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SUPPLEMENT  
TO THE  
AMERICAN AND ENGLISH  
ENCYCLOPÆDIA OF LAW  
(SECOND EDITION)

EDITED BY  
DAVID S. GARLAND AND CHARLES PORTERFIELD  
UNDER THE SUPERVISION OF  
JAMES COCKCROFT

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## HOW TO USE THE SUPPLEMENT.

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THE titles of the articles and defined words and phrases are repeated in the order in which they are to be found in the AMERICAN AND ENGLISH ENCYCLOPÆDIA OF LAW, Second Edition. At the top of each page are given the name of the subject and the pages thereof which are supplemented by reference to and statement of the late cases. Thus :

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**956-961**

*AGENCY.*

Vol. I.

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at the top of a page signifies that pages 956 to 961 of the article "Agency" in the first volume of the Second Edition are supplemented.

In both text and notes the catch lines which appear in the Second Edition are here repeated in connection with new cases, thereby denoting that such new cases support the statement of law made in the text or notes of the Second Edition under the corresponding catch line.

The large heavy-faced figures refer to the pages of the volume of the Second Edition. The smaller figure following the page number in the notes refers to the original note numbered by that same figure on that page. Thus, a note numbered **950. 2.**, with cases cited, indicates that those cases support the proposition to which the cases in note 2 on page 950 were cited.

In some instances the new cases have necessitated the writing of new text, and the fact that such text is new is indicated by inclosing it with brackets. In the notes great freedom has been indulged in stating new illustrations and applications.

The omission of a title that appeared in the Second Edition implies that no new cases on that subject have been found.





# SUPPLEMENT

## TO THE

# American and English Encyclopædia of Law

### (SECOND EDITION.)

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1. **CONSTRUCT.** — See note 2.
2. **CONSTRUCTION.** — See notes 1, 2.
3. **CONSTRUCTIVE CONTEMPTS.** — See note 1.  
     **[CONSTRUCTIVE CONTRACT.** — See note 1a.]  
     **CONSTRUCTIVE CONVERSION.** — See note 2.  
     **CONSTRUCTIVE DELIVERY.** — See note 3.  
     **[CONSTRUCTIVE EVICTION.** — See note 3a.]  
     **CONSTRUCTIVE FRAUDS.** — See note 4.
4. **CONSTRUCTIVE NOTICE.** — See notes 2, 3.

1. 2. *Weldin v. Wilmington*, 3 Penn. (Del.) 472.

**Not Equivalent to Purchase.** — An Act authorizing a town board to *construct* a town hall does not empower it to purchase therefor a store in which it has been holding its meetings. *Barker v. Floyd*, (Supm. Ct. Tr. T.) 32 Misc. (N. Y.) 474, *affirmed* 61 N. Y. App. Div. 92.

**Building Being Constructed — Workmen's Compensation Act.** — A building in the construction of which scaffolding is used is not completely *constructed* within the meaning of section 7 of the Workmen's Compensation Act until the scaffolding has been removed, and the removal of the scaffolding is a part of the work of construction. *Frid v. Fenton*, 82 L. T. N. S. 193, 69 L. J. Q. B. 436.

**Constructing a Railroad Fence.** — In construing a *New York* statute providing that barbed wire shall not be used in *constructing* a railroad fence, the court said: "Clearly this provision does not in terms apply the prohibition to fences already *constructed*. \* \* \* But *construct* means 'to put together, as the parts of a thing, for a new product; to form with contrivance; to fabricate; to build.'" *Stisser v. New York Cent., etc., R. Co.*, 32 N. Y. App. Div. 98.

2. 1. **Construction of a Railroad.** — A contract for the extension of a railroad by purchase is not equivalent to one by *construction*. The court in this case said: "*Construction* is defined to be 'the act of building or making; the act of devising and forming; fabrication.' Cent. Dict. It is in that sense that the term was used in this contract." *Michigan Cent. R. Co. v. Pere Marquette R. Co.*, 128 Mich. 333.

2. In *Deane v. State*, 159 Ind. 313, the court said: "*Construction*, as applied to written law, is the art or process of discovering and

expounding the meaning and intention of the authors of the law with respect to its application to a given case, where that intention is rendered doubtful either by reason of apparently conflicting provisions or directions, or by reason of the fact that the given case is not explicitly provided for in the law." See also *Terre Haute, etc., R. Co. v. Erdel*, 158 Ind. 344.

3. 1. *State v. Shepherd*, 177 Mo. 205; *State v. Clancy*, 24 Mont. 359.

1a. "A *constructive contract* is where, as here, duty defines it, instead of the contract defining the duty to be performed. *Constructive contracts* are fictions of law adopted to enforce the legal duties by actions of contract where no proper contract exists, express or implied." *Graham v. Cummings*, 208 Pa. St. 516.

2. *Scruggs v. Scruggs*, 105 Fed. Rep. 28.

3. *Swafford v. Spratt*, 93 Mo. App. 631.

3a. In *Talbott v. English*, 156 Ind. 307, the court said: "Eviction is either actual or *constructive*; actual when the tenant is deprived of the occupancy of some part of the demised premises, and *constructive* when the lessor, without intending to oust the lessee, does an act by which the latter is deprived of the beneficial enjoyment of some part of the premises, in which case the tenant has his right of election, to quit, and avoid the lease and rent, or abide the wrong and seek his remedy in an action for the trespass." And see the title LANDLORD AND TENANT.

4. **Other Definitions.** — *Barnes v. Thuet*, 116 Iowa 359; *Warren v. Robinson*, 21 Utah 429.

4. 2. See *Keen v. Havre de Grace*, 93 Md. 34.

3. *Fuller v. McMahon*, (Iowa 1903) 94 N. W. Rep. 205; *Thomas v. Flint*, 123 Mich. 10;



4. [CONSTRUCTIVE OCCUPANCY. — See note 3a.]  
 CONSTRUCTIVE POSSESSION. — See note 4.  
 5. CONSTRUCTIVE TRUST. — See note 1.

Kirklin v. Atlas Sav., etc., Assoc., (Tenn. Ch. 1900) 60 S. W. Rep. 149.

4. 3a. In Davis v. Kelly, 62 Neb. 644, the court said: "It is true that actual occupancy is not absolutely required in every case where a homestead is claimed. Nevertheless, occupancy is the test established by the statute, and it is only through liberal construction to meet the beneficent ends of the statute that certain substitutes therefor have been permitted. The most usual is what has been called *constructive occu-*

*pancy*, as, for example, where property occupied as a homestead has been temporarily vacated without abandonment and with a *bona fide* and subsisting intention to return."

4. Constructive Possession. — See Masters v. Teller, 7 Okla. 668, where *constructive possession* was held equivalent to actual possession under the circumstances of the case.

5. 1. Classes of Constructive Trusts. — Pope v. Dapray, 176 Ill. 478.

## CONSULS.

By R. N. CHAFFEE.

6. I. DEFINITION. — See note 1.  
 8. V. CONSULAR POWERS AND CONSULAR ACTS — 1. Consular Powers in General. — See note 3.  
 10. 2. Certain Specific Powers under United States Statutes — Lists of Seamen and Ships — Estates of Decedents — Consular Reports. — See notes 2, 3.  
 Other Duties. — See note 8.  
 3. Notarial Functions. — See note 10.  
 12. VI. PRIVILEGES AND IMMUNITIES — 1. General Principles. — See note 5.  
 14. 2. Engaging in Trade. — See note 5.  
 15. VII. FEDERAL AND STATE JURISDICTION IN SUITS BY OR AGAINST CONSULS. — See note 3.  
 17. State Courts — Suits Against Consuls. — See note 1.

6. 1. The Word "Consul" as used in Comp. Stat. Neb. (1899), c. 73, § 6, is understood to mean "any person invested by the national government with the functions of consul-general, vice consul-general, consul, or vice-consul." Morris v. Linton, 61 Neb. 537.

8. 3. Cannot Exempt Enemy's Ships from Capture. — The Benito Estenger, 176 U. S. 568.

10. 2. See Tucker v. Alexandroff, 183 U. S. 424.

3. Estates of Decedents. — To the same effect as Lanfear v. Ritchie, 9 La. Ann. 96, stated in the original note, see Matter of Logiorato, (Surrogate Ct.) 34 Misc. (N. Y.) 31. But compare Matter of Lobrasciano, (Surrogate Ct.) 38 Misc. (N. Y.) 415.

Article 8 of the consular convention of Dec. 11, 1871, between Germany and the United States, does not constitute a German consul administrator of the estate of a deceased person; it only authorizes German consuls to act as legal representatives of the German emperor's subjects. The General McPherson, 100 Fed. Rep. 860.

8. Restoration of Deserting Seamen. — Under the treaty made in 1892 between Great Britain and the United States and Rev. Stat. U. S., § 5280, in force at that time, a commissioner has no authority to direct the restoration of deserting seamen to the ship. The statute only permits their delivery to the consul. U. S. v. Kelly, 108 Fed. Rep. 538.

10. Certifying to the Official Character of a Foreign Notary. — The court will take judicial notice of the seal and signature of the United States deputy consul where he certifies the official character of a foreign notary. Barber v. International Co., 73 Conn. 587.

Under the Laws of Ohio, a United States consul is not authorized to act as a notary public in the taking of depositions. Matter of Herckelrath, 5 Ohio Dec. 565, 7 Ohio N. P. 537.

A Deputy Consul has been held to be disqualified, under the Maryland statute of 1773, in force in the District of Columbia, on account of his confidential relations with the consul, from acting as commissioner to take the consul's deposition. Massachusetts Mut. Acc. Assoc. v. Dudley, 15 App. Cas. (D. C.) 472.

12. 5. Amenability to Subpoena. — See, as to article 2 of the consular convention of 1853, between the United States and France. Baiz v. Malo, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 685.

Inviolability of Consular Archives. — Documents forming a part of the archives of a foreign consulate are privileged, and a witness cannot be compelled to disclose their contents. Kessler v. Best, 121 Fed. Rep. 439.

14. 5. Consuls Entitled to No Immunities in Trade. — Scott v. Hobe, 108 Wis. 239.

15. 3. See Scott v. Hobe, 108 Wis. 239.

17. 1. State Courts Held to Have Concurrent Jurisdiction in Suits Against Consuls. — See Scott v. Hobe, 108 Wis. 239.



**22. CONSULT.** — See note 5.

**23. CONTAIN.** — See note 1.

**CONTEMPLATION.** — See note 2.

## CONTEMPT.

BY M. G. BEAMAN.

**28. I. DEFINITIONS** — **2. Contempt of Court** — *a. DIRECT CONTEMPT.* — See notes 1, 2, 3, 4, 5.

*b. INDIRECT CONTEMPT.* — See note 6.

*c. CIVIL AND CRIMINAL CONTEMPTS* — **Criminal Contempt.** — See note 6*a*.

**29. Civil Contempt.** — See note *a*.

**Doing a Forbidden Act.** — See note 1.

**22. 5. Consultation — Life Insurance.** — *Billings v. Metropolitan L. Ins. Co.*, 70 Vt. 477.

**23. 1. Contain and State.** — *Leach v. Adams*, 21 Ind. App. 547.

**Contained in — Fire Insurance.** — *Hannon v. Hartford F. Ins. Co.*, 41 N. Y. App. Div. 226.

**2. Contemplation of Insolvency or Bankruptcy.** — See *In re Hirsch*, 96 Fed. Rep. 468; *Hayden v. Chemical Nat. Bank*, (C. C. A.) 84 Fed. Rep. 874, *affirmed* 174 U. S. 610. See also the title **INSOLVENCY AND BANKRUPTCY**.

**The Words "in Contemplation of Death"** in the New York Transfer Tax Law do not refer to that general expectation which every man entertains of death as an ultimate termination of his career. They mean an apprehension of death from some present disease or some other impending peril. *Matter of Bullard*, (Surrogate Ct.) 37 Misc. (N. Y.) 663; *Matter of Baker*, 83 N. Y. App. Div. 530. And see the title **SUCCESSION TAXES**.

**Contemplated Synonymous with Intended — Life Insurance.** — See *Christian v. Connecticut Mut. L. Ins. Co.*, 143 Mo. 460.

**28. 1. Improper Conduct in Presence of Court.** — *State v. Shepherd*, 177 Mo. 205, 99 Am. St. Rep. 624.

**Secreting Important Paper During Trial in Open Court.** — *Matter of Teitelbaum*, 84 N. Y. App. Div. 351.

**2. Locking the Judge Out of the Court Room** is contempt. — *Dahnke v. People*, 168 Ill. 102.

**Court Not in Session.** — Abusing the judge to his face, in a room next to the court room, is not a contempt in the presence of the court, unless the court is in session. *Snyder v. State*, 151 Ind. 553.

**3. Open Defiance of Court's Authority.** — *Ex p. O'Neal*, 125 Fed. Rep. 967.

**Assaulting a United States Commissioner** is a gross contempt of court, if the assault is made because of his official actions, even though he was not at the time acting in any official capacity. *Ex p. McLeod*, 120 Fed. Rep. 130.

**4. Disrespectful Behavior to Presiding Judge.** — *Mahoney v. State*, 33 Ind. App. 655, 104 Am. St. Rep. 276; *State v. Crum*, 7 N. Dak. 299.

**Publicly Denouncing and Abusing Judge.** — *U. S. v. Gehr*, 116 Fed. Rep. 520.

**5. Approaching a Witness in the Hallway with**

**a View to Bribing Him** is a contempt in the presence of the court. *Fisher v. McDaniel*, 9 Wyo. 457, 87 Am. St. Rep. 971.

**Fabricating Evidence** and producing it in court is a gross contempt of court. *Chicago Directory Co. v. U. S. Directory Co.*, 123 Fed. Rep. 194.

**6. Indirect Contempts.** — *Ex p. Smith*, 14 Hawaii 257, *per Perry, J.*, *dissenting*, *citing* 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 28; *State v. Shepherd*, 177 Mo. 205, 99 Am. St. Rep. 624.

**Disobedience of a Subpoena to Attend Court** is indirect contempt under the *Kansas* statutes. *State v. Anders*, 64 Kan. 742.

**6*a*. Powers v. People**, 114 Ill. App. 323, *citing* and adopting the language of 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 28.

**29. a. Powers v. People**, 114 Ill. App. 323, *citing* and following closely the language of 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 28 [29].

**1. Criminal and Civil Contempts — United States.** — *Bessette v. W. B. Conkey Co.*, 194 U. S. 324; *In re Nevitt*, (C. C. A.) 117 Fed. Rep. 448; *In re Reese*, (C. C. A.) 107 Fed. Rep. 942.

**Colorado.** — *Tebbetts v. People*, 31 Colo. 461, *citing* 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 28.

**Illinois.** — *Swedish-American Telephone Co. v. Fidelity, etc., Co.*, 208 Ill. 562; *Oster v. People*, 192 Ill. 473; *Glady v. People*, 94 Ill. App. 602.

**Indiana.** — *Anderson v. Indianapolis Drop Forging Co.*, (Ind. App. 1904) 72 N. E. Rep. 277.

**Louisiana.** — *State v. Judge*, 50 La. Ann. 552.

**Michigan.** — *Eaton Rapids v. Horner*, 126 Mich. 52.

**Missouri.** — *State v. Shepherd*, 177 Mo. 205, 99 Am. St. Rep. 624, *citing* 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 28.

**Nebraska.** — *Nebraska Children's Home Soc. v. State*, 57 Neb. 765.

**New Jersey.** — *Frank v. Herold*, 64 N. J. Eq. 371; *Ashby v. Ashby*, 62 N. J. Eq. 618.

**New York.** — *Falkenberg v. Frank*, (N. Y. City Ct. Gen. T.) 20 Misc. (N. Y.) 692.

**Oregon.** — *State v. Downing*, 40 Oregon 309.

**Pennsylvania.** — *Donaldson v. Miller*, 23 Pa.

**30. II. RIGHT OF COURTS AND OFFICERS TO PUNISH — 1. Superior Courts of Record — a. THE RIGHT INHERENT.** — See note 1.

**31. 2. Inferior Courts — a. RULE AT COMMON LAW.** — See note 3.

*b. UNDER STATUTES.* — See notes 4, 5.

**32.** See note 2.

*c. JUSTICES OF THE PEACE.* — See note 3.

**III. EFFECT OF STATUTORY DECLARATIONS — 1. In General.** — See note 6.

**2. Abridgment of Right to Punish — a. COURTS CREATED BY LEGISLATURE.** — See note 7.

Co. Ct. 393, 9 Pa. Dist. 282, *citing* 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 28, 29.

*South Carolina.* — State *v. Rice*, 67 S. Car. 236.

*South Dakota.* — *In re Taber*, 13 S. Dak. 62.

*Wyoming.* — *Laramie Nat. Bank v. Steinhoff*, 7 Wyo. 464.

In *Montana* it is held that contempt proceedings have most if not all the characteristics of a criminal case, and few, if any, of a civil action. State *v. Clancy*, 30 Mont. 193; State *v. District Ct.*, 30 Mont. 547.

**Object of Contempt Proceedings.** — In *Louisiana* it is held that the object and purpose of a proceeding for contempt is solely to vindicate the authority and maintain the dignity of the court. State *v. Civil Dist. Ct.*, 112 La. 182. To the same effect see *Chisolm v. Caines*, 121 Fed. Rep. 397; State *v. Ryan*, 182 Mo. 349, illustrating the point by the statement that "one court cannot even punish for the contempt of another;" *Johnstown Min. Co. v. Morse*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 504.

**30. 1. Right to Punish Inherent in Superior Courts of Record — United States.** — *Ex p. Stricker*, 109 Fed. Rep. 145, *citing* 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 30; *Bessette v. W. B. Conkey Co.*, 194 U. S. 324; *In re Nevitt*, (C. C. A.) 117 Fed. Rep. 448; *In re Anderson*, 103 Fed. Rep. 854, *reversed* (C. C. A.) 113 Fed. Rep. 115.

*California.* — *Burns v. Superior Ct.*, 140 Cal. 1, *citing* 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 30.

*Colorado.* — *People v. District Ct.*, 29 Colo. 182.

*Georgia.* — *Bradley v. State*, 111 Ga. 168, 78 Am. St. Rep. 157.

*Illinois.* — *Swedish-American Telephone Co. v. Fidelity, etc., Co.*, 208 Ill. 562.

*Indiana.* — *Joyce v. Everson*, 161 Ind. 440; *Mahoney v. State*, 33 Ind. App. 655, 104 Am. St. Rep. 276.

*Iowa.* — *Field v. Thornell*, 106 Iowa 7, 68 Am. St. Rep. 281.

*Massachusetts.* — *Telegram Newspaper Co. v. Com.*, 172 Mass. 295.

*Michigan.* — *Nichols v. Judge*, 130 Mich. 187.

*Missouri.* — State *v. Shepherd*, 177 Mo. 205, 99 Am. St. Rep. 624, *citing* 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 30; State *v. Ryan*, 182 Mo. 349, *quoting* 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 30.

*Montana.* — State *v. Clancy*, 30 Mont. 193.

*Nebraska.* — *Nebraska Children's Home Soc. v. State*, 57 Neb. 765.

*New York.* — *People v. Marr*, 88 N. Y. App. Div. 422; *modified* 181 N. Y. 463; *Falkenberg*

*v. Frank*, (N. Y. City Ct. Gen. T.) 20 Misc. (N. Y.) 692.

*North Dakota.* — State *v. Crum*, 7 N. Dak. 299.

*Oklahoma.* — *Smith v. Speed*, 11 Okla. 95.

*Pennsylvania.* — *Irwin's Estate*, 9 Pa. Dist. 283, 23 Pa. Co. Ct. 393, *citing* 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 30.

*South Dakota.* — *In re Taber*, 13 S. Dak. 62.

*Virginia.* — *Carter v. Com.*, 96 Va. 791.

*West Virginia.* — State *v. Fredlock*, 52 W. Va. 232, 94 Am. St. Rep. 932, *citing* 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 30.

*Wisconsin.* — *Jos. Schlitz Brewing Co. v. Washburn Brewing Assoc.*, 122 Wis. 515; State *v. Circuit Ct.*, 97 Wis. 1, 65 Am. St. Rep. 90; *In re Meggett*, 105 Wis. 291.

*Wyoming.* — *Fisher v. McDaniel*, 9 Wyo. 457, 87 Am. St. Rep. 971.

**31. 3. Kansas Statutes — Police Judge.** — In Kansas a police judge has no authority to try an accusation for an indirect contempt. *In re Rich*, 10 Kan. App. 280.

**4. Inferior Courts — Statutes.** — *In re Abbott*, 7 Okla. 78.

**5. Construction of Statutes Giving the Power.** — See *In re Palmeter*, 58 Kan. 809.

**A Surrogate's Power in New York** now extends to committing an executor for contempt in refusing to pay over money. *Matter of Holmes*, 79 N. Y. App. Div. 267, *affirmed* 176 N. Y. 604.

**32. 2. Mau v. Stoner, 12 Wyo. 478.**

**3. Justices of the Peace.** — *Church v. Pearne*, 75 Conn. 350; *People v. Williams*, 51 N. Y. App. Div. 102.

In *Georgia* a justice of the peace may punish for contempt only of the court over which he presides, and only when the court has been duly organized. *Ormond v. Ball*, 120 Ga. 916.

In *Massachusetts* a justice of the peace has no power to commit to jail a witness who refuses to answer a question on his deposition being taken. *Lawson v. Rowley*, 185 Mass. 171.

**6. Statutes Declaratory.** — State *v. Shepherd*, 177 Mo. 205, 99 Am. St. Rep. 624; State *v. Clancy*, 30 Mont. 193; State *v. Bee Pub. Co.*, 60 Neb. 282, 83 Am. St. Rep. 531; State *v. Tugwell*, 10 Wash. 238.

**7. Courts Created by Legislature — Abridgment of Right to Punish.** — *Cuyler v. Atlantic, etc., R. Co.*, 131 Fed. Rep. 95; *Hillmon v. Mutual L. Ins. Co.*, 79 Fed. Rep. 749; *In re Odum*, 133 N. Car. 250; *Scott v. State*, 109 Tenn. 390; State *v. Hansford*, 43 W. Va. 773. See also *Bradley v. State*, 111 Ga. 168, 78 Am. St. Rep. 157.

**33.** *b.* COURTS CREATED BY CONSTITUTION. — See notes 1, 2, 3.

**34.** IV. TRIAL COURT EXCLUSIVE JUDGE OF CONTEMPTS — 1. General Rule — At Common Law. — See notes 1, 2.

When Appeal Lies. — See note 3.

**35.** See note 2.

2. Statutes Authorizing Appeals. — See note 3.

**36.** V. JURISDICTION OF COURT AND AUTHORITY TO MAKE ORDER — 1. In General. — See note 1.

United States Statutes. — U. S. *v.* Weber, 114 Fed. Rep. 950.

The Supreme Court of the *District of Columbia* is a court of the United States, and hence Rev. Stat. U. S., § 725, applies to contempts of court committed therein. *Moss v. U. S.*, 23 App. Cas. (D. C.) 475.

Right to Abridge Must Be Reserved by Legislature at Time of Creation. — *Nichols v. Judge*, 130 Mich. 187.

**33.** 1. Constitutional Courts. — *Mahoney v. State*, 33 Ind. App. 655, 104 Am. St. Rep. 276; *Bradley v. State*, 111 Ga. 168, 78 Am. St. Rep. 157, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 33; *Nichols v. Judge*, 130 Mich. 187; *State v. Shepherd*, 177 Mo. 205, 99 Am. St. Rep. 624, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 33; *State v. Clancy*, 30 Mont. 193; *People v. Marr*, 88 N. Y. App. Div. 422, modified 181 N. Y. 463; *Smith v. Speed*, 11 Okla. 95; *In re Taber*, 13 S. Dak. 62; *Carter v. Com.*, 96 Va. 791; *State v. Circuit Ct.*, 97 Wis. 1, 65 Am. St. Rep. 90. See also *Joyce v. Everson*, 161 Ind. 440; *Anderson v. Indianapolis Drop Forging Co.*, (Ind. App. 1904) 72 N. E. Rep. 277. And see the title CONSTITUTIONAL LAW, 1048. 7.

2. Regulation of Exercise of Power. — *Mahoney v. State*, 33 Ind. App. 655, 104 Am. St. Rep. 276; *Carter v. Com.*, 96 Va. 791.

3. Under the Arkansas Constitution the legislature may limit the punishment only in case of contempts not committed (1) in presence or hearing of the court, or (2) in disobedience of process. *Ford v. State*, 69 Ark. 550.

**34.** 1. Trial Court the Exclusive Judge — Common-law Rule. — *Heinze v. Butte*, etc., *Consol. Min. Co.*, (C. C. A.) 129 Fed. Rep. 274; *People v. Kuhlman*, 118 Cal. 140; *Matter of Wittmeier*, 118 Cal. 255; *Florida Cent.*, etc., *R. Co. v. Williams*, (Fla. 1903) 33 So. Rep. 991; *People v. Ann Arbor R. Co.*, (Mich. 1904) 100 N. W. Rep. 892; *State v. Shepherd*, 177 Mo. 205, 99 Am. St. Rep. 624, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 34.

2. *Ex p.* Brown, (Ariz. 1892) 77 Pac. Rep. 489.

3. The United States Circuit Court of Appeals has jurisdiction to review a judgment of a Circuit or District Court finding a person guilty of contempt; but the review must be by writ of error. *Besette v. W. B. Conkey Co.*, 194 U. S. 324; *In re Heinze*, (C. C. A.) 127 Fed. Rep. 96; *Flower v. MacGinniss*, (C. C. A.) 112 Fed. Rep. 377. But see *Heinze v. Butte*, etc., *Consol. Min. Co.*, (C. C. A.) 129 Fed. Rep. 274.

A Circuit Court has no jurisdiction to review the action of a District Court on a writ of habeas corpus. *Ex p.* O'Neal, 125 Fed. Rep. 967.

In *Nebraska* a sentence imposed in contempt

proceedings cannot be reviewed in an action to which the state is not a party. *Whitaker v. McBride*, (Neb. 1904) 98 N. W. Rep. 877.

In *Tennessee* no appeal is allowed, but the remedy is by habeas corpus or certiorari. *Brizendine v. State*, 103 Tenn. 677.

**35.** 2. *Kentucky*. — *Nienaber v. Tarvin*, 104 Ky. 149.

3. *United States*. — The Supreme Court will review the judgments of the state courts, if there are sufficient facts to establish the jurisdiction. *Tinsley v. Anderson*, 171 U. S. 101.

*Colorado*. — The Supreme Court may review only (1) criminal contempts; (2) civil contempts where the case involves the essential elements which the Court of Appeals Act says must be present to give jurisdiction. *Tebbetts v. People*, 31 Colo. 461; *Naturita Canal*, etc., *Co. v. People*, 30 Colo. 407.

*Illinois*. — An appeal lies in civil cases. *Swedish-American Telephone Co. v. Fidelity*, etc., *Co.*, 208 Ill. 562; *Kyle v. People*, 72 Ill. App. 171.

*Indiana*. — *Anderson v. Indianapolis Drop Forging Co.*, (Ind. App. 1904) 72 N. E. Rep. 277. The state may appeal in proceedings for indirect contempt. *State v. Rockwood*, 159 Ind. 94.

*New Jersey*. — Civil contempts are appealable. *Grand Lodge*, etc., *v. Jansen*, 62 N. J. Eq. 737.

*New York*. — Final orders in contempt proceedings are appealable to the Court of Appeals. *King v. Ashley*, 179 N. Y. 281.

*North Dakota*. — Any final order may be reviewed in the Supreme Court. *State v. Massey*, 10 N. Dak. 154; *Noble Tp. v. Aasen*, 10 N. Dak. 264; *Merchant v. Pielke*, 9 N. Dak. 245.

*Ohio*. — Contempt proceedings may be reviewed on error. *Brimson v. State*, 63 Ohio St. 347; *State v. Davis*, 10 Ohio Cir. Dec. 203, 18 Ohio Cir. Ct. 479.

*Oregon*. — An appeal is allowed as in other cases. *State v. Gray*, 42 Oregon 261.

*Virginia*. — Judgments of contempt may be reviewed on writ of error. *Trimble v. Com.*, 96 Va. 818.

*Washington*. — Either party may appeal. *State v. Superior Ct.*, 28 Wash. 590.

*Wyoming*. — Final orders may be reviewed. *Laramie Nat. Bank v. Steinhoff*, 7 Wyo. 464.

**36.** 1. Want of Jurisdiction. — *Cuyler v. Atlantic*, etc., *R. Co.*, 131 Fed. Rep. 95; *Foot v. Buchanan*, 113 Fed. Rep. 156; *Ex p.* Clarke, 126 Cal. 235, 77 Am. St. Rep. 176; *Fisher v. Nash*, 47 N. Y. App. Div. 234; *Ex p.* Duncan, 42 Tex. Crim. 668; *Ex p.* Ellis, 37 Tex. Crim. 539, 66 Am. St. Rep. 831; *Ex p.* Lake, 37 Tex. Crim. 656, 66 Am. St. Rep. 848. See also *Florida Cent.*, etc., *R. Co. v. Williams*, (Fla. 1903) 33 So. Rep. 991.



**36.** 2. What Constitutes Jurisdiction. — See note 3.

**38.** 3. Instances of Jurisdictional Defects. — See note 1.

**VI. IMPRISONMENT TO ENFORCE PAYMENT OF MONEY DEMANDS — 1. In General** — Other Methods Have Been Provided by Statute. — See note 2.

**39.** 2. Constitutional Prohibitions Against Imprisonment for Debt — *a.* IN GENERAL. — See note 1.

*b.* OBLIGATIONS IN TORT — (1) *Generally.* — See note 2.

**41.** *c.* NONPAYMENT OF ALIMONY. — See note 2.

When Unable to Pay. — See note 3.

**42.** Necessity of Personal Demand for Payment. — See note 1.

*d.* COURT COSTS. — See note 3.

*e.* SUPPLEMENTARY PROCEEDINGS — (2) *Refusal to Attend or to Answer Questions.* — See notes 6, 7.

**43.** (3) *Refusal to Deliver Property.* — See notes 1, 2.

**36.** 3. Jurisdiction to Render Particular Judgment. — Overend *v.* Superior Ct., 131 Cal. 280; Rogers *v.* Superior Ct., 145 Cal. 88; *In re* Taber, 13 S. Dak. 62, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 36; *Ex p.* Duncan, 42 Tex. Crim. 668, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 36; *Ex p.* Stone, (Tex. Crim. 1903) 72 S. W. Rep. 1000. See also Herring *v.* Pugh, 126 N. Car. 852, *per* Faircloth, J., dissenting, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 36.

**38.** 1. Where Act Charged Is No Contempt. — *In re* Cowden, 139 Cal. 244; De Witt *v.* Superior Ct., (Cal. 1897) 47 Pac. Rep. 871; Elliott *v.* U. S., 23 App. Cas. (D. C.) 456; *Ex p.* Snodgrass, 43 Tex. Crim. 359.

**2.** Enforcement of Payment of Money Decrees. — Matter of Van Alstine, 21 Wash. 194, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 38.

**39.** 1. The United States Revised Statutes. — A court of bankruptcy may commit a bankrupt for contempt in refusing to surrender his property to the trustee, notwithstanding Rev. Stat. U. S., § 990. Ripon Knitting Works *v.* Schreiber, 101 Fed. Rep. 810; *In re* Anderson, 103 Fed. Rep. 854, reversed (C. C. A.) 113 Fed. Rep. 115.

**2.** Obligations *Ex Delicto.* — State *v.* Judge, 50 La. Ann. 552; Lorick *v.* Motley, 69 S. Car. 567; *In re* Meggett, 105 Wis. 291.

**41.** 2. Alimony. — *In re* Popejoy, 26 Colo. 32, 77 Am. St. Rep. 222; Tolman *v.* Leonard, 6 App. Cas. (D. C.) 224; Barclay *v.* Barclay, 184 Ill. 471; State *v.* Cook, 66 Ohio St. 566; Matter of Cave, 26 Wash. 213, 90 Am. St. Rep. 736. See also Lubbering *v.* State, 10 Ohio Cir. Dec. 508, 19 Ohio Cir. Ct. 658.

The Power of the Court Remains After the Expiration of the Term at which the original decree was granted. Cavanaugh *v.* Cavanaugh, 106 Ill. App. 209; Welty *v.* Welty, 195 Ill. 335, 88 Am. St. Rep. 208.

Other Remedies Must Be Exhausted First. — Flower *v.* Flower, (N. J. 1901) 49 Atl. Rep. 158.

**3.** Inability to Pay. — *In re* Cowden, 139 Cal. 244; Wester *v.* Martin, 115 Ga. 776; Kahlbon *v.* People, 101 Ill. App. 567.

In New York inability is ground for relief from imprisonment, but is not a defense to proceedings for contempt. Young *v.* Young, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 335.

Where Party Disables Himself to Pay. — State *v.* McClinton, 17 Wash. 45.

Burden of Proof Is On Husband. — State *v.* Cook, 66 Ohio St. 566.

If the Husband Can Pay Part it is error to commit him until he pays the whole. Green *v.* Green, 130 N. Car. 578.

**42.** 1. Demand Necessary. — Flor *v.* Flor, 73 N. Y. App. Div. 262; Goldie *v.* Goldie, 77 N. Y. App. Div. 12; Delanoy *v.* Delanoy, 19 N. Y. App. Div. 295.

**3.** Failure to Pay Costs Is Not Contempt in the Absence of an Order making such failure a contempt. *Ex p.* Coltey, 140 Ala. 193.

**6.** Refusal to Attend. — People *v.* McCarthy, (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 429; Kreiser *v.* Kitaoka, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 174.

**7.** When Refusal to Answer Punishable. — The refusal must be clearly shown, East River Bank *v.* De Lacy, (Supm. Ct. App. T.) 37 Misc. (N. Y.) 765; and it has been held that it must result in damage to the creditor, Matter of Ryan, 73 N. Y. App. Div. 137.

False Testimony Not Contempt. — Bernheimer *v.* Kelleher, (Supm. Ct. App. T.) 31 Misc. (N. Y.) 464.

**43.** 1. Refusal to Deliver Property. — Joyce *v.* Everson, 161 Ind. 440; Matter of Blumenthal, (Supm. Ct. App. T.) 22 Misc. (N. Y.) 704.

Disposing of Property Contempt. — Browning *v.* Chadwick, (Supm. Ct. App. T.) 30 Misc. (N. Y.) 420.

If the Order Is to the Sheriff to sequester the property, it is not contempt to refuse to deliver it to him, for this would be making the proceeding for contempt an easy substitute for usual legal remedies. State *v.* Civil Dist. Ct., 112 La. 182.

New York Statute. — Under Code Civ. Pro., N. Y., § 1241, subd. 4, contempt proceedings are permissible only when the money is to be paid to an officer of the court. General Electric Co. *v.* Sire, 88 N. Y. App. Div. 498.

Violation of Order to Return Money to Debtor. — Under Code Civ. Pro., N. Y., §§ 14, 2266, 2268, a judgment creditor who has received money from the receiver is in contempt if he fails to make restitution when ordered by the court. Newell *v.* Hall, 74 N. Y. App. Div. 278.

Disobedience of Any Order Contempt. — Holton *v.* Robinson, 50 N. Y. App. Div. 45.

**2.** Payment Must Be to Officer of Court. — Harris *v.* Elliott, 163 N. Y. 269.

**43.** Necessity of Demand. — See note 4.

**44.** VII. CONTEMPT BY OFFICERS OF COURT — 1. In General. — See note 1.

2. By Attorneys — *a.* DISOBEDIENCE OF ORDER REQUIRING PAYMENT OF MONEY. — See note 3.

*b.* ADVICE TO CLIENT TO VIOLATE ORDER OF COURT. — See note 4.

*c.* FILING FICTITIOUS SUIT. — See note 5.

*d.* OTHER ILLUSTRATIONS. — See note 6.

**45.** *e.* DISBARMENT OR SUSPENSION. — See note 2.

**46.** Right to Be Heard. — See note 2.

3. By Jurymen. — See note 3.

4. By Receivers. — See note 4.

**43. 4. Necessity for Demand.** — *Gerson v. Berti*, (Supm. Ct. App. T.) 87 N. Y. Supp. 458. See also *General Electric Co. v. Sire*, 88 N. Y. App. Div. 498.

**44. 1. Marshal — Packing Jury.** — It is a contempt for a marshal to assist in packing a jury. *U. S. Richards*, 1 Alaska 913, reversed on the evidence, (C. C. A.) 126 Fed. Rep. 105.

**Sheriff.** — It is a contempt for a sheriff to fail to execute the process of the court. *Dailey v. Fenton*, 47 N. Y. App. Div. 418; *Sparks v. State*, 42 Tex. Crim. 374.

A sheriff releasing a prisoner on a void order is guilty of contempt. *Matter of Leggat*, 162 N. Y. 437.

**Clerks of Court.** — It is a contempt for a clerk of the court to fail to transmit the record, unless for cause. *Matter of Contempt by Four Clerks*, 111 Ga. 89.

**A Judge May Be Guilty of Contempt** in refusing to obey an order of a superior court. *In re Noyes*, (C. C. A.) 121 Fed. Rep. 209.

**A Police Officer** warning a person for whom a warrant has been issued is guilty of contempt. *State v. O'Brien*, 87 Minn. 161.

**Election Officers** are officers of the court, by statute in *Illinois*, and liable for contempt. *Sherman v. People*, 210 Ill. 552.

**An Executor** is in contempt if he refuses to deliver up the property of the estate when so ordered by the court. *State v. Judge*, 50 La. Ann. 552.

**A Special Administrator** is an officer of the court, and it is contempt for him to refuse to obey the commands of the court. *In re Taber*, 13 S. Dak. 62.

**3. Order to Return Retainer.** — Where the court orders an attorney to return a portion of his retainer, on the ground that he has not earned it, he is not in contempt for refusing, where he has had no opportunity to be heard as to the value of his services. *Tomsky v. Superior Ct.*, 131 Cal. 620.

**4. Advising Client to Violate Order of Court.** — *In re Fortunato*, 123 Fed. Rep. 622; *Royal Trust Co. v. Washburn, etc.*, R. Co., 113 Fed. Rep. 531; *Anderson v. Comptois*, (C. C. A.) 109 Fed. Rep. 971, affirmed 111 Fed. Rep. 998; *People v. District Ct.*, 29 Colo. 182; *Stolts v. Tuska*, 82 N. Y. App. Div. 81.

**To Render an Opinion as to the Validity of an Order**, without advising disobedience, is not a contempt. *In re Noyes*, (C. C. A.) 121 Fed. Rep. 209.

**5. Fictitious Suit.** — *Hatfield v. King*, 131 Fed. Rep. 791, holding, however, that the at-

tempt must be clearly proved, or the court will not act.

**6. Disobeying Order of Court.** — *In re Noyes*, (C. C. A.) 121 Fed. Rep. 209.

**Procuring Insolvent or Fictitious Sureties.** — *Nuccio v. Porto*, 72 N. Y. App. Div. 88.

**Deserting a Case in the Midst of the Trial**, after a refusal of the court to rule as desired, is contempt, though the attorney's acts result from zeal for his client's cause. *People v. Newburger*, 98 N. Y. App. Div. 92.

**Upon Application for Charge of the Judge**, based upon alleged prejudice, the attorney making the motion may set out in the affidavit facts showing such prejudice, provided nothing immaterial and irrelevant is inserted. *Works v. Superior Ct.*, 130 Cal. 304.

**Drafting a Petition for a New Trial by Persons Not Parties** is not punishable as a contempt. *State v. Hansford*, 43 W. Va. 773.

**Failure to Be in Court at the Time Set for Trial** is not a contempt, where the attorney is unavoidably detained, and evinces a respectful consideration for the court. *Wise v. Com.*, 97 Va. 779.

**Mere Error of Judgment** in upholding the dignity and jurisdiction of a state court as against a federal court, is not a contempt or the latter. *In re Watts*, 190 U. S. 1.

**Filing an Illegal Petition in a Respectful Manner** has been held not to be a contempt. *State v. Parsons*, 48 W. Va. 275.

**Proper Comment on the Testimony of a Witness Is Not Contempt**, even if it leads the witness to assault the attorney in open court. *Ex p. Snodgrass*, 43 Tex. Crim. 359.

**Protesting Against Illegal Arrest** is not contempt. *Ex p. Duncan*, 42 Tex. Crim. 668.

**Jurisdiction of Federal Courts.** — A federal court has jurisdiction to commit for contempt an attorney who misbehaves in his official capacity, since he is an officer of the court within Rev. Stat. U. S., § 725. *Ex p. Davis*, 112 Fed. Rep. 139.

**45. 2. In re Mains**, 121 Mich. 603; *Morrison v. Snow*, 26 Utah 247.

**46. 2. Contempt Proceedings and Disbarment Proceedings Are Distinct**, and should not be combined. *People v. O'Brien*, 196 Ill. 250.

**3. Contempt by Jurors.** — Under Code N. Car., § 654, subsec. 5, if a juror allows himself to be improperly influenced he may be committed "as for contempt." *In re Gorham*, 129 N. Car. 481.

**4. Refusal of Receiver to Obey Order Is Contempt.** — *Tornanses v. Melsing*, (C. C. A.) 106 Fed. Rep. 775; *Tindall v. Nisbet*, 113 Ga. 1114, 114 Ga. 224.

**46. VIII. CONTEMPT BY WITNESSES — 1. Failure or Refusal to Attend. —** See note 5.

**47.** See note 1.

**2. Refusal to Be Sworn — a. IN GENERAL — That Criminating Evidence May Be Sought. —** See note 4.

**3. Refusal to Answer Questions — a. IN GENERAL. —** See note 9.

**48.** See note 1.

**c. SELF CRIMINATION — (2) Where Answer Would Incriminate —**

**(a) In General. —** See note 6.

**49. (b) Where Court Is Exclusive Judge. —** See note 1.

**(c) Where Witness Is Exclusive Judge. —** See note 2.

**50. (d) Statutory Safeguards — Grant of Immunity Must Be Coextensive with Constitutional Guaranty. —** See note 1.

**Absolute Immunity from Prosecution. —** See note 2.

**51. (3) Exposure to Disgrace — Irrelevant Questions. —** See note 3.

**(4) Where Court Has No Jurisdiction. —** See note 4.

**52. IX. INTERFERENCE WITH PROPERTY IN CUSTODIA LEGIS — 1. In General. —** See note 1.

**2. In Custody of Sheriff or Other Like Officer — a. AT COMMON LAW. —** See note 2.

**3. In the Hands of Receiver — a. IN GENERAL. —** See note 6.

**53. b. SUITS AGAINST RECEIVER. —** See note 5.

But a receiver is not guilty of contempt in refusing to turn the property over to a receiver appointed by another court, if he acts in good faith. He is entitled to wait until the question is settled by the courts. *Worth v. Piedmont Bank*, 121 N. Car. 343.

**Under an Order to Pay under Certain Conditions** a refusal to pay is not contempt unless there has been a compliance with the conditions. *Witherbee v. Witherbee*, 55 N. Y. App. Div. 181.

**46. 5. Compelling Attendance of Witnesses. —** *Huckins v. State*, 61 Neb. 871.

**47. 1. Broderick v. Genesee Circuit Judge**, 125 Mich. 274.

**4. Matter of Leich**, (Supm. Ct. Spec. T.) 31 Misc. (N. Y.) 671.

**9. Refusal of Witness to Answer Proper Questions. —** *Kelly's Contested Election*, 200 Pa. St. 430, 86 Am. St. Rep. 719.

**Power of Notary under Ohio Statutes. —** See *In re Rauh*, 65 Ohio St. 128; *Ex p. Turner*, 11 Ohio Dec. 251, 8 Ohio N. P. 241.

**Deposition Taken Before Judge. —** If a witness is brought before a judge to give a deposition, it is a contempt to refuse to answer. *Crocker v. Conrey*, 140 Cal. 213.

**Refusal to Produce Books. —** See *Friedman v. Newman*, (Supm. Ct. App. T.) 86 N. Y. Supp. 735; *Hannum v. McRae*, 18 Ont. Pr. 185.

**Refusal to Answer One Proper Question is Enough**, though others are improper. *In re Rogers*, 129 Cal. 468.

**48. 1. Refusal to Testify Before Grand Jury. —** *Foot v. Buchanan*, 113 Fed. Rep. 156. *In re Archer*, 134 Mich. 408 (refusal to produce books).

**6. Where Answer Would Incriminate. —** *Foot v. Buchanan*, 113 Fed. Rep. 156; *Kanter v. Circuit Ct.*, 108 Ill. App. 287; *People v. O'Brien*, 81 N. Y. App. Div. 51, *affirmed* 176 N. Y. 253.

**49. 1. Where Court Exclusive Judge. —** *Overend v. Superior Ct.*, 131 Cal. 280; *In re Rogers*, 129 Cal. 468.

**2. Where Witness Exclusive Judge. —** *Foot v. Buchanan*, 113 Fed. Rep. 156; *People v. O'Brien*, 81 N. Y. App. Div. 51, *affirmed* 176 N. Y. 253.

**50. 1. The United States Revised Statutes. —** See *Foot v. Buchanan*, 113 Fed. Rep. 156.

The rule adopted in the federal courts has been adopted in *New York*. *People v. O'Brien*, 81 N. Y. App. Div. 51, *affirmed* 176 N. Y. 253; *Matter of Leich*, (Supm. Ct. Spec. T.) 31 Misc. (N. Y.) 671.

**Contra. —** *Kelly's Contested Election*, 200 Pa. St. 430, 86 Am. St. Rep. 719.

**2. Where Absolute Indemnity Afforded. —** *In re Briggs*, 135 N. Car. 118.

**51. 3. Rogers v. Superior Ct.**, 145 Cal. 88.

**4. Where Court Has Not Jurisdiction. —** *Flower v. MacGinniss*, (C. C. A.) 112 Fed. Rep. 377; *Elliott v. U. S.*, 23 App. Cas. (D. C.) 456; *Lindsay v. Allen*, 113 Tenn. 517.

**52. 1. Removal of Child During Pendency of Habeas Corpus Proceedings. —** *Matter of Grant*, 26 Wash. 412.

**Mere Threat to Interfere Not Enough. —** *In re McBryde*, 99 Fed. Rep. 686.

**2. Making a False Affidavit in a Replevin Suit Against a City Marshal**, and thus relieving the property from an execution lien, is an obstruction of public justice, and a contempt. *Matter of Goslin*, 95 N. Y. App. Div. 407, *affirmed* 180 N. Y. 505.

**6. Disturbing Possession of Receiver Is Contempt. —** *Royal Trust Co. v. Washburn*, etc., R. Co., 113 Fed. Rep. 531; *Ledoux v. La Bee*, 83 Fed. Rep. 761; *Fletcher v. McKeon*, 74 N. Y. App. Div. 231; *Coffin v. Burstein*, 68 N. Y. App. Div. 22; *Sainberg v. Weinberg*, (N. Y. City Ct. Gen. T.) 25 Misc. (N. Y.) 327. See also *Powers v. People*, 114 Ill. App. 323.

**Discretionary with Court Whether to Punish. —** *Witherbee v. Witherbee*, 55 N. Y. App. Div. 181.

**53. 5. Suing Receiver Without Permission. —**



**54. XI. VIOLATION OF INJUNCTIONS AND ORDERS — 1. In General.** — See note 6.

**55. 2. Necessity of Service of Order — a. GENERALLY ESSENTIAL.** — See note 1.

**b. PERSONAL KNOWLEDGE OF ORDER.** — See note 4.

**Actual Presence in Court.** — See note 5.

**3. Injunction After Appeal.** — See note 6.

**56. 4. Order or Injunction Erroneously Granted.** — See note 1.

*Greene v. Odell*, 43 N. Y. App. Div. 608; *Kroner v. Reilly*, 49 N. Y. App. Div. 41.

**54. 6. General Rule as to Violation of Injunction.** — *United States*. — *Westinghouse Air Brake Co. v. Christensen Engineering Co.*, 130 Fed. Rep. 735; *U. S. v. Haggerty*, 116 Fed. Rep. 510; *U. S. v. Sweeney*, 95 Fed. Rep. 434.

*Alabama*. — *Ex p. Miller*, 129 Ala. 130.

*Alaska*. — *U. S. v. Price*, 1 Alaska 204.

*Kentucky*. — *Kentucky Heating Co. v. Louisville Gas Co.*, (Ky. 1900) 59 S. W. Rep. 1090.

*Louisiana*. — *Alverson v. Sommerville*, 105 La. 273; *State v. Rost*, 50 La. Ann. 1006.

*Nebraska*. — *Jenkins v. State*, 60 Neb. 205; *Hydock v. State*, 59 Neb. 296.

*New Jersey*. — *Ashby v. Ashby*, 62 N. J. Eq. 618; *Matter of Taylor*, 62 N. J. L. 131.

*New York*. — *Stolts v. Tuska*, 82 N. Y. App. Div. 81; *Matter of Granz*, 78 N. Y. App. Div. 399; *Ray v. New York Bay Extension R. Co.*, 20 N. Y. App. Div. 539, *appeal dismissed* 155 N. Y. 102; *Fitzsimmons v. Ryan*, 64 N. Y. App. Div. 404; *People v. Wright*, 22 N. Y. App. Div. 165.

*North Dakota*. — *Merchant v. Pielke*, 9 N. Dak. 245.

*Washington*. — *State v. McFaul*, 27 Wash. 286.

*West Virginia*. — *State v. Fredlock*, 52 W. Va. 234.

*Wisconsin*. — *In re Meggett*, 105 Wis. 291.

**Contra — Violation of Order Not in Itself Sufficient.** — *Tessierdit Laplante v. Guay*, 23 Quebec Super. Ct. 75; *Greene v. Carpenter*, 22 Quebec Super. Ct. 104.

**That the Officer of the Court Does Not Intend to Enforce the Order** is no excuse. *McDonald v. People*, 86 Ill. App. 558.

**Order Must Be Actually Made.** — *Gardner v. People*, 100 Ill. App. 254; *In re Garis*, 185 Pa. St. 497.

**May Be Punished Second Time for Second Violation.** — *Rosenthal v. Hobson*, (Iowa 1898) 77 N. W. Rep. 488; *U. S. v. Sweeney*, 95 Fed. Rep. 434.

**To Determine the Title to Property Not Included in the Injunction contempt proceedings** are not proper. *State v. District Ct.*, 30 Mont. 96.

**Obedience to Order as Signed by Judge.** — A person is not in contempt for failing to obey an order as entered by the clerk in his minutes at the hearing. The order as signed by the judge is conclusive. *State v. Bell*, 34 Wash. 185.

**Order Dissolved — Party May Act When Judge Announces Decision.** — *Dady v. O'Rourke*, 71 N. Y. App. Div. 557.

**Disobedience of Writ of Habeas Corpus Flagrant Contempt.** — *State v. District Ct.*, 29 Mont. 230.

**Mere Technical Violation Not Ground for Punishment.** — *Boston*, etc., *Consol. Copper*, etc.,

*Min. Co. v. Montana Ore Purchasing Co.*, 24 Mont. 117.

**55. 1. Service of Order Generally Necessary.** — *Corde v. Laughlin*, (Supm. Ct. App. T.) 86 N. Y. Supp. 795; *Marcy Tp. Case*, 10 Kulp (Pa.) 42; *Ex p. Stone*, (Tex. Crim. 1903) 72 S. W. Rep. 1000, *citing 7 AM. AND ENG. ENCYC. OF LAW* (2d ed.) 54, 55.

**Personal Service Necessary.** — *Matter of Siebert*, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 680.

**4. Personal Knowledge by Contemnor of Issuance of Writ.** — *In re Krinsky*, 112 Fed. Rep. 972; *Murphey v. Harker*, 115 Ga. 77; *State v. District Ct.*, 29 Mont. 230; *Kempson v. Kempson*, 61 N. J. Eq. 303; *Ex p. Stone*, (Tex. Crim. 1903) 72 S. W. Rep. 1000.

**A Person Not a Party** may be punished. *Seaward v. Paterson*, (1897) 1 Ch. 545; *Chisolm v. Caines*, 121 Fed. Rep. 397; *Ex p. Richards*, 117 Fed. Rep. 658; *In re Coggs*, 100 Mo. App. 585; *People v. Marr*, 88 N. Y. App. Div. 422, *modified* 181 N. Y. 463; *Miller v. Toledo Grain, etc., Co.*, 11 Ohio Cir. Dec. 629, 21 Ohio Cir. Ct. 325; *State v. Lavery*, 31 Oregon 77.

**Knowledge Essential.** — *Dowagiac Mfg. Co. v. Minnesota Moline Plow Co.*, 124 Fed. Rep. 736, *affirmed* (C. C. A.) 129 Fed. Rep. 1005.

**5. Presence of Attorney Sufficient.** — *Hawks v. Fellows*, 108 Iowa 133.

**6. Disobedience After Appeal.** — *Green Bay, etc., Canal Co. v. Norrie*, 118 Fed. Rep. 923, *citing 7 AM. AND ENG. ENCYC. OF LAW* (2d ed.) 55, *affirmed* (C. C. A.) 128 Fed. Rep. 896; *State v. Downing*, 40 Oregon 309. *Contra*, *New York Mail, etc., Transp. Co. v. Shea*, (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 15, *reversed* 30 N. Y. App. Div. 374.

**No Excuse that Contemnor Has Filed Motion to Modify.** — *Young v. Rothrock*, 121 Iowa 588.

**An Order Imposing a Fine for Contempt Is Not Suspended** until final hearing. *Westinghouse Air Brake Co. v. Christensen Engineering Co.*, 123 Fed. Rep. 632.

**Need Not Obey Mandamus Pending Appeal.** — *Croker v. Sturgis*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 596.

**56. 1. Order or Injunction Improperly Granted — United States.** — *Royal Trust Co. v. Washburn, etc., R. Co.*, 113 Fed. Rep. 531; *Chisolm v. Caines*, 121 Fed. Rep. 397.

*Georgia*. — *Russell v. Mohr-Weil Lumber Co.*, 102 Ga. 563.

*Illinois*. — *Swedish-American Telephone Co. v. Fidelity, etc., Co.*, 208 Ill. 562; *Elmstedt v. People*, 102 Ill. App. 231; *St. Louis, etc., R. Co. v. Gray*, 100 Ill. App. 538; *Glady v. People*, 94 Ill. App. 598; *French v. Commercial Nat. Bank*, 79 Ill. App. 110.

*Montana*. — *State v. Judge*, 23 Mont. 171.

*New York*. — *Brown v. Braunstein*, 86 N. Y.

- 56.** 5. Irregularity in Exercise of Power. — See note 2.  
**57.** 6. Want of Jurisdiction to Make the Order. — See note 1.  
**58.** 7. Strangers to the Cause — Agents. — See note 1.  
 Contempt of Agent. — See note 2.  
 8. Right to Personal Notice and Hearing. — See notes 4, 5.  
**59.** 9. Nature of Punishment. — See note 1.

**XII. CONTEMPT BY NEWSPAPER PUBLICATIONS — 1. In General. — See**

note 3.

- 60.** 2. Attack on Integrity of the Court. — See note 1.  
 Necessary that Finding Show Intent. — See note 2.  
 3. Tending to Prejudice a Cause. — See note 3.  
**61.** Where Publication Does Not Prejudice the Cause. — See note 1.  
 5. Publication Must Relate to Pending Cause. — See note 3.  
 6. Summary Punishment Not Unconstitutional. — See note 4.

App. Div. 499; *Sheffield v. Cooper*, 21 N. Y. App. Div. 518; *Lawson v. Tyler*, 98 N. Y. App. Div. 10. See also *Matter of Hayward*, 44 N. Y. App. Div. 265; *People v. Guggenheimer*, 44 N. Y. App. Div. 399.

*North Carolina.* — *Williamson v. Pender*, 127 N. Car. 481; *Delozier v. Bird*, 123 N. Car. 689. *Oklahoma.* — *Smith v. Speed*, 11 Okla. 95. *Oregon.* — *State v. Downing*, 40 Oregon 309. *Texas.* — *Ex p. Warfield*, 40 Tex. Crim. 413, 76 Am. St. Rep. 724. *Wyoming.* — *Laramie Nat. Bank v. Steinhoff*, 7 Wyo. 464.

**56.** 2. Irregularity Merely. — *Nebraska Children's Home Soc. v. State*, 57 Neb. 765; *Matter of Humfreville*, 19 N. Y. App. Div. 381, reversed 154 N. Y. 115; *Matter of Hatfield*, 17 N. Y. App. Div. 430, affirmed 155 N. Y. 628.

Where the Order Is Too Broad or Indefinite, that part must be obeyed which is certain and definite. *Kanter v. Circuit Ct.*, 108 Ill. App. 287; *Ex p. Tinsley*, 31 Tex. Crim. 517, 66 Am. St. Rep. 818.

**57.** 1. Jurisdictional Defects. — *In re Reese*, (C. C. A.) 107 Fed. Rep. 942; *Old Dominion Tel. Co. v. Powers*, 140 Ala. 220, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 56; *Tebbetts v. People*, 31 Colo. 461, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 57; *Weaver v. Toney*, 107 Ky. 419; *State v. District Ct.*, 21 Mont. 155, 69 Am. St. Rep. 645; *Kroner v. Reilly*, 49 N. Y. App. Div. 41; *Johnstown Min. Co. v. Morse*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 504; *State v. McGahey*, 12 N. Dak. 535; *Forman v. Healey*, 11 N. Dak. 563; *In re Grear*, 9 Ohio Dec. 299; *State v. Rice*, 67 S. Car. 236, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 56, 57; *Lindsay v. Allen*, 113 Tenn. 517; *Ex p. Foster*, 44 Tex. Crim. 423, 100 Am. St. Rep. 866; *Ex p. Warfield*, 40 Tex. Crim. 413, 76 Am. St. Rep. 724. See also *Hebb v. Tucker*, County Ct., 48 W. Va. 279.

**58.** 1. Strangers. — *Rigas v. Livingston*, 178 N. Y. 20; *Cassidy v. John Church Co.*, 11 Ohio Cir. Dec. 461, 21 Ohio Cir. Ct. 197, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 58; *State v. Lavery*, 31 Oregon 77.

2. Agents. — *Stolts v. Tuska*, 82 N. Y. App. Div. 81.

4. Right to Notice and Opportunity to Be Heard. — *Goldie v. Goldie*, 77 N. Y. App. Div. 12; *Ward v. Ward*, 70 Vt. 430.

5. Service on Attorney Sufficient. — *Foley v.*

*Foley*, 120 Cal. 33, 65 Am. St. Rep. 147; *Isaacs v. Calder*, 42 N. Y. App. Div. 152.

**59.** 1. Civil Remedy to Enforce Decree. — See *Hannah v. People*, 198 Ill. 77.

3. Newspaper Publications — General Rule. — *Telegram Newspaper Co. v. Com.*, 172 Mass. 295, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 59.

Rule in Federal Courts. — The Federal, Circuit, and District Courts can punish only for acts committed in their presence or so near thereto as to obstruct the administration of justice. *Cuyler v. Atlantic*, etc., R. Co., 131 Fed. Rep. 95.

Publication of the Truth as to Legal Proceedings is not contempt. *McClatchy v. Superior Ct.*, 119 Cal. 413.

Publishing a Misleading Statement as to the effect of a temporary injunction is contempt. *Gorham Mfg. Co. v. Emery-Bird-Thayer Dry-Goods Co.*, 92 Fed. Rep. 774, affirmed (C. C. A.) 104 Fed. Rep. 243.

**60.** 1. Attack on Integrity of Court. — *Reg. v. Gray*, (1900) 2 Q. B. 36; *State v. Shepherd*, 177 Mo. 205, 99 Am. St. Rep. 624; *State v. Bee Pub. Co.*, 60 Neb. 282, 83 Am. St. Rep. 531; *State v. Rosewater*, 60 Neb. 438. See also *Stoddard v. Prentice*, 6 British Columbia, 308.

2. McLeod v. St. Aubyn, (1899) A. C. 549.

3. Tending to Prejudice a Cause. — *Rex v. Parke*, (1903) 2 K. B. 432; *Rex v. Charlier*, 12 Quebec Q. B. 385; *Field v. Thornell*, 106 Iowa 7, 68 Am. St. Rep. 281; *Telegram Newspaper Co. v. Com.*, 172 Mass. 295; *State v. Tugwell*, 19 Wash. 238.

Not Contempt to Report Evidence. — *Ex p. Foster*, 44 Tex. Crim. 423, 100 Am. St. Rep. 866.

**61.** 1. No Tendency to Prejudice Cause. — *Re Hooley*, 79 L. T. N. S. 306.

Not Contempt Unless Prejudice Is Shown. — *State v. Edwards*, 15 S. Dak. 383.

3. Publication Must Relate to Pending Cause. — *Ex p. Green*, (Tex. Crim. 1904) 81 S. W. Rep. 723; *State v. Circuit Ct.*, 97 Wis. 1, 65 Am. St. Rep. 90. *Contra*, *Reg. v. Gray*, (1900) 2 Q. B. 36; *Burdett v. Com.*, 103 Va. 838.

The Fact that the Court Is Not in Session is immaterial. The cardinal consideration is that the cause is not at an end. *Rex v. Parke*, (1903) 2 K. B. 432.

4. Constitutional Provisions. — *State v. Shepherd*, 177 Mo. 205, 99 Am. St. Rep. 624.

An Opportunity to Defend Himself must be



**61.** 7. Punishment Within Discretion of Court. — See note 5.

**62.** XIII. CONTEMPT OF LEGISLATURE — 3. In United States — *a.* NO GENERAL POWER TO PUNISH. — See note 5.

**65.** XIV. OTHER INSTANCES OF CONTEMPT — An Attempt to Bribe a Juror. — See notes 4, 6.

Influencing Witness to Absent Himself. — See notes 10, 11.

Interference with Judicial Proceedings — Falsely Justifying as Surety. — See note 12.

**66.** XV. SUMMARY PUNISHMENT OF CONTEMPTS — 1. Guaranty of Trial by Jury. — See note 2.

2. Indictability of Offense No Bar to Punishment. — See note 3.

3. Punishment by Fine or Imprisonment — *a.* CRIMINAL CONTEMPTS — Statutes Fixing Maximum Punishment. — See note 4.

**67.** In the Absence of Statute. — See note 1.

Punishment by Fine. — See note 3.

Imprisonment for the Nonpayment of Fine. — See note 5.

given to the publisher. *McClatchy v. Superior Ct.*, 119 Cal. 413.

**61.** 5. Telegram Newspaper Co. *v.* Com., 172 Mass. 295.

**62.** 5. Extent of Power. — *Lowe v. Summers*, 69 Mo. App. 637.

**65.** 4. *Nichols v. Judge*, 130 Mich. 187.

6. *Ex p. Smith*, 40 Tex. Crim. 179.

Asking a Person to Find Out How a Juror Stands as to a case on trial has been held not to be contempt. *Ex p. McRae*, (Tex. Crim. 1903) 77 S. W. Rep. 211.

10. Inducing a Witness to Swear Falsely is contempt. *Ricketts v. State*, 111 Tenn. 380.

Trying to Suppress Evidence is contempt. *Re Hooley*, 79 L. T. N. S. 306.

Urging a Wife to Settle an Action for Separation is not contempt. *Herrmann v. Herrmann*, 82 N. Y. App. Div. 437.

11. Contra under Tennessee Statutes. — *Scott v. State*, 109 Tenn. 390.

12. Falsely Justifying Is Contempt. — *Nuccio v. Porto*, 72 N. Y. App. Div. 88; *Matter of Hay Foundry, etc., Works*, 22 N. Y. App. Div. 87; *Buffalo Loan, etc., Co. v. Medina Gas, etc., Co.*, 68 N. Y. App. Div. 414; *Matter of Sheppard*, (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 724.

Falsity Must Be Clearly Proven. — *Johnson v. Austin*, 76 N. Y. App. Div. 312.

Falsely Justifying Not Punishable in Favor of Third Party. — *Schreiber v. Raymond, etc., Mfg. Co.*, 18 N. Y. App. Div. 158.

Putting in Fictitious Bail is also a contempt in New York. *Hall v. Lanza*, 97 N. Y. App. Div. 490.

**66.** 2. Summary Punishment. — *Tinsley v. Anderson*, 171 U. S. 101; *Ripon Knitting Works v. Schreiber*, 101 Fed. Rep. 810; *Tindall v. Nisbet*, 113 Ga. 1114; *Bradley v. State*, 111 Ga. 168, 78 Am. St. Rep. 157; *State v. Shepherd*, 177 Mo. 205, 99 Am. St. Rep. 624; *State v. Fredlock*, 52 W. Va. 234, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 66. See also *State v. Murphy*, 71 Vt. 127; *Carter v. Com.*, 96 Va. 791. And see the title CONSTITUTIONAL LAW, 987. 1.

Indirect Contempt — Contemnor Entitled to Be Heard. — *Ex p. Stricker*, 109 Fed. Rep. 145.

Illinois Statute. — Laws Ill. 1893, p. 96, requiring a jury trial "in all cases where a judgment may be satisfied by imprisonment," does

not apply to contempt proceedings for nonpayment of alimony. *Barclay v. Barclay*, 184 Ill. 471.

3. Indictability No Bar to Summary Punishment. — *Chicago Directory Co. v. U. S. Directory Co.*, 123 Fed. Rep. 194; *Ripon Knitting Works v. Schreiber*, 101 Fed. Rep. 810; *Sherman v. People*, 210 Ill. 552, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 66; *Nichols v. Judge*, 130 Mich. 187; *Fisher v. McDaniel*, 9 Wyo. 457, 87 Am. St. Rep. 971.

Contempt Not Merged in Offense. — *Ricketts v. State*, 111 Tenn. 380, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 66.

Court May in Its Discretion Leave Matter to Criminal Law. — *In re Dolan*, 6 Pa. Dist. 578.

4. In the United States Courts fine or imprisonment may be imposed, but not both. *Moss v. U. S.*, 23 App. Cas. (D. C.) 475. But a contemnor who has been sentenced to both fine and imprisonment cannot obtain his discharge on habeas corpus until he has performed one or the other of the elements of the sentence. *Ex p. Davis*, 112 Fed. Rep. 139.

Louisiana. — See *State v. St. Paul*, 104 La. 203.

In Wyoming the imprisonment may work out the fine, at the rate of one dollar per day, but a definite imprisonment may also be ordered. *Fisher v. McDaniel*, 9 Wyo. 457, 87 Am. St. Rep. 971.

In New York a distinction is made between acts of omission and acts of commission. In the former case imprisonment can last only until the act is performed and the fine paid. *People v. Brice*, 62 N. Y. App. Div. 593.

**67.** 1. The New Jersey Statute (Gen. Stat. N. J., p. 392) limiting the punishment for contempts applies only to civil contempts. *Frank v. Herold*, 64 N. J. Eq. 371.

Imprisonment Should Be for Definite Term. — *Kahlbon v. People*, 101 Ill. App. 567.

3. Fine Goes to State. — *State v. Fifth Judicial Dist. Ct.*, 24 Mont. 33; *Mutual Milk, etc., Co. v. Tietjen*, 73 N. Y. App. Div. 532.

The object of the proceeding is not to compensate the opposite party. *Dowagiac Mfg. Co. v. Minnesota Moline Plow Co.*, 124 Fed. Rep. 736, affirmed (C. C. A.) 129 Fed. Rep. 1005.

5. Imprisonment for Nonpayment of Fine. — *Kanter v. Circuit Ct.*, 108 Ill. App. 287.



**68. b. CIVIL CONTEMPTS.** — See note 2.

Compensatory Fine. — See note 3.

Fine Regulated by Damage to Adverse Party. — See note 5.

Imprisonment to Coerce Performance of Act. — See note 6.

**69.** See note 1.**XVI. POWER OF EXECUTIVE TO PARDON** — President of the United States. —

See note 2.

State Executives. — [In *North Carolina* and *Tennessee* the governor is held to have the power of pardoning persons convicted of contempt.<sup>6a</sup>]**70. XVII. CONTEMNOR'S DISABILITIES.** — See note 1.

Cannot Affect Legal Rights. — See notes 3, 4.

**71.** See note 3.**72. XVIII. PURGING CONTEMPTS — 2. Difference Between Rule at Law and in Equity** — The Common-law Rule. — See note 1.

In Courts of Equity. — See note 3.

**68. 2. Civil Contempts.** — *In re Nevitt*, (C. C. A.) 117 Fed. Rep. 448, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 68; *Bessette v. W. B. Conkey Co.*, 194 U. S. 324; *Heinze v. Butte*, etc., Consol. Min. Co., (C. C. A.) 129 Fed. Rep. 274; *In re Fortunato*, 123 Fed. Rep. 622; *People v. O'Brien*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 110; *Lorick v. Motley*, 69 S. Car. 567.

Delay in Instituting Contempt Proceedings may operate to bar the remedy. *Matheson v. Hanna-Schoellkopf Co.*, 122 Fed. Rep. 836.

**3. Compensatory Fine.** — *Ashby v. Ashby*, 62 N. J. Eq. 618; *Lorick v. Motley*, 69 S. Car. 567. Under Code Civ. Pro. N. Y., § 2284, the punishment may be limited to a fine alone. *Hommel v. Buttlung*, 46 N. Y. App. Div. 206.

The Federal Courts have power to order all or part of the fine paid to the other party. *Cary Mfg. Co. v. Acme Flexible Clasp Co.*, (C. C. A.) 108 Fed. Rep. 873.

In *Montana* there is no statute providing for indemnifying the other party, and it is held that the fine must go to the state. *State v. Fifth Judicial Dist. Ct.*, 24 Mont. 33.

**5. Amount Regulated by Damage to Adverse Party.** — *Friedman v. Newman*, (Supm. Ct. App. T.) 86 N. Y. Supp. 735; *Stolts v. Tuska*, 82 N. Y. App. Div. 81; *Buffalo Loan*, etc., Co. v. *Medina Gas*, etc., Co., 68 N. Y. App. Div. 414; *Matter of Becker*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 322; *Burnham v. Denike*, 53 N. Y. App. Div. 407; *Country Club Land Assoc. v. Lohbauer*, 43 N. Y. App. Div. 169; *Noble Tp. v. Aasen*, 10 N. Dak. 264. See also *Mutual Milk*, etc., Co. v. *Tietjen*, 73 N. Y. App. Div. 532.

By statute in *New York*, unless the damage to the other party is shown, the fine is limited to two hundred and fifty dollars. This amount is payable but once, and cannot be collected from several defendants. *Socialistic Co-operative Pub. Assoc. v. Kuhn*, 164 N. Y. 473.

**New York Statute — Refusal to Produce Books.** — Under Code Civ. Pro. N. Y., §§ 856, 876, a witness who refuses to produce books or papers may be imprisoned, but not fined. *Press Pub. Co. v. Associated Press*, 41 N. Y. App. Div. 493.

**6. Imprisonment to Coerce Performance.** — *Ripon Knitting Works v. Schreiber*, 101 Fed. Rep. 810, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 68; *Rebham v. Fuhrman*, (Ky.

1899) 50 S. W. Rep. 976; *Lorick v. Motley*, 69 S. Car. 567.

Such Imprisonment Is Coercive, and not punitive. *Frankel v. Frankel*, 173 Mass. 214, 73 Am. St. Rep. 266.

**69. 1. Duration of Imprisonment.** — *In re Nevitt*, (C. C. A.) 117 Fed. Rep. 448; *Tindall v. Nisbet*, 113 Ga. 1114, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 68, 69; *Nebraska Children's Home Soc. v. State*, 57 Neb. 765; *Williamson v. Pender*, 127 N. Car. 481; *Delozier v. Bird*, 123 N. Car. 689; *Ex p. Tinsley*, 37 Tex. Crim. 517, 66 Am. St. Rep. 818; *Jos. Schlitz Brewing Co. v. Washburn Brewing Assoc.*, 122 Wis. 515. *Contra*, *Matter of Curtis*, 10 Okla. 660.

**Reversal of Order Disobeyed.** — Where the order for the disobedience of which the contemnor is punished is reversed, the imprisonment should last only until the fine is paid. *State v. Downing*, 40 Oregon 309.

**Opportunity to Purge Himself of the Contempt** must be afforded to the prisoner. *Ex p. Overend*, 122 Cal. 201; *Billingsley v. People*, 86 Ill. App. 233. See also *McDonald v. People*, 86 Ill. App. 558.

**2. Power Does Not Extend to Civil Contempts.** — *In re Nevitt*, (C. C. A.) 117 Fed. Rep. 448.

**6a.** *Herring v. Pugh*, 126 N. Car. 852; *Sharp v. State*, 102 Tenn. 9, 73 Am. St. Rep. 851.

**70. 1. Disability of Person in Contempt.** — *Reed v. Reed*, (Ky. 1903) 74 S. W. Rep. 207.

**3. The Privilege of Appearing in His Own Behalf** cannot be denied to a party because of his contempt. *Kruegel v. Nash*, 31 Tex. Civ. App. 15.

So the Right to Appear by Counsel cannot be denied to a party unless his contempt has affected the due course of procedure. *Ward v. Ward*, 70 Vt. 430.

**4.** *Foley v. Foley*, 120 Cal. 33, 65 Am. St. Rep. 147.

**71. 3.** See *In re Haines*, 67 N. J. L. 442, holding that a person cannot be required to purge himself of an alleged contempt until proof of guilt has been offered.

**72. 1. Common-law Rule — Answer of Contemnor Conclusive.** — *Oster v. People*, 192 Ill. 473; *Kyle v. People*, 72 Ill. App. 171; *Anderson v. Indianapolis Drop Forging Co.*, (Ind. App. 1904) 72 N. E. Rep. 277.

**3. Rule in Courts of Equity — Evidence Intro-**

- 72.** 3. Inability to Comply with Order — *a.* IN GENERAL. — See note 6.
- 73.** *b.* WHEN INABILITY RESULT OF FAULT OF CONTEMNOR. — See note 1.
- 74.** 4. Disavowal of Intention to Commit Contempt — *a.* CRIMINAL CONTEMPTS. — See note 1.
- 75.** Attack on Court — Motions — Arguments — Publications. — See notes 1, 2.
- 76.** *b.* CIVIL CONTEMPTS — Failure to Comply with Order — Inability. — See note 1.
- Damage to Adverse Party. — See note 2.
- Evidence of the Motives. — See note 3.
- 77.** See note 1.
5. Erroneous Advice of Counsel. — See notes 2, 3.

duced to Prove and to Rebut. — *U. S. v. Sweeney*, 95 Fed. Rep. 434; *Tolman v. Leonard*, 6 App. Cas. (D. C.) 224; *Anderson v. Indianapolis Drop Forging Co.*, (Ind. App. 1904) 72 N. E. Rep. 277.

**72.** 6. Inability to Obey — *Alabama*. — *McKissack v. Voorhees*, 119 Ala. 101.

*California*. — *In re Cowden*, 139 Cal. 244.

*Georgia*. — *Nisbet v. Tindall*, 115 Ga. 374.

*Illinois*. — *Moseley v. People*, 101 Ill. App. 564; *Kahlbon v. People*, 101 Ill. App. 567; *Herrington v. Cassem*, 82 Ill. App. 594.

*Nebraska*. — See *Jenkins v. State*, 60 Neb. 205.

*New Jersey*. — *Grand Lodge, etc., v. Jansen*, 62 N. J. Eq. 737. See also *Kempson v. Kempson*, 63 N. J. Eq. 783, 92 Am. St. Rep. 682.

*New Mexico*. — *In re Jaramillo*, 8 N. Mex. 598.

*New York*. — *Matter of Lothringer*, (Surrogate Ct.) 26 Misc. (N. Y.) 690; *Matter of Wegman*, 40 N. Y. App. Div. 632. See also *infra*, this title, **76. 1.**

Compliance Not Required Where It Would Be Unjust. — *Krakower v. Lavelle*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 423.

Inability to Pay a Large Sum does not show inability to pay a smaller sum. *State v. Downing*, 40 Oregon 309.

Inability Must Be Real. — Where the order is to turn over certain formulas used in compounding medicines, it is not enough to show that these have been burned, it appearing that they were in the memory of the contemnor. *Lawson v. Tyler*, 98 N. Y. App. Div. 10.

**73. 1. Fault of Contemnor.** — *Tindall v. Nisbet*, 113 Ga. 1114; *Barclay v. Barclay*, 184 Ill. 471; *Reed v. Reed*, (Ky. 1903) 74 S. W. Rep. 207; *Huckins v. State*, 61 Neb. 871; *People v. Wright*, 22 N. Y. App. Div. 165; *Matter of Collins*, (Surrogate Ct.) 39 Misc. (N. Y.) 753. See also *In re Meggett*, 105 Wis. 291.

**74. 1. Disclaimer of Intention to Commit.** — *In re Perkins*, 100 Fed. Rep. 950; *Matter of Contempt by Four Clerks*, 111 Ga. 89; *Hughson v. People*, 91 Ill. App. 396; *Mackay v. State*, 60 Neb. 144, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 74.

Malevolent Intention Necessary. — "Before inflicting any punishment on appellant it should \* \* \* clearly appear, inasmuch as the act constituting the alleged contempt occurred out of the presence of the court, that he was actuated by some malevolent intention to lower or assail the dignity of the court, or wilfully and knowingly interfered with the administration of justice. Even in civil contempts there

must be an intent to do wrong or a wilful refusal to comply with the order of the court." *Powers v. People*, 114 Ill. App. 323.

**75. 1.** *Bloom v. People*, 23 Colo. 416; *Rex v. Charlier*, 12 Quebec Q. B. 385.

False Application for Continuance — Disclaimer Immaterial. — *Carter v. Com.*, 96 Va. 791.

Iowa Statute. — Code Iowa, § 4465, allows the contemnor to make a written explanation under oath. But this right may be waived by the conduct of the contemnor. *Harden v. Silvani*, 114 Iowa 157.

**2. Good Faith — Extenuation.** — *Mackay v. State*, 60 Neb. 144, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 75.

**76. 1. Inability to Perform Act for Benefit of Adverse Party.** — *Donaldson v. Miller*, 23 Pa. Co. Ct. 393, 9 Pa. Dist. 283, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 75, 76.

**2. Damage Caused to Adverse Party.** — *Rodgers v. Pitt*, 89 Fed. Rep. 424, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 76; *Young v. Rothrock*, 121 Iowa 588; *Herring v. Pugh*, 126 N. Car. 852; *State v. Fredlock*, 52 W. Va. 234; *Webster v. Douglas County*, 102 Wis. 181, 72 Am. St. Rep. 870; *Laramie Nat. Bank v. Steinhoff*, 7 Wyo. 464.

Under an order requiring all persons having property belonging to a corporation to pay it over to the receiver, it is not contempt to refuse to deliver to the receiver property which the alleged contemnor believes in good faith not to belong to the corporation. *State v. Denham*, 30 Wash. 643.

**3. Motive as Mitigating Punishment.** — *Ex p. Richards*, 117 Fed. Rep. 658; *French v. Commercial Nat. Bank*, 79 Ill. App. 110; *Young v. Rothrock*, 121 Iowa 588; *Coffey v. Gamble*, 117 Iowa 545; *Coffin v. Burstein*, 68 N. Y. App. Div. 22.

**77. 1.** *Comly v. Buchanan*, 81 Fed. Rep. 58; *Rumney v. Donovan*, 28 Mont. 69.

**2. Advice of Counsel — Will Not Justify Disobedience of Order.** — *Rodgers v. Pitt*, 89 Fed. Rep. 424, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 77; *Royal Trust Co. v. Washburn, etc.*, R. Co., 113 Fed. Rep. 531; *Tornanses v. Melsing*, (C. C. A.) 106 Fed. Rep. 775; *Continental Nat. Bldg., etc., Assoc. v. Scott*, 41 Fla. 421; *Stolts v. Tuska*, 82 N. Y. App. Div. 81; *Matter of Granz*, 78 N. Y. App. Div. 399; *Delozier v. Bird*, 123 N. Car. 689.

**3. When Advice of Counsel Will Palliate Offense.** — *Rodgers v. Pitt*, 89 Fed. Rep. 424, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 77; *Russell v. Mohr-Weil Lumber Co.*, 102 Ga.



- 78. CONTENTS.**—See note 2.  
**CONTEST.**—See note 3.  
**79. CONTIGUOUS.**—See note 1.  
**81. CONTINGENT.**—See note 1.  
**CONTINUE, CONTINUOUS, ETC.**—See note 2.  
**82. [CONTRABAND LIQUOR.**—See note 1a.]  
**CONTRABAND OF WAR.**—See note 2.

563; Coffey *v.* Gamble, 117 Iowa 545; Rumney *v.* Donovan, 28 Mont. 69; Coffin *v.* Burstein, 68 N. Y. App. Div. 22; Stolts *v.* Tuska, 82 N. Y. App. Div. 81.

**78. 2. Contents of a Promissory Note, or Chase in Action.**—North American Transp., etc., Co. *v.* Morrison, 178 U. S. 262; Ban *v.* Columbia Southern R. Co., (C. C. A.) 117 Fed. Rep. 21.

**A Gift of a house and furniture and "all the contents"** does not include securities in a safe. Fenton *v.* Fenton, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 479.

**Insurance.**—See West *v.* Farmers' Mut. Ins. Co., 117 Iowa 147.

**3. Oxford v. Frank,** 30 Tex. Civ. App. 343.

**"The Word 'Contest' in Constitutions and Statutes Is a Word of Art.**—It has a distinct, defined meaning. It is a litigation. It implies a plaintiff and a defendant, and a thing in controversy. When it is decided it is, or should be, decided upon evidence, and the decision is a judgment." Pratt *v.* Breckinridge, 112 Ky. 23.

**79. 1. Local Assessments.**—Matthews *v.* Kimball, 70 Ark. 451; Bloomington *v.* Reeves, 177 Ill. 161.

**81. 1. Contingent as Indorser.**—In Bowns *v.* Stewart, (Supm. Ct. App. T.) 28 Misc. (N. Y.) 475, the court said: "The word *contingent* ordinarily means 'liable to occur.' In law its meaning is 'dependent upon an uncertain future event.' Standard Dict. 406, vol. 1. The words '*contingent* as indorser' in the case at bar are equivalent to saying, the defendant is liable as indorser to an extent dependent upon the future acts (or payments) of the prior obligors."

**The Word Contingently in Code Civ. Pro. N. Y., § 2662,** providing for the appointment as administrator of a person absolutely or *contingently* entitled thereto, means a person to whom, at the time the petition is filed, letters

would issue if persons entitled thereto in priority, under section 2660, did not take. Matter of Ferrigan, 92 N. Y. App. Div. 376.

**2. Continuing Guaranty.**—See Fisk *v.* Rickel, 108 Iowa 370; Parr's Banking Co. *v.* Yates, (1898) 2 Q. B. 460.

**Continue in the Sense of Remain.**—In construing an act which provided "That this act shall be deemed and taken as a public act, and at all times, in all courts and places whatever, be recognized as such; and shall be commenced within two years, and *continue* in full force for the term of fifty years," the court said: "The word *continue* is used in the sense of 'remain,' and has no reference to any prior term to which the fifty years are to be added; it does not say for fifty years thereafter." Gray *v.* Newark Plank Road Co., 65 N. J. L. 51.

**A Continuous Ride** does not mean a ride interrupted by a considerable interval of time. If the time within which a transfer may be used expires by reason of the failure of the company to run its cars frequently enough, that fact does not make the transfer good or authorize a conductor to honor it. Garrison *v.* United R., etc., Co., 97 Md. 347.

**82. 1a. Contraband Liquor—Dispensary Law.**—Alcoholic liquor imported into the state for personal use is not *contraband* for failure to have attached certificates of the state commissioner as required by the South Carolina Dispensary Act. State *v.* McGee, 55 S. Car. 247. And see State *v.* Holleyman, 55 S. Car. 207.

**2.** "By the modern law of nations provisions are not, in general, deemed *contraband*; but they may become so, although the property of a neutral, on account of the particular situation of the war, or on account of their destination." The Benito Estenger, 176 U. S. 568.

## CONTRACT LABOR LAWS.

**84.** 3. History of Statute. — See note 1.

II. CONSTITUTIONALITY OF STATUTE. — See notes 2, 3.

III. WHO ARE EXCLUDED — 1. Statute Affects Only Alien Immigrants. —

See note 4.

2. Character of Occupation Followed — *a.* GENERALLY. — See note 5.

**85.** See note 1.

**86.** IV. PENALTY FOR ASSISTING PROHIBITED IMMIGRANTS — 1. When Penalty Recoverable. — See note 3.

[Who May Recover Penalty. — See note 3*a.*]

2. Jurisdiction of Actions for Penalty. — See note 5.

**87.** 3. Nature of Action for Penalty. — See note 1.

V. EXCLUSION AND DEPORTATION OF PROHIBITED IMMIGRANTS. — See note 2.

**84.** 1. *U. S. v. Gay*, (C. C. A.) 95 Fed. Rep. 226.

2. See Japanese Immigrant Case, 189 U. S. 86.

3. See Japanese Immigrant Case, 189 U. S. 86.

**4. Not Applicable to Alien Seamen.** — Alien seamen using the ports of the country in their ships are not alien immigrants, and are, therefore, not aliens coming into the country, within the meaning of the statute, and whose right to remain here can be definitely and finally determined by the executive officers of the government. *U. S. v. Burke*, 99 Fed. Rep. 895.

In case an alien domiciled and residing in the United States ships on a vessel for a round voyage from a port in this country in a capacity other than that of seaman, no fine is incurred by the vessel or master, under the Act of March 3, 1893 (27 Stat. L. 569), if on such alien's return he is not entered on an immigrant list as provided in the statute. Such persons are alien residents and not alien immigrants, within the meaning of that Act. Immigration Laws — Alien Residents, 23 Op. Atty.-Gen. 278.

**5. Window Dresser Not Within Statute.** — The purpose of the statute was to stay the influx of cheap unskilled manual labor, and it does not include the case of one engaged to work as a draper, window dresser, and dry goods clerk. *U. S. v. Gay*, (C. C. A.) 95 Fed. Rep. 226.

**85.** 1. *U. S. v. Gay*, (C. C. A.) 95 Fed. Rep. 226.

**A Laborer Imported to Work in and upon a Farm** is within the statutes. *U. S. v. Parsons*, (C. C. A.) 130 Fed. Rep. 681.

**86.** 3. **An Advertisement in an English Newspaper** to first-class weavers that they could find employment at their trade with the defendant, which would yield a stated return varying between specified rates, is within section 3 of the amendatory act (Act March 3, 1891, c. 551, 26 Stat. L. 1084), providing "that it shall be deemed a violation of said Act of February 26, 1885, to assist or encourage the importation or migration of any alien by promise of employment through advertisements printed and published

in any foreign country; and any alien coming to this country in consequence of such an advertisement shall be treated as coming under a contract contemplated by such Act; and the penalties by such Act imposed shall be applicable in such a case; provided, this section shall not apply to states and immigration bureaus of states advertising the inducements they offer for immigration to such states." *U. S. v. Baltic Mills Co.*, (C. C. A.) 124 Fed. Rep. 38.

**3*a.* A Private Person Cannot Sue for His Own Benefit** to recover the penalty provided by this Act, as such action being penal must be prosecuted by the district attorney. The amendatory Act of 1888 authorizing pay to an informer does not change the rule. *Rosenberg v. Union Iron Works*, 109 Fed. Rep. 844.

**5.** *Rosenberg v. Union Iron Works*, 109 Fed. Rep. 844.

**87.** 1. **An Action of Debt** is the proper form of action to recover the penalty provided by this statute not only by the terms of the statute but on general principles, for while the action, being based on a violation of the statute, sounds in tort, "debt lies for a statutory penalty, because the sum demanded is certain." *U. S. v. McElroy*, 115 Fed. Rep. 253.

**2. Deportation of Aliens Within a Year.** — Under the Act of March 3, 1891, § 10, an alien who succeeds in surreptitiously landing in the United States may, within a year from the date of such landing, be arrested and deported by the secretary of the treasury without a judicial proceeding before a court. The omission of the statute to make final the decision of the secretary of the treasury, directing that one who has landed in the United States in violation of the law be returned to the country whence he came, does not render such decision and order invalid. *U. S. v. Yamasaka*, (C. C. A.) 100 Fed. Rep. 404.

**Negligently Permitting Aliens to Land — Sufficiency of Evidence.** — *Hackfield v. U. S.*, (C. C. A.) 125 Fed. Rep. 596; *Moffitt v. U. S.*, (C. C. A.) 128 Fed. Rep. 375.

**87. Decisions of Immigration Officials Are Final.** — See notes 3, 4.

**87. 3.** *U. S. v. Burke*, 99 Fed. Rep. 895; *Lavin v. Le Fevre*, (C. C. A.) 125 Fed. Rep. 695. See also *U. S. v. Yamasaka*, (C. C. A.) 100 Fed. Rep. 404.

**4.** In *U. S. v. Burke*, 99 Fed. Rep. 895, the court said: "Whatever may be the right of any officer to determine the status of a particular alien as between the government and the alien, the right to enforce a penalty against the ship that brings him is essentially a judicial right, and when, therefore, it is attempted on the part of the executive officer to constrain a shipmaster to pay a penalty, or when clearance is refused to his ship for failure to pay such

penalty, the courts are not excluded from a consideration of the question whether a case is made for the imposition of the penalty or the restraint of the ship."

In *Lavin v. Le Fevre*, (C. C. A.) 125 Fed. Rep. 693, the court said: "If the appellees were alien immigrants who had been imported into the port of New York from France within one year, and their absence from the United States just prior to their arrival at Seattle was only temporary, as the finding of facts indicates, when their deportation to France would appear to be, under the circumstances, according to law."

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## CONTRACTS.

BY O. D. ESTEE.

**93. III. CONTRACTS CLASSIFIED — 2. Express and Implied Contracts — b. EXPRESS CONTRACTS CLASSIFIED — (1) Contracts by Specialty — (a) In General** — The Seal Has Lost Much of Its Significance. — See note 4.

**94.** (2) *Parol or Simple Contracts.* — See note 5.

**95. 4. Entire and Divisible Contracts — A Contract Is Entire.** — See note 6a. Question of Intention. — See note 8.

**96. Sale of Several Distinct Things — One Consideration.** — See note 1. Entire Contract — How Enforced. — See note 3.

**97. Severable Contract — Apportionment.** — See note 3.

**99. IV. THE ELEMENTS OF A CONTRACT — 1. General Statement.** — See note 1.

**2. Parties — a. IN GENERAL — More than One Essential.** — See note 2.

**100. b. CAPACITY TO CONTRACT — (1) Extent of Capacity — Insanity** — Proof of Insanity Avoids Contract. — See note 3.

**93. 4. Raises Rebuttable Presumption of Consideration.** — *Howie v. Kasnowitz*, 83 N. Y. App. Div. 295.

**94. 5.** *Webster v. Fleming*, 178 Ill. 140, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 94, 95.

**95. 6a.** *Gorse v. Lynch*, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 150, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 95.

**8. Intention.** — *Gorse v. Lynch*, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 150, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 95.

**96. 1. One Consideration — Several Distinct Things.** — *Nichols v. Charlebois*, 10 N. Dak. 446, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 96.

**3. Entire Contract Cannot Be Enforced Piecemeal.** — *Union Cent. L. Ins. Co. v. Berlin*, (C. C. A.) 90 Fed. Rep. 779, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 95 [96] and declaring also the next following proposition of the text; *Granat v. Kruse*, 114 Ill. App. 488, dismissed 213 Ill. 328, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 98 [96]; *Gorse v. Lynch*, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 150, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 96.

**97. 3. A Contract Containing Two or More Independent Promises**, one of which is void, may be enforced as to the valid promise. *Granat v. Kruse*, 114 Ill. App. 488, dismissed 213 Ill. 328.

**99. 1. Elements of Contract in General.** — *Cockrell v. McIntyre*, 161 Mo. 59, quoting 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 98. And see *Edward C. Jones Co. v. Perry*, 26 Ind. App. 554, per Wiley, J., dissenting, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 98, 99.

**2. Must Be More than One Party.** — See *Edward C. Jones Co. v. Perry*, 26 Ind. App. 554, per Wiley, J., dissenting, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 99.

**100. 3. Proof of Insanity Avoids Contract.** — *Barlow v. Strange*, 120 Ga. 1015; *Woolley v. Gaines*, 114 Ga. 122, 88 Am. St. Rep. 22; *State v. Grand Lodge, etc.*, 78 Mo. App. 546.

**Nature of Insanity Requisite.** — In order to avoid a contract on the ground that one of the contracting parties was insane, it must appear that the insanity was of such a nature that the party had no reasonable understanding of the terms and nature of the contract. *Elwood v. O'Brien*, 105 Iowa 239.



**101.** *c.* JOINT, AND JOINT AND SEVERAL CONTRACTS — Construction — Suit on Joint Contract. — See note 5.

**102.** Joint Contract — Remedy Must Be By or Against All Joint Parties. — See note 3.

**104.** Contract by Several Presumed Joint. — See note 1.

*d.* PRIVACY — PERSONS AFFECTED BY CONTRACT — (2) *Contract for Benefit of Third Person* — (a) History — English Doctrine. — See note 7.

**106.** (b) Authorities in the United States — *aa.* STATES ADOPTING ENGLISH RULE — In Michigan. — See note 2.

In Vermont. — See note 4.

**107.** *bb.* AMERICAN DOCTRINE — THIRD PARTY MAY SUE — (*bb*) *New York*. — See notes 3, 4.

(*cc*) *Doctrine in Other States*. — See note 5.

**108.** In Connecticut, Maryland, and Pennsylvania. — See note 1.

**101. 5.** *Streichen v. Fehleisen*, 112 Iowa 612, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 101; *Trenton Potteries Co. v. Oliphant*, 56 N. J. 680.

**102. 3.** *Slaughter v. Davenport*, 151 Mo. 26, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 172 [102].

**104. 1.** *Matthews v. Williams Mfg. Co.*, 98 Me. 234, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 104; *Hill v. Combs*, 92 Mo. App. 242. See also *Trenton Potteries Co. v. Oliphant*, 56 N. J. Eq. 680.

**7. General Rule — Third Party Cannot Sue.** — See *Guthrie v. Atlantic Coast Line R. Co.*, 119 Ga. 663, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 104; *Spears v. Scott*, 111 Ga. 745, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 104 *et seq.*

**106. 2. Michigan.** — *Ebel v. Piehl*, 134 Mich. 64. See also, as declaring the doctrine in *Michigan, New Hampshire, and Vermont*, *Blakeley v. Adams*, 113 Ky. 392, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 106.

But a party may enforce at law a promise made directly to himself on a consideration furnished by a third person. *Palmer v. Bray*, (Mich. 1904) 98 N. W. Rep. 849; *Clark v. Clark*, 134 Mich. 602.

In Equity "a person for whose benefit a promise is made may enforce it in his own name." *Palmer v. Bray*, (Mich. 1904) 98 N. W. Rep. 849; *Corning v. Burton*, 102 Mich. 95.

**4. Vermont.** — *Green v. McDonald*, 75 Vt. 93.

**107. 3.** See *Chicago, etc., R. Co. v. Ottumwa*, 112 Iowa 300, *per* Waterman, J., *dissenting*, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 107.

**4. Incidental Benefit Insufficient.** — *Hurd v. Wing*, 76 N. Y. App. Div. 506; *Lehman v. Musgrave*, 22 N. Y. App. Div. 566; *Lennon v. Lyon*, (County Ct.) 22 Misc. (N. Y.) 505; *Buchanan v. Tilden*, 5 N. Y. App. Div. 354, *reversed* 158 N. Y. 109.

**5. United States.** — *Barker v. Pullman's Palace Car Co.*, 124 Fed. Rep. 555, *affirmed* (C. C. A.) 134 Fed. Rep. 70; *Central Electric Co. v. Sprague Electric Co.*, (C. C. A.) 120 Fed. Rep. 925; *Welden Nat. Bank v. Smith*, (C. C. A.) 86 Fed. Rep. 398.

*Arkansas.* — *Thomas Mfg. Co. v. Prather*, 65 Ark. 27.

*Colorado.* — *Taylor v. Ingersoll*, 18 Colo. 272. *Illinois.* — *Hillsboro Bldg., etc., Assoc. v. Simmering*, 75 Ill. App. 647; *Forster v. Gregory*,

107 Ill. App. 437; *Webster v. Fleming*, 178 Ill. 140; *Robinson v. Holmes*, 75 Ill. App. 203.

*Indiana.* — See *McCoy v. McCoy*, 32 Ind. App. 38, 102 Am. St. Rep. 223, holding that it is not necessary for the beneficiary to give notice of his acceptance of the contract.

*Iowa.* — *German State Bank v. Northwestern Water, etc., Co.*, 104 Iowa 717; *Daily v. Minnick*, 117 Iowa 563.

*Kansas.* — *Hume v. Atkinson*, 8 Kan. App. 18.

*Kentucky.* — *Blakeley v. Adams*, 113 Ky. 392, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 106, as to the general American doctrine and stating that "in no state has this doctrine been carried farther than in Kentucky;" *Benge v. Potter*, (Ky. 1900) 55 S. W. Rep. 431; *Munday v. Munday*, (Ky. 1899) 52 S. W. Rep. 966.

*Louisiana.* — *Allen, etc., Mfg. Co. v. Shreveport Waterworks Co.*, 113 La. 1091, *quoting* 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 106 as to the American doctrine.

*Missouri.* — *Carpenter v. Reliance Realty Co.*, 103 Mo. App. 480, 23 Am. St. Rep. 887; *Crone v. Dexter*, 68 Mo. App. 122.

*Nebraska.* — *Goos v. Goos*, 57 Neb. 294; *Rohman v. Gaiser*, 53 Neb. 474.

*New Jersey.* — *Whitehead v. Burgess*, 61 N. J. L. 75.

*North Carolina.* — *Gorrell v. Greensboro Water Supply Co.*, 124 N. Car. 328, *citing* 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 105-108.

*Oregon.* — *Feldman v. McGuire*, 34 Oregon 309.

*Tennessee.* — *Ruohs v. Traders F. Ins. Co.*, 111 Tenn. 405, 102 Am. St. Rep. 790.

*Utah.* — *Montgomery v. Rief*, 15 Utah 495.

*Wisconsin.* — *Rowe v. Moon*, 115 Wis. 566; *Tweeddale v. Tweeddale*, 116 Wis. 517, 96 Am. St. Rep. 1003; *Peterson v. Chicago, etc., R. Co.*, 119 Wis. 197, 100 Am. St. Rep. 879.

In Georgia the rule is as follows: If A makes a promise to B, B may sue A though the consideration for A's promise was furnished by C. But where A merely makes a contract with C to pay C's debt to B, and there is no trust created in B's favor, B cannot maintain an action against A. *Hawkins v. Central of Georgia R. Co.*, 119 Ga. 159, *citing* 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 105-109; *Anstell v. Humphries*, 99 Ga. 408; *Spears v. Scott*, 111 Ga. 745; *Guthrie v. Atlantic Coast Line R. Co.*, 119 Ga. 663.

**108. 1. Connecticut.** — The rule permitting a third party to sue on a contract made for his benefit can seldom, if ever, extend to a

**109.** In Virginia. — See note 1.

(*dd*) *Revocation — Acceptance by Third Party — Subject to Equities Between Original Parties.* — See note 3.

(*ee*) *Instruments under Seal.* — See notes 4, 5.

**110.** (*ff*) *Statutes.* — See note 1.

(*c*) *Doctrine in Equity.* — See note 3.

In the United States. — See note 4.

(*d*) *Actions in Tort Arising from Breach of Contract.* — See note 6.

3. Assent. — See note 10.

**111.** Assent Wanting — Contract Not Binding — See note 1.**112.** Presumption of Assent from Signature. — See note 1.

Accepting Contract Tendered and Signed. — See note 2.

**113.** Acceptance in Reliance on Representations. — See note 1.

stranger to the consideration who is not in some relation of privity to the nominal promisee. *Baxter v. Camp*, 71 Conn. 245.

Pennsylvania. — See *Howes v. McCrea*, 21 Pa. Super. Ct. 592.

**109.** 1. Virginia. — Code Va. (1887), § 2415, permits a third party to bring suit on a contract where the promise is made solely for his benefit. *New Port News v. Potter*, (C. C. A.) 122 Fed. Rep. 321.

3. *Hargadine-McKittrick Dry-Goods Co. v. Swofford Bros. Dry-Goods Co.*, 65 Kan. 572; *Goos v. Goos*, 57 Neb. 294.

4. *Instruments under Seal an Exception.* — *Harvey v. Maine Condensed Milk Co.*, 92 Me. 115.

The law is well settled in *New York* that "only parties named in and who executed an instrument under seal can enforce its covenants." *Williams v. Magee*, 76 N. Y. App. Div. 512, *affirmed* 177 N. Y. 534.

5. *No Exception as to Sealed Contracts.* — *Webster v. Fleming*, 178 Ill. 140, *citing* 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 109; *Robinson v. Holmes*, 75 Ill. App. 203; *Hillsboro Bldg., etc., Assoc. v. Simmering*, 75 Ill. App. 647.

**110.** 1. *Gastonia v. McEntee-Peterson Engineering Co.*, 131 N. Car. 363, *citing* 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 110.

3. See *Gastonia v. McEntee-Peterson Engineering Co.*, 131 N. Car. 363, *citing* 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 110.

4. *Doctrine in Vermont.* — A was indebted to B, and C made a binding contract with A to pay A's debt to B. On A's failure to pay B it was held that B could be subrogated in equity to A's contract rights against C and thus recover from C. *Green v. McDonald*, 75 Vt. 93.

6. *Abraham v. Cincinnati*, 13 Ohio Dec. 627, *citing* 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 110.

10. *Assent Essential.* — *Davis v. Thomas*, 28 Colo. 303; *Newlin v. Prevo*, 90 Ill. App. 515; *Sutter v. Raeder*, 140 Mo. 297; *Columbus, etc., R. Co. v. Gaffney*, 65 Ohio St. 104; *Dorr v. Camden*, 55 W. Va. 226, *citing* 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 110; *Limer v. Traders Co.*, 44 W. Va. 175.

*Assent Must Correspond with Terms of Offer.* — To have a binding contract the minds of the parties must meet and the terms of the acceptance must exactly correspond with the terms of the offer. *Krum v. Chamberlain*, 57 Neb. 220.

**111.** 1. *American Pub., etc., Co. v. Walker*, 87 Mo. App. 503.

**112.** 1. *Signature Creates Presumption of Assent — United States.* — *Muller v. Kelly*, 116 Fed. Rep. 545, *reversed* (C. C. A.) 125 Fed. Rep. 212.

*California.* — *Kimmell v. Skelly*, 130 Cal. 555.

*Georgia.* — *Georgia Medicine Co. v. Hyman*, 117 Ga. 851; *Harrison v. Wilson Lumber Co.*, 119 Ga. 6.

*Indiana.* — *Wood v. Wack*, 31 Ind. App. 252.

*Missouri.* — *Johnston v. Covenant Mut. L. Ins. Co.*, 93 Mo. App. 580; *Wyrick v. Missouri, etc., R. Co.*, 74 Mo. App. 406.

*Pennsylvania.* — *Ruby v. Emig*, 12 York Leg. Rec. (Pa.) 174.

*South Carolina.* — *Sloan v. Courtenay*, 54 S. Car. 314.

*West Virginia.* — *Ferrell v. Ferrell*, 53 W. Va. 515.

*Wisconsin.* — *Bostwick v. Mutual L. Ins. Co.*, 116 Wis. 392.

Where one party signs and delivers his written obligation to another party who acts upon it, he is estopped from asserting afterwards that he did not know the contents of the paper on account of his inability to read. *Hurt v. Wallace*, (Tex. Civ. App. 1899) 49 S. W. Rep. 675.

*Fraud or Force in Procuring Execution of Contract.* — *McBride v. Macon Tel. Pub. Co.*, 102 Ga. 422; *Headley v. Pickering*, (Ky. 1901) 64 S. W. Rep. 527; *Spelts v. Ward*, (Neb. 1901) 96 N. W. Rep. 56; *Story v. Gammell*, (Neb. 1903) 94 N. W. Rep. 982; *Nebraska Mut. Bond Assoc. v. Klee*, (Neb. 1903) 97 N. W. Rep. 476; *Alexander v. Brogley*, 63 N. J. L. 307; *Strauss v. Welsbach Gas-Lamp Co.*, (Supm. Ct. App. T.) 42 Misc. (N. Y.) 184; *Houston, etc., R. Co. v. Burns*, (Tex. Civ. App. 1901) 63 S. W. Rep. 1035; *Bostwick v. Mutual L. Ins. Co.*, 116 Wis. 392.

2. *Contents Presumptively Known and Assented to.* — A party who accepts and retains a policy of insurance for several months without reading it is estopped from afterwards asserting that the policy is different from the one for which he contracted. *Bostwick v. Mutual L. Ins. Co.*, 116 Wis. 392.

**113.** 1. *Reliance on Representations.* — *Old Colony Trust Co. v. Dubuque Light, etc., Co.*, 89 Fed. Rep. 794; *Watson v. Brown*, 113 Iowa 308; *Coffey v. Hendrick*, (Ky. 1901) 65 S. W. Rep. 127.

One who was induced to enter into a contract

**113.** Common Mutual Understanding Implied. — See note 2.

**114.** 4. Subject-matter — *a.* ITS CONSTITUENTS — (1) *Consideration* — Mutuality. — See notes 3, 4.

**115.** Want of Mutuality — How Remedied. — See note 1.

(2) *Continued Existence of Thing Contracted For.* — See note 5.

**116.** Where Performance Dependent on Continued Existence of Person or Thing. — See note 2.

*b.* REQUIREMENTS AS TO SUBJECT-MATTER — (1) *Certainty.* — See note 3.

*c.* CONDITIONS — (1) *Generally* — A Conditional Contract. — See note 4.

**118.** Condition Plainly Expressed. — See note 1.

(2) *Precedent.* — See note 4.

by false representations may avoid the contract where such representations were made by the other party concerning facts that were peculiarly within his own knowledge with intent to deceive, and the first party was actually deceived thereby. *Hingston v. L. P., etc., Smith Co., (C. C. A.)* 114 Fed. Rep. 294.

**113.** 2. Mutuality of Understanding and Assent Is Requisite. — *Falck v. Williams, (1900) A. C. 176; Murray v. Jenkins, 28 Can. Sup. Ct. 565; Calhoun v. Brewster, 1 N. Bruns. Eq. Rep. 529; Singer v. Grand Rapids Match Co., 117 Ga. 86; Drake v. Biddinger, 30 Ind. App. 357, quoting 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 113; Russell v. Clough, 71 N. H. 177, 93 Am. St. Rep. 507, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 113.*

When the Minds of the Parties Meet, the contract is made. *American Pub., etc., Co. v. Walker, 87 Mo. App. 503.*

**114.** 3. Laclede Constr. Co. v. Tudor Iron Works, 169 Mo. 137, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 114.

**4. Necessity of Mutuality.** — *Greene v. Sigua Iron Co., (C. C. A.) 88 Fed. Rep. 203; Harvester King Co. v. Mitchell, etc., Co., 89 Fed. Rep. 173; Cold Blast Transp. Co. v. Kansas City Bolt, etc., Co., (C. C. A.) 114 Fed. Rep. 77; Loudenback Fertilizer Co. v. Tennessee Phosphate Co., (C. C. A.) 121 Fed. Rep. 298; Woolsey v. Ryan, 59 Kan. 601; Laclede Constr. Co. v. Tudor Iron Works, 169 Mo. 137, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 114; Smyth v. Greacen, 100 N. Y. App. Div. 275, quoting 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 114 (the whole text paragraph); Fuller v. Schrenk, 58 N. Y. App. Div. 222, affirmed 171 N. Y. 671; Cook v. Casler, 87 N. Y. App. Div. 8; Hirschhorn v. Nelden-Judson Drug Co., 26 Utah 110; Teipel v. Meyer, 106 Wis. 41, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 114.*

**115.** 1. How Want of Mutuality Remedied. — *Harvester King Co. v. Mitchell, etc., Co., 89 Fed. Rep. 173; Brown v. Bowman, 119 Ga. 153, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 115; Woolsey v. Ryan, 59 Kan. 601; Laclede Constr. Co. v. Tudor Iron Works, 169 Mo. 137, quoting 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 115; American Pub., etc., Co. v. Walker, 87 Mo. App. 503, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 115; Sagalowicz v. Pellman, (Supm. Ct. App. T.) 32 Misc. (N. Y.) 508, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 115; Boyd v. Brown, 47 W. Va. 238, quoting*

*7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 115; Eclipse Oil Co. v. South Penn Oil Co., 47 W. Va. 84, quoting 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 115; Friend v. Mallory, 52 W. Va. 53, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 114 [115].*

**5. Subject Destroyed or Nonexistent.** — *McCaslin v. Advance Mfg. Co., 155 Ind. 298, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 115; Dixon v. Breon, 22 Pa. Super. Ct. 340.*

**116.** 2. Implied Condition as to Continued Existence. — *Griffith v. Blackwater Boom, etc., Co., 46 W. Va. 56, quoting 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 116.*

**3. Certainty.** — *Hart v. Georgia R. Co., 101 Ga. 188; Almini Co. v. King, 92 Ill. App. 276; Blakistone v. German Bank, 87 Md. 302; Marble v. Standard Oil Co., 169 Mass. 553; Howie v. Kasnowitz, 83 N. Y. App. Div. 295; Flaherty v. Cary, 62 N. Y. App. Div. 116, affirmed 174 N. Y. 550; Hauser v. Harding, 126 N. Car. 295; Shute v. Heath, 131 N. Car. 281; Teague v. Schaub, 133 N. Car. 458; Thomas v. Thomasville Shooting Club, 122 N. Car. 285; Evans v. Peck-Hammond Co., 25 Ohio Cir. Ct. 161.*

**Degree of Certainty Requisite.** — In *Waterloo First Nat. Bank v. Park, 117 Iowa 552*, it was held that "a contract will not be declared void for uncertainty unless after reading and interpreting it in the light of the circumstances under which it was made, and supplying and rejecting words necessary to carry into effect the reasonable intention of the parties, their intention cannot be fairly collected and effectuated."

**117.** 4. *Kenan v. Lindsay, 127 Ala. 270, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 117.*

**118.** 1. *Withers v. Moore, 140 Cal. 591, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 118; Sigur v. Burguires, 111 La. 1077, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 118; Buford v. Landrum, (Tex. Civ. App. 1902) 67 S. W. Rep. 1066, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 118.*

**4. Condition Precedent.** — See *Frank v. Stratford-Handcock, (Wyo. 1904) 77 Pac. Rep. 134*, holding in reference to a real-estate contract, that a condition precedent "is one that must happen or be performed before the estate dependent upon it can arise."

**A Suspensive Condition**, under the *Louisiana Code*, is equivalent to a condition precedent at common law. *New Orleans v. Texas, etc., R. Co., 171 U. S. 312.*



**119.** Future Promise on Day Which May Come Before Consideration Performed. — See note 1.

**120.** Construction as Independent Promises Favored. — See note 1.  
Whether Mutual Promises Independent or Conditional Depends on Intent. — See note 2.

Performance of Condition Precedent Essential. — See note 3.

**121.** See note 1.

Effect of Failure to Perform. — See note 2.

(3) *Concurrent or Dependent*. — See note 3.

Effect of One Party's Refusal to Perform. — See note 4.

**122.** Construction of Stipulations as Dependent Favored. — See note 1.

**123.** (4) *Subsequent* — Condition of Forfeiture Must Be Clear. — See note 1.

(5) *Waiver of Conditions*. — See note 3.

**124.** Waiver of Condition in Avoidance. — See note 1.

*d.* INDEPENDENT PROMISES. — See note 4.

**125.** *c.* ALTERNATIVE PROMISES — OPTIONS — If the Option Is Not Exercised by the Time Fixed. — See note 2.

**V. FORMATION AND EXECUTION — 1. By Act of the Parties —**

**a. EXPRESS AGREEMENT — OFFER AND ACCEPTANCE. — See note 7.**

**119. 1.** *O'Neill v. Webb*, 78 Mo. App. 1.

**120. 1.** Construction of Provisions as Conditions Precedent Not Favored. — *Bradley v. Citizen's Trust, etc., Co.*, 7 Pa. Super. Ct. 419, quoting 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 120.

**2.** Intent Governs. — *Frank v. Stratford-Handcock*, (Wyo. 1904) 77 Pac. Rep. 134.

To Determine Whether Covenants or Agreements Are Dependent or Independent, they are to be construed according to the intent and meaning of the parties, to be collected from the instrument and according to the circumstances legally admissible in evidence with reference to which the instrument is to be construed. Where a covenant or agreement goes to part of the consideration on both sides, and failure to perform the covenant may be compensated for in damages, it is an independent covenant or contract. *Re Canadian Niagara Power Co.*, 30 Ont. 185.

**3.** Performance. — *National Surety Co. v. Long*, (C. C. A.) 125 Fed. Rep. 887; *Zirkle v. Jones*, 129 Ala. 444, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 120; *Palmer v. Meriden Britannia Co.*, 188 Ill. 508; *New Orleans v. Texas, etc., R. Co.*, 171 U. S. 312; *Waller County v. McDade*, 25 Tex. Civ. App. 280; *Frank v. Stratford-Handcock*, (Wyo. 1904) 77 Pac. Rep. 134.

**121. 1.** Performance of Condition Impossible. — A party is excused from performing a condition precedent where performance is rendered impossible by the act of the other party. *Antonelle v. Kennedy, etc., Lumber Co.*, 140 Cal. 309.

**2.** *Zirkle v. Jones*, 129 Ala. 444, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 121.

**3.** Concurrent Conditions. — *Campbell v. Moran Bros. Co.*, (C. C. A.) 97 Fed. Rep. 477, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 121.

**4.** Performance or Excuse Must Be Shown. — If the conditions of a contract are dependent, one party cannot recover unless he shows performance of the contract on his part or facts which excuse it. *Newman v. Tichenor*, 107 Ill. App. 53.

"If there is a distinct refusal by one party to be bound by the terms of a contract in the future, the other party may, in our opinion, treat the contract as at an end. \* \* \* Short of such refusal, we think the true principle to be deduced from all the cases is that you must ascertain whether the action of the party who is breaking the contract is such that the other party is entitled to conclude that the party breaking the contract no longer intends to be bound by its provisions." *Rhymney R. Co. v. Brecon, etc., R. Co.*, 83 L. T. N. S. 111.

**122. 1.** *Antonelle v. Kennedy, etc., Lumber Co.*, 140 Cal. 309; *Schmidt v. Mitchell*, 177 Ga. 6.

**123. 1.** "A Clause Working Forfeiture Must Be Strictly Construed, and its precise scope should not be left to conjecture." *Shera v. Ocean Acc., etc., Corp.*, 32 Ont. 411.

**3.** Waiver of Conditions. — *Skinner v. Osgood*, 83 Ill. App. 454, reversed 186 Ill. 491. See also *Connecticut Valley Granite, etc., Co. v. New York, etc., Bridge*, 32 N. Y. App. Div. 83, appeal dismissed 159 N. Y. 543. And see, to the same effect as *Attix v. Pelan*, 5 Iowa 336, stated in the original note, *Kerker v. Lederer*, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 651; *Ryan v. McNichol*, 1 N. Bruns. Eq. Rep. 487.

In the Case of a Contract under Seal conditions may be waived by parol provided such waiver does not tend to introduce new matter into the contract, but merely operates as a release. *Kraft v. Starin*, 73 Ill. App. 371, affirmed 174 Ill. 120; *Palmer v. Meriden Britannia Co.*, 188 Ill. 508; *Emslie v. Livingston*, 51 N. Y. App. Div. 628.

**124. 1.** *Sheldon v. Dunbar*, 200 Ill. 490. See also *Ryan v. McNichol*, 1 N. Bruns. Eq. Rep. 487.

**4.** If the Promises Are Independent and Non-performance May Be Compensated in Damages neither party is released by the default of the other. *Wright v. Polson*, 30 Nova Scotia 437; *Re Canadian Niagara Power Co.*, 30 Ont. 185.

**125. 2.** *Amanda Gold Min., etc., Co. v. People's Min., etc., Co.*, 28 Colo. 251, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 125.

**7.** Express Agreement. — *Kenan v. Lindsay*,

- 126.** Unaccepted Offer. — See note 1.  
**127.** See note 1.  
**128.** Withdrawal of Offer. — See notes 1, 2.  
**129.** A Mere Mental Determination to Accept. — See note 2.  
 Manner of Indicating Assent. — See note 3.  
**132.** If a Proposal Includes Any Qualifying Conditions. — See note 2.  
 If the Acceptance Is Conditional. — See note 4.

127 Ala. 270, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 125; State v. Meysenburg, 171 Mo. 1, quoting 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 125; Johnston v. Rogers, 30 Ont. 150, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 125. See also Patten v. Warner, 11 App. Cas. (D. C.) 149; Huling v. Century Pub., etc., Co., 108 Ill. App. 549.

**Instances of Contract Arising Out of Accepted Offer.** — Where a person filled out a blank application for a loan, furnished by an insurance company, and the insurance company, through its proper officers, indorsed its approval on the application, it was held that a binding contract was thereby created. New York L. Ins. Co. v. Lord, (C. C. A.) 100 Fed. Rep. 17.

Where a party received a circular from a broker offering to invest money intrusted to him, and forwarded the money to the broker to be invested in accordance with the terms contained in the circular, it was held that the parties had entered into a binding contract. Zeltner v. Irwin, (Supm. Ct. App. T.) 21 Misc. (N. Y.) 13, reversed 25 N. Y. App. Div. 228.

**What Is Not an Offer.** — A written statement of the writer's readiness to enter into an agreement upon terms to be thereafter arranged is not an offer. Baston v. Toronto Fruit Vinegar Co., 4 Ont. L. Rep. 20.

**An Offer to "Consider Favorably" an Application for the Renewal of a Contract** does not create a binding obligation to renew the contract. Montreal Gas Co. v. Vasey, (1900) A. C. 595.

**Where the Parties Have Corresponded by Means of a Telegraphic Code,** it is for the plaintiff, in an action for breach of contract, to show that the proposal made by him and accepted by the defendant is so clear and unambiguous that the defendant cannot be heard to say that he misunderstood it. It is not a matter for the court to construe. Falck v. Williams, (1900) A. C. 176.

**126. 1. When Offer Unaccepted.** — Van Vlissingen v. Manning, 105 Ill. App. 255; Cady v. Straus, 97 Va. 701; Frank v. Stratford-Handcock, (Wyo. 1904) 77 Pac. Rep. 134; Baston v. Toronto Fruit Vinegar Co., 4 Ont. L. Rep. 20.

An offer is not accepted unless the acceptance is definite, unambiguous, and unqualified. Thurber v. Smith, 25 R. I. 60.

**127. 1. Promise Not Assented To.** — Baston v. Toronto Fruit Vinegar Co., 4 Ont. L. Rep. 20.

**Illustrations.** — A made an offer to B that he would guarantee that C would perform his contract with B, if B and C made a contract. B failed to notify A of his acceptance of the offer. It was held that A was not bound. Barnes Cycle Co. v. Schofield, 111 Ga. 880.

**128. 1. When Offer May Be Withdrawn.** — Groomer v. McCully, 93 Mo. App. 544; Omaha L. & T. Co. v. Goodman, 62 Neb. 197; Mendell

v. Willyoung, (Supm. Ct. App. T.) 42 Misc. (N. Y.) 210; Huber Mfg. Co. v. Smithgall, 19 Pa. Super. Ct. 641; Jones v. New York L. Ins. Co., 15 Utah 522; Cady v. Straus, 97 Va. 701.

**Knowledge of Withdrawal.** — See Frank v. Stratford-Handcock, (Wyo. 1904) 77 Pac. Rep. 134.

**Withdrawal of Option.** — A made an offer to B to remain open for B's acceptance within a certain time. Before this time expired and before B accepted, A withdrew the offer. It was held that B could not make a binding contract by a subsequent acceptance, since the offer had been withdrawn, and that he had no right of action against A for his failure to keep the offer open for the stipulated time, since the agreement was without consideration. Abbott v. 76 Land, etc., Co., (Cal. 1898) 53 Pac. Rep. 445.

**2. American Pub., etc., Co. v. Walker,** 87 Mo. App. 503.

**129. 2. Determination to Accept — No Communication.** — Leszynsky v. Meyer, (Cal. 1898) 53 Pac. Rep. 703; Barnes Cycle Co. v. Schofield, 111 Ga. 880; American Pub., etc., Co. v. Walker, 87 Mo. App. 503; Busher v. New York L. Ins. Co., 72 N. H. 557; Mendell v. Willyoung, (Supm. Ct. App. T.) 42 Misc. (N. Y.) 210.

**3. Assent, How Indicated — Speech, Words, and Conduct.** — Bowen v. Hart, (C. C. A.) 101 Fed. Rep. 376, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 129; Metropolitan Bank v. Northern Fuel Co., 73 Ill. App. 164, 173 Ill. 345; Bohn Mfg. Co. v. Sawyer, 169 Mass. 477; State v. Meysenburg, 171 Mo. 1, quoting 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 129; American Pub., etc., Co. v. Walker, 87 Mo. App. 503, the court saying that "many overt acts may be evidence of assent;" Mendell v. Willyoung, (Supm. Ct. App. T.) 42 Misc. (N. Y.) 210; Baillard v. Rowan, (Supm. Ct. App. T.) 21 Misc. (N. Y.) 324.

**Accepting the Benefit of a Contract.** — Mummenhoff v. Randall, 19 Ind. App. 44.

**Receiving Periodical Through the Mail.** — Shoemaker v. Roberts, 103 Iowa 681.

**Landlord and Tenant — Lease.** — See Bruckman v. Hargadine-McKittrick Dry Goods Co., 91 Mo. App. 454.

**Performing Acts in Accordance with the Proposition.** — Marshall v. Old, 14 Colo. App. 32; White v. Elgin Creamery Co., 108 Iowa 522.

**132. 2. Eagle Mill Co. v. Caven,** 76 Mo. App. 458; Watson v. McAllum, 87 L. T. N. S. 547.

**4. Where Acceptance Conditional.** — Clark v. Robinson, 51 W. R. 443; Davis v. Thomas, 28 Colo. 303; Monk v. McDaniel, 116 Ga. 108; Kansas City, etc., R. Co. v. McGuire Mfg. Co., 108 Ill. App. 258; Seymour v. Armstrong, 62 Kan. 720; Melick v. Kelley, 53 Neb. 509.

**The Submission of a Counter Proposition**

- 134.** If Time Is Given for the Acceptance. — See note 1.  
If No Time Is Named. — See note 2.  
When the Obligation Commences. — See notes 3, 4.
- 135.** Delivery of Answer to Proposer Not Essential. — See notes 2, 3.
- 136.** What Law Governs. — See note 1.  
*b.* OFFER BY ADVERTISEMENT — Notice. — See note 5.
- 137.** Knowledge of Offer. — See note 2.  
Official Duty. — See note 3.
- 138.** *c.* INCOMPLETE CONTRACT — (1) *In General.* — See note 3.  
(2) *Quotation of Prices — Ordering Goods.* — See note 4.
- 140.** (4) *Future Execution of Formal Contract.* — See note 2.

amounts to a rejection of the offer; but if the offerer accepts the counter proposition a binding contract is made. *Sloan v. Wolf Co.*, (C. C. A.) 124 Fed. Rep. 196; *Kimbark v. Illinois Car, etc., Co.*, 103 Ill. App. 632; *Metropolitan Coal Co. v. Boutell Transp., etc., Co.*, 185 Mass. 391.

**134. 1. Time Limited for Acceptance.** — *Eagle Mill Co. v. Caven*, 76 Mo. App. 458; *James v. Marion Fruit Jar, etc., Co.*, 69 Mo. App. 207; *Johnston v. Rogers*, 30 Ont. 150, *citing* 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 133, 134.

**2. When No Time Named — Reasonable Time Intended.** — *McCracken v. Harned*, 66 N. J. L. 37, *citing* 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 134; *Omaha L. & T. Co. v. Goodman*, 62 Neb. 197.

**A Contract Sealed and Delivered by One Party** which is subject to the approval of the other party cannot be revoked by the former before the latter has had a reasonable time within which to signify his assent. *Waterous Engine Works Co. v. Pratt*, 30 Ont. 538.

**3. Time when Obligation Commences.** — *Kenan v. Lindsay*, 127 Ala. 270, *citing* 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 134.

**4. Emerson Co. v. Proctor, 97 Me. 360, *citing* 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 134.**

**135. 2. Re London, etc., Bank, 81 L. T. N. S. 512, 69 L. J. Ch. 24; *Bruner v. Moore*, (1904) 1 Ch. 305; *Emerson Co. v. Proctor*, 97 Me. 360, *citing* 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 135; *Busher v. New York L. Ins. Co.*, 72 N. H. 551; *Galloway v. Standard F. Ins. Co.*, 45 W. Va. 237.**

**A Contract Made by Telegraph** is complete only where the offering party is notified by the person to whom it is offered of his acceptance. *Beaubien Produce, etc., Co. v. Robertson*, 18 Quebec Super. Ct. 429.

**A Town Postman Is Not an Agent of the Post-office** for the purpose of receiving letters. Hence the delivery to him of a letter of acceptance of an application for the allotment of shares in a bank will not, for the purpose of fixing the time of the acceptance, be regarded by the court as a posting of the letter. *Re London, etc., Bank*, 81 L. T. N. S. 512.

**3. Emerson Co. v. Proctor, 97 Me. 360, *citing* 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 135.**

**136. 1. Conflict of Laws.** — *Guarantee Sav., etc., Co. v. Alexander*, 96 Fed. Rep. 870, *citing* 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 136; *Interstate Bldg., etc., Assoc. v. Edgefield*

*Hotel Co.*, 120 Fed. Rep. 422, *affirmed* (C. C. A.) 134 Fed. Rep. 74, *citing* 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 137 [136]; *Emerson Co. v. Proctor*, 97 Me. 360; *Antes v. State Ins. Co.*, 61 Neb. 55; *Galloway v. Standard F. Ins. Co.*, 45 W. Va. 237; *Schmidt v. Crowe*, 5 Quebec Pr. 361; *Beaubien Produce, etc., Co. v. Robertson*, 18 Quebec Super. Ct. 429.

**5. Necessity of Notice to Advertiser.** — Where a money-lender advertised that he had money to loan and that he would divide commissions evenly with persons bringing borrowers, and an action was brought against such money-lender by a person who claimed commissions for services in procuring a borrower, it was held that the plaintiff must show that the defendant, prior to the making of the loan, had notice that the plaintiff expected that the commission should be divided. The court said that it was not necessary that such notice should have been in clear and unequivocal terms, but that it was sufficient if the circumstances surrounding the transaction were such that a reasonable man in the defendant's position would have inferred that the plaintiff expected a division of the commission. *Van Vlissingen v. Manning*, 105 Ill. App. 255.

**137. 2. Knowledge of Offer — Conflict of Authority.** — "By many courts it is said that if one, without knowledge of an offered reward, do that for which the offer is made, he is entitled to the reward." *Van Vlissingen v. Manning*, 105 Ill. App. 255, *citing* 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 137. See further the title REWARDS, 957. 9 *et seq.*

**3. Cornwell v. St. Louis Transit Co.**, 106 Mo. App. 135. And see the title REWARDS, 952. 12 *et seq.*

**138. 3. Kenan v. Lindsay**, 127 Ala. 270, *citing* 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 138; *Fields v. Brown*, 188 Ill. 111, *citing* 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 138.

**4. Quotation of Prices.** — *Fairmount Glass Works v. Crunden-Martin Woodenware Co.*, 106 Ky. 659, *citing* 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 138; *Johnston v. Rogers*, 30 Ont. 150, *quoting* 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 138. See also *Baston v. Toronto Fruit Vinegar Co.*, 4 Ont. L. Rep. 20.

**140. 2. Question of Intention.** — *Hinote v. Brigman*, 44 Fla. 589, *citing* 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 140; *Baltimore, etc., R. Co. v. People*, 195 Ill. 423, *quoting* 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 140; *Ferre Canal Co. v. Burgin*, 106 La. 309; *North Bergen Board of Education v. Jaeger*, 67 N. J. L. 39, *citing* 7 AM. AND ENG. ENCYC. OF LAW



**142. d. FORMALITIES ATTENDING EXECUTION — (2) Signature —**  
Necessity of. — See notes 7, 8.

**143. Form of Signature.** — See note 3.  
Agency. — See note 6.

**144. e. RATIFICATION.** — See note 1.  
Fraud — Duress — Intoxication. — See notes 4, 5.  
Ignorance of Any Material Fact. — See note 9.  
Express or Implied. — See notes 10, 12.

**145. VI. METHODS OF DISCHARGE — 3. Performance.** — See note 8.  
Substantial Performance. — See note 9.

**147. Tender — Readiness to Perform.** — See notes 1, 2.

**4. Impossibility of Performance — Act of God.** — See notes 4, 5.

(2d ed.) 141 [140]; *Donnelly v. Currie Hardware Co.*, 66 N. J. L. 388; *Diskin v. Herter*, 73 N. Y. App. Div. 453, *affirmed* 175 N. Y. 480; *Boysen v. Van Dorn Iron Works Co.*, 94 N. Y. App. Div. 95; *Koksilah Quarry Co. v. Reg.*, 5 British Columbia 525.

**A Stipulation to Reduce a Valid Written Contract to Some Other Form.** — *Brauer v. Oceanic Steam Nav. Co.*, 77 N. Y. App. Div. 407, *affirmed* 178 N. Y. 339.

**142. 7. Signature.** — *Freeman v. State*, 112 Ga. 48, *citing* 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 142; *Grafeman Dairy Co. v. St. Louis Dairy Co.*, 96 Mo. App. 495; *American Pub., etc., Co. v. Walker*, 87 Mo. App. 503.

**8. Recognizing and Adopting Contract.** — *Edwards v. Gildemeister*, 61 Kan. 141; *American Pub., etc., Co. v. Walker*, 87 Mo. App. 503; *Schnurr v. Quinn*, 83 N. Y. App. Div. 70.

A debtor drew up and signed a written agreement for an extension of time to pay his debt. The creditor did not sign it, but acted under the agreement until his death. It was held that this constituted a binding contract. *Harts v. Emery*, 184 Ill. 560.

**Actual Performance of the Work under a contract to repair a building shows acceptance and renders immaterial the lack of the contractor's signature.** *Whately v. Reese*, 128 Ala. 500. See also *New Iberia Rice Milling Co. v. Romero*, 105 La. 439.

**143. 3. Christian Name.** — *Walker v. Walker*, 175 Mass. 349.

**6. Agency.** — *Landers v. Foster*, 34 Wash. 674.

**144. 1. Ratification.** — A contract voidable on account of insanity may be ratified by the party after he regains his reason. *Whitcomb v. Hardy*, 73 Minn. 285.

**4. Fraud.** — *Wilson v. Hundley*, 96 Va. 96, 70 Am. St. Rep. 837.

**5. Duress.** — *Kennedy v. Roberts*, 105 Iowa 521.

**9. Williams v. Hamilton**, 104 Iowa 423, 65 Am. St. Rep. 475.

**10. Implied Ratification.** — *Kennedy v. Roberts*, 105 Iowa 521.

**12. Ratification May Not Be of Part.** — *Mauss-Bruning Shoe Mfg. Co. v. Prince*, 51 W. Va. 510, *citing* 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 144, and supporting also the preceding statement of the text.

**145. 8. Kangas v. Boulton**, 127 Mich. 539, *citing* 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 145. See also *Van Sicklen v. Ballard*, 97 Ill. App. 640.

**9. General Rule — Substantial Performance Enough.** — *Kauffman v. Raeder*, (C. C. A.) 108 Fed. Rep. 171; *Evans v. Howell*, 211 Ill. 85; *Shepard v. Mills*, 173 Ill. 223; *Cook v. American Luxfer Prism Co.*, 93 Ill. App. 299; *Palmer v. Meriden Britannia Co.*, 188 Ill. 508; *Kangas v. Boulton*, 127 Mich. 539, *citing* 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 145; *Feeney v. Bardsley*, 66 N. J. L. 239; *Miller v. Northern Imp. Co.*, (Supm. Ct. App. T.) 28 Misc. (N. Y.) 762; *Vogel v. Friedman*, (Supm. Ct. App. T.) 34 Misc. (N. Y.) 775; *Kane v. Wilson, etc.*, Stone Co., 4 Ohio Dec. (Reprint) 509, 2 Cleve. L. Rep. 290; *Gallagher v. Philadelphia*, 9 Pa. Super. Ct. 498; *Anderson v. Harper*, 30 Wash. 378.

Substantial performance is sufficient to justify a recovery under the contract, as trivial defects can be easily compensated by slight deductions from the contract price. *Perry v. Levenson*, 82 N. Y. App. Div. 94, *affirmed* 178 N. Y. 559.

**For Further Illustrations** see *Philip Hiss Co. v. Pitcairn*, 107 Fed. Rep. 425; *Buschmann v. Bray*, 68 Mo. App. 8; *Petrolia Mfg. Co. v. Jenkins*, 29 N. Y. App. Div. 403; *Lennon v. Smith*, 23 N. Y. App. Div. 293, *affirmed* 161 N. Y. 661; *Desmond-Dunne Co. v. Friedman-Doscher Co.*, 162 N. Y. 486; *Russell v. Iredell County*, 123 N. Car. 264; *Anderson v. Todd*, 8 N. Dak. 158.

**What Is Not Substantial Performance — Instances.** — No recovery is allowed on the theory of substantial performance where the deviations were wilful and intentional. *Braseth v. State Bank*, 12 N. Dak. 486.

A contract to erect a boiler of two hundred and fifty horse power is not performed by erecting one with a capacity of one hundred and forty horse power. *Manitowoc Steam Boiler Works v. Manitowoc Glue Co.*, 120 Wis. 1.

**For Further Illustrations** see *Anderson v. Pringle*, 79 Minn. 433; *Cornish, etc., Co. v. Antrim Co-operative Dairy Assoc.*, 82 Minn. 215; *Mitchell v. Williams*, 80 N. Y. App. Div. 527; *Spence v. Ham*, 27 N. Y. App. Div. 379, *affirmed* 163 N. Y. 220.

**147. 1. Tender.** — *Burwell, etc., Irrigation, etc., Co. v. Wilson*, 57 Neb. 396.

**2. A Party Who Has Committed a Substantial Breach** of an entire contract cannot sue the other party for his failure to perform. *Loudenbaek Fertilizer Co. v. Tennessee Phosphate Co.*, (C. C. A.) 121 Fed. Rep. 298; *Adams v. Turner*, 73 Conn. 38.

**4. Lincoln Trust Co. v. Nathan**, 175 Mo. 32,

- 147.** Personal Services — Promisor Physically Disabled. — See note 6.  
**148.** Destruction of Subject-matter. — See note 1.  
 Where Substantial Performance Possible. — See note 2.  
 Absolute Undertaking. — See note 3.  
**150.** 5. Breach — The Effect of a Breach. — See note 1.  
 Severable Contract. — See note 2.  
 Demand — Tender — Immediate Right of Action. — See notes 5, 6.  
**151.** Voluntarily Disabling One's Self to Perform. — See note 1.  
 Other Party Preventing Performance. — See note 2.

citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 147; Board of Education v. Townsend, 63 Ohio St. 514, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 147; Campbell v. Luck, 25 Ohio Cir. Ct. 356, quoting 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 147; Dixon v. Breon, 22 Pa. Super. Ct. 340, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 147.

**147.** 5. Act of God. — Gleason v. U. S., 33 Ct. Cl. 65; School Dist. No. 16 v. Howard, (Neb. 1904) 98 N. W. Rep. 666; Hysell v. Sterling Coal, etc., Co., 46 W. Va. 158.

**6. Contract for Personal Services — Promisor Disabled.** — Dow v. State Bank, 88 Minn. 355; Dixon v. Breon, 22 Pa. Super. Ct. 340, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 147; Comstock v. Fraternal Acc. Assoc., 116 Wis. 382, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 147. And to the same effect as Hawkins v. Ball, 18 B. Mon. (Ky.) 816, 68 Am. Dec. 755, stated in the original note, see Volk v. Stowell, 98 Wis. 385.

**Contract Not Depending on Personal Conduct of Deceased.** — Where a contract is made by a partnership, and one of the partners dies, the survivors are not relieved from performance of the contract if it has no relation to the personal conduct of the deceased. Phillips v. Alhambra Palace Co., (1901) 1 Q. B. 59.

**148.** 1. Board of Education v. Townsend, 63 Ohio St. 514, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 148.

**Destruction of Subject-matter of Contract by Fire.** — Where a contractor agreed to put a tin roof on a house, the destruction of the house by fire was held to excuse the performance of the contract. Hysell v. Sterling Coal, etc., Co., 46 W. Va. 158. See also Krause v. School Trustees, (Ind. App. 1903) 66 N. E. Rep. 1010; Angus v. Scully, 176 Mass. 357, 79 Am. St. Rep. 318; Rhodes v. Hinds, 79 N. Y. App. Div. 379; Wolf v. Altmeyer, 8 Pa. Dist. 408; Atlantic, etc., R. Co. v. Delaware Constr. Co., 98 Va. 503.

So the performance of a contract to remove a schoolhouse is excused by the destruction of the building before the time for performance arrives. Board of Education v. Townsend, 8 Ohio Cir. Dec. 732, 15 Ohio Cir. Ct. 674. See also Dixon v. Breon, 22 Pa. Super. Ct. 340, holding that the destruction of a forest by fire would excuse the owner from cutting and delivering the timber to another in accordance with a contract that he had made before the fire.

**2. Rule Where Substantial Performance Possible.** — Board of Education v. Townsend, 63 Ohio St. 514, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 148.

**3. Undertaking Absolute.** — Ashmore v. Cox,

(1899) 1 Q. B. 436, 68 L. J. Q. B. 72; Dow v. State Bank, 88 Minn. 355.

**Contract on Its Face Impossible of Performance.** — No action lies for nonperformance of a term of a contract which on its face is impossible of performance by either of the parties. Thus, where a contract was made by a company for the electric lighting of a city for a specified number of nights before a fixed date at a fixed rate per night, and there were not as many as the specified number of nights between the date of the execution of the contract and the date of its performance, it was held that the company was not entitled to recover at the contract rate for the specified number of nights or for more than the number of nights for which it actually furnished lights. Stratford Gas Co. v. Stratford, 26 Ont. App. 109.

**150.** 1. Union Cent. L. Ins. Co. v. Berlin, (C. C. A.) 90 Fed. Rep. 779, 62 U. S. App. 223; Moore v. Guardian Trust Co., 173 Mo. 218, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 150.

**A Servant Who Has Been Wrongfully Discharged** before the expiration of his time may sue at once for breach of contract where his employment was for a fixed period. Banta v. Banta, 84 N. Y. App. Div. 138.

**2. When Contract Severable.** — Worthington v. Gwin, 119 Ala. 44, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 150, and supporting the whole text paragraph.

**5. When Demand Dispensed With.** — Fox v. Starr, 106 Ill. App. 273.

**6. Immediate Cause of Action.** — Roehm v. Horst, (C. C. A.) 91 Fed. Rep. 345, affirmed 178 U. S. 1; Chapman v. Kansas City, etc., R. Co., 146 Mo. 481; O'Neill v. Supreme Council, etc., 70 N. J. L. 410, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 150, supporting the whole text paragraph, and applying the principles there stated to an unauthorized reduction by a benefit society of the amount payable to the beneficiaries; Worden v. Connell, 196 Pa. St. 28; Barnes v. Morrison, 97 Va. 372.

**151.** 1. Voluntarily Disabling One's Self to Perform. — Stark v. Duvall, 7 Okla. 213.

In payment for whiskey a liveryman agreed to permit the plaintiff to use his horses in his business. Before the time for performance arrived, the liveryman moved out of the neighborhood. It was held that a suit for breach of contract might be at once brought against the liveryman without first making demand. Murphy v. Dernberg, 84 N. Y. App. Div. 101.

**2. Performance Prevented or Dispensed With.** — District of Columbia v. Camden Iron Works, 181 U. S. 453; Wagar Lumber Co. v. Sullivan Logging Co., 120 Ala. 558; Cochran v. Balfe, 12 Colo. App. 75; Lockport v. Shields, 87 Ill.

**152.** Election of Remedies. — See note 4.

**153.** Continuing with Performance — Increasing Damages. — See note 3.

A Breach in Any Vital Part of the Contract. — See note 5.

Default in Part Not Vital. — See note 7.

**154.** Breach of a Contract May Be Waived. — See note 5.

App. 150; *Romero v. Newman*, 50 La. Ann. 80; *North v. Mallory*, 94 Md. 305; *Murphy v. Black*, 78 Mo. App. 316.

**Illustrations.** — In *Foternick v. Watson*, 184 Mass. 187, one party to a contract left the state in order to escape a tender of performance by the other party. It was held that this conduct relieved the other party from the necessity of tendering performance before bringing suit.

A made a contract with B to install air propellers in B's factory and guaranteed that they would remove the smoke. After the propellers were installed B refused to furnish the motive power to run them. It was held that this released A from any further obligations under the contract and gave to him the right to maintain suit at once. *Howard v. American Mfg. Co.*, 162 N. Y. 347.

In *Vaughn v. Digman*, (Ky. 1897) 43 S. W. Rep. 251, failure to complete a chimney in accordance with the terms of a contract was excused and a recovery was allowed, as the owner of the building had refused to put it in such condition that a chimney might be erected on it.

**152. 4. May Consider Contract as Rescinded — Quantum Meruit.** — *Hysell v. Sterling Coal, etc., Co.*, 46 W. Va. 158, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 152.

**153. 3. May Not Continue Performance and So Increase Damages.** — *American Pub., etc., Co. v. Walker*, 87 Mo. App. 503, citing 7 AM. AND

ENG. ENCYC. OF LAW (2d ed.) 153; *Mendell v. Willyoung*, (Supm. Ct. App. T.) 42 Misc. (N. Y.) 210; *Winton v. Mulherin*, 3 Lack. Leg. N. (Pa.) 264.

**5. Breach in Vital Part of Contract.** — *McConnell v. Hewes*, 50 W. Va. 33, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 153. See also *Ballance v. Vanuxem*, 191 Ill. 319, holding that a failure to comply with terms which are of the substance of the contract excuses performance by the other party where there is no default on his part.

**7. Kauffman v. Raeder**, (C. C. A.) 108 Fed. Rep. 171; *Rioux v. Ryegate Brick Co.*, 72 Vt. 148, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 153; *Re Canadian Niagara Power Co.*, 30 Ont. 185. See also *Wright v. Polson*, 30 Nova Scotia 437.

**154. 5. Acceptance of Work or Assent to Default.** — *Kauffman v. Raeder*, (C. C. A.) 108 Fed. Rep. 171; *Orr v. Cooledge*, 117 Ga. 195; *Mills v. Osawatomie*, 59 Kan. 463; *Thompson Lumber Co. v. Howard*, (Ky. 1900) 57 S. W. Rep. 615; *Tilden v. Buffalo Office Bldg. Co.*, 27 N. Y. App. Div. 510.

**Illustrations.** — Where a contractor has failed substantially to perform his contract to build a house, the owner may waive the breach by accepting the work, but the mere fact that the owner occupies the house is not sufficient evidence to prove acceptance. *Feeney v. Bardsley*, 66 N. J. L. 239.



# CONTRACTS OF AFFREIGHTMENT AND CHARTER-PARTIES.

BY A. W. VARIAN.

- 163.** II. CONTRACTS OF AFFREIGHTMENT DEFINED. — See note 3.  
**164.** IV. CHARTER-PARTIES — 2. Kinds of Charter-parties — *a.* IN GENERAL. — See note 1.  
**165.** *b.* DEMISE — Charterer Owner for Voyage. — See note 1.  
**166.** *c.* AFFREIGHTMENT. — See note 3.  
**167.** Presumption that Charter-party Is a Contract of Affreightment. — See notes 1, 2.  
*d.* FOR TIME OR VOYAGE. — See note 3.  
**169.** *g.* SUBCHARTER. — See note 1.  
 3. Form — *b.* SOMETIMES VERBAL. — See note 4.  
*c.* NOT GENERALLY UNDER SEAL. — See note 5.  
**171.** 4. Execution — *a.* WHO MAY MAKE — (6) *Brokers.* — See note 1.  
**174.** 5. Contents — *c.* SITUATION, AND TIME OF LOADING, SAILING, AND COMPLETING VOYAGE. — See note 8.  
**175.** Construction of Such Stipulations. — See note 1.  
**176.** *e.* CAPACITY. — See note 1.

**163.** 3. Distinguished from Contract of Towage. — A contract to transport a locomotive loaded on board a barge furnished by the shipper, the barge being lashed to the steamship of the carrier, is a contract of affreightment and not of towage. *The Nettie Quill*, 124 Fed. Rep. 667.

**164.** 1. General Classification. — *The Del Norte*, 111 Fed. Rep. 542, *affirmed* (C. C. A.) 119 Fed. Rep. 118, *citing* 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 164; *American Steel-Barge Co. v. Cargo of Coal*, 107 Fed. Rep. 964, *reversed* (C. C. A.) 115 Fed. Rep. 669.

The Contract of Affreightment Does Not Require the Execution of a Charter-party for its constitution. *Rideri Aktiebolaget Nordstjernan v. Salvesen*, Sc. Ct. of Sess. 6 F. 64.

**165.** 1. Demise. — *The Del Norte*, 111 Fed. Rep. 542, *affirmed* (C. C. A.) 119 Fed. Rep. 118, *citing* 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 164-194; *McCormick v. Shippy*, 119 Fed. Rep. 226, *affirmed* (C. C. A.) 124 Fed. Rep. 48; *American Steel-Barge Co. v. Cargo of Coal*, 107 Fed. Rep. 964, *reversed* (C. C. A.) 115 Fed. Rep. 669; *The New York*, 93 Fed. Rep. 495; *Collins Bay Rafting, etc., Co. v. Kaine*, 29 Can. Sup. Ct. 247. See also *The Del Norte*, (C. C. A.) 119 Fed. Rep. 118; *Kerry v. Pacific Marine Co.*, 121 Cal. 564, 66 Am. St. Rep. 65, *modified* (Cal. 1898) 54 Pac. Rep. 262.

Charterer Not Owner in Contest with Actual Owner. — See *Auten v. Bennett*, 88 N. Y. App. Div. 15.

**166.** 3. Charter-party Not Amounting to Demise. — *Weir v. Union Steamship Co.*, (1900) A. C. 525, 83 L. T. N. S. 91; *The Del Norte*, 111 Fed. Rep. 542, *citing* 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 164-194, *affirmed* (C. C. A.) 119 Fed. Rep. 118; *American Steel-Barge Co. v. Cargo of Coal*, 107 Fed. Rep. 964, *reversed* (C. C. A.) 115 Fed. Rep. 669; *The*

*Georg Dumois*, 88 Fed. Rep. 537; *Kerry v. Pacific Marine Co.*, 121 Cal. 564, 66 Am. St. Rep. 65, *modified* (Cal. 1898) 54 Pac. Rep. 262. See also *Auten v. Bennett*, 88 N. Y. App. Div. 15.

**167.** 1. Presumption Against Demise. — *Auten v. Bennett*, 88 N. Y. App. Div. 15.

2. *The Del Norte*, 111 Fed. Rep. 542, *affirming* (C. C. A.) 119 Fed. Rep. 118, *citing* 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 164-194.

3. Time Charters. — *The Mary Adelaide Randall*, 93 Fed. Rep. 222, *affirmed* (C. C. A.) 98 Fed. Rep. 895.

A time charter should usually be construed to permit and include a complete voyage between the ports mentioned in the charter, and allow a return cargo such as is usual from the ports mentioned. *Straits of Dover Steamship Co. v. Munson*, 95 Fed. Rep. 600.

**169.** 1. Subcontracts of Affreightment. — *The Astraea*, 124 Fed. Rep. 83.

4. Verbal Charter-parties. — *Moore v. Sun Printing, etc., Assoc.*, 95 Fed. Rep. 485.

5. *Moore v. Sun Printing, etc., Assoc.*, 95 Fed. Rep. 485.

**171.** 1. See *Moore v. Sun Printing, etc., Assoc.*, 95 Fed. Rep. 485.

**174.** 8. Time and Situation Are Material. — *Giuseppe v. Manufacturers' Export Co.*, 124 Fed. Rep. 663.

**175.** 1. "With All Possible Dispatch" is a warranty that the vessel shall so proceed. *Giuseppe v. Manufacturers' Export Co.*, 124 Fed. Rep. 663.

**176.** 1. Agreement to Rebate for Shortage in Capacity. — Where the charter-party provided for the payment of a fixed sum as lump freight, based on the owners' guaranty that the vessel would carry a specified dead weight and that the charterer should have at his disposal a certain number of tons of cargo space grain

**177.** *f.* CARGO SPACE; QUANTITY AND KIND OF CARGO. — See note 1.  
Mixed Cargo. — See note 4.

**178.** Fitness of Cargo. — See note 1.

*g.* LOADING AND UNLOADING. — See note 7.

**179.** Place of Loading or Discharge. — See note 1.

**181.** Stevedore Clause. — See note 2.

*h.* LAY DAYS AND DEMURRAGE — Express Stipulation Unnecessary. —

See note 4.

**182.** *j.* CESSER OF LIABILITY. — See note 2.

**183.** *m.* BILLS OF LADING — Meaning Of — Master Not Made the Agent of the Charterer. — See note 3.

"Without Prejudice to the Charter-party." — See note 5.

measurement, failing which a *pro rata* reduction in the freight should be made, it was held that the charterer was entitled to such *pro rata* reduction for a deficiency in the dead-weight capacity of the vessel, though the prescribed tonnage of space measurement was placed at his disposal. *Societa Anonyma Ungherese, etc., v. Tyser Line*, 8 Com. Cas. (Eng.) 25.

**177. 1.** What Variation Allowed. — Where the charter-party provided that the charterers were to load on the ship "a cargo of ore, say about two thousand eight hundred tons," not exceeding what she could reasonably stow and carry, and it appeared that the carrying capacity of the ship was two thousand eight hundred and eighty tons and that the charterers actually loaded two thousand eight hundred and forty tons, it was held that they had performed their obligation under the charter-party. *Miller v. Borner*, (1900) 1 Q. B. 691, *distinguishing* *Morris v. Levison*, 1 C. P. D. 155, stated in the original note.

**What Part of Ship Charterer May Load.** — A charter-party giving to the charterers "full reach of the whole cargo capacity, including the half deck," includes all cargo spaces wherein any lawful merchandise could properly be stowed, except only such spaces as the charter itself reserved or such as are usually and necessarily reserved for the uses of the ship in the prosecution of the voyage. Under such a grant a charterer may stow a cargo of fruit in a shelter deck intended for cattle. *Menantic Steamship Co. v. Peirce*, 88 Fed. Rep. 308.

**What Is a "Cargo"** for a particular ship is a question of fact. A very small quantity of goods in comparison to the carrying capacity of the vessel would not be a cargo. It must to some extent approach her carrying capacity before it can be called a cargo. *Miller v. Borner*, (1900) 1 Q. B. 691, 82 L. T. N. S. 258. But see *Caffin v. Aldridge*, (1895) 2 Q. B. 648.

**The Expression "to Ship a Full and Complete Cargo"** must have relation to the article which is to be shipped. There may be a full and complete cargo of certain articles though not every nook and cranny of the ship is filled thereby. *Steamship Isis Co. v. Bahr*, (1900) A. C. 340.

**4. When There Are Two Varieties of the Article** of which the cargo is to consist, and one of the varieties is bulkier and lighter than the other, the charterer may load the vessel wholly or partially with the lighter variety, if there is no stipulation to the contrary in the charter-party. *Steamship Isis Co. v. Bahr*, (1900) A. C. 340.

**178. 1.** Transportation of Asphalt. — Under a charter giving leave to engage in "such lawful trades as the charterer might direct" between "upper South American" ports and others, and to carry any "lawful merchandise," it was held that the charterer was entitled to carry asphalt and that the risk of the sufficiency of the vessel to carry such cargo was upon the owners. *Dene Steamship Co. v. Munson*, 103 Fed. Rep. 983.

**7. Stipulations to Loading and Unloading.** — See *Midland Nav. Co. v. Dominion Elevator Co.*, 34 Can. Sup. Ct. 578, *affirming* 6 Ont. L. Rep. 432.

**179. 1.** "Always Afloat." — The owner cannot be required to mutilate his ship in order to reach a discharging berth named by the charterers. *Mencke v. Cargo of Java Sugar*, 187 U. S. 248.

**Safe Departure After Loading.** — *Bacon v. Ennis*, 110 Fed. Rep. 404, *reversed* (C. C. A.) 114 Fed. Rep. 260; *Tweedie Trading Co. v. New York, etc., Dyewood Co.*, (C. C. A.) 127 Fed. Rep. 278.

**A Covenant for a Safe Loading or Discharging Place** implies that a port to be named by the charterer shall be one where the vessel can safely go with her whole cargo. *Crisp v. U. S.*, etc., *Steamship Co.*, 124 Fed. Rep. 748; *Mencke v. Cargo of Java Sugar*, 187 U. S. 249.

**181. 2.** "Expense of Stevedoring at the Customary Rates" permits only a reasonable charge, where there is no customary rate. *Macy v. Perry*, 91 Fed. Rep. 671, *affirmed* (C. C. A.) 99 Fed. Rep. 1004.

**4. Unreasonable Delay — Damages in Nature of Demurrage.** — See *Carlton Steamship Co. v. Castle Mail Packets Co.*, (1898) A. C. 486, 78 L. T. N. S. 661.

**182. 2. Construction.** — See *Crossman v. Burrill*, 179 U. S. 100; *Schmidt v. Keyser* (C. C. A.) 88 Fed. Rep. 799, both cases *following* and *approving* the case set out in the original note.

**183. 3.** *Wastwater Steamship Co. v. Neale*, 86 L. T. N. S. 266.

**5. Without Prejudice to Charter-party.** — *Turner v. Haji Goolam Mahomed Azam*, (1904) A. C. 826. See also *Cushing v. McLeod*, 2 N. Bruns. Eq. Rep. 63, 77.

**Lien for Freight Payable under Charter-party.** — "This clause does not override or limit the power of the captain to issue bills of lading at different rates of freight, or entitle the ship-owners to a lien on the goods of persons who have come under no contract with them con-

**185.** *o.* CANCELLATION CLAUSE — (1) *Charter Voidable* — Time and Place of Exercising Option. — See note 2.

**186.** *b.* Construction — *c.* INTENTION OF THE PARTIES. — See note 2.

From Correspondence. — See note 4.

From Construction of the Parties. — See note 5.

*d.* ALL PROVISIONS MUST BE MADE EFFECTIVE. — See note 6.

**187.** *e.* EXCEPTIONS — CONSTRUCTION AGAINST PARTY TO BE BENEFITED. — See note 1.

**188.** *h.* ADMISSIBILITY OF PAROL EVIDENCE. — See note 5.

**189.** *i.* ADMISSIBILITY OF USAGE — (1) *To Explain Ambiguities*. — See note 1.

**190.** See note 1.

(2) *Not to Contradict or Vary*. — See note 3.

**191.** *j.* CHARTER-PARTY REFERRED TO IN A BILL OF LADING — (1) *Effect of Reference*. — See notes 1, 4.

ferring a lien for the freight payable under the time charter. A right to seize one person's goods for another person's debt must be clearly and distinctly conferred before a court of justice can be expected to recognize it." *Turner v. Haji Goolam Mahomed Azam*, (1904) A. C. 826.

**185.** 2. Place of Exercising Option. — See *Bucknall v. Tatem*, 83 L. T. N. S. 121.

**186.** 2. Intention Controls Construction. — *Tweedie Trading Co. v. New York*, etc., *Dye-wood Co.*, (C. C. A.) 127 Fed. Rep. 278; *McNear v. Leblond*, (C. C. A.) 123 Fed. Rep. 384; *Auten v. Bennett*, 88 N. Y. App. Div. 15.

Whole Instrument Regarded. — The charter must be construed according to the intent of the parties as manifested by the whole instrument, rather than by the literal meaning of any particular clause taken by itself. *Crossman v. Burrill*, 179 U. S. 100.

**4.** Previous Correspondence Admissible. — See *Giuseppe v. Manufacturers' Export Co.*, 124 Fed. Rep. 663.

**5.** Construction of the Parties Adopted. — See *The S. L. Watson*, (C. C. A.) 118 Fed. Rep. 945.

**6.** Construed Together. — The provisions of the charter must be construed together. *Schmidt v. Keyser*, (C. C. A.) 88 Fed. Rep. 799; *The Hollinside*, (1898) P. 131; *Crossman v. Burrill*, 179 U. S. 100.

Effect Given to Whole Document When Possible. — "Where there are several clauses, as far as possible they must be construed consistently with one another, and one of them ought not to be treated as surplusage and rejected unless it is impossible to read it with other clauses." *Borthwick v. Elderslie Steamship Co.*, (1904) 1 K. B. 319.

**187.** 1. How Exceptions Are Construed. — *Westport Coal Co. v. McPhail*, (1898) 2 Q. B. 130; *The Dunbeth*, (1897) P. 133; *Steamship Waikato v. New Zealand Shipping Co.*, (1899) 1 Q. B. 56; *Rathbone v. MacIver*, (1903) 2 K. B. 378; *The Carib Prince*, 170 U. S. 655; *Pacific Coast Steamship Co. v. Bancroft-Whitney Co.*, (C. C. A.) 94 Fed. Rep. 180, *reversed* 180 U. S. 49. See also *Christie v. Davis Coal*, etc., Co., 95 Fed. Rep. 837, *affirmed* (C. C. A.) 110 Fed. Rep. 1006; *McCormick v. Shippy*, (C. C. A.) 124 Fed. Rep. 48; *Glengoil Steamship Co. v. Pilkington*, 28 Can. Sup. Ct. 146.

Clear Words Must Be Used. — See *Steamship Waikato v. New Zealand Shipping Co.*, (1898) 1 Q. B. 645.

**188.** 5. Parol Evidence Is Generally Inadmissible. — *Morris v. Chesapeake*, etc., *Steamship Co.*, 125 Fed. Rep. 62; *Johnson v. D. H. Bibb Lumber Co.*, 140 Cal. 95.

**189.** 1. Usage Admissible. — *Jameson v. Sweeney*, (N. Y. City Ct. Gen. T.) 32 Misc. (N. Y.) 645.

Measurement of Cargo. — *Peterson v. Eight Hundred and Sixty-nine Cedar Logs*, 127 Fed. Rep. 868, *citing* 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 189.

The Owners of a Vessel Are Chargeable with Knowledge of the usage of a port from which the vessel is to obtain its cargo. *The Thomas P. Sheldon*, 113 Fed. Rep. 779.

**190.** 1. Custom Considered as Part of Contract. — *Helios v. Ekman*, (1897) 2 Q. B. 83; *Peterson v. Eight Hundred and Sixty-nine Cedar Logs*, 127 Fed. Rep. 868.

**3.** Not Admissible When the Contract Express or Unambiguous. — *Helios v. Ekman*, (1897) 2 Q. B. 83; *Brendan Steamship Co. v. Green*, (1900) 1 Q. B. 518; *Gulf Line v. Laycock*, 7 Com. Cas. (Eng.) 1; *Parsons v. Hart*, 30 Can. Sup. Ct. 473; *Portland Flouring Mills Co. v. British*, etc., *Marine Ins. Co.*, (C. C. A.) 130 Fed. Rep. 860; *Smith v. Britain Steamship Co.*, 123 Fed. Rep. 176; *Bonanno v. Tweedie Trading Co.*, 117 Fed. Rep. 991, *affirmed* (C. C. A.) 130 Fed. Rep. 448; *Carbon Slate Co. v. Ennis*, (C. C. A.) 114 Fed. Rep. 260.

A Custom Merely Annexing an Incident to the Contract, but not contradicting it, is good. *Cardiff Steamship Co. v. Jameson*, 88 L. T. N. S. 87.

**191.** 1. Imports Only Conditions to Be Performed to Person Receiving Cargo. — *Diederichsen v. Farquharson*, (1898) 1 Q. B. 150, 77 L. T. N. S. 543.

Provision as to Berth for Discharge of Cargo. — Where the charter-party contained a clause providing that the ship should discharge in such berth or dock as was ordered by the charterers or their agents, and the bill of lading provided that the goods should be delivered to a specified person or his assigns, "he or they paying freight for the goods, \* \* \* all other terms, conditions, and clauses as per charter-party," and on the arrival of the ship



**192.** *k. CONFLICT BETWEEN CHARTER-PARTY AND BILL OF LADING* — (1) *Between Shipowner and Charterer.* — See note 1.

**194.** **V. RIGHTS AND LIABILITIES UNDER THE CHARTER-PARTY** — **2. Master and Crew** — *b. LIABILITY FOR ACTS AND CONDUCT.* — See note 2.

**196.** **3. Repairs and Supplies** — *b. WITHOUT AGREEMENT.* — See notes 2, 3, 4.

*c. LIABILITY OF THE VESSEL.* — See note 5.

**197.** **4. Loss of or Damage to the Vessel** — *a. BY EXPRESS AGREEMENT.* — See note 1.

**198.** **Marine Risks.** — See note 1.

*b. WITHOUT AGREEMENT.* — See notes 4, 5.

**199.** **5. Liability for Carriage of Cargo** — *b. OF SHIPOWNER AND CHARTERER TO SHIPPER* — (1) *General Owner, Owner for the Voyage* — See note 3.

**201.** (2) *Charterer, Owner Pro Hac Vice.* — See note 1.

at the port of discharge, the indorsee of the bill of lading, who was also the charterers' agent, ordered her to discharge at a certain dock, but she discharged at another dock, it was held that the clause in the charter-party was incorporated into the bill of lading and that the shipowners were liable to the indorsee of the bill of lading for the damage suffered by him by the discharge of the cargo at a dock other than the one which he designated. *East Yorkshire Steamship Co. v. Hancock*, 5 Com. Cas. (Eng.) 266.

**191.** **4.** *Runciman v. Smyth*, 20 Times L. Rep. 625.

**192.** **1. Where the Charter Expressly Authorizes the Captain to Sign Bills of Lading**, bills so signed are not mere receipts for goods, but are contracts binding on the shipowner. *Turner v. Haji Goolam Mahomed Axam*, (1904) A. C. 826, *distinguishing Colvin v. Newberry*, 1 Cl. & F. 283.

**194.** **2. Master and Crew Servants of the Shipowner.** — *The Del Norte*, 111 Fed. Rep. 542, *citing 7 AM. AND ENG. ENCYC. OF LAW* (2d ed.) 194, *affirmed* (C. C. A.) 119 Fed. Rep. 118; *McCormick v. Shippy*, 119 Fed. Rep. 226, *affirmed* (C. C. A.) 124 Fed. Rep. 48. See also *Auten v. Bennett*, 88 N. Y. App. Div. 15.

**196.** **2. The Temporary Owner Is Liable for Supplies.** — *The Barge David Wallace v. Bain*, 8 Can. Exch. 205.

**3. Liability for Liens.** — A charterer under a demise is bound to keep the vessel free from liens. *The Barnstable*, 181 U. S. 464.

**4.** See *Weir v. Union Steamship Co.*, (1900) A. C. 525, 83 L. T. N. S. 91.

**Shipowner Bound to Provide Proper Ballast.** — *Weir v. Union Steamship Co.*, (1900) A. C. 525.

**5. Necessaries Ordered by Special Owner.** — In an action brought against a foreign vessel and its owners for necessaries supplied on her account, where it appeared that at the time the necessaries were supplied the vessel was under charter, the owner having by the charter-party transferred to the charterers the possession and control of the vessel, and that the charterers appointed the master, engaged the crew, and paid the wages of the master and crew and the running and other expenses of the vessel, and that the person supplying the necessaries knew that the vessel was under charter but did not know the terms of the charter-party, it was

held that the vessel could not be made liable for the necessaries so supplied, as the master, who ordered the necessaries, was the servant and agent of the charterers and not of the owner, and therefore had no authority to pledge the owner's credit, and the liability of the vessel was dependent on the liability of the owner. *The Barge David Wallace v. Bain*, 8 Can. Exch. 205. See also *Rochester, etc., Coal, etc., Co. v. The Ship Garden City*, 7 Can. Exch. 34, *affirmed* 7 Can. Exch. 94.

**Torts.** — The vessel is liable *in rem* for a collision while under the control of the charterers. *The Barnstable*, 181 U. S. 464.

**197.** **1. Destruction Caused by Act of God.** — See *Moore v. Sun Printing, etc., Assoc.*, 95 Fed. Rep. 485, *affirmed* (C. C. A.) 101 Fed. Rep. 591.

**Owner to Pay for Insurance.** — A clause in a charter-party requiring the owner to pay for insurance relieves the charterers from all liability to the owners for such losses as could be covered by insurance. *The Barnstable*, (C. C. A.) 94 Fed. Rep. 213, *reversed* 181 U. S. 464.

**198.** **1. International Contracting Co. v. Walsh**, 115 Fed. Rep. 851; *The Ely*, 110 Fed. Rep. 563, *affirmed* (C. C. A.) 122 Fed. Rep. 447.

**4. Charterer Liable When Vessel Demised.** — *Collins Bay Rafting, etc., Co. v. Kaine*, 29 Can. Sup. Ct. 247; *Hastorf v. Moore*, 92 Fed. Rep. 398.

**The Charterer Must Take Ordinary Care of the vessel.** *The Barnstable*, 181 U. S. 464; *Dailey v. New York*, 128 Fed. Rep. 796. See also *Moore v. Sun Printing, etc., Assoc.*, (C. C. A.) 101 Fed. Rep. 591, *affirmed* 183 U. S. 642. And it has been held that he is not liable in the absence of negligence. *W. H. Beard Dredging Co. v. Hughes*, 113 Fed. Rep. 680.

**5. When Loss Falls on General Owner.** — See *The Ely*, 110 Fed. Rep. 563, *affirmed* (C. C. A.) 122 Fed. Rep. 447; *Lake Michigan Car Ferry Transp. Co. v. Crosby*, 107 Fed. Rep. 723; *Auten v. Bennett*, 88 N. Y. App. Div. 15.

**199.** **3. General Owner and Charterer Both Liable.** — *Glengoil Steamship Co. v. Pilkington*, 28 Can. Sup. Ct. 146. See also *Turner v. Haji Goolam Mahomed Azam*, (1904) A. C. 826.

**201.** **1. The Liability of the Ship in Rem** is not changed by the fact that the charterer becomes the owner *pro hac vice*. *The New York*, 93 Fed. Rep. 495.

**202.** *c.* OF VESSEL TO SHIPPER — Charter a Contract of Affreightment Only. — See note 1.

Charterer the Owner Pro Hac Vice. — See note 3.

**203.** VI. RIGHTS AND LIABILITIES COMMON TO ALL CONTRACTS OF AFFREIGHTMENT — 1. In General. — See note 1.

2. Loss Through Inherent Vice of Cargo. — See note 2.

**204.** 4. Negligence. — See note 2.

Effect of Exceptions. — See note 3.

5. Stowage — *a.* IN GENERAL. — See note 5.

**205.** Dunnage. — See note 1.

**206.** *d.* BURDEN OF PROOF. — See note 6.

6. Delay. — See note 8.

**207.** A Carrier Not an Insurer as to Time. — See note 2.

7. Deviation — *a.* GENERAL DOCTRINE — Loss Occurring During the Deviation. — See note 3.

**209.** *c.* AUTHORIZED DEVIATION. — See note 5.

**202.** 1. Vessel and Her Owners Liable. — See The Seaboard, 119 Fed. Rep. 375; The Georg Dumois, 88 Fed. Rep. 537.

3. The *Astraea*, 124 Fed. Rep. 83. See also The National City, (C. C. A.) 117 Fed. Rep. 822.

**203.** 1. Carrier by Water Is Liable as a Common Carrier. — The Hiram, 101 Fed. Rep. 138; Pacific Coast Steamship Co. *v.* Bancroft-Whitney Co., (C. C. A.) 94 Fed. Rep. 180, *reversed* 180 U. S. 49.

2. Owner Not Liable for Inherent Vice. — The Prussia, (C. C. A.) 93 Fed. Rep. 837.

**204.** 2. Liability for Negligence. — Kerry *v.* Pacific Marine Co., 121 Cal. 564, 66 Am. St. Rep. 65, *modified* (Cal. 1898) 54 Pac. Rep. 262.

3. Exceptions Do Not Relieve from Liability for Negligence. — City of Lincoln *v.* Smith, (1904) A. C. 250; Price *v.* Union Lighterage Co., (1904) 1 K. B. 412; The Pearlmoor, (1904) P. 286.

5. Duty to Stow Properly. — The William Power, 131 Fed. Rep. 136; Bethel *v.* Mellor, etc., Co., 131 Fed. Rep. 129; Lazarus *v.* Barber, 124 Fed. Rep. 1007; Doherr *v.* Houston, 123 Fed. Rep. 334, *affirmed* (C. C. A.) 128 Fed. Rep. 594; The Arcadian, 116 Fed. Rep. 930; The Mississippi, 113 Fed. Rep. 985, *affirmed* (C. C. A.) 120 Fed. Rep. 1020; The John A. Briggs, 113 Fed. Rep. 948, *modified* (C. C. A.) 120 Fed. Rep. 6; The Oneida, 108 Fed. Rep. 886, *reversed* (C. C. A.) 128 Fed. Rep. 687; Glengoil Steamship Co. *v.* Pilkington, 28 Can. Sup. Ct. 146.

The Shipper's Knowledge of the Manner in Which His Goods Are Being Stowed does not of itself excuse the shipowner from liability for damages caused by improper or insufficient stowage. Glengoil Steamship Co. *v.* Pilkington, 28 Can. Sup. Ct. 146.

May Refuse to Carry Damageable Cargo. — And the master may refuse to receive cargo presented by the charterers but belonging to third persons, where there is a reasonable apprehension of its being damaged from the fumes of other cargo already loaded. Birt *v.* Hardie, 132 Fed. Rep. 61.

Improper Stowage. — Stowing tanned skins in the same hold with tea is improper. The Hudson, 122 Fed. Rep. 96.

Wool should not be stowed forward of wet

sugar unless care is taken that the vessel does not get down by the head and thereby damage the wool by sugar drainage. Knott *v.* Botany Mills, 179 U. S. 69.

The stowage of a piece of shafting weighing three tons upon one stanchion where four stanchions were necessary and had been provided was held to constitute an improper loading, making the ship unfit to perform her voyage. The Kate, 91 Fed. Rep. 679.

**205.** 1. Shipowner Must Supply Dunnage. — The Earnwood, 83 Fed. Rep. 315.

**206.** 6. The Musselcrag, 125 Fed. Rep. 786. But see The Kensington, 88 Fed. Rep. 331, *affirmed* (C. C. A.) 94 Fed. Rep. 885, holding that proper stowage is essential to seaworthiness as respects cargo or baggage, and the burden of proof of such stowage is upon the ship.

8. Implied Obligation Against Unnecessary Delay. — Where the charter-party provides for no lay days, the obligation is to load within a reasonable time. What is a reasonable time must be determined with regard to all the stipulations of the contract and existing conditions, and there is no liability for delay not imputable to personal fault or negligence. Carlton Steamship Co. *v.* Castle Mail Packets Co., (1898) A. C. 486, 78 L. T. N. S. 661.

**207.** 2. Breach of Charter-party. — A shipowner is liable for damages caused by a failure to commence a voyage at the expected time, where such failure was caused by a previous breach of the charter-party. The Georg Dumois, 88 Fed. Rep. 537.

3. Deviation as a Ground for Damages. — The Dunbeth, (1897) P. 133; Sutcliffe *v.* Seligman, (C. C. A.) 121 Fed. Rep. 803; Louisville-Cincinnati Packet Co. *v.* Rogers, 20 Ind. App. 594.

**209.** 5. Stipulation Construed. — A bill of lading which provides that the vessel may "make deviation" gives "only a limited right of departure from the voyage; and the limits must be those of necessity and reasonable regard for the rights of both the shipper and carrier, growing out of the nature of the principal contract." Swift *v.* Furness, 87 Fed. Rep. 345.

Stipulation Against Calling at Ports — Force Majeure. — Where a contract to carry live stock provided that the vessel was to have the liberty

**210.** See note 1.

*d.* CUSTOMARY DEVIATION. — See note 3.

**211.** 8. Variation in Manner or Means of Transporting Cargo. — See notes 2, 4.

9. Seaworthiness — *a.* WARRANTY — (1) *By Implication of Law.* — See notes 5, 6.

**212.** (2) *Latent Defects.* — See note 2.

(3) *Time to Which Warranty Relates.* — See note 3.

**213.** (4) *Maintaining Seaworthiness* — See note 2.

"to deviate for the purpose of saving life or property, but not to call at any port or ports before landing her live stock except in case of *force majeure*," it was held that the clause amounted to an absolute undertaking by the shipowners that the vessel should not, before landing her live stock, call at any port, whether in or out of the ordinary course of the voyage, except in case of *force majeure*; also that there was no case of *force majeure* where, by a miscalculation of the master and engineer, the vessel started on her voyage with an insufficient supply of coal and in consequence thereof was compelled to stop for coal at an intermediate port, and that the shipowners were liable for the depreciation of the live stock caused by the deviation. *Yrazu v. Astral Shipping Co.*, 9 Com. Cas. (Eng.) 100, 20 Times L. Rep. 153.

**210.** 1. Assisting Disabled Vessels. — *Potter v. Burrell*, (1897) 1 Q. B. 97.

3. See *Forest Oak Steam Shipping Co. v. Richard*, 5 Com. Cas. (Eng.) 100.

**211.** 2. *Louisville-Cincinnati Packet Co. v. Rogers*, 20 Ind. App. 594.

4. Vessels Changed. — *Louisville-Cincinnati Packet Co. v. Rogers*, 20 Ind. App. 594.

5. Owner Warrants the Vessel Seaworthy — *England*. — *Rowson v. Atlantic Transport Co.*, (1903) 1 K. B. 114; *Rathbone v. Mac Iver*, (1903) 2 K. B. 378; *The Vortigern*, (1899) P. 140.

*Canada*. — *Collins Bay Rafting, etc., Co. v. Kaine*, 29 Can. Sup. Ct. 247, *per* Girouard, J. citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 211.

*United States*. — *The Southwark*, 191 U. S. 1; *The Irrawaddy*, 171 U. S. 187; *Lake Michigan Car Ferry Transp. Co. v. Crosby*, 107 Fed. Rep. 723; *Nord-Deutscher Lloyd v. Insurance Co. of North America*, (C. C. A.) 110 Fed. Rep. 420; *Pacific Coast Steamship Co. v. Bancroft-Whitney Co.*, (C. C. A.) 94 Fed. Rep. 180, *reversed* 180 U. S. 49; *The New York*, 93 Fed. Rep. 495; *Leiter v. Ronalds*, 84 Fed. Rep. 894; *Ronalds v. Leiter*, (C. C. A.) 109 Fed. Rep. 905; *McCormick v. Shippy*, (C. C. A.) 124 Fed. Rep. 48.

*New York*. — *Auten v. Bennett*, 88 N. Y. App. Div. 15.

Shipowner Must Provide Proper Ballast. — *Weir v. Union Steamship Co.*, (1900) A. C. 525.

6. Fitness for Cargo. — *Rowson v. Atlantic Transport Co.*, (1903) 1 K. B. 114, *quoting from and approving* *The Thames*, (C. C. A.) 61 Fed. Rep. 1014, set out in the original note; *Rathbone v. Mac Iver*, (1903) 2 K. B. 378; *Steamship Waikato v. New Zealand Shipping Co.*, (1898) 1 Q. B. 645; *The Southwark*, 191 U.

S. 1; *Smith v. Heinlein*, 132 Fed. Rep. 1001; *American Sugar Refining Co. v. Rickinson*, (C. C. A.) 124 Fed. Rep. 188; *Neilson v. Coal, etc., Co.*, (C. C. A.) 122 Fed. Rep. 617; *The Southwark*, 191 U. S. 1.

*Carriage of Bullion*. — There is an implied warranty that the room of a vessel wherein bullion is to be placed for shipment shall be fit to resist thieves. *Queensland Nat. Bank v. Peninsular, etc., Steam Nav. Co.*, (1898) 1 Q. B. 567, 78 L. T. N. S. 67.

**212.** 2. *Latent Defects*. — *The Irrawaddy*, 171 U. S. 187; *The Southwark*, 191 U. S. 1; *The Sandfield*, (C. C. A.) 92 Fed. Rep. 663; *Pacific Coast Steamship Co. v. Bancroft-Whitney Co.*, (C. C. A.) 94 Fed. Rep. 180, *reversed* 180 U. S. 49; *Auten v. Bennett*, 88 N. Y. App. Div. 15.

An Express Stipulation relating to the commencement of the voyage has been held to be necessary to relieve the shipowner for latent defects existing before the commencement of the voyage. *The Aggi*, (C. C. A.) 107 Fed. Rep. 300.

Exception as to Latent Does Not Extend to Patent Defects. — *Steamship Waikato v. New Zealand Shipping Co.*, (1899) 1 Q. B. 56.

3. At the Time of Beginning the Voyage. — *The Vortigern*, (1899) P. 140; *The Irrawaddy*, 171 U. S. 187; *Ronalds v. Leiter*, (C. C. A.) 109 Fed. Rep. 905; *The Whittieburn*, 89 Fed. Rep. 526; *Pacific Coast Steamship Co. v. Bancroft-Whitney Co.*, (C. C. A.) 94 Fed. Rep. 180, *reversed* 180 U. S. 49; *The Georg Dumois*, 88 Fed. Rep. 537; *The Sandfield*, (C. C. A.) 92 Fed. Rep. 663.

When Voyage Is Divided into Stages. — *The Vortigern*, (1899) P. 140.

**213.** 2. *Seaworthiness Must Be Maintained*. — *Leiter v. Ronalds*, 84 Fed. Rep. 894; *Auten v. Bennett*, 88 N. Y. App. Div. 15; *Collins Bay Rafting, etc., Co. v. Kaine*, 29 Can. Sup. Ct. 247 (by statute). See also *McCormick v. Shippy*, (C. C. A.) 124 Fed. Rep. 48.

Providing Sufficient Supply of Coal. — Where, under a charter-party for a round voyage, the charterers are bound to provide and pay for all the coal, the shipowners are not relieved from the responsibility of seeing that the ship is seaworthy at the commencement of each stage of her voyage in respect of there being a sufficient supply of coal on board. *McIver v. Tate Steamers*, (1903) 1 K. B. 362.

Coal is a necessary part of the equipment of a steam vessel, and the vessel is bound to have sufficient to complete her entire voyage, or where the voyage is divided into stages she must have on board at each stage of the voyage sufficient coal to enable her to complete that stage. *The Vortigern*, (1899) P. 140.



**213.** *b.* MEANING OF THE TERM. — See notes 3, 4, 5.

**214.** *c.* PRESUMPTION AND BURDEN OF PROOF — In General. — See note 2.

Presumption Rebutted. — See note 4.

**215.** See note 1.

10. Commencement of Liability. — See note 2.

**216.** 11. Termination of Liability — *a.* DELIVERY. — See note 2.

**217.** 12. WHAT IS SUFFICIENT DELIVERY — (1) *Place of Delivery* — At the Wharf. — See note 1.

**213.** 3. Fit to Encounter Ordinary Perils. — The *Vortigern*, (1899) P. 140; The *Southwark*, 191 U. S. 1; The *Tjomo*, 115 Fed. Rep. 919; Davidson Steamship Co. v. 119,254 Bushels Flaxseed, 117 Fed. Rep. 283; The *Aggi*, 93 Fed. Rep. 484; The *Sandfield*, (C. C. A.) 92 Fed. Rep. 663; *Farr, etc., Mfg. Co. v. International Nav. Co.*, (C. C. A.) 98 Fed. Rep. 636, *affirmed* 181 U. S. 218; The *Arctic Bird*, 109 Fed. Rep. 167; The *Prussia*, (C. C. A.) 93 Fed. Rep. 837.

Seaworthiness Includes Proper Ballasting, Loading, and Stowage of cargo. The *Whitlieburn*, 89 Fed. Rep. 526; The *British King*, 89 Fed. Rep. 872, *affirmed* (C. C. A.) 92 Fed. Rep. 1018.

Necessary Equipment is as requisite as that the hull of the vessel should be staunch and strong. The *Georg Dumois*, 88 Fed. Rep. 537.

4. The *Tjomo*, 115 Fed. Rep. 919; The *Aggi*, 93 Fed. Rep. 484; The *Sandfield*, (C. C. A.) 92 Fed. Rep. 663.

5. Depends upon Voyage and Cargo. — *Queensland Nat. Bank v. Peninsular, etc., Steam Nav. Co.*, (1898) 1 Q. B. 567, 78 L. T. N. S. 67; The *Southwark*, 191 U. S. 1; The *Silvia*, 171 U. S. 462; *Farr, etc., Mfg. Co. v. International Nav. Co.*, (C. C. A.) 98 Fed. Rep. 636, *affirmed* 181 U. S. 218; *Neilson v. Coal, etc., Co.*, (C. C. A.) 122 Fed. Rep. 617; *American Sugar Refining Co. v. Rickinson*, (C. C. A.) 124 Fed. Rep. 188; *Insurance Co. of North America v. North German Lloyd Co.*, 106 Fed. Rep. 973; The *Arctic Bird*, 109 Fed. Rep. 167.

Not Inflexible Quantity. — "Seaworthiness is not a fixed inflexible quantity; it is a question of fact which must be decided according to the circumstances of each case." *Per Girouard, J., in Collins Bay Rafting, etc., Co. v. Kaine*, 29 Can. Sup. Ct. 247.

**214.** 2. Presumption of Seaworthiness. — The *Chattahoochee*, 173 U. S. 540.

The "Harter Act" has not changed the presumption. The *Wildcroft*, (C. C. A.) 130 Fed. Rep. 521. Compare The *Aggi*, 93 Fed. Rep. 484; The *British King*, 89 Fed. Rep. 872, *affirmed* (C. C. A.) 92 Fed. Rep. 1018; The *Kensington*, 88 Fed. Rep. 331, *affirmed* (C. C. A.) 94 Fed. Rep. 885. And see further *infra*, this title, **231. 4 et seq.**, and the title *GENERAL AVERAGE*, **961. 2.**

4. Burden Shifted to the Shipowner. — The *Southwark*, 191 U. S. 1; *Forbes v. Merchants' Express, etc., Co.*, 111 Fed. Rep. 796; The *Arctic Bird*, 109 Fed. Rep. 167; *Insurance Co. of North America v. North German Lloyd Co.*, 106 Fed. Rep. 973; *Pacific Coast Steamship Co. v. Bancroft-Whitney Co.*, (C. C. A.) 94 Fed. Rep. 180, *reversed* 180 U. S. 49; *Auten v. Bennett*, 88 N. Y. App. Div. 15.

Presumption from Successfully Encountering Sea Perils. — The *Sandfield*, (C. C. A.) 92 Fed. Rep. 663, quoting The *Warren Adams*, (C. C. A.) 74 Fed. Rep. 413, set out in the original note. See also The *Aggi*, 93 Fed. Rep. 484.

**215.** 1. See *Forbes v. Merchants' Express, etc., Co.*, 111 Fed. Rep. 796.

2. Goods Placed on Lighters by the orders of the shipowner for delivery to the ship are in the custody and care of the ship and her owners, who are liable for damages thereto. *Insurance Co. of North America v. North German Lloyd Co.*, 106 Fed. Rep. 973.

**216.** 2. Delivery Terminates Liability. — The *St. Georg*, 95 Fed. Rep. 172.

Distinction Between Inland and Ocean Carriage. — See The *St. Georg*, 95 Fed. Rep. 172.

Liability as Warehouseman. — The *M. C. Currie*, 132 Fed. Rep. 125.

Overcarriage of Cargo. — Where a bill of lading contained a clause providing that "if in the opinion of the master, discharge cannot be effected without undue detention, the steamer shall have liberty to overcarry the cargo to London, at merchant's risk, and deliver there to consignees or their assigns," it was held that the shipowner was not authorized by this clause to overcarry where the circumstances creating the undue detention were due to his default, or that of his agents or servants. *Searle v. Lund*, 88 L. T. N. S. 863.

**217.** 1. Unloaded and Stored by Order of a Port Official. — See *Herbst v. The Asiatic Prince*, 97 Fed. Rep. 343, *affirmed* (C. C. A.) 108 Fed. Rep. 287.

Selection of the Wharf. — The ship is bound only to deliver the cargo at the usual wharf. *McCaughn v. Milliot*, 78 Miss. 976.

A cargo owner cannot require that the ship be mutilated in order to unload at a wharf designated by him. The cargo owner must select a wharf which the vessel can physically approach. *Mencke v. A Cargo of Sugar*, 99 Fed. Rep. 298, *affirmed* 187 U. S. 249.

Under a charter requiring delivery to be made at the port of New York, the charterer cannot demand that the vessel be discharged at New Rochelle. *Mitchell v. A Cargo of Lumber*, 117 Fed. Rep. 189.

Where a charterer undertook to transport passengers and merchandise to Alaska, and deliver them on board another vessel of the charterer at St. Michael for transportation up the Yukon River, it was held to be improper to discharge the passengers and merchandise upon an island in the river, notwithstanding the vessel which was to have completed the carriage on the Yukon had been lost by a sea peril. The *National City*, (C. C. A.) 117 Fed. Rep. 822.

**217.** (2) *Time of Delivery*. — See note 2.

**218.** (3) *Notice*. — See note 1.

**219.** (4) *Storing Goods*. — See note 2.

(5) *Usage*. — See note 3.

**220.** 12. Who May Sue for Breach of Contract — *b*. THE CONSIGNEE. — See note 2.

**222.** VII. LIMITATION OF LIABILITY — 2. By Contract — *b*. USUAL EXCEPTIONS — (1) *Perils of the Seas* — (a) Meaning of Phrase. — See note 1. See also the title MARINE INSURANCE, **1022**. 12 *et seq*.

(b) Illustrations — Shipping Water During Storm. — See note 2.

**223.** Bad Stowage. — See note 4.

**224.** (2) *Seaworthiness and Fitness*. — See note 6.

Effect of Other Exceptions. — See note 8.

**Injury from Exposure After Unloading.** — Perishable goods should be delivered at a covered wharf if practicable. *The St. Georg*, 95 Fed. Rep. 172.

**Duty to Separate the Different Consignments.** — *The Titania*, (C. C. A.) 131 Fed. Rep. 229.

**Apart from Custom**, a ship has delivered her cargo when it is put over the rail. *Brenda Steamship Co. v. Green*, (1900) 1 Q. B. 518.

**217.** 2. *The St. Georg*, 95 Fed. Rep. 172.

**218.** 1. Notice Necessary. — *The Titania*, (C. C. A.) 131 Fed. Rep. 229.

**219.** 2. Shipowner Must Protect the Cargo. — *The St. Georg*, 95 Fed. Rep. 172; *The Titania*, 124 Fed. Rep. 975, *affirmed* (C. C. A.) 131 Fed. Rep. 229.

It is the duty of the owner to remove his goods where he has been notified of their arrival. *Smith v. Britain Steamship Co.*, 123 Fed. Rep. 176.

**3. Modification by Usage.** — *Herbst v. The Asiatic Prince*, 97 Fed. Rep. 343, *affirmed* (C. C. A.) 108 Fed. Rep. 287. *Hewlett v. Burrell*, (C. C. A.) 105 Fed. Rep. 80.

**Illustrations.** — A usage was shown to exist whereby all merchandise was delivered to the customs authorities, who in turn made delivery to the proper parties, and it was held that a delivery made to the customs officials pursuant to the usage was sufficient. *The Asiatic Prince*, (C. C. A.) 108 Fed. Rep. 287.

**220.** 2. Action Brought by the Consignee. — *The Prussia*, 100 Fed. Rep. 484.

**222.** 1. *Perils of the Seas* — Defined and Construed. — *Blackburn v. Liverpool*, etc., *Steam Nav. Co.*, (1902) 1 K. B. 290; *The Frey*, 106 Fed. Rep. 319; *The Orcadian*, 116 Fed. Rep. 930; *The Arctic Bird*, 109 Fed. Rep. 167; *Insurance Co. of North America v. Easton*, etc., *Transp. Co.*, 97 Fed. Rep. 653.

**Loss from Wear and Tear** is not a sea peril. *Insurance Co. of North America v. Easton*, etc., *Transp. Co.*, 97 Fed. Rep. 653.

**Damage Arising from Closing of Ventilators.** — Where a cargo of maize and oats was damaged by heated air, proceeding from the bulkheads enclosing the engine and boiler space, which was unable to escape owing to the necessary closing of the ventilators for a period of seven days, during a storm of exceptional severity and duration, it was held that the loss was occasioned by "accidents of the seas." *The Thruscoe*, (1897) P. 301.

**Perils Occasioned by Negligence.** — The shipowner may protect himself by an exception ex-

empting him from liability for loss or damage arising from the perils of the sea or of navigation due to the negligence, default, or error in judgment of the pilot, master, mariners, engineers, or others of the crew. *Blackburn v. Liverpool*, etc., *Steam Nav. Co.*, (1902) 1 K. B. 290.

**Sea Water Admitted by Explosion.** — Damage done to goods by sea water entering a ship through a hole caused by an explosion of detonators is not damage by a peril of the sea or an "accident of navigation." *The G. R. Booth*, 171 U. S. 450.

**2.** Damage by Sea Water. — *The Savona*, (1900) P. 252.

But damage by sea water admitted by the negligence of the engineer in opening a valve into a cargo compartment when intending to fill a ballast tank is a sea peril. *Blackburn v. Liverpool*, etc., *Steam Nav. Co.*, (1902) 1 K. B. 290.

**223.** 4. Bad Stowage. — *Glengoil Steamship Co. v. Pilkington*, 28 Can. Sup. Ct. 146.

**224.** 6. *The Prussia*, (C. C. A.) 93 Fed. Rep. 837.

**Exception as to Latent Defects.** — A clause in a bill of lading exempting the shipowner from liability for "defects latent on beginning voyage or otherwise" does not exempt him from liability for a defect patent at the beginning of the voyage. *Steamship Waikato v. New Zealand Shipping Co.*, (1899) 1 Q. B. 56.

Where the owner desires the exemption to cover a condition of unseaworthiness existing at the commencement of the voyage, he must unequivocally contract therefor. A mere exemption from liability for damages caused by "latent defects" does not cover latent defects existing at the commencement of the voyage. *The Carib Prince*, 170 U. S. 655, *reversing* (C. C. A.) 68 Fed. Rep. 254.

An open port, although unknown to the master, is not a latent defect. *The Manitoba*, 104 Fed. Rep. 145.

**8. Warranty of Seaworthiness Not Affected by Other Exceptions.** — *Steamship Waikato v. New Zealand Shipping Co.*, (1899) 1 Q. B. 56; *The Vortigern*, (1899) P. 140; *Rathbone v. MacIver*, (1903) 2 K. B. 378; *Borthwick v. Elderslie Steamship Co.*, (1904) 1 K. B. 319; *The Georg Dumois*, 88 Fed. Rep. 537. See also *Steamship Waikato v. New Zealand Shipping Co.*, (1898) 1 Q. B. 645.

**Exception as to Negligence of Servants.** — Unless the conditions of a charter-party relieve



- 225.** (5) *Rust, Leakage, or Breakage.* — See note 3.  
**226.** (6) *Deterioration of Cargo.* — See note 1.  
 (8) *Restraints of Princes, Rulers, and Peoples.* — See note 3.  
*Delays and Deviations.* — See note 5.  
**227.** (9) *Negligence* — (a) *United States.* — See note 1.  
 (b) *England.* — See note 2.

the owner, as distinct from his servants and agents, from the consequences of personal negligence, he is liable for a ship, in other respects seaworthy, which is rendered unseaworthy by being so laden under his orders as to become top-heavy at starting, with the result that her deck cargo was partly jettisoned and partly swept overboard in a gale which otherwise could have been weathered in safety. *City of Lincoln v. Smith*, (1904) A. C. 250.

**Defective Refrigerating Machinery.** — *Rowson v. Atlantic Transport Co.*, (1903) 1 K. B. 114; *The Southwark*, 191 U. S. 1.

It is lawful for a shipowner to stipulate for exemption from liability for defective refrigerating machinery, provided he has exercised due diligence to provide suitable and perfect machinery. *The Prussia*, (C. C. A.) 93 Fed. Rep. 837.

**Exemption from Warranty Must Be Clearly Shown.** — In construing a bill of lading or charter-party, the warranty of seaworthiness will not be held to have been excepted by the special exception, unless it plainly appears that it was intended to except it. It is well settled that when a shipowner desires to relieve himself from his common-law liability, he must do so in plain and unambiguous language. *Rathbone v. MacIver*, (1903) 2 K. B. 378, 89 L. T. N. S. 378; *Borthwick v. Elderslie Steamship Co.*, (1904) 1 K. B. 310.

**Failure or Breakdown of Machinery, etc.** — An exception against liability for loss or damage resulting from "failure or breakdown of machinery, insulation, or other appliances, refrigerating or otherwise," does not exempt the shipowners from liability for loss resulting from the general unseaworthiness of the vessel. *Borthwick v. Elderslie Steamship Co.*, (1904) 1 K. B. 310.

**Limitation of Time to Sue for Unseaworthiness.** — Under a bill of lading providing that all claims for loss of or damage to the goods shipped should be completely barred unless presented within one month from the date of the bill of lading, it was held that the limitation applied to a claim for damages arising from the unseaworthiness of the vessel. *Union Steamship Co. v. Drysdale*, 32 Can. Sup. Ct. 379, *reversing* 8 British Columbia 228, and *distinguishing* *The Ship Maori King v. Hughes*, (1895) 2 Q. B. 550; *Steel v. State Line Steamship Co.*, 3 App. Cas. 72, and *Tattersall v. National Steamship Co.*, 12 Q. B. D. 297.

**225. 3. Rust, Leakage, Etc.** — *The Henry B. Hyde*, (C. C. A.) 90 Fed. Rep. 114; *The Lennox*, 90 Fed. Rep. 308.

**226. 1. Damage from "Sweating," "Decaying," and "Heating."** — Where the bill of lading for a cargo of grain provided that the shipowners should not be responsible for "loss, damage, or injury arising from sweating, \* \* \* decay, \* \* \* explosion, heat, fire at sea or on shore," etc., and part of the cargo became

heated during the voyage and the remainder deteriorated otherwise, it was held that the words "sweating" and "decay" were inapplicable to cover damage to the grain arising from improper stowage, and that the context showed that the word "heat" referred to heat arising from some extraneous cause — as from the engine room — and not to the heating of the cargo from its own spontaneous combustion or generation of heat. *The Pearlmoor*, (1904) P. 286.

**3. A Blockade** is within the exception of restraints of princes, rulers, etc. *The Styria*, (C. C. A.) 101 Fed. Rep. 728, *modified* 186 U. S. 1.

**A Well-founded Apprehension of Capture** by the cruisers of a belligerent is the equivalent of an actual restraint. *The Styria*, (C. C. A.) 101 Fed. Rep. 728, *modified* 186 U. S. 1.

**Contraband — Effect of Promise of Exception.** — After the loading of a vessel with sulphur, war was declared between the destined country and another, and sulphur was declared contraband, but negotiations were immediately commenced for an exception to such article, and unofficial assurances had been given to the master that the exception would be allowed. Under such circumstances the master was held to have properly discharged his cargo and was not bound to reload it again upon the unofficial assurances that sulphur had been excepted as contraband. *The Styria v. Morgan*, 186 U. S. 1, *reversing* (C. C. A.) 101 Fed. Rep. 728, 93 Fed. Rep. 474.

**The Carriage by a Shipowner of Goods Destined for an Alien Enemy**, without the knowledge and consent of the other shippers, is a breach of duty towards such other shippers, and the shipowner is liable for damages for delay in delivering their goods at the port of destination, if the ship is seized and detained by reason of having enemies' goods on board, notwithstanding an exception against restraints by princes, rulers, and peoples. *Dunn v. Bucknall*, (1902) 2 K. B. 614.

**5. See** *Brunner v. Webster*, 5 Com. Cas. (Eng.) 167.

**227. 1. Limiting Liability for Negligence.** — *The Irrawaddy*, 171 U. S. 187; *Knott v. Botany Mills*, 179 U. S. 69.

**Are Against Public Policy.** — *Nord-Deutscher Lloyd v. Insurance Co. of North America*, (C. C. A.) 110 Fed. Rep. 420.

**A Charterer** may exempt his liability to the owners of a vessel for the negligence of the master. *McCormick v. Shippy*, (C. C. A.) 124 Fed. Rep. 48, *affirming* 119 Fed. Rep. 226.

**2. Exceptions as to Negligence Valid in England.** — *City of Lincoln v. Smith*, (1904) A. C. 250; *Price v. Union Lighterage Co.*, (1903) 1 K. B. 750; *Westport Coal Co. v. McPhail*, (1898) 2 Q. B. 130.

**Canada.** — A condition in a bill of lading that the shipowners shall not be liable for negligence on the part of the master or mariners or their other servants or agents is neither contrary



**228.** (10) *Amount of Damages.*—See note 1.

(11) *Other Exceptions.*—See notes 4, 6, 7.

**229.** *c. BURDEN OF PROOF*—(1) *Upon Shipowner to Bring the Breach Within the Exceptions.*—See note 1.

(2) *Upon the Cargo Owner to Show Negligence.*—See note 2.

*d. WHEN EXCEPTIONS APPLY*—(1) *In General.*—See note 3.

**230.** (4) *Loading and Unloading.*—See note 3.

to public policy nor prohibited by law in the province of *Quebec*. *Glengoil Steamship Co. v. Pilkington*, 28 Can. Sup. Ct. 146.

**Exceptions Against Negligence "Are to Be Construed Strictly,** and must not be extended to any cases but those expressly specified." *Glengoil Steamship Co. v. Pilkington*, 28 Can. Sup. Ct. 146.

**Exception as to Negligence Not Favored.**—When a clause in a contract of affreightment is susceptible of two constructions, one of which will make it applicable where there is no negligence on the part of the carrier or his servants, and the other will make it applicable where there is such negligence, it requires special words to make the clause cover nonliability in the event of negligence. *Price v. Union Lighterage Co.*, (1904) 1 K. B. 412, *affirming* (1903) 1 K. B. 750, *followed in* *The Pearlmoor*, (1904) P. 286.

**Negligence of Master Who Was Part Owner.**—Where a bill of lading signed by the master (who was also part owner of the ship) on behalf of himself and his co-owners contained an exception in respect of "the neglect and default of master in navigating the ship," and the cargo was lost by the stranding of the ship through the negligence, but not the wilful negligence, of the master, it was held, in an action by the shipper of the cargo, that the negligence which caused the loss was that of the master exclusively as master, and not as part owner, and was therefore within the exception. *Westport Coal Co. v. McPhail*, (1898) 2 Q. B. 130.

**Negligence "in Providing, Dispatching, and Navigating the Vessel or Otherwise."**—Where a dog was shipped under a bill of lading which exempted the shipowner from liability for loss or damage arising from any act of negligence or default of the master, officer, crew, or any servant of the shipowner "in providing, dispatching, and navigating the vessel or otherwise," and the dog was lost on the voyage owing to the negligence of the shipowner's servants in letting it loose, it was held that the words "or otherwise" protected the shipowner from liability. *Packwood v. Union-Castle Mail Steamship Co.*, 20 Times L. Rep. 59.

**228. 1. Damages Limited to Invoice Value.**—This exception or limitation does not authorize the ship to deduct the freight from the invoice price in ascertaining the amount of its liability for a loss. *The Styria*, 93 Fed. Rep. 474.

A limitation of liability to the invoice value of the goods fixes the limit of liability only where there is a total loss of the goods, and where the loss is only partial, as by a delayed delivery, the vessel must respond in damage calculated at the difference between the market value of the goods on the date they should have arrived and their market value on arrival. *The*

*Styria*, (C. C. A.) 101 Fed. Rep. 728, *modified* 186 U. S. 1.

**4. Robbers and Thieves.**—*The Manitoba*, 104 Fed. Rep. 145.

**6. "All Other Accidents."**—Where a charter-party provided that the shipowners should be exempted from liability for loss or damage resulting from the act of God and other causes enumerated and from "all other accidents," it was held that they were not liable for damage caused by the reckless and improper manner in which the stevedores discharged the cargo. *The Torbryan*, (1903) P. 194.

**7. "Causes Beyond His Control."**—An exception that the ship shall not be liable for numerous injuries therein particularized, "nor for any loss or damage occasioned by causes beyond his control," is held in the federal courts not to relieve the shipowner from liability for all injuries beyond his control, but such exception applies to causes of loss *ejusdem generis* with those particularized. *The G. R. Booth*, (C. C. A.) 91 Fed. Rep. 164.

**229. 1. What Shipowners Must Show.**—*The Patria*, (C. C. A.) 132 Fed. Rep. 971, *affirming* 125 Fed. Rep. 425; *The Titania*, (C. C. A.) 131 Fed. Rep. 229; *Pacific Coast Steamship Co. v. Bancroft-Whitney Co.*, (C. C. A.) 94 Fed. Rep. 180, *reversed* 180 U. S. 49; *The Marechal Suchet*, 112 Fed. Rep. 440; *The C. W. Elphicke*, 117 Fed. Rep. 279, *affirmed* (C. C. A.) 122 Fed. Rep. 439; *The Lennox*, 90 Fed. Rep. 308; *The Aggi*, (C. C. A.) 107 Fed. Rep. 300; *The Frey*, (C. C. A.) 106 Fed. Rep. 319; *Argo Steamship Co. v. Seago*, (C. C. A.) 101 Fed. Rep. 999; *Insurance Co. of North America v. Easton, etc.*, *Transp. Co.*, 97 Fed. Rep. 653. See also *Collins Bay Rafting, etc., Co. v. Kaine*, 29 Can. Sup. Ct. 247, *per* Girouard, J.

**2. Negligence Must Be Shown by the Cargo Owner.**—*Blackburn v. Liverpool, etc.*, *Steam Nav. Co.*, (1902) 1 K. B. 290; *The Patria*, (C. C. A.) 132 Fed. Rep. 971; *The Tjomo*, 115 Fed. Rep. 919; *The Henry B. Hyde*, (C. C. A.) 90 Fed. Rep. 114; *The Frey*, 92 Fed. Rep. 667; *Crowell v. Union Oil Co.*, (C. C. A.) 107 Fed. Rep. 302; *The Lennox*, 90 Fed. Rep. 308; *The Aggi*, 93 Fed. Rep. 484.

**3. Do Not Extend to Unseaworthiness at Commencement of Voyage.**—An exception of liability for damages occasioned by any "latent defects" does not extend to such as were in existence at the commencement of the voyage. *The Carib Prince*, 170 U. S. 655; *The Sandfield*, (C. C. A.) 92 Fed. Rep. 663.

**An Exception as to Negligence Applies Only to the Carriage of the Goods,** and does not cover damages caused by neglect or improper stowage prior to the commencement of the voyage. *Glengoil Steamship Co. v. Pilkington*, 28 Can. Sup. Ct. 146.

**230. 3. Southerland-Innes Co. v. Thynas**, (C. C. A.) 128 Fed. Rep. 42.

**230.** (5) *Transportation of the Cargo Unnecessarily Prolonged.* — See note 6.

**231.** 4. By Statute — *a.* UNITED STATES — (1) *The Harter Act* — (a) *Stipulation for Nonliability in Certain Cases Prohibited* — *aa.* AS TO NEGLIGENCE. — See note 4.

**232.** *bb.* AS TO SEAWORTHINESS. — See note 1.

(b) *No Liability in Certain Cases.* — See note 2.

**230.** 6. *Unauthorized Deviation.* — An exemption from liability does not apply for loss occurring during a deviation unauthorized by the contract. *Swift v. Furness*, 87 Fed. Rep. 345.

**231.** 4. *Contrary Stipulations of No Effect.* — The *Southwark*, 191 U. S. 1; *Knott v. Botany Mills*, 179 U. S. 69; *The Manitou*, 116 Fed. Rep. 60, *affirmed* (C. C. A.) 127 Fed. Rep. 554; *The Germanic*, (C. C. A.) 124 Fed. Rep. 1. "Proper Loading and Stowage" includes not only the proper distribution of the cargo itself, but the ballasting necessary to accompany it in order to prevent the vessel from being top-heavy and unfit for sea. *The Whitleburn*, 89 Fed. Rep. 526.

**232.** 1. *The Second Section of the Harter Act* deals solely with the shipowner's power to exempt himself from furnishing a seaworthy vessel, and does not in any way relieve him from his duty to furnish such a vessel when he has not exempted himself from so doing by contract. *The Carib Prince*, 170 U. S. 655.

2. *Construction and Effect of Act.* — The trend of judicial decision in the United States has been to construe the Harter Act strictly, and not to extend the carrier's exemption from liability to doubtful and uncertain cases; and to leave the liability of the ship and the owner as it was defined and enforced by the law maritime and by the common law, unless the act plainly and unequivocally asserts a different liability. *The Germanic*, (C. C. A.) 124 Fed. Rep. 1. *Compare The Nettie Quill*, 124 Fed. Rep. 667, holding that the act materially modifies the law relating to the carriage of goods.

Section 2 of the Harter Act is the complement of section 3. The two sections are to be read together, both being intended to enforce the same rule of diligence in respect to the same subject-matter. *The Prussia*, (C. C. A.) 93 Fed. Rep. 837.

The first section is in the interest of the shipper, and the third section is in the interest of the carrier, and is intended as a compensation for the loss of his right to limit his liability as provided in the preceding section. *The Germanic*, (C. C. A.) 124 Fed. Rep. 1.

To cases which fall under the specific provisions of the first section of the Harter Act, the general provisions of the third section are not applicable. *The Whitleburn*, 89 Fed. Rep. 526.

"The Main Purposes of the Act were to relieve the shipowner from liability for latent defects not discoverable by the utmost care and diligence, and, in event that he has exercised due diligence to make his vessel seaworthy, to exempt him and the ship from responsibility for damage or loss resulting from faults or errors in navigation or in the management of the vessel." *The Irrawaddy*, 171 U. S. 187.

*Obligation of Furnishing Seaworthy Vessel Not Changed.* — The Harter Act does not relieve

the shipowner from the obligation of furnishing a vessel in all respects seaworthy, although he has exercised due diligence to make her so. *The Carib Prince*, 170 U. S. 655; *The Southwark*, 191 U. S. 1; *Knott v. Botany Mills*, 179 U. S. 69; *The Silvia*, 171 U. S. 462; *The C. W. Elphicke*, (C. C. A.) 122 Fed. Rep. 439, *affirming* 117 Fed. Rep. 279; *Nord-Deutscher Lloyd v. Insurance Co. of North America*, (C. C. A.) 110 Fed. Rep. 420, *affirming Insurance Co. of North America v. North German Lloyd Co.*, 106 Fed. Rep. 973; *The Aggi*, (C. C. A.) 107 Fed. Rep. 300.

*Seaworthiness Is a Condition Precedent*, and fault in management is no defense where there has been a lack of diligence to make the vessel seaworthy. *International Nav. Co. v. Farr, etc., Mfg. Co.*, 181 U. S. 218; *The Wildcroft*, (C. C. A.) 130 Fed. Rep. 521; *The Manitou*, 116 Fed. Rep. 60, *affirmed* (C. C. A.) 127 Fed. Rep. 554; *Rawson v. Atlantic Transport Co.*, (1903) 1 K. B. 114.

But for injuries resulting from the specific causes enumerated in the third section, the vessel is not absolutely bound to be seaworthy if due diligence has been exercised to make her so. *The Manitoba*, 104 Fed. Rep. 145.

*Latent Defects.* — And the ship is liable for damages occasioned by latent defects existing at the commencement of the voyage unless there is an exception thereto in the contract which relates to the time of sailing. *The Carib Prince*, 170 U. S. 655; *The Southwark*, 191 U. S. 1; *The Sandfield*, (C. C. A.) 92 Fed. Rep. 663.

*Due Diligence* requires such watchfulness and foresight as the circumstances of the particular service demand. It must be adequate to the occasion. It must be due diligence in the work itself, and not merely in the selection of agents to do the work. *Nord-Deutscher Lloyd v. Insurance Co. v. North America*, (C. C. A.) 110 Fed. Rep. 420. See also *The Frey*, 92 Fed. Rep. 667; *The Abbazia*, 127 Fed. Rep. 495.

The exercise of due diligence to make the vessel seaworthy is a condition precedent to the exemption of liability. *American Sugar Refining Co. v. Rickinson*, (C. C. A.) 124 Fed. Rep. 188; *Nord-Deutscher Lloyd v. Insurance Co. of North America*, (C. C. A.) 110 Fed. Rep. 420.

*Burden of Proof.* — The shipowner, in order to avail himself of any of the exemptions of his liability provided for by the act, must establish either the existence of seaworthiness or that he exercised due diligence to make the vessel seaworthy. *International Nav. Co. v. Farr, etc., Mfg. Co.*, 181 U. S. 218; *The Southwark*, 191 U. S. 1; *The Phœnicia*, 90 Fed. Rep. 110, *affirmed* (C. C. A.) 99 Fed. Rep. 1005; *Nord-Deutscher Lloyd v. Insurance Co. of North America*, (C. C. A.) 110 Fed. Rep. 420; *The Oneida*, (C. C. A.) 128 Fed. Rep. 687; *The Manitou*, 116 Fed. Rep. 60, *affirmed* (C. C. A.)

**233.** (c) Applicable to Foreign Vessels. — See note 1.

(d) Applicable to Both Foreign and Domestic Commerce. — See note 2.

(e) To What the Act Relates. — See note 3.

**234.** (2) *Act Regulating Transportation of Merchandise* — (b) Loss by Fire. — See note 2.

(c) Liability Limited to Interest. — See note 3.

Privity or Knowledge of the Master. — See note 4.

127 Fed. Rep. 554; The Manitoba, 104 Fed. Rep. 145; The Friesland, 104 Fed. Rep. 99.

And this burden requires that there be proof, not only of due inspection, but of actual repair, if repair be found necessary. The Aggi, 93 Fed. Rep. 484.

The Words "Navigation" and "Management," as used in the act, include the control, during the voyage, of everything with which the vessel is equipped for the purpose of protecting her and her cargo against the inroads of the sea. The Silvia, 171 U. S. 462. Thus, they include improper handling of the ship, as a ship, which affects the safety of the cargo. The Rodney, (1900) P. 112.

The primary duty to equip the vessel properly rests upon the owners, and any omission upon the part of those to whom the owners have delegated the duty is imputable to them, and cannot be called an error in the management of the vessel. The Niagara, (C. C. A.) 84 Fed. Rep. 902.

The owner is not excused by the act, if, after proper equipment and manning, he adopts a course of business which renders both inefficient, as by permitting her crew to leave her without a proper watch, and permitting the fires to be banked so that no steam could be obtained to run the pumps. *In re Tweed*, 131 Fed. Rep. 355.

*Illustrations.* — The following have been held to be faults or errors in "management:" The failure of the officers and crew to close a port, when occasion therefor arose, which had been left open at the time of sailing and was readily accessible. The Silvia, 171 U. S. 462. But where a port was negligently left open at the commencement of the voyage, although accessible to the officers and crew, but unknown to them, it was held that the vessel was unseaworthy, and that the failure to discover and close the port was not an error in navigation or management. *International Nav. Co. v. Farr, etc.*, Mfg. Co., 181 U. S. 218. See also *The Manitoba*, 104 Fed. Rep. 145.

Failure to open the sluices during a prolonged storm. *The Sandfield*, (C. C. A.) 92 Fed. Rep. 663.

Failure to use the pumps when necessary. *The Merida*, (C. C. A.) 107 Fed. Rep. 146; *The Ontario*, 106 Fed. Rep. 324, *affirmed* (C. C. A.) 115 Fed. Rep. 769. And to take soundings. *The British King*, 89 Fed. Rep. 872, *affirmed* (C. C. A.) 92 Fed. Rep. 1018.

The opening of a cock and letting water run into the cargo. *The Wildcroft*, (C. C. A.) 130 Fed. Rep. 521; *American Sugar Refining Co. v. Rickinson*, (C. C. A.) 124 Fed. Rep. 188.

The negligence of the master and crew in permitting refrigerating machinery to become disarranged. *Rowson v. Atlantic Transport Co.*, (1903) 1 K. B. 114.

Failure to station a lookout forward. *The Rosedale*, 88 Fed. Rep. 324, *affirmed* (C. C. A.) 92 Fed. Rep. 1021.

The failure of the master to unload the cargo at a port of distress, to ascertain the condition of the interior of the ship, *The Gaudeloupe*, 92 Fed. Rep. 670.

The following have been held not to be faults in management or navigation:

The failure of the master, after a partial disability of his ship, to put into an available port for repair. *The Musselcrag*, 125 Fed. Rep. 787.

Faults or errors in loading, unloading, stowage, custody, care, or delivery of cargo. *The Germanic*, (C. C. A.) 124 Fed. Rep. 1, *affirming* 107 Fed. Rep. 294; *Knott v. Botany Mills*, 179 U. S. 69; *The Oneida*, (C. C. A.) 128 Fed. Rep. 687.

**Contribution to General Average Loss.** — The act gives no right to the owner of the ship to share in the benefits of a general average contribution to meet losses occasioned by faults in the navigation and management of the ship. *The Irrawaddy*, 171 U. S. 187, *overruling* *Chrystal v. Flint*, 82 Fed. Rep. 472, *affirmed* 171 U. S. 187; *The Strathdon*, 94 Fed. Rep. 206. See generally the title GENERAL AVERAGE.

**Collision Cases.** — The act does not change the liability to each other of vessels in collision, though one or both of such vessels be laden with cargo. *The Chattahoochee*, 173 U. S. 540.

**233.** 1. *The Silvia*, 171 U. S. 462; *The Chattahoochee*, 173 U. S. 540; *Knott v. Botany Mills*, 179 U. S. 69; *The Frey*, 92 Fed. Rep. 667.

2. *The Nettie Quill*, 124 Fed. Rep. 667; *In re Piper Aden Goodall Co.*, 86 Fed. Rep. 670.

3. *The Chattahoochee*, 173 U. S. 540; *Farr, etc.*, Mfg. Co. v. *International Nav. Co.*, 94 Fed. Rep. 675.

**Passengers.** — The Harter Act does not apply to the transportation of passengers nor to their baggage when not shipped as merchandise and not paying freight. *The Rosedale*, 88 Fed. Rep. 324, *affirmed* (C. C. A.) 92 Fed. Rep. 1021; *The Kensington*, 88 Fed. Rep. 331, *affirmed* (C. C. A.) 94 Fed. Rep. 885; *In re California Nav., etc., Co.*, 110 Fed. Rep. 678.

**234.** 2. **Statute Construed.** — See *The Strathdon*, 89 Fed. Rep. 374, (C. C. A.) 101 Fed. Rep. 600; *The City of Clarksville*, 94 Fed. Rep. 201.

3. **Meaning of Freight.** — *The Jane Grey*, 99 Fed. Rep. 582.

**Construction.** — *The Longfellow*, (C. C. A.) 104 Fed. Rep. 360.

The vessel need not be actually engaged in a voyage, in order to have the benefit of the act. *In re Michigan Steamship Co.*, 133 Fed. Rep. 577.

4. *The Strathdon*, 89 Fed. Rep. 374.



**235. VIII. FREIGHT — 1. Definition.** — See note 3.

**236. 3. When Payable — a. UPON DELIVERY — (1) General Rule.** — See note 1.

**238. (4) Right to Partial Freight upon Partial Delivery.** — See note 2.

**239. (5) Performance of Contract Prevented by the Cargo Owner — (b) Cargo Reclaimed.** — See note 1.

**240. (8) Abandonment of Ship During Voyage — (b) United States.** — See note 2.

(9) *Cargo Damaged* — (a) *Freight Sometimes Due.* — See note 3.

**241. (b) Amount of Damage Permissible — Destruction in Specie.** — See note 4.

(c) *Cause of Damage Immaterial.* — See note 6.

**243. (g) Cross Action or Set-off for Damage to Cargo — United States.** — See note 1.

(10) *Apportionment of Freight* — (a) *Full Cargo Not Loaded or Delivered.*

— See note 2.

**246. b. ADVANCE FREIGHT — (1) Due by Express Agreement.** — See note 5.

**247. (2) Stipulation for Advance Freight Must Be Clear.** — See note 1.

**248. (6) Repayment in Case of Nonperformance — (a) When Not Obligatory.** — See note 4.

(b) *When Obligatory.* — See note 5.

**235. 3. General Definition of Freight.** — Freight in the strict sense is the price of the carriage and delivery of goods by the ship according to the agreement of the parties. In a wider sense, in insurance, it includes compensation for any use of the ship. *Christie v. Davis Coal, etc., Co.*, 95 Fed. Rep. 837, *affirmed* (C. C. A.) 110 Fed. Rep. 1006. See also *Weir v. Girvin*, (1899) 1 Q. B. 193.

**236. 1. Freight Payable upon Performance of the Contract.** — *Weir v. Girvin*, (1899) 1 Q. B. 193; *Portland Flouring Mills Co. v. British, etc., Marine Ins. Co.*, (C. C. A.) 130 Fed. Rep. 860; *Christie v. Davis Coal, etc., Co.*, 95 Fed. Rep. 837, *affirmed* (C. C. A.) 110 Fed. Rep. 1006.

**238. 2. Right to Demand Pro Rata Freight on Partial Delivery.** — *Christie v. Davis Coal, etc., Co.*, 95 Fed. Rep. 837, *affirmed* (C. C. A.) 110 Fed. Rep. 1006.

**239. 1. Nicolini v. Lutchter, etc., Lumber Co.**, (C. C. A.) 108 Fed. Rep. 550.

**240. 2. United States.** — See *The Eliza Lines*, (C. C. A.) 114 Fed. Rep. 307, *modified* (C. C. A.) 132 Fed. Rep. 242.

**3. The Styria**, 95 Fed. Rep. 698.

**241. 4. Destruction in Specie.** — *Weir v. Girvin*, (1900) 1 Q. B. 45, 81 L. T. N. S. 687.

**6. Sea Perils.** — *Christie v. Davis Coal, etc., Co.*, 95 Fed. Rep. 837, *affirmed* (C. C. A.) 110 Fed. Rep. 1006.

**243. 1. United States — Set-off Allowed.** — *Aldrich v. Cargo* 246 5/20 Tons Egg Coal, 117 Fed. Rep. 757.

**2. Pro Rata Freight Payable for Partial Delivery.** — *Mediterranean, etc., Steamship Co. v. Mackay*, (1903) 1 K. B. 297; *Weir v. Girvin*, (1900) 1 Q. B. 45, 81 L. T. N. S. 687.

**Cargo Destroyed Before Sailing.** — Where part of the cargo, after being put on board, is destroyed by an excepted peril, the charterers are not bound to ship further cargo in place of what was destroyed, although they were bound to load a full and complete cargo; neither can they be called upon to pay freight in respect to what was destroyed. The part of the ship

which would have been taken up by the destroyed cargo was at the disposal of the shipowners to fill as they might desire, provided that the contemplated voyage was not thereby delayed. *Weir v. Girvin*, (1900) 1 Q. B. 45, 81 L. T. N. S. 687.

**246. 5. Definition.** — *Portland Flouring Mills Co. v. British, etc., Marine Ins. Co.*, (C. C. A.) 130 Fed. Rep. 860, *citing* 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 246.

**Stipulation for Advance Freight Is Binding.** — A clause in a bill of lading stipulating that the freight is to be paid at all events, "ship lost or not lost," on the total quantity of goods embarked, irrespective of the quantity loaded, in cash on demand, without deduction or abatement of any kind, is a valid and binding condition. The provisions of Civil Code Quebec, art. 2442, 2451, that freight is not due on goods lost by shipwreck, nor until their carriage has been completely performed, are to be applied only in the absence of an agreement to the contrary. *Dean v. Furness*, 9 Quebec Q. B. 81.

**Competent to Contract for Advance Freight.** — *Weir v. Girvin*, (1899) 1 Q. B. 193.

**247. 1. Weir v. Girvin**, (1899) 1 Q. B. 193.

**248. 4. Destruction of Cargo Before Sailing of Vessel.** — Under a charter-party in which fire was one of the perils mutually excepted, and there was a provision that the freight should be paid "two-thirds in cash, three days after sailing, ship lost or not lost, the balance on unloading and right delivery of the cargo," where it appeared that after the charterers had loaded a part of the cargo, a fire broke out on board and destroyed the goods so loaded, and the ship subsequently sailed after the charterers had loaded the balance of the cargo, it was held that the shipowners were not entitled to payment of advance freight on the portion of the cargo destroyed by fire. *Weir v. Girvin*, (1900) 1 Q. B. 45, *affirming* (1899) 1 Q. B. 193.

**5. Money Advanced as a Loan Must Be Refunded.** — *De Sola v. Pomares*, 119 Fed. Rep. 373; *The Schooner Arthur B.*, 1 Alaska 403.

**249.** 4. Time Freight — *a.* GENERAL RULE. — See note 2.

**250.** *c.* DEDUCTION FOR TIME LOST — Express Agreement as to Lost Time. — See note 6.

**251.** 5. Lump Freight — *a.* IN GENERAL. — See note 1.

*b.* PARTIAL NONPERFORMANCE — (2) *Whole Cargo Not Delivered.*

— See note 5.

**253.** (b) United States — Present Doctrine. — See note 1.

6. Rate and Amount — *a.* RATE — (1) *Implied Rate.* — See note 2.

**249.** 2. Shipowner's Waiver of Default. — Where a steamer was chartered for three months at a monthly hire, payment to be made monthly in advance under a charter-party, providing that the shipowner was at liberty to withdraw the vessel from the service of the charterers on default in payment, and the second month's hire became due on July 12, but was not then paid, and the vessel arrived on that day at a port where she loaded a cargo, and sailed from such port on July 14, on which latter date the owner gave notice to the charterers that he withdrew the ship, and the charterers on receipt of the notice tendered the amount of the hire which the owner refused to accept, it was held that there had been a punctual and regular payment of the hire, and if not, that the action of the captain in taking a cargo on board when the hire was due and unpaid amounted to a waiver by the owner of his right to withdraw the steamer. *Nova Scotia Steel Co. v. Sutherland Steam Shipping Co.*, 5 Com. Cas. (Eng.) 106.

**Dissolution by Shipowner for Nonpayment of Freight.** — Where a charter-party provided for the payment of time freight at stipulated intervals and authorized the owner to dissolve the contract on default in any payment, and a week after a default had been made by the charterer the owner withdrew the ship from service without having previously demanded payment of the defaulted instalment of freight, it was held that the owner had a right to dissolve the charter-party without first making demand of payment, and that the delay of a week in exercising such right did not constitute a waiver thereof. *Tyrer v. Hessler*, 86 L. T. N. S. 697.

**Time Freight Payable in Advance.** — Where it was provided by a charter-party that the charterer should pay freight at a specified rate per calendar month "and at and after the same rate for any part of a month, hire to continue until her redelivery to the owner, payment for the said hire to be made in cash, monthly in advance," and it was also provided that the shipowner should have a lien for any amount due him under the charter, and that the charterer should have a lien on the ship for all moneys paid in advance and not earned, it was held that the charterer was bound to pay the full freight in advance at the beginning of each month, though it might be probable that the hire would not continue for the entire month. *Tonnellier v. Smith*, 77 L. T. N. S. 277.

**250.** 6. Time Consumed in Unloading. — *Lake Steam Shipping Co. v. Bacon*, 129 Fed. Rep. 819.

**Detention Caused by Breakdown of Ship.** — Where the charter-party provided that in the

event of the breakdown of the steamship's machinery or damage preventing the working of the vessel for more than twenty-four running hours, the payment of hire should cease until she should be again in an efficient state to resume her services, but that "detention by ice" was "to be for account of the charterers unless caused by breakdown of steamer," and the ship while proceeding on her voyage under the charter was stranded, and thereby was so much damaged that the making of the necessary repairs so delayed her that she was unable to reach the port of destination before it was closed by ice, and it further appeared that but for the damage occasioned by the stranding she could have reached such port, discharged her cargo, and gotten away before it was closed by ice, it was held that there had been a detention of the ship by ice, caused by the breakdown of the steamer, within the meaning of the charter-party, and that the hire of the ship ceased to be payable by the charterers during such detention. *In re Traae*, (1904) 2 K. B. 377; *Nordraak v. Lennard*, 8 Com. Cas. (Eng.) 239.

**Detention by Average Accident.** — Where a charter-party provided that in the event of loss of time from "detention by average accidents to ship" the payment of hire should cease for the time thereby lost, and, an average accident having occurred to the ship while on a voyage from Hamburg to New York, she put back to Queenstown for repairs and resumed her voyage after being repaired, it was held that the charterer was liable to pay hire during the time occupied after leaving Queenstown in going back to the place where the accident had occurred. *Vogemann v. Zanzibar Steamship Co.*, 7 Com. Cas. (Eng.) 254.

**251.** 1. *Peterson v. Eight Hundred and Sixty-nine Cedar Logs*, 127 Fed. Rep. 868, *citing* 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 251.

**5. No Apportionment of Lump Freight.** — *Christie v. Davis Coal, etc., Co.*, 95 Fed. Rep. 837, *affirmed* (C. C. A.) 110 Fed. Rep. 1006.

**253.** 1. Present Doctrine. — See *Christie v. Davis Coal, etc., Co.*, 95 Fed. Rep. 837, *affirmed* (C. C. A.) 110 Fed. Rep. 1006.

**2. The Shipowner Was Held to Be Entitled to Reasonable Freight** where the charter-party provided that the charterer was to have the option of shipping damaged cotton on deck, consistent with the seaworthiness of the steamer, such cotton to be at the shipper's risk and expense, and that the charterer was fully to insure the freight thereon, but the charter-party contained no provision for the payment of freight on such deck cargo. *Ursula Bright Steamship Co. v. Ripley*, 8 Com. Cas. (Eng.) 171.

- 253.** (2) *Alternative Rate* — Larger or Smaller Rate According to the Service. — See note 3.
- 254.** *b. WEIGHT AND MEASUREMENT* — (3) *Intake Measurement and Weight* — Measurement. — See note 5.
- 255.** *7. To Whom Payable* — *a. TO SHIPOWNER.* — See note 5.
- 259.** *c. TO CHARTERER* — (1) *Charterer Owner Pro Hac Vice.* — See note 3.
- 260.** *8. By Whom Payable* — *b. CONSIGNORS.* — See note 4.
- 265.** *d. ENGLISH BILLS OF LADING ACT* — Consignees or Indorsees. — See note 3.
- 267.** *IX. LIENS* — 1. *Lien of the Shipowner* — *a. FOR FREIGHT* — (2) *Origin and Nature of the Lien* — (a) *Origin.* — See note 2.
- 268.** (3) *Vessel Chartered* — (a) *General Owner, Owner for the Voyage* — *bb. AS AGAINST OTHER PERSONS* — (aa) *Freight Actually Due by the Shipper.* — See note 1.
- 269.** (bb) *Charter-party Freight and Charges* — *aaa. When There Is a Bill of Lading.* — (bbb) *As Against a Shipper Other than the Charterer.* — See note 2.
- 272.** (b) *Charterer Owner Pro Hac Vice.* — See note 3.
- (4) *How Lost* — (a) *Waiver* — *aa. BY DELIVERY.* — See note 4.
- 274.** "He or They Paying Freight." — See note 1.
- bb. BY INCONSISTENT STIPULATIONS.* — See note 3.
- 276.** *b. FOR DEAD FREIGHT.* — See note 8.

**253.** 3. *Time for Exercising Option as to Rate.* — Under a charter-party giving to the charterer the option of paying freight at a certain rate on the weight delivered, or at a lower rate on the intake weight, where the shipowners did not require the charterer to declare his option as soon as the cargo was delivered, and the charterer elected to pay the lower rate, it was held that the charterer was not bound to exercise his option until the time for the payment of the freight had arrived, as the shipowners had waived their right to require the exercise of the option at the time of the delivery of the cargo. *The Dowlais*, 51 W. R. 88.

**254.** 5. *Deduction of Freight for Goods Not Delivered.* — Where the charter-party provides that freight is to be payable on the intake measurement, the consignee is entitled to a deduction from the freight for such portion of the cargo as is not actually delivered to him. In a shipment of timber, if the bill of lading specifies the total number of pieces and the charter-party provides that the bill of lading is to be conclusive as to the quantity delivered to the ship, and there is no evidence as to the actual measurement of the timber not delivered to the consignee, the consignee is entitled to a deduction from the freight payable under the charter-party, of an amount proportionate to the freight attributable to the shortage. *Mediterranean, etc., Steamship Co. v. Mackay*, (1903) 1 K. B. 297.

**255.** 5. *The Master Cannot Maintain an Action for Freight* when he signed the bills of lading merely as agent for the shipowners, and not as principal. *Repetto v. Millar's Karri*, (1901) 2 K. B. 306.

**259.** 3. *Lien Reserved by Shipowner.* — Although the owner has, in the charter-party, reserved a lien for subfreight, the shipper is protected by payment to the charterer where he has no notice of the owner's lien. *American Steel Barge Co. v. Chesapeake, etc., Coal Agency Co.*, (C. C. A.) 115 Fed. Rep. 669.

**260.** 4. *Consignor's Liability Not Terminated by Delivery of Goods.* — *Portland Flouring Mills Co. v. British, etc., Marine Ins. Co.*, (C. C. A.) 130 Fed. Rep. 860.

**265.** 3. *When a Bill of Lading Is Signed by the Master as Agent of the Shipowners*, they may sue the indorsee of the bill of lading for freight due thereon. *Wastwater Steamship Co. v. Neale*, 86 L. T. N. S. 266.

**267.** 2. *Maritime Lien.* — *American Steel Barge Co. v. Chesapeake, etc., Coal Agency Co.*, (C. C. A.) 115 Fed. Rep. 669.

**268.** 1. *Lien of General Owner as Against Persons Other than the Charterer.* — *Wastwater Steamship Co. v. Neale*, 86 L. T. N. S. 266; *American Steel Barge Co. v. Chesapeake, etc., Coal Agency Co.*, (C. C. A.) 115 Fed. Rep. 669, affirming 107 Fed. Rep. 964.

**269.** 2. "If the Shipper Knew that There Was a Charter-party, and had an opportunity of reading it, and did not trouble himself about it, he might be treated as knowing its contents." *Turner v. Haji Goolam Mahomed Azam*, (1904) A. C. 826.

**272.** 3. *When the Charterer Has the Lien.* — See *American Steel Barge Co. v. Chesapeake, etc., Coal Agency Co.*, (C. C. A.) 115 Fed. Rep. 669.

4. *Shipowner's Lien for Subfreight.* — A lien for subfreight given to a shipowner by a charter-party can be exercised only before the subfreight has been paid to the charterer or his agent. The lien confers no right on the shipowner to follow the money after it has been so paid. *Tagart v. Fisher*, (1903) 1 K. B. 391.

**274.** 1. *Waiver of Lien Does Not Relieve Shipper's Liability.* — *Portland Flouring Mills Co. v. British, etc., Marine Ins. Co.*, (C. C. A.) 130 Fed. Rep. 860, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 276 [274].

3. *Place of Payment and Delivery Different.* — *The Moringen*, 68 Fed. Rep. 996.

**276.** 8. *No Lien When No Stipulation.* — *The Ripon City*, (C. C. A.) 102 Fed. Rep. 176.



- 277.** *c.* FOR ADVANCE FREIGHT. — See note 2.  
**278.** *c.* FOR DEMURRAGE. — See note 1.  
**2.** Lien of the Shipper. — See note 6.  
**279.** **3.** When Liens Take Effect — *a.* IN GENERAL. — See note 1.  
**281.** **X.** DISSOLUTION AND EXCUSES FOR NONPERFORMANCE — **4.** Fraud. — See note 5.  
**283.** **6.** Difficulty or Improbability of Performance as an Excuse. — See note 1.  
**284.** **9.** Effect of War. — See note 1.  
**285.** **13.** Conditions Precedent — *b.* BY CONSTRUCTION OF LAW — (2) *Seaworthiness.* — See note 4.  
**286.** (3) *Situation and Time of Loading and Sailing* — (a) *Stipulations* — *aa.* IN GENERAL. — See note 2.  
**287.** *bb.* ILLUSTRATIONS. — See note 1.  
     To Sail Within Reasonable Time. — See note 4.  
**288.** *cc.* WAIVER. — See note 1.

**277.** **2.** No Lien for Advance Freight. — The Ripon City, (C. C. A.) 102 Fed. Rep. 176.

**278.** **1.** *Signing Bills of Lading Does Not Waive Lien.* — If the lien clause covers a detention in loading as well as in discharging cargo, such lien is not lost by the signing of bills of lading presented to the master for signature, where the bills of lading are subject to the conditions of the charter-party and the charter-party expressly provides that the bills of lading shall be without prejudice to the charter. *Cushing v. McLeod*, 2 N. Bruns. Eq. Rep. 77.

**6.** *Shipper's Lien on Vessel.* — The Astraea, 124 Fed. Rep. 83; The Seaboard, 119 Fed. Rep. 375; The Ripon City, (C. C. A.) 102 Fed. Rep. 176; The New York, 93 Fed. Rep. 495, holding further that the same liability exists against a ship in favor of a charterer where she is chartered to a carrier, and by reason of her unseaworthy condition goods in his custody were damaged, which damages the charterer paid.

**279.** **1.** *Part of Cargo Must Be in the Shipowner's Custody.* — The Energia, 124 Fed. Rep. 842, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 279; The Universe, 108 Fed. Rep. 968; The Hiram, 101 Fed. Rep. 138; The Habil, 100 Fed. Rep. 120; The Georg Dumois, 88 Fed. Rep. 543.

**281.** **5.** *Fraud Renders Contract Unenforceable.* — See Clydesdale Shipowners' Co. v. Wm. W. Brauer Steamship Co., 120 Fed. Rep. 854.

**283.** **1.** *Performance Hazardous.* — Where a cargo of coal was wet by a sea peril and unloaded at an intermediate port, and was in such condition as to make it dangerous for the vessel to reload and transport it for fear of spontaneous combustion, it was held that the master was entitled to terminate the contract. And though by waiting and going to a considerable expense the cargo could be put into shape for such reshipment, the master was not bound to do so where the expense involved would be out of proportion to the value of the cargo. *The Savona*, (1900) P. 252.

**284.** **1.** *War Between Country of Ship and Country of Destination Necessary.* — *Graves v. Miami Steamship Co.*, (Supm. Ct. App. T.) 29 Misc. (N. Y.) 645, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 284.

*Contraband Cargo.* — Though the vessel does not belong to one of the belligerent powers,

if the cargo is contraband and is to be delivered into a port of one of the belligerents and there is probability of capture, it is the right and duty of the master to refuse to proceed with the voyage. *The Styria*, 93 Fed. Rep. 474.

**285.** **4.** *Seaworthiness a Condition Precedent.* — *Ronalds v. Leiter*, (C. C. A.) 109 Fed. Rep. 905.

**286.** **2.** *Stipulation as to Time and Place — Conditions Precedent.* — *Midland Nav. Co. v. Dominion Elevator Co.*, 34 Can. Sup. Ct. 578, affirming 6 Ont. L. Rep. 432.

To Proceed "with All Possible Dispatch." — See *Giuseppe v. Manufacturers' Export Co.*, 124 Fed. Rep. 663.

*Stipulation as to Place of Unloading Before Voyage Not a Condition Precedent.* — See *Giuseppe v. Manufacturers' Export Co.*, 124 Fed. Rep. 663.

*Cancellation for Stoppage in Loading.* — Where a charter-party provided that the vessel should "be loaded in one hundred and forty running hours, commencing when written notice is given of steamer being completely discharged of inward cargo and ballast in all her holds, and ready to load," and further provided that in the event of a stoppage arising from strikes "continuing for a period of six running days from the time of the vessel being ready to load, this charter shall become null and void, provided, however, that no cargo shall have been shipped on board the steamer previous to such stoppage," and a stoppage arising from a strike commenced and continued for six days, at a time when no cargo had been shipped, but nearly two weeks after the vessel was ready to load, and the charterers gave notice that the charter was canceled, it was held that the charter-party contemplated a stoppage in existence at the beginning of the loading time, and that the charterers were not entitled to cancel the charter upon stoppage at a later period. *Steel v. Grand Canary Coaling Co.*, 90 L. T. N. S. 720, reversing 87 L. T. N. S. 321.

**287.** **1.** *Midland Nav. Co. v. Dominion Elevator Co.*, 34 Can. Sup. Ct. 578, affirming 6 Ont. L. Rep. 432.

**4.** *Where There Is No Stipulation in the charter-party as to time, the law implies a stipulation that there shall be no unreasonable or unusual delay in commencing the voyage.* *Giuseppe v. Manufacturers' Export Co.*, 124 Fed. Rep. 663.

**288.** **1.** *Waiver of Conditions Precedent.* —

**288.** *dd.* TIME OF ESSENCE IN A TIME CHARTER. — See note 2.

*ee.* EFFECT OF EXCEPTIONS. — See note 3.

(b) IMPLIED OBLIGATION AS TO LOADING AND SAILING. — See note 6.

**289.** Delay for Repairs. — See note 2.

**291.** **XI. MEASURE OF DAMAGES** — 1. In General. — See note 1.

Cargo Lost. — See note 2.

Cargo Damaged. — See note 3.

**292.** Delivery Delayed. — See note 1.

Failure or Refusal to Carry. — See note 2.

**293.** 2. Vessel Chartered — *a.* AMOUNT RECOVERABLE BY THE CHARTERER — Increased Freight. — See note 2.

**294.** *b.* AMOUNT RECOVERABLE BY THE SHIPOWNER — (1) *Nonperformance, Total or Partial.* — See note 2.

**295.** (2) *Diminution of Damages* — (*a*) General Rule. — See note 3.

**296.** (*b*) Obtaining Other Cargo — *bb.* TIME OF WAITING FOR ORIGINAL CARGO. — See note 4.

**297.** *c.* LIQUIDATED DAMAGES. — See note 1.

**298.** **XII. JURISDICTION.** — See note 1.

*Bonanno v. Tweedie Trading Co.*, 117 Fed. Rep. 991, *affirmed* (C. C. A.) 130 Fed. Rep. 448.

**288.** 2. *Rosasco v. Pitch Pine Lumber Co.*, 121 Fed. Rep. 437.

3. Failure to Be at Port of Lading Due to Excepted Peril. — *The Hercules*, 129 Fed. Rep. 945, *affirmed* (C. C. A.) 134 Fed. Rep. 705.

6. Not Generally a Condition Precedent. — *Rosasco v. Pitch Pine Lumber Co.*, 121 Fed. Rep. 437. See also *M'Keen v. Davis Coke, etc.*, Co., 110 Fed. Rep. 576.

**289.** 2. *The Hercules*, 129 Fed. Rep. 945, *affirmed* (C. C. A.) 134 Fed. Rep. 705.

**291.** 1. Damage by Sea Peril and Fault of Ship. — Where it is impossible to determine the extent of the various items of damage, caused partly by sea peril and partly by fault of the vessel, the whole damage will be equally divided between the ship and the owner of the cargo. *The Musselcrag*, 125 Fed. Rep. 787.

2. Loss of Cargo. — *The Oneida*, (C. C. A.) 128 Fed. Rep. 687.

Where There Is No Evidence of the Market Value at the port of destination, the market value at the port of shipment may be taken, for it will be presumed that the market value there will not exceed such value at the port of destination. *The Protection*, (C. C. A.) 102 Fed. Rep. 516.

3. Freight Paid to a carrier for transporting goods is not recoverable after their delivery in a damaged condition. *The Styria*, 95 Fed. Rep. 698.

**292.** 1. Delay in Delivery. — *Dunn v. Bucknell*, (1902) 2 K. B. 614; *The Styria*, (C. C. A.) 101 Fed. Rep. 728, *modified* 186 U. S. 1.

2. When Nonfulfilment of Shipper's Contract Not Due to Delay. — In an action by the charterer for damages for an admitted breach of contract arising from the failure of the shipowner to provide a ship in August or September as required by the charter-party, where it appeared that the charterer's contract with his customer stipulated that delivery should be made in August or September, but that the shipowner had no notice of such contract, and where it further appeared that the charterer had paid to his customer the loss resulting under the contract of sale — that is, the difference be-

tween the contract price of the goods and the price at which they had been bought by the charterer at the port of shipment — it was held that the charterer was not entitled to recover his loss under the contract of sale, as the breach thereof was not caused by the shipowner's breach of his contract, and that the only damages recoverable were for storage and other charges caused by the delay. *Strome Bruks Aktie Bolag v. Hutchison*, Sc. Ct. of Sess. 6 F. 486.

**293.** 2. Expected Profits. — The charterer cannot recover for the profits he would have made upon a recharter of the vessel agreed upon before the making of the original charter of which the shipowner had no knowledge. *Richard v. Holman*, 123 Fed. Rep. 734.

**294.** 2. Damages for Failure to Furnish Stipulated Cargo. — *McNear v. Leblond*, (C. C. A.) 123 Fed. Rep. 384, *affirming* 104 Fed. Rep. 826; *Johnson v. D. H. Bibb Lumber Co.*, 140 Cal. 95.

Short Cargo Fault of Ship. — Where the master has loaded an unnecessary quantity of coal, thereby making it impossible for the charterer to carry a full cargo, the ship cannot recover for dead freight. *Tweedie Trading Co. v. New York, etc., Dyewood Co.*, 118 Fed. Rep. 492, *affirmed* (C. C. A.) 127 Fed. Rep. 278.

**295.** 3. Damages Lessened by Earnings. — *McNear v. Leblond*, (C. C. A.) 123 Fed. Rep. 384; *William H. Beard Dredging Co. v. Hughes*, (C. C. A.) 121 Fed. Rep. 808; *Cornwell v. Moore*, 125 Fed. Rep. 646, 132 Fed. Rep. 868.

**296.** 4. Right to Observe Lay Days. — The ship is not bound to accept employment, although offered, prior to the expiration of the lay days. *Cornwall v. Moore*, 132 Fed. Rep. 868.

**297.** 1. Illustrations. — Where a charter-party provided that the value of the vessel (a yacht) for the purposes of the charter-party should be a sum stated, and that the charterer should give security to that amount to pay for all losses which might occur to the vessel, the charterer was held liable to the extent of the amount so named, upon a failure to redeliver the yacht as provided in the contract. *Sun Printing, etc., Assoc. v. Moore*, 183 U. S. 642.

**298.** 1. *Dunbar v. Weston*, 93 Fed. Rep. 472.

# CONTRACTS OF HIRE (LAW OF BAILMENTS).

By L. C. BOEHM.

## 300. II. CONTRACTS OF HIRE GENERALLY — 2. Essentials of the Contract —

*a.* GENERALLY. — See note 3.

**302. 3. Standard of Diligence Required of the Bailee — *a.* DUTY TO USE ORDINARY CARE.** — See note 1.

Negligence a Question for Jury. — See note 3.

Act of God — Irresistible Force. — See note 4.

**303. Special Contract.** — See note 1.

*b.* NEGLIGENCE — BURDEN OF PROOF — Burden of Proof Rests upon Bailor. — See notes 2, 3.

**304. Contrary Doctrine.** — See note 1.

4. Character of the Bailee's Possession. — See note 3.

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**306. III. THE SEVERAL KINDS OF CONTRACTS OF HIRE — 2. Hire of Things — *b.* RIGHTS AND OBLIGATIONS OF THE PARTIES — (1) *Of the Letter* —**

(*a*) Rights of the Letter — *bb.* AGAINST THIRD PERSONS. — See note 4.

(*b*) Duties and Obligations of the Letter — *aa.* IN GENERAL. — See note 5.

*bb.* WARRANTY OF THING HIRED. — Of Character and Condition. — See note 6.

**300. 3. Bailments Interpreted by Rule of Contracts.** — New York, etc., *R. Co. v. New Jersey Electric R. Co.*, 60 N. J. L. 338, *affirmed* 61 N. J. L. 287.

**302. 1. Bailee Must Exercise Ordinary Care.** — Booth *v.* New York, 127 Fed. Rep. 459; Union Compress Co. *v.* Nunnally, 67 Ark. 284; Strong *v.* Morgan, 8 Idaho 269; Standard Brewery *v.* Bemis, etc., Malting Co., 171 Ill. 602, *affirming* 70 Ill. App. 363; Saunders *v.* Hartsook, 85 Ill. App. 55; Dailey *v.* Black, 92 Mo. App. 228; Sulpho-Saline Bath Co. *v.* Allen, 66 Neb. 295; New York, etc., *R. Co. v. New Jersey Electric R. Co.*, 60 N. J. L. 338, *affirmed* 61 N. J. L. 287; Moeran *v.* New York Poultry, etc., Assoc., (Supm. Ct. App. T.) 28 Misc. (N. Y.) 537.

3. Negligence a Question for Jury. — Southern Pac. Co. *v.* Von Schmidt Dredge Co., 118 Cal. 368; Bradbury *v.* Lawrence, 91 Me. 457; McKenna *v.* Walker, 85 Mo. App. 570; Hoffman *v.* Coughlin, (Supm. Ct. App. T.) 26 Misc. (N. Y.) 24; Whalen *v.* New York, etc., Electric Co., 63 N. Y. App. Div. 615.

4. Loss by Act of God. — Booth *v.* New York, 127 Fed. Rep. 459; Rapid Safety Fire Extinguisher Co. *v.* Hay-Budden Mfg. Co., (Supm. Ct. App. T.) 37 Misc. (N. Y.) 556.

**303. 1. Special Contract.** — Stipulations in a charter lessening the hirer's liability are not void as against public policy. McCormick *v.* Shippy, 119 Fed. Rep. 226, *affirmed* (C. C. A.) 121 Fed. Rep. 48.

2. Burden of Proving Negligence Rests upon Bailor. — W. H. Beard Dredging Co. *v.* Hughes, 113 Fed. Rep. 680; International Contracting Co. *v.* Walsh, 115 Fed. Rep. 851; James *v.* Orrell, 68 Ark. 284, 82 Am. St. Rep. 293; Pusey *v.* Webb, 2 Penn. (Del.) 490; Bradbury *v.* Lawrence, 91 Me. 457; Hislop *v.* Ordner, 28 Tex. Civ. App. 540.

3. Bailee Must Account for Loss or Injury of Thing Bailed. — Pusey *v.* Webb, 2 Penn. (Del.) 490; Rothoser *v.* Cosel, (Supm. Ct. App. T.) 39 Misc. (N. Y.) 337. Compare Stearns *v.* Farrand, (Supm. Ct. App. T.) 29 Misc. (N. Y.) 292; Rutherford *v.* Krause, 55 N. Y. App. Div. 210; Lyons *v.* Thomas, (Supm. Ct. App. T.) 34 Misc. (N. Y.) 175.

**304. 1. Contrary Doctrine — Alabama.** — Cartlidge *v.* Sloane, 124 Ala. 596.

Georgia. — Massillon Engine, etc., Co. *v.* Akerman, 110 Ga. 570; Concord Variety Works *v.* Beckham, 112 Ga. 242.

Illinois — Brewster *v.* Weir, 93 Ill. App. 588. Missouri. — Dixon *v.* McDonnell, 92 Mo. App. 479.

Nebraska. — Sulpho-Saline Bath Co. *v.* Allen, 66 Neb. 295.

Wisconsin. — See Hildebrand *v.* Carroll, 106 Wis. 324, 80 Am. St. Rep. 29.

3. Bailee May Sue for Violation of Possession. — Chicago *v.* Pennsylvania Co., (C. C. A.) 119 Fed. Rep. 497.

**305. 1. Property Bailed Belongs to Bailor.** — Keith *v.* De Bussigney, 179 Mass. 255; New York, etc., *R. Co. v. New Jersey Electric R. Co.*, 60 N. J. L. 338, *affirmed* 61 N. J. L. 287.

**306. 4. Permanent Injury.** — New York, etc., *R. Co. v. New Jersey Electric R. Co.*, 60 N. J. L. 338, *affirmed* 61 N. J. L. 287, supporting generally the whole text paragraph.

5. Nisbet *v.* Wells, 76 S. W. Rep. 120, 25 Ky. L. Rep. 511.

6. Warranty of Thing Hired. — Moriarty *v.* Porter, (N. Y. City Ct. Gen. T.) 22 Misc. (N. Y.) 536.

Injury to Third Person. — Where the defendant had supplied sacks to the plaintiffs for the purpose of being used in unloading a cargo of peas from a ship, and one of the sacks, while it was being hoisted full of peas from the hold



**308.** (2) *Of the Hirer* — (a) *Rights of the Hirer* — Right to Possession and Enjoyment. — See note 2.

**309.** *Hirer Cannot Sell.* — See note 1.

(b) *Duties and Liabilities of the Hirer* — *aa. IN GENERAL.* — See note 2.

*bb. DUTY TO EXERCISE ORDINARY CARE.* — See note 3.

**310.** *Duty of Hirer of a Horse.* — See note 1.

**312.** *dd. HIRER TRANSCENDING CONTRACT OF HIRE.* — See note 4.

**313.** See note 1.

*ee. DUTY TO PAY PRICE OF HIRE.* — See note 2.

**314.** *ff. DUTY TO RETURN THING HIRED.* — See note 1.

*Redelivery Impossible.* — See note 3.

**315.** *gg. LIABILITY OF HIRER FOR ACTS OF AGENTS.* — See note 1.

*c. TERMINATION OF THE CONTRACT.* — See note 3.

**316.** *Breach Terminates Contract.* — See note 1.

of the ship, broke and fell and injured a man who was engaged in the work, and the injured man recovered damages and costs from the plaintiffs, and it appeared that the sack in question, when supplied by the defendant, was unfit for the purpose for which it was hired, it was held that the plaintiffs were entitled to recover, as damages for breach of warranty, the damages and costs which they had been compelled to pay to the person injured. *Vogan v. Oulton*, 81 L. T. N. S. 435, following *Mowbray v. Merryweather*, (1895) 2 Q. B. 646.

**308. 2. Hirer's Right of Action Against Third Persons.** — *The Winkfield*, (1902) P. 42, 85 L. T. N. S. 668, 50 W. R. 246, holding further that "in an action against a stranger for loss of goods caused by his negligence, the bailee in possession can recover the value of the goods, although he would have had a good answer to an action by the bailor for damages for the loss of the thing bailed."

**309. 1. Hirer Cannot Sell Thing Hired.** — *Detroit F. & M. Ins. Co. v. Hartz*, 132 Mich. 518; *New York, etc., R. Co. v. New Jersey Electric R. Co.*, 60 N. J. L. 338, affirmed 61 N. J. L. 287.

**2. General Duties of Hirer.** — *Gannon v. Consolidated Ice Co.*, (C. C. A.) 91 Fed. Rep. 539.

**3. Hirer Bound to Use Ordinary Care.** — *Sanderson v. Collins*, (1904) 1 K. B. 628.

**Hirer Not Liable for Loss Not Imputable to His Negligence.** — *New York, etc., R. Co. v. New Jersey Electric R. Co.*, 60 N. J. L. 338, affirmed 61 N. J. L. 287.

**310. 1. Hirer of Horse Must Use Ordinary Care.** — *Bradbury v. Lawrence*, 91 Me. 457.

**Duty of Letter to Warn Hirer of Risks.** — In an action by a livery-stable keeper to recover damages for the loss of a horse and sleigh which he had let to a person who was a stranger in the locality, and which were lost by falling through the ice while crossing a river, where it appeared that the plaintiff was not only aware that the defendant intended to make use of the road over the ice, but also gave directions as to the course he should take, it was held that the plaintiff was not entitled to recover, as it was incumbent on him to warn the defendant of any circumstances which might render his journey dangerous, and that he must be taken to have contemplated the risks incident to the journey, of which the accident that happened was one. *McKenzie v. Lewis*, 31 Nova Scotia 408.

**312. 4. If the Hirer of a Horse.** — *Cartlidge v. Sloane*, 124 Ala. 596; *Evertson v. Frier*, (Tex. Civ. App. 1898) 45 S. W. Rep. 201; *Cochran v. Walker*, (Tex. Civ. App. 1899) 49 S. W. Rep. 403. See also *Whalen v. New York, etc., Electric Co.*, 63 N. Y. App. Div. 615.

If the hirer in driving to the point contracted for makes immaterial variations from the general course, he does not thereby incur any liability. *Young v. Muhling*, 48 N. Y. App. Div. 617.

**313. 1. Misuser of Thing Hired Is Conversion.** — *Cartlidge v. Sloane*, 124 Ala. 596; *Ledbetter v. Thomas*, 130 Ala. 299.

**2. The Burden Is on the Bailee to prove**, when sued for the use of a horse, that he was to have the use for the keep of the horse. *Palmer v. Smith*, 76 Conn. 210.

**314. 1. Duty to Redeliver.** — *New York, etc., R. Co. v. New Jersey Electric R. Co.*, 60 N. J. L. 338, affirmed 61 N. J. L. 287.

**Where the Hirer Refuses to Redeliver.** — *Bain v. Ganzer*, 74 N. Y. App. Div. 621.

**Conversion Is Misdemeanor.** — *State v. Sienkiewicz*, 4 Penn. (Del.) 59.

**3. Moore v. Sun Printing, etc., Assoc.**, (C. C. A.) 101 Fed. Rep. 591, affirmed 183 U. S. 642.

**315. 1. Hirer Liable for Acts of Agents.** — *Cannon v. Consolidated Ice Co.*, (C. C. A.) 91 Fed. Rep. 539; *New York, etc., R. Co. v. New Jersey Electric R. Co.*, 60 N. J. L. 338, affirmed 61 N. J. L. 287.

**Servant Acting Outside Scope of Employment.** — The bailee of a chattel for hire is not, in the absence of want of due care on his part, liable to the bailor for damage to the chattel caused by the tortious act of the bailee's servant while acting outside the scope of his employment. *Sanderson v. Collins*, (1904) 1 K. B. 628, applying the rule where the bailee's coachman surreptitiously took a hired carriage out for his own purposes and through his negligent driving injured the carriage.

**3. Contract Terminated by Accomplishment of Object.** — *New York, etc., R. Co. v. New Jersey Electric R. Co.*, 60 N. J. L. 338, affirmed 61 N. J. L. 287.

**Contract Terminated by Mutual Agreement.** — *New York, etc., R. Co. v. New Jersey Electric R. Co.*, 60 N. J. L. 338, affirmed 61 N. J. L. 287.

**316. 1. Breach of Contract by Hirer Terminates Bailment.** — *New York, etc., R. Co. v. New Jersey Electric R. Co.*, 60 N. J. L. 338, affirmed 61 N. J. L. 287.

**316. 3. Hire of Labor and Services—***b. RIGHTS, DUTIES, AND OBLIGATIONS OF THE PARTIES—*(2) *Of the Bailee—*(a) *Rights of the Bailee—**aa. RIGHT TO POSSESSION.*—See note 7.

**317.** *bb. RIGHT TO LIEN.*—See note 2.

**318. Waiver of Lien.**—See notes 1, 2.

(b) *Duties and Obligations of the Bailee—**bb. DUTY TO EXERCISE ORDINARY CARE.*  
—See note 4.

**319. Liability for Acts of Servants.**—See note 2.

*cc. RESPONSIBILITY FOR SKILL—*(aa) *When Professing Skill.*—See note 3.

**322. 4. Hire of Custody.**—See note 1.

**316. 7. A Bailee May Demand by Opposition** *Afin d'Annuler*, in *Quebec*, that a seizure of goods in his possession as bailee—as skins given a tanner to be tanned—should be set aside. *Latouche v. Leclerc*, 17 *Quebec Super. Ct.* 181.

**317. 2. Right to Lien.**—*Burrow v. Fowler*, 68 *Ark.* 178; *Knapp v. McCaffrey*, 178 *Ill.* 107, 69 *Am. St. Rep.* 290; *Zartman-Thalman Carriage Co. v. Reid*, 99 *Mo. App.* 415; *Drummond Carriage Co. v. Mills*, 54 *Neb.* 417, 69 *Am. St. Rep.* 719; *Becker v. Brown*, 65 *Neb.* 264; *Gorman v. Williams*, (*Supm. Ct. App. T.*) 26 *Misc. (N. Y.)* 776; *Robinson v. Young*, 51 *N. Y. App. Div.* 603; *Henderson v. Mahoney*, 31 *Tex. Civ. App.* 539; *Lambert v. Nicklass*, 45 *W. Va.* 527, 72 *Am. St. Rep.* 828.

**No Lien on One Article for Charges on Another.**—*Cotta v. Carr*, (*Supm. Ct. App. T.*) 27 *Misc. (N. Y.)* 545.

**Possession Necessary.**—No lien exists where the workman acquires no exclusive possession, as where he is employed to convert trees into railroad ties on the land of the employer. Such a contract is one of employment, and is not a bailment. *Atlantic Coast Line R. Co. v. Baker*, 118 *Ga.* 809.

**Cleaning a Wagon and Harness** is not such labor as will give an artisan's lien at common law. "That lien attaches only to chattels which have been improved, or the value of which has been enhanced, by the labor employed." *Robinson v. Kaplan*, (*Supm. Ct. App. T.*) 21 *Misc. (N. Y.)* 686.

**318. 1. Forfeiture of Lien by Delivery of Property.**—*Burrow v. Fowler*, 68 *Ark.* 178; *Gorman v. Williams*, (*Supm. Ct. App. T.*) 26 *Misc. (N. Y.)* 776; *Darling v. Hunt*, 46 *N. Y. App. Div.* 631.

**Involuntary Loss of Possession.**—Where an officer with a levy of execution against goods in

charge of a livery-stable keeper demanded the goods, but the liveryman refused on the ground that he himself had a prior lien, and the officer came afterwards and took the goods when the liveryman was away, the latter was held not to have waived his lien. *Shue v. Ingle*, 87 *Ill. App.* 522.

**2. Assertion of Claim Inconsistent with Lien Acts as Waiver.**—*Viley v. Lockwood*, 102 *Tenn.* 426.

**Lien Not Waived by Attachment.**—*Lambert v. Nicklass*, 45 *W. Va.* 527, 72 *Am. St. Rep.* 828.

**4. Bailee Must Exercise Ordinary Care.**—*Pusey v. Webb*, 2 *Penn. (Del.)* 490; *May v. Georger*, (*Supm. Ct. App. T.*) 21 *Misc. (N. Y.)* 622.

**Loss Caused by Bailor.**—Where a loss occurred through a defect in a machine which the bailor compelled the bailee to use, it was held that the bailor could not set off such loss in an action by the bailee for his compensation. *Vroman v. Kryn*, (*Supm. Ct. App. T.*) 86 *N. Y. Supp.* 94.

**319. 2. Bailee Liable for Acts of Servants.**—*Pusey v. Webb*, 2 *Penn. (Del.)* 490.

**3. Workman Answerable for Skill.**—*Pusey v. Webb*, 2 *Penn. (Del.)* 490, applying the rule to the case of a blacksmith shoeing a horse.

**322. 1. World's Fair Liable for Destruction of Exhibit After Close of Fair.**—*French Republic v. World's Columbian Exposition*, 83 *Fed. Rep.* 109, *reversed* (*C. C. A.*) 91 *Fed. Rep.* 64.

**Compensation of Herder—Action.**—Where the bailor of cattle took possession of them and sold them, as he was authorized to do by the agreement, without paying the bailee and without his consent, it was held that the latter could not recover in trespass, but must sue for breach of the agreement. *Sheaffer v. Sensenig*, 182 *Pa. St.* 634.

# CONTRIBUTION AND EXONERATION.

BY JOHN SIMPSON.

## 326. II. GENERAL PRINCIPLES — 1. Of Contribution — Foundation of Doctrine.

— See note 4.

**327.** Relations to Which Applicable. — See note 1.

**328.** See note 5.

Jurisdiction in Equity and at Law. — See note 7.

**329.** See note 1.

**330.** See note 1.

## 2. Of Exoneration — This Right May Arise. — See note 7.

**326. 4. Basis of Doctrine — Equality Is Equity**—*United States*. — *Springs v. Brown*, 97 Fed. Rep. 405.

*California*. — *Bunker v. Osborn*, 132 Cal. 480; *Williams v. Riehl*, 127 Cal. 365, 78 Am. St. Rep. 60.

*Indiana*. — *Springer v. Foster*, 27 Ind. App. 15; *Norris v. Churchill*, 20 Ind. App. 668.

*Massachusetts*. — *Weeks v. Parsons*, 176 Mass. 570; *McBride v. Potter-Lovell Co.*, 169 Mass. 7, 61 Am. St. Rep. 265.

*Missouri*. — *Jacobsmeier v. Jacobsmeier*, 88 Mo. App. 102; *Dysart v. Crow*, 170 Mo. 275.

*Montana*. — *Merchants Nat. Bank v. Great Falls Opera House Co.*, 23 Mont. 33, 75 Am. St. Rep. 499; *Northwestern Nat. Bank v. Great Falls Opera House Co.*, 23 Mont. 1.

*Nebraska*. — *Pawnee City First Nat. Bank v. Avery Planter Co.*, (Neb. 1903) 95 N. W. Rep. 622.

*New York*. — *Kimball v. Williams*, 51 N. Y. App. Div. 616.

*North Carolina*. — *Smith v. Carr*, 128 N. Car. 150; *Pully v. Pass*, 123 N. Car. 168.

*Ohio*. — *Robinson v. Boyd*, 60 Ohio St. 57.

*Oklahoma*. — *Strickler v. Gitchel*, 14 Okla. 523.

*Oregon*. — *Thompson v. Dekum*, 32 Oregon 506.

*Pennsylvania*. — *Reber's Estate*, 15 Pa. Super. Ct. 122.

*Texas*. — *Merchants' Nat. Bank v. McAnulty*, 89 Tex. 124.

*Virginia*. — *Tate v. Winfree*, 99 Va. 255.

**Right to Contribution Depends on Intention of Parties.** — "The right of contribution depends, according to the better view, on a broad principle of equity, \* \* \* though it has sometimes been regarded as based on an implied contract. In either case, the question is one of intention, and \* \* \* evidence may be given for the purpose of showing that the equity ought not to be applied, or that the intention ought not to be inferred." *Re Bentinck*, 80 L. T. N. S. 71.

**327. 1. Several Principal Debtors**—*Alabama*. — *Truss v. Miller*, 116 Ala. 494.

*Arkansas*. — *Wilks v. Vaughan*, (Ark. 1904) 83 S. W. Rep. 913.

*Indiana*. — *Norris v. Churchill*, 20 Ind. App. 668.

*Kentucky*. — *Graziani v. Hall*, (Ky. 1902) 67 S. W. Rep. 9; *Greene v. Anderson*, 102 Ky. 216.

*Missouri*. — *Jacobsmeier v. Jacobsmeier*, 88 Mo. App. 102.

*New York*. — *Kimball v. Williams*, 51 N. Y. App. Div. 616.

*North Carolina*. — *Pully v. Pass*, 123 N. Car. 168.

*Pennsylvania*. — *Power v. Rees*, 189 Pa. St. 496.

**Illustration.** — Where the notes of several parties in the hands of a common agent for sale were wrongfully pledged for the agent's debt, the makers are liable in contribution to each other. *McBride v. Potter-Lovell Co.*, 169 Mass. 7, 61 Am. St. Rep. 265.

**328. 5. Not Restricted to Particular Relations.** — *Barnes v. Cushing*, 43 N. Y. App. Div. 158, reversed 168 N. Y. 542.

**7. Administered on Equitable Principles.** — *Hinshaw v. Austin*, 64 Kan. 460.

**Right to Jury Trial.** — Defendants are not entitled to a jury as a matter of right. *Merrill v. Prescott*, 67 Kan. 767.

**Where One Becomes Surety at the Other's Request,** that alone is not sufficient to release him from liability, though such a request is a good consideration for a promise of indemnity. *Bishop v. Smith*, (N. J. 1904) 57 Atl. Rep. 874, quoting 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 329.

**329. 1. Jurisdiction in Courts of Law**—*Illinois*. — *Porter v. Horton*, 80 Ill. App. 333.

*Indiana*. — *Norris v. Churchill*, 20 Ind. App. 668.

*New Hampshire*. — *Weston v. Elliott*, 72 N. H. 433.

*New York*. — *Egbert v. Hanson*, (Supm. Ct. Tr. T.) 34 Misc. (N. Y.) 596.

*Oregon*. — *Thompson v. Hibbs*, 45 Oregon 141; *Thompson v. Dekum*, 32 Oregon 506.

*Wisconsin*. — *Boutin v. Etsell*, 110 Wis. 276.

**330. 1. Equitable Jurisdiction Still Exists.** — *Washington v. Norwood*, 128 Ala. 383; *McDavid v. McLean*, 202 Ill. 354; *Huber v. Hess*, 191 Ill. 305; *Dysart v. Crow*, 170 Mo. 275; *Weston v. Elliott*, 72 N. H. 433; *Thompson v. Hibbs*, 45 Oregon 141; *Fischer v. Gaither*, 32 Oregon 161.

**7. Vendee Assuming Mortgage.** — See also the title SURETYSHIP, vol. 27, p. 433.



**331. III. APPLICATION TO PARTICULAR RELATIONS — 1. Contribution and Exoneration Between Sureties and Principal — a. CONTRIBUTION BETWEEN COSURETIES — (1) *General Principles.* — See note 1.**

**Foundation of Right.** — See note 2.

**332. (2) *When the Right Accrues* — Liability of Surety's Estate. — See note 3. Remedy Against Cosurety Before Payment. — See notes 4, 5.**

**333. See note 1.**

**(3) *Incidents of the Right* — (a) Different Instruments, but the Same Obligation — Suretyship May Be Under Different Instruments. — See note 2.**

**331. 1. The Right of Contribution Between Cosureties.** — Bishop v. Smith, (N. J. 1904) 57 Atl. Rep. 874, quoting 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 331.

**2. Basis of Right — England.** — Greenwood v. Francis, (1899) 1 Q. B. 312, 68 L. J. Q. B. 228, 79 L. T. N. S. 624, 47 W. R. 230.

**Colorado.** — McAllister v. Irwin, 31 Colo. 254. **Illinois.** — Burgett v. Streat, 85 Ill. App. 72; Porter v. Horton, 80 Ill. App. 333.

**Indiana.** — Norris v. Churchill, 20 Ind. App. 668.

**Kansas.** — Merrill v. Prescott, 67 Kan. 767. **Kentucky.** — Bottoms v. Leonard, (Ky. 1899) 53 S. W. Rep. 273.

**Montana.** — Northwestern Nat. Bank v. Great Falls Opera House Co., 23 Mont. 1. **New Hampshire.** — Weston v. Elliott, 72 N. H. 433.

**New Jersey.** — Bishop v. Smith, (N. J. 1904) 57 Atl. Rep. 874, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 331.

**New York.** — Kimball v. Williams, 51 N. Y. App. Div. 616.

**North Carolina.** — McDowell County v. Nichols, 131 N. Car. 501, 92 Am. St. Rep. 785.

**Ohio.** — Daum v. Kehnast, 9 Ohio Cir. Dec. 867.

**Oregon.** — Ladd v. Chamber of Commerce, 37 Oregon 60; Fischer v. Gaither, 32 Oregon 161; Thompson v. Dekum, 32 Oregon 506.

**Texas.** — Mateer v. Cockrill, 18 Tex. Civ. App. 391.

**Washington.** — Belond v. Guy, 20 Wash. 160. **West Virginia.** — Hood v. Morgan, 47 W. Va. 817.

**332. 3. Estate of Deceased Cosurety Liable** — Colorado. — McAllister v. Irwin, 31 Colo. 254.

**Kentucky.** — Hudson v. Combs, 110 Ky. 762; Swift v. Donohue, 104 Ky. 137.

**Michigan.** — Meeske v. Pfenning, 120 Mich. 474.

**New York.** — Egbert v. Hanson, (Supm. Ct. Tr. T.) 34 Misc. (N. Y.) 596.

**Pennsylvania.** — Kerr's Estate, 17 Pa. Co. Ct. 193.

But ignorance that the deceased cosurety owned the land against which contribution is sought will not prevent the statute of limitations beginning to run where there is no fraudulent concealment by the heirs. Harris v. Thomas, (Tenn. Ch. 1899) 52 S. W. Rep. 706.

**4. Compelling Contribution in Equity Before Payment.** — Keach v. Hamilton, 84 Ill. App. 413; Thompson v. Dekum, 32 Oregon 506.

**5. Washington v. Norwood, 128 Ala. 383; Whitehouse v. Bolster, 95 Me. 458.**

**333. 1. Action to Recover Defendant's Proportion of Debt — United States.** — Knight v. Weeks, (C. C. A.) 115 Fed. Rep. 970,

**Alabama.** — Washington v. Norwood, 128 Ala. 383; Babcock v. Carter, 117 Ala. 575, 67 Am. St. Rep. 193; Truss v. Miller, 116 Ala. 494.

**California.** — Williams v. Riehl, 127 Cal. 365, 78 Am. St. Rep. 60.

**Iowa.** — Novak v. Dupont, 112 Iowa 334.

**Kentucky.** — Bottoms v. Leonard, (Ky. 1899) 53 S. W. Rep. 273.

**Maryland.** — P. Dougherty Co. v. Gring, 89 Md. 535.

**Minnesota.** — Canosia Tp. v. Grand Lake Tp., 80 Minn. 357.

**New Jersey.** — Bishop v. Smith, (N. J. 1904) 57 Atl. Rep. 874.

**Oregon.** — Ladd v. Chamber of Commerce, 37 Oregon 60, rehearing 37 Oregon 66.

**Pennsylvania.** — Morrison v. Warner, 197 Pa. St. 59.

**Tennessee.** — Mayfield v. McKnight, (Tenn. Ch. 1899) 56 S. W. Rep. 42.

**Texas.** — Mulkey v. Templeton, (Tex. Civ. App. 1901) 60 S. W. Rep. 439.

**Virginia.** — Tate v. Winfree, 99 Va. 255.

**Wisconsin.** — Barth v. Graf, 101 Wis. 27.

In an action against several co-obligors, a judgment against one only does not bar his claim for contribution against the others on paying the judgment. Hoxie v. Farmers, etc., Nat. Bank, 20 Tex. Civ. App. 462.

In Louisiana the sureties have a right on being sued to demand that the creditor shall reduce his demand to the share of each of the sureties. Metropolitan Bank v. Muller, 50 La. Ann. 1278, 69 Am. St. Rep. 475.

**Where Debt Has Been Settled by a Partial Payment.** — Bishop v. Smith, (N. J. 1904) 57 Atl. Rep. 874.

Where a person seeks contribution from another owning land partly covered by a mortgage over the land of both, he must show that he has paid the whole mortgage debt. Springer v. Foster, 27 Ind. App. 15.

**Right of Contribution Inchoate from Date of Original Contract.** — Norris v. Churchill, 20 Ind. App. 668.

In Georgia where the contract does not show the suretyship, a surety on paying part of the debt may maintain an action against a cosurety to compel contribution and have the fact of suretyship adjudicated. Cooper v. Chamblee, 114 Ga. 116.

**2. Liable under Different Instruments — Alabama.** — Carter v. Fidelity, etc., Co., 134 Ala. 369, 92 Am. St. Rep. 41.

**Georgia.** — Snow v. Brown, 100 Ga. 117.

**Massachusetts.** — McBride v. Potter-Lovell Co., 169 Mass. 7, 61 Am. St. Rep. 265.

**Ohio.** — Robinson v. Boyd, 60 Ohio St. 57.

**Oregon.** — Thompson v. Dekum, 32 Oregon 506.

**334.** See note 1.

But the Obligation Must Be the Same. — See notes 2, 4.

**336.** (c) Payment Must Be Compulsory. — See note 2.**337.** But Suit Is Not Necessary. — See note 1.**338.** (d) Payment by Note. — See note 1.

(e) Notice and Demand Not Necessary. — See note 2.

(f) Insolvency of Principal. — See note 3.

**339.** See note 1.

(g) Special Contracts and Parol Proof. — See notes 2, 3.

*Wisconsin.* — *Rudolf v. Malone*, 104 Wis. 470.

Sureties on successive bonds to secure the same official duty are liable to contribute together. *Thompson v. Dekum*, 32 Oregon 506; *Barker v. Boyd*, (Ky. 1903) 71 S. W. Rep. 528.

Where Two Individuals Deposit Securities to Indemnify a surety, each is liable in proportion to the amount of securities he has deposited. *Springs v. Brown*, 97 Fed. Rep. 405.

**334. 1. Contribution Though Cosureties Ignorant of Each Other's Suretyship.** — *Merrill v. Prescott*, 67 Kan. 767; *McBride v. Potter-Lovell Co.*, 169 Mass. 7, 61 Am. St. Rep. 265; *Robinson v. Boyd*, 60 Ohio St. 57; *Thompson v. Dekum*, 32 Oregon 506.

**2. Liability for Separate Obligations Relating to Same Transaction.** — *Novak v. Dupont*, 112 Iowa 334; *Sanders v. Wettermark*, 20 Tex. Civ. App. 175.

In *Barnes v. Cushing*, 43 N. Y. App. Div. 158, the court, quoting 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 334, held that a bond given by a state depository to secure the funds deposited during the current year, and also a balance carried forward from the preceding year, related to a different sum of money from a bond given in the preceding year to secure deposits made during that year; and that, therefore, the sureties on the later bond were not entitled to contribution from the sureties on the earlier bond. The decision in this case was reversed, however, in 168 N. Y. 542, on the ground that, so far as the fund for which the sureties on the later bond were held liable consisted of the balance brought forward from the preceding year, the two bonds secured the same sum of money, and that contribution should have been allowed as to that portion.

**4. Surety Secondarily Liable.** — *In re Denton*, (1904) 2 Ch. 178; *Tittle v. Bennett*, 94 Ga. 405; *Snow v. Brown*, 100 Ga. 117.

**336. 2. Voluntary Payment Not Sufficient.** — *Kentucky.* — *Saulsberry v. Saulsberry*, (Ky. 1904) 82 S. W. Rep. 415.

*Maryland.* — *P. Dougherty Co. v. Gring*, 89 Md. 535.

*Missouri.* — *Taylor v. Planet Property, etc., Co.*, 78 Mo. App. 137.

*Nebraska.* — *Gorder v. Connor*, 56 Neb. 781.

*New York.* — *Wilson v. Sanger*, 57 N. Y. App. Div. 323.

*Ohio.* — *Rurr v. Bates*, 2 Ohio Cir. Dec. 1.

*Oregon.* — *Ladd v. Chamber of Commerce*, 37 Oregon 60.

*Virginia.* — *Downey v. Strouse*, 101 Va. 226.

Judgment Against the Principal is conclusive on the sureties. *Thompson v. Dekum*, 32 Oregon 506.

Judgment Against a Cosurety does not bind a

surety if he had no notice of the suit. *Hood v. Morgan*, 47 W. Va. 817.

**Defendant's Continued Liability Not Essential.** — Release by the creditor to a cosurety will not relieve the latter from liability for contribution. *Morris v. Churchill*, 20 Ind. App. 668.

**337. 1. Surety Need Not Await Suit.** — *Shoemaker v. Wood*, 9 Kulp (Pa.) 436.

**Need Not Interpose Futile Defense.** — The surety is not compelled to interpose a plea of the statute of limitations to a claim when it is clear that the plea would be futile. *Harts v. Latham*, 84 Ill. App. 483.

**Burden of Attaching Judgment Against Sureties.** — In an action for contribution by a surety in a sheriff's bond who has satisfied a judgment, the burden is on the defendant cosurety to show that he had no notice of the action in which the judgment was rendered against the sureties. *Hudson v. Combs*, 110 Ky. 762.

**338. 1. Payment by Note.** — *Greene v. Anderson*, 110 Ky. 762; *Ryan v. Krusor*, 76 Mo. App. 496; *Sloan v. Gibbes*, 56 S. Car. 480, 76 Am. St. Rep. 559; *Bates v. Cain*, 70 Vt. 144.

**Payment by Check.** — Payment by the check of a company of which the surety is a member is a payment entitling him to contribution. *Meeske v. Pfenning*, 120 Mich. 474.

**2. Notice and Demand.** — Demand before suit against a cosurety's representatives may be waived by joining issue. *Hudson v. Combs*, 110 Ky. 762.

**Contribution Between Judgment Debtors.** — *Kansas.* — The notice required by the Kansas Code to be filed by a judgment debtor before claiming the benefit of the judgment in enforcing contribution need not be given where he seeks recourse by a separate action. *Ft. Scott v. Kansas City, etc., R. Co.*, 66 Kan. 610.

**3. Showing Insolvency of Principal.** — **Rule at Law.** — *Fischer v. Gaither*, 32 Oregon 161; *Boutin v. Etsell*, 110 Wis. 276.

Where the Sureties on a Note Have Renewed It, without the signature of the principal, they become joint principals on the new note, and one claiming contributions does not require to prove the insolvency of the principal on the original note. *Graziani v. Hall*, (Ky. 1902) 67 S. W. Rep. 9.

**339. 1. Rule in Equity.** — *Fischer v. Gaither*, 32 Oregon 161.

**2. Express Contract Modifying Prima Facie Relationship.** — *Leeper v. Paschal*, 70 Mo. App. 117; *Strickler v. Gitchel*, 14 Okla. 523; *Rose v. Wollenburg*, 36 Oregon 154.

**Conditional Contract.** — An offer to sign a contract varying the surety's liability upon certain conditions is not binding upon the surety where the conditions have not been performed. *Ladd v. Chamber of Commerce*, 37 Oregon 60.



**340.** (4) *Defenses* — (a) Release to Cosurety. — See note 1.

(b) Release to Principal. — See note 2.

(d) *The Statute of Limitations*. — See notes 4, 5.

**341.** (5) *The Measure of Contribution* — (a) *Insolvency of One Surety*. — See note 1.

**339. 3. Relations of Parties Proved by Parol.** — *Snook v. Munday*, 96 Md. 514; *Bronson v. Marsh*, 131 Mich. 35; *Egert v. Hanson*, (Supm. Ct. Tr. T.) 34 Misc. (N. Y.) 596; *Lyth v. Green*, 21 N. Y. App. Div. 300; *Robinson v. McDowell*, 130 N. Car. 246; *Smith v. Carr*, 128 N. Car. 150, 129 N. Car. 232; *Boren v. Boren*, (Tex. Civ. App. 1902) 68 S. W. Rep. 184.

A Mere Understanding between two sureties as to their proportionate liability under an official bond is not sufficient proof of a contract varying the ordinary rule of contribution. *Rose v. Wollenburg*, 36 Oregon 154.

**340. 1. Release of Cosurety.** — *Weston v. Elliott*, 72 N. H. 433.

Dismissal of an Action for Contribution as to cosureties who had paid their proportion cannot be objected to by the other defendants, whose liability is not thereby increased. *Carter v. Fidelity, etc., Co.*, 134 Ala. 369, 92 Am. St. Rep. 41.

A Compulsory Dismissal of the case against cosureties not objected to by the codefendants cannot be objected to on appeal. *Mateer v. Cockrill*, 18 Tex. Civ. App. 391.

**2. When Surety Releases Principal.** — Sureties who pay off a mortgage and take an assignment of a bond on which they are sureties may give such time for payment as might have been given by the mortgagee without losing their claim for contribution against a cosurety. *Greenwood v. Francis*, (1899) 1 Q. B. 312, 68 L. J. Q. B. 228.

A surety on a bond who takes from the principal a transfer of property, giving an agreement to sell the same and pay the principal the surplus after payment of such sum as the surety is compelled to pay on the bond, does not thereby release a cosurety from contribution, but the transaction is a mere taking of security which will inure to the benefit of both sureties. *Roeder v. Neidermeier*, 112 Mich. 608.

**Depreciation of Security Given by Principal Debtor.** — Where the principal debtor gives his sureties counter-security consisting of a mortgage on real estate, any of the sureties is entitled, after the principal debtor's default, to enforce the security without the consent or concurrence of his cosureties, and it is not an answer to a claim for contribution by one surety who has paid the whole debt that the security has depreciated in value, and that the paying surety has refused to take any steps to enforce it. *Moorhouse v. Kidd*, 25 Ont. App. 221, affirming 28 Ont. 35.

**4. Period of Limitation.** — *Northwestern Nat. Bank v. Great Falls Opera House Co.*, 23 Mont. 1; *Tate v. Winfree*, 99 Va. 255.

**5. The Statute of Limitations Runs from the Payment.** — *Banker v. Osborn*, 132 Cal. 480; *Novak v. Dupont*, 112 Iowa 334; *Northwestern Nat. Bank v. Great Falls Opera House Co.*, 23 Mont. 1; *McCormick v. Sener*, 200 Pa. St. 11; *Faires v. Cockerell*, 88 Tex. 428 (reversing (Tex. Civ. App. 1895) 29 S. W. Rep. 669,

cited in the original note); *Reed v. Sieckenius*, (Tex. Civ. App. 1901) 65 S. W. Rep. 487; *Cathcart v. Bryant*, 28 Wash. 31.

Contribution will not be granted against the heirs of a cosurety ten years after payment though the plaintiff may have been ignorant that the deceased cosurety owned the land. *Harris v. Thomas*, (Tenn. Ch. 1899) 52 S. W. Rep. 706.

In Montana under Code Civ. Pro., § 1242, providing that a surety shall have the benefit of a judgment which he pays, his right to enforce contribution exists as long as the judgment is kept alive. *Northwestern Nat. Bank v. Great Falls Opera House Co.*, 23 Mont. 1.

The remedy under the act is not exclusive, and the surety may take an assignment of the judgment to himself and enforce contribution. *Merchants' Nat. Bank v. Great Falls Opera House Co.*, 23 Mont. 33, 75 Am. St. Rep. 499.

**Where Payment Is Made Before Maturity of a note,** the statute begins to run from the date of maturity. *Truss v. Miller*, 116 Ala. 494.

**When Liability Ascertained.** — Where personal liability was assumed by those to be benefited by the construction of a railroad, to be paid for by subscription, the time began to run when the exact liability of defendants to contribute could be definitely ascertained. *Mateer v. Cockrill*, 18 Tex. Civ. App. 391.

**Cosurety on Administrator's Bond.** — The statute does not commence to run on an action for contribution against a cosurety on an administrator's bond who has conveyed lands to a third party until the final settlement of the administration, although the grantee has been in possession for more than ten years. *Washington v. Norwood*, 128 Ala. 383.

**341. 1. Measure of Contribution — California.** — *Williams v. Riehl*, 127 Cal. 365, 78 Am. St. Rep. 60.

*Illinois.* — *McDavid v. McLean*, 202 Ill. 354, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 341.

*Indiana.* — *Norris v. Churchill*, 20 Ind. App. 668.

*Kansas.* — *Merrill v. Prescott*, 67 Kan. 767. *New Hampshire.* — *Weston v. Elliott*, 72 N. H. 433.

*New Jersey.* — *Bishop v. Smith*, (N. J. 1904) 57 Atl. Rep. 874.

*New York.* — *Kimball v. Williams*, 51 N. Y. App. Div. 616.

*Pennsylvania.* — *Reber's Estate*, 15 Pa. Super. Ct. 122; *Pomeroy v. Sterrett*, 183 Pa. St. 17.

*South Carolina.* — *Sloan v. Gibbes*, 56 S. Car. 480, 76 Am. St. Rep. 559, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 341.

*Texas.* — *Merchants' Nat. Bank v. McNulty*, 89 Tex. 124.

**Rule in Scotland.** — Where there were five sureties who were jointly and severally liable, and two of them paid the debt on default of the principal, and thereafter brought an action against the third surety for relief to the extent



**342.** See note 1.

(b) **Absence from the Jurisdiction.** — See note 3.

(d) **Only the Net Amount Overpaid Is Recoverable.** — See notes 6, 7.

**343.** See note 1.

**344.** (e) **Interest and Costs.** — See notes 1, 2.

of one-third of the sum they had paid, alleging and giving evidence that the two remaining sureties were insolvent, and the defendant denied that the insolvency of the remaining sureties had been proved, and pleaded that he was liable to the extent of a fifth only of the sum paid by the plaintiffs, it was held that whether the two remaining sureties were insolvent or not, the plaintiffs were not bound to bear the whole risk of their insolvency, and that therefore the defendant was liable to the extent of one-third of the sum paid by the plaintiffs. *Buchanan v. Main*, Sc. Ct. of Sess. 3 F. 215.

**342. 1. Insolvency of Surety Considered at Law — Colorado.** — *McAllister v. Irwin*, 31 Colo. 254.

*Kentucky.* — *Swift v. Donahue*, 104 Ky. 137; *Saulsberry v. Saulsberry*, (Ky. 1904) 82 S. W. Rep. 415; *Bottoms v. Leonard*, (Ky. 1899) 53 S. W. Rep. 273; *Hudson v. Combs*, 110 Ky. 762; *Greene v. Anderson*, 102 Ky. 216.

*Louisiana.* — *Metropolitan Bank v. Muller*, 50 La. Ann. 1278, 69 Am. St. Rep. 475.

*South Carolina.* — *Sloan v. Gibbs*, 56 S. Car. 480, 76 Am. St. Rep. 559, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 341.

*Wisconsin.* — *Boutin v. Etsell*, 110 Wis. 276.

**3. Absence from Jurisdiction.** — *Merrill v. Prescott*, 67 Kan. 767; *Bottoms v. Leonard*, (Ky. 1899) 53 S. W. Rep. 273.

*P. Dougherty Co. v. Gring*, 89 Md. 535.

**7. Must Account for Advantages Received from Creditor.** — *Thompson v. Dekum*, 32 Oregon 506; *McGonnigle v. McGonnigle*, 5 Pa. Super. Ct. 168, 178.

**The Advantage Must Have Relation to the Same Transaction.** — *Sanders v. Wettermark*, 20 Tex. Civ. App. 175.

**Compromise of a Judgment** on a judicial bond results to the benefit of all the sureties and is the basis of their individual liability in an action for contribution. *Boutin v. Etsell*, 110 Wis. 276.

Proof that the attorney in fact of the underwriters of a policy had compromised the claim thereunder and allowed judgment for the full amount to be recovered was held admissible in evidence by the defendants in a suit for contribution. *Cuff v. Heine*, (Supm. Ct. App. T.) 27 Misc. (N. Y.) 498.

**343. 1. Surety Who Has Received Security from Principal — California.** — *Williams v. Riehl*, 127 Cal. 365, 78 Am. St. Rep. 60.

*Kansas.* — *Gilmore v. Gilmore*, 6 Kan. App. 922, 50 Pac. Rep. 90.

*Kentucky.* — *Barker v. Boyd*, (Ky. 1903) 71 S. W. Rep. 528; *Cornett v. Holcomb*, (Ky. 1901) 62 S. W. Rep. 477.

*Louisiana.* — *Moore v. Drew*, 51 La. App. 740.

*Michigan.* — *Roeder v. Neidermeier*, 112 Mich. 608.

*New York.* — *Sherman v. Foster*, 158 N. Y. 587.

*North Carolina.* — *Blanton v. Bostic*, 126 N. Car. 418; *Carr v. Smith*, 129 N. Car. 232.

*Ohio.* — *Niece v. Rogers*, 7 Ohio Cir. Dec. 671, 14 Ohio Cir. Ct. 646.

*Tennessee.* — *Pile v. McCoy*, 99 Tenn. 367.

*Texas.* — *Urbahn v. Martin*, 19 Tex. Civ. App. 93.

**Surety Not Bound to Realize on Indemnity.** — He may proceed against his cosurety and, if he afterwards realizes on the security, he must share it with those who have contributed. *Williams v. Riehl*, 127 Cal. 365, 78 Am. St. Rep. 60.

**Qualifications and Exceptions.** — Before surrender of collateral in the hands of a cosurety who had taken up a note and kept it alive can be compelled, the surety must show an offer by him to pay his share of the debt. *Kirby v. Barlow*, (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 254, affirmed 60 N. Y. App. Div. 630.

Where the powers in an indemnity mortgage could not be enforced by the surety and no greater obligation rested upon him to have it applied to the common liability than on the cosurety, it was held that the rule did not apply. *Norwood v. Washington*, 136 Ala. 657.

A purchase in good faith of the assets of an insolvent corporation on whose note the purchaser is an indorser will not make him liable to account for the profits on such purchase to another indorser ranking by agreement as a cosurety. *Weeks v. Parsons*, 176 Mass. 570.

A surety may stipulate with the principal, before entering into the contract, for a separate indemnity, and will not be compelled, in the absence of fraud, to communicate the benefit thereof to a cosurety until he has himself been reimbursed. *McDowell County v. Nichols*, 131 N. Car. 501, 92 Am. St. Rep. 785.

The fact that a stockholder of an insolvent corporation suing for contribution sold lands to the corporation in excess of their value, receiving therefor stock of the corporation, is not material. *Merrill v. Prescott*, 67 Kan. 767.

**Where a Cosurety Is Also Surety for the Same Principal** to a third person, he may take indemnity for the liability to the latter. *Urbahn v. Martin*, 19 Tex. Civ. App. 93.

**Where the Sureties Have Adjusted the Loss** among themselves, if the principal afterwards indemnifies one of them, the others cannot claim division. *Urbahn v. Martin*, 19 Tex. Civ. App. 93. See also *Cramer v. Redman*, 10 Wyo. 328.

**344. 1. Interest — Indiana.** — *Hamilton v. Hamilton*, 162 Ind. 430.

*Iowa.* — *Heaton v. Ainley*, (Iowa 1898) 74 N. W. Rep. 766.

*Kentucky.* — *Hudson v. Combs*, 110 Ky. 762; *Koehler v. Hussey*, (Ky. 1900) 57 S. W. Rep. 241; *Greene v. Anderson*, 102 Ky. 216.

*Oklahoma.* — *Strickler v. Gitchel*, 14 Okla. 523.

*Oregon.* — *Thompson v. Hibbs*, 45 Oregon 141.

*Pennsylvania.* — *Morrison v. Warner*, 200 Pa. St. 315.

**345.** See notes 1, 2.

*b. EXONERATION OF SURETIES BY PRINCIPAL — (1) General Principles.* — See note 3.

**346.** See note 1.

*The Right to Indemnity Rests on a Contract Implied.* — See note 2.

**347.** (2) *When the Right Accrues.* — See notes 1, 3.

**348.** See note 1.

*Texas.* — Merchants' Nat. Bank *v.* McNulty, 89 Tex. 124; *Faires v. Cockerell*, 88 Tex. 428. *Wisconsin.* — Barth *v.* Graf, 101 Wis. 27.

But see *Smith v. Stephens*, 164 Mo. 415, where a widow paying off a mortgage was held entitled to recover from the heir only the interest paid by her up to the time of payment.

**Legal Interest** only can be claimed. *Faires v. Cockerell*, 88 Tex. 428; *Reed v. Sieckenius*, (Tex. Civ. App. 1901) 65 S. W. Rep. 487.

A surety cannot recover usurious interest which he has paid from his principal, where he had knowledge of the usury. *Boren v. Boren*, (Tex. Civ. App. 1902) 68 S. W. Rep. 184.

**344. 2. Cost of Defense.** — *Carter v. Fidelity*, etc., Co., 134 Ala. 369, 92 Am. St. Rep. 41, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 632; *McAllister v. Irwin*, 31 Colo. 254; *Bronson v. Marsh*, 131 Mich. 35.

**Notice of Action.** — The surety is not liable in contribution to the costs of an unsuccessful defense where he had no notice of the action. *Barnes v. Cushing*, 71 N. Y. App. Div. 366.

**345. 1. Must Be Reasonably Incurred.** — *Chicago*, etc., R. Co. *v.* Glenny, 175 Ill. 238.

**2. Counsel Fees.** — *Boutin v. Etsell*, 110 Wis. 276.

**Attorney's Fees Provided by a Mortgage** which the plaintiff has paid may be included in contribution. *Morrison v. Warner*, 200 Pa. St. 315.

**Attorney's Fees for Collection of a Note** are not included. *Reed v. Sieckenius*, (Tex. Civ. App. 1901) 65 S. W. Rep. 487.

**3. Exoneration of Surety** — *Indiana.* — *Howe v. White*, 162 Ind. 74.

*Indian Territory.* — *Sparks v. Childers*, 2 Indian Ter. 187.

*Iowa.* — *Green v. Schoenhofen Brewing Co.*, 103 Iowa 252.

*Kansas.* — *Reed v. Humphrey*, 69 Kan. 155.

*Michigan.* — *Archer v. Laidlaw*, 135 Mich. 88.

*Minnesota.* — *Richardson v. Merritt*, 74 Minn. 354.

*New York.* — *Auerbach v. Rogin*, (Supm. Ct. App. T.) 40 Misc. (N. Y.) 695; *City Trust*, etc., Co. *v.* American Brewing Co., 174 N. Y. 486, affirming 70 N. Y. App. Div. 511.

*North Carolina.* — *Pully v. Pass*, 123 N. Car. 168.

*Pennsylvania.* — *Farrow v. Yoder*, 9 Pa. Dist. 67.

*Texas.* — *Hollimon v. Karger*, 30 Tex. Civ. App. 558; *Beville v. Boyd*, 16 Tex. Civ. App. 491.

**346. 1. Bill to Compel Principal to Pay.** — *Roberts v. American Bonding*, etc., Co., 83 Ill. App. 463; *Ladd v. Chamber of Commerce*, 37 Oregon 66, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1127; *Allen v. Cooley*, 53 S. Car. 414.

**Limitations of the Right.** — The creditor must be made a party defendant, otherwise he would

not be compelled to receive payment. *Ladd v. Chamber of Commerce*, 37 Oregon 66.

In *Kentucky*, under section 546 Code Civ. Pro., the surety may have an action of indemnity before the debt is paid, whenever an order for attachment may be made under the code. *Walton v. Williams*, 5 Okla. 642.

**2. Right Rests on Implied Contract.** — *Christian v. Highlands*, 32 Ind. App. 104; *Green v. Schoenhofen Brewing Co.*, 103 Iowa 252; *Washburn v. Blundell*, 75 Miss. 266; *Funk v. Seehorn*, 99 Mo. App. 587.

**May Sue on Original Contract.** — The surety on a note may take an assignment thereof and sue the principal thereon. *Stratton v. Heuser*, (Ky. 1897) 42 S. W. Rep. 1133; *Beville v. Boyd*, 16 Tex. Civ. App. 491; *Bay View Brewing Co. v. Tecklenberg*, 19 Wash. 469. See also *Sparks v. Childers*, 2 Indian Ter. 187.

**347. 1. Where Right to Exoneration Becomes Fixed.** — *In re Stout*, 109 Fed. Rep. 794; *Ramsay v. Whitbeck*, 183 Ill. 550; *Norris v. Churchill*, 20 Ind. App. 668; *Whitehouse v. Bolster*, 95 Me. 458.

**Promise Implied at Date of Obligation — Payment Only Fixes Amount of Recovery.** — *Washburn v. Blundell*, 75 Miss. 266.

**Right of Sureties to Security Given by Principal Debtor.** — The right of a surety against the security given to the creditor by the principal debtor arises at the time of his becoming surety and does not remain in abeyance till he is called on to discharge the obligation of the principal debtor. *Dixon v. Steel*, (1901) 2 Ch. 602 (explaining *South v. Bloxam*, 2 Hem. & M. 457, 34 L. J. Ch. 369).

**3. Setting Aside Fraudulent Conveyance.** — *Conley v. Buck*, 100 Ga. 187; *Sanford v. U. S. Fidelity*, etc., Co., 116 Ga. 689; *Citizens Bank v. Burrus*, 178 Mo. 716; *Shapira v. Paletz*, (Tenn. Ch. 1900) 59 S. W. Rep. 774.

**348. 1. Right of Action for Money Paid Accrues Only on Payment.** — *Christian v. Highlands*, 32 Ind. App. 104; *Norris v. Churchill*, 20 Ind. App. 668; *Klein v. Funk*, 82 Minn. 3; *Citizens Bank v. Burrus*, 178 Mo. 716; *Bullard v. Brown*, 74 Vt. 120; *Shoemaker v. Stimson*, 16 Wash. 1. See also *Weir-Booger Dry Goods Co. v. Kelly*, 80 Miss. 64.

Under the *Louisiana Civil Code* a surety may sue the principal before payment when the debt has become due by the expiration of the term for which it was contracted. *Iberia Cypress Co. v. Christen*, 112 La. 448.

**Special Agreements for Indemnity.** — The surety may, before payment, foreclose a mortgage given by the principal to indemnify the surety. *Albany v. Andrews*, 29 N. Y. App. Div. 20.

If a mortgage is given and the principal pays only a part of the debt, the surety paying the balance may enforce the mortgage. *Cook v. Landrum*, (Ky. 1904) 82 S. W. Rep. 585.

**348.** Statute of Limitations — Discharges in Bankruptcy. — See note 2.

**349.** If the Surety Pays the Debt Before Maturity. — See note 2.

(3) *Incidents of the Right* — Payment by Note. — See notes 3, 4, 5.

**350.** (4) *Measure of Damages*. — See note 2.

**351.** The Costs Which the Surety Had to Pay. — See note 1.

**352.** (5) *Joinder of Suit*. — See notes 2, 3, 4.

**353.** 2. Contribution Between Coinsurers — Provisions of Modern Policies. — See note 2.

**354.** 3. Contribution Between Co-owners of Property — *a.* TO THE REMOVAL OF INCUMBRANCES — Removal by Joint Tenants or Tenants in Common. — See note 1.

A surety may, before he has paid the debt, sue the maker of a note held by him as collateral security, which he is authorized to collect. *Klein v. Funk*, 82 Minn. 3.

Where the principal has executed a mortgage to secure two sureties, one who pays the debt may foreclose the mortgage without joining the other surety. *Morgan v. Street*, 28 Ind. App. 131.

Parol evidence is admissible to show that a mortgage given by the principal to the surety is for the indemnity of the latter. *Boren v. Boren*, (Tex. Civ. App. 1902) 68 S. W. Rep. 184.

A mortgage given by the principal to indemnify the sureties in a note remains in force though the obligors sign a new note to pay off that described in the mortgage. *Jarboe v. Shiveley*, 109 Ky. 402, 95 Am. St. Rep. 384.

**348.** 2. Statute of Limitations. — *Loewenthal v. Coonan*, 135 Cal. 381, 87 Am. St. Rep. 115; *Sparks v. Childers*, 2 Indian Ter. 187; *May v. Ball*, 108 Ky. 180; *Miers v. Betterton*, 18 Tex. Civ. App. 430; *Carthart v. Bryant*, 28 Wash. 31.

Where the Time of Payment Is Extended with the surety's consent, the statute begins to run from the expiring of the extended period. *Cook v. Landrum*, (Ky. 1904) 82 S. W. Rep. 85.

**349.** 2. Payment by Surety Before Maturity. — *Truss v. Miller*, 116 Ala. 494.

**Presumed to Have Paid at Maturity.** — Where it does not appear when the surety took up the note the presumption is that it was at maturity. *Heaton v. Ainley*, (Iowa 1898) 74 N. W. Rep. 766.

**3.** Payment by Negotiable Note. — *Auerbach v. Rogin*, (Supm. Ct. App. T.) 40 Misc. (N. Y.) 695.

**4.** Surety Need Not Await Suit. — *Howe v. White*, 162 Ind. 74; *May v. Ball*, 108 Ky. 180. **Judgment Prima Facie Proof of Liability.** — *Reed v. Humphrey*, 69 Kan. 155.

**The Surety Need Not Be a Judgment Creditor**, and if he has paid the judgment against his principal on a replevin bond the fact that judgment over in his favor has not been taken will not prevent his filing a bill to subject the property of his principal fraudulently conveyed to the payment of the debt. *Shapira v. Paletz*, (Tenn. Ch. 1900) 59 S. W. Rep. 774.

**5.** Must Be under Legal Obligation to Pay. — *Pennhaur v. Malloy*, 21 Ind. App. 287.

**Exceptions and Qualifications.** — A secret agreement between the principal and the creditor, discharging the former from liability to the creditor, will not affect his liability to the surety, the latter having no means of knowing of the agreement. *Hyde v. Miller*, 45 N. Y. App. Div. 396, *affirmed* 168 N. Y. 590.

If the surety was at the time of his paying the debt legally bound to pay, he may recover though the principal was discharged from the debt by limitations. *Reed v. Humphrey*, 69 Kan. 155.

**350.** 2. Amount of Exoneration. — *Howe v. White*, 162 Ind. 74; *Christian v. Highlands*, 32 Ind. App. 104.

**351.** 1. Costs Recoverable. — U. S. Fidelity, etc., Co. v. Hittle, 121 Iowa 352; *Ellis v. Norman*, (Ky. 1898) 44 S. W. Rep. 429; *Albany v. Andrews*, 29 N. Y. App. Div. 20.

**Qualifications and Exceptions.** — He cannot recover the costs of an appeal which he has taken. *City Trust, etc., Co. v. American Brewing Co.*, 88 N. Y. App. Div. 383.

**Attorney's Fees** provided for in a note which the surety pays without suit may be recovered of the principal. *Beville v. Boyd*, 16 Tex. Civ. App. 491.

**352.** 2. Payment by Agent of Sureties on Their Joint Credit. — *Whitbeck v. Ramsay*, 74 Ill. App. 524.

**3.** Paying Joint Judgment. — *Weeks v. Parsons*, 176 Mass. 570.

**4.** Each Paying His Proportion Individually. — *Whitbeck v. Ramsay*, 74 Ill. App. 524.

**353.** 2. Contribution Enforced in Case of Double Insurance. — *Meigs v. London Assur. Co.*, 126 Fed. Rep. 781; *Schmaelzle v. London, etc., F. Ins. Co.*, 75 Conn. 397, 96 Am. St. Rep. 233; *Sun Ins. Office v. Varble*, 103 Ky. 758; *Home Ins. Co. v. Minneapolis, etc., R. Co.*, 71 Minn. 296; *Bateman v. Lumbermen's Ins. Co.*, 189 Pa. St. 465; *Chandler v. Insurance Co. of North America*, 70 Vt. 562.

**Where There Are General and Special Policies** over the same building, the general policies cannot be relieved from liability by contribution until the insured has been completely indemnified. *Niagara F. Ins. Co. v. Heenan*, 81 Ill. App. 678, *affirmed* 181 Ill. 575.

**354.** 1. Contribution Between Joint Tenants, Etc. — *United States*. — *McClintock v. Fontaine*, 119 Fed. Rep. 448.

*Indiana*. — *Springer v. Foster*, 27 Ind. App. 15.

*Iowa*. — *Koboliska v. Swehla*, 107 Iowa 124. *Nebraska*. — *Carson v. Broady*, 56 Neb. 648, 71 Am. St. Rep. 691, *citing* 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 354.

*Pennsylvania*. — *Morrison v. Warner*, 200 Pa. St. 315.

*Rhode Island*. — *Green v. Walker*, 22 R. I. 14. *Tennessee*. — *Mayfield v. McKnight*, (Tenn. Ch. 1899) 55 S. W. Rep. 42.

*Texas*. — *Thomas v. Morrison*, (Tex. Civ. App. 1898) 46 S. W. Rep. 46, *modified* 92 Tex. 329.



**354.** Applications of Principle. — See note 2.

**355.** See notes 1, 2, 4.

Partial Conveyances of Encumbered Tracts. — See note 5.

**356.** *b.* TO THE MAKING OF REPAIRS — By the Modern Rule. — See note 3.

**357.** *c.* TO THE MAKING OF IMPROVEMENTS — Cotenant's Right to Reimbursement for Improvements. — See notes 1, 2.

**358.** Partition — Adjusting as to Improvements. — See notes 1, 2, 3.

*Virginia.* — *Grove v. Grove*, 100 Va. 556.

*West Virginia.* — *Morris v. Roseberry*, 46 W. Va. 24.

May Be Enforced Against Infant as Well as Adults. — *Case v. Case*, 103 Ill. App. 177.

Incumbrance Must Have Been a Joint Estate. — *Hancock v. Wiggins*, 28 Ind. App. 449.

Right Does Not Accrue Till Partition Suit Brought. — *Grove v. Grove*, 100 Va. 556.

**354. 2. Payment of Mortgage.** — *Koboliska v. Swehla*, 107 Iowa 124; *Fritz v. Ramspott*, 76 Minn. 489; *Smith v. Stephens*, 164 Mo. 415; *Crawford v. O'Connell*, 39 Oregon 153; *Morrison v. Warner*, 200 Pa. St. 315; *Green v. Walker*, 22 R. I. 14.

The Test as to the Right to Contribution is whether the equities are equal, and if the party paying was under an obligation to discharge the mortgage as a debt of his own he cannot claim contribution. *Huber v. Hess*, 191 Ill. 305.

Whole Mortgage Debt Must Be Paid. — *Springer v. Foster*, 27 Ind. App. 15.

**355. 1. Purchase-money Lien.** — *Walker v. Sarven*, 41 Fla. 210; *Funk v. Seehorn*, 99 Mo. App. 587; *Burnes v. Porter*, 82 Mo. App. 66; *Grove v. Grove*, 100 Va. 556; *Morris v. Roseberry*, 46 W. Va. 24.

**2. Taxes.** — *McClintock v. Fontaine*, 119 Fed. Rep. 448; *Glos v. Clark*, 97 Ill. App. 609, *appeal dismissed* 199 Ill. 147; *Plant v. Fate*, 114 Iowa 283; *Montgomery v. Montgomery*, (Ky. 1904) 78 S. W. Rep. 465; *Hake v. Lee*, 106 La. 482; *Fritz v. Ramspott*, 76 Minn. 489; *Bennett v. Bennett*, 84 Miss. 493; *Armijo v. Neher*, 11 N. Mex. 645.

Where a Remainderman paid the taxes on the property which he had rented from the life-tenant, it was held that, the life-tenant being chargeable with the payment of such taxes, the presumption was that the payment was on his account, and contribution from the other remaindermen could not be compelled. *Downey v. Strouse*, 101 Va. 226.

Payment Without Request or Necessity will not give the right to contribution. *Wilson v. Sanger*, 57 N. Y. App. Div. 323.

One Without Title to the Land who pays the taxes is not entitled to contribution from the remaindermen. *Taylor v. Planet Property, etc., Co.*, 78 Mo. App. 137.

Must Be for Defendant's Benefit. — Contribution can only be had for such taxes as are paid for the defendant's benefit. *Arthur v. Arthur*, 76 N. Y. App. Div. 330.

**4. Removal of Superior Title.** — *Goralski v. Kostuski*, 179 Ill. 177, 70 Am. St. Rep. 98; *Douglas v. Douglas*, (Ky. 1903) 74 S. W. Rep. 233; *Carson v. Broady*, 56 Neb. 648, 71 Am. St. Rep. 691, *citing* 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 354; *Craven v. Craven*, (Neb. 1903) 94 N. W. Rep. 604; *Gass v. Waterhouse*, (Tenn. Ch. 1900) 61 S. W. Rep. 450; *Thomas v. Morri-*

*son*, (Tex. Civ. App. 1898) 46 S. W. Rep. 46, *modified* 92 Tex. 329; *Allen v. Allen*, 114 Wis. 615.

Unassigned Dower an Incumbrance. — *Case v. Case*, 103 Ill. App. 177.

Expense of Defending Title. — *McClintock v. Fontaine*, 119 Fed. Rep. 448.

**5. Sale of Part with Warranty — Retained Tract Must Bear Whole Burden.** — *Jenkins v. Craig*, 22 Ind. App. 192, *rehearing denied* 22 Ind. App. 201.

For a discussion of the inverse order of alienation, see the title MARSHALING ASSETS, vol. 19, p. 1273 *et seq.*

**356. 3. Compelling Contribution as to Expenses of Repairs.** — *Hotopp v. Morrison Lodge No. 76*, 110 Ky. 987; *Armijo v. Neher*, 11 N. Mex. 645.

Only in Cases Where Repairs Not Made in Violation of Law. — *Cass County v. Sarpy County*, 66 Neb. 473.

When the Relation of Landlord and Tenant Exists between the cotenants, the one in possession cannot, in an action for partition, charge his landlord for repairs, in the absence of a special agreement. *Schmidt v. Constans*, 82 Minn. 347, 83 Am. St. Rep. 437.

No Claim Against Deceased Cotenant's Estate. — A tenant in common has no claim against the personal estate of a deceased cotenant for repairs made after the latter's death; his claim, if any, is against the heirs at law. *De Grange v. De Grange*, 96 Md. 609.

**357. 1. Cotenant's Right to Reimbursement for Improvements.** — See *Carson v. Broady*, 56 Neb. 648, 71 Am. St. Rep. 691. And see generally the title IMPROVEMENTS, vol. 16, p. 62.

**2. Improvements Without Consent of Cotenant.** — *Havey v. Kelleher*, 36 N. Y. App. Div. 201.

Contribution for improvements made without the knowledge of the cotenants will only be allowed so far as they add to the value of the property. *Heppe v. Szczepanski*, 209 Ill. 88.

**358. 1. Partition — Improvements.** — *Dunavant v. Fields*, 68 Ark. 534; *Patrick v. Young Men's Christian Assoc.*, 120 Mich. 185; *Funk v. Seehorn*, 99 Mo. App. 587; *Burford v. Aldridge*, 165 Mo. 419; *Carson v. Broady*, 56 Neb. 648, 71 Am. St. Rep. 691; *Polk v. Gunther*, 107 Tenn. 16.

**2. Judicial Sale — Apportionment of Value.** — *Turnbull v. Foster*, 116 Ga. 765; *Burford v. Aldridge*, 165 Mo. 419; *Carson v. Broady*, 56 Neb. 648, 71 Am. St. Rep. 691.

**3. Offsetting Improvements Against Rents and Profits Received.** — *Turnbull v. Foster*, 116 Ga. 765; *Bennett v. Bennett*, 84 Miss. 493; *Holt v. Couch*, 125 N. Car. 456, 74 Am. St. Rep. 648.

It must be shown that the improvements added to the rental value or the permanent value of the property. *Armijo v. Neher*, 11 N. Mex. 645.

**358.** 4. Contribution Between Heirs, Devisees, and Legatees. — See note 4.

**359.** 5. Contribution Between the Parties to Commercial Paper? — Order of Liability Generally. — See note 2.

Without Contract No Contribution Between Successive Parties. — See notes 3, 5, 6.

Parol Proof of Cosuretyship. — See note 7.

**360.** See note 1.

6. Contribution Between Partners — Generally No Contribution. — See note 3.

**361.** When Contribution Enforceable. — See notes 1, 2.

If the Partnership Has Been Closed. — See note 3.

**362.** 7. Contribution in Regard to Party Walls. — See note 1.

On the other hand, if claim is made by the occupying tenant for the expense of improvements, the other party will be entitled to set off rents and occupation. *Eighmey v. Thayer*, 135 Mich. 682; *Neher v. Armijo*, 11 N. Mex. 67.

**358.** 4. Contribution Among Heirs, Devisees, and Legatees. — *Douglas v. Douglas*, (Ky. 1903) 74 S. W. Rep. 233; *Smith v. Catlin*, (Ky. 1901) 63 S. W. Rep. 473; *Newton v. Rebenack*, 90 Mo. App. 650.

Specific Devisees cannot be compelled to contribute by heirs. *Maupin v. Maupin*, (Tenn. Ch. 1901) 62 S. W. Rep. 1110. Or by executors, *Re Bentinck*, 80 L. T. N. S. 71.

Dower is compelled to contribute towards the discharge of a mortgage covering part of land assigned to some of the heirs. *Zinn v. Hazlett*, 67 Ill. App. 410.

A Specific Legatee Whose Legacy Is Taken for Debts may have contribution from other specific legatees. *Frasier v. Littleton*, 100 Va. 9.

Where All the Devisees Are Specific All Must Contribute to payment of the debts. *Pittman's Estate*, 182 Pa. St. 355.

Land Encumbered After Execution of Will. — Where an incumbrance has been placed upon lands devised after the execution of the will, which contains a provision that the testator's debts shall be paid out of the personal estate, on that failing to pay the incumbrance, the devisee of the encumbered lands cannot call upon the devisee of other lands for contribution. *Frasier v. Littleton*, 100 Va. 9.

General Legatees have no claim against specific legatees until the funds applicable to general legacies have been exhausted. *Duffield v. Pike*, 71 Conn. 521.

**359.** 2. *Sloan v. Gibbes*, 56 S. Car. 480, 76 Am. St. Rep. 559, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 359.

3. Contribution Between Indorsers. — *Egbert v. Hanson*, (Supm. Ct. Tr. T.) 34 Misc. (N. Y.) 596; *Stacy v. Rose*, (Tenn. Ch. 1900) 58 S. W. Rep. 1087; *Poisson v. Bourgeois*, 17 Quebec Super. Ct. 94.

Contribution Among Coindorsers. — *Smith v. Car*, 128 N. Car. 150.

Where two parties jointly indorse a note, the presumption is that they are equally liable. *Bunker v. Osborn*, 132 Cal. 480.

5. Maker and Indorser. — *McRae v. Lionais*, 16 Quebec Super. Ct. 262.

6. Surety and Indorser. — *Mulkey v. Templeton*, (Tex. Civ. App. 1901) 60 S. W. Rep. 439.

7. Parol Proof of Cosuretyship Among Indorsers.

— *Weeks v. Parsons*, 176 Mass. 570; *Egbert v. Hanson*, (Supm. Ct. Tr. T.) 34 Misc. (N. Y.) 596; *Stacy v. Stayner*, 7 Ont. L. Rep. 684. See also *McDavid v. McLean*, 202 Ill. 354.

Admissions of Defendant. — *Strickler v. Gitchel*, 14 Okla. 523.

**360.** 1. Parol Evidence to Show Real Relations of Parties. — *McDavid v. McLean*, 202 Ill. 354; *Greene v. Anderson*, 102 Ky. 216; *Snook v. Munday*, 96 Md. 514; *Leeper v. Paschal*, 70 Mo. App. 117; *Hecker v. Mahler*, 64 Ohio St. 398; *Mulkey v. Templeton*, (Tex. Civ. App. 1901) 60 S. W. Rep. 439; *In re Boutin*, 12 Quebec Super. Ct. 186.

The Burden of Proof. — *Sloan v. Gibbes*, 56 S. Car. 480, 76 Am. St. Rep. 559.

3. Entire Account Must Be Settled in Equity. — *Johnson v. Ewald*, 82 Mo. App. 276; *Foss v. Dawes*, (Neb. 1904) 101 N. W. Rep. 237; *Clayton v. Davett*, (N. J. 1897) 38 Atl. Rep. 308; *Eddins v. Menefee*, (Tenn. Ch. 1899) 54 S. W. Rep. 992.

**361.** 1. Partnership for Single Transaction — Expenditure Outside Scope of Partnership. — *Kimball v. Williams*, 51 N. Y. App. Div. 616; *Burleigh v. Bevin*, (Supm. Ct. Spec. T.) 22 Misc. (N. Y.) 38; *Power v. Rees*, 189 Pa. St. 496.

2. *Kistner v. Tejcek*, 88 Ill. App. 188.

3. After Partnership Closed. — *Brewer v. Swartz*, 83 Mo. App. 451.

**362.** 1. Party Walls. — See generally the title PARTY WALLS, vol. 22, p. 236.

In *Alabama* no contribution can be had for the necessary repair of a party wall in the absence of a statute creating liability therefor. *Merchants' Bank v. Foster*, 124 Ala. 696.

In *Louisiana* one who uses a party wall as a support is liable for one-half the cost of construction. *Monteleone v. Harding*, 50 La. Ann. 1147.

In *Canada* one who erects a wall separating his land from that of the adjoining proprietor cannot compel reimbursement of one-half of the cost. *Bernard v. Pauzé*, 16 Quebec Super. Ct. 406.

Running of Party-wall Agreement with Land. — *Harris v. Dozier*, 72 Ill. App. 542; *Hall v. Geyer*, 7 Ohio Cir. Dec. 436, 14 Ohio Cir. Ct. 229; *Parsons v. Baltimore Bldg., etc., Assoc.*, 44 W. Va. 335, 67 Am. St. Rep. 769.

In *Pennsylvania* by statute one who uses a party wall must contribute. *Fidelity F. Ins., etc., Co. v. Hafner*, 6 Pa. Super. Ct. 48.

In *Sebold v. Mulholland*, 155 N. Y. 455, a party-wall agreement was held not to be a covenant running with the land.

**363. 8. Contribution Between Directors and Stockholders in Corporation.** — The Stockholders of a Corporation. — See note 1.

Directors. — See note 2.

**364. 9. Contribution and Indemnity Between Tortfeasors — General Rule — No Contribution or Indemnity.** — See note 2.

**365. Limitations on Rule.** — See notes 1, 2, 3.

**366.** See note 1.

**363. 1. Contribution Between Stockholders** — *California*. — Myers *v.* Sierra Valley Stock, etc., Assoc., 122 Cal. 669.

*Kansas*. — Hinshaw *v.* Austin, 64 Kan. 460, quoting 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 363; Merrill *v.* Prescott, 67 Kan. 767.

*Minnesota*. — Rogers *v.* Gross, 67 Minn. 224.

*Missouri*. — McClure *v.* Paducah Iron Co., 90 Mo. App. 567.

*Nebraska*. — Bennison *v.* McConnell, 56 Neb. 46; Van Pelt *v.* Gardner, 54 Neb. 701.

Where there is an agreement to contribute it is not necessary to first exhaust the assets of the corporation before suing. Davidson *v.* Gretna State Bank, 59 Neb. 63.

**A Voluntary Assumption** or payment of the debt of a corporation will not give the stockholder a right of contribution. Gorder *v.* Connor, 56 Neb. 781.

**2. Tortious Division of Assets.** — There is no contribution for a tortious payment of assets to shareholders. Sharp *v.* Call, (Neb. 1903) 95 N. W. Rep. 16.

**364. 2. No Contribution Between Tortfeasors.** — The Mariska, 100 Fed. Rep. 500, reversed (C. C. A.) 107 Fed. Rep. 989; Sutton *v.* Morris, 102 Ky. 611; Engstrand *v.* Kleffman, 86 Minn. 403, 91 Am. St. Rep. 359, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 364; Sharp *v.* Call, (Neb. 1903) 95 N. W. Rep. 16; Interna-

tional Light, etc., Co. *v.* Maxwell, 27 Tex. Civ. App. 294; Robertson *v.* Trammell, (Tex. Civ. App. 1904) 83 S. W. Rep. 258.

**Statutes.** — The right may be given by statute. Ovid First Nat. Bank *v.* Steel, (Mich. 1904) 99 N. W. Rep. 786.

Under *Kansas* Code of Civ. Pro., § 480, contribution may be had between joint judgment debtors though the action is founded on tort. Ft. Scott *v.* Kansas City, etc., R. Co., 66 Kan. 610.

**365. 1. Where There Is No Guilty Intent.** — Pawnee City First Nat. Bank *v.* Avery Planter Co., (Neb. 1903) 95 N. W. Rep. 622.

**Where There Is No Concert of Action** between the tortfeasors the right to contribution does not exist. Paddock-Hawley Iron Co. *v.* Rice, 179 Mo. 480.

**2.** Boston, etc., R. Co. *v.* Sargent, 72 N. H. 455, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 365; Robertson *v.* Trammell, (Tex. Civ. App. 1904) 83 S. W. Rep. 258; Smith *v.* San Antonio, (Tex. Civ. App. 1900) 57 S. W. Rep. 881 (judgment reversed 94 Tex. 266).

**3. When Contribution Recoverable.** — The Frankland, (1901) P. 161, 70 L. J. P. 42, 84 L. T. N. S. 395.

**366. 1. When Indemnity Recoverable.** — Boston, etc., R. Co. *v.* Sargent, 72 N. H. 455, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 365.



# CONTRIBUTORY NEGLIGENCE.

By B. B. BLYDENBURGH.

**371. II. DEFINITIONS — 1. Negligence.** — See note 1.

**2. Contributory Negligence.** — See note 3.

**III. THE GENERAL RULE — 1. Statement of Rule.** — See note 4.

**371. 1.** See the title NEGLIGENCE, vol. 21, p. 457.

**3. Various Definitions of Contributory Negligence.** — The definition given in the text is quoted by the Supreme Court of South Carolina as "the best definition of contributory negligence we have seen," *Cooper v. Georgia*, etc., R. Co., 56 S. Car. 91; and by the Supreme Court of Utah, as "an accurate definition of contributory negligence," *Hone v. Mammoth Min. Co.*, 27 Utah 168. It has also been cited or quoted in the following cases:

*United States.* — *Alaska United Gold Min. Co. v. Keating*, (C. C. A.) 116 Fed. Rep. 561.

*Illinois.* — *St. Louis Nat. Stock Yards v. Godfrey*, 198 Ill. 288.

*Indiana.* — *Krenzer v. Pittsburg*, etc., R. Co., 151 Ind. 587, 68 Am. St. Rep. 252 (dissenting opinion of McCabe, J.).

*Missouri.* — *Zumault v. Kansas City Suburban Belt R. Co.*, 175 Mo. 288.

*South Carolina.* — *Bowen v. Southern R. Co.*, 58 S. Car. 222; *Easler v. Southern R. Co.*, 59 S. Car. 311; *Kennedy v. Southern R. Co.*, 59 S. Car. 535; *Bodie v. Charleston*, etc., R. Co., 61 S. Car. 468; *Burns v. Southern R. Co.*, 65 S. Car. 229; *Scott v. Seaboard Air Line R. Co.*, 67 S. Car. 136.

"Contributory negligence is nothing more than negligence on the part of the plaintiff." *McGhee v. Campbell*, (C. C. A.) 101 Fed. Rep. 936.

In *Redmond v. Maitland*, 23 N. Y. App. Div. 194, the following definition from Beach on Contributory Negligence is quoted with approval: "Contributory negligence, in its legal signification, is such an act or omission on the part of a plaintiff, amounting to a want of ordinary care, as, concurring or co-operating with the negligent act of the defendant, is a proximate cause or occasion of the injury complained of. To constitute contributory negligence there must be a want of ordinary care on the part of the plaintiff, and a proximate connection between that and the injury. Perhaps, besides these two, there are no other necessary elements."

For other definitions see the following cases:

*United States.* — *Illinois Cent. R. Co. v. Jones*, (C. C. A.) 95 Fed. Rep. 370.

*Indiana.* — *Baltimore*, etc., R. Co. *v. Young*, 153 Ind. 163.

*Kentucky.* — *Louisville v. Keher*, 79 S. W. Rep. 270, 25 Ky. L. Rep. 2003.

*Michigan.* — *Proper v. Lake Shore*, etc., R. Co., (Mich. 1904) 99 N. W. Rep. 283, 11 Detroit Leg. N. 35.

*Minnesota*\* — *Craig v. Benedictine Sisters Hospital Assoc.*, 88 Minn. 535.

*Nebraska.* — *Chicago*, etc., R. Co. *v. Lilley*, (Neb. 1903) 93 N. W. Rep. 1012.

*North Carolina.* — *Harrill v. South Carolina*, etc., R. Co., 135 N. Car. 601.

*South Carolina.* — *Kirby v. Southern R. Co.*, 63 S. Car. 494.

*Texas.* — *Texas Cent. R. Co. v. Yarbrow*, 32 Tex. Civ. App. 246; *Central Texas*, etc., R. Co. *v. Gibson*, (Tex. Civ. App. 1904) 83 S. W. Rep. 862.

*Washington.* — *McLeod v. Spokane*, 26 Wash. 346.

*Canada.* — *London St. R. Co. v. Brown*, 31 Can. Sup. Ct. 642, reversing 2 Ont. L. Rep. 53.

**4. The Rule Stated.** — *Hubbard v. New York*, etc., R. Co., 72 Conn. 24, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 371; *Hogan v. Citizens' R. Co.*, 150 Mo. 36, citing 7 AM. AND ENG. OF LAW (2d ed.) 371 et seq.

And for other cases supporting the text see the following:

*England.* — *Reynolds v. Tilling*, 20 Times L. Rep. 57.

*Delaware.* — *Adams v. Wilmington*, etc., Electric R. Co., 3 Penn. (Del.) 512.

*Louisiana.* — *Barnhill v. Texas*, etc., R. Co., 109 La. 43.

*Maine.* — *Moulton v. Sanford*, etc., R. Co., 99 Me. 508.

*Maryland.* — *Consolidated Gas Co. v. Getty*, 96 Md. 683, 94 Am. St. Rep. 603.

*North Carolina.* — *Bogan v. Carolina Cent. R. Co.*, 129 N. Car. 154.

*North Dakota.* — *Cameron v. Great Northern R. Co.*, 8 N. Dak. 124.

*Wisconsin.* — *Tesch v. Milwaukee Electric R.*, etc., Co., 108 Wis. 593.

**American Statements of the General Doctrine.** —

"One may not contribute to his injury by an omission of ordinary care for his own safety, and then recover damages for injuries suffered from the neglect of another." *St. Louis*, etc., R. Co. *v. Karns*, 66 Kan. 802.

"Contributory negligence prevents a recovery because the plaintiff, of his own volition, intervenes between the negligence of the defendant and the injury received, so that the former is not the sole cause of the latter." *Dowd v. New York*, etc., R. Co., 170 N. Y. 459.

"It is well settled that no right of action accrues at common law for an injury resulting proximately from the mutual negligence of the injured person and another. \* \* \* A defendant whose negligence contributed proximately to the plaintiff's hurt is not legally re-

**372.** See notes 1, 2.

**373.** 2. Reason for Rule. — See note 1.

3. Difficulties in Its Application. — See note 2.

**IV. ELEMENTS OF CONTRIBUTORY NEGLIGENCE — 1. Negligence of Defendant.** — See note 3.

2. Negligence of Plaintiff Must Be Proximate. — See note 4.

**374.** See note 1.

**375.** 3. Plaintiff's Remote Negligence. — See notes 1, 2, 3.

sponsible therefor, if the plaintiff was also guilty of proximate negligence." *Memphis St. R. Co. v. Wilson*, 108 Tenn. 618.

The plaintiff "is entitled to no relief if the injuries resulted from negligence of his own combined with that of the defendant." *Kilpatrick v. Grand Trunk R. Co.*, 72 Vt. 263, 82 Am. St. Rep. 939.

**As to Actions Against More than One Defendant**, see *Fletcher v. Boston, etc.*, R. Co., 187 Mass. 463, 105 Am. St. Rep. 414.

**Georgia — Rule of Comparative Negligence.** — "At common law, if the negligence of the plaintiff contributed to the injury, he could not recover. This doctrine, referred to usually as that of 'contributory negligence,' is not the law of this state; but the doctrine referred to often as that of 'comparative negligence' is the rule of force here." *Western, etc., R. Co. v. Ferguson*, 113 Ga. 708, referring to *Civ. Code Ga.*, §§ 2322, 3830.

But it is only where the person injured is less at fault than the defendant that a recovery can be had. *Brunswick, etc., R. Co. v. Wiggins*, 113 Ga. 842. See the title **COMPARATIVE NEGLIGENCE**.

**If a Person Might Have Avoided His Injury** by the exercise of ordinary care he cannot recover for the negligence of another. *Phillips v. Grand Trunk R. Co.*, 1 Ont. L. Rep. 28.

**372.** 1. See *Sego v. Southern Pac. R. Co.*, 137 Cal. 405; *Consolidated Gas Co. v. Getty*, 96 Md. 683, 94 Am. St. Rep. 603; *Cummings v. Helena, etc., Smelting, etc., Co.*, 26 Mont. 434. 2. See *Warren v. Manchester St. R. Co.*, 70 N. H. 352.

**373.** 1. **Law Will Not Measure Extent of Contribution.** — *Karczewski v. Wilmington City R. Co.*, 4 Penn. (Del.) 24; *Lorenz v. Burlington, etc., R. Co.*, 115 Iowa 377; *Murphy v. Dayton*, 8 Ohio Dec. 354, 7 Ohio N. P. 227; *Smith v. Centennial Eureka Min. Co.*, 27 Utah 307. See also *Massey v. Seller*, 45 Oregon 267; as to the jurisdictions in which the rule of comparative negligence prevails, see the title **COMPARATIVE NEGLIGENCE**, vol. 6, p. 36.

2. **Indefiniteness of Rule.** — See dissenting opinion of Bossé, J., in *Macdonald v. Thibaudeau*, 8 Quebec Q. B. 465, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 373.

3. **Defendant Must Be Negligent.** — *Cox v. Norfolk, etc., R. Co.*, 123 N. Car. 604, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 373. See also *Wissler v. Atlantic*, 123 Iowa 11; *Graves v. Norfolk, etc., R. Co.*, 136 N. Car. 3.

4. **Negligence of Plaintiff Must Be Proximate** — *United States*. — *Alaska United Gold Min. Co. v. Keating*, (C. C. A.) 116 Fed. Rep. 561.

*Illinois*. — See *St. Louis Nat. Stock Yards v. Godfrey*, 198 Ill. 288.

*Indiana*. — *Southern R. Co. v. Davis*, (Ind. App. 1905) 72 N. E. Rep. 1053.

*Iowa*. — See *Jerolman v. Chicago G. W. R. Co.*, 108 Iowa 177.

*Kansas*. — *Chicago G. W. R. Co. v. Bailey*, 66 Kan. 115.

*Louisiana*. — *Rice v. Crescent City R. Co.*, 51 La. Ann. 108, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 373.

*Massachusetts*. — *Aiken v. Holyoke St. R. Co.*, 184 Mass. 269.

*New York*. — *McKeon v. Steinway R. Co.*, 20 N. Y. App. Div. 601; *Brick v. Metropolitan St. R. Co.*, (N. Y. City Ct. Gen. T.) 35 Misc. (N. Y.) 135; *Jewell v. New York Cent., etc., R. Co.*, 27 N. Y. App. Div. 500.

*North Carolina*. — *Brewster v. Elizabeth City*, 137 N. Car. 392.

*Ohio*. — *Schweinfurth v. Cleveland, etc., R. Co.*, 60 Ohio St. 215; *Matthews v. Toledo*, 11 Ohio Cir. Dec. 375, 21 Ohio Cir. Ct. 69.

*South Carolina*. — *Burns v. Southern R. Co.*, 65 S. Car. 229.

*Tennessee*. — See *Burke v. Citizens St. R. Co.*, 102 Tenn. 409.

*Texas*. — *Hawkins v. Missouri, etc., R. Co.*, (Tex. Civ. App. 1904) 83 S. W. Rep. 52. See also *Central Texas, etc., R. Co. v. Hoard*, (Tex. Civ. App. 1898) 49 S. W. Rep. 142.

*West Virginia*. — *Bias v. Chesapeake, etc., R. Co.*, 46 W. Va. 349; *Barker v. Ohio River R. Co.*, 51 W. Va. 423, 90 Am. St. Rep. 808.

*Wisconsin*. — *Mauch v. Hartford*, 112 Wis. 40.

"Negligence, to prevent recovery by plaintiff, must contribute to the injury complained of. It is not contributory unless it is the proximate cause of the injury." *Indianapolis St. R. Co. v. Schmidt*, (Ind. App. 1904) 71 N. E. Rep. 663.

**374.** 1. **Contributory Negligence Is a Defense Which Confesses and Avoids the Plaintiff's Case** — *Maryland*. — *Tucker v. State*, 89 Md. 471.

*Missouri*. — *Allen v. St. Louis Transit Co.*, 183 Mo. 411.

*Montana*. — *Wastl v. Montana Union R. Co.*, 24 Mont. 159, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 373, 374.

*North Carolina*. — *Bolden v. Southern R. Co.*, 123 N. Car. 614.

*South Carolina*. — *Bodie v. Charleston, etc., R. Co.*, 61 S. Car. 468; *Kennedy v. Southern R. Co.*, 59 S. Car. 535.

*Canada*. — See dissenting opinion of Bossé, J., in *Macdonald v. Thibaudeau*, 8 Quebec Q. B. 465, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 374 et seq.

**375.** 1. **Plaintiff's Remote Negligence.** — *Aiken v. Holyoke St. R. Co.*, 184 Mass. 269; *Omaha St. R. Co. v. Larson*, (Neb. 1903) 97 N. W. Rep. 824; *Halifax Electric Tramway*

**375.** 4. Want of Ordinary Care. — See note 4.

**376.** See note 1.

**377.** See notes 1, 2, 3.

5. Slight Want of Ordinary Care. — See note 5.

**378.** 6. Test of Ordinary Care. — See note 1.

*Co. v. Inglis*, 30 Can. Sup. Ct. 256. See also *Davenport v. F. B. Dubach Lumber Co.*, 112 La. 943.

But it seems that, in *Tennessee*, so-called "remote contributory negligence" is to be considered in mitigation of damages. *Nashville R. Co. v. Norman*, 108 Tenn. 324.

**375. 2. Mere Antecedent Occasion.** — *Little v. Boston*, etc., R. Co., 72 N. H. 502.

**3.** *Aiken v. Holyoke St. R. Co.*, 184 Mass. 269. See also *Fritz v. Western Union Tel. Co.*, 25 Utah 263.

**4. Want of Ordinary Care** — *United States*. — *Kansas City Southern R. Co. v. Prunty*, (C. C. A.) 133 Fed. Rep. 13.

*California*. — *Studer v. Southern Pac. R. Co.*, 121 Cal. 400, 66 Am. St. Rep. 39.

*Colorado*. — *Thunborg v. Pueblo*, 18 Colo. App. 80.

*Illinois*. — *Chicago*, etc., R. Co. *v. Ptacek*, 171 Ill. 9.

*Indiana*. — *Southern R. Co. v. Davis*, (Ind. App. 1905) 72 N. E. Rep. 1053.

*Kentucky*. — *Louisville*, etc., R. Co. *v. Survant*, (Ky. 1898) 44 S. W. Rep. 88.

*Massachusetts*. — *Tumalty v. New York*, etc., R. Co., 170 Mass. 164. See also *McCarvel v. Sawyer*, 173 Mass. 540, 73 Am. St. Rep. 318.

*Minnesota*. — *Hafner v. St. Paul City R. Co.*, 7 Minn. 252.

*Missouri*. — *Harff v. Green*, 168 Mo. 308.

*Montana*. — *Cummings v. Helena*, etc., *Smelting*, etc., Co., 26 Mont. 434.

*New Jersey*. — See *Kathmeyer v. Mehl*, (N. J. 1905) 60 Atl. Rep. 40.

*New York*. — *Walsh v. Central New York Telephone*, etc., Co., 176 N. Y. 163; *Smith v. New York Cent.*, etc., R. Co., 177 N. Y. 224; *Reed v. Metropolitan St. R. Co.*, 180 N. Y. 315.

*Ohio*. — See *Katafiasz v. Toledo Consol. Electric Co.*, 24 Ohio Cir. Ct. 127.

*South Carolina*. — *Bussey v. Charleston*, etc., R. Co., 52 S. Car. 438.

*Texas*. — *St. Louis Southwestern R. Co. v. Cannon*, (Tex. Civ. App. 1904) 81 S. W. Rep. 778.

*Utah*. — *Burgess v. Salt Lake City R. Co.*, 17 Utah 406.

*Wisconsin*. — *Deisenrieter v. Kraus-Merkel Malting Co.*, 97 Wis. 279.

**376. 1. Immaterial that Plaintiff's Want of Ordinary Care Preceded Defendant's Negligence.** — See *Denver*, etc., R. Co. *v. Buffehr*, 30 Colo. 27.

**377. 1. Or Succeeded It.** — See *Denver*, etc., R. Co. *v. Buffehr*, 30 Colo. 27.

**2. Or Was Contemporaneous with It.** — *Denver*, etc., R. Co. *v. Buffehr*, 30 Colo. 27; *De Lon v. Kokomo City St. R. Co.*, 22 Ind. App. 377.

**3. The Causal Connection in Such Cases** — *United States*. — See *Chicago*, etc., R. Co. *v. Rossow*, 54 C. C. A. 313, 117 Fed. Rep. 491; *Kansas City Southern R. Co. v. Prunty*, (C. C. A.) 133 Fed. Rep. 13.

*Alabama*. — See *Peters v. Southern R. Co.*, 135 Ala. 533.

*Georgia*. — *Georgia Southern*, etc., R. Co. *v. Cartledge*, 116 Ga. 164.

*Louisiana*. — *Williams v. Illinois Cent. R. Co.*, (La. 1905) 37 So. Rep. 992.

*Montana*. — *Wastl v. Montana Union R. Co.*, 24 Mont. 159.

*Pennsylvania*. — *Elliott v. Allegheny County Light Co.*, 204 Pa. St. 568.

*Wisconsin*. — *Bolin v. Chicago*, etc., R. Co., 108 Wis. 333, 81 Am. St. Rep. 911.

"The question in cases of alleged contributory negligence is not whether the negligence of the plaintiff or that of the defendant is the more proximate cause of the injury, but whether or not the negligence of the plaintiff directly contributed to it. One whose negligence directly contributed to his injury cannot recover damages of another whose negligence concurred to cause it, although the carelessness of the latter was the more proximate cause of it." *Gilbert v. Burlington*, etc., R. Co., (C. C. A.) 128 Fed. Rep. 529.

**5. Slight Want of Ordinary Care Constitutes Negligence** — *United States*. — *Riggs v. Standard Oil Co.*, 130 Fed. Rep. 199.

*Alabama*. — *Birmingham R.*, etc., Co. *v. Bynum*, 139 Ala. 389.

*Georgia*. — *Central of Georgia R. Co. v. McClifford*, 120 Ga. 90.

*Illinois*. — *Cicero*, etc., St. R. Co. *v. Snider*, 72 Ill. App. 300; *U. S. Express Co. v. McCluskey*, 77 Ill. App. 56.

*Iowa*. — *Root v. Des Moines R. Co.*, 122 Iowa 469; *Camp v. Chicago G. W. R. Co.*, 124 Iowa 238; *Matthieson v. Burlington*, etc., R. Co., 125 Iowa 90.

*Michigan*. — *Hunter v. Durand*, (Mich. 1904) 100 N. W. Rep. 191.

*Nebraska*. — *Kitzberger v. Chicago*, etc., R. Co., (Neb. 1903) 93 N. W. Rep. 935.

*Wisconsin*. — *Lyon v. Grand Rapids*, 121 Wis. 609; *Bolin v. Chicago*, etc., R. Co., 108 Wis. 333, 81 Am. St. Rep. 911; *Mauch v. Hartford*, 112 Wis. 40.

**"Slight Negligence" Distinguished.** — In *Jerolman v. Chicago G. W. R. Co.*, 108 Iowa 177, *citing* 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 377, the court said: "Slight want of ordinary care must not be confused with slight negligence, which is usually applied to an omission of extraordinary care." See also *Camp v. Chicago G. W. R. Co.*, 124 Iowa 238; *Jewell City v. Van Meter*, (Kan. 1905) 79 Pac. Rep. 149.

**378. 1. Meaning of "Ordinary Care"** — *United States*. — *Illinois Cent. R. Co. v. Jones*, (C. C. A.) 95 Fed. Rep. 370; *Texas*, etc., R. Co. *v. Putman*, 57 C. C. A. 58, 120 Fed. Rep. 754.

*Arkansas*. — *Hot Springs St. R. Co. v. Hil-dreth*, 72 Ark. 572.

*California*. — *McGraw v. Friend*, etc., *Lumber Co.*, 120 Cal. 574.

*Connecticut*. — *Nesbit v. Crosby*, 74 Conn. 554.

*Delaware*. — *Adams v. Wilmington*, etc., *Elec-*



tric R. Co., 3 Penn. (Del.) 512; *Neal v. Wilmington, etc., Electric R. Co.*, 3 Penn. (Del.) 467. See also *Wilman v. People's R. Co.*, 4 Penn. (Del.) 260.

*Florida*.—*Florida Cent., etc., R. Co. v. Mooney*, 40 Fla. 17.

*Georgia*.—See *Western, etc., R. Co. v. Rogers*, 104 Ga. 224.

*Illinois*.—*Commonwealth Electric Co. v. Melville*, 210 Ill. 70; *Spring Valley v. Gavin*, 81 Ill. App. 456, *affirmed* 182 Ill. 232.

*Indiana*.—*Robards v. Indianapolis St. R. Co.*, (Ind. 1903) 67 S. E. Rep. 953; *Republic Iron, etc., Co. v. Ohler*, 161 Ind. 393; *Pittsburgh, etc., R. Co. v. Seivers*, 162 Ind. 234.

*Iowa*.—*Hill v. Glenwood*, 124 Iowa 479; *Stanley v. Cedar Rapids, etc., R. Co.*, 119 Iowa 526.

*Kansas*.—*Cummings v. Wichita R., etc., Co.*, 68 Kan. 218; *Jewell City v. Van Meter*, (Kan. 1905) 79 Pac. Rep. 149.

*Kentucky*.—*Louisville, etc., R. Co. v. Logsdon*, 114 Ky. 746; *Gorman v. Louisville R. Co.*, (Ky. 1903) 72 S. W. Rep. 760; *Macon v. Paducah St. R. Co.*, 110 Ky. 680.

*Louisiana*.—*Cowden v. Shreveport Belt R. Co.*, 106 La. 238.

*Minnesota*.—*Gilbert v. Duluth Gen. Electric Co.*, 93 Minn. 99.

*Missouri*.—*Linder v. St. Louis Transit Co.*, 103 Mo. App. 574; *Kean v. Schoening*, 103 Mo. App. 77; *Kolb v. St. Louis Transit Co.*, 102 Mo. App. 143; *Livingston v. Wabash R. Co.*, 170 Mo. 452; *Johnson v. St. Joseph*, 96 Mo. App. 663; *Groom v. Kavanagh*, 97 Mo. App. 362; *Holwerson v. St. Louis, etc., R. Co.*, 157 Mo. 216.

*New Jersey*.—*Quimby v. Filter*, 62 N. J. L. 766; *Wheeler v. South Orange, etc., Traction Co.*, 70 N. J. L. 725.

*New York*.—*Walsh v. Central New York Telephone, etc., Co.*, 176 N. Y. 163; *Kellegher v. Forty-second St., etc., R. Co.*, 171 N. Y. 309; *Piper v. New York Cent., etc., R. Co.*, 156 N. Y. 224, 66 Am. St. Rep. 560; *Coxhead v. Johnson*, 20 N. Y. App. Div. 605, *affirmed* 162 N. Y. 640; *Tompert v. Hastings Pavement Co.*, 35 N. Y. App. Div. 578.

*North Dakota*.—*Heckman v. Evenson*, 7 N. Dak. 173.

*Ohio*.—*Wabash R. Co. v. Skiles*, 64 Ohio St. 458.

*Rhode Island*.—*Beerman v. Union R. Co.*, 24 R. I. 275.

*South Carolina*.—*Bodie v. Charleston, etc., R. Co.*, 61 S. Car. 468.

*Texas*.—*Southern Kansas R. Co. v. Sage*, (Tex. Civ. App. 1904) 80 S. W. Rep. 1038; *Chicago, etc., R. Co. v. James*, (Tex. Civ. App. 1903) 75 S. W. Rep. 930; *San Antonio v. Talerico*, (Tex. Civ. App. 1903) 78 S. W. Rep. 28; *Louisiana Western Extension R. Co. v. McDonald*, (Tex. Civ. App. 1899) 52 S. W. Rep. 649; *Pecos, etc., R. Co. v. Reveley*, 24 Tex. Civ. App. 293; *Taylor, etc., R. Co. v. Warner*, (Tex. Civ. App. 1900) 60 S. W. Rep. 442; *Houston, etc., R. Co. v. Sgalinski*, 19 Tex. Civ. App. 107.

*Utah*.—*Hone v. Mammoth Min. Co.*, 27 Utah 168.

*Vermont*.—*LaFlam v. Missisquoi Pulp Co.*, 74 Vt. 125, *citing* 7 AM. AND ENG. ENCYC. OF

LAW (2d ed.) 378; *Carter v. Central Vermont R. Co.*, 72 Vt. 190.

*Virginia*.—*Roanoke v. Shull*, 97 Va. 419, 75 Am. St. Rep. 791; *Newport News, etc., R., etc., Co. v. Bradford*, 99 Va. 117.

*West Virginia*.—*Barker v. Ohio River R. Co.*, 51 W. Va. 423, 90 Am. St. Rep. 808.

*Wisconsin*.—*Tesch v. Milwaukee Electric R., etc., Co.*, 108 Wis. 593; *Rhyner v. Menasha*, 107 Wis. 201; *Schrunk v. St. Joseph*, 120 Wis. 223; *Hanlon v. Milwaukee Electric R., etc., Co.*, 118 Wis. 210.

**Judicial Statements and Explanations of the Rule.**—"In the exercise of the same degree of care, different degrees of precaution may be necessary." *Griffen v. Manice*, 166 N. Y. 188, 82 Am. St. Rep. 630.

"The expressions 'due care,' 'ordinary care,' and 'reasonable care' are convertible terms." *Baltimore, etc., R. Co. v. Faith*, 175 Ill. 58.

Where a trial court had stated ordinary care to be that care and foresight to avoid danger which a person of ordinary prudence, caution, and intelligence would usually exercise under the same or similar circumstances, it was held on appeal that the use of the word "usually" was not erroneous. *Chicago Union Traction Co. v. Chugren*, 209 Ill. 429.

**The Conduct of the Injured Person** must be such as a person of ordinary care and prudence would not have been guilty of under the circumstances, or it does not constitute contributory negligence.

*United States*.—*St. Louis, etc., R. Co. v. Leftwich*, 54 C. C. A. 1, 117 Fed. Rep. 127; *Hemingway v. Illinois Cent. R. Co.*, (C. C. A.) 114 Fed. Rep. 843. See also *National Metal Edge Box Co. v. Maroni*, (C. C. A.) 123 Fed. Rep. 410.

*Colorado*.—*Pueblo Electric St. R. Co. v. Sherman*, 25 Colo. 114, 71 Am. St. Rep. 116.

*Delaware*.—*Queen Anne's R. Co. v. Reed*, (Del. 1905) 59 Atl. Rep. 860.

*Illinois*.—*Chicago City R. Co. v. Fennimore*, 119 Ill. 9.

*Indiana*.—*Rhodium v. Johnson*, 24 Ind. App. 401; *Green v. Eden*, 24 Ind. App. 583.

*Iowa*.—*Jerolman v. Chicago G. W. R. Co.*, 108 Iowa 177; *Lorenz v. Burlington, etc., R. Co.*, 115 Iowa 377.

*Kentucky*.—*Maysville v. Guilfoyle*, 110 Ky. 670; *Louisville, etc., R. Co. v. Coons*, 76 S. W. Rep. 45, 25 Ky. L. Rep. 509; *Louisville, etc., R. Co. v. Smith*, (Ky. 1905) 84 S. W. Rep. 755.

*Maine*.—*Foren v. Rodick*, 90 Me. 276.

*Massachusetts*.—*Dorr v. Schenck*, 187 Mass. 542.

*Michigan*.—*Sosnofski v. Lake Shore, etc., R. Co.*, 134 Mich. 72, 10 Detroit Leg. N. 360; *Ablard v. Detroit United R. Co.*, (Mich. 1905) 102 N. W. Rep. 741.

*Mississippi*.—*Yazoo, etc., R. Co. v. Eakin*, 79 Miss. 735.

*Missouri*.—*Moore v. St. Louis Transit Co.*, 95 Mo. App. 728; *Baker v. Kansas City, etc., R. Co.*, 147 Mo. 140; *Deitring v. St. Louis Transit Co.*, 109 Mo. App. 524; *Giardina v. St. Louis, etc., R. Co.*, 185 Mo. 330.

*Nebraska*.—*Missouri Pac. R. Co. v. Fox*, 60 Neb. 531; *Chicago, etc., R. Co. v. Featherly*, 64 Neb. 323.

**379.** 7. Degrees of Negligence. — See notes 1, 2.

**380.** V. HOW THE ELEMENTS MUST COMBINE. — See notes 2, 3, 4.

**381.** VI. PROXIMATE AND REMOTE CAUSES — 1. Proximate Cause Defined. — See notes 1, 2.

*New Hampshire.* — *Davis v. Concord, etc., R. Co.*, 68 N. H. 247; *Folsom v. Concord, etc., R. Co.*, 68 N. H. 454.

*New Jersey.* — *Harmer v. Reed Apartment, etc., Co.*, 68 N. J. L. 332.

*New York.* — *Ayres v. Delaware, etc., R. Co.*, 158 N. Y. 254; *Bertsch v. Metropolitan St. R. Co.*, 68 N. Y. App. Div. 228, affirmed 173 N. Y. 634; *Wall v. New York Cent., etc., R. Co.*, 56 N. Y. App. Div. 599.

*North Carolina.* — *Asbury v. Charlotte Electric R., etc., Co.*, 125 N. Car. 568.

*Texas.* — *Citizens R. Co. v. Gossett*, (Tex. Civ. App. 1904) 85 S. W. Rep. 35; *San Antonio, etc., R. Co. v. Lester*, (Tex. Civ. App. 1904) 84 S. W. Rep. 401.

*Virginia.* — *Bass v. Norfolk R., etc., Co.*, 100 Va. 1; *Winchester v. Carroll*, 99 Va. 727.

*West Virginia.* — *Compare Normile v. Wheeling Traction Co.*, (W. Va. 1905) 49 S. E. Rep. 1030.

*Wisconsin.* — *Mauch v. Hartford*, 112 Wis. 40.

**379. 1. Degrees of Negligence** — *United States.* — *Baltimore, etc., R. Co. v. Landrigan*, 191 U. S. 461; *Purple v. Union Pac. R. Co.*, 51 C. C. A. 564, 114 Fed. Rep. 123.

*Delaware.* — *Reed v. Queen Anne's R. Co.*, 4 Penn. (Del.) 413.

*Indiana.* — See *Cleveland, etc., R. Co. v. Miller*, 149 Ind. 490.

*Nebraska.* — *Friend v. Burleigh*, 53 Neb. 674.

*New York.* — *Thies v. Thomas*, (Supm. Ct. 1r. T.) 77 N. Y. Supp. 276.

*Wisconsin.* — *Bolin v. Chicago, etc., R. Co.*, 108 Wis. 333, 81 Am. St. Rep. 911; *Rideout v. Winnebago Traction Co.*, 123 Wis. 297.

**"There Are No Degrees of Negligence."** — *Magrane v. St. Louis, etc., R. Co.*, 183 Mo. 119.

A charge that one may recover if his negligence is slight, and that of the person injuring him, gross, is error. *Franklin v. Engel*, 34 Wash. 480.

2. *Chicago, etc., Coal Co. v. Moran*, 210 Ill. 9; *La Flam v. Missisquoi Pulp Co.*, 74 Vt. 125, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 379.

In *Tennessee* There is a Modification of the doctrine of contributory negligence. *Nashville R. Co. v. Norman*, 108 Tenn. 331. See also cases cited *infra*, 452. 1.

The Doctrine of Comparative Negligence has been repudiated in most jurisdictions. See the title COMPARATIVE NEGLIGENCE.

**380. 2. Causal Connection of Elements** — *United States.* — *Kansas City Southern R. Co. v. Prunty*, (C. C. A.) 133 Fed. Rep. 13.

*Alabama.* — *Birmingham R., etc., Co. v. Brantley*, (Ala. 1904) 37 So. Rep. 698.

*Indiana.* — *Elwood v. Addison*, 26 Ind. App. 28.

*Maryland.* — *Baltimore Consol. R. Co. v. Rifcowitz*, 89 Md. 338.

*Missouri.* — *Oates v. Metropolitan St. R. Co.*, 168 Mo. 535; *Frank v. St. Louis Transit Co.*, 99 Mo. App. 323.

*South Carolina.* — *Nelson v. Georgia, etc., R. Co.*, 68 S. Car. 462.

*Texas.* — *Houston, etc., R. Co. v. Turner*, (Tex. Civ. App. 1904) 78 S. W. Rep. 712; *Galveston, etc., R. Co. v. Pendleton*, 30 Tex. Civ. App. 431; *Gulf, etc., R. Co. v. Mangham*, 29 Tex. Civ. App. 486.

*Virginia.* — *Southern R. Co. v. Bruce*, 97 Va. 92.

*Wisconsin.* — *Mauch v. Hartford*, 112 Wis. 40.

3. **Proximate Contribution Not Enough.** — *MacDonald v. Thibaudeau*, 8 Quebec Q. B. 449, 476, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 380; *Glueck v. Scheld*, 125 Cal. 288. See also *Hall v. Cedar Rapids, etc., R. Co.*, 115 Iowa 18; *Texas, etc., R. Co. v. McDonald*, (Tex. Civ. App. 1905) 85 S. W. Rep. 493.

4. **There Must also Be a Want of Ordinary Care.** — *Kansas City Southern R. Co. v. Prunty*, (C. C. A.) 133 Fed. Rep. 13.

**381. 1.** "A defendant whose negligence contributed proximately to the plaintiff's hurt is not legally responsible therefor, if the plaintiff was also guilty of proximate negligence. Proximate contributory negligence on the part of the plaintiff in such a case bars his action." *Memphis St. R. Co. v. Wilson*, 108 Tenn. 618. See also *Barksdale v. Charleston, etc., R. Co.*, 66 S. Car. 204.

2. **The Proximate Cause Is the Efficient Cause.** — *Consolidated Gas Co. v. Getty*, 96 Md. 683, 94 Am. St. Rep. 603, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 381.

For other cases discussing and defining "proximate cause" in connection with the defense of contributory negligence, see the following:

*United States.* — *Kansas City Southern R. Co. v. Prunty*, (C. C. A.) 133 Fed. Rep. 13; *Berlin Mills Co. v. Croteau*, (C. C. A.) 88 Fed. Rep. 860.

*Colorado.* — *Walters v. Denver Consol. Electric Light Co.*, 12 Colo. App. 145.

*Illinois.* — *Claypool v. Wigmore*, (Ind. App. 1904) 71 N. E. Rep. 509; *Chicago Hair, etc., Co. v. Mueller*, 203 Ill. 558, affirming 106 Ill. App. 21.

*Indiana.* — *Cleveland, etc., R. Co. v. Carey*, 33 Ind. App. 275.

*Kansas.* — *Missouri Pac. R. Co. v. Columbia*, 65 Kan. 390.

*Maine.* — *Bowden v. Derby*, 99 Me. 208.

*Maryland.* — *Maryland Steel Co. v. Marney*, 88 Md. 482, 71 Am. St. Rep. 441.

*Minnesota.* — *Ready v. Peavy Elevator Co.*, 89 Minn. 154.

*New York.* — *Leeds v. New York Telephone Co.*, 178 N. Y. 118; *Rider v. Syracuse Rapid Transit Co.*, 171 N. Y. 139; *Laidlaw v. Sage*, 158 N. Y. 73; *Williams v. Koehler*, 41 N. Y. App. Div. 426; *Frounfelker v. Delaware, etc., R. Co.*, 74 N. Y. App. Div. 224; *Koch v. Fox*, 71 N. Y. App. Div. 288.

*Pennsylvania.* — *Marsh v. Giles*, 211 Pa. St. 17.



**381. 2. Remote Cause Defined.** — See note 3.**382. 3. Principles by Which Question Determined** — *Causa Proxima et Non Remota Spectatur*. — See notes 1, 2, 4, 5.

*Rhode Island*. — *Vizacchero v. Rhode Island Co.*, 26 R. I. 392.

*South Carolina*. — *Branham v. Camden Cotton Mill*, 61 S. Car. 491.

*Tennessee*. — *Chattanooga Light, etc., Co. v. Hodges*, 109 Tenn. 331, 97 Am. St. Rep. 844; *Barr v. Southern Ry. Co.*, 105 Tenn. 547.

*Texas*. — *Texas Cent. R. Co. v. Bender*, 32 Tex. Civ. App. 568; *De La Pena v. International, etc., R. Co.*, 32 Tex. Civ. App. 241; *Denison, etc., R. Co. v. Carter*, (Tex. 1904) 82 S. W. Rep. 782.

*Virginia*. — *Danville R., etc., Co. v. Hodnett*, 101 Va. 361; *Charlottesville v. Failes*, 103 Va. 53; *Richmond Traction Co. v. Martin*, 102 Va. 209.

*Wisconsin*. — *Deisenrieter v. Kraus-Merkel Malting Co.*, 97 Wis. 279; *Feldschneider v. Chicago, etc., R. Co.*, 122 Wis. 423; *Pautz v. Plankington Packing Co.*, 118 Wis. 47; *Dehsoy v. Milwaukee Electric R., etc., Co.*, 110 Wis. 412.

**381. 3. Remote Cause.** — *Ward v. Maine Cent. R. Co.*, 96 Me. 136; *Oates v. Metropolitan St. R. Co.*, 168 Mo. 535; *Omaha St. R. Co. v. Larson*, (Neb. 1903) 97 N. W. Rep. 824; *Ploof v. Burlington Traction Co.*, 70 Vt. 509. See also *International, etc., R. Co. v. Bryant*, (Tex. Civ. App. 1899) 54 S. W. Rep. 364.

But it seems that in *Tennessee*, so-called "remote contributory negligence" is to be considered in mitigation of damages. *Nashville R. Co. v. Norman*, 108 Tenn. 331.

**382. 1. Cause Proximate et Non Remota Spectatur.** — See the dissenting opinion in *McCabe, J.*, in *Krenzer v. Pittsburg, etc., R. Co.*, 151 Ind. 587, 68 Am. St. Rep. 252, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 382. See also *Claypool v. Wignore*, (Ind. App. 1904) 71 N. E. Rep. 509; *Bodie v. Charleston, etc., R. Co.*, 61 S. Car. 468; *Neely v. Ft. Worth, etc., R. Co.*, 96 Tex. 274.

**2. To a Sound Judgment Must Be Left Each Particular Case.** — *Texas, etc., R. Co. v. Coutourie*, (C. C. A.) 135 Fed. Rep. 465, quoting 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 382; *Ellick v. Wilson*, 58 Neb. 584; *Rider v. Syracuse Rapid Transit R. Co.*, 171 N. Y. 139; *Chattanooga Light, etc., Co. v. Hodges*, 109 Tenn. 331, 97 Am. St. Rep. 844.

**4. Graves v. Norfolk, etc., R. Co.**, 136 N. Car. 3; *Lindsay v. Norfolk, etc., R. Co.*, 132 N. Car. 59.

**5. Doctrine of Davies v. Mann — Discovered Peril** — *United States*. — *The Steam Dredge No. 1*, 122 Fed. Rep. 679; *Louisville, etc., R. Co. v. Morlay*, (C. C. A.) 86 Fed. Rep. 240; *Texas, etc., R. Co. v. Putnam*, 57 C. C. A. 58, 120 Fed. Rep. 754.

*Alabama*. — *Memphis, etc., R. Co. v. Martin*, 131 Ala. 269; *Central of Georgia R. Co. v. Foshee*, 125 Ala. 213; *Alabama G. S. R. Co. v. Burgess*, 116 Ala. 509; *Birmingham R., etc., Co. v. Brantley*, (Ala. 1904) 37 So. Rep. 608.

*California*. — *Fox v. Oakland Consol. St. R. Co.*, 118 Cal. 55, 62 Am. St. Rep. 216; *Harrington v. Los Angeles R. Co.*, 140 Cal. 514, 98 Am. St. Rep. 85.

*Colorado*. — *Posten v. Denver Consol. Tramway Co.*, 11 Colo. App. 187.

*Delaware*. — *Tully v. Philadelphia R., etc., Co.*, 3 Penn. (Del.) 455; *Maxwell v. Wilmington City R. Co.*, 1 Marv. (Del.) 199; *Di Prisco v. Wilmington City R. Co.*, 4 Penn. (Del.) 527.

*Georgia*. — *Kendrick v. Seaboard Air-Line R. Co.*, 121 Ga. 775.

*Indiana*. — *Krenzer v. Pittsburg, etc., R. Co.*, 151 Ind. 587, 68 Am. St. Rep. 252; *Hammond, etc., Electric R. Co. v. Eads*, 32 Ind. App. 249.

*Iowa*. — *Goodrich v. Burlington, etc., R. Co.*, 103 Iowa 412. See also *Christy v. Des Moines City R. Co.*, 126 Iowa 428.

*Kentucky*. — *Floyd v. Paducah R., etc., Co.*, (Ky. 1901) 64 S. W. Rep. 653; *South Covington, etc., R. Co. v. Riegler*, (Ky. 1904) 82 S. W. Rep. 382; *Becker v. Louisville, etc., R. Co.*, 110 Ky. 474, 96 Am. St. Rep. 459. See also *Washington Mfg., etc., Co. v. Barnett*, (Ky. 1897) 42 S. W. Rep. 1120.

*Maine*. — *Atwood v. Bangor, etc., R. Co.*, 91 Me. 399.

*Michigan*. — *Quirk v. Rapid R. Co.*, 130 Mich. 654; *Bedell v. Detroit, etc., R. Co.*, 131 Mich. 668, 9 Detroit Leg. N. 479.

*Missouri*. — *Meyers v. St. Louis Transit Co.*, 99 Mo. App. 363.

*Nebraska*. — *Omaha St. R. Co. v. Larson*, (Neb. 1903) 97 N. W. Rep. 824; *Dailey v. Burlington, etc., R. Co.*, 58 Neb. 396.

*New York*. — *McKeon v. Steinway R. Co.*, 20 N. Y. App. Div. 601; *Wall v. New York Cent., etc., R. Co.*, 56 N. Y. App. Div. 599.

*New Hampshire*. — *Little v. Boston, etc., R. Co.*, 72 N. H. 502.

*North Carolina*. — *Cox v. Norfolk, etc., R. Co.*, 126 N. Car. 103.

*Ohio*. — *Snyder v. Cleveland, etc., R. Co.*, 60 Ohio St. 487; *Erie R. Co. v. McCormick*, 24 Ohio Cir. Ct. 86.

*Rhode Island*. — See *Vizacchero v. Rhode Island Co.*, 26 R. I. 392.

*Texas*. — *Central Texas, etc., R. Co. v. Gibson*, (Tex. Civ. App. 1904) 79 S. W. Rep. 351; *Texas, etc., R. Co. v. Yarbrough*, (Tex. Civ. App. 1903) 73 S. W. Rep. 844; *Dallas Consol. Electric St. R. Co. v. Illo*, 32 Tex. Civ. App. 290; *Smith v. Houston, etc., R. Co.*, 17 Tex. Civ. App. 502; *Kroeger v. Texas, etc., R. Co.*, 30 Tex. Civ. App. 87; *White v. Houston, etc., R. Co.*, (Tex. Civ. App. 1898) 46 S. W. Rep. 382; *El Paso Electric R. Co. v. Kendall*, (Tex. Civ. App. 1905) 85 S. W. Rep. 61. See also *St. Louis Southwestern R. Co. v. Matthews*, (Tex. Civ. App. 1904) 79 S. W. Rep. 71.

*Vermont*. — See *Wiley v. Boston, etc., R. Co.*, 72 Vt. 120.

*Virginia*. — See *Richmond Traction Co. v. Martin*, 102 Va. 209.

*Washington*. — *Roberts v. Spokane St. R. Co.*, 23 Wash. 325.

**Rule Based on a Public Policy.** — In *St. Louis Southwestern R. Co. v. Jacobson*, 28 Tex. Civ. App. 150, the court said: "The doctrine of liability upon the discovered peril of one in fault is based upon grounds of public policy which forbid the killing or maiming of another,



**383.** Slight Want of Ordinary Care Not Slight Negligence. — See note 1.

**384.** Defendant's Negligence More Immediate Efficient Cause. — See note 1.

**385.** Rule in *Tuff v. Warman*. — See note 1.

even with his consent or acquiescence. \* \* \* The duty to resort to every means at hand, consistent with the safety of the train, to avoid the injury, is absolute, and the failure to do so partakes of the nature of a wanton wrong, against which no act on the part of the person injured will be a defense. The rule has been adopted without qualification in this state. The courts have not sought to justify it on the questionable and technical ground that the defendant's failure to resort to every means at hand to prevent the disaster is a new and intervening cause. It is based rather on the broad ground of public policy, which forbids the interposition of such a defense by a wrongdoer who knowingly fails to prevent the destruction of human life when he can." *Compare Texas, etc., R. Co. v. Staggs*, 90 Tex. 458.

**Negligence in Failing to Discover** appellant's perilous position is not the equivalent of discovered peril. *Hawkins v. Missouri, etc., R. Co.*, (Tex. Civ. App. 1904) 83 S. W. Rep. 52.

**For Authorities Charging the Defendant with Constructive Notice of Plaintiff's Peril**, see *infra*, **385. 1.**

**383. 1. Slight Want of Ordinary Care Not Slight Negligence.**—*Lindberg v. Chicago City R. Co.*, 83 Ill. App. 433; *Bodie v. Charleston, etc., R. Co.*, 61 S. Car. 468, *quoting* 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 383; *Bolin v. Chicago, etc., R. Co.*, 108 Wis. 333, 81 Am. St. Rep. 911; *Tesch v. Milwaukee Electric R., etc., Co.*, 108 Wis. 593. See also the cases cited *supra*, p. 377, note 5.

**But it Must Be Proximate to Bar a Recovery**—*Massachusetts*.—*Aiken v. Holyoke St. R. Co.*, 184 Mass. 269.

*Missouri*.—*Sepetowski v. St. Louis Transit Co.*, 102 Mo. App. 110.

*New York*.—*McKeon v. Steinway R. Co.*, 20 N. Y. App. Div. 601; *Erius v. Brooklyn Heights R. Co.*, 63 N. Y. App. Div. 353.

*South Carolina*.—*Nelson v. Georgia, etc., R. Co.*, 68 S. Car. 462.

*Texas*.—*Baca v. San Antonio, etc., R. Co.*, 32 Tex. Civ. App. 210; *Galveston, etc., R. Co. v. Pendleton*, 30 Tex. Civ. App. 431.

*Wisconsin*.—*Mauch v. Hartford*, 112 Wis. 40.

**384. 1. Not Proximate When Defendant's Negligence More Immediate Efficient Cause**—*California*.—*Sego v. Southern Pac. R. Co.*, 137 Cal. 405.

*Colorado*.—*Posten v. Denver Consol. Tramway Co.*, 11 Colo. App. 187.

*Delaware*.—*Cox v. Wilmington City R. Co.*, 4 Penn. (Del.) 162.

*Maine*.—*Ward v. Maine Cent. R. Co.*, 96 Me. 136; *Conley v. Maine Cent. R. Co.*, 95 Me. 149.

*Michigan*.—*Hinchman v. Pere Marquette R. Co.*, (Mich. 1904) 99 N. W. Rep. 277, 11 Detroit Leg. N. 38.

*New York*.—*Distler v. Long Island R. Co.*, 151 N. Y. 424; *Wagner v. Metropolitan St. R. Co.*, 79 N. Y. App. Div. 591, *affirmed* 176 N. Y. 610; *Steinacker v. Hills Bros. Co.*, 91 N. Y. App. Div. 521.

*North Carolina*.—*Norton v. North Carolina R. Co.*, 122 N. Car. 910.

*Pennsylvania*.—See *Boulfrois v. United Traction Co.*, 210 Pa. St. 263, 105 Am. St. Rep. 809.

*South Carolina*.—*Bodie v. Charleston, etc., R. Co.*, 61 S. Car. 468, *quoting* 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 384.

*Utah*.—*Shaw v. Salt Lake City R. Co.*, 21 Utah 76.

**385. 1. Rule in Tuff v. Warman—Doctrine of "Last Clear Chance"**—*United States*.—*Baltimore, etc., R. Co. v. Anderson*, 85 Fed. Rep. 413, 56 U. S. App. 137; *Turnbull v. New Orleans, etc., R. Co.*, 57 C. C. A. 151, 120 Fed. Rep. 783.

*California*.—See *Fox v. Oakland Consol. St. R. Co.*, 118 Cal. 55, 62 Am. St. Rep. 216.

*Colorado*.—*Denver, etc., R. Co. v. Buffehr*, 30 Colo. 27.

*Delaware*.—*Cox v. Wilmington City R. Co.*, 4 Penn. (Del.) 162.

*Indiana*.—*Indianapolis St. R. Co. v. Schmidt*, (Ind. App. 1904) 71 N. E. Rep. 663; *Elwood Electric St. R. Co. v. Ross*, 26 Ind. App. 258.

*Iowa*.—*Barry v. Burlington R., etc., Co.*, 119 Iowa 62.

*Kentucky*.—*Toner v. South Covington, etc., St. R. Co.*, 109 Ky. 41; *Louisville, etc., R. Co. v. Lowe*, 80 S. W. Rep. 768, 25 Ky. L. Rep. 2317; *Kentucky, etc., Bridge, etc., Co. v. Sydor*, 82 S. W. Rep. 989, 26 Ky. L. Rep. 951; *Floyd v. Paducah R., etc., Co.*, 73 S. W. Rep. 1122, 24 Ky. L. Rep. 2364; *Flynn v. Louisville, R. Co.*, 110 Ky. 662.

*Louisiana*.—See *Lampkin v. McCormick*, 105 La. 418, 83 Am. St. Rep. 245. *Compare*. *Cowden v. Shreveport Belt R. Co.*, 106 La. 238.

*Maine*.—*Ward v. Maine Cent. R. Co.*, 96 Me. 136; *Coombs v. Mason*, 97 Me. 270.

*Maryland*.—*Baltimore Consol. R. Co. v. Rificowitz*, 89 Md. 338; *Baltimore City Pass. R. Co. v. Cooney*, 87 Md. 261.

*Michigan*.—*Labarge v. Pere Marquette R. Co.*, 134 Mich. 139.

*Minnesota*.—*Rawitzer v. St. Paul City R. Co.*, 93 Minn. 84.

*Missouri*.—*Moore v. Lindell R. Co.*, 176 Mo. 528, *quoting* 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 385; *Deitring v. St. Louis Transit Co.*, 109 Mo. App. 524; *Jett v. Central Electric R. Co.*, 178 Mo. 664; *Klockenbrink v. St. Louis, etc., R. Co.*, 172 Mo. 678; *Livingston v. Wabash R. Co.*, 170 Mo. 452; *Degel v. St. Louis Transit Co.*, 101 Mo. App. 56; *Shanks v. Springfield Traction Co.*, 101 Mo. App. 702; *Baxter v. St. Louis Transit Co.*, 103 Mo. App. 597; *Kolb v. St. Louis Transit Co.*, 102 Mo. App. 143; *Linder v. St. Louis Transit Co.*, 103 Mo. App. 574; *Parks v. St. Louis, etc., R. Co.*, 178 Mo. 108; *Moore v. St. Louis Transit Co.*, 95 Mo. App. 728. See also *Heinze v. Metropolitan St. R. Co.*, 182 Mo. 528; *Meyers v. St. Louis Transit Co.*, 99 Mo. App. 363; *Sepetowski v. St. Louis Transit Co.*, 102 Mo. App. 110; *Hanheide v. St. Louis Transit Co.*, 104 Mo. App. 323.

**386.** See note 1.

Conversely. — See note 2.

**387.** Where Negligence of Other Party Might Have Been Discovered by Ordinary Care. — See notes 1, 2, 3.

*New Hampshire.* — See *Gahagan v. Boston*, etc., R. Co., 70 N. H. 441.

*New York.* — *Costello v. Third Ave. R. Co.*, 161 N. Y. 317.

*North Carolina.* — *Bogan v. Carolina Cent. R. Co.*, 129 N. Car. 154; *Smith v. Atlanta*, etc., R. Co., 132 N. Car. 819; *Marks v. Atlantic Coast Line R. Co.*, 133 N. Car. 89; *Lassiter v. Raleigh*, etc., R. Co., 133 N. Car. 247.

*South Carolina.* — *Bodie v. Charleston*, etc., R. Co., 61 S. Car. 468, quoting 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 383-286.

*Tennessee.* — *Memphis St. R. Co. v. Haynes*, 112 Tenn. 712.

*Texas.* — *Texas*, etc., R. Co. v. *Staggs*, 90 Tex. 458; *St. Louis Southwestern R. Co. v. Jacobson*, 28 Tex. Civ. App. 150. See also *St. Louis Southwestern R. Co. v. Bolton*, (Tex. Civ. App. 1904) 81 S. W. Rep. 123; *Kroeger v. Texas*, etc., R. Co., 30 Tex. Civ. App. 87.

*Utah.* — *Thompson v. Salt Lake Rapid Transit Co.*, 16 Utah 281, 67 Am. St. Rep. 621.

*Virginia.* — *Richmond Traction Co. v. Clarke*, 101 Va. 382.

*West Virginia.* — *Bias v. Chesapeake*, etc., R. Co., 46 W. Va. 349.

**Doctrine Repudiated.** — In *Nebraska and Wisconsin* the courts have flatly repudiated the doctrine of "the last clear chance" as incompatible with the rule of contributory negligence. *Chicago*, etc., R. Co. v. *Lilley*, (Neb. 1903) 93 N. W. Rep. 1012; *Tesch v. Milwaukee Electric R.*, etc., Co., 108 Wis. 593; *Bolin v. Chicago*, etc., R. Co., 108 Wis. 333, 81 Am. St. Rep. 911.

**How Applied to Trespassers.** — It is the general rule that no duty arises in favor of a trespasser until his danger is actually discovered. *Humphreys v. Valley R. Co.*, 100 Va. 749; *Thomas v. Chicago*, etc., R. Co., 114 Iowa 169; *Houston*, etc., R. Co. v. *Ramsey*, (Tex. Civ. App. 1904) 81 S. W. Rep. 825; *Louisiana Western Extension R. Co. v. McDonald*, (Tex. Civ. App. 1899) 52 S. W. Rep. 649. But there is a duty when his danger is discovered. *Fitzgibbons v. Manhattan R. Co.*, (Supm. Ct. App. T.) 88 N. Y. Supp. 341. And it is sometimes said that in crowded places some care must be taken by railroads on behalf of trespassers. *Jones v. Charlestown*, etc., R. Co., 61 S. Car. 556; *Chesapeake*, etc., R. Co. v. *Keelin*, (Ky. 1901) 62 S. W. Rep. 261. See also *Rawitzer v. St. Paul City R. Co.*, 93 Minn. 84; *Adams v. Southern R. Co.*, 52 U. S. App. 433, 84 Fed. Rep. 596. And that a reasonable lookout under the circumstances should be kept by a railroad for helpless trespassers, such as little children. *Bias v. Chesapeake*, etc., R. Co., 46 W. Va. 349. And it has been held in *Missouri* that under some circumstances the failure to discover a trespasser may amount to wantonness, and that a recovery may be had on that ground (and not upon the ground of a new act of negligence). *Morgan v. Wabash R. Co.*, 159 Mo. 262, distinguishing *Rine v. Chicago*, etc., R. Co., 88 Mo. 392, 25 Am. & Eng. R. Cas. 545,

cited in the original note. And the Supreme Court of *North Carolina*, in its opinion in *Bogan v. Carolina Cent. R. Co.*, 129 N. Car. 154, seems to draw no marked distinction between the duty of a railroad on its trestle and that of a traveler on a public highway.

**386.** 1. *Memphis*, etc., R. Co. v. *Martin*, 131 Ala. 269; *Moore v. Lindell R. Co.*, 176 Mo. 528, quoting 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 386; *Kolb v. St. Louis Transit Co.*, 102 Mo. App. 143; *Bodie v. Charleston*, etc., R. Co., 61 S. Car. 468, quoting 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 386. See also *Borschall v. Detroit R. Co.*, 115 Mich. 473.

2. **Plaintiff's Subsequent Negligence a Bar** — *California.* — *Sego v. Southern Pac. R. Co.*, 137 Cal. 405.

*Illinois.* — *Claypool v. Wigmore*, (Ind. App. 1904) 71 N. E. Rep. 509.

*Louisiana.* — *Barnhill v. Texas*, etc., R. Co., 109 La. 43.

*Maryland.* — *McNab v. United R.*, etc., Co., 94 Md. 726.

*Mississippi.* — See *Gulf*, etc., R. Co. v. *Sneed*, 84 Miss. 252.

*Missouri.* — *Moore v. Lindell R. Co.*, 176 Mo. 528, quoting 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 386; *Gettys v. St. Louis Transit Co.*, 103 Mo. App. 573, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 385.

*South Carolina.* — *Bodie v. Charleston*, etc., R. Co., 61 S. Car. 468, quoting 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 386.

*Rhode Island.* — *Vizacchero v. Rhode Island Co.*, 26 R. I. 392.

*Utah.* — See *Peck v. Oregon Short Line R. Co.*, 25 Utah 21.

**In Georgia** this doctrine is declared by statute. *Briscoe v. Southern R. Co.*, 103 Ga. 224; *Macon*, etc., St. R. Co. v. *Holmes*, 103 Ga. 655; *Savannah*, etc., R. Co. v. *Flaherty*, 110 Ga. 335; *Bridger v. Gresham*, 111 Ga. 814; *Barber v. East*, etc., R. Co., 111 Ga. 838. See also *Simmons v. Seaboard Air Line R. Co.*, 120 Ga. 225; *Western*, etc., R. Co. v. *Ferguson*, 113 Ga. 708; *Atlanta*, etc., R. Co. v. *Gardner*, 122 Ga. 82.

**387.** 1. **Rule When Negligence Might Have Been Discovered by Ordinary Care.** — *Metropolitan St. R. Co. v. Arnold*, 67 Kan. 260, quoting 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 387; *Baltimore*, etc., R. Co. v. *Bauer*, 60 U. S. App. 156, 88 Fed. Rep. 116, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 387. And see the cases cited *supra*, p. 385, note 1.

2. **When the Rule Does Not Apply.** — *Borschall v. Detroit R. Co.*, 115 Mich. 473; *Moore v. Lindell R. Co.*, 176 Mo. 528; *Danville St. Car Co. v. Watkins*, 97 Va. 713. See also *Sosnofski v. Lake Shore*, etc., R. Co., 134 Mich. 72, 10 Detroit Leg. N. 360.

3. **When the Rule Can Be Invoked.** — *Rawitzer v. St. Paul City R. Co.*, 93 Minn. 84; *Klockenbrink v. St. Louis*, etc., R. Co., 172 Mo. 678. See also *Hogan v. Citizens' R. Co.*, 150 Mo. 36; *South Covington*, etc., R. Co. v. *Riegler*, (Ky. 1904) 82 S. W. Rep. 382.

**387.** When the Negligence of the Two Parties Is Concurrent. — See notes 4, 5.

**388.** VII. AGGRAVATION OF INJURY BY PLAINTIFF'S NEGLIGENCE. — See note 1, 2.

VIII. INJURY ENHANCED BY DISEASE — 1. Defendant's Negligence Causing or Aggravating Disease. — See notes 3, 4, 5, 6, 7.

And if There Can Be No Apportionment. — See note 8.

**389.** 2. Diseased Condition Independent of Injury — Defendant's Knowledge. — See note 1.

**387.** 4. Has No Application When Negligence Concurrent. — *United States*. — Gilbert *v.* Erie R. Co., 38 C. C. A. 408, 97 Fed. Rep. 747.

*California*. — *Sego v. Southern Pac. R. Co.*, 137 Cal. 405.

*Delaware*. — *Dungan v. Wilmington City R. Co.*, 4 Penn. (Del.) 458.

*Indiana*. — *Robards v. Indianapolis St. R. Co.*, (Ind. App. 1903) 67 N. E. Rep. 953.

*Maine*. — *Butler v. Rockland, etc., St. R. Co.*, 99 Me. 149, 105 Am. St. Rep. 267.

*Michigan*. — *Labarge v. Pere Marquette R. Co.*, 134 Mich. 139, 10 Detroit Leg. N. 430.

*Missouri*. — *Ledwidge v. St. Louis Transit Co.*, (Mo. App. 1903) 73 S. W. Rep. 1008; *Hornstein v. United R. Co.*, 97 Mo. App. 271; *Holwerson v. St. Louis, etc., R. Co.*, 157 Mo. 216; *Hanheide v. St. Louis Transit Co.*, 104 Mo. App. 323. See also *Markowitz v. Metropolitan St. R. Co.*, 186 Mo. 350.

*New Hampshire*. — *Gahagan v. Boston, etc., R. Co.*, 70 N. H. 441.

*New York*. — *Rider v. Syracuse Rapid Transit R. Co.*, 171 N. Y. 139; *Bortz v. Dry Dock, etc., R. Co.*, 78 N. Y. App. Div. 386.

*Ohio*. — *Lake Shore, etc., R. Co. v. Callahan*, 25 Ohio Cir. Ct. 115; *Cleveland, etc., R. Co. v. Gahan*, 24 Ohio Cir. Ct. 277.

*Rhode Island*. — See *Vizacchero v. Rhode Island Co.*, 26 R. I. 392.

*Vermont*. — See *French v. Grand Trunk R. Co.*, 76 Vt. 441.

*Virginia*. — *Consumers' Brewing Co. v. Doyle*, 102 Va. 399. See also *Richmond Traction Co. v. Martin*, 102 Va. 209.

This so-called exception to the rule of contributory negligence (*i. e.*, the doctrine of "the last clear chance") will not be extended to cases where the plaintiff's own negligence extended up to and actually contributed to the injury. To warrant its application there must have been some new breach of duty on the part of the defendant subsequent to the plaintiff's negligence. See the following cases: *Hot Springs St. R. Co. v. Johnson*, 64 Ark. 420; *Little Rock, etc., R. Co. v. Smith*, 64 Ark. 662, 43 S. W. Rep. 969; *West Chicago St. R. Co. v. Liderman*, 187 Ill. 463, 70 Am. St. Rep. 226; *Baltimore City Pass. R. Co. v. Cooney*, 87 Md. 261; *Shanks v. Springfield Traction Co.*, 101 Mo. App. 702; *Delfowsky v. Dry Dock, etc., R. Co.*, 78 N. Y. App. Div. 632; *Jones v. Charleston, etc., R. Co.*, 61 S. Car. 556; *Cooper v. Georgia, etc., R. Co.*, 56 S. Car. 91; *Texas Midland R. Co. v. Tidwell*, (Tex. Civ. App. 1899) 49 S. W. Rep. 641.

**5.** *Green v. Los Angeles Terminal R. Co.*, 143 Cal. 31, 101 Am. St. Rep. 68.

**388.** 1. Plaintiff's Negligence After Injury. — *Wissler v. Atlantic*, 123 Iowa 11, citing 7

AM. AND ENG. ENCYC. OF LAW (2d ed.) 387. See also *Joseph Schlitz Brewing Co. v. Duncan*, 6 Kan. App. 178; *Missouri, etc., R. Co. v. Schilling*, 32 Tex. Civ. App. 417; *Galveston, etc., R. Co. v. Hubbard*, (Tex. Civ. App. 1902) 70 S. W. Rep. 112; *Texas, etc., R. Co. v. McKenzie*, 30 Tex. Civ. App. 293.

**2.** Cannot Recover for Portion Caused by His Own Negligence. — *Gulf, etc., R. Co. v. Denson*, (Tex. Civ. App. 1903) 72 S. W. Rep. 70.

**3.** Defendant's Negligence Causing a Disease. — *Chicago City R. Co. v. Saxby*, 213 Ill. 280, 104 Am. St. Rep. 218, quoting 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 388. See also *Wood v. New York Cent., etc., R. Co.*, 83 N. Y. App. Div. 604, affirmed 179 N. Y. 557; *Ayres v. Delaware, etc., R. Co.*, 158 N. Y. 254; *Eichholz v. Niagara Falls Hydraulic Power, etc., Co.*, 68 N. Y. App. Div. 441, affirmed 174 N. Y. 519; *Rea v. St. Louis Southwestern R. Co.*, (Tex. Civ. App. 1903) 73 S. W. Rep. 555.

Where the defendant's negligence caused the plaintiff to contract the smallpox, and there was no evidence to show that it was contributory negligence to be unvaccinated, a recovery was sustained. *Missouri, etc., R. Co. v. Wood*, (Tex. Civ. App. 1902) 68 S. W. Rep. 802.

**4.** Developing a Latent Tendency to Disease. — *Chicago City R. Co. v. Saxby*, 213 Ill. 280, 104 Am. St. Rep. 218, quoting 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 388.

**5.** Aggravating a Prior Disease. — *Chicago City R. Co. v. Saxby*, 213 Ill. 280, 104 Am. St. Rep. 218, quoting 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 388; *Jordan v. Seattle*, 30 Wash. 298. See also *Campbell v. Los Angeles Traction Co.*, 137 Cal. 565.

**6.** Leading Directly to Disease. — *Chicago City R. Co. v. Saxby*, 213 Ill. 280, 104 Am. St. Rep. 218, quoting 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 388; *McGarrahan v. New York, etc., R. Co.*, 171 Mass. 211. See also *Cameron v. New England Telephone, etc., Co.*, 182 Mass. 310; *Consolidated Traction Co. v. Lambertson*, 60 N. J. L. 457.

**7.** Measure of Damages — How Apportioned. — *Berard v. Boston, etc., R. Co.*, 177 Mass. 179; *Elliott v. Kansas City*, 174 Mo. 554; *Ford v. Kansas City*, 181 Mo. 137. And see *Chicago City R. Co. v. Saxby*, 213 Ill. 280, 104 Am. St. Rep. 218, quoting 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 388.

**8.** When No Apportionment. — *Chicago City R. Co. v. Saxby*, 213 Ill. 280, 104 Am. St. Rep. 218, quoting 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 388.

**389.** 1. Defendant Not Liable for Consequences of Disease Alone. — See *O'Brien v. Missouri, etc., R. Co.*, (Tex. Civ. App. 1904) 82 S. W. Rep. 319; *Chicago City R. Co. v. Saxby*, 213 Ill. 280, 104 Am. St. Rep. 218.



**389.** Yet if He Knew of the Diseased Condition. — See note 2.

**3.** Direct and Natural Consequences — Carriers. — See notes 3, 4.

Action Arising Out of Contract — Sounding in Tort. — See note 5.

**390.** 4. Diseased Condition Must Be Traced to Injury. — See notes 1, 2, 3. Question for Jury. — See notes 5, 6.

**391.** 5. Injury or Disease Enhanced by Surgical Operation. — See note 1.

**IX. KNOWLEDGE OF THE DANGER** — 1. On Part of Plaintiff — Ignorant of the Danger. — See note 2.

**392.** Reason to Apprehend Danger Must Exist. — See note 1.

Knowledge of Danger Not Negligence Per Se. — See notes 2, 3.

**389.** 2. When Liable for Aggravation. — Chattanooga Light, etc., Co. v. Hodges, 109 Tenn. 331, 97 Am. St. Rep. 844.

**3.** And All Natural Consequences of Injury. — Chicago City R. Co. v. Saxby, 213 Ill. 280, 104 Am. St. Rep. 218; Chicago City R. Co. v. Cooney, 196 Ill. 466. See also Lutz v. Louisville R. Co., (Ky. 1899) 48 S. W. Rep. 1080; Williams v. Southern R. Co., 68 S. Car. 369.

**4.** Especially When Owning Special Duty. — See Chicago City R. Co. v. Saxby, 213 Ill. 280, 104 Am. St. Rep. 218.

**5.** The Action May Arise in Contract, but Sounds in Tort. — See Fletcher v. Boston, etc., R. Co., 187 Mass. 463, 105 Am. St. Rep. 414.

**390.** 1. Fright. — "The consensus of opinion would seem to be that no recovery can be had for mere fright." Mitchell v. Rochester R. Co., 151 N. Y. 107, 56 Am. St. Rep. 604. But the rule is otherwise if fright follows physical shock. Lofink v. Interborough Rapid Transit Co., 102 N. Y. App. Div. 275.

**2.** Any Diseased Condition Must Be Traced to Injury. — Koch v. Fox, 71 N. Y. App. Div. 288.

**3.** But This Is Done if No Other Efficient Cause Appears. — Chicago City R. Co. v. Cooney, 196 Ill. 466.

**5.** But It Is for the Jury to Determine the Question. — Denver v. Hyatt, 28 Colo. 129; Chicago City R. Co. v. Saxby, 213 Ill. 280, 104 Am. St. Rep. 218; Olson v. Chicago, etc., R. Co., (Minn. 1905) 102 N. W. Rep. 449; Dallas v. Moore, (Tex. Civ. App. 1903) 74 S. W. Rep. 95; Normile v. Wheeling Traction Co., (W. Va. 1905) 49 S. E. Rep. 1030.

**6.** That Plaintiff's Physical Condition Makes Him More Susceptible to Injury Is No Defense. — Texas, etc., R. Co. v. Lee, 32 Tex. Civ. App. 23.

**391.** 1. Surgical Treatment Enhancing Effects of Injury. — Illinois. — Morris v. Despain, 104 Ill. App. 452; Chicago City R. Co. v. Saxby, 213 Ill. 280, 104 Am. St. Rep. 218; Chicago City R. Co. v. Cooney, 196 Ill. 466.

Massachusetts. — McGarrahan v. New York, etc., R. Co., 171 Mass. 211.

Missouri. — Elliott v. Kansas City, 174 Mo. 554.

New Hampshire. — Seeton v. Dunbarton, (N. H. 1905) 59 Atl. Rep. 944.

But Failure to Consult a Physician Is Want of Due Care. — Gulf, etc., R. Co. v. Condra, (Tex. Civ. App. 1904) 82 S. W. Rep. 528.

**2.** Plaintiff Ignorant of Danger — United States. — Western Gas Constr. Co. v. Danner, (C. C. A.) 97 Fed. Rep. 888, quoting 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 391.

Illinois. — Chicago, etc., R. Co. v. Burrige, 107 Ill. App. 23, reversed 211 Ill. 9.

Indiana. — Tipton Light, etc., Co. v. New-

comer, (Ind. App. 1903) 67 N. E. Rep. 548. See also Stoy v. Louisville, etc., Consol R. Co., 160 Ind. 144; Central Union Tel. Co. v. Sokola, (Ind. App. 1905) 73 N. E. Rep. 143.

Kansas. — Salina Mill, etc., Co. v. Hoyne, 10 Kan. App. 579, 63 Pac. Rep. 660.

Kentucky. — Henderson v. O'Halaran, 114 Ky. 186, 102 Am. St. Rep. 279.

Louisiana. — Schwartz v. New Orleans, etc., R. Co., 110 La. 534.

Massachusetts. — See Thompson v. Lowell, etc., St. R. Co., 170 Mass. 577.

Michigan. — Butterfield v. Arnold, 131 Mich. 583, 9 Detroit Leg. N. 451; Kyes v. Valley Telephone Co., 132 Mich. 281, 9 Detroit Leg. N. 609.

New York. — Eastland v. Clarke, 165 N. Y. 420; Steinacker v. Hills Bros. Co., 91 N. Y. App. Div. 521. See also Frank v. Metropolitan St. R. Co., 58 N. Y. App. Div. 100, affirmed 171 N. Y. 666.

Pennsylvania. — Apfelbach v. Consolidated Gas Co., 204 Pa. St. 570; Smith v. Pittsburg, etc., R. Co., 210 Pa. St. 345.

South Carolina. — Matthews v. Seaboard Air Line R. Co., 67 S. Car. 501.

Virginia. — Chesapeake, etc., R. Co. v. Harris, 103 Va. 635.

West Virginia. — Thomas v. Wheeling Electrical Co., 54 W. Va. 395.

Wisconsin. — Hanlon v. Milwaukee Electric R. etc., Co., 118 Wis. 210.

Canada. — Thorn v. James, 14 Manitoba 373.

"It is an elementary principle, based upon reason and humanity, that it is not negligent to act reasonably upon the presumption that others will exercise ordinary care in the performance of duties imposed upon them." Setterstrom v. Brainerd, etc., R. Co., 89 Minn. 262.

**392.** 1. Reason to Apprehend Danger Must Exist — United States. — The Steam Dredge No. 1, 122 Fed. Rep. 679.

Indiana. — Scofield v. Myers, 27 Ind. App. 375, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 392.

Iowa. — Carver v. Minneapolis, etc., R. Co., 120 Iowa 346.

Kansas. — Iola Portland Cement Co. v. Moore, 65 Kan. 762, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 392.

Maine. — Coombs v. Mason, 97 Me. 270.

New York. — Shilagi v. Degnon-McLean Contracting Co., 71 N. Y. App. Div. 152, affirmed 173 N. Y. 625; Sullivan v. Dunham, 35 N. Y. App. Div. 342, affirmed 161 N. Y. 290.

Pennsylvania. — Morrison v. Pittsburg, etc., R. Co., 26 Pa. Super. Ct. 338.

**2.** But Knowledge of Danger Not Negligence Per Se. — Texas, etc., R. Co. v. Reeder, 170

**393.** See notes 1, 2.

Question for Jury. — See note 3.

But There Seems to Be a Presumption of Fact. — See note 4.

**394.** **X. DANGER INCURRED TO SAVE LIFE—1. General Rule Stated.** — See note 3.**395.** See notes 1, 2.

2. Danger Created by Wrongful Act. — See note 3.

3. Whether Negligence of Person Saved Imputed to Rescuer. — See note 4.

U. S. 530; *Harris v. Atlantic Coast Line R. Co.*, 132 N. Car. 160; *La Flam v. Missisquoi Pulp Co.*, 74 Vt. 125, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 392.

**392. 3. And Exposure to Known Danger Not Always Negligence.** — *Potts v. Shreveport Belt R. Co.*, 110 La. 1, 98 Am. St. Rep. 452; *St. Louis Southwestern R. Co. v. Matthews*, (Tex. Civ. App. 1904) 79 S. W. Rep. 71; *La Flam v. Missisquoi Pulp Co.*, 74 Vt. 125, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 392.

**393. 1. But Person So Exposing Himself Assumes Ordinary Risks** — *United States*. — *Klutt v. Philadelphia, etc.*, R. Co., 133 Fed. Rep. 1003; *The Buena Ventura*, 117 Fed. Rep. 988; *Smith v. Day*, 117 Fed. Rep. 956.

*California*. — *Studer v. Southern Pac. R. Co.*, 121 Cal. 400, 66 Am. St. Rep. 39.

*Georgia*. — *Simmons v. Seaboard Air Line R. Co.*, 120 Ga. 225; *Columbus R. Co. v. Dorsey*, 119 Ga. 363.

*Indiana*. — *Bass v. Reitdorf*, 25 Ind. App. 650.

*Iowa*. — *Mabbott v. Illinois Cent. R. Co.*, 116 Iowa 490.

*Kansas*. — *Sweet v. Union Pac. R. Co.*, 65 Kan. 812. See also *Atchison, etc.*, R. Co. v. *Schwindt*, 67 Kan. 8.

*Maryland*. — *McNab v. United R., etc.*, Co., 94 Md. 726; *Heying v. United R., etc.*, Co., (Md. 1905) 59 Atl. Rep. 667.

*Massachusetts*. — *Neylon v. Phillips*, 179 Mass. 334; *Kiander v. Brookline Gas Co.*, (Mass. 1901) 60 N. E. Rep. 796.

*Michigan*. — *Ball v. Hauser*, 129 Mich. 397, 8 Detroit Leg. N. 1014.

*Minnesota*. — *Roskoyek v. St. Paul, etc.*, R. Co., 76 Minn. 28; *Berg v. Great Northern R. Co.*, 70 Minn. 272, 68 Am. St. Rep. 524.

*Missouri*. — *Petty v. St. Louis, etc.*, R. Co., 179 Mo. 666; *Atherton v. Kansas City Coal etc.*, Co., 106 Mo. App. 591.

*New York*. — *Magar v. Hammond*, 171 N. Y. 377; *Hoes v. Edison Gen. Electric Co.*, 23 N. Y. App. Div. 433, reversed 161 N. Y. 35; *Seggerman v. Metropolitan St. R. Co.*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 374, affirmed 82 N. Y. App. Div. 637; *Daly v. New York City R. Co.*, (Supm. Ct. App. T.) 92 N. Y. Supp. 245.

*Pennsylvania*. — *Smith v. Electric Traction Co.*, 187 Pa. St. 110.

*Vermont*. — *La Flam v. Missisquoi Pulp Co.*, 74 Vt. 125, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 392 [393].

*Virginia*. — *Danville St.-Car Co. v. Watkins*, 97 Va. 713.

*Washington*. — *Reynolds v. Northern Pac. R. Co.*, 22 Wash. 165.

*West Virginia*. — See *Sesler v. Rolfe Coal, etc.*, Co., 51 W. Va. 318.

2. When He May Recover for Negligent Injury. — *The Steam Dredge No. 1*, 122 Fed. Rep. 679; *Spring Valley v. Gavin*, 81 Ill. App. 456, affirmed 182 Ill. 232; *Schwartz v. New Orleans, etc.*, R. Co., 110 La. 534; *La Flam v. Missisquoi Pulp Co.*, 74 Vt. 125, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 392 [393]. See also *Sesler v. Rolfe Coal, etc.*, Co., 51 W. Va. 318.

3. In Such Cases Jury to Decide. — *Daum v. North Jersey St. R. Co.*, 69 N. J. L. 1.

4. But There Is a Rebuttable Presumption of Contributory Negligence. — *Lockport v. Licht*, 113 Ill. App. 613.

**394. 3. Not Contributory Negligence to Try to Save Life** — *Colorado*. — *Walters v. Denver Consol. Electric Light Co.*, 12 Colo. App. 145. *Kentucky*. — *Becker v. Louisville, etc.*, R. Co., 110 Ky. 474, 96 Am. St. Rep. 459.

*Tennessee*. — *Ridley v. Mobile, etc.*, R. Co., (Tenn. 1905) 86 S. W. Rep. 606, quoting 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 394; *Chattanooga Light, etc.*, Co. v. *Hodges*, 109 Tenn. 331, 97 Am. St. Rep. 844.

*Texas*. — *San Antonio, etc.*, R. Co. v. *Gray*, 95 Tex. 427.

*West Virginia*. — *Schwartz v. Shull*, 45 W. Va. 405.

**395. 1. But the Question Is for the Jury.** — *Kansas City, etc.*, R. Co. v. *Thornhill*, (Ala. 1904) 37 So. Rep. 412; *West Chicago St. R. Co. v. Liderman*, 187 Ill. 463, 79 Am. St. Rep. 226; *Ridley v. Mobile, etc.*, R. Co., (Tenn. 1905) 86 S. W. Rep. 606, quoting 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 394 [395]. See also *Saylor v. Parsons*, 122 Iowa 679, 101 Am. St. Rep. 283; *Healy v. Vorndran*, 65 N. Y. App. Div. 353; *Houston, etc.*, R. Co. v. *Goodman*, (Tex. Civ. App. 1905) 85 S. W. Rep. 492.

2. When Recovery May Be Had. — *Louisville, etc.*, R. Co. v. *Orr*, 121 Ala. 489; *Bitzer v. Caver*, 74 S. W. Rep. 735, 25 Ky. L. Rep. 92; *Corbin v. Philadelphia*, 195 Pa. St. 461, 78 Am. St. Rep. 825; *Ridley v. Mobile, etc.*, R. Co., (Tenn. 1905) 86 S. W. Rep. 606, quoting 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 394 [395]; *International, etc.*, R. Co. v. *McVey*, (Tex. Civ. App. 1904) 81 S. W. Rep. 991.

But "the rescuer must not rashly and unnecessarily expose himself to danger." *Chattanooga Light, etc.*, Co. v. *Hodges*, 109 Tenn. 331, 97 Am. St. Rep. 844.

3. Danger Created by Wrongful Act. — *Maryland Steel Co. v. Marney*, 88 Md. 482, 71 Am. St. Rep. 441.

4. Whether Negligence of Saved Imputed to Savior. — In a recent case in *Ohio* it appeared that the plaintiff, who was a crossing watchman in the employ of the defendant railroad, was injured by the defendant's caboose while



**395.** 4. Person Saved Non Sui Juris, or Not Negligent. — See notes 6, 7, 8.

**396.** XI. DANGER INCURRED IN DISCHARGE OF DUTY — 1. General Rule. — See note 1.

2. Where Danger Apparent. — See note 2.

3. Person Injured Must Be Free from Fault. — See notes 3, 5.

5. Private Duty of Imperative Obligation. — See note 7.

**397.** 6. Assumption of Risks of Known Danger. — See notes 1, 3.

XII. INEVITABLE ACCIDENT — CONCURRING CAUSES — 1. Inevitable Accident Causing Injury. — See note 4.

**398.** 2. Accident and Negligence in Combination. — See note 1.

3. Natural Consequences Always Proximate. — See note 2.

pushing a woman out of its way. The evidence showed the negligence of the defendant and that the woman's danger permitted no time for deliberation. The court in sustaining a verdict for the plaintiff refused to admit that any negligence of the rescued woman could be imputed to her rescuer, holding that contributory negligence was in law a reprehensible act, and, therefore, a person guilty of it could not recover, but that the law could not consider the heroism or the plaintiff as reprehensible. *Pittsburg, etc., R. Co. v. Lynch*, 69 Ohio St. 123, 100 Am. St. Rep. 658.

**395.** 6. Persons Saved Non Sui Juris. — *Ridley v. Mobile, etc., R. Co.*, (Tenn. 1905) 86 S. W. Rep. 606, quoting 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 394 [395]. See also *Louisville, etc., R. Co. v. Orr*, 121 Ala. 489.

7. If Person Saved Not Negligent, Defendant Liable. — *Ridley v. Mobile, etc., R. Co.*, (Tenn. 1905) 86 S. W. Rep. 606, quoting 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 394 [395].

8. Provided Defendant Was Negligent. — *Hirschman v. Dry Dock, etc., R. Co.*, 46 N. Y. App. Div. 621; *Ridley v. Mobile, etc., R. Co.*, (Tenn. 1905) 86 S. W. Rep. 606, quoting 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 394 [395].

Where the plaintiff, a bright boy of twelve, was injured in rescuing his brother, aged five years, from a railroad turntable, it was held that a nonsuit was proper, as the maintenance of turntables is not negligence *per se* (though the manner of maintaining them may be negligent), and there being no evidence that the plaintiff was injured by any negligence of the defendant. *Thomason v. Southern R. Co.*, (C. C. A.) 113 Fed. Rep. 80.

**396.** 1. Not Contributory Negligence to Discharge Duty. — *Missouri Pac. R. Co. v. Lyons*, 54 Neb. 633; *Missouri, etc., R. Co. v. Goss*, 31 Tex. Civ. App. 300.

2. Even Though Dangers Are Apparent. — *Murphy v. Baltimore, etc., R. Co.*, 114 Ky. 696, where the court quotes 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 396, saying "the rule stated is manifestly sound in principle and consonant with reason."

3. But Persons So Injured Must Have Been Free from Fault. — *Murphy v. Baltimore, etc., R. Co.*, 114 Ky. 696, quoting 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 396, notes 3, 4, 5.

5. Where Ordinary Care Would Not Have Avoided Injury. — *Texas, etc., R. Co. v. Scott*, 30 Tex. Civ. App. 496.

7. Private Duty of Imperative Obligation. — *Allison v. Southern R. Co.*, 120 N. Car. 336; *International, etc., R. Co. v. McVey*, (Tex. Civ.

App. 1904) 81 S. W. Rep. 991; *La Flam v. Missisquoi Pulp Co.*, 74 Vt. 125, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 396; *Keating v. Pacific Steam Whaling Co.*, 21 Wash. 415, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 396.

But the attempt must not be rash and reckless. *Berg v. Great Northern R. Co.*, 70 Minn. 272, 68 Am. St. Rep. 524.

And a railroad servant, who imperils himself in trying to save a train from danger, may not recover from his master for injuries, unless there was a reasonable apprehension of danger to the train. *Gulf, etc., R. Co. v. Roane*, (Tex. Civ. App. 1903) 76 S. W. Rep. 771.

**397.** 1. But the Risks of Injury Are Often Assumed. — *Moore v. Stetson*, 96 Me. 197; *Chattanooga Light, etc., Co. v. Hodges*, 109 Tenn. 331, 97 Am. St. Rep. 844.

3. *La Flam v. Missisquoi Pulp Co.*, 74 Vt. 125, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 397.

4. Inevitable Accident Causing Injury — *Dela-ware*. — *Adams v. Wilmington, etc., Electric R. Co.*, 3 Penn. (Del.) 512.

*Illinois*. — *Illinois Cent. R. Co. v. Smiesni*, 104 Ill. App. 194.

*Kansas*. — *Cleghorn v. Thompson*, 62 Kan. 727; *Missouri Pac. R. Co. v. Columbia*, 65 Kan. 390.

*Missouri*. — See *Rogers v. Meyerson Printing Co.*, 103 Mo. App. 683.

*New York*. — *Ayers v. Rochester R. Co.*, 156 N. Y. 104.

*Pennsylvania*. — *Kilbride v. Carbon Dioxide, etc., Co.*, 201 Pa. St. 552, 88 Am. St. Rep. 829.

*Virginia*. — *Consumers' Brewing Co. v. Doyle*, 102 Va. 399.

**398.** 1. Accident and Negligence in Combination. — *Lockport v. Richards*, 81 Ill. App. 533; *Sutphen v. Hedden*, 67 N. J. L. 324; *Goe v. Northern Pac. R. Co.*, 30 Wash. 654. See also *Patton v. Southern R. Co.*, (C. C. A.) 82 Fed. Rep. 979; *American Express Co. v. Risley*, 178 Ill. 295.

"It is well settled that where two causes combine to produce the injury, both in their nature proximate, one of them being a natural cause for which neither party is responsible, and the other being one for which the defendant is responsible, it is no defense that the former cause concurred with the latter in producing the injury." *Keeler v. Lederer Realty Corp.*, 26 R. I. 524.

2. Unusual Consequences May Be Proximate. — *Texas, etc., R. Co. v. Carlin*, 49 C. C. A. 605, 111 Fed. Rep. 777; *Henderson v. O'Halaran*,



**399. XIII. ERRONEOUS OR ILLEGAL CONDUCT OF PLAINTIFF — 1. Erroneous Conduct Caused by Defendant.** — See note 2.

**400. When Plaintiff's Erroneous Act Not Proximate Cause.** — See note 1.

**401. Plaintiff's Contributory Negligence.** — See note 1.

**2. Illegal Conduct — a. IN GENERAL.** — See notes 2, 3.

114 Ky. 186, 102 Am. St. Rep. 279; Cohn v. Palmer, 78 N. Y. App. Div. 506; Koch v. Fox, 71 N. Y. App. Div. 288; Corbin v. Philadelphia, 195 Pa. St. 461, 78 Am. St. Rep. 825. See also Atchison, etc., R. Co. v. Parry, 67 Kan. 515; Hillebrand v. Standard Biscuit Co., 139 Cal. 233; Cleghorn v. Thompson, 62 Kan. 727; Drum v. Miller, 135 N. Car. 204, 102 Am. St. Rep. 528; Deisenrieter v. Kraus-Merkel Malt-ing Co., 97 Wis. 279.

**399. 2. Defendant Putting Plaintiff in Danger — Alabama.** — See Central of Georgia R. Co. v. Foshee, 125 Ala. 213.

*Colorado.* — Colorado Midland R. Co. v. Rob-bins, 30 Colo. 449.

*Georgia.* — Atlanta, etc., R. Co. v. Roberts, 116 Ga. 505.

*Illinois.* — Chicago, etc., R. Co. v. Corson, 198 Ill. 98.

*Kansas.* — Kansas City Leavenworth R. Co. v. Langley, (Kan. 1904) 78 Pac. Rep. 858.

*Kentucky.* — Chesapeake, etc., R. Co. v. Ogles, 73 S. W. Rep. 751, 24 Ky. L. Rep. 2160.

*New Jersey.* — Tuttle v. Atlantic City R. Co., 66 N. J. L. 327, 88 Am. St. Rep. 491.

*New York.* — Schafer v. New York, 154 N. Y. 466; Wood v. New York Cent., etc., R. Co., 83 N. Y. App. Div. 604, *affirmed* 179 N. Y. 557; Wall v. New York Cent., etc., R. Co., 56 N. Y. App. Div. 599; Boyce v. Shawangunk, 40 N. Y. App. Div. 593; Schoenfeld v. Metropolitan St. R. Co., (Supm. Ct. App. T.) 40 Misc. (N. Y.) 201. See also Heffernan v. Barber, 36 N. Y. App. Div. 163; Browne v. New York Cent., etc., R. Co., 87 N. Y. App. Div. 206, *affirmed* 179 N. Y. 582.

*Pennsylvania.* — Chambers v. Carroll, 199 Pa. St. 371.

*Texas.* — International, etc., R. Co. v. Bryant, (Tex. Civ. App. 1899) 54 S. W. Rep. 364; Bryant v. International, etc., R. Co., 19 Tex. Civ. App. 88; Saunders v. Missouri, etc., R. Co., (Tex. Civ. App. 1904) 80 S. W. Rep. 387. See also Texas Midland R. Co. v. Booth, (Tex. Civ. App. 1904) 80 S. W. Rep. 121.

*Utah.* — Mathews v. Daly-West Min. Co., 27 Utah 193.

*Virginia.* — Richmond Traction Co. v. Wilkin-son, 101 Va. 394.

*West Virginia.* — Normile v. Wheeling Trac-tion Co., (W. Va. 1905) 49 S. E. Rep. 1030.

*Canada.* — Macdonald v. Thibaudeau, 8 Que-beck Q. B. 476, *citing* 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 399.

"One may not by his own negligence or want of proper care place another in a perilous situation and, when sued for injuries resulting therefrom, put the burden on the plaintiff of showing that he acted with reasonable care. Persons in great peril are not required to ex-ercise the presence of mind required of prudent men under ordinary circumstances." Richmond R., etc., Co. v. Hudgins, 100 Va. 409.

**400. 1. When Plaintiff's Erroneous Act Not a Proximate Cause — Illinois.** — Momence Stone

Co. v. Groves, 197 Ill. 88; Junction Min. Co. v. Ench, 111 Ill. App. 346; Illinois Cent. R. Co. v. Haecker, 110 Ill. App. 102.

*Indiana.* — Chicago, etc., R. Co. v. Martin, 31 Ind. App. 308.

*Kentucky.* — Murphy v. Baltimore, etc., R. Co., 114 Ky. 696; Middlesborough R. Co. v. Stallard, 72 S. W. Rep. 17, 24 Ky. L. Rep. 1666.

*Nebraska.* — Ellick v. Wilson, 58 Neb. 584. *New Hampshire.* — Folsom v. Concord, etc., R. Co., 68 N. H. 454.

*New York.* — Poulsen v. Nassau Electric R. Co., 30 N. Y. App. Div. 246; Thies v. Thomas, (Supm. Ct. Tr. T.) 77 N. Y. Supp. 276. See also Burns v. Second Ave. R. Co., 21 N. Y. App. Div. 521.

*Pennsylvania.* — Cannon v. Pittsburg, etc., Traction Co., 194 Pa. St. 159.

*Texas.* — Bryant v. International, etc., R. Co., 19 Tex. Civ. App. 88; San Antonio, etc., R. Co. v. Ankerson, 31 Tex. Civ. App. 327; San An-tonio, etc., R. Co. v. Peterson, 20 Tex. Civ. App. 495; White v. Houston, etc., R. Co., (Tex. Civ. App. 1898) 46 S. W. Rep. 382.

But the apprehension of danger must be a reasonable one. Chretien v. New Orleans R. Co., 113 La. 761, 104 Am. St. Rep. 519.

**Peril Need Not Be Caused by Defendant.** — In Chattanooga Electric R. Co. v. Cooper, 109 Tenn. 308, the court was of the opinion that "the peril producing the confusion of judg-ment" need not be caused by the negligent act of the defendant.

**401. 1. But Plaintiff's Contributory Negli-gence Bars Him.** — Briscoe v. Southern R. Co., 103 Ga. 224; Albert v. New York, 75 N. Y. App. Div. 553; Dummer v. Milwaukee Electric R., etc., Co., 108 Wis. 589. See also Wabash R. Co. v. Keister, 163 Ind. 609.

**2. Illegal Conduct Not Negligence Per Se.** — Pewonka v. Stewart, (N. Dak. 1904) 99 N. W. Rep. 1080; Chesapeake, etc., R. Co. v. Jennings, 98 Va. 70, *citing* 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 401.

**Party Traveling on Illegal Pass.** — Where an editor was traveling on a pass issued in dis-obedience of a statute, it was held that the court would not entertain an action against the car-rier for personal injuries — both parties being as regards the pass *in pari delicto*. McNeill v. Durham, etc., R. Co., 132 N. Car. 510, 95 Am. St. Rep. 641.

**3. Must Proximately Contribute to Be a Bar.** — Little v. Southern R. Co., 120 Ga. 347, 102 Am. St. Rep. 104; Tackett v. Taylor County, 123 Iowa 149.

**When Plaintiff's Action Founded in His Viola-tion of Law.** — Voshefskey v. Hillside Coal, etc., Co., 21 N. Y. App. Div. 168, (decided under the law of *Pennsylvania*); Denison, etc., R. Co. v. Carter, (Tex. 1904) 82 S. W. Rep. 782.

And where both parties were engaged in a charivari, it was held that one could not recover of the other for injuries from the careless

**402. b. TRESPASS AS AN ELEMENT OF NEGLIGENCE. — See note 1.****404. c. CHILDREN AS TRESPASSERS. — See note 1.**

discharge of a pistol. *Gilmore v. Fuller*, 198 Ill. 130.

**402. 1. Trespass as Element of Negligence —**  
*United States.* — *Purple v. Union Pac. R. Co.*, 51 C. C. A. 564, 114 Fed. Rep. 123; *Singleton v. Felton*, (C. C. A.) 101 Fed. Rep. 526; *Johnson v. Chicago, etc.*, R. Co., 94 Fed. Rep. 473; *Berlin Mills Co. v. Croteau*, (C. C. A.) 88 Fed. Rep. 860. See also *Smith v. Hopkins*, 57 C. C. A. 193, 120 Fed. Rep. 921.

*Alabama.* — *Alabama G. S. R. Co. v. Guest*, 136 Ala. 348.

*Arkansas.* — *St. Louis, etc.*, R. Co. v. Townsend, 69 Ark. 380.

*Colorado.* — *Denver, etc.*, R. Co. v. Buffehr, 30 Colo. 27.

*Delaware.* — *Weldon v. Philadelphia, etc.*, R. Co., 2 Penn. (Del.) 1; *Tully v. Philadelphia, etc.*, R. Co., 3 Penn. (Del.) 455.

*Georgia.* — *Southern R. Co. v. Eubanks*, 117 Ga. 217; *Bullard v. Southern R. Co.*, 116 Ga. 644.

*Illinois.* — *Illinois Cent. R. Co. v. Eicher*, 202 Ill. 556; *Chicago Terminal Transfer R. Co. v. Gruss*, 200 Ill. 195; *Chicago Terminal Transfer R. Co. v. Kotoski*, 199 Ill. 383; *Cleveland, etc.*, R. Co. v. Cline, 111 Ill. App. 416, 424; *Chicago, etc.*, R. Co. v. McDonough, 112 Ill. App. 315. See also *Heiman v. Kinnare*, 190 Ill. 156, 83 Am. St. Rep. 123.

*Indiana.* — *Hill v. Indianapolis, etc.*, R. Co., 31 Ind. App. 98.

*Kansas.* — See *Union Pac. R. Co. v. Cappier*, 66 Kan. 649.

*Kentucky.* — *Dorsey v. Louisville, etc.*, R. Co., (Ky. 1904) 80 S. W. Rep. 1131; *Chinn v. Chesapeake, etc.*, R. Co., 74 S. W. Rep. 215, 24 Ky. L. Rep. 2350; *Dilas v. Chesapeake, etc.*, R. Co., 71 S. W. Rep. 492, 24 Ky. L. Rep. 1347; *Becker v. Louisville, etc.*, R. Co., 110 Ky. 474, 96 Am. St. Rep. 459; *Cincinnati, etc.*, R. Co. v. Marrs, (Ky. 1905) 85 S. W. Rep. 188; *Manning v. Illinois Cent. R. Co.*, (Ky. 1905) 84 S. W. Rep. 565.

*Maryland.* — *Reidel v. Philadelphia, etc.*, R. Co., 87 Md. 153, 67 Am. St. Rep. 328.

*Massachusetts.* — *Spellman v. Dyer*, 186 Mass. 176; *Griswold v. Boston, etc.*, R. Co., 183 Mass. 434.

*Missouri.* — *Carrier v. Missouri Pac. R. Co.*, 175 Mo. 470; *Koegel v. Missouri Pac. R. Co.*, 181 Mo. 379; *Wencker v. Missouri, etc.*, R. Co., 169 Mo. 592.

*Nebraska.* — *Chesley v. Rocheford*, (Neb. 1903) 96 N. W. Rep. 241.

*New Jersey.* — *Furey v. New York Cent., etc.*, R. Co., 67 N. J. L. 270. See also *Powell v. Erie R. Co.*, 70 N. J. L. 290.

*New York.* — *Downes v. Elmira Bridge Co.*, 179 N. Y. 136; *Magar v. Hammond*, 95 N. Y. App. Div. 249; *Gunther v. New York Cent., etc.*, R. Co., 81 N. Y. App. Div. 606; *Fitzgibbons v. Manhattan R. Co.*, (Supm. Ct. App. T.) 88 N. Y. Supp. 341; *McCann v. Thilemann*, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 145, affirmed 74 N. Y. App. Div. 630; *Magar v. Hammond*, 54 N. Y. App. Div. 532, reversed 171 N. Y. 377; *Downes v. Elmira Bridge Co.*, 41 N. Y. App. Div. 339; *Forbrick v. General*

*Electric Co.*, (Supm. Ct. Tr. T.) 45 Misc. (N. Y.) 452.

*North Carolina.* — *Lewis v. Norfolk, etc.*, R. Co., 132 N. Car. 382; *Wright v. Southern R. Co.*, 132 N. Car. 327.

*Ohio.* — *Cleveland, etc.*, R. Co. v. Gahan, 24 Ohio Cir. Ct. 277. See also *Buchtel College v. Martin*, 25 Ohio Cir. Ct. 494.

*South Carolina.* — *McKeown v. South Carolina, etc.*, R. Co., 68 S. Car. 483; *Jones v. Charleston, etc.*, R. Co., 61 S. Car. 556; *Elkins v. South Carolina, etc.*, R. Co., 64 S. Car. 553; *Ringstaff v. Lancaster, etc.*, R. Co., 64 S. Car. 546; *Haltiwanger v. Columbia, etc.*, R. Co., 64 S. Car. 7.

*Texas.* — *Houston, etc.*, R. Co. v. Sgalinski, 19 Tex. Civ. App. 107; *Louisiana Western Extension R. Co. v. McDonald*, (Tex. Civ. App. 1899) 52 S. W. Rep. 649; *Chicago, etc.*, R. Co. v. Martin, (Tex. Civ. App. 1904) 79 S. W. Rep. 1101; *Missouri, etc.*, R. Co. v. Hammer, (Tex. Civ. App. 1904) 78 S. W. Rep. 708; *McCowen v. Gulf, etc.*, R. Co., (Tex. Civ. App. 1903) 73 S. W. Rep. 46; *Luna v. Missouri, etc.*, R. Co., (Tex. Civ. App. 1903) 73 S. W. Rep. 1061. See also *Over v. Missouri, etc.*, R. Co., (Tex. Civ. App. 1903) 73 S. W. Rep. 535; *Texas, etc.*, R. Co. v. Ball, 96 Tex. 622.

*Virginia.* — *Hortenstein v. Virginia-Carolina R. Co.*, 102 Va. 914.

*West Virginia.* — *Williams v. Belmont Coal, etc.*, Co., 55 W. Va. 84.

*Wisconsin.* — *Bolin v. Chicago, etc.*, R. Co., 108 Wis. 333, 81 Am. St. Rep. 911.

*Canada.* — *Devlin v. Jeffray*, Sc. Ct. of Sess. 5 F. 130.

**A Trespasser on a Railroad Train** injured in a collision caused by the negligence of an intersecting railroad has no cause of action against the latter. *Wickenburg v. Minneapolis, etc.*, R. Co., (Minn. 1905) 102 N. W. Rep. 713.

**404. 1. Infant Trespassers —***Alabama.* — *Alabama G. S. R. Co. v. Crocker*, 131 Ala. 584.

*Colorado.* — *Kopplekom v. Colorado Cement Pipe Co.*, 16 Colo. App. 274.

*Illinois.* — *Siddall v. Jansen*, 168 Ill. 43. See also *Donk Bros. Coal, etc., Co. v. Leavitt*, 109 Ill. App. 385; *McAllister v. Jung*, 112 Ill. App. 138.

*Indiana.* — *Cincinnati, etc.*, Spring Co. v. Brown, 32 Ind. App. 58; *Elwood v. Addison*, 26 Ind. App. 28.

*Iowa.* — *Edgington v. Burlington, etc.*, R. Co., 116 Iowa 410.

*Kansas.* — *Price v. Atchison Water Co.*, 58 Kan. 551, 62 Am. St. Rep. 625; *Biggs v. Consolidated Barb-Wire Co.*, 60 Kan. 217.

*Nebraska.* — *Chicago, etc.*, R. Co. v. Krayenbuhl, 65 Neb. 889.

*North Dakota.* — See *O'Leary v. Brooks Elevator Co.*, 7 N. Dak. 554.

*Pennsylvania.* — See *Duffy v. Sable Iron Works*, 210 Pa. St. 326.

*Tennessee.* — *East Tennessee, etc.*, R. Co. v. Cargille, 105 Tenn. 628.

*Texas.* — *San Antonio, etc.*, R. Co. v. Morgan, 24 Tex. Civ. App. 58; *San Antonio, etc.*, R. Co. v. Skidmore, 27 Tex. Civ. App. 329.

**405. XIV. CONTRIBUTORY NEGLIGENCE OF CHILDREN — 1. Standard of Care Varies with Age and Capacity. — See notes 1, 2.**

**2. Children of Tender Years. — See note 3.**

See also *North Texas Constr. Co. v. Bostick*, (Tex. Civ. App. 1904) 80 S. W. Rep. 109.

*Wisconsin*. — See *Busse v. Rogers*, 120 Wis. 443.

*Canada*. — *McShane v. Toronto, etc.*, R. Co., 31 Ont. 185.

The Modern Tendency of the courts is to limit the doctrine of the "turntable cases" very strictly. See the following cases:

*California*. — *George v. Los Angeles R. Co.*, 126 Cal. 357, 77 Am. St. Rep. 184; *Peters v. Bowman*, 115 Cal. 345, 56 Am. St. Rep. 106; *Loftus v. Dehail*, 133 Cal. 214.

*Georgia*. — *Savannah, etc., R. Co. v. Beavers*, 113 Ga. 398, quoting 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 403, 404; *Rome v. Cheney*, 114 Ga. 194; *O'Connor v. Brucker*, 117 Ga. 451.

*Kansas*. — *Wilson v. Atchison, etc., R. Co.*, 66 Kan. 183.

*Kentucky*. — *Ball v. Middlesboro Town, etc., Co.*, (Ky. 1902) 68 S. W. Rep. 6.

*Minnesota*. — *Kayser v. Lindell*, 73 Minn. 123; *Stendal v. Boyd*, 73 Minn. 53, 72 Am. St. Rep. 597; *Ericksen v. Great Northern R. Co.*, 82 Minn. 60, 83 Am. St. Rep. 410; *Dehanitz v. St. Paul*, 73 Minn. 385.

*Nebraska*. — *Omaha v. Bowman*, 52 Neb. 293, 66 Am. St. Rep. 506.

*Ohio*. — *Ann Arbor R. Co. v. Kinz*, 68 Ohio St. 210.

*Tennessee*. — *Cooper v. Overton*, 102 Tenn. 211, 73 Am. St. Rep. 864.

*Texas*. — *Dobbins v. Missouri, etc., R. Co.*, 91 Tex. 60, 66 Am. St. Rep. 856; *San Antonio, etc., R. Co. v. Morgan*, 92 Tex. 98; *Simonton v. Citizens Electric Light, etc., Co.*, 28 Tex. Civ. App. 374.

*Washington*. — *Clark v. Northern Pac. R. Co.*, 29 Wash. 139; *Curtis v. Tenino Stone Quarries*, 37 Wash. 355. And see the title NEGLIGENCE, vol. 21, p. 473.

**Doctrine Repudiated.** — In some states the courts apply the same rule to infant trespassers as to adults.

*Massachusetts*. — *Holbrook v. Aldrich*, 168 Mass. 15, 60 Am. St. Rep. 364.

*Michigan*. — *Ryan v. Towar*, 128 Mich. 463, 92 Am. St. Rep. 481; *Peninsular Trust Co. v. Grand Rapids*, 131 Mich. 571, 9 Detroit Leg. N. 446. See also *Formall v. Standard Oil Co.*, 127 Mich. 496.

*New Hampshire*. — *Hughes v. Boston, etc., R. Co.*, 71 N. H. 279, 93 Am. St. Rep. 518; *Buch v. Amory Mfg. Co.*, 69 N. H. 257.

*New Jersey*. — *Turess v. New York, etc., R. Co.*, 61 N. J. L. 314; *Delaware, etc., R. Co. v. Reich*, 61 N. J. L. 635, 68 Am. St. Rep. 727; *Friedman v. Snare, etc., Co.*, (N. J. 1905) 61 Atl. Rep. 401. See also *Fitzpatrick v. Cumberland Glass Mfg. Co.*, 61 N. J. L. 378.

*New York*. — *Walsh v. Fitchburg R. Co.*, 145 N. Y. 301, 45 Am. St. Rep. 615, reversing 78 Hun (N. Y.) 1; *Coleman v. Robert Graves Co.*, (Supm. Ct. Tr. T.) 30 Misc. (N. Y.) 85. See also *Fitzgerald v. Rodgers*, 58 N. Y. App. Div. 208; *Saverio-Cella v. Brooklyn Union El. R. Co.*, 55 N. Y. App. Div. 98.

*Rhode Island*. — *Paolino v. McKendall*, 24 R. I. 432, 96 Am. St. Rep. 736, quoting 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 403, 404.

*West Virginia*. — *Ritz v. Wheeling*, 45 W. Va. 262; *Uthermohlen v. Boggs' Run Co.*, 50 W. Va. 457, 88 Am. St. Rep. 884.

**405. 1. Ordinary Care under the Circumstances.** — *Illinois Cent. R. Co. v. Jones*, (C. C. A.) 95 Fed. Rep. 370, quoting 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 405-407.

**2. Standard of Care Varies with Age and Capacity.** — *Cleveland, etc., R. Co. v. Miles*, 162 Ind. 553, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 405; *Campbell v. St. Louis, etc., R. Co.*, 175 Mo. 161, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 405; *Livingston v. Wabash R. Co.*, 170 Mo. 452, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 405.

**3. Infants of Tender Years Incapable of Negligence** — *United States*. — *Illinois Cent. R. Co. v. Jones*, (C. C. A.) 95 Fed. Rep. 380, quoting 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 405; *Baltimore, etc., R. Co. v. Bauer*, 60 U. S. App. 156, 88 Fed. Rep. 116.

*Alabama*. — See *Alabama G. S. R. Co. v. Burgess*, 116 Ala. 509.

*Georgia*. — *Crawford v. Southern R. Co.*, 106 Ga. 870.

*Illinois*. — *Chicago City R. Co. v. Tuohy*, 196 Ill. 410; *Potter v. Leviton*, 199 Ill. 93; *True, etc., Co. v. Woda*, 201 Ill. 315; *Illinois Cent. R. Co. v. Jernigan*, 198 Ill. 297; *Chicago, etc., R. Co. v. Jamieson*, 112 Ill. App. 69; *Chicago, etc., R. Co. v. Eganolf*, 112 Ill. App. 323; *Donk Bros. Coal, etc., Co. v. Leavitt*, 109 Ill. App. 385.

*Indiana*. — *Indianapolis St. R. Co. v. Schomberg*, (Ind. App. 1904) 71 N. E. Rep. 237; *Evansville v. Senhenn*, 151 Ind. 42, 68 Am. St. Rep. 218; *Jeffersonville v. McHenry*, 22 Ind. App. 10; *Elwood Electric St. R. Co. v. Ross*, 26 Ind. App. 258; *Elwood v. Addison*, 26 Ind. App. 28; *Indianapolis St. R. Co. v. Schomberg*, (Ind. 1905) 72 N. E. Rep. 1041.

*Iowa*. — *Fink v. Des Moines*, 115 Iowa 641.

*Kansas*. — *Kansas City Suburban Belt R. Co. v. Herman*, (Kan. App. 1900) 62 Pac. Rep. 543; *Missouri Pac. R. Co. v. Prewitt*, 7 Kan. App. 556, reversed 59 Kan. 734.

*New York*. — *Lifschitz v. Dry Dock, etc., R. Co.*, 67 N. Y. App. Div. 602; *Morrissey v. Smith*, 67 N. Y. App. Div. 189; *Carr v. Merchants' Union Ice Co.*, 91 N. Y. App. Div. 162; *Kennedy v. Hills Bros. Co.*, 54 N. Y. App. Div. 29; *Dehmann v. Beck*, 61 N. Y. App. Div. 505; *Adams v. Metropolitan St. R. Co.*, 60 N. Y. App. Div. 188; *Healey v. Ehret*, 42 N. Y. App. Div. 27.

*Oregon*. — *Macdonald v. O'Reilly*, 45 Oregon 589.

*Pennsylvania*. — *Satinsky v. Mutual Brewing Co.*, 187 Pa. St. 57; *Smeltz v. Pennsylvania R. Co.*, 186 Pa. St. 364; *Jones v. United Traction Co.*, 201 Pa. St. 344.

*South Carolina*. — *Mason v. Southern R. Co.*, 58 S. Car. 70, 70 Am. St. Rep. 826.

*Tennessee*. — *Wise v. Morgan*, 101 Tenn. 273.



**406.** See note 1.

**407.** See note 1.

*Texas.* — Galveston, etc., *R. Co. v. Clark*, 21 Tex. Civ. App. 167; *San Antonio Traction Co. v. Court*, 31 Tex. Civ. App. 146.

*Washington.* — *Eskildsen v. Seattle*, 29 Wash. 583.

*Wisconsin.* — *O'Brien v. Wisconsin Cent. R. Co.*, 119 Wis. 7; *Holdridge v. Mendenhall*, 108 Wis. 1, 81 Am. St. Rep. 871.

*Canada.* — *Ricketts v. Markdale*, 31 Ont. 610, quoting 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 405.

**When Care of Child for Jury** — *United States.* — *Smith v. Pittsburgh, etc.*, R. Co., 90 Fed. Rep. 783.

*District of Columbia.* — *Baltimore, etc., R. Co. v. Webster*, 6 App. Cas. (D. C.) 182.

*Illinois.* — *Cleveland, etc., R. Co. v. Scott*, 111 Ill. App. 234.

*Indiana.* — *Indianapolis St. R. Co. v. Antrobus*, 33 Ind. App. 663; *Krenzer v. Pittsburg, etc., R. Co.*, 151 Ind. 587, 68 Am. St. Rep. 252.

*Iowa.* — *Allen v. Ames College R. Co.*, 106 Iowa 602.

*Kentucky.* — *South Covington, etc., St. R. Co. v. Herrklotz*, 104 Ky. 400; *Reliance Textile, etc., Works v. Mitchell*, 71 S. W. Rep. 425, 24 Ky. L. Rep. 1286. See also *Louisville, etc., R. Co. v. Logsdon*, (Ky. 1904) 81 S. W. Rep. 657.

*Louisiana.* — *Rice v. Crescent City R. Co.*, 51 La. Ann. 108.

*Massachusetts.* — *Butler v. New York, etc., R. Co.*, 177 Mass. 191. See also *McNeil v. Boston Ice Co.*, 173 Mass. 570.

*Missouri.* — *Schmidt v. St. Louis R. Co.*, 163 Mo. 645.

*New Jersey.* — *Bergen County Traction Co. v. Heitman*, 61 N. J. L. 682; *Markey v. Consolidated Traction Co.*, 65 N. J. L. 82.

*New York.* — *Zwack v. New York, etc., R. Co.*, 160 N. Y. 362; *Dempsey v. Brooklyn Heights R. Co.*, 98 N. Y. App. Div. 182; *Fritsch v. New York, etc., R. Co.*, 93 N. Y. App. Div. 554; *Atchason v. United Traction Co.*, 90 N. Y. App. Div. 571; *Howell v. Rochester R. Co.*, 24 N. Y. App. Div. 502; *Thies v. Thomas*, (Supm. Ct. Tr. T.) 77 N. Y. Supp. 276; *Hill v. Baltimore, etc., R. Co.*, 75 N. Y. App. Div. 325. See also *Neun v. Rochester R. Co.*, 165 N. Y. 146, reversing 28 N. Y. App. Div. 622.

*Ohio.* — *Ludtke v. Lake Shore, etc., R. Co.*, 24 Ohio Cir. Ct. 120; *Ludden v. Columbus, etc., R. Co.*, 9 Ohio Dec. 793, 7 Ohio N. P. 106; *Toledo Real Estate, etc., Co. v. Putney*, 10 Ohio Cir. Dec. 698, 20 Ohio Cir. Ct. 486.

*Pennsylvania.* — *Kelly v. Pittsburg, etc., Traction Co.*, 204 Pa. St. 623.

*Virginia.* — *Richmond Traction Co. v. Wilkinson*, 101 Va. 394; *Roanoke v. Shull*, 97 Va. 419, 75 Am. St. Rep. 791.

"Where there is any doubt as to a child being of that age and capacity that in law he should be held to be *sui juris*, the question should be left to the jury to say whether he is so or not." *Elwood v. Addison*, 26 Ind. App. 28.

In *Parker v. Washington Electric St. R. Co.*, 207 Pa. St. 438, where a judgment for the infant plaintiff was sustained, it was held to be no error to refuse to submit to the jury the

question of the contributory negligence of a boy seven years and eight months old who stepped or jumped off a moving street car. The court said in its opinion: "In analogy to the common-law rule of responsibility for crimes committed, a child under seven years of age has been conclusively presumed to be incapable of appreciating the guarding against danger; and after seven the presumption of incapacity, although not irrebuttable, and growing less strong with each year, continues until fourteen, when the presumption of capacity arises. But these are only convenient points in the uncertain line between capacity and incapacity, at which the law changes the presumption."

"The law presumes that an infant between seven and fourteen years of age cannot be guilty of contributory negligence, and in an action by such infant the burden is on the defendant to overcome this presumption, by proof of intelligence and capacity." *Lynchburg Cotton Mills v. Stanley*, 102 Va. 590.

**406. 1. The "Ordinary Care" of a Child** — *United States.* — *Illinois Cent. R. Co. v. Jones*, (C. C. A.) 95 Fed. Rep. 380, quoting 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 406; *Smith v. Pittsburgh, etc., R. Co.*, 90 Fed. Rep. 783.

*Connecticut.* — *Murphy v. Derby St. R. Co.*, 73 Conn. 249.

*Delaware.* — *Di Prisco v. Wilmington City R. Co.*, 4 Penn. (Del.) 527; *Weldon v. Philadelphia, etc., R. Co.*, 2 Penn. (Del.) 1.

*Illinois.* — See *Chicago City R. Co. v. Tuohy*, 196 Ill. 410.

*Indiana.* — *Elwood Electric St. R. Co. v. Ross*, 26 Ind. App. 258; *Indianapolis St. R. Co. v. Schomberg*, (Ind. 1905) 72 N. E. Rep. 1041.

*Massachusetts.* — *Gleason v. Smith*, 180 Mass. 6, 91 Am. St. Rep. 261.

*Minnesota.* — *Craig v. Benedictine Sisters Hospital Assoc.*, 88 Minn. 535.

*Missouri.* — *Heinze v. Metropolitan St. R. Co.*, 182 Mo. 528.

*New York.* — *Robinson v. Metropolitan St. R. Co.*, 91 N. Y. App. Div. 158, affirmed 179 N. Y. 593; *Atchason v. United Traction Co.*, 90 N. Y. App. Div. 571; *Sullivan v. Union R. Co.*, 81 N. Y. App. Div. 596, affirmed 177 N. Y. 525.

*Pennsylvania.* — *Enright v. Pittsburg Junction R. Co.*, 204 Pa. St. 543; *Daltry v. Media Electric Light, etc., Co.*, 208 Pa. St. 403; *Rachmel v. Clark*, 205 Pa. St. 314.

*Texas.* — *Freeman v. Carter*, (Tex. Civ. App. 1904) 81 S. W. Rep. 81.

*Virginia.* — *Richmond Traction Co. v. Wilkinson*, 101 Va. 394; *Roanoke v. Shull*, 97 Va. 419, 75 Am. St. Rep. 791.

*Washington.* — *Roberts v. Spokane St. R. Co.*, 23 Wash. 325.

*Canada.* — *Ricketts v. Markdale*, 31 Ont. 610, quoting 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 405, 406.

**407. 1. "Due Care" of Child Not That of Adult** — *United States.* — *Illinois Cent. R. Co. v. Jones*, (C. C. A.) 95 Fed. Rep. 380, quoting 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 407; *Adams v. Southern R. Co.*, 52 U. S. App. 433, 84 Fed. Rep. 596. See also *Cleveland, etc.,*

**407.** 3. Care Required of Child Employee. — See notes 2, 3.

**408.** See note 1.

**4.** Natural Instincts of Childhood. — See notes 2, 3.

**5.** Degree of Care Toward Child. — See note 4.

*R. Co. v. Morton*, 57 C. C. A. 226, 120 Fed. Rep. 936.

*California*. — *Quill v. Southern Pac. R. Co.*, 140 Cal. 268; *Studer v. Southern Pac. R. Co.*, 121 Cal. 400, 66 Am. St. Rep. 39.

*Connecticut*. — *Rohloff v. Fair Haven, etc.*, R. Co., 76 Conn. 689. See also *Nelson v. Bradford Lighting, etc., Co.*, 75 Conn. 548.

*Delaware*. — *Weldon v. Philadelphia, etc., R. Co.*, 2 Penn. (Del.) 1; *Tully v. Philadelphia, etc., R. Co.*, 3 Penn. (Del.) 455.

*District of Columbia*. — *Baltimore, etc., R. Co. v. Cumberland*, 12 App. Cas. (D. C.) 598.

*Georgia*. — *Western, etc., R. Co. v. Rogers*, 104 Ga. 224.

*Illinois*. — *Illinois Iron, etc., Co. v. Weber*, 106 Ill. 526; *Illinois Cent. R. Co. v. Bandy*, 88 Ill. App. 629; *Calumet Electric St. R. Co. v. Van Pelt*, 68 Ill. App. 582, affirmed 173 Ill. 70.

*Indiana*. — *Elwood v. Addison*, 26 Ind. App. 28.

*Iowa*. — See *Goodrich v. Burlington, etc., R. Co.*, 103 Iowa 412.

*Kansas*. — *Price v. Atchison Water Co.*, 58 Kan. 551, 62 Am. St. Rep. 625.

*Louisiana*. — *Mitchell v. Illinois Cent. R. Co.*, 110 La. 630, 98 Am. St. Rep. 472.

*Missouri*. — *Caskey v. La Belle*, 101 Mo. 590; *Livingston v. Wabash R. Co.*, 170 Mo. 452; *Anderson v. Union Terminal R. Co.*, 81 Mo. App. 116.

*New York*. — *Costello v. Third Ave. R. Co.*, 161 N. Y. 317; *Lafferty v. Third Ave. R. Co.*, 85 N. Y. App. Div. 592, affirmed 176 N. Y. 594; *Hicks v. Nassau Electric R. Co.*, 47 N. Y. App. Div. 479; *Schilling v. Smith*, 76 N. Y. App. Div. 464; *Murphy v. Perlstein*, 73 N. Y. App. Div. 256; *Cox v. New York Cent., etc., R. Co.*, 69 N. Y. App. Div. 451. See also *Leary v. Fitchburg R. Co.*, 53 N. Y. App. Div. 52.

*Texas*. — *Texas, etc., R. Co. v. Ball*, (Tex. Civ. App. 1905) 85 S. W. Rep. 456.

*Utah*. — *Young v. Clark*, 16 Utah 42.

*Canada*. — *Ricketts v. Markdale*, 31 Ont. 610, quoting 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 406, 407; *Bernier v. Génèreux*, 12 Quebec K. B. 24.

**Burden of Proof.** — In *New York* it has been held that in the case of a child under twelve years of age the burden is on the defendant to show that the child had sufficient appreciation of the danger to be guilty of contributory negligence; while in the case of a child over twelve the burden is on the plaintiff to show the contrary. *McDonald v. Metropolitan St. R. Co.*, 80 N. Y. App. Div. 233. See also *Charleston v. Forty-Second St., etc., R. Co.*, 79 N. Y. App. Div. 546.

**407.** 2. Care Required of a Child Employee. — *Rogers v. Meyerson Printing Co.*, 103 Mo. App. 683; *Lynchburg Cotton Mills v. Stanley*, 102 Va. 590; *Giebell v. Collins Co.*, 54 W. Va. 518.

**3. Only Assumes Risk Within His Comprehension** — *Georgia*. — *Evans v. Mills*, 119 Ga. 448.

*Indiana*. — *Brewer v. Locke*, 31 Ind. App. 353.

*Kentucky*. — *Mayfield Woolen Mills v. Frazier*, (Ky. 1904) 80 S. W. Rep. 456.

*Nebraska*. — *Ittner Brick Co. v. Killian*, (Neb. 1903) 93 N. W. Rep. 951.

*North Carolina*. — *Fitzgerald v. Alma Furniture Co.*, 131 N. Car. 636.

*Pennsylvania*. — *Dynes v. Bromley*, 208 Pa. St. 633; *Smith v. Hillside Coal, etc., Co.*, 186 Pa. St. 28.

*South Carolina*. — *Morrow v. Gaffney Mfg. Co.*, 70 S. Car. 244.

*Tennessee*. — *American Lead Pencil Co. v. Davis*, 108 Tenn. 251.

*Texas*. — See *Bering Mfg. Co. v. Femelat*, (Tex. Civ. App. 1904) 79 S. W. Rep. 869.

*West Virginia*. — *Williams v. Belmont Coal, etc., Co.*, 55 W. Va. 84.

"A minor assumes the ordinary dangers and risks of his employment that he actually knows and appreciates, and those which are so apparent and open that one of his age, experience, and capacity would, in the exercise of ordinary care and prudence, know and appreciate them to the same extent as an adult." *Cudahy Packing Co. v. Marcum*, 45 C. C. A. 515, 106 Fed. Rep. 645.

**408.** 1. May Recover When Injured by Uncomprehended Dangers. — *Doyle v. Pittsburg Waste Co.*, 204 Pa. St. 618; *North Texas Constr. Co. v. Bostick*, (Tex. Civ. App. 1904) 80 S. W. Rep. 109; *Moyes v. Ogden Sewer Pipe, etc., Co.*, 28 Utah 148.

**2. Allowance Made for Childish Instincts.** — *Ricketts v. Markdale*, 31 Ont. 622, quoting 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 408. See also the cases cited *supra*, p. 404, note 1.

**Injuries to Children in Streets.** — *True, etc., Co. v. Woda*, 201 Ill. 315; *Harper v. Kopp*, 73 S. W. Rep. 1127, 24 Ky. L. Rep. 2342; *Kelley v. Parker-Washington Co.*, 107 Mo. App. 490; *Straub v. St. Louis*, 175 Mo. 413; *Macdonald v. O'Reilly*, 45 Oregon 589. See also *Harrold v. Watney*, (1898) 2 Q. B. 320, 67 L. J. Q. B. 771, 78 L. T. N. S. 788, 46 W. R. 642. But compare *Guilmartin v. Philadelphia*, 201 Pa. St. 518.

**3. Infancy and Helplessness Often Excuse.** — *St. Louis, etc., R. Co. v. Colum*, 72 Ark. 1; *Quill v. Southern Pac. R. Co.*, 140 Cal. 268.

**4. But Great Care Must Be Exercised Toward a Child.** — "The same degree of care is required toward infants as toward adults, but that conduct which comes up to that degree of care when exercised toward adults may fall short of it when exercised toward infants under the same circumstances." *Rohloff v. Fair Haven, etc., R. Co.*, 76 Conn. 689.

See also the following cases:

*United States*. — *Smith v. Pittsburgh, etc., R. Co.*, 90 Fed. Rep. 783.

*Indiana*. — *Elwood Electric St. R. Co. v. Ross*, 26 Ind. App. 258; *Indianapolis St. R. Co. v. Schomberg*, (Ind. 1905) 72 N. E. Rep. 1041.

*Iowa*. — *Thomas v. Chicago, etc., R. Co.*, 114 Iowa 169.

**409.** 6. Question for Jury. — See note 1.

7. Liability for Sudden Act of Child. — See note 2.

8. Defendant Not Negligent — Apprehension of Danger by Infant. —

See notes 3, 4.

**410.** See note 1.

*Minnesota.* — *Cameron v. Duluth-Superior Traction Co.*, (Minn. 1905) 102 N. W. Rep. 208.

*Missouri.* — *Schmidt v. St. Louis R. Co.*, 163 Mo. 645; *Jett v. Central Electric R. Co.*, 178 Mo. 664; *Livingston v. Wabash R. Co.*, 170 Mo. 452.

*New Jersey.* — *Bergen County Traction Co. v. Heitman*, 61 N. J. L. 682.

*New York.* — *Howell v. Rochester R. Co.*, 24 N. Y. App. Div. 502. See also *Schaffer v. Baker Transfer Co.*, 29 N. Y. App. Div. 459.

*Ohio.* — *Ficker v. Cleveland, etc.*, R. Co., 9 Ohio Dec. 804, 7 Ohio N. P. 600.

*Pennsylvania.* — *Kroesen v. New Castle Electric St. R. Co.*, 198 Pa. St. 26. See also *Brown v. Schellenberg*, 19 Pa. Super. Ct. 286.

*Texas.* — *Missouri, etc.*, R. Co. *v. Hammer*, (Tex. Civ. App. 1904) 78 S. W. Rep. 708; *San Antonio Traction Co. v. Court*, 31 Tex. Civ. App. 146; *Ollis v. Houston, etc.*, R. Co., 31 Tex. Civ. App. 601.

*Canada.* — *Delage v. Delisle*, 10 Quebec K. B. 481.

**409.** 1. Ordinary Care of Child for Jury, When — *California.* — *Killelea v. California Horse-shoe Co.*, 140 Cal. 602; *George v. Los Angeles R. Co.*, 126 Cal. 357, 77 Am. St. Rep. 184.

*Colorado.* — *Pueblo Electric St. R. Co. v. Sherman*, 25 Colo. 114, 71 Am. St. Rep. 116.

*Delaware.* — *Di Prisco v. Wilmington City R. Co.*, 4 Penn. (Del.) 527.

*Indiana.* — *Cleveland, etc.*, R. Co. *v. Miles*, 162 Ind. 646.

*Kansas.* — *Biggs v. Consolidated Barb-Wire Co.*, 60 Kan. 217; *Consolidated City, etc.*, R. Co. *v. Wyatt*, 59 Kan. 772, 52 Pac. Rep. 98.

*Kentucky.* — *Owensboro v. York*, 77 S. W. Rep. 1130, 25 Ky. L. Rep. 1397, quoting 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 408, 409; *Macon v. Paducah St. R. Co.*, 110 Ky. 680; *Harper v. Kopp*, 73 S. W. Rep. 1127, 24 Ky. L. Rep. 2342.

*Louisiana.* — *Buechner v. New Orleans*, 112 La. 599, 104 Am. St. Rep. 455.

*Massachusetts.* — *McDermott v. Boston El. R. Co.*, 184 Mass. 126, 100 Am. St. Rep. 548; *O'Brien v. Hudner*, 182 Mass. 381.

*New Jersey.* — *Vogel v. North Jersey St. R. Co.*, 69 N. J. L. 219.

*New York.* — *Travell v. Bannerman*, 174 N. Y. 47; *Marino v. Lehmaier*, 173 N. Y. 530; *Costello v. Third Ave. R. Co.*, 161 N. Y. 317. See also *Noonan v. Obermeyer, etc.*, *Brewing Co.*, 50 N. Y. App. Div. 377.

*Oregon.* — *Dubiver v. City, etc.*, R. Co., 44 Oregon 239; *Schleiger v. Northern Pac. Terminal R. Co.*, 43 Oregon 4.

*Pennsylvania.* — *Daltry v. Media Electric Light, etc.*, Co., 208 Pa. St. 403; *Rachmel v. Clark*, 205 Pa. St. 314; *Guilmartin v. Philadelphia*, 201 Pa. St. 518.

*Texas.* — *St. Louis Southwestern R. Co. v. Bolton*, (Tex. Civ. App. 1904) 81 S. W. Rep. 123; *El Paso Electric R. Co. v. Kendall*, (Tex. Civ. App. 1904) 78 S. W. Rep. 1081; *Houston,*

*etc.*, R. Co. *v. Bulger*, (Tex. Civ. App. 1904) 80 S. W. Rep. 557; *St. Louis Southwestern R. Co. v. Shiflet*, 94 Tex. 131; *Missouri, etc.*, R. Co. *v. Scarborough*, 29 Tex. Civ. App. 194. See also *Texas, etc.*, R. Co. *v. Phillips*, 91 Tex. 281.

*Utah.* — *Moyes v. Ogden Sewer Pipe, etc.*, Co., 28 Utah 148; *Young v. Clark*, 16 Utah 42. *Virginia.* — *Washington, etc.*, Electric R. Co. *v. Quayle*, 95 Va. 741.

*Canada.* — *Tabb v. Grand Trunk R. Co.*, 8 Ont. L. Rep. 203.

"No arbitrary rule can be established to fix the time at which a child, during its minority, may be declared wholly capable or incapable of understanding and avoiding dangers to be encountered upon railroad tracks." *Chicago, etc.*, R. Co. *v. Russell*, (Neb. 1904) 100 N. W. Rep. 156.

2. No Liability for Sudden Act of Child. — *Culbertson v. Crescent City R. Co.*, 48 La. Ann. 1376; *Baltimore City Pass. R. Co. v. Cooney*, 87 Md. 261; *Morey v. Gloucester St. R. Co.*, 171 Mass. 164; *Brennan v. Standard Oil Co.*, 187 Mass. 376; *Fitzhenry v. Consolidated Traction Co.*, 64 N. J. L. 674, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 409; *Holdridge v. Mendenhall*, 108 Wis. 1, 81 Am. St. Rep. 871.

3. If Defendant Not Negligent, Not Liable — *United States.* — See *Thomason v. Southern R. Co.*, (C. C. A.) 113 Fed. Rep. 80.

*Alabama.* — See *Nashville, etc.*, R. Co. *v. Harris*, (Ala. 1904) 37 So. Rep. 794.

*Georgia.* — *Southern R. Co. v. Eubanks*, 117 Ga. 217; *Atlanta, etc.*, R. Co. *v. West*, 121 Ga. 641.

*Idaho.* — *Thomas v. Pocatello Power, etc.*, Co., 7 Idaho 435.

*Illinois.* — *Putney v. Keith*, 98 Ill. App. 285.

*Indiana.* — *McNamara v. Beck*, 21 Ind. App. 483.

*Iowa.* — *Horn v. Chicago, etc.*, R. Co., 124 Iowa 281; *Wagner v. Chicago, etc.*, R. Co., 124 Iowa 462.

*Kentucky.* — *Louisville, etc.*, R. Co. *v. Logsdon*, (Ky. 1904) 81 S. W. Rep. 657; *Ball v. Middlesboro, Town, etc.*, Co., (Ky. 1902) 68 S. W. Rep. 6.

*Missouri.* — *Lee v. Jones*, 181 Mo. 291.

*New York.* — *Powers v. Owego Bridge Co.*, 97 N. Y. App. Div. 477.

*Texas.* — *International, etc.*, R. Co. *v. Wear*, (Tex. Civ. App. 1903) 77 S. W. Rep. 272.

*Virginia.* — *Seaboard, etc.*, R. Co. *v. Hickey*, 102 Va. 394.

*West Virginia.* — *Ritz v. Wheeling*, 45 W. Va. 262.

4. Injury from Risks Assumed by Child. — *Flett v. Coulter*, 5 Ont. L. Rep. 375; *Chicago Union Traction Co. v. McGinnis*, 112 Ill. App. 177; *Krenzer v. Pittsburgh, etc.*, R. Co., 151 Ind. 587, 68 Am. St. Rep. 252; *Wilson v. Atchison, etc.*, R. Co., 66 Kan. 183; *Sewell v. New York, etc.*, R. Co., 171 Mass. 302. See also *Brinkley Car Works, etc.*, Co. *v. Cooper*, 70 Ark. 331.

**410.** 1. Minor may Be Guilty of Negligence as



**410. 9. Injuries to Idiots, Lunatics, and Others of Weak Mind.** — See note 2.

**XV. EFFECT OF PRIVACY BETWEEN PLAINTIFF AND DEFENDANT —**

**1. In General.** — See note 3.

**411. 3. Travelers on Streets and Highways — a. A NONCONTRACTUAL SPECIAL DUTY.** — See note 2.

**Matter of Law** — *United States*. — See *Illinois Cent. R. Co. v. Jones*, (C. C. A.) 95 Fed. Rep. 370.

*California*. — *Studer v. Southern Pac. R. Co.*, 121 Cal. 400, 66 Am. St. Rep. 39.

*Illinois*. — *Heimann v. Kinnare*, 190 Ill. 156, 83 Am. St. Rep. 123, quoting 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 409, 410; *McAllister v. Jung*, 112 Ill. App. 138.

*Kansas*. — *Wilson v. Atchison, etc., R. Co.*, 66 Kan. 183.

*Maryland*. — See *Baltimore City Pass. R. Co. v. Cooney*, 87 Md. 261.

*Michigan*. — *Henderson v. Detroit Citizens' St. R. Co.*, 116 Mich. 368.

*New Jersey*. — See *Fitzhenry v. Consolidated Traction Co.*, 64 N. J. L. 674.

*New York*. — *McGrell v. Buffalo Office Bldg. Co.*, 153 N. Y. 265; *Ledman v. Dry Dock, etc., R. Co.*, 28 N. Y. App. Div. 197; *Albert v. New York*, 75 N. Y. App. Div. 553.

*Ohio*. — *Cleveland, etc., R. Co. v. Gahan*, 24 Ohio Cir. Ct. 277.

*Oregon*. — See *Dubiver v. City, etc., R. Co.*, 44 Oregon 239.

*Pennsylvania*. — See *Hunt v. Graham*, 15 Pa. Super. Ct. 42.

*Rhode Island*. — *Dolan v. Callender, etc., Co.*, 26 R. I. 198.

*Texas*. — *Cockrell v. Texas, etc., R. Co.*, (Tex. Civ. App. 1904) 82 S. W. Rep. 529.

It has been held that a boy of nine years of age killed at a railroad crossing was guilty of contributory negligence as a matter of law. *Anderson v. Central R. Co.*, 68 N. J. L. 269.

There is a suggestion in the opinion of the court in *Morey v. Gloucester St. R. Co.*, 171 Mass. 164, that this may be so as to a child eight years old.

And where a case had been tried upon the assumption of court and counsel that the plaintiff, an infant seven years old, was *sui juris*, a nonsuit, on the ground of her contributory negligence, was approved. *McCarthy v. New York Cent., etc., R. Co.*, 37 N. Y. App. Div. 187.

**410. 2.** See *Simpson v. Rhode Island Co.*, 26 R. I. 200.

**3. Ordinary Care in Relations of Privacy.** — *Conowingo Bridge Co. v. Hedrick*, 95 Md. 669; *Ayres v. Delaware, etc., R. Co.*, 158 N. Y. 254.

**411. 2. Noncontractual Special Duty** — *California*. — See *Glueck v. Scheld*, 125 Cal. 288.

*Colorado*. — *Colorado Springs v. May*, (Colo. App. 1904) 77 Pac. Rep. 1093; *Thunborg v. Pueblo*, 18 Colo. App. 80.

*Connecticut*. — See *Upton v. Windham*, 75 Conn. 288, 96 Am. St. Rep. 197.

*Illinois*. — *Chicago v. Gillett*, 108 Ill. App. 455; *Herrin v. Newton*, 103 Ill. App. 423; *Chicago v. Harris*, 113 Ill. App. 633. See also *Upper Alton v. Green*, 112 Ill. App. 439.

*Indiana*. — *Gaston v. Bailey*, 24 Ind. App. 24. See also *Ft. Wayne v. Mellinger*, 22 Ind. App. 191; *Elwood v. Addison*, 26 Ind. App. 28.

*Iowa*. — See *v. Wabash R. Co.*, 123 Iowa 443; *Sutherland v. Council Bluffs*, (Iowa 1904) 99 N. W. Rep. 572; *Evans v. Iowa City*, 125 Iowa 202; *Schnee v. Dubuque*, 122 Iowa 459; *Wissler v. Atlantic*, 123 Iowa 11; *Earl v. Cedar Rapids*, 126 Iowa 361.

*Kansas*. — *Garnett v. Hamilton*, 69 Kan. 866; *Chanute v. Higgins*, 65 Kan. 680; *Jewell City v. Van Meter*, (Kan. 1905) 79 Pac. Rep. 149.

*Kentucky*. — *Louisville v. Keher*, 79 S. W. Rep. 270, 25 Ky. L. Rep. 2003; *Covington v. Jones*, (Ky. 1904) 79 S. W. Rep. 243; *House v. Covington*, (Ky. 1904) 82 S. W. Rep. 374; *Louisville v. Johnson*, 69 S. W. Rep. 803, 24 Ky. L. Rep. 685.

*Louisiana*. — *Buechner v. New Orleans*, 112 La. 599, 104 Am. St. Rep. 455.

*Maine*. — *Moriarty v. Lewiston*, 98 Me. 482. See also *Barnes v. Rumford*, 96 Me. 315.

*Michigan*. — *Hunter v. Durand*, (Mich. 1904) 100 N. W. Rep. 191.

*Missouri*. — *Caskey v. La Belle*, 101 Mo. App. 590; *Coffey v. Carthage*, 186 Mo. 573; *Hiitt v. Kansas City*, 110 Mo. App. 713.

*Nebraska*. — *Atkinson v. Fisher*, (Neb. 1903) 93 N. W. Rep. 211; *South Omaha v. Meyers*, (Neb. 1902) 92 N. W. Rep. 743.

*New York*. — *Bush v. Delaware, etc., R. Co.*, 166 N. Y. 210; *Donnelly v. Rochester*, 166 N. Y. 315; *Collett v. New York*, 51 N. Y. App. Div. 394; *Boyce v. Shawangunk*, 40 N. Y. App. Div. 593; *Laverdure v. New York*, 28 N. Y. App. Div. 65; *Brewer v. New York*, 31 N. Y. App. Div. 244; *O'Brien v. Syracuse*, 31 N. Y. App. Div. 328; *Schafer v. New York*, 154 N. Y. 466. See also *Mogk v. New York, etc., Telephone Co.*, 78 N. Y. App. Div. 560; *Wiley v. Smith*, 25 N. Y. App. Div. 351.

*North Carolina*. — *Foy v. Winston*, 126 N. Car. 381; *Brewster v. Elizabeth City*, 137 N. Car. 392.

*North Dakota*. — See *Pewonka v. Stewart*, (N. Dak. 1904) 99 N. W. Rep. 1080.

*Ohio*. — See *Matthews v. Toledo*, 11 Ohio Cir. Dec. 375, 21 Ohio Cir. Ct. 69.

*Pennsylvania*. — *Emery v. Philadelphia*, 208 Pa. St. 492; *Kelchner v. Nanticoke*, 209 Pa. St. 412; *Iseminger v. York Haven Water, etc., Co.*, 206 Pa. St. 591. See also *Kessler v. Berger*, 205 Pa. St. 289; *Herron v. Pittsburgh*, 204 Pa. St. 509, 93 Am. St. Rep. 798.

*Rhode Island*. — See *Hutchinson v. Clarke*, 26 R. I. 307.

*Texas*. — *San Antonio v. Talerico*, (Tex. Civ. App. 1903) 78 S. W. Rep. 28.

*Virginia*. — *Roanoke v. Shull*, 97 Va. 419, 75 Am. St. Rep. 791.

*Washington*. — *Gallamore v. Olympia*, 34 Wash. 379. See also *Eskildsen v. Seattle*, 29 Wash. 583.

*Wisconsin*. — *Krause v. Merrill*, 115 Wis. 526; *Mauch v. Hartford*, 112 Wis. 40; *Radichel v. Kendall*, 121 Wis. 560; *Ruscher v. Stanley*, 120 Wis. 380. See also *Duncan v. Grand Rapids*, 121 Wis. 626.

**412. b. USING DEFECTIVE HIGHWAY WITH KNOWLEDGE.**—See note 1.

**c. WANT OF ORDINARY CARE BY TRAVELER.**—See note 2.

**413. 4. Master and Servant—*a. RISKS ASSUMED BY SERVANT.***—See note 1.

**412. 1. Using Defective Highway with Knowledge of Defects**—*United States*.—*Moshuev v. District of Columbia*, 191 U. S. 247. *Colorado*.—*Garbanati v. Durango*, 30 Colo. 358.

*Connecticut*.—*Wood v. Danbury*, 72 Conn. 69. *Georgia*.—*Kent v. Southern Bell Telephone, etc.*, Co., 120 Ga. 980.

*Illinois*.—*Wilmette v. Brachle*, 209 Ill. 621. *Indiana*.—*Muncie v. Spence*, 33 Ind. App. 599; *Mishawaka v. Kirby*, 32 Ind. App. 233; *Michigan City v. Phillips*, 163 Ind. 449; *Chicago, etc.*, R. Co. v. *Leachman*, 161 Ind. 512.

*Iowa*.—*Jones v. Shelby County*, 124 Iowa 551; *Houseman v. Belle Plaine*, 124 Iowa 510; *Hill v. Glenwood*, 124 Iowa 479; *Bailey v. Centerville*, 115 Iowa 271; *Templin v. Boone*, (Iowa 1905) 102 N. W. Rep. 789; *Considine v. Dubuque*, 126 Iowa 283.

*Kentucky*.—*Madisonville v. Pemberton*, 75 S. W. Rep. 229, 25 Ky. L. Rep. 347; *Lancaster v. Walter*, (Ky. 1904) 80 S. W. Rep. 189; *West Kentucky Tel. Co. v. Pharis*, 78 S. W. Rep. 917, 25 Ky. L. Rep. 1838; *Loutsville v. Brewer*, 72 S. W. Rep. 9, 24 Ky. L. Rep. 1671; *Maysville v. Guilfoyle*, 110 Ky. 670.

*Massachusetts*.—*Hyde v. Boston*, 186 Mass. 115; *Griffin v. Boston*, 182 Mass. 409; *Welsh v. Amesbury*, 170 Mass. 437.

*Michigan*.—*Oesterreich v. Detroit*, (Mich. 1904) 100 N. W. Rep. 593; *Herring v. St. Joseph*, (Mich. 1904) 100 N. W. Rep. 747; *Belyea v. Port Huron*, (Mich. 1904) 99 N. W. Rep. 740; *Burrell v. Greenville*, (Mich. 1903) 94 N. W. Rep. 732, 10 Detroit Leg. N. 146; *Hunt v. Lincoln Tp.*, 131 Mich. 637, 9 Detroit Leg. N. 467.

*Missouri*.—*Elliott v. Kansas City*, 174 Mo. 554; *Jennings v. Kansas City*, 105 Mo. App. 677; *Beauvais v. St. Louis*, 169 Mo. 500; *Wentworth v. Duffy*, 68 Mo. App. 513; *Stevens v. Walpole*, 76 Mo. App. 213. See also *Ford v. Kansas City*, 181 Mo. 137.

*Nebraska*.—*Omaha v. Houlihan*, (Neb. 1904) 100 N. W. Rep. 415; *South Omaha v. Taylor*, (Neb. 1903) 96 N. W. Rep. 209; *Seyfer v. Otoe County*, 66 Neb. 566; *Nebraska Telephone Co. v. Jones*, 60 Neb. 396.

*New York*.—See *Walsh v. Central New York Telephone, etc.*, Co., 176 N. Y. 163; *Fordham v. Gouverneur*, 160 N. Y. 541; *Schubert v. Cowles*, 31 N. Y. App. Div. 418.

*Oklahoma*.—*Guthrie v. Finch*, 13 Okla. 496.

*Pennsylvania*.—*Evans v. Philadelphia*, 205 Pa. St. 193, 97 Am. St. Rep. 732. See also *Potter v. Natural Gas Co.*, 183 Pa. St. 575.

*Texas*.—*McKinney v. Brown*, (Tex. Civ. App. 1904) 81 S. W. Rep. 88.

*Virginia*.—*Charlottesville v. Stratton*, 102 Va. 95.

*Washington*.—*Shearer v. Buckley*, 31 Wash. 370; *McLeod v. Spokane*, 26 Wash. 346.

*Wisconsin*.—See *Jenewein v. Irving*, 122 Wis. 228; *Lyon v. Grand Rapids*, 121 Wis. 609.

**Failure to Take Another Route**—*Illinois*.—*Mt. Sterling v. Crummy*, 73 Ill. App. 572.

*Iowa*.—*Sylvester v. Casey*, 110 Iowa 256. *New York*.—*Murphy v. Perlstein*, 73 N. Y. App. Div. 256.

*Pennsylvania*.—*Mellor v. Burgess*, 14 Montg. Co. Rep. (Pa.) 184.

*Texas*.—*Dallas v. Moore*, (Tex. Civ. App. 1903) 74 S. W. Rep. 95; *Pecos, etc.*, R. Co. v. *Bowman*, (Tex. Civ. App. 1903) 78 S. W. Rep. 22; *Houston, etc.*, R. Co. v. *Dunn*, 17 Tex. Civ. App. 687.

*Virginia*.—*Newport News, etc.*, R., etc., Co. v. *Bradford*, 99 Va. 117.

*Washington*.—*Jordan v. Seattle*, 30 Wash. 298.

**2. Any Want of Ordinary Care Will Bar Traveler**—*Colorado*.—*Denver v. Murray*, 18 Colo. App. 142.

*Indiana*.—*Crown Point v. Thompson*, 31 Ind. App. 195; *Evansville v. Christy*, 29 Ind. App. 44.

*Iowa*.—*Bender v. Minden*, 124 Iowa 685; *Tuttle v. Clear Lake*, (Iowa 1905) 102 N. W. Rep. 136.

*Maine*.—*Orr v. Oldtown*, 99 Me. 190; *Whitman v. Lewiston*, 97 Me. 519.

*Maryland*.—*Knight v. Baltimore*, 97 Md. 647.

*Michigan*.—*Harden v. Jackson*, (Mich. 1904) 100 N. W. Rep. 389; *Tracey v. South Haven Tp.*, 132 Mich. 492, 9 Detroit Leg. N. 698.

*Missouri*.—*Wheat v. St. Louis*, 179 Mo. 572, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 412; *Durham v. Bolivar*, 106 Mo. App. 601.

*New York*.—*Hamilton v. Buffalo*, 173 N. Y. 72; *Williams v. Port Leyden*, 62 N. Y. App. Div. 490. See also *Kane v. Yonkers*, 169 N. Y. 392; *Gribben v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 84 N. Y. Supp. 196.

*Pennsylvania*.—*Sickels v. Philadelphia*, 209 Pa. St. 113; *Guinter v. Williamsport*, 208 Pa. St. 587; *Martin v. Williamsport*, 208 Pa. St. 590; *Easton v. Philadelphia*, 26 Pa. Super. Ct. 517.

*South Dakota*.—*Bohl v. Dell Rapids*, 15 S. Dak. 619.

*Texas*.—See *Texas, etc.*, R. Co. v. *Kelly*, (Tex. Civ. App. 1904) 78 S. W. Rep. 372.

*Virginia*.—*Charlottesville v. Failes*, 103 Va. 53; *Winchester v. Carroll*, 99 Va. 727; *Osborne v. Pulaski Light, etc.*, Co., 95 Va. 16.

**In Georgia**, under Civ. Code Ga. (1895) § 3830, it is the rule that the plaintiff may recover, though he may in some way have contributed to the injury sustained, unless he could have avoided it by ordinary care. *Columbus v. Anglin*, 120 Ga. 785.

**413. 1. Master and Servant—Special Duty of Master.**—See in general the following cases:

*United States*.—*New England R. Co. v. Conroy*, 175 U. S. 323 (overruling *Chicago, etc.*, R. Co. v. *Ross*, 112 U. S. 377, cited in the original note).

*Colorado*.—*Holshouser v. Denver Gas, etc.*, Co., 18 Colo. App. 431.

*Illinois*.—*Chicago, etc.*, R. Co. v. *Heerey*, 203 Ill. 492.

## 414. See note 1.

*Indiana*. — *Dill v. Marmon*, (Ind. 1905) 73 N. E. Rep. 67.

*New Hampshire*. — *Wallace v. Boston, etc.*, R. Co., 72 N. H. 504.

*New Jersey*. — *McDonald v. Standard Oil Co.*, 69 N. J. L. 445.

*New York*. — *Maltbie v. Belden*, 167 N. Y. 307; *Vogel v. American Bridge Co.*, 180 N. Y. 373.

*North Carolina*. — *Marks v. Harriet Cotton Mills*, 135 N. Car. 287.

*Oklahoma*. — *Neeley v. Southwestern Cotton Seed Oil Co.*, 13 Okla. 356.

*South Carolina*. — *Carson v. Southern R. Co.*, 68 S. Car. 55.

*Texas*. — *Bonn v. Galveston, etc.*, R. Co., (Tex. Civ. App. 1904) 82 S. W. Rep. 808.

*Virginia*. — *Parlett v. Dunn*, 102 Va. 459.

**414. 1. Risks Assumed by Servant** — *United States*. — *Texas, etc.*, R. Co. *v. Swearingen*, 196 U. S. 51; *Johnson v. Southern Pac. R. Co.*, 196 U. S. 1; *Alaska Min. Co. v. Whelan*, 168 U. S. 86; *Martin v. Atchison, etc.*, R. Co., 166 U. S. 399; *St. Louis Cordage Co. v. Miller*, 61 C. C. A. 477, 126 Fed. Rep. 495; *Brady v. Chicago, etc.*, R. Co., 52 C. C. A. 58, 114 Fed. Rep. 100; *King v. Morgan*, (C. C. A.) 109 Fed. Rep. 446; *Chesapeake, etc.*, R. Co. *v. Hennessey*, 38 C. C. A. 307, 96 Fed. Rep. 713; *Detroit Crude-Oil Co. v. Grable*, (C. C. A.) 94 Fed. Rep. 73; *Glenmont Lumber Co. v. Roy*, (C. C. A.) 126 Fed. Rep. 524; *Chicago, etc.*, R. Co. *v. Voelker*, (C. C. A.) 129 Fed. Rep. 522; *Maxfield v. Graveson*, (C. C. A.) 131 Fed. Rep. 841; *Crawford v. American Steel, etc.*, Co., (C. C. A.) 123 Fed. Rep. 275; *Pennsylvania R. Co. v. Fishack*, (C. C. A.) 123 Fed. Rep. 465; *Kilpatrick v. Choctaw, etc.*, R. Co., 57 C. C. A. 255, 121 Fed. Rep. 11; *Bunker Hill, etc.*, Min., etc., Co. *v. Kettleson*, 58 C. C. A. 525, 121 Fed. Rep. 529; *Kenney v. Meddaugh*, 55 C. C. A. 115, 118 Fed. Rep. 209; *Davis v. Trade Dollar Consol. Min. Co.*, 54 C. C. A. 636, 117 Fed. Rep. 122.

*Colorado*. — *Greeley v. Foster*, 32 Colo. 292; *Floyd v. Colorado Fuel, etc.*, Co., 18 Colo. App. 153; *McKean v. Colorado Fuel, etc.*, Co., 18 Colo. App. 285; *Kellogg v. Denver City Tramway Co.*, 18 Colo. App. 475.

*Connecticut*. — *McQueeney v. Norcross*, 75 Conn. 381.

*Delaware*. — *Punkowski v. New Castle Leather Co.*, 4 Penn. (Del.) 544; *Karczewski v. Wilmington City R. Co.*, 4 Penn. (Del.) 24; *Winkler v. Philadelphia, etc.*, R. Co., 4 Penn. (Del.) 80; *Boyd v. Blumenthal*, 3 Penn. (Del.) 564.

*Georgia*. — *Western, etc.*, R. Co. *v. Moran*, 116 Ga. 441. But see, under statute, *Savannah, etc.*, R. Co. *v. Williams*, 117 Ga. 414.

*Illinois*. — *Illinois Cent. R. Co. v. Smith*, 208 Ill. 608; *Webster Mfg. Co. v. Nesbitt*, 205 Ill. 273; *Cichowicz v. International Packing Co.*, 206 Ill. 346; *Ewald v. Michigan Cent. R. Co.*, 107 Ill. App. 294; *Browne v. Siegel*, 191 Ill. 226. See also *Chicago, etc.*, R. Co. *v. Heerey*, 203 Ill. 492.

*Indiana*. — *Indianapolis, etc.*, Rapid Transit Co. *v. Foreman*, 162 Ind. 85, 102 Am. St. Rep. 185; *Southern Indiana R. Co. v. Harrell*, 161

Ind. 689; *American Rolling Mill Co. v. Hullinger*, 161 Ind. 673; *L. T. Dickason Coal Co. v. Unverferth*, 30 Ind. App. 546; *Pennsylvania R. Co. v. Ebaugh*, 152 Ind. 531; *Standard Pottery Co. v. Moudy*, (Ind. App. 1905) 73 N. E. Rep. 188.

*Iowa*. — *Jacobson v. Smith*, 123 Iowa 263; *Olson v. Hanford Produce Co.*, 118 Iowa 55; *McQueeney v. Chicago, etc.*, R. Co., 120 Iowa 522. See also *Vohs v. A. E. Shorthill Co.*, 124 Iowa 471.

*Kentucky*. — *Kentucky Freestone Co. v. McGee*, (Ky. 1904) 80 S. W. Rep. 1113; *Wilson v. Chess, etc.*, Co., 78 S. W. Rep. 453, 25 Ky. L. Rep. 1655; *Illinois Cent. R. Co. v. Elliott*, (Ky. 1904) 82 S. W. Rep. 374; *Buey v. Chess, etc.*, Co., (Ky. 1905) 84 S. W. Rep. 563.

*Maine*. — *Cowett v. American Woolen Co.*, 97 Me. 543.

*Maryland*. — *South Baltimore Car Works v. Schaefer*, 96 Md. 88, 94 Am. St. Rep. 560; *Maryland Telephone, etc.*, Co. *v. Cloman*, 97 Md. 620; *Maryland Clay Co. v. Goodnow*, 95 Md. 330.

*Massachusetts*. — *Archibald v. Cygolf Shoe Co.*, 186 Mass. 213; *Lodi v. Maloney*, 184 Mass. 240; *Archambault v. Archambault*, 184 Mass. 274; *Nordquist v. Fuller*, 182 Mass. 411; *Conner v. Draper Co.*, 182 Mass. 184; *Mooney v. Beattie*, 180 Mass. 451; *McClusky v. Garfield, etc.*, Coal Co., 180 Mass. 115. See also *Larabee v. New York, etc.*, R. Co., 182 Mass. 348.

*Michigan*. — *Randa v. Detroit Screw Works*, 134 Mich. 343, 10 Detroit Leg. N. 504; *Lenderink v. Rockford*, 135 Mich. 531, 10 Detroit Leg. N. 832; *Turner v. Detroit Southern R. Co.*, (Mich. 1904) 100 N. W. Rep. 268; *Bauer v. American Car, etc.*, Co., 132 Mich. 537, 10 Detroit Leg. N. 17; *Kopf v. Monroe Stone Co.*, 133 Mich. 286, 10 Detroit Leg. N. 185; *Cronin v. Russell Wheel, etc.*, Co., 132 Mich. 500, 9 Detroit Leg. N. 681; *Carr v. St. Clair Tunnel Co.*, 131 Mich. 592, 9 Detroit Leg. N. 455; *Fischer v. Goldie*, 132 Mich. 574, 10 Detroit Leg. N. 29; *Miller v. Detroit, etc.*, R. Co., 133 Mich. 564, 10 Detroit Leg. N. 342; *Secombe v. Detroit Electric R. Co.*, 133 Mich. 170, 10 Detroit Leg. N. 129.

*Minnesota*. — *Nelson v. Kelso*, 91 Minn. 77; *Gittens v. William Porten Co.*, 90 Minn. 512; *Dixon v. Union Iron Works*, 90 Minn. 492; *McKenna v. Chicago, etc.*, R. Co., 92 Minn. 508.

*Missouri*. — *Bair v. Heibel*, 103 Mo. App. 621; *Harff v. Green*, 168 Mo. 308; *Cothron v. Cudahy Packing Co.*, 98 Mo. App. 343; *Beckman v. Anheuser-Busch Brewing Assoc.*, 98 Mo. App. 555.

*Montana*. — *McCabe v. Montana Cent. R. Co.*, 30 Mont. 323.

*Nebraska*. — *New Omaha Thompson-Houston Electric Light Co. v. Rombold*, (Neb. 1904) 97 N. W. Rep. 1030; *Evans Laundry Co. v. Crawford*, (Neb. 1903) 93 N. W. Rep. 177; *Missouri Pac. R. Co. v. Lyons*, 54 Neb. 633.

*New Hampshire*. — *Hill v. Boston, etc.*, R. Co., 72 N. H. 518; *Murphy v. Grand Trunk R. Co.*, (N. H. 1904) 58 Atl. Rep. 835; *Hilton v. Fitchburg R. Co.*, (N. H. 1904) 59 Atl. Rep. 625.



**416.** See notes 1, 2.

*New Jersey.* — *Enright v. Oliver*, 69 N. J. L. 357, 101 Am. St. Rep. 710; *McGrath v. Delaware, etc.*, R. Co., 69 N. J. L. 331; *Randolph v. New York Cent., etc.*, R. Co., 69 N. J. L. 420; *Loid v. J. S. Rogers Co.*, 68 N. J. L. 713; *Anderson v. Erie R. Co.*, 68 N. J. L. 647.

*New Mexico.* — See *Cerrillos Coal R. Co. v. Deserant*, 9 N. Mex. 49.

*New York.* — *Drake v. Auburn City R. Co.*, 173 N. Y. 466; *Madigan v. Oceanic Steam Nav. Co.*, 178 N. Y. 242, 102 Am. St. Rep. 495; *Kline v. Abraham*, 178 N. Y. 377; *Maltbie v. Belden*, 167 N. Y. 307; *Di Vito v. Crage*, 165 N. Y. 378; *Capasso v. Woolfolk*, 163 N. Y. 472; *Perry v. Rogers*, 157 N. Y. 251; *Huda v. American Glucose Co.*, 154 N. Y. 474; *Kimmer v. Weber*, 151 N. Y. 417, 56 Am. St. Rep. 630; *Braunberg v. Solomon*, 102 N. Y. App. Div. 330; *Sheridan v. Interborough Rapid Transit Co.*, 101 N. Y. App. Div. 534; *Dooling v. Deutscher-Verein*, 97 N. Y. App. Div. 39; *Breslin v. Sparks*, 97 N. Y. App. Div. 69; *Riola v. New York Cent., etc.*, R. Co., 97 N. Y. App. Div. 252; *Belt v. Henry Du Bois Sons Co.*, 97 N. Y. App. Div. 392; *Mullen v. Metropolitan St. R. Co.*, 89 N. Y. App. Div. 21; *Ehrenfried v. Lackawanna Iron, etc.*, Co., 89 N. Y. App. Div. 130, *affirmed* 180 N. Y. 515; *Vykess v. Duncan Co.*, 88 N. Y. App. Div. 129; *Van Derhoff v. New York Cent., etc.*, R. Co., 88 N. Y. App. Div. 418; *Peet v. H. Remington, etc.*, *Pulp, etc.*, Co., 86 N. Y. App. Div. 101; *Field v. New York Cent., etc.*, R. Co., 86 N. Y. App. Div. 148; *Bookman v. Masterson*, 83 N. Y. App. Div. 4; *Skapura v. National Sugar Refining Co.*, 83 N. Y. App. Div. 21; *Gerstner v. New York Cent., etc.*, R. Co., 81 N. Y. App. Div. 562, *affirmed* 178 N. Y. 627; *Kilkin v. New York Cent., etc.*, R. Co., 76 N. Y. App. Div. 529, *affirmed* 177 N. Y. 566; *Harvey v. McConchie*, 77 N. Y. App. Div. 361, *affirmed* 177 N. Y. 569; *Rosa v. Volkening*, 64 N. Y. App. Div. 426, *affirmed* 173 N. Y. 590; *Toohey v. Ocean Steamship Co.*, 78 N. Y. App. Div. 178; *Willdigg v. Knox*, 80 N. Y. App. Div. 390; *Batty v. Niagara Falls Hydraulic Power, etc.*, Co., 79 N. Y. App. Div. 466.

*North Carolina.* — *Ausley v. American Tobacco Co.*, 130 N. Car. 34; *Smith v. Wilmington, etc.*, R. Co., 129 N. Car. 173, 85 Am. St. Rep. 740.

*Ohio.* — *Erie R. Co. v. McCormick*, 69 Ohio St. 45; *Memphis, etc.*, *Packet Co. v. Britton*, 25 Ohio Cir. Ct. 153.

*Oklahoma.* — *Ruenmeli-Braun Co. v. Cahill*, 14 Okla. 422.

*Oregon.* — *Robinson v. Taku Fishing Co.*, 42 Oregon 537.

*Pennsylvania.* — *Fullmer v. New York Cent., etc.*, R. Co., 208 Pa. St. 598; *Simmons v. Southern Traction Co.*, 207 Pa. St. 589; *Masterson v. Eldridge*, 208 Pa. St. 242.

*Rhode Island.* — *Langlois v. Dunn Worsted Mills*, 25 R. I. 645; *Paoline v. J. W. Bishop Co.*, 25 R. I. 298; *Baumler v. Narragansett Brewing Co.*, 23 R. I. 430; *Mayott v. Norcross*, 24 R. I. 187.

*South Carolina.* — *Rosemand v. Southern R. Co.*, 66 S. Car. 91.

*Tennessee.* — *Ohio River, etc.*, R. Co. *v. Ed-*

*wards*, 111 Tenn. 31; *Heald v. Wallace*, 109 Tenn. 346.

*Texas.* — *Missouri, etc.*, R. Co. *v. Smith*, (Tex. Civ. App. 1904) 82 S. W. Rep. 787; *Consumers' Cotton Oil Co. v. Jonte*, (Tex. Civ. App. 1904) 80 S. W. Rep. 847; *Parish v. Missouri, etc.*, R. Co., (Tex. Civ. App. 1903) 76 S. W. Rep. 234; *Ft. Worth Ironworks v. Stokes*, (Tex. Civ. App. 1903) 76 S. W. Rep. 231; *Galveston, etc.*, R. Co. *v. Walker*, (Tex. Civ. App. 1903) 76 S. W. Rep. 228; *Bering Mfg. Co. v. Femelat*, (Tex. Civ. App. 1904) 79 S. W. Rep. 869; *Ft. Worth Stockyards Co. v. Whittenburg*, (Tex. Civ. App. 1904) 78 S. W. Rep. 363; *Hettich v. Hillje*, (Tex. Civ. App. 1903) 77 S. W. Rep. 641; *San Antonio Traction Co. v. De Rodriguez*, (Tex. Civ. App. 1903) 77 S. W. Rep. 420; *Tucker v. National Loan, etc.*, Co., (Tex. Civ. App. 1904) 80 S. W. Rep. 879; *Texas, etc.*, R. Co. *v. Peden*, 32 Tex. Civ. App. 315; *Gulf, etc.*, R. Co. *v. Garren*, 96 Tex. 605, 97 Am. St. Rep. 939; *Merchants', etc.*, Oil Co. *v. Burns*, 96 Tex. 573; *St. Louis Southwestern R. Co. v. Barrett*, (Tex. Civ. App. 1903) 72 S. W. Rep. 884; *Texas Portland Cement Co. v. Poe*, 32 Tex. Civ. App. 469; *Galveston, etc.*, R. Co. *v. Butchek*, (Tex. Civ. App. 1901) 66 S. W. Rep. 335.

*Utah.* — *Christienson v. Rio Grande Western R. Co.*, 27 Utah 132; *Higgins v. Southern Pac. R. Co.*, 26 Utah 164.

*Vermont.* — *McKane v. Marr*, 77 Vt. 7.

*Virginia.* — *Big Stone Gap Iron Co. v. Ketron*, 102 Va. 23, 102 Am. St. Rep. 839; *W. R. Trigg Co. v. Lindsay*, 101 Va. 193; *Atlantic, etc.*, Co. *v. West*, 101 Va. 13; *Gay v. Southern R. Co.*, 101 Va. 466.

*Washington.* — *Cully v. Northern Pac. R. Co.*, 35 Wash. 241; *Wilson v. Northern Pac. R. Co.*, 31 Wash. 67; *Decker v. Stimson Mill Co.*, 31 Wash. 522.

*West Virginia.* — *Williams v. Belmont Coal, etc.*, Co., 55 W. Va. 84.

*Wisconsin.* — *Kamp v. Cox*, 122 Wis. 206; *Uptegrove v. Jones, etc.*, *Consol. Co.*, 118 Wis. 673; *Pautz v. Plankinton Packing Co.*, 118 Wis. 47; *Deisenrieter v. Kraus-Merkel Malting Co.*, 97 Wis. 279; *Williams v. North Wisconsin Lumber Co.*, (Wis. 1905) 102 N. W. Rep. 589.

For a detailed discussion see the title MASTER AND SERVANT, vol. 20, p. 109 *et seq.*

**A Person Engaged to Discover and Remedy Defects** assumes the risk of injury resulting from an undiscovered defect. *Davidson v. Stuart*, 34 Can. Sup. Ct. 215.

**416. 1. Assumption of the Risks Not Contributory Negligence** — *United States.* — *Choctaw, etc.*, R. Co. *v. McDade*, 191 U. S. 64; *St. Louis Cordage Co. v. Miller*, 61 C. C. A. 477, 126 Fed. Rep. 495; *Pennsylvania R. Co. v. Jones*, (C. C. A.) 123 Fed. Rep. 753.

*Alabama.* — *Southern R. Co. v. Howell*, 135 Ala. 639.

*Illinois.* — *Chicago, etc.*, R. Co. *v. Heerey*, 203 Ill. 492.

*Indiana.* — *Baltimore, etc.*, R. Co. *v. Cavanaugh*, (Ind. App. 1904) 71 N. E. Rep. 239.

*Iowa.* — See *Carver v. Minneapolis, etc.*, R. Co., 120 Iowa 346.

*Kansas*. — *Atchison, etc., R. Co. v. Bancord*, 66 Kan. 81.

*Michigan*. — *Bradburn v. Wabash R. Co.*, 134 Mich. 575, 10 Detroit Leg. N. 592.

*Missouri*. — *Curtis v. McNair*, 173 Mo. 270.

*Montana*. — *Ball v. Gussenhoven*, 29 Mont. 321.

*Nebraska*. — *Missouri Pac. R. Co. v. Fox*, 60 Neb. 531.

*New Jersey*. — *Dowd v. Erie R. Co.*, 70 N. J. L. 451.

*New York*. — *Dowd v. New York, etc., R. Co.*, 170 N. Y. 459; *Cooper v. New York, etc., R. Co.*, 84 N. Y. App. Div. 42, reversed 180 N. Y. 12; *Allison v. Long Clove Trap Rock Co.*, 75 N. Y. App. Div. 267.

*Ohio*. — See *Narramore v. Cleveland, etc., R. Co.*, 37 C. C. A. 500, 96 Fed. Rep. 298.

*South Carolina*. — *Barksdale v. Charleston, etc., R. Co.*, 66 S. Car. 204; *Bodie v. Charleston, etc., R. Co.*, 61 S. Car. 468. See also *Powers v. Standard Oil Co.*, 53 S. Car. 358.

*Texas*. — *Missouri, etc., R. Co. v. Hoskins*, (Tex. Civ. App. 1904) 79 S. W. Rep. 369; *Gulf, etc., R. Co. v. Elmore*, (Tex. Civ. App. 1904) 79 S. W. Rep. 891; *Horton v. Ft. Worth Packing, etc., Co.*, (Tex. Civ. App. 1903) 76 S. W. Rep. 211; *El Paso, etc., R. Co. v. McComas*, (Tex. Civ. App. 1903) 72 S. W. Rep. 629.

*Washington*. — See discussion in *Bier v. Hosford*, 35 Wash. 544.

*Wisconsin*. — See *Koepcke v. Wisconsin Bridge, etc., Co.*, 116 Wis. 92.

**416. 2. When Assumption of Risks Does Not Bar Servant** — *United States*. — *Texas, etc., R. Co. v. Archibald*, 170 U. S. 665; *Kansas City Southern R. Co. v. Prunty*, (C. C. A.) 133 Fed. Rep. 13; *American Distributing Co. v. Thorne*, 58 C. C. A. 413, 122 Fed. Rep. 431; *Chicago Terminal Transfer R. Co. v. Stone*, 55 C. C. A. 187, 118 Fed. Rep. 19; *Texas, etc., R. Co. v. Carlin*, 49 C. C. A. 605, 111 Fed. Rep. 777, affirmed 189 U. S. 354; *Felton v. Harbeson*, 44 C. C. A. 188, 104 Fed. Rep. 737; *Southern Pac. R. Co. v. Yeargin*, (C. C. A.) 109 Fed. Rep. 436; *Narramore v. Cleveland, etc., R. Co.*, 37 C. C. A. 500, 96 Fed. Rep. 298; *Pittsburgh, etc., R. Co. v. Thompson*, (C. C. A.) 82 Fed. Rep. 720. See also *Patton v. Southern R. Co.*, (C. C. A.) 82 Fed. Rep. 979.

*Alabama*. — *Osborne v. Alabama Steel, etc., Co.*, 135 Ala. 571; *Alabama G. S. R. Co. v. Brooks*, 135 Ala. 401; *Northern Alabama R. Co. v. Shea*, (Ala. 1904) 37 So. Rep. 796; *Louisville, etc., R. Co. v. Mothershed*, 121 Ala. 658; *McGhee v. Campbell*, (C. C. A.) 101 Fed. Rep. 936 (decided under the Alabama statute).

*Georgia*. — *Wrightsville, etc., R. Co. v. Lattimore*, 118 Ga. 581.

*Illinois*. — *Slack v. Harris*, 200 Ill. 96; *Illinois Steel Co. v. Ryska*, 200 Ill. 280; *Mobile, etc., R. Co. v. Vallowe*, 214 Ill. 124; *Indiana, etc., R. Co. v. Ostot*, 212 Ill. 429; *Malott v. Hood*, 201 Ill. 202. See also *Chicago, etc., R. Co. v. Heerey*, 203 Ill. 492.

*Indiana*. — *Island Coal Co. v. Swaggerty*, 159 Ind. 664; *Brazil Block Coal Co. v. Gibson*, 160 Ind. 310, 98 Am. St. Rep. 281; *Barley v. Southern Indiana R. Co.*, 30 Ind. App. 406; *Princeton Coal, etc., Co. v. Roll*, (Ind. 1903) 66 N. E. Rep. 169; *Consolidated Stone Co. v. Morgan*,

160 Ind. 241; *Gould Steel Co. v. Richards*, 30 Ind. App. 348; *Pittsburgh, etc., R. Co. v. Nicholas*, (Ind. App. 1905) 73 N. E. Rep. 195.

*Iowa*. — *Branz v. Omaha, etc., R., etc., Co.*, 120 Iowa 406; *Pierson v. Chicago, etc., R. Co.*, (Iowa 1905) 102 N. W. Rep. 149. See also *Phinney v. Illinois Cent. R. Co.*, 122 Iowa 488.

*Kansas*. — *Coffeyville Vitrified Brick, etc., Co. v. Shanks*, 69 Kan. 306; *Buoy v. Clyde Milling, etc., Co.*, 68 Kan. 436; *Emporia v. Kowalski*, 66 Kan. 64.

*Kentucky*. — *Louisville, etc., R. Co. v. Lowe*, 80 S. W. Rep. 768, 25 Ky. L. Rep. 2317; *Cumberland Telephone, etc., Co. v. Ware*, 115 Ky. 581; *Board v. Chesapeake, etc., R. Co.*, 70 S. W. Rep. 625, 24 Ky. L. Rep. 1079. See also *Cincinnati, etc., R. Co. v. Maley*, 76 S. W. Rep. 334, 25 Ky. L. Rep. 690.

*Louisiana*. — *McGinn v. McCormick*, 109 La. 396.

*Massachusetts*. — *Mahoney v. Bay State Pink Granite Co.*, 184 Mass. 287; *Pierce v. Arnold Print Works*, 182 Mass. 260; *Murphy v. Marston Coal Co.*, 183 Mass. 385; *Garant v. Cashman*, 183 Mass. 13.

*Michigan*. — *Sipes v. Michigan Starch Co.*, (Mich. 1904) 100 N. W. Rep. 447.

*Minnesota*. — *Ready v. Peavy Elevator Co.*, 89 Minn. 154; *Kline v. Minnesota Iron Co.*, 93 Minn. 63.

*Missouri*. — *Curtis v. McNair*, 173 Mo. 270; *Chambers v. Chester*, 172 Mo. 461; *Bane v. Irwin*, 172 Mo. 306; *Hester v. Jacob Dold Packing Co.*, 95 Mo. App. 16; *Cole v. St. Louis Transit Co.*, 183 Mo. 81; *Dover v. Mississippi River, etc., R. Co.*, 100 Mo. App. 330.

*Nebraska*. — *Missouri Pac. R. Co. v. Fox*, 60 Neb. 531; *New Omaha Thomson-Houston Electric Light Co. v. Dent*, (Neb. 1903) 94 N. W. Rep. 819.

*New Jersey*. — *Durand v. New York, etc., R. Co.*, 65 N. J. L. 656.

*New York*. — *Jenks v. Thompson*, 179 N. Y. 20; *Norman v. Dowd*, 86 N. Y. App. Div. 243.

*North Carolina*. — *Turrentine v. Wellington*, 136 N. Car. 308; *Mott v. Southern R. Co.*, 131 N. Car. 234; *Sigman v. Southern R. Co.*, 135 N. Car. 181. See also *Harrill v. South Carolina, etc., R. Co.*, 135 N. Car. 601.

*Ohio*. — *Smith v. Newark Ice, etc., Co.*, 8 Ohio Dec. 332, 6 Ohio N. P. 528.

*South Carolina*. — *Bussey v. Charleston, etc., R. Co.*, 52 S. Car. 438; *Barksdale v. Charleston, etc., R. Co.*, 66 S. Car. 204. See also *Schumpert v. Southern R. Co.*, 65 S. Car. 332, 95 Am. St. Rep. 802.

*Texas*. — *International, etc., R. Co. v. Reeves*, (Tex. Civ. App. 1904) 79 S. W. Rep. 1099; *St. Louis Southwestern R. Co. v. Rea*, (Tex. Civ. App. 1904) 84 S. W. Rep. 428; *International, etc., R. Co. v. Moynahan*, (Tex. Civ. App. 1903) 76 S. W. Rep. 803; *St. Louis Southwestern R. Co. v. Swinney*, (Tex. Civ. App. 1904) 78 S. W. Rep. 547; *Missouri, etc., R. Co. v. O'Connor*, (Tex. Civ. App. 1904) 78 S. W. Rep. 374; *San Antonio, etc., R. Co. v. Brock*, (Tex. Civ. App. 1904) 80 S. W. Rep. 422; *St. Louis Southwestern R. Co. v. Pope*, (Tex. Civ. App. 1904) 82 S. W. Rep. 360; *Texas Portland Cement, etc., Co. v. Lee*, (Tex. Civ. App. 1904) 82 S. W. Rep. 306; *Texas Cent. R. Co. v. Bender*, 32 Tex. Civ. App. 568; *Mis-*

**417. b. MASTER'S DUTIES AND LIABILITIES GENERALLY — To Warn the Servant of Extraneous Risks.** — See note 1.

**418. To Instruct an Immature or Inexperienced Servant.** — See note 1.

souri, etc., R. Co. v. Schilling, 32 Tex. Civ. App. 417; Missouri, etc., R. Co. v. Blackman, 32 Tex. Civ. App. 200; Missouri, etc., R. Co. v. Goss, 31 Tex. Civ. App. 300; St. Louis Southwestern R. Co. v. McDowell, (Tex. Civ. App. 1903) 73 S. W. Rep. 974; Galveston, etc., R. Co. v. Pendleton, 30 Tex. Civ. App. 431; International, etc., R. Co. v. Hoyt, 30 Tex. Civ. App. 518; Galveston, etc., R. Co. v. Newport, 26 Tex. Civ. App. 583.

*Utah.* — Braegger v. Oregon Short Line R. Co., 24 Utah 391; Mathews v. Daly-West Min. Co., 27 Utah 193; Hone v. Mammoth Min. Co., 27 Utah 168.

*Virginia.* — See Chesapeake, etc., R. Co. v. Pierce, 103 Va. 99.

*Washington.* — Currans v. Seattle, etc., R., etc., Co., 34 Wash. 512.

See generally the title MASTER AND SERVANT, vol. 20, p. 109 *et seq.*

**417. 1. The Ross Case Overruled.** — The Supreme Court of the United States has recently decided that the conductor of a freight train was not, between stations, the vice-principal of the railroad company, and that therefore the latter was not liable for the death of a brakeman due to the negligence of the conductor. In its opinion (Mr. Justice Harlan dissenting), the court exhaustively reviewed the authorities from Farwell v. Boston, etc., R. Corp., 4 Met. (Mass.) 49, 38 Am. Dec. 339, down, and overruled the case of Chicago, etc., R. Co. v. Ross, 112 U. S. 377, saying, *inter alia*, in reference to that case: "It must be admitted that the reasoning employed by Mr. Justice Field in his opinion expressing the views of a majority of the court, and the conclusion reached by him, cannot be reconciled with the other decisions of this court hereinbefore cited." New England R. Co. v. Conroy, 175 U. S. 323.

**There Are Many Cases Supporting the Doctrine of the Text — United States.** — Pennsylvania R. Co. v. Jones, (C. C. A.) 123 Fed. Rep. 753; Bethlehem Iron Co. v. Weiss, 40 C. C. A. 270, 100 Fed. Rep. 45; Cincinnati, etc., R. Co. v. Gray, 41 C. C. A. 535, 101 Fed. Rep. 623.

*Colorado.* — Holshouser v. Denver Gas, etc., Co., 18 Colo. App. 431.

*Iowa.* — Norris v. Cudahy Packing Co., 124 Iowa 748.

*Minnesota.* — Lyons v. Dee, 88 Minn. 490.

*Missouri.* — Chambers v. Chester, 172 Mo. 461.

*New York.* — Finn v. Cassidy, 165 N. Y. 584; Simone v. Kirk, 173 N. Y. 7; True v. Niagara Gorge R. Co., 70 N. Y. App. Div. 383, *affirmed* 175 N. Y. 487.

*Rhode Island.* — Cox v. American Agricultural Chemical Co., 24 R. I. 503.

*Texas.* — Missouri, etc., R. Co. v. Jones, (Tex. Civ. App. 1903) 75 S. W. Rep. 53; San Antonio Foundry Co. v. Drish, (Tex. Civ. App. 1905) 85 S. W. Rep. 440.

*Virginia.* — Virginia Portland Cement Co. v. Luck, 103 Va. 427.

See also the title MASTER AND SERVANT, vol. 20, p. 94 *et seq.*

**418. 1. Master's Duty to Immature and Inexperienced Servant — United States.** — Choctaw, etc., R. Co. v. McDade, 191 U. S. 64; Sink v. Sikes Co., 134 Fed. Rep. 144; Louisville, etc., R. Co. v. Miller, (C. C. A.) 104 Fed. Rep. 124; Felton v. Girardy, (C. C. A.) 104 Fed. Rep. 127; The Anchoria, 113 Fed. Rep. 982, *affirmed* (C. C. A.) 120 Fed. Rep. 1017.

*Arkansas.* — King-Ryder Lumber Co. v. Cochran, 71 Ark. 55.

*Delaware.* — Punkowski v. New Castle Leather Co., 4 Penn. (Del.) 544; Karczewski v. Wilmington City R. Co., 4 Penn. (Del.) 24.

*Illinois.* — Cobb Chocolate Co. v. Kundson, 207 Ill. 452.

*Indiana.* — La Porte Carriage Co. v. Sullender, (Ind. App. 1904) 71 N. E. Rep. 922; Republic Iron, etc., Co. v. Ohler, 161 Ind. 393; Brower v. Locke, 31 Ind. App. 353.

*Iowa.* — Shebeck v. National Cracker Co., 120 Iowa 414. See also Vohs v. A. E. Short-hill Co., 124 Iowa 471.

*Kansas.* — Missouri Pac. R. Co. v. Johnson, 69 Kan. 721; Patterson v. Cole, 67 Kan. 441.

*Maryland.* — National Enameling, etc., Co. v. Brady, 93 Md. 646.

*Massachusetts.* — Joyce v. American Writing Paper Co., 184 Mass. 230; Lynch v. M. T. Stevens, etc., Co., 187 Mass. 397; Jarvis v. Coes Wrench Co., 177 Mass. 170; De Costa v. Hargraves Mills, 170 Mass. 375.

*Minnesota.* — Bernier v. St. Paul Gaslight Co., 92 Minn. 214; Dell v. McGrath, 92 Minn. 187.

*Mississippi.* — Bradford v. Taylor, 85 Miss. 409.

*Missouri.* — Henderson v. Kansas City, 177 Mo. 477.

*Montana.* — Coleman v. Perry, 28 Mont. 1.

*Nebraska.* — Ittner Brick Co. v. Killian, (Neb. 1903) 93 N. W. Rep. 951.

*New Hampshire.* — Kasjeta v. Nashua Mfg. Co., (N. H. 1904) 58 Atl. Rep. 874.

*New York.* — Koren v. National Conduit, etc., Co., 82 N. Y. App. Div. 527, *affirmed* 179 N. Y. 552; Kochman v. Chase, 32 N. Y. App. Div. 630.

*North Carolina.* — Ward v. Odell Mfg. Co., 126 N. Car. 946.

*Pennsylvania.* — Doyle v. Pittsburg Waste Co., 204 Pa. St. 618.

*Rhode Island.* — Pierce v. Dyrexville Mfg. Co., 25 R. I. 512; Lebeau v. Dyerville Mfg. Co., (R. I. 1904) 57 Atl. Rep. 1092.

*Tennessee.* — American Lead Pencil Co. v. Davis, 108 Tenn. 251.

*Texas.* — International, etc., R. Co. v. Pine, (Tex. Civ. App. 1903) 77 S. W. Rep. 979.

*Utah.* — Moyes v. Ogden Sewer Pipe, etc., Co., 28 Utah 148; Pence v. California Min. Co., 27 Utah 378.

*Virginia.* — Lynchburg Cotton Mills v. Stanley, 102 Va. 590.

*Washington.* — Jancko v. West Coast Mfg., etc., Co., 34 Wash. 556.

*West Virginia.* — Giebell v. Collins Co., 54 W. Va. 518.



**419. To Provide Suitable Machinery.** — See note 1.

*Canada.* — See *Sparano v. Canadian Pac. R. Co.*, 22 Quebec Super. Ct. 292.

But where the plaintiff's intestate, a man inexperienced in handling dynamite, was killed by the negligence of an experienced fellow servant, it was held that the master was not liable for failure to warn the deceased. *O'Brien v. Buffalo Furnace Co.*, 68 N. Y. App. Div. 451.

**When Certain Doctrines Do Not Apply — United States.** — *Terry v. Schmidt*, (C. C. A.) 116 Fed. Rep. 627.

*Illinois.* — See *Chicago, etc., R. Co. v. Heerey*, 203 Ill. 492.

*Indiana.* — *Baltimore, etc., R. Co. v. Hunsucker*, 33 Ind. App. 27.

*Massachusetts.* — *Gavin v. Fall River Automatic Telephone Co.*, 185 Mass. 78.

*Minnesota.* — *Wendler v. Red Wing Gas, etc., Co.*, 92 Minn. 122.

*Mississippi.* — *Truly v. North Lumber Co.*, 83 Miss. 430.

*Missouri.* — *Bair v. Heibel*, 103 Mo. App. 621; *Mueller v. La Puelle Shoe Co.*, 109 Mo. App. 506.

*Nebraska.* — *Fremont Telephone Co. v. Keeler*, (Neb. 1904) 101 N. W. Rep. 245; *Omaha Bottling Co. v. Theiler*, 59 Neb. 257, 80 Am. St. Rep. 673.

*New York.* — *Monzi v. Friedline*, 33 N. Y. App. Div. 217; *Wahl v. Chatillon*, 56 N. Y. App. Div. 554.

*Texas.* — *Ft. Worth Iron Works v. Stokes*, (Tex. Civ. App. 1903) 76 S. W. Rep. 231.

*Vermont.* — See *La Flam v. Missisquoi Pulp Co.*, 74 Vt. 125.

*Wisconsin.* — *Upthegrove v. Jones, etc., Coal Co.*, 118 Wis. 673; *Wagner v. Plano Mfg. Co.*, 110 Wis. 48.

See also the title MASTER AND SERVANT, vol. 20, p. 94 *et seq.*

**419. 1. Duty as to Appliances — United States.** — *Deserant v. Cerillos Coal R. Co.*, 178 U. S. 409; *Texas, etc., R. Co. v. Archibald*, 170 U. S. 665; *Choctaw, etc., R. Co. v. McDade*, 191 U. S. 64; *Choctaw, etc., R. Co. v. Holloway*, 191 U. S. 334; *Northern Pac. R. Co. v. Tynan*, (C. C. A.) 119 Fed. Rep. 288; *Cudahy Packing Co. v. Anthes*, 54 C. C. A. 504, 117 Fed. Rep. 118; *Mason, etc., R. Co. v. Yockey*, (C. C. A.) 103 Fed. Rep. 265.

*Alabama.* — See *Southern Car, etc., Co. v. Jennings*, 137 Ala. 247.

*Alaska.* — *Gibson v. Canadian Pac. Nav. Co.*, 1 Alaska 407.

*Colorado.* — *Mulligan v. Colorado Fuel, etc., Co.*, (Colo. App. 1904) 77 Pac. Rep. 977.

*Delaware.* — *Winkler v. Philadelphia, etc., R. Co.*, 4 Penn. (Del.) 80; *Boyd v. Blumenthal*, 3 Penn. (Del.) 564.

*Illinois.* — *Chicago, etc., R. Co. v. Rains*, 203 Ill. 417.

*Indiana.* — *Brazil Block Coal Co. v. Gibson*, 160 Ind. 319, 98 Am. St. Rep. 281.

*Iowa.* — *Shebeck v. National Cracker Co.*, 120 Iowa 414; *Branz v. Omaha, etc., R., etc., Co.*, 120 Iowa 406.

*Kansas.* — *Buoy v. Clyde Milling, etc., Co.*, 68 Kan. 436; *Brinkmeier v. Missouri Pac. R. Co.*, 69 Kan. 738; *Atchison, etc., R. Co. v. Bancord* 66 Kan. 81,

*Kentucky.* — *Murphy v. Baltimore, etc., R. Co.*, 114 Ky. 696; *Louisville, etc., R. Co. v. Poulter*, (Ky. 1905) 84 S. W. Rep. 576.

*Louisiana.* — *McGinn v. McCormick*, 109 La. 396; *Ingham v. John B. Honor Co.*, 113 La. 1040.

*Maryland.* — See *South Baltimore Car Works v. Schaefer*, 96 Md. 88, 94 Am. St. Rep. 560.

*Massachusetts.* — *Boucher v. Robeson Mills*, 182 Mass. 500; *Rapson v. Leighton*, 187 Mass. 432.

*Michigan.* — *McLean v. Pere Marquette R. Co.*, (Mich. 1904) 100 N. W. Rep. 748; *Bernard v. Pittsburgh Coal Co.*, (Mich. 1904) 100 N. W. Rep. 396; *Corbett v. American Screen-Door Co.*, 133 Mich. 669, 10 Detroit Leg. N. 305; *Noe v. Rapid R. Co.*, 133 Mich. 152, 10 Detroit Leg. N. 155.

*Minnesota.* — *Hagerty v. Evans*, 87 Minn. 435. See also *Gittens v. William Porten Co.*, 90 Minn. 512.

*Missouri.* — *Cole v. St. Louis Transit Co.*, 183 Mo. 81; *Jones v. Kansas City, etc., R. Co.*, 178 Mo. 528, 101 Am. St. Rep. 434; *Curtis v. McNair*, 173 Mo. 270; *Glasscock v. Swofford Bros. Dry Goods Co.*, (Mo. App. 1903) 74 S. W. Rep. 1039; *Franklin v. Missouri, etc., R. Co.*, 97 Mo. App. 473.

*Montana.* — *Ball v. Gussenhoven*, 29 Mont. 321.

*Nebraska.* — *Missouri Pac. R. Co. v. Fox*, 60 Neb. 531. See also *Cudahy Packing Co. v. Roy*, (Neb. 1904) 99 N. W. Rep. 231.

*New Jersey.* — *Campbell v. T. A. Gillespie Co.*, 69 N. J. L. 279.

*New York.* — *Welle v. Celluloid Co.*, 175 N. Y. 401; *Gmaehle v. Rosenberg*, 178 N. Y. 147; *Kremer v. New York Edison Co.*, 102 N. Y. App. Div. 433; *Cummings v. Kenny*, 97 N. Y. App. Div. 114; *Holloway v. McWilliams*, 97 N. Y. App. Div. 360; *Tierney v. Vunck*, 97 N. Y. App. Div. 1; *Devaney v. Degnon-McLean Constr. Co.*, 79 N. Y. App. Div. 62, *affirmed* 178 N. Y. 620. See also *Scanlon v. Kahn*, 40 N. Y. App. Div. 62.

*North Carolina.* — *Elmore v. Seaboard Air-Line R. Co.*, 132 N. Car. 865; *Myers v. Concord Lumber Co.*, 129 N. Car. 252.

*North Dakota.* — *Cameron v. Great Northern R. Co.*, 8 N. Dak. 124.

*Oklahoma.* — *Neeley v. Southwestern Cotton Seed Oil Co.*, 13 Okla. 356.

*Oregon.* — *Geldard v. Marshall*, 43 Oregon 438.

*Pennsylvania.* — *Finnerty v. Burnham*, 205 Pa. St. 305.

*Rhode Island.* — *McGarrity v. New York, etc., R. Co.*, 25 R. I. 269; *Crandall v. Stafford Mfg. Co.*, 24 R. I. 555; *Cummings v. National, etc., Worsted Mills*, 24 R. I. 390, 53 Atl. Rep. 280.

*South Carolina.* — *Bussey v. Charleston, etc., R. Co.*, 52 S. Car. 438.

*Tennessee.* — See *East Tennessee, etc., R. Co. v. Lindamood*, 111 Tenn. 457.

*Texas.* — *Missouri, etc., R. Co. v. Hutchens*, (Tex. Civ. App. 1904) 80 S. W. Rep. 415; *Texas Cent. R. Co. v. Yarbrow*, (Tex. Civ. App. 1903) 74 S. W. Rep. 357; *St. Louis, etc., R.*

**419.** To Inspect and Repair Machinery. — See note 2.

**420.** To Provide a Safe Place for the Servant. — See note 1.

*Co. v. Skaggs*, (Tex. Civ. App. 1903) 74 S. W. Rep. 783; *Missouri, etc., R. Co. v. Blackman*, 32 Tex. Civ. App. 200; *Texas, etc., R. Co. v. Hartnett*, (Tex. Civ. App. 1903) 75 S. W. Rep. 809; *Galveston, etc., R. Co. v. Newport*, 26 Tex. Civ. App. 583. See also *Missouri, etc., R. Co. v. Smith*, (Tex. Civ. App. 1904) 82 S. W. Rep. 787; *Hirsch v. Ashe*, (Tex. Civ. App. 1904) 80 S. W. Rep. 650.

*Utah*. — *Boyle v. Union Pac. R. Co.*, 25 Utah 420.

*Washington*. — *Currans v. Seattle, etc., R., etc., Co.*, 34 Wash. 512; *Towle v. Stimson Mill Co.*, 33 Wash. 305; *Keating v. Pacific Steam Whaling Co.*, 21 Wash. 415.

*West Virginia*. — *Giebell v. Collins Co.*, 54 W. Va. 518.

*Canada*. — *Godwin v. Newcombe*, 1 Ont. L. Rep. 525.

For a detailed discussion, see the title MASTER AND SERVANT, vol. 20, p. 71 *et seq.*

**Where It Is Servant's Duty to Inspect** he cannot recover. *Bowers v. Bristol Gas, etc., Co.*, 100 Va. 533; *Heald v. Wallace*, 109 Tenn. 346.

But in such case the contract of employment must make such inspection one of its primary objects. *Dupree v. Alexander*, (Tex. Civ. App. 1902) 68 S. W. Rep. 739.

**419. 2. Master's Duty to Inspect and Repair** — *United States*. — *Texas, etc., R. Co. v. Archibald*, 170 U. S. 665.

*Alabama*. — *E. E. Jackson Lumber Co. v. Cunningham*, (Ala. 1904) 37 So. Rep. 445.

*Colorado*. — *Mulligan v. Colorado Fuel, etc., Co.*, (Colo. App. 1904) 77 Pac. Rep. 977.

*Connecticut*. — *Rincicotti v. John J. O'Brien Contracting Co.*, 77 Conn. 617.

*Illinois*. — *Ehlen v. O'Donnell*, 205 Ill. 38; *Allen B. Wrisley Co. v. Burke*, 203 Ill. 250.

*Kansas*. — *Emporia v. Kowalski*, 66 Kan. 64.

*Kentucky*. — *Louisville, etc., R. Co. v. Roberts*, 70 S. W. Rep. 833, 24 Ky. L. Rep. 1160.

*Louisiana*. — *Broadfoot v. Shreveport Cotton Oil Co.*, 111 La. 467.

*Massachusetts*. — *Murphy v. Marston Coal Co.*, 183 Mass. 385.

*Michigan*. — *McDonald v. Michigan Cent. R. Co.*, 132 Mich. 372, 102 Am. St. Rep. 426, 9 Detroit Leg. N. 700.

*New Jersey*. — See *Fulton v. Grieb Rubber Co.*, 69 N. J. L. 221; *McGrath v. Delaware, etc., R. Co.*, 69 N. J. L. 331.

*New York*. — *McGuire v. Bell Telephone Co.*, 167 N. Y. 208; *Byrne v. Eastman's Co.*, 163 N. Y. 461; *Walsh v. New York, etc., R. Co.*, 80 N. Y. App. Div. 316, *affirmed* 178 N. Y. 588; *Meehan v. Atlas Safe Moving, etc., Co.*, 94 N. Y. App. Div. 306; *Franck v. American Tartar Co.*, 91 N. Y. App. Div. 571; *Smith v. New York, etc., R. Co.*, 86 N. Y. App. Div. 188, *affirmed* 178 N. Y. 635; *Rowley v. American Illuminating Co.*, 83 N. Y. App. Div. 609; *McKnight v. Brooklyn Heights R. Co.*, (Supm. Ct. Tr. T.) 23 Misc. (N. Y.) 527.

*North Carolina*. — *Womble v. Merchants Grocery Co.*, 135 N. Car. 474.

*North Dakota*. — *Cameron v. Great Northern R. Co.*, 8 N. Dak. 124.

*Pennsylvania*. — *Finnerty v. Burnham*, 205 Pa. St. 305.

*Rhode Island*. — *Vartanian v. New York, etc., R. Co.*, 25 R. I. 398; *Collins v. Harrison*, 25 R. I. 489; *McGarrity v. New York, etc., R. Co.*, 25 R. I. 269.

*South Carolina*. — *Barksdale v. Charleston, etc., R. Co.*, 66 S. Car. 204.

*Texas*. — *Galveston, etc., R. Co. v. Collins*, 31 Tex. Civ. App. 70; *San Antonio, etc., R. Co. v. Lindsey*, 27 Tex. Civ. App. 316; *Bookrum v. Galveston, etc., R. Co.*, (Tex. Civ. App. 1900) 57 S. W. Rep. 919. See also *Texas Mexican R. Co. v. Mendez*, (Tex. Civ. App. 1903) 78 S. W. Rep. 25.

*Washington*. — *Roberts v. Port Blakely Mill Co.*, 30 Wash. 25; *Young v. O'Brien*, 36 Wash. 570; *Goldthorpe v. Clark-Nickerson Lumber Co.*, 31 Wash. 467.

*Wisconsin*. — *Grant v. Keystone Lumber Co.*, 119 Wis. 229, 100 Am. St. Rep. 883.

*Canada*. — *George Matthews Co. v. Bouchard*, 8 Quebec Q. B. 550.

For a detailed discussion see the title MASTER AND SERVANT, vol. 20, p. 88 *et seq.*

**420. 1. Master's Duty to Provide Safe Place to Work** — *England*. — *Lloyd v. Woolland*, 87 L. T. N. S. 73.

*United States*. — *Deserant v. Cerillos Coal R. Co.*, 178 U. S. 409; *Texas, etc., R. Co. v. Swearingin*, 196 U. S. 51; *Cudahy Packing Co. v. Anthes*, 54 C. C. A. 504, 117 Fed. Rep. 118; *Alaska United Gold Min. Co. v. Keating*, (C. C. A.) 116 Fed. Rep. 561; *Bunker Hill, etc., Min., etc., Co. v. Jones*, (C. C. A.) 130 Fed. Rep. 813; *Harder, etc., Coal Min. Co. v. Schmidt*, 43 C. C. A. 532, 104 Fed. Rep. 282. See also *The Gladestry*, 124 Fed. Rep. 112, *affirmed* (C. C. A.) 128 Fed. Rep. 591.

*Alabama*. — *Tennessee Coal, etc., Co. v. Garrett*, 140 Ala. 563.

*Delaware*. — *Karczewski v. Wilmington City R. Co.*, 4 Penn. (Del.) 24; *Boyd v. Blumenthal*, 3 Penn. (Del.) 564.

*Georgia*. — *Central of Georgia R. Co. v. McClifford*, 120 Ga. 90; *Jackson v. Merchants', etc., Transp. Co.*, 118 Ga. 651.

*Illinois*. — *Rock Island Sash, etc., Works v. Pohlman*, 210 Ill. 133; *Central Union Bldg. Co. v. Kolander*, 212 Ill. 27; *Spring Valley Coal Co. v. Rowatt*, 196 Ill. 156; *Allen B. Wrisley Co. v. Burke*, 203 Ill. 250; *Armour v. Golkowsky*, 202 Ill. 144; *Momence Stone Co. v. Turrell*, 205 Ill. 515; *Libby v. Banks*, 209 Ill. 109; *Ehlen v. O'Donnell*, 205 Ill. 38; *Barnett, etc., Co. v. Schlappa*, 208 Ill. 426; *Illinois Terminal R. Co. v. Thompson*, 210 Ill. 226.

*Indiana*. — *Ætna Powder Co. v. Earlandson*, 33 Ind. App. 251; *Consolidated Stone Co. v. Morgan*, 160 Ind. 241; *Chicago, etc., R. Co. v. Martin*, 31 Ind. App. 308; *Island Coal Co. v. Swaggerty*, 159 Ind. 664; *Parkhurst v. Swift*, 31 Ind. App. 521. See also *Southern Indiana R. Co. v. Harrell*, 161 Ind. 689.

*Iowa*. — *Buehner v. Creamery Package Mfg. Co.*, 124 Iowa 445, 104 Am. St. Rep. 354.

*Kentucky*. — *East Jellico Coal Co. v. Golden*, 79 S. W. Rep. 291, 25 Ky. L. Rep. 2056; *St.*

**420.** To Guard Against a Danger to the Servant of Which He Has Been Notified. — See note 2.

**421.** To Make and Promulgate Proper Rules. — See note 1.

To Employ and Retain Competent and Trustworthy Servants. — See note 2.

*Bernard Coal Co. v. Southard*, 76 S. W. Rep. 167, 25 Ky. L. Rep. 638; *Covington Sawmill, etc., Co. v. Clark*, 116 Ky. 461; *Angel v. Jellico Coal Min. Co.*, 115 Ky. 728; *Vandyke v. Memphis, etc., Packet Co.*, (Ky. 1903) 71 S. W. Rep. 441; *Adams Express Co. v. Smith*, 72 S. W. Rep. 752, 24 Ky. L. Rep. 1915; *Tradewater Coal Co. v. Johnson*, 72 S. W. Rep. 274, 24 Ky. L. Rep. 1777; *Pfisterer v. Peter*, 78 S. W. Rep. 450, 25 Ky. L. Rep. 1605.

*Louisiana.* — *Kimbell v. Homer Compress, etc., Co.*, 109 La. 963; *Bowden v. Derby*, 99 Me. 208.

*Massachusetts.* — *Bourbonnais v. West Boylston Mfg. Co.*, 184 Mass. 250; *Garant v. Cashman*, 183 Mass. 13. See also *Boyle v. Columbian Fire Proofing Co.*, 182 Mass. 93.

*Michigan.* — *Bradburn v. Wabash R. Co.*, 134 Mich. 575, 10 Detroit Leg. N. 592.

*Minnesota.* — *Merrill v. Pike*, (Minn. 1905) 102 N. W. Rep. 393.

*Missouri.* — *Rogers v. Meyerson Printing Co.*, 103 Mo. App. 683; *Hester v. Jacob Dold Packing Co.*, 95 Mo. App. 16.

*Montana.* — *McCabe v. Montana Cent. R. Co.*, 30 Mont. 323.

*Nebraska.* — *Fremont Brewing Co. v. Schulz*, (Neb. 1904) 101 N. W. Rep. 234.

*New Jersey.* — *Meany v. Standard Oil Co.*, (N. J. 1903) 55 Atl. Rep. 653.

*New York.* — *Simone v. Kirk*, 173 N. Y. 7; *Finn v. Cassidy*, 165 N. Y. 584; *Eastland v. Clarke*, 165 N. Y. 420; *Gmaehle v. Rosenberg*, 178 N. Y. 147; *Bateman v. New York Cent., etc., R. Co.*, 178 N. Y. 84; *Wazenski v. New York Cent., etc., R. Co.*, 180 N. Y. 466; *Diamond v. Planet Mills Mfg. Co.*, 97 N. Y. App. Div. 43; *Franck v. American Tartar Co.*, 91 N. Y. App. Div. 571; *Muhlens v. Obermeyer*, 83 N. Y. App. Div. 88; *Eichholz v. Niagara Falls Hydraulic Power, etc., Co.*, 68 N. Y. App. Div. 441, *affirmed* 174 N. Y. 519; *Hoelter v. McDonald*, 82 N. Y. App. Div. 423; *Duggan v. Phelps*, 82 N. Y. App. Div. 509; *Wingert v. Krakauer*, 76 N. Y. App. Div. 34; *Boyle v. Degnon-McLean Constr. Co.*, 47 N. Y. App. Div. 311; *Benthin v. New York Cent., etc., R. Co.*, 24 N. Y. App. Div. 303; *Mullane v. Houston, etc., R. Co.*, (Supm. Ct. App. T.) 21 Misc. (N. Y.) 10.

*North Carolina.* — *Lindsay v. Norfolk, etc., R. Co.*, 132 N. Car. 59; *Myers v. Concord Lumber Co.*, 129 N. Car. 252; *Wilkie v. Raleigh, etc., R. Co.*, 127 N. Car. 203; *Wright v. Southern R. Co.*, 122 N. Car. 959.

*Ohio.* — *Wellston Coal Co. v. Smith*, 65 Ohio St. 70, 87 Am. St. Rep. 547; *New York, etc., R. Co. v. Roe*, 25 Ohio Cir. Ct. 628.

*Pennsylvania.* — *McGroarty v. Wanamaker*, 187 Pa. St. 132.

*South Carolina.* — *Rinake v. Victor Mfg. Co.*, 58 S. Car. 360.

*Texas.* — *Southern Kansas R. Co. v. Sage*, (Tex. Civ. App. 1904) 80 S. W. Rep. 1038; *Galveston, etc., R. Co. v. Brown*, (Tex. Civ. App. 1903) 77 S. W. Rep. 832.

*Utah.* — *Utah Sav., etc., Co. v. Diamond Coal, etc., Co.*, 26 Utah 299.

*Washington.* — *McMillan v. North Star Min. Co.*, 32 Wash. 579, 98 Am. St. Rep. 908; *Gaudie v. Northern Lumber Co.*, 34 Wash. 34; *Czarecki v. Seattle, etc., R., etc., Co.*, 30 Wash. 288; *Green v. Western American Co.*, 30 Wash. 87.

*West Virginia.* — *Fulton v. Crosby, etc., Co.*, (W. Va. 1905) 49 S. E. Rep. 1012.

For a detailed discussion see the title MASTER AND SERVANT, vol. 20, p. 55 *et seq.*

**420. 2. Master's Duty to Obviate Danger of Which He Has Notice.** — See in support of the rule *Swift v. Madden*, 165 Ill. 41; *Rice v. Eureka Paper Co.*, 174 N. Y. 385, 95 Am. St. Rep. 585; *Dowd v. Erie R. Co.*, 70 N. J. L. 451. And see generally the title MASTER AND SERVANT, vol. 20, p. 54 *et seq.*

**421. 1. Master's Duty to Make and Promulgate Rules.** — *Sirois v. Henry*, (N. H. 1905) 59 Atl. Rep. 936; *Dowd v. New York, etc., R. Co.*, 170 N. Y. 459; *Devoe v. New York Cent., etc., R. Co.*, 174 N. Y. 1; *Texas Cent. R. Co. v. Yarbrow*, (Tex. Civ. App. 1903) 74 S. W. Rep. 357; *Bain v. Northern Pac. R. Co.*, 120 Wis. 412. See also *Secombe v. Detroit Electric R. Co.*, 133 Mich. 170, 10 Detroit Leg. N. 129.

And see the title MASTER AND SERVANT, vol. 20, p. 101.

**2. Master's Duty to Employ and Retain Competent Servants.** — *United States.* — *Elliott v. Canadian Pac. R. Co.*, 129 Fed. Rep. 163.

*Illinois.* — *Metropolitan West Side El. R. Co. v. Fortin*, 203 Ill. 454.

*Indiana.* — See *Southern Indiana R. Co. v. Harrell*, 161 Ind. 689; *Princeton Coal, etc., Co. v. Roll*, 162 Ind. 115.

*Iowa.* — *Scott v. Iowa Telephone Co.*, 126 Iowa 524.

*Kentucky.* — *Illinois Cent. R. Co. v. Langan*, 116 Ky. 318.

*Louisiana.* — *Hill v. Big Creek Lumber Co.*, 108 La. 168.

*Maryland.* — *Maryland Steel Co. v. Marney*, 88 Md. 482, 71 Am. St. Rep. 441.

*Michigan.* — See *Secombe v. Detroit Electric R. Co.*, 133 Mich. 170, 10 Detroit Leg. N. 129.

*Minnesota.* — *Dell v. McGrath*, 92 Minn. 187.

*Mississippi.* — *Yazoo, etc., R. Co. v. Schraag*, 84 Miss. 125.

*Missouri.* — *Meilly v. St. Louis, etc., R. Co.*, 107 Mo. App. 466.

*New York.* — *Young v. Syracuse, etc., R. Co.*, 166 N. Y. 227; *Allcot v. Kirkham*, 101 N. Y. App. Div. 77.

*South Carolina.* — *Bodie v. Charleston, etc., R. Co.*, 66 S. Car. 302. See also *Hyland v. Southern Bell Telephone, etc., Co.*, 70 S. Car. 315.

*Texas.* — *Texas, etc., R. Co. v. Lee*, (Tex. Civ. App. 1903) 74 S. W. Rep. 345. See also *Consumers' Cotton Oil Co. v. Jonte*, (Tex. Civ. App. 1904) 80 S. W. Rep. 847.

*Washington.* — *Green v. Western American Co.*, 30 Wash. 87.



- 422.** *c.* MASTER MAY NOT DELEGATE HIS DUTIES. — See note 1.  
**423.** *d.* MASTER EXPOSING SERVANT TO UNUSUAL DANGERS. — See note 1.  
**424.** *e.* SERVANT'S CONTRIBUTORY NEGLIGENCE. — See note 1.

*Wisconsin.* — See *Kamp v. Coxe*, 122 Wis. 206.  
 See generally the title FELLOW SERVANTS, vol. 12, p. 893.

**422. 1. Master Cannot Delegate These Duties and Avoid Liability** — *United States.* — *Bunker Hill*, etc., Min., etc., Co. *v.* *Jones*, (C. C. A.) 130 Fed. Rep. 813; *National Steel Co. v. Lowe*, (C. C. A.) 127 Fed. Rep. 311; *Cudahy Packing Co. v. Anthes*, 54 C. C. A. 504, 117 Fed. Rep. 118.

*Colorado.* — *Mulligan v. Colorado Fuel*, etc., Co., (Colo. App. 1904) 77 Pac. Rep. 977.

*Connecticut.* — *Rincicotti v. John J. O'Brien Contracting Co.*, 77 Conn. 617.

*Illinois.* — *Slack v. Harris*, 200 Ill. 96; *Spring Valley Coal Co. v. Rowatt*, 196 Ill. 156.

*Indiana.* — *Island Coal Co. v. Swaggerty*, 159 Ind. 664.

*Kansas.* — *Coffeyville Vitrified Brick*, etc., Co. *v.* *Shanks*, 69 Kan. 306.

*Kentucky.* — *Covington Sawmill*, etc., Co. *v.* *Clark*, 116 Ky. 461; *Vandyke v. Memphis*, etc., Packet Co., (Ky. 1903) 71 S. W. Rep. 441.

*Michigan.* — *McDonald v. Michigan Cent. R. Co.*, 132 Mich. 372, 102 Am. St. Rep. 426, 9 Detroit Leg. N. 700.

*Minnesota.* — *Hjelm v. Western Granite Contracting Co.*, (Minn. 1905) 102 N. W. Rep. 384.

*New York.* — *Simone v. Kirk*, 173 N. Y. 7; *Eastland v. Clarke*, 165 N. Y. 420; *Galasso v. National Steamship Co.*, 27 N. Y. App. Div. 169; *McKnight v. Brooklyn Heights R. Co.*, (Supm. Ct. Tr. T.) 23 Misc. (N. Y.) 527; *Sarno v. Atlantic Stevedoring Co.*, 66 N. Y. App. Div. 611.

*North Carolina.* — See *Turrentine v. Welling-ton*, 136 N. Car. 308.

*North Dakota.* — *Cameron v. Great Northern R. Co.*, 8 N. Dak. 124.

*Pennsylvania.* — *Smith v. Hillside Coal*, etc., Co., 186 Pa. St. 28.

*Rhode Island.* — *Vartanian v. New York*, etc., R. Co., 25 R. I. 398; *Crandall v. Stafford Mfg. Co.*, 24 R. I. 555; *McGarritty v. New York*, etc., R. Co., 25 R. I. 269.

*Texas.* — *St. Louis*, etc., R. Co. *v.* *Skaggs*, (Tex. Civ. App. 1903) 74 S. W. Rep. 783.

*Washington.* — *McMillan v. North Star Min. Co.*, 32 Wash. 579, 98 Am. St. Rep. 908.

*West Virginia.* — *Giebell v. Collins Co.*, 54 W. Va. 518.

*Canada.* — See *Martel v. Ross*, 16 Quebec Super. Ct. 118.

See also the title FELLOW SERVANTS, vol. 12, p. 946.

**423. 1. Master Exposing Servant to Unusual Dangers** — *United States.* — *Allen v. Gilman*, 127 Fed. Rep. 609; *Felton v. Girardy*, (C. C. A.) 104 Fed. Rep. 127.

*Alabama.* — *Southern R. Co. v. Guyton*, 122 Ala. 231, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 423.

*Arkansas.* — *King-Ryder Lumber Co. v. Cochran*, 71 Ark. 55.

*Illinois.* — *Pressed Steel Car Co. v. Herath*, 207 Ill. 576; *Chicago Hair*, etc., Co. *v.* *Mueller*,

203 Ill. 558; *Slack v. Harris*, 200 Ill. 96; *Illinois Steel Co. v. Ryska*, 200 Ill. 280; *Hartrich v. Hawes*, 202 Ill. 334.

*Indiana.* — *Republic Iron*, etc., Co. *v.* *Berkes*, 162 Ind. 517; *Republic Iron*, etc., Co. *v.* *Ohler*, 161 Ind. 393.

*Iowa.* — *Klaffke v. Bettendorf Axle Co.*, 125 Iowa 224.

*Kansas.* — *Seeds v. American Bridge Co.*, 68 Kan. 522.

*Kentucky.* — *Smith v. Kentucky Lumber Co.*, 78 S. W. Rep. 120, 25 Ky. L. Rep. 1386; *Crabtree Coal Min. Co. v. Sample*, (Ky. 1903) 72 S. W. Rep. 24; *Southern R. Co. v. Hart*, (Ky. 1901) 64 S. W. Rep. 650; *Long v. Illinois Cent. R. Co.*, 113 Ky. 806, 101 Am. St. Rep. 374. See also *Illinois Cent. R. Co. v. McIntosh*, (Ky. 1904) 80 S. W. Rep. 496; *Illinois Cent. R. Co. v. Keebler*, (Ky. 1905) 84 S. W. Rep. 1167.

*Louisiana.* — *Carter v. Fred. W. Dubach Lumber Co.*, 113 La. 239.

*Missouri.* — *Bane v. Irwin*, 172 Mo. 306.

*New York.* — *Wolf v. Devitt*, 83 N. Y. App. Div. 42, affirmed 179 N. Y. 569.

*Pennsylvania.* — *Williams v. Clark*, 204 Pa. St. 416.

*Utah.* — *Hicks v. Southern Pac. R. Co.*, 27 Utah 526.

*Vermont.* — *La Flam v. Missisquoi Pulp Co.*, 74 Vt. 125, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 423.

*Washington.* — *Goe v. Northern Pac. R. Co.*, 30 Wash. 654; *Goldthorpe v. Clark-Nickerson Lumber Co.*, 31 Wash. 467. See also *Keating v. Pacific Steam Whaling Co.*, 21 Wash. 415.

*Canada.* — *McCarthy v. Thomas*, etc., Mfg. Co., 18 Quebec Super. Ct. 272.

For a detailed discussion see the title MASTER AND SERVANT, vol. 20, p. 54 *et seq.*

**424. 1. But Servant's Contributory Negligence in Such Case a Bar** — *United States.* — *Musser-Sauntry Land*, etc., Co. *v.* *Brown*, (C. C. A.) 126 Fed. Rep. 141; *Gilbert v. Burlington*, etc., R. Co., (C. C. A.) 128 Fed. Rep. 529; *Gilbert v. Chicago*, etc., R. Co., 123 Fed. Rep. 832, affirmed (C. C. A.) 128 Fed. Rep. 529; *Sievers v. Eyre*, 122 Fed. Rep. 734; *Morris v. Duluth*, etc., R. Co., 47 C. C. A. 661, 108 Fed. Rep. 747.

*Arkansas.* — *Choctaw*, etc., R. Co. *v.* *Stallings*, 70 Ark. 603.

*Delaware.* — *Punkowski v. New Castle Leather Co.*, 4 Penn. (Del.) 544; *Karczewski v. Wilmington City R. Co.*, 4 Penn. (Del.) 24.

*Georgia.* — *Little v. Southern R. Co.*, 120 Ga. 347, 102 Am. St. Rep. 104; *Ludd v. Wilkins*, 118 Ga. 525.

*Illinois.* — *Illinois Cent. R. Co. v. Curran*, 94 Ill. App. 182, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 424; *Wiggins Ferry Co. v. Hill*, 112 Ill. App. 475; *Whalin v. Illinois Cent. R. Co.*, 112 Ill. App. 428. See also *Chicago*, etc., R. Co. *v.* *Heerey*, 203 Ill. 492.

*Indiana.* — *Chicago*, etc., R. Co. *v.* *Tackett*, 33 Ind. App. 379; *Cleveland*, etc., R. Co. *v.* *Goddard*, 33 Ind. App. 321; *L. T. Dickason Coal Co. v. Peach*, 32 Ind. App. 33.

**425.** Disobedience — Failure to Observe Rules. — See note 1.

**426.** 5. Certain Other Relations. — See note 1.

*Kansas.* — Libbey *v.* Atchison, etc., R. Co., 69 Kan. 869.

*Kentucky.* — Louisville, etc., R. Co. *v.* Hall, 115 Ky. 567; Buey *v.* Chess, etc., Co., (Ky. 1905) 84 S. W. Rep. 563; Reiser *v.* Southern Planting Mill, etc., Co., 114 Ky. 1.

*Louisiana.* — Williams *v.* Illinois Cent. R. Co., (La. 1905) 37 So. Rep. 992.

*Maine.* — Boston *v.* Buffum, 97 Me. 230.

*Massachusetts.* — Archambault *v.* Archambault, 184 Mass. 274; Mulligan *v.* McCaffery, 182 Mass. 420; Dolphin *v.* New York, etc., R. Co., 182 Mass. 509; Tiffaney *v.* Hathaway, 182 Mass. 431; Chmiel *v.* Thorndike Co., 182 Mass. 112.

*Michigan.* — Chapman *v.* Pere Marquette R. Co., 133 Mich. 311, 10 Detroit Leg. N. 194; Ramsay *v.* Eddy, 123 Mich. 158.

*Minnesota.* — Swenson *v.* Osgood, etc., Mfg. Co., 91 Minn. 509; Sours *v.* Great Northern R. Co., 84 Minn. 230, 88 Minn. 504.

*Missouri.* — Meily *v.* St. Louis, etc., R. Co., 107 Mo. App. 466; Doerr *v.* St. Louis Brewing Assoc., 176 Mo. 547; Richardson *v.* Mesker, 171 Mo. 666.

*Montana.* — Cummings *v.* Helena, etc., Smelting, etc., Co., 26 Mont. 434.

*Nebraska.* — Kitzberger *v.* Chicago, etc., R. Co., (Neb. 1903) 93 N. W. Rep. 935.

*New Jersey.* — Smith *v.* Thomas Iron Co., 69 N. J. L. 11.

*New York.* — Kennedy *v.* Friederich, 168 N. Y. 379; Leach *v.* Central New York Telephone, etc., Co., 81 N. Y. App. Div. 637; Maxwell *v.* Thomas, 31 N. Y. App. Div. 546; Clancy *v.* Guaranty Constr. Co., 25 N. Y. App. Div. 355.

*North Carolina.* — Crech *v.* Wilmington Cotton Mills, 135 N. Car. 680.

*Rhode Island.* — Russell *v.* Riverside Worsted Mills, 24 R. I. 591; Donohoe *v.* Lonsdale Co., 25 R. I. 187.

*South Carolina.* — Branham *v.* Camden Cotton Mills, 135 N. Car. 680.

*Tennessee.* — Heald *v.* Wallace, 109 Tenn. 346.

*Texas.* — O'Brien *v.* Missouri, etc., R. Co., (Tex. Civ. App. 1904) 82 S. W. Rep. 319; Tucker *v.* National Loan, etc., Co., (Tex. Civ. App. 1904) 80 S. W. Rep. 879; Andrews *v.* Jefferson Cotton Oil, etc., Co., (Tex. Civ. App. 1903) 74 S. W. Rep. 342. See also Consumers' Cotton Oil Co. *v.* Gentry, (Tex. Civ. App. 1904) 80 S. W. Rep. 394.

*Virginia.* — Norfolk, etc., R. Co. *v.* Hawkes, 102 Va. 452; Newport News Pub. Co. *v.* Beaumeister, 102 Va. 677.

*Washington.* — Steeples *v.* Panel, etc., Box Co., 33 Wash. 359; McHugh *v.* Northern Pac. R. Co., 32 Wash. 30; Johnson *v.* Anderson, etc., Lumber Co., 31 Wash. 554; Bier *v.* Hosford, 35 Wash. 544.

*Wisconsin.* — Upthegrove *v.* Jones, etc., Coal Co., 118 Wis. 673.

*Canada.* — Deyo *v.* Kingston, etc., R. Co., 8 Ont. L. Rep. 588.

And for a detailed discussion, see the title MASTER AND SERVANT, vol. 20, p. 134 *et seq.*

**Wilful Disobedience of a Statute by the master**

is held in *Illinois* to bar the defense of contributory negligence. Spring Valley Coal Co. *v.* Rowatt, 196 Ill. 156; Riverton Coal Co. *v.* Shepherd, 207 Ill. 395; Fulton *v.* Wilmington Star Min. Co., (C. C. A.) 133 Fed. Rep. 193.

But this rule is not applied to a wilful disobedience of a mere ordinance. Browne *v.* Siegel, 191 Ill. 226.

**425. 1. Disobedience of Servant — Failure to Observe Rules — United States.** — Erie R. Co. *v.* Kane, 55 C. C. A. 129, 118 Fed. Rep. 223.

*United States.* — Erie R. Co. *v.* Kane, 55 C. C. A. 129, 118 Fed. Rep. 223.

*Delaware.* — Punkowski *v.* New Castle Leather Co., 4 Penn. (Del.) 544.

*Minnesota.* — Green *v.* Brainerd, etc., R. Co., 85 Minn. 318, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 425; Scott *v.* Eastern R. Co., 90 Minn. 135; Nordquist *v.* Great Northern R. Co., 89 Minn. 485.

*Mississippi.* — Natchez Cotton Mill Co. *v.* McLain, (Miss. 1903) 33 So. Rep. 723.

*Nebraska.* — Western Mattress Co. *v.* Ostergaard, (Neb. 1904) 99 N. W. Rep. 229.

*New York.* — Shannon *v.* New York Cent., etc., R. Co., 88 N. Y. App. Div. 349; Frounfelker *v.* Delaware, etc., R. Co., 74 N. Y. App. Div. 224; Sheridan *v.* Long Island R. Co., 40 N. Y. App. Div. 381; Bruen *v.* Uhlmann, 30 N. Y. App. Div. 453.

*North Carolina.* — Whitson *v.* Wrenn, 134 N. Car. 86.

*Tennessee.* — Heald *v.* Wallace, 109 Tenn. 346.

*Texas.* — Texas, etc., R. Co. *v.* Fields, 32 Tex. Civ. App. 414.

*Utah.* — Smith *v.* Centennial Eureka Min. Co., 27 Utah 307; Higgins *v.* Southern Pac. R. Co., 26 Utah 164.

*Virginia.* — Street *v.* Norfolk, etc., R. Co., 101 Va. 746; Driver *v.* Southern R. Co., 103 Va. 650.

*Canada.* — Coutlee *v.* Grand Trunk R. Co., 23 Quebec Super. Ct. 242; Holden *v.* Grand Trunk R. Co., 5 Ont. L. Rep. 301. See also George Matthews Co. *v.* Bouchard, 8 Quebec Q. B. 550. Compare *Warmington v. Palmer*, 7 British Columbia 414, affirmed 32 Can. Super. Ct. 126.

See also the title MASTER AND SERVANT, vol. 20, p. 105.

**But Failure to Observe Rules Is Not Negligence Per Se.** — Texas Cent. R. Co. *v.* Bender, 32 Tex. Civ. App. 568; Missouri, etc., R. Co. *v.* Jones, (Tex. Civ. App. 1903) 75 S. W. Rep. 53; Texas, etc., R. Co. *v.* Scott, 30 Tex. Civ. App. 496.

**Sanction of Violation by Master.** — Boyle *v.* Union Pac. R. Co., 25 Utah 420.

**426. 1. Cases of Special Duty.** — Indianapolis Abattoir Co. *v.* Temperly, 150 Ind. 651, 95 Am. St. Rep. 330 (landlord and tenant); Burk *v.* Walsh, 118 Iowa 397 (merchant and customer); Curran *v.* Olson, 88 Minn. 307, 97 Am. St. Rep. 517 (saloon keeper and guest); Gillette *v.* Tucker, 67 Ohio St. 106, 93 Am. St. Rep. 639 (physician and patient); Barrett *v.* Lake Ontario Beach Imp. Co., 174 N. Y. 310 (places of amusement, etc.).

**426. XVI. EFFECT OF ABSENCE OF PRIVACY BETWEEN PLAINTIFF AND DEFENDANT** — 1. General Principles — Violation of Positive Law. — See note 2.

**427. Rights and Duties Equal, Mutual, and Reciprocal.** — See note 1.

The Test of "Ordinary Care under the Circumstances." — See note 2.

**2. Contributory Negligence at Railway Crossings** — *a.* IN GENERAL — Ordinary Care. — See note 4.

**428.** See notes 1, 2.

A tenant using a defective hallway is not bound, as matter of law, to keep his mind on the defects; it is for the jury to say whether he was reasonably prudent. *Keating v. Mott*, 92 N. Y. App. Div. 156.

**426. 2. Violation of Positive Law as Affecting Negligence.** — A foreign corporation not authorized to do business in the state is not precluded from setting up the defense of contributory negligence. *Bischoff v. Automobile Touring Co.*, 97 N. Y. App. Div. 17.

**427. 1. When Rights and Duties Are Equal.** — *Mitchell v. Illinois Cent. R. Co.*, 110 La. 630, 98 Am. St. Rep. 472; *Faust v. Philadelphia, etc., R. Co.*, 191 Pa. St. 420.

**2. The Standard of Ordinary Care Varies with Circumstances.** — *Patton v. Southern R. Co.*, (C. C. A.) 82 Fed. Rep. 979; *Lofsten v. Brooklyn Heights R. Co.*, 97 N. Y. App. Div. 395; *Buckley v. Westchester Lighting Co.*, 93 N. Y. App. Div. 436; *New York v. Metropolitan St. R. Co.*, 90 N. Y. App. Div. 66; *Beerman v. Union R. Co.*, 24 R. I. 275; *Hanlon v. Milwaukee Electric R., etc., Co.*, 118 Wis. 210.

**4. Railroad's Duty at Highway Crossings** — *United States.* — *Illinois Cent. R. Co. v. Jones*, (C. C. A.) 95 Fed. Rep. 370.

*Alabama.* — *Central of Georgia R. Co. v. Foshee*, 125 Ala. 213.

*Delaware.* — *Queen Anne's R. Co. v. Reed*, (Del. 1905) 59 Atl. Rep. 860.

*Illinois.* — *Chicago Junction R. Co. v. McGrath*, 203 Ill. 511; *Chicago, etc., R. Co. v. Corson*, 198 Ill. 98.

*Indiana.* — *Baltimore, etc., R. Co. v. Young*, 153 Ind. 163; *Cleveland, etc., R. Co. v. Carey*, 33 Ind. App. 275.

*Kentucky.* — *Louisville, etc., R. Co. v. Walden*, 74 S. W. Rep. 694, 25 Ky. L. Rep. 1; *Louisville, etc., R. Co. v. Cummins*, 111 Ky. 333.

*Louisiana.* — *Lampkin v. McCormick*, 105 La. 418, 83 Am. St. Rep. 245.

*Missouri.* — *Montgomery v. Missouri Pac. R. Co.*, 181 Mo. 477; *Baker v. Kansas City, etc., R. Co.*, 147 Mo. 140.

*Montana.* — *Hunter v. Montana Cent. R. Co.*, 22 Mont. 525.

*New Hampshire.* — *Gahagan v. Boston, etc., R. Co.*, 70 N. H. 441; *Davis v. Concord, etc., R. Co.*, 68 N. H. 247.

*North Carolina.* — *Edwards v. Atlantic Coast Line R. Co.*, 129 N. Car. 78.

*Ohio.* — *Schweinfurth v. Cleveland, etc., R. Co.*, 60 Ohio St. 215.

*Pennsylvania.* — *Smeltz v. Pennsylvania R. Co.*, 186 Pa. St. 364.

*South Carolina.* — See *Nohrden v. Northeastern R. Co.*, 59 S. Car. 87, 82 Am. St. Rep. 826, affirmed 60 S. Car. 237, 85 Am. St. Rep. 842.

*Texas.* — *Missouri, etc., R. Co. v. Matherly*, (Tex. Civ. App. 1904) 81 S. W. Rep. 589;

*Missouri, etc., R. Co. v. Owens*, (Tex. Civ. App.

1903) 75 S. W. Rep. 579; *Central Texas, etc., R. Co. v. Gibson*, (Tex. Civ. App. 1904) 83 S. W. Rep. 862. See also *Hawkins v. Missouri, etc., R. Co.*, (Tex. Civ. App. 1904) 83 S. W. Rep. 52.

*Utah.* — *Peck v. Oregon Short Line R. Co.*, 25 Utah 21.

**428. 1. Traveler's Duty at Railroad Crossings** — *United States.* — *Southern Pac. R. Co. v. Harada*, (C. C. A.) 109 Fed. Rep. 379.

*Delaware.* — *Queen Anne's R. Co. v. Reed*, (Del. 1905) 59 Atl. Rep. 860.

*Georgia.* — *Thomas v. Central of Georgia R. Co.*, 121 Ga. 38.

*Illinois.* — *Chicago, etc., R. Co. v. Zapp*, 209 Ill. 339; *Toledo, etc., R. Co. v. Gallagher*, 109 Ill. App. 67; *Chicago, etc., R. Co. v. Corson*, 198 Ill. 98.

*Indiana.* — *Rich v. Evansville, etc., R. Co.*, 31 Ind. App. 10.

*Iowa.* — *Lorenz v. Burlington, etc., R. Co.*, 115 Iowa 377.

*Kentucky.* — *Louisville, etc., R. Co. v. Cummins*, 111 Ky. 333.

*Maryland.* — *Jenkins v. Baltimore, etc., R. Co.*, 98 Md. 402.

*Missouri.* — *Baker v. Kansas City, etc., R. Co.*, 147 Mo. 140.

*New Hampshire.* — *Davis v. Concord, etc., R. Co.*, 68 N. H. 247.

*New Jersey.* — *Dwojakowski v. Central R. Co.*, 69 N. J. L. 601; *Wolcott v. New York, etc., R. Co.*, 68 N. J. L. 421.

*New York.* — *Canning v. Buffalo, etc., R. Co.*, 168 N. Y. 555; *Lewis v. Long Island R. Co.*, 162 N. Y. 52; *Comby v. New York Cent., etc., R. Co.*, 25 N. Y. App. Div. 309; *Ryan v. New York Cent., etc., R. Co.*, 30 N. Y. App. Div. 153.

*Ohio.* — *Schweinfurth v. Cleveland, etc., R. Co.*, 60 Ohio St. 215.

*South Carolina.* — *Gosa v. Southern R. Co.*, 67 S. Car. 347; *Kirby v. Southern R. Co.*, 63 S. Car. 494.

*Texas.* — *Texas, etc., R. Co. v. Huber*, (Tex. Civ. App. 1903) 75 S. W. Rep. 547.

*West Virginia.* — *Meeks v. Ohio River R. Co.*, 52 W. Va. 99.

**2. It Is Ordinary Care under the Circumstances** — *United States.* — *Hines v. Texas, etc., R. Co.*, 55 C. C. A. 654, 119 Fed. Rep. 157.

*Illinois.* — *Patterson v. Chicago, etc., R. Co.*, 111 Ill. App. 441.

*Indiana.* — *Pittsburgh, etc., R. Co. v. Brown-*

*ing*, (Ind. App. 1904) 71 N. E. Rep. 227; *Baltimore, etc., R. Co. v. Young*, 153 Ind. 163.

*Iowa.* — *Defrieze v. Illinois Cent. R. Co.*, (Iowa 1903) 94 N. W. Rep. 505.

*Nebraska.* — *Hajsek v. Chicago, etc., R. Co.*, (Neb. 1903) 97 N. W. Rep. 327.

*New Hampshire.* — *Gahagan v. Boston, etc., R. Co.*, 70 N. H. 441.



**429.** See note 1.

*b.* THE "STOP, LOOK, AND LISTEN" RULE—Negligence Per Se.—  
See notes 2, 3.

Precaution Required in Pennsylvania.—See note 4.

**430.** But in Other Jurisdictions.—See notes 1, 2.

*New Jersey.*—*Passman v. West Jersey, etc., R. Co.*, 68 N. J. L. 719, 96 Am. St. Rep. 573.

*New York.*—*Westervelt v. New York Cent., etc., R. Co.*, 86 N. Y. App. Div. 316.

*Pennsylvania.*—*Rachmel v. Clark*, 205 Pa. St. 314.

*Texas.*—*Texas Midland R. Co. v. Booth*, (Tex. Civ. App. 1904) 80 S. W. Rep. 121; *Gulf, etc., R. Co. v. Hall*, (Tex. Civ. App. 1904) 80 S. W. Rep. 133; *Carraway v. Houston, etc., R. Co.*, 31 Tex. Civ. App. 184.

**429. 1. The Standard Cannot Be Absolutely Fixed.**—*United States.*—*Illinois Cent. R. Co. v. Jones*, (C. C. A.) 95 Fed. Rep. 370; *Hemingway v. Illinois Cent. R. Co.*, (C. C. A.) 114 Fed. Rep. 843; *Southern Pac. R. Co. v. Harada*, (C. C. A.) 109 Fed. Rep. 379.

*Illinois.*—*Chicago Junction R. Co. v. McGrath*, 203 Ill. 511; *Chicago, etc., R. Co. v. Olson*, 113 Ill. App. 320.

*Indiana.*—*Rich v. Evansville, etc., R. Co.*, 31 Ind. App. 10.

*Iowa.*—*Lorenz v. Burlington, etc., R. Co.*, 115 Iowa 377.

*Missouri.*—*Baker v. Kansas City, etc., R. Co.*, 147 Mo. 140.

*New Hampshire.*—*Roberts v. Boston, etc., R. Co.*, 69 N. H. 354.

*New York.*—*Smith v. New York Cent., etc., R. Co.*, 177 N. Y. 224.

*Texas.*—See *Texas Midland R. Co. v. Tidwell*, (Tex. Civ. App. 1899) 49 S. W. Rep. 641.

*Virginia.*—*Bass v. Norfolk R., etc., Co.*, 100 Va. 1.

**Distinction Between Street and Steam Railways.**—The rules as to what will constitute contributory negligence in persons crossing street car lines are in some respects quite different from those applicable in case of steam railroad crossings. *Richmond Traction Co. v. Clarke*, 101 Va. 382; *Campbell v. Los Angeles Traction Co.*, 137 Cal. 565; *Howard v. Indianapolis St. R. Co.*, 29 Ind. App. 514; *Butler v. Rockland, etc., St. R. Co.*, 99 Me. 149, 105 Am. St. Rep. 267; *Lawson v. Metropolitan St. R. Co.*, 40 N. Y. App. Div. 307, *affirmed* 166 N. Y. 589; *Thompson v. Salt Lake Rapid Transit Co.*, 16 Utah 281, 67 Am. St. Rep. 621; *Burian v. Seattle Electric Co.*, 26 Wash. 606.

But in a recent case in *Kansas* it was said: "Certainly no less vigilance ought to be exercised in the latter case [a street railroad] than in the former" [a steam railway]. *Burns v. Metropolitan St. R. Co.*, 66 Kan. 188.

**2. The "Stop, Look, and Listen" Rule.**—*Alabama.*—*Burns v. Louisville, etc., R. Co.*, 136 Ala. 522; *Central of Georgia R. Co. v. Foshee*, 125 Ala. 213.

*Indiana.*—*Indianapolis St. R. Co. v. Zaring*, 33 Ind. App. 207.

*Maryland.*—*Baltimore, etc., R. Co. v. State*, 96 Md. 67; *Philadelphia, etc., R. Co. v. Holden*, 93 Md. 420.

*Pennsylvania.*—*Canfield v. Baltimore, etc., R. Co.*, 208 Pa. St. 372; *Ihrig v. Erie R. Co.*,

210 Pa. St. 98; *Burns v. Pennsylvania R. Co.*, 210 Pa. St. 90; *Faust v. Philadelphia, etc., R. Co.*, 191 Pa. St. 420. See also *Harvey v. Erie R. Co.*, 210 Pa. St. 95.

In *Wands v. Chicago, etc., R. Co.*, 106 Mo. App. 96, the court said: "In this state, to stop, look, and listen (at least to look and listen, as in some circumstances it has been held unnecessary to stop) is held to be a specific duty, and it is negligence to omit to do so."

**3. When the Rule Does Not Govern.**—See *Green v. Los Angeles Terminal R. Co.*, 143 Cal. 31, 101 Am. St. Rep. 68.

**4. When Traveler Must Lead His Horse.**—*Pennsylvania Rule.*—"If one approaches a railroad in a vehicle, and cannot, from his seat in it, have a view of the tracks, he must get down from it, and walk to where he can." *Kinter v. Pennsylvania R. Co.*, 204 Pa. St. 497, 93 Am. St. Rep. 795.

**430. 1. Such Precaution Not Required Elsewhere.**—*United States.*—*Illinois Cent. R. Co. v. Jones*, (C. C. A.) 95 Fed. Rep. 370; *Tomlinson v. Chicago, etc., R. Co.*, (C. C. A.) 134 Fed. Rep. 233; *Hemingway v. Illinois Cent. R. Co.*, (C. C. A.) 114 Fed. Rep. 843.

*Illinois.*—*Chicago Junction R. Co. v. McGrath*, 203 Ill. 511; *Chicago, etc., R. Co. v. Pulliam*, 111 Ill. App. 305, *affirmed* 208 Ill. 456.

*Iowa.*—*Lorenz v. Burlington, etc., R. Co.*, 115 Iowa 377.

*Michigan.*—*Proper v. Lake Shore, etc., R. Co.*, (Mich. 1904) 99 N. W. Rep. 283, 11 Detroit Leg. N. 35.

*Oregon.*—*Blackburn v. Southern Pac. R. Co.*, 34 Oregon 215, *citing* 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 430; *Hecker v. Oregon R. Co.*, 40 Oregon 6, *citing* 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 430.

*Texas.*—*Frugia v. Texarkana, etc., R. Co.*, (Tex. Civ. App. 1904) 82 S. W. Rep. 814; *Galveston, etc., R. Co. v. Tirres*, (Tex. Civ. App. 1903) 76 S. W. Rep. 806.

*Utah.*—*Peck v. Oregon Short Line R. Co.*, 25 Utah 21, *quoting* 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 430.

*Vermont.*—*Carter v. Central Vermont R. Co.*, 72 Vt. 190.

*Canada.*—*Vallee v. Grand Trunk R. Co.*, 1 Ont. L. Rep. 224.

**2. General Rule as to Care Required of Traveler.**—*United States.*—*Northern Pac. R. Co. v. Freeman*, 174 U. S. 379; *Chicago, etc., R. Co. v. Pounds*, 49 U. S. App. 476, 82 Fed. Rep. 217; *Gilbert v. Erie R. Co.*, 38 C. C. A. 408, 97 Fed. Rep. 747; *Mobile, etc., R. Co. v. Coerver*, 50 C. C. A. 360, 112 Fed. Rep. 489; *Delaware, etc., R. Co. v. Devore*, 52 C. C. A. 77, 114 Fed. Rep. 155; *Cowen v. Grabow*, 57 C. C. A. 39, 120 Fed. Rep. 259; *Northern Pac. R. Co. v. Spike*, 57 C. C. A. 384, 121 Fed. Rep. 44; *Delaware, etc., R. Co. v. Devore*, 58 C. C. A. 543, 122 Fed. Rep. 791; *Dishon v. Cincinnati, etc., R. Co.*, (C. C. A.) 133 Fed. Rep. 471.

**432.** See note 1.

**433.** See notes 1, 2.

**434.** Yet When the Facts Are Undisputed. — See note 1.

*Alabama.* — Gaynor *v.* Louisville, etc., R. Co., 136 Ala. 244; Memphis, etc., R. Co. *v.* Martin, 131 Ala. 269.

*California.* — Green *v.* Southern California R. Co., 138 Cal. 1; Sego *v.* Southern Pac. R. Co., 137 Cal. 405.

*Delaware.* — Queen Anne's R. Co. *v.* Reed, (Del. 1905) 59 Atl. Rep. 860.

*Georgia.* — Western, etc., R. Co. *v.* Ferguson, 113 Ga. 708.

*Illinois.* — Toledo, etc., R. Co. *v.* Christy, 111 Ill. App. 247.

*Indiana.* — Cleveland, etc., R. Co. *v.* Miller, 149 Ind. 490; Southern R. Co. *v.* Davis, (Ind. App. 1905) 72 N. E. Rep. 1053; Wabash R. Co. *v.* Keister, 163 Ind. 609; Quinn *v.* Chicago, etc., R. Co., 162 Ind. 442; Malott *v.* Hawkins, 159 Ind. 127.

*Iowa.* — Mitchell *v.* Union Terminal R. Co., 122 Iowa 237.

*Kansas.* — Bush *v.* Union Pac. R. Co., 62 Kan. 709.

*Louisiana.* — Lampkin *v.* McCormick, 105 La. 418, 83 Am. St. Rep. 245.

*Maine.* — Blumenthal *v.* Boston, etc., R. Co., 97 Me. 255.

*Maryland.* — Northern Cent. R. Co. *v.* McMahon, 97 Md. 483.

*Massachusetts.* — Raymond *v.* New York, etc., R. Co., 182 Mass. 337.

*Michigan.* — Proper *v.* Lake Shore, etc., R. Co., (Mich. 1904) 99 N. W. Rep. 283, 11 Detroit Leg. N. 35.

*Mississippi.* — Illinois Cent. R. Co. *v.* McLeod, 78 Miss. 334, 84 Am. St. Rep. 630; Yazoo, etc., R. Co. *v.* Eakin, 79 Miss. 735.

*New Hampshire.* — Waldron *v.* Boston, etc., R. Co., 71 N. H. 362.

*New York.* — Fejdowski *v.* Delaware, etc., Canal Co., 168 N. Y. 500; Smith *v.* New York Cent., etc., R. Co., 177 N. Y. 224; Dolfini *v.* Erie R. Co., 178 N. Y. 1; Wieland *v.* Delaware, etc., Canal Co., 167 N. Y. 19, 82 Am. St. Rep. 707; Stack *v.* New York Cent., etc., R. Co., 96 N. Y. App. Div. 575; Cox *v.* New York Cent., etc., R. Co., 69 N. Y. App. Div. 451; Lewin *v.* Lehigh Valley R. Co., 52 N. Y. App. Div. 69, affirmed 165 N. Y. 667; McAuliffe *v.* New York Cent., etc., R. Co., 85 N. Y. App. Div. 187.

*Ohio.* — Lake Shore, etc., R. Co. *v.* Landphair, 23 Ohio Cir. Ct. 435.

*Oregon.* — Hecker *v.* Oregon R. Co., 40 Oregon 6.

*Pennsylvania.* — Coolbroth *v.* Pennsylvania R. Co., 209 Pa. St. 433; Wolfe *v.* Pennsylvania R. Co., 22 Pa. Super. Ct. 335.

*Texas.* — Ft. Worth, etc., R. Co. *v.* Wyatt, (Tex. Civ. App. 1904) 79 S. W. Rep. 349; International, etc., R. Co. *v.* Ives, (Tex. Civ. App. 1903) 78 S. W. Rep. 36; Galveston, etc., R. Co. *v.* Tirres, (Tex. Civ. App. 1903) 76 S. W. Rep. 806; Lumsden *v.* Chicago, etc., R. Co., 31 Tex. Civ. App. 604; St. Louis Southwestern R. Co. *v.* Branom, (Tex. Civ. App. 1903) 73 S. W. Rep. 1064; Gulf, etc., R. Co. *v.* Miller, 30 Tex. Civ. App. 122.

*Utah.* — Peck *v.* Oregon Short Line R. Co.,

25 Utah 21, quoting 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 430.

*Vermont.* — Carter *v.* Central Vermont R. Co., 72 Vt. 190.

*Virginia.* — Southern R. Co. *v.* Bryant, 95 Va. 212.

*Wisconsin.* — Steber *v.* Chicago, etc., R. Co., 115 Wis. 200.

**432. 1. Not Negligence, Per Se, Not to Stop — United States.** — Hemingway *v.* Illinois Cent. R. Co., (C. C. A.) 114 Fed. Rep. 843.

*Iowa.* — Selensky *v.* Chicago G. W. R. Co., 120 Iowa 113.

*New York.* — Smith *v.* New York Cent., etc., R. Co., 177 N. Y. 224; Lewis *v.* Long Island R. Co., 162 N. Y. 52; Judson *v.* Central Vermont R. Co., 158 N. Y. 597.

*Oregon.* — Blackburn *v.* Southern Pac. R. Co., 34 Oregon 215.

*Utah.* — Peck *v.* Oregon Short Line R. Co., 25 Utah 21, quoting 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 431, 432.

**433. 1. Failure to Stop, Look, and Listen: When Not Negligent.** — Fejdowski *v.* Delaware, etc., Canal Co., 168 N. Y. 500; Peck *v.* Oregon Short Line R. Co., 25 Utah 21, quoting 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 432, 433; Southern R. Co. *v.* Bryant, 95 Va. 212. See also Browne *v.* New York Cent., etc., R. Co., 87 N. Y. App. Div. 206, affirmed 179 N. Y. 582.

**2. Failure to Stop, Look, Listen, Not Negligence Per Se.** — Illinois Cent. R. Co. *v.* Jones, (C. C. A.) 95 Fed. Rep. 370; Western, etc., R. Co. *v.* Ferguson, 113 Ga. 708; Hecker *v.* Oregon R. Co., 40 Oregon 6; Peck *v.* Oregon Short Line R. Co., 25 Utah 21, quoting 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 433.

**434. 1. But Such Failure May Be Negligence as a Matter of Law — United States.** — Shatto *v.* Erie R. Co., (C. C. A.) 121 Fed. Rep. 678; Chicago, etc., R. Co. *v.* Rossow, 54 C. C. A. 313, 117 Fed. Rep. 491.

*Alabama.* — Peters *v.* Southern R. Co., 135 Ala. 533. See also Central of Georgia R. Co. *v.* Freeman, 134 Ala. 354.

*California.* — Green *v.* Southern California R. Co., 138 Cal. 1.

*Indiana.* — Pittsburgh, etc., R. Co. *v.* West, (Ind. App. 1904) 69 N. E. Rep. 1017. See also Malott *v.* Hawkins, 159 Ind. 127.

*Iowa.* — McLeod *v.* Chicago, etc., R. Co., 125 Iowa 270.

*Kansas.* — Atchison, etc., R. Co. *v.* Withers, 69 Kan. 620.

*Maine.* — Blumenthal *v.* Boston, etc., R. Co., 97 Me. 255; Day *v.* Boston, etc., R. Co., 97 Me. 528.

*Michigan.* — Boutell *v.* Michigan Cent. R. Co., 133 Mich. 486, 10 Detroit Leg. N. 284.

*Montana.* — Hunter *v.* Montana Cent. R. Co., 22 Mont. 525.

*New York.* — Dolfini *v.* Erie R. Co., 178 N. Y. 1.

*Oregon.* — Blackburn *v.* Southern Pac. R. Co., 34 Oregon 215.

*Vermont.* — Carter *v.* Central Vermont R. Co., 72 Vt. 190; Boyden *v.* Fitchburg R. Co., 72 Vt. 89.

**434.** But If the Facts Are Disputed. — See note 2.

**435.** Greater the Danger, Greater the Care. — See notes 1, 2.

**436.** c. STATUTORY WARNINGS AND PRECAUTIONS. — See note 1.

**434. 2. The Question Generally for the Jury** — *United States*. — Hemingway v. Illinois Cent. R. Co., (C. C. A.) 114 Fed. Rep. 843.

*Delaware*. — Reed v. Queen Anne's R. Co., 4 Penn. (Del.) 413.

*Illinois*. — Chicago City R. Co. v. Fennimore, 199 Ill. 9; Chicago Junction R. Co. v. McGrath, 203 Ill. 511.

*Indiana*. — Malott v. Hawkins, 159 Ind. 127.

*Iowa*. — Selensky v. Chicago G. W. R. Co., 120 Iowa 113.

*Maryland*. — Northern Cent. R. Co. v. McMahon, 97 Md. 483.

*New Hampshire*. — Stone v. Boston, etc., R. Co., 72 N. H. 206.

*New York*. — Turell v. Erie R. Co., 49 N. Y. App. Div. 94.

*Oregon*. — Hecker v. Oregon R. Co., 40 Oregon 6.

*Texas*. — Frugia v. Texarkana, etc., R. Co., (Tex. Civ. App. 1904) 82 S. W. Rep. 814; International, etc., R. Co. v. Ives, (Tex. Civ. App. 1903) 78 S. W. Rep. 36; Galveston, etc., R. Co. v. Tirres, (Tex. Civ. App. 1903) 76 S. W. Rep. 806. See also *St. Louis Southwestern R. Co. v. Matthews*, (Tex. Civ. App. 1904) 79 S. W. Rep. 71.

*Utah*. — Peck v. Oregon Short Line R. Co., 25 Utah 21.

*Virginia*. — Southern R. Co. v. Bryant, 95 Va. 212.

*West Virginia*. — Vance v. Ravenswood, etc., R. Co., 53 W. Va. 338.

**435. 1. The Greater the Danger, the Greater the Care.** — *Illinois Cent. R. Co. v. Jones*, (C. C. A.) 95 Fed. Rep. 370; *Barnhill v. Texas, etc., R. Co.*, 109 La. 43, quoting 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 435; *Day v. Boston, etc., R. Co.*, 97 Me. 528; *Hunter v. Montana Cent. R. Co.*, 22 Mont. 525.

**2. Unusual Difficulties Require Unusual Precautions** — *United States*. — *Chicago, etc., R. Co. v. Andrews*, (C. C. A.) 130 Fed. Rep. 65.

*Delaware*. — Queen Anne's R. Co. v. Reed, (Del. 1905) 59 Atl. Rep. 860.

*Indiana*. — Pittsburgh, etc., R. Co. v. West, (Ind. App. 1904) 69 N. E. Rep. 1017.

*Mississippi*. — Hackney v. Illinois Cent. R. Co., (Miss. 1903) 33 So. Rep. 723.

*New Jersey*. — Passman v. West Jersey, etc., R. Co., 68 N. J. L. 719, 96 Am. St. Rep. 573.

*New York*. — Mixsell v. New York, etc., R. Co., (Supm. Ct. Tr. T.) 22 Misc. (N. Y.) 73.

*Utah*. — Peck v. Oregon Short Line R. Co., 25 Utah 21.

*Vermont*. — Carter v. Central Vermont R. Co., 72 Vt. 190.

*Virginia*. — Southern R. Co. v. Bruce, 97 Va. 92, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 435.

**436. 1. Failure of Company to Give Statutory Signals** — *United States*. — Northern Pac. R. Co. v. Freeman, 174 U. S. 379; *Dishon v. Cincinnati, etc., R. Co.*, (C. C. A.) 133 Fed. Rep. 471; *Garlich v. Northern Pac. R. Co.*, (C. C. A.) 131 Fed. Rep. 837; *Chicago, etc., R. Co. v. Andrews*, (C. C. A.) 130 Fed. Rep. 65; *Dunworth v. Grand Trunk Western R. Co.*, (C. C. A.)

127 Fed. Rep. 307; *Chicago, etc., R. Co. v. Rossow*, 54 C. C. A. 313, 117 Fed. Rep. 491; *Gilbert v. Erie R. Co.*, 38 C. C. A. 408, 97 Fed. Rep. 747.

*Alabama*. — Central of Georgia R. Co. v. Foshee, 125 Ala. 213.

*California*. — Green v. Los Angeles Terminal R. Co., 143 Cal. 31, 101 Am. St. Rep. 68; *Sego v. Southern Pac. R. Co.*, 137 Cal. 405. See also *Green v. Southern California R. Co.*, 138 Cal. 1.

*Georgia*. — Western, etc., R. Co. v. Ferguson, 113 Ga. 708.

*Illinois*. — Imes v. Chicago, etc., R. Co., 105 Ill. App. 37. Compare *Davenport, etc., R. Co. v. De Yaeger*, 112 Ill. App. 537.

*Indiana*. — Pittsburgh, etc., R. Co. v. West, (Ind. App. 1904) 69 N. E. Rep. 1017; *Rich v. Evansville, etc., R. Co.*, 31 Ind. App. 10; *Cleveland, etc., R. Co. v. Miller*, 149 Ind. 490. See also *Baltimore, etc., R. Co. v. Young*, 153 Ind. 163.

*Kansas*. — Bush v. Union Pac. R. Co., 62 Kan. 709. See also *Zirkle v. Missouri Pac. R. Co.*, 67 Kan. 77.

*Maine*. — Day v. Boston, etc., R. Co., 97 Me. 528.

*Maryland*. — Philadelphia, etc., R. Co. v. Holden, 93 Md. 420.

*Michigan*. — Stahl v. Lake Shore, etc., R. Co., 117 Mich. 273.

*Mississippi*. — Illinois Cent. R. Co. v. McLeod, 78 Miss. 334, 84 Am. St. Rep. 630.

*Montana*. — Hunter v. Montana Cent. R. Co., 22 Mont. 525.

*New Hampshire*. — Gahagan v. Boston, etc., R. Co., 70 N. H. 441.

*New Jersey*. — Passman v. West Jersey, etc., R. Co., 68 N. J. L. 719, 96 Am. St. Rep. 573.

*Ohio*. — Lake Shore, etc., R. Co. v. Landphair, 23 Ohio Cir. Ct. 435.

*Texas*. — St. Louis Southwestern R. Co. v. Branom, (Tex. Civ. App. 1903) 73 S. W. Rep. 1064.

*Utah*. — Peck v. Oregon Short Line R. Co., 25 Utah 21, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 436. See also *Holland v. Oregon Short Line R. Co.*, 26 Utah 209.

*Vermont*. — Carter v. Central Vermont R. Co., 72 Vt. 190; *Boyden v. Fitchburg R. Co.*, 72 Vt. 80.

*Canada*. — Compare *Vallee v. Grand Trunk R. Co.*, 1 Ont. L. Rep. 224.

**But in South Carolina by Statute** (Rev. Stat. S. Car., § 1685), a want of ordinary care will not bar the traveler when the statutory signals are omitted. *Hutto v. South Bound R. Co.*, 61 S. Car. 495; *Davis v. Atlanta, etc., Air Line R. Co.*, 63 S. Car. 370; *Mercer v. Southern R. Co.*, 66 S. Car. 246; *Kirby v. Southern R. Co.*, 63 S. Car. 404; *Bowen v. Southern R. Co.*, 58 S. Car. 222; *Gosa v. Southern R. Co.*, 67 S. Car. 347.

**By Statute in Tennessee** (Shannon's Code Tenn., §§ 1574-1576), railroads are made absolutely liable for injuries occasioned by failure to keep a lookout on the locomotive or to take the other precautions required by such sections, and contributory negligence is not a defense to actions for such injuries. Southern



**437. d. WILFUL INJURIES — REMOTE NEGLIGENCE OF PLAINTIFF.** — See notes 1, 2.

**e. INVITATION OR DIRECTION TO CROSS — KNOWLEDGE OF APPROACH OF TRAIN.** — See note 3.

**438. When Injury Certain.** — See notes 2, 3.

**439. f. PRESUMPTION OF NEGLIGENCE FROM INJURY — BURDEN OF PROOF.** — See note 2.

**440.** See note 1.

**441. g. QUALIFICATIONS — RULE AS TO CHILDREN.** — See note 1.

**XVII. INTOXICATION — 1. Intoxication Not Negligence Per Se.** — See notes 2, 3, 4.

**442.** See note 1.

**443. XVIII. BLINDNESS AND DEAFNESS.** — See notes 1, 2.

R. Co. v. Simpson, (C. C. A.) 131 Fed. Rep. 705. See also Iron Mountain R. Co. v. Dies, 98 Tenn. 655.

**437. 1. Injury Wilful.** — See authorities cited *infra*, p. 443, note 3.

**2. Plaintiff's Negligence Remote.** — Northern Pac. R. Co. v. Freeman, 174 U. S. 379; Weitzman v. Nassau Electric R. Co., 33 N. Y. App. Div. 585, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 437; Green v. Metropolitan St. R. Co., 42 N. Y. App. Div. 160, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 437; Flanagan v. New York Cent., etc., R. Co., 70 N. Y. App. Div. 505, affirmed 173 N. Y. 631.

**3. Invitation to Cross.** — Baltimore, etc., R. Co. v. Stumpf, 97 Md. 78; Stegner v. Chicago, etc., R. Co., (Minn. 1905) 102 N. W. Rep. 205; Montgomery v. Missouri Pac. R. Co., 181 Mo. 477; Wood v. New York Cent., etc., R. Co., 83 N. Y. App. Div. 604, affirmed 179 N. Y. 557; San Antonio, etc., R. Co. v. Votaw, (Tex. Civ. App. 1904) 81 S. W. Rep. 130; International, etc., R. Co. v. Bryant, (Tex. Civ. App. 1899) 54 S. W. Rep. 364. See also Illinois Cent. R. Co. v. Jones, (C. C. A.) 95 Fed. Rep. 370; Baltimore, etc., R. Co. v. Landrigan, 20 App. Cas. (D. C.) 135; Louisville, etc., R. Co. v. Dick, (Ky. 1904) 78 S. W. Rep. 914; Galveston, etc., R. Co. v. Fry, (Tex. Civ. App. 1905) 84 S. W. Rep. 664.

But in *Pennsylvania* it seems that an invitation will not excuse the traveler from his imperative duty in that state to stop, look, and listen. *Ihrig v. Erie R. Co.*, 210 Pa. St. 98.

**438. 2. Crossing in Front of Approaching Train — Knowledge of Same.** — Stahl v. Lake Shore, etc., R. Co., 117 Mich. 273; Pugh v. Illinois Cent. R. Co., (Miss. 1898) 23 So. Rep. 356; Chicago, etc., R. Co. v. Featherly, 64 Neb. 323; Burnett v. Easton, etc., R. Co., 61 N. J. L. 373; Getman v. Delaware, etc., R. Co., 162 N. Y. 21.

**3. Not Always Negligent to Cross in Front of Advancing Train.** — Chicago, etc., R. Co. v. Ptacek, 171 Ill. 9; Davis v. Concord, etc., R. Co., 68 N. H. 247; Folsom v. Concord, etc., R. Co., 68 N. H. 454.

**439. 2. Presumption of Due Care.** — Baltimore, etc., R. Co. v. Landrigan, 191 U. S. 461; St. Louis, etc., R. Co. v. Townsend, 69 Ark. 380. See also Queen Anne's R. Co. v. Reed, (Del. 1905) 59 Atl. Rep. 860. See also the authorities cited *infra*, p. 454, note 2.

**440. 1. The True Rule — No Presumption**

**Either Way.** — Gahagan v. Boston, etc., R. Co., 70 N. H. 441; Passman v. West Jersey, etc., R. Co., 68 N. J. L. 719, 96 Am. St. Rep. 573; Clegg v. Southern R. Co., 132 N. Car. 292; Schweinfurth v. Cleveland, etc., R. Co., 60 Ohio St. 215; Texas, etc., R. Co. v. Huber, (Tex. Civ. App. 1903) 75 S. W. Rep. 547; Texas, etc., R. Co. v. Shoemaker, (Tex. 1905) 84 S. W. Rep. 1049.

**441. 1. Modification of Doctrine When Persons Non Sui Juris.** — Bageard v. Consolidated Traction Co., 64 N. J. L. 316, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 491 [441].

**2. Intoxication Not Negligence Per Se.** — Sylvester v. Casey, 110 Iowa 256; Lyons v. Dee, 88 Minn. 490; Missouri, etc., R. Co. v. Jones, (Tex. Civ. App. 1904) 80 S. W. Rep. 852; Rhyner v. Menasha, 107 Wis. 201.

**3. But It May Be Evidence of Negligence.** — Wabash R. Co. v. Monegan, 94 Ill. App. 82; Rhyner v. Menasha, 107 Wis. 201.

**4. If a Proximate Cause of Injury, Is a Bar.** — Louisville, etc., R. Co. v. Cummins, 111 Ky. 333, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 441; Clarke v. Philadelphia, etc., Coal, etc., Co., 92 Minn. 418; Kenney v. Rhinelander, 28 N. Y. App. Div. 246, affirmed 163 N. Y. 576; Mooney v. Pennsylvania R. Co., 203 Pa. St. 222; Mercer v. Southern R. Co., 66 S. Car. 246. See also Roach v. Atlanta, etc., R. Co., 119 Ga. 98; Richmond Traction Co. v. Martin, 102 Va. 209.

**442. 1. Voluntary Incapacity No Excuse.** — Burke v. Chicago, etc., R. Co., 108 Ill. App. 565; Vizacchero v. Rhode Island Co., 26 R. I. 392; McCowen v. Gulf, etc., R. Co., (Tex. Civ. App. 1903) 73 S. W. Rep. 46; Missouri, etc., R. Co. v. Jones, (Tex. Civ. App. 1904) 80 S. W. Rep. 852.

**443. 1. Effect of Blindness or Deafness on Doctrine of Negligence.** — Desure v. New York Cent., etc., R. Co., 94 N. Y. App. Div. 251. See also Shanks v. Springfield Traction Co., 101 Mo. App. 702; Foy v. Winston, 135 N. Car. 439; McKeown v. South Carolina, etc., R. Co., 68 S. Car. 483.

**Epileptic.** — Marks v. Atlantic Coast Line R. Co., 133 N. Car. 89.

**2. Does Not Relieve from Duty of Ordinary Care — United States.** — Chicago, etc., R. Co. v. Pounds, 49 U. S. App. 476, 82 Fed. Rep. 217. *Colorado.* — Garbanati v. Durango, 30 Colo. 358.

**443. XIX. WILFUL INJURIES — 1. In General.** — See note 3.

2. Wilfulness and Negligence Distinguished. — See note 4.

**444.** See notes 1, 2.

**XX. LORD CAMPBELL'S ACT — CONTRIBUTORY NEGLIGENCE OF DECEDENT.** — See note 5.

**445.** See note 1.

**XXI. IMPUTABLE CONTRIBUTORY NEGLIGENCE — 1. General Doctrine.** — See notes 2, 3.

*Florida.* — *Florida Cent., etc., R. Co. v. Williams*, 37 Fla. 406.

*Iowa.* — *Hill v. Glenwood*, 124 Iowa 479.

*Kansas.* — *Sweet v. Union Pac. R. Co.*, 65 Kan. 812.

*Missouri.* — *Carrier v. Missouri Pac. R. Co.*, 175 Mo. 470; *Aldrich v. St. Louis Transit Co.*, 101 Mo. App. 77.

*North Carolina.* — *Foy v. Winston*, 126 N. Car. 381.

*Pennsylvania.* — *Karl v. Juniata County*, 206 Pa. St. 633.

*Texas.* — *Ft. Worth, etc., R. Co. v. Wyatt*, (Tex. Civ. App. 1904) 79 S. W. Rep. 349.

*Utah.* — *Thompson v. Salt Lake Rapid Transit Co.*, 16 Utah 281, 67 Am. St. Rep. 621.

*Virginia.* — *Portsmouth St. R. Co. v. Peed*, 102 Va. 662.

*Canada.* — See *Homewood v. Hamilton*, 1 Ont. L. Rep. 267, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 443.

**The Same Is True as to Lameness.** — *Harden v. Jackson*, (Mich. 1904) 100 N. W. Rep. 389.

**443. 3. Wilful Injuries and Contributory Negligence — United States.** — *McGhee v. Campbell*, (C. C. A.) 101 Fed. Rep. 936, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 443, 444.

*Alabama.* — *Birmingham Southern R. Co. v. Powell*, 136 Ala. 232; *Louisville, etc., R. Co. v. Orr*, 121 Ala. 489; *Birmingham R., etc., Co. v. Pinckard*, 124 Ala. 372; *Central of Georgia R. Co. v. Partridge*, 136 Ala. 587; *Birmingham R., etc., Co. v. Baker*, 132 Ala. 507. See also *Alabama G. S. R. Co. v. Guest*, 136 Ala. 348.

*Arkansas.* — *St. Louis, etc., R. Co. v. Townsend*, 69 Ark. 380.

*California.* — *Harrington v. Los Angeles R. Co.*, 140 Cal. 514, 98 Am. St. Rep. 85.

*Illinois.* — *Pittsburgh, etc., R. Co. v. Kinnare*, 203 Ill. 388; *Chicago Terminal Transfer R. Co. v. Gruss*, 200 Ill. 195; *Chicago Terminal Transfer R. Co. v. Kotoski*, 199 Ill. 383; *Chicago Union Traction Co. v. McGinnis*, 112 Ill. App. 177; *Schaefer v. North Chicago St. R. Co.*, 82 Ill. App. 473.

*Indiana.* — *Cleveland, etc., R. Co. v. Miller*, 149 Ind. 490; *Gartin v. Meredith*, 153 Ind. 16.

*Louisiana.* — *Miller v. Meche*, 111 La. 143, citing [7] AM. AND ENG. ENCYC. OF LAW (2d ed.) [443].

*Maryland.* — See *Tucker v. State*, 89 Md. 471.

*Massachusetts.* — *Aiken v. Holyoke St. R. Co.*, 184 Mass. 260, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 443.

*Michigan.* — See *Labarge v. Pere Marquette R. Co.*, 134 Mich. 139, 10 Detroit Leg. N. 430; *Buxton v. Ainsworth*, (Mich. 1904) 101 N. W. Rep. 817, 11 Detroit Leg. N. 682; *Finnegan v. Michigan Cent. R. Co.*, 127 Mich. 15.

*New York.* — See *Mapes v. Union R. Co.*, 56 N. Y. App. Div. 508.

*North Carolina.* — *Brendle v. Spencer*, 125 N. Car. 474.

*South Carolina.* — *Proctor v. Southern R. Co.*, 61 S. Car. 170. See also *Gosa v. Southern R. Co.*, 67 S. Car. 347.

*Wisconsin.* — *Bolin v. Chicago, etc., R. Co.*, 108 Wis. 333, 81 Am. St. Rep. 911.

**Illinois — Wilful Disobedience of Statute by Master — Servant's Contributory Negligence No Defense.** — See *supra*, p. 424, note 1.

**Where Both Parties Are Guilty** of recklessness or wantonness there can be no recovery. *Moore v. Lindell R. Co.*, 176 Mo. 528.

**4. Wilfulness Negatives Negligence.** — *Cleveland, etc., R. Co. v. Miller*, 149 Ind. 490; *Rideout v. Winnebago Traction Co.*, 123 Wis. 297, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 443. See also *Louisville, etc., R. Co. v. Orr*, 121 Ala. 489; *Sharp v. Missouri Pac. R. Co.*, 161 Mo. 214; *Tanner v. Missouri Pac. R. Co.*, 161 Mo. 497; *Morrison v. Lee*, (N. Dak. 1904) 102 N. W. Rep. 223.

**444. 1. "Gross" or "Wilful" Negligence a Misnomer.** — *Proctor v. Southern R. Co.*, 61 S. Car. 170, quoting 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 443, 444.

2. *Cleveland, etc., R. Co. v. Miller*, 149 Ind. 490; *Bolin v. Chicago, etc., R. Co.*, 108 Wis. 333, 81 Am. St. Rep. 911; *Tesch v. Milwaukee Electric R., etc., Co.*, 108 Wis. 593. See also *Rideout v. Winnebago Traction Co.*, 123 Wis. 297.

**5. Decedent's Contributory Negligence a Bar.** — *In re Kimball Steamship Co.*, 123 Fed. Rep. 838, reversed (C. C. A.) 128 Fed. Rep. 397; *Regina v. Dunlop Steamship Co.*, 128 Fed. Rep. 784; *Missouri Pac. R. Co. v. Fox*, 60 Neb. 531; *Riddle v. Forty Second St., etc., R. Co.*, 173 N. Y. 327.

**445. 1. The Question Determined by the Usual Rules.** — *Tully v. Philadelphia, etc., R. Co.*, 3 Penn. (Del.) 455; *Di Prisco v. Wilmington City R. Co.*, 4 Penn. (Del.) 527; *Tucker v. State*, 89 Md. 471; *Chicago, etc., R. Co. v. Lagerkrans*, 65 Neb. 566; *Fitzgerald v. New York Cent., etc., R. Co.*, 154 N. Y. 263; *Thompson v. Metropolitan St. R. Co.*, 89 N. Y. App. Div. 10; *Smith v. Centennial Eureka Min. Co.*, 27 Utah 307. See also the authorities cited *infra*, p. 454, note 2.

**2. The General Doctrine — Indiana.** — *Abbutt v. Lake Erie, etc., R. Co.*, 150 Ind. 498.

*New York.* — *Bronson v. New York Cent., etc., R. Co.*, 24 N. Y. App. Div. 262; *Koslovski v. International Heater Co.*, 75 N. Y. App. Div. 60, affirmed 178 N. Y. 631.

*North Carolina.* — *Duval v. Atlantic Coast Line R. Co.*, 134 N. Car. 331, 101 Am. St. Rep. 830; *Crampton v. Ivie*, 126 N. Car. 894.

*Oregon.* — *Macdonald v. O'Reilly*, 45 Oregon 589.

**445. 2. Essentials.** — See note 4.

**446. 3. The Several Classes of Cases Considered — b. OCCUPANTS OF PUBLIC CONVEYANCES.** — See note 2.

**447.** See notes 1, 5.

**448. c. OCCUPANTS OF PRIVATE CONVEYANCES.** — See notes 1, 2.

*Texas.* — Central Texas, etc., *R. Co. v. Gibson*, (Tex. Civ. App. 1904) 83 S. W. Rep. 862.

**445. 3. Bars When a Proximate Cause of the Injury.** — See *Warren v. Manchester St. R. Co.*, 70 N. H. 352.

**4. What Must Appear to Make Imputable.** — See *Boyden v. Fitchburg R. Co.*, 72 Vt. 89.

**Instances Where the Doctrine Does Not Apply.** — The negligence of an employer is not imputable to his employee. *Philip v. Heraty*, 135 Mich. 446.

"As a rule a stranger cannot take advantage of the negligence of a coemployee of the person injured." *Harper v. Delaware, etc., R. Co.*, 22 N. Y. App. Div. 273. See also *Chicago, etc., R. Co. v. Vipond*, 212 Ill. 199; *Chicago, etc., R. Co. v. Harrington*, 192 Ill. 9.

The contributory negligence of a locomotive engineer is not imputable to a fireman subject to the engineer's orders. *Southern Indiana R. Co. v. Davis*, 32 Ind. App. 569.

**446. 2. Carrier and Passengers — General Rule** — *District of Columbia.* — *Baltimore, etc., R. Co. v. Adams*, 10 App. Cas. (D. C.) 97.

*Illinois.* — *Chicago, etc., R. Co. v. Mochell*, 193 Ill. 208, 86 Am. St. Rep. 318; *Springfield Consol. R. Co. v. Puntenney*, 200 Ill. 9. See also *Springfield Consol. R. Co. v. Puntenney*, 200 Ill. 9.

*Indiana.* — *Frank Bird Transfer Co. v. Krug*, 30 Ind. App. 602.

*Kentucky.* — *Louisville, etc., Packet Co. v. Mulligan*, 77 S. W. Rep. 704, 25 Ky. L. Rep. 1287, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 446.

*Minnesota.* — See *Kopitz v. St. Paul*, 86 Minn. 373.

*New York.* — *Lewis v. Long Island R. Co.*, 162 N. Y. 52.

*North Carolina.* — *Duval v. Atlantic Coast Line R. Co.*, 134 N. Car. 331, 101 Am. St. Rep. 830; *Bradley v. Ohio River, etc., R. Co.*, 126 N. Car. 735. Compare *Crampton v. Ivie*, 126 N. Car. 894.

**Maine Statute — Rule Not Applicable in Cases Against Towns.** — *Barnes v. Rumford*, 96 Me. 315.

**447. 1. The Minority Rule** — *Iowa.* — See *Elenz v. Conrad*, 115 Iowa 183.

*Michigan.* — *Thorogood v. Bryan*, 8 C. B. 115, 65 E. C. L. 115, is recognized as authority in *Michigan*. See *Hampel v. Detroit, etc., R. Co.*, (Mich. 1904) 100 N. W. Rep. 1002.

*Wisconsin.* — *Ritger v. Milwaukee*, 99 Wis. 190; *Lightfoot v. Winnebago Traction Co.*, 123 Wis. 479; *Olson v. Luck*, 103 Wis. 33.

**5. The Doctrine Generally Abandoned.** — *Duval v. Atlantic Coast Line R. Co.*, 134 N. Car. 331, 101 Am. St. Rep. 830; *Crampton v. Ivie*, 126 N. Car. 894.

**448. 1. Negligence of Driver — When Not Imputable** — *United States.* — *Kowalski v. Chicago G. W. R. Co.*, 84 Fed. Rep. 586, affirmed (C. C. A.) 92 Fed. Rep. 310.

*Alabama.* — *Birmingham R., etc., Co. v. Baker*, 132 Ala. 507.

*Arkansas.* — *Hot Springs St. R. Co. v. Hil-dreth*, 72 Ark. 572, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 447.

*Illinois.* — *West Chicago St. R. Co. v. Petters*, 196 Ill. 298; *West Chicago St. R. Co. v. Ded-loff*, 92 Ill. App. 547; *Chicago City R. Co. v. Wall*, 93 Ill. App. 411.

*Indiana.* — *Indianapolis St. R. Co. v. John-son*, 163 Ind. 518.

*Maine.* — See *Whitman v. Lewiston*, 97 Me. 519.

*Maryland.* — *United R., etc., Co. v. Biedler*, 98 Md. 564.

*Massachusetts.* — See *Evensen v. Lexington, etc., St. R. Co.*, 187 Mass. 77.

*Michigan.* — *McKernan v. Detroit Citizens' St. R. Co.*, (Mich. 1904) 101 N. W. Rep. 812, 11 Detroit Leg. N. 685; *Hampel v. Detroit, etc., R. Co.*, (Mich. 1904) 100 N. W. Rep. 1002.

*Minnesota.* — *Kopitz v. St. Paul*, 86 Minn. 373.

*Missouri.* — *Baxter v. St. Louis Transit Co.*, 103 Mo. App. 597; *Johnson v. St. Joseph*, 96 Mo. App. 663.

*New Jersey.* — *Noonan v. Consolidated Traction Co.*, 64 N. J. L. 579; *Consolidated Traction Co. v. Hoimark*, 60 N. J. L. 456.

*New York.* — *Geary v. Metropolitan St. R. Co.*, 84 N. Y. App. Div. 514, affirmed 177 N. Y. 535; *Robinson v. Metropolitan St. R. Co.*, 91 N. Y. App. Div. 158, affirmed 179 N. Y. 593; *Flanagan v. New York Cent., etc., R. Co.*, 70 N. Y. App. Div. 505, affirmed 173 N. Y. 631; *Morris v. Metropolitan St. R. Co.*, 63 N. Y. App. Div. 78, affirmed 170 N. Y. 592; *Lewin v. Lehigh Valley R. Co.*, 41 N. Y. App. Div. 89; *Fisher v. Mt. Vernon*, 41 N. Y. App. Div. 293; *Kleiner v. Third Ave. R. Co.*, 36 N. Y. App. Div. 191, reversed 162 N. Y. 193; *Bergold v. Nassau Electric R. Co.*, 30 N. Y. App. Div. 438; *Zimmermann v. Union R. Co.*, 28 N. Y. App. Div. 445; *Scarangelo v. Interurban St. R. Co.*, (Supm. Ct. App. T.) 90 N. Y. Supp. 430. See also *Countryman v. Fonda, etc., R. Co.*, 166 N. Y. 201, 82 Am. St. Rep. 640; *Mack v. Shawangunk*, 98 N. Y. App. Div. 577.

*North Carolina.* — *Duval v. Atlantic Coast Line R. Co.*, 134 N. Car. 331, 101 Am. St. Rep. 830, quoting 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 447, 448.

*Ohio.* — *Wheeling, etc., R. Co. v. Suhrwiar*, 12 Ohio Cir. Dec. 809, 22 Ohio Cir. Ct. 560. See also *Smith v. Newark Ice, etc., Co.*, 8 Ohio Dec. 283.

*Pennsylvania.* — *Beardslee v. Columbia Tp.*, 5 Lack. Leg. N. (Pa.) 290.

*Tennessee.* — *Hydes Ferry Turnpike Co. v. Yates*, 108 Tenn. 428, quoting 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 447, 448.

*Texas.* — Central Texas, etc., *R. Co. v. Gib-son*, (Tex. Civ. App. 1904) 83 S. W. Rep. 862; *Bryant v. International, etc., R. Co.*, 19 Tex. Civ. App. 88.

*Washington.* — *Shearer v. Buckley*, 31 Wash. 370.



**448. d. LEGAL CUSTODIAN OF CHILD — Child's Negligence Imputable — Jurisdictions Favoring the View.** — See note 3.

**449.** See note 1.

**Rule Applies to Fellow Servants.** — *Le Blanc v. Interurban St. R. Co.*, (Supm. Ct. App. T.) 88 N. Y. Supp. 150; *Waters v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 85 N. Y. Supp. 1120.

It was held in *Hobson v. New York Condensed Milk Co.*, 25 N. Y. App. Div. 111, that the contributory negligence of the driver of a horse car was not imputable to the conductor, who was injured in a collision, the driver not being under the conductor's control.

**But if Driver's Companion Remain Carelessly Inert, He May Be Guilty of Contributory Negligence** — *Delaware*. — *Farley v. Wilmington, etc., Electric R. Co.*, 3 Penn. (Del.) 581.

*Indiana*. — *Vincennes v. Thuis*, 28 Ind. App. 523.

*Kansas*. — *Bush v. Union Pac. R. Co.*, 62 Kan. 709; *Missouri, etc., R. Co. v. Bussey*, 66 Kan. 735.

*Maine*. — *Whitman v. Fisher*, 98 Me. 575.

*Minnesota*. — *Finley v. Chicago, etc., R. Co.*, 71 Minn. 471; *Cunningham v. Thief River Falls*, 84 Minn. 21. See also *Lammers v. Great Northern R. Co.*, 82 Minn. 120.

*Mississippi*. — *Illinois Cent. R. Co. v. McLeod*, 78 Miss. 334, 84 Am. St. Rep. 630.

*Missouri*. — See *Holden v. Missouri R. Co.*, 177 Mo. 456.

*New York*. — *Anderson v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 30 Misc. (N. Y.) 104; *Meenagh v. Buckmaster*, 26 N. Y. App. Div. 451.

*Pennsylvania*. — *Lohman v. McManus*, 9 Pa. Dist. 223.

*Virginia*. — *Atlantic, etc., R. Co. v. Ironmonger*, 95 Va. 625.

**448. 2. Negligence of Driver — When Imputable** — *Read v. City, etc., R. Co.*, 115 Ga. 366; *Markowitz v. Metropolitan St. R. Co.*, 186 Mo. 350; *Reed v. Metropolitan St. R. Co.*, 58 N. Y. App. Div. 87; *Duval v. Atlantic Coast Line R. Co.*, 134 N. Car. 331, 101 Am. St. Rep. 830, *quoting* 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 448; *New York, etc., R. Co. v. Kistler*, 66 Ohio St. 326.

The contributory negligence of one managing a rowboat with the consent of the person injured is imputable to the latter. *Yarnold v. Bowers*, 186 Mass. 396.

**Persons in Joint Enterprise.** — Where the person injured is engaged in a joint enterprise with the driver, each is the agent of the other, and the driver's negligence is imputable to the injured person. *Boyden v. Fitchburg R. Co.*, 72 Vt. 89.

**Mere Employment Not Sufficient.** — But a mere employment is not sufficient unless the relation of master and servant exists. *Lewis v. Long Island R. Co.*, 162 N. Y. 52.

**3. Parent's Duty of Care — California.** — See *Fox v. Oakland Consol. St. R. Co.*, 118 Cal. 55, 62 Am. St. Rep. 216.

*Illinois*. — *West Chicago St. R. Co. v. Liderman*, 187 Ill. 463, 79 Am. St. Rep. 226. See also *True, etc., Co. v. Woda*, 201 Ill. 315; *Illinois Cent. R. Co. v. Bandy*, 88 Ill. App. 629.

*Indiana*. — See *Indianapolis St. R. Co. v. Schomberg*, (Ind. 1905) 72 N. E. Rep. 1041.

*Iowa*. — *Thomas v. Chicago, etc., R. Co.*, 114 Iowa 169.

*Massachusetts*. — *Cotter v. Lynn, etc., R. Co.*, 180 Mass. 145, 91 Am. St. Rep. 267; *Butler v. New York, etc., R. Co.*, 177 Mass. 191; *Walsh v. Loorem*, 180 Mass. 18.

*New York*. — See *Lafferty v. Third Ave. R. Co.*, 85 N. Y. App. Div. 592, *affirmed* 176 N. Y. 594; *Adams v. Metropolitan St. R. Co.*, 60 N. Y. App. Div. 188.

*Pennsylvania*. — *Del Rossi v. Cooney*, 208 Pa. St. 233; *Duffy v. Sable Iron Works*, 210 Pa. St. 326. See also *Kroesen v. Newcastle Electric St. R. Co.*, 198 Pa. St. 26; *Daubert v. Delaware, etc., R. Co.*, 199 Pa. St. 345; *Phillips v. Duquesne Traction Co.*, 8 Pa. Super. Ct. 210.

*West Virginia*. — See *Bias v. Chesapeake, etc., R. Co.*, 46 W. Va. 349.

*Wisconsin*. — *Decker v. McSorley*, 111 Wis. 91.

**Allowing Child on Street.** — "It has been repeatedly held that it is not negligence, as matter of law, for the parent to permit a child who is *non sui juris* to be on the street of a city unattended." *Ehrmann v. Nassau Electric R. Co.*, 23 N. Y. App. Div. 21. To the same effect see *Kennedy v. Hills Bros. Co.*, 54 N. Y. App. Div. 29; *Holdridge v. Mendenhall*, 108 Wis. 1, 81 Am. St. Rep. 871.

A temporary incursion of a child from sidewalk to roadway will not necessarily attribute negligence *per se* to his parent or custodian. *Dehmann v. Beck*, 61 N. Y. App. Div. 505.

**449. 1. Negligence Held Imputable to Child — United States.** — *Delaware, etc., R. Co. v. Devore*, 52 C. C. A. 77, 114 Fed. Rep. 155.

*Indiana*. — The contrary doctrine has now been established. See the cases cited *infra*, p. 450, note 1.

*Massachusetts*. — *Cotter v. Lynn, etc., R. Co.*, 180 Mass. 145, 91 Am. St. Rep. 267.

*New York*. — *Lafferty v. Third Ave. R. Co.*, 85 N. Y. App. Div. 592, *affirmed* 176 N. Y. 594; *Lifschitz v. Dry Dock, etc., R. Co.*, 67 N. Y. App. Div. 602; *Finkelstein v. American Ice Co.*, (Supm. Ct. App. T.) 88 N. Y. Supp. 942; *Burke v. Brooklyn Wharf, etc., Co.*, 86 N. Y. App. Div. 296. See also *Neun v. Rochester R. Co.*, 165 N. Y. 146; *Smith v. City Realty Co.*, 79 N. Y. App. Div. 441; *Lowery v. New York Ice Co.*, (Supm. Ct. Tr. T.) 26 Misc. (N. Y.) 163, *affirmed* 44 N. Y. App. Div. 637. But see *Lewin v. Lehigh Valley R. Co.*, 52 N. Y. App. Div. 69 (*affirmed* 165 N. Y. 667, the Court of Appeals not passing on the question), *approving* *Hennessey v. Brooklyn City R. Co.*, 6 N. Y. App. Div. 206 (cited in the original note), on a similar state of facts. The action was brought by the father, as administrator, for negligence causing his child's death. In *Delaware, etc., R. Co. v. Devore*, 52 C. C. A. 77, 114 Fed. Rep. 155, the court declined to follow the distinction made in *Hennessey v. Brooklyn City R. Co.*, 6 N. Y. App. Div. 206.

**Parent Barred When Child Not — United**

**450.** Jurisdictions Denying the Doctrine. — See note 1.

**451.** Person in Actual Custody of Child. — See note 1.

Modifications of Rule. — See notes 3, 4, 6.

**452. XXII. APPORTIONMENT OF DAMAGES — 1. In General.** — See note 1.

*States.* — *Garner v. Trumbull*, 36 C. C. A. 361, 94 Fed. Rep. 321.

*Alabama.* — *Alabama G. S. R. Co. v. Burgess*, 116 Ala. 509.

*Arkansas.* — *St. Louis, etc., R. Co. v. Dawson*, 68 Ark. 1; *St. Louis, etc., R. Co. v. Colum*, 72 Ark. 1.

*Indiana.* — *Indianapolis St. R. Co. v. Antrobus*, 33 Ind. App. 663. See also *Evansville v. Senhenn*, 151 Ind. 42, 68 Am. St. Rep. 218.

*Iowa.* — *Thomas v. Chicago, etc., R. Co.*, 114 Iowa 169.

*New York.* — *O'Shea v. Lehigh Valley R. Co.*, 79 N. Y. App. Div. 254.

*North Carolina.* — *Davis v. Seaboard Air Line R. Co.*, 136 N. Car. 115.

*Pennsylvania.* — *Duffy v. Sable Iron Works*, 210 Pa. St. 326; *Del Rossi v. Cooney*, 208 Pa. St. 233. See also *Enright v. Pittsburg Junction R. Co.*, 204 Pa. St. 543; *Faust v. Philadelphia, etc., R. Co.*, 191 Pa. St. 420; *Karahuta v. Schuylkill Traction Co.*, 6 Pa. Super. Ct. 319.

*Utah.* — See *Corbett v. Oregon Short Line R. Co.*, 25 Utah 449.

*Vermont.* — *Ploof v. Burlington Traction Co.*, 70 Vt. 509.

*West Virginia.* — See dissenting opinion of Brannon, J., in *Bias v. Chesapeake, etc., R. Co.*, 46 W. Va. 349, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 449.

But the father may sue as administrator of the child. *Warren v. Manchester St. R. Co.*, 70 N. H. 352. See also *Carney v. Concord St. R. Co.*, 72 N. H. 364; *Lewin v. Lehigh Valley R. Co.*, 52 N. Y. App. Div. 69, affirmed 165 N. Y. 667.

**And the Question of Imputability for the Jury.** — *McNeil v. Boston Ice Co.*, 173 Mass. 570; *Cameron v. Duluth-Superior Traction Co.*, (Minn. 1905) 102 N. W. Rep. 208; *Weitzman v. Nassau Electric R. Co.*, 33 N. Y. App. Div. 585; *Muhlhouse v. Monongahela St. R. Co.*, 201 Pa. St. 244; *Jones v. United Traction Co.*, 201 Pa. St. 346.

**450. 1. Where Held Not Imputable — United States.** — *Kowalski v. Chicago G. W. R. Co.*, 84 Fed. Rep. 586, affirmed 34 C. C. A. 1, 92 Fed. Rep. 310, following the *Iowa* doctrine.

*Alabama.* — *Alabama G. S. R. Co. v. Burgess*, 116 Ala. 509.

*Illinois.* — See *Donk Bros. Coal, etc., Co. v. Leavitt*, 109 Ill. App. 385.

*Indiana.* — *Evansville v. Senhenn*, 151 Ind. 42, 68 Am. St. Rep. 218, distinguishing or overruling the prior Indiana authorities to the contrary; *McNamara v. Beck*, 21 Ind. App. 483; *Jeffersonville v. McHenry*, 22 Ind. App. 10.

*Iowa.* — *Ives v. Welden*, 114 Iowa 476, 89 Am. St. Rep. 379; *Fink v. Des Moines*, 115 Iowa 641; *Allen v. Ames College R. Co.*, 106 Iowa 602.

*Kentucky.* — *South Covington, etc., St. R. Co. v. Herrklotz*, 104 Ky. 400. See also *Toner v. South Covington, etc., St. R. Co.*, 109 Ky. 41.

*Michigan.* — *Hampel v. Detroit, etc., R. Co.*, (Mich. 1904) 100 N. W. Rep. 1002.

*Missouri.* — *Profit v. Chicago, G. W. R. Co.*, 91 Mo. App. 369.

*New Hampshire.* — *Carney v. Concord St. R. Co.*, 72 N. H. 364; *Warren v. Manchester St. R. Co.*, 70 N. H. 352.

*New Jersey.* — *Markey v. Consolidated Traction Co.*, 65 N. J. L. 82; *Bergen County Traction Co. v. Heitman*, 61 N. J. L. 682.

*North Carolina.* — See *Davis v. Seaboard Air Line R. Co.*, 136 N. Car. 115.

*Ohio.* — *Ludden v. Columbus, etc., R. Co.*, 9 Ohio Dec. 793, 7 Ohio N. P. 106. See also *Toledo Real Estate, etc., Co. v. Putney*, 10 Ohio Cir. Dec. 698, 20 Ohio Cir. Ct. 486.

*Oregon.* — *Macdonald v. O'Reilly*, 45 Oregon 589.

*South Carolina.* — *Watson v. Southern R. Co.*, 66 S. Car. 47, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 449.

*Texas.* — *Gulf, etc., R. Co. v. Johnson*, (Tex. Civ. App. 1899) 51 S. W. Rep. 531; *Texas, etc., R. Co. v. Kingston*, 30 Tex. Civ. App. 24.

*Vermont.* — *Ploof v. Burlington Traction Co.*, 70 Vt. 509.

*Virginia.* — *Roanoke v. Shull*, 97 Va. 419, 75 Am. St. Rep. 791.

*Washington.* — *Eskildsen v. Seattle*, 29 Wash. 583.

**451. 1.** See *Levine v. Metropolitan St. R. Co.*, 78 N. Y. App. Div. 426, affirmed 177 N. Y. 523; *Healey v. Ehret*, 42 N. Y. App. Div. 27.

**3. When Child Used Due Care No Imputability.** — See *Nashville R. Co. v. Howard*, 112 Tenn. 107, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 451.

**4. When Defendant Could Have Avoided Inflicting Injury.** — See *Tully v. Philadelphia, etc., R. Co.*, 3 Penn. (Del.) 455.

**6. Then a Question of "Ordinary Care of Child."** — *Lafferty v. Third Ave R. Co.*, 85 N. Y. App. Div. 592, affirmed 176 N. Y. 594.

**452. 1. No Apportionment at Common Law.** — *Compare Jess v. Quebec, etc., Ferry Co.*, 25 Quebec Super. Ct. 224.

**In Georgia**, by statute, there may be a recovery where the negligence of both parties is concurrent, the jury to diminish the damages in proportion to the plaintiff's fault. *Alabama G. S. R. Co. v. Coggins*, 60 U. S. App. 140, 88 Fed. Rep. 455; *Brunswick, etc., R. Co. v. Wiggins*, 113 Ga. 842; *Macon, etc., St. R. Co. v. Holmes*, 103 Ga. 655; *Savannah, etc., R. Co. v. Flaherty*, 110 Ga. 335.

**In Tennessee**, so-called "remote contributory negligence" is to be considered in mitigation of damages. *Nashville R. Co. v. Norman*, 108 Tenn. 331; *Memphis St. R. Co. v. Haynes*, 112 Tenn. 712; *Iron Mountain R. Co. v. Dies*, 98 Tenn. 655; *Saunders v. City, etc., R. Co.*, 99 Tenn. 130. See also *Illinois Cent. R. Co. v. Jordan*, 78 S. W. Rep. 426, 25 Ky. L. Rep. 1610, decided under the law of Tennessee.

**In Florida**, by statute, in actions against

**452. 2. Plaintiff's Subsequent Negligence.** — See note 2.**3. In Case of Disease.** — See note 3.**453. XXIII. THE BURDEN OF PROOF — 1. View that Burden on Plaintiff.** —

See notes 1, 2, 3.

**2. View that Burden on Defendant.** — See note 4.

railroads, the negligence of the plaintiff may diminish the damages. *Florida Cent., etc., R. Co. v. Williams*, 37 Fla. 406; *Florida Cent., etc., R. Co. v. Foxworth*, 41 Fla. 1, 79 Am. St. Rep. 149.

**452. 2. But Damages Should Be Limited to Actual Effects.** — *Wissler v. Atlantic*, 123 Iowa 11; *Zibbell v. Grand Rapids*, 129 Mich. 659; *Texas Portland Cement Co. v. Poe*, (Tex. Civ. App. 1903) 74 S. W. Rep. 563. See also *Atkinson v. Fisher*, (Neb. 1903) 93 N. W. Rep. 211.

**3. Yet Plaintiff May Recover for Enhancement by Disease.** — *Denver v. Hyatt*, 28 Colo. 129; *Chicago City R. Co. v. Saxby*, 213 Ill. 280, 104 Am. St. Rep. 218; *Koch v. Fox*, 71 N. Y. App. Div. 288.

**453. 1. The Burden of Proof Question.** — See the review of the positions of various jurisdiction in *Burke v. Citizens St. R. Co.*, 102 Tenn. 409.

**2. Where Burden Held on the Plaintiff — Illinois.** — *U. S. Brewing Co. v. Stoltenberg*, 211 Ill. 531; *Macon v. Holcomb*, 205 Ill. 643; *Chicago, etc., R. Co. v. Barr*, 204 Ill. 163; *Chicago, etc., R. Co. v. Harrington*, 192 Ill. 9; *West Chicago St. R. Co. v. Liderman*, 187 Ill. 463, 79 Am. St. Rep. 226; *Donley v. Dougherty*, 174 Ill. 582; *Jones v. Illinois Cent. R. Co.*, 106 Ill. App. 597; *Omaha Packing Co. v. Murray*, 112 Ill. App. 233. See also *Chicago, etc., R. Co. v. Heerey*, 203 Ill. 492.

*Indiana.* — By statute the burden is now placed on the defendant. See *infra*, p. 453, note 4.

*Iowa.* — *Bell v. Clarion*, 113 Iowa 126; *Thomas v. Chicago, etc., R. Co.*, 114 Iowa 169; *Decatur v. Simpson*, 115 Iowa 348; *Burk v. Walsh*, 118 Iowa 397; *Wissler v. Atlantic*, 123 Iowa 11; *Phinney v. Illinois Cent. R. Co.*, 122 Iowa 488; *McLeod v. Chicago, etc., R. Co.*, 125 Iowa 270. But compare, as to an action against a railroad under the statute, based on its failure to keep a crossing in repair, See *v. Wabash R. Co.*, 123 Iowa 443.

*Louisiana.* — The contrary rule now obtains. See *infra*, p. 453, note 4.

*Maine.* — *Orr v. Oldtown*, 99 Me. 190; *Blumenthal v. Boston, etc., R. Co.*, 97 Me. 255; *Coombs v. Mason*, 97 Me. 270; *Butler v. Rockland, etc., St. R. Co.*, 99 Me. 149, 105 Am. St. Rep. 267. See also *McLane v. Perkins*, 92 Me. 39.

*Massachusetts.* — *Spellman v. Dyer*, 186 Mass. 176; *Cox v. South Shore, etc., St. R. Co.*, 182 Mass. 497; *Tumulty v. New York, etc., R. Co.*, 170 Mass. 164; *Hilton v. Boston*, 171 Mass. 478.

*Michigan.* — *Tracey v. South Haven Tp.*, 132 Mich. 492, 9 Detroit Leg. N. 608; *Sosnofski v. Lake Shore, etc., R. Co.*, 134 Mich. 72, 10 Detroit Leg. N. 360.

*New Hampshire.* — *Gahagan v. Boston, etc., R. Co.*, 70 N. H. 441; *Waldron v. Boston, etc., R. Co.*, 71 N. H. 362; *Hutchins v. Macomber*, 68 N. H. 473.

*New York.* — *Eastland v. Clarke*, 165 N. Y. 420; *Whalen v. Citizens' Gas Light Co.*, 151 N. Y. 70; *Brugher v. Buchtenkirch*, 167 N. Y. 153; *Rider v. Syracuse Rapid Transit R. Co.*, 171 N. Y. 139; *Lynch v. Third Ave. R. Co.*, 88 N. Y. App. Div. 604; *McGuire v. Board*, 58 N. Y. App. Div. 388, *affirmed* 171 N. Y. 672; *Mauer v. Brooklyn Heights R. Co.*, 87 N. Y. App. Div. 119; *Meinrenken v. New York Cent., etc., R. Co.*, 81 N. Y. App. Div. 132; *Bronson v. New York Cent., etc., R. Co.*, 24 N. Y. App. Div. 262; *Hoes v. Edison Gen. Electric Co.*, 23 N. Y. App. Div. 433, *reversed* 161 N. Y. 35; *Coxhead v. Johnson*, 20 N. Y. App. Div. 605, *affirmed* 162 N. Y. 640; *Sandman v. Baylies*, (N. Y. City Ct. Gen. T.) 21 Misc. (N. Y.) 523, *affirmed* (Supm. Ct. App. T.) 26 Misc. (N. Y.) 692. See also *Boyle v. Degnon-McLean Constr. Co.*, 47 N. Y. App. Div. 314; *Landrigan v. Brooklyn Heights R. Co.*, 23 N. Y. App. Div. 43; *Wolpers v. New York, etc., Electric Light, etc., Co.*, 91 N. Y. App. Div. 424.

*North Carolina.* — The rule is now the other way. See the cases cited *infra*, p. 453, note 4.

*Oregon.* — The rule is now the other way. See *infra*, p. 453, note 4.

**Death by Wrongful Act.** — In *New York* it is held that, while in an action for death by wrongful act less evidence of freedom from contributory negligence is required, yet the burden is upon the plaintiff, and it will not be presumed that the deceased used due care. *Wieland v. Delaware, etc., Canal Co.*, 167 N. Y. 19, 82 Am. St. Rep. 707; *Getman v. Delaware, etc., R. Co.*, 162 N. Y. 21; *Schafer v. New York*, 154 N. Y. 466; *McHugh v. Manhattan R. Co.*, 179 N. Y. 378; *Pinder v. Brooklyn Heights R. Co.*, 173 N. Y. 519; *Fitzgerald v. New York Cent., etc., R. Co.*, 154 N. Y. 263; *Perez v. Sandrowitz*, 180 N. Y. 397; *Goodhines v. Chase*, 100 N. Y. App. Div. 87; *Lowry v. Anderson Co.*, 96 N. Y. App. Div. 465; *O'Reilly v. Brooklyn Heights R. Co.*, 82 N. Y. App. Div. 492; *Scheir v. Quirin*, 77 N. Y. App. Div. 624, *affirmed* 177 N. Y. 568; *Frounfelker v. Delaware, etc., R. Co.*, 74 N. Y. App. Div. 224; *Martin v. Third Ave. R. Co.*, 27 N. Y. App. Div. 52. See also *Henavie v. New York Cent., etc., R. Co.*, 166 N. Y. 280; *Monck v. Brooklyn Heights R. Co.*, 97 N. Y. App. Div. 447; *Browne v. New York Cent., etc., R. Co.*, 87 N. Y. App. Div. 206, *affirmed* 179 N. Y. 582; *McAuliffe v. New York Cent., etc., R. Co.*, 85 N. Y. App. Div. 187; *Caven v. Troy*, 32 N. Y. App. Div. 154; *Harper v. Delaware, etc., R. Co.*, 22 N. Y. App. Div. 273. For the rule in other jurisdictions see *infra*, p. 453, note 4.

**3. The Presumption of Negligence Again — Indiana.** — Since the enactment of Burns's Annot. Stat. Ind. 1901, § 359a, there is no presumption of contributory negligence. *Nichols v. Baltimore, etc., R. Co.*, 33 Ind. App. 236.

**4. Where the Burden Held on Defendant — United States.** — *Northern Pac. R. Co. v. Spike*, 57 C. C. A. 384, 121 Fed. Rep. 44; *The Steam*



Dredge No. 1, 122 Fed. Rep. 679; Hemingway v. Illinois Cent. R. Co., (C. C. A.) 114 Fed. Rep. 843; Mobile, etc., R. Co. v. Coerver, 50 C. C. A. 360, 112 Fed. Rep. 489; Illinois Cent. R. Co. v. Jones, (C. C. A.) 95 Fed. Rep. 370.

*Alabama.*—Mobile, etc., R. Co. v. Bromberg, (Ala. 1904) 37 So. Rep. 395; Southern R. Co. v. Shelton, 136 Ala. 191.

*Arkansas.*—Hot Springs St. R. Co. v. Hil-dreth, 72 Ark. 572.

*California.*—McGraw v. Friend, etc., Lum-ber Co., 120 Cal. 574. See also Quill v. Southern Pac. R. Co., 140 Cal. 268.

*Connecticut.*—Upton v. Windham, 75 Conn. 288, 96 Am. St. Rep. 197; Walsh v. Hayes, 72 Conn. 397. See also Wood v. Danbury, 72 Conn. 69.

*Delaware.*—Punkowski v. New Castle Leather Co., 4 Penn. (Del.) 544; Di Prisco v. Wilmington City R. Co., 4 Penn. (Del.) 527; Winkler v. Philadelphia, etc., R. Co., 4 Penn. (Del.) 80; Boyd v. Blumenthal, 3 Penn. (Del.) 564.

*District of Columbia.*—Atchison v. Wills, 21 App. Cas. (D. C.) 548.

*Indiana.*—By Burns's Annot. Stat. Ind. 1901, § 359a, the burden of proof is put on the de-fendant. Chicago, etc., R. Co. v. La Porte, 33 Ind. App. 691; Nichols v. Baltimore, etc., R. Co., 33 Ind. App. 236; Cleveland, etc., R. Co. v. Miles, 162 Ind. 646; Lafayette v. Fitch, 32 Ind. App. 134; Baltimore, etc., R. Co. v. Ryan, 31 Ind. App. 597; Brower v. Locke, 31 Ind. App. 353; Evansville v. Christy, 29 Ind. App. 44; Southern R. Co. v. Davis, (Ind. App. 1905) 72 N. E. Rep. 1053.

*Kansas.*—Topeka v. Myers, 10 Kan. App. 576, 63 Pac. Rep. 273.

*Louisiana.*—Buechner v. New Orleans, 112 La. 599, 104 Am. St. Rep. 455, *overruling* pre-vious decisions to the contrary.

*Maryland.*—Baltimore, etc., R. Co. v. Stumpf, 97 Md. 78.

*Minnesota.*—Lammers v. Great Northern R. Co., 82 Minn. 120; Tvedt v. Wheeler, 70 Minn. 161.

*Missouri.*—Campbell v. St. Louis, etc., R. Co., 175 Mo. 161; Allen v. St. Louis Transit Co., 183 Mo. 411; Riska v. Union Depot R. Co., 180 Mo. 168; Groom v. Kavanagh, 97 Mo. App. 362.

*Montana.*—Nord v. Boston, etc., Consol. Cop-per, etc., Min. Co., 30 Mont. 48, *overruling* con-trary holding in Ryan v. Gilmer, 2 Mont. 517; Ball v. Gussenhoven, 29 Mont. 321; Cum-mings v. Helena, etc., Smelting, etc., Co., 26 Mont. 434.

*Nebraska.*—Rupp v. Sarpy County, (Neb. 1904) 98 N. W. Rep. 1042; Riley v. Missouri Pac. R. Co., (Neb. 1903) 95 N. W. Rep. 20; New Omaha Thomson-Houston Electric Light Co. v. Dent, (Neb. 1902) 94 N. W. Rep. 810.

*New Hampshire.*—The burden is now held to be on the plaintiff. See the cases cited *supra*, p. 453, note 2.

*New Jersey.*—Quimby v. Filter, 62 N. J. L. 766.

*Ohio.*—Schweinfurth v. Cleveland, etc., R. Co., 60 Ohio St. 215.

*North Carolina.*—Cox v. Norfolk, etc., R. Co., 123 N. Car. 604; Bolden v. Southern R. Co., 123 N. Car. 614; Cox v. Norfolk, etc., R.

Co., 123 N. Car. 604; Pharr v. Atlanta, etc., R. Co., 132 N. Car. 418; Lewis v. Norfolk, etc., R. Co., 132 N. Car. 382; Pharr v. Atlanta, etc., R. Co., 132 N. Car. 418.

*Oregon.*—Dubiver v. City, etc., R. Co., 44 Oregon 239.

*Pennsylvania.*—Coolbroth v. Pennsylvania R. Co., 209 Pa. St. 433; Lewin v. Pauli, 19 Pa. Super. Ct. 447.

*South Carolina.*—Oliver v. Columbia, etc., R. Co., 65 S. Car. 1; Scott v. Seaboard Air Line R. Co., 67 S. Car. 136; Jones v. Charles-ton, etc., R. Co., 61 S. Car. 556; Bodie v. Charleston, etc., R. Co., 61 S. Car. 468.

*Tennessee.*—Burke v. Citizens St. R. Co., 102 Tenn. 409; Illinois Cent. R. Co. v. Davis, 104 Tenn. 442.

*Texas.*—Bonn v. Galveston, etc., R. Co., (Tex. Civ. App. 1904) 82 S. W. Rep. 808; Gillum v. New York, etc., Steamship Co., (Tex. Civ. App. 1903) 76 S. W. Rep. 232; Gulf, etc., R. Co. v. Hall, (Tex. Civ. App. 1904) 80 S. W. Rep. 133; Houston, etc., R. Co. v. Bulger, (Tex. Civ. App. 1904) 80 S. W. Rep. 557; Galveston, etc., R. Co. v. Tirres, (Tex. Civ. App. 1903) 76 S. W. Rep. 806; Gulf, etc., R. Co. v. Matthews, 32 Tex. Civ. App. 137; Chicago, etc., R. Co. v. Long, 32 Tex. Civ. App. 40; Galveston, etc., R. Co. v. Jackson, 31 Tex. Civ. App. 342; Kroeger v. Texas, etc., R. Co., 30 Tex. Civ. App. 87; Chicago, etc., R. Co. v. Buie, 31 Tex. Civ. App. 654; Missouri, etc., R. Co. v. Scarborough, 29 Tex. Civ. App. 194; Central Texas, etc., R. Co. v. Gibson, (Tex. Civ. App. 1904) 83 S. W. Rep. 862; Hawkins v. Missouri, etc., R. Co., (Tex. Civ. App. 1904) 83 S. W. Rep. 52; Texas Portland Cement, etc., Co. v. Lee, (Tex. Civ. App. 1904) 82 S. W. Rep. 306. See also Inter-national, etc., R. Co. v. Pina, (Tex. Civ. App. 1903) 77 S. W. Rep. 979; Gulf, etc., R. Co. v. Condra, (Tex. Civ. App. 1904) 82 S. W. Rep. 528; Gulf, etc., R. Co. v. Elmore, (Tex. Civ. App. 1904) 79 S. W. Rep. 891.

*Utah.*—Holland v. Oregon Short Line R. Co., 26 Utah 209; Corbett v. Oregon Short Line R. Co., 25 Utah 449.

*Vermont.*—See Winifred v. Rutland R. Co., 71 Vt. 48; Boyden v. Fitchburg R. Co., 72 Vt. 89; Benedict v. Union Agricultural Soc., 74 Vt. 91.

*Virginia.*—Southern R. Co. v. Bruce, 97 Va. 92; Winchester v. Carroll, 99 Va. 727.

*Washington.*—Currans v. Seattle, etc., R. Co., 34 Wash. 512; Bier v. Hosford, 35 Wash. 544.

*West Virginia.*—Barker v. Ohio River R. Co., 51 W. Va. 423, 90 Am. St. Rep. 808.

*Wisconsin.*—Mauch v. Hartford, 112 Wis. 40; Schunk v. St. Joseph, 120 Wis. 223; Bain v. Northern Pac. R. Co., 120 Wis. 412; Light-foot v. Winnebago Traction Co., 123 Wis. 479.

If it appears that the plaintiff committed an act dangerous to himself, the burden is upon him to excuse it. Taillon v. Mears, 29 Mont. 161; Hunter v. Montana Cent. R. Co., 22 Mont. 525. See also Chicago, etc., R. Co. v. Featherly, 64 Neb. 323; Lake Shore, etc., R. Co. v. Whidden, 23 Ohio Cir. Ct. 85.

The same rule applies as to acts of a de-ceased person in actions for *wrongful death*. Pennsylvania R. Co. v. Mahoney, 12 Ohio Cir. Dec. 366, 22 Ohio Cir. Ct. 469.

**454. 3. Where Plaintiff's Evidence Shows Contributory Negligence.** — See note 1.

**4. Nature of Proof Required of Plaintiff When Burden on Defendant.** — See note 2.

**455. 5. Summary — The True Doctrine.** — See notes 1, 2.

**Presumption in Case of Death by Wrongful Act.** — In an action to recover damages for death by wrongful act, it will be presumed, in the absence of any evidence on the subject, that the deceased was in the exercise of due care when the accident occurred.

*United States.* — Baltimore, etc., R. Co. v. Landrigan, 191 U. S. 461; Northern Pac. R. Co. v. Spike, 57 C. C. A. 384, 121 Fed. Rep. 44.

*Arkansas.* — St. Louis, etc., R. Co. v. Townsend, 69 Ark. 380.

*Delaware.* — Cox v. Wilmington City R. Co., 4 Penn. (Del.) 162; Reed v. Queen Anne's R. Co., 4 Penn. (Del.) 413.

*Illinois.* — Chicago, etc., R. Co. v. Heerey, 203 Ill. 492; Central Union Bldg. Co. v. Kollander, 212 Ill. 27. See also Davenport, etc., R. Co. v. De Yaeger, 112 Ill. App. 537.

*Indiana.* — Nichols v. Baltimore, etc., R. Co., 33 Ind. App. 236.

*Iowa.* — Ames v. Waterloo, etc., Rapid Transit Co., 120 Iowa 640; Schnee v. Dubuque, 122 Iowa 459; Phinney v. Illinois Cent. R. Co., 122 Iowa 488; Bell v. Clarion, 113 Iowa 126.

*Minnesota.* — Ready v. Peavy Elevator Co., 89 Minn. 154.

*Missouri.* — Rogers v. Samuel Meyerson Printing Co., 103 Mo. App. 683.

*New Hampshire.* — Waldron v. Boston, etc., R. Co., 71 N. H. 362; Tucker v. Boston, etc., R. Co., (N. H. 1905) 59 Atl. Rep. 943. Compare Dame v. Laconia Car Co. Works, 71 N. H. 407.

*North Carolina.* — Cogdell v. Wilmington, etc., R. Co., 132 N. Car. 852; Norton v. North Carolina R. Co., 122 N. Car. 910.

*North Dakota.* — Cameron v. Great Northern R. Co., 8 N. Dak. 124.

*Pennsylvania.* — Haughey v. Pittsburg R. Co., 210 Pa. St. 363; Cromley v. Pennsylvania R. Co., 208 Pa. St. 445; Burns v. Pennsylvania R. Co., 210 Pa. St. 90.

*South Carolina.* — Kirby v. Southern R. Co., 63 S. Car. 494.

*Virginia.* — Southern R. Co. v. Bryant, 95 Va. 212.

**454. 1. How When Plaintiff's Evidence Shows Contributory Negligence** — *United States.* — See Hemingway v. Illinois Cent. R. Co., (C. C. A.) 114 Fed. Rep. 843.

*Arkansas.* — Hot Springs St. R. Co. v. Hildreth, 72 Ark. 572.

*California.* — McGraw v. Friend, etc., Lumber Co., 120 Cal. 574.

*Delaware.* — See Queen Anne's R. Co. v. Reed, (Del. 1905) 59 Atl. Rep. 860.

*Colorado.* — Colorado Midland R. Co. v. Robbins, 30 Colo. 449.

*Georgia.* — See Southern R. Co. v. Barfield, 115 Ga. 724. See also Barber v. East, etc., R. Co., 111 Ga. 838; Abrams v. Waycross, 114 Ga. 712.

*Indiana.* — Elwood v. Addison, 26 Ind. App. 28; Cleveland, etc., R. Co. v. Coffman, 30 Ind. App. 462; Rich v. Evansville, etc., R. Co., 31

Ind. App. 10; Van Winkle v. New York, etc., R. Co., (Ind. App. 1905) 73 N. E. Rep. 157.

*Indian Territory.* — See De Graffenried v. Wallace, 2 Indian Ter. 657.

*Kansas.* — Sweet v. Union Pac. R. Co., 65 Kan. 812; Burns v. Metropolitan St. R. Co., 66 Kan. 188; Missouri, etc., R. Co. v. Merrill, 61 Kan. 682, overruled 65 Kan. 436, 93 Am. St. Rep. 287.

*Minnesota.* — Sours v. Great Northern R. Co., 84 Minn. 230.

*Missouri.* — Allen v. St. Louis Transit Co., 183 Mo. 411; Pim v. St. Louis Transit Co., 108 Mo. App. 713.

*Montana.* — Cummings v. Helena, etc., Smelting, etc., Co., 26 Mont. 434; Ball v. Gussenhoven, 29 Mont. 321; Nord v. Boston, etc., Consol. Copper, etc., Min. Co., 30 Mont. 48.

*Nebraska.* — Chicago, etc., R. Co. v. Featherly, 64 Neb. 323.

*New York.* — Dolfini v. Erie R. Co., 178 N. Y. 1; Canning v. Buffalo, etc., R. Co., 28 N. Y. App. Div. 621; Caspers v. Dry Dock, etc., R. Co., 22 N. Y. App. Div. 156.

*North Carolina.* — Bolden v. Southern R. Co., 123 N. Car. 614.

*Pennsylvania.* — Heiss v. Lancaster, 203 Pa. St. 260.

*South Carolina.* — Elkins v. South Carolina, etc., R. Co., 64 S. Car. 553. See also Kennedy v. Southern R. Co., 59 S. Car. 535.

*South Dakota.* — Bohl v. Dell Rapids, 15 S. Dak. 619, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 454.

*Texas.* — Gulf, etc., R. Co. v. Elmore, (Tex. Civ. App. 1904) 79 S. W. Rep. 891; Texas Portland Cement, etc., Co. v. Lee, (Tex. Civ. App. 1904) 82 S. W. Rep. 306; Missouri, etc., R. Co. v. Jolly, 31 Tex. Civ. App. 512; Gulf, etc., R. Co. v. Denson, (Tex. Civ. App. 1903) 72 S. W. Rep. 70; Gulf, etc., R. Co. v. Hill, 29 Tex. Civ. App. 12; Missouri, etc., R. Co. v. Scarborough, 29 Tex. Civ. App. 194; Louisiana Western Extension R. Co. v. McDonald, (Tex. Civ. App. 1899) 52 S. W. Rep. 649.

*Virginia.* — Southern R. Co. v. Bruce, 97 Va. 92; Winchester v. Carroll, 99 Va. 727.

*Washington.* — Bier v. Hosford, 35 Wash. 544.

*West Virginia.* — Williams v. Belmont Coal, etc., Co., 55 W. Va. 84. See also Barker v. Ohio River R. Co., 51 W. Va. 423, 90 Am. St. Rep. 808.

*Wisconsin.* — Schrunck v. St. Joseph, 120 Wis. 223.

In a recent case in *Nebraska* it was said that while the defendant had the benefit of anything in the plaintiff's evidence, this did not mean that the burden had shifted, as it must remain with the defendant. Rupp v. Sarpy County, (Neb. 1904) 98 N. W. Rep. 1042.

**2. Proof Required of Plaintiff When Burden on the Defendant.** — Pharr v. Atlanta, etc., R. Co., 132 N. Car. 418.

**455. 1. In New York** the doctrine is now

# **456. XXIV. QUESTIONS OF LAW AND FACT — 1. When a Question of Fact for Jury. — See note 1.**

well established that the burden of proof is on the plaintiff. See *supra*, p. 453, note 2.

**455. 2. The Underlying Principle.** — Toledo, etc., R. Co. v. Chisholm, 49 U. S. App. 700, 83 Fed. Rep. 652; Tucker v. State, 89 Md. 471; Schweinfurth v. Cleveland, etc., R. Co., 60 Ohio St. 215; Cox v. Norfolk, etc., R. Co., 123 N. Car. 604; Southern R. Co. v. Bryant, 95 Va. 212.

**456. 1. Contributory Negligence: When for the Jury — United States.** — *Warnerv. Baltimore*, etc., R. Co., 168 U. S. 339; *Chicago G.W.R.Co. v. Roddy*, (C. C. A.) 131 Fed. Rep. 712; *Elliott v. Canadian Pac. R. Co.*, 129 Fed. Rep. 163; *Cary v. Morrison*, (C. C. A.) 129 Fed. Rep. 177; *Smith v. Day*, (C. C. A.) 128 Fed. Rep. 561; *Gilbert v. Burlington*, etc., R. Co., (C. C. A.) 128 Fed. Rep. 529; *Olsen v. Cook Inlet Coal Fields Co.*, 58 C. C. A. 146, 121 Fed. Rep. 726; *Northern Pac. R. Co. v. Tynan*, (C. C. A.) 119 Fed. Rep. 288; *St. Louis, etc., R. Co. v. Leftwich*, 54 C. C. A. 1, 117 Fed. Rep. 127; *Hemingway v. Illinois Cent. R. Co.*, (C. C. A.) 114 Fed. Rep. 843; *Texas, etc., R. Co. v. Carlin*, 49 C. C. A. 605, 111 Fed. Rep. 777, affirmed 189 U. S. 354; *McGhee v. Campbell*, (C. C. A.) 101 Fed. Rep. 936; *Western Gas Constr. Co. v. Danner*, (C. C. A.) 97 Fed. Rep. 888; *Illinois Cent. R. Co. v. Jones*, (C. C. A.) 95 Fed. Rep. 370; *Patton v. Southern R. Co.*, (C. C. A.) 82 Fed. Rep. 979. See also *Mosheuev v. District of Columbia*, 191 U. S. 247.

*Alabama.* — *Southern R. Co. v. Howell*, 135 Ala. 639.

*California.* — *Campbell v. Los Angeles Trac-tion Co.*, 137 Cal. 565.

*Colorado.* — *Walters v. Denver Consol. Elec-tric Light Co.*, 12 Colo. App. 145.

*District of Columbia.* — *U. S. Electric Light-ing Co. v. Sullivan*, 22 App. Cas. (D. C.) 115. See also *Baltimore, etc., R. Co. v. Landrigan*, 20 App. Cas. (D. C.) 135.

*Florida.* — *Florida Cent., etc., R. Co. v. Mooney*, 40 Fla. 17.

*Georgia.* — *Central of Georgia R. Co. v. Mc-Kinney*, 118 Ga. 535; *Chenall v. Palmer Brick Co.*, 117 Ga. 106.

*Illinois.* — *Chicago City R. Co. v. Barker*, 209 Ill. 321; *Chicago Union Traction Co. v. O'Don-nell*, 211 Ill. 349; *Wilson v. Illinois Cent. R. Co.*, 210 Ill. 603; *West Chicago St. R. Co. v. Liderman*, 187 Ill. 463, 79 Am. St. Rep. 226.

*Indiana.* — *Rhodus v. Johnson*, 24 Ind. App. 401; *Chicago, etc., R. Co. v. Stephenson*, 33 Ind. App. 95; *Pennsylvania Co. v. Fertig*, (Ind. App. 1904) 70 N. E. Rep. 834; *Lafayette v. Fitch*, 32 Ind. App. 134; *Malott v. Hawkins*, 159 Ind. 127.

*Iowa.* — *Buehner v. Creamery Package Mfg. Co.*, 124 Iowa 445, 104 Am. St. Rep. 354.

*Kansas.* — *Cummings v. Wichita R., etc., Co.*, 68 Kan. 218; *Metropolitan St. R. Co. v. Arnold*, 67 Kan. 260.

*Kentucky.* — *Louisville, etc., R. Co. v. Lowe*, 80 S. W. Rep. 768, 25 Ky. L. Rep. 2317.

*Maryland.* — *Jenkins v. Baltimore, etc., R. Co.*, 98 Md. 402.

*Massachusetts.* — *Humphreys v. Portsmouth Trust, etc., Co.*, 184 Mass. 422; *Drew v. Farns-*

*worth*, 186 Mass. 365; *McCarthy v. Boston El. R. Co.*, 187 Mass. 493.

*Michigan.* — *Milliken v. St. Clair*, (Mich. 1904) 99 N. W. Rep. 7, 10 Detroit Leg. N. 1030.

*Minnesota.* — *Steindorff v. St. Paul Gaslight Co.*, 92 Minn. 496.

*Missouri.* — *Reed v. St. Louis, etc., R. Co.*, 107 Mo. App. 238; *Young v. Waters-Pierce Oil Co.*, 185 Mo. 634; *Campbell v. St. Louis, etc., R. Co.*, 175 Mo. 161.

*Montana.* — *Nord v. Boston, etc., Consol. Copper, etc., Min. Co.*, 30 Mont. 48; *McCabe v. Montana Cent. R. Co.*, 30 Mont. 323.

*Nebraska.* — *Fremont Brewing Co. v. Schulz*, (Neb. 1904) 101 N. W. Rep. 234.

*Nevada.* — *Taylor v. Nevada-California-Ore-gon R. Co.*, 26 Nev. 415.

*New Hampshire.* — *Davis v. Concord, etc., R. Co.*, 68 N. H. 247; *Folsom v. Concord, etc., R. Co.*, 68 N. H. 454; *Roberts v. Boston, etc., R. Co.*, 69 N. H. 354.

*New Jersey.* — *T. A. Gillespie Co. v. Cum-mings*, 62 N. J. L. 370; *Brooks v. Consoli-dated Gas Co.*, 70 N. J. L. 211; *Spires v. Mid-dlesex, etc., Electric Light, etc., Co.*, 70 N. J. L. 355; *Zolpher v. Camden, etc., R. Co.*, 69 N. J. L. 417; *Wolcott v. New York, etc., R. Co.*, 68 N. J. L. 421.

*New York.* — *Stillings v. Metropolitan St. R. Co.*, 177 N. Y. 344; *Smith v. New York Cent., etc., R. Co.*, 177 N. Y. 224; *Walsh v. Central New York Telephone, etc., Co.*, 176 N. Y. 163; *Kellegher v. Forty-second St., etc., R. Co.*, 171 N. Y. 309; *Canning v. Buffalo, etc., R. Co.*, 168 N. Y. 555; *Bush v. Delaware, etc., R. Co.*, 166 N. Y. 210; *Countryman v. Fonda, etc., R. Co.*, 166 N. Y. 201, 82 Am. St. Rep. 640; *Finn v. Cassidy*, 165 N. Y. 584; *Eastland v. Clarke*, 165 N. Y. 420; *Di Vito v. Crage*, 165 N. Y. 378; *St. John v. New York Cent., etc., R. Co.*, 165 N. Y. 241; *Kettle v. Turl*, 162 N. Y. 255; *Graham v. Joseph H. Bauland Co.*, 97 N. Y. App. Div. 141; *Loughrain v. Autophone Co.*, 77 N. Y. App. Div. 542; *Kenney v. Rhinelander*, 28 N. Y. App. Div. 246, affirmed 163 N. Y. 576; *Hoes v. Edison Gen. Electric Co.*, 161 N. Y. 35; *Rich v. Pelham Hod Elevating Co.*, 23 N. Y. App. Div. 246.

*North Carolina.* — *Graves v. Norfolk, etc., R. Co.*, 136 N. Car. 3.

*North Dakota.* — *Cameron v. Great Northern R. Co.*, 8 N. Dak. 124.

*Oklahoma.* — *Neeley v. Southwestern Cotton Seed Oil Co.*, 13 Okla. 356.

*Oregon.* — *Geldard v. Marshall*, 43 Oregon 438; *Hecker v. Oregon R. Co.*, 40 Oregon 6.

*Pennsylvania.* — *Kroesen v. New Castle Elec-tric St. R. Co.*, 198 Pa. St. 26; *McHugh v. Kerr*, 208 Pa. St. 225; *Cromley v. Pennsylvania R. Co.*, 208 Pa. St. 445; *Coolbroth v. Pennsylvania R. Co.*, 209 Pa. St. 433; *Confer v. Pennsylvania R. Co.*, 209 Pa. St. 425; *Herron v. Pittsburg*, 204 Pa. St. 509, 93 Am. St. Rep. 798.

*Rhode Island.* — *Lebeau v. Dyerville Mfg. Co.*, (R. I. 1904) 57 Atl. Rep. 1092; *Hutchin-son v. Clarke*, 26 R. I. 307; *Crandall v. Stafford Mfg. Co.*, 24 R. I. 555; *McGarrity v. New York, etc., R. Co.*, 25 R. I. 269.



**456. 2. When a Question of Law for Court.** — See note 2.**457. 3. Mixed Questions of Law and Fact.** — See notes 1, 2, 3.

*South Carolina.* — *Bussey v. Charleston, etc.*, R. Co., 52 S. Car. 438.

*Tennessee.* — *Memphis St. R. Co. v. Haynes*, 112 Tenn. 712.

*Texas.* — *San Antonio, etc., R. Co. v. Votaw*, (Tex. Civ. App. 1904) 81 S. W. Rep. 130; *International, etc., R. Co. v. Quinones*, (Tex. Civ. App. 1904) 81 S. W. Rep. 757; *San Antonio, etc., R. Co. v. Jackson*, (Tex. Civ. App. 1905) 85 S. W. Rep. 445; *Missouri, etc., R. Co. v. Hoskins*, (Tex. Civ. App. 1904) 79 S. W. Rep. 369; *Galveston, etc., R. Co. v. Tirres*, (Tex. Civ. App. 1903) 76 S. W. Rep. 806; *San Antonio Traction Co. v. Upson*, 31 Tex. Civ. App. 50.

*Utah.* — *Pence v. California Min. Co.*, 27 Utah 378; *Hone v. Mammoth Min. Co.*, 27 Utah 168; *Holland v. Oregon Short Line R. Co.*, 26 Utah 209; *Copley v. Union Pac. R. Co.*, 26 Utah 361.

*Vermont.* — *Carter v. Central Vermont R. Co.*, 72 Vt. 190.

*Virginia.* — *Standard Oil Co. v. Wakefield*, 102 Va. 824; *Bass v. Norfolk R., etc., Co.*, 100 Va. 1.

*Washington.* — *Jancko v. West Coast Mfg., etc., Co.*, 34 Wash. 556; *Green v. Western American Co.*, 30 Wash. 87; *Burian v. Seattle Electric Co.*, 26 Wash. 606.

*Wisconsin.* — *Bain v. Northern Pac. R. Co.*, 120 Wis. 412; *Turtenwald v. Wisconsin Lakes Ice, etc., Co.*, 121 Wis. 65.

*Canada.* — *Vallee v. Grand Trunk R. Co.*, 1 Ont. L. Rep. 224.

**456. 2. When for the Court**—*United States.* — *Chicago, etc., R. Co. v. Andrews*, (C. C. A.) 130 Fed. Rep. 65; *Riggs v. Standard Oil Co.*, 130 Fed. Rep. 199; *Dunworth v. Grand Trunk Western R. Co.*, (C. C. A.) 127 Fed. Rep. 307; *Mason, etc., R. Co. v. Yockey*, (C. C. A.) 103 Fed. Rep. 265; *Detroit Crude-Oil Co. v. Grable*, (C. C. A.) 94 Fed. Rep. 73; *Clause v. Northern Steamship Co.*, 60 U. S. App. 716, 89 Fed. Rep. 646.

*Alabama.* — *Peters v. Southern R. Co.*, 135 Ala. 533.

*Arkansas.* — See *Hot Springs St. R. Co. v. Hildreth*, 72 Ark. 572.

*California.* — *Green v. Southern California R. Co.*, 138 Cal. 1.

*Delaware.* — *Queen Anne's R. Co. v. Reed*, (Del. 1903) 59 Atl. Rep. 860.

*District of Columbia.* — See *Baltimore, etc., R. Co. v. Landrigan*, 20 App. Cas. (D. C.) 135.

*Illinois.* — *Browne v. Siegel*, 191 Ill. 226; *Wabash R. Co. v. Kamradt*, 109 Ill. App. 203; *McAllister v. Jung*, 112 Ill. App. 138.

*Indiana.* — *Pittsburgh, etc., R. Co. v. Seivers*, 162 Ind. 234; *Indianapolis St. R. Co. v. Slifer*, (Ind. App. 1905) 72 N. E. Rep. 1055. See also *Republic Iron, etc., Co. v. Berkes*, 162 Ind. 517.

*Iowa.* — *Ames v. Waterloo, etc., Rapid Transit Co.*, 120 Iowa 640; *Mabbott v. Illinois Cent. R. Co.*, 116 Iowa 490.

*Maine.* — *Butler v. Rockland, etc., St. R. Co.*, 99 Me. 149, 105 Am. St. Rep. 267; *Robinson v. Rockland, etc., St. R. Co.*, 99 Me. 47; *Blumenthal v. Boston, etc., R. Co.*, 97 Me. 255.

*Maryland.* — *Knight v. Baltimore*, 97 Md. 647, quoting 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 456.

*Massachusetts.* — *Connors v. Merchants Mfg. Co.*, 184 Mass. 466.

*Missouri.* — *Wheat v. St. Louis*, 179 Mo. 572; *Moore v. Lindell R. Co.*, 176 Mo. 528; *Meyers v. Chicago, etc., R. Co.*, 103 Mo. App. 268.

*Nebraska.* — *Chicago, etc., R. Co. v. Lilley*, (Neb. 1903) 93 N. W. Rep. 1012.

*New Hampshire.* — *Waldron v. Boston, etc., R. Co.*, 71 N. H. 362; *Gahagan v. Boston, etc., R. Co.*, 70 N. H. 441.

*New York.* — *Dolfini v. Erie R. Co.*, 178 N. Y. 1; *Campbell v. Wood*, 22 N. Y. App. Div. 599; *Crowley v. Metropolitan St. R. Co.*, 24 N. Y. App. Div. 101.

*North Carolina.* — *Bessent v. Southern R. Co.*, 132 N. Car. 934.

*Ohio.* — *Wabash R. Co. v. Skiles*, 64 Ohio St. 458; *Pennsylvania R. Co. v. Alburn*, 23 Ohio Cir. Ct. 130.

*Oregon.* — *Wolf v. City, etc., R. Co.*, 45 Oregon 446; *Robinson v. Taku Fishing Co.*, 42 Oregon 537. See also *Massey v. Seller*, 45 Oregon 267.

*Pennsylvania.* — *Sickels v. Philadelphia*, 209 Pa. St. 113; *Haughey v. Pittsburg R. Co.*, 210 Pa. St. 363; *Bobb v. Union Traction Co.*, 206 Pa. St. 265.

*Rhode Island.* — *Beerman v. Union R. Co.*, 24 R. I. 275.

*Tennessee.* — *Knoxville Traction Co. v. Carroll*, 113 Tenn. 514.

*Texas.* — *St. Louis Southwestern R. Co. v. Branom*, (Tex. Civ. App. 1903) 73 S. W. Rep. 1064; *Bennett v. St. Louis Southwestern R. Co.*, (Tex. Civ. App. 1904) 82 S. W. Rep. 333; *Merchants, etc., Oil Co. v. Burus*, 96 Tex. 573; *Smith v. Houston, etc., R. Co.*, 17 Tex. Civ. App. 502.

*Utah.* — *Burgess v. Salt Lake City R. Co.*, 17 Utah 406.

*West Virginia.* — *Ritz v. Wheeling*, 45 W. Va. 262.

*Wisconsin.* — *Ruscher v. Stanley*, 120 Wis. 380.

**457. 1. A Mixed Question of Law and Fact**—*United States.* — *Patton v. Southern R. Co.*, (C. C. A.) 82 Fed. Rep. 979.

*Arkansas.* — *Hot Springs St. R. Co. v. Hildreth*, 72 Ark. 572.

*Colorado.* — *Walters v. Denver Consol. Electric Light Co.*, 12 Colo. App. 145.

*Indiana.* — See *Barley v. Southern Indiana R. Co.*, 30 Ind. App. 406; *Malott v. Hawkins*, 159 Ind. 127.

*New York.* — *Coxhead v. Johnson*, 20 N. Y. App. Div. 605, affirmed 162 N. Y. 640.

*North Carolina.* — *Graves v. Norfolk, etc., R. Co.*, 136 N. Car. 3.

*Virginia.* — *Winchester v. Carroll*, 99 Va. 727.

*West Virginia.* — *Bias v. Chesapeake, etc., R. Co.*, 46 W. Va. 349.

**2. What This Means**—*United States.* — *Erie R. Co. v. Kane*, 55 C. C. A. 129, 118 Fed. Rep. 223. See also *Langbein v. Swift*, 121 Fed. Rep. 416, affirmed (C. C. A.) 127 Fed. Rep. 111.

- 457. CONTROL.** — See note 5.  
**458. CONTROVERSY.** — See note 1.  
**459. CONVENIENT.** — See note 1.  
**460. [CONVENTION.** — See note 1.]

*Arkansas.* — Hot Springs St. R. Co. v. Hildreth, 72 Ark. 572.

*Delaware.* — Neal v. Wilmington, etc., Electric R. Co., 3 Penn. (Del.) 467.

*Illinois.* — Chicago, etc., R. Co. v. Harrington, 192 Ill. 9.

*New Hampshire.* — See Ela v. Postal Tel. Cable Co., 71 N. H. 1.

*North Carolina.* — Graves v. Norfolk, etc., R. Co., 136 N. Car. 3.

*Wisconsin.* — Deisenrieter v. Kraus-Merkel Malting Co., 97 Wis. 279.

**457. 3. Duty of Jury.** — Baltimore Consol. R. Co. v. Rifcowitz, 89 Md. 338; Potter v. Natural Gas Co., 183 Pa. St. 575; Bowen v. Southern R. Co., 58 S. Car. 222.

5. Byrne v. Drain, 127 Cal. 663; Young v. Fountain Inn Graded School, 64 S. Car. 131.

"The Words 'Control and Direction' in the amendment of 1889 to the local law have, I think, no broader significance with reference to the duties and powers of the commissioners of highways of the two towns in question than have the words 'care and superintendence' in section 4 of the Highway Law with reference to the duties and powers of commissioners of highways in the towns of the state." *Palatine v. Canajoharie Water Supply Co.*, 90 N. Y. App. Div. 551.

**Synonymous with Superintendence.** — The word *control* has no legal or technical meaning distinct from that given in its popular acceptance. Webster employs the word "superintendence" as expressive of the meaning of the word *control*, and gives the word *control* as one of the synonyms of the word "superintendence." *Ure v. Ure*, 185 Ill. 216.

A "Controller" is the easily recognized cylinder-shaped electric mechanism of an electric car at the left hand of the motorman, which is operated by a handle which is constantly being swung to and fro, and is the visible means by which the speed of the car is retarded or is promoted. The *controller*, as a whole, is a device for regulating or controlling

the current delivered to an electric motor, and thereby regulating the speed of the car. *Electric Car Co. v. Nassau Electric R. Co.*, (C. C. A.) 91 Fed. Rep. 142.

**458. 1.** See *State v. Guinotte*, 156 Mo. 513; *Matthews v. Noble*, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 674.

**Removal of Causes.** — *Snow v. Smith*, 88 Fed. Rep. 657.

**Suit and Controversy Synonymous.** — *Nichols v. Bingham*, 70 Vt. 320.

**459. 1. Nuisance — Convenient Place.** — *Susquehanna Fertilizer Co. v. Spangler*, 86 Md. 571.

**Publication in Newspaper.** — In *Berkson v. Anderson*, 115 Iowa 677, the court said: "The word *convenient* has many definitions, but as used in this statute it seems to us that but one thought in relation thereto could have been in the minds of the makers of the law. The requirement that the notice be published in some newspaper as '*convenient*' as practicable to the principal place of business' of the corporation means that it shall be published in the nearest or 'most handy' paper suitable therefor."

**Conveniently Used as a Ballot Paper.** — "The expression in section 109, 'that it cannot be *conveniently* used as a ballot paper,' is one which certainly requires consideration. The side note, leaving out the word *conveniently*, is utterly inapt and misleading. *Convenient* (*conveniens*, a coming together, a meeting) means fit, suitable, proper, well adapted, commodious, easily used, serviceable; to which must be supplied in each case the preposition by or for, some person or thing or purpose. \* \* \* *Conveniently* in the section means '*conveniently* for the voter and for his wish, purpose, and intention in voting.' *Hastings v. Summerfeldt*, 30 Ont. 577.

**460. 1. Convention.** — "A *convention* or primary meeting within the meaning of this chapter is an organized assemblage of electors or delegates representing a political party or principle." *State v. Hogan*, 24 Mont. 392.

# CONVERSION AND RECONVERSION.

BY BRISCOE B. CLARK.

**464. I. CONVERSION — DEFINITION AND ORIGIN OF DOCTRINE — 1. Definition.** — See note 1.

Double Conversion. — See note 2.

**2. Origin of the Doctrine — a. IN GENERAL.** — See note 3.

**465.** See note 1.

*b. EQUITABLE DOCTRINE ONLY.* — See note 2.

**II. CONVERSION — HOW EFFECTED — 1. By Act of Parties — a. BY WILL — (1) In General.** — See note 3.

(2) *Sufficiency of Direction for Conversion* — **Intention of Testator Controlling.** — See notes 4, 5.

**464. 1. Definition.** — *In re Journey*, 7 Del. Ch. 1; *Greenwood v. Greenwood*, 178 Ill. 387; *Duckworth v. Jordan*, 138 N. Car. 520; *Clapp v. Tower*, 11 N. Dak. 556, *citing* 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 464.

**2. Double Conversion.** — *In re Dunphy*, (Cal. 1905) 81 Pac. Rep. 315.

**3. Origin of Doctrine.** — *Clarke's Appeal*, 70 Conn. 195; *Wayne v. Fouts*, 108 Tenn. 145; *Severns's Estate*, 211 Pa. St. 65.

**465. 1. Early Recognition of Doctrine.** — *Sweeney v. Horn*, 190 Pa. St. 237.

**2. Doctrine Recognized in Equity Only.** — *Connell v. Crosby*, 210 Ill. 380 (not applicable in proceedings to enforce succession tax), *citing* 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 465; *Boland v. Tiernay*, 118 Iowa 59; *Condit v. Bigalow*, 64 N. J. Eq. 504; *Clapp v. Tower*, 11 N. Dak. 556; *Van Zandt v. Garretson*, 21 R. I. 418; *Wayne v. Fouts*, 108 Tenn. 145; *Sulphur Mines Co. v. Thompson*, 93 Va. 293.

**3. Land into Money** — *United States*. — *Handley v. Palmer*, 103 Fed. Rep. 39, 43 C. C. A. 100. *California*. — *Matter of Pforr*, 144 Cal. 121.

*Connecticut*. — *Duffield v. Pike*, 71 Conn. 521; *Ritch v. Talbot*, 74 Conn. 137.

*Illinois*. — *Nevitt v. Woodburn*, 175 Ill. 376; *Lash v. Lash*, 209 Ill. 595.

*Indiana*. — *Nelson v. Nelson*, (Ind. App. 1904) 72 N. E. Rep. 482.

*Iowa*. — *Boland v. Tiernay*, 118 Iowa 59.

*Kentucky*. — *Duff v. Duff*, (Ky. 1900) 54 S. W. Rep. 711.

*Massachusetts*. — *Thissell v. Schillinger*, 186 Mass. 180.

*New York*. — *Mutual L. Ins. Co. v. Bailey*, 19 N. Y. App. Div. 204; *Baker v. Baker*, 18 N. Y. App. Div. 189, *appeal dismissed* 157 N. Y. 671; *Matter of Hosford*, 27 N. Y. App. Div. 427; *Kessler v. Friede*, (Supm. Ct. Spec. T.) 29 Misc. (N. Y.) 187; *Trask v. Sturges*, (Supm. Ct. Spec. T.) 31 Misc. (N. Y.) 195, *affirmed* 56 N. Y. App. Div. 625; *Schlereth v. Schlereth*, 73 N. Y. App. Div. 283, *affirmed* 173 N. Y. 444; *Russell v. Hilton*, 80 N. Y. App. Div. 178, *modifying* (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 642, 175 N. Y. 525; *Scott v. Douglas*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 555.

*North Carolina*. — *Baptist Female University*

*v. Borden*, 132 N. Car. 476; *Lee v. Baird*, 132 N. Car. 755.

*Ohio*. — *In re Davis*, 12 Ohio Cir. Dec. 29; *Martin v. Spurrier*, 23 Ohio Cir. Ct. 110; *Hutchings v. Davis*, 68 Ohio St. 160.

*Pennsylvania*. — *In re Klotz*, 190 Pa. St. 152; *Re Horne*, 28 Pittsb. Leg. J. N. S. (Pa.) 443; *Peterson's Estate*, 195 Pa. St. 78; *Githens's Estate*, 9 Pa. Dist. 465, 16 Montg. Co. Rep. (Pa.) 196; *Yerkes v. Yerkes*, 15 Pa. Super. Ct. 442, *reversed* 200 Pa. St. 419; *Rauch's Estate*, 21 Pa. Super. Ct. 60; *Weeter's Estate*, 21 Pa. Super. Ct. 241.

*Rhode Island*. — *Holder's Petition*, 21 R. I. 48; *Van Zandt v. Garretson*, 21 R. I. 352, *citing* 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 465.

*South Carolina*. — *Walker v. Killian*, 62 S. Car. 482.

*Tennessee*. — *Hardin v. Young*, (Tenn. Ch. 1896) 41 S. W. Rep. 1080; *Wayne v. Fouts*, 108 Tenn. 145; *McElroy v. McElroy*, 110 Tenn. 137.

*West Virginia*. — *Brown v. Miller*, 45 W. Va. 211; *Lynch v. Spicer*, 53 W. Va. 426.

*Wisconsin*. — *McWilliams v. Gough*, 116 Wis. 576; *Harrington v. Pier*, 105 Wis. 485, 76 Am. St. Rep. 924.

**Money into Land.** — *In re Dunphy*, (Cal. 1905) 81 Pac. Rep. 315; *In re Journey*, 7 Del. Ch. 1.

**Exercise of Power of Appointment.** — *In re Redgate*, (1903) 1 Ch. 356.

**Conflict of Laws.** — *Holcomb v. Wright*, 5 App. Cas. (D. C.) 76.

The question whether a will works a conversion of real estate is to be determined by the laws of the state in which the realty is situated. *Clarke v. Clarke*, 178 U. S. 186, *affirming* 70 Conn. 483.

**4. Intention of Testator Controlling.** — *Chick v. Ives*, (Neb. 1902) 90 N. W. Rep. 751; *Merritt v. Merritt*, 161 N. Y. 634, *affirming* 32 N. Y. App. Div. 442; *Kelly v. Hoey*, 35 N. Y. App. Div. 273; *McGowan v. Tift*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 603; *Severns's Estate*, 211 Pa. St. 65; *Becker v. Chester*, 115 Wis. 90.

The whole theory of conversion rests upon the intention of the testator, and can only be



**466.** How Evidenced. — See notes 1, 2.

**467.** (3) *Discretionary Power of Sale*. — See note 1.

Actual Sale Under Power of Sale. — See note 2.

**468.** (4) *Discretion as to Time or Manner of Sale* — (a) Discretion Given Executor or Trustee. — See note 1.

invoked to aid, never to thwart, such intention. *Clements v. Babcock*, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 90.

**465.** 5. *Intention Must Be Clearly Evidenced*. — *Clarke's Appeal*, 70 Conn. 195; *Poulter v. Poulter*, 193 Ill. 641, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 766; *Koezly v. Koezly*, (Supm. Ct. Spec. T.) 31 Misc. (N. Y.) 397; *Thompson v. Hart*, 58 N. Y. App. Div. 439, reversing (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 552; *Matter of Tatum*, 169 N. Y. 514, affirming 61 N. Y. App. Div. 513; *Reid v. Clendenning*, 193 Pa. St. 406; *Wayne v. Fouts*, 108 Tenn. 145.

**466.** 1. *Necessitated by Provisions of Will* — *Illinois*. — *Greenwood v. Greenwood*, 178 Ill. 387.

*Nebraska*. — *Chick v. Ives*, (Neb. 1902) 90 N. W. Rep. 751.

*New York*. — *Meehan v. Brennan*, 16 N. Y. App. Div. 395; *Allen v. Stevens*, (Supm. Ct. Spec. T.) 22 Misc. (N. Y.) 158, reversed 33 N. Y. App. Div. 485; *Kelly v. Hoey*, 35 N. Y. App. Div. 273; *Russell v. Hilton*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 642, affirmed 175 N. Y. 525; *Mendel v. Levis*, (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 271.

*Pennsylvania*. — *Reid v. Clendenning*, 193 Pa. St. 406; *Mustin's Estate*, 194 Pa. St. 437, 75 Am. St. Rep. 702; *Dodd's Estate*, 13 Montg. Co. Rep. (Pa.) 78; *Keim's Estate*, 10 Pa. Dist. 252, 201 Pa. St. 609; *Severns's Estate*, 211 Pa. St. 65. Compare *Carey's Estate*, 9 Kulp (Pa.) 336.

*Wisconsin*. — *McHugh v. McCole*, 97 Wis. 166, 65 Am. St. Rep. 106; *Hood v. Dorer*, 107 Wis. 149; *Becker v. Chester*, 115 Wis. 90.

*Sufficiency of Direction to Sell*. — *Rhodes v. Caswell*, 41 N. Y. App. Div. 229 ("pay over"). Compare *Clarke's Appeal*, 70 Conn. 195, disapproving *Clarke v. Clarke*, 46 S. Car. 230, 57 Am. St. Rep. 675, in which same will as affecting a conversion was invalid. Compare also *Clarke v. Clarke*, 178 U. S. 186, affirming 70 Conn. 483.

*Will for Benefit of Alien*. — In *State v. Thresher*, 77 Conn. 70, however, a will merely directing the trust property consisting of realty and personalty to be paid over to an alien after the death of another was held not to work a conversion.

*A Direction for the Sale of Land and the Disposition of the Proceeds* works a conversion. *Duckworth v. Jordan*, 138 N. Car. 520.

**2. By Blending Realty and Personalty**. — *Matter of Russell*, 59 N. Y. App. Div. 242, affirmed 168 N. Y. 169; *Wright v. Mercein*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 414, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 466; *Hutchings v. Davis*, 68 Ohio St. 160; *Mustin's Estate*, 8 Pa. Dist. 264, affirmed 194 Pa. St. 438; *Keim's Estate*, 10 Pa. Dist. 252, affirmed 201 Pa. St. 609; *Harrington v. Pier*, 105 Wis. 485, 76 Am. St. Rep. 924.

*Not to Work Conversion*. — *Clarke's Appeal*, 70 Conn. 195; *Poulter v. Poulter*, 193 Ill. 641;

*Matter of Tatum*, 169 N. Y. 514, affirming 61 N. Y. App. Div. 513; *Reid v. Clendenning*, 193 Pa. St. 406; *Sauerbier's Estate*, 202 Pa. St. 187; *Cooper's Estate*, 206 Pa. St. 628, 98 Am. St. Rep. 799.

**467.** 1. *Mere Power or Authority to Sell* — *England*. — *In re Pitcairn*, (1896) 2 Ch. 199; *In re Wintle*, (1896) 2 Ch. 711.

*Connecticut*. — *Clarke's Appeal*, 70 Conn. 195. *New Jersey*. — *Condit v. Bigalow*, 64 N. J. Eq. 504.

*New York*. — *Matthews v. Studley*, 161 N. Y. 633, affirming 17 N. Y. App. Div. 303; *Matter of Hardenbrook*, (Surrogate Ct.) 23 Misc. (N. Y.) 538; *Koezly v. Koezly*, (Supm. Ct. Spec. T.) 31 Misc. (N. Y.) 397; *Thompson v. Hart*, 58 N. Y. App. Div. 439, reversing (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 552, affirmed 169 N. Y. 571; *Matter of Tatum*, 61 N. Y. App. Div. 513, affirming (Surrogate Ct.) 34 Misc. (N. Y.) 25, affirmed 169 N. Y. 514; *Carberry v. Ennis*, 72 N. Y. App. Div. 489; *Matter of Coolidge*, 177 N. Y. 541, affirming 85 N. Y. App. Div. 295.

*Pennsylvania*. — *Carey's Estate*, 9 Kulp (Pa.) 336; *Taylor v. Haskell*, 178 Pa. St. 106; *Reid v. Clendenning*, 193 Pa. St. 406; *Keim's Estate*, 201 Pa. St. 609; *Sauerbier's Estate*, 202 Pa. St. 187; *Schwab's Estate*, 22 Pa. Co. Ct. 218; *Cooper's Estate*, 206 Pa. St. 628, 98 Am. St. Rep. 799; *Severns's Estate*, 211 Pa. St. 65. *Tennessee*. — *Wayne v. Fouts*, 108 Tenn. 145; *Bedford v. Bedford*, 110 Tenn. 204.

*Virginia*. — *Meade v. Campbell*, (Va. 1899) 34 S. E. Rep. 30, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 467.

*Wisconsin*. — *Becker v. Chester*, 115 Wis. 90.

**The Mere Direction from a Principal to His Agent to Invest money in the hands of the agent in a particular class of property does not work a conversion of the moneys into such property, as there cannot be an equitable conversion which invests no enforceable right in any one to have the conversion actually made.** *Bromberg v. Bates*, 112 Ala. 363.

**A Will Expressing that It Is the Desire of the Testator that his realty be sold and the proceeds distributed does not give merely a discretionary power of sale, but works a conversion.** *Matter of Pffor*, 144 Cal. 121.

**2. Sale under Power of Sale**. — *Wyeth v. Sorchan*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 173.

Where real estate is devised to an infant with discretionary power of sale in the executor, an actual sale works a conversion of the property into personalty, so that upon the death of the infant the proceeds pass to his executor or administrator and not to the infant's heirs. *Matter of McKay*, 75 N. Y. App. Div. 78, overruling (Surrogate Ct.) 37 Misc. (N. Y.) 590.

**468.** 1. *Discretion as to Time or Manner of Sale*. — *Bates v. Spooner*, 75 Conn. 501; *Trask v. Sturges*, (Supm. Ct. Spec. T.) 31 Misc. (N. Y.) 195, 56 N. Y. App. Div. 625; *Matter of Russell*, 59 N. Y. App. Div. 242, affirmed 168

- 468.** (5) *Sale at Future Time.* — See note 3.  
 (6) *Sale Dependent upon Request or Consent.* — See note 4.  
 (7) *Option of Purchase by or Conveyance to Beneficiary.* — See note 5.

- 469.** (8) *Conditional Direction for Sale.* — See note 2.

- (11) *Time of Conversion* — (a) *In General.* — See note 5.

- 470.** But Where the Sale Is Not Obligatory. — See note 1.

- (b) *Sale at Future Date.* — See notes 2, 3.

- (c) *Sale Dependent on Contingency.* — See note 4.

*b. BY CONTRACT* — (1) *Marriage Settlements* — Investment Dependent on Request. — See note 6.

- 471.** (2) *Contracts of Sale.* — See note 1.

- 472.** (4) *Conveyances to Trustees.* — See note 1.

N. Y. 169; *Russell v. Hilton*, 80 N. Y. App. Div. 178, *modifying* (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 642; *Martin v. Spurrier*, 23 Ohio Cir. Ct. 110; *Severns's Estate*, 211 Pa. St. 65; *Jones v. Probate Ct.*, 25 R. I. 361.

**468. 3. Sale after Death of Life Tenant.** — *Handley v. Palmer*, 91 Fed. Rep. 948, 103 Fed. Rep. 39, 43 C. C. A. 100; *Lash v. Lash*, 209 Ill. 595, *citing* 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 468; *Mutual L. Ins. Co. v. Bailey*, 19 N. Y. App. Div. 204; *Weeter's Estate*, 21 Pa. Super. Ct. 241; *Hardin v. Young*, (Tenn. Ch. 1896) 41 S. W. Rep. 1080; *McWilliams v. Gough*, 116 Wis. 576.

**4. Sale Dependent on Request or Consent.** — *McGwire v. McGwire*, (1900) 1 Ir. R. 200; *In re Wintle*, (1896) 2 Ch. 711; *Meade v. Campbell*, (Va. 1899) 34 S. W. Rep. 30, *citing* 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 468.

**5. Option of Purchase by or Conveyance to Beneficiary.** — *Weeter's Estate*, 21 Pa. Super. Ct. 241.

The fact that the beneficiaries are expressly given the power to take the land instead of the proceeds, will not prevent the direction to the executors to sell from working a conversion. *Robinson v. Botkin*, 181 Ill. 182.

**469. 2. Conditional Direction for Sale.** — *Matthews v. Studley*, 17 N. Y. App. Div. 303, *affirmed* 161 N. Y. 633; *Reid v. Clendenning*, 193 Pa. St. 406; *Sauerbier's Estate*, 202 Pa. St. 187; *Cooper's Estate*, 206 Pa. St. 628, 98 Am. St. Rep. 799; *Bedford v. Bedford*, 110 Tenn. 204; *Meade v. Campbell*, (Va. 1899) 34 S. E. Rep. 30.

**5. Time of Conversion — Death of Testator — Connecticut.** — *Bates v. Spooner*, 75 Conn. 501. *Illinois.* — *Primm v. Primm*, 111 Ill. App. 244. *Indiana.* — *Nelson v. Nelson*, (Ind. App. 1904) 72 N. E. Rep. 482.

*New York.* — *Meehan v. Brennan*, 16 N. Y. App. Div. 395; *Mutual L. Ins. Co. v. Bailey*, 19 N. Y. App. Div. 204; *Trask v. Sturges*, (Supm. Ct. Spec. T.) 31 Misc. (N. Y.) 195, *reversed* 170 N. Y. 482 (sale directed when trustees deem best); *Trask v. Sturges*, 56 N. Y. App. Div. 625, *affirming* (Supm. Ct. Spec. T.) 31 Misc. (N. Y.) 195; *Matter of Russell*, 59 N. Y. App. Div. 242, *affirmed* 168 N. Y. 169; *Matter of Hammond*, 74 N. Y. App. Div. 547, *citing* 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 469; *Russell v. Hilton*, 80 N. Y. App. Div. 178, *modifying* (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 642.

*Pennsylvania.* — *In re Klotz*, 190 Pa. St. 152; *Mustin's Estate*, 194 Pa. St. 437, 75 Am. St. Rep. 702; *Howell v. Mellon*, 189 Pa. St. 169.

*Rhode Island.* — *Holder's Petition*, 21 R. I. 48; *Van Zandt v. Garretson*, 21 R. I. 352.

*Tennessee.* — *Wayne v. Fouts*, 108 Tenn. 145. *West Virginia.* — *Lynch v. Spicer*, 53 W. Va. 426.

*Wisconsin.* — *Harrington v. Pier*, 105 Wis. 485, 76 Am. St. Rep. 924; *Becker v. Chester*, 115 Wis. 90; *McWilliams v. Gough*, 116 Wis. 576.

**470. 1. Mutual L. Ins. Co. v. Bailey**, 19 N. Y. App. Div. 204; *Cooper's Estate*, 206 Pa. St. 628, 98 Am. St. Rep. 799.

**2. Sale at Future Date — Conversion After Expiration of Time Specified.** — *Mutual L. Ins. Co. v. Bailey*, 19 N. Y. App. Div. 204; *Ukiak Bank v. Rice*, 143 Cal. 265, 101 Am. St. Rep. 118 (rule not changed by Cal. Civ. Code, §1338, providing that where a will directs the conversion of realty into money such property and its proceeds must be deemed personalty from testator's death); *Matter of Hammond*, 74 N. Y. App. Div. 547; *Matter of Schabacker*, (Surrogate Ct.) 46 Misc. (N. Y.) 219.

**3.** The conversion is as of the date of the testator's death though the direction is to sell at a certain time after the testator's death. *Handley v. Palmer*, (C. C. A.) 103 Fed. Rep. 39.

**Sale After Death of Life Tenant.** — *Lash v. Lash*, 209 Ill. 595; *Duckworth v. Jordan*, 138 N. Car. 520.

**4. Sale Dependent on Contingency.** — *Mutual L. Ins. Co. v. Bailey*, 19 N. Y. App. Div. 204.

**6. Conversion Dependent on Request.** — *McGwire v. McGwire*, (1900) 1 Ir. R. 200.

**471. 1. Contract for Sale of Land.** — *Baldwin v. Smith*, (1900) 1 Ch. 588, 69 L. J. Ch. 336, 82 L. T. N. S. 616, 48 W. R. 346; *Darrow v. Calkins*, 154 N. Y. 503, *affirming* 6 N. Y. App. Div. 28; *Clapp v. Tower*, 11 N. Dak. 556, *citing* 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 471, note 1.

**The Sale of Limestone in Place**, payment to be made as quarried by way of royalties, works a conversion into personalty. *Gardner's Estate*, 19, Pa. St. 524.

**Affirmance by Master in Lunacy of Lunatic's Voidable Contract** to purchase land. *Baldwyn v. Smith*, (1900) 1 Ch. 588.

**A Sale of Coal in Place** though payments are to be made as the coal is mined will work a conversion, so that the payments to be made are to be considered personalty upon the death of the vendor. *Door v. Reynolds*, 26 Pa. Super. Ct. 139.

**472. 1. Conveyances in Trust.** — *C. H. Brown Banking Co. v. Stockton*, 107 Ky. 492; *Sweeney v. Horn*, 190 Pa. St. 237.



**472.** (5) *Partnership Property* — **United States.** — See note 3.

**473.** 2. *By Act of Law* — **Order of Court** — *b.* **EXTENT OF CONVERSION.** — See note 4.

*c.* **TIME OF CONVERSION.** — See note 5.

**474.** See note 1.

*d.* **PARTITION OF PROPERTY OF PERSONS NON SUI JURIS.** — See note 2.

*e.* **INFANTS', LUNATICS', AND TRUST ESTATES.** — See note 3.

**475.** 3. *By Statutory Authority* — **Eminent Domain.** — See note 1.

**III. EFFECTS OF CONVERSION** — 1. *In General* — **Land into Money.** — See note 3.

**472.** 3. **Extent of Conversion.** — *Darrow v. Calkins*, 154 N. Y. 503, *affirming* 6 N. Y. App. Div. 28.

**Dower in Partnership Lands.** — *Oliver v. Oliver*, 105 Ky. 614.

**473.** 4. **Extent of Conversion.** — *Smith v. Smith*, 63 Ill. App. 534, *affirmed* 174 Ill. 52. See also *Canfield v. Canfield*, 62 N. J. Eq. 578.

Where in a partition sale of land, sale is made under an order of court in order to make a partition, the proceeds of the sale have the character of personality as regards adult cotenants, and do not retain their nature of realty. *Findley v. Findley*, 42 W. Va. 372.

Where Real Estate Is Sold in Partition Proceedings for Distribution Amongst the Heirs of a Non-resident Decedent, the proceeds do not acquire the character of personality so as to require their distribution according to the laws of the domicile of the decedent, but such proceeds retain the character of realty. *Smith v. Smith*, 174 Ill. 52, *affirming* 63 Ill. App. 534.

Where Land Is Sold by an Executor or Administrator under Order of Court to Pay Debts of the decedent, the surplus of the proceeds retains the character of realty (Mass. Pub. Stat., c. 142, § 49). *Adams v. Jones*, 176 Mass. 185, 79 Am. St. Rep. 304.

**Mortgage Foreclosure.** — Surplus moneys arising from a sale of a decedent's real estate under the foreclosure of a mortgage thereon are regarded as realty which go to the heirs or devisees of the decedent and not to his executor or administrator. *Matter of Knapp*, (Surrogate Ct.) 25 Misc. (N. Y.) 133.

5. **After Sale and Distribution** by the court, the proceeds are regarded as personality. *In re Morgan*, (1900) 2 Ch. 474.

**474.** 1. **From Compliance by Purchaser with Terms of Sale.** — *Schmid's Estate*, 182 Pa. St. 267; *Wayne v. Fouts*, 108 Tenn. 145.

2. **Married Women.** — *In re Morgan*, (1900) 2 Ch. 474, 69 L. J. Ch. 735, 48 W. R. 670; *Merriam v. Dunham*, 62 N. J. Eq. 567; *Major v. Hunt*, 64 S. Car. 97; *Findley v. Findley*, 42 W. Va. 372.

**Infants.** — *In re Norton*, (1900) 1 Ch. 101, 69 L. J. Ch. 31, 48 W. R. 140 (the fact that the sale is made at the request of the infant is immaterial). Compare *Ray's Estate*, 24 Pa. Co. Ct. 366, 31 Pittsb. Leg. J. N. S. (Pa.) 244.

**Duration of Conversion.** — *In re Morgan*, (1900) 2 Ch. 474; *Findley v. Findley*, 42 W. Va. 372.

3. **Infants.** — Compare *Baldwin v. Smith*, (1900) 1 Ch. 588.

Where land of an infant is sold by order of court, the proceeds retain their character of

realty in so far as regards the power of the infant to dispose of the same by will. *Major v. Hunt*, 64 S. Car. 97.

**Lunatics.** — *Matter of Reeve*, (Surrogate Ct.) 38 Misc. (N. Y.) 409; *Findley v. Findley*, 42 W. Va. 372 (proceeds of lunatic's land sold under W. Va. Code 1891, c. 83, remain realty).

**Trust Estate.** — *Magnolia Park Co. v. Tinsley*, 96 Tex. 364.

**Actual Sale of Land by Trustee for Purposes of the Trust** held not to affect the original nature of the property. *Rhode Island Hospital Trust Co. v. Harris*, 20 R. I. 408.

**Land Purchased with Personality.** — *In re Bolton*, (Supm. Ct. App. Div.) 56 N. Y. Supp. 1105, *affirming* (Surrogate Ct.) 20 Misc. (N. Y.) 532, *affirmed* 159 N. Y. 129 (real estate purchased by guardian regarded as personality).

Where an heir of a decedent owed the decedent's estate and, in order to save the indebtedness, real estate of the heir was purchased at judicial sale, such real estate as between the personal representatives and heir of the decedent should be regarded as personality. *Rogers v. Rogers*, 101 Tenn. 428. See also *Gumaer v. Barber*, 2 Lack. Leg. N. (Pa.) 237.

Where the trustee under a deed of trust purchases at trust sale the land, in order to save the indebtedness secured by the trust deed, the land will be regarded in equity as personality. *Sulphur Mines Co. v. Thompson*, 93 Va. 293.

**The Sale of Land under Power of Sale.** — *Matter of McKay*, 75 N. Y. App. Div. 78, *overruling* (Surrogate Ct.) 37 Misc. (N. Y.) 590.

**Timber Cut on Settled Lands.** — Where timber growing on settled lands is cut and sold by order of court the proceeds become personality as between the heir and the personal representative. *Hartley v. Pendarves*, (1901) 2 Ch. 498.

**Power of Master in Lunacy.** — So also the master in lunacy has power to change the character of funds of the lunatic's estate. *Baldwyn v. Smith*, (1900) 1 Ch. 588.

**475.** 1. **Conversion under Power of Eminent Domain.** — *In re Stark*, 9 Kulp (Pa.) 120.

3. **Effect of Conversion on Descent of Property.** — *In re Norton*, (1900) 1 Ch. 101, 69 L. J. Ch. 31, 81 L. T. N. S. 724, 48 W. R. 140; *In re Journey*, 7 Del. Ch. 1; *Nelson v. Nelson*, (Ind. App. 1904) 72 N. E. Rep. 482; *Clapp v. Tower*, 11 N. Dak. 556; *Hardin v. Young*, (Tenn. Ch. 1896) 41 S. W. Rep. 1080; *Wayne v. Fouts*, 108 Tenn. 145.

**Extent of Conversion.** — *Smith v. Smith*, 174 Ill. 52, *affirming* 63 Ill. App. 534; *James v. Hanks*, 202 Ill. 114; *Wadsworth v. Murray*, 161



**476.** See note 2.

2. Liability to Judgment Lien or Sale on Execution. — See note 5.

3. Dower and Curtesy. — See note 11.

4. Validity of the Provisions of the Will. — See note 12.

**477.** 5. Legacy Tax. — See note 1.

**IV. RESULTING TRUST ON FAILURE OF GIFT — 1. In General —** See note 5.

**479.** 4. Residuary Legacy — Effect. — See note 3.

5. Conversion Out and Out — Effect. — See note 4.

6. Character of Trust Fund. — See note 7.

**480.** **V. RECONVERSION — 1. Definition and Reasons of Doctrine. —** See notes 3, 4, 5.

N. Y. 274, 76 Am. St. Rep. 265, *affirming* 29 N. Y. App. Div. 191; Matter of Weinstein, (Surrogate Ct.) 43 Misc. (N. Y.) 577; Jones v. Kelly, 170 N. Y. 401, *affirming* 63 N. Y. App. Div. 614; Rudy's Estate, 6 Pa. Dist. 246; Morris v. Knight, 14 Pa. Super. Ct. 324; Straw's Estate, 10 Kulp (Pa.) 163.

**Power of Administrator to Sell.** — The fact that the will converts realty into personalty through a direction for its sale, does not, where the will fails to name the person by whom the property shall be sold, authorize the administrator to sell under the theory of an equitable conversion of the realty into personalty. McElroy v. McElroy, 110 Tenn. 137.

**Effect on Dower.** — Conversion does not affect widow's dower rights. *In re Davis*, 12 Ohio Cir. Dec. 29, 21 Ohio Cir. Ct. 720.

**Effect in Application of Rules for Construction of Will.** — Talbot v. Snodgrass, 124 Iowa 681.

**Land Converted into Personalty as Personal Assets for Payment of Testator's Debts.** — Taylor v. Crook, 136 Ala. 354, 96 Am. St. Rep. 26; Baptist Female University v. Borden, 132 N. Car. 476; Mustin's Estate, 8 Pa. Dist. 264, *affirmed* 194 Pa. St. 438; Gardner's Estate, 199 Pa. St. 524.

**476. 2.** C. H. Brown Banking Co. v. Stockton, 107 Ky. 492; Howell v. Mellon, 189 Pa. St. 169.

**Deed.** — Torrence's Estate, 31 Pittsb. Leg. J. N. S. (Pa.) 243.

**Mortgage.** — Chick v. Ives, (Neb. 1902) 90 N. W. Rep. 751.

A beneficiary in the proceeds of land converted into personalty has no interest in the land as such which he may mortgage or dispose of by will. Nelson v. Nelson, (Ind. App. 1904) 72 N. E. Rep. 482.

Where a will converts real estate into personalty for distribution among the beneficiaries, the mortgage by the beneficiaries upon the real estate though invalid as a mortgage will be given effect in equity as an assignment of the mortgagor's interest. Walker v. Killian, 62 S. Car. 482. Compare also Lawton v. Lawton, 7 Ohio Dec. 493.

**5. Judgment Lien — Land Converted into Personalty.** — Robison v. Botkin, 181 Ill. 182; Click v. Ives, (Neb. 1902) 90 N. W. Rep. 751; Sweeney v. Horn, 190 Pa. St. 237 (judgment lien); Yerkes v. Yerkes, 15 Pa. Super. Ct. 442, *reversed* 200 Pa. St. 419; Weeter's Estate, 21 Pa. Super. Ct. 241 (judgment lien).

**11. Where a Widow Elects to Take Against the Will,** a conversion of land into personalty

worked by a direction in the will to sell the land is inoperative as against the interest taken by the widow under such election. Petterson's Estate, 195 Pa. St. 78.

**12. Validity of Provisions of Will — United States.** — Handley v. Palmer, 91 Fed. Rep. 948. Connecticut. — Bates v. Spooner, 75 Conn. 501.

*Illinois.* — Greenwood v. Greenwood, 178 Ill. 387; Lash v. Lash, 209 Ill. 595; Primm v. Primm, 111 Ill. App. 244.

*New York.* — Kelly v. Hoey, 35 N. Y. App. Div. 273; Wright v. Mercein, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 414; Schlereth v. Schlereth, 73 N. Y. App. Div. 283, *affirmed* 173 N. Y. 444; Russell v. Hilton, 80 N. Y. App. Div. 178, *modifying* (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 642.

*South Carolina.* — Major v. Hunt, 64 S. Car. 97.

*Wisconsin.* — Becker v. Chester, 115 Wis. 90.

**477. 1. Legacy Tax.** — Compare Connell v. Crosby, 210 Ill. 380.

**5. Land and Money — Resulting Trust in Favor of Heirs.** — Canfield v. Canfield, 62 N. J. Eq. 578; Clements v. Babcock, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 90; Jones v. Kelly, 72 N. Y. Supp. 24, 63 N. Y. App. Div. 614, *affirmed* 170 N. Y. 401; Matter of Weinstein, (Surrogate Ct.) 43 Misc. (N. Y.) 577; Jones v. Kelly, 170 N. Y. 401, *affirming* 63 N. Y. App. Div. 614; *In re Rudy*, 185 Pa. St. 359; Major v. Hunt, 64 S. Car. 97; Harrington v. Pier, 105 Wis. 485, 76 Am. St. Rep. 924. See, however, Lash v. Lash, 209 Ill. 595.

**479. 3. Residuary Legacy — Undisposed Surplus.** — Compare English v. Cooper, 183 Ill. 203, *affirming* 83 Ill. App. 148.

**4. Conversion Out and Out — Wills.** — English v. Cooper, 183 Ill. 203, *affirming* 83 Ill. App. 148; Lash v. Lash, 209 Ill. 595; Hutchings v. Davis, 68 Ohio St. 160.

**7. Personalty into Land — Partial Failure.** — Harrington v. Pier, 105 Wis. 485, 76 Am. St. Rep. 924.

**480. 3. Definition.** — Condit v. Bigalow, 64 N. J. Eq. 504; Wayne v. Fouts, 108 Tenn. 145; Duckworth v. Jordan, 138 N. Car. 520.

**4. Reasons of Doctrine.** — Duckworth v. Jordan, 138 N. Car. 520.

**5. Robison v. Botkin**, 181 Ill. 182; Boland v. Tiernay, 118 Iowa 50; Harper v. Chatham Nat. Bank, (Supm. Ct. Spec. T.) 17 Misc. (N. Y.) 221; Trask v. Sturges, 170 N. Y. 482, *reversing* (Supm. Ct. App. Div.) 68 N. Y. Supp. 1149; McGarry v. McGarry, 9 Pa. Super. Ct. 71;

**480. 2. Election — (b) CAPACITY TO ELECT — (1) In General.** — See note 8.

(2) *Persons Non Sui Juris* — (a) *Infants.* — See note 9.

**481.** See note 2.

(b) *Lunatics.* — See note 3.

(3) *Undivided Interests.* — See notes 9, 10.

(5) *Remainderman.* — See note 12.

**482. d. EFFECT OF ELECTION.** — See note 5.

**e. WHAT CONSTITUTES ELECTION — (1) By Act of Parties.** — See notes 7, 8, 9, 10.

**483. (2) By Act of Law — Property "At Home."** — See note 1.

(3) *Burden of Proof.* — See note 2.

**484. CONVEY — CONVEYANCE.** — See note 2.

**485. Writing.** — See note 1.

**487. Personal Property.** — See notes 1, 2.

*Lease.* — See notes 5, 6.

**488. Mortgages.** — See note 2.

*Yerkes v. Yerkes*, 15 Pa. Super. Ct. 442, *reversed* 200 Pa. St. 419; *Singer Mfg. Co. v. Sproull*, 20 Pa. Co. Ct. 378, 4 Lack. Leg. N. (Pa.) 59; *Rauch's Estate*, 21 Pa. Super. Ct. 60; *Wayne v. Fouts*, 108 Tenn. 145; *Brown v. Miller*, 45 W. Va. 211.

**480. 8. Capacity to Elect — Persons Sui Juris.** — *Boland v. Tiernay*, 118 Iowa 59.

**Creditor of Beneficiary** has no right to elect for beneficiary. *Yerkes v. Yerkes*, 15 Pa. Super. Ct. 442, *reversed* 200 Pa. St. 419.

**9. Infants.** — *Duckworth v. Jordan*, 138 N. Car. 520.

**481. 2. Election by Court for Infant.** — *Duckworth v. Jordan*, 138 N. Car. 520.

**3. Lunatics.** — *In re Douglas*, (1902) 2 Ch. 296. **Election by Master in Lunacy for Lunatics.** — *Baldwyn v. Smith*, (1900) 1 Ch. 588.

**9. Undivided Interests — Land into Money.** — *Matter of Pforr*, 144 Cal. 121; *Lash v. Lash*, 209 Ill. 595; *Scott v. Douglas*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 555; *Duckworth v. Jordan*, 138 N. Car. 520; *Singer Mfg. Co. v. Sproull*, 20 Pa. Co. Ct. 378, 4 Lack. Leg. N. (Pa.) 59; *Rauch's Estate*, 21 Pa. Super. Ct. 60; *Wayne v. Fouts*, 108 Tenn. 145, *citing* 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 481; *Brown v. Miller*, 45 W. Va. 211. See also *Ukiah Bank v. Rice*, 143 Cal. 265, 101 Am. St. Rep. 118.

One who is entitled to property subject to a trust for sale to answer an annuity, cannot elect to take the property *in specie* without the annuitant's consent. *In re Douglas*, (1902) 2 Ch. 296.

**10. Personality into Land.** — *Robison v. Botkin*, 181 Ill. 182; *McWilliams v. Gough*, 116 Wis. 576.

**12. Remaindermen.** — *Harper v. Chatham Nat. Bank*, (Supm. Ct. Spec. T.) 17 Misc. (N. Y.) 221.

**482. 5. Effect upon Legal Title.** — Where beneficiaries of land converted into personality elect to reconvert the property into land such election does not have the effect of passing to them the legal title to the land, which was vested in a third person subject to the conversion. *Van Zandt v. Garretson*, 21 R. I. 418.

**7. What Constitutes Election — Intention Controlling.** — *Boland v. Tiernay*, 118 Iowa 59; *Atlee v. Bullard*, 123 Iowa 274; *Duckworth v. Jordan*, 138 N. Car. 520; *McGarry v. McGarry*, 9 Pa. Super. Ct. 71; *Singer Mfg. Co. v. Sproull*,

20 Pa. Co. Ct. 378, 4 Lack. Leg. N. (Pa.) 59; *Rauch's Estate*, 21 Pa. Super. Ct. 60.

**8. Trask v. Sturges, 170 N. Y. 483, *reversing* (Supm. Ct. App. Div.) 68 N. Y. Supp. 1149.**

**9. How Evidenced.** — *Rauch's Estate*, 21 Pa. Super. Ct. 60; *Wayne v. Fouts*, 108 Tenn. 145.

**10. Partition.** — Where beneficiaries of land equitably converted into personality make partition of the land itself between them, it works a reconversion. *Condit v. Bigalow*, 64 N. J. Eq. 504.

**483. 1. Property "At Home."** — *In re Morgan*, (1900) 2 Ch. 474.

**2. Burden of Proof.** — *Ukiah Bank v. Rice*, 143 Cal. 265, 101 Am. St. Rep. 118; *Wayne v. Fouts*, 108 Tenn. 145.

**484. 2. Title.** — See *Leadville v. Coronado Min. Co.*, 29 Colo. 17.

**Sell and Convey Used Synonymously.** — *Belding-Hall Mfg. Co. v. Smith*, 125 Mich. 54, *citing* 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 485.

**Convey Synonymous with Grant.** — *Leadville v. Coronado Min. Co.*, 29 Colo. 17; *Chapman v. Charter*, 46 W. Va. 769; *Uhl v. Ohio River R. Co.*, 51 W. Va. 106.

**Term Imports a Deed.** — *Harrell v. Enterprise Sav. Bank*, 183 Ill. 538; *Langmede v. Weaver*, 65 Ohio St. 17, holding that the term *conveyed*, used in reference to the transfer of lands by the owner to another person, fairly imports that the conveyance is by a legally executed deed which transfers the whole title.

**Convey in a Trust Deed in the Sense of Appoint.** — *Manning v. Screven*, 56 S. Car. 78.

**485. 1. Writing Implied.** — *Vann v. Edwards*, 135 N. Car. 661.

**487. 1.** See *Vann v. Edwards*, 135 N. Car. 661.

**2.** The indorsement of a bill or note in blank is not a *conveyance*. *Walton v. Bristol*, 125 N. Car. 419.

**5. Including Leases.** — *Crouse v. Michell*, 130 Mich. 347; *State v. Morrison*, 18 Wash. 664; *Koeber v. Somers*, 108 Wis. 497, holding leases for more than three years *conveyances*.

**6. Lease Not Included.** — *Tuohy's Estate*, 23 Mont. 305.

**Same — Married Women.** — *Heal v. Niagara Oil Co.*, 150 Ind. 483.

**488. 2. Conveyance Includes a Mortgage — Recording Acts.** — *Gordon v. Constantine Hy-*

- 491.** See notes 2, 4.  
 Will or Devise. — See note 6.
- 492.** Other Transactions. — See note 1.
- 494.** See note 1.
- 496.** **CONVICT.** — See note 2.
- 497.** **CONVICTION.** — See note 3.
- 498.** See note 1.
- 499.** See note 1.
- 502.** See note 1.
- 503.** Other Constructions. — See note 4.
- 506.** **CO-PARTIES.** — See note 2.  
**COPY.** — See note 3.
- 507.** See note 1.

draulic Co., 117 Mich. 620; Allison v. Manzke, 118 Wis. 11.

**Conveyance Includes a Mortgage of a Leasehold.** — Lembeck, etc., Eagle Brewing Co. v. Kelly, 63 N. J. Eq. 401.

**491. 2. Assignment of Mortgage Held a Conveyance.** — Hull v. Diehl, 21 Mont. 71; Henniges v. Paschke, 9 N. Dak. 489.

**4. Mortgages — Agreement to Execute a Mortgage.** — Compare Davidson v. Fox, 65 N. Y. App. Div. 262.

**6. Will Held Not to Be a Conveyance.** — Foote v. Nickerson, 70 N. H. 496; Bell v. Couch, 132 N. Car. 346.

**492. 1. A Mere Executory Contract for the Sale of Land is not a conveyance.** Stevens Point First Nat. Bank v. Chafee, 98 Wis. 42.

**"A Homestead Is Not a Conveyance.** — It possesses none of the essential requisites of a conveyance. There is neither grantor, nor grantee, nor consideration in a declaration of homestead. There is no transfer of, or change in, the title." Burbank v. Kirby, 6 Idaho 213.

**English Stamp Act.** — As to what constitutes a conveyance on sale within the meaning of the Stamp Act, see Chesterfield Brewery Co. v. Inland Revenue Com'rs, (1899) 2 Q. B. 7.

An order of adjudication in bankruptcy is not a conveyance within the meaning of the Middlesex Registry Act (7 Anne, c. 20), section 1. *In re Calcott*, (1898) 2 Ch. 460.

**494. 1. The Term Awaiting Further Conveyance in a bill of lading must mean awaiting conveyance by the person upon whom the duty of conveyance devolved, and no such duty devolved until notice of the arrival of the property had been given.** Texas, etc., R. Co. v. Reiss, 183 U. S. 621.

**Conveying Travelers — Sunday Laws.** — Taking persons in street cars from point to point in a city is not "conveying travelers" within the meaning of a Sunday Act. *Atty.-Gen. v. Hamilton St. R. Co.*, 24 Ont. App. 170.

**Accident Insurance — Passenger Conveyance.** — A passenger injured by falling from the platform of a car is not within the meaning of a policy of accident insurance providing against injuries sustained while riding as a passenger in any passenger conveyance, etc. *Van Bokkelen v. Travelers Ins. Co.*, 34 N. Y. App. Div. 399, affirmed 167 N. Y. 590.

**496. 2. State Prison Convict.** — One confined in a state prison under sentence of death is a convict within the meaning of Laws 1889, c. 382, sec. 40, relating to the identification of criminals. *Molineux v. Collins*, 177 N. Y. 395.

**497. 3. People v. Lyman**, (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 243, quoting 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 497.

**Former Conviction.** — See *Barker v. Almy*, 20 R. I. 367.

**498. 1. Pardon.** — A judgment imposing fine and imprisonment for contempt is a conviction within the meaning of the constitutional provision authorizing the governor to grant pardons and reprieves "after conviction." *Sharp v. State*, 102 Tenn. 9. See also *Parker v. State*, 103 Tenn. 547.

**499. 1. Final Sentence.** — *People v. Black*, 122 Cal. 73; *Munkley v. Hoyt*, 179 Mass. 108; *State v. Townley*, 147 Mo. 205; *People v. Sullivan*, 34 N. Y. App. Div. 548; *Barker v. Almy*, 20 R. I. 367.

**502. 1. Witness — Infamy.** — But see *People v. Ward*, 134 Cal. 301.

**A Plea of Nolo Contendere is not a conviction and cannot be used for the purpose of discrediting a witness.** *Doughty v. De Amorel*, 22 R. I. 158; *State v. Conway*, 20 R. I. 270.

**503. 4. Chinese Exclusion Act.** — "Section 13 of the Chinese Exclusion Act provides that any Chinese person convicted before a 'commissioner of a United States court' may, within ten days from such conviction, 'appeal to the judge of the District Court for the district.' The context shows that the word conviction here refers to an order that the Chinese person in question shall be removed from the United States to the country whence he came, and that it does not refer to any conviction, in the proper sense of the word, of a criminal offense." *In re Chow Loy*, 110 Fed. Rep. 952.

**506. 2. Co-Parties.** — *Hildebrand v. Sattley Mfg. Co.*, 25 Ind. App. 220.

**3. A Perforated Sheet of Music is not a copy of a sheet of music within the meaning of the Copyright Act.** *Boosey v. Whight*, (1900) 1 Ch. 124.

**A Translation of a Constitution is not a copy within the meaning of a constitutional provision that no person shall have the right to vote who shall not be able to read the Constitution.** *Rasmussen v. Baker*, 7 Wyo. 117.

**507. 1. In the book trade the word copy does not usually mean a single volume of a work, but a reproduction of the whole of it, without regard to the number of volumes.** *Johnson v. Weed-Parsons Printing Co.*, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 628.



# COPYRIGHT.

BY THEODOR MEGAARDEN.

**512. I. DEFINITION.** — See note 1.

**II. DISTINGUISHED FROM THE COMMON-LAW RIGHT.** — See note 2.

**513. IV. LITERARY PROPERTY — 2. At Common Law — b. BEFORE PUBLICATION** — (1) *In General.* — See note 4.

(2) *In What Productions.* — See note 5.

**514. (3) Nature and Extent of the Property** — Control of Publication. — See note 6.

**515.** See note 1.

**517. (4) Transfer** — (b) **Partial or Conditional Assignments.** — See note 1.

(c) **Construction of Assignments.** — See note 4.

**520. c. AFTER PUBLICATION — (3) Effect of Copyright Legislation** — In the United States. — See note 3.

**512. 1. A Copyright Is an Incorporeal Right** to print and publish. *Werckmeister v. American Lith. Co.*, (C. C. A.) 134 Fed. Rep. 321, reversing 126 Fed. Rep. 244, 117 Fed. Rep. 360; *People v. Roberts*, 159 N. Y. 70, reversing 35 N. Y. App. Div. 624 and holding that copyrights secured under the United States statutes cannot be made the subject of taxation by one of the United States.

**2. "The Right Secured by Statute** is the exclusive one of multiplying copies after publication." *Werckmeister v. American Lith. Co.*, (C. C. A.) 134 Fed. Rep. 321, reversing 126 Fed. Rep. 244, 117 Fed. Rep. 360.

**513. 4. Before Publication — At Common Law.** — *Holmes v. Hurst*, 174 U. S. 8, affirming (C. C. A.) 80 Fed. Rep. 514, 76 Fed. Rep. 757; *New Jersey State Dental Soc. v. Dentacura Co.*, 57 N. J. Eq. 593, affirmed without opinion (N. J. 1899) 43 Atl. Rep. 1098.

**5. Dramatic Productions.** — The existence of a dramatic or stage right is recognized by the common law. *Maxwell v. Goodwin*, 93 Fed. Rep. 665.

**514. 6. Right to Withhold from Publication.** — *Werckmeister v. American Lith. Co.*, (C. C. A.) 134 Fed. Rep. 321, reversing 126 Fed. Rep. 244, 117 Fed. Rep. 360; *New Jersey State Dental Soc. v. Dentacura Co.*, 57 N. J. Eq. 593, affirmed without opinion (N. J. 1899) 43 Atl. Rep. 1098.

**515. 1. Right to Restrict Use.** — *Werckmeister v. American Lith. Co.*, (C. C. A.) 134 Fed. Rep. 321, reversing 126 Fed. Rep. 244, 117 Fed. Rep. 360.

**517. 1. Restricted Communication of News Items.** — It is competent for a news agency to collect information from a public source and transmit it to subscribers to whom it is new upon the terms that they shall not communicate it to third parties; and the court will interfere by injunction to restrain a subscriber from communicating such information to a third party in breach of his contract, and also to restrain a third party from inducing a subscriber to break his contract by supplying him

with such information with a view of publication. *Exchange Tel. Co. v. Central News*, (1897) 2 Ch. 48, 66 L. J. Ch. 672, 76 L. T. N. S. 591.

**4. Tams v. Witmark**, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 293, affirmed without opinion 48 N. Y. App. Div. 632.

**520. 3. Established Doctrine in the United States.** — *Holmes v. Hurst*, 174 U. S. 82, affirming (C. C. A.) 80 Fed. Rep. 514, 76 Fed. Rep. 757; *Werckmeister v. American Lith. Co.*, (C. C. A.) 134 Fed. Rep. 321, reversing 126 Fed. Rep. 244, 117 Fed. Rep. 360; *Wagner v. Conried*, 125 Fed. Rep. 798; *Tribune Co. v. Associated Press*, 116 Fed. Rep. 126; *Mifflin v. Dutton*, 107 Fed. Rep. 708; *D'Ole v. Kansas City Star Co.*, 94 Fed. Rep. 840; *Larrowe-Loisette v. O'Loughlin*, 88 Fed. Rep. 896; *Stern v. Rosey*, 17 App. Cas. (D. C.) 562; *Jewelers' Mercantile Agency v. Jewelers' Weekly Pub. Co.*, 155 N. Y. 241, reversing 84 Hun (N. Y.) 12; *Wright v. Eisle*, 86 N. Y. App. Div. 356.

**Publication of Play.** — The publication by the author of the text of a drama, in a printed book, destroys his playwright, or right to control the representation of the drama on the stage. *Daly v. Walrath*, 40 N. Y. App. Div. 220.

**Control of Manner of Reproduction.** — An author whose mental productions — prose, verse, and title — have been given to the world by publication without copyright, so that any one is free to reprint or sell the whole or any part of them, cannot control or regulate the manner in which reprinted matter may be grouped and entitled, and cannot restrain any application of the title he selected otherwise than he uses or used it. *Kipling v. Fenno*, 106 Fed. Rep. 692.

**In Canada.** — Under the Canadian Copyright Acts the publication of a work without registration works a forfeiture of the right to exclusive publication. *Angers v. Leprohon*, 22 Quebec Super. Ct. 170.

**Burden of Proving Publication.** — In an action to enforce the common-law right in an intellectual production, the burden of proving that

**521. 4. Publication — a. EFFECT OF PUBLICATION ON LITERARY PROPERTY.** — See note 4.

Restricted Publication. — See note 5.

**522. b. WHAT CONSTITUTES PUBLICATION — Printing Copies Without Distribution.** — See note 2.

Restricted Distribution. — See note 3.

**523. Distribution Unrestricted as to Persons and Purpose.** — See notes 1, 2, 3.

Publication of Book in Serial Form. — See note 4.

**525. Right to Reproduce from Memory of Spectator.** — See note 1.

there has been a dedication to the public by publication is upon the defendant. *New Jersey State Dental Soc. v. Dentacura Co.*, 57 N. J. Eq. 593, *affirmed* without opinion (N. J. 1899) 43 Atl. Rep. 1098.

The consent of the author to the publication which is claimed to work a forfeiture of the common-law property must be affirmatively proved by the party who relies upon the publication. *Daly v. Walrath*, 40 N. Y. App. Div. 220.

**Effect of Interim Copyright Act of 1904.** — It has been held that the Interim Copyright Act of Jan. 7, 1904, 33 U. S. Stat. L. 4, c. 2, for the protection of exhibitors of foreign literary, artistic, or musical works at the Louisiana Purchase Exposition, did not have the effect of extending copyright protection to book exhibited at the exposition which had been previously published in the United States. *Encyclopædia Britannica Co. v. Werner Co.*, 135 Fed. Rep. 841.

**521. 4. Werckmeister v. American Lith. Co.**, (C. C. A.) 134 Fed. Rep. 321, *reversing* 126 Fed. Rep. 244, 117 Fed. Rep. 360; *Stern v. Rosey*, 17 App. Cas. (D. C.) 562; *Jewelers' Mercantile Agency v. Jewelers' Weekly Pub. Co.*, 155 N. Y. 241, *reversing* 84 Hun (N. Y.) 12.

**5. Limited and General Publication Distinguished.** — Publication of a subject of copyright is effected by its communication or dedication to the public. Such a publication is what is known as a "general publication." There may be also a "limited publication." The use of the word "publication" in these two senses is unfortunate, and has led to much confusion. A limited publication of a subject of copyright is one which communicates a knowledge of its contents under conditions expressly or impliedly precluding its dedication to the public. *Werckmeister v. American Lith. Co.*, (C. C. A.) 134 Fed. Rep. 321, *reversing* 126 Fed. Rep. 244, 117 Fed. Rep. 360.

**522. 2. Printing Alone Not Publication.** — *Jewelers' Mercantile Agency v. Jewelers' Weekly Pub. Co.*, 155 N. Y. 241, *reversing* 84 Hun (N. Y.) 12.

**3. Sending Copies of Directory to Subscribers.** — "If a book be put within reach of the general public, so that all may have access to it, no matter what limitations be put upon the use of it by the individual subscriber or lessee, it is published, and what is known as the common-law copyright, or right of first publication, is gone." *Jewelers' Mercantile Agency v. Jewelers' Weekly Pub. Co.*, 155 N. Y. 241, *reversing* 84 Hun (N. Y.) 12, stated in the original note.

**Deposit of Copies of Book with Librarian of Congress.** — In *Jewelers' Mercantile Agency v. Jewelers' Weekly Pub. Co.*, 155 N. Y. 241, *reversing* 84 Hun (N. Y.) 12, stated in the original note,

it was said by Bartlett, Martin, and Vann, JJ., that the depositing of copies of a book in the office of the librarian of Congress constitutes a publication.

**523. 1. The Gratuitous Distribution of Pamphlets Without Restriction** as to persons constitutes a publication. *D'Ole v. Kansas City Star Co.*, 94 Fed. Rep. 840.

**Absolute Sale with Restrictions as to Use.** — Where the author of a book on memory sold copies to pupils whom he instructed in the system expounded in the work, without placing any restriction upon the title or the use of the books except that it was stipulated that the purchasers should not communicate to any person any idea or part of the system, it was held that there had been a publication which prevented the obtaining of a statutory copyright. It was said that "to hold that a person may offer a book to every person in the world who will buy it and pay a certain price for it with an agreement not to show it to any other person, and that this course of distribution might be continued for many years, and then a copyright secured for the legal term, would be a large advance upon, and wide departure from, any decisions which have been cited in this case. In most, if not quite, all the cases in which a distribution has been held not to be a publication, the author did not part with the title to the books distributed." *Larrowe-Loisette v. O'Loughlin*, 88 Fed. Rep. 896.

**2. Notice in Book of Restriction as to Use.** — If the publication of an opera is otherwise unrestricted and complete, a notice in each copy that it must not be used for production on the stage is ineffective to reserve the right of stage presentation. *Wagner v. Conried*, 125 Fed. Rep. 798.

**3. Publication of Plans and Specification for Building.** — When plans and specifications for a building are prepared by an architect and filed with the building department of a city for the purpose of securing a building permit, and a house is constructed according to the plans under the supervision of the architect, who receives a stipulated sum for drawing the plans and for the work of supervision, there has been a publication of the plans, and the architect can have no further property in them. *Wright v. Eisle*, 86 N. Y. App. Div. 356.

**4. Publication of Book in Serial Form.** — *Holmes v. Hurst*, 174 U. S. 82, *affirming* (C. C. A.) 80 Fed. Rep. 514, 76 Fed. Rep. 757.

**525. 1. View that Stage Presentation Does Not Authorize Reproduction from Memory.** — See *Werckmeister v. American Lith. Co.*, (C. C. A.) 134 Fed. Rep. 321, *reversing* 126 Fed. Rep. 244, 117 Fed. Rep. 360.

- 525.** Delivery of Lectures. — See note 3.  
**526.** Public Exhibition of Paintings. — See note 1.  
**528.** Publication Abroad. — See note 1.  
**529.** V. SUBJECTS OF COPYRIGHT — 2. Construction of Particular Terms —  
 a. "BOOK" — (1) *In General*. — See note 4.  
**530.** (2) *Newspapers and Magazines*. — See note 1.  
 b. "PRINT." — See notes 2, 3.  
**531.** d. "PHOTOGRAPH." — See note 4.  
 f. "DRAMATIC COMPOSITION." — See notes 6, 8.  
**532.** Dialogue Unimportant. — See note 1.  
**533.** 3. Requirements as to Quality of Publications — b. ORIGINALITY —  
 (1) *In General*. — See notes 2, 4.

**525.** 3. Reading Paper Before Society of Dentists. — The report of a committee of an association of dentists was read at the annual meeting of the association. Many persons not connected with the society were present, but it was not shown that they were admitted free. It was held that the reading of the report did not constitute a publication. *New Jersey State Dental Soc. v. Dentacura Co.*, 57 N. J. Eq. 593, *affirmed* without opinion (N. J. 1899) 43 Atl. Rep. 1098.

**526.** 1. Rule in the United States. — A painting was exhibited in a common gallery by an association of artists, largely for the purposes of sale. Members of the association and their guests were admitted free, but the public were admitted only upon the payment of an admission fee. There was an express prohibition of the making of copies, and there was evidence that steps had been taken to enforce the prohibition. It was held that the exhibition did not amount to a general publication so as to work a forfeiture of copyright. *Werckmeister v. American Lith. Co.*, (C. C. A.) 134 Fed. Rep. 321, *reversing* 126 Fed. Rep. 244, 117 Fed. Rep. 360.

**528.** 1. Foreign Publication. — *Daly v. Walrath*, 40 N. Y. App. Div. 220. See also *Tribune Co. v. Associated Press*, 116 Fed. Rep. 126.

If the foreign publication is unauthorized it does not prevent the existence of copyright in *Canada*. *Anglo-Canadian v. Dupuis*, 2 Com. L. R. 503.

**529.** 4. Form of Publication Immaterial. — It is the intellectual production of the author which the copyright protects, and not the particular form which such production ultimately takes; hence the word "book" as used in the statute is not to be understood in its technical sense of a bound volume, but includes any species of publication which the author selects to embody his literary product. *Holmes v. Hurst*, 174 U. S. 82 *affirming* (C. C. A.) 80 Fed. Rep. 514, 76 Fed. Rep. 757.

**530.** 1. Newspapers and Magazines Copyrightable as Books. — In *Tribune Co. v. Associated Press*, 116 Fed. Rep. 126, Seaman, J., expressed the opinion that "there can be no general copyright of a newspaper composed in large part of matter not entitled to protection."

2. Prints. — Pictures which had been printed in successive colors from metal plates, from which plates part of the metal had been cut out so as to leave portions thereof in relief, have been held to be "prints" within the general enumeration of Rev. Stat. U. S., § 4956. *Hills v. Austrich*, 120 Fed. Rep. 862.

3. Chromo-lithographs may be entitled to copyright protection even though the pictures are drawn from life. *Bleistein v. Donaldson Lithographing Co.*, 188 U. S. 239, *reversing* (C. C. A.) 104 Fed. Rep. 993, 98 Fed. Rep. 608.

**531.** 4. *Falk v. Curtis Pub. Co.*, 98 Fed. Rep. 989.

**Photographs for Reproducing Moving Scenes.** — The negatives of a series of pictures of the launching of a vessel, and the positive reproduction of the pictures, made for the purpose of reproducing the scene by means of kinetoscopes, have been held to be proper subjects of copyright. *Edison v. Lubin*, (C. C. A.) 122 Fed. Rep. 240, *reversing* 119 Fed. Rep. 993.

**Picture Reproduced from Partly Etched Negative.** — It has been held that a picture which was produced by the use of a negative which had been changed by etching so as to introduce into the picture an object which was not in the group of objects which were exposed to the camera could not be copyrighted as a photograph. *Snow v. Laird*, (C. C. A.) 98 Fed. Rep. 813.

**6. Narrative Character an Essential Element.** — See *Barnes v. Miner*, 122 Fed. Rep. 480.

**8. Device of Representing Performer's Changes of Costume by Pictures.** — It has been held that the device of representing a stage performer's changing of costumes in the dressing room between songs, by throwing pictures representing the changes upon a screen by means of kinetoscopes, is not the subject of copyright. *Barnes v. Miner*, 122 Fed. Rep. 480.

**532.** 1. Series of Dramatic Events — "Railroad Scene." — See *Brady v. Daly*, 175 U. S. 148, *affirming* (C. C. A.) 83 Fed. Rep. 1007.

**533.** 2. New Editions. — A copyright in a new edition of a work protects only that which is original in the new edition; it does not operate to extend or enlarge the prior copyrights or remove from the public domain the portions which have been dedicated to the public. *Kipling v. Putnams*, (C. C. A.) 120 Fed. Rep. 631.

4. Reclaiming Published Work by Making Changes Therein. — Where a photograph has been dedicated to the public by publication, it cannot be reclaimed and be made a proper subject of copyright by making changes in the negative by means of etching, if the changes are merely colorable and not made in good faith for the purpose of producing a new work of art. *Snow v. Laird*, (C. C. A.) 98 Fed. Rep. 813.



**536.** (8) *Pirated Matter*. — See note 3.

*c.* LITERARY OR ARTISTIC MERIT — (1) *General Principles*. — See note 5.

**537.** See note 1.

(2) *Descriptive Advertisements*. — See note 3.

**538.** See note 1.

*d.* IMMORAL OR OTHERWISE ILLEGAL PUBLICATIONS. — See note 7.

**541.** 6. Statutes. — See note 2.

**543.** VI. WHO MAY COPYRIGHT — 1. Author, Inventor, Designer — *b.* WHAT CONSTITUTES AN AUTHOR, INVENTOR, OR DESIGNER. — See note 1.

*c.* REQUIREMENTS AS TO CITIZENSHIP AND RESIDENCE — (1) *In England* — (a) *Under the General Copyright Statutes* — *British Author Resident Abroad*. — See note 2.

An "Official Form Chart" containing the names of certain racehorses, the races in which they have taken part, the jockeys who have ridden them, the weights carried by them, their position with reference to other horses during the course of other races, the odds offered for and against them, and other details of each race calculated to show what a particular horse has accomplished under the various conditions which each race has imposed, has been held to be a subject of copyright. *Egbert v. Greenberg*, 100 Fed. Rep. 447.

**536.** 3. *Pirated Matter*. — *Edward Thompson Co. v. American Law Book Co.*, (C. C. A.) 122 Fed. Rep. 922, *reversing* 121 Fed. Rep. 907, *affirmed* 130 Fed. Rep. 639, *quoting* 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 536.

5. *Apparent Recognition of the Requirement as to Literary Merit*. — See *Barnes v. Miner*, 122 Fed. Rep. 480, wherein it was held that by the use of the words "dramatic composition" in the statute it was not intended to include any compositions that would not tend to "promote the progress of science and useful arts," and that a stage production which lacks those elements in a substantial degree is not the subject of copyright.

*Indexed Letter File*. — *Amberg File, etc., Co. v. Smith*, (C. C. A.) 82 Fed. Rep. 314, *affirming* 78 Fed. Rep. 479, stated in the original note.

*Stock Quotations and News Items Transmitted by "Tickers"* are not subjects of copyright protection. *National Tel. News Co. v. Western Union Tel. Co.*, (C. C. A.) 119 Fed. Rep. 204.

**537.** 1. *Degree of Literary Merit Required*. — As illustrating the slight degree of artistic merit which is necessary to entitle any engraving, cut, or print to copyright protection, see *Bleistein v. Donaldson Lithographing Co.*, 188 U. S. 239, *reversing* (C. C. A.) 104 Fed. Rep. 993, 98 Fed. Rep. 608, wherein chromo-lithographs used as advertisements of a circus were held to be protected by copyright.

3. *A Mere Price Catalogue*, illustrated with pictures of wares offered for sale, and containing letterpress which is confined to a statement of dimensions and prices and is of no literary merit, is not within the protection of the copyright statute. *J. L. Mott Iron Works v. Clow*, (C. C. A.) 82 Fed. Rep. 316.

**538.** 1. *Advertising Catalogue*. — In *England* it has been said that copyright may exist

in a catalogue or mere list of articles for sale. *North, J.*, in *Collis v. Cater*, 78 L. T. N. S. 613.

7. *Immoral Publications Not Copyrightable*. — *Barnes v. Miner*, 122 Fed. Rep. 491, *citing* 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 538; *Broder v. Zeno Mauvais Music Co.*, 88 Fed. Rep. 78, *citing* 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 538.

"Official Form Chart." — It has been held that an "official form chart" which is of value to persons engaged in the breeding, trading, and raising of horses is a proper subject of copyright, although the chart may also be used by persons who bet on horse races. *Egbert v. Greenberg*, 100 Fed. Rep. 447.

**541.** 2. *Statutes Not Copyrightable*. — *Howell v. Miller*, (C. C. A.) 91 Fed. Rep. 129, wherein it was said that a copyright in a compilation of statutes covers all that may fairly be deemed the result of the compiler's labors. "Speaking generally, this would include marginal references, notes, memoranda, table of contents, indexes, and digests of judicial decisions prepared by him from original sources of information; also such headnotes as are clearly the result of his labors."

**543.** 1. See *Springfield v. Thame*, 89 L. T. N. S. 242.

*Person Reporting Public Speech*. — In *England* it has been held that a person who makes notes of a speech delivered in public, transcribes them, and publishes in a newspaper a verbatim report of the speech is the "author" of the report within the meaning of the Copyright Act of 1842, and is entitled to hold or assign the copyright in the report. *Walter v. Lane*, (1900) A. C. 539, 69 L. J. Ch. 699, 83 L. T. N. S. 289, *reversing* (1899) 2 Ch. 749, 68 L. J. Ch. 760, 81 L. T. N. S. 395.

2. *Imperial Fine Arts Copyright Act 1862*. — It has been held that the Imperial Fine Arts Copyright Act 1862, which confers on British subjects and persons resident in British dominions copyright in pictures, drawings, and photographs, extends to the whole of the United Kingdom, but does not extend to any part of the British dominions outside of the United Kingdom, and there is nothing in the Canada Copyright Act 1875, or in the International Copyright Acts, which conflicts with this view. *Graves v. Gorrie*, (1903) A. C. 496, 72 L. J. P. C. 95, 89 L. T. N. S. 111, 52 W. R. 113, *affirming*

**546.** 2. Assigns of Author, Etc. — *a.* IN GENERAL. — See note 1.

*b.* ASSIGNS OF NONRESIDENT ALIEN AUTHOR. — See note 2.

3. Proprietor — *b.* MEANING OF THE TERM. — See note 6.

**547.** *c.* EMPLOYER'S RIGHT TO COPYRIGHT WORK OF EMPLOYEE —

Dependent on Contract of Employment. — See notes 4, 5.

**548.** See note 1.

5. Right of Trustee to Copyright. — See note 5.

**551.** VII. FORMALITIES FOR SECURING COPYRIGHT — 2. Necessity of Complying with Directions — *a.* IN THE UNITED STATES. — See note 3.

**552.** *b.* IN ENGLAND. — See note 4.

3 Ont. L. Rep. 697, 1 Ont. L. Rep. 309, 32 Ont. 266.

**546.** 1. *Mifflin v. Dutton*, 190 U. S. 265, affirming (C. C. A.) 112 Fed. Rep. 1004.

2. Prior to the International Copyright Amendments. — *Fraser v. Yack*, (C. C. A.) 116 Fed. Rep. 285.

6. A Mere Temporary Licensee in the use of the manuscript of a play does not come within the meaning of the term "proprietor" so as to be entitled to enter the play for copyright. *Koppel v. Downing*, 11 App. Cas. (D. C.) 93.

**547.** 4. Express Agreement. — *Mallory v. Mackaye*, 86 Fed. Rep. 122.

5. Implication from Attendant Circumstances. — *Colliery Engineer Co. v. United Correspondence Schools Co.*, 94 Fed. Rep. 152.

In general when an artist is commissioned to execute a work of art not in existence at the time when the commission is given, the burden of proving that he retains a copyright in the work of art executed, sold, and delivered under the commission rests heavily upon the artist; when a patron gives a commission to an artist, a strong implication arises that the work of art commissioned is to belong unreservedly and without limitation to the patron, and that the patron has a right to make and permit to any extent reproductions of the work of art sold to him. *Dielman v. White*, 102 Fed. Rep. 892, holding that the plaintiff, an artist who executed certain panels for the government, to be placed in the congressional library, could not enjoin a publication of photographs of the panels, which were taken with the consent of the proper government officials, although he had duly entered the panels for copyright.

Under the English Statute the inference that the copyright was intended to belong to the employer of another to do a specified work may be fairly drawn when there are no specific circumstances, and the only material facts are the employment and the payment. *Lawrence v. Aflalo*, (1904) A. C. 17, 73 L. J. Ch. 85, 89 L. T. N. S. 569, reversing 72 L. J. Ch. 107, (1903) 1 Ch. 318, 87 L. T. N. S. 605, (1902) 1 Ch. 264, 70 L. J. Ch. 797, 85 L. T. N. S. 342, 50 W. R. 24.

Where a photograph is in the ordinary way taken by a photographer for a sitter at the request of the sitter, and upon a promise by him, express or implied, to pay for it, the negative of the photograph is, within the true meaning of the proviso to section 1 of the Fine Arts Copyright Act 1862, "made or executed for or on behalf of any other person for a good or a valuable consideration," and the

copyright belongs to the sitter, notwithstanding that the photographer retains the property in the negative. *Boucas v. Cooke*, (1903) 2 K. B. 227, 72 L. J. K. B. 741, 88 L. T. N. S. 760.

A photographer who has taken a photograph for a customer is not entitled, without the consent of the customer, to sell or exhibit copies of the photograph. *McCosh v. Crow*, Sc. Ct. of Sess. 5 F. 670.

Under the Fine Arts Copyright Act 1862, it is not necessary that any agreement in writing should be made or entered on the register where registration is in the name of the person for or on behalf of whom a drawing is made or executed for a good or valuable consideration. *Petty v. Taylor*, (1897) 1 Ch. 465, 66 L. J. Ch. 209.

**548.** 1. *Mifflin v. Dutton*, 190 U. S. 265, affirming (C. C. A.) 112 Fed. Rep. 1004, and holding that where the author of a contribution to a magazine enters it for copyright immediately after its publication in the magazine there can be no presumption that there was an intention to authorize the publishers of the magazine to obtain a copyright in their own names.

5. Trustee. — The real owner of a manuscript which has been entered for copyright by another cannot, by a retroactive adoption and for the purpose of bringing suit for infringement, constitute the person making the entry a trustee. *Koppel v. Downing*, 11 App. Cas. (D. C.) 93.

Registration by Agent. — In England it has been held that registration of copyright under the Copyright Act 1842, or the Fine Arts Copyright Act 1862, in the name of a person who is a mere agent or nominee of the proprietor of the copyright, and not a trustee of the copyright for him, is bad; and joinder of the unregistered proprietor as coplaintiff with the person so improperly registered will not render an action for infringement of the copyright maintainable. *Petty v. Taylor*, (1897) 1 Ch. 465, 66 L. J. Ch. 209, 75 L. T. N. S. 545, 45 W. R. 299.

**551.** 3. Under the Act of 1831. — *Mifflin v. Dutton*, 190 U. S. 265, affirming (C. C. A.) 112 Fed. Rep. 1004.

Under the Canadian Copyright Act, to entitle the author of a book to protection, the book must have been duly registered. *Angers v. Leprohon*, 22 Quebec Super. Ct. 170.

**552.** 4. The Assignee of a copyright under 5 and 6 Vict., c. 45, must be registered before he can maintain an action for its infringement. *Morang v. Publishers Syndicate*, 32 Ont. 393; *Liverpool Gen. Brokers Assoc. v. Commercial*



**552. 3. Sufficiency of Compliance with Directions — a. CONSTRUCTION OF THE STATUTES.** — See note 7.

**553. b. FILING COPY OF TITLE — (2) Variance Between Title Filed and That Published.** — See note 3.

**554.** See note 1.

**555. c. DEPOSITING COPY OF WORK — (2) Time of Depositing Copies.** — See note 5.

**d. PUBLICATION.** — See note 6.

**557. e. INSCRIBING NOTICE OF COPYRIGHT — (1) Contents of Notice — (d) Name of Person Taking Out the Copyright.** — See note 1.

**558. (2) In What Copies Inserted.** — See note 1.

**560. (4) In the Case of Paintings.** — See note 1.

**4. Wrongful Use of Copyright Notice — Cases in Which Penalty Incurred.** — See notes 3, 4.

Press Telegram Bureaux, (1897) 2 Q. B. 1, 66 L. J. Q. B. 405, 76 L. T. N. S. 292.

**Filing Copies — Penalty.** — The failure of an author to comply with the requirement of the copyright statutes in England as to filing copies of his work in certain libraries does not affect the copyright, but only makes him liable to a penalty for the failure. *Larowe-Louisette v. O'Loughlin*, 88 Fed. Rep. 896.

**552. 7. Strict Construction as to Penalty.** — In actions to recover the penalty imposed by section 4965 of the United States Revised Statutes the plaintiff must show that there has been a strict compliance with section 4956; that section should be strictly construed, because it contains the conditions precedent to the recovery of severe penalties. *Bennett v. Carr*, (C. C. A.) 96 Fed. Rep. 213.

**553. 3. Immaterial Variation.** — The title deposited with the librarian of Congress read as follows: "The Captain of the Rajah. By Howard Patterson. Illustrated by Warren Sheppard. A thrilling and realistic sea story from a noted sailor's pen, and lavishly illustrated by the pencil of America's greatest marine artist." The book was published with the short title: "The Captain of the Rajah. A Story of the Sea, by Howard Patterson. Illustrated by Warren Sheppard." It was held that the variance was immaterial and that the protection of the statute was not thereby lost. *Patterson v. J. S. Ogilvie Pub. Co.*, 119 Fed. Rep. 451.

**554. 1. Mifflin v. Dutton, 190 U. S. 265, affirming (C. C. A.) 112 Fed. Rep. 1004.**

**555. 5. Holmes v. Hurst, 174 U. S. 82, affirming (C. C. A.) 80 Fed. Rep. 514, 76 Fed. Rep. 757.**

**6. Koppel v. Downing, 11 App. Cas. (D. C.) 93.**

**557. 1. Name of Person Taking Out the Copyright.** — *Mifflin v. Dutton*, 107 Fed. Rep. 708.

It is incorrect to say that any form of notice is good if it calls attention to the person of whom inquiry can be made and information obtained, since, the right being purely statutory, the public may justly demand that the person claiming a monopoly of publication shall pursue, in substance, at least, the statutory method of securing it. *Mifflin v. Dutton*, 190 U. S. 265, affirming (C. C. A.) 112 Fed. Rep. 1004.

The following copyright notice has been held

to be sufficient: "Copyright, 1902, Published by Hills & Co., Ltd., London, England." *Hills v. Austrich*, 120 Fed. Rep. 862.

**558. 1. Works Published Both Serially and in Book Form.** — Where a work which has been copyrighted by the author is published serially in a magazine without any notice of the author's copyright, there is a forfeiture of the copyright, although the magazine is copyrighted by the publishers, and each number contains a proper notice of the publishers' copyright. *Mifflin v. Dutton*, 107 Fed. Rep. 708. So where a work which had been published serially in a copyrighted magazine was subsequently copyrighted by the author and published in book form with a notice of the copyright entry by the author only, it was held that the copyright protection was lost. *Mifflin v. Dutton*, 190 U. S. 265, affirming (C. C. A.) 112 Fed. Rep. 1004, 107 Fed. Rep. 708.

**Photographs for Reproducing Moving Scenes.** — Notice of copyright in a series of pictures designed for reproduction by means of kinetoscopes is sufficiently given by inscribing the notice at the front end of the films which contain the positive reproductions of the pictures. *Edison v. Lubin*, (C. C. A.) 122 Fed. Rep. 240, reversing 119 Fed. Rep. 993.

**Omission of Notice by Licensee.** — It has been held that the copyright duly secured in a story is not forfeited in consequence of the inadvertent omission of the notice of copyright by a licensee to whom permission is given to publish the story, on the express condition that it shall be printed with the usual copyright notice. *American Press Assoc. v. Daily Story Pub. Co.*, (C. C. A.) 120 Fed. Rep. 766.

**560. 1. Delivery of Description of Painting.** — The formalities for securing a copyright in a painting have not been sufficiently complied with unless a description of the painting is delivered in the office of the librarian of Congress, or deposited in the mails; the delivery or depositing of a photograph only is not sufficient. *Bennett v. Carr*, (C. C. A.) 96 Fed. Rep. 213.

**3. Person Liable for Penalty.** — While the statute as amended in 1897 subjects to the penalty every person "who shall knowingly issue or sell" any book bearing a copyright notice when there has been no entry for copyright, the law as it stood prior to that amendment provided that "any person who shall insert or impress"



**560.** Defective Notice. — See note 5.

**561. VIII. EXTENT AND LIMITATIONS OF COPYRIGHT PROTECTION —**

1. Statutory Provisions — Right to Dramatize or Translate. — See note 2.

2. Parts of Book Protected by Copyright — *c.* PRINTS, ENGRAVINGS, ETC., CONTAINED IN BOOK. — See note 5.

*d.* WHETHER TITLE PROTECTED. — See note 7.

**562.** 3. Right to Sell by Subscription Only. — See note 2.

**563.** 4. Limitations of Copyright Protection — *c.* THEORIES, SPECULATIONS, OR OPINIONS. — See note 1.

*d.* SUBJECT OF WORK. — See note 2.

**564.** *e.* FORM AND SIZE OF BOOK. — See note 1.

such false copyright notice should be liable for the penalty, and it has been held that under the statute as it stood before the amendment the penalty was not incurred by a person who sold books containing a fictitious copyright notice which he had neither inserted nor caused to be inserted. *Ross v. Raphael Tuck, etc., Co.*, (C. C. A.) 91 Fed. Rep. 128.

**560.** 4. False Statement Affixed in Foreign Country. — Under the law as it stood prior to the amendment of 1897 the penal provisions relating to the wrongful use of copyright notices had no extraterritorial operation, and therefore did not embrace the act of affixing in a foreign country to a publication a false statement that it was copyrighted under the laws of the United States. And since the proviso in the amendment of 1897 expressly excluded from the operation of that amendment "any importation of or sale of such goods or articles brought into the United States prior to the passage hereof," the penalty is not incurred by the sale after that enactment of the amendment of publications with false copyright notices which were imported before the amendment went into effect. *McLoughlin v. Raphael Tuck Co.*, 191 U. S. 267, affirming 115 Fed. Rep. 85.

5. Notice Omitting Date of Copyright. — It has been held that the penalty is not incurred by using a notice which is defective in that it does not contain any date of alleged copyright. *Hoertel v. Tuck*, 94 Fed. Rep. 844.

**561.** 2. The Right to Dramatize may exist in a series of cartoons. *Empire City Amusement Co. v. Wilton*, 134 Fed. Rep. 132.

5. Prints, etc., Contained in Book Protected. — *Marshall v. Bull*, 85 L. T. N. S. 77.

But it has been held in *England* that registration of a book under the Copyright Act 1842, in the name of the author of the letterpress, does not confer any protection in respect of drawings which are introduced into the book as illustrations and the art copyright in which is vested in other persons. *Petty v. Taylor*, (1897) 1 Ch. 465, 66 L. J. Ch. 209.

**Penalty — Newspaper Cuts.** — An action for the recovery of the pecuniary penalty for an infringement of a copyright engraving, cut, or print imposed by Rev. Stat. U. S., § 4965, as amended, cannot be maintained for the infringement of a cut appearing in an issue of a newspaper which was entered for copyright as a whole, there having been no separate entry of the cut for copyright. *Bennett v. Boston Traveler Co.*, (C. C. A.) 101 Fed. Rep. 445.

7. No Protection Afforded by Title Alone. — It has been held that no protection under the

copyright laws is afforded by the title alone, separate from the work which it is used to designate. *Corbett v. Purdy*, 80 Fed. Rep. 901.

**562.** 2. Controlling Price of Book under Copyright Law. — It has been held that the price at which a copyright book may be sold by dealers cannot be controlled by a notice in each copy stating the price at which it is to be sold and declaring that any sale at a lower price will be treated as an infringement of copyright. *Bobbs-Merrill Co. v. Snellenburg*, 131 Fed. Rep. 530.

**Controlling Price of Book by Contract.** — An agreement between the owner of the copyright in a book and a party to whom the right to print and publish the book is given that it shall not be sold at less than a stipulated price is not void as being in restraint of trade. *Murphy v. Christian Press Assoc. Pub. Co.*, 38 N. Y. App. Div. 426.

**563.** 1. Scope of Copyright Protection. — In *Holmes v. Hurst*, 174 U. S. 82, affirming (C. C. A.) 80 Fed. Rep. 514, 76 Fed. Rep. 757, it was said that the right secured by the copyright act "is not a right to the use of certain words, because they are the common property of the human race, and are as little susceptible of private appropriation as air or sunlight; nor is it the right to ideas alone, since in the absence of means of communicating them they are of value to no one but the author. But the right is to that arrangement of words which the author has selected to express his ideas. Or, as Lord Mansfield describes it, 'an incorporeal right to print a set of intellectual ideas, or modes of thinking, communicated in a set of words or sentences, and modes of expression. It is equally detached from the manuscript, or any other physical existence whatsoever.' *Millar v. Taylor*, 4 Burr. 2396. The nature of this property is perhaps best defined by Mr. Justice Erle in *Jefferys v. Boosey*, 4 H. L. Cas. 867: 'The subject of property is the order of words in the author's composition; not the words themselves, they being analogous to the elements of matter, which are not appropriated unless combined, nor the ideas expressed by those words, they existing in the mind alone, which is not capable of appropriation.'"

2. *Falk v. City Item Printing Co.*, 79 Fed. Rep. 321. See also *Springfield v. Thame*, 89 L. T. N. S. 242.

**564.** 1. See *Holmes v. Hurst*, 174 U. S. 82, affirming (C. C. A.) 80 Fed. Rep. 514, 76 Fed. Rep. 757.

**Right to Bind or Rebind and Sell Copyrighted Works.** — The purchaser of unbound copies of a copyrighted work has a right, so far as the copy-

**565. X. TRANSFER OF COPYRIGHT — 2. Assignment of Partial Interest.** — See note 4.

**566. 6. Contracts Not Amounting to Assignments of Copyright — Agreement to Publish.** — See note 4.

Sale of Plates. — See note 6.

Assignment of Right to Reproduce Play or Sell Copies of Book in Limited Territory.

— See note 7.

**567. XI. LICENSE — Effect of License on Title.** — See note 1.

Construction of Licenses. — See note 2.

**XII. INFRINGEMENT — 1. In General.** — See note 6.

**2. Constituent Elements — a. COPYING — (1) General Rule.** — See note 7.

**568. (2) Similarity Without Infringement — Similar Work Produced in Ignorance of Copyrighted Work.** — See note 2.

Similarity Resulting from Common Subject-matter or Origin. — See note 3.

**569.** See note 1.

right statute is concerned, to bind and resell them. *Kipling v. Putnam*, (C. C. A.) 120 Fed. Rep. 631.

And so far as the copyright statutes are concerned, the purchaser of copyrighted books may restore the volumes to their original condition by cleaning them, trimming the edges of the leaves, and rebinding them in exact imitation of the original binding, and may place them on the market. *Doan v. American Book Co.*, (C. C. A.) 105 Fed. Rep. 772.

**565. 4. Transfer of Right to Sell in Limited Territory.** — The right to sell a book in any manner anywhere in the United States which is secured by the copyright laws may be transferred to another as to a particular part of the country. *Davis v. Vories*, 141 Mo. 234.

**566. 4. For Cases Construing Publishing Contracts,** see *Gollancz v. Dent*, 88 L. T. N. S. 358; *Wagner v. Conried*, 125 Fed. Rep. 798; *Fraser v. Yack*, (C. C. A.) 116 Fed. Rep. 285; *Holt v. Silver*, 169 Mass. 435.

**Bankruptcy of Assignee.** — A copyright which is held by a bankrupt under an absolute and unqualified assignment to him and his successors and assigns is a part of the bankrupt's property which passes to the trustee in bankruptcy. *In re Howley-Dresser Co.*, 132 Fed. Rep. 1002.

**6. Assignment of Plates.** — The transfer of the plates from which a copyrighted work is printed at a sheriff's sale does not transfer the copyright so as to give title thereto to one to whom the purchaser at the sale may transfer the plates. *Patterson v. J. S. Ogilvie Pub. Co.*, 119 Fed. Rep. 451.

**7. Assignment of Right to Print and Sell for Limited Period.** — A contract which assigned the right to print and sell a copyrighted work for a limited period, but expressly reserved the copyright, and provided for the surrender of the plates and unsold copies at the end of the stipulated period, has been held to be a license. *Black v. Imperial Book Co.*, 8 Ont. L. Rep. 9, affirming with variations 5 Ont. L. Rep. 184, 1 Com. L. R. 417.

**567. 1.** *Marshall v. Bull*, 85 L. T. N. S. 77, per Byrne, J. See also *Davis v. Vories*, 141 Mo. 234.

**2. Construction of License to Produce Play.** — *Herne v. Liebler*, 73 N. Y. App. Div. 194.

**6. Infringement of Statutory Copyright and Common-law Property Determined by Same Rules.** — *Maxwell v. Goodwin*, 93 Fed. Rep. 665.

**7. Copying Necessary to Constitute Infringement.** — *Maloney v. Foote*, 101 Fed. Rep. 264; *Maxwell v. Goodwin*, 93 Fed. Rep. 665.

It has been held that a copyright in the photographs of a stage dancer was not infringed by the publication in a newspaper of a crude illustration or woodcut of certain poses assumed by the dancer on the stage in her dancing exhibitions, when it did not appear, and could not be inferred from the exhibits, that the illustrations were copies of, or in any way connected with, the photographs. *Falk v. City Item Printing Co.*, 79 Fed. Rep. 321.

**Uncompleted Copying.** — In order that one work may be an infringement of the copyright in another, for the purpose of forfeiture, at least, it must have been so far perfected as to establish the identity; in other words, infringement, for the purpose of forfeiture, must be an accomplished fact, and cannot be inferred from what is intended when the copy is completed. *Morrison v. Pettibone*, 87 Fed. Rep. 330.

**Reproduction of Musical Score by Rolls of Perforated Paper.** — It has been held that rolls of perforated paper used in organettes were not copies of the music from which they were adapted within the meaning of the copyright law. *Kennedy v. McTammany*, 33 Fed. Rep. 584.

So under a statute defining copyright as "the sole and exclusive liberty of printing and otherwise multiplying copies" it has been held that perforated papers, used in an "Æolian," which represented the instrumental music of certain copyrighted songs, were not copies of the musical score of the songs, and therefore were not infringements of the copyright therein. *Boosey v. Whight*, (1900) 1 Ch. 122, 69 L. J. Ch. 66, 81 L. T. N. S. 571, affirming (1899) 1 Ch. 836, 68 L. J. Ch. 379, 80 L. T. N. S. 561, 47 W. R. 554.

**568. 2. Work Similar to Copyrighted Work Produced Independently Thereof.** — *Maxwell v. Goodwin*, 93 Fed. Rep. 665.

**3. Similarity Due to Fact of a Common Subject.** — *Maxwell v. Goodwin*, 93 Fed. Rep. 665.

**569. 1. Similarity Due to Fact of a Common Source.** — *Moffatt v. Gill*, 84 L. T. N. S. 452,

- 569.** *b.* PUBLICATION — (1) *In General*. — See note 5.  
**570.** *c.* FRAUD NOT ESSENTIAL. — See note 8.  
**571.** **3.** What Copying Constitutes Infringement — *a.* GENERAL RULE. — See note 1.  
*b.* CONSIDERATIONS CONTROLLING THE QUESTION OF INFRINGEMENT. — See notes 3, 4.  
**572.** Copying by Author Who Has Parted with Copyright. — See note 7.  
**573.** *c.* PARTIAL REPRODUCTION — (1) *In General*. — See notes 2, 3.  
**574.** *e.* DRAMATIZATION WITH PUBLICATION IN PRINT. — See note 5.  
**576.** **4.** In the Case of Compilations — *a.* GENERAL PRINCIPLES — Restrictions on Use of Prior Works. — See note 7.  
**577.** Permissible Use of Prior Works. — See notes 1, 2.  
**578.** See note 1.  
*b.* DIRECTORIES. — See notes 3, 4.

*reversed* 86 L. T. N. S. 465, 49 W. R. 438; *Howell v. Miller*, (C. C. A.) 91 Fed. Rep. 129.

**569.** **5.** Reproduction of Song by Means of Phonograph. — The reproduction through the agency of a phonograph of the sounds of musical instruments playing a copyrighted musical composition is not a "copying" or "publication" within the meaning of the copyright law, and therefore does not constitute an infringement of the copyright in the composition. *Stern v. Rosey*, 17 App. Cas. (D. C.) 562.

**570.** **8.** Inadvertent Infringement. — *Green v. Irish Independent Co.*, (1899) 1 Ir. R. 386; *American Press Assoc. v. Daily Story Pub. Co.*, (C. C. A.) 120 Fed. Rep. 766. *Compare* *Snow v. Laird*, (C. C. A.) 98 Fed. Rep. 813, an action for the recovery of the statutory penalties.

**571.** **1.** Copyright Infringed by Literal Reproduction or Reproduction with Colorable Variation. — *Moffatt v. Gill*, 86 L. T. N. S. 465, 50 W. R. 528; *Maxwell v. Goodwin*, 93 Fed. Rep. 665.

**3.** Value of Material Taken. — *Social Register Assoc. v. Murphy*, 128 Fed. Rep. 116.

**4.** Injury to Sale of Original. — Injury to the sale of a copyrighted work by a subsequent publication is not alone sufficient to constitute infringement; the second work must be to some extent a copy of the first. *Boosey v. Whight*, (1900) 1 Ch. 122, 69 L. J. Ch. 66, 81 L. T. N. S. 571, *affirming* (1899) 1 Ch. 836, 68 L. J. Ch. 379, 80 L. T. N. S. 561.

**572.** **7.** *Compare* *Colliery Engineer Co. v. United Correspondence Schools Co.*, 94 Fed. Rep. 152.

**573.** **2.** Reproduction of Part Only May Constitute Piracy. — *Maxwell v. Goodwin*, 93 Fed. Rep. 665.

**Copying Central Figure of Picture.** — Where a picture contains a direct copy of a substantial portion of a copyrighted work, that substantial portion constitutes an infringement if it is a copy in the ordinary sense, and particularly where the sentiment expressed in the copyright picture has also been embodied. *Brooks v. Religious Tract Soc.*, 45 W. R. 476.

**3.** Reproduction of Material and Substantial Parts Necessary. — *Moffatt v. Gill*, 84 L. T. N. S. 452, 49 W. R. 438, *reversed* 86 L. T. N. S. 465; *Social Register Assoc. v. Murphy*, 128 Fed. Rep. 116; *Howell v. Miller*, (C. C. A.) 91 Fed. Rep. 129.

**574.** **5.** See *Liddell v. Copp-Clark Co.*, 19 Ont. Pr. 332.

**576.** **7.** *Social Register Assoc. v. Murphy*, 128 Fed. Rep. 116.

**577.** **1.** Justifiable Use of Prior Compilation. — In a case which goes so far in upholding the right to make use of prior compilations as to be of questionable authority, it appeared that the defendant had been enjoined from publishing certain school text-books on the ground that they were infringements of text-books published by the complainant. Thereupon the defendants took the infringing books and compared them with the authorities from which the complainant had compiled its original books. Where the text or example was found in the earlier books it was marked for retention; all else was struck out, and that which was left was republished. On the ground that this did not constitute an infringement it was held that the defendants could not be punished for contempt for violating the injunction. *Colliery Engineer Co. v. Ewald*, 126 Fed. Rep. 843.

**2.** Use of Prior Work to Test Completeness. — An author in dealing with a subject already treated by another may use the earlier work to test the completeness of his own. *Moffatt v. Gill*, 84 L. T. N. S. 452, 49 W. R. 438, *reversed* 86 L. T. N. S. 465.

**578.** **1.** Using Work to Find Authorities. — *Moffatt v. Gill*, 84 L. T. N. S. 452, 49 W. R. 438, *reversed* 86 L. T. N. S. 465.

It has been held that the compilers of an encyclopædia of law do not infringe the copyright of an earlier work of a similar character by taking therefrom lists of the cases cited, without copying any of the text, and making use of them, in connection with citations obtained from other sources, by examining the original reports. *Edward Thompson Co. v. American Law Book Co.*, (C. C. A.) 122 Fed. Rep. 922, *reversing* 121 Fed. Rep. 907, *affirmed* 130 Fed. Rep. 639.

**3.** Use of Directories. — In *Sampson, etc., Co. v. Seaver-Radford Co.*, 129 Fed. Rep. 761, the court, without deciding the question, expressed the opinion that there is strong reason for holding that the publisher of a new directory has a right to take an old directory and be guided by it to original sources of information, and that if, so guided, he goes to those sources of information and obtains facts, he may publish those facts, even though they consist of names and addresses which are identical with those published by the old directory. And it was so



**581.** 5. In the Case of Prints, Engravings, Etc. — Indirect Copying. — See note 4.

6. In the Case of Dramatic Compositions — In General. — See note 5.

**582.** Reproducing Mechanical Contrivances and Stage Scenes. — See note 1.

**583.** XIII. PERSONS LIABLE FOR INFRINGEMENT — 1. Printer and Publisher. — See note 4.

**584.** XIV. REMEDIES FOR INFRINGEMENT — 2. Injunction and Accounting — a. IN GENERAL. — See note 5.

**585.** f. GROUNDS FOR REFUSING INJUNCTION — (2) *Insignificance of Infringement.* — See note 8.

**586.** (3) *Laches or Acquiescence of Plaintiff.* — See note 5.

*Plaintiff's Knowledge of the Infringement.* — See note 7.

g. PROOF OF DAMAGES NOT NECESSARY. — See note 8.

**587.** h. TEMPORARY INJUNCTION — WHEN GRANTED — (1) *General Rule.* — See note 1.

**588.** (2) *Considerations Controlling the Question — Infringement of the Copyright.* — See note 4.

*Comparative Injury to Respective Parties.* — See note 5.

*Defendant's Financial Responsibility.* — See note 6.

decided in *Sampson, etc., Co. v. Seaver-Radford Co.*, 134 Fed. Rep. 890.

In a case which seems to go very far in upholding the right to make use of prior compilations it appeared that the defendant, in preparing a book of credit ratings, by making use of the complainant's similar book, discovered the names of individuals, firms, and corporations engaged in business, and therefore desirable for inclusion in the book, which names had apparently not been discovered by the investigations of the defendant's own canvassers, nor found in some other publication. The names thus obtained from the complainant's book aggregated certainly hundreds, possibly thousands. It was held that infringement of copyright was not sufficiently shown to justify a temporary injunction. *Dun v. International Mercantile Agency*, 127 Fed. Rep. 173.

**578.** 4. See *Social Register Assoc. v. Murphy*, 128 Fed. Rep. 116. See also *Williams v. Smythe*, 110 Fed. Rep. 961, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 578.

**581.** 4. *Reproducing Photographs of Painting.* — It has been held that the copyright in a song is not infringed by the publication of an illustration which is a reproduction of a copyrighted photograph of the painting. *Champney v. Haag*, 121 Fed. Rep. 944.

5. *Imitation of Authorized Singer.* — It has been held that the copyright in a song is not infringed by the singing of the chorus of the song by one who attempts to give an imitation of the singing and acting of the authorized singer of the whole song. *Bloom v. Nixon*, 125 Fed. Rep. 977.

**582.** 1. *Scenes.* — See *Brady v. Daly*, 175 U. S. 148, affirming (C. C. A.) 83 Fed. Rep. 1007.

**583.** 4. *Liability of Printer.* — The mere fact that an infringing book bears the imprint of a particular printer does not make him liable for the infringement if he did not in fact print the book, although he may have printed parts of the book containing no infringing matter. *Kelly v. Gavin*, (1902) 1 Ch. 631, 71 L. J. Ch. 405, 86 L. T. N. S. 393, affirming (1901)

1 Ch. 374, 70 L. J. Ch. 237, 84 L. T. N. S. 581, 49 W. R. 313.

**584.** 5. *Statutory Recognition of Remedy in United States.* — See *Howell v. Miller*, (C. C. A.) 91 Fed. Rep. 129.

**585.** 8. *Invasion of Copyright Slight.* — *Howell v. Miller*, (C. C. A.) 91 Fed. Rep. 129.

**586.** 5. *Werner Co. v. Encyclopædia Britannica Co.*, (C. C. A.) 134 Fed. Rep. 831, 1024.

7. *Encyclopædia Britannica Co. v. American Newspaper Assoc.*, 130 Fed. Rep. 460, holding that laches cannot be successfully invoked in aid of a publisher of an infringing article when it does not appear that the owner of the copyrighted article had knowledge of the infringement, or that he had notice of any facts sufficient to put him upon inquiry.

8. *Proof of Actual Damages Not Necessary.* — *Sampson, etc., Co. v. Seaver-Radford Co.*, 134 Fed. Rep. 890.

**587.** 1. *General Rule as to Temporary Injunction.* — Where there is no doubt of the infringement, and no defense rendering it inequitable to grant the relief prayed for, a preliminary injunction will be granted. *Encyclopædia Britannica Co. v. American Newspaper Assoc.*, 130 Fed. Rep. 460.

**588.** 4. *Doubt as to Fact of Infringement a Ground for Refusal.* — *Dun v. International Mercantile Agency*, 127 Fed. Rep. 173; *Colliery Engineer Co. v. United Correspondence Schools Co.*, 94 Fed. Rep. 152. But see *Harper v. Holman*, 84 Fed. Rep. 224.

5. *Possibility of Undue Injury to Defendant a Ground for Refusal.* — It has been said that it is the business of a court of equity to inquire not only whether serious and irreparable damage is to be done to the complainant if the temporary injunction is refused, but also to inquire whether or not the injury done to the defendant by the granting of an injunction will be disproportionate to the benefit derived by the complainant. *Sampson, etc., Co. v. Seaver-Radford Co.*, 120 Fed. Rep. 761.

6. *Requiring Defendant to Give Bond.* — A conditional order may be made for the entry of an interlocutory decree for an injunction un-

**588.** *i.* COMPELLING DEFENDANT TO KEEP ACCOUNT OF SALES AND PROFITS. — See note 7.

**589.** *k.* SCOPE OF INJUNCTION — (2) *Where Pirated and Original Matter Are Separable.* — See note 3.

(3) *Where Pirated and Original Matter Are Not Separable.* — See note 5.

*l.* ACCOUNT OF PROFITS — Incident to Right to Injunction. — See note 6.

**590.** Profits Recoverable — General Rule. — See notes 3, 4.

**3.** Penalties and Forfeitures — *a.* STATUTORY PROVISIONS. — See note 6.

*b.* CONSTRUCTION OF THE PROVISIONS. — See note 7.

**591.** *d.* PERSONS LIABLE FOR THE STATUTORY PENALTIES — In Case of Infringement by an Agent. — See notes 5, 6.

**592.** *e.* COPIES OR SHEETS FOR WHICH PENALTIES ATTACH — Copies Found in Possession of Infringer. — See note 5.

less the defendant shall file a bond to the complainant for the payment of the sum which may finally be decreed against the defendant. *Sampson, etc., Co. v. Seaver-Radford Co.*, 129 Fed. Rep. 761; *Trow Directory, etc., Co. v. Boyd*, 97 Fed. Rep. 586.

**588.** *7.* Refusal of Injunction and Ordering of Account of Sales and Profits to Be Kept. — *Sampson, etc., Co. v. Seaver-Radford Co.*, 129 Fed. Rep. 761; *Trow Directory, etc., Co. v. Boyd*, 97 Fed. Rep. 586.

**589.** *3.* Injunction Limited to Parts Copied. — *Sampson, etc., Co. v. Seaver-Radford Co.*, 134 Fed. Rep. 890.

**5.** Where Original and Pirated Matter Not Separable. — *Williams v. Smythe*, 110 Fed. Rep. 961.

A general injunction may be granted against the defendant with liberty to apply for a modification when the pirated matter shall have been expunged. *Social Register Assoc. v. Murphy*, 128 Fed. Rep. 116; *Williams v. Smythe*, 110 Fed. Rep. 961.

**6.** *Beauchemin v. Cadieux*, 22 Quebec Super. Ct. 482.

**590.** *3.* Approved Rule. — See *Muddock v. Blackwood*, (1898) 1 Ch. 58, 67 L. J. Ch. 6, 77 L. T. N. S. 493.

**4.** Limits of Accounting. — While the complainant in a suit in equity for infringement of copyright is entitled to an account of the profits, gains, and advantages which the defendant has received, he is not entitled to damages other than this. *Social Register Assoc. v. Murphy*, 129 Fed. Rep. 148, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 590. And see *infra*, this title, **592.** 11.

**6.** Penalty under Section 4965 of the Revised Statutes. — There can be no recovery of the penalty imposed by section 4965 of the United States Rev. Stat., for the infringement of a cut published in an issue of a newspaper which is entered for copyright as a whole, without any separate entry of the cut for copyright. *Bennett v. Boston Traveler Co.*, (C. C. A.) 101 Fed. Rep. 445.

**Replevin to Enforce Forfeitures.** — The action of replevin, as it exists in the state of *Pennsylvania*, is not an appropriate remedy to enforce the forfeiture provided by section 4965 of the United States Rev. Stat., and the subsequent legislation relating to copyright. *Gustin v.*

*Record Pub. Co.*, 127 Fed. Rep. 603; *Rinehart v. Smith*, 121 Fed. Rep. 148.

But in a case arising in *Illinois* it was held that replevin was the proper remedy to enforce the forfeiture of infringing plates and sheets found in the possession of the defendants as declared by section 4965, relating to copyrights. *Morrison v. Pettibone*, 87 Fed. Rep. 330.

**A Prior Demand and Refusal Are Not Necessary** to the maintenance of an action under the copyright statute for the recovery of penalties and forfeitures. *Hegeman v. Springer*, (C. C. A.) 110 Fed. Rep. 374.

**7.** Provisions Strictly Construed. — *Falk v. Curtis Pub. Co.*, 98 Fed. Rep. 989, (C. C. A.) 107 Fed. Rep. 126; *Morrison v. Pettibone*, 87 Fed. Rep. 330.

**591.** *5.* Infringement by Agent — Principal's Liability. — *McDonald v. Hearst*, 95 Fed. Rep. 656.

**6.** Liability of Printer. — Under section 6 of the English Fine Arts Copyright Act of 1862, which imposes a penalty on any person who, not being the proprietor for the time being of copyright in any painting, etc., "shall without the consent of such proprietor repeat, copy, etc., or cause or procure to be repeated, copied, etc., any such work or the design thereof," it has been held that printers cannot escape on the ground of innocent agency, the liability for the penalty imposed. *Baschet v. London Illustrated Standard Co.*, (1900) 1 Ch. 73, 69 L. J. Ch. 35, 81 L. T. N. S. 509.

**592.** *5.* Penalty Limited to Sheets Found in Defendant's Possession. — *Bolles v. Outing Co.*, 175 U. S. 262, affirming 45 U. S. App. 449, 77 Fed. Rep. 966; *Falk v. Curtis Pub. Co.*, 98 Fed. Rep. 989.

On the ground that unless there has been a legal forfeiture the right to sue for the forfeited penalty has not accrued, it has been held that where no proceedings have been taken against a defendant for forfeiture, and no seizure by condemnation or other legal proceedings has been made, no papers have been "found in the possession" of the defendant within the meaning of the statute, and therefore no cause of action exists against the defendant to recover the statutory penalty for the infringement of a copyright in a photograph. *Child v. New York Times Co.*, 110 Fed. Rep. 527; *Falk v. Curtis Pub. Co.*, (C. C. A.) 107 Fed. Rep. 126.

**592.** Penalty Limited by Number of Sheets. — See note 6.

**4. Damages for Infringement — Not Recoverable in Equity.** — See note 11.

**593.** Whether Recoverable When Penalties Are Prescribed. — See notes 1, 2.

**6. Limitation of Actions — Actions in Equity.** — See note 9.

**XV. JURISDICTION — Actions Based on the Common-law Property.** — See note 11.

**Actions Based on Statutory Copyright.** — See note 12.

**594.** Actions for the Statutory Penalties and Forfeitures. — See note 1.

**XVI. EVIDENCE — 1. Of the Existence of Copyright — a. BURDEN OF PROOF.** — See note 3.

**Showing Compliance with Statutory Formalities.** — See note 5.

**b. COMPETENCY OF EVIDENCE — Deposit of Title.** — See note 8.

**Deposit of Copies.** — See note 9.

**Possession by Agent of Corporation.** — The statute extends to corporations as well as natural persons, and the possession of agents of a corporation, who in that behalf are its representatives, is the possession of the corporation itself. *Falk v. Curtis Pub. Co.*, 98 Fed. Rep. 989.

**Persons by Whom Sheets Found.** — Although the forfeiture is limited as to the number of copies to such as have been found in the possession of the defendant, it is not necessary that they must have been so found "by the plaintiff or some one acting on his behalf in the premises." *Falk v. Curtis Pub. Co.*, 100 Fed. Rep. 77.

**592. 6. Uncompleted Copies.** — Where the making of a lithograph had advanced only to the extent of making the first impression, presenting merely the initial color and exterior lines of the intended lithograph, without the features or any substantial embodiment of the complainant's photograph, and several plates or stones were required to make the complete copy, it was held that the sheets containing this first or outline impression only were not within the provision relating to forfeiture of plates and copies in Rev. Stat. U. S., § 4965. *Morrison v. Pettibone*, 87 Fed. Rep. 330.

**11. Damages Not Recoverable in Equity.** — *Social Register Assoc. v. Murphy*, 129 Fed. Rep. 148.

**593. 1.** See *Scribner v. Straus*, 130 Fed. Rep. 389.

**2. No Common-law Action for Damages.** — It has been held that under section 4965 of the United States Rev. Stat., which provides for a forfeiture and penalty, but does not provide a remedy for damages, there is no common-law action for damages for the infringement of a copyright in a map. *Walker v. Globe Newspaper Co.*, 130 Fed. Rep. 593.

**9. Patterson v. J. S. Ogilvie Pub. Co.**, 119 Fed. Rep. 451. See also *Beauchemin v. Cadieux*, 22 Quebec Super. Ct. 482.

**11. Larrowe-Loisette v. O'Loughlin**, 88 Fed. Rep. 896.

**12. A State Court Has Jurisdiction of an Action to Restrain a Combination to control the price of copyrighted books although the issue may require the court to construe the rights of the parties under the copyright law.** *Straus v. American Publishers' Assoc.*, (Supm. Ct. Spec. T.) 45 Misc. (N. Y.) 251.

**594. 1. Jurisdiction of United States Circuit Court.** — Although "the general jurisdiction over actions for penalties and forfeitures has been

and is vested in the District Court," it has been held that under Rev. Stat. U. S., § 629, which vests in the Circuit Courts original jurisdiction "of all suits at law arising under the patent or copyright laws of the United States," a Circuit Court has jurisdiction of actions brought under Rev. Stat. U. S., § 4965, to recover the penalty thereby imposed. *Falk v. Curtis Pub. Co.*, 100 Fed. Rep. 77; *Brady v. Daly*, 175 U. S. 148, *affirming* (C. C. A.) 83 Fed. Rep. 1007.

**3. Burden of Proof on Plaintiff.** — *Snow v. Laird*, (C. C. A.) 98 Fed. Rep. 813.

It has been said that authors take their rights under and subject to the law, and, when assailed, the burden is upon them to show literal compliance with each and every statutory requirement in the nature of conditions precedent. *Osgood v. A. S. Aloe Instrument Co.*, 83 Fed. Rep. 470.

**Citizenship of Person Claiming Copyright.** — It has been held that the status of a complainant as "a citizen of the United States or a resident therein" was sufficiently shown by the certificate of the librarian of Congress, dated 1902, describing him as "of New York" and the testimony of the complainant that he was a resident of New York, and mailed the two copies to the librarian of Congress, in that city, in 1890. *Patterson v. J. S. Ogilvie Pub. Co.*, 119 Fed. Rep. 451.

**5. Osgood v. A. S. Aloe Instrument Co.**, 83 Fed. Rep. 470.

**8. Under the Canadian Copyright Act** certificates of registration produced from the proper branch of the department of agriculture at Ottawa are *prima facie* evidence of due compliance with the requirements of the statute entitling the producing party to registration. *Anglo-Canadian v. Dupuis*, 2 Com. L. R. 503.

**Entry at Stationers' Hall.** — A certified copy of the entry at Stationers' Hall has been held to be *prima facie* evidence of proprietorship under sections 18 and 19 of the Imperial Copyright Act of 1842 (5 & 6 Vict., c. 45). *Black v. Imperial Book Co.*, 8 Ont. L. Rep. 9, *affirming* with variations 5 Ont. L. Rep. 184, 1 Com. L. R. 417.

**9. Deposit of Copies in the Mail.** — It has been held that the required deposit of copies was sufficiently shown by the uncorroborated testimony of the complainant that he personally inclosed two copies of his book in a package addressed to the librarian of Congress, and deposited them in the mail on a special date prior



**595.** 2. Of the Infringement — *b.* COMPETENCY OF EVIDENCE — Similarity Between the Two Works. — See notes 3, 4.

How Proved. — See note 5.

Fact of Common Errors. — See note 6.

3. Of Profits. — See note 8.

**CORAM NON JUDICE.** — See note 8a.

**597.** **CORNER.** — See note 1.

to the publication of the book, although the register of copyrights certified that he had made search and could not find any copies of the book on file. *Patterson v. J. S. Ogilvie Pub. Co.*, 119 Fed. Rep. 451.

**595.** 3. *Beauchemin v. Cadieux*, 10 Quebec K. B. 285, *reversed* 31 Can. Sup. Ct. 370, *quoting* 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 595.

**Dramatic Situation.** — The mere fact that two plays which are wholly dissimilar in plot, in characters, in text, and in most of the dramatic situations contain a dramatic situation of which use has frequently been made by dramatists is not sufficient to show that one of the plays is a copy of the other. *Huges v. Belasco*, 130 Fed. Rep. 388.

4. *Encyclopædia Britannica Co. v. American Newspaper Assoc.*, 130 Fed. Rep. 460; *Chicago Directory Co. v. U. S. Directory Co.*, 122 Fed. Rep. 189; *Cadieux v. Beauchemin*, 31 Can. Sup. Ct. 370, *reversing* 10 Quebec K. B. 285.

5. *Encyclopædia Britannica Co. v. American*

*Newspaper Assoc.*, 130 Fed. Rep. 460; *Beauchemin v. Cadieux*, 10 Quebec K. B. 285, *reversed* 31 Can. Sup. Ct. 370, *quoting* 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 595. But *compare* *Carte v. Dennis*, 5 N. W. Ter. 30.

6. **Infringement Shown by Coincident of Errors.** — *George T. Bisel Co. v. Welsh*, 131 Fed. Rep. 564; *Social Register Assoc. v. Murphy*, 128 Fed. Rep. 116; *Williams v. Smythe*, 110 Fed. Rep. 961; *Trow Directory Printing, etc., Co. v. U. S. Directory Co.*, 122 Fed. Rep. 191; *Cadieux v. Beauchemin*, 31 Can. Sup. Ct. 370, *reversing* 10 Quebec K. B. 285, *quoting* 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 595.

8. See *D'Ole v. Kansas City Star Co.*, 94 Fed. Rep. 840; *Beauchemin v. Cadieux*, 22 Quebec Super. Ct. 482.

8a. *St. Lawrence Boom, etc., Co. v. Holt*, 51 W. Va. 363, *quoting* 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 595.

**597.** 1. *Christian v. Gernt*, (Tenn. Ch. 1900) 64 S. W. Rep. 399.

## CORONERS.

By B. B. BLYDENBURGH.

**598.** I. DEFINITION — A Coroner. — See note 1.

**599.** History of the Office. — See note 1.

**600.** III. ELECTION AND APPOINTMENT — Statutory Changes in America. — See note 4.

**602.** VI. POWERS AND DUTIES — Judicial and Ministerial. — See note 1.

1. As a Judicial Officer — *a.* GENERALLY. — See note 2.

Duties Defined — Principal Duties. — See note 3.

**598.** 1. "An Instructive Article on the Office of a Coroner is found in the AMERICAN AND ENGLISH ENCYCLOPEDIA OF LAW (2d ed.), vol. 7, subtit. 'Coroner.'" *Per* Rose, J., in *Davidson v. Garrett*, 30 Ont. 653, 5 Can. Crim. Cas. (Ont.) 200.

**599.** 1. Powers and Jurisdiction Not Dependent on Statute. — "The powers and jurisdiction of coroners are of very ancient origin, and do not depend upon the provisions of any statute, though statutes have been passed both in England and in Canada dealing to some extent with their duties and powers." *Davidson v. Garrett*, 30 Ont. 653.

**600.** 4. In the City of New York the coroners are borough, not county, officers. *People v. Scholer*, 94 N. Y. App. Div. 282, *reversing* (Supm. Ct. Tr. T.) 42 Misc. (N. Y.) 355; *People v. Blair*, 21 N. Y. App. Div. 213,

*affirmed* 154 N. Y. 734; *Tuthill v. New York*, (Supm. Ct. Spec. T.) 29 Misc. (N. Y.) 555.

**602.** 1. Office — Judicial and Ministerial. — *Fayette County Deputy Coroner's Case*, 20 Pa. Co. Ct. 641, *quoting* 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 602.

2. See *Fountain County v. Van Cleave*, 19 Ind. App. 643; *Cox v. Royal Tribe, etc.*, 42 Oregon 365, 95 Am. St. Rep. 752.

A Coroner Is Not a Justice of the Peace within the meaning of section 687 of the Criminal Code of Quebec, which provides for using on a trial the depositions "taken by a justice in the preliminary or other investigation of any charge" of a witness absent from Canada. *Reg. v. Graham*, 8 Quebec Q. B. 167, 2 Can. Crim. Cas. (Quebec) 388.

3. *Fayette County Deputy Coroner's Case*, 20 Pa. Co. Ct. 641.

**603.** *b. INVESTIGATING EXTRAORDINARY DEATHS — (1) Generally.* — See notes 5, 6.

When Inquest to Be Held. — See note 7.

**604.** See notes 1, 3.

(2) *The Inquest* — (a) Status of the Court. — See notes 7, 8.

**606.** (b) Time, Place, and Manner of Holding — Right to Hold Second Inquest over Same Body. — See note 3.

(c) Provision for Holding Inquest When Coroner Absent. — See note 4.

(d) Proceedings — *aa. THE JURY* — Summoning Jurors. — See note 5.

**607.** *bb. WITNESSES* — Summoning and Examining. — See note 5.

**603.** 5. *Inquest Defined.* — A coroner's inquest is a judicial investigation by a coroner, with the aid of a jury, into the cause of death. *People v. Coombs*, 158 N. Y. 532.

6. *Coroner Holding Inquests in Performance of Judicial Function.* — *Metztradt v. Modern Brotherhood of America*, 112 Iowa 522; *Wasey v. Travelers' Ins. Co.*, 126 Mich. 119; *People v. Coombs*, 158 N. Y. 532. But see *Germania L. Ins. Co. v. Ross-Lewin*, 24 Colo. 43, 65 Am. St. Rep. 215; *In re Sly*, (Idaho 1904) 76 Pac. Rep. 766; *Cox v. Royal Tribe, etc.*, 42 Oregon 365, 95 Am. St. Rep. 752.

Statutes Authorize the Appointment of a Deputy. — The judicial powers of a deputy depend wholly upon statute. *Deputy Coroner's Certificates*, 7 Pa. Dist. 568.

7. *When Inquest to Be Held.* — *Davidson v. Garrett*, 30 Ont. 653.

An inquest should be held only where death has been sudden, the cause is unknown, and the circumstances are suspicious. *Metzger Inquest*, 8 Pa. Dist. 573; *Coroner's Inquest*, 20 Pa. Co. Ct. 660.

It is proper to hold an inquest where the deceased was killed in a quarrel. *Jefferson County v. Cook*, 65 Ark. 557.

*Ohio Statute.* — Under the Ohio statute requiring the coroner to hold an inquest when informed that the body of one whose death is supposed to have been caused by violence is "found" within the county, it is held that the word "found" means present in the county, that such presence is necessary to give jurisdiction to the coroner, and that the violence referred to is unlawful violence and not accident. *State v. Bellows*, 62 Ohio St. 307.

**604.** 1. *Discretion of Coroner — Presumption that He Acted Properly.* — *Fayette County Coroner's Returns*, 24 Pa. Co. Ct. 498.

In *Ohio* it seems that the coroner has no power to hold an inquest unless the cause of death is unknown. *Birmingham v. Franklin County*, 5 Ohio Dec. 587, 7 Ohio N. P. 443.

*Accident in Mine.* — In *Pennsylvania*, where the death is caused by an accident in a mine, the statutory notice must be given, and the inquest must show that it was given and that the inquest was necessary. *Coroner's Inquest*, 20 Pa. Co. Ct. 660.

3. *Improper Inquest — Coroner Not Entitled to Fees.* — The presumption that a coroner acted on sufficient cause and in good faith may be overcome by evidence, in which case he is not entitled to fees. *Fayette County Coroner's Returns*, 24 Pa. Co. Ct. 498.

7. See *Cox v. Royal Tribe, etc.*, 42 Oregon

365, 95 Am. St. Rep. 752, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 604.

In *Canada* the coroner's court is a court of record, *Reg. v. Hammond*, 29 Ont. 225; *Davidson v. Garrett*, 30 Ont. 653; and a criminal court of the realm, *Reg. v. Hammond*, 29 Ont. 225; and the coroner is a judge of a court of record, *Haney v. Mead*, 34 Can. L. J. 330; *Davidson v. Garrett*, 30 Ont. 653.

*Attending Physician Incompetent to Hold Inquest.* — Where the coroner was a practicing physician, it was held that he was incompetent to hold an inquest over the bodies of two men who had died from diphtheria and whom he had attended during their last illness, on the grounds that a coroner is a judge of the court of record and that the same person cannot be both a witness and a judge in a cause which is on trial before him. *Haney v. Mead*, 34 Can. L. J. 330, the court saying: "In this case there is a dangerous precedent to be avoided. A physician who is at the same time a coroner, in order to avoid prosecution for malpractice, would have only to call a jury and hold an inquest on the body of his victim, and the law would be powerless to prevent him."

8. *In re Sly*, (Idaho 1904) 76 Pac. Rep. 766, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 604; *Cox v. Royal Tribe, etc.*, 42 Oregon 365, 95 Am. St. Rep. 752, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 604.

**606.** 3. *Fountain County v. Van Cleave*, 19 Ind. App. 643.

4. *Rio Grande County v. Wilson*, 26 Colo. 31, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 606, but holding further that if the coroner is in the county, although not in the immediate vicinity, he is not "absent" so as to authorize a justice to act.

*Jurisdiction Statutory.* — *Metzger Inquest*, 8 Pa. Dist. 573.

5. *Mode of Summoning Jury.* — "I am unable to find anything which makes it essential to the constitution of the coroner's court or to the exercise by him of his judicial functions with regard to a dead body or the holding of an inquest, that he should issue his warrant for the summoning of a jury for the purpose of the inquest. That is no doubt the usual course taken, but there is no reason that I can see why the coroner, if he chooses to do so, may not himself impanel the jury, summoning them to attend by a verbal direction for that purpose given by himself; and indeed a case might arise in which such a course might be not only convenient but almost necessary." *Davidson v. Garrett*, 30 Ont. 653, per Meredith, C. J.

**607.** 5. *May Punish for Contempt a Witness*

**607.** Physicians and Surgeons. — See note 6.

**608.** See note 1.

**Examination Need Not Be Taken in Presence of Accused.** — See note 3.

**All Material Witnesses to Be Examined.** — See note 5.

**609.** *cc.* THE AUTOPSY. — See notes 1, 2.

**610.** *cc.* THE INQUISITION — **Effect of Inquisition.** — See notes 4, 6.

**Inquisition to Be Returned to Proper Court.** — See note 7.

**611.** *ii.* DISPOSITION OF PROPERTY FOUND UPON BODY. — See note 5.

**612.** *(i)* Record of Inquest as Evidence — **On the Trial of Accused.** — See note 3.

**Depositions Admissible.** — See note 4.

**In Civil Actions.** — See note 5.

**Refusing to Testify.** — See *Kuhlman v. Superior Ct.*, 122 Cal. 636.

**An Accused Person Called as a Witness** at a coroner's inquest must be warned of his rights by the coroner, otherwise his testimony cannot be used against him upon his trial. *People v. Molineux*, 168 N. Y. 264.

**Right to Demand Declaration from Accused.** — A coroner who proceeds to an inquest has no right, before the verdict, to demand a declaration from a person whom he may have accused or suspected of a crime, and whom he has caused to be arrested in his capacity of justice of the peace. *Reg. v. Lalonde*, 7 Quebec Q. B. 204.

**607. 6. Coroner's Physician — City of New York.** — See *People v. Zucca*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 260.

**608. 1. When Physician Compellable to Perform Autopsy.** — In a case where it was held that a physician was not entitled to any greater fee for an autopsy than he was for a simple attendance at an inquest, the court seems to have been of the opinion that a physician could not refuse to make the autopsy. *Naftel v. Montgomery County*, 127 Ala. 563.

**3. *Ætna L. Ins. Co. v. Milward***, 82 S. W. Rep. 364, 26 Ky. L. Rep. 589.

**5. Coroner to Present to Jury All Material Testimony.** — *Cox v. Royal Tribe*, etc., 42 Oregon 365, 95 Am. St. Rep. 752.

**609. 1. Mode of Directing Autopsy.** — "Though the ordinary course is to issue a summons to the medical witness whose attendance is required, that formality is unnecessary if the witness chooses to attend upon the verbal or other request of the coroner, and there is nothing which requires that the direction to the medical witness to hold the *post mortem* should be in writing." *Davidson v. Garrett*, 30 Ont. 653.

**Time of Holding Autopsy.** — There is no rule of law forbidding the making of the *post mortem* examination before the impaneling of the jury. This is a matter of procedure within the discretion of the coroner. The meaning of *Rev. Stat. Ont.*, p. 97, § 12, subsec. 2, is that the coroner shall not, without the consent of the crown attorney, direct a *post mortem* examination for the purpose of determining whether an inquest shall be held, but only where the coroner has determined to hold an inquest and gave the direction as part of the proceedings incident to it; but if the provision should be read differently, it is at all events merely directory, and does not render an act done by a surgeon in good faith under the direction of a coroner unlawful because the coroner

had neglected to obtain the prescribed consent, where the act would be lawful if the consent had been obtained. *Davidson v. Garrett*, 30 Ont. 653.

**2. Liability of County for Employment of Expert.** — See *Fountain County v. Van Cleave*, 19 Ind. App. 643.

The reasonable value of the services of the physician making an autopsy should be allowed and paid. *Fairchild v. Ada County*, 6 Idaho 340.

**Fees Regulated by Statute.** — *Frank v. St. Louis*, 145 Mo. 600; *Polk County v. Phillips*, (Tex. Civ. App. 1899) 51 S. W. Rep. 535.

**610. 4.** See *Smalls v. State*, 101 Ga. 570.

**6. Germania L. Ins. Co. v. Ross-Lewin**, 24 Colo. 43, 65 Am. St. Rep. 215; *Smalls v. State*, 101 Ga. 570.

**Purpose.** — Strictly speaking, the verdict of a coroner's jury has no legal effect; its purpose is to inform the officers of the law. *Ralston's Petition*, 9 Pa. Dist. 514, 30 Pittsb. Leg. J. N. S. (Pa.) 410.

**7. Inquisition Open to Inspection of Accused.** — *Jenkins v. State*, (Tex. Crim. 1903) 75 S. W. Rep. 312.

**611. 5. Disposition of Property Found upon Body.** — Under the charter of the city of Baltimore the coroners are to deposit in bank, subject to the order of the judges of the Orphans' Court, money and other effects found upon the persons of those over whom they hold inquests. The coroner as such has no right to demand letters of administration. *Jones v. Harbaugh*, 93 Md. 269.

**612. 3.** *State v. Tate*, 50 La. Ann. 1183; *State v. Baptiste*, 108 La. 234.

**Weight Formerly Given to Inquisition.** — *Wasey v. Travelers' Ins. Co.*, 126 Mich. 119.

**Tennessee — Inquisition Not Admissible in Evidence.** — *Colquit v. State*, 107 Tenn. 381.

**4. State v. Corcoran**, 7 Idaho 220. See also *Halloway v. People*, 181 Ill. 544; *Head v. State*, 40 Tex. Crim. 265.

**Coroner Not to Testify as to Evidence Given at Inquest.** — On a trial for murder the court properly refused to allow the coroner to answer questions of the defendant's counsel as to what the evidence at the inquest was or tended to show. *Hall v. State*, 137 Ala. 44.

**The Physician Who Made an Autopsy** for the coroner may testify to the result of it on the trial of the accused; the fact that the coroner is required to make a record in no way affects the competency of such witness. *State v. Vaughan*, 152 Mo. 73.

**5. Record as Evidence in Civil Suit.** — A finding



**612.** 2. As a Ministerial Officer — Common-law Doctrine. — See note 7.

**613.** See note 1.

Under Statutes. — See note 2.

**615.** VII. PRIVILEGES AND LIABILITIES — 1. As a Judicial Officer. — See note 3.

2. As a Ministerial Officer. — See note 4.

**616.** IX. REMUNERATION — No Remuneration at Common Law. — See note 5.  
Statutory Changes. — See note 6.

**618.** CORPORATE. — See note 2.

of a coroner's jury as to the responsibility of a railroad for the death of a person killed in a collision has no binding force in an action by the personal representative to recover damages for the death. *Cox v. Chicago, etc.*, R. Co., 92 Ill. App. 15.

The inquisition is not admissible in evidence to prove suicide in defense of an action against a life-insurance company. *Germania L. Ins. Co. v. Ross-Lewin*, 24 Colo. 43, 65 Am. St. Rep. 215. To the same effect see *Cox v. Royal Tribe, etc.*, 42 Oregon 365, 95 Am. St. Rep. 752; *Wasey v. Travelers' Ins. Co.*, 126 Mich. 119. See also *Ætna L. Ins. Co. v. Milward*, 82 S. W. Rep. 364, 26 Ky. L. Rep. 589, where the court elaborately reviewed the authorities.

But in *Iowa* it seems that in such a case the inquisition is admissible in evidence, but is not conclusive. *Metzradt v. Modern Brotherhood of America*, 112 Iowa 522.

A Coroner's Report is not admissible in evidence unless based on the verdict of a jury properly impaneled. *National Union v. Thomas*, 10 App. Cas. (D. C.) 277.

**612.** 7. Coroner as Sheriff's Substitute. — *Horsfall v. Sutherland*, 31 Nova Scotia 471. And see generally the article SERVICE OF PROCESS AND PAPERS, 19 ENCYC. OF PL. AND PR. 586, and the Supplement thereto.

The coroner and not an elisor is the proper person to serve a venire where the sheriff is disqualified. *Orscheln v. Scott*, 79 Mo. App. 534. To the same effect see *People v. Fellows*, 122 Cal. 233. See also as to the *Mississippi* statute *Lipscomb v. State*, 76 Miss. 223.

**613.** 1. When the Sheriff Is in the Custody of the Federal Authorities the coroner should act as sheriff. *State v. Corcoran*, 7 Idaho 220.

2. Statutes Authorize Coroner to Execute Process Where Sheriff Is a Party. — But in *Wisconsin*, where the sheriff is a defendant in a replevin action in a court of a justice of the peace, the process must be executed by a constable. *Griswold v. Nichols*, 111 Wis. 344.

**615.** 3. Status in United States Generally. — It is not against the *Wyoming* statute for a county to contract with the coroner who is a practicing physician to attend the paupers of the county. *Baker v. Crook County*, 9 Wyo. 51.

Presenting a False Bill for Fees is a crime in *New York*. *People v. Coombs*, 158 N. Y. 532.

Mutilating Body. — In *Palenzke v. Bruning*, 98 Ill. App. 644, it appeared that a body was in its coffin in the possession of the parents of the

deceased, and that the coroner, with a physician and undertaker, took the body, mutilated it, and removed parts which they threw away without the parents' consent; and it was held that an action against them would lie in favor of the parents for damages for the outrage to their feelings.

4. Liability of Coroner Same as That of Sheriff. — *Horsfall v. Sutherland*, 31 Nova Scotia 471. See also *Barton v. Shull*, 62 Neb. 570.

**616.** 5. Fayette County Deputy Coroner's Case, 20 Pa. Co. Ct. 641.

6. Provision Statutory. — See as to the *Georgia* statute *Davis v. Bibb County*, 116 Ga. 23.

*Pennsylvania* — Special Statutes. — Under the Act Pa. March 30, 1897, a coroner who views a body and decides that no inquest is necessary is entitled to the same fee and mileage for such view as are allowed in cases of inquest, but not to any additional fees. *Com. v. Lloyd*, 9 Kulp (Pa.) 191. If no inquest is held, the coroner is not entitled to fees for qualifying witnesses, even though that be necessary. *Troutman v. Chambers*, 9 Pa. Dist. 533.

Under Act Pa. April 15, 1834, § 48, county auditors have jurisdiction over all the accounts of the coroner, not merely those where he is acting as sheriff. *Goehrig v. Lycoming County*, 13 Pa. Super. Ct. 67.

Approval of the Court of Quarter Sessions to the proceedings of a justice of the peace holding an inquest is a prerequisite to his fees. *Metzger Inquest*, 8 Pa. Dist. 573.

As to fees under Act Pa. March 31, 1896, § 16, see *Beiler v. Muldoon*, 16 Pa. Super. Ct. 553.

For Certifying that No Inquest Is Necessary a deputy coroner is not entitled to any fee in *Pennsylvania*. *Fayette County Deputy Coroner's Case*, 20 Pa. Co. Ct. 641.

Where an Inquest Is Held at the Request of an Employer to show that he was not responsible for the death of his employee by accident, the county is not responsible for the coroner's fees. *Coroner's Inquest*, 20 Pa. Co. Ct. 660.

*Alabama* Statute — When Fees Allowable. — See *Jefferson County v. Abernathy*, 139 Ala. 264.

Coroner's Stenographer — *New York City*. — See *Baker v. New York*, 56 N. Y. App. Div. 350.

**618.** 2. Corporate Authorities. — *South Park Com'rs v. Chicago First Nat. Bank*, 177 Ill. 234.

Corporate Franchise or Business. — *Plummer v. Coler*, 178 U. S. 128.

# CORPORATIONS (PRIVATE).

By M. G. BEAMAN.

## 632. III. DEFINITION, GENERAL NATURE, AND DISTINCTIONS — 1. Definition.

— See note 3.

634. 2. General Nature. — See note 1.

## 635. IV. CLASSIFICATION — 1. In General. — See note 2.

2. Aggregate and Sole. — See note 3.

## 638. 5. Public and Private — Distinction Between Public and Private Corporations.

— See note 1.

## 641. V. CREATION AND ORGANIZATION — 1. Power to Create — c. IN THE UNITED STATES — (2) *Power of State Legislatures* — (a) In General. — See note 3.

642. (b) Constitutional Limitations upon Legislative Power. — See note 1.

But Where a General Law Would Prove Ineffective. — See note 3.

643. Limitation Confined to Creation. — See notes 1, 2.

644. (3) *Power of Territorial Assemblies* — In General. — See note 1.

645. 2. Mode of Creation — a. IN GENERAL — Precise Form of Words Unnecessary. — See note 6.

647. d. UNDER GENERAL LAWS — (3) *Purposes for Which Incorporation Is Allowed*. — See note 5.

632. 3. Definition. — *Feiner v. Reiss*, 98 N. Y. App. Div. 40, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 632.

634. 1. Considered as an Aggregation of Persons. — *Chicago First Nat. Bank v. F. C. Trebein Co.*, 59 Ohio St. 316; *Kendall v. Klappenthal Co.*, 202 Pa. St. 596.

635. 2. Mixed Corporations. — In *Matter of Lampson*, (Surrogate Ct.) 22 Misc. (N. Y.) 198, affirmed 33 N. Y. App. Div. 49, it is said that it is doubtful if there is now such a thing as a mixed corporation.

3. Corporations Aggregate. — *Sibley v. Penobscot Lumbering Assoc.*, 93 Me. 399.

638. 1. Public and Private Corporations Distinguished. — *State v. Maryland Institute*, etc., 87 Md. 643; *Watson Seminary v. Pike County Ct.*, 149 Mo. 57; *Com. v. Hazen*, 207 Pa. St. 52; *Maia v. Eastern State Hospital*, 97 Va. 507.

An Agricultural Association Is a Private Corporation. — *Ismon v. Loder*, 135 Mich. 345.

641. 3. Right to Organize Is Not an Original, but a Derivative Right. — *State v. Debenture Guarantee*, etc., Co., 51 La. Ann. 1874.

642. 1. Prohibition of Special Acts. — *Grey v. Newark Plank Road Co.*, 65 N. J. L. 51.

3. Not Reviewable by Courts. — *Smith v. Havens Relief Fund Soc.*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 594.

643. 1. Delaware Constitution. — The legislature may amend by special act the charter of an industrial school organized to promote religious and moral education among its inmates. *State v. Levy Ct.*, 1 Penn. (Del.) 597.

2. See also *Deitch v. Staub*, (C. C. A.) 115 Fed. Rep. 309.

Inapplicable to Pre-existing Corporations. — *State v. Bangor*, 68 Me. 114.

644. 1. Territorial Assemblies. — *Colorado Springs Co. v. American Pub. Co.*, 38 C. C. A. 433.

645. 6. Precise Words Unnecessary. — *Andrew Bros. Co. v. Youngstown Coke Co.*, (C. C. A.) 86 Fed. Rep. 585; *Smith v. Havens Relief Fund Soc.*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 594.

647. 5. Illinois. — Under 1 Starr & Curt. Stat. (2d ed.), c. 32, par. 29, a corporation cannot be formed having for its object pecuniary profit. *People v. Rose*, 188 Ill. 268.

Indiana. — Under Burns Rev. Stat. 1894, § 4583, authorizing incorporation for buying and selling merchandise, a corporation cannot be formed for buying and selling bonds. *Indiana Bond Co. v. Ogle*, 22 Ind. App. 593, 72 Am. St. Rep. 326.

Kansas. — A corporation may be organized for the manufacture and sale of any product or products, alone or all combined. *Parkinson Sugar Co. v. Ft. Scott Bank*, 60 Kan. 474.

Louisiana. — Corporations cannot be organized for purposes of stock jobbing. *State v. Debenture Guarantee*, etc., Co., 51 La. Ann. 1874.

Under Acts 1888, No. 36, p. 27, a corporation may be incorporated to act as the agent of other persons or corporations. *State v. Michel*, 113 La. 4.

Nebraska. — Instalment investment companies must obtain the approval of the state banking board as a prerequisite to corporate existence. *State v. Northwestern Trust Co.*, (Neb. 1904) 101 N. W. Rep. 14.

New Jersey. — Under the New Jersey statutes the corporation must be confined to the accomplishment of lawful objects. *U. S. v. Northern Securities Co.*, 120 Fed. Rep. 721, affirmed 193 U. S. 197.

Holding stock in other corporations is a "lawful purpose." *Dittman v. Distilling Co.*, 64 N. J. Eq. 539.

Ohio. — The organization of incorporated companies for the purpose of dealing in real

- 649.** Incorporation Against Public Policy. — See note 1.  
 (4) *Residence of Corporators.* — See note 3.
- 650.** (5) *Usual Mode of Procedure* — (b) By Whom Application to Be Made — Number of Persons Required to Make the Application. — See note 5.  
 (d) *Signing Articles.* — See note 9.
- 651.** (e) *Publication of Charter or of Notice of Application.* — See note 1.  
 Object of Publication. — See note 2.  
 (f) *Filing Articles.* — See note 3.
- 652.** (6) *Contents of Articles* — (a) *Name and Place of Business.* — See note 1.
- 653.** (b) *Purpose of the Corporation.* — See note 1.

estate under Rev. Stat., § 3235, is necessarily for profit, and such companies must have a capital stock. *State v. Home Co-operative Union*, 63 Ohio St. 547.

*Oregon.* — Under the statute authorizing incorporation for the purpose of engaging in any lawful business, enterprise, etc., it is not necessary that the object of the corporation be money making. *Maxwell v. Akin*, 89 Fed. Rep. 178.

*Pennsylvania.* — Under Act of 1874, April 29, § 2, clause 11, a corporation may be organized for the promotion of the interest of a particular trade. Roofing, etc., Contractors' Assoc., 200 Pa. St. 111.

Under Act 1874, April 29, a charter will be granted "for the encouragement of trade and commerce" only when the public will be benefited, as opposed to a particular class. *Master Granite, etc., Stone Cutters' Assoc.*, 9 Pa. Dist. 357.

Incorporation will not be granted unless it seems that some object will be effected thereby which cannot be obtained without incorporation. *Deutsch-Amerikanischer Volksfest-Verein*, 9 Pa. Dist. 753, reversed 200 Pa. St. 143; *Junior Order of United American Mechanics*, 10 Pa. Dist. 5. See also *Master Granite, etc., Stone Cutters' Assoc.*, 9 Pa. Dist. 357.

Political clubs may not be incorporated. *In re Monroe Republican Club*, 28 Pittsb. Leg. J. N. S. (Pa.) 52.

*Texas.* — Under the power given to incorporate for the "growing, selling, and purchasing of seeds, plants, trees, etc., for agricultural and ornamental purposes" it is not lawful to organize a corporation for the purpose of growing and selling rice. *Miller v. Tod*, 95 Tex. 404.

A corporation may be formed for any one or more of the purposes specified in any subdivision of Rev. Stat. Tex., art. 642, but not for two or more purposes designated in two or more subdivisions. *Ramsey v. Tod*, 95 Tex. 614.

**649. 1. Public Policy.** — *First Church of Christ, Scientist*, 205 Pa. St. 543, 97 Am. St. Rep. 753.

**South Dakota Statute.** — Laws S. Dak. 1890, § 5, provides that two corporators must make oath that the corporation is not being formed for the purpose of enabling several corporations to avoid the provisions of the act. *Thomas v. Wilcox*, (S. Dak. 1904) 101 N. W. Rep. 1072.

**3.** In *Washington* the only restriction is that one of the board of trustees must be a resident of the state. *Hastings v. Anacortes Packing Co.*, 29 Wash. 224.

**Majority of Incorporators Should Be United States Citizens.** — See also *In re Society, etc.*, 28 Pittsb. Leg. J. N. S. (Pa.) 42.

**Presumption that Majority Are United States Citizens.** — *Northwestern Telephone Exch. Co. v. Chicago, etc.*, R. Co., 76 Minn. 334.

**New York.** — Under Laws N. Y. 1895, c. 672, only one incorporator need be a resident of the state, notwithstanding section 29 of the General Incorporation Law. *People v. McDonough*, (Supm. Ct. Spec. T.) 28 Misc. (N. Y.) 652.

**650. 5. Five or More Required.** — *Civ. Code Cal.*, § 292, requiring five or more persons, applies to all private corporations. *People v. Golden Gate Lodge No. 6*, 128 Cal. 257.

**9. Signing Necessary to Corporate Existence.** — *Lawrie v. Silsby*, 76 Vt. 240, 104 Am. St. Rep. 927.

**Arkansas Statute.** — Under Sandels & H. Dig., § 1326, it is enough if the president and directors sign the articles without adding their official titles. *St. Louis, etc., R. Co. v. Southwestern Telephone, etc., Co.*, 58 C. C. A. 198.

**651. 1. Insufficient Publication.** — A publication in a newspaper in a small town over sixty miles from place of business, a large city, does not satisfy the *Iowa* statute. *Berkson v. Anderson*, 115 Iowa 674.

**2.** See also *Seaton v. Grimm*, 110 Iowa 145.

**3. Filing Prerequisite of Existence.** — *Elgin Nat. Watch Co. v. Loveland*, 132 Fed. Rep. 41; *Sims v. Com.*, 114 Ky. 827; *Lusk v. Riggs*, (Neb. 1904) 97 N. W. Rep. 1033; *Braddock v. Penn Water Co.*, 189 Pa. St. 379. See also *San Diego Gas Co. v. Frame*, 137 Cal. 441.

**Corporation Exists from Date of Recording.** — *Armstrong Water Co. v. Rayburn Water Co.*, 24 Pa. Co. Ct. 13.

**Filed with Recorder of Deeds.** — *Dempster Mfg. Co. v. Downs*, 126 Iowa 80.

**Arkansas Statute.** — Under Sandels & H. Dig., § 1334, the certificate need be filed only in the county in which the company selects as that in which the general business is to be transacted. *St. Louis, etc., R. Co. v. Southwestern Telephone, etc., Co.*, 58 C. C. A. 198.

**Filing Must Be of Papers Such as Required by Law.** — *Kinston, etc., R. Co. v. Stroud*, 132 N. Car. 413.

**652. 1. Georgia.** — The principal office of the corporation need not be at the place where the work of the corporation is being carried on. *McCandless v. Inland Acid Co.*, 115 Ga. 968.

**653. 1. Purpose Must Be Stated.** — *Bayou Cook Nav., etc., Co. v. Doullut*, 111 La. 517.

**Purposes Statute Not to Be Limited by Parol Testimony.** — *Kalamazoo v. Kalamazoo Heat, etc., Co.*, 124 Mich. 74.

**Objects Must Be Set Out with Reasonable Clearness.** — *Stephens v. Mysore Reefs Min. Co.*, (1902) 1 Ch. 745.



**654.** (h) Effect of Introducing Matters Not Required. — See notes 4, 5.

(7) Duration of Corporate Existence. — See note 6.

(8) Extension of Corporate Existence. — See note 7.

**655.** e. DE FACTO CORPORATIONS. — See note 1.

f. COMPLIANCE WITH STATUTORY REQUIREMENTS. — See note 2.

Substantial Compliance Sufficient. — See note 3.

**658.** 3. Acceptance of Charter — e. PROOF OF ACCEPTANCE — (2) *Presumption of Acceptance* — (a) Lapse of Time and User. — See note 6.

**660.** f. PARTIAL OR CONDITIONAL ACCEPTANCE NOT PERMISSIBLE. — See note 3.

**661.** 4. Proof of Incorporation — a. IN CIVIL CASES — (1) *In General* — Proof by Reputation and Lapse of Time. — See note 7.

**662.** (2) *Corporations Created by Special Charter* — (a) *In General*. — See note 3.

**663.** (b) Proof of Charter — aa. IN GENERAL — Conditional and Unconditional Charters. — See note 2.

**666.** (3) *Corporations Organized under General Laws* — (a) *Generally*. — See note 1.

**Nature of Corporation to Be Determined from Articles Filed.** — *Craig v. Benedictine Sisters Hospital Assoc.*, 88 Minn. 535.

**Purpose Must Be Stated in specific language** so that a perusal of the charter will show that it is lawful. *Xantha Beneficial, etc., Assoc.*, 8 Pa. Dist. 142; *In re C. Columbus Italian-American Citizens' Assoc.*, 30 Pittsb. Leg. J. N. S. (Pa.) 47; *La Fayette Club*, 21 Pa. Co. Ct. 243.

**654.** 4. Additional Parts Are Surplusage and Void. — *State v. Anderson*, 31 Ind. App. 34, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 654; *Marion Bond Co. v. Mexican Coffee, etc., Co.*, 160 Ind. 558; *Smith v. Havens Relief Fund Soc.*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 594; *Tennessee Automatic Lighting Co. v. Massey*, (Tenn. Ch. 1899) 56 S. W. Rep. 35; *Shoun v. Armstrong*, (Tenn. Ch. 1900) 59 S. W. Rep. 790.

But if several purposes, each lawful in itself, are combined in one charter, the whole is void, if the law does not allow such combination, for it is impossible to make a selection. *Williams v. Citizens' Enterprise Co.*, 25 Ind. App. 351; *Bayou Cook Nav., etc., Co. v. Doullut*, 111 La. 517.

5. If the articles set out purposes for which incorporation may not lawfully be granted, the articles are not saved by the fact that lawful purposes are also inserted. *Miller v. Tod*, 95 Tex. 404.

**6.** *Missouri*. — An educational institution does not lose its charter at the end of twenty years. *State v. Westminster College*, 175 Mo. 52.

7. See also *Iron Silver Min. Co. v. Cowie*, 31 Colo. 450.

The power of extending the corporate existence may be exercised unless forbidden by the charter. *Smith v. Eastwood Wire Mfg. Co.*, 58 N. J. Eq. 337.

*Civ. Code Cal.*, §§ 287, 402, applies to quasi-public corporations as well as to private corporations. *People v. Auburn, etc., Turnpike Co.*, 122 Cal. 335.

**Iowa.** — Under Code of Iowa 1897, § 1618, the corporate life may be extended by an amendment duly adopted and recorded, and it

is not necessary to form a new company. *Lamb v. Dobson*, 117 Iowa 124.

**655.** 1. *Marion Bond Co. v. Mexican Coffee, etc., Co.*, 161 Ind. 558, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 655, note 1; *Boyd v. Logansport, etc., Traction Co.*, 161 Ind. 587, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 655.

2. *Marion Bond Co. v. Mexican Coffee, etc., Co.*, 160 Ind. 558, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 655, note 2; *Elgin Nat. Watch Co. v. Loveland*, 132 Fed. Rep. 41; *Wall v. Mines*, 130 Cal. 27; *Card v. Moore*, 68 N. Y. App. Div. 327, affirmed 173 N. Y. 598; *Jackson v. Crown Point Min. Co.*, 21 Utah 1.

3. **Necessity of Compliance with Law.** — *People v. Golden Gate Lodge No. 6*, 128 Cal. 257; *San Diego Gas Co. v. Frame*, 137 Cal. 441; *Seaton v. Grimm*, 110 Iowa 145; *Thomas v. Wilcox*, (S. Dak. 1904) 101 N. W. Rep. 1072; *Carpenter v. Frazier*, 102 Tenn. 462.

**Paying in Proportion of Capital Stock.** — Unless it appears from the articles filed that this requirement has been complied with, the corporation cannot exercise its powers. *Kinston, etc., R. Co. v. Stroud*, 132 N. Car. 413.

**Informalities Remedied by Subsequent Legislation.** — *Smith v. Havens Relief Fund Soc.*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 594.

**658.** 6. Lapse of Time and User as Proof of Acceptance. — *Augusta, etc., R. Co. v. Augusta*, 100 Ga. 701; *Terre Haute, etc., R. Co. v. State*, 159 Ind. 438.

**660.** 3. Acceptance in Part. — *MacDonald v. New York, etc., R. Co.*, 23 R. I. 558, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 660.

**661.** 7. So a witness may testify that he never heard of such a corporation doing business in a certain town. *Cobb v. Bryan*, (Tex. Civ. App. 1904) 83 S. W. Rep. 887.

**662.** 3. Proof of Charter and User. — *U. S. Mortgage Co. v. McClure*, 42 Oregon 190; *State Bank v. Carr*, 130 N. Car. 470.

**663.** 2. Conditions Precedent Must Be Proved. — *Card v. Moore*, 68 N. Y. App. Div. 327, affirmed 173 N. Y. 598; *Goodale Lumber Co. v. Shaw*, 41 Oregon 544.

**666.** 1. Proof of Corporate Existence under

**666.** (b) *Articles of Association and Certificate.* — See note 2.

**668.** (4) *Effect of Estoppel upon Proof of Incorporation.* — See notes 2, 3.  
b. IN CRIMINAL CASES. — See note 4.

**669.** 5. *Amendment and Repeal* — a. RIGHT TO AMEND OR REPEAL —  
(1) *In General* — *Charter an Inviolable Contract.* — See note 2.

**672.** b. RESERVED RIGHT TO AMEND OR REPEAL — (2) *Constitutional Reservation.* — See note 4.

**673.** (3) *Reservation under General Laws.* — See note 2.

**674.** (4) *Reservation in Charter* — *In General.* — See note 2.

**675.** (5) *Extent of Reserved Power.* — See note 2.

**General Laws.** — *Thomas v. Wilcox*, (S. Dak. 1904) 101 N. W. Rep. 1072. See also *Petty v. Hayden*, 115 Iowa 212.

**666.** 2. *Nebraska.* — *Equitable Bldg., etc., Assoc. v. Bidwell*, 60 Neb. 169.

*Washington.* — *Spokane, etc., Lumber Co. v. Loy*, 21 Wash. 501.

**668.** 2. *Estoppel* — *United States.* — *Toledo, etc., R. Co. v. Continental Trust Co.*, 36 C. C. A. 155; *Louisville Trust Co. v. Louisville, etc., R. Co.*, 56 U. S. App. 208; *W. L. Wells Co. v. Avon Mills*, 118 Fed. Rep. 190, *reversed* (C. C. A.) 128 Fed. Rep. 369.

*Alabama.* — *Harris v. Gateway Land Co.*, 128 Ala. 652; *Owensboro Wagon Co. v. Bliss*, 132 Ala. 253, 90 Am. St. Rep. 907.

*California.* — *California Cured Fruit Assoc. v. Stelling*, 141 Cal. 713; *Weill v. Crittenden*, 139 Cal. 488.

*Colorado.* — *Grande Ronde Lumber Co. v. Cotton*, 12 Colo. App. 375; *Cripple Creek First Cong. Church v. Grand Rapids School Furniture Co.*, 15 Colo. App. 46.

*District of Columbia.* — *Ohio Nat. Bank v. Central Constr. Co.*, 17 App. Cas. (D. C.) 524.

*Georgia.* — *Etowah Milling Co. v. Crenshaw*, 116 Ga. 406.

*Illinois.* — *Lincoln Park Chapter No. 177 v. Swatek*, 204 Ill. 228; *West Side Auction House Co. v. Connecticut Mut. L. Ins. Co.*, 186 Ill. 156; *Edwards v. Cleveland Dryer Co.*, 83 Ill. App. 643; *Riemann v. Tyroler, etc., Vereine*, 104 Ill. App. 413.

*Maine.* — *Seven Star Grange No. 73 v. Ferguson*, 98 Me. 176.

*Michigan.* — *Kalamazoo v. Kalamazoo Heat, etc., Co.*, 124 Mich. 74; *Calkins v. Bump*, 120 Mich. 335.

*Minnesota.* — *Continental Ins. Co. v. Richardson*, 69 Minn. 433.

*Missouri.* — *West Missouri Land Co. v. Kansas City Suburban Belt R. Co.*, 161 Mo. 595.

*Nebraska.* — *Equitable Bldg., etc., Assoc. v. Bidwell*, 60 Neb. 169; *Otoe County Fair, etc., Assoc. v. Doman*, (Neb. 1901) 95 N. W. Rep. 327.

*New York.* — *Eagle Sav., etc., Co. v. Samuels*, 43 N. Y. App. Div. 386.

*Oregon.* — *Law Trust Soc. v. Hogue*, 37 Oregon 544, *citing* 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 668.

*South Dakota.* — *Mason v. Stevens*, 16 S. Dak. 320.

*Tennessee.* — *Tennessee Automatic Lighting Co. v. Massey*, (Tenn. Ch. 1899) 56 S. W. Rep. 35; *Shoun v. Armstrong*, (Tenn. Ch. 1900) 59 S. W. Rep. 790, *citing* 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 668, note 2.

*Utah.* — *Marsh v. Mathias*, 19 Utah 350.

*Wisconsin.* — *Clausen v. Head*, 110 Wis. 405, 84 Am. St. Rep. 933; *Citizens Bank v. Jones*, 117 Wis. 446, *citing* 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 668; *Gilman v. Druse*, 111 Wis. 400.

3. *People v. Ward*, 134 Cal. 301; *Brady v. Delaware Mut. L. Ins. Co.*, 2 Penn. (Del.) 237; *Crystal White Soap Co. v. Roseboom*, 91 Ill. App. 551; *Gay v. Kohlsaat*, 80 Ill. App. 178.

*Appearance Is Admission of Corporate Existence.* — *State v. Glucose Sugar Refining Co.*, 117 Iowa 524; *Herald Shoe Co. v. Oklahoma Pub. Co.*, (Okla. 1904) 79 Pac. Rep. 111.

4. *De Facto Existence Sufficient* — *Parol Evidence.* — *People v. Dole*, 122 Cal. 486, 68 Am. St. Rep. 50; *State v. Pittam*, 32 Wash. 137.

**669.** 2. *Charter as Contract.* — *Michigan Telephone Co. v. St. Joseph*, 121 Mich. 502, 80 Am. St. Rep. 520; *Kehr's Petition*, 23 Pa. Co. Ct. 460; *MacDonald v. New York, etc., R. Co.*, 23 R. I. 558.

**672.** 4. *Delaware Constitution Construed.* — In Delaware the legislature has the power to revoke at pleasure any or all of the franchises, and may recall all, or any number less than all, of the corporate rights and privileges. *Wilmington City R. Co. v. Wilmington, etc., R. Co.*, (Del. 1900) 46 Atl. Rep. 18; *Wilmington v. Addicks*, (Del. 1900) 47 Atl. Rep. 366.

*Florida Constitution.* — The Florida constitution merely reserves to the legislature the right to regulate the rates charged by public service corporations. *Tampa v. Tampa Waterworks Co.*, (Fla. 1903) 34 So. Rep. 631.

**673.** 2. *Reservation under General Laws.* — *People v. Rose*, 207 Ill. 352; *Watson Seminary v. Pike County Ct.*, 149 Mo. 57; *Gregg v. Granby Min., etc., Co.*, 164 Mo. 616.

A general law reserving to the legislature the right to amend or repeal covers not only new charters, but also amendments and extensions of old charters. *Northern Bank v. Stone*, 88 Fed. Rep. 413.

**674.** 2. *Reservation in Charter.* — *Phinney v. Sheppard, etc., Hospital*, 88 Md. 633.

**675.** 2. *Extent of Exercise of Power.* — *Per Deater, C. J., dissenting*, in *State v. Haun*, 61 Kan. 146, *citing* 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 675; *Smith v. Lake Shore, etc., R. Co.*, 114 Mich. 460.

*Power Not Unlimited.* — *McKee v. Chautauqua Assembly*, (C. C. A.) 130 Fed. Rep. 536, *affirming* 124 Fed. Rep. 808; *Lincoln St. R. Co. v. Lincoln*, 61 Neb. 109.

*Vested Rights Cannot Be Impaired.* — *Atchison, etc., R. Co. v. Campbell*, 61 Kan. 430, 78 Am. St. Rep. 328, *citing* 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 675.

*Power Reserved Is Confined to Matters Concern-*

**676.** Amendments Auxiliary to Original Design. — See note 1.

*c.* AMENDMENT OR REPEAL UNDER POLICE POWER — In General. —

See note 2.

**677.** *d.* SERVICE OF PROCESS — STATUTES ENFORCING OBLIGATIONS, AND ACTS MERELY AFFECTING THE REMEDY — Service of Process. — See note 2.

Acts Affecting the Remedy. — See note 4.

**679.** *g.* ACCEPTANCE OF AMENDMENTS — (1) *Necessity for* — (a) When There Is No Reservation. — See note 2.

**681.** (3) *By Whom Accepted* — (b) Acceptance by Majority of Stockholders — *bb.* FUNDAMENTAL AMENDMENTS. — See note 1.

**682.** (4) *Proof of Acceptance* — By Acts and Omissions. — See note 1.

**683.** *h.* MANNER OF ALTERING OR AMENDING — (2) *Under General Laws*. — See note 3.

**684.** VI. ORDINARY INCIDENTS — 1. In General. — See note 2.

2. Perpetual Succession. — See note 11.

**686.** 3. NAME — *c.* CHANGE OF NAME — HOW EFFECTED — (1) *In General*. — See note 2.

(2) *By Special Act*. — See note 3.

**687.** (5) *Effect of Change*. — See note 3.

**688.** *e.* MISNOMER — (1) *In General*. — See note 3.

**689.** (2) *In Grants to or by Corporations*. — See note 1.

**690.** *f.* EXCLUSIVE USE OF NAME. — See note 1.

*ing Public*. — Matter of Newark Library Assoc., 64 N. J. L. 217.

Power to Amend Does Not Authorize Departure from General Restrictions or Legislation. — Woodward v. Central Vermont R. Co., 180 Mass. 599.

**676.** 1. Grant of Auxiliary Powers. — McKee v. Chautauqua Assembly, 124 Fed. Rep. 808, affirmed (C. C. A.) 130 Fed. Rep. 536.

2. Right to Amend or Repeal under Police Power. — Michigan Telephone Co. v. Charlotte, 93 Fed. Rep. 11, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 676; Franklin L. Ins. Co. v. People, 200 Ill. 619; Chicago, etc., R. Co. v. Milwaukee, 97 Wis. 418.

**677.** 2. See also Bay State Gas Co. v. State, 4 Penn. (Del.) 238.

4. Acts Affecting Remedy. — People v. Rose, 207 Ill. 352; MacDonald v. New York, etc., R. Co., 23 R. I. 558.

**679.** 2. See also State v. Citizens' Bank, 52 La. Ann. 1086.

**681.** 1. Majority Cannot Accept Fundamental Amendments. — Alexander v. Atlanta, etc., R. Co., 108 Ga. 151, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 681.

**682.** 1. Proof of Acceptance. — Georgia R., etc., Co. v. Maddox, 116 Ga. 64, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 682.

A corporation is entitled to the benefits of an act protecting property, though it has not complied with a constitutional provision that no corporation shall benefit by future legislation without first accepting it. Cahill v. Perrine, 105 Ky. 531.

**683.** 3. Ohio. — Picard v. Hughey, 58 Ohio St. 577.

**684.** 2. Sibley v. Penobscot Lumbering Assoc., 93 Me. 399; Williams v. Port Chester, 97 N. Y. App. Div. 84.

11. "Perpetual Succession" Means "Continuous Succession." — Kehr's Petition, 23 Pa. Co.

Ct. 460, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 684.

**686.** 2. In California the legislature is prohibited by the constitution from changing the name by special act, but it may authorize a court to grant changes of name on application. Matter of La Société Française, etc., 123 Cal. 525.

3. Name Changed by Special Act. — Phinney v. Sheppard, etc., Hospital, 88 Md. 636, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 686.

**687.** 3. Effect of Change of Name. — State v. Brock, 66 S. Car. 357, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 687; South Carolina Mut. Ins. Co. v. Price, 67 S. Car. 207, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 687; Wilhite v. Convent of Good Shepherd, 78 S. W. Rep. 138, 25 Ky. L. Rep. 1375. See also Palfrey v. Association for Relief, etc., 110 La. 452.

**688.** 3. Misnomer Generally. — Church of Christ v. Christian Church, 193 Ill. 144, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 688.

**689.** 1. Grants to or from Corporations. — Precious Blood Soc. v. Elsythe, 102 Tenn. 40.

**690.** 1. Right to Corporate Name — England. — La Societe, etc., v. Panhard Levassor Motor Co., (1901) 2 Ch. 513; Manchester Brewery Co. v. North Cheshire, etc., Brewery Co., (1898) 1 Ch. 539.

Canada. — Canada Permanent Loan, etc., Co. v. British Columbia Permanent Loan, etc., Co., 6 British Columbia 377.

United States. — Philadelphia Trust, etc., Co. v. Philadelphia Trust Co., 123 Fed. Rep. 534; Continental Ins. Co. v. Continental F. Assoc., 41 C. C. A. 326; Elgin Nat. Watch Co. v. Loveland, 132 Fed. Rep. 41.

California. — Dodge Stationery Co. v. J. S. Dodge Co., 145 Cal. 380.

Connecticut. — Hygeia Distilled Water Co. v. Hygeia Ice Co., 72 Conn. 646.



- 692.** 4. Seal — *b*. WHAT CONSTITUTES — (3) *Adoption*. — See note 1.  
**693.** *g*. PROOF OF SEAL. — See note 6.  
**694.** Presumption as to Genuineness — Proof of Officer's Signature. — See note 2.  
 5. By-laws. — See note 3.  
 6. Residence — Citizenship of National Corporations. — See note 5.  
**695.** VII. POWERS OF CORPORATIONS — 1. Corporate Powers in General —  
*c*. POWERS MEASURED BY CHARTER — (1) *In General*. — See note 8.

*District of Columbia*. — Original *La Tosca Social Club v. La Tosca Social Club*, 23 App. Cas. (D. C.) 96.

*Illinois*. — Koebel *v. Chicago Landlords' Protective Bureau*, 210 Ill. 176, 102 Am. St. Rep. 154; International Committee, etc., *v. Young Women's Christian Assoc.*, 194 Ill. 194; Imperial Mfg. Co. *v. Schwartz*, 105 Ill. App. 525; McFell Electric, etc., Co. *v. McFell Electric Co.*, 110 Ill. App. 182.

*Iowa*. — Red Polled Cattle Club *v. Red Polled Cattle Club*, 108 Iowa 105.

*Kentucky*. — Industrial Mut. Deposit Co. *v. Central Mut. Deposit Co.*, 112 Ky. 937.

*Michigan*. — Lamb Knit-Goods Co. *v. Lamb Glove, etc., Co.*, 120 Mich. 159.

*Minnesota*. — Nesne *v. Sundet*, 93 Minn. 299.

*New Jersey*. — Glucose Sugar Refining Co. *v. American Glucose Sugar Refining Co.*, (N. J. 1899) 56 Atl. Rep. 861; Edison Storage Battery Co. *v. Edison Automobile Co.*, (N. J. 1904) 56 Atl. Rep. 861; St. Patrick's Alliance *v. Byrne*, 59 N. J. Eq. 26.

*New York*. — Society of War 1812 *v. Society of War* 1812, 46 N. Y. App. Div. 568; People *v. O'Brien*, 101 N. Y. App. Div. 296, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 689; Legal Aid Soc. *v. Co-operative Legal Aid Soc.*, (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 127; Colonial Dames of America *v. Colonial Dames*, (Supm. Ct. Spec. T.) 29 Misc. (N. Y.) 10, affirmed 63 N. Y. App. Div. 615.

*Ohio*. — Cincinnati Vici Shoe Co. *v. Cincinnati Shoe Co.*, 9 Ohio Dec. 579.

*Pennsylvania*. — American Clay Mfg. Co. *v. American Clay Mfg. Co.*, 198 Pa. St. 189.

*Rhode Island*. — Aiello *v. Montecarlo*, 21 R. I. 496.

**692.** 1. See also *District of Columbia v. Camden Iron Works*, 181 U. S. 453.

**693.** 6. Effect of Absence of Proof. — Reed *v. Fleming*, 102 Ill. App. 668, reversed 209 Ill. 390.

**694.** 2. Proof of Officers' Signatures. — McClure *v. Supreme Lodge, etc.*, 41 N. Y. App. Div. 131, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 694 [691]; Ellison *v. Branstrator*, 153 Ind. 146; Roth *v. Continental Wire Co.*, 94 Mo. App. 236; Quackenboss *v. Globe, etc., F. Ins. Co.*, 177 N. Y. 71.

3. Power to Make By-Laws. — Wierman *v. International Bldg., etc., Union*, 67 Ill. App. 550; Stein *v. Marks*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 140; Alters *v. Journeymen Bricklayers Protective Assoc.*, 19 Pa. Super. Ct. 272; Bailey *v. Master Plumbers' Assoc.*, 103 Tenn. 99.

5. Matter of Cushing, (Surrogate Ct.) 40 Misc. (N. Y.) 505, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 694.

**695.** 8. General Rule as to Corporate Powers — *United States*. — De La Vergne Refrigerating Mach. Co. *v. German Sav. Inst.*, 175 U. S. 40; New Albany Waterworks *v. Louisville*

Banking Co., 58 C. C. A. 576; Joseph Bancroft, etc., Co. *v. Bloede*, 45 C. C. A. 354; Cumberland Telephone, etc., Co. *v. Evansville*, 127 Fed. Rep. 187.

*Alabama*. — Steiner *v. Steiner Land, etc., Co.*, 120 Ala. 134, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 695 *et seq.*

*Colorado*. — Pueblo *v. Shutt Invest. Co.*, 28 Colo. 524, 89 Am. St. Rep. 221.

*Georgia*. — Trust Co. *v. State*, 109 Ga. 736; Plant *v. Macon Oil, etc., Co.*, 103 Ga. 666.

*Illinois*. — Bixler *v. Summerfield*, 195 Ill. 147; Best Brewing Co. *v. Klassen*, 185 Ill. 37, 76 Am. St. Rep. 26; Wheeler *v. Home Sav., etc., Bank*, 188 Ill. 34, 80 Am. St. Rep. 161; National Home Bldg., etc., Assoc. *v. Home Sav. Bank*, 181 Ill. 35, 72 Am. St. Rep. 245; People *v. Pullmans Palace Car Co.*, 175 Ill. 125; Danielson *v. Wilson*, 73 Ill. App. 287, affirmed 176 Ill. 94.

*Iowa*. — Traer *v. Lucas Prospecting Co.*, 124 Iowa 107.

*Kansas*. — Parkinson Sugar Co. *v. Ft. Scott Bank*, 60 Kan. 474; Bankers' Union of the World *v. Crawford*, 67 Kan. 449, 100 Am. St. Rep. 465.

*Kentucky*. — Bletz *v. State Bank*, (Ky. 1900) 55 S. W. Rep. 697; Fidelity Trust Co. *v. Louisville Gas Co.*, (Ky. 1904) 81 S. W. Rep. 927; Cynthia, etc., Turnpike Co. *v. Hutchinson*, (Ky. 1901) 60 S. W. Rep. 378.

*Louisiana*. — Bayou Cook Nav., etc., Co. *v. Doullut*, 111 La. 517.

*Maryland*. — Mutual F. Ins. Co. *v. Farquhar*, 86 Md. 668.

*Massachusetts*. — Nantasket Beach Steamboat Co. *v. Shea*, 182 Mass. 147.

*Minnesota*. — Gould *v. Fuller*, 79 Minn. 414, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 695.

*Mississippi*. — Woodberry *v. McClurg*, 78 Miss. 831.

*Missouri*. — State *v. Lincoln Trust Co.*, 144 Mo. 562; Watson Seminary *v. Pike County Ct.*, 149 Mo. 57; Hall *v. Farmers', etc., Bank*, 145 Mo. 418.

*New York*. — Matter of Griffin, 45 N. Y. App. Div. 102, reversed 167 N. Y. 71; Feiner *v. Reiss*, 98 N. Y. App. Div. 40, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 695.

*Ohio*. — Merchants' Nat. Bank *v. Standard Wagon Co.*, 9 Ohio Dec. 380, 6 Ohio N. P. 264; Kit Carter Cattle Co. *v. McGillin*, 10 Ohio Dec. 146.

*Tennessee*. — Shoun *v. Armstrong*, (Tenn. Ch. 1900) 59 S. W. Rep. 790; Herring *v. Ruskin Coöperative Assoc.*, (Tenn. Ch. 1899) 52 S. W. Rep. 327.

*Texas*. — Scott *v. Farmers', etc., Nat. Bank*, (Tex. Civ. App. 1902) 66 S. W. Rep. 485.

*Washington*. — Parsons *v. Tacoma Smelting, etc., Co.*, 25 Wash. 492; Spokane *v. Amster-*

**699.** *d.* HOW POWERS ARE CONFERRED BY CHARTER — (3) *Implied Powers* — (c) *Powers Implied from Those Expressly Conferred* — *aa.* IN GENERAL. — See note 10.

**700.** *bb.* RELATION BETWEEN ACT AND AUTHORIZED OBJECTS. — See note 1.

**701.** *cc.* WHETHER ACT MUST BE ABSOLUTELY NECESSARY. — See note 1.

*e.* MODE OF EXERCISING CORPORATE POWERS — (2) *In the Absence of Express Requirements.* — See note 6.

**702.** *f.* TIME OF COMMENCING BUSINESS AND EXERCISING POWERS — (1) *In General.* — See note 1.

(2) *Conditions Precedent.* — See note 2.

**703.** *i.* PRESUMPTION AS TO POWERS. — See note 1.

**704.** 2. *Business of Corporations in General* — *b.* BUSINESS MUST BE AUTHORIZED BY CHARTER — (1) *In General.* — See note 1.

(2) *Application of Rule* — (a) *Banking Corporations.* — See note 2.

(d) *Railroad, Steamboat, and Turnpike Corporations, Etc.* — See note 7.

**705.** (e) *Manufacturing and Trading Corporations.* — See notes 1, 2.

(f) *Other Illustrations.* — See note 3.

**706.** *c.* BUSINESS INCIDENTAL TO PRINCIPAL BUSINESS — (2) *Application of Rule* — (b) *Railroad Corporations.* — See note 3.

(c) *Manufacturing and Trading Corporations.* — See note 5.

damsch Trustees Kantoor, 22 Wash. 172; Washington Mill Co. v. Sprague Lumber Co., 19 Wash. 165.

**699.** 10. *Rule as to Implied Powers.* — Central Trust Co. v. Columbus, etc., R. Co., 87 Fed. Rep. 815; Merchants' Bldg., Imp. Co. v. Chicago Exch. Bldg. Co., 210 Ill. 26, 102 Am. St. Rep. 145; Fidelity Trust Co. v. Louisville Gas Co., (Ky. 1904) 81 S. W. Rep. 927; Horst v. Lewis, (Neb. 1904) 98 N. W. Rep. 1046; Virgil v. Virgil Practice Clavier Co., (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 200; Central Ohio Natural Gas, etc., Co. v. Capital City Dairy Co., 60 Ohio St. 96. See also Sherman v. American Cong. Assoc., 51 C. C. A. 329.

**700.** 1. Chicago First M. E. Church v. Dixon, 178 Ill. 260; People v. Pullman's Palace Car Co., 175 Ill. 125; Burke v. Mead, 159 Ind. 252.

**701.** 1. *Rule as to Necessity for Act.* — Flaherty v. Portland Longshoremen's Benev. Soc., 99 Me. 253; Central Ohio Natural Gas, etc., Co. v. Capital City Dairy Co., 60 Ohio St. 96.

6. Central Trust Co. v. Columbus, etc., R. Co., 87 Fed. Rep. 815; Stockton v. American Tobacco Co., 55 N. J. Eq. 352, *affirmed* 56 N. J. Eq. 847. See also Dickinson v. Consolidated Traction Co., 114 Fed. Rep. 232, *affirmed* (C. C. A.) 119 Fed. Rep. 871.

Only the state may complain if the corporation exercises its powers in bad faith. Windsor Glass Co. v. Carnegie Co., 204 Pa. St. 459.

**702.** 1. Ryland v. Hollinger, 54 C. C. A. 248. 2. *Conditions Precedent to Exercise of Powers.* — State v. Twin Village Water Co., 98 Me. 214; Cleveland v. Mullin, 96 Md. 598; Goodale Lumber Co. v. Shaw, 41 Oregon 544.

*Paying in Proportion of Capital Stock.* — Globe Realty Co. v. Whitney, 106 La. 257.

**703.** 1. *Presumption of Power.* — Southern Illinois, etc., Bridge Co. v. Stone, 174 Mo. 1, *citing* 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 703; International Bldg., etc., Assoc. v. Wall, 153 Ind. 554; U. S. Mortgage Co. v. McClure, 42 Oregon 190.

**704.** 1. Henry v. Simanton, 64 N. J. Eq. 572.

The constitution of Louisiana provides that "no corporation shall engage in any business other than that expressly authorized by its charter or incidental thereto." Bayou Cook Nav., etc., Co. v. Doullut, 111 La. 517.

2. *Banking Companies.* — Blez v. State Bank, (Ky. 1900) 55 S. W. Rep. 697.

7. By Acts La. 1902, p. 288, § 1, corporations organized for works of public improvement are forbidden to engage in mercantile business. Bayou Cook Nav., etc., Co. v. Doullut, 111 La. 517.

*Railroad Corporation Cannot Engage in Business as Public Warehousemen.* — State v. Morgan's Louisiana, etc., R. etc., Co., 106 La. 513.

**705.** 1. *Manufacturing and Trading Corporations.* — Powell v. Murray, 3 N. Y. App. Div. 273, *affirmed* 157 N. Y. 717.

*Lumber Company Cannot Fill Contracts with Products of Other Companies.* — Miller v. Kennedy, 31 Pittsb. Leg. J. N. S. (Pa.) 274.

*Manufacturing Company Cannot Become Broker of Bonds.* — Peck-Williamson Heating, etc., Co. v. Board of Education, 6 Okla. 279.

2. A corporation organized to make fertilizer from cotton seed oil, has no power to buy and sell guano fertilizer manufactured by another company. Richmond Guano Co. v. Farmers' Cotton Seed Oil Mill, etc., Co., (C. C. A.) 126 Fed. Rep. 712.

*Brewing Company Cannot Sell Beer of Another Company.* — Pittsburg Pure Beer Brewing Cos. Petition, 7 Pa. Dist. 233.

3. A corporation for promoting pleasant relations among its members and settling matters relating to a certain trade, has no power to seek to compel the payment of debts to its members by a system of blacklisting. Hartnett v. Plumb-ers' Supply Assoc., 169 Mass. 229.

**706.** 3. *Railroad Corporation May Lease Its Property to Warehouse Corporation.* — State v. New Orleans Warehouse Co., 109 La. 64.

*Railroad Corporations May Own and Operate Boats as Feeders.* — Atkins v. Shreveport, etc., R. Co., 106 La. 568.

5. *Publishing Trade Directory by Trade News-*

- 707.** (e) *Employment of Idle Property.* — See note 2.
- 708.** 3. *Construction of Charter* — *a.* **WHAT CONSTITUTES CHARTER** — (2) *Corporations Formed under General Laws.* — See note 2.
- b.* **RULES FOR CONSTRUING CHARTERS** — (1) *Strict Construction in Favor of Public* — (a) *In General.* — See note 7.
- 709.** (b) *Exemption from Taxation.* — See note 1.
- 710.** (2) *Operation of General Laws* — (a) *In General.* — See note 4.
- 713.** (7) *Examination of Whole Law.* — See note 2.
- 714.** (11) *Limitation of General Terms by Preceding Special Terms.* — See note 1.
- (12) *Enumeration of Powers as an Exclusion of Others.* — See note 2.
- 716.** 4. *Power to Take and Hold Property* — *a.* **REAL PROPERTY** — (7) *When the Power to Purchase Will Be Implied* — (a) *In General.* — See note 6.
- 718.** (8) *When the Power to Purchase Will Not Be Implied* — (a) *In General.* — See note 3.
- (e) *Corporations Not Created to Deal in Land.* — See notes 5, 6.
- 719.** (9) *Purchase of Works and Property of Another Corporation.* — See note 1.
- (11) *Amount of Property.* — See note 4.

*paper Not Ultra Vires.* — *Jewelers' Circular Pub. Co. v. Jacobs*, 109 Fed. Rep. 509.

**A Newspaper Company** may charter a yacht for the purpose of collecting news. *Sun Printing, etc., Assoc. v. Moore*, 183 U. S. 642.

**Parlor Car Company** may sell liquor to travelers, under a charter authorizing it to manufacture cars, with "all convenient appendages and supplies." *People v. Pullman's Palace Car Co.*, 175 Ill. 125.

**Corporation for Manufacture and Sale of Instrument to Teach Piano Playing** may properly maintain a school for the purpose of introducing its product. *Virgil v. Virgil Practice Clavier Co.*, (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 200.

**707.** 2. *Employment of Idle Property.* — *People v. Pullman's Palace Car Co.*, 175 Ill. 125.

**708.** 2. *General Laws.* — *Cunningham v. German Ins. Bank*, 41 C. C. A. 609; *Bixler v. Summerfield*, 195 Ill. 147; *State v. Anderson*, 31 Ind. App. 34; *Traer v. Lucas Prospecting Co.*, 124 Iowa 107; *Woodberry v. McClurg*, 78 Miss. 831; *Lincoln St. R. Co. v. Lincoln*, 91 Neb. 109; *Kit Carter Cattle Co. v. McGillin*, 10 Ohio Dec. 146; *Shoun v. Armstrong*, (Tenn. Ch. 1900) 59 S. W. Rep. 790.

**Same Rules of Construction Apply to Articles of Incorporation as to Charters.** — *Dempster Mfg. Co. v. Downs*, 126 Iowa 80.

**7.** *General Rule as to Construing Charters.* — *Chicago First M. E. Church v. Dixon*, 178 Ill. 260; *People v. Pullman's Palace Car Co.*, 175 Ill. 125; *State v. Lincoln Trust Co.*, 144 Mo. 562; *Watson Seminary v. Pike County Ct.*, 149 Mo. 57; *Lincoln St. R. Co. v. Lincoln*, 61 Neb. 109; *Grey v. Newark Plank-Road Co.*, 65 N. J. L. 51.

**709.** 1. *Exemption from Taxation.* — *Adams v. Yazoo, etc., R. Co.*, 77 Miss. 194.

**710.** 4. *Subject to General Laws and Police Regulations.* — *Sampson v. Camperdown Cotton Mills*, 82 Fed. Rep. 833; *Cleveland v. Mullin*, 96 Md. 598; *Martin v. Remington-Martin Co.*, 95 N. Y. App. Div. 18.

**713.** 2. *Georgia R., etc., Co. v. Maddox*, 116 Ga. 64, citing 7 AM. AND ENG. ENCYC. OF

LAW (2d ed.) 713; *Immigration Soc. v. Com.*, 103 Va. 46.

**714.** 1. *State v. Lincoln Trust Co.*, 144 Mo. 562; *Robotham v. Prudential Ins. Co.*, 64 N. J. Eq. 673. See also *Stephens v. Mysore Reefs Min. Co.*, (1902) 1 Ch. 745.

2. *State v. Lincoln Trust Co.*, 144 Mo. 562.

**716.** 6. *Hotel Company*, having power to purchase land, may sell its site and buy another more suitable to its business. *Freeman v. Sea View Hotel Co.*, 57 N. J. Eq. 68.

**718.** 3. *When Power to Purchase Not Implied.* — *Thompson v. West*, 59 Neb. 677, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 718; *National Home Bldg., etc., Assoc. v. Home Sav. Bank*, 181 Ill. 35, 72 Am. St. Rep. 245; *Chicago First M. E. Church v. Dixon*, 178 Ill. 260; *State v. Westminster College*, 175 Mo. 52; *Scott v. Farmers', etc., Nat. Bank*, (Tex. Civ. App. 1902) 66 S. W. Rep. 485.

**5.** *Turnpike Companies.* — *Cynthia, etc., Turnpike Co. v. Hutchinson*, (Ky. 1901) 60 S. W. Rep. 378.

**Mercantile Corporation Cannot Purchase Real Estate.** — *Schneider v. Sellers*, (Tex. Civ. App. 1904) 81 S. W. Rep. 126.

*In Illinois* a corporation organized under the general law cannot hold real estate for investment purposes. *Bixler v. Summerfield*, 195 Ill. 147.

**6.** *Manufacturing Company* has not power to buy land, erect houses, churches, etc., for the accommodation of its employees. *People v. Pullman's Palace Car Co.*, 175 Ill. 125.

**719.** 1. *Manufacturing Company* may buy plant already built and in operation. *Bristol Bank, etc., Co. v. Jonesboro Banking, etc., Co.*, 161 Tenn. 545.

**Authority to Own and Operate** such plants as may be necessary includes the power to purchase plants of other companies. *State v. Continental Tobacco Co.*, 177 Mo. 1.

**4.** A corporation may erect and hold an office building larger than its immediate needs, renting the remainder of the building. *People v. Pullman's Palace Car Co.*, 175 Ill. 125.

**Purchase of More than Needed Not Ultra Vires**



- 720.** (13) *Power to Take Lease.* — See note 3.
- 728.** *b. PERSONAL PROPERTY, CHOSSES IN ACTION, ETC.* — (5) *Purchasing or Taking Choses in Action* — When Authorized to Take. — See note 4.
- 729.** When Taking Unauthorized. — See note 1.
- (6) *Purchase of Judgments.* — See note 3.
- 731.** *c. PRESUMPTION AS TO POWER.* — See note 5.
- 732.** 5. *Power to Act as Trustee* — *b. MODERN DOCTRINE* — When the Power Exists. — See note 2.
- 733.** When the Power Does Not Exist. — See note 2.
- 734.** 6. *Power to Alienate Property* — *a. IN GENERAL.* — See note 1.
- 735.** *b. ALIENATION OF ENTIRE PROPERTY.* — See note 1.
- Dissent of Stockholders. — See note 4.
- 736.** See note 1.
- c. SALE AND TRANSFER FOR STOCK IN PURCHASING CORPORATION* — To Wind Up Business. — See note 2.
- Continuation of Vendor Corporation. — See note 3.
- 737.** *d. PREJUDICE TO RIGHTS OF CREDITORS.* — See note 1.
- e. LEASE OF REAL PROPERTY* — (1) *In General.* — See note 2.
- (2) *Lease of Entire Property.* — See notes 5, 6.
- 738.** *g. GRANT OF EASEMENT.* — See note 3.

**if Made in Good Faith.** — *Lauder v. Peoria Agricultural, etc., Soc.*, 71 Ill. App. 475.

If there be a limit, the question whether or not the limit has been passed may be raised only by the state. *Thomas v. Wilcox*, (S. Dak. 1904) 101 N. W. Rep. 1072.

**720. 3. A Soda Water Corporation** may rent a "saloon" without specifying in the lease what is to be sold there. *Brewer, etc., Brewing Co. v. Boddie*, 181 Ill. 622.

**728. 4. Taking Assignment of Account.** — *Mahoney v. Butte Hardware Co.*, 27 Mont. 463.

**Buying Claim for Damages.** — A corporation, when buying a plant and established business, may buy a claim for damages inflicted on such plant. *Central Ohio Natural Gas, etc., Co. v. Capital City Dairy Co.*, 60 Ohio St. 96.

**729. 1. A Real Estate Corporation** cannot buy a claim against a city for damage done to land. *Pueblo v. Shutt Invest. Co.*, 28 Colo. 524, 89 Am. St. Rep. 221.

**3. Purchase of Judgment.** — *Capital Lumbering Co. v. Learned*, 36 Oregon 544, 78 Am. St. Rep. 792.

**731. 5. Presumption in Favor of Power.** — *Diamond Coal Co. v. Cook*, 129 Cal. xviii, 61 Pac. Rep. 578.

**732. 2. Express Authority Given by Charter.** — *Smith v. New England Bank*, 72 N. H. 4.

**733. 2.** See also *Matter of Griffin*, 45 N. Y. App. Div. 102, reversed 167 N. Y. 71.

**734. 1. Power to Alienate in General.** — *New Hampshire Sav. Bank v. Richey*, 58 C. C. A. 294; *Freeman v. Sea View Hotel Co.*, 57 N. J. Eq. 68; *Coal Creek Min., etc., Co. v. Tennessee Coal, etc., Co.*, 106 Tenn. 651; *Hearst v. Putnam Min. Co.*, (Utah 1904) 77 Pac. Rep. 753.

**735. 1. Power to Dispose of All Its Property.** — *State v. Continental Tobacco Co.*, 177 Mo. 1, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 734; *Morisette v. Howard*, 62 Kan. 463.

**4. Rights of Stockholders.** — *Keystone Bank v. Union Oil Co.*, 25 Ohio Cir. Ct. 464, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 735;

*Phillips v. Providence Steam Engine Co.*, 21 R. I. 302, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 735.

**Express Authority.** — In *West Virginia*, by statute, a majority of stockholders may sell all the corporate property. *Metcalf v. American School Furniture Co.*, 122 Fed. Rep. 115.

**736. 1.** *Forrester v. Boston, etc., Consol. Copper, etc., Min. Co.*, 21 Mont. 544, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 734-736. See also *Post v. Beacon Vacuum Pump, etc., Co.*, 50 U. S. App. 271.

**2. Transfer for Stock in Purchasing Corporation.** — *Metcalf v. American School Furniture Co.*, 122 Fed. Rep. 115.

**Otherwise Where Stockholder Dissents.** — *Morris v. Elyton Land Co.*, 125 Ala. 263.

**If Authority Is Given in Charter** the dissent of a stockholder is immaterial. *Traer v. Lucas Prospecting Co.*, 124 Iowa 107.

**3. Where Vendor Corporation Continues.** — *Forrester v. Boston, etc., Consol. Copper, etc., Min. Co.*, 21 Mont. 544, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 734-736.

**Express Power May Be Given in Charter.** — *Wall v. London, etc., Assets Corp.*, (1898) 2 Ch. 469, 79 L. T. N. S. 249.

**737. 1. Rights of Creditors.** — *Hurd v. New York, etc., Steam Laundry Co.*, 167 N. Y. 89.

**2. Authorized Leases.** — *State v. New Orleans Warehouse Co.*, 109 La. 64; *Nantasket Beach Steamboat Co. v. Shea*, 182 Mass. 147; *Coal Creek Min., etc., Co. v. Tennessee Coal, etc., Co.*, 106 Tenn. 651.

By statute in *New York* a railroad may lease its property for 999 years. *Wormser v. Metropolitan St. R. Co.*, 98 N. Y. App. Div. 29.

**5. Leasing Entire Property.** — *Plant v. Macon Oil, etc., Co.*, 103 Ga. 666.

**6. Parsons v. Tacoma Smelting, etc., Co.**, 25 Wash. 492.

**738. 3. May Grant Easement if Power to Perform Public Duties Not Lost Thereby.** — *Benton v. Elizabeth*, 61 N. J. L. 411, affirmed 61 N. J. L. 693.

**738.** *i.* MORTGAGE OR PLEDGE OF PROPERTY—(1) *Real Property*.—See note 6.

**740.** *k.* CONVEYANCE OR TRANSFER IN PAYMENT OF DEBTS—(1) *In General*.—See note 5.

**741.** (2) *Assignment for Benefit of Creditors*—(b) *Preferring Creditors*—Denial of Right.—See note 4.

**742.** *Contrary Doctrine*.—See note 1.

**743.** (c) *Preferring Officers and Stockholders*.—See notes 1, 2.

**738.** 6. *Mortgage of Real Property*.—Farmers' Bank v. Ohio River Line Steamboat Co., 108 Ky. 447; Belt, etc., Co. v. Kentucky Glass Works Co., 106 Ky. 7; Bosche v. Toledo Display Horse Co., 7 Ohio Cir. Dec. 374, 14 Ohio Cir. Ct. 289; Union Trust Co. v. Mercantile Library Hall Co., 189 Pa. St. 263; Washington Mill Co. v. Sprague Lumber Co., 19 Wash. 165.

**Power to Borrow Money and Execute Mortgage** authorizes mortgage to secure bonds issued for purpose of taking up an outstanding obligation. Big Creek Gap Coal, etc., Co. v. American L. & T. Co., (C. C. A.) 127 Fed. Rep. 625.

**Mortgage of Income**.—In *Georgia* a corporation may not mortgage its income. Lubroline Oil Co. v. Athens Sav. Bank, 104 Ga. 376.

**740.** 5. *Transfer in Payment of Debts*.—Hamilton v. Menominee Falls Quarry Co., 106 Wis. 352.

**741.** 4. *Denial of Right to Prefer Creditors*.—Kit Carter Cattle Co. v. McGillin, 11 Ohio Cir. Dec. 413; Rogers v. Southern Pine Lumber Co., 21 Tex. Civ. App. 48; Washington Liquor Co. v. Alladio Café Co., 28 Wash. 176; Burrell v. Bennett, 20 Wash. 644.

**Otherwise Before Cessation of Business**.—Ford v. Lamson, 9 Ohio Cir. Dec. 374, 17 Ohio Cir. Ct. 539.

**Adverse Proceedings by Creditor**.—Lopez v. Campbell, 163 N. Y. 340.

**742.** 1. *Doctrine Allowing Preference of Creditors*—*United States*.—National Bank of Commerce v. Allen, (C. C. A.) 90 Fed. Rep. 545; U. S. Rubber Co. v. American Oak Leather Co., 181 U. S. 434.

*Alabama*.—Corey v. Wadsworth, 118 Ala. 488.

*Arkansas*.—Smead v. Chandler, 71 Ark. 505.

*California*.—Welch v. Sargent, 127 Cal. 72; Merced Bank v. Ivett, 127 Cal. 134, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 742.

*Colorado*.—John V. Farwell Co. v. Sweetzer, 10 Colo. App. 421; Beaman v. Stewart, 19 Colo. App. 226.

*Illinois*.—Rockford Wholesale Grocery Co. v. Standard Grocery, etc., Co., 74 Ill. App. 317, affirmed 175 Ill. 89.

*Iowa*.—Latrobe First Nat. Bank v. Garretson, 107 Iowa 196.

*Kansas*.—Grand De Tour Plow Co. v. Rude Bros. Mfg. Co., 60 Kan. 145, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 742. See Morisette v. Howard, 62 Kan. 463.

*Maryland*.—Hodson v. Karr, 96 Md. 475.

*Mississippi*.—Fargason v. Oxford Mercantile Co., 78 Miss. 65.

*Nebraska*.—German Nat. Bank v. Hastings First Nat. Bank, 55 Neb. 86; M. A. Seeds Dry-Plate Co. v. Heyn Photo-Supply Co., 57 Neb. 214.

*New Jersey*.—Jessup v. Thomason, (N. J. 1904) 59 Atl. Rep. 226.

*Pennsylvania*.—Moller v. Keystone Fibre Co., 187 Pa. St. 553.

*Utah*.—Burnham v. McCornick, 18 Utah 42.

**743.** 1. *Doctrine Allowing Preference of Officers*.—American Exch. Nat. Bank v. Ward, 49 C. C. A. 611; Corey v. Wadsworth, 118 Ala. 488; Wilson v. Stevens, 129 Ala. 630, 87 Am. St. Rep. 86; Anderson v. Bullock County Bank, 122 Ala. 275; Campau v. Detroit Driving Club, 135 Mich. 575; A. B. Frank Co. v. Berwind, (Tex. Civ. App. 1898) 47 S. W. Rep. 681.

**Preference Allowed Where Preferred Officer's Vote Necessary**.—Nappanee Canning Co. v. Reid, 159 Ind. 614; City Nat. Bank v. Goshen Woolen Mills Co., 163 Ind. 214.

**Preference Must Be for Interests of Corporation**.—State v. Manhattan Rubber Mfg. Co., 149 Mo. 181.

**Must Be Good Faith**.—Shields v. Hobart, 172 Mo. 491; Pitman v. Chicago Lead Co., 93 Mo. App. 592.

**2. Doctrine Denying Right to Prefer Officers**—*United States*.—Richards v. Halliday, 92 Fed. Rep. 798.

*Illinois*.—Mayr v. Hodge, etc., Co., 78 Ill. App. 556.

*Louisiana*.—Brashear v. Alexandria Cooperage Co., 50 La. Ann. 8587.

*Maine*.—Symonds v. Lewis, 94 Me. 501.

*Minnesota*.—Taylor v. Mitchell, 80 Minn. 492; Taylor v. Fanning, 87 Minn. 52.

*Mississippi*.—Lamb v. Russell, 81 Miss. 382.

*Nebraska*.—Wyman v. Williams, 53 Neb. 670; M. A. Seeds Dry-Plate Co. v. Heyn Photo-Supply Co., 57 Neb. 214; Stough v. Ponca Mill Co., 54 Neb. 500.

*New Jersey*.—Tennant v. Appleby, (N. J. 1898) 41 Atl. Rep. 110; Gray v. Taylor, (N. J. 1897) 38 Atl. Rep. 951; Jessup v. Thomason, (N. J. 1904) 59 Atl. Rep. 226; Savage v. Miller, 56 N. J. Eq. 437, reversing 56 N. J. Eq. 432.

*New York*.—Joseph v. Raff, 82 N. Y. App. Div. 47, affirmed 176 N. Y. 611; Mott v. Edwards, 98 N. Y. App. Div. 511; Halpin v. Mutual Brewing Co., 20 N. Y. App. Div. 583.

*North Carolina*.—See Graham v. Carr, 130 N. Car. 271.

*Ohio*.—Ford v. Lamson, 9 Ohio Cir. Dec. 374, 17 Ohio Cir. Ct. 539.

*Pennsylvania*.—Pangburn v. American Vault, etc., Co., 205 Pa. St. 83; Hill v. Standard Telephone Mfg. Co., 198 Pa. St. 446; Moller v. Keystone Fibre Co., 187 Pa. St. 553; Charles Beck Paper Co. v. Bates Paper Box Co., 7 Pa. Dist. 477.

*South Dakota*.—Portland Consol. Min. Co. v. Rossiter, 16 S. Dak. 633, 102 Am. St. Rep. 726.

**Preference May Be Given to Corporations in Which Director of Debtor Corporation Is Officer**.—Colorado Fuel, etc., Co. v. Western Hardware Co., 16 Utah 4.

**744.** See note 1.

Debts as to Which Officers Are Guarantors, Sureties, or Indorsers. — See notes 2, 3.

**745.** Debts Due Relatives of Officers. — See note 1.

Express Statutory Prohibition. — See note 3.

1. EXPRESS OR IMPLIED PROHIBITION OR LIMITATION — (1) *Express Prohibition or Limitation.* — See note 6.

**746.** (2) *Implied Prohibition or Limitation in General.* — See note 1.

**747.** (6) *Alienation by Quasi-Public Corporations* — (a) *In General.* — See note 3.

**749.** (c) *Contract for Joint Use of Property.* — See note 4.

**751.** (7) *Alienation of Franchises and Special Privileges* — *Conflicting Decisions in Some States.* — See note 1.

(8) *Express Authority to Alienate Franchises, Special Privileges, and Property* — (a) *In General.* — See note 2.

**752.** (b) *What Amounts to Express Authority* — *Authority to Purchase as Authority to Another to Sell.* — See note 4.

*Other Decisions.* — See note 9.

**753.** (c) *Property and Rights Included.* — See note 3.

*Preference Not Invalid Because Director of Debtor Corporation Also Director in Preferred Creditor, when the preference is made in good faith, and in ignorance of insolvency.* Chick v. Fuller, 51 C. C. A. 648.

*Preference Not Valid Where Director Resigns to Obtain.* — Rokker v. J. W. Butler Paper Co., 88 Ill. App. 278.

*Preference to De Facto Officer Invalid.* — Slack v. Northwestern Nat. Bank, 103 Wis. 57, 74 Am. St. Rep. 841.

*Director May Enforce Judgment Fairly Obtained.* — Nebraska Nat. Bank v. Clark, 58 Neb. 183; Off v. Jack, 104 Ill. App. 655, affirmed 204 Ill. 79.

*Preference Cannot Be Questioned unless Corporation Insolvent.* — Wolf v. Erwin, etc., Co., 71 Ark. 438; Finch Mfg. Co. v. Stirling Co., 187 Pa. St. 596.

*Preference Voidable, Not Void.* — Wyman v. Bowman, (C. C. A.) 127 Fed. Rep. 257.

**744.** 1. Under Burns Stat. Ind., § 5064 et seq., the stockholders cannot be preferred to the creditors. Reagan v. Chicago First Nat. Bank, 157 Ind. 623.

2. *Cases Allowing Preferences When Officers Are Guarantors.* — Rockford Wholesale Grocery Co. v. Standard Grocery, etc., Co., 74 Ill. App. 317, affirmed 175 Ill. 89; Howard v. Central Tobacco Warehouse Co., 123 N. Car. 90; Wells v. Scott, 18 Utah 127.

3. *Cases Denying Such Right.* — Atlas Tack Co. v. Macon Hardware Co., 101 Ga. 391; Swift v. Dyer-Veatch Co., 28 Ind. App. 1; National Wall Paper Co. v. Columbia Nat. Bank, 63 Neb. 234; Reynolds v. Smith, 60 Neb. 197; Merchants' Nat. Bank v. McDonald, 63 Neb. 363; Williams v. Turner, 63 Neb. 575.

*Rights of Creditors Not Affected.* — Emanuel v. Barnard, (Neb. 1904) 99 N. W. Rep. 666.

*Preferred Creditor May Obtain His Share.* — Though the conveyance is set aside the transferee is entitled to share with the other creditors. National Wall Paper Co. v. Columbia Nat. Bank, (Neb. 1903) 93 N. W. Rep. 1004; Hill v. Standard Telephone Mfg. Co., 209 Pa. St. 231.

**745.** 1. See Jefferson County Nat. Bank v. Townley, 159 N. Y. 490.

3. *Express Prohibition.* — Industrial Mut. De-

posit Co. v. Taylor, (Ky. 1904) 82 S. W. Rep. 574; Miller v. Audenried, (N. J. 1904) 57 Atl. Rep. 1076; Hilton v. Ernst, 38 N. Y. App. Div. 94, affirmed 161 N. Y. 226; O'Brien v. East River Bridge Co., 161 N. Y. 539; Spellman v. Looschen, etc., Piano Co., 162 N. Y. 268; Dudensing v. Jones, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 69; Tate v. Commercial Bldg. Assoc., 97 Va. 74.

6. *Requirement of Consent of Stockholders.* — Baggaley v. Pittsburg, etc., Iron Co., (C. C. A.) 90 Fed. Rep. 636; Bishop v. Kent, etc., Co., 20 R. I. 680.

**746.** 1. *Prohibition on Selling Includes Prohibition on Mortgaging.* — Mannhardt v. Illinois Staats Zeitung Co., 90 Ill. App. 315.

**747.** 3. *Alienation by Quasi-Public Corporations.* — New Albany Waterworks v. Louisville Banking Co., 58 C. C. A. 576; Cumberland Telephone, etc., Co. v. Evansville, 127 Fed. Rep. 187.

*Effect of Legislative Authority.* — Even if there be authority to make a lease, this will not relieve the corporation from the performance of public duties imposed upon it by its charter. Ryerson v. Morris Canal, etc., Co., (N. J. 1904) 59 Atl. Rep. 29.

**749.** 4. See Benton v. Elizabeth, 61 N. J. L. 411, affirmed 61 N. J. L. 693.

**751.** 1. State v. Topeka Water Co., 61 Kan. 547.

2. *Express Authority to Alienate.* — Central Trust Co. v. Western, etc., R. Co., 89 Fed. Rep. 24, modified (C. C. A.) 98 Fed. Rep. 489; Sioux City Terminal R., etc., Co. v. Trust Co. of North America, 49 U. S. App. 523; Michigan Telephone Co. v. St. Joseph, 121 Mich. 502, 80 Am. St. Rep. 520; State v. Anderson, 97 Wis. 114.

*If Authority to Lease, Length of Lease Immaterial.* — Dickinson v. Consolidated Traction Co., (C. C. A.) 119 Fed. Rep. 871.

**752.** 4. Pinkerton v. Pennsylvania Traction Co., 193 Pa. St. 229.

9. *Authority to Lease Does Not Include Power to Sell.* — Cumberland Telephone, etc., Co. v. Evansville, 127 Fed. Rep. 187.

**753.** 3. *Power to "Convey Such Real and Per-*



**755.** 7. Powers with Respect to Contracts — *b.* WHEN THE POWER TO CONTRACT WILL BE IMPLIED — General Statement. — See note 1.

**756.** Powers Implied from Power to Own or Deal in Property. — See note 7.

Powers Incident to Power to Manufacture or Trade. — See note 9.

**757.** Advertising. — See note 1.

*c.* WHEN THE POWER TO CONTRACT WILL NOT BE IMPLIED — General Doctrine. — See note 3.

**759.** *e.* CONTRACTS WITH MEMBERS OR STOCKHOLDERS. — See note 5.

*g.* UNLAWFUL AGREEMENTS — (1) *In General.* — See note 8.

(2) *Restraint of Trade, and Monopolies.* — See note 9.

**761.** *i.* FORM AND MANNER OF ENTERING INTO CONTRACTS — (2) *In the Absence of Express Requirements.* — See note 2.

**762.** (3) *Use of Corporate Seal* — (a) *The Old Doctrine.* — See note 3.

(b) *Modern Doctrine in the United States.* — See note 4.

**765.** (d) *Modern Doctrine in Canada.* — See note 2.

(e) *Executed and Implied Contracts — Recovery Against Corporation.* — See note 6.

**766.** (g) *Express Requirement of Seal.* — See note 4.

**769.** *j.* LIMITATION AS TO AMOUNT OF INDEBTEDNESS — *Debts Prohibited — In General.* — See note 4.

*Debts Contracted in Course of Ordinary Business.* — See note 5.

**770.** *k.* PRESUMPTION OF POWER TO CONTRACT. — See note 6.

**771.** *l.* POWERS WITH RESPECT TO PARTICULAR CONTRACTS — (1) *Borrowing Money* — (a) *When the Power Will Be Implied — United States.* — See note 1.

sonal Estate" as May Be Proper for Maintaining Its Business. — Under such a statute the corporation may not convey its franchise and go out of business. *Cumberland Telephone, etc., Co. v. Evansville*, 127 Fed. Rep. 187; *New Albany Waterworks v. Louisville Banking Co.*, 58 C. C. A. 576; *Stowe v. Citizens' Natural Gas Co.*, 23 Pa. Co. Ct. 273.

**755.** 1. Implied Power to Contract. — *Lowe v. Ring*, 115 Wis. 575, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 755; *Colorado Springs Co. v. American Pub. Co.*, 38 C. C. A. 433; *National Deposit Bank v. Louisville City Nat. Bank*, (Ky. 1901) 62 S. W. Rep. 725; *Curtis v. Natalie Anthracite Coal Co.*, 89 N. Y. App. Div. 61, affirmed 181 N. Y. 543; *Koehler v. Reinheimer*, 26 N. Y. App. Div. 1.

**756.** 7. Neosho Valley Invest. Co. v. Han-  
num, 10 Kan. App. 499.

9. Powers Implied from Power to Manufacture and Trade. — *Pierpont Mfg. Co. v. Goodman Produce Co.*, (Tex. Civ. App. 1900) 60 S. W. Rep. 347.

**757.** 1. Advertising. — *Colorado Springs Co. v. American Pub. Co.*, 38 C. C. A. 433.

3. Ultra Vires Contracts in General. — *Kelley v. O'Brien Varnish Co.*, 90 Ill. App. 287; *Sturdevant v. Farmers', etc., Bank*, (Neb. 1903) 95 N. W. Rep. 819.

**759.** 5. *Rogers v. Nashville, etc., R. Co.*, (C. C. A.) 91 Fed. Rep. 299; *Singer v. Salt Lake Copper Mfg. Co.*, 17 Utah. 143.

8. Usurious Contract Is Not Ultra Vires since it is good in the hands of bona fide holders. *Fletcher v. Alpena Circuit Judge*, (Mich. 1904) 99 N. W. Rep. 748.

9. So under the constitution of Montana. *MacGinniss v. Boston, etc., Consol. Copper, etc., Min. Co.*, 29 Mont. 428.

**761.** 2. *St. Joseph Hydraulic Co. v. Globe Tissue Paper Co.*, 156 Ind. 665.

**762.** 3. *Columbia Casino Co. v. World's Columbian Exposition*, 85 Ill. App. 369.

4. Modern Doctrine as to Corporate Seal in United States. — *Hailey First Nat. Bank v. G. V. Bryan Min. Co.*, 89 Fed. Rep. 439, modified (C. C. A.) 95 Fed. Rep. 23; *Brown v. Commercial F. Ins. Co.*, 21 App. Cas. (D. C.) 325; *Seiberling v. Miller*, 207 Ill. 443; *Speirs v. Union Drop-Forge Co.*, 174 Mass. 175; *Ismon v. Loder*, 135 Mich. 345; *East End Bldg., etc., Co. v. Hughey*, 8 Ohio Cir. Dec. 724, 16 Ohio Cir. Ct. 19; *Thayer v. Nehalem Mill Co.*, 31 Oregon 437; *St. Clair v. Rutledge*, 115 Wis. 583, 95 Am. St. Rep. 964.

Contract Made by Resolution of Stockholders May Be Modified Only in Same Manner. — *Pinchback v. Bessemer Min., etc., Co.*, 137 N. Car. 171.

**765.** 2. *Hill v. Ingersoll, etc., Gravel Road Co.*, 32 Ont. 194.

6. Use and Occupation. — *Garland Mfg. Co. v. Northumberland Paper, etc., Co.*, 31 Ont. 40.

**766.** 4. *Allen v. Brown*, 6 Kan. App. 704; *Caldwell v. Morganton Mfg. Co.*, 121 N. Car. 339.

**769.** 4. Limitation on Bonded Indebtedness Does Not Apply to Other Indebtedness. — *Fidelity Trust Co. v. Louisville Gas Co.*, (Ky. 1904) 81 S. W. Rep. 927.

5. Indebtedness in Course of Ordinary Business. — *Curtis v. Natalie Anthracite Coal Co.*, 89 N. Y. App. Div. 61, affirmed 181 N. Y. 543.

**770.** 6. Power to Contract Presumed. — *Allen v. West Point Min., etc., Co.*, 132 Ala. 292; *West v. Averill Grocery Co.*, 109 Iowa 488. See also *Keating v. American Brewing Co.*, 62 N. Y. App. Div. 501.

**771.** 1. Power to Borrow Implied. — *Cunningham v. German Ins. Bank*, 41 C. C. A. 609; *Ingraham v. National Salt Co.*, (C. C. A.) 130 Fed. Rep. 676; *Fidelity Trust Co. v. Louisville*

**772.** Particular Corporations. — See note 2.

**774.** (b) When the Power Will Not Be Implied — *cc.* UNAUTHORIZED BUSINESS OR PURPOSE. — See note 3.

**775.** (d) Limitation as to Amount, Manner, or Purpose of Borrowing — *aa.* IN GENERAL. — See note 5.

**779.** (2) *Issue of Negotiable Instruments Generally* — (c) Doctrine in the United States — *aa.* WHEN THE POWER WILL BE IMPLIED. — See note 2.

**780.** Particular Corporations. — See note 2.

**783.** (3) *Execution and Issue of Bonds* — (a) When the Power Will Be Implied. — See note 3.

**786.** *dd.* EXPRESS OR IMPLIED PROHIBITION OR LIMITATION. — See note 1.

*ee.* AGAINST ISSUE EXCEPT FOR MONEY PAID, LABOR DONE, OR PROPERTY RECEIVED, Etc. — See note 2.

Transactions Not Prohibited. — See note 3.

**788.** *kk.* REQUIREMENT OF NOTICE TO OR CONSENT OF STOCKHOLDERS. — See note 1.

(g) *Negotiability of Corporate Bonds.* — See note 3.

(4) *Contracts of Suretyship and Guaranty* — (a) General Rule that the Power Does Not Exist. — See note 4.

**789.** Reasons for the Rule. — See note 2.

Benefit to Corporation from the Contract. — See note 3.

Gas Co., (Ky. 1904) 81 S. W. Rep. 927; Beacon Trust Co. v. Souther, 183 Mass. 413; Bosche v. Toledo Display Horse Co., 7 Ohio Cir. Dec. 374, 14 Ohio Cir. Ct. 289; Buck v. Troy Aqueduct Co., 76 Vt. 75.

**772.** 2. Building and Loan Associations. — Marion Trust Co. v. Crescent Loan, etc., Co., 27 Ind. App. 451, 87 Am. St. Rep. 257; Manship v. New South Bldg., etc., Assoc., 110 Fed. Rep. 845.

**774.** 3. Borrowing to Make Ultra Vires Purchase. — Vliet v. Simanton, 63 N. J. L. 458.

**775.** 5. Rule in United States. — Bell, etc., Co. v. Kentucky Glass-Works Co., 106 Ky. 7; Bell, etc., Co. v. Kentucky Glass-Works Co., (Ky. 1898) 48 S. W. Rep. 440.

**779.** 2. Doctrine in United States. — Smith v. New Hartford Water Co., 73 Conn. 626; Andres v. Morgan, 62 Ohio St. 236, 78 Am. St. Rep. 712; Howard Oil, etc., Co. v. Hughes, 12 Pa. Super. Ct. 311; Buck v. Troy Aqueduct Co., 76 Vt. 75.

**780.** 2. Manufacturing and Trading Companies. — Beacon Trust Co. v. Souther, 183 Mass. 413.

**783.** 3. Issue of Bonds. — Berger v. U. S. Steel Corp., 63 N. J. Eq. 809; William Firth Co. v. South Carolina L. & T. Co., (C. C. A.) 122 Fed. Rep. 569.

**786.** 1. Express or Implied Prohibition or Limitation. — Gunnison Gas, etc., Co. v. Whitaker, 91 Fed. Rep. 191; Flynn v. Coney Island, etc., R. Co., 26 N. Y. App. Div. 416.

2. Issue to Retire Notes Given for Property Received Is Good. — Matter of Snyder, (Supm. Ct. Spec. T.) 29 Misc. (N. Y.) 1.

Issue for Note of Solvent Person Is Good Issue. — *In re* Waterloo Organ Co., 128 Fed. Rep. 517, reversed (C. C. A.) 134 Fed. Rep. 341.

Contract to Issue Bonds in Advance for Work Done by Contractor Is Valid. — Hudson River, etc., R. Co. v. Hanfield, 36 N. Y. App. Div. 605.

3. Transactions Not Prohibited. — William Firth Co. v. South Carolina L. & T. Co., (C. C. A.) 122 Fed. Rep. 569.

**788.** 1. Notice to or Consent of Stockholders — *Riesterer v. Horton Land, etc., Co.*, 160 Mo. 141.

3. Negotiability of Bonds. — Edelstein v. Schuler, (1902) 2 K. B. 144; Bechuanaland Exploration Co. v. London Trading Bank, (1898) 2 Q. B. 658; Atlantic Trust Co. v. Crystal Water Co., 72 N. Y. App. Div. 539.

Negotiability Restrained by Statute. — *Bramblet v. Commonwealth Land, etc., Co.*, (Ky. 1904) 83 S. W. Rep. 599.

4. Contracts of Suretyship and Guaranty. — *Wheeler v. Home Sav., etc., Bank*, 188 Ill. 34, 80 Am. St. Rep. 161, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 788; *M. V. Monarch Co. v. Farmers', etc., Bank*, 105 Ky. 435, 88 Am. St. Rep. 310, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 788; *Bacon v. Farmers' Bank*, 79 Mo. App. 406, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 788; *In re S. P. Smith Lumber Co.*, 132 Fed. Rep. 620; *Ward v. Joslin*, 44 C. C. A. 456; *Rogers v. Jewell Belting Co.*, 184 Ill. 574; *Kelley v. O'Brien Varnish Co.*, 90 Ill. App. 287; *Washington Mill Co. v. Sprague Lumber Co.*, 19 Wash. 165. See also *In re Prospect Worsted Mills*, 126 Fed. Rep. 1011; *Bankers' Union of the World v. Crawford*, 67 Kan. 449, 100 Am. St. Rep. 465.

A corporation which possesses power to act as trustee, may contract to hold as trustee certain securities, and to faithfully discharge its duties, since the corporation is liable, not as a guarantor of the value of the securities, but only for want of reasonable diligence and prudence as a trustee. *Smith v. New England Bank*, 72 N. H. 4.

**789.** 2. Reason for Rule. — *In re S. P. Smith Lumber Co.*, 132 Fed. Rep. 620; *M. V. Monarch Co. v. Farmers', etc., Bank*, 105 Ky. 435, 88 Am. St. Rep. 310.

3. Benefit to Corporation. — *Bacon v. Farmers' Bank*, 79 Mo. App. 406, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 789; *Best Brewing Co. v. Klassen*, 185 Ill. 37, 76 Am. St. Rep. 26.

**790.** (b) When the Power Will Be Implied — *aa.* In General. — See note 1.

*bb.* CONTRACT TO INCREASE TRADE OR BUSINESS. — See note 3.

**791.** *cc.* AIDING ENTERPRISE OF ANOTHER. — See note 2.

**792.** *ff.* GUARANTY ON NEGOTIATION OR SALE OF BONDS, NOTES, ETC. — See note 2.

**793.** *hh.* CORPORATION AS THE REAL PRINCIPAL. — See note 2.

(5) *Issue of Accommodation Paper* — (a) General Rule that the Power Does Not Exist. — See note 6.

**794.** (6) *Contracts of Partnership and Joint Contracts* — (a) General Rule that the Power Does Not Exist. — See note 4.

**797.** (e) Management Intrusted Solely to Corporation. — See note 1.

(f) Contracts Imposing Liability of Partner. — See notes 2, 3.

**798.** (7) *Loaning Money* — (b) When the Power Will Not Be Implied — In the Absence of Express Prohibition. — See note 5.

**799.** (e) Express Prohibition or Limitation. — See note 4.

**800.** (h) Limitation as to Amount of Loans. — See note 5.

**790.** 1. Power Exists if Valuable Consideration. — *Smith v. Ferries, etc., R. Co., (Cal. 1897) 51 Pac. Rep. 710.*

**3.** *Contra.* — *Central Lumber Co. v. Kelter, 201 Ill. 503.*

**May Loan Its Credit to Customer.** — *Hess v. Sloane, 66 N. Y. App. Div. 522, affirmed 173 N. Y. 616.*

**Brewing Company May Guarantee Payment of Rent by Customer.** — *Aarnson v. David Mayer Brewing Co., (N. Y. City Ct. Gen. T.) 26 Misc. (N. Y.) 655, reversed (Supm. Ct. App. T.) 29 Misc. (N. Y.) 289; Koehler v. Reinheimer, 26 N. Y. App. Div. 1, affirming (Supm. Ct. Tr. T.) 20 Misc. (N. Y.) 62; Holm v. Claus Lipsius Brewing Co., 21 N. Y. App. Div. 204.*

**Brewing Company May Be Surety on tenant's liquor license bond.** *Horst v. Lewis, (Neb. 1904) 98 N. W. Rep. 1046.*

**791.** 2. *Vanderveer v. Asbury Park, etc., St. R. Co., 82 Fed. Rep. 355.*

**Guarantee to Procure Railroad Necessary to Business.** — See also *Central Trust Co. v. Columbus, etc., R. Co., 87 Fed. Rep. 815.*

**792.** 2. *Guaranty on Negotiation or Sale of Bonds.* — *Central R., etc., Co. v. Farmers' L. & T. Co., (C. C. A.) 114 Fed. Rep. 263; Fidelity Trust Co. v. Louisville Gas Co., (Ky. 1904) 81 S. W. Rep. 927; Broadway Nat. Bank v. Baker, 176 Mass. 294.*

**793.** 2. *Corporation Real Principal.* — *Thoma v. East End Opera House Co., 30 Pittsb. Leg. J. N. S. (Pa.) 230.*

**6. Power as to Accommodation Paper.** — *Gilbert v. Seaton Mfg. Co., 98 Fed. Rep. 208, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 793; In re Prospect Worsteds Mills, 126 Fed. Rep. 1011; Park Hotel Co. v. St. Louis Fourth Nat. Bank, (C. C. A.) 86 Fed. Rep. 742; Lyon v. Sioux City First Nat. Bank, 55 U. S. App. 747; Steiner v. Steiner Land, etc., Co., 120 Ala. 134, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 793; El Capitan Land, etc., Co. v. Boston-Kansas City Cattle Loan Co., 65 Kan. 359, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 793; Bacon v. Farmers' Bank, 79 Mo. App. 406; Preston v. Northwestern Cereal Co., (Neb. 1903) 93 N. W. Rep. 136; Fox v. Rural Home Co., 90 Hun (N. Y.) 365, affirmed 157 N. Y. 684; McCampbell v. Fountain Head R. Co., 111 Tenn. 55, 102 Am. St. Rep. 731.*

**Power Not Given by N. Y. Negotiable Instru-**

**ments Law.** — *Oppenheim v. Simon Reigel Cigar Co., (Supm. Ct. App. T.) 90 N. Y. Supp. 355.*

**Form of Transaction Immaterial.** — If the corporation in fact indorses for value, it is immaterial that the transaction assumes such a form that the corporation appears to be only an accommodation indorser. *Beacon Trust Co. v. Souther, 183 Mass. 413.*

**Corporations May Be Liable on Accommodation Paper.** — *Murphy v. Arkansas, etc., Land, etc., Co., 97 Fed. Rep. 723; Willard v. Crook, 21 App. Cas. (D. C.) 237.*

**794.** 4. *Contracts of Partnership.* — *South Carolina, etc., R. Co. v. Augusta Southern R. Co., 107 Ga. 176, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 794; Rogers v. Jewell Belting Co., 184 Ill. 574; Garrett v. Republican Pub. Co., 61 Neb. 541, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 794; Merchants' Nat. Bank v. Standard Wagon Co., 9 Ohio Dec. 380, 6 Ohio N. P. 264; Markowitz v. Greenwall Theatrical Circuit Co., (Tex. Civ. App. 1903) 75 S. W. Rep. 74, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 794; Wilson v. Carter Oil Co., 46 W. Va. 469, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 794. See also *Kelly v. Biddle, 180 Mass. 147.**

**Corporation May Bind Itself to Extent of Dividing Profits as Consideration for Advances Made.** — *Mestier v. A. Chevalier Pavement Co., 108 La. 562.*

**797.** 1. *Sole Management in Corporation.* — *Markowitz v. Greenwall Theatrical Circuit Co., (Tex. Civ. App. 1903) 75 S. W. Rep. 74, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 796.*

**2.** *Markowitz v. Greenwall Theatrical Circuit Co., (Tex. Civ. App. 1903) 75 S. W. Rep. 74, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 797.*

**3.** Where a corporation and an individual have assumed to enter into a partnership, and jointly transacted business together, they may recover upon obligations made to them in the partnership name, even though the corporation may have no power to enter into a partnership. *Wilson v. Carter Oil Co., 46 W. Va. 469.*

**798.** 5. *When Power to Loan Will Not Be Implied.* — *Leigh v. American Brake-Beam Co., 205 Ill. 147.*

**799.** 4. *Fisher v. Parr, 92 Md. 245.*

**800.** 5. *Effect of Prohibited Loan.* — *Nelson v. Leiter, 190 Ill. 414, 83 Am. St. Rep. 142;*



- 801.** (i) *Rate of Interest.* — See note 1.
- 802.** (8) *Taking and Enforcing Securities* — (f) *Enforcing Securities.* — See note 6.
- 806.** (9) *Contracts Incident to Purchase of Real or Personal Property* — (b) *Terms of Contract.* — See note 2.
- 807.** (12) *Subscriptions to Other Enterprises.* — See note 2.
- 809.** (15) *Employment of Agents and Servants* — (b) *Mode of Appointment of Agents* — *bb.* *HOLDING OUT AND ESTOPPEL.* — See note 2.
- (16) *Power to Act as Agent.* — See note 4.
- 811.** 8. *Power to Take and Hold Stock in Another Corporation* — *c.* *DOCTRINE IN THE UNITED STATES.* — See note 1.
- d.* *ORIGINAL SUBSCRIPTIONS.* — See note 2.
- 812.** *e.* *PURCHASE AFTER INCORPORATION.* — See note 1.
- 813.** *k.* *PURPOSE TO CONTROL OTHER CORPORATION OR PREVENT COMPETITION.* — See note 4.
- 814.** *n.* *EXPRESS GRANT OF POWER.* — See note 3.
- o.* *WHEN THE POWER WILL BE IMPLIED* — (1) *In General.* — See note 4.
- 815.** (2) *Implication from Grant of Power to Consolidate, Control, Aid, Etc.* — See note 2.
- (3) *Investment of Funds.* — See note 3.
- 817.** (6) *Sale of All the Property of One Corporation for Stock in Another* — (a) *To Wind Up Business.* — See note 2.
- 818.** *p.* *PRESUMPTION AS TO POWER.* — See note 1.

Fargason v. Oxford Mercantile Co., 78 Miss. 65.

**801.** 1. *Rate of Interest and Usury.* — Lowry v. Collateral Loan Assoc., 62 N. Y. App. Div. 240, affirmed 172 N. Y. 394.

**802.** 6. Lowrey v. Sterling, 41 Oregon 518, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 802.

**806.** 2. *Terms of Contracts.* — Ingraham v. National Salt Co., (C. C. A.) 130 Fed. Rep. 676.

*Assumption of Incumbence.* — Farmers' Bank v. Ohio River Line Steamboat Co., 108 Ky. 447.

*Contracts for Future Delivery.* — A cotton mill corporation may purchase cotton for future delivery if the purchase is in good faith and not a speculation. Sampson v. Camperdown Cotton Mills, 82 Fed. Rep. 833.

**807.** 2. *Subscription for Political Purposes Invalid.* — McConnell v. Combination Min., etc., Co., 30 Mont. 239, 104 Am. St. Rep. 703.

**809.** 2. *Estoppel.* — Cox v. Island Min. Co., 65 N. Y. App. Div. 508, modified 175 N. Y. 328, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 809.

4. State v. Michel, 113 La. 4.

**811.** 1. *Prevailing Doctrine in United States.* — Lester v. Bemis Lumber Co., 71 Ark. 379, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 810-813; Chemical Nat. Bank v. Havermale, 120 Cal. 601; People v. Pullman's Palace Car Co., 175 Ill. 125; Martin v. Ohio Stove Co., 78 Ill. App. 105; MacGinniss v. Boston, etc., Consol. Copper, etc., Min. Co., 29 Mont. 428; Coler v. Tacoma R., etc., Co., 65 N. J. Eq. 347. See also Hunt v. Hauser Malting Co., 90 Minn. 282.

*Express Prohibition.* — De La Vergne Refrigerating Mach. Co. v. German Sav. Inst., 175 U. S. 40; Midland Steel Co. v. Citizens' Nat. Bank, 26 Ind. App. 71.

2. *Original Subscriptions.* — McAlester Mfg. Co. v. Florence Cotton, etc., Co., 128 Ala. 240; Military Interstate Assoc. v. Savannah, etc., R. Co., 105 Ga. 420; Newland Hotel Co. v. Lowe Furniture Co., 73 Mo. App. 135; Nebraska Shirt Co. v. Horton, (Neb. 1903) 93 N. W. Rep. 225; McCampbell v. Fountain Head R. Co., 111 Tenn. 55, 102 Am. St. Rep. 731.

**812.** 1. *Purchase After Incorporation.* — Parsons v. Tacoma Smelting, etc., Co., 25 Wash. 492.

**813.** 4. *To Control Other Corporation or Prevent Competition.* — De La Vergne Refrigerating Mach. Co. v. German Sav. Inst., 175 U. S. 40.

**814.** 3. Trust Co. v. State, 109 Ga. 736; Traer v. Lucas Prospecting Co., 124 Iowa 107; Dittman v. Distilling Co., 64 N. J. Eq. 537; Rubino v. Pressed Steel Car Co., (N. J.) 53 Atl. Rep. 1050; Phelan v. Edison Electric Illuminating Co., (Supm. Ct. Spec. T.) 24 Misc. (N. Y.) 109.

*Authority to Invest in Stock Not Authority to Subscribe.* — Robotham v. Prudential Ins. Co., 64 N. J. Eq. 673, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 810, 816.

4. Joseph Bancroft, etc., Co. v. Bloede, 45 C. C. A. 354.

**815.** 2. See MacGinniss v. Boston, etc., Consol. Copper, etc., Min. Co., 29 Mont. 428.

3. *Power to "Invest in Enterprises Calculated to Advance Their Interests"* does not authorize the subscription for shares in another corporation. McAlester Mfg. Co. v. Florence Cotton, etc., Co., 128 Ala. 240.

**817.** 2. *Intent to Wind Up Corporation and Distribute Stock.* — Metcalf v. American School Furniture Co., 122 Fed. Rep. 115.

**818.** 1. *Presumption.* — Burden v. Burden, 159 N. Y. 287.

**818.** 9. Power of Corporation to Acquire and Hold Its Own Stock — *a.* DOCTRINE IN ENGLAND. — See note 2.

*b.* DOCTRINE IN THE UNITED STATES — (1) *That the Power Exists.* — See note 3.

**819.** (2) *That the Power Does Not Exist* — (a) *In General.* — See note 1.

(b) *Reasons for This Doctrine.* — See note 2.

**820.** *c.* GOOD FAITH IN MAKING PURCHASE. — See note 2.

*d.* INTENTION TO INJURE OR INJURY TO CREDITORS. — See note 3.

**821.** *h.* TAKING SHARES IN PAYMENT OF DEBTS. — See note 2.

**822.** *l.* EFFECT OF PURCHASE OF ITS OWN SHARES BY CORPORATION. — See note 2.

**825.** VIII. LIABILITIES OF CORPORATIONS — 2. Liability for Torts — *c.* MODERN DOCTRINE — (1) *In General.* — See note 1.

**826.** (2) *Wilful Acts of Agents.* — See note 2.

**827.** (4) *Particular Torts* — (c) *Assault and Battery and False Imprisonment.* — See note 5.

**828.** See note 1.

(e) *Nuisances.* — See note 3.

**831.** (i) *Torts Involving a Mental Element* — *bb.* FRAUD AND DECEIT — (*bb*) *Doctrine in the United States.* — See note 1.

**832.** *cc.* MALICIOUS WRONGS — (*aa*) *In General.* — See note 1.

**833.** (*bb*) *Libel.* — See note 1.

**818.** 2. English Doctrine. — *Bellerby v. Rowland, etc., Steamship Co., (1902) 2 Ch. 14, 9 Manson 291.*

3. Doctrine in United States. — *Burnes v. Burnes, 132 Fed. Rep. 485; In re S. P. Smith Lumber Co., 132 Fed. Rep. 618; Wisconsin Lumber Co. v. Greene, etc., Telephone Co., (Iowa 1904) 101 N. W. Rep. 742; West v. Averill Grocery Co., 109 Iowa 488; Porter v. Plymouth Gold Min. Co., 29 Mont. 347; Fremont Carriage Mfg. Co. v. Thomsen, 65 Neb. 370; Oliver v. Rahway Ice Co., 64 N. J. Eq. 596; Berger v. U. S. Steel Corp., 63 N. J. Eq. 809; Joseph v. Raff, 82 N. Y. App. Div. 47, affirmed 176 N. Y. 611; Howe Grain, etc., Co. v. Jones, 21 Tex. Civ. App. 198; Marvin v. Anderson, 111 Wis. 387.*

*Power Expressly Given.* — *Chapman v. Iron Clad Rheostat Co., 62 N. J. L. 497.*

*Corporation Cannot Vote Shares.* — *O'Connor v. International Silver Co., (N. J. 1904) 59 Atl. Rep. 321.*

**819.** 1. Denial of Power. — *Hamor v. Taylor-Rice Engineering Co., 84 Fed. Rep. 392; St. Louis Rawhide Co. v. Hill, 72 Mo. App. 142; Merchants' Nat. Bank v. Overman Carriage Co., 9 Ohio Cir. Dec. 738, 17 Ohio Cir. Ct. 253. See also Herring v. Ruskin Co-operative Assoc., (Tenn. Ch. 1899) 52 S. W. Rep. 327.*

2. Reasons for Doctrine Denying Power. — *Kassler v. Kyle, 28 Colo. 374, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 819.*

*Trust Fund Doctrine.* — *Hamor v. Taylor-Rice Engineering Co., 84 Fed. Rep. 392.*

**820.** 2. *Hall v. Henderson, 126 Ala. 449, 85 Am. St. Rep. 53, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 818, 819, 820; In re S. P. Smith Lumber Co., 132 Fed. Rep. 618.*

3. Injury to or Intent to Injure Creditors. — *Olmstead v. Vance, etc., Co., 196 Ill. 236; Vance, etc., Co. v. Bentley, 92 Ill. App. 287, affirmed 196 Ill. 236.*

**821.** 2. Taking Shares in Payment of Debt. — *St. Louis Rawhide Co. v. Hill, 72 Mo. App. 142.*

**822.** 2. Authorized Purchase. — *Porter v. Plymouth Gold Min. Co., 29 Mont. 347; Fremont Carriage Mfg. Co. v. Thomsen, 65 Neb. 370; Howe Grain, etc., Co. v. Jones, 21 Tex. Civ. App. 198.*

**825.** 1. Modern Doctrine. — *West Virginia Transp. Co. v. Standard Oil Co., 50 W. Va. 611, 88 Am. St. Rep. 895, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 824; Southern Express Co. v. Platten, 36 C. C. A. 46; Texas, etc., R. Co. v. Parker, 29 Tex. Civ. App. 264.*

**826.** 2. *Riser v. Southern R. Co., 67 S. Car. 419.*

**827.** 5. Assault and Battery — Modern Doctrine. — *Southern Express Co. v. Platten, 36 C. C. A. 46; Maisenbacher v. Concordia Society, 71 Conn. 369; Haggerty v. Potter, 111 Ill. App. 433.*

**828.** 1. False Imprisonment. — *Bingham v. Lipman, 40 Oregon 363; Texas, etc., R. Co. v. Parker, 29 Tex. Civ. App. 264.*

3. Nuisance. — *Powell v. Brookfield Pressed Brick, etc., Mfg. Co., 104 Mo. App. 713.*

**831.** 1. Rule in United States. — *Benedict v. Guardian Trust Co., 58 N. Y. App. Div. 302, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 931; Powers-Taylor Drug Co. v. Faulconer, 52 W. Va. 581, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 830, 831; Hindman v. Louisville First Nat. Bank, 39 C. C. A. 1.*

**832.** 1. Modern Doctrine. — *West Virginia Transp. Co. v. Standard Oil Co., 50 W. Va. 611, 88 Am. St. Rep. 895, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 830; Cornford v. Carlton Bank, (1899) 1 Q. B. 392; Waters v. West Chicago St. R. Co., 101 Ill. App. 265.*

*Act Must Be Within Scope of Employment.* — *Walker v. Culman, 9 Kan. App. 691.*

**833.** 1. Libel. — *Sun L. Assur. Co. v. Bailey, 101 Va. 443.*

- 834.** (cc) *Malicious Prosecution*. — See note 1.  
 dd. *CONSPIRACY*. — See note 3.  
 (5) *Liability for Exemplary Damages*. — See note 5.
- 835.** (6) *Authority in Charter* — (a) *Effect in General*. — See note 2.
- 837.** *Strict Construction of Charter*. — See note 1.  
 (b) *Excess or Abuse of Authority* — aa. *EXCESS OF AUTHORITY*. — See note 2.
- 841.** 4. *Liability to Indictment* — a. *IN GENERAL*. — See note 3.
- 842.** c. *MISFEASANCE IN GENERAL* — *Modern Doctrine*. — See note 2.
- 844.** d. *OFFENSES INVOLVING ELEMENTS OF MALICE, CRIMINAL INTENT, OR PERSONAL VIOLENCE*. — See note 7.
- 845.** e. *STATUTORY CRIMES*. — See notes 2, 3.
- 846.** g. *EFFECT OF AUTHORITY IN CHARTER* — *Construction of Charter*. — See note 2.
- 847.** h. *EXCESS OF AUTHORITY BY AGENTS*. — See note 2.  
 5. *Liability for Contempt* — *Modern Doctrine*. — See note 5.
- 848.** IX. *ACTIONS BY AND AGAINST CORPORATIONS* — 1. *Capacity to Sue* — a. *IN GENERAL*. — See notes 1, 2.
- 849.** c. *REMEDIES IN EQUITY*. — See note 8.  
 e. *STATUTORY REMEDIES* — (1) *In General*. — See note 11.
- 850.** h. *EFFECT OF INSOLVENCY AND DISSOLUTION*. — See note 7.
- 834.** 1. *Criminal Prosecution*. — Cornford v. Carlton Bank, (1899) 1 Q. B. 392; Waters v. West Chicago St. R. Co., 101 Ill. App. 265; Scott v. Dennett Surpassing Coffee Co., 51 N. Y. App. Div. 321.
- No *Liability Unless Acts Done Within Scope of Employment*. — Beiswanger v. American Bonding, etc., Co., 98 Md. 287.
3. *Conspiracy*. — Hindman v. Louisville First Nat. Bank, 39 C. C. A. 1; West Virginia Transp. Co. v. Standard Oil Co., 50 W. Va. 611, 88 Am. St. Rep. 895; Zinc Carbonate Co. v. Shullsburg First Nat. Bank, 103 Wis. 125, 74 Am. St. Rep. 845.
5. *Exemplary Damages*. — Times Pub. Co. v. Carlisle, 36 C. C. A. 475; Bingham v. Lipman, 40 Oregon 363.
- 835.** 2. *Authority from Charter*. — Canadian Pac. R. Co. v. Roy, (1902) A. C. 220.
- 837.** 1. *Charter to Be Strictly Construed*. — Powell v. Brookfield Pressed Brick, etc., Mfg. Co., 104 Mo. App. 713. See also Metropolitan West Side El. R. Co. v. Goll, 100 Ill. App. 323.
2. *Excess of Authority*. — Williamson v. Eastern Bldg., etc., Assoc., 54 S. Car. 582, 71 Am. St. Rep. 822, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 837.
- 841.** 3. *Penalty*. — U. S. v. Alaska Packers' Assoc., 1 Alaska 217.
- 842.** 2. *Modern Doctrine as to Misfeasance*. — U. S. v. John Kelso Co., 86 Fed. Rep. 304; U. S. v. Alaska Packers' Assoc., 1 Alaska 217; Telegram Newspaper Co. v. Com., 172 Mass. 295.
- Obstruction of Highways*. — State v. White, 96 Mo. App. 34.
- Peddling Without License*. — Standard Oil Co. v. Com., 107 Ky. 606.
- 844.** 7. *People v. Dunlap*, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 390, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 844; Com. v. Punxsutawney St. Pass. R. Co., 24 Pa. Co. Ct. 25, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 844.
- 845.** 2. *Corporations as "Persons" Within Penal Statutes*. — Pearks v. Ward, (1902) 2 K. B. 1; U. S. v. John Kelso Co., 86 Fed. Rep. 304.
3. *Paragon Paper Co. v. State*, 19 Ind. App. 314.
- 846.** 2. See *Immigration Soc. v. Com.*, 103 Va. 46.
- 847.** 2. *Authority of Agents*. — Franklin L. Ins. Co. v. People, 200 Ill. 619, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 847.
5. *Modern Doctrine as to Contempt*. — Telegram Newspaper Co. v. Com., 172 Mass. 295, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 847; Nebraska Children's Home Soc. v. State, 57 Neb. 765.
- 848.** 1. *Capacity to Sue in General*. — Boston Base Ball Assoc. v. Brooklyn Base Ball Club, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 521, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 848; Solomon v. Schneider, 56 Neb. 680; Capital Lumbering Co. v. Learned, 36 Oregon 544, 78 Am. St. Rep. 792.
- Jury Should Consider Case Same as Suit Between Private Citizens*. — Chicago, etc., R. Co. v. Burridge, 211 Ill. 9.
2. Under Code Pro. La., Art. 112, a corporation may sue in its own name. New Orleans Terminal Co. v. Teller, 113 La. 733.
- 849.** 8. *Corporation Can File Bill Only Through Agent*. — Jockish v. Deutscher Krieger Verein, 98 Ill. App. 9.
11. *Statutory Remedies*. — Solomon v. Schneider, 56 Neb. 680.
- Suit as Common Informer*. — Where a corporation applies to have a theatre license revoked, the court will deny the motion unless it appears that such an application is within the corporate powers of the petitioner. Matter of New York Sabbath Committee, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 422.
- 850.** 7. *Corporation May Sue*. — Kalb v. American Nat. Bank, 11 Ohio Cir. Dec. 437.



## CORPUS DELICTI.

**861. I. DEFINITION AND ELEMENTS** — Definition. — See note 1.

Elements of Corpus Delicti. — See note 2.

**862. II. PROOF OF CORPUS DELICTI** — 1. General Rule — Quantum of Proof. — See note 1.

The Burden of Proof. — See note 2.

**863. 2. Nature of Proof** — Direct and Circumstantial Evidence — Sufficiency of Circumstantial Evidence. — See notes 5, 6.

**864.** See notes 1, 2, 3.

**3. Proof of Corpus Delicti to Render Confessions Admissible.** — See note 4.

**865. CORRECT — CORRECTION, ETC.** — See note 2.

**870. COST.** — See note 1.

**873. COUNCIL.** — See note 2.

**874. COUNT.** — See notes 3, 6.

**861. 1.** *People v. Benham*, 160 N. Y. 402; *State v. Pereles*, 12 Ohio Dec. 642, quoting 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 861; *Knapp v. State*, 25 Ohio Cir. Ct. 571, quoting 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 861.

**2. Elements of Corpus Delicti.** — *Dimmick v. U. S.*, (C. C. A.) 135 Fed. Rep. 257; *People v. Jones*, 123 Cal. 65, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 861; *People v. Lagroppo*, 90 N. Y. App. Div. 219, affirmed 179 N. Y. 126; *People v. Benham*, 160 N. Y. 402; *State v. Pereles*, 12 Ohio Dec. 642, quoting 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 861; *Knapp v. State*, 25 Ohio Cir. Ct. 571; *State v. Taylor*, 56 S. Car. 376, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 861 and following *State v. Martin*, 47 S. Car. 67, stated in original note; *State v. Gates*, 28 Wash. 695, quoting 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 861.

**In Arson.** — *State v. Pereles*, 12 Ohio Dec. 642, quoting 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 862.

**862. 1. Proof Beyond Reasonable Doubt.** — *Dimmick v. U. S.*, (C. C. A.) 135 Fed. Rep. 257; *People v. Benham*, 160 N. Y. 402; *State v. Pereles*, 12 Ohio Dec. 642; *White v. State*, 40 Tex. Crim. 366, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 862; *Goldman v. Com.*, 100 Va. 865; *Buel v. State*, 104 Wis. 132. See also *State v. Taylor*, 56 S. Car. 360.

**2. Burden of Proof.** — *State v. Pereles*, 12 Ohio Dec. 642; *State v. Taylor*, 56 S. Car. 360; *Goldman v. Com.*, 100 Va. 865.

**863. 5.** *Dimmick v. U. S.*, (C. C. A.) 135 Fed. Rep. 257; *Buel v. State*, 104 Wis. 132.

**6. Proof by Circumstantial Evidence.** — *Dimmick v. U. S.*, (C. C. A.) 135 Fed. Rep. 257, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 863; *State v. Alcorn*, 7 Idaho 599, 97 Am. St. Rep. 252; *State v. Minor*, 106 Iowa 642; *Com. v. Williams*, 171 Mass. 461, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 863, 864; *White v. State*, 40 Tex. Crim. 366; *State v. Gates*, 28 Wash. 689; *Buel v. State*, 104 Wis. 132. See also *Curran v. State*, 12 Wyo. 553.

**Corpus Delicti in Larceny.** — See *Chezem v. State*, 56 Neb. 496.

**In Poisoning.** — See *State v. Shackelford*, 148 Mo. 493.

**864. 1.** *People v. Benham*, 160 N. Y. 402; *People v. Lagroppo*, 90 N. Y. App. Div. 219, affirmed 179 N. Y. 126. In this case the court said: "When, therefore, both the people and the defendant assumed that the person who was stabbed was the same person who was dead and buried, this amounted to an admission of such fact by the defendant; and, as the proof offered directly tends to establish the same fact, we think it sufficient to show by direct and competent evidence the death of the person charged in the indictment to have been killed."

**2.** *State v. Calder*, 23 Mont. 504; *People v. Benham*, 160 N. Y. 402.

**3.** *State v. Calder*, 23 Mont. 504.

**4.** *People v. Jones*, 123 Cal. 65; *Com. v. Williams*, 171 Mass. 461; *Knapp v. State*, 25 Ohio Cir. Ct. 575; *White v. State*, 40 Tex. Crim. 366.

**865. 2. Correct Weight — English Weight and Measures Act.** — When coal is conveyed for delivery on sale in bulk, in a vehicle not belonging to the purchaser, the "correct weight," which is required by section 22 of the Weights and Measures Act, 1889, to be inserted in the ticket which is to be given to the purchaser, is the weight as ascertained at the place from which the coal is brought and not the weight at the time of delivery. *Knowles v. Sinclair*, (1898) 1 Q. B. 170.

**870. 1. Actual Cost.** — *Newton, Petitioner*, 172 Mass. 7.

**873. 2. Councilmen.** — In *Akerman v. Ford*, 116 Ga. 473, the court said: "In our opinion the words councilmen and aldermen do not embrace the mayor of a city."

**874. 3.** *Ryan v. Riddle*, 109 Mo. App. 115.

**6.** *Richardson v. Fletcher*, 74 Vt. 417.

# COUNTERFEITING.

By E. G. CHILTON.

**876. I. DEFINITION.** — See note 1.

**877. III. MAKING COUNTERFEIT MONEY — ELEMENTS OF OFFENSE — 3. The Similitude.** — See notes 1, 2.

**878. 4. Intention to Deceive.** — See note 1.

**879. IV. JURISDICTION — 2. State Courts.** — See note 2.

**880. V. SUBJECTS OF COUNTERFEITING — 2. Coins — a. DOMESTIC.** — See note 4.

**881. 3. Bills and Other Obligations — a. DOMESTIC.** — See note 2.

**883. VI. WHO MAY COMMIT — 5. Aiders and Abettors.** — See note 7.

**886. VII. POSSESSION OF INSTRUMENTS, COUNTERFEIT COINS, BILLS, ETC. — 2. Counterfeit Coins, Bills, and Other Obligations.** — See note 1.

**890. X. EVIDENCE — 2. Scienter — a. PROOF OF GUILTY KNOWLEDGE IN GENERAL.** — See note 1.

**895. 6. Competency of Witnesses — a. ACCOMPLICES.** — See note 1.

**876. 1. A Counterfeit** "is an instrument falsely made in the similitude of a genuine instrument." U. S. v. Barrett, 111 Fed. Rep. 369.

**877. 1. Similitude — Sufficient — Ordinary Caution.** — U. S. v. Fitzgerald, 91 Fed. Rep. 374; Glass v. State, 45 Tex. Crim. 607, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 877.

**State Bank Note.** — See U. S. v. Conners, 111 Fed. Rep. 734; U. S. v. Pitts, 112 Fed. Rep. 522.

The Test of similitude is whether the alleged counterfeit is "calculated to deceive an honest, sensible, and unsuspecting man of ordinary care and observation, dealing with a supposed honest man." U. S. v. Kuhl, 85 Fed. Rep. 624.

**2. Similitude — Question for Jury.** — U. S. v. Fitzgerald, 91 Fed. Rep. 374; U. S. v. Kuhl, 85 Fed. Rep. 624.

**878. 1. Possession with Guilty Intent.** — To warrant a conviction it must appear that the accused intended to make use of the counterfeit by sale or to make a profit out of it. U. S. v. Fitzgerald, 91 Fed. Rep. 374.

**879. 2. Jurisdiction of State Courts.** — Stroube v. State, 40 Tex. Crim. 581, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 879.

**880. 4. Circular Metal Tokens,** differing in size and design from any coin of the United States, and not purporting to be pieces of money or obligations to pay money, do not come within the prohibition of Rev. Stat. U. S., § 5462. U. S. v. Roussopoulos, 95 Fed. Rep. 977.

**Copper Cent Resembling Dime.** — Knowingly passing a copper cent, changed by some chemical process to resemble a dime, constitutes the crime of counterfeiting. Glass v. State, 45 Tex. Crim. 605.

**881. 2. Trademarks.** — See State v. Niesman, 101 Mo. App. 507; People v. Krivitzky, 60 N. Y. App. Div. 307, affirmed 168 N. Y. 182; People v. Strauss, 94 N. Y. App. Div. 453, affirmed 179 N. Y. 553; People v. Hilfman, 61 N. Y. App. Div. 541; Com. v. Norton, 16 Pa. Super. Ct. 423. And see the title TRADEMARKS, 21

ENCYC. OF PL. AND PR. 774, and the Supplement thereto.

**Confederate Money.** — U. S. v. Barrett, 111 Fed. Rep. 369. See also U. S. v. Kuhl, 85 Fed. Rep. 624.

**State Bank Bills.** — The possession or sale of bills issued by a state bank for circulation does not constitute a crime within the meaning of Rev. Stat. U. S., § 5430, such bills not purporting to be obligations of the United States. U. S. v. Conners, 111 Fed. Rep. 734; U. S. v. Pitts, 112 Fed. Rep. 522.

**883. 7. Who Is Not Accomplice.** — In a prosecution for violating the statute relative to the sale of merchandise to which a counterfeit trademark is affixed, a person is not an accomplice who bought the merchandise, not with the intent to resell to the public, but to establish the fact of sale by the defendant. People v. Hilfman, 61 N. Y. App. Div. 541.

**886. 1. Possession of Counterfeit Coins, Etc.** — See U. S. v. Fitzgerald, 91 Fed. Rep. 374.

**A Genuine Confederate States Note** does not bear a sufficient resemblance to the national currency to warrant a conviction under Rev. Stat. U. S., § 5430. U. S. v. Kuhl, 85 Fed. Rep. 624.

**Elements of Offense.** — The worthless character of the note and the intent to defraud are not essential to the crime of having in possession under the federal statute. U. S. v. Kuhl, 85 Fed. Rep. 624.

**890. 1. Knowledge of Registry of Label.** — In a prosecution for offering for sale an article to which a counterfeit trademark has been affixed, the accused is charged with guilty knowledge; it is of no consequence that he did not know of the registry of the label. Com. v. Norton, 16 Pa. Super. Ct. 423.

**895. 1. Corroboration of Accomplice.** — It is not necessary that evidence corroborative of the testimony of an accomplice should extend to every material fact essential to constitute the crime of violating the statute relative to coun-

**895.** *c.* EXPERTS. — See note 3.

**897.** COUNTERSIGN. — See note 3.

teifiting trademarks. *People v. Strauss*, 94 N. Y. App. Div. 453, *affirmed* 179 N. Y. 553.

**895.** 3. An Expert May Operate a Plating Machine and demonstrate to the jury that coins

can be plated with it. *Taylor v. U. S.*, (C. C. A.) 89 Fed. Rep. 954.

**897.** 3. *Donaldson v. York County School Superintendent*, 8 Pa. Dist. 187, *quoting* 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 897.

## COUNTIES.

By J. E. BRADY.

**900.** I. DEFINITION AND GENERAL CHARACTERISTICS. — See note 1.

**901.** A Quasi-Corporation. — See notes 2, 3, 4.

**900.** 1. Definition.—*United States*. — *Steele County v. Erskine*, (C. C. A.) 98 Fed. Rep. 218.

*Arizona*. — *Haupt v. Maricopa County*, (Ariz. 1902) 68 Pac. Rep. 525.

*California*. — *San Mateo County v. Coburn*, (Cal. 1900) 63 Pac. Rep. 78.

*Colorado*. — *Colburn v. El Paso County*, 15 Colo. App. 90.

*Delaware*. — *Duncan v. Willits*, 4 Penn. (Del.) 493.

*Georgia*. — *Millwood v. De Kalb County*, 106 Ga. 743.

*Illinois*. — *People v. Martin*, 178 Ill. 621.

*Indiana*. — *Miami County v. Mowbray*, 160 Ind. 10, *citing* 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 900; *Monroe County v. Galloway*, 17 Ind. App. 689; *Swartz v. Lake County*, 158 Ind. 141.

*Kansas*. — *In re Dalton*, 61 Kan. 264, *quoting* 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 900.

*Kentucky*. — *Com. v. Boyle County Fiscal Ct.*, 113 Ky. 325.

*Montana*. — *Independent Pub. Co. v. Lewis & Clarke County*, 30 Mont. 83, *citing* 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 900. See also *State v. Coad*, 23 Mont. 131.

*New York*. — *Markey v. Queens County*, 154 N. Y. 675; *Kennedy v. Queens County*, 47 N. Y. App. Div. 250.

*North Carolina*. — *Bell v. Johnston County*, 127 N. Car. 85; *State v. Haywood County*, 122 N. Car. 812; *Jones v. Madison County*, 137 N. Car. 579.

*Ohio*. — *Summers v. Hamilton County*, 5 Ohio Dec. 553, 7 Ohio N. P. 542; *Jones v. Lucas County*, 57 Ohio St. 189, 63 Am. St. Rep. 710.

*Oklahoma*. — *Greer County v. Watson*, 7 Okla. 174; *Territory v. Hopkins*, 9 Okla. 133.

*Oregon*. — *Baker County v. Benson*, 40 Oregon 207; *Seton v. Hoyt*, 34 Oregon 266, 75 Am. St. Rep. 641.

*Pennsylvania*. — *College Ave. Bridge*, 9 Pa. Dist. 15; *Bucher v. Northumberland County*, 209 Pa. St. 618.

*South Dakota*. — *Stuart v. Kirley*, 12 S. Dak. 245.

*Washington*. — *Hoexter v. Judson*, 21 Wash. 646.

*Parishes*. — *Fischer Land, etc., Co. v. Bordelon*, 52 La. Ann. 429.

**901.** 2. In *United States Counties Invested with Corporate Capacity*. — *Com. v. Boyle County Fiscal Ct.*, 113 Ky. 325, *citing* 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 901.

**3. Counties Not Corporations in Full Sense**. — *Millwood v. De Kalb County*, 106 Ga. 743; *Com. v. Boyle County Fiscal Ct.*, 113 Ky. 325, *citing* 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 901; *State v. Smith*, 84 Minn. 295; *Kennedy v. Queens County*, 47 N. Y. App. Div. 250, *quoting* 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 901; *Markey v. Queens County*, 154 N. Y. 675; *Bell v. Johnston County*, 127 N. Car. 85; *Bucher v. Northumberland County*, 209 Pa. St. 618.

**4. Counties Commonly Called Quasi-corporations** — *United States*. — *Steele County v. Erskine*, (C. C. A.) 98 Fed. Rep. 218.

*Florida*. — *Duval County v. Charleston Lumber, etc., Co.*, (Fla. 1903) 33 So. Rep. 531.

*Georgia*. — *Millwood v. De Kalb County*, 106 Ga. 743.

*Indiana*. — *McCullom v. Shaw*, 21 Ind. App. 63.

*Kansas*. — See *Williams v. Kearny County*, 61 Kan. 708.

*Kentucky*. — *Com. v. Boyle County Fiscal Ct.*, 113 Ky. 325, *citing* 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 901; *Zimmerman v. Brooks*, (Ky. 1904) 80 S. W. Rep. 443.

*Louisiana*. — *Fischer Land, etc., Co. v. Bordelon*, 52 La. Ann. 429.

*Minnesota*. — *Grannis v. Blue Earth County*, 81 Minn. 58; *State v. Smith*, 84 Minn. 295.

*Montana*. — *Independent Pub. Co. v. Lewis & Clarke County*, 30 Mont. 83.

*New York*. — *Kennedy v. Queens County*, 47 N. Y. App. Div. 250; *Markey v. Queens County*, 154 N. Y. 675.

*North Carolina*. — *Jones v. Madison County*, 137 N. Car. 579.

*Pennsylvania*. — *College Ave. Bridge*, 9 Pa. Dist. 15; *Bucher v. Northumberland County*, 209 Pa. St. 618.

*Washington*. — *Hoexter v. Judson*, 21 Wash. 646.

**Political Corporations**. — *San Mateo County v. Coburn*, 130 Cal. 631.



**902.** Not a Private Corporation. — See notes 1, 3.

Not a Municipal Corporation. — See note 4.

**903.** County and Municipal Corporation Distinguished. — See note 2.

**904.** II. ORIGIN AND HISTORY. — See note 2.

III. CREATION AND ORGANIZATION — 1. Source of Creation. — See

notes 3, 4.

Creation by Legislature. — See note 6.

By Special Enactment. — See note 7.

**905.** 2. Mode of Establishing and Determining Boundaries. — See notes 3, 5, 6.

**907.** 4. De Facto Organization. — See note 1,

Legislative Recognition of De Facto Organization. — See note 3.

**908.** 5. Judicial Notice of Counties. — See notes 2, 4.

IV. ALTERATION OF BOUNDARIES — 1. Power of Legislature. — See

note 6.

**902.** 1. See *People v. Martin*, 178 Ill. 621.

**3.** Sometimes Called Public Corporations. — *Van Horn v. Kittitas County*, (Supm. Ct. Spec. T.) 28 Misc. (N. Y.) 333, *affirmed* 46 N. Y. App. Div. 623; *Lincoln County v. Brock*, 37 Wash. 14.

**4.** Sometimes Called Municipal Corporations. — *Duval County v. Charleston Lumber, etc., Co.*, (Fla. 1903) 33 So. Rep. 531; *State v. Coad*, 23 Mont. 131; *Kennedy v. Queens County*, 47 N. Y. App. Div. 250; *People v. St. Lawrence County*, 101 N. Y. App. Div. 327; *Rogers v. Westchester County*, 77 N. Y. App. Div. 501; *Sutherland v. St. Lawrence County*, (Supm. Ct. Tr. T.) 42 Misc. (N. Y.) 38; *reversed* 101 N. Y. App. Div. 299; *Markey v. Queens County*, 154 N. Y. 675; *Jones v. Madison County*, 137 N. Car. 579; *College Ave. Bridge*, 9 Pa. Dist. 15, *quoting* 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 902, 903; *Lincoln County v. Brock*, 37 Wash. 14, *quoting* 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 902.

**903.** 2. County and Municipal Corporation Distinguished. — *San Mateo County v. Coburn*, 130 Cal. 631; *Duval County v. Charleston Lumber, etc., Co.*, (Fla. 1903) 33 So. Rep. 531; *People v. Martin*, 178 Ill. 621, *citing* 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 903; *McCullom v. Shaw*, 21 Ind. App. 63; *Williams v. Kearny County*, 61 Kan. 708; *Com. v. Boyle County Fiscal Ct.*, 113 Ky. 325, *citing* 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 903; *Fischer Land, etc., Co. v. Bordelon*, 52 La. Ann. 429; *Markey v. Queens County*, 154 N. Y. 675; *Bucher v. Northumberland County*, 209 Pa. St. 618; *College Ave. Bridge*, 9 Pa. Dist. 15.

**904.** 2. Origin and History of Counties. — *Markey v. Queens County*, 154 N. Y. 675.

**3.** Counties Created by State. — *Miami County v. Mowbray*, 160 Ind. 10, *citing* 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 900 *et seq.*; *State v. Stanford*, 24 Utah 148.

**4.** Creation Without Consent of Inhabitants. — *Frost v. Pfeiffer*, 26 Colo. 338.

**6.** Creation by Legislature. — *Zimmerman v. Brooks*, (Ky. 1904) 80 S. W. Rep. 443; *Markey v. Queens County*, 154 N. Y. 675; *State v. Stanford*, 24 Utah 148; *Farquharson v. Yeargin*, 24 Wash. 549. See also *Hinton v. Perry County*, 84 Miss. 536; *State v. Haywood County*, 122 N. Car. 812.

**7.** The Act Creating a County must expressly

declare the creation of the county. If it does not, the county cannot be held to exist by implication. *Holmberg v. Jones*, 7 Idaho 752.

**905.** 3. Boundaries Established as Directed by Legislature. — *Baker County v. Benson*, 40 Oregon 207. See also *Waters v. Pool*, 130 Cal. 136.

**5.** Establishing Boundaries by Courts. — *Davidson County v. Cheatham County*, (Tenn. Ch. 1901) 63 S. W. Rep. 209; *Lampasas County v. Coryell County*, 27 Tex. Civ. App. 195.

**6.** Establishing Boundary by Surveyors Appointed by County. — See *Wise County v. Montague County*, 21 Tex. Civ. App. 444.

**Commissioners Without Discretion.** — Where commissioners are appointed "to survey and mark the boundary line as established by law," they cannot establish a new line. *Huntingdon County Line*, 14 Pa. Super. Ct. 571.

**907.** 1. *Greer County v. Clarke*, 12 Okla. 197.

**3.** Legislative Recognition of De Facto Counties. — *People v. Alturas County*, 6 Idaho 418. See also *Greer County v. Clarke*, 12 Okla. 197.

The state of *Texas* brought an action against the grantees of *Greer county* to recover lands conveyed to the county by the state, the Supreme Court of the United States having declared, since the time of the conveyance, that the territory called *Greer county* belonged to the United States, and not to the state of *Texas*. The *Texas* legislature had by various acts recognized the territory as a part of the state. It was held that such legislative recognition was binding on the courts and that the state could not recover the property. *Cameron v. State*, 95 Tex. 545.

**908.** 2. Judicial Notice of Names of Counties Containing Certain Cities. — *Baily v. Birkhofer*, 123 Iowa 59.

**4.** Judicial Notice of Boundaries. — *Zimmerman v. Brooks*, (Ky. 1904) 80 S. W. Rep. 443.

**Judicial Notice of Population.** — *State v. Monroe County Council*, 158 Ind. 102. See also *Whitley County v. Garty*, 161 Ind. 464.

**6.** Extension or Abridgment of Boundaries. — *Farquharson v. Yeargin*, 24 Wash. 549.

In *Oregon* it is not obligatory upon the legislature to submit to popular vote the question of a proposed alteration of county boundary lines. *Baker County v. Benson*, 40 Oregon 207.

**909.** See note 1.

**2. Constitutional Limitations** — *a.* IN GENERAL. — See note 6.

*b.* REQUIREMENT OF SUBMISSION OF QUESTION TO POPULAR VOTE — Texas and Iowa. — See note 7.

Nebraska. — See note 8.

**910.** [Under the North Dakota Constitution a legislative enactment attempting to change the boundaries of a county, but containing no provision for submission to the voters of the county, is void.<sup>1a</sup>]

[In South Carolina no section of a county may be cut off without "consent by a two-thirds vote of those voting in such section."<sup>1b</sup>]

Voluntary Submission of Question to Popular Vote by Legislature. — See note 2.

*c.* LIMITATIONS UPON REDUCTION OF AREA. — See note 3.

**912.** *e.* HOW CONSTITUTIONALITY OF ALTERATION TO BE CALLED IN QUESTION — Collateral Attack. — See note 1.

**913.** **3. Effects of Alteration** — *a.* ON COUNTY RIGHTS AND LIABILITIES — (1) *Status Quo of Parent County Maintained as a General Rule.* — See note 3.

**914.** **Right of Old County to County Taxes.** — See note 1.

Taxes After Division — See note 4.

(2) *Apportionment by Statute.* — See note 5.

**909.** **1. Division of County into Two or More.** — State *v.* Demann, 83 Minn. 331; Baker County *v.* Benson, 40 Oregon 207; Farquharson *v.* Yeargin, 24 Wash. 549.

**6. Legislative Power Subject to Constitutional Limitation.** — Zimmerman *v.* Brooks, (Ky. 1904) 80 S. W. Rep. 443. See also McMillan *v.* Hannah, 106 Tenn. 689.

A Petition by One-third of the Electors within the area of each section affected is required in South Carolina as a condition precedent to legislative power to cut off territory from an established county for the purpose of forming a new one. Fraser *v.* James, 65 S. Car. 78.

**7. Submission of Question of Alteration of Boundaries to Vote** — Texas — Iowa. — Presidio County *v.* Jeff Davis County, (Tex. Civ. App. 1903) 77 S. W. Rep. 278.

**8. Nebraska.** — State *v.* Clark, 59 Neb. 702.

**910.** **1a. North Dakota.** — Schaffner *v.* Young, 10 N. Dak. 245.

**1b. South Carolina.** — Segars *v.* Parrott, 54 S. Car. 1.

**2. Voluntary Legislative Submission of Question of Change of Boundary to Vote.** — Jackson *v.* State, 131 Ala. 25, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 910.

**3. Constitutional Limitation upon Reduction of Area.** — See Bay County *v.* Edmunds, (Mich. 1905) 102 N. W. Rep. 998; Hinton *v.* Perry County, 84 Miss. 536; Baker County *v.* Benson, 40 Oregon 207; McMillan *v.* Hannah, 106 Tenn. 689. See also Zimmerman *v.* Brooks, (Ky. 1904) 80 S. W. Rep. 443.

**Reduction of Population.** — Under the constitution of Washington "no new county shall be established which shall reduce any county to a population of less than four thousand" inhabitants. Farquharson *v.* Yeargin, 24 Wash. 549.

**912.** **1. Constitutionality of Alteration Not Subject to Collateral Attack.** — Baker County *v.* Benson, 40 Oregon 207.

**913.** **3. Rights and Duties Unaffected in Absence of Express Provision.** — *In re Fremont*

County, 8 Wyo. 22, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 912, 913, and supporting the text paragraph generally. See also Colusa County *v.* Glenn County, 124 Cal. 498; Riverside County *v.* San Bernardino County, 134 Cal. 517.

**914.** **1. Right of Old County to Taxes.** — Colusa County *v.* Glenn County, 124 Cal. 498; *In re Fremont* County, 8 Wyo. 43, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 913. See also Nassau County *v.* Phipps, 43 N. Y. App. Div. 595.

**Apportionment by Commissioners.** — After the creation of a new county out of land previously belonging to another county the board of commissioners appointed by the legislature to apportion the property and indebtedness of the two counties made such apportionment and fixed a ratio for the payment of taxes except those for two years. These taxes were subsequently paid into the two counties under the ratio established by the commission. It was held that under the circumstances the old county could not maintain an action against the newly created county for the recovery of that portion of the unassessed taxes received by the new county. San Diego County *v.* Riverside County, (Cal. 1898) 55 Pac. Rep. 7.

**4. Taxes upon Persons and Property Within a New County,** levied after its organization, belong to the new county by statute in Texas. Harde- man County *v.* Foard County, 19 Tex. Civ. App. 212.

**5. Apportionment of County Rights and Liabilities by Statute.** — Desha County *v.* State, (Ark. 1904) 84 S. W. Rep. 625; Riverside County *v.* San Bernardino County, 134 Cal. 517; Denver *v.* Adams County, (Colo. 1904) 77 Pac. Rep. 858; State *v.* Demann, 83 Minn. 331; Baker County *v.* Benson, 40 Oregon 207; Jeff Davis County *v.* City Nat. Bank, 22 Tex. Civ. App. 157; *In re Fremont* County, 8 Wyo. 23, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 914.

**Where a Debt of Unascertained Amount Existed** at the time of division and apportionment, it

**916.** Power in Legislature Exclusive. — See note 1.

**919.** (3) *Whether Apportionment Must Be Contemporaneous with Division of Territory.* — See note 5.

Previous General Law Providing for Apportionment. — See note 6.

Apportionment by Subsequent Legislation. — See note 8.

**920.** (4) *By Whom Apportionment May Be Made.* — See note 1.

Employment of Agency — Board of Commissioners. — See notes 2, 3,

**921.** (5) *Mode of Enforcement of Apportionment — Action at Law.* — See note 6.

Where No Express Statutory Provision Is Made. — See note 7.

**922.** (6) *Liability of Annexed Territory for Debts of County to Which Annexed.* — See note 1.

**923.** *d.* ON JURISDICTION OF COURTS — (1) *Before New Organization Is Accomplished.* — See note 2.

**925.** *f.* ON OTHER POLITICAL DIVISIONS — Annexation of Territory in Different Judicial or Senatorial Districts. — See note 1.

V. ANNEXATION OF COUNTIES FOR SPECIAL PURPOSES — Attachment of Unorganized Territory to County for Special Purposes. — See note 8.

**926.** VI. POWERS — 1. In General. — See note 3.

2. Ordinary Corporate Powers — *a.* TO SUE AND BE SUED — (1) *In General.* — See note 4.

was held thereafter that the old county was liable for its proportionate share thereof. *Bingham County v. Bannock County*, 5 Idaho 627.

**916.** 1. Power of Legislature Exclusive. — *Riverside County v. San Bernardino County*, 134 Cal. 517; *State v. Demann*, 83 Minn. 331; *In re Fremont County*, 8 Wyo. 23, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 915.

**919.** 5. *Stuart v. Kirley*, 12 S. Dak. 245.

6. See *In re Fremont County*, 8 Wyo. 1.

8. *Desha County v. State*, (Ark. 1904) 84 S. W. Rep. 625; *Denver v. Adams County*, (Colo. 1904) 77 Pac. Rep. 858; *In re Fremont County*, 8 Wyo. 1.

**920.** 1. Apportionment Made by Legislature. — *Desha County v. State*, (Ark. 1904) 84 S. W. Rep. 625; *In re Fremont County*, 8 Wyo. 29, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 920.

2. Apportionment Through Agency. — *Riverside County v. San Bernardino County*, 134 Cal. 517; *In re Fremont County*, 8 Wyo. 29, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 920. See also *Desha County v. State*, (Ark. 1904) 84 S. W. Rep. 625.

3. Apportionment by Commissioners. — *San Diego County v. Riverside County*, (Cal. 1898) 55 Pac. Rep. 7; *Riverside County v. San Bernardino County*, 134 Cal. 517; *State v. McMillan*, 52 S. Car. 60; *In re Fremont County*, 8 Wyo. 29, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 920.

**921.** 6. Action at Law to Enforce Apportionment. — *Jeff Davis County v. City Nat. Bank*, 22 Tex. Civ. App. 157.

7. Action at Law Where No Statutory Provision Is Made. — *Perkins County v. Keith County*, 58 Neb. 323; *In re Fremont County*, 8 Wyo. 29, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 921.

**Mandamus.** — The original county may force the new county by mandamus to contribute its share of the indebtedness as provided by statute. *State v. Demann*, 83 Minn. 331.

Action at Law Not Allowable. — See *Riverside County v. San Bernardino County*, 134 Cal. 517.

**922.** 1. Liability of Annexed Territory for Debts of County to Which Annexed. — *Desha County v. State*, (Ark. 1904) 84 S. W. Rep. 625.

**923.** 2. Jurisdiction of Courts of Old County Before Organization of New County. — *Rushton v. Woodham*, 68 S. Car. 110.

**925.** 1. Annexation of Counties in Different Political Divisions. — See *Baker County v. Benson*, 40 Oregon 207.

8. Territory Attached to County for Judicial Purposes. — *Brewster County v. Presidio County*, 19 Tex. Civ. App. 638.

**926.** 3. Governmental and Corporate Incidents Generally. — *Arizona*. — *Santa Cruz County v. Barnes*, (Ariz. 1904) 76 Pac. Rep. 621.

*Georgia*. — *Howard v. Early County*, 104 Ga. 669; *Koger v. Hunter*, 102 Ga. 76.

*Indiana*. — *Miami County v. Mowbray*, 160 Ind. 10.

*Iowa*. — *Harrison v. Palo Alto County*, 104 Iowa 383.

*Minnesota*. — *Grannis v. Blue Earth County*, 81 Minn. 58, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 926; *State v. Smith*, 84 Minn. 295.

*Montana*. — *Independent Pub. Co. v. Lewis & Clarke County*, 30 Mont. 83.

*Nebraska*. — *Lancaster County v. Green*, 54 Neb. 98.

*New Mexico*. — *Agua Pura Co. v. Las Vegas*, 10 N. Mex. 6.

*Oregon*. — See also *State v. Hall*, 37 Oregon 479.

*Tennessee*. — *McAndrews v. Hamilton County*, 105 Tenn. 399.

*Utah*. — *Auerbach v. Salt Lake County*, 23 Utah 103; *Daggett v. Lynch*, 18 Utah 49.

*Wyoming*. — *Appel v. State*, 9 Wyo. 187.

4. Counties Incapable of Suing or Being Sued at Common Law. — *Duncan v. Willits*, 4 Penn.



**927.** By Statute — Express Grant of Power. — See note 1.

**928.** Implied Grant of Power. — See note 1.

(2) *In Particular Actions — On Contracts.* — See note 7.

**929.** For the Recovery of Property. — See notes 1, 2.

(3) *Employment of Counsel.* — See notes 6, 7.

c. TO MAKE CONTRACTS — (1) *In General.* — See note 9.

**930.** Unauthorized Contracts. — See note 1.

Constitutional Limitations. — See note 4.

(Del.) 493; *Bell v. Johnston County*, 127 N. Car. 85; *Summers v. Hamilton County*, 5 Ohio Dec. 553, 7 Ohio N. P. 542; *Hoexter v. Judson*, 21 Wash. 646.

**Indictment.** — A county cannot be proceeded against by indictment in the absence of statute. *Com. v. Boyle County Fiscal Ct.*, 113 Ky. 325.

**927. 1. Statutes Granting Capacity to Sue and Be Sued.** — *Santa Cruz County v. Barnes*, (Ariz. 1904) 76 Pac. Rep. 621; *Millwood v. De Kalb County*, 106 Ga. 743; *Van Horn v. Kittitas County*, (Supm. Ct. Spec. T.) 28 Misc. (N. Y.) 333, *affirmed* 46 N. Y. App. Div. 623; *Kennedy v. Queens County*, 47 N. Y. App. Div. 250; *State v. Davis*, 11 S. Dak. 111, 74 Am. St. Rep. 780; *Nickens v. Lewis County*, 23 Wash. 125; *Washburn County v. Thompson*, 99 Wis. 585. See also *Santa Cruz County v. McPherson*, 133 Cal. 282; *Greeley v. Cascade County*, 22 Mont. 580; *Ayres v. Thurston County*, 63 Neb. 96.

**Statutory Exemption.** — In *Arkansas* counties are by statute made exempt from liability to suit by other counties. See *Nevada County v. Williams*, 72 Ark. 394.

**928. 1. Implied Grant of Capacity to Sue and Be Sued.** — *Harris County v. Brady*, 115 Ga. 767; *State v. Davis*, 11 S. Dak. 111, 74 Am. St. Rep. 780.

**Implied Power to Settle Claims.** — The statutory authority to sue and be sued carries with it an implied power to compromise disputed claims. This power is vested in the county board. *Washburn County v. Thompson*, 99 Wis. 585.

**7. Power of County to Sue on Contract.** — *Sullivan County v. Ruth*, 106 Tenn. 85.

**929. 1. Suit to Recover Personal Property.** — Under a statute of *California* counties were empowered to sue for the recovery of money paid by the supervisors without legal authority. This statute, it was held, did not give to a county the right to recover money fraudulently paid for printing expenses, since the county board had authority to order the payment of such an expense. *Santa Cruz County v. McPherson*, 133 Cal. 282.

**2. Ejectment to Recover Possession of Lands.** — *Franklin County v. Gills*, 96 Va. 330.

**6. Employment of Counsel.** — *Speer v. Kearney County*, (C. C. A.) 88 Fed. Rep. 749. See *Hinsdale County v. Crump*, 18 Colo. App. 59; *Reynolds v. Clark County*, 162 Mo. 680; *State v. Butler County*, 164 Mo. 214. See also *Nickens v. Lewis County*, 23 Wash. 125. Compare *Logan County v. Jones*, 4 Okla. 341. And see further the title COUNTY COMMISSIONERS, 992. 1.

**Lobbying Contracts.** — A county has no authority to employ counsel for the purpose of defeating the passage of a bill by the legislature. *Colusa County v. Welch*, 122 Cal. 428.

See generally the title ILLEGAL CONTRACTS, 969. 3 et seq.

**Who May Contract with Counsel.** — The authority to employ counsel in behalf of the county rests with the county commissioners and such an employment by a sheriff is invalid. *True v. Crow Wing County*, 83 Minn. 293.

**7. Power to Employ Counsel Implied.** — *Santa Cruz County v. Barnes*, (Ariz. 1904) 76 Pac. Rep. 621. See also *Bevington v. Woodbury County*, 107 Iowa 424.

**9. Power to Make Contracts.** — *Grannis v. Blue Earth County*, 81 Minn. 55; *State v. Smith*, 84 Minn. 295; *State v. Cass County*, 60 Neb. 566; *Agua Pura Co. v. Las Vegas*, 10 N. Mex. 6. See also *State v. Hall*, 37 Oregon 479.

**Erection of Bridge.** — A county may contract for the construction of a bridge. *Morris v. Bell County*, (Ky. 1899) 50 S. W. Rep. 531.

**Compliance with Statutory Requirements Necessary.** — A contract for the erection of a court house which does not comply with the requirements of statute as to publishing notice for bids is void. *Scott v. Crow*, 121 Ga. 68.

**930. 1. Unauthorized Contracts Void — United States.** — *Lee v. Monroe County*, 114 Fed. Rep. 744, 52 C. C. A. 376.

*California.* — *Swasey v. Shasta County*, 141 Cal. 392.

*Georgia.* — *Dyer v. Erwin*, 106 Ga. 845.

*Minnesota.* — *Grannis v. Blue Earth County*, 81 Minn. 58.

*New York.* — *Rogers v. Westchester County*, 77 N. Y. App. Div. 501.

*Oklahoma.* — *D County v. Gillett*, 9 Okla. 593.

*Oregon.* — *Municipal Security Co. v. Baker County*, 39 Oregon 396, *citing* 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 930.

*Texas.* — *Noel Young Bond, etc., Co. v. Mitchell County*, 21 Tex. Civ. App. 638.

See also the title COUNTY COMMISSIONERS, 989. 2. Compare *Barnard v. Sangamon County*, 190 Ill. 116.

**Offering Rewards.** — *Felker v. Elk County*, (Kan. 1904) 78 Pac. Rep. 167.

It is beyond the authority of a county, acting through its board of commissioners, to offer a reward for the return of a missing citizen. *Scheiber v. Von Arx*, 87 Minn. 298.

**Authority Irregularly Exercised.** — Where a county had authority to contract for the reconstruction of a court house, but exercised such authority irregularly, the contract will be enforced and a recovery allowed against the county, the latter having accepted the benefits of the contract. *Coles County v. Goehring*, 209 Ill. 142.

**4. Limitation upon Amount of Indebtedness to Be Incurred — United States.** — *Lyon County v. Ashuelot Nat. Bank*, (C. C. A.) 87 Fed. Rep.

**931.** See note 1.

**Parties Dealing with the County to Take Notice of Limitation.** — See note 2.

**Form of Contract.** — See note 4.

**932.** (2) *To Borrow Money.* — See note 3.**933.** *d.* TO ACQUIRE AND HOLD PROPERTY — (1) *In General.* — See note 3.**934.** See note 1.

**Power to Acquire Land for Special Purposes.** — See note 5.

137; *Ætna L. Ins. Co. v. Lyon County*, 95 Fed. Rep. 325; *Rollins v. Rio Grande County*, (C. C. A.) 90 Fed. Rep. 575; *Keene Five-Cent Sav. Bank v. Lyon County*, 90 Fed. Rep. 523; *Corning v. Meade County*, (C. C. A.) 102 Fed. Rep. 57; *Gillette-Herzog Mfg. Co. v. Canyon County*, 85 Fed. Rep. 396.

*Alabama.* — *Sisk v. Cargile*, 138 Ala. 164.

*Georgia.* — *Habersham County v. Porter Mfg. Co.*, 103 Ga. 613.

*Idaho.* — *Andrews v. Ada County*, 7 Idaho 453.

*Illinois.* — *Coles County v. Goehring*, 209 Ill. 142; *Hodges v. Crowley*, 186 Ill. 305.

*Indiana.* — *Perry County v. Gardner*, 155 Ind. 165; *Miami County v. Mowbray*, 160 Ind. 10.

*Iowa.* — *Reynolds v. Lyon County*, 121 Iowa 733.

*Kansas.* — *Webster v. Haskell County*, 7 Kan. App. 764.

*Kentucky.* — *Hopkins County v. St. Bernard Coal Co.*, 114 Ky. 153; *Carpenter v. Central Covington*, (Ky. 1904) 81 S. W. Rep. 919; *Columbia Bank v. Taylor County*, 112 Ky. 243; *Whitney v. Kentucky Midland R. Co.*, 110 Ky. 955.

*Minnesota.* — *Johnson v. Norman County*, 93 Minn. 290.

*Missouri.* — *Anderson v. Ripley County*, 181 Mo. 46; *Mountain Grove Bank v. Douglas County*, 146 Mo. 42; *State v. Johnson*, 162 Mo. 621.

*Montana.* — *Tinkel v. Griffen*, 26 Mont. 426.

*Nebraska.* — *F. C. Austin Mfg. Co. v. Colfax County*, (Neb. 1903) 93 N. W. Rep. 145; *F. C. Austin Mfg. Co. v. Brown County*, 65 Neb. 60; *National L. Ins. Co. v. Dawes County*, (Neb. 1903) 93 N. W. Rep. 187.

*Oklahoma.* — *D County v. Gillett*, 9 Okla. 593; *Rogers Mills County v. Sauer*, 8 Okla. 409; *Huddleston v. Noble County*, 8 Okla. 614; *Custer County v. De Lana*, 8 Okla. 213; *Johnson v. Pawnee County*, 7 Okla. 686; *Giles v. Dennison*, (Okla. 1904) 78 Pac. Rep. 174.

*Oregon.* — *Municipal Security Co. v. Baker County*, 33 Oregon 338, 39 Oregon 396; *Eaton v. Minnaugh*, 43 Oregon 465.

*Pennsylvania.* — *Schuylkill County v. Snyder*, 20 Pa. Co. Ct. 649.

*South Dakota.* — *Lawrence County v. Meade County*, 10 S. Dak. 175.

*Utah.* — *Daggett v. Lynch*, 18 Utah 49.

*Washington.* — *Farquharson v. Yeargin*, 24 Wash. 549; *State Sav. Bank v. Davis*, 22 Wash. 406; *Duryee v. Friars*, 18 Wash. 55.

*West Virginia.* — *Hanley v. Randolph County Ct.*, 50 W. Va. 439.

*Wisconsin.* — *Crogster v. Bayfield County*, 99 Wis. 1.

*Wyoming.* — *In re Fremont County*, 8 Wyo. 1.

**931. 1.** *Municipal Security Co. v. Baker County*, 33 Oregon 338, quoting 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 930.

**Warrants of Indebtedness Increasing the Debts of the County** beyond the amount limited by the constitution are not void where they are issued in payment of compulsory obligations. *Farquharson v. Yeargin*, 24 Wash. 549.

**2. Parties Dealing with County to Take Notice of Limitation.** — *Gillette-Herzog Mfg. Co. v. Canyon County*, 85 Fed. Rep. 396; *Miami County v. Mowbray*, 160 Ind. 10. See also *D County v. Gillett*, 9 Okla. 593.

**4. Form Prescribed by Statute.** — An action by a county cannot be defended on the ground that the contract upon which suit is brought did not meet statutory requirements as to form and method, such requirements existing only for the protection of the county. *In re Worcester County*, (C. C. A.) 102 Fed. Rep. 808.

**Statutory Requirements.** — In *Missouri*, by statute, contracts made by a county must be in writing. *Anderson v. Ripley County*, 181 Mo. 46.

And in *Georgia* every contract made with a county must be in writing and entered on the minutes of the county officers. *Milburn v. Glynn County*, 109 Ga. 477; *Manley Bldg. Co. v. Newton*, 114 Ga. 245; *Holliday v. Jackson County*, 121 Ga. 310. But one who has made a valid written contract with the county officers may compel them by mandamus to enter it on the minutes. *Milburn v. Glynn County*, 112 Ga. 160.

**932. 3. Construction of Statute.** — Under the *Washington* statute providing that the assent of three-fifths of the voters at an election shall be necessary to authorize increasing the county indebtedness beyond a certain amount, three-fifths of those voting upon the particular question of indebtedness is sufficient. *Strain v. Young*, 25 Wash. 578.

**933. 3. Power of Counties to Acquire and Hold Property.** — *Dahnke v. People*, 168 Ill. 102; *Colburn v. El Paso County*, 15 Colo. App. 90.

**934. 1. Power to Take Property by Devise.** — See *Fulbright v. Perry County*, 145 Mo. 432.

**Public Purpose Only.** — Counties have power to acquire property for public purposes only. "They cannot hold property for profit." *Buell v. Arnold*, (Wis. 1905) 102 N. W. Rep. 338.

**5. Power to Acquire Land for Special Purposes.** — *Witter v. Polk County*, 112 Iowa 380; *Waggoner v. Wise County*, 17 Tex. Civ. App. 220; *Norfolk County v. Cox*, 98 Va. 270.

Authority to acquire lands for public purposes does not empower a county to contract for the purchase of land for the purpose of donating it to a city. *Bazille v. Ramsey County*, 71 Minn. 198.

**935.** (2) *Incidental Powers.* — See note 3.

(3) *Disposal of Property.* — See note 4.

**936.** *Real Estate Held for Special Purpose.* — See note 1.

**937.** *Conformity to Mode of Disposition Prescribed by Statute Necessary.* — See note 1.

**3. Governmental Functions** — *a.* IN GENERAL. — See note 4.

*b.* PROVISION FOR INTERNAL IMPROVEMENT. — See notes 8, 9, 10.

**938.** *c.* AID OF ENTERPRISES OF QUASI-PUBLIC NATURE — **Railway Construction.** — See note 1.

**Power to Acquire Turnpike and Gravel Roads.** — See *Nicholas County v. Hawkins*, 109 Ky. 679.

**935. 3. Powers Incident to Power to Hold Lands.** — *Witter v. Polk County*, 112 Iowa 380.

**4. Power to Dispose of Real Estate.** — *Hunnicut v. Atlanta*, 104 Ga. 1; *Dallas County v. Club Land, etc., Co.*, 95 Tex. 200; *State v. McConnaughey*, 33 Wash. 571. See also *Colburn v. El Paso County*, 15 Colo. App. 90.

Counties have no implied power to give covenants of warranty in making a conveyance of real estate. *Harrison v. Palo Alto County*, 104 Iowa 383.

**Swamp Lands.** — See *American Stave, etc., Co. v. Butler County*, 93 Fed. Rep. 301.

**Rescinding Contract to Sell Swamp Lands.** — Under the *Missouri* statute authorizing counties to contract to sell swamp lands, and to cancel a contract, with the consent of the purchaser, if the county should be unable to convey valid title, where the county rescinded such a contract without the consent of the buyer it was held that the rescission was unlawful and that the buyer was entitled to receive back payments made under the contract. *State v. Adams*, 161 Mo. 349.

**Power to Dispose of Personal Property.** — See *Nelson v. Harrison County*, 126 Iowa 436.

**936. 1. Power to Sell School Lands.** — The constitution of *Texas* provides that counties may sell lands held for school purposes and invest the proceeds for the benefit of the public schools. This does not authorize a county to transfer lands in payment of services rendered, and such a conveyance is invalid. *Dallas County v. Club Land, etc., Co.*, 95 Tex. 200.

**937. 1. Conformity to Mode of Disposition Prescribed by Statute Necessary.** — See *Hunnicut v. Atlanta*, 104 Ga. 1; *State v. McConnaughey*, 33 Wash. 571.

**4. Governmental Functions of Counties.** — *State v. Standford*, 24 Utah 148.

**8. Erection and Repair of Poorhouses.** — *Cass County v. Gibson*, (C. C. A.) 107 Fed. Rep. 369.

**9. Erection of Court Houses** — *United States.* — *Hughes County v. Livingston*, 104 Fed. Rep. 306, 43 C. C. A. 541.

*Alabama.* — *Alabama G. S. R. Co. v. Reed*, 124 Ala. 253, 82 Am. St. Rep. 166.

*California.* — *Swasey v. Shasta County*, 141 Cal. 392.

*Florida.* — *Potter v. Lainhart*, 44 Fla. 647.

*Georgia.* — *Manly Bldg. Co. v. Newton*, 114 Ga. 245; *Scott v. Crow*, 121 Ga. 68.

*Illinois.* — *Coles County v. Goehring*, 209 Ill. 142.

*Indiana.* — *Swartz v. Lake County*, 158 Ind. 141.

*Kentucky.* — *Campbell County v. Court-House*

*Dist.*, (Ky. 1897) 42 S. W. Rep. 111; *Combs v. Letcher County*, 107 Ky. 379.

*Massachusetts.* — *Morse v. Norfolk County*, 170 Mass. 555; *Connors v. Stone*, 177 Mass. 424.

*New Hampshire.* — *Whitcher v. Grafton County*, 67 N. H. 582.

*New York.* — *People v. Oneida County*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 597, affirmed 68 N. Y. App. Div. 650.

*Ohio.* — *Wood County v. Pargillis*, 6 Ohio Cir. Dec. 717.

*Oklahoma.* — *Giles v. Dennison*, (Okla. 1904) 78 Pac. Rep. 174.

*Pennsylvania.* — *Mahon v. Luzerne County*, 197 Pa. St. 1.

*Texas.* — *Noel Young Bond, etc., Co. v. Mitchell County*, 21 Tex. Civ. App. 638.

**Express Legislative Authority Is Not Necessary** in *North Carolina* to authorize the construction of a court house. *Black v. Buncombe County*, 129 N. Car. 121.

**10. Erection of Jails.** — *Hughes County v. Livingston*, 104 Fed. Rep. 306, 43 C. C. A. 541; *Swasey v. Shasta County*, 141 Cal. 392; *Potter v. Lainhart*, 44 Fla. 647; *Coles County v. Goehring*, 209 Ill. 142; *Combs v. Letcher County*, 107 Ky. 379; *Queens County v. Phipps*, 35 N. Y. App. Div. 350; *Giles v. Dennison*, (Okla. 1904) 78 Pac. Rep. 174.

**Erection of Armory.** — An act authorizing county commissioners to erect an armory for the use of the Ohio National Guard, and to borrow money for that purpose, was held to be void in that it imposed upon the county an expenditure for the benefit of the state at large. *Hubbard v. Fitzsimmons*, 57 Ohio St. 436.

**938. 1. Aid in Railway Construction** — *United States.* — *Stanley County v. Coler*, (C. C. A.) 113 Fed. Rep. 705, affirmed 190 U. S. 437, reversing (C. C. A.) 96 Fed. Rep. 284, and affirming 89 Fed. Rep. 257; *Corning v. Meade County*, (C. C. A.) 102 Fed. Rep. 57.

*Alabama.* — *Carpenter v. Greene County*, 130 Ala. 613.

*Illinois.* — *Stebbins v. Perry County*, 167 Ill. 567.

*Kentucky.* — *Richmond Cemetery Co. v. Sullivan*, 104 Ky. 723; *Green County v. Shortell*, 116 Ky. 108; *Sparks v. Bohannon*, 61 S. W. Rep. 260, 22 Ky. L. Rep. 1710; *Whitney v. Kentucky Midland R. Co.*, 110 Ky. 955; *Sparks v. Bohannon*, (Ky. 1901) 61 S. W. Rep. 260.

*Louisiana.* — *James v. Arkansas Southern R. Co.*, 110 La. 145; *Guillory v. Avoyelles R. Co.*, 104 La. 11; *Vicksburg, etc., R. Co. v. Scott*, 52 La. Ann. 512.

*Nebraska.* — *Colburn v. McDonald*, (Neb. 1904) 100 N. W. Rep. 961.

*North Carolina.* — *Wilkes County v. Call*, 123 N. Car. 308.



**939.** 4. By Whom Powers Are to Be Exercised — *a.* IN GENERAL. — See note 10.

**940.** Limitations of Authority. — See note 2.

Unauthorized Act of Agent Not Binding. — See note 3.

Persons Dealing with Agent to Take Notice of Limit of Authority. — See note 4.

*b.* DELEGATION OF AUTHORITY BY COUNTY AGENTS. — See note 5.

**941.** See note 1.

**VII. DUTIES AND LIABILITIES — 1. Generally.** — See note 2.

*West Virginia.* — *West Virginia, etc., R. Co. v. Harrison County Ct.*, 47 W. Va. 273.

*Wisconsin.* — *Crogster v. Bayfield County*, 99 Wis. 1.

**939. 10. Powers Exercised by County Board** — *United States.* — *Haskell County v. National L. Ins. Co.*, 50 Fed. Rep. 228, 61 U. S. App. 53; *Hughes County v. Livingston*, 104 Fed. Rep. 306, 43 C. C. A. 541; *Pratt County v. Savings Soc.*, 90 Fed. Rep. 233, 61 U. S. App. 61.

*Arizona.* — *Haupt v. Maricopa County*, (Ariz. 1902) 68 Pac. Rep. 525.

*California.* — *Ex p. Anderson*, 134 Cal. 69, 86 Am. St. Rep. 236; *McPherson v. San Joaquin County*, (Cal. 1899) 56 Pac. Rep. 802. See also *Colusa County v. Welch*, 122 Cal. 428.

*Colorado.* — *Colburn v. El Paso County*, 15 Colo. App. 90.

*Illinois.* — *Hardin v. Sangamon*, 71 Ill. App. 103.

*Minnesota.* — *True v. Crow Wing County*, 83 Minn. 293.

*Montana.* — *State v. Coad*, 23 Mont. 131.

*New Mexico.* — *Agua Pura Co. v. Las Vegas*, 10 N. Mex. 6.

*Pennsylvania.* — *Bucher v. Northumberland County*, 209 Pa. St. 618.

*Washington.* — *Hoexter v. Judson*, 21 Wash. 646; *State Sav. Bank v. Davis*, 22 Wash. 406.

*Wisconsin.* — *Washburn County v. Thompson*, 99 Wis. 585; *Johnson v. Buffalo County*, 111 Wis. 265; *Northern Trust Co. v. Snyder*, 113 Wis. 516, 90 Am. St. Rep. 867.

*Wyoming.* — *Appel v. State*, 9 Wyo. 187.

**940. 2. Limitations of Authority Vested in Agency.** — *Turner v. Fulton County*, 109 Ga. 633; *Howell v. Ada County*, 6 Idaho 154; *Monroe County v. Galloway*, 17 Ind. App. 689; *Hubler v. Cass County*, 19 Ind. App. 464; *Stanton v. State*, 27 Ind. App. 105; *Sudbury v. Monroe County*, 157 Ind. 446; *Lancaster County v. Green*, 54 Neb. 98; *Buchanan Bridge Co. v. Campbell*, 60 Ohio St. 406; *Franklin County v. Gills*, 96 Va. 330; *Endion Imp. Co. v. Evening Telegram Co.*, 104 Wis. 432. See also the title COUNTY COMMISSIONERS, **976. 3, 977. 1, 987. 2 et seq.**

**3. Unauthorized Act of Agent Not Binding** — *United States.* — *Lee v. Monroe County*, 114 Fed. Rep. 744, 52 C. C. A. 376.

*Georgia.* — *Dyer v. Erwin*, 106 Ga. 845; *Turner v. Fulton County*, 109 Ga. 633.

*Idaho.* — *Andrews v. Ada County*, 7 Idaho 453.

*Indiana.* — *Hubler v. Cass County*, 19 Ind. App. 464; *Wrought-Iron Bridge Co. v. Hendricks County*, 19 Ind. App. 672; *Monroe County v. Galloway*, 17 Ind. App. 689.

*Kansas.* — *Felker v. Elk County*, (Kan. 1904) 78 Pac. Rep. 167.

*Minnesota.* — *Bazille v. Ramsey County*, 71 Minn. 198.

*Mississippi.* — *Jones v. Sunflower County*, 84 Miss. 98.

*Montana.* — *State v. Coad*, 23 Mont. 131.

*New York.* — *People v. St. Lawrence County*, 101 N. Y. App. Div. 327.

*Ohio.* — *Buchanan Bridge Co. v. Campbell*, 60 Ohio St. 406.

*South Dakota.* — *Meek v. Meade County*, 12 S. Dak. 166.

*Virginia.* — *Franklin County v. Gills*, 96 Va. 330.

*Washington.* — *Chehalis County v. Hutcheson*, 21 Wash. 82, 75 Am. St. Rep. 818.

*Wisconsin.* — *Endion Imp. Co. v. Evening Telegram Co.*, 104 Wis. 432.

*Compare* *Barnard v. Sangamon County*, 190 Ill. 116.

**4. Persons Dealing with Agency to Take Notice of Limit of Authority** — *Idaho.* — *Castle v. Bannock County*, 8 Idaho 124.

*Illinois.* — *Barnard v. Sangamon County*, 190 Ill. 116.

*Indiana.* — *Deitrick v. Parke County*, 28 Ind. App. 83; *Stanton v. State*, 27 Ind. App. 105; *Monroe County v. Galloway*, 17 Ind. App. 689; *Wrought-Iron Bridge Co. v. Hendricks County*, 19 Ind. App. 672.

*Kentucky.* — *Perry County v. Engle*, 116 Ky. 594.

*Missouri.* — *Anderson v. Ripley County*, 181 Mo. 46.

*Nevada.* — *Office Specialty Mfg. Co. v. Washoe County*, 24 Nev. 359.

*Ohio.* — *Buchanan Bridge Co. v. Campbell*, 60 Ohio St. 406.

*South Dakota.* — *Meek v. Meade County*, 12 S. Dak. 166.

*Wisconsin.* — *Endion Imp. Co. v. Evening Telegram Co.*, 104 Wis. 432. See also *Bazille v. Ramsey County*, 71 Minn. 198.

**5. Delegation of Authority by County Agents.** — See also *Cass County v. Gibson*, (C. C. A.) 107 Fed. Rep. 369.

In *Illinois* it has been held that where the county board has power to contract it may appoint agents to exercise that power. *Crawford County v. Walter*, 89 Ill. App. 7; *Wilson v. State*, 53 Neb. 113.

**941. 1.** *Rio Grande County v. Lewis*, 28 Colo. 378.

**2. Liabilities of Counties Generally** — *Alabama.* — *Naftel v. Montgomery County*, 127 Ala. 563.

*Arizona.* — *Reilly v. Cochise County*, 5 Ariz. 380.

**942. 2. On Contracts — a. IN GENERAL. — See note 1.**

Unauthorized Contracts. — See note 2.

Liability for Services. — See note 3.

*Colorado.* — Lake County *v.* Glynn, 19 Colo. App. 233.*Delaware.* — Duncan *v.* Willits, 4 Penn. (Del.) 493.*Florida.* — National Bank *v.* Duval County, (Fla. 1903) 34 So. Rep. 894.*Georgia.* — Millwood *v.* De Kalb County, 106 Ga. 743; Howard *v.* Early County, 104 Ga. 669; Turner *v.* Fulton County, 109 Ga. 633; Polk County *v.* Crocker, 112 Ga. 152; Talbot County *v.* Mansfield, 115 Ga. 766; Seymore *v.* Elbert County, 116 Ga. 371.*Indiana.* — Harrison County *v.* Bline, (Ind. App. 1905) 72 N. E. Rep. 1034; Schnurr *v.* Huntington County, 22 Ind. App. 188; Ellis *v.* Steuben County, 153 Ind. 91; Deitrick *v.* Parke County, 28 Ind. App. 83; Sherfey, etc., Co. *v.* Clay County, 26 Ind. App. 66.*Minnesota.* — Hillman *v.* Hennepin County, 84 Minn. 130.*Mississippi.* — Jones *v.* Sunflower County, 84 Miss. 98.*Montana.* — Sears *v.* Gallatin County, 20 Mont. 462.*New York.* — Markey *v.* Queens County, 154 N. Y. 675; Salisbury *v.* Washington County, 30 N. Y. App. Div. 187.*North Carolina.* — Bell *v.* Johnston County, 127 N. Car. 85; Jones *v.* Franklin County, 130 N. Car. 451.*Ohio.* — Buchanan Bridge Co. *v.* Campbell, 60 Ohio St. 406. See also Richardson *v.* State, 10 Ohio Cir. Dec. 458, 19 Ohio Cir. Ct. 191.*Oklahoma.* — Greer County *v.* Watson, 7 Okla. 174.*Pennsylvania.* — Price *v.* Lancaster County, 24 Pa. Co. Ct. 225, 17 Lanc. L. Rev. 353; Bucher *v.* Northumberland County, 209 Pa. St. 618.*Wisconsin.* — Putney Bros. Co. *v.* Milwaukee County, 108 Wis. 554.See also Layman *v.* Beeler, 113 Ky. 221.**Liability for Deputy's Salary.** — In *Idaho* it has been held that a county is not liable for the salary of a deputy sheriff appointed by authority of the board of county commissioners. Taylor *v.* Canyon County, 7 Idaho 171.**942. 1. Counties Liable Like Individuals on Contracts.** — Barnard *v.* Sangamon County, 190 Ill. 116; Williams *v.* Kearney County, 61 Kan. 708; Morris *v.* Bell County, (Ky. 1899) 50 S. W. Rep. 531; Dean *v.* Saunders County, 55 Neb. 759; People *v.* Cayuga County, (Supm. Ct. Spec. T.) 22 Misc. (N. Y.) 616. See also Boland *v.* Luzerne County, 186 Pa. St. 68; Shelby County *v.* Bickford, 102 Tenn. 395.**A Mere Vote by the County Board to Accept a Bid** submitted by a contractor does not constitute the making of the contract, and the county is not liable for thereafter refusing to award the contract. Edge Moor Bridge Works *v.* Bristol County, 170 Mass. 528.**2. County Not Liable on Unauthorized Contract** — *United States.* — Willis *v.* Wyandotte County, (C. C. A.) 86 Fed. Rep. 872; Lee *v.* Monroe County, 114 Fed. Rep. 744, 52 C. C. A. 376.*California.* — Merced County *v.* Cook, 120 Cal. 275; Harris *v.* Cook, 119 Cal. 454.*Colorado.* — Colburn *v.* El Paso County, 15 Colo. App. 90.*Georgia.* — Turner *v.* Fulton County, 109 Ga. 633; Daniel *v.* Putnam County, 113 Ga. 570; Dyer *v.* Erwin, 106 Ga. 845.*Idaho.* — Castle *v.* Bannock County, 8 Idaho 124.*Illinois.* — But see Barnard *v.* Sangamon County, 190 Ill. 116.*Indiana.* — Stanton *v.* State, 27 Ind. App. 105; Monroe County *v.* Galloway, 17 Ind. App. 689; Wrought-Iron Bridge Co. *v.* Hendricks County, 19 Ind. App. 672; Hubler *v.* Cass County, 19 Ind. App. 464; Harrison County *v.* Bline, (Ind. App. 1905) 72 N. E. Rep. 1034.*Kansas.* — Felker *v.* Elk County, (Kan. 1904) 78 Pac. Rep. 167.*Kentucky.* — Perry County *v.* Engle, 116 Ky. 594.*Minnesota.* — Grannis *v.* Blue Earth County, 81 Minn. 58, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 942; True *v.* Crow Wing County, 83 Minn. 293; Bazille *v.* Ramsey County, 71 Minn. 198.*Mississippi.* — Jones *v.* Sunflower County, 84 Miss. 98.*Missouri.* — Anderson *v.* Ripley County, 181 Mo. 46.*Montana.* — See also Sears *v.* Gallatin County, 20 Mont. 462; Williams *v.* Broadwater County, 28 Mont. 360.*Nebraska.* — Card *v.* Dawes County, (Neb. 1904) 99 N. W. Rep. 662.*New York.* — People *v.* St. Lawrence County, 101 N. Y. App. Div. 327.*North Carolina.* — Hornthall *v.* Washington County, 126 N. Car. 26.*North Dakota.* — Fox *v.* Jones, (N. Dak. 1905) 102 N. W. Rep. 161.*Ohio.* — Buchanan Bridge Co. *v.* Campbell, 60 Ohio St. 406.*Oklahoma.* — Logan County *v.* Jones, 4 Okla. 341.*Oregon.* — Municipal Security Co. *v.* Baker County, 39 Oregon 396.*South Dakota.* — Meek *v.* Meade County, 12 S. Dak. 166.*Texas.* — Shelby County *v.* Gibson, 18 Tex. Civ. App. 121; Noel Young Bond, etc., Co. *v.* Mitchell County, 21 Tex. Civ. App. 638.*Virginia.* — Franklin County *v.* Gills, 96 Va. 330.*Washington.* — Smith *v.* Lamping, 27 Wash. 624; Chehalis County *v.* Hutcheson, 21 Wash. 82, 75 Am. St. Rep. 818.*Wisconsin.* — Endion Imp. Co. *v.* Evening Telegram Co., 104 Wis. 432; Johnson *v.* Buffalo County, 111 Wis. 265.**3. Liability for Services under Authorized Contract** — *Arizona.* — Santa Cruz County *v.* Barnes, (Ariz. 1904) 76 Pac. Rep. 621.*California.* — McPherson *v.* San Joaquin County, (Cal. 1899) 56 Pac. Rep. 802; Contra Costa County *v.* Soto, 138 Cal. 57.

**943.** See note 1.

**944.** *Attorney's Services.* — See notes 1, 2.

**945.** See notes 1, 2.

*Services of Attorney Appointed to Defend Poor Persons — Compensation Provided for by Statute.* — See note 3.

*b. IMPLIED CONTRACTS.* — See note 6.

**946.** See note 1.

*Colorado.* — *Prowers County v. Bedell*, 13 Colo. App. 261; *San Juan County v. Tulley*, 17 Colo. App. 113.

*Illinois.* — *La Salle County v. Hatheway*, 78 Ill. App. 95; *Edgar County v. Middleton*, 86 Ill. App. 502.

*Indiana.* — *Garrigus v. Howard County*, 157 Ind. 103.

*Kansas.* — *Youmans v. Wyandotte County*, 68 Kan. 104.

*Minnesota.* — *Webber v. Ramsey County*, 93 Minn. 320.

*Missouri.* — *Reynolds v. Clark County*, 162 Mo. 680.

*New York.* — *People v. Cayuga County*, (Supm. Ct. Spec. T.) 22 Misc. (N. Y.) 616.

*Oregon.* — *State v. Hall*, 37 Oregon 479. See also *Steiner v. Polk County*, 40 Oregon 124.

*Pennsylvania.* — *Graham v. Schuylkill County*, 16 Pa. Super. Ct. 180; *Unkrich v. Potter County*, 19 Pa. Co. Ct. 548.

*Texas.* — *Presidio County v. Clarke*, (Tex. Civ. App. 1905) 85 S. W. Rep. 475; *Polk County v. Phillips*, 92 Tex. 630; *Galveston County v. Ducie*, 91 Tex. 665.

*Washington.* — *De Rackin v. Lincoln County*, 19 Wash. 360; *Nickeus v. Lewis County*, 23 Wash. 125.

**A Physician** may recover the reasonable value of his services in assisting at a coroner's inquest, the physician being appointed to act by the coroner under statutory authority. *Fairchild v. Ada County*, 6 Idaho 340.

**943. 1. Liability for Services under Contract Not Authorized.** — *Georgia.* — *Talbot County v. Mansfield*, 115 Ga. 766; *Turner v. Fulton County*, 109 Ga. 633.

*Indiana.* — *Monroe County v. Galloway*, 17 Ind. App. 689; *Perry County v. Bader*, 20 Ind. App. 339; *Hubler v. Cass County*, 19 Ind. App. 464; *Harrison County v. Bline* (Ind. App. 1905) 72 N. E. Rep. 1034.

*Mississippi.* — *Jones v. Sunflower County*, 84 Miss. 98.

*Tennessee.* — *Holtzclaw v. Hamilton County*, 101 Tenn. 338.

*Texas.* — *Galveston County v. Ducie*, 91 Tex. 665.

*Washington.* — *Chehalis County v. Hutcheson*, 21 Wash. 82, 75 Am. St. Rep. 818.

See also *Mousseau v. Sioux City*, 113 Iowa 246.

**944. 1. County Liable for Compensation of Counsel Where Right to Employ Exists.** — *Hinsdale County v. Crump*, 18 Colo. App. 59. See also *Anderson v. Shoshone County*, 6 Idaho 76.

**Ultra Vires Contract.** — Where a county has received and benefited by the services of an attorney under a contract it cannot defend on the ground of *ultra vires*. *Freeman v. Wyandotte County*, 8 Kan. App. 72.

**2. Liability for Services of Counsel Employed by**

**Proper Authorities.** — *Power v. May*, 123 Cal. 147; *Bevington v. Woodbury County*, 107 Iowa 424; *Hyatt v. Hamilton County*, 121 Iowa 292, 100 Am. St. Rep. 354; *Worcester County v. Melvin*, 89 Md. 37; *Warren County v. Dabney*, 81 Miss. 273; *Warren County v. Booth*, 81 Miss. 267; *Reynolds v. Clark County*, 162 Mo. 680; *Hancock v. Craven County*, 132 N. Car. 209; *People v. Coler*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 454; *People v. Grout*, 87 N. Y. App. Div. 193, *affirmed* 177 N. Y. 587; *Presidio County v. Clarke*, (Tex. Civ. App. 1905) 85 S. W. Rep. 475. See also *Anderson v. Shoshone County*, 6 Idaho 76.

**945. 1. Where the Services Were Part of the Duties of the State's Attorney**, the county is not liable to an attorney for services performed under an agreement with the county board. *Fox v. Jones*, (N. Dak. 1905) 102 N. W. Rep. 161; *McHenderson v. Anderson County*, 105 Tenn. 591. See also *Merced County v. Cook*, 120 Cal. 275.

**2. Contract by Unauthorized Official.** — See *Scoville v. Baugh*, (Ky. 1905) 84 S. W. Rep. 1146.

A county is not liable to an attorney for services performed under an employment by a sheriff. *True v. Crow Wing County*, 83 Minn. 293.

In *Williams v. Broadwater County*, 28 Mont. 360, it was held that the chairman of the county board, acting without authority, could not bind the county by a contract for the services of an attorney in a suit to which the county was not a party.

**Contract by County Attorney.** — See *Card v. Dawes County*, (Neb. 1904) 99 N. W. Rep. 662.

**Appointment of Counsel by Superior Court.** — See *Barr v. State*, 148 Ind. 424.

**3.** See *Hinsdale County v. Crump*, 18 Colo. App. 59; *People v. Grout*, 87 N. Y. App. Div. 193, *affirmed* 177 N. Y. 587.

**6. Liability of County on Implied Contract.** — *Harrison v. Palo Alto County*, 104 Iowa 383; *Cass County v. Sarpy County*, 66 Neb. 473. See also *Shepard v. Easterling*, 61 Neb. 882.

**946. 1. Services Done or Materials Furnished by Request but Without Agreement as to Compensation.** — *Harrison v. Palo Alto County*, 104 Iowa 383; *Hyatt v. Hamilton County*, 121 Iowa 292, 100 Am. St. Rep. 354.

**Extra Work.** — After a contract for the construction of a court house had been let it became necessary to have extra work done which was not provided for in the contract. In an action to recover compensation for such work it was held that the county could not defend on the ground of *ultra vires* in that bids had not been called for as to the additional work. *Fulton County v. Gibson*, 158 Ind. 471.

**A Member of a Sheriff's Posse**, under obligation by statute to assist the sheriff when called upon, cannot recover from the county for ser-



**946.** Statutory Prohibition. — See notes 2, 3.

Liability for Property Obtained under Contract *Ultra Vires*. — See notes 4, 5.

**947.** *c.* VOLUNTARY SERVICES. — See note 1.

*d.* LIABILITY TO ASSIGNEE OF CONTRACT. — See note 2.

**3.** In Tort — *a.* GENERAL RULE. — See note 5.

**948.** *b.* NEGLIGENCE IN PERFORMANCE OF CORPORATE DUTIES —  
(1) *In General*. — See note 1.

**949.** See note 1.

(2) *Negligence in Construction and Maintenance of County Buildings*  
— Court Houses. — See note 2.

vices rendered by him in pursuing a fugitive from justice. *Sears v. Gallatin County*, 20 Mont. 462.

**946. 2.** No Implied Liability Where Express Contract Is Prescribed by Statute. — *Wrought-Iron Bridge Co. v. Hendricks County*, 19 Ind. App. 672; *Groton Bridge, etc., Co. v. Warren County*, 80 Miss. 214, quoting 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 946. See also *Lee v. Monroe County*, 114 Fed. Rep. 744, 52 C. C. A. 376.

**3.** No Implied Contract Where Express Contract Forbidden. — *Anderson v. Ripley County*, 181 Mo. 46; *Putney Bros. Co. v. Milwaukee County*, 108 Wis. 554.

**4.** Liability of County for Property Obtained under Contract *Ultra Vires*. — *Lee v. Monroe County*, 114 Fed. Rep. 744, 52 C. C. A. 376; *Sacramento County v. Southern Pac. R. Co.*, 127 Cal. 217; *Barnard v. Sangamon County*, 190 Ill. 116; *Municipal Security Co. v. Baker County*, 39 Oregon 396; *Auerbach v. Salt Lake County*, 23 Utah 103. But see *Buchanan Bridge Co. v. Campbell*, 60 Ohio St. 406; *Office Specialty Mfg. Co. v. Washoe County*, 24 Nev. 359; *Gillette-Herzog Mfg. Co. v. Canyon County*, 85 Fed. Rep. 396.

**Excess of Limit of Indebtedness.** — Warrants issued by the county, *ultra vires* because in excess of the constitutional limit of indebtedness, do not raise an implied liability even though the county has received benefits under the transaction. *Municipal Security Co. v. Baker County*, 33 Oregon 338.

**6.** Money Obtained under Contract *Ultra Vires*. — See *Auerbach v. Salt Lake County*, 23 Utah 103.

**Money Received by a Justice in Lieu of Bail**, without authority, may be recovered from the county. *Sutherland v. St. Lawrence County*, (Supm. Ct. Tr. T.) 42 Misc. (N. Y.) 38, reversed 101 N. Y. App. Div. 299.

**947. 1.** County Not Liable for Voluntary Services. — *Reilly v. Cochise County*, 5 Ariz. 380; *Sherfey, etc., Co. v. Clay County*, 26 Ind. App. 66.

**2.** Liability of County to Assignee of Contract for Work. — A party who had contracted with a county to do printing assigned the contract to a third person, who in turn assigned to another. The last assignee sued the county, the latter having refused to recognize the assignment. It was held that the county was not liable in damages, the contract not being assignable without the county's assent. *Campbell v. Sumner County*, 64 Kan. 376.

**A County Commissioner** cannot enforce against the county a contract assigned to him. *Knippa v. Stewart Iron Works*, (Tex. Civ. App. 1902) 66 S. W. Rep. 322.

**Liability to Assignor.** — Where a county had contracted for the services of a physician and the latter, being taken ill, turned his practice over to another physician for a part of the contract period, it was held that the physician contracting with the county could recover on the agreement. *Prowers County v. Bedell*, 13 Colo. App. 261.

**Where the County Acquiesced in the Assignment** it is of course liable to the assignee. *Weatherhogg v. Jasper County*, 158 Ind. 14.

**5.** *Schnurr v. Huntington County*, 22 Ind. App. 188; *Hornthall v. Washington County*, 126 N. Car. 26; *Jones v. Franklin County*, 130 N. Car. 451; *Hitch v. Edgecombe County*, 132 N. Car. 573; *Hoexter v. Judson*, 21 Wash. 646. See also *Layman v. Beeler*, 113 Ky. 221.

**Conversion.** — A county is not liable for conversion by its officers under the *New York County Law* of 1892. *People v. Westchester County*, 57 N. Y. App. Div. 135.

But in *Washington* a county is liable in an action for conversion for the act of county officers in wrongfully seizing the plaintiff's property. *Rose v. Pierce County*, 25 Wash. 119.

**Unlawful Imprisonment.** — An action in tort cannot be maintained against a county on the ground that the plaintiff was unlawfully confined in jail by a chain-gang superintendent, even though the latter was carrying out the instructions of the county authorities. *Bailey v. Fulton County*, 111 Ga. 313.

**948. 1.** Negligence in Performance of Corporate Duties — *Georgia*. — *Millwood v. De Kalb County*, 106 Ga. 743.

*Illinois*. — *Chicago v. Cook County*, 106 Ill. App. 47.

*Indiana*. — *Johnson County v. Reinier*, 18 Ind. App. 119.

*Kansas*. — *Williams v. Kearney County*, 61 Kan. 708.

*Louisiana*. — *Fischer Land, etc., Co. v. Bordelon*, 52 La. Ann. 429.

*Minnesota*. — *Gaare v. Clay County*, 90 Minn. 532.

*New York*. — *Napier v. Brooklyn*, 41 N. Y. App. Div. 274; *Markey v. Queens County*, 154 N. Y. 675.

*North Carolina*. — *Bell v. Johnston County*, 127 N. Car. 85.

*Tennessee*. — *McAndrews v. Hamilton County*, 105 Tenn. 399; *Rhea County v. Sneed*, 105 Tenn. 581.

**949. 1.** See *Bell v. Johnston County*, 127 N. Car. 85.

**2.** Negligence in Construction or Maintenance of Court House — Elevator. — *Simons v. Gregory*, (Ky. 1905) 85 N. W. Rep. 751.

**949.** Liability to Adjoining Property Owners. — See note 5.

Liability to Inmates. — See note 6.

**950.** (3) *Injuries Caused by Defective Highways or Bridges* — Prevailing Doctrine. — See notes 1, 2.

**951.** In a Few Jurisdictions. — See note 1.

**952.** By Express Statute. — See note 1.

**954.** 4. Liability for Interest — Claims Arising Ex Contractu. — See note 5.

Interest by Way of Damages. — See note 6.

**955.** 5. Some Specific Duties and Liabilities — *b.* EXPENSES CONNECTED WITH THE ADMINISTRATION OF JUSTICE. — See note 1.

Costs in Criminal Prosecutions. — See note 3.

**Negligence in Construction of Sewer.** — Schnurr *v.* Huntington County, 22 Ind. App. 188.

**Negligent Destruction of Court House.** — Where a county leases a building for use as a court house under statutory authority it is liable to the owner for the destruction of the building through the negligence of its officers. Williams *v.* Kearny County, 61 Kan. 708.

**949.** 5. Lefrois *v.* Monroe County, 162 N. Y. 563.

**6. Liability to Inmates for Negligence of Officers.** — See Crause *v.* Harris County, 18 Tex. Civ. App. 375.

**950.** 1. At Common Law. — Spencer *v.* Chosen Freeholders, 66 N. J. L. 303, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 950; Markey *v.* Queens County, 154 N. Y. 675.

*Highways.* — Millwood *v.* De Kalb County, 106 Ga. 743.

**2. County Not Liable for Injuries from Defective Highways in Absence of Express Statute** — *Indiana.* — Johnson County *v.* Reinier, 18 Ind. App. 119.

*Kentucky.* — See Simons *v.* Gregory, (Ky. 1905) 85 S. W. Rep. 751; Sinkhorn *v.* Lexington, etc., Turnpike Co., 112 Ky. 205.

*Mississippi.* — Rainey *v.* Hinds County, 79 Miss. 238.

*Nebraska.* — Goes *v.* Gage County, (Neb. 1903) 93 N. W. Rep. 923.

*New Jersey.* — Spencer *v.* Chosen Freeholders, 66 N. J. L. 303, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 950.

*New York.* — Markey *v.* Queens County, 154 N. Y. 675.

*Ohio.* — Alexander *v.* Brady, 61 Ohio St. 174. See also Rhea County *v.* Sneed, 105 Tenn. 581.

**County Not Liable in Damages for Negligence in Construction of a Ditch.** — Floria *v.* Galveston County, (Tex. Civ. App. 1900) 55 S. W. Rep. 540.

**County Not Liable for Failure of Officers to Keep Highway Unobstructed.** — Com. *v.* Boyle County Fiscal Ct., 113 Ky. 325.

**In the Absence of Negligence** a county is not liable for damages resulting from a breakage of the machinery of a drawbridge. Pettit *v.* Chosen Freeholders, 87 Fed. Rep. 768.

**Constructing Highway.** — In the absence of statute a county is not liable in trespass for the acts of its officers done in the building of a highway. Hitch *v.* Edgecombe County, 132 N. Car. 573.

**951.** 1. Damaging Adjacent Lands. — In Georgia a county is liable for damages to one

whose land is damaged as a result of changes made in a public road. Barfield *v.* Macon County, 109 Ga. 386.

**952.** 1. County Made Liable by Statute. — Parr *v.* Shawnee County, (Kan. 1904) 78 Pac. Rep. 449; Hardin County *v.* Coffman, 10 Ohio Cir. Dec. 91, 18 Ohio Cir Ct. 254.

**In New Jersey.** — Spencer *v.* Chosen Freeholders, 66 N. J. L. 303.

**By the Georgia Code.** — See Hackney *v.* Coweta County, 117 Ga. 327; Warren County *v.* Evans, 118 Ga. 200.

**954.** 5. Interest on Claims Arising by Contract. — National Bank *v.* Duval County, (Fla. 1903) 34 So. Rep. 894; Coles County *v.* Goehring, 209 Ill. 142; Cooper *v.* Wait, 106 Ky. 628. See also Power *v.* May, 123 Cal. 147. Compare Auerbach *v.* Salt Lake County, 23 Utah 103.

**County Liable.** — In Kentucky, where a county contracted for the erection of a bridge and agreed to make payment upon its completion, it was held that the county was liable for interest from the time set for payment. Morris *v.* Bell County, (Ky. 1899) 50 S. W. Rep. 531.

**6. Interest by Way of Damages.** — Presidio County *v.* Walker, 29 Tex. Civ. App. 614, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 954.

**955.** 1. Expenses Connected with Administration of Justice. — Talbot County *v.* Mansfield, 115 Ga. 766; People *v.* Westchester County, 83 N. Y. App. Div. 51; People *v.* Jefferson County, 35 N. Y. App. Div. 239; People *v.* Cayuga County, (Supm. Ct. Spec. T.) 22 Misc. (N. Y.) 616; Civic Federation *v.* Salt Lake County, 22 Utah 6. See also Barr *v.* State, 148 Ind. 424; Sayler *v.* Nodaway County, 159 Mo. 520; Henrie *v.* Columbia County, 24 Pa. Co. Ct. 171, 9 Pa. Dist. 624, affirmed 16 Pa. Super. Ct. 339.

**3. Costs in Criminal Cases Not Chargeable to County at Common Law** — *Colorado.* — Otero County *v.* Wood, 11 Colo. App. 19.

*Iowa.* — State *v.* Dorland, 106 Iowa 40.

*Kansas.* — Greenwood County *v.* Elk County, 63 Kan. 857.

*Montana.* — Independent Pub. Co. *v.* Lewis & Clarke County, 30 Mont. 83.

*North Carolina.* — Clerk *v.* Carteret County, 121 N. Car. 29.

*Oklahoma.* — Greer County *v.* Watson, 7 Okla. 174.

*Pennsylvania.* — Com. *v.* Watts, 21 Pa. Co. Ct. 556; Sippler *v.* Clarion County, 8 Pa. Dist. 253.

*South Carolina.* — Kershaw County *v.* Rich-

**956.** Costs Accruing from a Change of Venue. — See notes 1, 2.

Costs in Civil Proceedings. — See note 3.

Where County Is Party. — See note 4.

**957.** *d.* EXPENSES INCURRED IN PRESERVATION OF PUBLIC HEALTH. — See note 3.

*f.* ELECTION EXPENSES. — See note 5.

**6. Enforcement of Liabilities** — *a.* PRESENTATION OF CLAIMS FOR AUDITING AND ALLOWANCE. — See notes 8, 9. See also generally the title COUNTY COMMISSIONERS, **1003**. 1 *et seq.*

land County, 61 S. Car. 75, *quoting* 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 955; Whittle *v.* Saluda County, 59 S. Car. 554; *Ex p.* Henderson, 51 S. Car. 331.

*Tennessee.* — Donaldson *v.* Walker, 101 Tenn. 236.

*Texas.* — McConnell *v.* Coleman County, 21 Tex. Civ. App. 453.

**Stenographer's Fees.** — In Clinton County *v.* Martin, 65 Ohio St. 287, the county was held liable to a defendant in a charge of manslaughter for money paid by him to a stenographer for services rendered during his trial, such expense being chargeable to the county by statute.

**Costs in Trial for Misdemeanor.** — Where the taxing of costs in criminal cases is provided for by statute, it was held that the statute applied to trials for misdemeanors and not to trials for felonies alone. State *v.* Evenson, 18 Wash. 609.

**956. 1. Costs Accruing from a Change of Venue.** — Hamilton County *v.* Tipton County, 23 Ind. App. 330; Kershaw County *v.* Richland County, 61 S. Car. 75, *quoting* 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 956; McConnell *v.* Coleman County, 21 Tex. Civ. App. 453. See also Greenwood County *v.* Elk County, 63 Kan. 857.

2. Kershaw County *v.* Richland County, 61 S. Car. 75, *quoting* 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 956.

**3. Change of Venue in Civil Case.** — In Kansas the county from which a case was transferred cannot be held liable for costs accruing in a civil case by the county where the case was tried after a change of venue. Greenwood County *v.* Elk County, 63 Kan. 857. But in *Indiana*, by statute, it is otherwise. Randolph County *v.* Henry County, 27 Ind. App. 378.

**4. Costs in Civil Proceedings to Which County Is a Party.** — Waters *v.* Garvin, 67 Kan. 855.

**Costs Advanced by Member of Board.** — Where a member of the board of commissioners paid costs in behalf of the county he is entitled to reimbursement even though he had not acted in strict compliance with the requirements of law. Osborn *v.* Ravenscraft, 5 Idaho 612.

**957. 3. Expenses Incurred in Preservation of Public Health.** — Matter of Boyce, (Supm. Ct. Spec. T.) 43 Misc. (N. Y.) 297.

A county is liable upon a contract made by a county board to indemnify the owner of a building, destroyed by order of the board, for the purpose of preventing the spread of a contagious disease. Haupt *v.* Maricopa County, (Ariz. 1902) 68 Pac. Rep. 525.

**5. Election Expenses.** — Washington County *v.* Nesbit, 7 Kan. App. 298; Fayette County *v.* Board of Education, 63 S. W. Rep. 477, 23 Ky. L. Rep. 389; Howell's Nomination, 6 Pa. Dist.

690, 19 Pa. Co. Ct. 598; Mellott *v.* Fulton County, 7 Pa. Dist. 81.

**8. Presentation of Claims Against County for Allowance.** — See Maxwell *v.* Saluda County, 55 S. Car. 382.

**9. Presentment a Prerequisite to Bringing Suit — United States.** — Lorschach *v.* Lincoln County, 94 Fed. Rep. 963, a case arising under the Nevada statute.

*Alabama.* — Washington County *v.* Porter, 128 Ala. 278; Scarbrough *v.* Watson, 140 Ala. 349.

*Indiana.* — State *v.* Wayne County Council, 157 Ind. 356; Myers *v.* Gibson, 152 Ind. 500.

*Iowa.* — Little *v.* Pottawattamie County, (Iowa 1904) 101 N. W. Rep. 752; Des Moines *v.* Polk County, 107 Iowa 525.

*Mississippi.* — Marion County *v.* Woulard, 77 Miss. 343; Young *v.* Leflore County, 81 Miss. 466.

*Ohio.* — Clinton County *v.* Martin, 65 Ohio St. 287.

*Oregon.* — Wallowa County *v.* Oakes, (Oregon 1904) 78 Pac. Rep. 892.

*South Dakota.* — Thomas *v.* Douglas County, 13 S. Dak. 520; State *v.* Pennington County, 13 S. Dak. 430.

*Texas.* — Brewster County *v.* Presidio County, 19 Tex. Civ. App. 638; Noel-Young Bond, etc., Co. *v.* Mitchell County, 21 Tex. Civ. App. 638; Clarke *v.* Presidio County, (Tex. Civ. App. 1904) 79 S. W. Rep. 593.

*Washington.* — Hoexter *v.* Judson, 21 Wash. 646. See also Nickeus *v.* Lewis County, 23 Wash. 125.

*West Virginia.* — Yates *v.* Taylor County Ct., 47 W. Va. 376.

*Wyoming.* — Houtz *v.* Uinta County, 11 Wyo. 152. See also *In re* Fremont County, 8 Wyo. 1.

See also Rio Grande County *v.* Phye, 27 Colo. 107; Finney County *v.* Gray County, 8 Kan. App. 745.

**Claim Must Be Itemized.** — Matter of White, 51 N. Y. App. Div. 175; Kennedy *v.* Queens County, 47 N. Y. App. Div. 250.

**Matter of Defense.** — The fact that a claim was not presented before the action was brought is a matter of defense and not part of the plaintiff's case. Such presentment is not required by statute, before suit may be maintained. Skinner *v.* Cowley County, 63 Kan. 557.

**Second Presentment.** — Under a statute, making it necessary to present a claim to the county board a second time, where a part only of the claim has been allowed, before bringing action thereon, a claim which has been disallowed entirely by the board need not be so presented. San Diego County *v.* Riverside County, (Cal. 1898) 55 Pac. Rep. 7.



**959. By Whom Allowance Is to Be Made.** — See note 1.

Time of Presentment. — See note 3.

Conclusiveness of Allowance Against County. — See note 4.

**960. Right of Appeal.** — See note 1.

Rescission by Board. — See note 2.

Claims Not Legally Chargeable — Action to Recover Back Money Paid — See

note 4.

**961. See note 1.**

**When Presentment Not Required.** — Where, pursuant to the division of a county, the county boards apportioned the indebtedness, under legislative authority, and nothing remained to be done calling for an exercise of discretion, it was held that the claim for the amount due need not be presented to the board of the debtor county. *Perkins County v. Keith County*, 58 Neb. 323.

The statutory requirement of the presenting of an itemized account of a claim prior to bringing suit does not apply in a case where the liability and the extent thereof are fixed by statute. *Fergus Falls v. Otter Tail County*, 88 Minn. 346.

**An Action by a City Collector** to recover money paid to the county treasurer without authority does not involve such a claim as is required to be presented to the county board. *Webster v. Wheeler*, 119 Mich. 601.

**In an Action of Trespass to Try Title**, brought against a county in *Texas*, it is not necessary that the claim should be first presented to the Commissioner's Court. The statute requiring such presentment does not apply to such a claim. *Bowie County v. Powell*, (Tex. Civ. App. 1901) 66 S. W. Rep. 237.

**The Utah Statute Does Not Expressly Prohibit** an action on a claim before it has been presented to and acted upon by the county commissioners. *Auerbach v. Salt Lake County*, 23 Utah 103.

**959. 1. Allowance Made by County Commissioners — Indiana.** — *State v. Robertson*, 23 Ind. App. 424; *Myers v. Gibson*, 152 Ind. 500.

*Iowa.* — *Heath v. Albrook*, 123 Iowa 559.

*Nebraska.* — *Wilson v. State*, 53 Neb. 113; *Taylor v. Davey*, 55 Neb. 153; *State v. Cass County*, 60 Neb. 566.

*New Hampshire.* — *Plymouth v. Grafton County*, 68 N. H. 361.

*New York.* — *Kennedy v. Queens County*, 47 N. Y. App. Div. 250; *People v. Jefferson County*, 35 N. Y. App. Div. 239; *People v. Westchester County*, 57 N. Y. App. Div. 135.

*North Carolina.* — *Martin v. Clark*, 135 N. Car. 178.

*Ohio.* — *State v. Craig*, 11 Ohio Cir. Dec. 557, 21 Ohio Cir. Ct. 180; *State v. Griggsby*, 8 Ohio Dec. 616, 6 Ohio N. P. 202; *Vindicator Printing Co. v. State*, 68 Ohio St. 362; *Jones v. Lucas County*, 57 Ohio St. 189, 63 Am. St. Rep. 710.

*Oklahoma.* — *Cooke v. Custer County*, 13 Okla. 111.

*South Carolina.* — *State v. Morris*, 67 S. Car. 153.

*Texas.* — *Knippa v. Stewart Iron Works*, (Tex. Civ. App. 1902) 66 S. W. Rep. 322.

*Utah.* — *Civic Federation v. Salt Lake County*, 22 Utah 6.

**Allowance Made by County Court.** — *Baker County v. Benson*, 40 Oregon 207.

**Claims Audited by Board of Auditors.** — *Morriston v. Kent*, 135 Mich. 38, 10 Detroit Leg. N. 678.

**Allowance Made by Temporary Board.** — *Speer v. Kearney County*, (C. C. A.) 88 Fed. Rep. 749.

**3. Time Within Which Presentment Must Be Made.** — *Colleton County v. Hampton County*, 52 S. Car. 589. See also *Nelson v. Merced County*, 122 Cal. 644.

**The Code of Georgia.** — See *Pearson v. Newton County*, 119 Ga. 863.

**Two Years** is the limitation in *Kansas*. *Herdman v. Woodson County*, 6 Kan. App. 513.

**4. Allowance of Claim Prima Facie Evidence Only Against County.** — *Sudbury v. Monroe County*, 157 Ind. 446; *Vindicator Printing Co. v. State*, 68 Ohio St. 362.

**Unauthorized Allowance.** — An allowance by the board of commissioners in excess of the amount as limited by statute does not bind the county. *State v. Monroe County Council*, 158 Ind. 102.

**Allowance Conclusively on Auditor.** — It is the duty of the county auditor to draw a warrant for the amount of a claim passed on and allowed by the board of county supervisors. *White v. Hayden*, 126 Cal. 621; *State v. Headlee*, 19 Wash. 477.

**Mandamus** will lie against the county treasurer to compel the payment of a claim allowed by the county commissioners. *State v. Adams*, 161 Mo. 349; *Martin v. Clark*, 135 N. Car. 178.

**960. 1. Right of Appeal by County.** — *St. Francis County v. Roleson*, 66 Ark. 139; *Wright v. Caskey*, 26 Ind. App. 520; *McCullom v. Shaw*, 21 Ind. App. 63. See also *Barnhill v. Woodard*, 26 Ind. App. 482.

**2. Rescission of Allowance by Board.** — *State v. Headlee*, 19 Wash. 477. See further the title COUNTY COMMISSIONERS, 1004. 2.

**In the Absence of Statute** a county board has authority to act upon a claim previously considered by it. *Myers v. Gibson*, 152 Ind. 500.

**Reconsideration After Rejection.** — Where no rights of third parties had intervened it was held in *Wyoming* that a county board had power, after rejecting a claim, to reverse its decision. *Appel v. State*, 9 Wyo. 187.

And in *Nebraska* it is held that a county board may, upon notice, reconsider its action upon a claim after disallowance. *Dean v. Saunders County*, 55 Neb. 759.

**4. Action to Recover Money Not Legally Chargeable.** — See the title COUNTY COMMISSIONERS, 1003. 1.

**961. 1. Recovery Back of Money Paid — Georgia.** — *Haralson County v. Golden*, 104 Ga. 19; *Bailey v. Fulton County*, 111 Ga. 313; *White v. Screven County*, 112 Ga. 802.

- 961.** Conclusiveness of Disallowance upon Claimant — Right of Appeal. — See note 2.  
**962.** Independent Right of Action. — See note 1.  
**963.** Remedy upon Refusal of Board to Audit. — See notes 1, 2.  
**964.** *c.* EXECUTION. — See notes 4, 7.

*Idaho.* — Fremont County *v.* Brandon, 6 Idaho 482.

*Indiana.* — Gross *v.* Whitley County, 158 Ind. 531; Sudbury *v.* Monroe County, 157 Ind. 446; Huntington County *v.* Buchanan, 21 Ind. App. 178.

*Kansas.* — Honey *v.* Jewell County, 65 Kan. 428. See also Rossel *v.* Greenwood County, 9 Kan. App. 638.

*Michigan.* — Wayne County *v.* Reynolds, 126 Mich. 231, 86 Am. St. Rep. 541.

*Nebraska.* — Mauer *v.* Gage County, (Neb. 1904) 100 N. W. Rep. 1026.

*North Dakota.* — Wiles *v.* McIntosh County, 10 N. Dak. 599, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 961.

*Ohio.* — Vindicator Printing Co. *v.* State, 68 Ohio St. 362; Richardson *v.* State, 66 Ohio St. 108; Higgins *v.* Logan County, 62 Ohio St. 621; Jones *v.* Lucas County, 57 Ohio St. 189, 63 Am. St. Rep. 710; State *v.* Griggsby, 8 Ohio Dec. 616, 6 Ohio N. P. 202. Compare Ottawa County *v.* Auditor, 5 Ohio Dec. 597, 7 Ohio N. P. 400.

*Wisconsin.* — Estell *v.* Knight, 117 Wis. 540; Land Log, etc., Co. *v.* McIntyre, 100 Wis. 245, 258, 69 Am. St. Rep. 915, 925.

**961. 2. Right of Appeal from Decision of Board** — *Indiana.* — Huntington County *v.* Beaver, 156 Ind. 450; Whisenand *v.* Belle, 154 Ind. 38; Myers *v.* Gibson, 152 Ind. 500. See also Sudbury *v.* Monroe County, 157 Ind. 446.

*Mississippi.* — Yandell *v.* Madison County, 79 Miss. 212; Young *v.* Leflore County, 81 Miss. 466; Marion County *v.* Woulard, 77 Miss. 343.

*Montana.* — Greeley *v.* Cascade County, 22 Mont. 580.

*Nebraska.* — Jarvis *v.* Chase County, 64 Neb. 74; Gage County *v.* George E. King Bridge Co., 58 Neb. 827.

*Ohio.* — Clinton County *v.* Martin, 65 Ohio St. 287; Ridenour *v.* State, 7 Ohio Cir. Dec. 481, 14 Ohio Cir. Ct. 393; State *v.* Griggsby, 8 Ohio Dec. 616, 6 Ohio N. P. 202; Stewart *v.* Logan County, 1 Ohio Cir. Dec. 404.

*Oklahoma.* — Monroe *v.* Beebe, 10 Okla. 581.

*Utah.* — Civic Federation *v.* Salt Lake County, 22 Utah 6.

*Wisconsin.* — Jones *v.* Washburn County, 106 Wis. 391.

See also Plymouth *v.* Grafton County, 68 N. H. 361.

**Where Part of a Claim Has Been Allowed,** the claimant cannot, under the *Idaho* and *Nebraska* statutes, accept and retain the part allowed and appeal as to that part not allowed. Clyne *v.* Bingham County, 7 Idaho 75; Dakota County *v.* Borowsky, (Neb. 1903) 93 N. W. Rep. 686.

**Where the Amount of the Allowance Is Fixed by Statute** acceptance of a partial allowance is not a waiver of the right to the remainder. Resner *v.* Carroll County, 126 Iowa 423.

**962. 1. Independent Right of Action upon Disallowance by Board** — *Indiana.* — Myers *v.* Gibson, 152 Ind. 500.

*Kentucky.* — Hudgins *v.* Carter County, 115 Ky. 133.

*Mississippi.* — Marion County *v.* Woulard, 77 Miss. 343; Young *v.* Leflore County, 81 Miss. 466.

*Montana.* — Greeley *v.* Cascade County, 22 Mont. 580, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 762.

*Nebraska.* — Ayres *v.* Thurston County, 63 Neb. 96.

*New York.* — Kennedy *v.* Queens County, 47 N. Y. App. Div. 250.

*Oregon.* — Wallowa County *v.* Oakes, (Oregon 1904) 78 Pac. Rep. 892.

See also Martin *v.* Clark, 135 N. Car. 178.

**New York.** — In Foy *v.* Westchester County, 168 N. Y. 180, it was held that the fact that an allowance made by the county board to a physician was not the full value of the services rendered does not entitle the physician to bring suit against the county.

**Where a Claimant Accepts Warrants** without protesting, whereby a part of his claim is disallowed, he may not thereafter bring action to recover the amount of his claim even though he subsequently made protest. La Plata County *v.* Morgan, 28 Colo. 322.

**963. 1. Action at Law upon Refusal of Board to Audit.** — Dunbar *v.* Canyon County, 6 Idaho 725; Kennedy *v.* Queens County, 47 N. Y. App. Div. 250; Wallowa County *v.* Oakes, (Oregon 1904) 78 Pac. Rep. 892.

**Where the County Board Had Held Eight Meetings** after the filing of a claim without taking action upon it, it was held that the owner of the claim might bring action thereon. Hinsdale County *v.* Crump, 18 Colo. App. 59.

**2. Remedy by Mandamus upon Refusal of Board to Audit.** — Chipman *v.* Wayne County Auditors, 127 Mich. 490, 8 Detroit Leg. N. 471; State *v.* Coufal, (Neb. 1901) 95 N. W. Rep. 362; Matter of Lanehart, 32 N. Y. App. Div. 4; People *v.* Livingston County, 89 N. Y. App. Div. 152; People *v.* Washington County, 66 N. Y. App. Div. 66; State *v.* Morris, 67 S. Car. 153; Civic Federation *v.* Salt Lake County, 22 Utah 6. See also Martin *v.* Clark, 135 N. Car. 178; Kennedy *v.* Queens County, 47 N. Y. App. Div. 250.

Mandamus will be to compel the board to act upon a claim, but not to make an allowance where there is discretion vested in the board in determining the amount. Robey *v.* Prince George's County, 92 Md. 150.

Mandamus will not lie where it does not appear that the board actually refused to act. People *v.* Cayuga County, (Supm. Ct. Spec. T.) 22 Misc. (N. Y.) 616.

**The Holder of Warrants** drawn against a county fund need not resort to an action at law. The proper remedy is mandamus to compel the levy of a tax and the payment of the claim. State Sav. Bank *v.* Davis, 22 Wash. 406.

**964. 4. No Execution Against Counties in Absence of Statute.** — See Buell *v.* Arnold, (Wis. 1905) 102 N. W. Rep. 338.

**965.** Reason of the Rule. — See note 1.

**966.** VIII. LEGISLATIVE CONTROL — 1. In General. — See notes 1, 2.

**967.** 2. Over Finances — *a.* COUNTY PROPERTY AND REVENUES — Diversion of Fund for Purpose Other than That Originally Designated — Property Derived from the State. — See note 3.

**969.** Transfer of Vested Property to Third Persons. — See note 1.

**970.** Release of Forfeiture or Penalty Imposed by Legislature for Benefit of County. — See note 1.

*b.* COUNTY INDEBTEDNESS — Inability of Legislature to Create Indebtedness to Third Person. — See note 5.

Power to Direct Payment of Just Claim. — See note 6.

Equitable Claims Invalid in Law. — See note 7.

**971.** Impairment of Obligation of Contracts. — See note 1.

**972.** 4. Validation of Void Acts. — See notes 4, 5.

The Montana Statute expressly provides that "no execution shall issue upon a judgment rendered against the county." *Greeley v. Cascade County*, 22 Mont. 580.

**964.** 7. *Monroe v. Crawford*, 9 Kan. App. 749.

**965.** 1. *Greeley v. Cascade County*, 22 Mont. 580.

**966.** 1. Legislative Control Over Counties Generally. — *Steele County v. Erskine*, 98 Fed. Rep. 215, 39 C. C. A. 173.

The legislature has authority to appoint a board, with authority to erect a county court house, and compel the county board of supervisors to issue bonds for the purpose of raising the money needed for the construction. *People v. Oneida County*, 170 N. Y. 105.

2. See *State v. Haywood County*, 122 N. Car. 812.

Legislative Power Subject to Constitutional Limitations. — *Zimmerman v. Brooks*, (Ky. 1904) 80 S. W. Rep. 443.

Precincts. — See *State v. Sawyer*, 139 Ala. 138.

**967.** 3. Under the Constitution of Utah the state is without power to dispose of county funds in a manner other than that for which they were collected under the authority of the county. *State v. Stanford*, 24 Utah 148.

**969.** 1. View that County Property Cannot Be Transferred to Third Persons. — See *Greene v. Niagara County*, 55 N. Y. App. Div. 475, affirmed 166 N. Y. 485.

**970.** 1. Release of Indebtedness to County. — Under the Constitution of Kentucky the general assembly has no power to release a liability

owing to a county. *Com. v. Tilton*, 111 Ky. 341.

5. Inability of Legislature to Create Indebtedness on Part of County. — *State v. Stanford*, 24 Utah 148. See also *Jones v. Madison County*, 135 N. Car. 218, 137 N. Car. 579.

Indebtedness Beyond Constitutional Limit. — The legislature cannot place a debt upon a county when the county is already indebted to the extent allowed by the Constitution. *Eaton v. Minnaugh*, 43 Oregon 465.

An Act Directing a County to Borrow Money for the purpose of building a court house is not unconstitutional. *People v. Oneida County*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 597, affirmed 68 N. Y. App. Div. 650.

6. Power of Legislature to Direct Payment of Just Claim. — *Worcester County v. Melvin*, 89 Md. 37; *Jones v. Madison County*, 137 N. Car. 579.

7. Direction to Pay Equitable Claims. — *New York L. Ins. Co. v. Cuyahoga County*, 106 Fed. Rep. 123, 45 C. C. A. 233.

**971.** 1. Impairment of Obligation of Contracts. — *Shinn v. Cunningham*, 120 Iowa 383. See also *New York L. Ins. Co. v. Cuyahoga County*, 106 Fed. Rep. 123, 45 C. C. A. 233.

**972.** 4. Validation by Legislature of Void County Acts. — *Carpenter v. Greene County*, 130 Ala. 613; *Givens v. Hillsborough County*, (Fla. 1903) 35 So. Rep. 88; *Potter v. Laihart*, 44 Fla. 647; *Witter v. Polk County*, 112 Iowa 380.

5. *Steele County v. Erskine*, 98 Fed. Rep. 215, 39 C. C. A. 173; *New York L. Ins. Co. v. Cuyahoga County*, 106 Fed. Rep. 123, 45 C. C. A. 233; *Daggett v. Lynch*, 18 Utah 49.



# COUNTY COMMISSIONERS.

By J. E. BRADY.

**975. I. DEFINITION** — Boards of County Commissioners. — See note 1.

**976.** See note 1.

Boards of Commissioners Are the General Public Agents. — See notes 2, 3.

**977.** See note 1.

**II. ELECTION AND TERM OF OFFICE.** — See note 3.

**978.** A Member of the Board Appointed to Fill a Vacancy Therein. — See note 3.

**979. III. MEETINGS OF THE BOARD — PROCEEDINGS AND RECORDS** — 1. General, Special, and Adjourned Meetings. — See note 1.

**975. 1. Quasi Corporations or Corporations.** — Prince George's County *v.* Mitchell, 97 Md. 330; Worcester County *v.* Melvin, 89 Md. 37. See also Duval County *v.* Charleston Lumber, etc., Co., (Fla. 1903) 33 So. Rep. 531; Jones *v.* Lucas County, 57 Ohio St. 189, 63 Am. St. Rep. 710.

**Perpetual Existence.** — A county board is a continuing body, and a change in its personnel has no effect upon a demand made before the change that the board bring an action for the recovery of certain claims. Bailey *v.* Strachan, 77 Minn. 526.

**976. 1. Are Administrative Officers.** — Hewitt's Appeal, 76 Conn. 685.

**County Boards Are Not Courts** within the meaning of the Nebraska Constitution. Sheibley *v.* Dixon County, 61 Neb. 409.

**2.** Appel *v.* State, 9 Wyo. 187; State *v.* Davis, 11 S. Dak. 111, 74 Am. St. Rep. 780.

**Chief Executive Agents of County.** — Corker *v.* Elmore County, (Idaho 1904) 77 Pac. Rep. 633.

**3. Powers Dependent on Statute** — *Idaho.* — Fremont County *v.* Brandon, 6 Idaho 482; Corker *v.* Elmore County, (Idaho 1904) 77 Pac. Rep. 633; Andrews *v.* Ada County, 7 Idaho 453. *Illinois.* — Dahnke *v.* People, 168 Ill. 102.

*Indiana.* — Wrought-Iron Bridge Co. *v.* Hendricks County, 19 Ind. App. 672; McCollom *v.* Shaw, 21 Ind. App. 63; State *v.* Trueblood, 25 Ind. App. 437; Meyers *v.* Gibson, 152 Ind. 500.

*Kansas.* — Felker *v.* Elk County, (Kan. 1904) 78 Pac. Rep. 167.

*Minnesota.* — Bazille *v.* Ramsey County, 71 Minn. 198.

*Montana.* — State *v.* Coad, 23 Mont. 131.

*Nevada.* — Office Specialty Mfg. Co. *v.* Washoe County, 24 Nev. 359.

*New York.* — Kingsley *v.* Bowman, 33 N. Y. App. Div. 1.

*North Dakota.* — Fox *v.* Jones, (N. Dak. 1905) 102 N. W. Rep. 161.

*Ohio.* — Jones *v.* Lucas County, 57 Ohio St. 189, 63 Am. St. Rep. 710; State *v.* Griggsby, 8 Ohio Dec. 616, 6 Ohio N. P. 202.

*South Dakota.* — State *v.* Davis, 11 S. Dak. 111, 74 Am. St. Rep. 780; Meek *v.* Meade County, 12 S. Dak. 166.

*Utah.* — Auerbach *v.* Salt Lake County, 23 Utah 103.

*Washington.* — Smith *v.* Lamping, 27 Wash. 624.

*Wisconsin.* — Putney Bros. Co. *v.* Milwaukee County, 108 Wis. 554; Endion Imp. Co. *v.* Evening Telegram Co., 104 Wis. 432; Washburn County *v.* Thompson, 99 Wis. 585; Northern Trust Co. *v.* Snyder, 113 Wis. 516, 90 Am. St. Rep. 867.

See also *infra*, this title, **987. 2.**, and see the title COUNTIES, **926. 3 et seq.**

**977. 1. Implied Powers.** — The county board is not confined in its actions to the powers expressly conferred, but may exercise those powers which may be fairly implied from the authority vested in it by legislature. People *v.* McIntyre, 154 N. Y. 628.

**3. For Holdings under the Provisions of Particular Statutes,** see People *v.* Long, 32 Colo. 486; Clayton *v.* Green, 61 N. J. L. 340; People *v.* Wende, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 330; State *v.* Brown, 60 Ohio St. 499; State *v.* Hadley, 59 Ohio St. 167; Stone *v.* Reynolds, 7 Okla. 397.

**Residence.** — The constitution of *Indiana* requires county officers to reside within the counties in which they hold office, and a county commissioner who moves away from the county thereby abandons his office. Relender *v.* State, 149 Ind. 283.

**County Redistricted.** — At the first election held after the number of commissioner districts in a county has been increased from three to five, an entire new board must, under statute in *Minnesota*, be elected. State *v.* Wilder, 75 Minn. 547.

**Appointment by Governor.** — The legislature may direct that the governor shall appoint the board of commissioners of a newly created county, though the constitution provides that county officers are to be elected by the people. Farquharson *v.* Yeargin, 24 Wash. 549.

**Control by Legislature.** — The term of office may be diminished or extended by the legislature. State *v.* Steele, 39 Oregon 419.

**978. 3. Filling Vacancy.** — In *Nebraska* a vacancy in the board of supervisors may be filled by the members of the board remaining. State *v.* West, 62 Neb. 461.

**979. 1. Meeting of Board Necessary for Official Action.** — But see Power *v.* May, 123 Cal. 147; Miller *v.* Smith, 7 Idaho 204; Castle *v.* Bannock County, 8 Idaho 124; McCollom *v.* Shaw, 21 Ind. App. 63; Modern Steel Structural Co. *v.* Van Buren County, 126 Iowa 606;

**979.** A Special Session of the Board. — See note 2.

**981.** Statutory Prescriptions as to the Manner of Holding Stated Meetings. — See note 5.

**982.** Presumption in Favor of Legality of Meeting. — See note 1.  
Adjournments. — See note 2.

**984.** 2. Record of Proceedings — Proof of Acts by Record — Effect of Failure to Record. — See note 2.

**985.** See notes 1, 2.

Signing the Record. — See note 3.

**986.** Amendment of Records. — See note 1.

3. Control of Proceedings — Rules. — See note 2.

IV. COMPENSATION. — See note 3.

*Williams v. Broadwater County*, 28 Mont. 360, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 979. See also *Wilson v. State*, 53 Neb. 113.

**979.** 2. Special Meetings — Notice. — *Knoxville v. Knoxville Water Co.*, 107 Tenn. 661, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 979; *State v. Headlee*, 19 Wash. 477.

**981.** 5. Quorum. — A Wisconsin statute enacts that "a majority of the supervisors entitled to a seat in the county board shall constitute a quorum for the transaction of business." *St. Emilianus Orphan Asylum v. Milwaukee County*, 107 Wis. 80.

**Place of Meeting.** — The Kentucky statute requiring supervisors to hold their meetings at the county seat is directory merely, and transactions at a meeting held in another place are valid. *Mossett v. Newport, etc., Bridge Co.*, 106 Ky. 518.

**Statutory Requirements.** — A statute which requires the county board to meet on certain designated days is not to be construed to mean that the board can meet at such times only. *Sayer v. Douglas County*, 119 Ga. 550.

**982.** 1. *Green v. Lancaster County*, 61 Neb. 473.

**2. Adjournments.** — *Butterfield v. Treichler*, 113 Iowa 328; *Douglas County v. Sommer*, 120 Wis. 424.

**984.** 2. Records as Evidence. — *Milburn v. Glynn County*, 109 Ga. 477, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 984. See also *Laramie County v. Stone*, 7 Wyo. 280.

**When Provable by Parol.** — The record is the best evidence, but in case there is no record proceedings of county boards may be proved by parol. *Duluth, etc., R. Co. v. Douglas County*, 103 Wis. 75; *Laramie County v. Stone*, 7 Wyo. 280.

**Publication of Proceedings.** — Statutes requiring the publication of proceedings of county boards are directory, and a failure to comply will not invalidate an act otherwise valid. *Wentworth v. Racine County*, 99 Wis. 26.

**985.** 1. Unrecorded Acts Held Valid. — *Milburn v. Glynn County*, 109 Ga. 477, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 985. See also *Fayette County v. Krause*, 31 Tex. Civ. App. 569.

**Publication of Ordinances.** — In *Utah* the statutory requirements as to the publication of ordinances are mandatory and must be strictly followed. Thus where the publication does not show which members voted for and against the ordinance, the ordinance is invalid. *Summit County v. Gustavson*, 18 Utah 351.

2. *Milburn v. Glynn County*, 109 Ga. 477,

citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 985; *Waggoner v. Wise County*, 17 Tex. Civ. App. 220; *Laramie County v. Stone*, 7 Wyo. 280.

**3. Signing Charges.** — Charges brought against a county officer by the board of commissioners in the name of the county need not be signed by the commissioners where such signing is not required by statute. *Showers v. Caddo County*, 14 Okla. 157.

**986.** 1. Power to Amend Records. — *Olympian Tribune Pub. Co. v. Byrne*, 28 Wash. 79, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 986.

By statute in *Nebraska* a board of county commissioners has power to correct errors in the assessment rolls, "within six months from the time the taxes would, if regularly assessed, have become delinquent." *Union Stock Yards Nat. Bank v. Thurston County*, 65 Neb. 408.

**2. Power to Adopt Rules.** — *La Salle County v. Hatheway*, 78 Ill. App. 95.

**3. Dependent on Statute** — *Arizona*. — *Reilly v. Cochise County*, 5 Ariz. 380.

*California*. — *Shepherd v. Keagle*, (Cal. 1898) 53 Pac. Rep. 702. See also *Davis v. Post*, 125 Cal. 210.

*Idaho*. — *Miller v. Smith*, 7 Idaho 204.

*Indiana*. — *McCollom v. Shaw*, 21 Ind. App. 63.

*Nebraska*. — *Otoe County v. Stroble*, (Neb. 1904) 98 N. W. Rep. 1065.

*Ohio*. — *Richardson v. State*, 66 Ohio St. 108; *State v. Richardson*, 9 Ohio Dec. 826; *Higgins v. Logan County*, 62 Ohio St. 621.

*Pennsylvania*. — *McKean County v. Young*, 11 Pa. Super. Ct. 481.

*Tennessee*. — *Hope v. Hamilton County*, 101 Tenn. 325.

*Virginia*. — *Johnson v. Black*, 103 Va. 477.

A county supervisor may bring an action to recover his salary from the county, and is not estopped by the fact that he accepted on account a smaller sum than the amount due. *Ellis v. Jefferds*, 130 Cal. 478.

**Extra Services.** — A member of a board of county supervisors cannot recover from the county for work performed while acting as a member of a committee appointed by the board, such services not being one of the duties of his office as supervisor and not being authorized by statute. *Irwin v. Yuba County*, 119 Cal. 686.

**Change of Salary.** — A county supervisor is not entitled to the benefit of an act passed subsequently to the beginning of his term changing the salaries of officers where the act provided that it should not apply to those then in office. *Tulare County v. Jefferds*, 118 Cal. 361.

**987. V. POWERS** — 1. General Statement. — See note 2.

**988. Ultra Vires Acts.** — See note 1.

Commissioners Not Liable as Individuals for Ultra Vires Acts. — See note 2.

Ratification of Unauthorized Acts. — See note 3.

2. Delegation of Powers. — See note 5.

**989. Limitations to Rule Against Delegation.** — See note 1.

3. Power to Contract — *a*. GENERAL DOCTRINE. — See note 2.

**County Commissioners Determining Their Own Salary.** — The county board cannot be vested with power under an act of legislature to fix the amount of the compensation of its members for service as such officers. *Stokey v. Nez Perces County*, 6 Idaho 542.

**Board and Lodging.** — Commissioners are not entitled to claim against their county for expenditures for board and lodging incurred while performing their official duties. *Richardson v. State*, 10 Ohio Cir. Dec. 458, 19 Ohio Cir. Ct. 191.

**987. 2.** See *State v. Hall*, 37 Oregon 479; *State Sav. Bank v. Davis*, 22 Wash. 406.

**The Board of Commissioners of a County Is a Creature of the Statute.** — See *supra*, this title, **976. 3**, **977. 1**.

**Changing Boundaries.** — The county board can alter the boundaries of commissioner districts only at the times designated by statute. *Van Den Bos v. Douglas County*, 11 S. Dak. 190.

**Divesting or Changing Powers.** — The legislature has authority to take from the county board any of the powers vested in it by statute. *Queens County v. Petry*, 54 N. Y. App. Div. 115; subject, of course, to the provisions of the constitution. *Prince George's County v. Mitchell*, 97 Md. 330.

**988. 1.** *Corker v. Elmore County*, (Idaho 1904) 77 Pac. Rep. 633.

**2.** *Detroit First Nat. Bank v. Becker County*, 81 Minn. 95; *Schieber v. Von Arx*, 87 Minn. 298.

**Contract.** — Commissioners are not personally liable on a contract made in their official capacity where it is not shown that they intended to bind themselves. *McKagen v. Windham*, 59 S. Car. 434.

**Negligence.** — County commissioners cannot be personally held liable for damages sustained from the negligence of a contractor employed by the board to construct a sewer. *Schnurr v. Huntington County*, 22 Ind. App. 188.

**Taking Lands for Highway Purposes.** — Commissioners have been held to be personally liable in *North Carolina* for unlawfully taking private property for a highway. *Hitch v. Edgecombe County*, 132 N. Car. 573.

**3. Power v. May**, 123 Cal. 147; *Appel v. State*, 9 Wyo. 187. See also *True v. Crow Wing County*, 83 Minn. 293.

**A Void Contract** cannot be ratified by the County Court. *Anderson v. Ripley County*, 181 Mo. 46.

**Unauthorized Contract.** — The board of supervisors has no power to ratify a contract which it had no authority to make in the first instance. *Smeltzer v. Miller*, 125 Cal. 41.

**5.** *Cass County v. Gibson*, 107 Fed. Rep. 363, 46 C. C. A. 341, quoting 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 988.

**The Power of Passing in Claims** cannot be

delegated by the county commissioners. *State v. Garland*, 134 N. Car. 749; *Heath v. Albrook*, 123 Iowa 559; *Wilson v. State*, 53 Neb. 113; *Bradford County v. Horton*, 6 Lack. Leg. N. (Pa.) 306; *Logan v. Stephens County*, (Tex. 1904) 83 S. W. Rep. 365.

**Auditing.** — Contracting with experts for the examination of county records, the work to be done being such as requires the assistance of experienced accountants, is not a delegation of an official power or duty of the county board. *Garrison v. Howard County*, 157 Ind. 103.

**989. 1. Ministerial Duties May Be Delegated.** — *Cass County v. Gibson*, 107 Fed. Rep. 369, 46 C. C. A. 341, quoting 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 988, 989; *Duluth, etc., R. Co. v. Douglas County*, 103 Wis. 75.

**Delegation of Power to Contract.** — See *Crawford County v. Walter*, 89 Ill. App. 7.

**2. Contracts — Arizona.** — *Santa Cruz County v. Barnes*, (Ariz. 1904) 76 Pac. Rep. 621.

**Colorado.** — *Dawson v. Woodhams*, 11 Colo. App. 394.

**Florida.** — *National Bank v. Duval County*, (Fla. 1903) 34 So. Rep. 894.

**Georgia.** — *Daniel v. Putnam County*, 113 Ga. 570; *Howard v. Early County*, 104 Ga. 669.

**Indiana.** — *McCollom v. Shaw*, 21 Ind. App. 63; *Hubler v. Cass County*, 19 Ind. App. 464. See also *Monroe County v. Galloway*, 17 Ind. App. 689.

**Kansas.** — *Felker v. Elk County*, (Kan. 1904) 78 Pac. Rep. 167.

**Minnesota.** — *Bazille v. Ramsey County*, 71 Minn. 198.

**Mississippi.** — *Monroe County v. Strong*, 78 Miss. 565.

**Missouri.** — *Anderson v. Ripley County*, 181 Mo. 46.

**Montana.** — *State v. Coad*, 23 Mont. 131.

**New York.** — *People v. Saratoga County*, 45 N. Y. App. Div. 42; *People v. St. Lawrence County*, 101 N. Y. App. Div. 327.

**Ohio.** — *Buchanan Bridge Co. v. Campbell*, 60 Ohio St. 406.

**South Dakota.** — *Meek v. Meade County*, 12 S. Dak. 166.

**Washington.** — *Smith v. Lamping*, 27 Wash. 624.

See also the title COUNTIES, **930. 1**.

**Illustrations.** — A board of commissioners has no power to bind the county by contract to maintain a court house upon a particular plot of land for all time. *Colburn v. El Paso County*, 15 Colo. App. 90.

A board of county commissioners has power to enter into a contract for the purpose of supplying the towns of the county with water. *Agua Pura Co. v. Las Vegas*, 10 N. Mex. 6.

A county board may make a valid contract for the examination of the county books. *Perry County v. Gardner*, 155 Ind. 165.



**990.** Contracts to Lowest Responsible Bidder. — See note 1.

Cannot Contract with Themselves. — See note 2.

**991.** Reward for Arrest of Criminal or Return of Property. — See note 1.

*b.* TO CREATE DEBTS AND BORROW MONEY. — See notes 3, 4, 5, 6.

**992.** *c.* EMPLOYMENT OF COUNSEL. — See note 1.

**Statutory Method to Be Followed.** — Where the method of entering into a contract by the commissioners is prescribed by statute a contract made not in accordance with the statutory requirements is void. *Scott v. Crow*, 121 Ga. 68.

**Contract Extending Beyond Board's Existence.** — It has been held that a valid contract by the board of supervisors for the performance of an administrative duty, such as the care of the roads, cannot be made for a term extending beyond its existence as a board. *Vacheron v. New York*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 420.

**Interference with Duties of County Officers.** — A contract between the county commissioners and a private individual which interferes with the duties of other county officers is void. *Burness v. Multnomah County*, 37 Oregon 460.

**Power to Release Contractor.** — A county board has no authority to relieve from his obligation a party with whom the county has contracted. *Corker v. Elmore County*, (Idaho 1904) 77 Pac. Rep. 633.

**990. 1. Contracts to Lowest Bidder — California.** — *Harris v. Cook*, 119 Cal. 454; *Swasey v. Shasta County*, 141 Cal. 392; *Smeltzer v. Miller*, 125 Cal. 41.

*Colorado.* — *Dawson v. Woodhams*, 11 Colo. App. 394.

*Georgia.* — *Dyer v. Erwin*, 106 Ga. 845; *Manly Bldg. Co. v. Newton*, 114 Ga. 245. See also *Scott v. Crow*, 121 Ga. 68.

*Idaho.* — *Andrews v. Ada County*, 7 Idaho 453.

*Iowa.* — *Vincent v. Ellis*, 116 Iowa 609.

*Montana.* — *State v. Coad*, 23 Mont. 131.

*Nebraska.* — *Woodruff v. Welton*, (Neb. 1904) 97 N. W. Rep. 1037.

*Nevada.* — *Office Specialty Mfg. Co. v. Washoe County*, 24 Nev. 359.

*New York.* — *Davenport v. Walker*, 57 N. Y. App. Div. 221. *Compare Kingsley v. Bowman*, 33 N. Y. App. Div. 1.

*North Dakota.* — *Tribune Printing, etc., Co. v. Barnes*, 7 N. Dak. 591.

*Ohio.* — *State v. Crawford County*, 9 Ohio Cir. Dec. 715, 17 Ohio Cir. Ct. 370; *Buchanan Bridge Co. v. Campbell*, 60 Ohio St. 406.

*Pennsylvania.* — *Com. v. Brown*, 25 Pa. Super. Ct. 269; *Bradford County v. Horton*, 6 Lack. Leg. N. (Pa.) 306.

*Wisconsin.* — *Mueller v. Eau Claire County*, 108 Wis. 304.

See also *Wright v. Caskey*, 26 Ind. App. 520; *Connors v. Stone*, 177 Mass. 424; *Curley v. Chosen Freeholders*, 66 N. J. L. 401. *Compare* *Barnard v. Sangamon County*, 190 Ill. 116. See further LOWER — LOWEST, **599**, 3, note; RESPONSIBLE BIDDER, **839**, 1; and the cross-references given under those definitions.

**In New Jersey** there is no law which requires the awarding of a contract to the person making the lowest bid. *Middle Valley Trap Rock, etc., Co. v. Chosen Freeholders*, 70 N. J. L. 625.

**Rescinding Contract.** — Where the county board

has let a contract to the lowest bidder as provided by statute it has no authority thereafter to rescind it. *Dawson v. Woodhams*, 11 Colo. App. 394.

**Rejecting All Bids.** — Commissioners, acting in good faith, may reject all bids received. *State v. Franklin County*, 1 Ohio Cir. Dec. 106

**2. Commissioners Cannot Contract with Themselves.** — *McCollom v. Shaw*, 21 Ind. App. 63; *Hope v. Hamilton County*, 101 Tenn. 325; *Nelson v. Harrison County*, 126 Iowa 436.

**Statutory Prohibition.** — *Knippa v. Stewart Iron Works*, (Tex. Civ. App. 1902) 66 S. W. Rep. 322; *Land, etc., Co. v. McIntyre*, 100 Wis. 245, 258, 69 Am. St. Rep. 915, 925.

**Modification of Rule.** — In *Michigan* it has been held that a county board may make a binding contract with one of its members to perform services which are not part of his duties and are not inconsistent therewith. *Hanna v. Chalker*, (Mich. 1904) 98 N. W. Rep. 732, 10 Detroit Leg. N. 958.

**991. 1. Felker v. Elk County, (Kan. 1904) 78 Pac. Rep. 167.**

**Reward for Missing Person.** — County boards have no power to bind the county by an offer to pay a reward to the individual locating a missing person. *Schieber v. Von Arx*, 87 Minn. 298.

**3. Borrowing Money.** — *Schuylkill County v. Snyder*, 20 Pa. Co. Ct. 649. See also *Strain v. Young*, 25 Wash. 578.

**Creating Debts.** — *Dyer v. Erwin*, 106 Ga. 845.

**4. Legislative Authority to Acquire Land** for a court-house site gives to the county board, incidentally, the power to create an indebtedness for the purpose of making the authorized purchase. *Witter v. Polk County*, 112 Iowa 380.

**Necessary Expense.** — Commissioners may incur indebtedness for necessary expenses without the express authority of the legislature. *Smathers v. Madison County*, 125 N. Car. 480.

**5. Pratt County v. Savings Soc.**, 90 Fed. Rep. 233, 61 U. S. App. 61.

**6. Submission to Popular Vote.** — Under statute in *Oklahoma* an indebtedness incurred for the purpose of building bridges is beyond the power of the county board unless authorized by a majority vote at a county election. *Theis v. Washita County*, 9 Okla. 643.

**992. 1. Employing Counsel — Arizona.** — *Santa Cruz County v. Barnes*, (Ariz. 1904) 76 Pac. Rep. 621.

*California.* — *Colusa County v. Welch*, 122 Cal. 428. See also *Power v. May*, 123 Cal. 147.

*Idaho.* — *Ponting v. Isaman*, 7 Idaho 581; *Anderson v. Shoshone County*, 6 Idaho 76.

*Iowa.* — *Bevington v. Woodbury County*, 107 Iowa 424.

*Kansas.* — *Freeman v. Wyandotte County*, 8 Kan. App. 72.

*Minnesota.* — *True v. Crow Wing County*, 83 Minn. 293. See also *Washington County v. Clapp*, 83 Minn. 512.

**993. d. EMPLOYMENT OF PHYSICIAN.** — See note 2.**4. Powers in Respect to Certain Specific Matters — a. AS TO OTHER COUNTY OFFICERS — Compensation.** — See note 3.

Appointment and Removal. — See note 4.

**994. Vacancy Cannot Be Created.** — See note 1.**995. b. AS TO COUNTY LANDS — Sale and Conveyance.** — See note 1.  
Purchase. — See note 3.

*Mississippi.* — *Warren County v. Booth*, 81 Miss. 267; *Warren County v. Dabney*, 81 Miss. 273.

*North Carolina.* — *Hancock v. Craven County*, 132 N. Car. 209.

*Ohio.* — *State v. Stafford*, 11 Ohio Dec. 720, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 992.

*Tennessee.* — *McHenderson v. Anderson County*, 105 Tenn. 591.

*Texas.* — *Presidio County v. Clarke*, (Tex. Civ. App. 1905) 85 S. W. Rep. 475.

*Wyoming.* — *Appel v. State*, 9 Wyo. 187.

See also *Hinsdale County v. Crump*, 18 Colo. App. 59; *Nickeus v. Lewis County*, 23 Wash. 125. And see the title COUNTIES, 929. 6, 7.

The board of commissioners has no authority to employ counsel to prosecute suits for the collection of license taxes. *Merced County v. Cook*, 120 Cal. 275.

**Where Provision Is Made by Statute** for counsel to represent the county it is held in *Oklahoma* that a contract by the board of commissioners for the employment of an attorney is *ultra vires*. *Logan County v. Jones*, 4 Okla. 341.

**Temporary Board.** — See *Speer v. Kearney County*, (C. C. A.) 88 Fed. Rep. 749.

**Where the County Is Not a Party** to a suit the county board is without power to contract for attorney's services in that suit. *Williams v. Broadwater County*, 28 Mont. 360.

**993. 2. Physician.** — *Miller v. Weld County*, 17 Colo. App. 120; *Monroe County v. Galloway*, 17 Ind. App. 689. See also *Prowers County v. Bedell*, 13 Colo. App. 261; *Steiner v. Polk County*, 40 Oregon 124.

**3. Powers as to Compensation of Other County Officers — Arizona.** — *Avery v. Pinia County*, (Ariz. 1900) 60 Pac. Rep. 702.

*California.* — *Agard v. Shaffer*, 141 Cal. 725.

*Idaho.* — *Fremont County v. Brandon*, 6 Idaho 482.

*Indiana.* — *Gross v. Whitley County*, 158 Ind. 531; *State v. Windle*, 156 Ind. 648.

*Kansas.* — *Naylor v. Gray County*, 8 Kan. App. 761.

*Kentucky.* — *Jefferson County v. Waters*, 114 Ky. 48.

*Michigan.* — *People v. Reigel*, 120 Mich. 78.

*Nebraska.* — *Hayes County v. Christner*, 61 Neb. 272; *Mitchell v. Clay County*, (Neb. 1903) 96 N. W. Rep. 673; *Mauer v. Gage County*, (Neb. 1904) 100 N. W. Rep. 1026.

*Ohio.* — *Jones v. Lucas County*, 57 Ohio St. 180.

*Washington.* — *Chehalis County v. Hutcheson*, 21 Wash. 82, 75 Am. St. Rep. 818.

*Wisconsin.* — *Northern Trust Co. v. Snyder*, 113 Wis. 516, 90 Am. St. Rep. 867.

See also *Grant County v. McKinley*, 8 Okla. 128; *Hadlock v. G County*, 5 Okla. 579.

By statute in *Indiana* the board of county commissioners has power to fix the salaries of township assessors and to change such salaries as it sees fit. *Allen County v. Chapman*, 22 Ind. App. 60.

**4. Irwin v. Yuba County**, 119 Cal. 686; *Turner v. Fulton County*, 109 Ga. 633; *Vanderbach v. Chosen Freeholders*, 65 N. J. L. 522; *Brower v. Kantner*, 190 Pa. St. 182.

**Clerk.** — The county board cannot, in the absence of statute, appoint a clerk, and allow to him a salary out of county funds. *White v. Screven County*, 112 Ga. 802.

**Power over Sheriff.** — County commissioners cannot increase or limit the authority of the sheriff. *Graham v. Schuylkill County*, 16 Pa. Super. Ct. 180.

**Appointment of Tax Collector.** — An ordinance of the board of supervisors which appoints a tax collector is void, such power of appointment being vested in the legislature. *San Luis Obispo County v. Greenberg*, 120 Cal. 300.

**A Justice of the Peace in Texas** holds office subject to the right of the Commissioners' Court to diminish the extent of his jurisdiction by a change of boundary though his compensation is thereby decreased. *State v. Rigby*, 17 Tex. Civ. App. 171.

**994. 1. County Board Cannot Create New Offices.** — See *Irwin v. Yuba County*, 119 Cal. 686.

**995. 1. Selling County Lands.** — *Hunnicut v. Atlanta*, 104 Ga. 1; *State v. McConnaughey*, 33 Wash. 571. See also *Waggoner v. Wise County*, 17 Tex. Civ. App. 220.

**Sale of School Lands.** — A conveyance by the county board of school lands in payment for services is invalid where the constitution provides that the proceeds of such sales shall be invested for the benefit of the public schools. *Dallas County v. Club Land, etc., Co.*, 95 Tex. 200.

**Personal Property of County.** — Under the *Iowa* code the county board is empowered to sell the personal property of the county not needed by the county. *Nelson v. Harrison County*, 126 Iowa 436.

**3. Power to Purchase Land.** — *Colburn v. El Paso County*, 15 Colo. App. 90; *Ball v. Bannock County*, 5 Idaho 602; *Norfolk County v. Cox*, 98 Va. 270.

**A Conveyance to a County for a Purpose Not Authorized** by statute, for instance, for donation to a city, is void. *Bazille v. Ramsey County*, 71 Minn. 198.

**Power to Lease.** — County commissioners have power to lease property to be used as a court house for a reasonable time, but not for an unreasonable period, and to pay rent as it falls due, but not in advance. *Webster v. Haskell County*, 7 Kan. App. 764.

**996. c. AS TO ERECTION AND MANAGEMENT OF COUNTY BUILDINGS.**

— See note 1.

**998. d. AS TO BRIDGES AND HIGHWAYS — Bridges. — See note 1.****999. Highways. — See note 1.****1000. See note 1.****1001. e. AS TO COUNTY PRINTING. — See note 1.**

**996. 1. Powers as to Public Buildings —** *United States.* — Price *v.* Chosen Freeholders, (C. C. A.) 96 Fed. Rep. 174.

*Alabama.* — Matkin *v.* Marengo County, 137 Ala. 155, quoting 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 996.

*Georgia.* — Carruth *v.* Wagener, 114 Ga. 740; Allen *v.* Lytle, 114 Ga. 275; Habersham County *v.* Porter Mfg. Co., 103 Ga. 613.

*Illinois.* — Hardin *v.* Sangamon County, 71 Ill. App. 103.

*Iowa.* — Zerwelch *v.* Thornburg, 123 Iowa 354.

*Maryland.* — B. F. Smith Fire Proof Constr. Co. *v.* Munroe, 97 Md. 370.

*Washington.* — Farquharson *v.* Yeargin, 24 Wash. 549. See also Strain *v.* Young, 25 Wash. 578.

*West Virginia.* — Hanley *v.* Randolph County Ct., 50 W. Va. 439.

See also State *v.* Ottawa County, 7 Ohio Dec. 34, 5 Ohio N. P. 260; Knippa *v.* Stewart Iron Works, (Tex. Civ. App. 1902) 66 S. W. Rep. 322. And see the title COUNTIES, **937. 8 et seq.**

**Insurance.** — See Barnhill *v.* Woodard, 26 Ind. App. 482.

**Care of Court-room.** — See Dahnke *v.* People, 168 Ill. 102, affirming 57 Ill. App. 619, stated in the original note.

In *Illinois* the management of the court house is intrusted to the sheriff, and he has the power to employ a janitor for that building. McDonough County *v.* Thomas, 84 Ill. App. 408; Edgar County *v.* Middleton, 86 Ill. App. 502.

**Erection of Court House.** — Commissioners have power to contract for the construction of a court house without special legislative authority. Black *v.* Buncombe County, 129 N. Car. 121.

But commissioners may be specially appointed by the legislature for the erection of a court house, though the county board is thereby deprived of its rights as to such buildings. People *v.* Oneida County, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 597, affirmed 68 N. Y. App. Div. 650, 170 N. Y. 105.

And in carrying out the directions of the legislature in erecting a court house county commissioners act under the laws of the state, and not as agents of the county. Morse *v.* Norfolk County, 170 Mass. 555.

**Elevator.** — The power to repair public buildings authorizes the fiscal court to have an elevator placed in the county court house. Simons *v.* Gregory, (Ky. 1905) 85 S. W. Rep. 751.

**Sidewalks.** — A statute placing upon the commissioners the duty of keeping county buildings in repair does not apply to sidewalks in front of the court house. Bucher *v.* Northumberland County, 209 Pa. St. 618.

**Leasing Buildings.** — A County Court judge has no power to lease county buildings for storage purposes. Franklin County *v.* Gills, 96 Va. 330.

**County Commissioners Have Authority to Rent a Building** for use as a court house under the statutes of *Kansas*. Williams *v.* Kearny County, 61 Kan. 708.

**Discretion as to Fireproof Qualities of Building.** — Under the *Virginia* statute requiring boards of supervisors to provide fireproof offices for county clerks, mandamus will not lie to compel the erection of a new building where in the opinion of the board the existing building is fireproof. Broadus *v.* Essex County, 99 Va. 370.

**Statute to Be Followed.** — In the construction of county buildings the commissioners must proceed in accordance with the requirements of statute. Mahon *v.* Luzerne County, 197 Pa. St. 1.

**998. 1. Discretion of Commissioners as to Erection of Bridges.** — Morris *v.* Bell County, (Ky. 1899) 50 S. W. Rep. 531; Ferguson *v.* Chosen Freeholders, 60 N. J. L. 404. See also Bayne *v.* Wright County, 90 Minn. 1; Markey *v.* Queens County, 154 N. Y. 675; McPeeters *v.* Blankenship, 123 N. Car. 651; Greenleaf *v.* Pasquotank County, 123 N. Car. 30.

**Powers as to Bridges Dependent on Statute.** — Pittsburg, etc., R. Co. *v.* Lawrence County, 198 Pa. St. 1.

**The Duty of Keeping Bridges in Repair** rests upon the county commissioners. Hardin County *v.* Coffman, 10 Ohio Cir. Dec. 91, 18 Ohio Cir. Ct. 254.

**999. 1. Roads and Highways.** — Fuselier *v.* Police Jury, 109 La. 551; Cumberland Valley R. Co. *v.* Martin, (Md. 1905) 59 Atl. Rep. 714; Meek *v.* Meade County, 12 S. Dak. 166, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 999. See also Jenkins *v.* Riggs, (Md. 1905) 59 Atl. Rep. 758; State *v.* Newland, 37 Wash. 428.

**Incidental Power.** — Authority to establish highways does not carry with it as an incidental power the authority to construct bridges. Wrought Iron Bridge Co. *v.* Hendricks County, 19 Ind. App. 672.

**Constructing Street Railway.** — The county board has authority to authorize the construction of a street railway along a public highway. Trotter *v.* St. Louis, etc., R. Co., 180 Ill. 471.

**Collateral Attack.** — The act of the county commissioners in establishing a highway is not open to collateral attack. Phillips *v.* Hutchinson, (Ind. App. 1905) 73 N. E. Rep. 159.

**1000. 1. Deitrich *v.* Parke County, 28 Ind. App. 83; Cumberland Valley R. Co. *v.* Martin, (Md. 1905) 59 Atl. Rep. 714; Meek *v.* Meade County, 12 S. Dak. 166.**

**Illustration — Taking Bond.** — Where the county commissioners in contracting for the construction of a county road failed to take a bond from the contractor as required by statute, the county is liable for the cost to the laborers and materialmen. Rounds *v.* Whatcom County, 22 Wash. 106.

**1001. 1. Printing.** — Santa Cruz County *v.*



**1001.** *f.* AS TO MANAGEMENT OF COUNTY FUNDS. — See note 2.

**1002.** *h.* AS TO OFFICIAL BONDS. — See note 2.

*i.* AS TO CONTROL OF LIQUOR LICENSES. — See note 3.

**1003.** *j.* AS TO AUDIT AND ALLOWANCE OF CLAIMS — **Acts Are Judicial.** — See note 1. See also generally the title COUNTIES, **957.** 8 *et seq.*

**1004.** Authority Depends on Statute. — See note 1.

McPherson, 133 Cal. 282; Olympian Tribune Pub. Co. v. Byrne, 28 Wash. 79. See also Piatt County v. Republican Printing Co., 99 Ill. App. 411; Honey v. Jewell County, 65 Kan. 428.

**Stationery.** — See Barnard v. Sangamon County, 190 Ill. 116.

**County Printing Not to Be Done Out of State.** — Under the statute of *North Dakota* providing that county printing shall be done within the state, county commissioners cannot be compelled to let a printing contract to a party contemplating doing the work outside of the state. Tribune Printing, etc., Co. v. Barnes, 7 N. Dak. 591.

**1001. 2. Management of County Funds.** — See Board of Roads and Revenue v. Clark, 117 Gal. 288; Cook County v. Hartney, 169 Ill. 566; Garrigus v. Howard County, 157 Ind. 103; Lancaster County v. Green, 54 Neb. 98; Queens County v. Phipps, 35 N. Y. App. Div. 350; Jones v. Lucas County, 57 Ohio St. 189, 63 Am. St. Rep. 710; Brown County v. Jenkins, 11 S. Dak. 330; Hoexter v. Judson, 21 Wash. 646.

**Issuing County Bonds.** — Potter v. Lainhart, 44 Fla. 647; Hillsborough County v. Henderson, (Fla. 1903) 33 So. Rep. 997. See also B. F. Smith Fire Proof Constr. Co. v. Munroe, 97 Md. 370.

An issue of bonds will not be restrained where the commissioners are not shown to have acted in abuse of their discretion. Synder v. Kantner, 190 Pa. St. 440.

**The Purposes Designated by the Constitution,** where there is such a designation, are, of course, the limitation of the commissioners' discretion. School Directors v. Forsyth County, 127 N. Car. 263.

**Money Raised by a Levy for Particular Purposes** cannot be transferred by the county board to a general fund. Bacon v. Dawes County, 66 Neb. 191.

**Designating Bank.** — A board of commissioners does not possess authority to designate a particular bank as a preferred depository of funds. State v. Whipple, 60 Neb. 650.

**The County Is Liable for a Diversion** of county funds by the county commissioners. State Sav. Bank v. Davis, 22 Wash. 406.

**1002. 2. Approving Bonds.** — A board of county commissioners may not approve official bonds unless the sureties possess the statutory qualifications. Miller v. Smith, 7 Idaho 204.

**3. License to Sell Intoxicating Liquors.** — "In granting or refusing a license the commissioners act upon all the information they may obtain, including the personal knowledge and personal investigation of each." Hewitt's Appeal, 76 Conn. 685.

**1003. 1. Allowance and Disallowance of Claims — California.** — Santa Cruz County v. McPherson, 133 Cal. 282.

*Colorado.* — Otero County v. Wood, 11 Colo.

App. 19; Rio Grande County v. Lewis, 28 Colo. 378.

*Minnesota.* — State v. District Ct., 90 Minn. 464, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1003.

*Nebraska.* — Cedar County v. McKinney Loan, etc., Co., (Neb. 1901) 95 N. W. Rep. 605; Trites v. Hitchcock County, 53 Neb. 79; Taylor v. Davey, 55 Neb. 153. See also Bacon v. Dawes County, 66 Neb. 191.

*New Hampshire.* — Plymouth v. Grafton County, 68 N. H. 361.

*New York.* — Foy v. Westchester County, 168 N. Y. 180; People v. Jefferson County, 35 N. Y. App. Div. 239; Matter of Lanehart, 32 N. Y. App. Div. 4; Staten Island Bank v. New York, 68 N. Y. App. Div. 231, affirmed 174 N. Y. 519; People v. Westchester County, 57 N. Y. App. Div. 135. See also Kennedy v. Queens County, 47 N. Y. App. Div. 250.

*North Carolina.* — Martin v. Clark, 135 N. Car. 178.

*Ohio.* — State v. Griggsby, 8 Ohio Dec. 616, 6 Ohio N. P. 202.

*Texas.* — School Trustees v. Farmer, 23 Tex. Civ. App. 39, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1003.

*Washington.* — State v. Headlee, 19 Wash. 477.

**Accounts Not Legally Chargeable.** — Huntington County v. Buchanan, 21 Ind. App. 178; Sudbury v. Monroe County, 157 Ind. 446; Gross v. Whitley County, 158 Ind. 531; Wayne County v. Reynolds, 126 Mich. 231; People v. Saratoga County, 45 N. Y. App. Div. 42; Higgins v. Logan County, 62 Ohio St. 621; Jones v. Lucas County, 57 Ohio St. 189, 63 Am. St. Rep. 710; School Trustees v. Farmer, 23 Tex. Civ. App. 39, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1003. See also Fremont County v. Brandon, 6 Idaho 482; Honey v. Jewell County, 65 Kan. 428. And see the title COUNTIES, **960.** 4.

**1004. 1. Authority Depends on Statute — California.** — Irwin v. Yuba County, 119 Cal. 866.

*Georgia.* — Howard v. Early County, 104 Ga. 669.

*Indiana.* — State v. Monroe County Council, 158 Ind. 102; Sudbury v. Monroe County, 157 Ind. 446.

*Montana.* — Independent Pub. Co. v. Lewis & Clarke County, 30 Mont. 83.

*New York.* — Matter of White, 51 N. Y. App. Div. 175; People v. Saratoga County, 45 N. Y. App. Div. 42.

*Ohio.* — Vindicator Printing Co. v. State, 68 Ohio St. 362; Jones v. Lucas County, 57 Ohio St. 189.

*Oklahoma.* — Cooke v. Custer County, 13 Okla. 11.

*Wisconsin.* — Endion Imp. Co. v. Evening Telegram Co., 104 Wis. 432; Northern Trust Co. v. Snyder, 113 Wis. 516, 90 Am. St. Rep. 867.

See also Lake County v. Glynn, 19 Colo. App. 233; Fremont County v. Brandon, 6 Idaho 482.

**1004.** Re-examination and Rejection. — See note 2.

**1005.** Rejection of Claim. — See note 1.

When Board Has No Discretion as to Amount of Allowance. — See note 2.

**1006.** When Amount of Allowance Discretionary. — See note 1.

Method of Hearing Claims. — See note 2.

**1007.** Allowance for Voluntary Services. — See note 1.

**VI. RESCISSION AND REVIEW OF OFFICIAL ACTS. — 1. Character of Official Acts Distinguished — A Ministerial Act. — See note 4.**

A Judicial Act. — See note 5.

**1008.** 2. Reconsidering and Rescinding of Official Action. — See notes 2, 3.

**1009.** See note 2.

**3. Review of Official Acts by Courts — Where Act Involved Discretion. — See notes 5, 6. See also the title COUNTIES, 960, 1, 961, 2.**

Judicial Action Cannot Be Attacked Collaterally. — See note 7.

Review by Certiorari and Other Extraordinary Processes. — See note 8.

**Void Claim.** — County boards have no authority to settle a claim against the county which is absolutely void. *Quayle v. Bayfield County*, 114 Wis. 108.

**Refunding Taxes.** — A county board has no authority to refund taxes which have been paid. *Howell v. Ada County*, 6 Idaho 154.

**If the Board Exceeds Its Authority** in allowing a claim a warrant therefor should be refused. *Walton v. McPhetridge*, 120 Cal. 440.

**1004. 2. Re-examining and Reversing Allowance.** — *Myers v. Gibson*, 152 Ind. 500. See also *Floyd County v. Scott*, 19 Ind. App. 227. Compare *People v. Delaware County*, 48 N. Y. App. Div. 428; *Adams v. Wheatfield*, 46 N. Y. App. Div. 466. And see the title COUNTIES, 960, 2, 3.

**1005. 1. Cutting Down Amount of Claim.** — The board of supervisors may not arbitrarily cut down the gross amount of a claim without passing on the different items separately. *People v. Westchester County*, 83 N. Y. App. Div. 51.

**Itemized Claim.** — Where a claim is itemized the county board should pass upon each item, and an allowance in gross for less than the amount claimed is improper. *People v. Westchester County*, 57 N. Y. App. Div. 135. But certain items of a like character may be disallowed as a group without reference to each particular item. *People v. Saratoga County*, 45 N. Y. App. Div. 42.

**2. Hubler v. Cass County**, 19 Ind. App. 464; *Resner v. Carroll County*, 126 Iowa 423; *Mitchell v. Clay County*, (Neb. 1903) 96 N. W. Rep. 673; *Chase County v. Kelley*, (Neb. 1903) 95 N. W. Rep. 865; *Crouch v. Pyle*, (Neb. 1903) 96 N. W. Rep. 1049; *Wallowa County v. Oakes*, (Oregon 1904) 78 Pac. Rep. 892.

**1006. 1. Allowance Discretionary.** — *Robey v. Prince George County*, 92 Md. 150; *Matter of Lanehart*, 32 N. Y. App. Div. 4; *People v. Westchester County*, 57 N. Y. App. Div. 135.

**2. Method of Hearing Claims.** — See *People v. Saratoga County*, 45 N. Y. App. Div. 42.

**1007. 1. Beneficial Services.** — A claim against a county for services rendered cannot be predicated upon the ground alone that such services were beneficial. *Irwin v. Yuba County*, 119 Cal. 686.

**4. Ministerial Act.** — *State v. McMillan*, 52 S. Car. 60. See *Territory v. Neville*, 10 Okla. 79.

**5. Judicial Act.** — See *Territory v. Neville*, 10 Okla. 79.

**1008. 2. Cannot Reconsider Judicial Acts.** — *Keenan v. Harkins*, 82 Miss. 710, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1008. See *Myers v. Gibson*, 152 Ind. 500; *Floyd County v. Scott*, 19 Ind. App. 227. But see *Dean v. Saunders County*, 55 Neb. 759; *People v. Delaware County*, 48 N. Y. App. Div. 428; *State v. Headlee*, 19 Wash. 477; *Appel v. State*, 9 Wyo. 187.

**3. On Appeal** the county board may agree that judgment be entered against it in a claim which it had previously disallowed, and such an agreement does not amount to an unauthorized allowance of a rejected claim. *Floyd County v. Scott*, 19 Ind. App. 227.

**1009. 2. A Resolution May Be Reconsidered** by the county board at any time before the rights of third persons have vested. *Appel v. State*, 9 Wyo. 187.

**5. Determination Final.** — *Otero County v. Wood*, 11 Colo. App. 19; *Rio Grande County v. Lewis*, 28 Colo. 378; *Yuma County v. Pendleton*, 17 Colo. App. 159; *Matter of Lanehart*, 32 N. Y. App. Div. 4; *State v. Headlee*, 19 Wash. 477.

**6. Rio Grande County v. Lewis**, 28 Colo. 378; *Matter of Lanehart*, 32 N. Y. App. Div. 4. See also *State v. Headlee*, 19 Wash. 477.

**7. Judgment Conclusive Against Collateral Attack.** — *Staten Island Bank v. New York*, 68 N. Y. App. Div. 231; *People v. Westchester County*, 57 N. Y. App. Div. 135; *School Trustees v. Farmer*, 23 Tex. Civ. App. 39, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1009. See *San Mateo County v. Coburn*, 130 Cal. 631.

**Void Order.** — Where a board of county commissioners allows compensation to an officer not by law entitled thereto, the order making such allowance is void and open to collateral attack. *Fremont County v. Brandon*, 6 Idaho 482.

**8. Indiana — When Appeal Lies.** — *Huntington County v. Beaver*, 156 Ind. 450; *Wright v. Caskey*, 26 Ind. App. 520; *Myers v. Gibson*, 152 Ind. 500.

A county board may take out insurance on county buildings, and, in so doing, acts ministerially. Where, in connection with insuring the buildings, the board makes an allowance of premiums due no appeal lies on the part of the county. *Barnhill v. Woodard*, 26 Ind. App. 482.

**Appeal Vacates Decision of Board.** — A decision of the county board upon a matter before it is vacated and rendered of no effect upon an appeal therefrom. *State v. Burgett*, (Ind. 1898) 49 N. E. Rep. 884.

## COUNTY-SEAT.

By J. E. BRADY.

**1012. I. DEFINITION AND NATURE.** — See note 1.

**1013.** See note 1.

Not Necessarily Coextensive with Town Where Located. — See note 2.

**II. LOCATION** — 1. Power to Locate. — See note 3.

**1014. 2. Where County-seat May Be Located** — *b.* CHOICE NOT LIMITED TO EXISTING MUNICIPALITIES. — See note 6.

**1015. c.** NO PARTICULAR PLACE WITHIN SETTLEMENT CHOSEN NEED BE NAMED. — See note 2.

**1016. 4. Permanent Location** — *a.* THERE CAN BE BUT ONE PERMANENT LOCATION. — See note 5.

**1017. b.** NUMBER OF VOTES NECESSARY TO LOCATE. — See note 1.

In Texas. — See note 2.

**1019. III. REMOVAL** — 1. Power to Remove — *a.* PRIMARILY VESTED IN LEGISLATURE. — See note 4.

**1020. How Power May Be Exercised.** — See note 2.

*b.* NECESSITY FOR CONSENT OF ELECTORS — CONSTITUTIONAL PROVISIONS. — See note 3.

**1021. Requirement that Voters Consent to Removal Cannot Be Evaded.** — See note 1.

**1022. d.** LIMITATION OF POWER. — See note 4.

**1012. 1. Seat of Government.** — *Matkin v. Marengo County*, 137 Ala. 155.

**1013. 1. Place Where County Business Is Transacted.** — "The 'county-seat' is the place properly designated for the doing of the business of the county; the place at which public buildings are to be erected, where the courts are held and the county offices are located." *Way v. Fox*, 109 Iowa 340.

**County-seat Does Not Mean County Buildings or Land Whereon They Are Situated.** — *Matkin v. Marengo County*, 137 Ala. 155; *Way v. Fox*, 109 Iowa 340.

**County Offices.** — The law impliedly obligates county officers to maintain their office at the county-seat so far as possible. *State v. Porter*, 15 S. Dak. 387.

**2. Not Necessarily Coextensive with Town Where Located.** — *Marengo County v. Matkin*, 134 Ala. 278, quoting 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1013; *Way v. Fox*, 109 Iowa 340.

**3. Power Resides in Legislature.** — *Allen v. Reed*, 10 Okla. 105. See also *Marengo County v. Matkin*, 134 Ala. 278.

**1014. 6. Not Limited to Existing Towns.** — *Compare Allen v. Reed*, 10 Okla. 105.

**1015. 2. Site Anywhere Within Municipal Limits May Be Designated.** — *Way v. Fox*, 109 Iowa 340.

**1016. 5. There Can Be But One Permanent Location.** — *Mitchell v. Lasseter*, 114 Ga. 275.

**1017. 1. Votes Necessary to a Choice.** — *Compare Adkins v. Lien*, 10 S. Dak. 436.

**2. Texas Rule.** — *Presidio County v. Jeff Davis County*, (Tex. Civ. App. 1903) 77 S. W. Rep. 278.

**1019. 4. Legislature Has Power to Remove in Absence of Constitutional Restrictions.** — *State v. Crook*, 126 Ala. 600, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1019; *Eagle County v. People*, 26 Colo. 297; *Swartz v. Lake County*, 158 Ind. 141; *Allen v. Reed*, 10 Okla. 105.

**County Officers Have No Authority to Remove.** — *State v. Porter*, 15 S. Dak. 387.

**Seat of Justice of Judicial District.** — The legislature has the power to remove the "seat of justice" of a judicial district, and the constitutional provisions in regard to county-seats do not apply. *Hinton v. Perry County*, 84 Miss. 536.

**1020. 2. Removal May Be Made Dependent upon Any Contingency.** — *State v. Crook*, 126 Ala. 600, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1020, and supporting the whole text paragraph.

**3. Electors Must Consent to Removal — Constitutions.** — *Marengo County v. Matkin*, 134 Ala. 278; *Eagle County v. People*, 26 Colo. 297; *Wells v. Ragsdale*, 102 Ga. 53; *Wilson v. Bartlett*, 7 Idaho 271.

**1021. 1. Requirement that Voters Consent Cannot Be Evaded.** — A town cannot, by extending its limits so as to take in the village where the county-seat is located, effect a removal of the county-seat without the vote of the electors. *Way v. Fox*, 109 Iowa 340.

**1022. 4. Limitation of Power of Removal.** — *Laws S. Dak.* 1890, c. 64, forbidding the resubmission of the question within four years, is not in conflict with *Const. S. Dak.*, art. 9, § 2, providing for the resubmission of the question to the electors of the county. *State v. Porter*, 13 S. Dak. 126.



**1024. 2. Imposition of Conditions — b. COMPLIANCE WITH CONDITIONS** — See note 1.

**1025. 3. When Question of Removal May Be Considered — a. RECONSIDERATION OF QUESTION PROHIBITED FOR SPECIFIED TIME.** — See note 3.

**4. Petition for Removal — a. NOTICE OF INTENTION TO CIRCULATE.** — See note 9.

**1026. b. FORM AND CONTENTS — (1) Need Not Aver All Facts Necessary to Authorize Removal.** — See note 1.

**(4) Residences of Petitioners — Dates of Signatures — In Nebraska.** — See note 5.

**c. NUMBER OF SIGNATURES.** — See note 7.

**1028. d. WITHDRAWAL OF NAMES.** — See note 2.

**1029. 5. Remonstrance.** — See notes 3, 5.

**1030. 6. Proceedings on Petition — a. NOTICE — Notice of County Commissioners' Meeting to Consider Petition.** — See note 1.

**1031. c. WHERE MORE THAN ONE PETITION — (1) In General.** — See notes 2, 3.

**1032. (2) Transferring Signatures.** — See note 2.

**f. OPPOSITION TO PETITION.** — See note 4.

**1024. 1. Conditions Must Be Complied with.** — The county board has no power to order the removal of the county-seat before the constitutional provisions, which are in the nature of conditions precedent, are complied with. *Simpson County v. Buckley*, 85 Miss. 713.

**Must Follow Statutory Provisions.** — In *Iowa* a board of supervisors has no power to relocate the county-seat without following the express provisions of Code Iowa, §§ 394-409. *Way v. Fox*, 109 Iowa 340.

**1025. 3. Where No Place Received a Majority of All the Votes** cast, it was held that a resubmission of the question within four years was invalid. *State v. Porter*, 13 S. Dak. 126.

**An Invalid Election** has been held in *Minnesota* not to prohibit resubmission of the question within the statutory period of inhibition. *Gile v. Stegner*, 92 Minn. 429.

**9. Sufficient Notice.** — Under Stat. Minn. (1894), § 647, a publication in one newspaper in the county is sufficient. *Foss v. Roseau County*, 93 Minn. 238.

**1026. 1. Affidavits.** — Under the *Minnesota* statute requiring that the affidavits of two of the signers thereof be attached to the petition, it has been held that the affidavits need not contain statements that the persons executing them had signed the petition. *Foss v. Roseau County*, 93 Minn. 238.

**5. Residence, etc., of Petitioners.** — In *Iowa* practically the same requirements as those stated in the original text obtain. *Willing v. Rye*, 123 Iowa 471.

**7. Number of Petitioners Necessary to Authorize Submission of Question.** — In *Arkansas* the petition must contain the names of one-third of the qualified voters of the county. *Williamson v. Russey*, (Ark. 1904) 84 S. W. Rep. 229.

In *Colorado* the petition must be signed by a majority of the taxpayers. *Eagle County v. People*, 26 Colo. 297.

*Minnesota*. — *Gile v. Stegner*, 92 Minn. 429.

*Nebraska*. — *Hoffman v. Nelson*, (Neb. 1901) 95 N. W. Rep. 347.

**1028. 2. Right of Petitioners to Withdraw Names.** — *Wilson v. Bartlett*, 7 Idaho 271, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1028.

**Right of Signers of Remonstrance to Withdraw Names.** — See *Willing v. Rye*, 123 Iowa 471; *Hoffman v. Nelson*, (Neb. 1901) 95 N. W. Rep. 347.

The right of withdrawal is manifestly analogous to that in the case of subscriptions. See the title SUBSCRIPTIONS, 285. 7 et seq.

**1029. 3. It Is Not Necessary to Wait until the Petition Is Filed** before circulating the remonstrance. *Willing v. Rye*, 123 Iowa 471.

**5. Petitioners Who Afterwards Sign Remonstrance Not Counted on Petition.** — See *Willing v. Rye*, 123 Iowa 471.

**1030. 1. Necessity for Notice of Meeting of County Commissioners.** — *Tucker v. Lincoln County*, 90 Minn. 406; *State v. Butler*, 81 Minn. 103.

**1031. 2. Several Petitions Considered as One.** — *Williamson v. Russey* (Ark. 1904) 84 S. W. Rep. 229.

**3. Successive Petitions, Each Sufficient — Election.** — Under the *Missouri* statute it has been held that where one sufficient petition has been presented it should be acted upon alone, without regard to a subsequent rival petition, the submission of which at the same election would have the effect of dividing between rival towns the vote on the question of removal. *State v. Garrett*, 76 Mo. App. 295.

**1032. 2. Irregularity Immaterial.** — In *Arkansas* the same determination as that in the *Florida* case cited in the original note has been reached. *Williamson v. Russey*, (Ark. 1904) 84 S. W. Rep. 229.

**4. Objection Cannot Be Raised After Election.** — *Scarborough v. Eubank*, 93 Tex. 106. But see *Rauner v. Forbes*, (Tex. Civ. App. 1899) 52 S. W. Rep. 568.

**1032.** *g.* CONCLUSIVENESS OF DECISION OF COUNTY COMMISSIONERS. — See note 5.

**1033.** 7. Vote Necessary to Authorize Removal — *a.* POWER OF LEGISLATURE TO DESIGNATE. — See note 2.

Constitutional Limitation. — See note 3.

**1034.** *b.* CONSTRUCTION OF PROVISIONS AS TO VOTE REQUIRED. — See note 3. See generally the definition MAJORITY, **614**, 2 *et seq.*

**1035.** See note 1.

8. The Election — *a.* HOW QUESTION OF REMOVAL SUBMITTED — GENERAL OR SPECIAL ELECTION. — See note 2.

**1038.** *f.* QUALIFICATIONS OF VOTERS. — See note 3.

*g.* BALLOTS — (1) *Generally*. — See note 4.

**1039.** *i.* THE CANVASS — (1) *By Whom Made*. — See note 4.

**1040.** *j.* CONTEST OF ELECTION — (1) *Time of Contesting*. — See note 6.

**1041.** (2) *Election Cannot Be Collaterally Attacked*. — See note 1.

**1043.** 11. Effect of Removal upon Private Rights — *a.* LOCATION OF COUNTY-SEAT NOT A CONTRACT. — See note 5.

**1032.** 5. Decision Conclusive. — Territory *v. Neville*, 10 Okla. 79.

**1033.** 2. Plenary Power of Legislature over Removal. — See *State v. Crook*, 126 Ala. 600; *State v. White*, 162 Mo. 533.

3. Legislature May Require Larger Vote than Constitution Requires. — *Dunn v. Lott*, 67 Ark. 591; *State v. White*, 162 Mo. 533.

**1034.** 3. Consent Given by Required Proportion of Votes Cast. — *Wells v. Ragsdale*, 102 Ga. 53. See also *State v. White*, 162 Mo. 533.

**1035.** 1. Required Proportion of Votes Cast on Question of Removal Insufficient. — Compare *Davis v. Brown*, 46 W. Va. 716.

2. Calling Election. — In *Georgia* the power to call an election upon the question of changing the county-seat is vested in the ordinary. *Wells v. Ragsdale*, 102 Ga. 53.

**1038.** 3. Legislature Cannot Prescribe Special Qualifications for Voters. — *Eagle County v. People*, 26 Colo. 297.

4. Requiring Numbering of Ballots. — The leg-

islature may enact that ballots in a county-seat election shall be numbered. *State v. Crook*, 126 Ala. 600.

Ballot Must Designate Place of Removal. — *Wells v. Ragsdale*, 102 Ga. 53.

**1039.** 4. The County Court Should Canvass the Vote in *West Virginia*. *Brown v. Randolph County Ct.*, 45 W. Va. 827.

**1040.** 6. The First Election Can Be Contested before the holding of the second election. *Robertson v. Grant County*, 14 Okla. 407.

Validity of Petition. — The determination of the county board as to the sufficiency of the petition cannot be attacked after the election has been held. *Scarborough v. Eubank*, 93 Tex. 106.

**1041.** 1. Election Cannot Be Collaterally Attacked for Irregularities. — Compare *Simpson County v. Buckley*, 85 Miss. 713.

**1043.** 5. Removal Not Violation of a Contract. — *Swartz v. Lake County*, 158 Ind. 141, supporting the whole of the original text paragraph.

# COUPLING CARS (INJURIES BY).

BY JOHN LEHMAN.

**1047. II. OBLIGATIONS OF THE MASTER AND RISKS ASSUMED BY THE SERVANT — 1. In Respect to the Instrumentalities of the Business — a. MASTER MUST USE REASONABLE AND ORDINARY CARE — (1) To Provide Safe Machinery and Places of Employment — (a) Rolling Stock and Apparatus. — See note 2.**

**1048. What Constitutes Ordinary Care — At Common Law. — See notes 1, 2.**

**1049. Automatic Couplers — Statutes. — See notes 1, 2.**

**1047. 2. Master Must Use Ordinary Care to Provide Safe Machinery — United States. —** Northern Pac. R. Co. v. Tynan, (C. C. A.) 119 Fed. Rep. 288; Pittsburgh, etc., R. Co. v. Thompson, (C. C. A.) 82 Fed. Rep. 720.

Arkansas. — Neal v. St. Louis, etc., R. Co., 71 Ark. 445, holding that the mere fact of an injury caused by a defect does not of itself make out a case of negligence, though it is different if a statutory duty is violated, proof of which establishes a *prima facie* case of negligence to go to the jury.

Illinois. — Belt R. Co. v. Confrey, 209 Ill. 344; Chicago, etc., R. Co. v. Finnan, 84 Ill. App. 383.

Iowa. — Branz v. Omaha, etc., R., etc., Co., 120 Iowa 406.

Kansas. — Chicago, etc., R. Co. v. Eversole, 65 Kan. 857, 69 Pac. Rep. 1126; Bradshaw v. Chicago, etc., R. Co., 58 Kan. 618.

Kentucky. — Kentucky Cent. R. Co. v. Carr, (Ky. 1897) 43 S. W. Rep. 193.

Michigan. — Hewitt v. East Jordan Lumber Co., (Mich. 1904) 98 N. W. Rep. 992.

Missouri. — Harney v. Missouri Pac. R. Co., 80 Mo. App. 667.

North Carolina. — Troxler v. Southern R. Co., 122 N. Car. 902.

Texas. — Southern Pac. R. Co. v. Winton, 27 Tex. Civ. App. 503; San Antonio, etc., R. Co. v. Hahl, (Tex. Civ. App. 1904) 83 S. W. Rep. 27 (where an instruction was approved); International, etc., R. Co. v. Gourley, 21 Tex. Civ. App. 579; Missouri, etc., R. Co. v. Hauer, (Tex. Civ. App. 1897) 43 S. W. Rep. 1078.

**Liability of Master for Defects in Foreign Cars. —** Youngblood v. South Carolina, etc., R. Co., 60 S. Car. 9, 85 Am. St. Rep. 824, supporting the first paragraph of the original note.

**Original Defects in Construction of Couplings. —** In such a case proof of notice to the defendant is unnecessary. Brinkmeier v. Missouri Pac. R. Co., 69 Kan. 738.

**Master Must Furnish Safe Appliances and Keep Them in Good Repair. —** Elgin, etc., R. Co. v. Eselin, 68 Ill. App. 97.

**Evidence — Stick as Part of Coupling Appliances. —** Where a recovery is sought for injuries alleged to have been caused by reason of defective coupling appliances, testimony by the plaintiff that he was not furnished with a coupling stick is competent, as it is for the jury to say what a set of coupling appliances embraces. Youngblood v. South Carolina, etc., R. Co., 60

S. Car. 9, 85 Am. St. Rep. 824. See also Binion v. Georgia Southern, etc., R. Co., 111 Ga. 878.

**Safe Engine. —** The defendant is liable for an injury caused by its failure to furnish a reasonably safe engine. Cambrou v. Omaha, etc., R. Co., 165 Mo. 543, wherein the engine was not furnished with proper brakes.

**1048. 1. Improved Appliances — Master Not Bound to Adopt. —** Bryce v. Burlington, etc., R. Co., 119 Iowa 274 (holding, however, that it may be shown that such later devices are practical in the operation of the road and tend to promote the safety of the employee, but that without this showing it is not competent to prove that such devices are in general use by other roads); Gillin v. Patten, etc., R. Co., 93 Me. 80; Buttner v. South Baltimore Steel Car, etc., Co., (Md. 1905) 60 Atl. Rep. 597. See also Creswell v. Wilmington, etc., R. Co., 2 Penn. (Del.) 210; Winkler v. Philadelphia, etc., R. Co., 4 Penn. (Del.) 80, affirmed 4 Penn. (Del.) 387.

But when the defendant shows that certain switch stands have been in general use on railroads for twenty years, the plaintiff may show on cross-examination of the witness that such appliances are being replaced by others of later pattern, this being germane to the examination in chief. Chicago, etc., R. Co. v. Howell, 208 Ill. 155.

**Appliances Not Required to Be the Best and Safest. —** Chicago, etc., R. Co. v. Finnan, 84 Ill. App. 383.

**2. Use of Cars with Different Styles of Couplings. —** Whitcombe v. Standard Oil Co., 153 Ind. 513.

**1049. 1. Judicial Notice Taken by State Courts. —** The courts of the country take judicial notice of the Act of Congress known as the "Safety Appliance Act." Kansas City, etc., R. Co. v. Filippo, 138 Ala. 487; Mobile, etc., R. Co. v. Bromberg, (Ala. 1904) 37 So. Rep. 395.

**Nature and Extent of Requirement as to Automatic Couplers. —** The act requiring cars used in interstate commerce to be equipped with automatic couplers does not require every car to be equipped with the same kind of coupling, and does not operate against the hauling of cars not so equipped which are either used in intrastate traffic solely or not used in any traffic at all. Johnson v. Southern Pac. R. Co., (C. C. A.) 117 Fed. Rep. 462, reversed 196 U. S. 1. See also Kansas City, etc., R. Co. v.



**1050. (b) Tracks and Yards — Care of Tracks. —** See notes 1, 2.  
Yards. — See note 4.

Flippo, 138 Ala. 489, wherein it was held that under the evidence the question whether a car was used in interstate commerce should have been left to the determination of the jury.

The operation of the statute is not confined to cases where the cars at the very moment of the injury are being actually used in moving interstate traffic, but extends to cars where the injury occurs in making up a train for the purpose of moving interstate traffic. *Mobile, etc., R. Co. v. Bromberg*, (Ala. 1904) 37 So. Rep. 395.

If the car being moved was in use for local traffic only, within the state, it is not within the statute, but if it had come from a point without the state with freight to be delivered in the state, it would be moving interstate traffic under the act. *Winkler v. Philadelphia, etc., R. Co.*, 4 Penn. (Del.) 80, *affirmed* 4 Penn. (Del.) 387.

If a railway company uses cars which do not conform to the statutory requirement of automatic couplers, either because they were never equipped with such couplers, or because the company, through negligence, has permitted the couplers, originally sufficient, to become worn out and inoperative, it is using cars improperly equipped under the statute. *Voelker v. Chicago, etc., R. Co.*, 116 Fed. Rep. 867 (*reversed* on other grounds in (C. C. A.) 129 Fed. Rep. 522). But compare *Kansas City, etc., R. Co. v. Flippo*, 138 Ala. 487, where it is held that evidence of defective automatic couplers was insufficient to support a cause of action alleged for failure to provide automatic couplers.

*To Prevent Going Between Ends of Cars. —* Both the Act of Congress and the similar statute in *Iowa* apply the test whether the person operating the coupler is required to go between the ends of the cars to the act of coupling as to that of uncoupling. *Chicago, etc., R. Co. v. Voelker*, (C. C. A.) 129 Fed. Rep. 522. See also *Philadelphia, etc., R. Co. v. Winkler*, 4 Penn. (Del.) 387.

*What Are Cars. —* In *Johnson v. Southern Pac. R. Co.*, (C. C. A.) 117 Fed. Rep. 462, *reversed* 196 U. S. 1, it is held that the Act of Congress requiring cars to be equipped with automatic couplers does not embrace a locomotive. And in *Iowa* and *Massachusetts* similar statutes are construed in the same way. *Bryce v. Burlington, etc., R. Co.*, 119 Iowa 274; *Larabee v. New York, etc., R. Co.*, 182 Mass. 348. *Contra, Philadelphia, etc., R. Co. v. Winkler*, 4 Penn. (Del.) 387.

In *North Carolina* it is held that the rulings of the court making it necessary to equip cars with automatic couplers cover locomotives also. *Fleming v. Southern R. Co.*, 131 N. Car. 476.

**1049. 2. In North Carolina**, without the aid of statute, failure to equip cars with automatic couplers or to keep such couplers in proper condition is held to be negligence *per se*. *Elmore v. Seaboard Air Line R. Co.*, 132 N. Car. 865; *Troxler v. Southern R. Co.*, 122 N. Car. 902; *Greenlee v. Southern R. Co.*, 122 N. Car. 977, 65 Am. St. Rep. 734; *Harden v. North Carolina R. Co.*, 129 N. Car. 354, 85 Am. St. Rep. 747.

**1050. 1. Obligation of Master in Respect to Tracks and Yards. —** *Indiana, etc., R. Co. v. Bundy*, 152 Ind. 590; *Chicago, etc., R. Co. v.*

*Lee*, 29 Ind. App. 480; *Trott v. Chicago, etc., R. Co.*, 115 Iowa 80; *Linck v. Louisville, etc., R. Co.*, 107 Ky. 370; *Gillin v. Patten, etc., R. Co.*, 93 Me. 80; *Fluhrer v. Lake Shore, etc., R. Co.*, 121 Mich. 212; *Jarvis v. Flint, etc., R. Co.*, 128 Mich. 61; *Texas, etc., R. Co. v. McCoy*, 19 Tex. Civ. App. 494; *Missouri, etc., R. Co. v. Keefe*, (Tex. Civ. App. 1905) 84 S. W. Rep. 679; *International, etc., R. Co. v. Penn.* (Tex. Civ. App. 1904) 79 S. W. Rep. 624. See also *Knapp v. Chicago, etc., R. Co.*, 114 Mich. 199, where the evidence was sufficient to require a submission of the case to the jury.

In *Culver v. South Haven, etc., R. Co.*, (Mich. 1904) 101 N. W. Rep. 663, it is held that the law does not impose upon the company the absolute duty to keep its tracks in a reasonably safe condition, but only to exercise reasonable watchfulness and care in inspecting them and in keeping them in a reasonably safe condition.

**Evidence. —** Testimony to the effect that the witness saw the track and made an examination of it, that there were no indications that any repairs or changes were made in it of any character within a month or six weeks prior to the time he saw it, and that he found low joints in the track, is admissible. *San Antonio, etc., R. Co. v. Beam*, (Tex. Civ. App. 1899) 50 S. W. Rep. 411.

The usual custom or practice of other railroad corporations would not exempt the defendant from liability if such custom or practice disregards the safety of the employee. *Keist v. Chicago G. W. R. Co.*, 110 Iowa 32.

**2. No Duty to Ballast Tracks. —** *Louisville, etc., R. Co. v. Bocoek*, 107 Ky. 223; *Miller v. Detroit, etc., R. Co.*, 133 Mich. 564.

**If Improperly Ballasted Company Is Liable. —** *Galveston, etc., R. Co. v. Pitts*, (Tex. Civ. App. 1897) 42 S. W. Rep. 255.

While there is no general duty to plank rails, if the railroad company undertakes to do so, it is under the duty to put down the plank and so maintain them as that they shall be reasonably safe to its employees who might be required to work thereon. *Valley R. Co. v. Keegan*, (C. C. A.) 87 Fed. Rep. 849; *Herrick v. Quigley*, (C. C. A.) 101 Fed. Rep. 187.

**4. Duty to Keep Yard in Reasonably Safe Condition. —** *Baltimore, etc., R. Co. v. Clifford*, 99 Ill. App. 381; *Indiana, etc., R. Co. v. Bundy*, 152 Ind. 590; *Rifley v. Minneapolis, etc., R. Co.*, 72 Minn. 469 (holding that the question of negligence was for the jury, where the defective condition complained of was a ridge of ice, covered by fresh snow, which had existed about a week before the injury); *Chittick v. Minneapolis, etc., R. Co.*, 88 Minn. 11; *International, etc., R. Co. v. Bonatz*, (Tex. Civ. App. 1898) 48 S. W. Rep. 767; *International, etc., R. Co. v. Turner*, (Tex. Civ. App. 1897) 43 S. W. Rep. 560.

**Culverts and Ditches. —** *Hennesey v. Chicago, etc., R. Co.*, 99 Wis. 109, wherein it was held that the question of care was for the jury.

**Cattle Guard in Freight Yard. —** *Galveston, etc., R. Co. v. Slinkard*, 17 Tex. Civ. App. 585,

**1051.** See note 1.

**1052.** *Blocking Frogs and Guard-rails.* — See notes 1, 2.

(2) *In the Matter of Inspection.* — See note 3.

**1053.** See note 1.

*Duty to Inspect Foreign Cars.* — See note 2.

**1055.** (4) *In the Loading of Cars — Projecting Loads.* — See note 4.

b. MASTER NOT AN INSURER — (1) *In General.* — See note 5.

supporting the first paragraph of the original note.

**Ashes and Snow.** — Reasonable care does not require railroad companies to remove all the snow from their yards. So long as it is kept practically level and is not allowed to accumulate in dangerous hummocks or ridges, or to contain dangerous holes, no negligence can be charged. *Fay v. Chicago, etc., R. Co.*, 72 Minn. 192.

**Lighted Yard.** — It is not the legal duty of a railroad company to have its yard lighted regardless of whether or not said yard would be reasonably safe without such light, and the question whether the yard would be reasonably safe without such light should be left to the jury. *Galveston, etc., R. Co. v. English*, (Tex. Civ. App. 1900) 50 S. W. Rep. 626.

**Rubbish on Tracks.** — It is negligence for a railroad company to allow rubbish to accumulate on its tracks in its yard and to suffer it to remain there. *Pittsburgh, etc., R. Co. v. Elwood*, 25 Ind. App. 671.

**1051. 1. Duty to Ballast Tracks in Freight Yards.** — *Lake Erie, etc., R. Co. v. Morrissey*, 177 Ill. 376, requiring ballasted tracks at all places where switching is done. See also *Illinois Cent. R. Co. v. Cozby*, 174 Ill. 109.

In *Arkansas Cent. R. Co. v. Jackson*, 70 Ark. 295, it was held that the company was liable for using in switching the unballasted track of another road.

**1052. 1. Failure to Block Frogs and Switches Not Negligence.** — *Kilpatrick v. Choctaw, etc., R. Co.*, (C. C. A.) 121 Fed. Rep. 11; *Banks v. Georgia R., etc., Co.*, 112 Ga. 655.

**Whether Failure to Block Guard-rails Negligence.** — *Gilbert v. Chicago, etc., R. Co.*, 123 Fed. Rep. 832, holding that the question of negligence was for the jury, where it was the practice in the particular yard to keep the guard-rails blocked, but the blocking in the particular instance had been out for some time.

**2. Statutory Requirements.** — *Gillin v. Patten, etc., R. Co.*, 93 Me. 80, holding that a railroad company has a reasonable time within which to comply with such a provision; *Jones v. Flint, etc., R. Co.*, 127 Mich. 198, holding that under such a statute it is the duty of the company to make the frogs as nearly safe as possible.

**3. Inspection of Cars and Apparatus.** — *Chicago, etc., R. Co. v. Eversole*, 65 Kan. 857.

**Tools in Use.** — In *Miller v. Erie R. Co.*, 21 N. Y. App. Div. 45, the rule that there is no duty resting on an employer to inspect during their use those common tools and appliances with which every one is conversant, is announced and applied to the case of a push pole, which is a stick placed between an engine and a car on different tracks to enable the engine to push the car.

**Violation of Duty of Employee to Inspect.** — One whose duty it is to inspect the couplings and report defects cannot impose upon the company liability for his failure to perform that duty. *Illinois Cent. R. Co. v. Barslow*, 94 Ill. App. 206.

**1053. 1.** *Chicago, etc., R. Co. v. Gillison*, 173 Ill. 264, 64 Am. St. Rep. 117; *Kentucky Cent. R. Co. v. Carr*, (Ky. 1897) 43 S. W. Rep. 193.

In *Munch v. Great Northern R. Co.*, 75 Minn. 61, it was held that under the facts it was a question for the jury to pass upon whether the company had not exercised reasonable care in the matter of inspection.

**Delegation of Duty.** — *Baltimore, etc., R. Co. v. Elliott*, 9 App. Cas. (D. C.) 541, holding that the duty cannot be delegated by the master so as to avoid liability; *Southern Pac. R. Co. v. Winton*, 27 Tex. Civ. App. 503, holding that the master cannot evade responsibility by simply giving general orders that servants shall examine for themselves before using appliances furnished.

**Provision for Inspection Sufficient.** — Where the railroad company provides for inspections of cars at divisional points, it discharges its duty to the employee in this regard, and, unless it is shown that such regulations were negligently complied with by those charged with the duty, the company would not be liable. *Hodges v. Kimball*, (C. C. A.) 104 Fed. Rep. 745.

**2. Duty to Inspect Foreign Cars.** — Supporting the text, see *Texas, etc., R. Co. v. Archibald*, 170 U. S. 665; *Northern Pac. R. Co. v. Tynan*, (C. C. A.) 119 Fed. Rep. 288; *Pittsburgh, etc., R. Co. v. Thompson*, (C. C. A.) 82 Fed. Rep. 720; *Belt R. Co. v. Confrey*, 209 Ill. 344 (holding evidence of certain defects admissible as tending to show a failure of the defendant to inspect); *Illinois Cent. R. Co. v. Barslow*, 94 Ill. App. 206; *Louisville, etc., R. Co. v. Veach*, (Ky. 1898) 46 S. W. Rep. 493; *Southern Pac. R. Co. v. Winton*, 27 Tex. Civ. App. 503.

An instruction that "the most efficient mode of discharging that duty [of providing safe machinery] in respect to cars used was to maintain a careful system of inspection," etc., was held to be error because it implied that the company was bound to adopt the most efficient mode of discharging its duty, and further because it is a question for the jury what is the most efficient mode of discharging this duty. *Cleveland, etc., R. Co. v. McClintock*, (C. C. A.) 91 Fed. Rep. 223.

**1055. 4. Projecting Loads — When Result of Negligence.** — *George v. Clark*, (C. C. A.) 85 Fed. Rep. 608 (holding that whether such loading was negligence was a question for the jury, under the facts in evidence); *Austin v. Fitchburg R. Co.*, 172 Mass. 484.

**5. Master Not Insurer.** — *Lake Erie, etc., R.*



**1056.** See note 2.

**Master Must Be Fixed with Knowledge of Defects.** — See note 3.

**1057.** *c.* RISKS ASSUMED BY THE SERVANT — (1) *Ordinary Dangers.* — See note 2.

**Illustrations of Ordinary Dangers.** — See notes 3, 4, 5, 6.

*Co. v. Morrissey*, 177 Ill. 376; *Whitcomb v. Standard Oil Co.*, 153 Ind. 513.

**1056. 2. Ordinary Care Sufficient.** — *Chicago, etc., R. Co. v. Lee*, 29 Ind. App. 480. See *Barrett v. Great Northern R. Co.*, 75 Minn. 113, where it was held that the company was not liable for an injury caused by a projection from the rail of its side track.

**Methods Approved by General Usage.** — A railroad company is excused if it maintains its roadway and appendages in a fashion generally approved and adopted by other firstclass railroads of the country. *Indiana, etc., R. Co. v. Bundy*, 152 Ind. 590.

**3. Master Must Be Fixed with Knowledge of Defects.** — *Buttner v. South Baltimore Steel Car, etc., Co.*, (Md. 1905) 60 Atl. Rep. 597, citing 7 AM. and ENG. ENCYC. OF LAW (2d ed.) 1056; *Herrick v. Quigley*, (C. C. A.) 101 Fed. Rep. 187 (approving an instruction submitting the question to the jury); *Hodges v. Kimball*, (C. C. A.) 104 Fed. Rep. 745; *Hayzel v. Columbia R. Co.*, 19 App. Cas. (D. C.) 359; *Illinois Cent. R. Co. v. Barslow*, 94 Ill. App. 206.

**Defect in Construction.** — See *supra*, **1047**, note 2.

**1057. 2. Ordinary Perils Assumed by Employee.** — *United States.* — *Hodges v. Kimball*, (C. C. A.) 104 Fed. Rep. 745; *Johnson v. Southern Pac. R. Co.*, (C. C. A.) 117 Fed. Rep. 462, reversed 196 U. S. 1.

*Delaware.* — *Winkler v. Philadelphia, etc., R. Co.*, 4 Penn. (Del.) 80, affirmed 4 Penn. (Del.) 387; *Creswell v. Wilmington, etc., R. Co.*, 2 Penn. (Del.) 210.

*District of Columbia.* — *Hayzel v. Columbia R. Co.*, 19 App. Cas. (D. C.) 359.

*Georgia.* — *Wrightsville, etc., R. Co. v. Lattimore*, 118 Ga. 581.

*Illinois.* — *Chicago, etc., R. Co. v. Gillison*, 173 Ill. 264, 64 Am. St. Rep. 117; *Whalin v. Illinois Cent. R. Co.*, 112 Ill. App. 428; *Blah v. West Chicago St. R. Co.*, 100 Ill. App. 393; *Elgin, etc., R. Co. v. Eselin*, 68 Ill. App. 97.

*Iowa.* — *Gorman v. Minneapolis, etc., R. Co.*, 117 Iowa 720.

*Massachusetts.* — *Bowes v. New York, etc., R. Co.*, 181 Mass. 89.

*Minnesota.* — *Schus v. Powers-Simpson Co.*, 85 Minn. 447 (holding that the risks assumed are such as are in point of fact ordinary risks of the employment, and not dangers resulting from the negligence of fellow servants); *Chittick v. Minneapolis, etc., R. Co.*, 88 Minn. 11.

*Missouri.* — *Thompson v. Chicago, etc., R. Co.*, 86 Mo. App. 141.

*Nebraska.* — *Missouri Pac. R. Co. v. Fax*, 60 Neb. 531.

*New Hampshire.* — *Burnham v. Concord, etc., R. Co.*, 68 N. H. 567; *Murphy v. Grand Trunk R. Co.*, (N. H. 1904) 58 Atl. Rep. 835.

*New York.* — *Hannigan v. Lehigh, etc., R. Co.*, 157 N. Y. 244, holding that the danger of injury from the meeting of drawheads was an assumed risk.

*Texas.* — *Gulf, etc., R. Co. v. Wilder*, (Tex. Civ. App. 1903) 75 S. W. Rep. 546; *Southern Pac. R. Co. v. Winton*, 27 Tex. Civ. App. 503.

*Wisconsin.* — *Zahn v. Milwaukee, etc., R. Co.*, 114 Wis. 38.

**The Risk of a Universal Custom of Action,** when such custom is known to the employee, is assumed. *Chicago, etc., R. Co. v. Voelker*, (C. C. A.) 129 Fed. Rep. 522.

**Violation by Company of Rule Requiring Automatic Couplers.** — Congress has provided for certain equipments on cars used in interstate commerce, and that an employee injured by reason of a violation of the statute shall not be deemed to have assumed the risk of such violation on account of his knowledge thereof. *Kansas City, etc., R. Co. v. Flippo*, 138 Ala. 487 (holding that such legislation is within the legislative competency of Congress); *Neal v. St. Louis, etc., R. Co.*, 71 Ark. 445. See also *supra*, 1049, notes 1 and 2.

A plea setting up the defense of assumed risk in an action under this act is frivolous. *Mobile, etc., R. Co. v. Bromberg*, (Ala. 1904) 37 So. Rep. 395.

But it is held that such statute does not mean that in a particular case of voluntary action with full knowledge of the situation, the character of the act is not to be determined according to all the facts and circumstances, or is to be determined without regard to plaintiff's knowledge of the defects. *Cleveland, etc., R. Co. v. Baker*, (C. C. A.) 91 Fed. Rep. 224; *Hodges v. Kimball*, (C. C. A.) 104 Fed. Rep. 745; *Denver, etc., R. Co. v. Arrighi*, (C. C. A.) 129 Fed. Rep. 347; *Winkler v. Philadelphia, etc., R. Co.*, 4 Penn. (Del.) 80, affirmed 4 Penn. (Del.) 387; *Schlemmer v. Buffalo, etc., R. Co.*, 207 Pa. St. 198. See also *Voelker v. Chicago, etc., R. Co.*, 116 Fed. Rep. 867, reversed on other grounds in (C. C. A.) 129 Fed. Rep. 522.

The language of the statute does not require the abrogation of the common-law rule that the servant assumes the risk of coupling a locomotive without automatic couplers with a car which is provided with them. *Johnson v. Southern Pac. R. Co.*, (C. C. A.) 117 Fed. Rep. 462, reversed 196 U. S. 1.

In *North Carolina* where the failure to equip cars with automatic couplers or to keep such devices in proper condition is negligence *per se*, there can be no contributory negligence which will discharge the master's liability for such failure and the doctrine of assumed risk does not apply. *Fleming v. Southern R. Co.*, 131 N. Car. 476; *Elmore v. Seaboard Air Line R. Co.*, 132 N. Car. 865; *Troxler v. Southern R. Co.*, 124 N. Car. 189, 70 Am. St. Rep. 580. But if the injury is in no way connected with the failure of the railroad company in this regard, then the mere failure is not sufficient to justify a recovery. *Fleming v. Southern R. Co.*, 131 N. Car. 476.

**3. Coupling Cars of Different Construction.** — *Hodges v. Kimball*, (C. C. A.) 104 Fed. Rep.



**1058.** (2) *Knowledge of Defects and Unusual Appliances — Defective and Dangerous Couplings.* — See note 2.

**1059.** *Defects in Tracks and Yards.* — See note 1.

**1060.** *Knowledge and Means of Knowledge Distinguished.* — See note 1.

745; *Whitcomb v. Standard Oil Co.*, 153 Ind. 513.

**1057. 4. Coupling Cars of Different Heights.** — *Holmes v. Southern Pac. R. Co.*, 120 Cal. 357; *Dolan v. Burden Iron Co.*, 62 N. Y. App. Div. 545; *Cleary v. Long Island R. Co.*, 54 N. Y. App. Div. 284.

**5. Use of Different Styles of Couplings.** — *Johnson v. Southern Pac. R. Co.*, (C. C. A.) 117 Fed. Rep. 462, 196 U. S. 1; *McDonald v. Norfolk, etc., R. Co.*, 95 Va. 98.

**6. Projecting Loads.** — *Cleveland, etc., R. Co. v. Somers*, 24 Ohio Cir. Ct. 67; *Tucker v. Northern Pac. Terminal Co.*, 41 Oregon 82, which cases hold the risk of danger from projecting loads assumed. See also *supra*, **1055**, note 4.

**1058. 2. Knowledge of Defects and Unusual Appliances.** — *Texas, etc., R. Co. v. Archibald*, 170 U. S. 665; *Whitcomb v. Standard Oil Co.*, 153 Ind. 513; *Brown v. Louisville, etc., R. Co.*, (Ky. 1901) 65 S. W. Rep. 588; *Gillin v. Patten, etc., R. Co.*, 93 Me. 80; *Harney v. Missouri Pac. R. Co.*, 80 Mo. App. 667; *Missouri Pac. R. Co. v. Fax*, 60 Neb. 531 (holding that what care is commensurate with the obvious risk of coupling two different kinds of couplers, is to be determined by the conduct of ordinarily prudent men confronted by such peril under like circumstances); *Texas, etc., R. Co. v. Peden*, 32 Tex. Civ. App. 315; *McDonald v. Norfolk, etc., R. Co.*, 95 Va. 98.

**Knowledge of Defects No Defense in South Carolina.** — In *South Carolina* it is provided by the constitution that knowledge by an employee of defects, etc., shall be no defense to an action for injuries caused thereby, except as to conductors or engineers in charge of dangerous or unsafe cars or engines voluntarily operated by them. *Youngblood v. South Carolina, etc., R. Co.*, 60 S. Car. 9, 85 Am. St. Rep. 824.

**The Risk of the Master's Negligence**, of the negligence of other employees for which the company would be liable in the absence of knowledge or negligence on the part of the plaintiff, is not assumed. See *Texas, etc., R. Co. v. Archibald*, 170 U. S. 665; *Northern Pac. R. Co. v. Tynan*, (C. C. A.) 119 Fed. Rep. 288; *George v. Clark*, (C. C. A.) 85 Fed. Rep. 608; *Pittsburgh, etc., R. Co. v. Thompson*, (C. C. A.) 82 Fed. Rep. 720; *Chicago, etc., R. Co. v. Gillison*, 173 Ill. 264, 64 Am. St. Rep. 117; *Indiana, etc., R. Co. v. Bundy*, 152 Ind. 590; *Chicago, etc., R. Co. v. Lee*, 29 Ind. App. 480; *Gulf, etc., R. Co. v. Wilder*, (Tex. Civ. App. 1903) 75 S. W. Rep. 546 (approving an instruction on assumed risks); *Missouri, etc., R. Co. v. Milam*, 20 Tex. Civ. App. 688; *Missouri, etc., R. Co. v. Gearheart*, (Tex. Civ. App. 1904) 81 S. W. Rep. 325; *Missouri, etc., R. Co. v. Keefe*, (Tex. Civ. App. 1905) 84 S. W. Rep. 679. See also *Holmes v. Chicago, etc., R. Co.*, (Neb. 1905) 103 N. W. Rep. 77, holding that the question of diligence on the part of the injured employee is for the jury.

**Brakeman Between Cars.** — A brakeman who

attempts to remedy a defective coupler does not assume the risk of the engineer's starting the train and crushing him without warning. *Gulf, etc., R. Co. v. Cooper*, (Tex. Civ. App. 1903) 77 S. W. Rep. 263; *Ft. Worth, etc., R. Co. v. Caskey*, (Tex. Civ. App. 1904) 84 S. W. Rep. 264. See also *Terre Haute, etc., R. Co. v. Rittenhouse*, 28 Ind. App. 633 (holding that a brakeman ordered by his superior to make a coupling does not assume the risk of having a second cut of cars run in on the side track and against the cars he was coupling, without warning to him); *Cincinnati, etc., R. Co. v. Cook*, 113 Ky. 161, (Ky. 1904) 83 S. W. Rep. 580; *Hooper v. Great Northern R. Co.*, 80 Minn. 400. But compare *Illinois Cent. R. Co. v. Jones*, (Ky. 1904) 80 S. W. Rep. 484; *Murphy v. Grand Trunk R. Co.*, (N. H. 1904) 58 Atl. Rep. 835.

In *Bowes v. New York, etc., R. Co.*, 181 Mass. 89, it was held that if a brakeman goes between cars to couple them he assumes the risk of their being run over him without warning, but that if he is ordered by the conductor to go between the cars to fix a defective coupler he has a right to expect that the cars would not be moved without warning to him.

**1059. 1. Risk of Defects in Yards and Tracks Assumed.** — *Indiana, etc., R. Co. v. Bundy*, 152 Ind. 590; *Louisville, etc., R. Co. v. Bocock*, 107 Ky. 223; *Arnold v. Louisville, etc., R. Co.*, (Ky. 1900) 58 S. W. Rep. 370; *Shannon v. Louisville, etc., R. Co.*, (Ky. 1902) 70 S. W. Rep. 626; *Miller v. Detroit, etc., R. Co.*, 133 Mich. 564; *Fay v. Chicago, etc., R. Co.*, 72 Minn. 192.

**Risk of Unblocked Frogs and Guard-rails Assumed.** — *Banks v. Georgia R., etc., Co.*, 112 Ga. 655; *Gillin v. Patten, etc., R. Co.*, 93 Me. 80 (wherein the plaintiff was working on a road not yet completed, and the company was held entitled to a reasonable time within which to comply with a statutory regulation requiring blocking, and the plaintiff having knowledge of the conditions was held to be bound to act with commensurate care and to have assumed the risk of continuing to work); *Burnham v. Concord, etc., R. Co.*, 68 N. H. 567; *Hynson v. St. Louis Southwestern R. Co.*, (Tex. Civ. App. 1905) 86 S. W. Rep. 928.

**1060. 1. Employee Only Assumes Risks from Defects of Which He Has Knowledge.** — See, supporting the original text, *Texas, etc., R. Co. v. Archibald*, 170 U. S. 665; *Northern Pac. R. Co. v. Tynan*, (C. C. A.) 119 Fed. Rep. 288; *Chicago, etc., R. Co. v. Eversole*, 65 Kan. 857, 69 Pac. Rep. 1126; *Brinkmeier v. Missouri Pac. R. Co.*, 69 Kan. 738; *Bradshaw v. Chicago, etc., R. Co.*, 58 Kan. 618; *Galveston, etc., R. Co. v. Pitts*, (Tex. Civ. App. 1897) 42 S. W. Rep. 255.

One who is not engaged especially in the business of coupling cars, but who is an ordinary laborer and never before had occasion to make a coupling, and who in the particular instance was asked by the foreman to make the coupling because of his proximity to the place where it was to be made, and who had no rea-

**1061.** See notes 1, 2.

**1062.** Knowledge or Obviousness a Question of Fact. — See note 1.

son to know of defects in the car or appliances, cannot be said to have assumed the risk of such defects. *Branz v. Omaha, etc., R., etc., Co.*, 120 Iowa 406.

**Knowledge Acquired at Time of Accident.** — If the knowledge is acquired at the time the attempt is made to couple the cars, or when the danger arises, the doctrine of assumed risk does not apply. *Branz v. Omaha, etc., R., etc., Co.*, 120 Iowa 406; *Jones v. Flint, etc., R. Co.*, 127 Mich. 108; *Southern Pac. R. Co. v. Winton*, 27 Tex. Civ. App. 503; *Missouri, etc., R. Co. v. Milam*, 26 Tex. Civ. App. 688; *Missouri, etc., R. Co. v. Gearheart*, (Tex. Civ. App. 1904) 81 S. W. Rep. 325. See also *Murphy v. Baltimore, etc., R. Co.*, 114 Ky. 696; *International, etc., R. Co. v. Hoyt*, 30 Tex. Civ. App. 518.

**1061. 1. Unusual Appliances.** — *Missouri, etc., R. Co. v. Baker*, (Tex. Civ. App. 1900) 58 S. W. Rep. 964, supporting the original text.

**2. Actual Knowledge or Obvious Danger.** — See the following cases supporting the original text:

*Delaware.* — *Creswell v. Wilmington, etc., R. Co.*, 2 Penn. (Del.) 210.

*Illinois.* — *Baltimore, etc., R. Co. v. Clifford*, 99 Ill. App. 381 (holding that knowledge on the part of the employee will not be presumed in the absence of evidence showing that he had such knowledge); *Belt R. Co. v. Confrey*, 209 Ill. 344.

*Indiana.* — *Indiana, etc., R. Co. v. Bundy*, 152 Ind. 590; *Chicago, etc., R. Co. v. Lee*, 29 Ind. App. 480.

In *Pennsylvania R. Co. v. Ebaugh*, 152 Ind. 531, the rule is stated to be that the employee assumes the ordinary dangers which are known to him, or which by the exercise of ordinary diligence would have been known to him.

*Kansas.* — *Brinkmeier v. Missouri Pac. R. Co.*, 69 Kan. 738.

*Massachusetts.* — *Austin v. Fitchburg R. Co.*, 172 Mass. 484.

*Michigan.* — *Hewitt v. East Jordan Lumber Co.*, (Mich. 1904) 98 N. W. Rep. 992.

*Missouri.* — *Thompson v. Chicago, etc., R. Co.*, 86 Mo. App. 141, holding that the knowledge which will defeat the recovery must be knowledge of the risk, not merely of the defect.

*Texas.* — *Galveston, etc., R. Co. v. Pitts*, (Tex. Civ. App. 1897) 42 S. W. Rep. 255; *International, etc., R. Co. v. Gourley*, 21 Tex. Civ. App. 579; *Hynson v. St. Louis Southwestern R. Co.*, (Tex. Civ. App. 1905) 86 S. W. Rep. 928. But compare *Galveston, etc., R. Co. v. English*, (Tex. Civ. App. 1900) 59 S. W. Rep. 626.

**When It Is One's Duty to Know** a thing the law will charge him not only with all knowledge he has, but also with all he would have had if he had used ordinary care. *Murphy v. Grand Trunk R. Co.*, (N. H. 1904) 58 Atl. Rep. 835.

**Employee May Assume Care by Employer in Maintaining Reasonably Safe Tracks and Yards.** — *Valley R. Co. v. Kegan*, (C. C. A.) 87 Fed. Rep. 849; *Arkansas Cent. R. Co. v. Jackson*, 70 Ark. 295; *Lake Erie, etc., R. Co. v. Morrissey*, 177 Ill. 376; *Louisville, etc., R. Co. v.*

*Bocock*, 107 Ky. 223; *Galveston, etc., R. Co. v. Slinkard*, 17 Tex. Civ. App. 585; *International, etc., R. Co. v. Bonatz*, (Tex. Civ. App. 1898) 48 S. W. Rep. 767; *Texas, etc., R. Co. v. McCoy*, 17 Tex. Civ. App. 494; *International, etc., R. Co. v. Penn.*, (Tex. Civ. App. 1904) 79 S. W. Rep. 624, holding that the knowledge of the brakeman of the condition of the track at the place where he was injured and at other points on the road is admissible. See also *De Cair v. Mainistee, etc., R. Co.*, 133 Mich. 578.

**Evidence of Defects at Other Places.** — Where the injury occurs by reason of an unblocked guard-rail, evidence to show that there were a large number of unblocked guard-rails in the yards of the company at other points is not admissible, because such defects are not open and obvious to a brakeman passing on a train. *Trott v. Chicago, etc., R. Co.*, 115 Iowa 80.

**Evidence of Warning as to Other Dangers.** — Plaintiff may testify that he had been warned by a certain person, who was the foreman under whom plaintiff worked, as to certain ground switches in the defendant's yards, but that he had not been warned as to the particular switch which is alleged to have caused the injury, such fact tending to explain plaintiff's failure to discover the existence of the last-mentioned switch. *Galveston, etc., R. Co. v. English*, (Tex. Civ. App. 1900) 59 S. W. Rep. 912.

**1062. 1. Knowledge of Defects and Dangers Question of Fact.** — *United States.* — *George v. Clark*, (C. C. A.) 85 Fed. Rep. 608; *Gilbert v. Chicago, etc., R. Co.*, 123 Fed. Rep. 832, *affirmed* (C. C. A.) 128 Fed. Rep. 529; *Cleveland, etc., R. Co. v. Baker*, (C. C. A.) 91 Fed. Rep. 224; *Valley R. Co. v. Keegan*, (C. C. A.) 87 Fed. Rep. 849; *Voelker v. Chicago, etc., R. Co.*, 116 Fed. Rep. 867, *reversed* on other grounds in (C. C. A.) 129 Fed. Rep. 522.

*Illinois.* — *Hartley v. Chicago, etc., R. Co.*, 197 Ill. 440; *Chicago, etc., R. Co. v. Howell*, 208 Ill. 155; *Belt R. Co. v. Confrey*, 209 Ill. 344.

*Indiana.* — *Indiana, etc., R. Co. v. Bundy*, 152 Ind. 590. See also *Pennsylvania R. Co. v. Ebaugh*, 152 Ind. 531.

*Iowa.* — *Trott v. Chicago, etc., R. Co.*, 115 Iowa 80.

*Kansas.* — *Chicago, etc., R. Co. v. Eversole*, 65 Kan. 857, 69 Pac. Rep. 1126; *Bradshaw v. Chicago, etc., R. Co.*, 58 Kan. 618; *St. Louis, etc., R. Co. v. Keller*, 10 Kan. App. 480.

*Massachusetts.* — *Austin v. Fitchburg R. Co.*, 172 Mass. 484.

*Michigan.* — *Fluhrer v. Lake Shore, etc., R. Co.*, 121 Mich. 212 (holding that it cannot be said, as a matter of law, that a brakeman must know the condition of the planking at every crossing along the line of the road); *De Cair v. Manistee, etc., R. Co.*, 133 Mich. 578.

*Missouri.* — *Harney v. Missouri Pac. R. Co.*, 80 Mo. App. 667; *Thompson v. Chicago, etc., R. Co.*, 86 Mo. App. 141.

*Wisconsin.* — *Hennesey v. Chicago, etc., R. Co.*, 99 Wis. 109.

**Knowledge May Be Inferred** from the charac-



**1062.** (3) *Servants Acting Beyond Scope of Employment.* — See note 2.

**1063.** *d. WHEN MASTER PROMISES TO REPAIR DEFECTS — Imminent Danger.* — See note 2.

**2. Duty of Master to Give Warning and Instruction.** — See note 3.

**1064.** See note 1.

**1065.** **3. Duty of Master to Make and Enforce Rules — Duty to Make Rules.** — See notes 1, 2, 3.

**4. Liability of Master for Negligence of Servants.** — See note 6.

ter of the apparatus or defect, or from the age, experience, or employment of the servant. *Creswall v. Wilmington, etc., R. Co., 2 Penn. (Del.) 210*; *Chicago, etc., R. Co. v. Lee, 29 Ind. App. 480*. See also *Keist v. Chicago G. W. R. Co., 110 Iowa 32*, where evidence as to the construction of chutes on the part of the defendant's road, over which the injured employee had been employed for a month preceding the accident, was held admissible, in view of other evidence as to what said employee had had to do with some of the chutes and his opportunity of observing them.

**1062. 2. The Conductor of a Freight Train.** — *Whiton v. South Carolina, etc., R. Co., 106 Ga. 796*.

**Yard Master.** — The court cannot say, as matter of law, that one who is yard master may not have the duty of coupling and uncoupling cars imposed upon him, by holding the averments in a complaint in this connection to be false, when the question is raised upon the pleadings. *McGhee v. Willis, 134 Ala. 281*.

**Foreman of Switch Crew.** — It being the duty of a foreman of a switching crew to make couplings, although his position might enable him to accomplish the end without the laying on of his own hands, it does not follow, especially in the absence of an express rule to the contrary, that in laying on his own hands he was acting outside the line of his duty. *Louisville, etc., R. Co. v. York, 128 Ala. 305*.

**Head Brakeman.** — If a head brakeman whose duty required him to be on the top of a car at a particular place is between two of the cars, the company cannot be held for an injury to him by reason of a collision with another train, crushing him, on the ground that the cars were not constructed so as to withstand the collision. *Filbert v. New York, etc., R. Co., 95 N. Y. App. Div. 199*.

**One Being Instructed cannot recover for injuries sustained by reason of his violation of his instructions.** *McMillan v. Grand Trunk R. Co., (C. C. A.) 130 Fed. Rep. 827*.

**1063. 2. Burden of Proof.** — *Ford v. Chicago, etc., R. Co., 106 Iowa 85*, where the same rule announced in the original opinion is reaffirmed on rehearing.

**3. Duty to Warn and Instruct.** — In support of the original text, see *Louisville, etc., R. Co. v. Miller, (C. C. A.) 104 Fed. Rep. 124*; *Pennsylvania R. Co. v. Hickley, 11 Ohio Cir. Dec. 379*, 20 Ohio Cir. Ct. 668, holding that the question of negligence under the facts was one for the jury. See also *Winkler v. Philadelphia, etc., R. Co., 4 Penn. (Del.) 80, affirmed 4 Penn. (Del.) 387*.

**Minors.** — Coupling cars which are being switched is of such a character that a boy of tender age should be instructed or cautioned

in reference to it before being permitted to undertake it. *McMillan v. Grand Trunk R. Co., (C. C. A.) 130 Fed. Rep. 827*.

**Pretended Experience.** — *Compare Louisville, etc., R. Co. v. Miller, (C. C. A.) 104 Fed. Rep. 124*, where it is held that the representations by the person seeking employment will not excuse the master from the performance of the duty of instructing him, the master having knowledge of the servant's inexperience.

**1064. 1. Unusual or Dangerous Appliances.** — *Southern Pac. R. Co. v. Winton, 27 Tex. Civ. App. 503*, supporting the original text.

It is not negligence to fail to warn an inexperienced employee of the greater danger incident to coupling cars that are supplied with deadwoods or buffers than cars having an ordinary device. Such increased danger is obvious and incident to the service. *Whitcomb v. Standard Oil Co., 153 Ind. 513*.

**1065. 1. Duty to Make Proper Rules.** — *Louisville, etc., R. Co. v. York, 128 Ala. 305*; *Devoe v. New York Cent., etc., R. Co., 174 N. Y. 1*, holding that the question of the adequacy of the rule was for the jury. See also *Winkler v. Philadelphia, etc., R. Co., 4 Penn. (Del.) 80, affirmed 4 Penn. (Del.) 387*.

**2. Sanner v. Atchison, etc., R. Co., 17 Tex. Civ. App. 337.**

**3. General Custom of Other Railroads may be shown, but proof of the rules of a particular railroad is not admissible.** *St. Louis, etc., R. Co. v. Nelson, 20 Tex. Civ. App. 536*.

**6. Liability for Negligence of Employee.** — In support of the text, see *Louisville, etc., R. Co. v. Grubbs, (Ky. 1899) 49 S. W. Rep. 3* (where the defendant company was held liable for the gross negligence of its engineer); *Illinois Cent. R. Co. v. Coleman, (Ky. 1900) 59 S. W. Rep. 13* (where the liability of the master for the negligence of one servant causing injury to another servant, the two being engaged in the same service at the time, is confined to the gross negligence of the servant at fault, where death does not result); *Linck v. Louisville, etc., R. Co., 107 Ky. 370*; *Cincinnati, etc., R. Co. v. Cook, 113 Ky. 161* (holding that where death results and the action is under the statute there may be a recovery for ordinary negligence of superior servants engaged in the same employment); *Ft. Worth, etc., R. Co. v. Bowen, 95 Tex. 364*; *Louisiana Extension R. Co. v. Carstens, 19 Tex. Civ. App. 190*.

**Brakeman Away Coupling Cars — Duty of Conductor Before Signaling Train to Start.** — *Andrews v. Toledo, etc., R. Co., 8 Ohio Cir. Dec. 584*.

**For Cases of Negligence Justifying Recovery, see the following:**

*Arkansas.* — *St. Louis, etc., R. Co. v. McCain, 67 Ark. 377*.



**1066. III. CONTRIBUTORY NEGLIGENCE — 1. General Rule. —** See note 1.  
**1067. 2. Proximate and Remote Causes. —** See notes 1, 2.

*Indiana.* — Chicago, etc., R. Co. v. Barnes, (Ind. 1903) 68 N. E. Rep. 166 (which involved the sufficiency of a complaint under the statute in Indiana); Lake Erie, etc., R. Co. v. Charman, 161 Ind. 95; Terre Haute, etc., R. Co. v. Rittenhouse, 28 Ind. App. 633.

*Kansas.* — Walker v. Gillett, 59 Kan. 214.

*Kentucky.* — Louisville, etc., R. Co. v. Adams, 106 Ky. 859; Louisville, etc., R. Co. v. Ewing, (Ky. 1904) 78 S. W. Rep. 460.

*Massachusetts.* — Bowes v. New York, etc., R. Co., 181 Mass. 89.

*Minnesota.* — Schus v. Powers-Simpson Co., 85 Minn. 447.

*Missouri.* — Black v. Missouri Pac. R. Co., 172 Mo. 177.

*Tennessee.* — Louisville, etc., R. Co. v. Jackson, 106 Tenn. 438.

*Texas.* — Gulf, etc., R. Co. v. Wilder, (Tex. Civ. App. 1903) 75 S. W. Rep. 546 (holding that the defendant railroad company was responsible for the negligence of the servant in charge of the engine resulting in injury to a car coupler); Missouri, etc., R. Co. v. Gearheart, (Tex. Civ. App. 1904) 81 S. W. Rep. 325; Gulf, etc., R. Co. v. Cooper, (Tex. Civ. App. 1903) 77 S. W. Rep. 263; International, etc., R. Co. v. Hoyt, 30 Tex. Civ. App. 518; Ft. Worth, etc., R. Co. v. Caskey, (Tex. Civ. App. 1904) 84 S. W. Rep. 264.

**1066. 1. Contributory Negligence.** — The following cases support the original text: Vany v. Peirce, (C. C. A.) 82 Fed. Rep. 162; McDonald v. Alabama Midland R. Co., 123 Ala. 227; Winkler v. Philadelphia, etc., R. Co., 4 Penn. (Del.) 80, *affirmed* 4 Penn. (Del.) 387; Creswell v. Wilmington, etc., R. Co., 2 Penn. (Del.) 210; Whitcomb v. Standard Oil Co., 153 Ind. 513 (holding that by the "Employers' Liability Act" the employee is not relieved from that caution and care of himself required by the common law); Ford v. Chicago, etc., R. Co., 106 Iowa 85; Schus v. Powers-Simpson Co., 85 Minn. 447; Elmore v. Seaboard Air Line R. Co., 132 N. Car. 865; Schlemmer v. Buffalo, etc., R. Co., 207 Pa. St. 198.

**The Test of the plaintiff's act** is what would be the conduct of ordinarily prudent men confronted by the same danger and under like circumstances. Missouri Pac. R. Co. v. Fox, 60 Neb. 531; Gulf, etc., R. Co. v. Cooper, (Tex. Civ. App. 1903) 77 S. W. Rep. 263.

**Choosing Dangerous Mode of Performing Act.** — For applications of the rule that one who has the choice between a safe and a dangerous mode of doing an act and chooses the latter, cannot recover for an injury thereby occasioned, see Gilbert v. Burlington, etc., R. Co., (C. C. A.) 128 Fed. Rep. 529; Denver, etc., R. Co. v. Arrighi, (C. C. A.) 129 Fed. Rep. 347; Herrick v. Quigley, (C. C. A.) 101 Fed. Rep. 187; Shorter v. Southern R. Co., 121 Ala. 158; Brinkmeier v. Missouri Pac. R. Co., 69 Kan. 738 (holding that the method adopted must be such that a reasonably prudent man would not, under all the circumstances, adopt it); Louisville, etc., R. Co. v. Fox, (Ky. 1897) 42 S. W. Rep. 922; Hewitt v. East-Jordan Lumber Co., (Mich. 1904) 98 N. W. Rep. 992; Caldwell v. Missouri Pac.

R. Co., 181 Mo. 455; Moore v. Kansas City, etc., R. Co., 146 Mo. 572.

But this rule rests upon the hypothesis that the duties could be performed as well and efficiently in the one way as in the other. Mobile, etc., R. Co. v. Bromberg, (Ala. 1904) 37 So. Rep. 395.

**Evidence — Custom.** — Carrier v. Union Pac. R. Co., 61 Kan. 447, holding that plaintiff may avoid the consequences of his own negligence by showing that it was the custom of other employees to engage in similar practices.

But where the evidence shows that the plaintiff could not make a "pilot-bar coupling" while riding on the steps of the engine, and that it was customary and necessary to ride upon the pilot in order to make the coupling, it would not be proper to instruct the jury that if the plaintiff could have ridden on the steps with more safety, but for his own convenience preferred to ride upon the pilot, the defendant would not be liable, etc., and it is proper to show that in making such coupling it was usual and customary for the brakeman to stand upon the pilot. San Antonio, etc., R. Co. v. Beam, (Tex. Civ. App. 1899) 50 S. W. Rep. 411.

**Order of Superior.** — Where a superior orders a coupler to go in and make a coupling, though the order is couched in the polite terms of a request, the doctrine which holds one responsible for his own choice of an unsafe course is not applicable. Fenn v. Seaboard Air-Line R. Co., 120 Ga. 664. See also Elmore v. Seaboard Air Line R. Co., 132 N. Car. 865.

But an employee has no right to subject himself to unnecessary or unusual risks even when ordered to do so. Wrightsville, etc., R. Co. v. Lattimore, 118 Ga. 581.

**1067. 1. Proximate and Remote Causes.** — Gilbert v. Burlington, etc., R. Co., (C. C. A.) 128 Fed. Rep. 529; Texas, etc., R. Co. v. McCoy, 17 Tex. Civ. App. 494 (approving instructions on this phase of the subject); Southern Pac. R. Co. v. Winton, 27 Tex. Civ. App. 503.

**2. Servant's Act, Not the Proximate Cause,** will not defeat a recovery. Chicago, etc., R. Co. v. Howell, 208 Ill. 155; Illinois Cent. R. Co. v. Jones, (Ky. 1904) 80 S. W. Rep. 484; Louisville, etc., R. Co. v. Veach, (Ky. 1898) 46 S. W. Rep. 493; Davenport v. F. B. Dubach Lumber Co., 112 La. 943; Youngblood v. South Carolina, etc., R. Co., 60 S. Car. 9, 85 Am. St. Rep. 824; Ft. Worth, etc., R. Co. v. Bowen, 95 Tex. 364; International, etc., R. Co. v. Gourley, 21 Tex. Civ. App. 579. See also Northern Pac. R. Co. v. Tynan, (C. C. A.) 119 Fed. Rep. 288; Richards v. Louisville, etc., R. Co., (Ky. 1899) 49 S. W. Rep. 419.

**Specific Instances of Proximate Cause.** — Where a bulletin required trains to be made up in a particular way at terminal stations, and the conductor disregarded the order and proceeded with the train to another station where he was having the train made according to his construction of the order, in the course of which he went between two cars to close an angle cock and the engine backed against the cars and caused an injury to him while in that position, the failure of the conductor to make up

- 1067.** Proximate Cause a Question of Fact. — See note 3.
- 1068.** **3. What Constitutes Negligence in Car Couplers — a. ACTS NEGLIGENCE PER SE — (1) Unnecessary Exposure to Danger — Illustrations.** — See notes 1, 2.
- 1069.** See notes 1, 2, 3.
- 1070.** (2) *Breach of Rules — (a) In General.* — See note 2.
- Coupling by Hand.** — See note 3.

the train properly at the terminal was not the proximate cause of the injury so as to defeat his action, and on the other hand, the failure of the yard master at the terminal to make up the train properly was not the proximate cause so as to furnish sufficient foundation for the cause of action. *St. Louis, etc., R. Co. v. Nelson*, 20 Tex. Civ. App. 536.

Notwithstanding the negligence of a brakeman it is the duty of the engineer to use all reasonable care in ascertaining any danger in which the brakeman may be placed, and for a breach of such duty, whereby an injury is caused to the brakeman, the company is liable. *Louisville, etc., R. Co. v. Adams*, 106 Ky. 859. And upon this phase of the subject, see also *supra*, p. 1058, note 2.

**1067. 3. Proximate Cause Question of Fact.** — *Herrick v. Quigley*, (C. C. A.) 101 Fed. Rep. 187; *McGhee v. Willis*, 134 Ala. 281; *Kansas City, etc., R. Co. v. Flipflo*, 138 Ala. 487; *Louisville, etc., R. Co. v. Ewing*, (Ky. 1904) 78 S. W. Rep. 460; *Richards v. Louisville, etc., R. Co.*, (Ky. 1899) 49 S. W. Rep. 419.

**1068. 1. Not Negligence Per Se, but Question Is One of Fact.** — *Branz v. Omaha, etc., R., etc., Co.*, 120 Iowa 406; *Galveston, etc., R. Co. v. Pitts*, (Tex. Civ. App. 1897) 42 S. W. Rep. 255; *Missouri, etc., R. Co. v. Keefe*, (Tex. Civ. App. 1905) 84 S. W. Rep. 679; *International, etc., R. Co. v. Turner*, (Tex. Civ. App. 1897) 43 S. W. Rep. 560.

**2. Uncoupling Cars While in Motion Constitutes Negligence.** — *Shannon v. Louisville, etc., R. Co.*, (Ky. 1902) 70 S. W. Rep. 626, where a night yardmaster walked along on the track in front of the train, while attempting to knock the wedge out of a coupling, and his foot caught in a frog. But see *De Cair v. Manistee, etc., R. Co.*, 133 Mich. 578, holding that the custom of employees of the defendant, in coupling cars, to go in front of moving cars, is admissible.

One is not guilty of negligence, as a matter of law, for attempting to make a coupling on a moving car instead of going to the stationary one, where there is no rule prohibiting such method and the evidence tends to show it is equally safe to make couplings in that manner. *Chittick v. Minneapolis, etc., R. Co.*, 88 Minn. 11.

**1069. 1. Not Negligence Per Se.** — It is not negligence *per se* to go between the cars and engine to make a coupling. *Kansas City, etc., R. Co. v. Flipflo*, 138 Ala. 487.

**2. Coupling on Inner Side of Curve.** — *Brown v. Louisville, etc., R. Co.*, (Ky. 1901) 65 S. W. Rep. 588 (supporting the text); *Hewitt v. East-Jordan Lumber Co.*, (Mich. 1904) 98 N. W. Rep. 992, announcing the rule of the original text where the danger is apparent, but holding further that if the coupling could have been made safely from the inside, but for another

cause which was the cause of the injury, then the entering from the inner side of the curve would be immaterial.

In *Mobile, etc., R. Co. v. Bromberg*, (Ala. 1904) 37 So. Rep. 395, where this defense was pleaded, the court applied, in testing the sufficiency of a replication, the rule that the servant must have been able to have performed his duty in the one way as efficiently as in the other, in order to preclude himself by having adopted the way which was more dangerous.

**3. Using Unsuitable Appliances.** — See *Cincinnati, etc., R. Co. v. Curtis*, 9 Ohio Cir. Dec. 112, where the act of a brakeman under an emergency was held not to defeat his recovery.

**1070. 2. Breach of Rules.** — *Cleveland, etc., R. Co. v. Baker*, (C. C. A.) 91 Fed. Rep. 224; *Louisville, etc., R. Co. v. Bockock*, 107 Ky. 223; *Fluhrer v. Lake Shore, etc., R. Co.*, 121 Mich. 212; *Jarvis v. Flint, etc., R. Co.*, 128 Mich. 61, which cases support the original text.

**Breach of Rules Is Not Negligence Per Se.** — *Texas Cent. R. Co. v. Yarbrow*, 32 Tex. Civ. App. 246.

**Connection Between Rule and Accident.** — It is proper to refuse to submit to the jury any question as to the violation of a rule where there is no connection between the particular rule and the accident. *Gulf, etc., R. Co. v. Cooper*, (Tex. Civ. App. 1903) 77 S. W. Rep. 263.

**What Is Not Breach.** — Where a rule required that employees should not put into a train cars having defective couplings, and a train already made up is turned over to a crew to operate, and in the course of the journey the train is separated at a street crossing, an employee who in coupling the cars is injured, by reason of defective couplings, has not violated the rule. *Southern Pac. R. Co. v. Winton*, 27 Tex. Civ. App. 503.

**3. Breach of Rules — Coupling by Hand.** — *Hodges v. Kimball*, (C. C. A.) 104 Fed. Rep. 745 (*Simonton, J., concurring*); *Shorter v. Southern R. Co.*, 121 Ala. 158; *Binion v. Georgia Southern, etc., R. Co.*, 118 Ga. 282, 115 Ga. 330; *Nichols v. Chicago, etc., R. Co.*, 125 Mich. 394; *Lake Shore, etc., R. Co. v. Ney*, 8 Ohio Cir. Dec. 567.

It must appear that the injury would not have occurred but for the failure to use a stick. *Louisville, etc., R. Co. v. Veach*, (Ky. 1898) 46 S. W. Rep. 493.

**Coupling Locomotive and Car.** — A rule against coupling or uncoupling cars except with a stick does not prohibit the going between a locomotive and a car to make a coupling, and this construction of the rule is supported by the fact that the coupling on the locomotive is of such a character and weight as to make the use of a stick a very difficult matter. *Fleming v. Southern R. Co.*, 131 N. Car. 476.

**Reasonableness of Rule Is a Question for the Jury.**



**1071.** Uncoupling Cars While in Motion. — See note 1.

(b) Rules Not Properly Published. — See note 2.

**1072.** (c) Waiver of Rules by Nonenforcement. — See note 2.

(d) When Circumstances Render Rules Impracticable. — See note 3.

**1073.** b. WHEN NEGLIGENCE IS A QUESTION FOR THE JURY. — See note 1.

— Texas Cent. R. Co. v. Yarbo, 32 Tex. Civ. App. 246.

**1071. 1. Uncoupling Cars While in Motion.** — See, supporting the original text, Shorter v. Southern R. Co., 121 Ala. 158; Louisville, etc., R. Co. v. Bocock, 107 Ky. 223; Jarvis v. Flint, etc., R. Co., 128 Mich. 61 (holding that the question whether plaintiff's conduct was a violation of a rule against going between cars except in the cases provided was for the determination of the jury); Hynson v. St. Louis Southwestern R. Co., (Tex. Civ. App. 1905) 86 S. W. Rep. 928.

**2. Rules Not Properly Published.** — Indiana, etc., R. Co. v. Bundy, 152 Ind. 590.

The plaintiff may testify that he was not given a copy of the rules of the company and was not familiar with them, in contradiction of his written application for employment, as the statements in such application are only declarations of fact and are not contractual. Missouri, etc., R. Co. v. Hauer, (Tex. Civ. App. 1897) 43 S. W. Rep. 1078.

**1072. 2. Waiver of Rules.** — Louisville, etc., R. Co. v. Bocock, 107 Ky. 223; Fluhrer v. Lake Shore, etc., R. Co., 124 Mich. 482, 121 Mich. 212; Nichols v. Chicago, etc., R. Co., 125 Mich. 394 (which last two cases hold that only where a rule is violated so universally and notoriously that it is fair to infer that the company sanctioned the violation, is the company deprived of this defense); Cleveland, etc., R. Co. v. Ullom, 11 Ohio Cir. Dec. 321; Galveston, etc., R. Co. v. Slinkard, 17 Tex. Civ. App. 585 (where knowledge of the division superintendent of the utter disregard of a rule was held to be notice to the railroad company); Sugarland R. Co. v. Archer, (Tex. Civ. App. 1902) 69 S. W. Rep. 430; Texas Cent. R. Co. v. Yarbo, 32 Tex. Civ. App. 246. See also Keegan v. New York Cent., etc., R. Co., 45 N. Y. App. Div. 629. Compare Chicago, etc., R. Co. v. Myers, 86 Ill. App. 401.

But where it is not shown that the conductor is such a representative of the company in the enforcement of its rules, as that his knowledge of their disobedience is the knowledge of the company, evidence of the conductor's knowledge of the violation of the rule is not admissible. Binion v. Georgia Southern, etc., R. Co., 118 Ga. 282.

**Waiver Question of Fact.** — Cleveland, etc., R. Co. v. Baker, (C. C. A.) 91 Fed. Rep. 224; Binion v. Georgia Southern, etc., R. Co., 111 Ga. 878.

**3. Impracticable Rule.** — Holmes v. Southern Pac. R. Co., 120 Cal. 357.

**1073. 1. Negligence Question for Jury** — United States. — Pittsburgh, etc., R. Co. v. Thompson, (C. C. A.) 82 Fed. Rep. 720; Northern Pac. R. Co. v. Tynan, (C. C. A.) 119 Fed. Rep. 288; Herrick v. Quigley, (C. C. A.) 101 Fed. Rep. 187.

Alabama. — McGhee v. Willis, 134 Ala. 281.

Arkansas. — St. Louis, etc., R. Co. v. McCain, 67 Ark. 377.

District of Columbia. — Baltimore, etc., R. Co. v. Elliott, 9 App. Cas. (D. C.) 341.

Illinois. — Illinois Cent. R. Co. v. Cozby, 174 Ill. 109; Chicago, etc., R. Co. v. Myers, 86 Ill. App. 401; Elgin, etc., R. Co. v. Eselin, 68 Ill. App. 97.

Iowa. — Baldwin v. Chicago G. W. R. Co., 109 Iowa 752, 81 N. W. Rep. 160 (holding that where the question whether the violation of a rule requiring the use of a stick was negligence was not before the court, still whether the act of the plaintiff in using his hand was negligence contributing to the injury was for the jury); Branz v. Omaha, etc., R., etc., Co., 120 Iowa 406; Trott v. Chicago, etc., R. Co., 115 Iowa 80.

Kansas. — Carrier v. Union Pac. R. Co., 58 Kan. 816, 50 Pac. Rep. 873; Walker v. Gillett, 59 Kan. 214; Brinkmeier v. Missouri Pac. R. Co., 69 Kan. 738; St. Louis, etc., R. Co. v. Keller, 10 Kan. App. 480.

Kentucky. — Illinois Cent. R. Co. v. Jones, (Ky. 1904) 80 S. W. Rep. 484; Murphy v. Baltimore, etc., R. Co., 114 Ky. 696.

Massachusetts. — Austin v. Fitchburg R. Co., 172 Mass. 484.

Michigan. — Jones v. Flint, etc., R. Co., 127 Mich. 198; Knapp v. Chicago, etc., R. Co., 114 Mich. 199.

Minnesota. — Chittick v. Minneapolis, etc., R. Co., 88 Minn. 111; Munch v. Great Northern R. Co., 75 Minn. 61.

Missouri. — Cambron v. Omaha, etc., R. Co., 165 Mo. 543; Black v. Missouri Pac. R. Co., 172 Mo. 177.

Nebraska. — Chicago, etc., R. Co. v. Holmes, (Neb. 1903) 94 N. W. Rep. 1007, holding that it was for the jury to say whether it was necessary for a switchman to get in front of a drawhead to see why a coupling was failing to work.

Ohio. — Pittsburg, etc., R. Co. v. Stone, 24 Ohio Cir. Ct. 192; Andrews v. Toledo, etc., R. Co., 8 Ohio Cir. Dec. 584.

Texas. — St. Louis, etc., R. Co. v. Nelson, 20 Tex. Civ. App. 536; International, etc., R. Co. v. Turner, (Tex. Civ. App. 1897) 43 S. W. Rep. 560.

**Inferences Must Be Drawn by Jury.** — If there is no evidence as to what the servant did just before the accident, the inference of his negligence from the position in which he was found after the injury is not alone sufficient to justify withdrawal of the case from the jury. Creswell v. Wilmington, etc., R. Co., 2 Penn. (Del.) 210.

**Evidence of Custom Admissible.** — De Cair v. Manistee, etc., R. Co., 133 Mich. 578; Rifley v. Minneapolis, etc., R. Co., 72 Minn. 469 (which involved the question of the practice of defendant's brakemen to walk in front of a moving car to adjust a coupling); Sehns v. Powers-Simpson Co., 85 Minn. 447; Hooper v. Great Northern R. Co., 80 Minn. 400; International, etc., R. Co. v. Penn. (Tex. Civ. App. 1904) 79 S. W. Rep. 624. See also Belt R. Co. v. Con-



**1073. IV. FELLOW SERVANTS.** — See notes 2, 3.

**1075. V. EVIDENCE — EXPERT TESTIMONY — In Respect to Construction.** — See note 1.

**1076. In Respect to Negligence of Brakeman.** — See note 1.

frey, 209 Ill. 344; *Chittick v. Minneapolis, etc.*, R. Co., 88 Minn. 11; *Keegan v. New York Cent., etc.*, R. Co., 45 N. Y. App. Div. 629. But see *Carrier v. Union Pac. R. Co.*, 61 Kan. 447.

**1073. 2.** In *Texas* it is provided by statute that railway companies shall be liable for all damages sustained by any servant thereof while engaged in the work of operating the cars, etc., by reason of the negligence of any other servant. This applies to a switchman engaged in making couplings. *Missouri, etc.*, R. Co. v. Baker, (Tex. Civ. App. 1900) 58 S. W. Rep. 964.

**Where Master's Negligence Contributes to Injury.** — For application of the rule that where the master's negligence contributes to the injury the negligence of a fellow servant will not defeat a recovery, see *Neal v. St. Louis, etc.*, R. Co., 71 Ark. 445; *Creswell v. Wilmington, etc.*, R. Co., 2 Penn. (Del.) 210; *Chicago, etc.*, R. Co. v. Gillison, 173 Ill. 264, 64 Am. St. Rep. 117; *Troxler v. Southern R. Co.*, 122 N. Car. 902; *International, etc.*, R. Co. v. Bonatz, (Tex. Civ. App. 1898) 48 S. W. Rep. 767; *McCoy v. Norfolk, etc.*, R. Co., 99 Va. 132 (holding that the master's negligence must have proximately contributed to the injury); *Virginia, etc.*, R. Co. v. Bailey, 103 Va. 205.

Where the defect has existed for so long a time that the defendant may be presumed to have notice of it, it will not be relieved of liability on the ground that the failure to repair was the negligence of a fellow servant. *Fluhrer v. Lake Shore, etc.*, R. Co., 121 Mich. 212.

**3. Engineer and Car Coupler — Held to Be Fellow Servants.** — *McDonald v. Norfolk, etc.*, R. Co., 95 Va. 98.

**Engineer and Conductor** are fellow servants. *Creswell v. Wilmington, etc.*, R. Co., 2 Penn. (Del.) 210. See also *Linck v. Louisville, etc.*, R. Co., 107 Ky. 370; *Edmonson v. Kentucky Cent. R. Co.*, 105 Ky. 479, which hold that the engineer is not the superior of a conductor who is engaged in uncoupling cars.

**Fireman and Brakeman — Held to Be Fellow Servants.** — *Virginia, etc.*, R. Co. v. Bailey, 103 Va. 205.

**Conductor and Car Coupler — Held to Be Fellow Servants.** — *Alabama G. S. R. Co. v. Baldwin*, 113 Tenn. 409.

*Held Not to Be Fellow Servants.* — *Walker v. Gillett*, 59 Kan. 214.

**Brakemen on Same Train — Held to Be Fellow Servants.** — *Grand Rapids, etc.*, R. Co. v. Pettit, 27 Ind. App. 120.

**Yard Master and Car Coupler — Held Not to Be Fellow Servants.** — *Lake Erie, etc.*, R. Co. v. Charman, 161 Ind. 95, under *Indiana* statute.

**Engineer and Fireman — Held Not to Be Fellow Servants.** — *Pennsylvania R. Co. v. Hickley*, 11 Ohio Cir. Dec. 379, 20 Ohio Cir. Ct. 668.

**Foreman of Switch Crew and Switchman — Held to Be Fellow Servants.** — *Garland v. Missouri, etc.*, R. Co., 85 Mo. App. 579, where the foreman gave a signal negligently, but was acting as intermediary between the engineer and the switchman making the coupling.

**Brakeman and Fireman of Switch Engine — Held to Be Fellow Servants.** — *Sanner v. Atchison, etc.*, R. Co., 17 Tex. Civ. App. 337.

*Held Not to Be Fellow Servants.* — *Terre Haute, etc.*, R. Co. v. Rittenhouse, 28 Ind. App. 633, under the statute in *Indiana*.

**Switchman and Foreman — Held Not to Be Fellow Servants.** — *St. Louis, etc.*, R. Co. v. McCain, 67 Ark. 377, under *Arkansas* statute.

**Road Master and Brakeman — Held Not to Be Fellow Servants.** — *Missouri, etc.*, R. Co. v. Keefe, (Tex. Civ. App. 1905) 84 S. W. Rep. 679.

**Conductor of Freight Train and Station Agent — Not Fellow Servants.** — *Louisville, etc.*, R. Co. v. Jackson, 106 Tenn. 438.

**Train Dispatcher and Car Coupler — Held Not to Be Fellow Servants.** — *McHugh v. Manhattan R. Co.*, 179 N. Y. 378.

**Fellow Servants or Not, Question of Fact.** — *Hartley v. Chicago, etc.*, R. Co., 197 Ill. 440.

**1075. 1. Yard Master May Testify as Expert** — *Missouri Pac. R. Co. v. Fox*, 60 Neb. 531, holding that a yard master may testify as an expert on the construction of such appliances.

**Brakeman.** — See *Baltimore, etc.*, R. Co. v. Elliott, 9 App. Cas. (D. C.) 341, holding testimony of a brakeman as to unsafe condition admissible without his qualifying as an expert.

**As to Safety of Track.** — Opinion evidence as to how the track could be made safest by showing how the roadbed should be constructed at switches is pertinent to be weighed by the jury in determining whether or not the defendant had used proper care. *Galveston, etc.*, R. Co. v. Pitts, (Tex. Civ. App. 1897) 42 S. W. Rep. 255.

**Must Be Pertinent to Issue.** — In an action for injuries based upon the alleged negligent maintaining of a ground switch by a railroad company in its yard, opinion evidence as to what is the safest kind of a switch to use in a yard is not admissible because the negligence charged is not on account of the character or construction of the switch. *Galveston, etc.*, R. Co. v. English, (Tex. Civ. App. 1900) 59 S. W. Rep. 626.

**Opinion as to Cause of Wound.** — An opinion as to what caused a wound cannot be given by a medical expert when based on the character of attachments on car and their location, and not on the character of the wound. *Missouri Pac. R. Co. v. Fox*, 56 Neb. 746.

**Matters Not for Opinion Evidence.** — Under an allegation of negligence in failing to provide and maintain sufficient lights in a yard at or near a switch, expert evidence as to whether the switch would have been safer with or without a light thereon is not admissible because the question is one for the jury and not for expert testimony. *Galveston, etc.*, R. Co. v. English, (Tex. Civ. App. 1900) 69 S. W. Rep. 626.

**1076. 1. In Respect to Negligence.** — *Chicago, etc.*, R. Co. v. Holmes, (Neb. 1903) 94 N. W. Rep. 1007 (holding that evidence by a switchman as to whether it was necessary for the injured person to do what he did, is not proper, the question being one for the jury); *St. Louis, etc.*, R. Co. v. Nelson, 20 Tex. Civ. App. 536.

# COUPONS.

By R. N. CHAFFEE.

**4. III. NEGOTIABILITY — 1. Bonds with Coupons Attached — Effect of Overdue Coupons Attached to Bonds.** — See note 5.

**5. A Circumstance Bearing on Question of Good Faith of Transferee.** — See note 1.

**6. 5. Detached Coupons — a. IN GENERAL.** — See notes 3, 4.

**9. d. RIGHTS OF HOLDER — (3) Stolen Coupons.** — See note 6.

**10. (5) Interest on Overdue Coupons.** — See note 4.

**16. V. ENFORCEMENT OF COUPONS — 1. Independent Right of Action — Production of Bond Not a Prerequisite.** — See note 3.

**18. 4. Statute of Limitations.** — See note 2.

**20. [COURT. — See note 1a.]**

**4. 5. Effect of Overdue Coupons Attached to Bonds.** — Buffalo Loan, etc., Co. *v.* Medina Gas, etc., Co., 162 N. Y. 67.

**5. 1. Buffalo Loan, etc., Co. *v.* Medina Gas, etc., Co., 162 N. Y. 67.**

**6. 3. Negotiability of Detached Coupons.** — Fox *v.* Hartford, etc., Horse R. Co., 70 Conn. 1; Wisner *v.* Osteyee, (Supm. Ct. App. T.) 23 Misc. (N. Y.) 123; Haskins *v.* Albany, etc., R., etc., Co., 74 N. Y. App. Div. 31; Connolly *v.* Montreal Park, etc., R. Co., 20 Quebec Super. Ct. 1, quoting 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 6.

**4. Detached Coupon an Independent Claim.** — Fox *v.* Hartford, etc., Horse R. Co., 70 Conn. 1; Haskins *v.* Albany, etc., R., etc., Co., 74 N. Y. App. Div. 31. But see Hudson Valley R. Co. *v.* O'Connor, 95 N. Y. App. Div. 6, holding that coupons are part of a bond, and are affected by its infirmities as well as endowed with its strength, and that their character is not changed by detaching them from the bond. And to the same effect see Kelly *v.* Forty-second St., etc., R. Co., 37 N. Y. App. Div. 500.

**9. 6. Rebutting Presumption.** — Where a coupon is acquired before maturity the presumption that the holder acquired it in good faith may be rebutted. Wisner *v.* Osteyee, (Supm. Ct. App. T.) 23 Misc. (N. Y.) 123.

**10. 4. Interest on Overdue Coupons.** — Lake County *v.* Linn, 29 Colo. 446; Fox *v.* Hartford, etc., Horse R. Co., 70 Conn. 1; Cook *v.* Illinois

Trust, etc., Bank, 68 Ill. App. 478. But see Lee *v.* Melby, 93 Minn. 4.

**Under Statute in Idaho.** — Vermont L. & T. Co. *v.* Tetzlaff, 6 Idaho 105.

**16. 3. Production of Bond Not a Prerequisite to Suit.** — Connolly *v.* Montreal Park, etc., R. Co., 20 Quebec Super. Ct. 1, quoting 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 16.

**18. 2. Statute of Limitations.** — Kelly *v.* Forty-second St., etc., R. Co., 37 N. Y. App. Div. 500, supporting also *obiter* the proposition that the statute begins to run against detached coupons from their respective maturities.

**20. 1a. Synonymous with Park and Square.** — The word *court* used in connection with the sale of a piece of land is synonymous in law with the words "park" and "square." Conrad *v.* West End Hotel, etc., Co., 126 N. Car. 776.

**Tenement House Act — New York.** — In Gutting *v.* Brennan, 97 N. Y. App. Div. 25, the court said: "But I am inclined to the view that the word *court*, as used in the statute [Tenement House Act], refers to open unoccupied spaces which are wholly or partially inclosed at the end, rather than to spaces which are open to free access from both the street and yard of the premises, and which if regarded as courts within the meaning of the law are to be considered as in reality two or double *courts*."

# COURTS.

By E. C. ELLSBREE.

## 22. II. DEFINITION. — See note 2.

Judge and Jury. — See notes 3, 4.

## 23. See note 1.

## 24. Clerk. — See note 1.

Time and Place. — See note 2.

## 25. Instances. — See note 1.

## 26. III. ORGANIZATION AND COMPONENT PARTS — Disqualification. — See note 1.

**22.** 2. *People v. Opel*, 188 Ill. 194, *quoting* 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 22; *Johnston v. Hunter*, 50 W. Va. 52.

**Other Definitions.** — A court is a judicial assembly. *State v. Woodson*, 161 Mo. 444.

A court is a tribunal, presided over by one or more judges, for the exercise of such judicial power as has been conferred upon it by law. *Von Schmidt v. Widber*, 99 Cal. 511.

**3. Presence of Judge.** — *People v. Opel*, 188 Ill. 194, *quoting* 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 22; *Scott v. State*, 43 Tex. Crim. 591, *citing* 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 22.

**4.** Louisville, etc., *R. Co. v. McDonald*, 79 Miss. 641, *citing* 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 22.

**23. 1. Judge Does Not Constitute Court.** — The election and qualification of a judge does not constitute a court. *Johnston v. Hunter*, 50 W. Va. 52.

**Not Synonymous with "Judge."** — While the judge is often called the "court," yet he is rightly so called only when the tribunal over which he presides is in session. *State v. Woodson*, 161 Mo. 444.

**Single Judge.** — *Jackson v. State*, 87 Md. 191.

**A Judge in Vacation.** — Louisville, etc., *R. Co. v. McDonald*, 79 Miss. 641, *quoting* 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 23, note.

A judge in vacation has no power to issue writs save the one of habeas corpus. *People v. District Ct.*, 28 Colo. 485.

It follows from this limitation of authority that a judge in vacation cannot grant an order to show cause why a writ of prohibition should not issue. *People v. District Ct.*, 28 Colo. 485.

A judge in vacation has no power to determine finally an action for an injunction, or to enter an order out of term time dismissing a cause. *Johnson v. Bouton*, 56 Neb. 626.

A district judge has no power to adjudicate the rights of litigants in vacation, unless authorized so to do by statute. *Ford v. Liner*, 24 Tex. Civ. App. 353.

A judge of a Circuit Court in vacation has no authority to render a final judgment or decree in any case. *State v. Woodson*, 161 Mo. 444.

An order extending the time within which to file a bill of exceptions may be made by the

court or the judge in vacation. Louisville, etc., *R. Co. v. McDonald*, 79 Miss. 641.

An application for a writ of certiorari, in the first judicial district, may be made to a judge at chambers; but it is the act of the court, nevertheless, and it should be entered in the minutes of the clerk. *People v. Stillings*, 76 N. Y. App. Div. 143.

Under Stat. Vt., § 4527, a chancellor, in vacation, has power to try and summarily punish a person guilty of violating an injunction. *In re Murphy*, 73 Vt. 115.

It is deducible from the provisions of Annot. Code Miss., § 3540, that the regular judge of the Circuit Court, trying in vacation an information in the nature of a quo warranto for a public office, would, in effect, be sitting as a Circuit Court, and would have all the powers of such court, with the incidental powers belonging thereto. *Kelly v. State*, 79 Miss. 168.

**24. 1. Clerk.** — "An open court contemplates the presence of the judge and the clerk of the court, or a duly qualified deputy, \* \* \* and the presence of the clerk's docket, upon which should be entered, under the eye of the court, the successive steps taken in open court in each case." *Hays v. Philadelphia*, etc., *R. Co.*, 99 Md. 413.

**2. Time and Place.** — *Johnston v. Hunter*, 50 W. Va. 52.

**25. 1. A Board to Try Election Contests** is a court. *Pratt v. Breckinridge*, 112 Ky. 1.

**A Board of Equalization** which passes on the question of value of property listed for taxation with power to approve, increase, or decrease the same, is not a legislative court. *Albin Co. v. Louisville*, (Ky, 1904) 79 S. W. Rep. 274.

**Board of Irrigation.** — In *Crawford Co. v. Hathaway*, 61 Neb. 317, the court said: "It is practically impossible to create an administrative body which does not also possess in a certain degree judicial functions. But the fact that such bodies possess to some extent judicial powers does not necessarily make such body a court within the meaning of the constitution."

**26. 1. Disqualification from Interest.** — *Phillips v. Curley*, 28 Colo. 34; *MacMillan v. Spencer*, 28 Colo. 80; *King's Lake Drainage*, etc., *Dist. v. Jamison*, 176 Mo. 557, *quoting* 1 AM. AND ENG. ENCYC. OF LAW (2d ed.) 26; *State v.*



**27.** See notes 1, 2.

**Personal Liability for Judicial Acts.** — See note 3.

**28.** **Subordinate Officers.** — See notes 2, 3.

**IV. INHERENT POWERS — 1. Generally.** — See note 6.

Mack, 26 Nev. 430; Rapid City First Nat. Bank v. Keenan, 12 S. Dak. 240; Rapid City First Nat. Bank v. McCarthy, 13 S. Dak. 356; Rapid City First Nat. Bank v. McGuire, 12 S. Dak. 226, 76 Am. St. Rep. 598.

In order to disqualify, the interest of the judge must be in the subject-matter of the cause, and not merely in a legal question involved in it. *Forest Coal Co. v. Doolittle*, 54 W. Va. 210.

**Pecuniary Interest.** — *Tootle v. Berkley*, 60 Kan. 446.

**Interest from Relationship.** — *Crook v. Newborg*, 124 Ala. 479, 82 Am. St. Rep. 190; *State v. Wall*, 41 Fla. 463, 79 Am. St. Rep. 195; *Roberts v. Roberts*, 115 Ga. 259, 90 Am. St. Rep. 108; *Matthews v. Noble*, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 674; *Vine v. Jones*, 13 S. Dak. 54; *Gresham v. State*, 43 Tex. Crim. 466.

**Interest from Having Acted as Counsel.** — *People v. District Ct.*, 26 Colo. 226; *Tootle v. Berkley*, 60 Kan. 446; *Graham v. State*, 43 Tex. Crim. 110; *Woody v. State*, (Tex. Crim. 1902) 69 S. W. Rep. 155; *Gaines v. Hindman*, (Tex. Civ. App. 1903) 74 S. W. Rep. 583.

It is improper for a judge to try indictments signed by him as prosecuting attorney. *State v. Cottrell*, 45 W. Va. 837.

**No Application to Quasi-judicial Tribunal.** — The common-law disqualification applied to judges has no application to the members of a quasi-judicial tribunal acting judicially in dealing with administrative matters. *State v. Houser*, 122 Wis. 534.

**27. 1. Merely Formal Matters.** — *Cullins v. Overton*, 7 Okla. 470; *Ross v. State*, 8 Wyo. 351.

**2. When No Other Judge Can Act.** — *State v. Houser*, 122 Wis. 534.

**3. Personal Liability.** — *English v. Ralston*, 112 Fed. Rep. 272; *Calhoun v. Little*, 106 Ga. 336, 71 Am. St. Rep. 254; *Roth v. Shupp*, 94 Md. 55; *Williams v. Elliott*, 76 Mo. App. 8; *Nienaber v. Tarvin*, 9 Ohio Dec. 561, 7 Ohio N. P. 110; *Comstock v. Eagleton*, 111 Okla. 487; *Webb v. Fisher*, 109 Tenn. 701, 97 Am. St. Rep. 863.

Where he acts corruptly, maliciously, or beyond his jurisdiction, his office is no protection. *Reed v. Taylor*, (Ky. 1904) 78 S. W. Rep. 892; *Stephens v. Wilson*, 115 Ky. 27.

**28. 2. Bailiff.** — While bailiffs are not constitutional officers, they are "officers of the court" by common understanding. *U. S. v. McCabe*, (C. C. A.) 129 Fed. Rep. 708, *affirming* 122 Fed. Rep. 653.

**3. Criers being appointed under Rev. Stat., U. S., § 715 (4 Fed. Stat. Annot. 81)**, may well be regarded as constitutional officers. *U. S. v. McCabe*, (C. C. A.) 129 Fed. Rep. 708, *affirming* 122 Fed. Rep. 653.

**6. General Rule as to Powers.** — *State v. Flynn*, 161 Ind. 554, *quoting* 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 28.

"Courts of justice have power, as a necessary incident to their general jurisdiction, to

make such orders in relation to the cases pending before them as are necessary to the progress of the cases and the dispatch of business." *Carr v. Adams*, (N. H. 1899) 45 Atl. Rep. 1084.

**Records.** — *Fay v. Stubenrauch*, 141 Cal. 573; *Mitchell v. State*, (Fla. 1903) 33 So. Rep. 1009; *Gilmore v. Harp*, 92 Mo. App. 386; *Kerr v. Hicks*, 131 N. Car. 90; *Ricaud v. Alderman*, 132 N. Car. 62; *Johnston v. Arrendale*, (Tex. Civ. App. 1902) 71 S. W. Rep. 44.

The power of a court to make its record speak the truth exists in criminal as well as in civil cases, and is not lost by mere lapse of time. *People v. Ward*, 141 Cal. 628.

The court possesses this power even in vacation. *Baum v. Corsicana Nat. Bank*, 32 Tex. Civ. App. 531; *Ft. Worth, etc., R. Co. v. Roberts*, (Tex. 1904) 81 S. W. Rep. 25.

A record cannot be amended at a subsequent term by parol evidence. *Evans v. Smith*, 22 Tex. Civ. App. 472.

**To Enforce Its Judgments and Mandates.** — *Jones v. Miller*, (Neb. 1902) 92 N. W. Rep. 201.

**To Replace Lost Records.** — *Roberson v. State*, (Fla. 1903) 34 So. Rep. 294; *Ormsby v. Graham*, 123 Iowa 202.

**To Preserve Order.** — Where the unobstructed travel along a street in front of the court house interrupts and hinders the proceedings in the court, said court has the power to stop traffic on said street so far as essential to abate the disturbance and protect the court from interruption. *Ex p. Birmingham*, 134 Ala. 609.

**To Judge of Its Own Jurisdiction.** — It is the province of the Supreme Court to finally determine the limits of its own jurisdiction, and thereby to mark the boundaries of the jurisdiction of Courts of Appeals. *Ortt v. Leonhardt*, (Mo. App. 1902) 68 S. W. Rep. 577.

**To Modify Judgment.** — A court of probate has unlimited power during the whole of the term to modify, vacate, or set aside its judgments rendered at such term. *Aull v. St. Louis Trust Co.*, 149 Mo. 1; *State v. Eyermann*, 172 Mo. 294; *Crawford v. Chicago, etc., R. Co.*, 171 Mo. 68.

**To Adjourn.** — "Courts of record have inherent power to adjourn from day to day and from week to week." *Buchanan v. State*, 118 Ga. 751; *Cribb v. State*, 118 Ga. 316.

**To Purchase Necessary Furniture for the court room.** *State v. Davis*, 26 Nev. 373.

But where by statute the duty of furnishing the court room devolves upon the city, the discretion as to the character of such furnishings being vested in the general council, the court has no power to coerce performance of such duty. *Nienaber v. Tarvin*, 104 Ky. 149.

**To Preserve Subject of Litigation.** — The Supreme Court possesses inherently whatever power is necessary to preserve the subject of the litigation and the status of the parties pending appeal. *Finlen v. Heinze*, 27 Mont. 107.

**To Appoint Interpreters.** — At common law the court has not only the right, but also the duty, to appoint an interpreter, where the necessity

**29. 2. Rules of Court.** — See note 5.

**30. Must Not Conflict with Law of the Land.** — See note 1.

**31. Adoption of Record Within Reasonable Time — Must Not Be Retroactive.** — See note 2.

**Courts May Rescind Their Rules.** — See note 3.

**Construction — Courts of Original Jurisdiction.** — See note 4.

**V. ADJUDICATIONS AND THEIR EFFECT.** — See note 5.

exists. *Menella v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 5.

**To Vacate Void Decree.** — Where a decree void for want of jurisdiction has been rendered, the court rendering it possesses the inherent power to vacate such decree, and should do so on motion. *Chamblee v. Cole*, 128 Ala. 649.

**To Make Continuous Terms.** — It is competent for the District Court, in the absence of express legislative prohibition, to make its terms continuous for the trial of particular classes of cases. *Hoyle's Succession*, 109 La. 623.

**29. 5. Power to Make Rules.** — *State v. Van Cleave*, 157 Ind. 608; *Schuler v. Collins*, 63 Kan. 372; *Carr v. Adams*, (N. H. 1899) 45 Atl. Rep. 1084; *Helfrich v. Greenberg*, 206 Pa. St. 516; *Smith v. Hawley*, 11 S. Dak. 399.

**Construction of Rules — Must Be Reasonable.** — See *Lewis v. Jones*, 10 Kulp. (Pa.) 32.

A court of chancery should liberally construe its rules governing matters of procedure, and not permit them to be converted into a maze wherein the skillful pleader may elude the pursuit of justice. *Jackson v. Lemler*, 83 Miss. 37.

**Evidence to Prove Rules.** — *Davis v. Northwestern El. R. Co.*, 170 Ill. 595.

The existence of a rule of court must be proved by the record; its nonexistence by the testimony of the clerk of the court. *Hughes v. Humphreys*, 102 Ill. App. 194.

**A Rule Limiting Instructions to a Given Number** is unreasonable. *Chicago City R. Co. v. Sandusky*, 198 Ill. 400.

**Rules as to Issuance of Alias Writs.** — The Supreme Court has power to make a rule providing for the issuing of alias and pluries original writs. *Van Benschoten v. Fales*, 126 Mich. 176.

**Rule as to Requests for Separate Findings of Fact and Law.** — A rule that a request for separate findings of fact and conclusions of law shall be made at the commencement of the trial is reasonable. *Schuler v. Collins*, 63 Kan. 372.

**Rules Exacting Fees.** — The board of justices of the Municipal Court of the city of New York has no authority under section 1375 of the city charter to make rules creating and exacting fees. *Matter of Hale*, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 104.

**Court May Enforce Its Rules *Suo Motu*.** — The right to invoke a rule of court is not confined to the appellee, but the court, charged with the duty of expediting the business before it, may of its own motion enforce it. *State v. Van Cleave*, 157 Ind. 608.

**Effect of Rules.** — The general rules of practice made pursuant to Code Civ. Pro., § 17, have the force of statute law. *Smith v. Warringer*, (County Ct.) 41 Misc. (N. Y.) 94. See also *Strouse v. Miller*, 3 Dauphin Co. Rep. (Pa.) 90.

**30. 1. Must Not Conflict with Law of the Land.** — *Hopper v. Mather*, 104 Ill. App. 309.

**Power Restricted by Constitution — Michigan.**

— The power of the Circuit Court to make rules of procedure is restricted by Const. Mich., art. 6, § 5, providing that the Supreme Court shall, by general rules, establish, modify, and amend the practice in the Circuit Court. *Detroit, etc., R. Co. v. Eaton Circuit Judge*, 128 Mich. 495.

**Power Restricted by Statutes — Florida.** — Under Rev. Stat. Fla., § 1308, the Supreme Court is invested with, and the inferior courts are divested of, the power to adopt rules of practice, of a permanent and general nature, and convenient simply, not necessary, to the administration of law by such inferior courts. *State v. Call*, 39 Fla. 504.

**Texas.** — Where the rules of practice and procedure in the District and County Courts are fixed by statute, and by rules prescribed by the Supreme Court under the statutes, the judges of such courts have no authority to arbitrarily fix a certain day in the term after which amendments to pleading may not be made. *Fidelity, etc., Co. v. Carter*, 23 Tex. Civ. App. 359.

**31. 2. Rawlings v. Neal**, 122 N. Car. 173.

**3. Must Apply to All Alike Until Rescinded.** — *Rio Grande Irrigation, etc., Co. v. Gildersleeve*, 174 U. S. 603; *District of Columbia v. Roth*, 18 App. Cas. (D. C.) 547; *Talty v. District of Columbia*, 20 App. Cas. (D. C.) 489; *Smith v. Guckenheimer*, 42 Fla. 1; *Hopper v. Mather*, 104 Ill. App. 309; *Magnuson v. Billings*, 152 Ind. 177; *State v. Birchard*, 35 Oregon 484.

**Court Bound as Well as Parties.** — The appellate court, equally with suitors, is bound by its rules, and they must be construed as statutes would be construed. *Merchants' Nat. Bank v. Grunthal*, 39 Fla. 388; *Hoodless v. Jernigan*, (Fla. 1903) 35 So. Rep. 656; *Talty v. District of Columbia*, 20 App. Cas. (D. C.) 489; *Kline-smith v. Van Bramer*, 104 Ill. App. 384.

**May Be Suspended for Cause.** — A rule of court may be suspended by the court for good cause. *Washington Bank v. Horn*, 24 Wash. 299; *Dolan v. Stone*, 63 Kan. 450.

**4. Liggett v. People**, 26 Colo. 364, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 31; *Roberts v. Kuhrt*, 119 Ga. 704, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 31; *State v. Birchard*, 35 Oregon 484, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 31; *Pelz v. Bollinger*, 180 Mo. 252; *Hunter v. Union L. Ins. Co.*, 58 Neb. 198; *Smith v. Warringer*, (County Ct.) 41 Misc. (N. Y.) 94. See also *Simmons v. Morrison*, 13 App. Cas. (D. C.) 161.

**5. Adjudications — Reversals — California.** — *Angus v. Pium*, 121 Cal. 608.

**Idaho.** — *People v. Alturas County*, 6 Idaho 418; *Walling v. Bown*, (Idaho 1904) 76 Pac. Rep. 318.

**Kentucky.** — *Flannery v. Givens*, (Ky. 1899) 52 S. W. Rep. 962; *Uhl v. Reynolds*, 64 S. W.



Rep. 498, 23 Ky. L. Rep. 759; *Nickels v. Com.*, 64 S. W. Rep. 448, 23 Ky. L. Rep. 778.

*Michigan*.—*Reid v. Wayne Circuit Judge*, 132 Mich. 406.

*Missouri*.—*Sedalia v. Gold*, 91 Mo. App. 32; *Shoenberg v. Heyer*, 91 Mo. App. 389.

*New Jersey*.—*State v. Taylor*, 68 N. J. L. 276.

*Ohio*.—*Cincinnati v. Taft*, 63 Ohio St. 141.

*Pennsylvania*.—*Shamokin, etc., Light, etc., Co. v. John*, 18 Pa. Super. Ct. 498.

*Texas*.—*Dean v. Gibson*, (Tex. Civ. App. 1898) 48 S. W. Rep. 57; *Hall v. White*, 94 Tex. 452.

*Wisconsin*.—*Lonstorf v. Lonstorf*, 118 Wis. 159.

See also *State v. Gibson*, 11 Ohio Dec. 90, 8 Ohio N. P. 367.

Before the Supreme Court overrules a decision deliberately made, it should be convinced not merely that the case was wrongly decided, but also that less injury will result from overruling than from following it. *McEvoy v. Sault Ste. Marie*, (Mich. 1904) 98 N. W. Rep. 1006.

Decisions construing an amended statute, the amendment to which was not called to the attention of the court, are not binding as precedents. *Elfring v. New Birdsall Co.*, 17 S. Dak. 350.

**A Single Decision** followed in no other case, rendered by a bare majority of the court, and placing a construction upon a statute palpably erroneous and contrary to public policy, will not be followed. *Postal Tel. Cable Co. v. Farmville, etc.*, R. Co., 96 Va. 661. See also *Hill v. State*, 112 Ga. 400; *McDonald v. Davey*, 22 Wash. 366.

**Dictum**.—*King v. Pomeroy*, 121 Fed. Rep. 287, 58 C. C. A. 209; *Southern R. Co. v. Simpson*, (C. C. A.) 131 Fed. Rep. 705; *Adams v. Yazoo, etc.*, R. Co., 77 Miss. 194, *affirmed* 180 U. S. 1; *St. Louis, etc., R. Co. v. Fowler*, 142 Mo. 670; *State v. Paxton*, 65 Neb. 110; *Williams v. Miles*, (Neb. 1903) 96 N. W. Rep. 151; *Modern Woodmen of America v. Coleman*, (Neb. 1903) 96 N. W. Rep. 154; *People v. Leubischer*, (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 495, *affirmed* 34 N. Y. App. Div. 577; *Matter of Klock*, 30 N. Y. App. Div. 24.

Principles are not established by what was said *arguendo*, but by what was decided. *People v. Tax Com'rs*, 174 N. Y. 417.

**Effect of Equal Division of Court**.—*Hanifen v. Armitage*, 117 Fed. Rep. 845; *State v. McClung*, (Fla. 1904) 37 So. Rep. 51.

**Language of Decision**.—*Crane v. Bennett*, 177 N. Y. 106, 101 Am. St. Rep. 722.

**Rule of Property**.—*Smith v. Ferries, etc.*, R. Co., (Cal. 1897) 51 Pac. Rep. 710; *Sacramento Bank v. Alcorn*, 121 Cal. 379; *Lacy v. Gunn*, 144 Cal. 511; *Parke v. Boulware*, (Idaho 1903) 73 Pac. Rep. 19; *Shumaker v. Pearson*, 67 Ohio St. 330; *Bright v. Esterly*, 199 Pa. St. 88; *Wilkins v. Chicago, etc.*, R. Co., 110 Tenn. 442; *Brader v. Brader*, 110 Wis. 423.

**Former Decisions of Same Court**.—*Carpenter v. Carpenter*, 126 Mich. 217; *Smith v. Neufeld*, 61 Neb. 699; *Hedding v. Gallagher*, 70 N. H. 631; *Matter of Post*, (Surrogate Ct.) 30 Misc. (N. Y.) 551; *Scott v. King*, 51 N. Y. App. Div. 619; *Devine's Estate*, 199 Pa. St. 250.

One judge will not review the rulings of an-

other in the same court. *Taylor v. Decatur Mineral, etc., Co.*, 112 Fed. Rep. 449.

When the Circuit Court has spoken through any of its judges its decision should be, and usually is, regarded as controlling upon all the others. *Hadden v. Natchaug Silk Co.*, 84 Fed. Rep. 80.

**While the Maxim, Stare Decisis, Is Not Imperative**.—*Daniels v. State*, 2 Penn. (Del.) 586.

There is strong reason for disregarding the doctrine of *stare decisis*, when to do so will result in restoring to a sovereign state the right to tax corporations. *Adams v. Yazoo, etc.*, R. Co., 77 Miss. 194, *affirmed* 180 U. S. 1.

**Effect of Decisions of Courts of Other States**.—To the same effect as *Nelson v. Goree*, 34 Ala. 565, stated in the original note. *New York L. Ins. Co. v. English*, 95 Tex. 391.

The construction of a statute of a state by its highest tribunal will ordinarily be received as conclusive in the courts of other states. *Fish v. Smith*, 73 Conn. 377, 84 Am. St. Rep. 161; *Bell v. Farwell*, 176 Ill. 489, 68 Am. St. Rep. 194; *Fred. Miller Brewing Co. v. Capital Ins. Co.*, 111 Iowa 590, 82 Am. St. Rep. 529; *Broadway Nat. Bank v. Baker*, 176 Mass. 294; *Rosenbaum v. U. S. Credit-System Co.*, 64 N. J. L. 34; *Roubicek v. Haddad*, 67 N. J. L. 522; *Schmaltz v. York Mfg. Co.*, 204 Pa. St. 1, 93 Am. St. Rep. 782.

**English Decisions**.—*Johnson v. Union Pac. Coal Co.*, 28 Utah 46. See also *North Chicago St. R. Co. v. Le Grand Co.*, 95 Ill. App. 435.

**Effect upon State Court of Federal Court Adjudications**.—Decisions of the federal courts upon federal questions are binding upon state courts. *United Land Assoc. v. Pacific Imp. Co.*, 139 Cal. 370; *U. S. Express Co. v. People*, 195 Ill. 155; *Richmond First Nat. Bank v. Turner*, 154 Ind. 456; *Baldwin v. Baker*, 121 Mich. 259; *Paddock v. Missouri Pac. R. Co.*, 155 Mo. 524; *Haseltine v. Central Nat. Bank*, 155 Mo. 66; *McLucas v. St. Joseph, etc.*, R. Co., (Neb. 1903) 97 N. W. Rep. 312; *Buffalo German Ins. Co. v. Buffalo Third Nat. Bank*, 29 N. Y. App. Div. 137, *reversed* 162 N. Y. 163; *Washougal, etc., Transp. Co. v. Dalles, etc.*, Nav. Co., 27 Wash. 490.

The Supreme Court of a state is not bound by the construction placed upon a statute of that state by the United States Supreme Court, but is entitled to construe such a statute according to its own lights. *People v. Linda Vista Irrigation Dist.*, 128 Cal. 477.

The federal courts accept the interpretation of a state statute placed upon it by the highest judicial tribunal of that state. *Missouri, etc., Trust Co. v. Krumseig*, 172 U. S. 351; *Missouri, etc.*, R. Co. v. McCann, 174 U. S. 580; *Warburton v. White*, 176 U. S. 484; *Brown v. New Jersey*, 175 U. S. 172; *Wilkes County v. Coler*, 180 U. S. 506; *Chesapeake, etc.*, R. Co. v. Kentucky, 179 U. S. 388; *W. W. Cargill Co. v. Minnesota*, 180 U. S. 452; *Yazoo, etc.*, R. Co. v. Adams, 181 U. S. 580; *Williams v. Gaylord*, 186 U. S. 157; *Louisville, etc.*, R. Co. v. Kentucky, 183 U. S. 503; *Iowa L. Ins. Co. v. Lewis*, 187 U. S. 335; *Carstairs v. Cochran*, 193 U. S. 10; *Seaman v. Northwestern Mut. L. Ins. Co.*, (C. C. A.) 86 Fed. Rep. 493; *Sutherland-Innes Co. v. Evart*, (C. C. A.) 86 Fed. Rep. 597; *Lapp v. Ritter*, 88 Fed. Rep. 108; *Berry v. Northwestern, etc., Bank*, (C. C. A.) 93 Fed.



**33.** See note 1.

Written Opinions. — See note 2.

**VI. JURISDICTION — Where Two Courts Have Concurrent Jurisdiction. — See**

note 4.

Consent of Parties. — See note 8.

**34. VII. TERMS OF COURT. — See note 1.**

Rep. 44; *Rummel v. Butler County*, 93 Fed. Rep. 304; *German Ins. Co. v. Manning*, 95 Fed. Rep. 597; *Rice v. Jerome*, (C. C. A.) 97 Fed. Rep. 719; *Randle v. Barnard*, 99 Fed. Rep. 348, (C. C. A.) 110 Fed. Rep. 906; *Southern R. Co. v. North Carolina Corp. Commission*, 99 Fed. Rep. 162; *Robinson v. Belt*, 100 Fed. Rep. 718; *Guaranty Trust Co. v. Galveston City R. Co.*, (C. C. A.) 107 Fed. Rep. 311; *Brown v. Grundy*, 111 Fed. Rep. 15; *Estill County v. Embry*, (C. C. A.) 112 Fed. Rep. 882; *In re Stone*, 116 Fed. Rep. 35; *Lockard v. Asher Lumber Co.*, (C. C. A.) 131 Fed. Rep. 689; *Southern R. Co. v. Simpson*, (C. C. A.) 131 Fed. Rep. 705.

**Hawaiian Decisions.** — The construction placed upon statutes of Hawaii by the courts of that country is binding upon courts of the United States. *McGrew v. Mutual L. Ins. Co.*, 132 Cal. 85, 84 Am. St. Rep. 20.

**Case No Precedent as to Question Not Argued.** — A decision affirming a judgment does not become a precedent as to any question not argued or expressly presented to the court, and left unnoticed in the opinion, although such question would have been proper to present, and, if presented, might have required another result. *Larson v. Pender First Nat. Bank*, 66 Neb. 595.

**33. 1.** *Calhoun Gold-Min. Co. v. Ajax Gold-Min. Co.*, 27 Colo. 1, 83 Am. St. Rep. 17; *Colorado Seminary v. Arapahoe County*, 30 Colo. 507; *Truxton v. Fait*, etc., Co., 1 Penn. (Del.) 483, 73 Am. St. Rep. 81; *Remy v. Iowa Cent. R. Co.*, 116 Iowa 133; *Young v. Downey*, 150 Mo. 317; *State v. Lewis*, 69 Ohio St. 202; *Kimball v. Grantsville City*, 19 Utah 368; *Kelley v. Rhoads*, 7 Wyo. 237, 75 Am. St. Rep. 904.

**2. Written Opinions — North Carolina.** — Whether a written opinion shall be filed is entirely within the discretion of the Supreme Court. *Parker v. Atlantic Coast Line R. Co.*, 133 N. Car. 335.

**4. Concurrent Jurisdiction.** — Consolidated Home Supply Ditch, etc., Co. v. New Loveland, etc., Irrigation, etc., Co., 27 Colo. 521; *Ewing v. Mallison*, 65 Kan. 484, 93 Am. St. Rep. 299; *Wright v. Williams*, 93 Md. 66; *Westerfield v. Rogers*, 63 N. Y. App. Div. 18, reversed 174 N. Y. 230; *Sprigg v. Commonwealth Title Ins., etc., Co.*, 206 Pa. St. 548; *Stone v. Byars*, 32 Tex. Civ. App. 154; *State v. Fredlock*, 52 W. Va. 232, 94 Am. St. Rep. 932.

**In Federal and State Courts.** — Baltimore, etc., R. Co. v. Wabash R. Co., (C. C. A.) 119 Fed. Rep. 678.

**8. Consent of Parties — California.** — Ball v. Putnam, 123 Cal. 134.

**Colorado.** — *McKinnon v. Hall*, 10 Colo. App. 291; *Whipple v. Stevenson*, 25 Colo. 447.

**Illinois.** — *Parsons v. Millar*, 189 Ill. 107.

**Maryland.** — *Danner v. State*, 89 Md. 220; *Hadaway v. Hynson*, 89 Md. 305.

**Nebraska.** — *Johnson v. Bouton*, 56 Neb. 626; *Armstrong v. Mayer*, 60 Neb. 423; *Crawford Co. v. Hathaway*, 61 Neb. 317; *Edney v. Baum*, (Neb. 1903) 97 N. W. Rep. 252.

**New Hampshire.** — *Burgess v. Burgess*, 71 N. H. 293.

**New York.** — *Chambers v. Feron, etc., Co.*, (Supm. Ct. Tr. T.) 56 N. Y. Supp. 338; *Matter of Krakauer*, (Surrogate Ct.) 33 Misc. (N. Y.) 674; *Albany Brewing Co. v. Barckley*, 70 N. Y. App. Div. 260; *Perlman v. Gunn*, (County Ct.) 41 Misc. (N. Y.) 166.

**Ohio.** — *Wilson v. Swigart*, 1 Ohio Dec. 418; *Ballou v. Farnsworth*, 4 Ohio Dec. (Reprint) 88, 1 Cleve. L. Rep. 17.

**Tennessee.** — *Baker v. Mitchell*, 105 Tenn. 610.

**Texas.** — *Mercer v. Woods*, (Tex. Civ. App. 1903) 78 S. W. Rep. 15.

**When Consent May Give Jurisdiction.** — *Hobbs v. German-American Doctors*, 14 Okla. 236; *Yates v. Taylor County Ct.*, 47 W. Va. 376.

**34. 1. Term of Court Defined.** — *Stockslager v. U. S.*, (C. C. A.) 116 Fed. Rep. 590.

The word "term" signifies the entire period from the first day of a term, as fixed by law, to its close; and "vacation" is the period between the final adjournment of one term and the beginning of another. *Hadley v. Bernero*, 97 Mo. App. 314.

**Time and Place of Sitting — Elements of Jurisdiction.** — Courts have no power to act away from the place fixed for their terms, and consent cannot confer jurisdiction in such cases. *Ex p. Wonacott*, 27 Nev. 102.

A judgment purporting to have been rendered by a justice's court is void when it affirmatively appears that the court was held at a place at which such court could not lawfully sit. *Hilson v. Kitchens*, 107 Ga. 230.

**In What Building or Room.** — To the same effect as *Reed v. State*, (Ind. 1897) 46 N. E. Rep. 135, stated in the original note. *Selleck v. Janesville*, 100 Wis. 157, 69 Am. St. Rep. 906.

The court may hold its sessions, when it has been so ordered, in any room of the court house, or elsewhere, provided it conforms to the requirements of the law. *Block v. Kearney*, 132 Cal. xviii, 64 Pac. Rep. 267.

Where the place of holding court has been changed temporarily to another building by reason of the destruction of the court house, no formal ceremony or notice is necessary to authorize the holding of court in the new court house when it is ready for occupancy. *State v. Staley*, 45 W. Va. 792.

A statute requiring the circuit courts of the several counties to be held at the court houses thereof does not prevent court from being held in a room in the court house other than the court room. *Scott v. State*, 133 Ala. 112.

Civil cases may be tried in the Criminal Court building. *Rutan v. Lagonda Nat. Bank*, 72 Ill. App. 35.

**36.** See notes 1, 2, 3.

**VIII. SYSTEMS AND CLASSES OF COURTS — 2. Courts of Record, and Courts Not of Record — Courts Not of Record.** — See note 6.

**37.** 4. Inferior, Superior, Supreme, and Appellate Courts — Inferior Courts. — See note 2.

**38.** Supreme Courts. — See note 1.

6. Courts of General, Limited, or Special Jurisdiction — The Distinction. — See note 6.

**Louisiana — District Court.** — A district judge has the right to be heard and consulted in so far as relates to the fixing of the terms of the Court of Appeals in the parish or parishes in which he constitutes one of the judges of that court. *State v. Leake*, 104 La. 106.

Act No. 163 of 1898, directing district judges to fix terms of court, does not control them in the length of time during which they should actually hold court in the different parishes. *State v. De Baillon*, 51 La. Ann. 788.

**Special Term — Kansas — Circuit Court.** — Under the act creating the Circuit Court of Shawnee county (Laws 1891, p. 142, c. 83), the court has authority to call a special term thereof. *Durand v. Higgins*, 67 Kan. 110.

**Duration.** — See *Richter v. Koopman*, 131 Ala. 399.

**For Other Instances of Construction of Special Statutes.** — *Knight v. State*, 116 Ala. 486 (special term, city court); *Sutherland v. State*, 150 Ind. 154 (Circuit Court, Starke county).

**Adjourned Terms.** — To the same effect as *Com. v. Justices*, 5 Mass. 435, stated in the original note. *West Point First Nat. Bank v. Bloch*, 82 Miss. 197; *Emrich v. Gilbert Mfg. Co.*, 138 Ala. 316; *Aull v. St. Louis Trust Co.*, 149 Mo. 1 [sustaining *Smith v. Smith*, 17 Ind. 75, stated in the original note]; *Wheeler v. State*, 158 Ind. 687.

An adjournment of court to a subsequent day in the term is merely an intermission, and neither adjourns the term nor deprives the judges of control of the proceedings. *Green v. Morse*, 57 Neb. 391, 73 Am. St. Rep. 518.

Where there has been no adjournment of the term *sine die*, but the court is being held pursuant to a temporary adjournment from day to day, the contention that the court is sitting in special session is unwarranted. *Walkley v. State*, 133 Ala. 183.

**36. 1.** *Stockslager v. U. S.*, (C. C. A.) 116 Fed. Rep. 590; *Cochran v. State*, 113 Ga. 726; *Dees v. State*, 78 Miss. 250; *French v. Seamans*, (Supm. Ct. Spec. T.) 21 Misc. (N. Y.) 722, reversed 27 N. Y. App. Div. 612; *State v. McBain*, 102 Wis. 431.

The circuit judge may extend his term to include Sunday, following the expiration of his term, so as to enable the jury to arrive at a verdict. *Franklin v. Com.*, 105 Ky. 237.

**Effect of Death of Judge.** — The death of the regular judge does not end the regular term of the court then in session. The death of the judge and the qualification of his successor happening on the same day, the court proceeds without intermission — the same term. *Franklin v. Vandervort*, 50 W. Va. 412. But see *Matter of Patswald*, 5 Okla. 789.

2. *Taylor v. Canaday*, 155 Ind. 671; *Roberts*

*v. Loxley*, 121 Mich. 63; *Tromble v. Hoffman*, 130 Mich. 676.

Courts take judicial notice of the terms of other courts of the same state. *Indiana Mut. Bldg., etc., Assoc. v. Paxton*, 18 Ind. App. 304; *Landkton v. U. S.*, 18 App. Cas. (D. C.) 348; *Scruton v. Hall*, 6 Kan. App. 714; *Emery v. League*, 31 Tex. Civ. App. 474; *Natrona County v. Shaffner*, 10 Wyo. 181.

Appellate courts will take notice of the terms of the circuit courts as prescribed by statutes, but not when terms are ended by final adjournments, although any court may take notice from its records of its own sessions, adjournments, and vacations. *Hadley v. Bernero*, 97 Mo. App. 314.

3. *Stockslager v. U. S.*, (C. C. A.) 116 Fed. Rep. 590; *Ledyard v. Auditor Gen.*, 121 Mich. 56.

6. **Courts of Record** — In *Ohio*. — *Kit Carter Cattle Co. v. McGillin*, 10 Ohio Dec. 146, 7 Ohio N. P. 575.

In *Oklahoma* the probate court is, upon all matters upon which it is authorized to deal and upon which it has jurisdiction, a court of record and of final authority. *Greer v. McNeal*, 11 Okla. 519, affirmed on rehearing, 11 Okla. 526.

**37. 2. Must Follow Decisions of Appellate Courts.** — *State v. Green*, 1 Penn. (Del.) 63.

**38. 1. Supreme Courts.** — The business of the Supreme Court is confined to the exercise of its appellate jurisdiction, except in cases of applications where "for peculiar and satisfactory reasons" they are not or cannot be made elsewhere. *In re Mielke*, 120 Wis. 501.

6. **Presumption in Favor of Jurisdiction.** — *Grannis v. Superior Ct.*, 143 Cal. 630; *Parsons v. Weis*, 144 Cal. 410; *Stuckey v. Watkins*, 112 Ga. 268, 81 Am. St. Rep. 47; *Meddis v. Kenney*, 176 Mo. 200, 98 Am. St. Rep. 496; *Beach v. Spokane Ranch, etc., Co.*, 25 Mont. 379; *Parsons v. State*, 61 Neb. 244; *Nehawka Bank v. Ingersoll*, (Neb. 1902) 89 N. W. Rep. 618; *Rutenic v. Hamakar*, 40 Oregon 444; *Empire Coal, etc., Co. v. Hull Coal, etc., Co.*, 51 W. Va. 474.

**Jurisdiction to Appear on the Record** — *Alabama*. — *Chamblee v. Cole*, 128 Ala. 649.

*Illinois*. — *Glos v. Woodard*, 202 Ill. 480.

*Kentucky*. — *Taylor v. Moore*, 112 Ky. 330.

*Missouri*. — *Vickery v. Omaha, etc., R. Co.*, 93 Mo. App. 1.

*Nebraska*. — *Kuker v. Beindorff*, 63 Neb. 91.

*New York*. — *Matter of Baker*, 173 N. Y. 249; *Tyroler v. Gummersbach*, (Supm. Ct. App. T.) 28 Misc. (N. Y.) 151; *Parker v. Dennett Surpassing Coffee Co.*, (Supm. Ct. App. T.) 30 Misc. (N. Y.) 768; *Willis v. Parker*, (Supm. Ct. App. T.) 30 Misc. (N. Y.) 750; *Sophian v. Henig*, (Supm. Ct. Spec. T.) 31 Misc. (N.

**40. COUSIN.** — See note 9.

Y.) 759; *Meuthen v. Eyelis*, (Supm. Ct. App. T.) 31 Misc. (N. Y.) 783.

*Oregon*. — *Rutenic v. Hamakar*, 40 Oregon 444.

*West Virginia*. — *Yates v. Taylor County Ct.*, 47 W. Va. 376.

The County Courts of Oregon in probate matters are courts of general and superior jurisdiction. *Rutenic v. Hamakar*, 40 Oregon 444.

Circuit Courts are of general jurisdiction.

*State v. Eyermann*, 172 Mo. 294.

Circuit Courts in *Ohio* are vested by the con-

stitution of that state with judicial power, and are presumed to be courts of general jurisdiction. *Poll v. Hicks*, 67 Kan. 191.

The Superior Court of Cook County is a court of general jurisdiction. *Ross v. Knapp, etc., Co.*, 77 Ill. App. 424.

The Special Term of the Superior Court of the city of Cincinnati is a court of original jurisdiction. *Robert Mitchell Furniture Co. v. Cleveland, etc., R. Co.*, 9 Ohio Dec. 674.

**40. 9. First Cousins.**—*Higginson v. Kerr*, 30 Ont. 62.

## COVENANTS.

BY BRISCOE B. CLARK.

**53. I. INTRODUCTORY** — **2. Origin and Purpose of Covenants for Title** — The Rule Caveat Emptor. — See note 3.

**54. II. CREATION AND CONSTRUCTION** — **1. Covenants in Deed and in Law** — **b. COVENANTS IN DEED** — (1) *Essentials to Their Creation and Operation* — Covenants Dependent upon Validity of Deed. — See note 3.

**55.** (2) *The Agreement or Assurance* — (a) **Form Immaterial** — Words of Creation. — See note 1.

**60.** (c) **Creation by Necessary Implication** — *cc. FROM WORDS THAT IMPORT A CONDITION.* — See note 2.

*Intention Governs Construction.* — See note 4.

**61.** **Construction as Covenants Preferred.** — See note 1.

*dd. FROM A RECITAL IN THE DEED.* — See note 2.

**62.** *ff. BY RESTRICTIONS UPON USE OF PROPERTY.* — See note 2.

*gg. BY DESCRIPTION OF LAND CONVEYED* — (aa) *As Respects the Quantity of Land.* —

See note 3.

**63.** **When Quantity Is of the Essence of the Conveyance.** — See note 1.

**64.** (3) *Exccution* — (a) **In General.** — See note 6.

**65.** (b) **Acceptance of Deed Poll.** — See note 1.

(4) *Limitation and Qualification of Covenants* — (b) **By a Limitation in the Covenant Itself.** — See note 4.

**53. 3. Use and Purpose of Covenants for Title.** — *Baker v. Sherman*, 73 Vt. 26, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 53.

**54. 3. Defective Deed — Dependent Covenants Void.** — *Dalton v. Taliaferro*, 101 Ill. App. 592, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 54; *Ross v. Davis*, 122 N. Car. 265.

**55. 1. Creation of Covenants — No Particular Form of Words Necessary.** — *Vincent v. Crane*, 134 Mich. 700, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 55.

**60. 2. Claypool v. German F. Ins. Co.**, 32 Ind. App. 540, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 60.

**4. Intention Governs Construction.** — *Atlanta Consol. St. R. Co. v. Jackson*, 108 Ga. 634.

**61. 1. Provisions Construed as Covenants Rather than Conditions.** — *Krekeler v. Aulbach*, 51 N. Y. App. Div. 591, affirmed 169 N. Y. 372.

**2. By Recitals.** — *Sibley v. Stacey*, 53 W. Va. 292.

**62. 2. Restrictions upon Use of Property.** — *Hemsley v. Marlborough Hotel Co.*, 65 N. J. Eq. 167.

**3. Mention of Number of Acres in Description Does Not Create a Covenant.** — *Adkins v. Quest*, 79 Mo. App. 36, 2 Mo. App. Rep. 348; *Martin v. Stone*, 79 Mo. App. 309, 2 Mo. App. Rep. 408; *Corrough v. Hamill*, 110 Mo. App. 53.

**63. 1. When Quantity Is of the Essence of Conveyance.** — *Sibley v. Stacey*, 53 W. Va. 292, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 63.

**64. 6. Execution Procured by Fraud.** — *Sibley v. Holcomb*, 104 Ky. 670.

**Where in the Performance of a Contract of Sale, the Vendee Accepts a Deed from a Third Person in which the vendor does not join, such vendor is not liable on the covenants in the deed.** *Bowling v. Bengel*, (Ky. 1900) 55 S. W. Rep. 422.

**65. 1. Acceptance of Deed Poll Creates Covenant.** — *West Virginia, etc., R. Co. v. McIntire*, 44 W. Va. 210.

**New York.** — *Thistle v. Jones*, (County Ct.) 45 Misc. (N. Y.) 215, following *Atlantic Dock Co. v. Leavitt*, 54 N. Y. 35.

**4. Limitation of Covenant.** — *Brantley Co. v.*



**66.** Exception of Mortgage. — See note 2.

**67.** (c) By the Subject-matter of the Conveyance — *bb.* COVENANTS RESTRICTED TO THE LAND CONVEYED — (aa) *In General.* — See notes 1, 2.

**68.** (cc) *Encroachment of Structures upon Adjoining Land.* — See note 4.

**69.** (dd) *Conflicting Descriptions.* — See note 1.

**70.** *cc.* COVENANTS RESTRICTED TO ESTATE CONVEYED — (aa) *In General.* — See note 1.

(cc) *Conveyances by Tenants in Common.* — See note 3.

(dd) *Conveyances of Land Subject to Incumbrances.* — See note 4.

Johnson, 102 Ga. 850; *Cameron v. Sexton*, 110 Ill. App. 381, *reversed* 212 Ill. 146; *Reagle v. Dennis*, 8 Kan. App. 151; *Miller v. Bayless*, 101 Mo. App. 487; *Orr v. Omaha*, (Neb. 1902) 90 N. W. Rep. 301; *Ravenal v. Ingram*, 131 N. Car. 549; *Lehman v. Given*, 177 Pa. St. 580; *Bonebrake v. Summers*, 8 Pa. Super. Ct. 55, *affirmed* 193 Pa. St. 22; *Stark v. Homuth*, (Tex. Civ. App. 1898) 45 S. W. Rep. 761; *Bennett v. Latham*, 18 Tex. Civ. App. 403.

**Incumbrances Done or Suffered by Covenantor.** — A covenant against incumbrances done or suffered by the covenantor in a foreclosure sale under mortgage with power of sale is not broken by outstanding taxes. *Hood v. Clark*, (Ala. 1904) 37 So. Rep. 550.

**Covenant to Discharge Assessment.** — Where a grant is made subject to an incumbrance arising from pending proceedings for special assessment, and the grantor covenants to pay off such assessment, upon dismissal of such proceeding and the subsequent institution of new proceedings, the grantor is not required to discharge an assessment imposed in such new proceedings. *Matter of Holmes*, 79 Ill. App. 59, *affirmed* 179 Ill. 275.

**Exception as to "Taxes"** does not include special assessment for public improvement. *Sanders v. Brown*, 65 Ark. 498; *Sullivan v. Hamilton*, 13 N. Y. App. Div. 140.

**"All Persons" Includes United States** in covenant to warrant against claims of all persons. *Giddings v. Wolter*, 19 Mont. 263.

**State.** — So also a general covenant of warranty to defend against the lawful claims of "all persons whatsoever," includes a paramount title outstanding in the state. *West Coast Mfg., etc., Co. v. West Coast Imp. Co.*, 25 Wash. 627.

**Interest on Mortgage** is included in exception of mortgage. *Johnson v. Nichols*, 105 Iowa 122. See also *Bankson v. Lagerlof*, (Iowa 1898) 75 N. W. Rep. 661.

**Express Limitation Creating a Patent Ambiguity.** — *Balch v. Arnold*, 9 Wyo. 17.

**Parol Evidence Is Not Admissible** to show that the parties at the time of the execution of the deed excluded from the covenant of incumbrances taxes which constituted the lien on the land. *Patterson v. Cappon*, (Wis. 1905) 102 N. W. Rep. 1083.

**66. 2. Exception of Mortgage.** — *Spaulding v. Thompson*, 119 Iowa 484 (subject to lease); *Laderoute v. Chale*, 9 N. Dak. 331.

**67. 1. Covenants Restricted to Lands Conveyed.** — *Feurer v. Stewart*, 83 Fed. Rep. 793; *Hot Springs R. Co. v. Williamson*, 72 Ark. 52; *Hemsley v. Maryborough Hotel Co.*, 62 N. J. Eq. 164; *Gunn v. Moore*, 46 N. Y. App. Div. 348; *Uhl v. Ohio River R. Co.*, 51 W. Va. 106 (covenant for further assurances); *Koch v. Hustis*, 113 Wis. 604, *affirming* 113 Wis. 599.

**Accretions.** — A covenant restricting the use of land conveyed which borders on tide waters does not restrict the use of land to which the grantee subsequently acquires title by accretion. *Evans v. New Auditorium Pier Co.*, (N. J. 1904) 58 Atl. Rep. 191.

**If Land Is Actually Included in the Description** the fact that part of the land is public land does not prevent the covenants from applying to such part. *Hynes v. Packard*, (Tex. Civ. App. 1897) 44 S. W. Rep. 548.

**2. Covenants Cannot Apply to Appurtenances Not Conveyed.** — *Bumstead v. Cook*, 169 Mass. 410, 61 Am. St. Rep. 293; *Fitzell v. Philadelphia*, 211 Pa. St. 1; *George v. Robison*, 23 Utah 79.

**68. 4. Encroachment of Structures upon Adjoining Land.** — *Farley v. Howard*, (Supm. Ct. Tr. T.) 33 Misc. (N. Y.) 57, *affirmed* 60 N. Y. App. Div. 193. See also *Farley v. Howard*, 172 N. Y. 628, *affirming* 60 N. Y. App. Div. 193.

**69. 1.** *Chestnut v. Chism*, 20 Tex. Civ. App. 23.

**70. 1.** *Hopper v. Smyser*, 90 Md. 363; *Smith v. Ingram*, 132 N. Car. 959, 95 Am. St. Rep. 680; *West Coast Mfg., etc., Co. v. West Coast Imp. Co.*, 25 Wash. 627, *citing* 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 75.

**Where a Mortgagee Joins with the Mortgagor** in the conveyance of the mortgaged premises, he incurs full liability on the covenants implied under Cal. Civ. Code, § 1113. *Holzheier v. Hayes*, 133 Cal. 456.

**3. Conveyance by Tenant in Common.** — *Singleton v. Singleton*, 60 S. Car. 216 (conveyance between cotenants).

**4. Conveyances of Land Subject to Incumbrances.** — *Johnson v. Nichols*, 105 Iowa 122; *Hopper v. Smyser*, 90 Md. 363; *Walther v. Briggs*, 69 Minn. 98.

**Conveyance Subject to Taxes.** — *Newburn v. Lucas*, 126 Iowa 85.

**Where the Grantee Expressly Agrees to Pay Off an Incumbrance**, such incumbrance is excepted from a general covenant of warranty. *Cureton v. Cureton*, 120 Ga. 559.

**Conveyance of Water Rights Subject to Prior Rights.** — Where a conveyance of a certain amount of water is made specially subject to prior rights to a specified amount, a subsequent general unqualified covenant of warranty and seizin does not include interferences from the exercise of the water rights subject to which the grant was made. *Koch v. Hustis*, 113 Wis. 604.

**Exception Strictly Construed.** — *Hall v. Allis*, 73 Conn. 238 (in this case general exception of mortgage was held qualified by subsequent clause).

**Assumption of Mortgage.** — Where the grantee expressly assumes the payment of a mortgage

- 71.** (cc) *Conveyance of Grantor's Right, Title, and Interest.* — See note 1.
- 72.** *To Be Construed Favorably to the Grantee.* — See note 3.
- 73.** (d) *By Another Covenant in the Same Deed* — aa. *IN GENERAL.* — See note 1.
- 75.** bb. *CONSTRUCTION OF ABSOLUTE AND LIMITED COVENANTS* — (aa) *Intention of Parties to Control* — *General Covenants to Be Given Effect if Possible.* — See note 3.
- (bb) *Absolute and Limited Covenants Held to Be Consistent* — *Exception from Covenant Against Incumbrances Only.* — See note 4.
- Other Illustrations. — See note 5.
- 79.** c. *COVENANTS IN LAW* — (1) *In Conveyances in Fee* — (a) *In General* — bb. *UNDER STATUTES* — (bb) *In the United States.* — See notes 2, 3.
- 80.** See note 1.
- (b) *In Exchanges* — *At Common Law.* — See note 2.
- 81.** (c) *In Partitions.* — See note 2.
- 82.** (3) *Abrogation of Implied Covenants by Statute.* — See notes 2, 3.

on land as conveyed, the general covenant of warranty will not be held to cover such mortgage. *Gaw v. Allen*, (Mo. App. 1905) 87 S. W. Rep. 590.

**71. 1. Conveyance of Grantor's Right, Title, and Interest.** — *Bumpass v. Anderson*, (Tex. Civ. App. 1899) 51 S. W. Rep. 1103.

**72. 3. When the Land and Not Merely Grantor's Interest Is Conveyed.** — *May v. Platt*, (1900) 1 Ch. 616, 69 L. J. Ch. 357, 83 L. T. N. S. 123, 48 W. R. 617; *Kempner v. Beaumont Lumber Co.*, 20 Tex. Civ. App. 307.

**73. 1.** *Miller v. Bayless*, 101 Mo. App. 487.

**75. 3. A Special Covenant Restrains a General One Where Two Are Absolutely Irreconcilable.** — *Miller v. Bayless*, 101 Mo. App. 487; *West Coast Mfg., etc., Co. v. West Coast Imp. Co.*, 25 Wash. 627, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 75.

**4. Exception of Mortgage from Covenant Against Incumbrances Does Not Affect Other Covenants.** — *Hall v. Allis*, 73 Conn. 238, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 75.

A general covenant of warranty is not restricted by an exception in a preceding covenant against incumbrances. *McLane v. Allison*, 7 Kan. App. 263, reversed 60 Kan. 441.

**5. A Limited Covenant for Title and a General Covenant for Quiet Enjoyment Are Consistent.** — *Duroe v. Stephens*, 101 Iowa 358.

**79. 2.** *Hood v. Clark*, (Ala. 1904) 37 So. Rep. 550.

**3. Decisions under Similar Statutes Approving the Pennsylvania Construction.** — *Dalton v. Taliaferro*, 101 Ill. App. 592; *Schnare v. Zwicker*, 31 Nova Scotia 177.

The general covenant of warranty implied under the *Missouri* statutes from the use of the words "grant, bargain, and sell," is limited by a special covenant of warranty. *Miller v. Bayless*, 101 Mo. App. 487.

**80. 1. Statutes Expressly Creating Covenant of Special Warranty** — *Alabama.* — *Haran v. Stratton*, 120 Ala. 145.

*Arkansas.* — *Seldon v. Dudley E. Jones Co.*, (Ark. 1905) 85 S. W. Rep. 778.

*California.* — *Holzheier v. Hayes*, 133 Cal. 456; *Lyles v. Perrin*, 134 Cal. 417.

*Georgia.* — *Allen v. Taylor*, 121 Ga. 841.

*Illinois.* — *Baring v. Bohn*, 64 Ill. App. 196; *Penn v. Schmisser*, 77 Ill. App. 526; *King v. King*, 215 Ill. 100.

*Indiana.* — *Beasley v. Phillips*, 20 Ind. App. 182.

*Mississippi.* — *Allen v. Caffee*, 85 Miss. 766. *Missouri.* — *Duffy v. Sharp*, 73 Mo. App. 316; *Langenberg v. Chas. H. Heer Dry Goods Co.*, 74 Mo. App. 12; *Blanchard v. Haseltine*, 79 Mo. App. 248, 2 Mo. App. Rep. 427 (implied in trustee's deed).

*New York.* — *Cassada v. Stabel*, 98 N. Y. App. Div. 600.

*Texas.* — *Taylor v. Lane*, 18 Tex. Civ. App. 545; *Bullitt v. Coryell*, (Tex. Civ. App. 1905) 85 S. W. Rep. 482.

Under the *Washington* statute (Ball. Annot. Codes & Stat., § 4520) providing that words in a conveyance, to wit, "bargain, sell, and convey," should express a covenant that the grantor was seized of an indefeasible estate free from incumbrances, etc., such covenants are implied in a deed reciting that the grantor "has granted, bargained, and sold." The question in this case was whether the substitution of the word "grant" expressed in the deed, for the word "convey" expressed in the statute, prevented the deed from being a substantial compliance with the statute. *Blood v. Sielert*, 38 Wash. 643.

"Grant, Bargain, and Sell, and Quitclaim" does not create implied covenants. *Nelson v. Hamilton County*, 102 Iowa 229.

**The Rule that Covenants Are Taken Most Strongly Against the Covenantor Is Reversed** in the case of statutory covenants, because they are implied and are in derogation of the common law. *Miller v. Bayless*, 101 Mo. App. 487.

**2. Exchange Creating Covenant.** — *Rotan v. Hays*, 33 Tex. Civ. App. 471 (statute creating covenant against incumbrances).

**81. 2. In Involuntary Partition covenant of warranty is implied.** *Reed v. Reed*, (Ky. 1904) 80 S. W. Rep. 520.

**82. 2.** The Conveyance Act of 1881, 44 & 45 Vict., c. 41, again enacted that certain covenants should be implied in conveyances. *Turner v. Moon*, (1901) 2 Ch. 825; *May v. Platt*, (1900) 1 Ch. 616, 69 L. J. Ch. 357, 83 L. T. N. S. 123, 48 W. R. 617.

**3. In the United States.** — *Thompson v. Schenectady R. Co.*, 124 Fed. Rep. 274; *Zimmerman v. Lynch*, 130 N. Car. 61 (sale of standing timber); *Barden v. Stickney*, 130 N. Car. 62; *Koch v. Hustis*, 113 Wis. 599, affirmed 113 Wis. 604.

**83.** *d.* COVENANTS IN DEED AND IN LAW CONSTRUED TOGETHER. — See note 1.

View that Both Operative When Not Inconsistent. — See note 2.

**86.** III. EFFECT AND BREACH OF COVENANTS — 1. General Principles — Operative Merely as Assurances. — See note 2.

Knowledge of Parties as to Defects or Incumbrances — General Rule. — See note 4.

**87.** Exceptions to the Rule. — See note 6.

**90.** 2. Covenant of Seizin — *a.* FORCE AND EFFECT — (1) *Of the Usual Covenant* — (b) Viewed as an Assurance of Title. — See note 4.

(2) *Of the Covenant of Seizin of an Indefeasible Estate.* — See note 5.

*b.* WHAT CONSTITUTES A BREACH — (1) *In General.* — See note 6.

**91.** (3) *Where the Covenant Is Deemed an Assurance of Title* — (a) *Grantor's Want of Title* — *aa.* GENERAL RULE. — See note 7.

**92.** *bb.* INTEREST IN THE LAND OUTSTANDING — Outstanding Estate for Years. — See notes 3, 4.

**93.** (b) *Grantor's Want of Possession.* — See note 1.

Adverse Possession by Third Person. — See note 2.

**83.** 1. Implied Covenants Restrained by Express Covenants. — *Rubens v. Hill*, 213 Ill. 539, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 83; *Miller v. Bayless*, 101 Mo. App. 487; *Rithet v. Beaven*, 5 British Columbia, 457; *Schnare v. Zwicker*, 31 Nova Scotia 177.

2. *Habendum Clause* in deed does not qualify or limit implied covenants. *Coleman v. Clark*, 80 Mo. App. 339, 2 Mo. App. Rep. 617.

**86.** 2. Covenant that After-acquired Title Shall Vest in Grantee. — *West Coast Mfg., etc., Co. v. West Coast Imp. Co.*, 25 Wash. 627, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 86-88.

4. *Covenantant's Knowledge of Defects or Incumbrances Immaterial* — *England.* — *May v. Platt*, (1900) 1 Ch. 616, 69 L. J. Ch. 357, 83 L. T. N. S. 123, 48 W. R. 617.

*Canada.* — *Sharpe v. Dick*, 22 Quebec Super. Ct. 527. See, however, *Les Ecclésiastiques, etc., v. Masson*, 10 Quebec K. B. 570, reversing 17 Quebec Super. Ct. 573.

*Colorado.* — *Bailey v. Murphy*, 19 Colo. App. 310.

*Georgia.* — *Osborn v. Pritchard*, 104 Ga. 145; *Godwin v. Maxwell*, 106 Ga. 194; *McCall v. Wilkes*, 121 Ga. 722; *Allen v. Taylor*, 121 Ga. 841.

*Illinois.* — *Weiss v. Binnian*, 178 Ill. 241; *Lloyd v. Sandusky*, 95 Ill. App. 593, affirmed 203 Ill. 621.

*Indiana.* — *Teague v. Whaley*, 20 Ind. App. 26; *Sherwood v. Johnson*, 28 Ind. App. 277; *Whittem v. Krick*, 31 Ind. App. 577.

*Iowa.* — *Spaulding v. Thompson*, 119 Iowa 484.

*Missouri.* — *Anthony v. Rockfeller*, 102 Mo. App. 326; *Whiteside v. Magruder*, 75 Mo. App. 364.

*New Jersey.* — *Demars v. Koehler*, 60 N. J. L. 314, reversed 62 N. J. L. 510; *De Long v. Spring Lake Beach Imp. Co.*, (N. J. 1905) 59 Atl. Rep. 1034.

*New York.* — *Eller v. Moore*, 48 N. Y. App. Div. 403; *Ladue v. Cooper*, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 544.

*Pennsylvania.* — *Evans v. Taylor*, 177 Pa. St. 286.

*Tennessee.* — *Perry v. Williamson*, (Tenn. Ch. 1897) 47 S. W. Rep. 189.

*Washington.* — *West Coast Mfg., etc., Co. v. West Coast Imp. Co.*, 25 Wash. 627, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 86-88.

*Compare Sanders v. Rowe*, (Ky. 1898) 48 S. W. Rep. 1083; *Elmore v. Davis*, 48 S. Car. 388.

*Covenant to Deliver Possession.* — Where, at the time of the conveyance, the grantee knew that the premises were in possession of a lessee, though the extent of the tenancy was unknown to him, there is no breach of the covenant by reason of the failure to deliver actual possession. *Ream v. Goslee*, 21 Ind. App. 241.

**87.** 6. *De Long v. Spring Lake Beach Imp. Co.*, (N. J. 1905) 59 Atl. Rep. 1034.

**90.** 4. *Doctrine Requiring Indefeasible Title.* — *Koepeke v. Winterfield*, 116 Wis. 44.

5. *Indefeasible Estate* — *Construction of Covenant For.* — *De Long v. Spring Lake, etc., Co.*, 65 N. J. L. 1, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 90.

6. *Parkinson v. Woulds*, 125 Mich. 325, 7 Detroit Leg. N. 527, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 90; *Egan v. Martin*, 71 Mo. App. 60.

*An Unfounded Claim* is not a breach. *Riel v. Press*, 70 N. H. 334.

*Deed of Minor in Chain of Title.* — The deed of a minor is sufficient to carry the estate conveyed until disaffirmed after he reaches his majority, and therefore the existence in the chain of title of a deed from a remote infant grantor is not a breach of the covenants in the deed. *Pritchett v. Redick*, 62 Neb. 296.

**91.** 7. *Seldon v. Dudley E. Jones Co.*, (Ark. 1905) 85 S. W. Rep. 778; *Bolinger v. Brake*, 4 Kan. App. 180, affirmed 57 Kan. 663; *Shire v. Plimpton*, 50 N. Y. App. Div. 122, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 186, 187; *Reinhalter v. Hutchins*, 26 R. I. 586.

**92.** 3. *Langenberg v. Chas. H. Heer Dry-Goods Co.*, 74 Mo. App. 12.

4. *Hebler v. Brown*, (Supm. Ct. Tr. T.) 18 Misc. (N. Y.) 395.

**93.** 1. *Grantor's Want of Possession Not Necessarily a Breach.* — *Barker v. Blanchard*, 7 Ohio Dec. 537, 5 Ohio N. P. 398.

2. *Third Person in Adverse Possession.* — *Coleman v. Clark*, 80 Mo. App. 339, 2 Mo. App. Rep. 617.



**94.** (7) *Existence of Easements and Incumbrances* — General Rule. — See note 4.

**95.** Right of Dower. — See note 1.

**97.** 3. Covenant of Right to Convey — *b*. BREACH. — See note 1.

4. Covenants of Warranty and for Quiet Enjoyment — *a*. FORCE AND EFFECT — Essential Sameness of the Covenants. — See note 7.

**98.** *b*. WHAT CONSTITUTES A BREACH — (1) *Constituent Elements* — (a) General Rule. — See note 4.

(b) Eviction — *aa*. GENERAL RULE REQUIRING. — See note 6.

**99.** *bb*. REASON FOR THE RULE. — See note 2.

**101.** *dd*. INAPPLICABILITY OF RULE WHERE COVENANT EMBRACES A COVENANT OF SEIZIN. — See note 1.

*ee*. EXCEPTION TO RULE WHERE TITLE IS IN THE UNITED STATES. — See note 3.

(c) Paramount Title or Interest — *bb*. COVENANT OF WARRANTY — General Rule. — See note 4.

**94.** 4. Easements and Incumbrances — Covenant of Seizin Not Broken by Existence of. — Compare *Robinson v. Bierce*, 102 Tenn. 428.

Restriction on Power of Alienation Constitutes Breach. — *Egan v. Martin*, 97 Mo. App. 535.

**Tax Lien.** — *Zerfing v. Seelig*, 12 S. Dak. 303, affirming 12 S. Dak. 25.

**95.** 1. Inchoate Right of Dower. — Building, etc., *Co. v. Fray*, 96 Va. 559.

**97.** 1. Existence of Easement of Way is regarded in England as a breach of the implied covenant of good right to convey. *Turner v. Moon*, (1901) 2 Ch. 825.

Outstanding Lease is not a breach. *Hebler v. Brown*, (Supm. Ct. Tr. T.) 18 Misc. (N. Y.) 395.

7. Sameness of the Covenants. — *Prestwood v. McGowin*, 128 Ala. 267, 86 Am. St. Rep. 136; *Bedell v. Christy*, 62 Kan. 760, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 97-101; *Eller v. Moore*, 48 N. Y. App. Div. 403; *Cain v. Fisher*, (W. Va. 1905) 50 S. E. Rep. 752, 1015.

A General Warranty in a Deed Relates Only to the Title and does not warrant the quantity of land stated in it. *Adams v. Baker*, 50 W. Va. 249; *Burbridge v. Sadler*, 46 W. Va. 39; *Maxwell v. Wilson*, 54 W. Va. 495. See also *Parrish v. Williams*, (Tex. Civ. App. 1904) 79 S. W. Rep. 1097.

**98.** 4. Union of Acts of Disturbance and Lawful Title Necessary. — *Reinhalter v. Hutchins*, 26 R. I. 586, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 98.

6. Necessity for Eviction — Covenant of Warranty — *United States*. — *Northern Pac. R. Co. v. Montgomery*, (C. C. A.) 86 Fed. Rep. 251.

*Alabama*. — *Oliver v. Bush*, 125 Ala. 534, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 97 et seq.

*Arkansas*. — *Thompson v. Brazile*, 65 Ark. 495; *Seldon v. Dudley E. Jones Co.*, (Ark. 1905) 85 S. W. Rep. 778.

*Georgia*. — *McMullen v. Butler*, 117 Ga. 845.

*Illinois*. — *Metz v. McAvoy Brewing Co.*, 98 Ill. App. 584; *Ingram v. Ingram*, 71 Ill. App. 497, affirmed 172 Ill. 288.

*Iowa*. — *Foshay v. Shafer*, 116 Iowa 302.

*Kentucky*. — *Pritchard v. Smith*, 107 Ky. 483.

*Louisiana*. — *Pharr v. Gall*, 108 La. 307.

*Maryland*. — *Boulden v. Wood*, 96 Md. 332, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 98.

*Nebraska*. — *Troxell v. Johnson*, 52 Neb. 46; *Hampton v. Webster*, 56 Neb. 628; *Troxell v. Stevens*, 57 Neb. 329; *Sears v. Broady*, 66 Neb. 207; *Merrill v. Suing*, 66 Neb. 404; *Lundgren v. Kerkow*, (Neb. 1901) 95 N. W. Rep. 501.

*New York*. — *Hebler v. Brown*, (Supm. Ct. Tr. T.) 18 Misc. (N. Y.) 395 (outstanding leasehold not asserted is not a breach); *Inderiald v. Honeywell*, 88 N. Y. App. Div. 144.

*North Carolina*. — *Britton v. Ruffin*, 123 N. Car. 67; *Ravenal v. Ingram*, 131 N. Car. 549.

*Oregon*. — *Jennings v. Kiernan*, 35 Oregon 349.

*Tennessee*. — *Robinson v. Bierce*, 102 Tenn. 428.

*Texas*. — *Stark v. Homuth*, (Tex. Civ. App. 1898) 45 S. W. Rep. 761; *Bennett v. Latham*, 18 Tex. Civ. App. 403; *Huff v. Riley*, 26 Tex. Civ. App. 101.

*Wisconsin*. — *Falkner v. Woodard*, 104 Wis. 608.

*Canada*. — *Vail v. Baker*, 6 Quebec Pr. 159. See also *Trudeau v. Molleur*, 5 Quebec Pr. 221.

Compare *Egan v. Martin*, 81 Mo. App. 676; *In re Banque Villé Marie*, 22 Quebec Super. Ct. 162.

Where the Title to a Part of the Land Conveyed Is in the Grantee at the time of the conveyance, there is no breach of the covenant of warranty since there is no eviction. *Rancho Bonito Land, etc., Co. v. North*, 92 Tex. 72.

Outstanding Tax Deed is not breach without eviction. *Bruington v. Barber*, 63 Kan. 28.

**99.** 2. Reason for the Rule. — *Boulden v. Wood*, 96 Md. 332, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 98.

**101.** 1. *Lundgren v. Kerkow*, (Neb. 1901) 95 N. W. Rep. 501.

Existence of Outstanding Estate in Remainder, grantor having only life estate, is not a breach. *Oliver v. Bush*, 125 Ala. 534.

3. *Jennings v. Kiernan*, 35 Oregon 349. See, however, *Northern Pac. R. Co. v. Montgomery*, (C. C. A.) 86 Fed. Rep. 251.

4. Necessity of Eviction Being under Paramount Title. — *McMullen v. Butler*, 117 Ga. 845; *Thorne v. Clark*, 112 Iowa 548, 84 Am. St. Rep. 356; *Bossier v. Jackson*, 114 La. 707; *Hampton v. Webster*, 56 Neb. 628; *Cain v. Fisher*, (W. Va. 1905) 50 S. E. Rep. 752.

Special Warranty. — Where the covenant of warranty is special, that is, to defend against

- 102.** *cc.* COVENANT FOR QUIET ENJOYMENT — General Rule. — See note 1.  
Tortious Acts by Third Persons. — See notes 2, 4.
- 103.** By the Covenantor. — See notes 1, 2, 3, 4.
- 104.** (2) *What Constitutes Eviction* — (b) *Necessity of Eviction by Process of Law.* — See note 7.
- 105.** (c) *What Constitutes a Constructive Eviction* — *aa.* IN GENERAL. — See note 3.
- 106.** *bb.* POSSESSION OF LAND BY THIRD PERSON AT TIME OF CONVEYANCE — (*aa*) *Under Paramount Title* — Present Doctrine. — See note 4.  
Where the Grantee Sues for Possession. — See note 5.
- 107.** (*bb*) *Without Title* — Where the Title Is in the Grantee. — See note 2.  
*cc.* SUBSEQUENT ENTRY, WHERE THE LAND REMAINS VACANT, BY THIRD PERSON — (*aa*) *By Trespasser.* — See note 4.
- 108.** (*bb*) *By the Owner of a Paramount Title.* — See note 1.  
*dd.* YIELDING TO PARAMOUNT TITLE OR INTEREST — (*aa*) *General Principles* — Surrender of Possession. — See note 2.
- 109.** Purchase of or Taking Lease under the Paramount Title. — See note 1.

claims of persons claiming through or under the grantor, to constitute a breach the eviction must be under a title derived from the grantor. *Ravenal v. Ingram*, 131 N. Car. 549.

**102. 1. Eviction Required to Be under Paramount Title.** — *Thorne v. Clark*, 112 Iowa 548, 84 Am. St. Rep. 356.

**2. Whether Broken by Tortious Eviction — Early View.** — *Indiana Natural Gas, etc., Co. v. Hinton*, 159 Ind. 398 (covenant in lease of oil and gas lands to furnish heat and light).

**4. Ft. Scott First Nat. Bank v. Elliott**, 62 Kan. 764, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 97-101; *Bossier v. Jackson*, 114 La. 707; *Jennings v. Kiernan*, 35 Oregon 349.

A covenant purporting to assure the purchaser from disturbance on the part of the grantor, "or any person or persons whomsoever," is not broken by the tortious disturbances of third parties. *Poley v. Lacert*, 35 Oregon 166.

**103. 1. Tortious Acts of Covenantor.** — *Poley v. Lacert*, 35 Oregon 166. See also *Cassada v. Stabel*, 98 N. Y. App. Div. 600, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 103.

**2. Entry by Executors of Covenantor.** — See *Cassada v. Stabel*, 98 N. Y. App. Div. 600, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 103.

**3. Where Acts of Covenantor Amount to an Assumption of Title.** — See *Cassada v. Stabel*, 98 N. Y. App. Div. 600, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 103.

**4. Mere Trespass by Covenantor.** — See *Cassada v. Stabel*, 98 N. Y. App. Div. 600, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 103.

**104. 7. Abandonment of the Requirement — In the United States.** — *Eller v. Moore*, 48 N. Y. App. Div. 403, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 104.

**105. 3. Beasley v. Phillips**, 20 Ind. App. 182.

**Vacant Lands — Existence of Paramount Title.** — If a grantor assumes to convey with full covenants of warranty unoccupied lands to which he has no title, there is at once a constructive eviction of the grantee which entitles him to the same remedies which he would be entitled to had he been turned out of the actual possession of the land by legal process. *Koepeke v. Winterfield*, 116 Wis. 44; *Cain v. Fisher*, (W. Va. 1905) 50 S. E. Rep. 752, 1015.

**106. 4. Approved Rule.** — *Prestwood v. McGowin*, 128 Ala. 267, 86 Am. St. Rep. 136; *Christy v. Bedell*, 10 Kan. App. 435, reversed 62 Kan. 760; *Anthony v. Rockefeller*, 102 Mo. App. 326; *Shankle v. Ingram*, 133 N. Car. 254; *Shell v. Evans*, 7 Ohio Dec. 501, 6 Ohio N. P. 230; *Barker v. Blanchard*, 7 Ohio Dec. 537, 5 Ohio N. P. 398; *McConaughy v. Bennett*, 50 W. Va. 172.

**Possession by Tenants of Vendor under Paramount Lease.** — *Leonard v. Cary*, 65 S. W. Rep. 124, 23 Ky. L. Rep. 1325.

**The Burden of Showing that the Person in Possession at the Time of the Conveyance holds under paramount title so as to constitute a breach of the covenant of warranty is upon the grantee.** *McMullen v. Butler*, 117 Ga. 845.

**5. Rule Applied Where Grantee Sues for Possession.** — *Browning v. Stilwell*, (Supm. Ct. App. Div. 87 N. Y. Supp. 1129, affirming (Supm. Ct. Tr. T.) 42 Misc. (N. Y.) 346 (failure of action by reason of outstanding lease).

**107. 2. Possession by Third Person under Mere Claim of Right.** — *McMullen v. Butler*, 117 Ga. 845, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 107; *Christy v. Bedell*, 10 Kan. App. 435, reversed 62 Kan. 760; *Barker v. Blanchard*, 7 Ohio Dec. 537, 5 Ohio N. P. 398; *Pigeon River Lumber, etc., Co. v. Mims*, (Tenn. Ch. 1897) 48 S. W. Rep. 385. Compare *Leonard v. Cary*, (Ky. 1901) 65 S. W. Rep. 124.

**4. Entry on Land, Where It Remains Vacant, by Trespasser.** — *Bedell v. Christy*, 62 Kan. 760, reversing *Christy v. Bedell*, 10 Kan. App. 435.

**108. 1. Where the land is wild and unimproved actual eviction is not necessary; the possession follows the legal title and the paramount title carries possession with it amounting to a constructive eviction.** *Seldon v. Dudley E. Jones Co.*, (Ark. 1905) 85 S. W. Rep. 778.

**2. Yielding Possession of the Land.** — *Lowery v. Yawn*, 111 Ga. 61; *Eagan v. Martin*, 81 Mo. App. 676; *Jennings v. Kiernan*, 35 Oregon 349.

**109. 1. Buying in the Paramount Title or Interest.** — *State Bank v. O'Neal*, 101 Ga. 673; *North Chicago Hebrew Congregation v. Garibaldi*, 70 Ill. App. 33 (no necessity to appeal from judgment for taxes); *Beasley v. Phillips*, 26 Ind. App. 182; *Leet v. Gratz*, 92 Mo. App. 422; *McCrillis v. Thomas*, 110 Mo. App. 699; *Walton v. Campbell*, 51 Neb. 788; *Pritchett v.*

**110.** (bb) *Necessity of a Hostile Assertion of Outstanding Title*—General Rule.—See note 2.

**111.** Where the Paramount Title Is in the United States.—See note 1.

Where the Paramount Title Is in a State.—See note 3.

**112.** (cc) *Necessity of a Surrender or Purchase*—General Rule.—See note 1.

**113.** ee. SUFFICIENCY OF THE HOSTILE ASSERTION—(aa) *In General*.—See note 1.

(bb) *By Suit or Judgment*.—See notes 2, 3.

**114.** (dd) *Sale of Premises*.—See note 1.

Execution Sale.—See note 6.

Sale for Taxes.—See note 7.

**116.** ff. EFFECT OF YIELDING ON BURDEN OF PROOF.—See note 9.

**117.** (d) *Disturbance of the Use of the Land*.—See note 1.

(3) *What Constitutes a Paramount Right*—(a) General Rule.—See

notes 3, 4.

**118.** (b) *Incumbrances*—General Rule.—See note 1.

Application of the Rule.—See notes 3, 5.

Redick, 62 Neb. 296; *Morrow v. Baird*, (Tenn. 1905) 86 S. W. Rep. 1079; *Boyd v. Leith*, (Tex. Civ. App. 1899) 50 S. W. Rep. 618; *Witte v. Pigott*, (Tex. Civ. App. 1900) 55 S. W. Rep. 753.

**Paying Mortgage.**—Where a paramount mortgage is asserted, the mortgagee may yield and pay it; this is a constructive eviction sufficient to give action on a general warranty. *Harr v. Shaffer*, 52 W. Va. 207, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 108.

**110. 2. Hostile Assertion of the Title Necessary.**—*Frix v. Miller*, 115 Ala. 476, 67 Am. St. Rep. 57; *Hebler v. Brown*, (Supm. Ct. Tr. T.) 18 Misc. (N. Y.) 395; *Harr v. Shaffer*, 52 W. Va. 207, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 110.

**Unnecessary Purchase of Paramount Title.**—*Tuggle v. Hamilton*, 100 Ga. 292.

**111. 1. Where Paramount Title Is in the United States.**—*Giddings v. Holter*, 19 Mont. 263 (cancellation of defective patent); *Troxell v. Stevens*, 57 Neb. 329. See also *Frix v. Miller*, 115 Ala. 476, 67 Am. St. Rep. 57.

**3. Seldon v. Dudley E. Jones Co.**, (Ark. 1905) 85 S. W. Rep. 778.

**112. 1. Yielding to Superior Title Necessary.**—*Vincent v. Hicks*, 64 S. W. Rep. 456, 23 Ky. L. Rep. 859; *Boulden v. Wood*, 96 Md. 332; *Leet v. Gratz*, 92 Mo. App. 422, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 111; *Ravenal v. Ingram*, 131 N. Car. 549.

**113. 1. Munford v. Keet**, 154 Mo. 36.

**Cancellation of Patent from Federal Government to Grantor, and Withdrawal of Lands from Entry.**—*Jennings v. Kiernan*, 35 Oregon 349.

**2. Judgment of Eviction.**—*North Chicago Hebrew Congregation v. Garibaldi*, 70 Ill. App. 33; *Christy v. Bedell*, 10 Kan. App. 435, reversed 62 Kan. 760 (decree quieting title); *McCrillis v. Thomas*, 110 Mo. App. 699; *Wiggins v. Pender*, 132 N. Car. 628; *Weyer v. Sager*, 12 Ohio Cir. Dec. 193, 21 Ohio Cir. Ct. 710.

But if the grantee has not yielded possession, the fact that a judgment in ejectment has been recovered against him, is not a sufficient eviction to constitute a breach of the covenant of warranty—as where the grantee remains in possession after the judgment pending an assessment of betterments. *Lundgren v. Kerkow*, (Neb. 1901) 95 N. W. Rep. 501.

**Adverse Judgment in Suit by Covenantee to Protect Title.**—*Louisville Public-Warehouse Co. v. James*, (Ky. 1900) 56 S. W. Rep. 19.

**3. Execution Against Grantee Not Necessary.**—*Ensign v. Colt*, 75 Conn. 111 (injunction against interference with easement).

**114. 1. Mortgage Sale.**—Where the property has been sold under a mortgage or deed of trust and the purchaser yields possession, this is sufficient to constitute a breach. *Harr v. Shaffer*, 52 W. Va. 207.

**6. Sale under Decree Foreclosing Lien.**—*Talbot v. Donaldson*, (Kan. 1905) 80 Pac. Rep. 981.

**7. The grantee under a deed with covenant of warranty is not, however, required to wait until the land is sold for taxes which constituted an incumbrance prior to the deed, but may immediately upon the default of the grantor in payment of such taxes pay the same and recover from the grantor for breach of his covenant.** *Swinney v. Cockrell*, (Miss. 1905) 38 So. Rep. 353.

**116. 9. Burden of Proof Assumed by Grantee Who Yields Possession or Purchases Title.**—*McMullen v. Butler*, 117 Ga. 845.

**117. 1. Eller v. Moore**, 48 N. Y. App. Div. 403, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 117-119.

**3. Required to Be the Elder Title.**—*Arnold v. Chamberlain*, 14 Tex. Civ. App. 634.

**4. Previous Sale of Mineral Rights.**—In *Sanders v. Rowe*, (Ky. 1898) 48 S. W. Rep. 1083, it was held that the covenant of warranty was not broken by the fact that the grantor had previously sold the mineral rights in the land where at the time of the conveyance the grantee had knowledge of such sale.

**118. 1. Paramount Incumbrances.**—*Osburn v. Pritchard*, 104 Ga. 145.

Under a covenant to warrant and defend a title to the premises against the lawful claims of all persons whomsoever, the lawful claims contemplated are those to the title conveyed and not to mere charges which may or may not be established as liens thereon, such as assessments for street improvements which had not become liens on the property at the time of the conveyance. *Cemansky v. Fitch*, 121 Iowa 186.

**3. Prior Judgments.**—*Jenkins v. Craig*, 22 Ind. App. 192.



- 118.** (c) Right of Dower. — See note 8.  
**119.** (d) Easements. — See notes 1, 3, 4.  
 (e) Outstanding Estate for Years. — See note 5.  
**121.** (4) *Loss of Appurtenances*. — See note 1.  
**122.** 5. Covenant Against Incumbrances — *a.* FORCE AND EFFECT. — See note 4.  
*b.* WHAT CONSTITUTES A BREACH — (1) *Of the Usual Covenant* —  
 (a) General Rule. — See note 5.  
 (3) *What Constitutes an Incumbrance* — (a) Definition. — See note 9.  
**123.** (b) Easement — *aa.* GENERAL RULE. — See note 1.  
*bb.* RIGHT OF WAY — GENERAL RULE — Private Way. — See note 3.  
**124.** Highway. — See note 2.  
**125.** See note 1.  
*cc.* PARTY WALL. — See note 6.  
**126.** (c) Taxes — General Rule. — See note 3.

**118.** 5. Lien for Taxes. — *Bigelow v. Stearns*, (Mich. 1904) 100 N. W. Rep. 125; *Cain v. Fisher*, (W. Va. 1905) 50 S. E. Rep. 752, 1015; *Patterson v. Cappon*, (Wis. 1905) 102 N. W. Rep. 1083.

8. Dower Right. — *Rafferty v. Easley*, 111 Ill. App. 413.

**119.** 1. Right to Take Turpentine from Trees. — *Brantley Co. v. Johnson*, 102 Ga. 850.

Easement for Public Park. — *De Long v. Spring Lake Beach Imp. Co.*, 67 N. J. L. 379.

3. Grantor's Ignorance of easement for unopened street is immaterial. *Southern Wood Mfg., etc., Co. v. Davenport*, 50 La. Ann. 505.

4. Private Rights of Way. — *Ensign v. Colt*, 75 Conn. 111; *Ladue v. Cooper*, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 544.

Right of Way in Railway Company. — *Pierce v. Houghton*, 122 Iowa 477.

5. Term of Years. — *Browning v. Stilwell*, (Supm. Ct. App. Div.) 87 N. Y. Supp. 1129, *affirming* (Supm. Ct. Tr. T.) 42 Misc. (N. Y.) 346.

Though an outstanding lease is, as a general rule, a breach of the covenant of warranty, yet if the grantee accepts attornment from the lessee, there is no breach. *Anthony v. Rockefeller*, 102 Mo. App. 326.

**121.** 1. Appurtenances — Loss of Constitutes a Breach. — *Anthony v. Rockefeller*, 102 Mo. App. 326 (loss of fixtures).

**122.** 4. Force and Effect of Covenant Against Incumbrances. — *Cream City Mirror Plate Co. v. Swedish Bldg., etc., Assoc.*, 74 Ill. App. 362.

The Right of a Mechanic to File a Lien, existing at the time of a conveyance, is an incumbrance within the meaning of a covenant against incumbrances. *Duffy v. Sharp*, 73 Mo. App. 316.

5. General Rule as to What Constitutes Breach of the Usual Covenant. — *Warren v. Stoddart*, 6 Idaho 602, *citing* 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 122.

9. Incumbrances Defined. — *Rittmaster v. Richner*, 14 Colo. App. 361.

Invalid Claims. — To constitute a breach of the covenant against incumbrances, the alleged incumbrance must be a valid one. Invalid claims by third persons against the land are not a breach of the covenant. *Luther v. Brown*, 66 Mo. App. 227.

**123.** 1. Easements Constitute Incumbrances. —

*Ensign v. Colt*, 75 Conn. 111; *De Long v. Spring Lake Beach Imp. Co.*, (N. J. 1905) 59 Atl. Rep. 1034; *Teague v. Whaley*, 20 Ind. App. 26.

Easement to Cut Ice. — *Weiss v. Binnian*, 178 Ill. 241.

Easement of Light. — *Denman v. Mentz*, 63 N. J. Eq. 613.

3. Private Way an Incumbrance. — *Turner v. Moon*, (1901) 2 Ch. 825, 70 L. J. Ch. 822, 85 L. T. N. S. 90, 50 W. R. 237; *Penn v. Schmisser*, 77 Ill. App. 526; *Young v. Gower*, 88 Ill. App. 70; *Sherwood v. Johnson*, 28 Ind. App. 277; *Eller v. Moore*, 48 N. Y. App. Div. 403; *Perry v. Williamson*, (Tenn. Ch. 1897) 47 S. W. Rep. 189.

Right of Way of Railway Company. — *Whiteside v. Magruder*, 75 Mo. App. 364.

The Fact that the Grantee Has Notice of the Right of Way, but not of its extent, does not prevent the existence of the way from being a breach of the covenant against incumbrances. *Eller v. Moore*, 48 N. Y. App. Div. 403.

**124.** 2. Rule that Existence of Highway Constitutes a Breach. — *Sherwood v. Johnson*, 28 Ind. App. 277.

Public Park. — *De Long v. Spring Lake, etc., Co.*, 65 N. J. L. 1; *De Long v. Spring Lake Beach Imp. Co.*, (N. J. 1905) 59 Atl. Rep. 1034.

**125.** 1. Application of the Rule Where the Highway Is Not Opened and in Use. — *Louisville Public Warehouse Co. v. James*, 70 S. W. Rep. 1046, 24 Ky. L. Rep. 1266.

6. Party Wall an Incumbrance. — *Finck v. Bauer*, (Supm. Ct. App. T.) 40 Misc. (N. Y.) 218. See also *Ensign v. Colt*, 75 Conn. 119, *citing* 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 125-126.

**126.** 3. Taxes Constitute an Incumbrance. — *Brenen v. Kelly*, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 46; *Witte v. Pigott*, (Tex. Civ. App. 1900) 55 S. W. Rep. 753; *Bullitt v. Coryell*, (Tex. Civ. App. 1905) 85 S. W. Rep. 482; *Carswell v. Habberzettle*, (Tex. Civ. App. 1905) 87 S. W. Rep. 911; *Patterson v. Cappon*, (Wis. 1905) 102 N. W. Rep. 1083.

Assessments Payable in Instalments. — In Canada it has been held that the covenant against incumbrances was not broken by special assessments imposed by the municipality payable in instalments for a term of years, except

- 126.** Must Be a Valid Tax. — See note 4.  
 Illegal Assessment Where Liability to Reassessment Exists. — See note 5.
- 127.** Must Be an Existing Lien Antedating the Conveyance — General Rule. — See note 1.  
 Existence of Tax Assessments. — See note 3.
- 128.** See note 1.
- 129.** (f) Lease. — See note 4.  
 (g) Right of Dower. — See note 7.
- 130.** (i) Building Agreement and Restriction on Use of the Land — Restriction upon the Use of the Land. — See note 3.  
 (4) *Subsequent Acts and Events*. — See note 4.
- 6.** Covenant for Further Assurance — *a.* IN GENERAL. — See note 6.
- 131.** *c.* REQUIRING FURTHER ASSURANCE — Usual Mode. — See note 10.
- 132.** 7. Time of Breach — Covenant of Seizin. — See note 6.
- 133.** Covenant of Right to Convey. — See note 1.  
 Covenants of Warranty and for Quiet Enjoyment. — See note 2.

for the arrears of such assessment due at the time of the conveyance. *Sharpe v. Dick*, 22 Quebec Super. Ct. 527.

**Penalties for Nonpayment of Taxes.** — Where a covenant against incumbrances is broken by reason of outstanding taxes which constitute a lien on the land, the covenantee is not required to pay the taxes so as to avoid the statutory penalties for nonpayment, but is entitled after such penalties have been incurred to recover the amount of the taxes together with such penalties. In this case the court said: "We think, if to the debt of the covenantor, which constitutes the incumbrance on the land, there is annexed either by law or by contract some condition by the happening of which the debt may be increased, and the condition happens, the increment is as much a part of the incumbrance as the original debt; and we also think the rule would apply with peculiar force when the happening of the contingency is the result of the covenantor's own default." *Carswell v. Habberzettle*, (Tex. 1905) 86 S. W. Rep. 738. See also *Carswell v. Habberzettle*, (Tex. Civ. App. 1905) 87 S. W. Rep. 911.

**126. 4. Must Be Valid Tax Legally Levied.** — *Sanders v. Brown*, 65 Ark. 498 (special assessment); *Rittmaster v. Richner*, 14 Colo. App. 361; *Barth v. Ward*, 63 N. Y. App. Div. 193.

**5. Existence of Assessment and Liability to Reassessment.** — *De Arment v. Kennedy*, 14 Pa. Super. Ct. 539; *Green v. Tidball*, 26 Wash. 338.

**127. 1. Must Be a Lien at the Time of the Conveyance.** — *Cemansky v. Fitch*, 121 Iowa 186, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 127; *Real Estate Corp. v. Harper*, 174 N. Y. 123, modifying 70 N. Y. App. Div. 64.

**3. Where the Lien Attaches Subsequently to the Assessment.** — *Cemansky v. Fitch*, 121 Iowa 186; *Real Estate Corp. v. Harper*, 174 N. Y. 123, modifying 70 N. Y. App. Div. 64; *Hastings v. Twenty-third Ward Land Imp. Co.*, 46 N. Y. App. Div. 609; *Barth v. Ward*, 63 N. Y. App. Div. 193; *De Arment v. Kennedy*, 14 Pa. Super. Ct. 539. See, however, *Green v. Tidball*, 26 Wash. 338. See also *Les Ecclesiastiques, etc., v. Masson*, 10 Quebec K. B. 570, reversing 17 Quebec Super. Ct. 573; *Sharpe v. Dick*, 22 Quebec Super. Ct. 527.

**128. 1. Where Lien of Taxes Subsequently**

**Imposed Relates Back Prior to Conveyance.** — *Sanders v. Brown*, 65 Ark. 498 (special assessment); *Vicksburg Waterworks Co. v. Vicksburg Water Supply Co.*, 80 Miss. 68, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 127-128.

**129. 4. Outstanding Lease an Incumbrance.** — *Brass v. Vandecar*, (Neb. 1903) 96 N. W. Rep. 1035; *La Rue v. Parmele*, (Neb. 1905) 103 N. W. Rep. 304; *Demars v. Koehler*, 60 N. J. L. 314, reversed 62 N. J. L. 510.

**Knowledge of Outstanding Lease.** — But if the grantee had knowledge of the outstanding lease which reserved rent to the lessor and his assigns, such outstanding lease is not a breach of the covenant against incumbrances. *Demars v. Koehler*, 60 N. J. L. 314, reversed 62 N. J. L. 510.

**7. Right of Dower an Incumbrance.** — *Seldon v. Dudley E. Jones Co.*, (Ark. 1905) 85 S. W. Rep. 778; *Rafferty v. Easley*, 111 Ill. App. 413; *Crowley v. C. A. Nelson Lumber Co.*, 66 Minn. 400; *Weyer v. Sager*, 12 Ohio Cir. Dec. 193, 21 Ohio Cir. Ct. 710.

**130. 3. Compare** *Thurgood v. Spring*, 139 Cal. 596 (in this case the restrictions against use had not been enforced against the grantee).

**4. Cemansky v. Fitch**, 121 Iowa 186. *Compare* *Duffy v. Sharp*, 73 Mo. App. 316.

**6. Force and Effect.** — *Uhl v. Ohio River R. Co.*, 51 W. Va. 106.

**131. 10. Necessity for Demand.** — *Trust Co. v. Universal Talking Mach. Co.*, 90 N. Y. App. Div. 207.

**132. 6. Covenant of Seizin Broken if at All, When Made.** — *Seldon v. Dudley E. Jones Co.*, (Ark. 1905) 85 S. W. Rep. 778; *Bolinger v. Brake*, 4 Kan. App. 180, affirmed 57 Kan. 663; *Jewett v. Fisher*, 9 Kan. App. 630; *Parkinson v. Woulds*, 125 Mich. 325, 7 Detroit Leg. N. 527; *Shankle v. Ingram*, 133 N. Car. 254; *Perry v. Williamson*, (Tenn. Ch. 1897) 47 S. W. Rep. 189.

**133. 1. Covenant of Right to Convey Broken When Made.** — *Turner v. Moon*, (1901) 2 Ch. 825, 70 L. J. Ch. 822, 85 L. T. N. S. 90, 50 W. R. 237; *Jewett v. Fisher*, 9 Kan. App. 630.

**2. Covenants of Warranty and for Quiet Enjoyment Broken at Time of Eviction.** — *Shankle v. Ingram*, 133 N. Car. 254; *Jennings v. Kiernan*, 35 Oregon 349.

**133.** Covenant Against Incumbrances. — See note 4.

**134.** IV. COVENANTS RUNNING WITH THE LAND — 1. Definitions — Covenants Running with the Land. — See note 2.

Covenants Running with the Reversion. — See note 3.

2. Creation — *a.* IN GENERAL — Covenant Must Be a Real Covenant. — See note 6.

Real Covenant May by Agreement Be Prevented from Running. — See note 7.

**135.** *b.* WITH WHAT ESTATE COVENANTS MAY RUN — (1) *Capacity of covenants to Run with Incorporeal Hereditaments.* — See note 1.

(2) *Covenant Can Only Be Annexed to an Interest in Realty.* — See note 4.

*c.* PRIVACY OF ESTATE — (1) *Covenants Imposing Burdens.* — See note 5.

**136.** (2) *Covenants Conferring Benefits.* — See note 1.

Covenant by Stranger to Title. — See note 2.

**133.** 4. Covenant Against Incumbrances Broken When Made. — *Jewett v. Fisher*, 9 Kan. App. 630; *Sears v. Broady*, 66 Neb. 207; *Brass v. Vandecar*, (Neb. 1903) 96 N. W. Rep. 1035; *Real Estate Corp. v. Harper*, 174 N. Y. 123, *modifying* 70 N. Y. App. Div. 64; *Dahl v. Stakke*, 12 N. Dak. 325; *Perry v. Williamson*, (Tenn. Ch. 1897) 47 S. W. Rep. 189.

The Implied Covenant under the Conveyance Act of 1881, 44 and 45 Vict., c. 41, of the right to convey freed from incumbrances, etc., is covenant *in presenti*, and is broken if at all at the time of the conveyance. *Turner v. Moon*, (1901) 2 Ch. 825.

**134.** 2. Definition — Covenants Running with the Land. — *Hurxthal v. St. Lawrence Boom, etc., Co.*, 53 W. Va. 87, 97 Am. St. Rep. 954, *citing* 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 134.

3. Covenants Running with the Reversion. — *Atlanta Consol. St. R. Co. v. Jackson*, 108 Ga. 634.

6. Covenant Must Be a Real Covenant. — *Wilmurt v. McGrane*, 16 N. Y. App. Div. 412; *Louisville, etc., R. Co. v. Webster*, 106 Tenn. 586; *Hurxthal v. St. Lawrence Boom, etc., Co.*, 53 W. Va. 93, *citing* 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 134.

7. Real Covenant May by Agreement Be Disconnected from Land. — *Rogers v. Hosegood*, 81 L. T. N. S. 515; *Stanton v. Sauk Rapids Co.*, 74 Minn. 286; *Hemsley v. Marlborough Hotel Co.*, 65 N. J. Eq. 167; *Brown v. Southern Pac. R. Co.*, 36 Oregon 128, 78 Am. St. Rep. 761; *Hutchison v. Thomas*, 190 Pa. St. 242.

Separation of Covenant of Warranty from Land. — Covenant of warranty prior to breach cannot be assigned separately from the land so as to give the assignee right to sue thereon in case of subsequent breach. *Ravenal v. Ingram*, 131 N. Car. 549; *McConaughy v. Bennett*, 50 W. Va. 172.

**135.** 1. Covenants May Run with Incorporeal Hereditaments. — *Louisville, etc., R. Co. v. Illinois Cent. R. Co.*, 174 Ill. 448.

4. Ferry Franchise. — *Barringer v. Virginia Trust Co.*, 132 N. Car. 409 (easement).

Conveyance of Standing Timber. — A conveyance of standing timber to be removed within five years with covenant of warranty is a conveyance of an interest in real estate so that the covenant of warranty will run with the

conveyance of the grantee's rights in such trees. *Asher Lumber Co. v. Cornett*, (Ky. 1901) 63 S. W. Rep. 974.

But it is otherwise as regards trees sold for immediate removal. *Asher Lumber Co. v. Cornett*, (Ky. 1900) 58 S. W. Rep. 438.

Equitable Interests. — It is a general principle that covenants run only with the legal title to lands and tenements. *Wallace v. Pereles*, 109 Wis. 316, 83 Am. St. Rep. 898.

Equity of Redemption — Rule in Equity. — In *Rogers v. Hosegood*, (1900) 2 Ch. 388, it was held that though at law a mortgagor is regarded as a stranger to the title, still in equity he is regarded as the owner and a covenant made with him may in equity run with the land.

A Mortgagor has a sufficient interest in the land to impose in a conveyance thereof restrictive covenants which will run with the land except as against the mortgagee. In *New York*, however, the mortgagor is regarded as the legal owner. *Scudder v. Watt*, 98 N. Y. App. Div. 228.

5. Privity of Estate Must Exist — Covenant Imposing Burdens. — *Los Angeles Terminal Land Co. v. Muir*, 136 Cal. 36; *Waycross Air-Line R. Co. v. Southern Pine Co.*, 115 Ga. 7; *Sullivan v. Kohlenberg*, 31 Ind. App. 215; *Atlantic City v. New Auditorium Pier Co.*, (N. J. 1904) 59 Atl. Rep. 158, *reversing* (N. J. 1904) 58 Atl. Rep. 729; *Houston v. Zahm*, 44 Oregon 610; *Hurxthal v. St. Lawrence Boom, etc., Co.*, 53 W. Va. 87, 97 Am. St. Rep. 954.

**136.** 1. Covenants Conferring Benefits. — *Rogers v. Hosegood*, 81 L. T. N. S. 515, 69 L. J. Ch. 59; *Pritchett v. Redick*, 62 Neb. 296; *Hemsley v. Marlborough Hotel Co.*, 62 N. J. Eq. 164; *Wallace v. Pereles*, 109 Wis. 316, 83 Am. St. Rep. 898. Compare *Hurxthal v. St. Lawrence Boom, etc., Co.*, 53 W. Va. 87, 97 Am. St. Rep. 954.

Covenant of Wife Joining in Deed to Bar Inchoate Dower Does Not Run with the Land. — *Pyle v. Gross*, 92 Md. 132.

2. Covenant by Stranger to Title. — *Mygatt v. Coe*, 152 N. Y. 457, 57 Am. St. Rep. 521, *affirming* 12 N. Y. App. Div. 245 (husband joining in wife's deed of separate property); *Wallace v. Pereles*, 109 Wis. 316, 83 Am. St. Rep. 898.



**137.** *c. NAMING ASSIGNS OF COVENANTOR — (1) Covenants Relating to Thing in Esse.* — See note 5.

(2) *Covenants Relating to Thing Not in Esse.* — See note 6.

**138.** **3. Particular Covenants Running with the Land — a. COVENANTS IMPOSING BURDENS — (1) Covenant May Relate to Thing Not in Esse.** — See note 2.

**139.** (2) *Covenant Must Affect Quality, Value, or Mode of Enjoyment of Estate.* — See note 1.

**140.** **Facts of Particular Case to Be Considered.** — See note 1.

(3) *Restrictive Covenants.* — See note 2.

**Equitable Relief.** — See note 3.

**137.** **5. Covenant Relating to Thing in Esse — Assigns Need Not Be Named.** — *Louisville, etc., R. Co. v. Illinois Cent. R. Co.*, 174 Ill. 448; *Wright v. Heidorn*, 6 Ohio Dec. 151, 4 Ohio N. P. 124.

**6. Covenant Relating to Thing Not in Esse — Assigns Must Be Named.** — *Brown v. Southern Pac. R. Co.*, 36 Oregon 128, 78 Am. St. Rep. 761; *Krekeler v. Aulbach*, 51 N. Y. App. Div. 591, *affirmed* 169 N. Y. 372; *Hutchison v. Thomas*, 190 Pa. St. 242. *Compare Fowler v. Kent*, 71 N. H. 388 (clerical mistake of scrivener); *Doty v. Chattanooga Union R. Co.*, 103 Tenn. 564.

**138.** **2. Covenant Relating to Thing Not in Esse May Run with the Land.** — *Fowler v. Kent*, 71 N. H. 388; *Doty v. Chattanooga Union R. Co.*, 103 Tenn. 576, *citing* 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 138-9; *Scott v. Farmers', etc., Nat. Bank*, (Tex. Civ. App. 1902) 66 S. W. Rep. 485, *rehearing denied* (Tex. Civ. App. 1902) 67 S. W. Rep. 343.

**Covenant as to Use of Property.** — *Uihlein v. Matthews*, 57 N. Y. App. Div. 476, *reversed* 172 N. Y. 154.

**Covenant by Grantee to Build and Maintain Fence.** — *Lake Erie, etc., R. Co. v. Griffin*, 25 Ind. App. 138.

**Covenant to Build and Maintain Division Fences.** — *Chicago, etc., R. Co. v. Wilson*, (Ky. 1903) 76 S. W. Rep. 138.

**Covenant to Build and Maintain Railway Switch.** — *Chicago, etc., R. Co. v. Wilson*, (Ky. 1903) 76 S. W. Rep. 138.

**Covenant to Maintain Farm Crossing.** — *Chicago, etc., R. Co. v. Wilson*, (Ky. 1903) 76 S. W. Rep. 138.

**Covenant to Operate Trains Over Right of Way Granted.** — *Doty v. Chattanooga Union R. Co.*, 103 Tenn. 576.

**Party-wall Agreement.** — *Finck v. Bauer*, (Supm. Ct. App. T.) 40 Misc. (N. Y.) 218.

**Construction of Statute Designating Covenants which Run with the Land.** — *Northern Pac. R. Co. v. McClure*, 9 N. Dak. 73 (N. Dak. Rev. Codes 3784-3787).

**139.** **1. Performance of Covenant Must Affect the Quality, Value, or Enjoyment of Estate.** — *Rogers v. Hosegood*, 81 L. T. N. S. 515, 69 L. J. Ch. 59; *Waycross Air-Line R. Co. v. Southern Pine Co.*, 115 Ga. 7; *Brown v. Southern Pac. R. Co.*, 36 Oregon 128, 78 Am. St. Rep. 761.

**Covenant Against Exercise of Power of Eminent Domain does not run with land.** *Morris, etc., R. Co. v. Hoboken, etc., R. Co.*, (N. J. 1904) 59 Atl. Rep. 332.

**Covenant to Pay Damages.** — In conveyance of

a right of way for a railway a covenant by the grantee to pay damages if it shall cease to operate the railway does not run with the land, as the performance or nonperformance of the agreement to pay damages does not affect the nature, quality, or value of the land, nor does it affect the mode of enjoyment of the land. *Atlanta Consol. St. R. Co. v. Jackson*, 108 Ga. 634.

**Covenant Not to Trespass.** — *Hinckel v. Stevens*, 35 N. Y. App. Div. 5, *affirmed* 165 N. Y. 171 (does not run with the land, but is merely personal).

**Covenant for Shipment of Stone Taken from Quarry from Particular Wharf does not run with the quarry.** *Bragdon v. Blaisdell*, 91 Me. 326.

**Covenant to Furnish Lumber to Build Division Fence.** — *Louisville, etc., R. Co. v. Webster*, 106 Tenn. 586.

**140.** **1. Covenant to Erect Fence.** — *Kelly v. Nypano R. Co.*, 23 Pa. Co. Ct. 177.

**Covenant to Maintain Fence.** — See also *Kelly v. Nypano R. Co.*, 23 Pa. Co. Ct. 177, *citing* 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 140, note.

**2. Trade Restrictions.** — *Los Angeles University v. Swarth*, 107 Fed. Rep. 798, 46 C. C. A. 647; *Electric City Land, etc., Co. v. West Ridge Coal Co.*, 187 Pa. St. 500; *Hansell v. Downing*, 17 Pa. Super. Ct. 235. *Compare Los Angeles Terminal Land Co. v. Muir*, 136 Cal. 36 (construing Cal. Civ. Code, § 1462).

**Covenant Against Sale of Liquor.** — *Spencer v. Stevens*, (Supm. Ct. Spec. T.) 18 Misc. (N. Y.) 112.

**3. Equitable Enforcement — England.** — *Rowell v. Satchell*, (1903) 2 Ch. 212; *Rogers v. Hosegood*, 81 L. T. N. S. 515, 69 L. J. Ch. 59; *John Bros. Abergarg Brewery Co. v. Holmes*, (1900) 1 Ch. 188, 69 L. J. Ch. 149, 81 L. T. N. S. 771, 48 W. R. 236, 64 J. P. 153; *Hooper v. Bromet*, 89 L. T. N. S. 37. *Compare Formby v. Barker*, (1903) 2 Ch. 539 (want of interest in enforcement of covenant).

**United States.** — *American Strawboard Co. v. Haldeman Paper Co.*, 83 Fed. Rep. 619, 54 U. S. App. 416.

**Indiana.** — *Sullivan v. Kohlenberg*, 31 Ind. App. 215.

**Kentucky.** — *Chicago, etc., R. Co. v. Wilson*, (Ky. 1903) 76 S. W. Rep. 138.

**Missouri.** — *Stevens v. Annex Realty Co.*, 173 Mo. 511.

**New Jersey.** — *Bridgewater v. Ocean City R. Co.*, 62 N. J. Eq. 276; *Atlantic City v. Atlantic City Steel Pier Co.*, 62 N. J. Eq. 139; *Bridgewater v. Ocean City R. Co.*, 63 N. J. Eq. 798,

**141.** *b.* COVENANTS CONFERRING BENEFITS — (1) *In General*. — See note 1.

Covenantee Must Be Owner of Land to Be Benefited. — See note 2.

(2) *Subject of Covenant*. — See note 3.

**142.** Not Necessarily for Performance of Act on the Land. — See note 1.

*c.* COVENANTS AS TO QUANTITY. — See note 2.

*d.* COVENANTS OF WARRANTY — (1) *In General*. — See note 3.

**143.** (2) *Louisiana Rule*. — See note 1.

*f.* COVENANTS FOR QUIET ENJOYMENT. — See note 3.

*g.* COVENANTS FOR FURTHER ASSURANCES. — See note 4.

**144.** 4. Covenant as a Grant of an Easement. — See note 2.

5. Covenant May Create Lien. — See note 3.

6. Conflict of Laws. — See note 5.

**V. BY AND AGAINST WHOM ENFORCEABLE** — 1. Remote Grantors and Grantees — *a.* IN GENERAL. — See note 6.

**145.** Deed Poll. — See note 4.

*b.* WHAT CONVEYANCE WILL TRANSFER COVENANT TO ASSIGNEE — (1) *In General*. — See note 5.

*affirming* 62 N. J. Eq. 276; *Atlantic City v. New Auditorium Pier Co.*, (N. J. 1904) 58 Atl. Rep. 729; *Roberts v. Scull*, 58 N. J. Eq. 396.

*New York*. — *Holt v. Fleischman*, 75 N. Y. App. Div. 593, *reversing* (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 172.

*Vermont*. — *Trudeau v. Field*, 69 Vt. 446.

**Change of Circumstances in Neighborhood as Ground for Refusing Injunctive Relief.** — *Roth v. Jung*, 79 N. Y. App. Div. 1; *Holt v. Fleischman*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 172, *reversed* 75 N. Y. App. Div. 593.

**141.** 1. **Covenants Conferring Benefits.** — *John Bros. Abergarw Brewery Co. v. Holmes*, (1900) 1 Ch. 188, 69 L. J. Ch. 149, 81 L. T. N. S. 771, 48 W. R. 236, 64 J. P. 153; *Rogers v. Hosegood*, (1900) 2 Ch. 388, 69 L. J. Ch. 652, 83 L. T. N. S. 186, 48 W. R. 659; *Nalder, etc., Brewery Co. v. Harman*, 83 L. T. N. S. 257; *Bridgewater v. Ocean City R. Co.*, 62 N. J. Eq. 276; *Hemsley v. Marlborough Hotel Co.*, 63 N. J. Eq. 804, *affirming* 62 N. J. Eq. 164; *Hansell v. Downing*, 17 Pa. Super. Ct. 235.

**Covenant to Maintain Railway Crossing.** — *Speer v. Erie R. Co.*, 64 N. J. Eq. 601.

**2. Covenantee Must Be Owner of Land Benefited.** — *Rogers v. Hosegood*, 81 L. T. N. S. 515.

**3. Collateral Benefits to Land Insufficient.** — *Rogers v. Hosegood*, 81 L. T. N. S. 515; *Brown v. Southern Pac. R. Co.*, 36 Oregon 128, 78 Am. St. Rep. 761.

**142.** 1. **Act Not to Be Performed on Land.** — *Louisville, etc., R. Co. v. Illinois Cent. R. Co.*, 174 Ill. 448. *Compare* *Los Angeles Terminal Land Co. v. Muir*, 136 Cal. 36 (construing Cal. Civ. Code, § 1462).

**2. Covenant as to Quantity.** — *Tucker v. McArthur*, 103 Ga. 409; *Pigeon River Lumber Co. v. Mims*, (Tenn. Ch. 1897) 48 S. W. Rep. 385.

**3. Covenant of Warranty Runs with the Land.** — *Whitern v. Krick*, 31 Ind. App. 577; *Walton v. Campbell*, 51 Neb. 788; *Troxell v. Stevens*, 57 Neb. 329; *Libby v. Hutchinson*, 72 N. H. 190; *Ravenal v. Ingram*, 131 N. Car. 549; *Wiggins v. Pender*, 132 N. Car. 628 (covenant running to grantee without naming assigns); *Smith v. Ingram*, 132 N. Car. 959; *Jennings v. Kiernan*, 35 Oregon 349; *Rutherford v. Mont-*

*gomery*, 14 Tex. Civ. App. 319. See, however, *Smith v. Ingram*, 130 N. Car. 100 (covenant running only to grantee and not to himself and assigns); *Reinhalter v. Hutchins*, 26 R. I. 586; *Morrow v. Baird*, (Tenn. 1905) 86 S. W. Rep. 1079. See also *Trudeau v. Molleur*, 5 Quebec Pr. 221.

**Covenant Broken.** — *Prestwood v. McGowin*, 128 Ala. 267, 86 Am. St. Rep. 136; *Wesco v. Kern*, 36 Oregon 433; *Pigeon River Lumber, etc., Co. v. Mims*, (Tenn. Ch. 1897) 48 S. W. Rep. 385; *McConaughy v. Bennett*, 50 W. Va. 172.

**143.** 1. **Louisiana Rule.** — See, however, *Hardy v. Pecot*, 113 La. 350.

**3. Covenant for Quiet Enjoyment.** — *Prestwood v. McGowin*, 128 Ala. 267, 86 Am. St. Rep. 136; *Libby v. Hutchinson*, 72 N. H. 190; *Cassada v. Stabel*, 98 N. Y. App. Div. 600, *citing* 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 143; *Wiggins v. Pender*, 132 N. Car. 628; *Reinhalter v. Hutchins*, 26 R. I. 586; *Patterson v. Cappon*, (Wis. 1905) 102 N. W. Rep. 1083.

**Also Against Voluntary Grantees.** — *Bridgewater v. Ocean City R. Co.*, 63 N. J. Eq. 798, *affirming* 62 N. J. Eq. 276.

**4. Covenant for Further Assurances.** — *Prestwood v. McGowin*, 128 Ala. 267, 86 Am. St. Rep. 136; *Wiggins v. Pender*, 132 N. Car. 628; *Clarke v. Priest*, 21 N. Y. App. Div. 174, *affirming* (Supm. Ct. Tr. T.) 18 Misc. (N. Y. 501; *Reinhalter v. Hutchins*, 26 R. I. 586.

**144.** 2. **Covenant May Operate as a Grant of an Easement.** — *Morrison v. Chicago, etc., R. Co.*, 117 Iowa 589, *citing* 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 144; *Chase v. Walker*, 167 Mass. 293; *Speer v. Erie R. Co.*, 64 N. J. Eq. 601; *Morton v. Thompson*, 69 Vt. 432.

**3. Covenant May Create Lien.** — *Doty v. Chattanooga Union R. Co.*, 103 Tenn. 564.

**5. Lex Loci Contractus.** — *Compare* *Dalton v. Taliaferro*, 101 Ill. App. 592.

**6. McConaughy v. Bennett**, 50 W. Va. 172.

**145.** 4. *Kelly v. Nypano R. Co.*, 23 Pa. Co. Ct. 181, *citing* 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 145.

**5. A Deed Without Warranty.** — *Ravenal v. Ingram*, 131 N. Car. 549.

**146.** (2) *Quitclaim and Sheriff's Deeds.* — See note 2.

**147.** *c. PRIVACY OF ESTATE NECESSARY* — (1) *In General.* — See note 1.

(2) *Where No Interest in Land Passes.* — See note 4.

**149.** (5) *Where Neither Title Nor Possession Passes with the Deed.* — See note 2.

**151.** (6) *Mere Seizin in Fact Sufficient* — *Where Possession or a Defeasible Title Passes.* — See note 1.

**152.** *d. WHEN BROKEN UPON DELIVERY OF DEED* — (1) *Rule in United States.* — See notes 1, 2.

**153.** *Conveyance as an Assignment of Covenant in Presenti.* — See note 1.

(2) *English Rule Followed in Some American Jurisdictions.* — See note 3.

**Conveyance of Equity of Redemption.** — The conveyance of the equity of redemption is sufficient to carry in equity a covenant annexed to the land and confer the benefit thereof. *Rogers v. Hosegood*, (1900) 2 Ch. 388.

**Conveyance of Equitable Title.** — A conveyance of the equitable title merely is not sufficient to carry covenants running with the land, as such covenants run only with the legal title. *Wallace v. Pereles*, 109 Wis. 316, 83 Am. St. Rep. 898.

**Sale Under Trustee's Deed.** — *Blanchard v. Haseltine*, 79 Mo. App. 248, 2 Mo. App. Rep. 427.

**Mortgage carries covenant of warranty.** *Baker v. Bradt*, 168 Mass. 58.

**146. 2. Purchaser at Sheriff's Sale — Quitclaim Deed.** — *Baker v. Bradt*, 168 Mass. 58; *Walton v. Campbell*, 51 Neb. 788; *Troxell v. Stevens*, 57 Neb. 329; *Hurxthal v. St. Lawrence Boom, etc., Co.*, 53 W. Va. 94, 97 Am. St. Rep. 954, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 146. Compare *Blodgett v. McMurtry*, 54 Neb. 69.

**147. 1. Dalton v. Taliaferro**, 101 Ill. App. 592, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 147; *Hurxthal v. St. Lawrence Boom, etc., Co.*, 53 W. Va. 87, 97 Am. St. Rep. 954, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 147.

**4. Conveyance of Land or Interest Therein Essential.** — *Pritchett v. Redick*, 62 Neb. 296.

**Covenant by Landowner with Board of Health as to Future Building.** — *Wilmurt v. McGrane*, 16 N. Y. App. Div. 412.

**149. 2. Grantor Without Title or Possession.** — *Houston v. Zahm*, 44 Oregon 621, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 149; *Wallace v. Pereles*, 109 Wis. 316, 83 Am. St. Rep. 898.

**151. 1. Possession by Covenantor Sufficient to Enable Covenant to Run with Land.** — *Tucker v. McArthur*, 103 Ga. 409; *Morton v. Thompson*, 69 Vt. 432.

**152. 1. Covenant Against Incumbrances — Broken When Made.** — *Woodward v. Brown*, 119 Cal. 283; *Jewett v. Fisher*, 9 Kan. App. 630; *Hardy v. Pecot*, 104 La. 136; *Langenberg v. Chas. H. Heer Dry Goods Co.*, 74 Mo. App. 12; *Sears v. Broady*, 66 Neb. 207; *Waters v. Bagley*, (Neb. 1902) 92 N. W. Rep. 637; *Brass v. Vandecar*, (Neb. 1903) 96 N. W. Rep. 1035; *Reinhalter v. Hutchins*, 26 R. I. 586. See, however, *Tucker v. McArthur*, 103 Ga. 409. Compare *Whitern v. Krick*, 31 Ind. App. 577.

In New York the rule has been established

that in case of a covenant against incumbrances, though there is a nominal breach at the time of the conveyance, still the covenant would run with the land for the purpose of substantial recovery, so as to enable a subsequent grantee to sue thereon, but if the subsequent grantee takes the land from the original grantee under a conveyance expressly subject to the incumbrance, neither he nor his grantee can maintain an action for breach of the original covenant against incumbrances. *Geisler v. De Graaf*, 166 N. Y. 339, affirming 44 N. Y. App. Div. 178.

**Covenant Against Tax Liens.** — *McPike v. Heaton*, 131 Cal. 109, 82 Am. St. Rep. 335.

**2. Covenants of Seizin and Right to Convey.** — *Prestwood v. McGowin*, 128 Ala. 267, 86 Am. St. Rep. 136; *Jewett v. Fisher*, 9 Kan. App. 630; *Libby v. Hutchinson*, 72 N. H. 190; *Reinhalter v. Hutchins*, 26 R. I. 586, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 151.

**Covenant Imposing Burden — Effect of Breach.** — Where a covenant imposing a burden, such as a covenant to build a house upon land, was broken at the time of the conveyance of the land by the covenantor, the burden of the covenant does not run with the land so as to bind his grantee. *Hurley v. Brown*, 44 N. Y. App. Div. 480.

**Continuing Covenants.** — But a covenant imposing a burden may be susceptible of continued breaches, and where such is the case, as in the case of a covenant to continue the operation of trains, the fact that there has been a breach of the covenant prior to the conveyance of the land upon which it was a burden will not prevent the continued running of the covenant as to future breaches. *Doty v. Chattanooga Union R. Co.*, 103 Tenn. 564.

**153. 1. Conveyance an Assignment of Action for Breach of Covenant of Seizin.** — *Randall v. Macbeth*, 81 Minn. 376, 83 Am. St. Rep. 387; *Blanchard v. Haseltine*, 79 Mo. App. 248, 2 Mo. App. Rep. 427; *Geisler v. De Graaf*, 166 N. Y. 339 affirming 44 N. Y. App. Div. 178. See also *Carroll v. Carroll*, 113 Iowa 419.

**Covenant Against Incumbrances.** — See, however, *Security Bank v. Holmes*, 68 Minn. 538; *Mandigo v. Conway*, (Supm. Ct. App. T.) 45 Misc. (N. Y.) 389.

**3. Jurisdictions in United States Adopting English Rule — Georgia.** — *Tucker v. McArthur*, 103 Ga. 409 (covenant against incumbrances). *Illinois.* — *Dalton v. Taliaferro*, 101 Ill. App. 592.

*Indiana.* — *Beasley v. Phillips*, 20 Ind. App. 182 (covenant of seizin and against incum-



**151.** Covenant Against Incumbrances Coupled with Covenant in Futuro. — See note 1.

**155.** (3) *Statutes Modifying Rule* — Statutes Requiring Real Party in Interest to Sue. — See note 1.

**156.** *e.* COVENANT OF WARRANTY — GRANTEE AT TIME OF BREACH MAY SUE. — See note 1.

*f.* RIGHT OF ACTION FOR COVENANT BROKEN DOES NOT PASS TO SUBSEQUENT GRANTEE. — See notes 2, 3.

**157.** *g.* WHEN A GRANTOR MAY SUE AFTER ASSIGNMENT — (1) *In General*. — See note 1.

(2) *When an Intermediate Grantor May Sue*. — See notes 2, 3.

**158.** Action by Intermediate Grantor on Covenant Broken When Made. — See note 1.

**160.** *l.* COVENANTS EXECUTED BY ONE PERSON ON BEHALF OF ANOTHER — Persons Executing Covenant Personally Bound. — See note 2.

**161.** *n.* REFORMATION OF DEED BEFORE BRINGING ACTION AT LAW. — See note 1.

*o.* DIVISIBILITY OF COVENANTS. — See note 2.

*p.* ASSIGNEE SUCCEEDS ONLY TO POSITION OF COVENANTEE. — See note 4.

**2.** Heirs — *a.* LIABILITY — Bound Only So Far as Assets Descend. — See note 6.

**162.** *b.* RIGHT TO ENFORCE — Breach After Covenantor's Death — Heirs May Sue. — See note 3.

**163.** **3.** Married Women — *a.* IN GENERAL. — See notes 1, 2.

branches implied by statute); *Whitern v. Krick*, 31 Ind. App. 577.

*Missouri*. — *Langenberg v. Chas. H. Heer Dry-Goods Co.*, 74 Mo. App. 12; *Ladd v. Montgomery*, 83 Mo. App. 355.

*Ohio*. — *Lescaleet v. Rickner*, 9 Ohio Cir. Dec. 422, 16 Ohio Cir. Ct. 461.

*Texas*. — *Taylor v. Lane*, 18 Tex. Civ. App. 545 (statutory implied covenant against incumbrances held to run with land until substantial breach).

**154.** **1.** Covenant Against Incumbrances Coupled with Covenant in Futuro. — *Clarke v. Priest*, 21 N. Y. App. Div. 174, *affirming* (Supm. Ct. Tr. T.) 18 Misc. (N. Y.) 501 (coupled with covenant for further assurances).

**155.** **1.** Statutes Giving Right of Action to Real Party in Interest. — *Clarke v. Priest*, (Supm. Ct. Tr. T.) 18 Misc. (N. Y.) 501, 21 N. Y. App. Div. 174; *Geiszler v. De Graaf*, 166 N. Y. 339, *affirming* 44 N. Y. App. Div. 178.

**156.** **1.** Grantee at Time of Breach May Maintain Action. — *Prestwood v. McGowin*, 128 Ala. 267, 86 Am. St. Rep. 136, *citing* 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 156-7.

**2.** Right of Action for Broken Covenant Does Not Pass with Land. — *Prestwood v. McGowin*, 128 Ala. 267, 86 Am. St. Rep. 136, *citing* 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 156-7.

**3.** Grantee at Time of Breach Proper Plaintiff. — *Prestwood v. McGowin*, 128 Ala. 267, 86 Am. St. Rep. 136, *citing* 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 156-7.

**157.** **1.** Grantor's Right to Sue After Assignment. — *Troxell v. Stevens*, 57 Neb. 329; *Taylor v. Lane*, 18 Tex. Civ. App. 545.

**Covenant to Maintain Fences.** — Where a landowner conveys a right of way to a railway company, the latter covenanting to maintain fences, etc., along the right of way, the fact that the grantor has conveyed the land retained by him at the time of the conveyance of the right of

way, reserving, however, a narrow strip adjacent to the right of way granted, does not debar him from the right to maintain an action for breach of the covenant. *Chicago, etc., R. Co. v. Wilson*, (Ky. 1903) 76 S. W. Rep. 138.

**2.** Intermediate Grantor. — *Ladd v. Montgomery*, 83 Mo. App. 355; *Morrow v. Baird*, (Tenn. 1905) 86 S. W. Rep. 1079.

**3.** Intermediate Grantor — Right After Making Satisfaction. — *Pritchett v. Redick*, 62 Neb. 296; *Blum v. Johnson*, 28 Tex. Civ. App. 10.

**158.** **1.** *Lewis v. Ross*, 95 Tex. 358, (Tex. Civ. App. 1901) 65 S. W. Rep. 504.

**160.** **2.** Covenants Bind Persons Executing. — *Hitchcock v. Southern Iron, etc., Co.*, (Tenn. Ch. 1896) 38 S. W. Rep. 588.

**161.** **1.** Right to Reformation of Deed to Maintain Action on Covenants. — *McCune v. Scott*, 18 Pa. Super. Ct. 263 (action by one co-grantee).

**2.** Covenant Restricting Use of Land. — *Rogers v. Hosegood*, 81 L. T. N. S. 515.

**4.** Assignment of Cause of Action. — After the covenant has been broken, the cause of action to recover damages for breach may, as other choses in action, be assigned. *McConaughy v. Bennett*, 50 W. Va. 172.

**6.** Heir Liable Only to Extent of Assets. — *Muller v. Fowler*, (Ind. App. 1904) 71 N. E. Rep. 512.

**162.** **3.** Heirs May Sue for Breach After Covenantor's Death. — *Martin v. Monongahela R. Co.*, 48 W. Va. 543, *citing* 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 162.

**Covenant to Maintain Railway Crossing.** — *Speer v. Erie R. Co.*, 64 N. J. Eq. 601 (though covenant ran only to covenantor and not to himself and heir).

**163.** **1.** Married Woman Bound by Covenants in Conveyance of Separate Property. — *McGuigan v. Gaines*, 71 Ark. 614, *citing* 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 163.

**164.** 4. Remaindermen Not Bound by Covenants of Life Tenants. — See note 2.

**165.** VI. RELEASE AND DISCHARGE OF LIABILITY OF COVENANTS — 1. Discharge by Express Agreement — *a.* IN GENERAL. — See note 4.

**167.** 2. Discharge by Operation of Law — *a.* ESTATE REVESTING IN COVENANTOR — (1) *In General.* — See note 4.

**168.** *b.* MUTUAL COVENANTS — REBUTTER — (1) *In General.* — See notes 1, 2.

(2) *Reconveyance by Mortgage with Similar Covenants.* — See note 3.

**169.** *c.* LAPSE OF TIME. — See note 2.

**171.** *h.* RECOVERY OF DAMAGES FOR BREACH — (2) *Continuing Breach.* — See note 1.

**172.** VII. DAMAGES — 1. Actions on Covenants in Deeds — *b.* COVENANT OF WARRANTY — (1) *Total Breach* — (*a.*) *Consideration.* — See notes 2, 3.

(*b.*) *Increased Valuation of Land and Improvements.* — See note 5.

**173.** Knowledge on the Part of the Grantor of Intended Improvements. — See note 1. Voluntary Deed. — See note 2.

**174.** (2) *Partial Breach* — (*a.*) *General Rule.* — See note 3.

**163.** 2. Wife Joining in Conveyance to Bar Dower. — See also *Pyle v. Gross*, 92 Md. 132.

**164.** 2. Cotenant or Coparcener is not bound by covenants of other cotenants or coparceners. *Jones v. Chapman*, (Tex. Civ. App. 1897) 41 S. W. Rep. 527.

**165.** 4. Release by Covenantee While Owner of the Land. — *Frank v. Cobban*, 20 Mont. 168.

*Intention to Waive.* — *Star Brewery Co. v. Primas*, 163 Ill. 652.

*Conditional Waiver or Release.* — *Wittenberg v. Mollyneaux*, 60 Neb. 583, 55 Neb. 429.

*Effect of Subsequent Quitclaim from Covenantee.* — *Uihlein v. Matthews*, 57 N. Y. App. Div. 476, reversed 172 N. Y. 154.

**167.** 4. Survival of Covenant in Mortgage after Discharge of Mortgage. — *Brown v. O'Brien*, 168 Mass. 484.

**168.** 1. Mutual Covenants Cancel Each Other. — *Carroll v. Carroll*, 113 Iowa 419, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 168. See also *Singleton v. Singleton*, 60 S. Car. 216.

2. *Green v. Edwards*, 15 Tex. Civ. App. 382 (reservation of vendor's lien in reconveyance is immaterial).

3. *Similar Covenants in Mortgage.* — *Wiggins v. Pender*, 132 N. Car. 628; *Wesco v. Kern*, 36 Oregon 433; *Reinhalter v. Hutchins*, 26 R. I. 586, quoting 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 168.

In *Frank v. Cobban*, 20 Mont. 168, it was held that where the grantor conveyed property with an express covenant that the premises were free from taxes and the grantee gave back a purchase-money mortgage whereby he expressly covenanted to discharge all subsisting taxes against the land or which might thereafter be imposed, the covenant in the mortgage discharged the grantor from liability on his covenant for freedom from taxes.

*Reconveyance in Representative Capacity to Remedy Prior Defective Conveyance.* — *Curtis v. Hawley*, 85 Ill. App. 429.

**169.** 2. The Long and Continuous (Twenty-four Years) User of the premises in a manner wholly inconsistent with the tenor and purposes of covenants restricting its use, is para-

mount to the waiver or release of such covenant. *Hepworth v. Pickles*, (1900) 1 Ch. 108.

**171.** 1. *Continuing Breach* — *Covenant to Repair Gate.* — *Doty v. Chattanooga Union R. Co.*, 103 Tenn. 564.

**172.** 2. *Consideration of Conveyance Recoverable* — *United States*. — *Northern Pac. R. Co. v. Montgomery*, (C. C. A.) 86 Fed. Rep. 251.

*Alabama.* — *Prestwood v. McGowin*, 128 Ala. 267, 86 Am. St. Rep. 136.

*Georgia.* — *St. John v. Leyden*, 111 Ga. 152.

*Kansas.* — *Herrington v. Clark*, 60 Kan. 855, 55 Pac. Rep. 462; *Craven v. Clary*, 8 Kan. App. 295.

*Louisiana.* — *Pharr v. Gall*, 104 La. 700.

*Missouri.* — *Pence v. Gabbert*, 70 Mo. App. 201; *Leet v. Gratz*, 92 Mo. App. 422.

*North Carolina.* — *Wiggins v. Pender*, 132 N. Car. 628.

*South Dakota.* — *Loiseau v. Threlstad*, 14 S. Dak. 257.

*Washington.* — *West Coast Mfg., etc., Co. v. West Coast Imp. Co.*, 31 Wash. 610.

*Rents and Profits* — *Set-off.* — *Compare Britton v. Ruffin*, 120 N. Car. 87.

3. *Purchase to Secure Other Land.* — The fact that the grantee purchased the tract of land with regard to which the title failed, at a price greater than its actual value, in order that he might purchase other property from the grantor does not prevent the grantee from recovering the consideration paid. *Kempner v. Beaumont Lumber Co.*, 20 Tex. Civ. App. 307.

5. *General Rule* — *Increased Valuation Not to Be Considered.* — See also *Allen v. Price*, 30 Can. Sup. Ct. 536 (construing Civ. Code, § 1512).

**173.** 1. *Knowledge of Vendor of Intended Improvements.* — *West Coast Mfg., etc., Co. v. West Coast Imp. Co.*, 31 Wash. 610 (so also though under the contract of sale the vendee was required to make improvements).

2. *Voluntary Deed.* — *Howser v. Cruikshank*, 122 Ala. 263, 82 Am. St. Rep. 76, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 173.

**174.** 3. *Partial Eviction* — *Proportionate Part of Consideration Only Recoverable* — *California.* — *Hoffman v. Kirby*, 136 Cal. 26.

*Georgia.* — *St. John v. Leyden*, 111 Ga. 152.

- 176.** (4) *Purchase of Paramount Title by Grantee.* — See note 2.  
**177.** *c. COVENANT FOR QUIET ENJOYMENT — Total Eviction.* — See note 3.  
**178.** *d. COVENANT AGAINST INCUMBRANCES — (1) Loss of Land by Reason of Incumbrance.* — See note 3.  
     *Partial Loss.* — See note 5.  
     *New England Rule.* — See note 6.  
**179.** (2) *Breach by Outstanding Estate — Outstanding Lease.* — See note 1.  
     (3) *Breach by Existence of Easement.* — See note 3.

*Indiana.* — McNally v. White, 154 Ind. 174, reaffirming 154 Ind. 163.

*Kansas.* — Craven v. Clary, 8 Kan. App. 295.

*Kentucky.* — Louisville Public Warehouse Co. v. James, (Ky. 1902) 70 S. W. Rep. 1046. Compare James v. Louisville Public Warehouse Co., (Ky. 1901) 64 S. W. Rep. 966.

*Louisiana.* — Southern Wood Mfg., etc., Co. v. Davenport, 50 La. Ann. 505.

*Michigan.* — Dubay v. Kelly, (Mich. 1904) 100 N. W. Rep. 677.

*Missouri.* — Blanchard v. Haseltine, 79 Mo. App. 248, 2 Mo. App. Rep. 427.

*New Hampshire.* — Libby v. Hutchinson, 72 N. H. 190.

*Oregon.* — Wesco v. Kern, 36 Oregon, 435, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 174.

*Pennsylvania.* — Lehman v. Given, 177 Pa. St. 580.

*Texas.* — Hynes v. Packard, 92 Tex. 44, reversing (Tex. Civ. App. 1897) 44 S. W. Rep. 548; Chestnut v. Chism, 20 Tex. Civ. App. 23, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 174; Branch v. Weiss, 23 Tex. Civ. App. 84.

*Washington.* — West Coast Mfg., etc., Co. v. West Coast Imp. Co., 31 Wash. 610.

**Burden of Proof.** — Hynes v. Packard, 92 Tex. 44, reversing (Tex. Civ. App. 1897) 44 S. W. Rep. 548.

**Application of Rule Where Land Is of Uniform Value.** — Haynie v. American Trust Invest. Co. (Tenn. Ch. 1896) 39 S. W. Rep. 860 (sale of lot by valuation per front foot).

**Land Included by Mistake.** — To mitigate damages evidence that the land to which title failed was included in the deed by mistake and no consideration was paid therefor, is admissible. Rook v. Rook, 111 Ill. App. 398.

**Sale by Acre.** — Where the sale is by the acre the grantee may recover the price paid per acre multiplied by the number of acres in the part to which the title of the grantor failed. McBride v. Burns, (Tex. Civ. App. 1905) 88 S. W. Rep. 394.

**176. 2. Recovery Limited to Price Paid for Paramount Title, Etc.** — Beasley v. Phillips, 20 Ind. App. 182; Craven v. Clary, 8 Kan. App. 295; Leet v. Gratz, 92 Mo. App. 422; McCrillis v. Thomas, 110 Mo. App. 699; Patterson v. Cappon, (Wis. 1905) 102 N. W. Rep. 1083.

**Purchase Insufficient to Acquire Permanent Title.** — It is necessary that the purchase be sufficient to acquire the permanent title. Leet v. Gratz, 92 Mo. App. 422.

**Title Acquired from United States.** — Rule applies where the grantee perfects his title by acquiring title from the United States, and the grantee is not entitled to recover the consideration paid his grantor. Holloway v. Miller, 84

Miss. 776; McCrillis v. Thomas, 110 Mo. App. 699.

**177. 3. Measure of Damages — Consideration with Interest.** — Loiseau v. Threlstad, 14 S. Dak. 257.

**178. 3. Loss of Land by Reason of Incumbrance — Consideration with Interest Recoverable.** — Loiseau v. Threlstad, 14 S. Dak. 257; Seibert v. Bergman, (Tex. Civ. App. 1898) 44 S. W. Rep. 872.

**Profits Received from Use of Land,** as where timber is cut, are not to be deducted. Seibert v. Bergman, (Tex. Civ. App. 1898) 44 S. W. Rep. 872.

**Not Required to Pay Incumbrance to Prevent Loss of Land.** — William Farrell Lumber Co. v. Deshon, 65 Ark. 103 (loss through tax lien which grantee neglected to pay).

**Grantee Is Not Required to Pay Incumbrance.** — Cain v. Fisher, (W. Va. 1905) 50 S. E. Rep. 752, 1015 (taxes).

**5. Partial Loss — Proportionate Share of Consideration.** — Loiseau v. Threlstad, 14 S. Dak. 257.

**6. Improvements Erected in Bad Faith.** — Richmond v. Ames, 167 Mass. 265.

**179. 1. Breach by Outstanding Lease.** — Turner v. Moon, (1901) 2 Ch. 825, 70 L. J. Ch. 822, 85 L. T. N. S. 90, 50 W. R. 237 (existence of easement); Wragg v. Mead, 120 Iowa 319; Brass v. Vandecar, (Neb. 1903) 96 N. W. Rep. 1035; Browning v. Stillwell, (Supm. Ct. Tr. T.) 42 Misc. (N. Y.) 346.

To entitle the grantee of a tenement house to substantial damages for breach through outstanding leases he must show that the actual rental value of the premises exceeds the rent reserved on the outstanding leases. Toch v. Horowitz, (Supm. Ct. App. T.) 87 N. Y. Supp. 455.

Where the incumbrance consisted of an outstanding lease, the fact that the grantor at the time of the conveyance had knowledge of the use to which the grantee intended to place the premises does not alter the rule. Wragg v. Mead, 120 Iowa 310.

**3. Breach by Existence of Easement.** — Turner v. Moon, (1901) 2 Ch. 825, 70 L. J. Ch. 822, 85 L. T. N. S. 90 (covenant implied under Conveyance Act 1881); Ensign v. Colt, 75 Conn. 111; Brantley Co. v. Johnson, 102 Ga. 850; Sherwood v. Johnson, 28 Ind. App. 277; Louisville Public Warehouse Co. v. James, 56 S. W. Rep. 19, 70 S. W. Rep. 1046, 24 Ky. L. Rep. 1266; Herb v. Metropolitan Hospital, etc., 80 N. Y. App. Div. 145.

**Easement for Street.** — See, however, Southern Wood Mfg., etc., Co. v. Davenport, 50 La. Ann. 505.

**Restriction on Use of Premises.** — Charman v. Hibbler, 31 N. Y. App. Div. 477.



- 180.** Time of Computing the Diminution in Value. — See note 2.  
 (4) *Incumbrance Not Asserted* — (a) *Money Liens*. — See notes 3, 4.
- 181.** (b) *Incumbrances Not Removable*. — See note 1.  
 (5) *Removing Incumbrances* — (a) *By Grantee*. — See note 2.
- 182.** Amount Recoverable as Affected by Consideration. — See note 3.
- 183.** *e.* COVENANT TO DISCHARGE INCUMBRANCES — *Covenant by Grantor*. — See note 5.  
*Covenant by Grantee*. — See note 6.  
*f.* COVENANT OF SEIZIN — (1) *Total Breach* — *General Rule*. — See note 8.
- 184.** (2) *Partial Breach*. — See note 4.
- 185.** See note 1.  
 Time of Estimating Relative Value of Land Lost. — See note 2.
- 186.** Breach by Existence of Easement. — See note 2.  
 (3) *Non-eviction* — *Only Nominal Damages for Nominal Breach*. — See note 5.

**Claim to Growing Crops.** — *Newburn v. Lucas*, 126 Iowa 85 (value of crops recoverable).

**Right of Way of Railway.** — *Whiteside v. Magruder*, 75 Mo. App. 364.

**180.** 2. *Sherwood v. Johnson*, 28 Ind. App. 277; *Louisville Public Warehouse Co. v. James*, 70 S. W. Rep. 1046, 24 Ky. L. Rep. 1266.

3. *Hastings v. Hastings*, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 244 (nominal damages recoverable).

4. *Incumbrances Not Asserted* — *Mortgages*. — *William Farrell Lumber Co. v. Deshon*, 65 Ark. 103; *McGuckin v. Milbank*, 152 N. Y. 297, *affirming* 83 Hun (N. Y.) 473; *Hastings v. Hastings*, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 244; *Henry v. Hand*, 36 Oregon 496, *citing* 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 180; *Loiseau v. Threlstad*, 14 S. Dak. 257; *Robinson v. Bierce*, 102 Tenn. 428. *Compare* *McLaughlin v. Royce*, 108 Iowa 254.

**Special Assessments.** — *Mandigo v. Conway*, (Supm. Ct. App. T.) 45 Misc. (N. Y.) 389.

**181.** 1. *Incumbrances Not Capable of Being Removed*. — *Bartlett v. Ball*, 142 Mo. 28.

2. *Removing Incumbrance* — *Amount Paid Recoverable*. — *William Farrell Lumber Co. v. Deshon*, 65 Ark. 103; *Whitern v. Krick*, 31 Ind. App. 577; *Talbott v. Donaldson*, (Kan. 1905) 80 Pac. Rep. 981; *Dahl v. Stakke*, 12 N. Dak. 325; *Weyer v. Sager*, 12 Ohio Cir. Dec. 193, 21 Ohio Cir. Ct. 710; *Loiseau v. Threlstad*, 14 S. Dak. 257; *Bullitt v. Coryell*, (Tex. Civ. App. 1905) 85 S. W. Rep. 482; *Carswell v. Habberzettle*, (Tex. 1905) 86 S. W. Rep. 738; *Green v. Tidball*, 26 Wash. 338; *Hastings v. Hastings*, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 244.

As in case of taxes which are barred by the statute of limitations and have ceased to be a lien. *Robinson v. Bierce*, 102 Tenn. 428.

**Incumbrance Barred by Statute of Limitations.** — If the incumbrance, which was paid off by the grantee, was at the time barred by the statute of limitations, the payment is gratuitous, and he cannot recover from the grantor the amount paid. *McMichael v. Russell*, 68 N. Y. App. Div. 104.

**182.** 3. *Recovery Cannot Exceed Consideration and Interest*. — *Deaver v. Deaver*, 137 N. Car. 240 (conveyance by holder of legal title to beneficial owner).

See, however, *Utica, etc., R. Co. v. Gates*, (Supm. Ct. Spec. T.) 21 Misc. (N. Y.) 205

(conveyance for nominal consideration but with view to improvements by grantee benefiting adjoining premises of grantor).

**Discharge of Incumbrance by Covenantor** — **Nominal Damages.** — *Egan v. Martin*, 71 Mo. App. 60.

**183.** 5. *Covenant by Grantor to Discharge Incumbrance*. — *Bohlcke v. Buchanan*, 94 Mo. App. 320.

**Damages Cannot Be Predicated on the Depreciation** in the value of the land not caused by the incumbrance. *Egan v. Yeaman*, (Tenn. Ch. 1897) 46 S. W. Rep. 1012.

**Incumbrance Foreclosed.** — *Bohlcke v. Buchanan*, 94 Mo. App. 320.

**Subsequent Bar of Incumbrance.** — Where the incumbrance which the grantor has covenanted to remove is subsequently barred by the statute of limitations, only nominal damages are recoverable. *Egan v. Yeaman*, (Tenn. Ch. 1897) 46 S. W. Rep. 1012.

6. *Covenant by Grantee*. — See also *McAbee v. Cribbs*, 194 Pa. St. 94.

8. *Consideration with Interest*. — *Prestwood v. McGowin*, 128 Ala. 267, 86 Am. St. Rep. 136; *Lloyd v. Sandusky*, 203 Ill. 621, *citing* 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 183; *Parkinson v. Woulds*, 125 Mich. 325, 7 Detroit Leg. N. 527; *De Long v. Spring Lake, etc., Co.*, 65 N. J. L. 1, *citing* 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 183-4; *Conklin v. Hancock*, 67 Ohio St. 455; *Loiseau v. Threlstad*, 14 S. Dak. 257; *Building, etc., Co. v. Fray*, 96 Va. 559.

**184.** 4. *Partial Breach* — *Proportionate Share of Consideration Recoverable*. — *Lloyd v. Sandusky*, 203 Ill. 621, *citing* 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 184; *Bolinger v. Brake*, 57 Kan. 663; *De Long v. Spring Lake, etc., Co.*, 65 N. J. L. 1; *Building, etc., Co. v. Fray*, 96 Va. 559.

**Consideration per Acreage.** — Where, however, the consideration was a uniform price per acre, in case of a partial breach the measure of damages is the acreage price, though all the land was not of the same quality. *Conklin v. Hancock*, 67 Ohio St. 455.

**185.** 1. *Land All of Same Quality*. — *Conklin v. Hancock*, 67 Ohio St. 455.

2. *Lloyd v. Sandusky*, 203 Ill. 621.

**186.** 2. *Breach by Existence of Easement*. — *Egan v. Martin*, 71 Mo. App. 535.

5. *Nominal Damages Recoverable*. — *Foshay v.*

**187.** *g.* COVENANT FOR RIGHT TO CONVEY. — See note 4.

**188.** Partial Failure of Title — Acquiring Paramount Title. — See note 1.

*i.* AFFIRMATIVE AND RESTRICTIVE COVENANTS. — See note 5.

**189.** *j.* CONSIDERATION NOT PECUNIARY. — See note 1.

*m.* ACTION BY REMOTE GRANTEE. — See note 5.

**190.** Remote Grantee Limited to Consideration Paid by Him. — See note 1.

*n.* EXPENSES OF LITIGATION — (1) *Expenses of Defending Title* —

(a) In General. — See note 4.

**191.** See notes 1, 2.

Shafer, 116 Iowa 302, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 186; Freymoth v. Nelson, 84 Mo. App. 293; Building, etc., Co. v. Fray, 96 Va. 559. See, however, Egan v. Martin, 71 Mo. App. 60 (where grantee voluntarily gives up possession).

**187. 4. Covenant for Right to Convey.** — Conklin v. Hancock, 67 Ohio St. 455; Loiseau v. Threlstad, 14 S. Dak. 257.

**188. 1. Breach by Existence of Easement of Way.** — In England, where the implied covenant for good right to convey is breached by the existence of an easement of way, the measure of damages in such a case is the difference between the value of the property as purported to be conveyed and what the grantor had in fact power to convey. Turner v. Moon, (1901) 2 Ch. 825, following Spoor v. Green, L. R. 9 Exch. 99.

**5. Actual Damages Sustained Recoverable.** — Wittenberg v. Mollyneaux, 60 Neb. 583.

**Covenant to Fence Right of Way.** — Depreciation in rental value of land may be recovered. Lake Erie, etc., R. Co. v. Griffin, 25 Ind. App. 138.

**189. 1. Exchange of Lands.** — Chenault v. Thomas, (Ky. 1904) 83 S. W. Rep. 109 (covenantee is not prejudiced by being allowed value of land received by him instead of value of land parted with where there is no evidence as to value of latter). See, however, Holmes v. Seaman, (Neb. 1904) 100 N. W. Rep. 417, where the covenantee was held entitled to recover the value of the land he should have received in the exchange.

**Shares of Stock as Consideration.** — Haynle v. American Trust Invest. Co., (Tenn. Ch. 1896) 39 S. W. Rep. 860 (value fixed by parties at time of conveyance).

**Where Bonds of the Grantor are surrendered as a consideration for the conveyance, the measure of recovery is the par value of the bonds and not their market value.** Northern Pac. R. Co. v. Montgomery, (C. C. A.) 86 Fed. Rep. 251.

**5. Action by Remote Grantee — Consideration Paid by Original Grantee Recoverable.** — Beasley v. Phillips, 20 Ind. App. 182 (voluntary grantee); Lewis v. Ross, 95 Tex. 358, modifying (Tex. Civ. App. 1901) 65 S. W. Rep. 504.

**190. 1. Consideration Paid by Remote Grantee.** — Teague v. Whaley, 20 Ind. App. 26; Charman v. Tatum, 54 N. Y. App. Div. 61, affirmed 166 N. Y. 605.

**4. Expenses of Defending Title** — Illinois. — Rook v. Rook, 111 Ill. App. 398.

Indiana. — Teague v. Whaley, 20 Ind. App. 26.

Iowa. — Alexander v. Staley, 110 Iowa 607.

Kentucky. — Louisville Public-Warehouse Co.

v. James, (Ky. 1900) 56 S. W. Rep. 19; Chenault v. Thomas, (Ky. 1904) 83 S. W. Rep. 109.

Michigan. — Dubay v. Kelly, (Mich. 1904) 100 N. W. Rep. 577; Seitz v. People's Sav. Bank, (Mich. 1905) 103 N. W. Rep. 545, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 190.

Missouri. — Coleman v. Clark, 80 Mo. App. 339, 2 Mo. App. Rep. 617; Long v. Wheeler, 84 Mo. App. 101; Hazelett v. Woodruff, 150 Mo. 534 (expense in procuring abstract in defense of title).

New York. — Charman v. Hibbler, 31 N. Y. App. Div. 477; Charman v. Tatum, 54 N. Y. App. Div. 61, affirming 166 N. Y. 605; Browning v. Stillwell, (Supm. Ct. Tr. T.) 42 Misc. (N. Y.) 346.

North Carolina. — Wiggins v. Pender, 132 N. Car. 628.

Ohio. — Weyer v. Sager, 12 Ohio Cir. Dec. 193, 21 Ohio Cir. Ct. 710.

**Expenses of Unsuccessful Appeal** are not recoverable. Louisville Public-Warehouse Co. v. James, (Ky. 1900) 56 S. W. Rep. 19.

**Expenses Not Paid.** — See, however, Cullity v. Dorffel, 18 Wash. 122.

**191. 1. Attorney's Fees Recoverable.** — Louisville Public-Warehouse Co. v. James, (Ky. 1900) 56 S. W. Rep. 19; Seitz v. People's Sav. Bank, (Mich. 1905) 103 N. W. Rep. 545, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 191; Coleman v. Clark, 80 Mo. App. 339, 2 Mo. App. Rep. 617; Long v. Wheeler, 84 Mo. App. 101; Charman v. Tatum, 166 N. Y. 605, affirming 54 N. Y. App. Div. 61. See also Alexander v. Staley, 110 Iowa 611, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 190, 191; Wiggins v. Pender, 132 N. Car. 628; Chenault v. Thomas, (Ky. 1904) 83 S. W. Rep. 109; Hazelett v. Woodruff, 150 Mo. 534; Browning v. Stilwell, (Supm. Ct. App. Div.) 87 N. Y. Supp. 1129, affirming (Supm. Ct. Tr. T.) 42 Misc. (N. Y.) 346.

**Necessity for Prior Payment.** — It is necessary that the covenantee should have actually paid the attorney fees to entitle them. Cullity v. Dorffel, 18 Wash. 122.

**Interest on Counsel Fees.** — Charman v. Tatum, 54 N. Y. App. Div. 61 (held recoverable), affirmed 166 N. Y. 605.

**Recovery Limited to Reasonable Value of Services of Attorney.** — Charman v. Tatum, 54 N. Y. App. Div. 61, affirmed 166 N. Y. 605.

**Expert Testimony as to Value of Attorney's Services** is not conclusive on jury. — Charman v. Tatum, 54 N. Y. App. Div. 61, affirmed 166 N. Y. 605.

**2. Cates v. Field,** (Tex. Civ. App. 1905) 85 S. W. Rep. 52. See also Spencer v. Commer-

**191.** Suit by Grantee. — See note 3.

**192.** (c) Defense by Covenantor. — See note 1.

(d) Where Defense Is Successful. — See note 2.

(f) Notice of Action to Covenantor. — See note 4.

(2) *Expense of Perfecting Title.* — See note 7.

**193.** a. INTEREST — (2) *Time from Which Interest Is to Be Computed* —

(a) In General. — See note 1.

(b) Possession of Land by Grantee — Interest from Date of Payment of Consideration. — See note 2.

Interest Limited to Time for Which Covenantee Liable for Mesne Profits. — See note 3.

**194.** See notes 1, 2.

Unproductive Lands. — See note 4.

[Rule in Texas. — See note 7a.]

**195.** p. EFFECT OF PURCHASE OF PARAMOUNT TITLE BY GRANTOR ON MEASURE OF DAMAGES — Title Acquired Before Eviction of Grantee. — See note 1.

Title Acquired After Eviction of Grantee. — See note 2.

**196.** r. CONSIDERATION EXPRESSED IN DEED AS EVIDENCE OF CONSIDERATION PAID. — See notes 2, 3.

Action by Remote Grantee. — See note 4.

**198.** VIII. MATTERS OF EVIDENCE — 1. Burden of Proof as to Breach — a. GENERALLY — Under Reformed Procedure — Burden Held to Be on Plaintiff. — See note 2.

Covenants of Freedom from Incumbrances and Quiet Enjoyment. — See note 4.

cial Co., 36 Wash. 374 (covenants in lease); Lampkin v. Garwood, 122 Ga. 407.

**191.** 3. Actions by Covenantee. — Louisville Public-Warehouse Co. v. James, (Ky. 1900) 56 S. W. Rep. 19; Browning v. Stilwell, (Supm. Ct. App. Div.) 87 N. Y. Supp. 1129, *affirming* (Supm. Ct. Tr. T.) 42 Misc. (N. Y.) 346 (unsuccessful action to evict lessee).

And this is especially true where the proceedings to perfect the title which fail are instituted at the request of the grantor and under his agreement to pay the expenses thereof. Brass v. Vandecar, (Neb. 1903) 96 N. W. Rep. 1035.

**192.** 1. Defense by Covenantor. — Long v. Wheeler, 84 Mo. App. 101.

2. Rittmaster v. Richner, 14 Colo. App. 361; Thorne v. Clark, 112 Iowa 548, 84 Am. St. Rep. 356; Jewett v. Fisher, 9 Kan. App. 630.

4. Notice to Covenantor Essential. — Long v. Wheeler, 84 Mo. App. 101.

7. Removing Cloud from Title. — Thorne v. Clark, 112 Iowa 548, 84 Am. St. Rep. 356; Luther v. Brown, 66 Mo. App. 227. Compare Coleman v. Clark, 80 Mo. App. 339, 2 Mo. App. Rep. 617 (expenses of action to gain possession held recoverable in action on covenant of seizure).

**193.** 1. Interest from Time of Payment — Possession Not Acquired by Grantee. — Northern Pac. R. Co. v. Montgomery, (C. C. A.) 86 Fed. Rep. 251; Craven v. Clary, 8 Kan. App. 295; Haynie v. American Trust Invest. Co., (Tenn. Ch. 1896) 39 S. W. Rep. 860; Kempner v. Beaumont Lumber Co., 20 Tex. Civ. App. 307.

Covenant of Seizin. — In *New Jersey* the rule has been settled in a late case that, though the grantee did not secure possession of the land, still he could only recover interest for the six years preceding the action for breach of

covenant of seizure. De Long v. Spring Lake, etc., Co., 65 N. J. L. 1.

2. Interest from Date of Payment. — Parkinson v. Woulds, 125 Mich. 325, 7 Detroit Leg. N. 527. See, however, Huff v. Riley, 26 Tex. Civ. App. 101.

3. From Time Covenantee Is Liable for Mesne Profits. — Craven v. Clary, 8 Kan. App. 295; British, etc., Mortg. Co. v. Todd, 84 Miss. 522; Pence v. Gabbert, 70 Mo. App. 201.

**194.** 1. Huff v. Riley, 26 Tex. Civ. App. 101.

2. Grantee Not Liable for Mesne Profits — Interest from Eviction. — Herington v. Clark, 60 Kan. 855, 55 Pac. Rep. 462; Walton v. Campbell, 51 Neb. 788.

4. Huff v. Riley, 26 Tex. Civ. App. 101.

7a. In Texas, interest on consideration cannot be recovered for the time the grantee was in possession. Huff v. Riley, 26 Tex. Civ. App. 101.

**195.** 1. Purchase of Paramount Title by Grantor. — Building, etc., Co. v. Fray, 96 Va. 559; Sanborn v. Knight, 100 Wis. 216.

2. Title Acquired After Eviction of Grantee. — See, however, Looney v. Reeves, 5 Kan. App. 279; Huff v. Riley, 26 Tex. Civ. App. 101.

**196.** 2. Sufficiency of Proof to Rebut Recital of Consideration. — Holzheier v. Hayes, (Cal. 1898) 52 Pac. Rep. 838.

3. True Consideration May Be Shown. — Lloyd v. Sandusky, 95 Ill. App. 593, *affirmed* 203 Ill. 621; Conklin v. Hancock, 67 Ohio St. 455.

4. Action by Remote Grantee — Consideration Expressed in Deed Conclusive. — Randall v. Macbeth, 81 Minn. 376, 83 Am. St. Rep. 387.

**198.** 2. Burden Held to Be on Plaintiff. — Zerfing v. Seelig, 14 S. Dak. 303, *affirming* 12 S. Dak. 25.

4. Osburn v. Pritchard, 104 Ga. 145.



**198.** *b.* BURDEN OF PROVING TITLE PARAMOUNT. — See notes 5, 6.

**199.** 2. Admissibility of Parol Evidence — *a.* AS TO SIMULTANEOUS OR PRIOR AGREEMENTS OR WARRANTIES. — See note 4.

**200.** *b.* AS TO PARTICULAR INCUMBRANCES NOT MENTIONED IN DEED — Inadmissible to Cut Down or Vary Covenant Against Incumbrances. — See note 2.

**203.** IX. NOTICE TO DEFEND OR TO MAINTAIN TITLE — 1. In Ejectment Suit Brought Against Covenantee — *a.* NECESSITY FOR NOTICE. — See note 5.

**205.** *d.* CHARACTER OF NOTICE. — See note 1.

*e.* SUFFICIENCY OF NOTICE — (1) *In General.* — See note 2.

**206.** 3. Effect of Judgment Against Covenantee Where Notice Given — *a.* IN SUIT BROUGHT AGAINST COVENANTEE — (1) *In General.* — See note 1.

**207.** *b.* IN SUIT BROUGHT BY COVENANTEE. — See note 4.

4. Effect of Judgment Where No Notice Given — *a.* IN GENERAL. —

See note 5.

**208.** X. REMEDIES — 1. At Law — *a.* ACTION OF COVENANT. — See note 3.

*c.* BREACH OF COVENANTS AS DEFENSE TO RECOVERY OF PURCHASE MONEY — (1) *Failure of Title as a Failure of Consideration* — Modern Rule. — See note 7.

**210.** (2) *In the Nature of Set-off or Recoupment* — Authorization of the Defense Independently of Statutes. — See note 2.

**211.** (3) *Necessity of a Substantial Breach.* — See note 1.

**212.** 2. In Equity — *a.* IN GENERAL. — See note 5.

**198.** 5. Where Covenantee Purchases Outstanding Title. — Robinson *v.* Bierce, 102 Tenn. 428; Hynes *v.* Packard, 92 Tex. 44.

**6.** Covenant of Seizin. — Wine *v.* Woods, 158 Ind. 388; Zarkowski *v.* Schroeder, 71 N. Y. App. Div. 526.

**199.** 4. Parol Evidence Inadmissible to Enlarge or Restrict Warranty. — Wright *v.* Phipps, 98 Fed. Rep. 1007, 38 C. C. A. 702, affirming 90 Fed. Rep. 556; Godwin *v.* Maxwell, 106 Ga. 194; West Coast Mfg., etc., Co. *v.* West Coast Imp. Co., 25 Wash. 627.

**200.** 2. Parol Evidence as to Particular Incumbrance Not Admissible. — Reagle *v.* Dennis, 8 Kan. App. 151. Compare Gill *v.* Ferrin, 71 N. H. 421.

**203.** 5. Notice to Defend Title Not Necessary to Recover for Breach of Warranty. — Chenault *v.* Thomas, (Ky. 1904) 83 S. W. Rep. 109; Winters *v.* Earl, (N. J. 1899) 43 Atl. Rep. 671.

**205.** 1. Notice Need Not Be in Writing. — See, however, Teague *v.* Whaley, 20 Ind. App. 26.

**2.** Notice Must Expressly Require Covenantor to Defend. — Teague *v.* Whaley, 20 Ind. App. 26.

**206.** 1. Judgment Against Covenantee in Action of Ejectment Conclusive Evidence of Paramount Title. — Lowery *v.* Yawn, 111 Ga. 61; McMullen *v.* Butler, 117 Ga. 845; Raftery *v.* Easley, 111 Ill. App. 413; Leet *v.* Gratz, 92 Mo. App. 422; Browning *v.* Stillwell, (Supm. Ct. Tr. T.) 42 Misc. (N. Y.) 346; Weyer *v.* Sager, 12 Ohio Cir. Dec. 193, 21 Ohio Cir. Ct. 710; McCune *v.* Scott, 18 Pa. Super. Ct. 263; Cullity *v.* Dorffel, 18 Wash. 122.

If the Judgment Is Rendered by Consent it is not conclusive upon the warrantor, though he was notified to defend the action. Raftery *v.* Easley, 111 Ill. App. 413.

**207.** 4. Record of Judgment Against Cove-

nantee in Suit by Him. — Louisville Public-Warehouse Co. *v.* James, (Ky. 1900) 56 S. W. Rep. 19.

Where Grantee Sues for Possession and the defendant set up a leasehold estate in defense, if the grantee notifies the grantor of such defense a judgment sustaining such defense is conclusive upon the grantor in an action for breach of covenant. Browning *v.* Stilwell, (Supm. Ct. App. Div.) 87 N. Y. Supp. 1129, affirming (Supm. Ct. Tr. T.) 42 Misc. (N. Y.) 346.

**5.** Rule Where Notice Not Given. — Osburn *v.* Pritchard, 104 Ga. 145; Lowery *v.* Yawn, 111 Ga. 61; Teague *v.* Whaley, 20 Ind. App. 26; McCrillis *v.* Thomas, 110 Mo. App. 699; Cullity *v.* Dorffel, 18 Wash. 122; Wallace *v.* Perelles, 109 Wis. 316, 83 Am. St. Rep. 898.

Sufficiency of Notice. — Weyer *v.* Sager, 12 Ohio Cir. Dec. 193, 21 Ohio Cir. Ct. 710.

**208.** 3. Venue. — Eames *v.* Armstrong, 136 N. Car. 392 (action is transitory not local).

**7.** Failure of Title Constitutes Failure of Consideration. — Hoffman *v.* Kirby, 136 Cal. 26; McLaughlin *v.* Betcher, 87 Minn. 1, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 208; Dahl *v.* Stakke, 12 N. Dak. 325, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 208.

**210.** 2. Breach of Covenant Entitling Covenantee to Damages Held a Defense. — William Farrell Lumber Co. *v.* Deshon, 65 Ark. 103; Thurgood *v.* Spring, 139 Cal. 596; Brantley Co. *v.* Johnson, 102 Ga. 850; Shire *v.* Plimpton, 50 N. Y. App. Div. 122, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 210; Swinney *v.* Cockrell, (Miss. 1905) 38 So. Rep. 353; Bullitt *v.* Coryell, (Tex. Civ. App. 1905) 85 S. W. Rep. 482.

**211.** 1. Covenants Not Broken. — See also Truss *v.* Miller, 116 Ala. 494.

**212.** 5. Suit in Equity for Breach of Cove-

**216.** *e.* RELIEF AGAINST FORECLOSURE OF PURCHASE-MONEY MORTGAGE — (1) *Covenants Not Broken* — (a) *In General*. — See note 3.

**217.** (b) *Outstanding Incumbrance*. — See note 4.

**218.** (2) *Covenants Broken*. — See note 3.

*f.* INJUNCTION AGAINST VIOLATION OF RESTRICTIVE COVENANTS. — See note 4.

**219.** *g.* SPECIFIC PERFORMANCE — (1) *General Rule*. — See note 2.

**220.** *h.* RESCISSION — (1) *By Grantee* — (a) *General Rule*. — See note 5.

**222.** *i.* JURISDICTION — (1) *Action Between Original Parties*. — See note 3.

**223.** *j.* STATUTE OF LIMITATIONS — (1) *Application of Provisions Relating to Actions on Specialties*. — See note 2.

**224.** (2) *Running of Statute* — *In General*. — See note 1.

Covenant of Seizin. — See notes 4, 5.

Covenant for Right to Convey. — See note 6.

Covenant of Warranty. — See note 8.

**225.** Covenant Against Incumbrances. — See notes 3, 4.

**COVER.** — See note 5.

**nants Not Maintainable.** — *Hastings v. Hastings*, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 244; *McConaughey v. Bennett*, 50 W. Va. 172.

**216. 3. Foreclosure of Mortgage — Covenant Not Broken.** — *Falkner v. Woodard*, 104 Wis. 608.

**217. 4. Outstanding Incumbrance.** — *Penn v. Schmisser*, 77 Ill. App. 526.

**218. 3. Cassada v. Stabel**, 98 N. Y. App. Div. 600.

**4. Injunction Against Violation of Restrictive Covenants.** — *Webb v. Fagoti*, 79 L. T. N. S. 683; *Los Angeles University v. Swarth*, 107 Fed. Rep. 798, 46 C. C. A. 647; *Holt v. Fleischman*, 75 N. Y. App. Div. 593; *Scudder v. Watt*, 98 N. Y. App. Div. 228; *Levy v. Halcyon Casino Hotel Co.*, (Supm. Ct. Spec. T.) 45 Misc. (N. Y.) 289.

**Change in Character of Neighborhood as Ground for Refusal to Enforce Restrictive Covenant.** — *McClure v. Leaycraft*, 97 N. Y. App. Div. 518 (not ground therefor).

**Change in Character of Neighborhood held not to deprive covenantee of the right to enforce restrictive covenant.** *Osborne v. Bradley*, (1903) 2 Ch. 446.

**Effect of Breach by Complainant upon His Right to Relief.** — *Hooper v. Bromet*, 89 L. T. N. S. 37 (a trivial breach by the complainant of another trivial restrictive covenant does not deprive him of the right to equitable relief).

**Mandatory Injunction.** — *Hemsley v. Marlborough Hotel Co.*, 65 N. J. Eq. 167 (materiality of encroachments).

**Acquiescence Depriving the Grantor of the Right to Injunctive Relief.** — *Ocean City Assoc. v. Chalfant*, 65 N. J. Eq. 156.

**219. 2. To Compel Removal of Cloud on Title.** — *Trudeau v. Molleur*, 5 Quebec Pr. 221 (action lies).

**Jurisdiction to Compel Removal of Incumbrance.** — *Hastings v. Hastings*, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 244. See, however, *In re Banque Ville-Marie*, 22 Quebec Super. Ct. 162.

**Rights to Compensation by Conveyance of Other Land — The Covenantor Cannot Be Required to Convey to the Grantee an Amount of Land Equal**

to that to which the title has failed. *Doyle v. Brundred*, 189 Pa. St. 113.

**220. 5. Defects in Title Not Ground for Rescission of Conveyance.** — *Vanbuskirk v. Vanwart*, 36 N. Bruns. 422.

**222. 3. Action Between Original Parties.** — *Hardy v. Pecot*, 104 La. 136; *Brass v. Vandecar*, (Neb. 1903) 96 N. W. Rep. 1035 (jurisdiction of county court in action on covenant against incumbrances); *Weyer v. Sager*, 12 Ohio Cir. Dec. 193, 21 Ohio Cir. Ct. 710 (Court of Common Pleas).

**223. 2. Provisions Relating to Actions on Specialties Applicable.** — *Sibley v. Stacey*, 53 W. Va. 292.

**224. 1. Statute Runs from Breach of Covenant** — *Shankle v. Ingram*, 133 N. Car. 254.

**Covenant of Quantity.** — *Sibley v. Stacey*, 53 W. Va. 292, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 223.

**4. Covenant of Seizin.** — *Jewett v. Fisher*, 9 Kan. App. 630.

**5. View that Statute Runs from Time Liability for Substantial Damages Attaches.** — *Foshay v. Shafer*, 116 Iowa 302.

**6. Covenant for Right to Convey.** — *Turner v. Moon*, (1901) 2 Ch. 825; *Jewett v. Fisher*, 9 Kan. App. 630.

**8. As to Actions on Covenant of Warranty Statute Runs from Time of Eviction.** — *Northern Pac. R. Co. v. Montgomery*, (C. C. A.) 86 Fed. Rep. 251; *Foshay v. Shafer*, 116 Iowa 302; *Chenault v. Thomas*, (Ky. 1904) 83 S. W. Rep. 109; *Ravenal v. Ingram*, 131 N. Car. 549; *Wiggins v. Pender*, 132 N. Car. 628; *Pigeon River Lumber, etc., Co. v. Mims*, (Tenn. Ch. 1897) 48 S. W. Rep. 385.

**225. 3. Covenant Against Incumbrances — Statute Runs from Execution of Deed.** — *Jewett v. Fisher*, 9 Kan. App. 630.

**4. Statute Runs from Time Substantial Damages are Suffered.** — *McClure v. Dee*, 115 Iowa 546, 91 Am. St. Rep. 181; *Seibert v. Bergman*, 91 Tex. 411, (Tex. Civ. App. 1898) 44 S. W. Rep. 872.

**5. Covered Flights of Steps.** — Section 342 of the revised ordinances of the city of

**226. COW.** — See note 2.

[**COWARDICE.** — See note 2*a*.]

[**CRACK-LOO.** — See note 2*b*.]

**228. CRAZY.** — See note 3.

**CREATE.** — See note 5.

**229. CREDIBLE.** — See note 2.

**230.** See note 1.

**231. CREDIT.** — See note 1.

New York, directing the use of guard railings on flights of steps projecting beyond the line of the street and leading into a basement, where such flights "shall not be *covered*," does not apply to a flight of steps to cover the opening to which wooden doors are provided. *Schroeck v. Reiss*, 46 N. Y. App. Div. 502.

**Glass Bottles Containing Liquids Are Not Coverings** within the meaning of the customs duties acts. *U. S. v. Nichols*, 186 U. S. 298.

**226. 2.** The word *cow* in an indictment for larceny was held to be used in its general and ordinary sense, meaning the mature female of bovine animals. *Wilburn v. Territory*, 10 N. Mex. 402.

**2*a*.** *Cowardice* is an antonym of courage as used in an instruction on the law of self-defense. *Coil v. State*, 62 Neb. 15.

**2*b*.** *Crack-loo* is a game played by two or more persons tossing up a coin and letting it fall upon the floor; the one whose coin falls and remains nearest a crack in the floor being the winner. *Donathan v. State*, 43 Tex. Crim. 427.

**228. 3.** *In re Heft*, 8 Pa. Dist. 101.

**5. Create a Corporation.** — *Indianapolis v. Navin*, 151 Ind. 139; *In re Bank of Commerce*, 153 Ind. 460.

**Create an Office.** — See *Roth v. State*, 158 Ind. 242.

**229. 2. Worthy of Belief.** — The word *credible* in a statute providing that process may be served by any *credible* person means worthy of belief. *Peck v. Chambers*, 44 W. Va. 270.

**Creditable Synonymous with Credible.** — In *State v. Kenilworth*, 69 N. J. L. 115, the court said: "The use of the word *creditable* to signify 'worthy of belief' is said by lexicographers to

be obsolete; and antiquity cannot be invoked to justify its use here in that sense, for it was introduced by our Act of 1888. Pamph. L., p. 249. Nevertheless, we think such is its significance in this statute, and by a '*creditable* witness' is meant one whose testimony is worthy of credit, credence, belief — that is, in more modern phase, a *credible* witness."

**230. 1. Credible in the Sense of Competent.** — *Johnson v. Johnson*, 187 Ill. 86; *Chicago Title, etc., Co. v. Brown*, 183 Ill. 42; *Sloan v. Sloan*, 184 Ill. 579; *Savage v. Bulger*, (Ky. 1903) 77 S. W. Rep. 717; *In re Trinitarian Cong. Church, etc.*, 91 Me. 416.

**231. 1. Malicious Prosecution — Reputation.** — *Curlee v. Rose*, 27 Tex. Civ. App. 259.

**Will — In the Sense of Assets.** — *Brandon v. Yeakle*, 66 Ark. 377.

**Correlative of Debt.** — *Wilde v. Mahaney*, 183 Mass. 455.

**Trustee Process — Choses in Action.** — See *Wilde v. Mahaney*, 183 Mass. 455.

**Stock — Taxation.** — *Commercial Bank v. Chambers*, 182 U. S. 556; *Wellington First Nat. Bank v. Chapman*, 173 U. S. 218; *Hubbard v. Brush*, 61 Ohio St. 252; *Primm v. Fort*, 23 Tex. Civ. App. 605.

**Taxation.** — Membership in the Western Associated Press is not a *credit* for the purposes of taxation under the *Colorado* statutes. *Arapahoe County v. Rocky Mountain News Printing Co.*, 15 Colo. App. 189.

**Certificates of Benefit Insurance** after the death of the insured are properly taxable as *credits* though the time within which the societies must pay after proof of loss has not elapsed. *Cooper v. Board of Review*, 207 Ill. 473.



## CREDIT INSURANCE.

**235.** See notes 1, 2.

Construction. — See note 4.

**239. CREDITOR.** — See note 1.

**240.** See note 1.

**241.** Fraudulent Conveyances. — See note 1.

**242.** Recording Acts. — See note 1.

**235. 1.** *Talcott v. National Credit Ins. Co.*, 28 N. Y. App. Div. 75, *affirmed* in 163 N. Y. 577.

**2. Contract of Insurance.** — *American Credit Indemnity Co. v. Athens Woolen Mills*, (C. C. A.) 92 Fed. Rep. 581.

**4.** *Strouse v. American Credit Indemnity Co.*, 91 Md. 244.

In *American Credit Indemnity Co. v. Athens Woolen Mills*, (C. C. A.) 92 Fed. Rep. 581, the court said: "These contracts of indemnity are merely contracts of insurance, carefully framed, to limit as narrowly as possible the liability of the insurer, and doubtful expressions in them are to be construed favorably to the insured."

**Interpretation of Policy.** — *Talcott v. National Credit Ins. Co.*, 28 N. Y. App. Div. 75, *affirmed* in 163 N. Y. 577, *distinguishing* *Goodman v. Mercantile Credit Guarantee Co.*, 17 N. Y. App. Div. 474. And see *American Credit Indemnity Co. v. Athens Woolen Mills*, (C. C. A.) 92 Fed. Rep. 581; *American Credit Indemnity Co. v. Champion Coated Paper Co.*, (C. C. A.) 103 Fed. Rep. 609; *Strouse v. American Credit Indemnity Co.*, 91 Md. 244; *Talcott v. Gray*, 59 N. J. Eq. 595; *Jaeckel v. American Credit Indemnity Co.*, 34 N. Y. App. Div. 565, *affirmed* in 164 N. Y. 598.

**Computation of Loss.** — See *American Credit Indemnity Co. v. Champion Coated Paper Co.*, (C. C. A.) 103 Fed. Rep. 609; *Strouse v. American Credit Indemnity Co.*, 91 Md. 244; *Talcott v. National Credit Ins. Co.*, 28 N. Y. App. Div. 75, *affirmed* in 163 N. Y. 577; *Jaeckel v. American Credit Indemnity Co.*, 34 N. Y. App. Div. 565, *affirmed* 164 N. Y. 598.

**Rating in Commercial Agency.** — See *Strouse v. American Credit Indemnity Co.*, 91 Md. 244.

**What Constitutes Insolvency.** — See *American Credit Indemnity Co. v. Carrollton Furniture Mfg. Co.*, (C. C. A.) 95 Fed. Rep. 111; *Strouse v. American Credit Indemnity Co.*, 91 Md. 244.

**What Constitutes Assignment for Benefit of Creditors.** — Written transfers, by which debtors convey substantially all their property to pay or secure debts, the property being at once delivered and the debtors thereupon at once ceasing to do business, constitute general assignments for creditors within the meaning of a policy prepared for use, not in any particular state or locality, but throughout the country generally, insuring against loss on sales sustained by the insolvency of debtors who have

made a general assignment for the benefit of their creditors, whether the assignment be in the form prescribed by state statutes or an assignment at common law, or for the benefit of a single creditor or all. *People v. Mercantile Credit Guarantee Co.*, 166 N. Y. 416.

**Return of Execution Unsatisfied.** — "Failure to return an execution until three days after the expiration of a credit insurance policy will not relieve the insurer from liability upon the claim upon which it is based under a provision in the policy limiting liability to cases where 'an execution has been returned unsatisfied on a judgment obtained \* \* \* for merchandise sold to said debtor during the period covered by this policy,' where the other requirements are complied with and the only applicable requirement as to returning the execution is the implied one that it shall be before the expiration of the time fixed for presenting final verified proofs of loss, which is done." *People v. Mercantile Credit Guarantee Co.*, 166 N. Y. 416.

**239. 1.** *Guaranty Trust Co. v. Galveston City R. Co.*, (C. C. A.) 107 Fed. Rep. 317, *quoting* 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 239; *Stewart v. Walterboro, etc.*, R. Co., 64 S. Car. 92, *quoting* 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 239; *Deseret Nat. Bank v. Kidman*, 25 Utah 379.

**240. 1. Larger Sense.** — *Guaranty Trust Co. v. Galveston City R. Co.*, (C. C. A.) 107 Fed. Rep. 317, *quoting* 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 239; *Wilson's Estate*, 80 Ill. App. 217; *Louisville, etc.*, R. Co. *v. Biddell*, 112 Ky. 494; *Winans v. Beidler*, 6 Okla. 603; *Dight v. Chapman*, 44 Oregon 272, *citing* 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 240; *Soly v. Aasen*, 10 N. Dak. 108, *citing* 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 251; *Stewart v. Walterboro, etc.*, R. Co., 64 S. Car. 92, *quoting* 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 240.

**Tort — Consolidation of Corporations.** — *Stewart v. Walterboro, etc.*, R. Co., 64 S. Car. 92.

**241. 1.** *Anglin v. Conley*, 114 Ky. 741; *Munson v. Genesee Iron, etc., Works*, 37 N. Y. App. Div. 203; *Stewart v. Walterboro, etc.*, R. Co., 64 S. Car. 92, *quoting* 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 241.

A wife who holds a claim to alimony is a creditor. *De Ruiter v. De Ruiter*, 28 Ind. App. 9.

**242. 1. Chattel Mortgages.** — *In re Pekin*

- 243.** Bankruptcy and Insolvency. — See note 1.  
**244.** Indorsers, Sureties, Etc. — See note 1.  
**245.** Other Examples. — See note 1.  
**248.** CRIME AGAINST NATURE. — See note 2.  
 CRIME — CRIMINAL. — See note 3.  
 Wrong Punished by State in Criminal Proceeding. — See note 4.  
**250.** The Term "Crime" Includes Misdemeanors. — See note 1.  
**251.** Criminal. — See note 2.  
**252.** A Criminal Action. — See note 1.  
 Violation of Ordinance. — See note 3.  
**253.** See note 1.  
**254.** Specific Instances. — See note 3.  
**259.** CRIMEN FALSI. — See note 2.

Plow Co., (C. C. A.) 112 Fed. Rep. 308; *In re Shirley*, (C. C. A.) 112 Fed. Rep. 301; *Reiss v. Argubright*, (Neb. 1902) 92 N. W. Rep. 988; *Greenville Nat. Bank v. Evans-Snyder-Buel Co.*, 9 Okla. 353; *Pierson v. Hickey*, 16 S. Dak. 46; *Eason v. Garrison*, (Tex. Civ. App. 1904) 82 S. W. Rep. 800; *Oak Cliff College v. Armstrong*, (Tex. Civ. App. 1899) 50 S. W. Rep. 610; *Blumauer v. Clock*, 24 Wash. 596; *Rock Springs First Nat. Bank v. Ludvigsen*, 8 Wyo. 230.

**243.** 1. The word *creditor* in section 48 of the Bankruptcy Act, 1883, means any person who at the date when the charge or payment is made is entitled, if bankruptcy supervenes, to prove in the bankruptcy and share in the distribution of the bankrupt's estate. *In re Blackpool Motor Car Co.*, (1901) 1 Ch. 77.

**244.** 1. Indorser. — *Swarts v. Siegel*, (C. C. A.) 117 Fed. Rep. 13; *Goldberg v. Harlan*, 33 Ind. App. 465.

**245.** 1. Claimant — Debts of Decedents. — *Municipal Ct. v. Whaley*, (R. I. 1904) 57 Atl. Rep. 1061.

**248.** 2. See *State v. Vicknair*, 52 La. Ann. 1921.

**3.** *Schick v. U. S.*, 195 U. S. 70; *U. S. v. Nash*, 111 Fed. Rep. 528; *Wilkins v. U. S.*, (C. C. A.) 96 Fed. Rep. 837; *State v. McConnell*, 70 N. H. 158.

**4.** *L'Association, etc., v. Brault*, 30 Can. Sup. Ct. 610, quoting 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 248; *Campbell v. Supreme Conclave, etc.*, 66 N. J. L. 282; *U. S. v. Lee Huen*, 118 Fed. Rep. 445; *People v. Olmstead*, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 349.

**Statutory Definition of Crime.** — *People v. Hagan*, 170 N. Y. 46; *State v. Hogan*, 8 N. Dak. 301.

**250.** 1. Crime Includes Misdemeanors. — *State v. Blitz*, 171 Mo. 530; *Price v. Lancaster County*, 24 Pa. Co. Ct. 231.

**Trial by Jury.** — *Schick v. U. S.*, 195 U. S. 70.

**251.** 2. Civil and Criminal Distinguished. — *Charleston v. Beller*, 45 W. Va. 45.

By "Criminal Business" is meant such conduct, attended with such intent, as amounts to a crime, as the law defines a crime. *Mosby v. Gisborn*, 17 Utah 257.

**252.** 1. See *U. S. v. Lee*, 84 Fed. Rep. 630.

**3. Ordinances.** — *Holliman v. Hawkinsville*, 109 Ga. 109; *State v. Nicholas*, 109 La. 83, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 84; *Delaney v. Police Ct.*, 167 Mo. 667; *State v. Gustin*, 152 Mo. 108; *Madison v. Horner*, 15 S. Dak. 359.

**253.** 1. Ordinances — Violation Held Crime. — *Barnett v. Atlanta*, 109 Ga. 166; *Charleston v. Beller*, 45 W. Va. 45.

**254.** 3. Contempt. — *Bradley v. State*, 111 Ga. 168.

**Suicide — Life Insurance.** — *Campbell v. Supreme Conclave, etc.*, 66 N. J. L. 274; *Patterson v. Natural Premium Mut. L. Ins. Co.*, 100 Wis. 118.

**Dogs.** — *State v. McConnell*, 70 N. H. 158.  
**Costs.** — *State v. Steele*, 112 Ga. 39.

**Criminal Cause or Matter — English Judicature Act — Not Within the Act.** — *Southwark, etc., Water Co. v. Hampton Urban Dist. Council*, (1899) 1 Q. B. 273.

**Proceedings for Forfeiture.** — A suit for the recovery of a penalty under the Anti-Trust Act held not to be a *criminal* case. *State v. Waters-Pierce Oil Co.*, (Tex. Civ. App. 1902) 67 S. W. Rep. 1057.

**The Omission to Have a Licensed Engineer in charge of a boat's engines**, in violation of a United States statute, comes strictly within the definition of the word *crime*. *U. S. v. Nash*, 111 Fed. Rep. 529.

**A Proceeding to Expel or Exclude Aliens** is not a criminal prosecution or proceeding. *U. S. v. Moy You*, 126 Fed. Rep. 226.

**259.** 2. See *Matzenbaugh v. People*, 194 Ill. 108.

# CRIMINAL CONVERSATION.

BY GEORGE E. FLEMING.

**261. II. NATURE OF THE TORT.** — See note 3.

**III. RIGHT AND MODE OF RECOVERY** — 1. **Who May Recover** — *b. WIFE* — At Common Law. — See note 5.

**262.** Under Married Women's Statutes. — See note 2.

3. **Circumstances Affecting the Right of Recovery** — *a. CONSENT OR RESISTANCE OF WIFE.* — See notes 5, 6.

**263. b. DEFENDANT'S KNOWLEDGE OR IGNORANCE OF THE MARRIAGE.** — See note 1.

*c. SEPARATION OF HUSBAND AND WIFE.* — See notes 2, 4.

*d. CONDUCT OF THE PARTIES* — (1) *Consent or Connivance of Husband.* — See note 5.

**264.** Permitting Wife to Live as a Prostitute. — See note 1.

(2) *Previous Conduct* — (a) *Of the Husband* — *bb. NEGLIGENCE IN RESPECT TO WIFE'S CONDUCT.* — See note 3.

*Leaving Opportunities Open.* — See note 4.

**265.** (3) *Subsequent Conduct* — (a) *Husband's Condonation of Wife's Offense.* — See notes 3, 4.

*c. PREVIOUS SUIT* — *Against Another Defendant.* — See note 7.

**266. g. DIVORCE OF HUSBAND AND WIFE.** — See notes 2, 3.

**261. 3.** *Lellis v. Lambert*, 24 Ont. App. 653.  
**5. At Common Law — Wife Cannot Maintain Action.** — *Morgan v. Martin*, 92 Me. 190; *Lellis v. Lambert*, 24 Ont. App. 653. *Contra*, *Lockwood v. Lockwood*, 67 Minn. 476, holding that the action is maintainable by the wife and in effect overruling the doctrine of *Kroessin v. Keller*, 60 Minn. 372, 51 Am. St. Rep. 533.

**262. 2. The Action Is Not Authorized by the Ontario Married Woman's Property Act.** — Rev. Stat. Ontario, c. 132. *Lellis v. Lambert*, 24 Ont. App. 653.

**5. Consent of Wife Immaterial.** — *Lee v. Hammond*, 114 Wis. 554, quoting 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 262; *Sieher v. Pettit*, 200 Pa. St. 58.

**6. Violence Will Not Bar Action.** — *Lee v. Hammond*, 114 Wis. 554, quoting 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 262.

**263. 1. The Defendant's Ignorance that the Woman Is Married** should be borne in mind by the jury in assessing the amount of damages. *Lord v. Lord*, (1900) P. 297, 69 L. J. P. 54.

**2. Separation of Husband and Wife — English Rule.** — *Compare Evans v. Evans*, (1899) P. 195, 68 L. J. P. 70, holding that the fact that the husband and wife had separated before the adultery was a sufficient reason for reducing the amount of damages.

**4. In the United States.** — See *Cole v. Beyland*, (Supm. Ct. Spec. T.) 67 N. Y. Supp. 1024.

**5. Consent or Connivance of Husband a Bar to the Action.** — *Morning v. Long*, 109 Iowa 288.

**264. 1. Husband Must Consent to Wife's Profligacy to Bar His Action.** — *Lee v. Hammond*, 114 Wis. 550.

*Plaintiff's Consent Must Be Shown* — When the plaintiff was told that his wife had had improper relations with the defendant, and "he did not make very much of a reply," it was held that there was no evidence of consent to the adultery; nor was connivance shown by evidence that the plaintiff's wife had committed adultery with other men before she met the defendant, where the plaintiff had never known of the previous adultery. *Smith v. Hockenberry*, (Mich. 1904) 101 N. W. Rep. 207.

**3. Husband's Negligence in Respect to Wife's Conduct.** — *Lee v. Hammond*, 114 Wis. 559, quoting 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 264.

**4. Lee v. Hammond**, 114 Wis. 550, quoting 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 264.

**265. 3. Shannon v. Swanson**, 208 Ill. 52, affirming 104 Ill. App. 465; *Smith v. Hockenberry*, (Mich. 1904) 101 N. W. Rep. 207.

**4. Condonation Not Evidence of Connivance.** — *Compare Morning v. Long*, 109 Iowa 288.

**7. Shannon v. Swanson**, 208 Ill. 52, affirming 104 Ill. App. 465.

**266. 2. Prettyman v. Williamson**, 1 Penn. (Del.) 224, holding that the divorce was not a bar, but was admissible in mitigation of damages.

**3. A Foreign Divorce, Invalid under Domestic Laws**, secured by the wife, has been held in Ontario not to bar an action by the husband against one who has married the wife, relying on such divorce. *C. v. D.*, 8 Ont. L. Rep. 308.



**266.** IV. DAMAGES RECOVERABLE — 1. Elements of Damage. — See notes 5, 6.

Recovery Not Dependent upon Actual Loss. — See note 7.

The Mental Anguish Suffered by the Plaintiff. — See note 8.

**267.** 2. Excessive Damages. — See notes 2, 4.

**268.** V. EVIDENCE — 1. Evidence Affecting the Right of Recovery — *a*. WHAT MUST BE PROVEN — Proof of Loss of Service, Society, etc., Not Essential. — See note 2.

*b*. PROOF OF MARRIAGE. — See note 3.

**269.** *c*. PROOF OF THE ADULTERY. — See note 1.

**271.** 2. Evidence Affecting Amount of Damages — *a*. CHARACTER AND CONDUCT OF PARTIES — (2) *Of the Wife*. — See note 2.

**272.** *c*. PREVIOUS FAMILY RELATIONS OF HUSBAND AND WIFE. — See note 1.

See generally the title MARRIAGE, 1211. 6 *et seq*.

**266.** \* 5. The Statute of Limitations is not a bar to an action for criminal conversation where the adulterous intercourse between the defendant and the plaintiff's wife has continued to a period within six years before the bringing of the action. *Quare*, does the statute begin to run only when the adulterous intercourse ceases, or is the plaintiff entitled only to damages for intercourse within the six years preceding the action? *King v. Bailey*, 31 Can. Sup. Ct. 338, *affirming* 27 Ont. App. 703.

**6.** Damages Recoverable — Exemplary Rather than Compensatory. — *Prettyman v. Williamson*, 1 Penn. (Del.) 224; *Lee v. Hammond*, 114 Wis. 558, *citing* 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 266.

If the jury finds for the plaintiff and assesses punitive damages, it should assess some actual damages also. *Mills v. Taylor*, 85 Mo. App. 111.

Though No Precise Amount of Specific Damages Is Proved, substantial damages may be awarded to the plaintiff for the disgrace and humiliation brought on him, and for the deprivation of his wife's society. *Hart v. Shorey*, 12 Quebec Super. Ct. 84.

**7.** Recovery Not Dependent upon Actual Loss. — *Shannon v. Swanson*, 208 Ill. 52, *affirming* 104 Ill. App. 465.

**8.** Alienation of Affections Is Not the Gist of the Action, but merely a matter of aggravation. The husband's right of action is based upon his loss of consortium. *Evans v. O'Connor*, 174 Mass. 287, 75 Am. St. Rep. 316.

**267.** 2. See *C. v. D.*, 8 Ont. L. Rep. 308, wherein a new trial was granted because of excessive damages and because of error in the admission of evidence.

**4.** Instances Where the Court Refused to Set the Verdict Aside. — A verdict assessing the damages at \$6,000 is not necessarily excessive. *Billings v. Albright*, 66 N. Y. App. Div. 239, *citing* 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 267.

In *Dorman v. Sebree*, (Ky. 1899) 52 S. W. Rep. 809, the court refused to set aside a verdict for \$4,374, holding that it was for the jury to determine the amount of damages.

**268.** 2. *Lee v. Hammond*, 114 Wis. 553, *quoting* 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 268.

**3.** Actual Marriage Must Be Proven. — *King v. Bailey*, 31 Can. Sup. Ct. 338, *affirming* 27 Ont. App. 703.

**269.** 1. Proof of Adultery. — To the same effect as *Burdick v. Freeman*, 120 N. Y. 420, stated in the original note, see *Dorman v. Sebree*, (Ky. 1899) 52 S. W. Rep. 809.

Opinion of Witness Not Admissible. — *Antle v. Craven*, 109 Iowa 346.

Evidence that the Parties Occupied the Same Room, containing one bed, is evidence of adultery. *Billings v. Albright*, 66 N. Y. App. Div. 239.

A Child Seven Years Old Is a Competent Witness to prove adultery, provided his evidence is admissible in other respects. *Shannon v. Swanson*, 208 Ill. 52, *affirming* 104 Ill. App. 465.

Where a Witness Waives the Privilege of Not Incriminating Himself in testifying to one fact in the cause, he may be questioned upon it within the legitimate limits of cross-examination; but this waiver does not extend to other distinct acts, even though they may be material in the cause. *Evans v. O'Connor*, 174 Mass. 287, 75 Am. St. Rep. 316.

**271.** 2. Evidence of Subsequent Acts of Adultery Not Admissible. — *Smith v. Hockenberry*, (Mich. 1904) 101 N. W. Rep. 207.

**272.** 1. Evidence of Previous Family Relations of Husband and Wife. — The fact that a divorce was granted to the husband before the commencement of the action is admissible. *Lee v. Hammond*, 114 Wis. 550, *citing* 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 270-272, and holding further that evidence of the wife's death prior to the institution of the action was admissible, as being nonprejudicial to the defendant and as accounting for her absence as a witness.

Any statements that the plaintiff's wife made to or in the presence of her husband are admissible for the purpose of proving her attitude towards him. But statements made by her to other persons and outside of his presence are inadmissible. *Billings v. Albright*, 66 N. Y. App. Div. 239.

The fact that family trouble occurred between the plaintiff and the plaintiff's wife eighteen years before the cause of action accrued has been held to be too remote, and therefore inadmissible. *Dorman v. Sebree*, (Ky. 1899) 52 S. W. Rep. 809.

# CRIMINAL LAW.

BY H. O'B. COOPER.

**276. II. SOURCES OF CRIMINAL LAW — 1. Common Law —** The Common Law in Relation to Crimes and Their Punishment. — See notes 1, 4.

**277.** See note 1.

**279. III. DEFINITION AND CLASSIFICATION OF CRIMES — 1. General Definition of Crime. —** See note 1.

Wrong Punished by State in Criminal Proceeding. — See note 2.

**280. 3. Classification of Crimes — a. ACCORDING TO GRADE OF OFFENSE. —** See note 3.

(2) *Felony*. — See note 6.

**281.** By Statute. — See note 2.

(3) *Misdemeanor*. — See note 4.

**282. IV. ELEMENTS OF CRIME — 1. Malice and Intent — a. MALICE —** Malice, in Its Legal Sense. — See note 1.

Express and Implied Malice. — See note 2.

**276. 1. District of Columbia. —** All crimes known to the common law are crimes in the District of Columbia, except as otherwise provided by statute. *Hill v. U. S.*, 22 App. Cas. (D. C.) 395; *Tyner v. U. S.*, 23 App. Cas. (D. C.) 324.

**4. In re Lambrecht**, (Mich. 1904) 100 N. W. Rep. 606; *State v. De Wolfe*, (Neb. 1903) 93 N. W. Rep. 746.

**277. 1.** See *Hill v. U. S.*, 22 App. Cas. (D. C.) 395.

**279. 1. Definition of Crime. —** See *Wilkins v. U. S.*, (C. C. A.) 96 Fed. Rep. 837; *Groves v. State*, 116 Ga. 516; *Campbell v. Supreme Conclave*, etc., 66 N. J. L. 274; *Mairs v. Baltimore*, etc., R. Co., 73 N. Y. App. Div. 265, *affirmed* 175 N. Y. 409.

**Infamous Crime. —** The question whether a crime is infamous must depend upon the inquiry whether, by the statute denying it, an infamous punishment can be awarded. *Jamison v. Wimbish*, 130 Fed. Rep. 351.

**A Completed Act Not an Offense at the Time of Its Commission** cannot become such by any subsequent act of the party charged, or of another, with which it has no connection, and this is true whether the first act was done for a good or a bad purpose. *U. S. v. Dietrich*, 126 Fed. Rep. 676.

**New York Criminal Code. —** The word "crime" is not used in the New York Code of Criminal Procedure in a sense broad enough to include petty offenses subject to summary jurisdiction by a magistrate. *Steinert v. Sobey*, 14 N. Y. App. Div. 505.

**Statutory Crime — Act Must Come Within Meaning of Words of Statute. —** *State v. Fontenat*, 112 La. 628.

**2. Wrong Punished by State in Criminal Proceeding. —** *State v. Pierce*, 123 N. Car. 745. See also *State v. De Hart*, 109 La. 570.

**"A Crime Is Essentially Local**, and is the creature of the law which defines or prohibits it. It is an offense against the sovereignty, and

can be taken notice of and punished only by the sovereignty offended." *People v. Martin*, (Ct. Gen. Sess.) 38 Misc. (N. Y.) 67, *reversed* 77 N. Y. App. Div. 396.

**280. 3.** See *Com. v. McGregor*, 6 Pa. Dist. 343, wherein the court said that "the distinction between felonies and misdemeanors is more superficial than real."

**6. Felony at Common Law. —** *Considine v. U. S.*, (C. C. A.) 112 Fed. Rep. 342.

**281. 2. Statutory Definition of Felony. —** *Considine v. U. S.*, (C. C. A.) 112 Fed. Rep. 342; *Mairs v. Baltimore*, etc., R. Co., 73 N. Y. App. Div. 265, *affirmed* 175 N. Y. 409. See also *State v. Pierce*, 123 N. Car. 745.

**Legislative Whim or Caprice** may alone determine in which category an offense, not a felony at common law, shall be placed. *Com. v. Hutchinson*, 6 Pa. Super. Ct. 405.

**4. Misdemeanors. —** *Considine v. U. S.*, (C. C. A.) 112 Fed. Rep. 342; *Mairs v. Baltimore*, etc., R. Co., 73 N. Y. App. Div. 265, *affirmed* 175 N. Y. 409. See also *Raines v. State*, 42 Fla. 141; *State v. Pierce*, 123 N. Car. 745.

**A Misdemeanor at Common Law** may be described as "such exclusive trespass against good morals or public peace as tends to injure the public, either directly or consequentially, but which does not amount to any higher degree of characterized crime." *Com. v. Flaherty*, 25 Pa. Super. Ct. 490.

**282. 1. Malice Defined. —** *Travers v. U. S.*, 6 App. Cas. (D. C.) 450; *Taylor v. State*, 105 Ga. 746; *Bias v. U. S.*, 3 Indian Ter. 27; *Ludwig v. Com.*, (Ky. 1900) 60 S. W. Rep. 8; *State v. Grassle*, 74 Mo. App. 313; *McVey v. State*, 57 Neb. 471; *State v. Mason*, 54 S. Car. 240; *Connell v. State*, (Tex. Crim. 1904) 81 S. W. Rep. 746; *Anonymous*, 6 Can. Crim. Cas. (Quebec) 163, *citing* 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 282.

**Malice and Ill Will Are Not Synonymous** in a legal sense. *Davis v. State*, 51 Neb. 307.

**2. Express and Implied Malice. —** See *State v.*

**283.** Malice Inferred from Act. — See notes 1, 2, 3.

**284.** Indiscriminate Assault — General Malice. — See note 1.

*b.* CRIMINAL INTENT — Evil Intent Necessary Element of Crime Generally. —

See notes 4, 5.

**285.** Criminal Negligence. — See note 1.

Act and Intent Must Coexist. — See notes 2, 3.

**286.** Length of Existence of Intent. — See notes 4, 5, 6.

*c.* INTENT PRESUMED FROM UNLAWFUL ACT. — See note 9.

**287.** See note 1.

Specific Intent Must Be Proved. — See notes 4, 5.

**288.** See note 2.

*d.* PRODUCING AN UNINTENDED RESULT — Where One Crime Is Intended

and by Mistake Another Is Committed. — See note 3.

Act Directed Against One Affecting Another. — See notes 8, 9.

Di Guglielmo, 4 Penn. (Del.) 336; Bias v. U. S., 3 Indian Ter. 27.

**283. 1. Inference of Malice from Striking with Deadly Weapon.** — Allen v. U. S., 164 U. S. 492; Bankhead v. State, 124 Ala. 14; Bondurant v. State, 125 Ala. 31; Halderman v. Territory, (Ariz. 1900) 60 Pac. Rep. 876; State v. Foreman, 1 Marv. (Del.) 517; Howard v. Com., (Ky. 1903) 71 S. W. Rep. 446; Kastner v. State, 58 Neb. 767; State v. Capps, 134 N. Car. 622; State v. Mason, 54 S. Car. 240. See also Davis v. State, 51 Neb. 301.

**2.** Harris v. State, 155 Ind. 15, 265.

**3. Malice Inferred from Circumstances Generally.** — State v. Foreman, 1 Marv. (Del.) 517; State v. Di Guglielmo, 4 Penn. (Del.) 336; Travers v. U. S., 6 App. Cas. (D. C.) 450; Robinson v. State, (Fla. 1903) 34 So. Rep. 294.

**284. 1.** See State v. Young, 50 W. Va. 96, 88 Am. St. Rep. 846.

**4. Evil Intent.** — State v. Hand, 1 Marv. (Del.) 545; State v. Torphy, 78 Mo. App. 206; State v. Clark, 178 Mo. 20; State v. McLean, 121 N. Car. 589. See also U. S. v. John Kelson, 86 Fed. Rep. 304; State v. Huff, 89 Me. 521.

In Felonies, except where malice was presumed, it was necessary at common law to prove the intent, for the reason that the doing of the act which constituted the offense was not denounced in so many words. State v. McLean, 121 N. Car. 589.

**Intent Suggested by Another.** — If it appears that the intent to commit a crime did not originate with the accused, but was suggested by a supposed accomplice, who was present in order to detect the accused, the prosecution will fail. Dalton v. State, 113 Ga. 1037.

**5. Evil Intent Implied from Circumstances.** — May v. State, 115 Ala. 14; Hendry v. State, 39 Fla. 235; Hughes v. Territory, 8 Okla. 28; Griffin v. State, (Tex. Crim. 1899) 53 S. W. Rep. 848 (implied from use of weapon).

**285. 1. Criminal Negligence.** — McClure v. People, 27 Colo. 358, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 285. See also Dillard v. State, 65 Ark. 404.

**2. Intent and Overt Act Must Unite.** — Milton v. State, 40 Fla. 251.

**3. Must Concur in Point of Time.** — Hendry v. State, 39 Fla. 235; Milton v. State, 40 Fla. 251.

**286. 4. Intent Need Not Have Existed for Any Given Time.** — Stewart v. State, 137 Ala. 33; Travers v. U. S., 6 App. Cas. (D. C.) 450; Perry v. State, 102 Ga. 365; Robinson v. State, (Neb. 1904) 98 N. W. Rep. 694; People v. Schmidt, 168 N. Y. 568; State v. Cole, 132 N. Car. 1069; State v. Hawkins, 23 Wash. 289.

**5. Existence at Instant of Act.** — Allen v. U. S., 164 U. S. 492; State v. Morgan, 22 Utah 162.

**6. Instantaneous as Successive Thoughts.** — Kilgore v. State, 124 Ala. 24; Halderman v. Territory, (Ariz. 1900) 60 Pac. Rep. 876; State v. Shuff, (Idaho 1903) 72 Pac. Rep. 664.

**9. Unlawful Act Raises Presumption of Unlawful Intent.** — Curtis v. State, 118 Ala. 125; May v. State, 115 Ala. 14; State v. Hand, 1 Marv. (Del.) 545; State v. Foreman, 1 Marv. (Del.) 517; Anderson v. State, 147 Ind. 445. See also Hughes v. Territory, 8 Okla. 28; Cupps v. State, 120 Wis. 535.

**287. 1. Act Evidence of Intent.** — Curtis v. State, 118 Ala. 125.

**4. McClure v. People,** 27 Colo. 358, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 287; Thalheim v. State, 38 Fla. 169 (embezzlement); Hughes v. Territory, 8 Okla. 28, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 287.

**5. Specific Intent Must Be Proved.** — Dillard v. State, 65 Ark. 404; State v. Hoot, 120 Iowa 238, 98 Am. St. Rep. 352, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 287; Hughes v. Territory, 8 Okla. 28, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 287.

**288. 2. Existence of Specific Intent Is for Jury.** — Hendry v. State, 39 Fla. 235; Hughes v. Territory, 8 Okla. 28, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 288, and supporting also the proposition that intent must be averred.

**3. One Crime Intended, Another Committed.** — State v. Evans, 1 Marv. (Del.) 477; Myers v. State, 43 Fla. 500; People v. Flanigan, 174 N. Y. 356; Thornton v. State, (Tex. Crim. 1901) 65 S. W. Rep. 1105.

**8. Act Directed Against One Affecting Another.** — State v. Evans, 1 Marv. (Del.) 477; Chelsey v. State, 121 Ga. 340; Brown v. State, 147 Ind. 28; State v. Cole, 132 N. Car. 1069. See also Wheatly v. State, (Tex. Crim. 1897) 39 S. W. Rep. 672.

**9. State v. Williams,** 122 Iowa 115; State v. Brown, 4 Penn. (Del.) 120.



**289.** Gross Carelessness in Performing a Lawful Act May Be Criminal. — See notes 8, 9, 10.

**290.** *e.* MOTIVE IMMATERIAL. — See note 1.

**291.** Evidence of Motive. — See note 1.

*f.* STATUTORY CRIMES WHERE INTENT IMMATERIAL. — See note 3.

**292.** 2. Criminal Act — *a.* GENERALLY. — See notes 2, 3.

*b.* CONNECTION WITH CRIMINAL ACT — (1) *Principals and Accessories* — A Principal in the First Degree. — See note 4.

**293.** *c.* ATTEMPTS, SOLICITATIONS, AND CONSPIRACIES — A Bare Solicitation to Commit a Felony. — See note 3.

3. Effect of Consent and Condonation — Consent. — See note 8.

**295.** Condonation. — See notes 1, 2.

5. Facilities Afforded Criminal for Commission of Crime. — See note 4.

**296.** See notes 1, 2.

V. CAPACITY AND RESPONSIBILITY FOR CRIME — 2. Ignorance or Mistake of Facts — Where Specific Intent Essential. — See note 4.

**289.** 8. Gross Carelessness in Lawful Action. — McClure *v.* People, 27 Colo. 358, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 289; State *v.* Gilliam, 66 S. Car. 419.

9. See Johnson *v.* State, 66 Ohio St. 59, 90 Am. St. Rep. 564.

10. See Thompson *v.* State, 131 Ala. 18.

**290.** 1. Motive Immaterial. — Schmidt *v.* U. S., (C. C. A.) 133 Fed. Rep. 257; Keady *v.* People, 32 Colo. 57; State *v.* Dunn, 179 Mo. 95.

**291.** 1. State *v.* Crabtree, 170 Mo. 642.

3. Intent Immaterial. — State *v.* Keller, 8 Idaho 699; Hamilton *v.* State, 22 Ind. App. 479, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 291 and quoting the whole text paragraph in a prosecution for hauling over a gravel road a load in excess of the weight permitted by statute; State *v.* Huff, 89 Me. 521; Garver *v.* Territory, 5 Okla. 432; Clopton *v.* State, (Tex. Crim. 1898) 44 S. W. Rep. 173. See also State *v.* Tichfeld, 23 Nev. 304, 62 Am. St. Rep. 800.

Doing Act Constitutes Offense. — "If there is anything well settled by the decisions of this court it is that, wherever an act is denounced as unlawful by statute, the doing of that act constitutes the offense, and the intent with which it is done is immaterial." State *v.* Southern R. Co., 122 N. Car. 1052. To the same effect is State *v.* McLean, 121 N. Car. 589.

**292.** 2. Milton *v.* State, 40 Fla. 251.

3. Presence of Every Element Essential. — To be punishable the act charged must have possessed, at the time when its commission was complete, every element necessary to its criminality under the statute. U. S. *v.* Dietrich, 126 Fed. Rep. 676.

4. Principal in First and Second Degrees Defined. — People *v.* Mills, (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 195.

**293.** 3. Solicitation. — Begley *v.* Com., (Ky. 1901) 60 S. W. Rep. 847; People *v.* Mills, (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 195. See also the title SOLICITATION TO COMMIT CRIME, 1153. *1 et seq.*

"The True Rule would seem to be that solicitation to commit a grave crime, be it a felony or a misdemeanor, which seriously affects the public peace or economy, is indictable." Com. *v.*

Hutchinson, 19 Pa. Co. Ct. 360, affirmed 6 Pa. Super. Ct. 405.

A Mere Request, Demand, or Persuasion to commit a crime, in the absence of facts showing coercion, is no defense. Carlisle *v.* State, 37 Tex. Crim. 108.

Solicitation of Misdemeanor — Offense at Common Law. — State *v.* Sullivan, 110 Mo. App. 75.

8. See Cunningham *v.* State, 61 N. J. L. 67.

**295.** 1. Goods Restored or Satisfaction Made. — Thalheim *v.* State, 38 Fla. 169; Williams *v.* State, 105 Ga. 606; Dean *v.* State, 147 Ind. 215; Whitney *v.* State, 53 Neb. 287. See also Williams *v.* State, 105 Ga. 606.

2. Status of Crime Fixed When Complete. — Dean *v.* State, 147 Ind. 215.

4. Facilities Afforded for Crime. — Dalton *v.* State, 113 Ga. 1037 (holding, however, that it must appear that the person charged with the offense did himself everything necessary to make out a complete offense against the law, since nothing done by another person present with the knowledge and consent of the victim will be imputed to the accused); *In re Wellcome*, 23 Mont. 450, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 295; People *v.* Mills, 91 N. Y. App. Div. 331, affirmed 178 N. Y. 274.

**296.** 1. Decoy Letters, Etc. — Evanston *v.* Myers, 172 Ill. 266; *In re Wellcome*, 23 Mont. 450, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 295.

2. Detectives Apparently Assisting in Crime. — *In re Wellcome*, 23 Mont. 450, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 295; People *v.* Mills, 91 N. Y. App. Div. 331, affirmed 178 N. Y. 274. See also Dalton *v.* State, 113 Ga. 1037.

Procuring Commission of Crime. — Neither a public officer nor a municipality may procure or encourage the commission of a crime, which is distinguished from the employing of detectives to ferret out criminals. Evanston *v.* Meyers, 70 Ill. App. 205, reversed 172 Ill. 266.

4. Effect of Ignorance or Mistake of Fact. — Garver *v.* Territory, 5 Okla. 342; Patrick *v.* State, 45 Tex. Crim. 587. See also State *v.* Foster, 22 R. I. 163; Giddings *v.* State, (Tex. Crim. 1904) 83 S. W. Rep. 694.

- 297.** Where No Specific Intent Essential, Mistake of Fact Immaterial. — See note 2.  
**298.** 3. Ignorance or Mistake of Law. — See notes 1, 3.  
**299.** 4. Necessity. — See note 3.  
 5. One Acting under Direction or Authority of Another. — See note 4.  
**300.** See note 1.

**297. 2. Mistake of Fact Immaterial, where Specific Intent Not Essential.** — *Garver v. Territory*, 5 Okla. 342. See also *State v. Zichfeld*, 23 Nev. 304, 62 Am. St. Rep. 800; *State v. Dorman*, 9 S. Dak. 528.

**298. 1. Ignorantia Legis Neminem Excusat.** — *Fraser v. State*, 112 Ga. 13; *Begley v. Com.*, (Ky. 1901) 60 S. W. Rep. 847; *Com. v. O'Brien*, 172 Mass. 248; *Pisar v. State*, 56 Neb. 455; *State v. McLean*, 121 N. Car. 589; *State v. Foster*, 22 R. I. 163; *Debardelaben v. State*, 99 Tenn. 649; *Patrick v. State*, 45 Tex. Crim. 587.

**3. Advice of Counsel.** — *State v. Huff*, 89 Me.

521. See also *Clopton v. State*, (Tex. Crim. 1898) 44 S. W. Rep. 173.

**299. 3. Necessity as Excuse.** — *State v. Bonofiglio*, 67 N. J. L. 239, 91 Am. St. Rep. 423.

**4. Acting under Authority of Superior.** — *In re Waite*, 81 Fed. Rep. 359, *affirmed* (C. C. A.) 88 Fed. Rep. 102.

**300. 1. Agent Acting under Orders.** — *Douglas v. State*, 18 Ind. App. 289; *People v. Dunlap*, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 390; *Com. v. Kolb*, 13 Pa. Super. Ct. 347. See also *State v. Lucas*, 94 Mo. App. 117 (pharmacist's clerk); *Com. v. Shober*, 3 Pa. Super. Ct. 554.

## CROPS.

BY GEORGE E. FLEMING.

**302. I. DEFINITION.** — See note 1.

**II. FRUCTUS INDUSTRIALES AND FRUCTUS NATURALES — 1. Generally.** — See note 2.

**303. 2. What Crops Are Fructus Industriales — Correct Test: Annual Labor Necessary to Produce Annual Fruit.** — See note 1.

**III. GROWING CROPS — 1. For What Purposes Part of Realty — a. IN GENERAL.** — See notes 5, 6.

**304.** See note 1.

**302. 1. Definitions.** — See *State v. Crook*, 132 N. Car. 1053.

**2. Fructus Industriales and Fructus Naturales Distinguished.** — *State v. Crook*, 132 N. Car. 1053, *citing* 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 302; *Simanek v. Newetz*, 120 Wis. 46, *quoting* 8 AM. AND ENG. ENCYC. OF LAW (2d ed. 302.

"Annual Crops Raised by Yearly Labor and Cultivation are Fructus Industriales, and are to be regarded as personal chattels, independent and distinct from the land, capable of a sale without regard to whether growing or matured." *Swafford v. Spratt*, 93 Mo. App. 631.

**303. 1. Where the Fruits of Plants Are Fructus Industriales.** — *State v. Fowler*, 88 Md. 601, 71 Am. St. Rep. 452, *citing* 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 303; *Nawahi v. Hakalau Plantation Co.*, 14 Hawaii 460, *citing* 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 303.

**Pineapple Plants** growing in the soil have been held to be part of the realty, and not farm products or fruit. *Long v. State*, 42 Fla. 509.

**But Growing Flax**, whether matured or not, is considered in *Missouri* to be personal property, and subject to sale at any time. *Glass v. Blazer*, 91 Mo. App. 564.

**5. Matured and Severed Crops** are personal property for all purposes. *Meffert v. Dyer*, 107 Mo. App. 462; *Wakefield v. Dyer*, 14 Okla. 92.

**6. Follow the Title to Land — California.** — *Penryn Fruit Co. v. Sherman-Worrell Fruit Co.*, 142 Cal. 643, 100 Am. St. Rep. 150.

*Illinois.* — *Firebaugh v. Divan*, 207 Ill. App. 287.

*Kentucky.* — *Sieffert v. Campbell*, 70 S. W. Rep. 630, 24 Ky. L. Rep. 1050.

*Louisiana.* — *Weill v. Kent*, 52 La. Ann. 2139.

*Maryland.* — *Wootton v. White*, 90 Md. 64, 78 Am. St. Rep. 425, *citing* 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 303, 304.

*Minnesota.* — *Kammrath v. Kidd*, 89 Minn. 380, 99 Am. St. Rep. 603; *Mitchell v. Tschida*, 71 Minn. 133.

*Oklahoma.* — *Phillips v. Keysaw*, 7 Okla. 674.

*Oregon.* — *Jones v. Adams*, 37 Oregon 475, *citing* 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 303.

*Wisconsin.* — *Simanek v. Nemetz*, 120 Wis. 46, *quoting* 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 303.

**304. 1. When Not Reserved Pass to Grantee of Land.** — *Gam v. Cordrey*, 4 Penn. (Del.) 143; *Firebaugh v. Divan*, 207 Ill. 287; *Voils v. Battin*, 6 Kan. App. 742; *Rardin v. Baldwin*, 9 Kan. App. 516; *Wootton v. White*, 90 Md. 64, 78 Am. St. Rep. 425, *citing* 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 304; *Kammrath v. Kidd*, 89 Minn. 380, 99 Am. St. Rep. 603; *Marshall v. Homier*, 13 Okla. 264; *Simanek*

**305.** See notes 1, 2, 3.

**306.** See note 1.

*b.* PASS WITH REALTY THOUGH RESERVED BY PAROL. — See note 3.

**307.** *c.* PURCHASER ENTITLED TO CROPS AS AGAINST TENANT OF MORTGAGOR. — See note 4.

**308.** 2. For What Purposes Regarded as Personalty — *a.* MAY BE LEVIED ON UNDER EXECUTION — (1) *In General* — At Common Law, Maturity of Crop Immaterial. — See note 4.

**309.** Rule that No Sale until Crop Matured. — See notes 1, 3.

(2) *Statutory Limitations.* — See note 4.

**310.** (3) *Sufficiency of Levy.* — See note 2.

*b.* PASS TO EXECUTOR OR ADMINISTRATOR. — See note 4.

**311.** IV. MORTGAGE OF CROPS — 1. While Growing. — See note 2.

**312.** 2. To Be Thereafter Planted — *a.* JURISDICTIONS IN WHICH SUCH MORTGAGE IS EFFECTIVE. — See note 1.

Title Passes. — See note 2.

*v. Nemetz*, 120 Wis. 46, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 304.

In *Nebraska* it is held that growing crops should belong as personality to the tenant, and not pass with the realty. This assurance to the tenant is the recognition of the law of the necessity of agriculture and the favor of its promotion. *Aldrich v. Ohio Bank*, 64 Neb. 276, 97 Am. St. Rep. 643.

**305.** 1. Pass to Lessee Unless Expressly Reserved. — *Simanek v. Nemetz*, 120 Wis. 42, quoting 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 304, but holding that a lessee of land who had planted crops thereon during his lease was entitled to them as against a purchaser of the land with notice of the tenancy and could pass title to them to the vendor of the land.

2. *Purchaser at Foreclosure Sale.* — *Penryn Fruit Co. v. Sherman-Worrell Fruit Co.*, 142 Cal. 643, 100 Am. St. Rep. 150; *Rardin v. Baldwin*, 9 Kan. App. 516; *Reiley v. Carter*, 75 Miss. 798, 65 Am. St. Rep. 621; *Cassell v. Ashley*, (Neb. 1902) 92 N. W. Rep. 1035; *Phillips v. Keysaw*, 7 Okla. 674; *Jones v. Adams*, 37 Oregon 473, 82 Am. St. Rep. 766. Compare *McKinney v. Williams*, (Tex. Civ. App. 1898) 45 S. W. Rep. 335.

3. Where Rent Is Conveyed. — *Clarke v. Cobb*, 121 Cal. 595.

**306.** 1. Recovery of Land from Adverse Holder. — *Phillips v. Keysaw*, 7 Okla. 674, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 306; *Churchill v. Ackerman*, 21 Wash. 227.

3. Growing Crops Cannot Be Reserved by Parol. — *Gam v. Cordrey*, 4 Penn. (Del.) 143; *Firebaugh v. Divan*, 207 Ill. 287.

**307.** 4. Purchaser at Foreclosure — Right Superior to Tenant. — *Wootton v. White*, 90 Md. 64, 78 Am. St. Rep. 425, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 307.

**308.** 4. Personalty for Levy of Execution. — *Voils v. Battin*, 6 Kan. App. 742; *Arnold v. Fowler*, 94 Md. 497, 89 Am. St. Rep. 444; *State v. Fowler*, 88 Md. 601, 71 Am. St. Rep. 452; *Sims v. Jones*, 54 Neb. 769, 69 Am. St. Rep. 749; *Aldrich v. Ohio Bank*, 64 Neb. 216, 97 Am. St. Rep. 643; *Johns v. Kamarad*, (Neb. 1901) 96 N. W. Rep. 118; *Phillips v. Keysaw*, 7 Okla. 674; *Simanek v. Nemetz*, 120

Wis. 46, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 308.

Personalty as Between Landlord and Tenant. — *Burket v. Miller*, 25 Ind. App. 110.

Homestead Exemption of Ungathered Crops. — See *Parker v. Hale*, (Tex. Civ. App. 1903) 78 S. W. Rep. 555; *Moore v. Graham*, 29 Tex. Civ. App. 235. And see the title HOMESTEAD, 593. 6.

**309.** 1. Crops Not Subject to Levy and Sale until Ripe. — *Gaston v. Marengo Imp. Co.*, 139 Ala. 465; *Cassell v. Ashley*, (Neb. 1902) 92 N. W. Rep. 1035; *Tipton v. Martzell*, 21 Wash. 273, 75 Am. St. Rep. 838.

3. Levy on Matured Crops Valid. — *Simanek v. Nemetz*, 120 Wis. 46.

4. Limitation as to Time of Levy. — *Layman v. Denton*, (Tenn. Ch. 1897) 42 S. W. Rep. 153.

**310.** 2. Sufficiency of Levy. — To the same effect as *Barr v. Cannon*, 69 Iowa 20, cited in the original note, see *State v. Fowler*, 88 Md. 601, 71 Am. St. Rep. 425, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 310.

4. Crops Pass to Personal Representative. — *Noble v. Tyler*, 61 Ohio St. 432; *Phillips v. Keysaw*, 7 Okla. 674.

**311.** 2. Mortgage of Growing Crops. — *Tuohy v. Linder*, 144 Cal. 790; *Voils v. Battin*, 6 Kan. App. 742; *Sporer v. McDermott*, (Neb. 1903) 96 N. W. Rep. 232, 659; *Momrich v. Schwartz*, (Neb. 1903) 96 N. W. Rep. 636; *Cooper v. Kimball*, 123 N. Car. 120; *Simanek v. Nemetz*, 120 Wis. 46.

Where Land Is Mortgaged, and the mortgage is silent as to crops, rents, etc., no lien is created on the crops or rents before foreclosure. *Locke v. Klunker*, 123 Cal. 231.

**312.** 1. Effectiveness of Mortgage on Unplanted Crop. — *Truss v. Harvey*, 120 Ala. 636; *Truss v. Byers*, 137 Ala. 509; *Leman v. Wolff*, 121 Cal. 272; *McMaster v. Emerson*, 109 Iowa 284; *Cumberland Nat. Bank v. Baker*, 51 N. J. Eq. 231; *Hahn v. Heath*, 127 N. Car. 27; *Schweinber v. Great Western Elevator Co.*, 9 N. Dak. 113; *Eckles v. Ray*, 13 Okla. 541.

2. Mortgage Passes Legal Title. — *Gaston v. Marengo Imp. Co.*, 139 Ala. 465.

In South Dakota no lien is created by the mortgage until the grain is in existence. *Savings Bank v. Canfield*, 12 S. Dak. 330.



**313.** In North Carolina. — See notes 3, 4.

*b.* JURISDICTIONS IN WHICH SUCH MORTGAGE IS INVALID. —

See notes 5, 6.

**314.** See note 1.

**3.** Validity as Against Third Persons — The Recording of a Mortgage Operates as a Constructive Notice. — See note 4.

**315.** **4.** Sufficiency of Description — *a.* AS RELATING TO PLACE OF GROWTH. — See notes 1, 2, 3.

Lands Must Be Designated with Certainty. — See note 5.

**316.** *b.* AS RELATING TO SPECIFIC CROPS GROWN. — See note 2.

**317.** *c.* AS RELATING TO TIME OF GROWTH. — See note 2.

**V. LANDLORD AND TENANT** — **1.** Possession of Premises and Title to Crop in Tenant. — See note 3.

**318.** **2.** Termination of Tenancy While Crops Are Growing — *a.* WHEN TENANT ENTITLED TO CROPS — (1) *Generally.* — See note 1.

**313.** **3.** Mortgage on Crop Unplanted Applies Only to Those of Next Season. — Schweinber *v.* Great Western Elevator Co., 9 N. Dak. 113.

**4.** Validity Limited to Current Year. — Modesto Bank *v.* Owens, 121 Cal. 223.

**5.** Invalidity of Mortgage on Unplanted Crop. — Campbell *v.* McKinnon, 14 Manitoba 421.

In California it has been held that a contract which was in effect a mortgage to secure the payment of the rent, having been given more than one year in advance of the sowing of the seed from which the crop in question was raised, and not having been given to secure any part of the purchase price of the land upon which the crops were grown, was void. Ward *v.* Rippe, 93 Minn. 36.

**6.** Subject to Execution or Attachment by Creditors of Mortgagor. — Campbell *v.* McKinnon, 14 Manitoba 421.

**314.** **1.** New Mortgage Necessary When Crops Come into Existence. — Campbell *v.* McKinnon, 14 Manitoba 421.

**4.** Constructive Notice by Record of Mortgage. — Truss *v.* Harvey, 120 Ala. 636.

A Mortgage Dated in Blank and Subsequently Recorded binds third parties as of the day of registration, unless they can prove that their lien existed before that time. Becker *v.* Bowen, (Tex. Civ. App. 1904) 79 S. W. Rep. 45.

**315.** **1.** All Crops on Certain Lands. — Hall *v.* Glass, 123 Cal. 500, 69 Am. St. Rep. 77.

**2.** All Crops of Designated Kind on Certain Lands. — Woods *v.* Rose, 135 Ala. 297; Truss *v.* Harvey, 120 Ala. 636; Graves *v.* Currie, 132 N. Car. 307.

**3.** Undivided Interest in Crops on Certain Lands. — Becker *v.* Bowen, (Tex. Civ. App. 1904) 79 S. W. Rep. 45.

**5.** Designation of Lands to Bind Third Parties. — Reinstein *v.* Roberts, 34 Oregon 87, 75 Am. St. Rep. 564; Commercial State Bank *v.* Interstate Elevator Co., 14 S. Dak. 276, 86 Am. St. Rep. 760.

**316.** **2.** Description Must Show the Portion of Crops Mortgaged. — Blount *v.* Lewis, (Tex. Civ. App. 1900) 50 S. W. Rep. 203.

**317.** **2.** Where the Time Is During the Continuance of the Mortgage, it is held in *California* to be sufficiently certain to render the mortgage valid. Hall *v.* Glass, 123 Cal. 500, 69 Am. St. Rep. 77.

**3.** Title to Crop in Tenant — *Alabama.* — Kilpatrick *v.* Harper, 119 Ala. 452.

*California.* — Clarke *v.* Cobb, 121 Cal. 595.

*Maine.* — Kelley *v.* Goodwin, 95 Me. 538.

*New Jersey.* — Reeves *v.* Hannan, 65 N. J. L. 249.

*Vermont.* — Beers *v.* Field, 69 Vt. 533.

**Construction of Contract.** — Rowlands *v.* Voelching, 115 Wis. 352, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 317.

**Tenant Must Cultivate Premises in Farm-like Manner.** — "In a contract for rent, where the landlord is to receive a part of the crop, there is an implied covenant that ordinary care should be exercised by the tenant to cultivate the premises in a farm-like manner." Cammack *v.* Rogers, 32 Tex. Civ. App. 125.

**Grass Belongs to the Tenant at Will.** — Where a tenant at will fenced the land and was in possession under the original verbal permission of the owner, it was held that he (the tenant) had the right, being thus in possession which had not been revoked, to cut the grass on the land. St. Louis, etc., R. Co., *v.* Hall, 71 Ark. 302.

**Covenant for Use of Hay on the Premises Leased.** — Where a landlord let a number of cows and a farm as a dairy-farm under a lease providing that all the hay, straw, and cornstalks raised on the farm should be fed to the cows thereon, it was held that while the property in hay produced on the farm might be legally in the tenant, his contract was so to use it that it should be fed to the cattle and consumed on the premises; that the tenant could make no other disposition whatever of such hay; and that his execution creditor had no higher right than he had. Snetzing *v.* Leitch, 32 Ont. 440.

**318.** **1.** Tenancy Terminates in Term by Death, Etc. — Crops Go to Tenant or Representative. — Nawahi *v.* Hakalau Plantation Co., 14 Hawaii 460, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 318; Horman *v.* Cargill, 100 Mo. App. 466. But see State *v.* Crook, 132 N. Car. 1053.

**Where Tenant Dies Before Crop Is Gathered.** — Where the landlord and the tenant made an agreement that the former should furnish and feed the team, farming implements, etc., and the latter should furnish and feed the labor to cultivate and save the crop, the crop to be divided equally, except the corn, of which the

**318.** By "Annual Crop" Is Here Meant. — See note 3.

**319.** (3) *When Terminated by Act of Lessor.* — See note 4.

(4) *Right of Entrance to Premises.* — See note 5.

b. *WHEN TENANT NOT ENTITLED TO CROPS* — (1) *Termination of Estate by Tenant.* — See note 6.

**320.** (2) *Where Term Is Certain.* — See note 2.

c. *EXCEPTIONS TO GENERAL RULE* — *CUSTOM OF JURISDICTION.* — See note 4.

**321.** 3. *Statutory Lien of Landlord on Crops* — a. *FOR RENT.* — See notes 1, 2. See also the title *LANDLORD AND TENANT.*

tenant was to have one-fourth, and the tenant died before the crop was gathered, having fulfilled all the conditions of the contract up to that time, it was held that the personal representative of the tenant could recover an amount equal to his share in the crop, minus the sum necessary to take care of the crops. *Parker v. Brown*, 136 N. Car. 280.

**318.** 3. *Annual Crops.* — *Nawahi v. Hakalau Plantation Co.*, 14 Hawaii 460, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 318 and holding further that sugar cane is a crop subject to the law of emblements, though it is not sown and may require more than a year to mature; *Voils v. Battin*, 6 Kan. App. 742.

**319.** 4. *Tenancy at Will Terminated by Lessor — Crops Go to Tenant.* — *Goodwin v. Clover*, 91 Minn. 438; *Brincefield v. Allen*, 25 Tex. Civ. App. 258.

5. *Tenant's Right of Egress to Remove Crop.* — *Ellison v. Dolbey*, 3 Penn. (Del.) 45; *Reeves v. Hannan*, 65 N. J. L. 249.

6. *Tenant Terminating Estate by His Own Act Not Entitled to Crops.* — *Nawahi v. Hakalau Plantation Co.*, 14 Hawaii 460.

**320.** 2. *Tenancy to Terminate at Fixed Time.* — *Nawahi v. Hakalau Plantation Co.*, 14 Hawaii 460.

4. *Right by Custom to Away-going Crops.* — *Constable v. Cranswick*, 80 L. T. N. S. 164; *Ellison v. Dolbey*, 3 Penn. (Del.) 45; *Reeves v. Hannan*, 65 N. J. L. 249; *Yeager v. Cassidy*, 16 Lanc. L. Rev. 305, 13 York Leg. Rec. (Pa.) 61.

**321.** 1. *Lien of Landlord on Crops for Rent* — *Alabama.* — *Foxworth v. Brown*, 120 Ala. 59; *Bush v. Willis*, 130 Ala. 395.

*Georgia.* — *Shealy v. Clark*, 117 Ga. 794.

*Illinois.* — *Harvey v. Hampton*, 108 Ill. App. 501.

*Indiana.* — *Gifford v. Meyers*, 27 Ind. App. 348; *Campbell v. Bowen*, 22 Ind. App. 562.

*Iowa.* — *Gray v. Bremer*, 122 Iowa 110; *Randall v. Ditch*, 123 Iowa 582; *Fishbaugh v. Spunaugle*, 118 Iowa 337.

*Kansas.* — *Gill v. Buckingham*, 7 Kan. App. 227; *Berry v. Berry*, 8 Kan. App. 584; *Nessley v. Taylor*, 63 Kan. 674; *Wester v. Long*, 63 Kan. 876; *Stadel v. Aikins*, 65 Kan. 82; *Harmon v. Payton*, 68 Kan. 67.

*Kentucky.* — *Rives v. Christie*, 104 Ky. 82.

*Mississippi.* — *Scroggins v. Foster*, 76 Miss. 318; *Ball v. Sledge*, 82 Miss. 749, 100 Am. St. Rep. 654.

*Missouri.* — *Williams v. De Lisle Store Co.*, 104 Mo. App. 567; *Hardy v. Mathews*, 101 Mo. App. 708.

*Nebraska.* — *Hubenka v. Vach*, 64 Neb. 170;

*Sporer v. McDermott*, (Neb. 1903) 96 N. W. Rep. 232, 659.

*North Carolina.* — *McGehee v. Breedlove*, 122 N. Car. 277; *State v. Neal*, 129 N. Car. 692; *State v. Crook*, 132 N. Car. 1053.

*South Carolina.* — *Graham v. Seignious*, 53 S. Car. 132.

*Texas.* — *Johnston v. Kleinsmith*, 33 Tex. Civ. App. 236; *Walker v. Patterson*, 33 Tex. Civ. App. 650.

2. *Where Lien of Landlord Is Given on Crops Both of Tenant and Subtenant.* — *Berry v. Berry*, 8 Kan. App. 584; *State v. Crook*, 132 N. Car. 1053.

*Where Statute Gives Action Against Purchaser.* — See *Fishbaugh v. Spunaugle*, 118 Iowa 337.

*Levy of Distress Warrant for Rent Not Essential to Enforcement of Lien.* — See *Polk v. King*, 19 Tex. Civ. App. 666.

*Where Rent Payable in Portion of Crop.* — *Gifford v. Meyers*, 27 Ind. App. 348; *Rowlands v. Voelchting*, 115 Wis. 352.

*Such Lien Enforceable After Removal of Crop as Against Bona Fide Purchaser.* — *Shelby v. Moore*, 22 Ind. App. 371.

*Not Good as Against Bona Fide Purchaser.* — *Foxworth v. Brown*, 120 Ala. 59.

*The Lien Attaches to All Crops Raised on the Premises* as well as to other personal property of the tenant which has been used upon the premises during the term. *Berry v. Berry*, 8 Kan. App. 584.

*The Lien Is Not Confined to One Crop*, but, the tenancy continuing, laps over from year to year. *Bush v. Willis*, 130 Ala. 395.

*Where the Landlord Is to Receive a Share of the Net Proceeds*, he has no lien on the crop to secure this payment, nor any right to control or even advise in the prosecution of the business. *Rowlands v. Voelchting*, 115 Wis. 352.

*Liability of Purchaser of Crop.* — A purchaser who has notice of the lien is liable to the landlord for the value of the crop purchased to the extent of the rent due and damages. *Stadel v. Aikins*, 65 Kan. 82; *Newman v. Ward*, (Tex. Civ. App. 1898) 46 S. W. Rep. 868. And it is held that the liability may be enforced in an action for conversion. *Bond v. Carter*, (Tex. Civ. App. 1903) 73 S. W. Rep. 45. But one buying crops on which there is a landlord's lien is not guilty of conversion unless he has actual knowledge of the lien. *Crane v. Murray*, 106 Mo. App. 697.

Where the tenant sends the crop to his (the tenant's) mortgagee, asking that it be applied to his mortgage, the receipt of the crop constitutes conversion, but does not destroy the

**323.** *b.* FOR SUPPLIES FURNISHED TO MAKE CROP. — See note 1.

*c.* SUPERIORITY OF LANDLORD'S LIEN. — See note 2.

**4.** Where Stipulated that Title to Crop Shall Be in Landlord. — See note 3.

landlord's lien. *Mensing v. Cardwell*, 33 Tex. Civ. App. 16.

*Where the Product Was Shipped Out of the State*, it was held that the lien did not attach and the purchaser was not liable, even where he had actual notice of the existence of the lien. *Ball v. Sledge*, 82 Miss. 749, 100 Am. St. 654.

In *Missouri* the statute gives to every landlord a lien upon the crops grown on demised premises in any year, etc., and further subjects any person buying crops grown on such premises upon which any rent is unpaid, with knowledge of the fact that such crop was grown upon such demised premises, to liability in an action for the value to any party entitled to the rent. *Hardy v. Mathews*, 101 Mo. App. 708.

The landlord does not lose his lien through misrepresentation of the tenant to a purchaser that the rent had been paid, provided the purchaser knew that the crop was raised on demised premises. *Williams v. De Lisle Store Co.*, 104 Mo. App. 567.

In *North Carolina* the statute reads that no lessee or cropper, or their assignees, or any other person, shall remove any part of the crop from the owner's land without the owner's consent, or without giving to him five days' notice and satisfying all liens; and a violation of the statute constitutes a misdemeanor. *State v. Neal*, 129 N. Car. 692; *State v. Crook*, 132 N. Car. 1053.

**Waiver of Lien.** — *A Sale of the Crop* by the tenant to an innocent purchaser, with the permission of the landlord, express or implied, releases the lien; *Foxworth v. Brown*, 120 Ala. 59; *Campbell v. Bowen*, 22 Ind. App. 562; *Fishbaugh v. Spunangle*, 118 Iowa 337; *Randall v. Ditch*, 123 Iowa 582; *Wimp v. Early*, 104 Mo. App. 85 (holding, however, that a deed of trust of the realty, expressly reserving the landlord's lien on crops, did not operate as a release of such lien); *Planters Compress Co. v. Howard*, (Tex. Civ. App. 1904) 80 S. W. Rep. 119. Compare *Sanger v. Magee*, 29 Tex. Civ. App. 397.

But where the landlord consented that third parties who furnished supplies to make the crops should handle and dispose of them on condition that they would protect him in his landlord's rights, it was held that he did not waive his lien on any portion of the crop. *Bigham v. Cross*, 69 Ark. 581.

And where the landlord orders the tenant to deliver the crops at a specified point or place, he does not waive his lien, as he is not authorizing the tenant to sell the crops. *Campbell v. Bowen*, 22 Ind. App. 562.

Where the landlord permitted the tenant to dispose of part of the crop on which he had no notice of claim against the tenant, he was held not to have waived his lien against the rest of the crop produced by the tenant, nor to be estopped from asserting it as against the purchaser. *Johnston v. Kleinsmith*, 33 Tex. Civ. App. 236.

*Where the Landlord Obtained a Judgment Against the Tenant*, after the levy of a distress warrant, but neglecting to foreclose his lien, it was held that he had waived his lien. *Bond v. Carter*, (Tex. Civ. App. 1903) 73 S. W. Rep. 45.

*The Landlord's Receipt of Money from the Proceeds of the sale of the crop* by the tenant does not estop him from claiming the crop under his lien, in the absence of evidence showing that he knew that the money was part of the proceeds of the sale. *Noe v. Layton*, 69 Ark. 551, holding further that the landlord's lien was not defeated by the fact that the landlord allowed the receipt, on the sale of the crop, to be made out in the name of the tenant, and that a purchaser who failed to avail himself of opportunities to inquire of the landlord as to the existence of a lien was not an innocent purchaser.

*Where a Distress Warrant Was Levied for Rent* by the landlord, and the crop was seized, the fact that it was replevied by the tenant was held not to discharge it of the landlord's lien. *McBride v. Puckett*, (Tex. Civ. App. 1901) 66 S. W. Rep. 242.

**A Landlord's Waiver of His Lien to a Mortgagee** is held to be personal, unless specifically stated, and does not extend to the assignee of the mortgage. *Neeley v. Phillips*, 70 Ark. 90.

**323. 1. Landlord's Lien for Supplies to Make Crops.** — *Noe v. Layton*, 69 Ark. 551; *Lightner v. Brannon*, 99 Ga. 606; *Walker v. Patterson*, 33 Tex. Civ. App. 650.

**2. Priority of Landlord's Lien.** — *Noe v. Layton*, 69 Ark. 551; *Lightner v. Brannon*, 99 Ga. 606; *Campbell v. Bowen*, 22 Ind. App. 562; *Shelby v. Moore*, 22 Ind. App. 371; *Nessley v. Taylor*, 63 Kan. 674; *Ball v. Sledge*, 82 Miss. 749, 100 Am. St. Rep. 654; *Hankinson v. Hankinson*, 61 S. Car. 193; *Walker v. Patterson*, 33 Tex. Civ. App. 650; *Mensing v. Cardwell*, 33 Tex. Civ. App. 16; *Newman v. Ward*, (Tex. Civ. App. 1898) 46 S. W. Rep. 868.

**3. Stipulation that Title to Crop in Landlord.** — *Crocker v. Cunningham*, 122 Cal. 547; *Summerville v. Stockton Milling Co.*, 142 Cal. 529; *De Loach v. Delk*, 119 Ga. 884; *Gifford v. Meyers*, 27 Ind. App. 348; *Kelley v. Goodwin*, 95 Me. 538; *McNeal v. Rider*, 79 Minn. 153, 79 Am. St. Rep. 437, citing 8 AM. AND ENG. ENCYC. 01 LAW (2d ed.) 323; *Avery v. Stewart*, 75 Minn. 106; *Bidgood v. Monarch Elevator Co.*, 9 N. Dak. 627, 81 Am. St. Rep. 604; *Savings Bank v. Canfield*, 12 S. Dak. 330.

**Mortgage by Tenant.** — Where title remained in the landlord, and the tenant mortgaged the share of the grain which should thereafter come to him, and the grain was delivered without division to an elevator company which gave to the landlord and the tenant receipts for their respective shares, it was held that the tenant never acquired any interest in the specific grain to which the mortgage lien could attach. *Bidgood v. Monarch Elevator Co.*, 9 N. Dak. 627, 81 Am. St. Rep. 604.



**324.** See note 1.

**VI. CROPPER — The Term "Cropper."** — See note 2.

**325.** Title to Land and to Crop. — See note 1.

**VII. TENANTS IN COMMON OF CROP.** — See note 2.

**326.** May Maintain Trespass Jointly Against Third Person. — See note 1.

**327.** **VIII. PARTNERSHIP BETWEEN CULTIVATORS — Criterion of Existence of Partnership.** — See note 1.

**IX. STATUTORY LIENS — 1. Agricultural Liens.** — See note

**328.** Advances of Money. — See note 1.

**329.** See note 1.

**324. 1. Measure of Damages for Breach of Contract.** — See *De Loach v. Delk*, 119 Ga. 884.

**2. A Cropper.** — *De Loach v. Delk*, 119 Ga. 884; *Wood v. Garrison*, 62 S. W. Rep. 728, 23 Ky. L. Rep. 295; *Kelly v. Rummerfield*, 117 Wis. 620, 98 Am. St. Rep. 951, quoting 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 324, 325.

**Exemption from Attachment Allowed to a Homestead** cannot be claimed by a cropper. *Webb v. Garrett*, 30 Tex. Civ. App. 240.

**325. 1. Possession of Land and Crop as Between Landowner and Cropper.** — *Bowles v. Bowles*, 101 Ga. 837; *Wood v. Garrison*, 62 S. W. Rep. 728, 23 Ky. L. Rep. 295; *Zimmerman v. Dean*, 54 S. Car. 90; *Kelly v. Rummerfield*, 117 Wis. 620, 98 Am. St. Rep. 951, quoting 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 324, 325; *Simanek v. Nemetz*, 120 Wis. 46. Compare *McNeal v. Rider*, 79 Minn. 153, 79 Am. St. Rep. 437 (wherein *Collins, J.*, dissenting, cited 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 323-325), holding that *Porter v. Chandler*, 27 Minn. 301, cited in the original note, has been in effect overruled, and that in the case at bar the parties were tenants in common of the crop.

**Difference Between Tenant and Cropper.** — See *Kelly v. Rummerfield*, 117 Wis. 620, 98 Am. St. Rep. 951.

**Rights of Landowner for Advances to Cropper.** — After a division has been made, the landowner has no lien or title to the cropper's share, title to which vests in the cropper, and he cannot maintain trover. If he has any claims against the cropper for advances, he must sue therefor. *Bowles v. Bowles*, 101 Ga. 837.

**Right to Dispossess Cropper.** — "If such a tenant [a cropper] fails to begin the labor contracted to be done by him, or, having begun, without good cause fails to continue it, the landlord may maintain forcible detainer, and dispossess him." *Wood v. Garrison*, 62 S. W. Rep. 728, 23 Ky. L. Rep. 295.

**2. Agreement by Which Parties Tenants in Common of Crops — California.** — *Clarke v. Cobb*, 121 Cal. 595; *Rohrer v. Babcock*, 126 Cal. 222.

*Missouri.* — *Black v. Scott*, 104 Mo. App. 37. *Nebraska.* — *Sims v. Jones*, 54 Neb. 769, 69 Am. St. Rep. 749.

*New Jersey.* — *Reeves v. Hannan*, 65 N. J. L. 249.

*New York.* — *Parker v. Mott*, 43 N. Y. App. Div. 338.

*Oregon.* — *Messinger v. Union Warehouse Co.*, 39 Oregon 546.

*Texas.* — *Fagan v. Vogt*, (Tex. Civ. App. 1904) 80 S. W. Rep. 664.

*Vermont.* — *Sowles v. Martin*, 76 Vt. 180.

*Wisconsin.* — *Kelly v. Rummerfield*, 117 Wis. 620, 98 Am. St. Rep. 951.

**Tenant in Common May Sell His Interest.** — "There can be no question of the right of a tenant in common to mortgage or otherwise sell or dispose of his interest in the common property." *McNeal v. Rider*, 79 Minn. 153, 79 Am. St. Rep. 437.

**Landlord Liable for Conversion.** — Where landlord and tenant contract that the tenant shall own a certain share of the crops when they are raised and harvested, the ownership of that share vests in the tenant on completion of and compliance with all the terms of the contract, and the landlord is liable in conversion for a wrongful use or withholding of the tenant's share. *Northness v. Hillstad*, 87 Minn. 304. See also *Baldwin v. Curth*, 9 Ohio Cir. Dec. 594, 17 Ohio Cir. Ct. 174.

**Where the Landlord Prohibits the Tenant from Harvesting the Crop,** the tenant is entitled to his share of the net profits, and the landlord can maintain no action against the tenant for non-performance. *Parker v. Mott*, 43 N. Y. App. Div. 338.

**326. 1. Right of Tenant to Sue Alone.** — A tenant on shares has been held to have a sufficient interest in the crop, irrespective of the landlord's superior right and lien for rent and supplies, to maintain an action for damages for a wrongful levy on such crop. *Parker v. Hale*, (Tex. Civ. App. 1903) 78 S. W. Rep. 555.

**327. 1. Where the Essential Elements of Partnership Exist.** — *Culley v. Taylor*, 62 Neb. 651.

**3. Agricultural Lien — In Favor of Persons Making Advances for Future Crops.** — *Norfleet v. Baker*, 131 N. Car. 99; *Schouweiler v. McCaull*, (S. Dak. 1904) 99 N. W. Rep. 95.

**Where the Mortgagee Took Possession of the Crop and harvested it,** it was held that his possession under these circumstances was not unlawful or tortious, and did not extinguish his lien. *Summerville v. Kelliher*, 144 Cal. 155.

**A Vendor of Land** cannot by his contract of sale with the vendee acquire in advance liens upon all crops which may be raised upon the land sold during a long period of credit given to the vendee, so as to deprive other creditors of the rights given by law to secure debts which may be due from the vendee. *Rives v. Christie*, 104 Ky. 82.

**328. 1. Money Advanced.** — *Mudgett v. Texas Tobacco Growing, etc., Co.*, (Tex. Civ. App. 1901) 61 S. W. Rep. 149. *Contra*, *Ragsdale v. Kinney*, 119 Ala. 454.

**329. 1. Southern Grocer Co. v. Adams**, 112 La. 60; *Weill v. Kent*, 52 La. Ann. 2139.

**329. 2. Lien of Farm Laborers.** — See note 2.

**3. Priority of Liens.** — See note 3.

**330. XI. RELATION OF TRESPASSER TO CROPS SOWN BY HIM.** — See notes 1, 2.

**XII. MEASURE OF DAMAGES FOR INJURY TO CROPS** — 1. Total Destruction. — See note 5.

**331. 2. Partial Loss.** — See note 1.

**329. 2. Laborer's Lien** — *Alabama.* — Hunt v. Matthews, 132 Ala. 286.

*Georgia.* — De Loach v. Delk, 119 Ga. 884.

*Idaho.* — Tuckey v. Lovell, 8 Idaho 731.

*Louisiana.* — Fortier v. Delgado, (C. C. A.) 122 Fed. Rep. 604 (under Louisiana statute).

*North Dakota.* — Moher v. Rasmusson, 12 N. Dak. 71.

*Texas.* — Mudgett v. Texas Tobacco Growing, etc., Co., (Tex. Civ. App. 1901) 61 S. W. Rep. 149.

**Construction of Mississippi Statute.** — Duncan v. Jayne, 76 Miss. 133.

**Thresher's Lien.** — A thresher's lien is purely of statutory origin, and one who claims such a lien must bring himself under the terms of the statute authorizing its creation. Courts are not at liberty to extend this lien by construction to cases not provided for in the statute. Moher v. Rasmusson, 12 N. Dak. 71. See also Schouweiler v. McCaull, (S. Dak. 1904) 99 N. W. Rep. 95.

**3. A Ginner's Lien** on cotton, to secure the payment of charges for ginning and baling, being for the common good of all the parties interested, and being absolutely essential to make the crop available to them, is held in *Mississippi* to be, from the necessity of the case, superior to all other liens, whether of the lossor or of others. Duncan v. Jayne, 76 Miss. 133.

**330. 1. Crops Sown by Trespasser** — **No Title until Severance.** — Merchants' State Bank v. Ruettell, 12 N. Dak. 519; Wadge v. Kittleson, 12 N. Dak. 452.

**2. Fructus Industriales** — **Title in Trespasser After Severance.** — Aultman, etc., Co. v. O'Dowd, 73 Minn. 58, 72 Am. St. Rep. 603; Phillips v. Keysaw, 7 Okla. 674, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 329, 330.

**5. Measure of Damages When Crop Totally Destroyed.** — Anderson v. Adams, 43 Oregon

632, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 330; Chicago, etc., R. Co. v. Longbottom, (Tex. Civ. App. 1904) 80 S. W. Rep. 542; Lester v. Highland Boy Gold Min. Co., 27 Utah 470, 101 Am. St. Rep. 988.

**Measure of Damages for Conversion of Standing Crops.** — Fagan v. Vogt, (Tex. Civ. App. 1904) 80 S. W. Rep. 664.

**331. 1. Where Crops Are Damaged.** — Kansas City, etc., R. Co. v. Pirtle, 67 Ark. 617, 55 S. W. Rep. 940; St. Louis, etc., R. Co. v. Hall, 71 Ark. 302; Burnett v. Great Northern R. Co., 76 Minn. 461; Pacific Live Stock Co. v. Murray, 45 Oregon 103; Horres v. Berkeley Chemical Co., 57 S. Car. 189; Neal v. Ohio River R. Co., 47 W. Va. 316.

"When a crop is injured partially, the rule has been laid down that the measure of damages is the difference between the value of the crop immediately before and the value immediately after the injury. \* \* \* The difference between the value of the probable crop in the market and the expense of maturing, preparing, and placing it there will, in most cases, give the value of the growing crops with as much certainty as can be obtained by any other method." San Antonio, etc., R. Co. v. Kiersey, (Tex. Civ. App. 1904) 81 S. W. Rep. 1045.

"The proper measure of damages is the value of the crops at the time and place when destroyed, or the amount of injury done them. This may be more or less than the value of the money, labor, and time expended on them. The crops may be good or bad. They may have cost more than their value. They may be worth more than their cost." Ducktown Sulphur, etc., Co. v. Barnes, (Tenn. 1900) 60 S. W. Rep. 593.

**For a Tenant to Allow Weeds to Grow Up** and land to go uncultivated has been held to be a ground for damages, where it hurts the ensuing crop. Culley v. Taylor, 62 Neb. 651.

# CROSSINGS.

By J. M. GREENFIELD.

**338. II. RAILROADS CROSSING RAILROADS — 1. Right to Cross.** — See note 3.

**339.** But This Right Is Subject to Restrictions. — See note 2.

2. Nature of Right. — See note 3.

**340.** 3. Source of Right — *b.* BY CONSTITUTIONAL PROVISION. — See note 2.

**341.** *c.* BY STATUTE. — See note 1.

**343.** *d.* BY AGREEMENT. — See note 1.

Enforcement of Contract. — See note 3.

**345.** 4. Abuse of Right — *c.* INJUNCTION AGAINST INJURIOUS CROSSING. — See note 3.

**346.** 5. Manner of Crossing — *a.* DUTY OF INTERSECTING ROADS. — See note 2.

*b.* SUBMISSION OF QUESTION TO COURT. — See note 3.

**347.** See note 2.

*c.* DETERMINATION BY COMMISSIONERS. — See note 3.

**348.** Setting Aside Award. — See note 3.

**338. 3. Right to Cross.** — Detroit, etc., R. Co. *v.* Railroad Com'r, 127 Mich. 219; Jennings *v.* Delaware, etc., R. Co., 103 N. Y. App. Div. 164.

Ownership of the Fee by the First Railroad is no objection to the establishment of a crossing. Williams Valley R. Co. *v.* Lykens, etc., Valley St. R. Co., 192 Pa. St. 552.

**339. 2. Consistent Use.** — Smethport R. Co. *v.* Pittsburg, etc., R. Co., 203 Pa. St. 176.

**3. Right Acquired in Intersected Road Is a Mere Easement.** — Wellsburg, etc., R. Co. *v.* Pan Handle Traction Co., 56 W. Va. 18.

**340. 2. Right to Cross at Grade Not Guaranteed.** — Kushequa R. Co. *v.* Pittsburg, etc., R. Co., 200 Pa. St. 526.

**341. 1. By Statute.** — Baltimore, etc., R. Co. *v.* Wabash R. Co., 31 Ind. App. 201; State *v.* Dearing, 173 Mo. 492.

**343. 1. Commencement of Condemnation Proceedings No Bar to Agreement.** — Baltimore, etc., R. Co. *v.* Wabash R. Co., 31 Ind. App. 201.

**3. Estoppel by Approval of Point of Crossing.** — Where the older company has approved the suggestion of the company seeking a crossing, as to the point of crossing, the older company is estopped to object to such point of crossing on condemnation proceedings brought after a failure to agree on terms, and after the new company had proceeded with the construction of its road relying on the approval of the old company as to the point of crossing. Arkansas, etc., R. Co. *v.* St. Louis, etc., R. Co., 103 Fed. Rep. 747.

**345. 3. Injunction.** — See Ohio River Junction R. Co. *v.* Freedom, etc., Electric St. R. Co., 204 Pa. St. 127.

Unauthorized Crossing. — Mobile, etc., R. Co. *v.* Louisville, etc., R. Co., (Ala. 1904) 37 So. Rep. 849.

**346. 2. Duty of Intersecting Roads.** — Jennings *v.* Delaware, etc., R. Co., 103 N. Y. App. Div. 164; Stillwater, etc., St. R. Co. *v.* Boston, etc., R. Co., 171 N. Y. 589.

**3. Submission to Court.** — Matter of West Jersey Traction Co., 59 N. J. Eq. 63; Jersey City, etc., R. Co. *v.* New York, etc., R. Co., 62 N. J. Eq. 390; Smethport R. Co. *v.* Pittsburg, etc., R. Co., 203 Pa. St. 176; Wellsburg, etc., R. Co. *v.* Pan Handle Traction Co., 56 W. Va. 18. See also Olean St. R. Co. *v.* Pennsylvania R. Co., 75 N. Y. App. Div. 412, affirmed 175 N. Y. 468; Oneonta, etc., R. Co. *v.* Cooperstown, etc., R. Co., 85 N. Y. App. Div. 284.

**347. 2. Mandatory Decree.** — Matter of West Jersey Traction Co., 59 N. J. Eq. 63; Jersey City, etc., R. Co. *v.* New York, etc., R. Co., 62 N. J. Eq. 390.

**Rights of First Occupant — Overhead Crossing.** — The railroad which first makes its survey, stakes out its line and fixes its grade, is the first occupant, and another railroad, although the first to construct its track, must put its line overhead where it is agreed or ordered that the tracks are not to cross at grade. Kushequa R. Co. *v.* Pittsburg, etc., R. Co., 200 Pa. St. 526. See also Smethport R. Co. *v.* Pittsburg, etc., R. Co., 203 Pa. St. 176.

**3. Determination by Commissioners.** — Oneonta, etc., R. Co. *v.* Cooperstown, etc., R. Co., 85 N. Y. App. Div. 284; Jennings *v.* Delaware, etc., R. Co., 103 N. Y. App. Div. 164. See also Olean St. R. Co. *v.* Pennsylvania R. Co., 75 N. Y. App. Div. 412, affirmed 175 N. Y. 468.

**Findings of Commissioners Conclusive.** — Chicago, etc., R. Co. *v.* Louisville, etc., R. Co., (Ky. 1900) 58 S. W. Rep. 799.

**348. 3. Determination of Commissioners Reviewable by Court.** — State *v.* Dearing, 173 Mo. 492.



**349.** *d.* BY BRIDGE, TUNNEL, OR AT GRADE — (2) *Grade Crossings.* — See notes 2, 3.

**350.** (3) *Jurisdiction of Courts of Equity.* — See notes 2, 3.

**351.** 6. *Compensation.* — See note 1.

**352.** *Illustrations of Rule.* — See note 3.

**353.** 7. *Subsequent Duties of Companies* — *a.* IN GENERAL. — See note 3.

**354.** *c.* DUTY TO PROVIDE WATCHMEN. — See note 3.

**356.** *e.* DUTY TO STOP BEFORE CROSSING — (3) *Statutory Requirement.* — See notes 1, 2.

**358.** III. RAILROADS CROSSING STREETS AND HIGHWAYS — 1. *Right to Cross* — *a.* IN GENERAL — NATURE OF RIGHT. — See note 1.

*Nature of Right.* — See note 3.

**359.** *b.* BY STATUTE. — See note 2.

**349.** 2. *Grade Crossings.* — *Pittsburg Junction R. Co. v. Ft. Pitt St. Pass. R. Co.*, 192 Pa. St. 44; *Kushequa R. Co. v. Pittsburg, etc.*, R. Co., 200 Pa. St. 526; *Baltimore, etc.*, R. Co. *v. Butler Pass. R. Co.*, 207 Pa. St. 406.

*Crossing at Grade Necessary.* — See *Stewart v. Wisconsin Cent. R. Co.*, 89 Fed. Rep. 617.

*Grade Crossings Not Discriminated Against.* — *Wellsburg, etc.*, R. Co. *v. Pan Handle Traction Co.*, 56 W. Va. 18.

*Interlocking Crossing at Grade Required.* — See *Minneapolis, etc.*, R. Co. *v. Gowrie, etc.*, R. Co., 123 Iowa 543.

*A Grade Crossing Will Be Permitted* where it appears that only a few trains will be operated on the second road and all needful safety appliances will be maintained. *Trenton, etc.*, R. Co. *v. Philadelphia, etc.*, R. Co., (N. J. 1899) 44 Atl. Rep. 853.

**3.** *Another Route Practicable.* — *Pittsburg Junction R. Co. v. Ft. Pitt St. Pass. R. Co.*, 192 Pa. St. 44; *Williams Valley R. Co. v. Lykens, etc.*, Valley St. R. Co., 192 Pa. St. 552; *Smethport R. Co. v. Pittsburg, etc.*, R. Co., 203 Pa. St. 176.

*Burden of Proof.* — The burden of showing that no other route is practicable is not necessarily on the road seeking the intersection at grade. *Williams Valley R. Co. v. Lykens, etc.*, Valley St. R. Co., 192 Pa. St. 552.

*Pennsylvania Statute.* — See *Carlisle, etc.*, R. Co. *v. Philadelphia, etc.*, R. Co., 199 Pa. St. 532.

**350.** 2. *Jurisdiction of Courts of Equity.* — *West Jersey, etc.*, R. Co. *v. Atlantic City, etc.*, Traction Co., 65 N. J. Eq. 613.

**3.** *Injunction.* — *Baltimore, etc.*, R. Co. *v. Butler Pass. R. Co.*, 207 Pa. St. 406. See also *Southern R. Co. v. Washington, etc.*, R. Co., 102 Va. 483.

**351.** 1. *Compensation.* — *Townsend v. Michigan Cent. R. Co.*, (C. C. A.) 101 Fed. Rep. 757; *West Jersey, etc.*, R. Co. *v. Atlantic City, etc.*, Traction Co., 65 N. J. Eq. 613.

*By an Iowa Statute* the cost of interlocking devices is required to be borne by the company seeking the intersection. *Minneapolis, etc.*, R. Co. *v. Cedar Rapids, etc.*, R. Co., 114 Iowa 502.

**352.** 3. *Obstructions Placed to Prevent a Crossing*, consisting of side tracks which the old road had constructed without any need therefor, but merely to hinder or prevent the crossing, will not be considered on the question of compensation. *Arkansas, etc.*, R. Co. *v. St. Louis, etc.*, R. Co., 103 Fed. Rep. 747.

**353.** 3. *No Prior Right of Passage* exists in favor of either road except by statute or agreement. *Missouri Pac. R. Co. v. Chicago G. W. R. Co.*, 98 Mo. App. 214.

**354.** 3. *When a Railroad Had Constructed Its Tracks Across a Street Car Line* and afterwards, on account of the increased use of both the railroad and the street car line, it became necessary to maintain safety appliances at the crossing, it was held that the commissioner of railroads had authority to require the street car company to bear a portion of the expense. *Detroit, etc.*, R. Co. *v. Railroad Com'r*, 127 Mich. 219.

**356.** 1. *Statutory Requirement.* — *Birmingham Southern R. Co. v. Powell*, 136 Ala. 232; *St. Louis Southwestern R. Co. v. Matthews*, 34 Tex. Civ. App. 302.

**2.** *Liability for Failure to Stop.* — *St. Louis Southwestern R. Co. v. Matthews*, 34 Tex. Civ. App. 302.

**358.** 1. *Adverse Possession.* — The construction and occasional use of a railroad track over a platted street while the street is yet unimproved and unfit for public use does not constitute such adverse possession as will give the railroad a right paramount to that of the public or the street. *St. Paul, etc.*, R. Co. *v. Duluth*, 73 Minn. 270.

**3.** *Nature of Right.* — See *Delaware, etc.*, R. Co. *v. Buffalo*, 158 N. Y. 266.

**359.** 2. *By Statute.* — See *Wisconsin, etc.*, R. Co. *v. State Railroad Crossing Board*, 119 Mich. 505.

*Construction of Statutes.* — A *Minnesota* statute giving a certain railroad the right to cross highways was held to confer no such right on branch roads which were neither a part of nor appurtenant to the main line of the road. *St. Paul, etc.*, R. Co. *v. Duluth*, 73 Minn. 270.

The right to cross city streets is conferred by a statute granting the power to cross any "public road or way." *Canton v. Canton Cotton Warehouse Co.*, 84 Miss. 268, 105 Am. St. Rep. 428.

Where a street is obstructed by the abutments of an overhead railroad bridge under an alleged statutory right, it must be shown that the statute, expressly or by implication, authorized the obstructions complained of. *Delaware, etc.*, R. Co. *v. Buffalo*, 158 N. Y. 266.

Under the *New York* railroad law, (Laws 1890, c. 565, § 11) requiring a railroad to give ten days' notice of the construction of a cross-

**360. 2. Manner of Crossing — a. IN GENERAL.** — See note 2.

Effect of Crossing. — See note 3.

Obstruction to Travel on Highway. — See note 4.

Usefulness of Highway Not to Be Impaired. — See note 5.

**361. b. GOING OVER OR UNDER HIGHWAY — (2) Election.** — See note 2.

Other Sources of Determination. — See note 4.

**362. 3. Right to Change Location of Highway — a. IN GENERAL.** — See note 2.

b. BY STATUTE. — See note 3.

**363. 4. Construction of Crossings — a. DUTY TO CONSTRUCT — (1) In General.** — See note 1.

Unfrequented Ways. — See note 2.

**364. (2) By Statute.** — See note 1.

ing over a highway to the commissioner of highways of the town, where a railroad moved its track thirty-five feet and constructed a bridge with abutments projecting eight feet onto the highway, it was held that the commissioner should have been given notice, since the change practically established a new crossing. *People v. Northern Cent. R. Co.*, 164 N. Y. 289.

**Consent of Local Authorities.** — The board of street and water commissioners in *Jersey City* has power to authorize grade crossings over streets. *Oliver v. Jersey City*, 63 N. J. L. 96.

**360. 2. Crossing May Be at Any Angle.** — *Morgan v. Des Moines Union R. Co.*, 113 Iowa 561.

**3. Effect of Crossing.** — *Chicago, etc., R. Co. v. State*, 158 Ind. 189.

**4. Travel Should Not Be Obstructed.** — *Evansville, etc., R. Co. v. Allen*, (Ind. App. 1905) 73 N. E. Rep. 630; *Cunningham v. Thief River Falls*, 84 Minn. 21; *Delaware, etc., R. Co. v. Buffalo*, 158 N. Y. 266.

**5. Usefulness as a Highway Should Not Be Impaired.** — *Chicago, etc., R. Co. v. State*, 158 Ind. 189, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 360; *Chicago, etc., R. Co. v. State*, 159 Ind. 237; *Lake Erie, etc., R. Co. v. Shelley*, 163 Ind. 36; *People v. Delaware, etc., R. Co.*, 177 N. Y. 337.

**A City Ordinance Requiring the Track to Be Lowered** to grade at crossings is not objectionable because it necessitates the lowering of the track between the crossings. *Houston, etc., R. Co. v. Dallas*, (Tex. 1905) 84 S. W. Rep. 648.

**361. 2. West Jersey, etc., R. Co. v. Waterford Tp.**, 64 N. J. Eq. 663.

**4. Commissioners.** — See *Selectmen Petitioners*, 169 Mass. 495.

**Determination by Railroad Commissioners.** — See *Bolivar v. Pittsburg, etc., R. Co.*, 88 N. Y. App. Div. 387, affirmed 179 N. Y. 523.

Under the *Maine* statute the whole question of how railroad crossings shall be constructed and maintained is left, in the first instance, to the sound judgment and discretion of the railroad commissioners whose decision is final unless an appeal is taken. *Boston, etc., R. Co. v. Saco Valley Electric R. Co.*, 98 Me. 78.

**362. 2. Right Recognized in Some Cases.** — *Leighton v. Concord, etc., R. Co.*, 72 N. H. 224; *West Jersey, etc., R. Co. v. Waterford Tp.*, 64 N. J. Eq. 663.

**3. Statutes — Connecticut.** — Gen. Stat. 1888, § 3489 (Gen. St. 1902, § 3713) leaves the deter-

mination of the method of constructing grade crossings, alterations, etc., to the railroad commissioners. See *Meriden v. Bennett*, 76 Conn. 58.

*Massachusetts.* — See *Boston, etc., R. Co. v. Middlesex County*, 177 Mass. 511.

*New Jersey.* — See *Morris, etc., Dredging Co. v. Jersey City*, 64 N. J. L. 142; *Clark v. Elizabeth*, 61 N. J. L. 565.

**363. 1. Duty to Construct and Maintain Safe and Convenient Crossings — Illinois.** — *Illinois Cent. R. Co. v. Griffin*, 84 Ill. App. 153, affirmed 184 Ill. 9; *Rock Island, etc., R. Co. v. Kepple*, 105 Ill. App. 303.

*Indiana.* — *Evansville, etc., R. Co. v. State*, 149 Ind. 276.

*Kentucky.* — *Louisville, etc., R. Co. v. Smith*, (Ky. 1898) 44 S. W. Rep. 385.

*Maryland.* — *Whitby v. Baltimore, etc., R. Co.*, 96 Md. 700, quoting 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 363.

*Minnesota.* — *Goodhue County v. Duluth, etc., R. Co.*, 67 Minn. 213.

*Missouri.* — *Independence v. Missouri Pac. R. Co.*, 86 Mo. App. 585.

*Nebraska.* — *Chicago, etc., R. Co. v. Sporer*, (Neb. 1903) 94 N. W. Rep. 991.

*New Hampshire.* — *Dickey v. Boston, etc., R. Co.*, 70 N. H. 34.

*Pennsylvania.* — *Lehigh Valley R. Co. v. Laceyville Bridge Co.*, 23 Pa. Co. Ct. 225.

**A Reasonably Safe Construction** for the ordinary purposes of travel is all that is required. *Lake Shore, etc., R. Co. v. Brazzill*, 6 Ohio Cir. Dec. 363, 13 Ohio Cir. Ct. 622.

**Where the Grade of the Highway Is Changed** the railroad must make necessary changes in the grade of the crossing at its own expense. *Cleveland v. Augusta*, 102 Ga. 233.

**Recovery from Railroad by County of Cost of Construction.** — *Galveston, etc., R. Co. v. Baudat*, 18 Tex. Civ. App. 595.

**2. Unfrequented Ways.** — *Walters v. Minneapolis, etc., R. Co.*, 76 Minn. 506.

**364. 1. By Statute.** — *Illinois Cent. R. Co. v. Truesdell*, 68 Ill. App. 324; *Evansville, etc., R. Co. v. State*, 149 Ind. 276; *Chicago, etc., R. Co. v. State*, 158 Ind. 189; *Lynch v. Cleveland, etc., R. Co.*, 11 Ohio Cir. Dec. 243; *Clarendon v. Rutland R. Co.*, 75 Vt. 6; *Charlottesville v. Southern R. Co.*, 97 Va. 428.

**Statute Not Applicable to Town Crossing.** — *Walters v. Minneapolis, etc., R. Co.*, 76 Minn. 506.

- 361.** Highways Laid Out over Existing Railroads. — See note 4.  
**365.** *b.* PROCEEDINGS TO COMPEL CONSTRUCTION. — See note 4.  
**366.** *c.* MODE OF CONSTRUCTION — (1) *In General.* — See note 1.  
     (2) *Width of Crossing.* — See note 2.  
     (3) *Approaches — Embankments.* — See notes 3, 4.  
**367.** (4) *Cattle Guards.* — See notes 1, 2.  
**368.** (5) *Bridges.* — See notes 1, 2.

**Necessity that Street Be Legally Established.** — St. Louis, etc., R. Co. *v.* Gordon, 157 Mo. 71.

**The Lighting of an Overhead Bridge** may be required under a statute making it the duty of the railroad to provide "suitable crossings." Concord *v.* Boston, etc., R. Co., 69 N. H. 87.

**364. 4. Highways Laid Out over Existing Railroads.** — See Baltimore, etc., R. Co. *v.* State, 159 Ind. 510.

**Construction of Statute.** — A statute requiring a railroad to construct crossings where the railroad has constructed or shall construct a railroad "across any public road" does not apply where the highway is laid out subsequently. Prairie County *v.* Fink, 65 Ark. 492.

**365. 4. Mandamus.** — Indiana *v.* Lake Erie, etc., R. Co., 83 Fed. Rep. 284; Chicago, etc., R. Co. *v.* State, 158 Ind. 189, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 365; Evansville, etc., R. Co. *v.* State, 149 Ind. 276; State *v.* Minnesota Transfer R. Co., 80 Minn. 108.

**366. 1. Municipal Ordinance Regulating Construction Valid.** — Hughes *v.* Arkansas, etc., R. Co., (Ark. 1905) 85 S. W. Rep. 773.

**Only Reasonable Care Necessary.** — St. Louis Southwestern R. Co. *v.* Johnson, (Tex. Civ. App. 1905) 85 S. W. Rep. 476.

**Evidence that Other Crossings Were Differently Constructed** is not competent on the question as to whether or not a certain crossing was defectively constructed, but it may be shown that other crossings similarly constructed had proved dangerous. Raper *v.* Wilmington, etc., R. Co., 126 N. Car. 563.

**A Crossing Safe for Persons Crossing the Track Is Sufficient,** and it is not required that it should be safe for persons walking along the track. Raper *v.* Wilmington, etc., R. Co., 126 N. Car. 563.

**2. Width of Crossing.** — Cleveland, etc., R. Co. *v.* Johns, 106 Ill. App. 427. See also Lynch *v.* Cleveland, etc., R. Co., 11 Ohio Cir. Dec. 243.

**Not Exceeding Width of Street.** — San Antonio, etc., R. Co. *v.* Belt, (Tex. Civ. App. 1898) 46 S. W. Rep. 374.

**Width Sufficient for Harvesting Machines Required.** — Atchison, etc., R. Co. *v.* Henry, 60 Kan. 322.

**3. Approaches — Embankments.** — Whitby *v.* Baltimore, etc., R. Co., 96 Md. 700, quoting 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 366; Illinois Cent. R. Co. *v.* Swalm, 83 Miss. 631.

**What Constitutes Approach.** — See Illinois Cent. R. Co. *v.* Truesdell, 68 Ill. App. 324.

**4. Provisions Regulating Crossings Apply.** — Illinois Cent. R. Co. *v.* Truesdell, 68 Ill. App. 324; Illinois Cent. R. Co. *v.* Griffin, 84 Ill. App. 152, affirmed 184 Ill. 9; Rock Island, etc., R. Co. *v.* Kepple, 106 Ill. App. 303; Evansville, etc., R. Co. *v.* State, 149 Ind. 276; Southern Indiana R. Co. *v.* McCarrell, 163 Ind. 469; See *v.* Wabash R. Co., 123 Iowa 443; Com. *v.*

Louisville, etc., R. Co., 109 Ky. 59, 58 S. W. Rep. 702; Whitby *v.* Baltimore, etc., R. Co., 96 Md. 700, quoting 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 366; Deming *v.* Terminal R. Co., 169 N. Y. 1, 88 Am. St. Rep. 521.

**Sidewalks.** — A statute imposing the duty to construct sidewalks has no application where a railroad in lowering its grade, so that a highway could pass over it, constructed a temporary foot bridge beyond the limits of the highway. Stewart *v.* New York, etc., R. Co., 170 Mass. 430.

**Grading Approaches.** — See Gulf, etc., R. Co. *v.* Sneed, 84 Miss. 252.

**The Construction of an Embankment Which Obstructs the View** of a crossing is not negligence *per se*. San Antonio, etc., R. Co. *v.* Stolleis, (Tex. Civ. App. 1899) 49 S. W. Rep. 679.

**367. 1. Duty to Erect Cattle Guards.** — St. Louis, etc., R. Co. *v.* Hood, 67 Ark. 357; Grace *v.* Gulf, etc., R. Co., (Miss. 1899) 25 So. Rep. 875; Chicago, etc., R. Co. *v.* Milwaukee, 97 Wis. 418. See also Lake Erie, etc., R. Co. *v.* Griffin, 25 Ind. App. 138; Clement *v.* Pere Marquette R. Co., (Mich. 1904) 100 N. W. Rep. 999.

**Sufficiency of Cattle Guards.** — Usage among other railroads as to the construction of cattle guards does not determine the sufficiency of the guard required by Burns's Stat. (Ind.) 1901, § 5323. Pennsylvania R. Co. *v.* Newby, (Ind. 1905) 72 N. E. Rep. 1043.

**Statute Requiring Cattle Guards at Crossings Not Applicable to Overhead Crossings.** — Albia *v.* Chicago, etc., R. Co., 102 Iowa 624.

**Statute Requiring Cattle Guards Held to Be Applicable to Street Railway.** — Evans *v.* Utica, etc., R. Co., (County Ct.) 44 Misc. (N. Y.) 345.

**Duty Not Inferred from Deed to Right of Way.** — A deed of right of way requiring the railroad company to "construct all crossings reasonably necessary" does not bind the railroad company to construct cow gaps. Kentucky Union R. Co. *v.* Forkner, (Ky. 1897) 40 S. W. Rep. 462.

**2. The Fact that Stock Can Pass over a Cattle Guard** does not show conclusively that it does not comply with a statute requiring safe and suitable cattle guards. St. Louis, etc., R. Co. *v.* Busick, (Ark. 1905) 86 S. W. Rep. 674.

**368. 1. Duty to Maintain Bridges.** — Illinois Cent. R. Co. *v.* Swalm, 83 Miss. 631; Sonn *v.* Erie R. Co., 66 N. J. L. 428; Bush *v.* Delaware, etc., R. Co., 166 N. Y. 210; Toledo *v.* Lake Shore, etc., R. Co., 9 Ohio Cir. Dec. 135; Hicks *v.* Chesapeake, etc., R. Co., 102 Va. 197. See Atty.-Gen. *v.* Ft. Street Union Depot Co., 117 Mich. 609.

**Height of Bridge.** — The bridge need not be at such a height above the highway as not to interfere with the passage of any vehicle whatever, but only at a reasonable height. Wooster



**368.** (6) *Precautions to Be Observed.* — See notes 3, 4.

**369.** 5. *Duty to Keep Crossings in Repair* — *a.* IN GENERAL. — See note 1.

**370.** *Obligation Inseparable from Enjoyment of Franchise.* — See note 1.

*b.* PROCEEDINGS TO COMPEL REPAIRS. — See note 3.

**371.** 6. *Duty to Restore Highway* — *a.* IN GENERAL. — See note 3.

*Turnpike Co. v. Cincinnati, etc., R. Co.*, 8 Ohio Cir. Dec. 269.

The *Mississippi* statute (Code 1892, § 3555) requiring railroads to maintain all bridges at points where, by raising or lowering the highway, the highway has to be carried across the railroad by bridge, applies to bridges of public roads laid out after the railroad was constructed. *Illinois Cent. R. Co. v. Copiah County*, 81 Miss. 685.

**368.** 2. *The Approaches to a Bridge.* — See *Harriman v. Southern R. Co.*, (Tenn. 1904) 82 S. W. Rep. 213.

*Construction of Bridge at Approach to Private Crossing.* — *Birlew v. St. Louis, etc., R. Co.*, 104 Mo. App. 561.

*Negligence in Maintaining Approach a Question for Jury.* — *Camp v. Wabash R. Co.*, 94 Mo. App. 272.

**3.** *Precautions to Be Observed.* — *Evansville, etc., R. Co. v. Allen*, (Ind. App. 1905) 73 N. E. Rep. 630; *Whitby v. Baltimore, etc., R. Co.*, 96 Md. 700; *Marshall v. Valley R. Co.*, 97 Va. 653.

**4.** *Sign Boards.* — See *Chicago, etc., R. Co. v. Milwaukee*, 97 Wis. 418.

*Gates.* — See *Rosenbaum v. Philadelphia, etc., R. Co.*, 19 Pa. Co. Ct. 666; *Chicago, etc., R. Co. v. Milwaukee*, 97 Wis. 418.

**369.** 1. *Duty to Keep Crossing in Repair* — *United States.* — *Indiana v. Lake Erie, etc., R. Co.*, 83 Fed. Rep. 284.

*Alabama.* — *Southern R. Co. v. Posey*, 124 Ala. 486, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 369.

*California.* — *Heckle v. Southern Pac. R. Co.*, 123 Cal. 441.

*Illinois.* — See *McFarlane v. Chicago*, 185 Ill. 242.

*Kentucky.* — *Louisville, etc., R. Co. v. Bloyd*, (Ky. 1900) 55 S. W. Rep. 694; *Com. v. Louisville, etc., R. Co.*, 109 Ky. 59, 58 S. W. Rep. 702.

*Maryland.* — *Whitby v. Baltimore, etc., R. Co.*, 96 Md. 700, quoting 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 369.

*Massachusetts.* — *Nickerson v. New York, etc., R. Co.*, 178 Mass. 195.

*Michigan.* — *Atty.-Gen. v. Ft. Street Union Depot Co.*, 117 Mich. 609.

*Minnesota.* — *Goodhue County v. Duluth, etc., R. Co.*, 67 Minn. 213; *Cunningham v. Thief River Falls*, 84 Minn. 21.

*New Jersey.* — *West Jersey, etc., R. Co. v. Waterford Tp.*, 64 N. J. Eq. 663.

*New York.* — *Yonkers v. New York Cent., etc., R. Co.*, 165 N. Y. 142; *Bush v. Delaware, etc., R. Co.*, 166 N. Y. 210.

*Pennsylvania.* — *Lehigh Valley R. Co. v. Laceyville Bridge Co.*, 23 Pa. Co. Ct. 225.

*Texas.* — *Texas, etc., R. Co. v. Kaufman County*, 17 Tex. Civ. App. 251; *San Antonio, etc., R. Co. v. Belt*, 24 Tex. Civ. App. 281; *International, etc., R. Co. v. Haddox*, (Tex. Civ. App. 1904) 81 S. W. Rep. 1036.

*Reasonably Safe.* — *Taylor v. Long Island R. Co.*, 16 N. Y. App. Div. 1.

*Bridge over Crossing to Be Maintained by City by Agreement.* — See *State v. Chicago, etc., R. Co.*, 85 Minn. 416.

*Duty to Keep Crossing Covered with Snow.* — In *Dickey v. Boston, etc., R. Co.*, 70 N. H. 34, it was held to be a question of fact for the jury as to whether it was the duty of a railroad company to cover a crossing with snow so as to put it in condition for public use.

*Duty to Restore Railway Bridge.* — On the condemnation of an old railroad bridge the company will be compelled to build a new one, notwithstanding the fact that the dedication of the street to the public was doubtful or defective, where the original bridge had been constructed by the company voluntarily and with full knowledge of the facts. *Toledo v. Lake Shore, etc., R. Co.*, 9 Ohio Cir. Dec. 135.

*Necessity for Notice of Defects.* — *Nixon v. Hannibal, etc., R. Co.*, 141 Mo. 425.

*The Right to Dig Up Streets to Make Repairs* belongs to the railroad company, and an ordinance which forbids the digging up of streets, without written permission from the proper authorities, has no application to railroad crossings. *New York Cent., etc., R. Co. v. Cambridge*, 186 Mass. 249.

**370.** 1. *Obligation Inseparable from Enjoyment of Franchise.* — *Whitby v. Baltimore, etc., R. Co.*, 96 Md. 700, quoting 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 370.

**3.** *Mandamus.* — *Chicago, etc., R. Co. v. State*, 158 Ind. 189, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 370; *State v. Minnesota Transfer R. Co.*, 80 Minn. 108.

*Statutory Action for Cost of Maintenance.* — See *Clarendon v. Rutland R. Co.*, 75 Vt. 6.

*By Application to Railroad Commissioners.* — *New York, etc., R. Co. v. New Haven*, 70 Conn. 390.

*Enforcement of Statutory Penalty.* — *Texas, etc., R. Co. v. Kaufman County*, 17 Tex. Civ. App. 251.

**371.** 3. *Duty to Restore Highway* — *Indiana.* — *Chicago, etc., R. Co. v. State*, 158 Ind. 189; *Seybold v. Terre Haute, etc., R. Co.*, 18 Ind. App. 367; *Evansville, etc., R. Co. v. Allen*, (Ind. App. 1905) 73 N. E. Rep. 630; *Indiana v. Lake Erie, etc., R. Co.*, 83 Fed. Rep. 284 (construing the Indiana statute).

*Kentucky.* — *Richmond, etc., R. Co. v. Estill County*, 105 Ky. 808.

*Minnesota.* — *State v. Minnesota Transfer R. Co.*, 80 Minn. 108.

*Missouri.* — *Harper v. Missouri, etc., R. Co.*, 70 Mo. App. 604; *Independence v. Missouri Pac. R. Co.*, 86 Mo. App. 585.

*New York.* — *Allen v. Buffalo, etc., R. Co.*, 151 N. Y. 434; *People v. Delaware, etc., R. Co.*, 177 N. Y. 337.

*Texas.* — *Texas Midland R. Co. v. Johnson*, 20 Tex. Civ. App. 572; *St. Louis Southwestern R. Co. v. Johnson*, (Tex. Civ. App. 1905) 85 S. W. Rep. 476.

**372.** *b.* BY CHARTER. — See note 1.

*c.* BY STATUTE. — See notes 2, 3.

**373.** What Constitutes Restoration. — See note 2.

**374.** Continuing Duty. — See note 1.

New Devices. — See note 2.

*d.* PROCEEDINGS TO COMPEL RESTORATION. — See notes 3, 4.

**375.** 7. Liability for Defective Crossings — *a.* IN GENERAL. — See note 1.

**376.** Illustrations of Rule. — See notes 1, 2.

*Wisconsin.* — *Sutton v. Chicago, etc., R. Co.*, 98 Wis. 157.

**372.** 1. By Charter. — See *State v. Morgan's Louisiana, etc., R., etc., Co.*, 111 La. 120; *Clarendon v. Rutland R. Co.*, 75 Vt. 6.

Enlargement of Bridge. — *Charlottesville v. Southern R. Co.*, 97 Va. 428.

**2.** By Statute — *Illinois.* — *Ohio, etc., R. Co. v. Bridgeport*, 63 Ill. App. 224.

*Indiana.* — *Indiana v. Lake Erie, etc., R. Co.*, 83 Fed. Rep. 284 (construing the *Indiana* statute); *Chicago, etc., R. Co. v. State*, 159 Ind. 237; *Chicago, etc., R. Co. v. Leachman*, 161 Ind. 512; *Seybold v. Terre Haute, etc., R. Co.*, 18 Ind. App. 367; *Lake Erie, etc., R. Co. v. Shelley*, 163 Ind. 36.

*New York.* — *Allen v. Buffalo, etc., R. Co.*, 151 N. Y. 434; *People v. Northern Cent. R. Co.*, 164 N. Y. 289.

*North Carolina.* — *Raper v. Wilmington, etc., R. Co.*, 126 N. Car. 563.

*Ohio.* — *Elyria v. Lake Shore, etc., R. Co.*, 23 Ohio Cir. Ct. 482.

*Texas.* — *Dublin v. Taylor, etc., R. Co.*, (Tex. Civ. App. 1898) 49 S. W. Rep. 667; *San Antonio, etc., R. Co. v. Belt*, 24 Tex. Civ. App. 281; *International, etc., R. Co. v. Haddox*, (Tex. Civ. App. 1904) 81 S. W. Rep. 1036.

*Virginia.* — *Charlottesville v. Southern R. Co.*, 97 Va. 428.

*Wisconsin.* — *Sutton v. Chicago, etc., R. Co.*, 98 Wis. 157.

Statute Applicable to Highway Laid Out After Construction of Railroad. — *Baltimore, etc., R. Co. v. State*, 159 Ind. 510.

**3.** *Indiana v. Lake Erie, etc., R. Co.*, 83 Fed. Rep. 284; *Chicago, etc., R. Co. v. State*, 158 Ind. 189.

**373.** 2. What Constitutes Restoration. — *Chicago, etc., R. Co. v. State*, 158 Ind. 189; *People v. Delaware, etc., R. Co.*, 177 N. Y. 337; *International, etc., R. Co. v. Haddox*, (Tex. Civ. App. 1904) 81 S. W. Rep. 1036.

Sufficiency of Restoration a Question for Jury. — *Allen v. Buffalo, etc., R. Co.*, 151 N. Y. 434.

Adjacent Streams Need Not Be Bridged. — A statute requiring railroad companies to construct and maintain approaches to crossings does not require such companies to bridge streams for the use of the public in crossing such streams. *Ohio, etc., R. Co. v. Bridgeport*, 63 Ill. App. 224.

Previously Existing Defects in the highway are not required to be corrected. *Whitby v. Baltimore, etc., R. Co.*, 96 Md. 700.

**374.** 1. Continuing Duty. — *Indiana v. Lake Erie, etc., R. Co.*, 83 Fed. Rep. 284; *State v. Minnesota Transfer R. Co.*, 80 Minn. 108; *Cunningham v. Thief River Falls*, 84 Minn. 21; *Charlottesville v. Southern R. Co.*, 97 Va. 428.

**2.** New Devices. — *Allen v. Buffalo, etc., R. Co.*, 151 N. Y. 434.

**3.** Proceedings to Compel Restoration. — *Indiana v. Lake Erie, etc., R. Co.*, 83 Fed. Rep. 284; *Chicago, etc., R. Co. v. State*, 158 Ind. 189, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 324; *People v. Northern Cent. R. Co.*, 164 N. Y. 289.

**4.** Mandatory Injunction Held Inappropriate. — See *Louisville, etc., R. Co. v. Smith*, (Ky. 1904) 78 S. W. Rep. 160.

**375.** 1. Liability for Defective Crossings. — *Southern R. Co. v. Posey*, 124 Ala. 486; *Illinois Cent. R. Co. v. Truesdell*, 68 Ill. App. 324; *Chicago, etc., R. Co. v. Leachman*, 161 Ind. 512; *Seybold v. Terre Haute, etc., R. Co.*, 18 Ind. App. 367; *Southern Indiana R. Co. v. McCarrall*, 163 Ind. 469; See *v. Wabash R. Co.*, 123 Iowa 443; *Louisville, etc., R. Co. v. Bloyd*, (Ky. 1900) 55 S. W. Rep. 694; *Whitby v. Baltimore, etc., R. Co.*, 96 Md. 700; *Cunningham v. Thief River Falls*, 84 Minn. 21; *Denison, etc., Suburban R. Co. v. Foster*, 28 Tex. Civ. App. 578.

Construction by Independent Contractor. — The fact that the construction was by an independent contractor does not relieve the railroad of liability for failure to restore the crossing. *Texas Midland R. Co. v. Johnson*, 20 Tex. Civ. App. 572.

Where the construction was by independent contractors but the defective crossing which caused the injury was located according to one view of the evidence, but the defendant's engineer who was supervising the work, a jury may find the defendant liable. *Dublin v. Taylor, etc., R. Co.*, 92 Tex. 535.

Where Independent Contractors had not yet turned over the work to the railroad company, the railroad would not be liable. *Dublin v. Taylor, etc., R. Co.*, (Tex. Civ. App. 1898) 49 S. W. Rep. 667. See also *Denning v. Terminal R. Co.*, 169 N. Y. 1, 88 Am. St. Rep. 521.

In *Massachusetts* by Pub. Stat., c. 52, §§ 18, 19, it is essential to a right of recovery that notice of the time, place, and cause of the accident be given within thirty days. *Nickerson v. New York, etc., R. Co.*, 178 Mass. 195.

Liability Attaches Only Where Crossing Is Public. — *San Antonio, etc., R. Co. v. Montgomery*, 31 Tex. Civ. App. 491.

Evidence as to the unsafe condition of the crossing prior to the time of the accident is competent. *Southern R. Co. v. Posey*, 124 Ala. 486.

**376.** 1. Erection of Barriers. — *Evansville, etc., R. Co. v. Allen*, (Ind. App. 1905) 73 N. E. Rep. 630; *Whitby v. Baltimore, etc., R. Co.*, 96 Md. 700.

**2.** Improper Spacing or Planking. — *Baltimore, etc., R. Co. v. Anderson*, (C. C. A.) 85 Fed.

**376.** *c.* LIMITED LIABILITY. — See notes 5, 6.

**377.** Extraordinary Care. — See note 1.

**IV. STREETS OR HIGHWAYS CROSSING RAILROADS — 1. Right to Cross**

— *a.* IN GENERAL. — See note 4.

**378.** *b.* BY STATUTE. — See note 1.

Power of Public Corporations. — See note 2.

**379.** 2. Nature of Right — Only Right of Way Acquired. — See note 1.

3. Manner of Crossing. — See note 2.

Land Necessary for Operation of Franchise. — See note 3.

**380.** 4. Compensation — *a.* IN GENERAL — No Compensation Allowed Railroad. — See note 1.

Railroad Entitled to Compensation. — See note 2.

**381.** *b.* ELEMENTS TO BE CONSIDERED. — See notes 2, 3, 4.

**382.** Structures Necessary for Safety of Crossing. — See note 3.

Remote Damages. — See note 7.

5. Right of Abutting Owners. — See notes 8, 9.

**384.** 6. Grade Crossings — *a.* IN GENERAL — Grade Crossings Allowed. — See note 2.

Grade Crossings Not Favored. — See note 4.

Rep. 413; *Emmons v. Minneapolis, etc., R. Co.*, 92 Minn. 521; *Harper v. Missouri, etc., R. Co.*, 70 Mo. App. 604.

Question for Jury. — *Raper v. Wilmington, etc., R. Co.*, 126 N. Car. 563.

**376.** 5. Limited Liability. — *Dublin v. Taylor, etc., R. Co.*, (Tex. Civ. App. 1898) 49 S. W. Rep. 667.

Liability Limited to "the Crossing." — *Gulf, etc., R. Co. v. Sneed*, 84 Miss. 252.

6. Assumption of Duty. — *Yazoo, etc., R. Co. v. Watson*, 82 Miss. 89.

**377.** 1. Proximate Cause. — The defective crossing must have been the proximate cause of the injury. *Myers v. Chicago, etc., R. Co.*, 101 Fed. Rep. 915.

4. Right to Cross. — *Matter of North Third Ave.*, 32 N. Y. App. Div. 394.

Prescription — Long User. — *Texas, etc., R. Co. v. Kaufman County*, 17 Tex. Civ. App. 251.

**378.** 1. By Statute. — *People v. New York Cent., etc., R. Co.*, 156 N. Y. 570.

Necessity for Notice. — See *Matter of Opening Ludlow St.*, 172 N. Y. 542.

2. Power of Public and Municipal Corporations. — *Albia v. Chicago, etc., R. Co.*, 102 Iowa 624.

**379.** 1. Nothing Acquired Save a Right of Way. — *Baltimore v. Cowen*, 88 Md. 447, 71 Am. St. Rep. 433, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 379.

2. Injunction Against Injurious Grade Crossing. — *Pennsylvania R. Co. v. Bogert*, 209 Pa. St. 589.

Manner of Crossing Determined by Railroad Commissioners. — *People v. Delaware, etc., R. Co.*, 81 N. Y. App. Div. 335, affirmed 177 N. Y. 337.

Condemnation Proceedings Necessary. — *St. Louis, etc., R. Co. v. Gordon*, 157 Mo. 71.

3. Land Necessary for Operation of Franchise. — *People v. New York Cent., etc., R. Co.*, 156 N. Y. 570.

**380.** 1. *New York.* — *People v. Delaware, etc., R. Co.*, 11 N. Y. App. Div. 280, affirmed 159 N. Y. 545. See also *Rochester, etc., R. Co. v. Rochester*, 17 N. Y. App. Div. 257, modified 163 N. Y. 608.

*Texas.* — See *Gulf, etc., R. Co. v. Milam County*, 90 Tex. 355.

2. Railroad Held Entitled to Compensation. — *Chicago, etc., R. Co. v. Milwaukee*, 97 Wis. 418. See also *Nichols v. Boston, etc., R. Co.*, 174 Mass. 379.

Where by Statute a Grade Crossing Is Removed and the street carried over the railroad by means of a bridge constructed at the expense of the city, no additional servitude is thereby imposed on the right of way of the railroad, and the railroad is not entitled to compensation for ground within its right of way occupied by the abutments of the bridge. *Boston, etc., R. Co. v. Worcester*, 180 Mass. 71.

Expense of Construction to Be Borne by Town. — *New Haven, etc., R. Co. v. Hampshire County*, 173 Mass. 12.

**381.** 2. Railroad Entitled to Cost of Structural Changes. — *Baltimore v. Cowen*, 88 Md. 447, 71 Am. St. Rep. 433.

3. Planking Roadbed. — *Chicago, etc., R. Co. v. Milwaukee*, 97 Wis. 418.

4. Cattle Guards. — See *Baltimore v. Cowen*, 88 Md. 447, 71 Am. St. Rep. 433.

**382.** 3. Included in Road's Operating Expenses. — *Gulf, etc., R. Co. v. Milam County*, 90 Tex. 355; *Chicago, etc., R. Co. v. Milwaukee*, 97 Wis. 418.

7. Observing Police Regulations. — *Chicago, etc., R. Co. v. Milwaukee*, 97 Wis. 418.

8. Right of Abutting Owners. — *Lancy v. Boston*, 185 Mass. 219; *Clark v. Elizabeth*, 61 N. J. L. 565.

9. *New York.* — See *Matter of Grade Crossing Com'rs*, 59 N. Y. App. Div. 498, affirmed 168 N. Y. 659.

**384.** 2. *New Jersey* — Grade Crossings Permitted. — See *Chosen Freeholders v. Central R. Co.*, (N. J. 1904) 59 Atl. Rep. 303.

4. Alteration or Removal of Grade Crossings — *Colorado.* — See *Burlington, etc., R. Co. v. People*, (Colo. App. 1904) 77 Pac. Rep. 1026.

*Connecticut.* — *New York, etc., R. Co. v. New Haven*, 70 Conn. 390; *New York, etc., R. Cos. Appeal*, 75 Conn. 264.

*Massachusetts.* — *Boston, etc., R. Co. v. Wor-*



**384.** *b.* CONSTITUTIONALITY OF STATUTES. — See note 5.

**385.** *c.* POWER OF COMMISSIONERS. — See notes 1, 2.

**386.** See note 1.

**V. INJURIES AT CROSSINGS — 1. Mutuality of Obligation Between Railroad Company and Traveler — a. IN GENERAL.** — See notes 2, 3.

**387.** See note 1.

*b.* DEGREE OF CARE REQUIRED OF EACH. — See notes 2, 3.

cester, 180 Mass. 71; New York, etc., R. Co. Petitioner, 182 Mass. 439; Norwood, Petitioner, 183 Mass. 147; Old Colony R. Co., Petitioner, 185 Mass. 160; Taunton, Petitioner, 185 Mass. 199; Lancy *v.* Boston, 185 Mass. 219; Newton, Petitioner, 172 Mass. 5; New Haven, etc., R. Co. *v.* Hampshire County, 173 Mass. 12; Hadley, Petitioner, 178 Mass. 319; Westborough, Petitioner, 184 Mass. 107.

*New Jersey.* — Swift *v.* Delaware, etc., R. Co., (N. J. 1904) 57 Atl. Rep. 456, *affirmed* 66 N. J. Eq. 452.

*New York.* — People *v.* Delaware, etc., R. Co., 177 N. Y. 337. See also Lehigh Valley R. Co. *v.* Adam, 70 N. Y. App. Div. 427, *reversed* 176 N. Y. 420; Yonkers *v.* New York Cent., etc., R. Co., 32 N. Y. App. Div. 474, *affirmed* 165 N. Y. 142.

**Future Grade Crossings Prohibited Except in Certain Cases.** — Pennsylvania R. Co. *v.* Bogert, 209 Pa. St. 589.

**Validity of Ordinance.** — Under a general authority granted a municipality by the legislature, to compel railroads to construct crossings, change the location, grade, and crossings of their roads, a city has no authority to require all railroads to construct elevated tracks over all the streets within a certain district of the city, regardless of what the necessity for such a measure may be at any particular crossing. State *v.* Indianapolis Union R. Co., 160 Ind. 45.

**A Statute Prohibiting Future Grade Crossings** applies to a crossing which has to be constructed in the relocation of an old highway which crossed the railroad at grade. Millinville Bridge, 206 Pa. St. 420.

**Under a Statute Providing that the Railroad Shall Pay a Certain Per Cent. of the Cost of abolishing the crossing,** including the cost of the hearing, the fees of counsel representing the town cannot be included. Providence, etc., R. Co., Petitioner, 172 Mass. 117.

**Evidence of Proposal of Railroad to Remove the Crossing** by building an underground highway crossing is incompetent in an action to compel the railroad to build such a crossing. State *v.* Minneapolis, etc., R. Co., 90 Minn. 88.

**384. 5. Constitutionality of Statutes** — Lancy *v.* Boston, 186 Mass. 128.

**385. 1. Maine.** — Chapin *v.* Maine Cent. R. Co., 97 Me. 151.

*New York.* — People *v.* New York Cent., etc., R. Co., 31 N. Y. App. Div. 334, *affirmed* 158 N. Y. 410.

**Buffalo Grade Crossing Act.** — See Lehigh Valley R. Co. *v.* Adam, 176 N. Y. 420.

**2. Power of Commissioners to Make Alterations in Highway.** — Bristol *v.* New England R. Co., 70 Conn. 305; New Haven Steam Saw Mill Co. *v.* New Haven, 72 Conn. 276; Leighton *v.* Concord, etc., R. Co., 72 N. H. 224.

**386. 1. Apportionment of Expense.** — See New Haven Steam Saw Mill Co. *v.* New Haven, 72 Conn. 276; New York, etc., R. Co.'s Appeal, 75 Conn. 264.

**Statute Making Judgment of Commissioners Conclusive Constitutional.** — Boston, etc., R. Co. *v.* Concord, 69 N. H. 91.

**2. Mutuality of Obligations** — *United States.* — Illinois Cent. R. Co. *v.* Jones, (C. C. A.) 95 Fed. Rep. 370, *citing* 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 386; Baltimore, etc., R. Co. *v.* Anderson, (C. C. A.) 85 Fed. Rep. 413.

*Alabama.* — Memphis, etc., R. Co. *v.* Martin, 117 Ala. 367.

*Delaware.* — Knopf *v.* Philadelphia, etc., R. Co., 2 Penn. (Del.) 392.

*Indiana.* — Louisville, etc., R. Co. *v.* Schmidt, 147 Ind. 638.

*Kentucky.* — Louisville, etc., R. Co. *v.* Cummins, 111 Ky. 333, *citing* 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 386; Southern R. Co. *v.* Barbour, (Ky. 1899) 51 S. W. Rep. 159; Chesapeake, etc., R. Co. *v.* Riddle, (Ky. 1903) 72 S. W. Rep. 22.

*Maryland.* — Baltimore, etc., R. Co. *v.* State, 96 Md. 67.

*New Jersey.* — Rafferty *v.* Erie R. Co., 66 N. J. L. 444.

*Ohio.* — Watson *v.* Erie R. Co., 10 Ohio Dec. 454.

*Virginia.* — Southern R. Co. *v.* Torian, 95 Va. 453.

*West Virginia.* — Berkeley *v.* Chesapeake, etc., R. Co., 43 W. Va. 11.

**3. Each in the Exercise of a Lawful Right.** — Illinois Cent. R. Co. *v.* Klein, 95 Ill. App. 220; Esler *v.* Wabash R. Co., 109 Mo. App. 580; Chicago, etc., R. Co. *v.* Roberts, (Neb. 1902) 91 N. W. Rep. 707.

**387. 1.** Baltimore, etc., R. Co. *v.* Anderson, (C. C. A.) 85 Fed. Rep. 413; Esler *v.* Wabash R. Co., 109 Mo. App. 580; Chicago, etc., R. Co. *v.* Pollard, 53 Neb. 730.

**2. The Same Degree of Care Required of Each.** — Illinois Cent. R. Co. *v.* Jones, (C. C. A.) 95 Fed. Rep. 370; Southern Pac. R. Co. *v.* Harada, (C. C. A.) 109 Fed. Rep. 379; Knopf *v.* Philadelphia, etc., R. Co., 2 Penn. (Del.) 392; Martin *v.* Baltimore, etc., R. Co., 2 Marv. (Del.) 123; Chicago, etc., R. Co. *v.* Pearson, 82 Ill. App. 605, *affirmed* 184 Ill. 386; Louisville, etc., R. Co. *v.* Schmidt, 147 Ind. 638; Louisville, etc., R. Co. *v.* Cummins, 111 Ky. 333, *citing* 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 387; Southern R. Co. *v.* Barbour, (Ky. 1899) 51 S. W. Rep. 159; Baltimore, etc., R. Co. *v.* State, 96 Md. 67; Chicago, etc., R. Co. *v.* Roberts, (Neb. 1902) 91 N. W. Rep. 707; Gahagan *v.* Boston, etc., R. Co., 70 N. H. 441; Berkeley *v.* Chesapeake, etc., R. Co., 43 W. Va. 11.

**3. Care Commensurate with Danger.** — Martin

**388.** *c.* SUPERIOR RIGHT OF PASSAGE. — See notes 2, 3.

**2.** Duty of Railroad Company — *a.* IN GENERAL. — See note 4.

**389.** See note 1.

**390.** *b.* CARE COMMENSURATE WITH DANGER — (1) *Generally.* — See note 2.

(2) *In Populous Places.* — See note 3.

**391.** (3) *Where View Is Obstructed* — Extra Danger. — See note 1.

*v.* Baltimore, etc., R. Co., 2 Marv. (Del.) 123; Louisville, etc., R. Co. *v.* Cummins, 111 Ky. 333, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 387; Chesapeake, etc., R. Co. *v.* Riddle, (Ky. 1903) 72 S. W. Rep. 22; Reed *v.* Queen Anne's R. Co., 4 Penn. (Del.) 413; Chicago, etc., R. Co. *v.* Roberts, (Neb. 1902) 91 N. W. Rep. 707.

**388.** 2. Superior Right of Passage. — Illinois Cent. R. Co. *v.* Jones, (C. C. A.) 95 Fed. Rep. 370; Malott *v.* Hawkins, 159 Ind. 127; Stoy *v.* Louisville, etc., R. Co., 160 Ind. 144; Chicago, etc., R. Co. *v.* Roberts, (Neb. 1902) 91 N. W. Rep. 707; Gahagan *v.* Boston, etc., R. Co., 70 N. H. 441; Waldron *v.* Boston, etc., R. Co., 71 N. H. 362; Rafferty *v.* Erie R. Co., 66 N. J. L. 444; New York, etc., R. Co. *v.* Kistler, 66 Ohio St. 326; Southern R. Co. *v.* Torian, 95 Va. 453; Berkeley *v.* Chesapeake, etc., R. Co., 43 W. Va. 11.

The Superior Right Belongs Only to Moving Trains. — Allen *v.* Boston, etc., R. Co., 94 Me. 402.

**3.** Derivation of Right. — Stoy *v.* Louisville, etc., R. Co., 160 Ind. 144; Gahagan *v.* Boston, etc., R. Co., 70 N. H. 441.

**4.** Ordinary Care on Part of Company. — Louisville, etc., R. Co. *v.* Cummins, 111 Ky. 333, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 388.

**Responsibility Not Affected by Requirements as to Gates and Flagmen.** — In Louisville, etc., R. Co. *v.* Lyon, (Ky. 1900) 58 S. W. Rep. 434, it was held that "the fact that the law authorizes the railroad commissioners to compel railroads to establish gates or station flagmen, or take other precautionary measures, within a certain distance of towns or cities, was not intended to, and does not, relieve railroads from the duty devolving upon them at other points to use proper means to warn travelers at public crossings of the approach of trains."

**Only Grade Crossings Contemplated.** — Houston, etc., R. Co. *v.* Sgalinski, 19 Tex. Civ. App. 107.

**389.** 1. Ordinary Care — What Constitutes. — Wabash R. Co. *v.* Aarvig, 66 Ill. App. 146.

**390.** 2. Care Commensurate with Danger. — Illinois Cent. R. Co. *v.* Jones, (C. C. A.) 95 Fed. Rep. 370; Pennsylvania R. Co. *v.* Miller, (C. C. A.) 99 Fed. Rep. 529; Martin *v.* Baltimore, etc., R. Co., 2 Marv. (Del.) 123; Reed *v.* Queen Anne's R. Co., 4 Penn. (Del.) 413; Illinois Cent. R. Co. *v.* Chicago Title, etc., Co., 79 Ill. App. 623; Missouri Pac. R. Co. *v.* Moffatt, 60 Kan. 113, 72 Am. St. Rep. 343; Louisville, etc., R. Co. *v.* Cummins, 111 Ky. 333; Eichorn *v.* New Orleans, etc., R. etc., Co., 112 La. 236, 104 Am. St. Rep. 437; Grenell *v.* Michigan Cent. R. Co., 124 Mich. 141; Hires *v.* Atlantic City R. Co., 66 N. J. L. 30; Stewart *v.* Long Island R. Co., 54 N. Y. App. Div. 623, affirmed 166 N. Y. 604; San Antonio, etc., R. Co. *v.*

Green, 20 Tex. Civ. App. 5. See also Denton *v.* Brooklyn Heights R. Co., 75 N. Y. App. Div. 619.

**Climbing Over Cars at Crossings.** — The statement of a brakeman to a person using the street, that the latter has time to climb over a train which blocked the crossing, is binding on the railroad company. Scott *v.* St. Louis, etc., R. Co., 112 Iowa 54.

When cars which have been blocking a crossing are moved, warning should be given. Thompson *v.* Missouri, etc., R. Co., 93 Mo. App. 548.

In Todd *v.* Philadelphia, etc., R. Co., 201 Pa. St. 558, it was held to be negligent to obstruct a crossing with cars for a length of time prohibited by statute, so that a pedestrian attempting to climb over such cars is injured. Compare Kriwinski *v.* Pennsylvania R. Co., 65 N. J. L. 392.

**Care to Be Observed Toward Children.** — See Baltimore, etc., R. Co. *v.* Hellenthal, (C. C. A.) 88 Fed. Rep. 116; Smith *v.* Pittsburgh, etc., R. Co., 90 Fed. Rep. 783; Jones *v.* Harris, 186 Pa. St. 469.

**3.** In Populous Places. — Chicago, etc., R. Co. *v.* Ohlsson, 70 Ill. App. 487; Chesapeake, etc., R. Co. *v.* Dixon, 104 Ky. 608; Louisville, etc., R. Co. *v.* Cummins, 111 Ky. 333; Crowley *v.* Louisville, etc., R. Co., (Ky. 1900) 55 S. W. Rep. 434; Eichorn *v.* New Orleans, etc., R., etc., Co., 112 La. 236, 104 Am. St. Rep. 437; Willet *v.* Michigan Cent. R. Co., 114 Mich. 411; Ludden *v.* Columbus, etc., R. Co., 9 Ohio Dec. 793; Girouard *v.* Canadian Pac. R. Co., 19 Quebec Super. Ct. 529.

**391.** 1. Where View Is Obstructed — *United States.* — See Illinois Cent. R. Co. *v.* Jones, (C. C. A.) 95 Fed. Rep. 370.

*Alabama.* — Memphis, etc., R. Co. *v.* Martin, 117 Ala. 367.

*Florida.* — Florida Cent., etc., R. Co. *v.* Foxworth, 41 Fla. 1, 79 Am. St. Rep. 149.

*Kentucky.* — Chesapeake, etc., R. Co. *v.* Dixon, 104 Ky. 608; Louisville, etc., R. Co. *v.* Breeden, 111 Ky. 729.

*Louisiana.* — Orlotano *v.* Morgan's Louisiana, etc., R., etc., Co., 109 La. 902; Eichorn *v.* New Orleans, etc., R., etc., Co., 112 La. 236, 104 Am. St. Rep. 437.

*Michigan.* — Willet *v.* Michigan Cent. R. Co., 114 Mich. 411.

*New Hampshire.* — Smith *v.* Boston, etc., R. Co., 70 N. H. 53, 85 Am. St. Rep. 596.

*New York.* — Branch *v.* New York Cent., etc., R. Co., 39 N. Y. App. Div. 435.

*North Carolina.* — Norton *v.* North Carolina R. Co., 122 N. Car. 910.

*Ohio.* — Lake Shore, etc., R. Co. *v.* Schade, 8 Ohio Cir. Dec. 316.

*Pennsylvania.* — See Muckinhaupt *v.* Erie R. Co., 196 Pa. St. 213.

**392.** Illustrations. — See notes 2, 3, 5.

Question of Fact. — See note 6.

Signals — Speed of Train. — See note 7.

**393.** See note 1.

c. LOOKOUTS. — See notes 2, 3.

Must Exercise Ordinary Care. — See note 4.

**394.** Precautions as to Persons Seen at or Near Crossing. — See note 1.

*Tennessee.* — See *Nashville, etc., R. Co. v. Witherspoon*, 112 Tenn. 128.

*Texas.* — *Dalwigh v. International, etc., R. Co.*, (Tex. Civ. App. 1897) 42 S. W. Rep. 1009; *International, etc., R. Co. v. Knight*, (Tex. Civ. App. 1898) 45 S. W. Rep. 167; *International, etc., R. Co. v. Dalwigh*, (Tex. Civ. App. 1898) 48 S. W. Rep. 527. See also *Galveston, etc., R. Co. v. Harris*, 22 Tex. Civ. App. 16.

*Virginia.* — *Atlantic, etc., R. Co. v. Reiger*, 95 Va. 418; *Demaine v. Washington Southern R. Co.*, (Va. 1897) 27 S. E. Rep. 437.

**Obstructions at Crossings.** — *Toledo, etc., R. Co. v. Patterson*, 94 Ill. App. 670.

**392. 2. View Obstructed by Curves or Cuts.** — *Chesapeake, etc., R. Co. v. Dixon*, 104 Ky. 608; *Eichorn v. New Orleans, etc., R., etc., Co.*, 112 La. 236, 104 Am. St. Rep. 437.

**3. View Obstructed by Standing Cars.** — *Chicago, etc., R. Co. v. Roberts*, (Neb. 1902) 91 N. W. Rep. 707; *Whalen v. New York Cent., etc., R. Co.*, 39 N. Y. App. Div. 642; *Demaine v. Washington Southern R. Co.*, (Va. 1897) 27 S. E. Rep. 437. See also *Baltimore, etc., R. Co. v. Webster*, 6 App. Cas. (D. C.) 182.

**Obstruction for Time Allowed by Statute Not Objectionable.** — *Chicago, etc., R. Co. v. Body*, 85 Ill. App. 133.

**5. View Obstructed by Underbrush.** — *Lake Shore, etc., R. Co. v. Schade*, 8 Ohio Cir. Dec. 316; *Galveston, etc., R. Co. v. Eaton*, (Tex. Civ. App. 1898) 44 S. W. Rep. 522. See also *Ellis v. Erie R. Co.*, 66 N. J. L. 451.

**6. Negligence Question for Jury.** — *Willet v. Michigan Cent. R. Co.*, 114 Mich. 411; *Elston v. Delaware, etc., R. Co.*, 196 Pa. St. 595.

**7. Duty to Give Signals.** — *Elston v. Delaware, etc., R. Co.*, 196 Pa. St. 595.

**393. 1. Decreased Speed.** — See *Lake Shore, etc., R. Co. v. Reynolds*, 23 Ohio Cir. Ct. 199.

**2. Lookouts.** — *Louisville, etc., R. Co. v. Creighton*, 106 Ky. 42; *Bradley v. Ohio River, etc., R. Co.*, 126 N. Car. 735, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 393; *Arrowood v. South Carolina, etc., R. Co.*, 126 N. Car. 629; *Chattanooga Rapid Transit Co. v. Walton*, 105 Tenn. 415.

**3. Special Duty at Crossings.** — *Baltimore, etc., R. Co. v. Anderson*, (C. C. A.) 85 Fed. Rep. 413; *Connell v. Chesapeake, etc., R. Co.*, (Ky. 1900) 58 S. W. Rep. 374; *Louisville, etc., R. Co. v. Cooper*, (Ky. 1901) 65 S. W. Rep. 795; *Bradley v. Ohio River, etc., R. Co.*, 126 N. Car. 735, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 393; *Johnson v. Great Northern R. Co.*, 7 N. Dak. 284; *Ludden v. Columbus, etc., R. Co.*, 9 Ohio Dec. 793; *Lake Shore, etc., R. Co. v. Schade*, 8 Ohio Cir. Dec. 316; *International, etc., R. Co. v. Dalwigh*, (Tex. Civ. App. 1898) 48 S. W. Rep. 527. See also *Sullivan v. New York, etc., R. Co.*, 73 Conn. 203;

*Staggs v. Mobile, etc., R. Co.*, 77 Miss. 507; *Jones v. Probasco*, 18 Tex. Civ. App. 699.

**4. Must Exercise Ordinary Care.** — *Southern R. Co. v. Shelton*, 136 Ala. 191; *Central of Georgia R. Co. v. Partridge*, 136 Ala. 587; *Crowley v. Louisville, etc., R. Co.*, (Ky. 1900) 55 S. W. Rep. 434; *New York, etc., R. Co. v. Kistler*, 66 Ohio St. 326; *Missouri, etc., R. Co. v. Magee*, (Tex. Civ. App. 1899) 49 S. W. Rep. 156; *Missouri, etc., R. Co. v. Matherly*, (Tex. Civ. App. 1904) 81 S. W. Rep. 589. See also *Bump v. New York, etc., R. Co.*, 38 N. Y. App. Div. 60, affirming 165 N. Y. 636.

**Tennessee Statute.** — See *Southern R. Co. v. Simpson*, (C. C. A.) 131 Fed. Rep. 705.

**Negligence in Employing Engineer with Defective Eyesight.** — See *Shoemaker v. Texas, etc., R. Co.*, 29 Tex. Civ. App. 578.

**Lookout by Fireman.** — The fact that the fireman in pursuance of his duties, got down where he could not keep a lookout, while at the same time the engineer's view was obstructed by a curve, is not negligence. *O'Brien v. Wisconsin Cent. R. Co.*, 119 Wis. 7.

**In Coupling Cars at a Crossing**, where the cars have been left in such a position that they cannot be coupled without driving them over the crossing, it is negligence to make the coupling without first seeing that the crossing is clear. *St. Louis Southwestern R. Co. v. Bowles*, (Tex. Civ. App. 1903) 72 S. W. Rep. 451.

**Failure of Fireman to Inform Engineer.** — Where the fireman saw the dangerous position of a traveler but failed to inform the engineer, the question as to whether he was negligent in not doing so is for the jury. *Rafferty v. Erie R. Co.*, 66 N. J. L. 444.

**394. 1. Right to Anticipate Action** — *United States.* — *Garrett v. Illinois Cent. R. Co.*, 126 Fed. Rep. 406.

*Alabama.* — *Central of Georgia R. Co. v. Foshlee*, 125 Ala. 199; *Louisville, etc., R. Co. v. Lewis*, (Ala. 1904) 37 So. Rep. 587.

*California.* — *Green v. Los Angeles Terminal R. Co.*, 143 Cal. 31, 101 Am. St. Rep. 68; *Green v. Southern Pac. R. Co.*, 122 Cal. 563.

*Illinois.* — *Theobald v. Chicago, etc., R. Co.*, 75 Ill. App. 208.

*Indiana.* — *Cleveland, etc., R. Co. v. Miller*, 149 Ind. 490.

*Michigan.* — See *Buckley v. Flint, etc., R. Co.*, 119 Mich. 583; *Mott v. Detroit, etc., R. Co.*, 120 Mich. 127.

*Missouri.* — See also *Van Bach v. Missouri Pac. R. Co.*, 171 Mo. 338.

*New Hampshire.* — *Waldron v. Boston, etc., R. Co.*, 71 N. H. 362.

*New York.* — See *Bump v. New York, etc., R. Co.*, 38 N. Y. App. Div. 60, affirmed 165 N. Y. 636.

*Ohio.* — *New York, etc., R. Co. v. Kistler*, 66 Ohio St. 326; *New York, etc., R. Co. v. Kist-*



**394. Limitation.** — See note 2.

*d. APPLIANCES FOR PUBLIC SAFETY AT CROSSINGS — (1) In General.* — See note 3.

(2) *Gates* — (a) *Duty to Maintain.* — See note 5.

**395. See note 1.**

(b) *Operation of Gate.* — See notes 2, 3.

(c) *Duty of Gatemen.* — See note 4.

*Iler*, 9 Ohio Cir. Dec. 277; *Ludden v. Columbus*, etc., R. Co., 9 Ohio Dec. 793.

*South Carolina.* — *Gosa v. Southern R. Co.*, 67 S. Car. 347.

*Texas.* — See *Galveston*, etc., R. Co. *v. Kieff*, 94 Tex. 334.

*Virginia.* — *Savage v. Southern R. Co.*, 103 Va. 422.

*Washington.* — *Woolf v. Washington R.*, etc., Co., 37 Wash. 491.

**Question for Jury.** — Whether or not, under the circumstances, it was the duty of a railroad company to stop its train has been held to be a question for the jury. *Cincinnati*, etc., R. Co. *v. Murphy*, 10 Ohio Cir. Dec. 195.

**394. 2.** *Baltimore*, etc., R. Co. *v. Henthall*, (C. C. A.) 88 Fed. Rep. 116; *Louisville*, etc., R. Co. *v. Truett*, (C. C. A.) 111 Fed. Rep. 876; *Chicago*, etc., R. Co. *v. Pollock*, 93 Ill. App. 483, *affirmed* 195 Ill. 156; *Edwards v. Chicago*, etc., R. Co., 94 Mo. App. 36; *Robson v. Nassau Electric R. Co.*, 80 N. Y. App. Div. 301; *Fletcher v. South Carolina*, etc., R. Co., 57 S. Car. 205; *Missouri*, etc., R. Co. *v. Weatherford*, 26 Tex. Civ. App. 20; *Willey v. Boston*, etc., R. Co., 72 Vt. 120. See also *Sloniker v. Great Northern R. Co.*, 76 Minn. 306.

**Negligence of Engineer a Question for Jury.** — *Memphis*, etc., R. Co. *v. Martin*, 131 Ala. 269; *Cottrell v. Southern R. Co.*, 80 Miss. 610.

**Rule Not Applicable to Children.** — *Ludden v. Columbus*, etc., R. Co., 9 Ohio Dec. 793.

**3. Appliances for Public Safety.** — *Lake Shore*, etc., R. Co. *v. Reynolds*, 23 Ohio Cir. Ct. 199.

**Electric Gong Out of Repair.** — Evidence that a railroad had maintained an electric gong at a crossing, but that on the occasion of the accident said gong was out of repair and did not ring, is competent to show negligence. This is true though no statute required such a signal to be given, the traveler having a right to rely on the customary warning. *Cleveland*, etc., R. Co. *v. Coffman*, 30 Ind. App. 462.

**5. Gates.** — *Baltimore*, etc., R. Co. *v. Adams*, 10 App. Cas. (D. C.) 97; *Cleveland*, etc., R. Co. *v. Richerson*, 10 Ohio Cir. Dec. 326; *Christensen v. Oregon Short Line R. Co.*, (Utah 1905) 80 Pac. Rep. 746.

**Validity of City Ordinance.** — When the charter of a city does not expressly authorize it to require a railroad company to maintain gates at street crossings, an ordinance to that effect is *ultra vires* and void. *West Jersey*, etc., R. Co. *v. Bridgeton*, 64 N. J. L. 189.

**Proof that There Were No Gates Is Admissible** for the purpose of showing the physical condition and the surroundings at the place of the accident. *Cleveland*, etc., R. Co. *v. Chinsky*, 92 Ill. App. 50; *Cohen v. Chicago*, etc., R. Co., 104 Ill. App. 314.

**Violation of Ordinance Requiring Gates Held to**

**Be Negligence.** — *Pittsburg*, etc., R. Co. *v. Banfill*, 107 Ill. App. 254, *affirmed* 206 Ill. 553.

**395. 1. Dangerous Crossings.** — *Lake Shore*, etc., R. Co. *v. Reynolds*, 23 Ohio Cir. Ct. 199. See also *Chicago G. W. R. Co. v. Kowalski*, (C. C. A.) 92 Fed. Rep. 310; *New York*, etc., R. Co. *v. Moore*, (C. C. A.) 105 Fed. Rep. 725.

It is not necessary under the *New Jersey* Act of March 16, 1898, entitled "An act for the protection of railroad crossings," that the hazardous condition at a crossing shall have been caused by the railroad company, to justify a court of chancery in ordering the erection of gates. *Eckert v. Perth Amboy*, etc., R. Co., 66 N. J. Eq. 437.

**2. Operation of Gates.** — *Sager v. Atchison*, etc., R. Co., (Kan. 1905) 79 Pac. Rep. 132; *O'Keefe v. St. Louis*, etc., R. Co., 108 Mo. App. 177; *Smith v. Atlantic City R. Co.*, 66 N. J. L. 307; *Edgerley v. Long Island R. Co.*, 46 N. Y. App. Div. 284; *San Antonio*, etc., R. Co. *v. Votaw*, (Tex. Civ. App. 1904) 81 S. W. Rep. 130.

**Company Relieved of Liability by Contributory Negligence.** — *Stack v. New York Cent.*, etc., R. Co., 96 N. Y. App. Div. 575.

**A Statute Requiring Extra Precautions of a Street Railway** in operating its cars over a steam railroad does not relieve the railroad of its duty in the operation of its gates. The duties of the two companies are concurrent. *Kopp v. Baltimore*, etc., R. Co., 25 Ohio Cir. Ct. 546.

**3. Acts of Gateman Tending to Mislead.** — *Cowen v. Merriman*, 17 App. Cas. (D. C.) 186; *Chicago*, etc., R. Co. *v. Schmitz*, 211 Ill. 446; *Chicago*, etc., R. Co. *v. Redmond*, 70 Ill. App. 119, *affirmed* 171 Ill. 347; *Chicago*, etc., R. Co. *v. Gunderson*, 74 Ill. App. 356, *affirmed* 174 Ill. 495; *Cohen v. Chicago*, etc., R. Co., 104 Ill. App. 314; *Smith v. Michigan Cent. R. Co.*, (Ind. App. 1905) 73 N. E. Rep. 928; *Jenkins v. Baltimore*, etc., R. Co., 98 Md. 402; *Woehrle v. Minnesota Transfer R. Co.*, 82 Minn. 165; *Threkeld v. Wabash R. Co.*, 68 Mo. App. 127; *Smith v. Atlantic City R. Co.*, 66 N. J. L. 307; *House v. Erie R. Co.*, 26 N. Y. App. Div. 559; *Gray v. New York Cent.*, etc., R. Co., 77 N. Y. App. Div. 1.

**Admissibility of Evidence.** — *Overtown v. Chicago*, etc., R. Co., 181 Ill. 323.

**Where a Gate Is Always Kept Down During the Night**, regardless of the approach of trains, the fact that the gate is down is no warning to a passenger acquainted with such custom. *Baltimore*, etc., R. Co. *v. Landrigan*, 191 U. S. 461, *affirming* 20 App. Cas. (D. C.) 135.

**4. Duty of Gateman.** — *Walter v. Baltimore*, etc., R. Co., 6 App. Cas. (D. C.) 20; *Chicago*, etc., R. Co. *v. Wise*, 206 Ill. 453; *Baltimore*, etc., R. Co. *v. Stumpf*, 97 Md. 78.

**396.** (3) *Flagmen — Watchmen — (a) Duty to Maintain.* — See note 3.

**397.** *Dangerous Crossings.* — See notes 1, 2.

*Established Practice.* — See note 3.

**398.** *Whether Question for Court or Jury.* — See note 2.

*Presence or Absence as Bearing on Question of Negligence.* — See note 4.

**399.** (b) *By Statute or Ordinance.* — See note 2.

*Failure to Comply with Requirement.* — See note 4.

**400.** (c) *Duty of Flagmen or Watchmen.* — See note 1.

#### **Duty to Give Warning of Approaching Trains.**

— *Walsh v. Boston, etc., R. Co., 171 Mass. 52.*

#### **Negligence of Gateman a Question for Jury.**

*Tubello v. Delaware, etc., R. Co., 67 N. J. L. 581.*

**Duty of Gateman Not Confined to Operating the Gates.** — He must observe the track and give warnings, particularly to persons who are in danger of an approaching train. *Lake Shore, etc., R. Co. v. Ehlert, 10 Ohio Cir. Dec. 443.*

**396. 3. Duty to Maintain Watchmen or Flagmen.** — *Martin v. Baltimore, etc., R. Co., 2 Marv. (Del.) 123; Baltimore, etc., R. Co. v. Adams, 10 App. Cas. (D. C.) 97; Lake Shore, etc., R. Co. v. Foster, 74 Ill. App. 387; Evansville, etc., R. Co. v. Clements, 32 Ind. App. 659; Siracusa v. Atlantic City R. Co., 68 N. J. L. 446; Cleveland, etc., R. Co. v. Richerson, 10 Ohio Cir. Dec. 326; Seifred v. Pennsylvania R. Co., 206 Pa. St. 399; McGoran v. New York, etc., R. Co., 25 R. I. 387; Christensen v. Oregon Short Line R. Co., (Utah 1905) 80 Pac. Rep. 746.*

**Signboards, Signals, Flagmen, and Gates at Crossings.** — *Hutcherson v. Louisville, etc., R. Co., (Ky. 1899) 52 S. W. Rep. 955.*

**Validity of Ordinance Requiring Watchman.** — An ordinance requiring a railroad company to keep a watchman at a dangerous crossing within the town limits is a valid police regulation, but such an ordinance will not be sustained if the crossing is in the open country. *Com. v. Philadelphia, etc., R. Co., 23 Pa. Super. Ct. 205.*

**397. 1. Flagmen Required under Certain Circumstances.** — *Kowalski v. Chicago G. W. R. Co., 84 Fed. Rep. 586, affirmed (C. C. A.) 92 Fed. Rep. 310; Chesapeake, etc., R. Co. v. Gunter, 108 Ky. 362; McSorley v. New York Cent., etc., R. Co., 60 N. Y. App. Div. 267; Missouri, etc., R. Co. v. Magee, 92 Tex. 616; Central Texas, etc., R. Co. v. Gibson, (Tex. Civ. App. 1904) 79 S. W. Rep. 351. See also Louisville, etc., R. Co. v. Cummins, 111 Ky. 333.*

**2. Danger Exceptional.** — *Lake Shore, etc., R. Co. v. Reynolds, 23 Ohio Cir. Ct. 199; Central Texas, etc., R. Co. v. Gibson, (Tex. Civ. App. 1904) 79 S. W. Rep. 351. See also Siracusa v. Atlantic City R. Co., 68 N. J. L. 446.*

**3. Established Practice.** — *Dolph v. New York, etc., R. Co., 74 Conn. 538; Martin v. Baltimore, etc., R. Co., 2 Marv. (Del.) 123.*

**398. 2. Question for Jury.** — *Wiletski v. Chicago G. W. R. Co., 84 Fed. Rep. 586, affirmed (C. C. A.) 92 Fed. Rep. 310; Lake Shore, etc., R. Co. v. Foster, 74 Ill. App. 387; Willet v. Michigan Cent. R. Co., 114 Mich. 411; Folsom v. Concord, etc., R. Co., 68 N. H. 454; Bradley v. Ohio River, etc., R. Co., 126 N. Car. 735, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 398; Cleveland, etc., R. Co. v. Richerson, 10 Ohio Cir. Dec. 326; Missouri, etc., R. Co. v.*

*Magee, (Tex. Civ. App. 1899) 49 S. W. Rep. 156, 92 Tex. 616; International, etc., R. Co. v. Jones, (Tex. Civ. App. 1901) 60 S. W. Rep. 978; Central Texas, etc., R. Co. v. Gibson, (Tex. Civ. App. 1904) 83 S. W. Rep. 862.*

**4. Presence or Absence as Bearing on Question of Negligence.** — *Lake Shore, etc., R. Co. v. Foster, 74 Ill. App. 387; Chicago, etc., R. Co. v. Gunderson, 174 Ill. 495, affirming 74 Ill. App. 356; Pratt v. Chicago, etc., R. Co., 107 Iowa 287; Montgomery v. Missouri Pac. R. Co., 181 Mo. 477; St. John v. New York Cent., etc., R. Co., 165 N. Y. 241; Harrington v. Erie R. Co., 79 N. Y. App. Div. 26; McAuliffe v. New York Cent., etc., R. Co., 88 N. Y. App. Div. 356, affirmed 181 N. Y. 537; Lake Shore, etc., R. Co. v. Johnston, 25 Ohio Cir. Ct. 41; Seifred v. Pennsylvania R. Co., 206 Pa. St. 399; Carrow v. Barre R. Co., 74 Vt. 176. See also Chicago, etc., R. Co. v. Durand, 65 Kan. 380.*

**399. 2. Statutes.** — A statute requiring railroad companies, under a penalty, to station a flagman at any street crossing when notified by the public authorities having charge of such street that a flagman is necessary, and a statute giving village trustees power to require railroad companies to keep flagmen at street crossings, are to be construed together; and therefore, a notice given by village trustees to a railroad company, to place a flagman at a certain crossing is ineffectual without the prior passage of an ordinance declaring that a flagman is necessary at such crossing. *Altamont v. Baltimore, etc., R. Co., 184 Ill. 47, affirming 84 Ill. App. 274.*

**Ordinance.** — *Southern R. Co. v. Aldridge, 101 Va. 142.*

**Burden of Proof on Plaintiff to Statute Requiring Flagman.** — *Wabash R. Co. v. Mahoney, 79 Ill. App. 53.*

**4. Failure to Comply with Ordinance.** — See *Southern R. Co. v. Aldridge, 101 Va. 142.*

**400. 1. Presumption in Absence of Signals.** — *Martin v. Baltimore, etc., R. Co., 2 Marv. (Del.) 123; Chicago, etc., R. Co. v. Blaul, 70 Ill. App. 518, affirmed 175 Ill. 183; Pittsburg, etc., R. Co. v. Smith, 110 Ill. App. 154, reversed 207 Ill. 486; Chicago Junction R. Co. v. McAnrow, 114 Ill. App. 501; Sights v. Louisville, etc., R. Co., (Ky. 1904) 78 S. W. Rep. 172; House v. Erie R. Co., 26 N. Y. App. Div. 559; Houston, etc., R. Co. v. Byrd, (Tex. Civ. App. 1901) 61 S. W. Rep. 147. See also Roberts v. Boston, etc., R. Co., 60 N. H. 354.*

**Flagman's Neglect of Duty Must Be Proximate Cause of Injury.** — *Bell v. Texas, etc., R. Co., (Tex. Civ. App. 1902) 70 S. W. Rep. 573.*

**Duty to Maintain Flagman Immaterial.** — Where a railroad assumed the duty to protect a crossing by a flagman, it was bound to perform it with due care and it was immaterial that the

**400.** Liability for Negligence of Flagman. — See note 2.

**401.** (4) *Signs* — (e) *Statutory Requirements*. — See notes 5, 6.

**402.** e. *RATE OF SPEED* — (1) *In General*. — See note 2.  
(2) *Right of Railroad Company to Regulate Speed*. — See notes 3, 4.

**403.** See note 1.

(3) *Rate of Speed Must Vary According to Locality* — (a) *In General*.

— See note 2.

(b) *Country Crossings*. — See note 3.

**404.** (c) *In Cities and Towns*. — See note 1.

(d) *Dangerous Places*. — See note 2.

*Rate of Speed Question for Jury*. — See note 3.

company was not required to maintain a flagman at all. *Wolcott v. New York, etc., R. Co.*, 68 N. J. L. 421. See also *Siracusa v. Atlantic City R. Co.*, 68 N. J. L. 446.

**Negligence of Flagman a Question for Jury.** — *Wolcott v. New York, etc., R. Co.*, 68 N. J. L. 421.

**No Duty to Person Crossing Outside Street Limits.** — *Strickland v. New York Cent., etc., R. Co.*, 88 N. Y. App. Div. 367.

**The Traveler Must Exercise Due Care** notwithstanding the presumption. *Hancock v. Lake Erie, etc., R. Co.*, 21 Ind. App. 10.

**Duty of Flagman to Protect Children.** — *Jones v. Harris*, 186 Pa. St. 469.

**400. 2. Liability for Negligence of Flagman.** — *Chicago Junction R. Co. v. McAnrow*, 114 Ill. App. 501; *Edwards v. Chicago, etc., R. Co.*, 94 Mo. App. 36.

**Carelessness in Giving Signal.** — *Coleman v. Pennsylvania R. Co.*, 195 Pa. St. 485.

**401. 5. Substantial Compliance with Statute as to Shipment.** — *Wellbrock v. Long Island R. Co.*, (Supm. Ct. Tr. T.) 31 Misc. (N. Y.) 424; *Lewis v. Long Island R. Co.*, (Supm. Ct. Tr. T.) 31 Misc. (N. Y.) 546.

**Statute Requiring Sign Boards at Crossings Not Applicable to Overhead Crossings.** — *Albia v. Chicago, etc., R. Co.*, 102 Iowa 624.

**A Railroad in the Hands of a Receiver** is not relieved of the duty to erect and maintain boards as required by statute. *Arkansas Cent. R. Co. v. State*, 72 Ark. 252.

**6. Intention of Statutes.** — *Henn v. Long Island R. Co.*, 51 N. Y. App. Div. 292; *New York, etc., R. Co. v. Kistler*, 9 Ohio Cir. Dec. 277. See also *Lewis v. Long Island R. Co.*, 162 N. Y. 52.

**402. 2. Speed of Train a Subject for Opinion Evidence by Nonexpert.** — *Louisville, etc., R. Co. v. Stewart*, 128 Ala. 313; *Flanagan v. New York Cent., etc., R. Co.*, 70 N. Y. App. Div. 505, *affirmed* 173 N. Y. 631; *Baltimore, etc., R. Co. v. Van Horn*, 12 Ohio Cir. Dec. 106.

**3. Right to Regulate Speed.** — *Reed v. Queen Anne's R. Co.*, 4 Penn. (Del.) 413; *Landon v. Chicago, etc., R. Co.*, 92 Ill. App. 216; *Boyd v. Chicago, etc., R. Co.*, 103 Ill. App. 199.

**4. Question of Fact.** — *Chicago, etc., R. Co. v. Pearson*, 71 Ill. App. 622; *Missouri, etc., R. Co. v. Melugin*, (Tex. Civ. App. 1901) 63 S. W. Rep. 338.

**403. 1. No Rate of Speed Negligence Per Se.** — *Cox v. Chicago, etc., R. Co.*, 92 Ill. App. 15; *Landon v. Chicago, etc., R. Co.*, 92 Ill. App. 216; *Boyd v. Chicago, etc., R. Co.*, 103 Ill. App.

199; *Custer v. Baltimore, etc., R. Co.*, 19 Pa. Super. Ct. 365.

**2. Rate of Speed Must Vary.** — *Lake Shore, etc., R. Co. v. Johnston*, 25 Ohio Cir. Ct. 41.

**3. In Open Country.** — *Davis v. Chesapeake, etc., R. Co.*, 116 Ky. 144; *Parkerson v. Louisville, etc., R. Co.*, (Ky. 1904) 80 S. W. Rep. 468; *Louisville, etc., R. Co. v. Cummins*, 111 Ky. 333; *Atchison, etc., R. Co. v. Judah*, 65 Kan. 474; *Hunt v. Fitchburg R. Co.*, 22 N. Y. App. Div. 212; *Lake Shore, etc., R. Co. v. Schade*, 8 Ohio Cir. Dec. 316; *Custer v. Baltimore, etc., R. Co.*, 206 Pa. St. 529; *Sutton v. Chicago, etc., R. Co.*, 98 Wis. 157. See also *Hajsek v. Chicago, etc., R. Co.*, (Neb. 1903) 97 N. W. Rep. 327.

**Not Required to Slacken Speed at Private Crossings.** — *Louisville, etc., R. Co. v. Survant*, (Ky. 1898) 44 S. W. Rep. 88.

**404. 1. In Cities and Towns — Alabama.** — *Memphis, etc., R. Co. v. Martin*, 117 Ala. 367.

*Illinois.* — *Chicago, etc., R. Co. v. Ohlsson*, 70 Ill. App. 487.

*Indiana.* — *Cleveland, etc., R. Co. v. Miles*, 162 Ind. 646. See also *Evansville, etc., R. Co. v. Clements*, 32 Ind. App. 659.

*Kentucky.* — *Chesapeake, etc., R. Co. v. Dixon*, 104 Ky. 608; *Louisville, etc., R. Co. v. Cummins*, 111 Ky. 333.

*Mississippi.* — *New Orleans, etc., R. Co. v. Brooks*, 85 Miss. 269.

*Missouri.* — *Gruebel v. Wabash R. Co.*, 108 Mo. App. 548.

*Ohio.* — *Ludden v. Columbus, etc., R. Co.*, 9 Ohio Dec. 793; *Lake Shore, etc., R. Co. v. Johnston*, 25 Ohio Cir. Ct. 41; *Lake Shore, etc., R. Co. v. Ehlert*, 10 Ohio Cir. Dec. 443.

*Pennsylvania.* — *Custer v. Baltimore, etc., R. Co.*, 206 Pa. St. 529.

*Utah.* — *Olson v. Oregon Short Line R. Co.*, 24 Utah 460.

**Admissibility of Evidence.** — *Overtoom v. Chicago, etc., R. Co.*, 181 Ill. 323.

**2. Dangerous Places.** — *Reed v. Queen Anne's R. Co.*, 4 Penn. (Del.) 413; *Lake Shore, etc., R. Co. v. Schade*, 8 Ohio Cir. Dec. 316.

**3. Rate of Speed Question for Jury — Georgia.** — *Georgia R., etc., Co. v. Cromer*, 106 Ga. 296.

*Illinois.* — *Chicago, etc., R. Co. v. Pearson*, 71 Ill. App. 622; *Lake Shore, etc., R. Co. v. Foster*, 74 Ill. App. 387; *Chicago G. W. R. Co. v. Mohan*, 88 Ill. App. 151, *affirmed* 187 Ill. 281.

*Minnesota.* — *Lammers v. Great Northern R. Co.*, 82 Minn. 120.

*Missouri.* — *Klockenbrink v. St. Louis, etc., R. Co.*, 81 Mo. App. 351.



**405.** Usual Rate of Speed Without Signals. — See note 2.

(4) *By Statute or Ordinance* — (a) *In General*. — See note 3.

**406.** Constitutionality. — See note 1.

(b) *Speed in Violation of Ordinance*. — See note 3.

**407.** See note 1.

*Nebraska*. — *Chicago, etc., R. Co. v. Sporer*, (Neb. 1903) 94 N. W. Rep. 991.

*New Hampshire*. — See *Davis v. Concord*, etc., R. Co., 68 N. H. 247.

*New York*. — *Zwack v. New York, etc., R. Co.*, 160 N. Y. 362; *Noble v. New York Cent., etc., R. Co.*, 20 N. Y. App. Div. 40, *affirmed* 161 N. Y. 620; *Lewin v. Lehigh Valley R. Co.*, 41 N. Y. App. Div. 89; *Frederick v. Fonda, etc., R. Co.*, 52 N. Y. App. Div. 603.

*Ohio*. — *Baltimore, etc., R. Co. v. Stoltz*, 9 Ohio Cir. Dec. 638.

*Pennsylvania*. — *Coleman v. Pennsylvania R. Co.*, 195 Pa. St. 485.

*South Carolina*. — *Risinger v. Southern R. Co.*, 59 S. Car. 429; *Kirby v. Southern R. Co.*, 63 S. Car. 494.

*Texas*. — *International, etc., R. Co. v. Starling*, 16 Tex. Civ. App. 365; *Galveston, etc., R. Co. v. Eaten*, (Tex. Civ. App. 1898) 44 S. W. Rep. 562.

*Wisconsin*. — *Schaidler v. Chicago, etc., R. Co.*, 102 Wis. 564.

**Opinion Evidence as to the Rate of Speed** may be given by a nonexpert witness. *Baltimore, etc., R. Co. v. Stoltz*, 9 Ohio Cir. Dec. 638.

**405. 2. Speed Rendering Signals Unavailing.** — *Hunt v. Fitchburg R. Co.*, 22 N. Y. App. Div. 212; *Olson v. Oregon Short Line R. Co.*, 24 Utah 460.

**3. Statutory Regulations.** — *Hemingway v. Illinois Cent. R. Co.*, (C. C. A.) 114 Fed. Rep. 843; *Comer v. Barfield*, 102 Ga. 485; *Chicago, etc., R. Co. v. Smith*, 77 Ill. App. 492, *affirmed* 180 Ill. 453; *Chicago, etc., R. Co. v. Fell*, 79 Ill. App. 376, *affirmed* 182 Ill. 523; *Chicago, etc., R. Co. v. Beaver*, 96 Ill. App. 558, *affirmed* 199 Ill. 34; *Stoltz v. Baltimore, etc., R. Co.*, 7 Ohio Dec. 435; *Blackburn v. Southern Pac. R. Co.*, 34 Oregon 215; *O'Brien v. Wisconsin Cent. R. Co.*, 119 Wis. 7.

**Mode of Running at Crossings.** — *Illinois Cent. R. Co. v. McCalip*, 76 Miss. 360.

**Right of Traveler to Assume that Statutory Speed Not Exceeded.** — *Stoltz v. Baltimore, etc., R. Co.*, 7 Ohio Dec. 435.

**406. 1. Exercise of Police Power.** — *Baltimore, etc., R. Co. v. Reynolds*, 33 Ind. App. 219.

**3. Speed in Violation of Ordinance.** — *Edwards v. Chicago, etc., R. Co.*, 94 Mo. App. 36; *Norton v. North Carolina R. Co.*, 122 N. Car. 910; *International, etc., R. Co. v. Dalwigh*, (Tex. Civ. App. 1898) 48 S. W. Rep. 527; *Texas, etc., R. Co. v. Moore*, (Tex. Civ. App. 1900) 56 S. W. Rep. 248; *Missouri, etc., R. Co. v. Matherly*, (Tex. Civ. App. 1904) 81 S. W. Rep. 589; *Washington Southern R. Co. v. Lacey*, 94 Va. 460; *Brown v. Chicago, etc., R. Co.*, 109 Wis. 384. See also *Central of Georgia R. Co. v. Partridge*, 136 Ala. 587; *McAuliffe v. New York Cent., etc., R. Co.*, 88 N. Y. App. Div. 358, *affirmed* 181 N. Y. 537; *Southern R. Co. v. Aldridge*, 101 Va. 142; *Schroeder v. Wisconsin Cent. R. Co.*, 117 Wis. 33.

**Proximate Cause.** — *Smith v. Michigan Cent. R. Co.*, (Ind. App. 1905) 73 N. E. Rep. 928; *Morey v. Lake Superior Terminal, etc., R. Co.*, (Wis. 1905) 103 N. W. Rep. 271. See also *Chicago, etc., R. Co. v. Mochell*, 193 Ill. 208, 86 Am. St. Rep. 318; *Frazier v. Southern R. Co.*, 130 N. Car. 355.

Running at a rate of speed prohibited by ordinance is not the proximate cause of an injury which the plaintiff, by due care, could have avoided. *Stahl v. Lake Shore, etc., R. Co.*, 117 Mich. 273.

In *Texas* the doctrine of the proximate cause, in so far as it involves the doctrine of comparative negligence, does not obtain. *Texas Midland R. Co. v. Tidwell*, (Tex. Civ. App. 1899) 49 S. W. Rep. 641.

**Negligence as Matter of Law.** — *Central of Georgia R. Co. v. Tribble*, 112 Ga. 863; *Chicago, etc., R. Co. v. Pulliam*, 111 Ill. App. 305, *affirmed* 208 Ill. 456; *Wabash R. Co. v. Kamradt*, 109 Ill. App. 203.

**Right of Traveler to Assume Observance of Ordinance.** — *Davenport, etc., R. Co. v. De Yaeger*, 112 Ill. App. 537; *Baltimore, etc., R. Co. v. Van Horn*, 12 Ohio Cir. Dec. 106.

**Right of Traveler to Assume Compliance with Statute.** — *Hutchinson v. Missouri Pac. R. Co.*, 161 Mo. 246, 84 Am. St. Rep. 710.

**Unlawful Speed Presumed to Be Cause of Injury.** — *Chicago, etc., R. Co. v. Smith*, 77 Ill. App. 492, *affirmed* 180 Ill. 453.

**Unlawful Speed Does Not Show Wantonness.** — *Chicago, etc., R. Co. v. Stone*, 109 Ill. App. 517.

**Negligence as Matter of Law.** — *Chicago, etc., R. Co. v. Mochell*, 193 Ill. 208, 86 Am. St. Rep. 318, *affirming* 96 Ill. App. 178. See also *Chicago, etc., R. Co. v. Fell*, 79 Ill. App. 376, *affirmed* 182 Ill. 523; *Chicago, etc., R. Co. v. Beaver*, 96 Ill. App. 558, *affirmed* 199 Ill. 34; *Chicago, etc., R. Co. v. Jamieson*, 112 Ill. App. 69.

**407. 1. Circumstances from Which Negligence Can Be Inferred.** — *Georgia R., etc., Co. v. Cromer*, 106 Ga. 296; *Central of Georgia R. Co. v. Bond*, 114 Ga. 913; *Golinvaux v. Burlington, etc., R. Co.*, 125 Iowa 652; *Haines v. Lake Shore, etc., R. Co.*, 129 Mich. 475; *Edwards v. Atlantic Coast Line R. Co.*, 129 N. Car. 78; *Stoltz v. Baltimore, etc., R. Co.*, 7 Ohio Dec. 435; *Lake Shore, etc., R. Co. v. Johnston*, 25 Ohio Cir. Ct. 41; *Faust v. Philadelphia, etc., R. Co.*, 191 Pa. St. 420. See also *Shatto v. Erie R. Co.*, (C. C. A.) 121 Fed. Rep. 678; *Watson v. Erie R. Co.*, 10 Ohio Dec. 454.

**Proximate Cause.** — *Chicago, etc., R. Co. v. Mochell*, 96 Ill. App. 178, *affirmed* 193 Ill. 208, 86 Am. St. Rep. 318; *Cincinnati, etc., R. Co. v. Murphy*, 10 Ohio Cir. Dec. 195, 18 Ohio Cir. Ct. 298; *Blackburn v. Southern Pac. R. Co.*, 34 Oregon 215; *Brown v. Chicago, etc., R. Co.*, 109 Wis. 384. See also *Knopf v. Philadelphia, etc., R. Co.*, 2 Penn. (Del.) 392; *Day v. Boston, etc., R. Co.*, 96 Me. 207, 90 Am. St. Rep. 335.

**Other Means of Information Open to Traveler**

**407.** *f.* DUTY TO GIVE SIGNALS — (1) *In General*. — See note 2.

**408.** See note 1.

(2) *By Statute* — (a) *In General*. — See note 2.

**No Excuse for Omission.** — *Faust v. Philadelphia*, etc., R. Co., 191 Pa. St. 420.

**Ordinance Held Inadmissible as Evidence.** — See *Southern R. Co. v. Wood*, (Ky. 1899) 52 S. W. Rep. 796.

**Question for Jury.** — Whether a rate of speed prohibited by ordinance was the proximate cause of the injury is a question for the jury. *Chicago, etc., R. Co. v. Mochell*, 96 Ill. App. 178, *affirmed* 193 Ill. 208, 86 Am. St. Rep. 318.

**407. 2. Train Must Give Reasonable Warning of Approach** — *United States*. — *Chesapeake, etc., R. Co. v. Steele*, (C. C. A.) 84 Fed. Rep. 93.

*Delaware.* — *Reed v. Queen Anne's R. Co.*, 4 Penn. (Del.) 413.

*Georgia.* — *Atlanta, etc., R. Co. v. Durham*, 108 Ga. 547.

*Illinois.* — *Chicago, etc., R. Co. v. Gunderson*, 174 Ill. 495, *affirming* 74 Ill. App. 356; *Elgin, etc., R. Co. v. Duffy*, 191 Ill. 489; *Cleveland, etc., R. Co. v. Baker*, 106 Ill. App. 500.

*Indiana.* — *Aurelius v. Lake Erie, etc., R. Co.*, 19 Ind. App. 584; *Nichols v. Baltimore, etc., R. Co.*, 33 Ind. App. 229; *Evansville, etc., R. Co. v. Clements*, 32 Ind. App. 659.

*Kentucky.* — *Chesapeake, etc., R. Co. v. Dixon*, 104 Ky. 608; *Connell v. Chesapeake, etc., R. Co.*, (Ky. 1900) 58 S. W. Rep. 374; *Mobile, etc., R. Co. v. Roper*, (Ky. 1900) 58 S. W. Rep. 518; *Louisville, etc., R. Co. v. Cooper*, (Ky. 1901) 65 S. W. Rep. 795.

*New York.* — *Schermerhorn v. New York Cent., etc., R. Co.*, 33 N. Y. App. Div. 17; *O'Bierne v. New York Cent., etc., R. Co.*, 37 N. Y. App. Div. 547, *affirmed* 167 N. Y. 568; *Manley v. New York Cent., etc., R. Co.*, 39 N. Y. App. Div. 144; *Branch v. New York Cent., etc., R. Co.*, 39 N. Y. App. Div. 435; *Whalen v. New York Cent., etc., R. Co.*, 39 N. Y. App. Div. 642; *Berkery v. Erie R. Co.*, 55 N. Y. App. Div. 489, *affirmed* 172 N. Y. 636; *Corbally v. Erie R. Co.*, 97 N. Y. App. Div. 21.

*North Carolina.* — *Norton v. North Carolina R. Co.*, 122 N. Car. 910.

*Ohio.* — *Lake Shore, etc., R. Co. v. Schade*, 8 Ohio Cir. Dec. 316.

*Pennsylvania.* — *Golden v. Pennsylvania R. Co.*, 187 Pa. St. 635; *Coleman v. Pennsylvania R. Co.*, 195 Pa. St. 485; *Wolfe v. Pennsylvania R. Co.*, 22 Pa. Super. Ct. 335.

*Texas.* — *Dalwigh v. International, etc., R. Co.*, (Tex. Civ. App. 1897) 42 S. W. Rep. 1009; *International, etc., R. Co. v. Dalwigh*, (Tex. Civ. App. 1898) 48 S. W. Rep. 527; *Texas, etc., R. Co. v. Moore*, (Tex. Civ. App. 1900) 56 S. W. Rep. 248; *Houston, etc., R. Co. v. Byrd*, (Tex. Civ. App. 1901) 61 S. W. Rep. 147.

*Virginia.* — *Southern R. Co. v. Bryant*, 95 Va. 212; *Washington Southern R. Co. v. Lacey*, 94 Va. 460.

*Wisconsin.* — *Schaidler v. Chicago, etc., R. Co.*, 102 Wis. 564.

**408. 1. Right to Presume that Warning Will Be Given.** — *Central of Georgia R. Co. v. Bond*, 114 Ga. 913; *Chicago, etc., R. Co. v. Gunderson*, 74 Ill. App. 356, *affirmed* 174 Ill. 495; *St.*

*Louis, etc., R. Co. v. Rawley*, 106 Ill. App. 550; *St. Louis, etc., R. Co. v. Dawson*, 64 Kan. 99; *Weller v. Chicago, etc., R. Co.*, 164 Mo. 180; *Baltimore, etc., R. Co. v. Van Horn*, 12 Ohio Cir. Dec. 106; *Watson v. Erie R. Co.*, 10 Ohio Dec. 454; *Missouri, etc., R. Co. v. Brantley*, 26 Tex. Civ. App. 11. See also *Peirce v. Ray*, 24 Ind. App. 302.

**2. Statutes Providing for Signals at Crossings** — *California.* — *Green v. Southern Pac. R. Co.*, 122 Cal. 563.

*Connecticut.* — *Tessmer v. New York, etc., R. Co.*, 72 Conn. 208.

*Florida.* — *Florida Cent., etc., R. Co. v. Foxworth*, 41 Fla. 1, 79 Am. St. Rep. 149.

*Georgia.* — *Comer v. Barfield*, 102 Ga. 485.

*Indiana.* — *Baltimore, etc., R. Co. v. Conoyer*, 149 Ind. 524; *Baltimore, etc., R. Co. v. Young*, 153 Ind. 163; *Aurelius v. Lake Erie, etc., R. Co.*, 19 Ind. App. 584; *Greenawaldt v. Lake Shore, etc., R. Co.*, (Ind. 1905) 73 N. E. Rep. 910.

*Massachusetts.* — *Lamoureux v. New York, etc., R. Co.*, 169 Mass. 338; *Walsh v. Boston, etc., R. Co.*, 171 Mass. 52.

*Missouri.* — *Lamb v. Missouri Pac. R. Co.*, 147 Mo. 171; *Elliott v. Chicago, etc., R. Co.*, 105 Mo. App. 523.

*New Hampshire.* — *Smith v. Boston, etc., R. Co.*, 70 N. H. 53, 85 Am. St. Rep. 596; *Gahagan v. Boston, etc., R. Co.*, 70 N. H. 441.

*New York.* — *McAuliffe v. New York Cent., etc., R. Co.*, 88 N. Y. App. Div. 356, *affirmed* 181 N. Y. 537; *McSorley v. New York Cent., etc., R. Co.*, 60 N. Y. App. Div. 267.

*South Carolina.* — *Risinger v. Southern R. Co.*, 59 S. Car. 429; *Burns v. Southern R. Co.*, 61 S. Car. 404; *Hutto v. South Bound R. Co.*, 61 S. Car. 495; *Kirby v. Southern R. Co.*, 63 S. Car. 494; *Littlejohn v. Richmond, etc., R. Co.*, 49 S. Car. 12; *Davis v. Southern R. Co.*, 68 S. Car. 446.

*Texas.* — *Houston, etc., R. Co. v. O'Neal*, 91 Tex. 671; *Galveston, etc., R. Co. v. Eaten*, (Tex. Civ. App. 1898) 44 S. W. Rep. 562; *Williams v. Cross*, 19 Tex. Civ. App. 426; *Texas, etc., R. Co. v. Scrivener*, (Tex. Civ. App. 1899) 49 S. W. Rep. 649; *Missouri, etc., R. Co. v. Magee*, (Tex. Civ. App. 1899) 49 S. W. Rep. 156, 92 Tex. 616; *Missouri, etc., R. Co. v. Taff*, 31 Tex. Civ. App. 657; *St. Louis Southwestern R. Co. v. Matthews*, 34 Tex. Civ. App. 302; *Galveston, etc., R. Co. v. Levy*, (Tex. Civ. App. 1904) 79 S. W. Rep. 879; *Missouri, etc., R. Co. v. Matherly*, (Tex. Civ. App. 1904) 81 S. W. Rep. 589.

*Virginia.* — *Atlantic, etc., R. Co. v. Reiger*, 95 Va. 418; *Simons v. Southern R. Co.*, 96 Va. 152.

**Highway Over or Under Track.** — Under the *New York* statute a railroad owes no positive duty to give signals except at grade crossings. *Skinner v. New York, etc., R. Co.*, (Supm. Ct. Tr. T.) 64 N. Y. Supp. 325.

In *Texas* it has been held that such a statute applies only to grade crossings. *Houston, etc., R. Co. v. Sgalinski*, 19 Tex. Civ. App. 107.

**409.** (b) Object and Purpose of Statutes — Protection of Travelers on Highway. — See note 2.

**410.** Not for Protection of Persons Walking Along or Parallel with Track. — See notes 1, 2.

Persons in Vicinity of Crossing. — See notes 3, 4.

(c) At What Crossings Warnings to Be Given. — See note 6.

**411.** Crossings Within City Limits. — See notes 1, 2.

**412.** (d) Constitutionality of Statutes. — See note 1.

(3) *Duty Without Statute to Signal at Places of Known Danger.* —

See note 2.

In Cities and Towns. — See note 3.

Where View Is Obstructed. — See note 4.

(4) *Place to Give Signals — Distance from Crossing.* — See note 5.

**No Warning Required.** — *Cooper v. Charleston, etc., R. Co., 65 S. Car. 214.*

**South Carolina Statute.** — When the statute provides that if an engine or car be standing less than one hundred rods from a crossing, the bell shall be rung thirty seconds before it moves, a train of cars obstructing the crossing must give such signal. *Littlejohn v. Richmond, etc., R. Co., 49 S. Car. 12.*

**An Ordinance Requiring the Signal to Be Given by a Member of the Train Crew** is unreasonable as there is no reason why the signal would not be equally efficacious if given by another employee of the company. *Central R. Co. v. Elizabeth, 70 N. J. L. 578.*

**Illinois Statute Not Applicable to Hand Cars.** — *Chicago, etc., R. Co. v. Vremeister, 112 Ill. App. 346.*

**No Signals Required of Hand Cars.** — *Louisville, etc., R. Co. v. Howerton, 115 Ky. 89.*

**409. 2. Object and Purpose of Statute.** — *Pennsylvania R. Co. v. Fertig, 34 Ind. App. 459; Boyden v. Fitchburg R. Co., 72 Vt. 89.*

**Statute Applicable Only to Grade Crossings.** — *Cleveland, etc., R. Co. v. Halbert, 179 Ill. 196, reversing 75 Ill. App. 592.*

**Signals Required Only at Grade Crossings.** — *Louisville, etc., R. Co. v. Sawyer, (Tenn. 1905) 86 S. W. Rep. 386.*

**Persons Using Private Crossing.** — It has been held that persons lawfully using a private crossing in the vicinity of a public crossing are entitled to the benefit of signals required to be given at the latter, and that a failure to give such signals is negligence as to persons using the private crossing. *Wilson v. Chesapeake, etc., R. Co., (Ky. 1905) 86 S. W. Rep. 690.*

**410. 1. Persons Walking Along Track.** — *Davis v. Chesapeake, etc., R. Co., 116 Ky. 144. Compare Chicago, etc., R. Co. v. Pollock, 93 Ill. App. 483, affirmed 195 Ill. 156.*

**A Person Walking Diagonally Across a Crossing** is not a trespasser. *Louisville, etc., R. Co. v. Price, (Ky. 1903) 76 S. W. Rep. 836.*

**2. Walking Parallel with Track.** — *Illinois Cent. R. Co. v. Schmitt, 100 Ill. App. 490.*

**3. Missouri, etc., R. Co. v. Taff, 31 Tex. Civ. App. 657.**

**4. Williams v. Cross, 19 Tex. Civ. App. 426.** See also *Chicago, etc., R. Co. v. Urbaniac, 106 Ill. App. 325; Lake Shore, etc., R. Co. v. Harris, 23 Ohio Cir. Ct. 400.*

**6. What Is a Traveled Public Road or Place.** — See *Kirby v. Southern R. Co., 63 S. Car. 494.*

**Signals at Other than Grade Crossings** may be necessary for the protection of those who may be riding or driving on the highway. *Chesapeake, etc., R. Co. v. Ogles, (Ky. 1903) 73 S. W. Rep. 751.*

**Signal Required Only at Crossings.** — *Farley v. Harris, 186 Pa. St. 440.*

**Signal at Crossings Designated by Sign.** — *Southern R. Co. v. Elder, (C. C. A.) 81 Fed. Rep. 791.*

**411. 1. No Application to Crossings Within City Limits.** — *Pratt v. Chicago, etc., R. Co., 107 Iowa 287.*

**2. Duty to Give Signals at Street Crossing.** — *Sights v. Louisville, etc., R. Co., (Ky. 1904) 78 S. W. Rep. 172.*

**412. 1. Not Interfering with Interstate Commerce.** — A statute requiring signals to be given at crossings does not interfere with interstate commerce, though the observance of the statute necessitates a delay of the train to secure a new whistle. *Willfong v. Omaha, etc., R. Co., 116 Iowa 548.*

**2. Dangerous Places.** — *Illinois Cent. R. Co. v. Scheffner, 106 Ill. App. 344, affirmed 209 Ill. 9; Cooper v. Charleston, etc., R. Co., 65 S. Car. 214, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 412.*

**3. In Cities and Towns.** — *Shatto v. Erie R. Co., (C. C. A.) 121 Fed. Rep. 678; Lake Shore, etc., R. Co. v. Boyts, 16 Ind. App. 640; Cleveland, etc., R. Co. v. Miles, 162 Ind. 646; Louisville, etc., R. Co. v. Ward, (Ky. 1898) 44 S. W. Rep. 1112; Gruebel v. Wabash R. Co., 108 Mo. App. 548.*

**4. When View Is Obstructed.** — *Chesapeake, etc., R. Co. v. Steele, (C. C. A.) 84 Fed. Rep. 93; Northern Pac. R. Co. v. Spike, (C. C. A.) 121 Fed. Rep. 44; Norton v. North Carolina R. Co., 122 N. Car. 910; International, etc., R. Co. v. Knight, (Tex. Civ. App. 1898) 45 S. W. Rep. 167. See also Tessmer v. New York, etc., R. Co., 72 Conn. 208.*

**5. Place to Give Signals.** — *Simons v. Southern R. Co., 96 Va. 152.*

**Proof of Signal Where There Are Two Crossings.** — Where there are two crossings so close together that the distance at which the whistle is required to be blown for the crossing in question would be beyond the other crossing, the plaintiff must show that a signal blown beyond the first crossing was not within the statutory distance from the crossing in question. *Watson v. Erie R. Co., 10 Ohio Dec. 454.*



**413. Distance from Crossing.** — See note 1.

Warning Must Be at Sufficient Distance to Be Effectual. — See note 2.

**414. (5) Character of Warning** — Warning Should Be Effective in Character. — See note 1.

Signal Should Comply with Statute. — See note 2.

Usual and Customary Signals. — See note 3.

Use of Both Bell and Whistle. — See note 4.

(6) *Private Crossings* — *Signals at.* — See note 5.**413. 1. Eighty Rods from Crossing** — *Arisona.* — Maricopa, etc., R. Co. v. Dean, (Ariz. 1900) 60 Pac. Rep. 871.*Connecticut.* — Tessmer v. New York, etc., R. Co., 72 Conn. 208.*Illinois.* — Chicago, etc., R. Co. v. Pearson, 184 Ill. 386; Chicago, etc., R. Co. v. Pulliam, 208 Ill. 456; Illinois Cent. R. Co. v. Chicago Title, etc., Co., 79 Ill. App. 623.*Massachusetts.* — Daniels v. New York, etc., R. Co., 183 Mass. 393.*Missouri.* — Reed v. St. Louis, etc., R. Co., 107 Mo. App. 238; Lamb v. Missouri Pac. R. Co., 147 Mo. 171.*New Hampshire.* — Smith v. Boston, etc., R. Co., 70 N. H. 53, 85 Am. St. Rep. 596; Stone v. Boston, etc., R. Co., 72 N. H. 206.*Ohio.* — Stoltz v. Baltimore, etc., R. Co., 7 Ohio Dec. 435.*Texas.* — Houston, etc., R. Co. v. O'Neal, 91 Tex. 671; Galveston, etc., R. Co. v. Harris, 22 Tex. Civ. App. 16; International, etc., R. Co. v. Ives, 31 Tex. Civ. App. 272; Texas, etc., R. Co. v. Scrivener, (Tex. Civ. App. 1899) 49 S. W. Rep. 649; Galveston, etc., R. Co. v. Tirres, 33 Tex. Civ. App. 362.**Train Starting Within Eighty Rods of Crossing.** — Herring v. Wabash R. Co., 80 Mo. App. 562; Ft. Worth, etc., R. Co. v. Greer, 32 Tex. Civ. App. 606. But see Gulf, etc., R. Co. v. Hall, 34 Tex. Civ. App. 535.**Other Statutory Provisions** — *Virginia.* — See Atlantic, etc., R. Co. v. Reiger, 95 Va. 418; Simons v. Southern R. Co., 96 Va. 152.**Signal Given More than Eighty Rods Away.** — A statute requiring the whistle to be blown "at the distance of at least eighty rods," means that the whistle must be blown for the crossing before passing the point eighty rods distant therefrom. Houston, etc., R. Co. v. O'Neal, (Tex. Civ. App. 1898) 45 S. W. Rep. 921, reversed 91 Tex. 671.**2. Warning Effectual for Purpose Intended.** — Chesapeake, etc., R. Co. v. Steele, (C. C. A.) 84 Fed. Rep. 93; Green v. Southern Pac. R. Co., 122 Cal. 563.**Sufficiency of Distance a Question for Jury.** — Bradley v. Ohio River, etc., R. Co., 126 N. Car. 735.**Whether Signal Timely a Question for Jury.** — Bradley v. Ohio River, etc., R. Co., 126 N. Car. 735.**414. 1. Signals Should Serve as a Protection.** — Northern Pac. R. Co. v. Krohne, (C. C. A.) 86 Fed. Rep. 230; Cleveland, etc., R. Co. v. Carey, 33 Ind. App. 275; Profit v. Chicago G. W. R. Co., 91 Mo. App. 379; Stewart v. Long Island R. Co., 54 N. Y. App. Div. 623, affirmed 166 N. Y. 604; Turell v. Erie R. Co., 63 N. Y. App. Div. 619; Butts v. Atlantic, etc., R. Co., 133 N. Car. 82.

Where Two Trains Are in Close Proximity so that the noise of the first train renders unavailing the statutory signals, it becomes the duty of the railroad to approach the crossing with the second train with an extra degree of care. Grenell v. Michigan Cent. R. Co., 124 Mich. 141.

**2. Missouri, etc., R. Co. v. Magee,** (Tex. Civ. App. 1899) 49 S. W. Rep. 156; Missouri, etc., R. Co. v. Taff, 31 Tex. Civ. App. 657; Simons v. Southern R. Co., 96 Va. 152. See also Henn v. Long Island R. Co., 51 N. Y. App. Div. 292.**Statutory Signals Sufficient.** — Cox v. Chicago, etc., R. Co., 92 Ill. App. 15.**Under the Illinois Statute** the signals need not be given continuously for eighty rods before the crossing. St. Louis, etc., R. Co. v. Rawley, 90 Ill. App. 653.**3. A Rule of the Railroad Company** requiring the bell to be rung for a quarter of a mile before crossings may be shown on the question of negligence. Hecker v. Oregon R. Co., 40 Oregon 6.**Evidence that Electric Signals Were Used at Other Crossings** is incompetent. McGovern v. Smith, 73 Vt. 52.**4. Use of Both Bell and Whistle Not Required.** — Butts v. Atlantic, etc., R. Co., 133 N. Car. 82; Texas, etc., R. Co. v. Scrivener, (Tex. Civ. App. 1899) 49 S. W. Rep. 649.**5. Signals at Private Ways.** — Defrieze v. Illinois Cent. R. Co., (Iowa 1903) 94 N. W. Rep. 505; Nichols v. Chicago, etc., R. Co., 125 Iowa 236; Louisville, etc., R. Co. v. Survant, (Ky. 1898) 44 S. W. Rep. 88; Louisville, etc., R. Co. v. Bodine, 109 Ky. 509; Early v. Louisville, etc., R. Co., 115 Ky. 13; Davis v. Chesapeake, etc., R. Co., 116 Ky. 144; Wilson v. Chesapeake, etc., R. Co., (Ky. 1905) 86 S. W. Rep. 690; Philadelphia, etc., R. Co. v. Holden, 93 Md. 417, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 414; Fletcher v. South Carolina, etc., R. Co., 57 S. Car. 205.**Effect of Custom or Peculiar Nature of Locality.** — In Louisville, etc., R. Co. v. Bodine, 109 Ky. 509, it was held that where it had been customary to give signals at a private crossing which was of a dangerous character and had long been used by persons other than the owners of the land, it was negligence for a special train to approach the crossing at a high rate of speed without giving any signal. See also Fletcher v. South Carolina, etc., R. Co., 57 S. Car. 205.**Right to Rely on Signaling at Public Crossings.** — One at or near a private crossing may take advantage of the failure to give signals at a public crossing. Defrieze v. Illinois Cent. R. Co., (Iowa 1903) 94 N. W. Rep. 505.**The Failure to Give Signals at a Public Crossing** is not evidence of negligence of the railroad company upon which a person injured at an

**415.** (7) *Effect on Liability of Failure to Give Signals.* — See note 1.

**416.** *Failure to Signal Held Negligent in Law.* — See note 1.

*Failure Is Prima Facie Negligent.* — See note 2.

*Omission to Signal Does Not Render Company Liable Per Se.* — See note 3.

**417.** *Question for Jury.* — See note 1.

(8) *Statutory Signals Not Sufficient in All Cases.* — See note 2.

adjacent private crossing can recover. Philadelphia, etc., R. Co. v. Holden, 93 Md. 417.

**415. 1. Liability for Failure to Give Signals** — Illinois. — See Chicago, etc., R. Co. v. Wise, 206 Ill. 453.

Massachusetts. — Walsh v. Boston, etc., R. Co., 171 Mass. 52.

Mississippi. — New Orleans, etc., R. Co. v. Brooks, 85 Miss. 269.

Missouri. — Elliott v. Chicago, etc., R. Co., 105 Mo. App. 523.

New Hampshire. — Stone v. Boston, etc., R. Co., 72 N. H. 206.

New York. — McSweeney v. Erie R. Co., 93 N. Y. App. Div. 496.

Ohio. — Stoltz v. Baltimore, etc., R. Co., 7 Ohio Dec. 435; Watson v. Erie R. Co., 10 Ohio Dec. 454.

South Carolina. — Hutto v. South Bound R. Co., 61 S. Car. 495; Burns v. Southern R. Co., 65 S. Car. 229; Mercer v. Southern R. Co., 66 S. Car. 246; Davis v. Southern R. Co., 68 S. Car. 446.

Texas. — St. Louis Southwestern R. Co. v. Mitchell, 25 Tex. Civ. App. 197.

Wisconsin. — Morey v. Lake Superior Terminal, etc., R. Co., (Wis. 1905) 103 N. W. Rep. 271.

**Accident Beyond Crossing.** — Bishop v. Southern R. Co., 63 S. Car. 532.

**Evidence that no Signal Was Given at Another Crossing.** — Chicago, etc., R. Co. v. Durand, 65 Kan. 380.

**Statutes Requiring Signals Applicable Where Stock Killed at Crossing.** — Houston, etc., R. Co. v. Red Cross Stock Farm, 22 Tex. Civ. App. 114.

**416. 1. Negligence Per Se.** — Pennsylvania R. Co. v. Fertig, 34 Ind. App. 459; Baltimore, etc., R. Co. v. Reynolds, 33 Ind. App. 219; Greenawaldt v. Lake Shore, etc., R. Co., (Ind. 1905) 73 N. E. Rep. 910; Reed v. St. Louis, etc., R. Co., 107 Mo. App. 238; Davis v. Atlanta, etc., Air Line R. Co., 63 S. Car. 370; Bishop v. Southern R. Co., 63 S. Car. 532; Galveston, etc., R. Co. v. Harris, 22 Tex. Civ. App. 16; Williams v. Cross, 19 Tex. Civ. App. 426; Missouri, etc., R. Co. v. Matherly, (Tex. Civ. App. 1904) 81 S. W. Rep. 589; Brown v. Chicago, etc., R. Co., 109 Wis. 384.

**2. Prima Facie Negligence.** — Mobile, etc., R. Co. v. Dugan, 103 Ill. App. 371.

**"Evidence of Negligence."** — Butts v. Atlantic, etc., R. Co., 133 N. Car. 82.

**3. Company Not Liable Per Se** — Alabama. — Bryant v. Southern R. Co., 137 Ala. 488; Central of Georgia R. Co. v. Foshee, 125 Ala. 199.

California. — Herbert v. Southern Pac. R. Co., 121 Cal. 227.

Illinois. — Illinois Cent. R. Co. v. Klein, 95 Ill. App. 220.

Indiana. — Baltimore, etc., R. Co. v. Conoyer, 149 Ind. 524.

Iowa. — Carpenter v. Chicago, etc., R. Co., 126 Iowa 94.

Minnesota. — Griswold v. Great Northern R. Co., 86 Minn. 67.

Missouri. — Hutchinson v. Missouri Pac. R. Co., 161 Mo. 246, 84 Am. St. Rep. 780; Korman v. Chicago, etc., R. Co., 86 Mo. App. 473.

Montana. — Hunter v. Montana Cent. R. Co., 22 Mont. 825.

New York. — Larsen v. U. S. Mortgage, etc., Co., 104 N. Y. App. Div. 76. *Contra*, Lampman v. New York Cent., etc., R. Co., 72 N. Y. App. Div. 363, *affirmed* 179 N. Y. 536.

North Carolina. — Edwards v. Atlantic Coast Line R. Co., 129 N. Car. 78.

Ohio. — See Cincinnati, etc., R. Co. v. Murphy, 10 Ohio Cir. Dec. 195.

South Carolina. — Mercer v. Southern R. Co., 66 S. Car. 246; Gosa v. Southern R. Co., 67 S. Car. 347.

Virginia. — Atlantic, etc., R. Co. v. Reiger, 95 Va. 418.

**417. 1. Question for Determination of Jury** — United States. — Southern Pac. R. Co. v. Harada, (C. C. A.) 109 Fed. Rep. 379.

California. — See Cooper v. Los Angeles Terminal R. Co., 137 Cal. 229.

Illinois. — Cleveland, etc., R. Co. v. Chinsky, 92 Ill. App. 50.

Indiana. — Wabash R. Co. v. Biddle, 27 Ind. App. 161.

Iowa. — Defrieze v. Illinois Cent. R. Co., (Iowa 1903) 94 N. W. Rep. 505.

Michigan. — Lehman v. Eureka Iron, etc., Works, 114 Mich. 260.

New York. — Henavié v. New York Cent., etc., R. Co., 166 N. Y. 280; Lewin v. Lehigh Valley R. Co., 41 N. Y. App. Div. 89; Degraw v. Erie R. Co., 49 N. Y. App. Div. 29; Lurell v. Erie R. Co., 49 N. Y. App. Div. 94; Wiedman v. Erie R. Co., 66 N. Y. App. Div. 347; Goodell v. New York Cent., etc., R. Co., 67 N. Y. App. Div. 271; Flanagan v. New York Cent., etc., R. Co., 70 N. Y. App. Div. 505, *affirmed* 173 N. Y. 631; Robson v. Nassau Electric R. Co., 80 N. Y. App. Div. 301; Swart v. New York Cent., etc., R. Co., 81 N. Y. App. Div. 402, *affirmed* 177 N. Y. 529; Chapman v. New York Cent., etc., R. Co., 41 N. Y. App. Div. 618.

Ohio. — Lake Shore, etc., R. Co. v. Ehlert, 10 Ohio Cir. Dec. 443.

South Carolina. — Mack v. South-Bound R. Co., 52 S. Car. 323, 68 Am. St. Rep. 913; Littlejohn v. Richmond, etc., R. Co., 49 S. Car. 12.

Texas. — Gulf, etc., R. Co. v. Hamilton, 17 Tex. Civ. App. 76; Galveston, etc., R. Co. v. Harris, 22 Tex. Civ. App. 16.

**Whether Crossing Is Public a Question for Jury.** — Texas, etc., R. Co. v. Wagley, (C. C. A.) 91 Fed. Rep. 860.

**2. Statutory Signals Not Sufficient in All Cases.** — Pennsylvania R. Co. v. Miller, (C. C. A.) 99 Fed. Rep. 529; Knopf v. Philadelphia, etc., R. Co., 2 Penn. (Del.) 392; Reed v. Queen Anne's

**418. Precautions Adopted — Question for Jury.** — See note 2.(c) *Evidence as to Signals — Burden of Proof.* — See note 3.**419. Negative and Positive Evidence.** — See notes 2, 3, 4.g. **FLYING SWITCH.** — See notes 5, 6.

R. Co., 4 Penn. (Del.) 413; Florida Cent., etc., R. Co. v. Foxworth, 41 Fla. 1, 79 Am. St. Rep. 149; Ortolano v. Morgan's Louisiana, etc., R., etc., Co., 109 La. 902; Petrie v. New York Cent., etc., R. Co., 63 N. Y. App. Div. 473, *affirmed* 171 N. Y. 638; Missouri, etc., R. Co. v. Oslin, 26 Tex. Civ. App. 370.

**418. 2. Precautions Adopted — Question for Jury.** — Turell v. Erie R. Co., 63 N. Y. App. Div. 619; Petrie v. New York Cent., etc., R. Co., 63 N. Y. App. Div. 473, *affirmed* 171 N. Y. 638.

**Whether Crossing Public a Question for Jury.** — Texas, etc., R. Co. v. Wagley, (C. C. A.) 91 Fed. Rep. 860.

**3. Burden of Proof.** — Pittsburgh, etc., R. Co. v. Frazee, 150 Ind. 576, 65 Am. St. Rep. 377; Texas, etc., R. Co. v. Scrivener, (Tex. Civ. App. 1899) 49 S. W. Rep. 649; Gulf, etc., R. Co. v. Hall, 34 Tex. Civ. App. 535.

**419. 2. Affirmative and Negative Evidence.** — Wabash R. Co. v. Aarvig, 66 Ill. App. 146; Stewart v. Michigan Cent. R. Co., 119 Mich. 91; Frank v. Pennsylvania R. Co., (N. J. 1903) 55 Atl. Rep. 691; Smith v. New York Cent., etc., R. Co., 41 N. Y. App. Div. 614; Jones v. Lehigh, etc., R. Co., 202 Pa. St. 81; Knox v. Philadelphia, etc., R. Co., 202 Pa. St. 504. See also Britton v. Michigan Cent. R. Co., 122 Mich. 359; Bond v. Lake Shore, etc., R. Co., 128 Mich. 577; Miller v. New York Cent., etc., R. Co., 66 N. Y. App. Div. 114; Wellbrock v. Long Island R. Co., (Supm. Ct. Tr. T.) 31 Misc. (N. Y.) 424; Texas-Mexican R. Co. v. Baldez, (Tex. Civ. App. 1897) 43 S. W. Rep. 564.

**Negative Testimony Positive in Character.** — Chicago, etc., R. Co. v. Pulliam, 111 Ill. App. 305, *affirmed* 208 Ill. 456; Mackerall v. Omaha, etc., R. Co., 111 Iowa 547; Selensky v. Chicago G. W. R. Co., 120 Iowa 113; Van Nostrand v. Long Island R. Co., 51 N. Y. App. Div. 608; Racine v. Erie R. Co., 69 N. Y. App. Div. 427; Stewart v. Long Island R. Co., 54 N. Y. App. Div. 623, *affirmed* 166 N. Y. 604; Cleveland, etc., R. Co. v. Richerson, 10 Ohio Cir. Dec. 326; Daubert v. Delaware, etc., R. Co., 109 Pa. St. 345.

**Remarks Made at Time.** — That a conductor testifying that the signal was given made a remark to the engineer at the time, is competent, but evidence as to what the remark was is not admissible. Dolph v. New York, etc., R. Co., 74 Conn. 538.

**Evidence of Automatic Device for Ringing Should Be Admitted.** — Threlkeld v. Wabash R. Co., 68 Mo. App. 127.

**Evidence that Other Trains Did Not Whistle Held Inadmissible.** — Chicago, etc., R. Co. v. Porterfield, 92 Tex. 442.

**Negative Testimony Sufficient in Absence of Positive Evidence.** — See Westervelt v. New York Cent., etc., R. Co., 86 N. Y. App. Div. 316.

**Testimony that Signals Would Have Been Heard If Given Competent.** — Cleveland, etc., R. Co. v. Beard, 106 Ill. App. 486.

**3. Arizona.** — Maricopa, etc., R. Co. v. Dean, (Ariz. 1900) 60 Pac. Rep. 871.

**Illinois.** — Chicago, etc., R. Co. v. Pulliam, 208 Ill. 456; Cleveland, etc., R. Co. v. Oliver, 83 Ill. App. 64; Chicago G. W. R. Co. v. Mohan, 88 Ill. App. 151, *affirmed* 187 Ill. 281.

**Iowa.** — Lorenz v. Burlington, etc., R. Co., 115 Iowa 377.

**Kentucky.** — Chesapeake, etc., R. Co. v. Duppee, (Ky. 1902) 67 S. W. Rep. 15; Louisville, etc., R. Co. v. Walden, (Ky. 1903) 74 S. W. Rep. 694.

**Massachusetts.** — Daniels v. New York, etc., R. Co., 183 Mass. 393; Dalton v. New York, etc., R. Co., 184 Mass. 344. See also McDonald v. New York Cent., etc., R. Co., 186 Mass. 474.

**Michigan.** — Bond v. Lake Shore, etc., R. Co., 117 Mich. 652; Grenell v. Michigan Cent. R. Co., 124 Mich. 141; Haines v. Lake Shore, etc., R. Co., 129 Mich. 475.

**Missouri.** — Young v. Missouri, etc., R. Co., 72 Mo. App. 263.

**New York.** — Henn v. Long Island R. Co., 51 N. Y. App. Div. 292; Smith v. Lehigh Valley R. Co., 61 N. Y. App. Div. 46, *reversed* 170 N. Y. 394.

**North Carolina.** — Edwards v. Atlantic Coast Line R. Co., 129 N. Car. 78.

**Pennsylvania.** — Corcoran v. Pennsylvania R. Co., 203 Pa. St. 380; Kuntz v. New York, etc., R. Co., 206 Pa. St. 162; Summers v. Bloomsburg, etc., R. Co., 24 Pa. Super. Ct. 615.

**Tennessee.** — See Nashville, etc., R. Co. v. Lawson, 105 Tenn. 639.

**Texas.** — International, etc., R. Co. v. Dalwigh, (Tex. Civ. App. 1898) 48 S. W. Rep. 527, (Tex. Civ. App. 1900) 56 S. W. Rep. 136; Galveston, etc., R. Co. v. Tirres, 33 Tex. Civ. App. 362.

**Circumstances Showing Recollection as to Signal.** — The fact that the witness and his companion remarked at the time on the absence of the signals is competent. Grenell v. Michigan Cent. R. Co., 124 Mich. 141.

**Signboards, Signals, Flagmen, and Gates at Crossings.** — Huteherson v. Louisville, etc., R. Co., (Ky. 1899) 52 S. W. Rep. 955.

**4. Negative Evidence Given Superior Weight.** — Browne v. New York Cent., etc., R. Co., 87 N. Y. App. Div. 206, *affirmed* 179 N. Y. 582.

**Negative Evidence Given Equal Weight.** — Southern R. Co. v. Bryant, 95 Va. 212.

**Evidence that Signals Were Not Given Is Positive and not negative in its nature where witnesses testify that they were listening for the signals and paid particular attention and that the signals were not given.** Lake Shore, etc., R. Co. v. Schade, 8 Ohio Cir. Dec. 316.

**5. A "Running" or "Flying Switch."** — Bradley v. Ohio River, etc., R. Co., 126 N. Car. 735.

**6. Care Required in Making Flying Switch.** — Chicago Junction R. Co. v. McGrath, 203 Ill. 511; Pinney v. Missouri, etc., R. Co., 71 Mo. App. 577; Bradley v. Ohio River, etc., R. Co., 126 N. Car. 735, *cing* 8 AM. AND ENG. ENCYC.



**419.** Negligence Per Se. — See note 7.

**420.** See note 1.

Whether Reasonable Precautions Taken Is for Jury. — See note 2.

*h.* BACKING CARS. — See notes 3, 4.

**421.** Stationing Brakeman on Rear Car. — See note 1.

*i.* FRIGHTENING TEAMS — (1) *In General.* — See note 2.

OF LAW (2d ed.) 419; *Steele v. Northern Pac. R. Co.*, 21 Wash. 287. See also *Gulf, etc., R. Co. v. Holland*, 27 Tex. Civ. App. 397.

**419. 7. Negligence Per Se.** — *Birmingham Southern R. Co. v. Powell*, 136 Ala. 232; *Mitchell v. Illinois Cent. R. Co.*, 110 La. 630, 98 Am. St. Rep. 472; *Pinney v. Missouri, etc., R. Co.*, 71 Mo. App. 577; *Baker v. Kansas City, etc., R. Co.*, 147 Mo. 140; *Bradley v. Ohio River, etc., R. Co.*, 126 N. Car. 735; *International, etc., R. Co. v. Brooks*, (Tex. Civ. App. 1899) 54 S. W. Rep. 1056; *Central Texas, etc., R. Co. v. Gibson*, (Tex. Civ. App. 1904) 79 S. W. Rep. 351; *Vance v. Ravenswood, etc., R. Co.*, 53 W. Va. 338. See also *Steele v. Northern Pac. R. Co.*, 21 Wash. 287.

**420. 1. Warning to Public.** — *Baker v. Kansas City, etc., R. Co.*, 147 Mo. 140; *Bradley v. Ohio River, etc., R. Co.*, 126 N. Car. 735, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 420; *Steele v. Northern Pac. R. Co.*, 21 Wash. 287. See also *O'Bierne v. New York Cent., etc., R. Co.*, 37 N. Y. App. Div. 547, affirmed 167 N. Y. 568.

**Man Stationed on Detached Section.** — *Florida Cent., etc., R. Co. v. Foxworth*, 41 Fla. 1, 79 Am. St. Rep. 149.

**2. Reasonable Care Question for Jury.** — *Chicago Junction R. Co. v. McGrath*, 203 Ill. 511; *Lehman v. Eureka Iron, etc., Works*, 114 Mich. 260; *Texas, etc., R. Co. v. Carr*, (Tex. Civ. App. 1897) 42 S. W. Rep. 126; *Gulf, etc., R. Co. v. Letsch*, (Tex. Civ. App. 1900) 55 S. W. Rep. 584, judgment affirmed 94 Tex. 650, 56 S. W. Rep. 1134. See also *Stover v. Pennsylvania R. Co.*, 195 Pa. St. 616.

**3. Care to Be Observed in Backing Trains — Arkansas.** — *St. Louis, etc., R. Co. v. Johnson*, (Ark. 1905) 86 S. W. Rep. 282.

*District of Columbia.* — *Walter v. Baltimore, etc., R. Co.*, 6 App. Cas. (D. C.) 20.

*Illinois.* — *Chicago, etc., R. Co. v. McDonnell*, 194 Ill. 82; *Wabash R. Co. v. Billings*, 105 Ill. App. 111, reversed 212 Ill. 37. See also *Chicago, etc., R. Co. v. Filler*, 195 Ill. 9; *Chicago, etc., R. Co. v. Randolph*, 199 Ill. 126, affirming 101 Ill. App. 121.

*Indiana.* — *Stoy v. Louisville, etc., R. Co.*, 160 Ind. 144.

*Kansas.* — *Atchison, etc., R. Co. v. Cross*, 58 Kan. 424. See also *Missouri, etc., R. Co. v. Young*, 8 Kan. App. 525.

*Kentucky.* — *Louisville, etc., R. Co. v. Price*, (Ky. 1903) 76 S. W. Rep. 836.

*Maryland.* — See *Jenkins v. Baltimore, etc., R. Co.*, 98 Md. 402.

*Michigan.* — *Smith v. Pere Marquette R. Co.*, (Mich. 1904) 98 N. W. Rep. 1022.

*Mississippi.* — *Illinois Cent. R. Co. v. McCalip*, 76 Miss. 360.

*Missouri.* — *Montgomery v. Missouri Pac. R. Co.*, 181 Mo. 477; *Reed v. St. Louis, etc., R. Co.*, 107 Mo. App. 238.

*New York.* — See *Manley v. New York Cent., etc., R. Co.*, 39 N. Y. App. Div. 144.

*Oregon.* — *Hecker v. Oregon R. Co.*, 40 Oregon 6; *Schleiger v. Northern Terminal R. Co.*, 43 Oregon 4.

*Texas.* — *Missouri, etc., R. Co. v. O'Connell*, (Tex. Civ. App. 1897) 43 S. W. Rep. 66.

*Virginia.* — *Demaine v. Washington Southern R. Co.*, (Va. 1897) 27 S. E. Rep. 437.

*West Virginia.* — *Meeks v. Ohio River R. Co.*, 52 W. Va. 99, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 420.

**Negligence a Question for Jury.** — *Chicago, etc., R. Co. v. Russell*, (Neb. 1904) 100 N. W. Rep. 156.

**Backing a Section of a Train** over a crossing in order to couple with the other section is within the purview of a statute which forbids backing a train without ringing the bell and stationing a lookout on the rear of the train. *Pittsburgh, etc., R. Co. v. McNeil*, (Ind. App. 1903) 66 N. E. Rep. 777; *Pittsburgh, etc., R. Co. v. McNeil*, (Ind. App. 1904) 69 N. E. Rep. 471.

**4. Signals or Lights at End of Car.** — *St. Louis, etc., R. Co. v. Johnson*, (Ark. 1905) 86 S. W. Rep. 282; *Baltimore, etc., R. Co. v. Peterson*, 156 Ind. 364; *Bradley v. Ohio River, etc., R. Co.*, 126 N. Car. 735. See also *Doud v. Delaware, etc., R. Co.*, 203 Pa. St. 227.

**421. 1. Brakeman on End of Rear Car.** — *St. Louis, etc., R. Co. v. Johnson*, (Ark. 1905) 86 S. W. Rep. 282; *Sullivan v. New York, etc., R. Co.*, 73 Conn. 203; *Florida Cent., etc., R. Co. v. Foxworth*, 41 Fla. 1, 79 Am. St. Rep. 149; *Baltimore, etc., R. Co. v. Peterson*, 156 Ind. 364; *Lake Shore, etc., R. Co. v. Boyts*, 76 Ind. App. 640; *Pittsburgh, etc., R. Co. v. McNeil*, (Ind. App. 1903) 66 N. E. Rep. 777; *Baltimore, etc., R. Co. v. Reynolds*, 33 Ind. App. 219.

**2. Noise Incident to Operation of Trains — Illinois.** — *Illinois Cent. R. Co. v. Klein*, 95 Ill. App. 220.

*Indiana.* — *Lake Erie, etc., R. Co. v. Juday*, 19 Ind. App. 436; *Lake Shore, etc., R. Co. v. Butts*, 28 Ind. App. 289; *Louisville, etc., R. Co. v. Schmidt*, 147 Ind. 638.

*Kentucky.* — *Louisville, etc., R. Co. v. Howerton*, 115 Ky. 89.

*Maryland.* — *Riley v. New York, etc., R. Co.*, 90 Md. 53.

*Nebraska.* — *Chicago, etc., R. Co. v. Roberts*, (Neb. 1902) 91 N. W. Rep. 707.

*New York.* — *Skinner v. New York, etc., R. Co.*, (Supm. Ct. Tr. T.) 64 N. Y. Supp. 325; *Wilson v. New York Cent., etc., R. Co.*, 41 N. Y. App. Div. 36.

*North Carolina.* — *Miller v. Wilmington, etc., R. Co.*, 128 N. Car. 26.

*Pennsylvania.* — *Farley v. Harris*, 186 Pa. St. 440.

*Texas.* — *Houston, etc., R. Co. v. Carruth*, (Tex. Civ. App. 1899) 50 S. W. Rep. 1036; *Galveston, etc., R. Co. v. Simon*, (Tex. Civ.

**421.** (2) *Negligent and Malicious Acts* — (a)<sup>6</sup> *In General*. — See notes 3, 4.  
**422.** See note 1.

(b) *Improper Sounding of Whistle*. — See note 2.

(c) *Escape of Steam*. — See note 3.

(3) *Failure to Give Signals*. — See note 4.

**423.** See note 1.

j. OBSTRUCTIONS AT CROSSING. — See note 2.

App. 1899) 54 S. W. Rep. 309; San Antonio, etc., R. Co. v. Belt, 24 Tex. Civ. App. 281; Houston, etc., R. Co. v. Dallas, (Tex. Civ. App. 1904) 78 S. W. Rep. 525.

*Virginia*. — Southern R. Co. v. Torian, 95 Va. 453; Southern R. Co. v. Cooper, 98 Va. 299.

*Wisconsin*. — Walters v. Chicago, etc., R. Co., 104 Wis. 251.

**Sounding of Whistle as Regular Warning.** — In Gulf, etc., R. Co. v. Milner, 28 Tex. Civ. App. 86, it was held to be negligent to sound the whistle as a regular warning, as required by statute, if the railroad employees saw that a horse would be frightened thereby, and there was nothing tending to show that injury to another at the crossing might have resulted from the failure to blow the whistle.

**421. 3. Negligent and Malicious Acts.** — Chicago, etc., R. Co. v. Parks, 59 Kan. 709; Louisville, etc., R. Co. v. Penrod, (Ky. 1902) 66 S. W. Rep. 1013; Missouri, etc., R. Co. v. Magee, (Tex. Civ. App. 1899) 49 S. W. Rep. 156; San Antonio, etc., R. Co. v. Peterson, 20 Tex. Civ. App. 495; San Antonio, etc., R. Co. v. Belt, 24 Tex. Civ. App. 281; St. Louis South-Western R. Co. v. Stonecyper, 25 Tex. Civ. App. 569. See also Schermerhorn v. New York Cent., etc., R. Co., 33 N. Y. App. Div. 17; Henze v. International, etc., R. Co., (Tex. Civ. App. 1903) 75 S. W. Rep. 822.

**4. Proximate Cause of Injury.** — Wabash R. Co. v. Coker, 81 Ill. App. 660, *affirmed* 183 Ill. 223; Hinchman v. Pere Marquette R. Co., (Mich. 1904) 99 N. W. Rep. 277; Simmons v. Pennsylvania R. Co., 199 Pa. St. 232; Beopple v. Illinois Cent. R. Co., 104 Tenn. 420.

**422. 1. Question for Jury.** — Pittsburgh, etc., R. Co. v. Robson, 204 Ill. 254; Pratt v. Chicago, etc., R. Co., 107 Iowa 287; Johnston v. New York, etc., R. Co., 65 N. J. L. 421; Boothby v. Boston, etc., R. Co., 90 Me. 313; Locke v. International, etc., R. Co., 25 Tex. Civ. App. 145; Southern R. Co. v. Torian, 95 Va. 453.

**2. Improper Sounding of Whistle.** — Cleveland, etc., R. Co. v. David, 105 Ill. App. 69; Chicago, etc., R. Co. v. Parks, 59 Kan. 709; Stoltz v. Baltimore, etc., R. Co., 7 Ohio Dec. 435; Texas, etc., R. Co. v. Moseley, (Tex. Civ. App. 1900) 58 S. W. Rep. 48; Missouri, etc., R. Co. v. Weatherford, 26 Tex. Civ. App. 20; Houston, etc., R. Co. v. Blan, (Tex. Civ. App. 1901) 62 S. W. Rep. 552; McGrew v. St. Louis, etc., R. Co., 32 Tex. Civ. App. 265; Southern R. Co. v. Torian, 95 Va. 453.

**Whistling in Passing Over or Under Bridge.** — See Farley v. Harris, 186 Pa. St. 440. But see Louisville, etc., R. Co. v. Shearer, (Ky. 1900) 59 S. W. Rep. 330. Compare Cowen v. Watson, 91 Md. 344.

**Propriety of Sounding Alarm Signal a Question for Jury.** — Nichols v. Baltimore, etc., R. Co., 33 Ind. App. 229.

**3. Escape of Steam.** — Pittsburgh, etc., R. Co. v. Robson, 204 Ill. 254; Louisville, etc., R. Co. v. Schmidt, 147 Ind. 638; Boothby v. Boston, etc., R. Co., 90 Me. 313; Hinchman v. Pere Marquette R. Co., (Mich. 1904) 99 N. W. Rep. 277; Missouri, etc., R. Co. v. Cloninger, (Tex. Civ. App. 1897) 42 S. W. Rep. 632; San Antonio, etc., R. Co. v. Belt, 24 Tex. Civ. App. 281; Texas Midland R. Co. v. Cardwell, (Tex. Civ. App. 1901) 67 S. W. Rep. 157.

**Automatic Valve.** — But see Wilson v. New York Cent., etc., R. Co., 41 N. Y. App. Div. (N. Y.) 36.

**4. Failure to Give Signals.** — Pennsylvania R. Co. v. Fertig, 34 Ind. App. 459; Cleveland, etc., R. Co. v. Carey, 33 Ind. App. 275; Chesapeake, etc., R. Co. v. Ogles, (Ky. 1903) 73 S. W. Rep. 751; Wood v. New York Cent., etc., R. Co., 83 N. Y. App. Div. 604, *affirmed* 179 N. Y. 557; Texas, etc., R. Co. v. Moseley, (Tex. Civ. App. 1900) 58 S. W. Rep. 48; Sherman, etc., R. Co. v. Eaves, 25 Tex. Civ. App. 409. See also Sights v. Louisville, etc., R. Co., (Ky. 1904) 78 S. W. Rep. 172; Cleveland, etc., R. Co. v. Richerson, 10 Ohio Cir. Dec. 326. Compare New York, etc., R. Co. v. Martin, (Ind. App. 1904) 72 N. E. Rep. 654; Lampman v. New York Cent., etc., R. Co., 72 N. Y. App. Div. 363, *affirmed* 179 N. Y. 536.

**No Actual Collision.** — Atlanta, etc., R. Co. v. Durham, 108 Ga. 547.

**Signaling at Overhead Bridge.** — Whether a failure to signal an approach to an overhead bridge is negligence is a question for the jury. Louisville, etc., R. Co. v. Shearer, (Ky. 1900) 59 S. W. Rep. 330.

**Signboards, Signals, Flagmen, and Gates at Crossings.** — Hutcherson v. Louisville, etc., R. Co., (Ky. 1899) 52 S. W. Rep. 955.

**Circumstance Not Requiring Signals.** — Where the animal frightened was too far from the crossing when seen for a collision to occur, and had no appearance of fright, failure to give signals was not negligence. Southern R. Co. v. Cooper, 98 Va. 299.

**423. 1. Driving Across Track in Face of Approaching Train.** — See Cleveland, etc., R. Co. v. Carey, 33 Ind. App. 275.

**2. Obstructions at Crossings.** — Illinois Cent. R. Co. v. Griffin, 84 Ill. App. 152, *affirmed* 184 Ill. 9; Parks v. Southern R. Co., 124 N. Car. 136; Texas, etc., R. Co. v. Wright, 31 Tex. Civ. App. 249; Galveston, etc., R. Co. v. Simon, (Tex. Civ. App. 1899) 54 S. W. Rep. 309; International, etc., R. Co. v. Locke, (Tex. Civ. App. 1902) 67 S. W. Rep. 1082; International, etc., R. Co. v. Mercer, (Tex. Civ. App. 1904) 78 S. W. Rep. 562. See also Cleveland, etc., R. Co. v. Richerson, 10 Ohio Cir. Dec. 326.

**A Box Car** is not an object so calculated to frighten a horse as to render a railroad com-

**423.** Questions for Jury. — See notes 3, 4.

**424.** See note 1.

**1. CROSSINGS BY CUSTOM OR LICENSE — (1) In General.** — See note 4.

**Acquiescence in Public Use.** — See note 6.

**425.** (2) *Forced Maintenance of Crossings.* — See note 1.

**426.** Without Invitation from Company. — See note 2.

**427.** VII. FARM CROSSINGS — 2. Right of Landowner. — See note 4.

**428.** 3. Duty to Construct — a. IN GENERAL. — See note 2.

b. BY STATUTE. — See note 3.

pany liable. *Chicago G. W. R. Co. v. Kenyon*, 70 Ill. App. 567.

**423.** 3. *Proximate Cause.* — See *Chicago, etc., R. Co. v. Roberts*, (Neb. 1902) 91 N. W. Rep. 707.

**A Car Standing at a Crossing** is not an object so calculated to frighten horses as to render the railroad company negligent. *Atchison, etc., R. Co. v. Morris*, 64 Kan. 411.

**4.** *Question for Jury.* — *Missouri Pac. R. Co. v. Clark*, (Kan. App. 1897) 49 Pac. Rep. 799; *Galveston, etc., R. Co. v. Simon*, (Tex. Civ. App. 1899) 54 S. W. Rep. 309.

**424.** 1. *Baltimore, etc., R. Co. v. Faith*, 175 Ill. 58, *affirming* 71 Ill. App. 59; *Rusterholtz v. New York, etc., R. Co.*, 191 Pa. St. 390. See also *Lake Erie, etc., R. Co. v. Juday*, 19 Ind. App. 436.

**No Liability for Consequences Not Reasonably Apparent.** — *Chicago, etc., R. Co. v. Scranton*, 95 Ill. App. 619.

**4.** *Duty Confined to Public Crossings.* — *Illinois Cent. R. Co. v. O'Connor*, 189 Ill. 559; *Illinois Cent. R. Co. v. James*, 67 Ill. App. 649; *Meinrenken v. New York Cent., etc., R. Co.*, 81 N. Y. App. Div. 132. See also *Weldon v. Philadelphia, etc., R. Co.*, 2 Penn. (Del.) 1.

**Whether Crossing Public a Question for Jury.** — *Texas, etc., R. Co. v. Wagley*, (C. C. A.) 91 Fed. Rep. 860.

**6.** *Acquiescence in Public Use.* — *Smith v. Pittsburgh, etc., R. Co.*, 90 Fed. Rep. 783; *Garrett v. Illinois Cent. R. Co.*, 126 Fed. Rep. 406; *Illinois Cent. R. Co. v. Clark*, 83 Ill. App. 620; *Illinois Cent. R. Co. v. Klein*, 95 Ill. App. 220; *Cleveland, etc., R. Co. v. Baker*, 106 Ill. App. 500; *Connell v. Chesapeake, etc., R. Co.*, (Ky. 1900) 58 S. W. Rep. 374; *Boothby v. Boston, etc., R. Co.*, 90 Me. 313; *Galveston, etc., R. Co. v. Eaten*, (Tex. Civ. App. 1898) 44 S. W. Rep. 562; *Galveston, etc., R. Co. v. Levy*, (Tex. Civ. App. 1904) 79 S. W. Rep. 879. See also *Rusterholtz v. New York, etc., R. Co.*, 191 Pa. St. 390; *San Antonio, etc., R. Co. v. Belt*, 24 Tex. Civ. App. 281; *Ray v. Chesapeake, etc., R. Co.*, (W. Va. 1905) 50 S. E. Rep. 413.

**Maintenance of Crossing an Invitation to Public.** — The building and keeping in repair by a railroad company of a bridge over, or an approach to, a private crossing is such an invitation to the public to use the same as renders the company liable for injuries resulting from defects negligently permitted to exist or remain in the structure. *Southern R. Co. v. Hooper*, 110 Ga. 779.

**425.** 1. *Forced Maintenance of Crossings.* — *San Antonio, etc., R. Co. v. Montgomery*, 31

*Tex. Civ. App. 491, citing 8 AM. AND ENG. ENCYC. OF LAW* (2d ed.) 425.

**426.** 2. *Without Invitation from Company.* — *San Antonio, etc., R. Co. v. Montgomery*, 31 Tex. Civ. App. 491, *citing 8 AM. AND ENG. ENCYC. OF LAW* (2d ed.) 426.

**427.** 4. *Right of Landowner to Crossings.* — *Atchison, etc., R. Co. v. Conlon*, 9 Kan. App. 338, *reversed* 62 Kan. 416; *Louisville, etc., R. Co. v. Brooks*, (Ky. 1903) 77 S. W. Rep. 693; *Kirk v. Kansas City, etc., R. Co.*, 51 La. Ann. 664; *Texas, etc., R. Co. v. Ford*, (Tex. Civ. App. 1897) 42 S. W. Rep. 589. See also *Kirk v. Kansas City, etc., R. Co.*, 51 La. Ann. 667; *Alabama, etc., R. Co. v. Ligon*, 74 Miss. 176.

**Right Not Acquirable by Prescription.** — *Schrimper v. Chicago, etc., R. Co.*, 115 Iowa 35; *Costello v. Grand Trunk R. Co.*, 70 N. H. 403.

**Right to Overhead Bridge under Terms of Grant to Railroad.** — See *Mt. Pleasant Coal Co. v. Delaware, etc., R. Co.*, 200 Pa. St. 434.

**Owners of Farm Crossings Not Licensees.** — *Baltimore, etc., R. Co. v. Keck*, 89 Ill. App. 72.

**Requisites Prescriptive Right to Crossing.** — See *Cleveland, etc., R. Co. v. Munsell*, 192 Ill. 430.

**Compensation for Land Instead of Farm Crossing.** — Where the value of land cut off by a line of railroad is so small as to be disproportionate to the cost of a farm crossing, a court has power to allow the owner a pecuniary compensation instead of a crossing. *Martin v. Maine Cent. R. Co.*, 19 Quebec Super. Ct. 561, *citing 8 AM. AND ENG. ENCYC. OF LAW* (2d ed.) 427.

**428.** 2. *Duty to Construct.* — *Plester v. Grand Trunk R. Co.*, 32 Ont. 55. But see *Kirk v. Kansas City, etc., R. Co.*, 51 La. Ann. 664.

**Opening in Right of Way Fences Required by Statute.** — *San Antonio, etc., R. Co. v. Grier*, 20 Tex. Civ. App. 138.

**3.** *Duty Imposed by Statute.* — *Baltimore, etc., R. Co. v. Keck*, 84 Ill. App. 159, *affirmed* 185 Ill. 400; *Schrimper v. Chicago, etc., R. Co.*, 115 Iowa 35; *Swinney v. Chicago, etc., R. Co.*, 123 Iowa 219; *Guinn v. Iowa, etc., R. Co.*, 125 Iowa 301; *Alabama, etc., R. Co. v. Odeneal*, 74 Miss. 827; *Birlew v. St. Louis, etc., R. Co.*, 104 Mo. App. 561; *Missouri, etc., R. Co. v. Chenault*, (Tex. Civ. App. 1900) 60 S. W. Rep. 55.

**In New Hampshire.** — See *Costello v. Grand Trunk R. Co.*, 70 N. H. 403.

**Missouri.** — In *Smith v. Missouri, etc., R. Co.*, 94 Mo. App. 398, the court said in regard to the Missouri statute (Rev. St. 1899, § 1105) providing for farm crossings: "It is unreasonable to suppose that the statute was intended to permit a person owning a small tract within the limits of a city to buy another small tract



**429. Retroactive Character of Statutes.** — See note 2.

Such Statutes Do Not Require. — See note 3.

c. UNDER CONTRACT. — See note 4.

**430. Whether Contract Runs with the Land.** — See note 3.**431. 4. Duty to Repair.** — See notes 2, 3.

5. Enforcement of Obligations. — See note 4.

**432. See note 1.**

Construction by Farm Owner. — See note 2.

6. Location of Crossings. — See note 3.

Under-grade Crossings. — See note 4.

**433. Sufficiency.** — See note 1.

7. Precautions to Be Observed by the Railroad Company — a. IN GENERAL. — See note 2.

on the opposite side of a railway and then compel the latter to put in a crossing under a statute intended to preserve the convenience of farmers in getting from one portion of their farms to another."

**Common-law Right Not Modified by Statute.** — Gulf, etc., R. Co. v. Clay, 28 Tex. Civ. App. 176.

**Where the Railroad Runs by the Side of a Farm** so as to cut it off from the highway but does not divide the farm, the company is, nevertheless, required, within the spirit of the statute, to construct a farm crossing. *Quantock v. Missouri, etc., R. Co.*, (Mo. App. 1903) 74 S. W. Rep. 1034.

**Where the Right of Way Was Acquired and Fenced Prior to the Statute** it was held that the railroad could not be compelled to open and maintain a crossing under the statute. *Owazarak v. Gulf, etc., R. Co.*, 31 Tex. Civ. App. 229.

**429. 2. In Texas** it is held that such a statute can have no application to a right of way acquired prior to the enactment of the statute. *San Antonio, etc., R. Co. v. Grier*, (Tex. Civ. App. 1897) 42 S. W. Rep. 1022; *Hemphill v. Texas, etc., R. Co.*, (Tex. Civ. App. 1898) 46 S. W. Rep. 874.

3. See *Gulf, etc., R. Co. v. Ellis*, 85 Miss. 586; *Aistrophe v. Tabor, etc., R. Co.*, (Iowa 1898) 75 N. W. Rep. 334.

**Railroad Cannot Be Compelled to Construct in Most Convenient Place.** — *Jones Fertilizing Co. v. Cleveland, etc., R. Co.*, 2 Ohio Dec. 511.

4. *Chicago, etc., R. Co. v. McEwen*, (Ind. App. 1904) 71 N. E. Rep. 926; *Speer v. Erie R. Co.*, 64 N. J. Eq. 601; *Gulf, etc., R. Co. v. Clay*, 28 Tex. Civ. App. 176.

**Construction of Contract.** — In determining the obligations and liabilities of a railroad company under a contract for the construction and maintenance of a farm crossing, the practical construction of the contract by the parties is controlling. *Walters v. Minneapolis, etc., R. Co.*, 76 Minn. 506.

**Substituting Gates for Open Crossing.** — Where, in compliance with an agreement, a railroad maintained an open crossing for eighteen years it cannot substitute gates over the objection of the landowner. *Gulf, etc., R. Co. v. Schawe*, 22 Tex. Civ. App. 599.

**430. 3. Covenant Held to Run with Land.** — *Chicago, etc., R. Co. v. McEwen*, (Ind. App. 1904) 71 N. E. Rep. 926.

**431. 2. Duty to Keep in Safe Condition.** — *Baltimore, etc., R. Co. v. Keck*, 89 Ill. App. 72.

The liability of a railroad company for damages resulting from failure to keep the crossing in repair is not limited to the owner of the land, but extends to any one using the crossing on the invitation of the landowner. *Plester v. Grand Trunk R. Co.*, 32 Ont. 55.

**3. Duty as to Building and Maintaining Fences, Etc.** — *Baltimore, etc., R. Co. v. Keck*, 84 Ill. App. 159, *affirmed* 185 Ill. 400.

**4. Action to Compel Performances.** — *Louisville, etc., R. Co. v. Brooks*, (Ky. 1903) 77 S. W. Rep. 693.

**Statute of Limitation.** — The duty to construct a crossing is a continuing one and hence a statute of limitation cannot be pleaded in bar of an action to compel construction. *Louisville, etc., R. Co. v. Pittman*, (Ky. 1899) 53 S. W. Rep. 1040.

**432. 1. Mandamus.** — *Swinney v. Chicago, etc., R. Co.*, 123 Iowa 219; *People v. New York Cent., etc., R. Co.*, 168 N. Y. 187.

**2. Construction by Landowner.** — *Baltimore, etc., R. Co. v. Keck*, 84 Ill. App. 159, *affirmed* 185 Ill. 400. See also *Mitchell, etc., Lumber Co. v. Wabash R. Co.*, 6 Ohio Dec. 135.

**Necessity that Statutory Remedy Be Pursued.** — See *Baltimore, etc., R. Co. v. Campbell*, 109 Ill. App. 25.

**3. Location.** — *Mitchell, etc., Lumber Co. v. Wabash R. Co.*, 6 Ohio Dec. 135.

**The Location of a Crossing May Be Changed** when reasonably necessary for the improvement of the road. *Costello v. Grand Trunk R. Co.*, 70 N. H. 403.

**The Location of the Crossing May Be Changed** by the railroad for the purpose of avoiding fire and accidents to passing trains, although the crossing had been established for more than ten years and the landowner objects to the change. *Schrimer v. Chicago, etc., R. Co.*, 115 Iowa 35.

**4. Under-grade Crossings.** — *Speer v. Erie R. Co.*, 64 N. J. Eq. 601; *State v. Wisconsin Cent. R. Co.*, 123 Wis. 551.

**433. 1. Sufficiency of Crossing.** — *Schrimer v. Chicago, etc., R. Co.*, 115 Iowa 35; *State v. Burlington, etc., R. Co.*, 99 Iowa 565; *Guinn v. Iowa, etc., R. Co.*, 125 Iowa 301; *Hamline v. Southern R. Co.*, 76 Miss. 410. See also *Speer v. Erie R. Co.*, (N. J. 1905) 60 Atl. Rep. 197.

**2. At Farm Crossings** less care is required of the railroad and a greater degree of care of the traveler. *Baltimore, etc., R. Co. v. Keck*, 84 Ill. App. 159, *affirmed* 185 Ill. 400.

**433.** *c.* GATES AND BARS. — See notes 4, 5.

**Reasonable Cattle Guards Required.** — Campbell *v.* Iowa Cent. R. Co., 124 Iowa 248.

**433. 4.** Atchison, etc., R. Co. *v.* Conlon, 9 Kan. App. 338, *reversed* 62 Kan. 416; Friend *v.* Chicago, etc., R. Co., 104 Wis. 663.

**Casual Breach or Defect.** — See St. Louis Southwestern R. Co. *v.* Adams, 24 Tex. Civ. App. 231.

**Statute Not to Be Construed Narrowly.** — A statute requiring railroad companies to build fences with gates and bars at farm crossings when necessary is remedial in its nature, seeking to minimize the inconveniences to the occu-

pant of the farm and is not to be narrowly construed. Baltimore, etc., R. Co. *v.* Keck, 84 Ill. App. 159, *judgment affirmed* 185 Ill. 400.

**5. Negligence of Third Person.** — A railroad is not liable for injuries to the landowner's stock where the gates were left open by a third person. St. Louis Southwestern R. Co. *v.* Adams, 24 Tex. Civ. App. 231.

**The Negligence of Third Persons** in leaving a gate open is no ground for an action against the railroad. St. Louis Southwestern R. Co. *v.* Adams, 24 Tex. Civ. App. 231.

## CRUEL AND UNUSUAL PUNISHMENT.

**436. I. CONSTITUTIONAL PROVISIONS.** — See note 2.

**437. What Punishment Is Prohibited.** — See note 2.

**II. FORM OF PUNISHMENT — 1. Death — a. NOT PROHIBITED.** —

See note 3.

*b.* MODE OF EXECUTION. — See note 6.

**440. III. DEGREE OF PUNISHMENT — 1. General Rule.** — See notes 2, 3.

**436. 2. Prohibition in United States Constitution Does Not Apply to States.** — See McDonald *v.* Massachusetts, 180 U. S. 311.

**437. 2. What Punishment Is Prohibited.** — Howard *v.* Fleming, 191 U. S. 126, *following In re Kemmler*, 136 U. S. 436.

**3. Death Penalty Permissible.** — Territory *v.* Ketchum, 10 N. Mex. 718, wherein it was held that a state statute prescribing the death penalty for assault on a train with intent to commit robbery or other felony does not prescribe a cruel and unusual punishment within the meaning of the Eighth Amendment to the Constitution of the United States.

**6. Electrocutation.** — Storti *v.* Com., 178 Mass. 549.

**440. 2. Prohibitions Apply to Form More than to Amount.** — *Ex p.* Brady, 70 Ark. 376, *citing* 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 440; Fisher *v.* McDaniel, 9 Wyo. 457, 87 Am. St. Rep. 971, *citing* 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 440.

**3. Courts Will Not Interfere Save in Extreme Cases.** — Jackson *v.* U. S., (C. C. A.) 102 Fed. Rep. 473, *citing* 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 440; *Ex p.* Brady, 70 Ark. 376, *citing* 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 440; State *v.* Stubblefield, 157 Mo. 360; State *v.* Laredo Ice Co., 96 Tex. 461; Fisher *v.* McDaniel, 9 Wyo. 457, 87 Am. St. Rep. 971.

In Shields *v.* State, 149 Ind. 395, the court said: "Section 16 of article 1, of the constitution of this state, which provides that cruel and unusual punishments shall not be inflicted, has reference to the statute fixing the punishment, and not to the punishment assessed by the jury within the limits fixed by the statute. If the statute fixing the punishment is not in violation of said section of the constitution, then any punishment assessed by a court or jury within the limits fixed by the statute cannot be adjudged excessive by this court, for the reason that the power to declare what

punishment may be assessed against those convicted of crime is not a judicial power, but is a legislative power, controlled only by the provisions of the constitution."

**Punishment Not Cruel or Unusual — Burglary.** — Confinement in penitentiary for thirty years for burglary of private residence. Handy *v.* State, (Tex. Crim. 1904) 80 S. W. Rep. 526.

**Assault and Battery.** — Ten years at hard labor in penitentiary for assault with a dangerous weapon. Jackson *v.* U. S., (C. C. A.) 102 Fed. Rep. 473.

**Assault with Intent to Rape.** — Fine of one thousand dollars. Doyle *v.* Com., 100 Va. 808.

**Assault with Intent to Kill.** — Two years imprisonment in penitentiary for an assault with intent to kill. State *v.* Lortz, 186 Mo. 122.

**Violation of Liquor Laws.** — Fines and costs aggregating forty thousand dollars in twenty prosecutions for unlawfully selling liquors, or imprisonment for about twelve years in jail and under contractors in serving out the same. *Ex p.* Brady, 70 Ark. 376.

A fine of not less than three hundred dollars or imprisonment for not less than three or more than twelve months for violation of liquor laws. State *v.* Constantino, 76 Vt. 192.

**Violating Game Laws.** — A fine of twenty dollars for each of eighteen birds in defendant's possession in violation of a game law. Stone's Petition, 21 R. I. 14.

A fine of twenty thousand dollars or imprisonment in the county jail until the fine paid, not exceeding two hundred days, for having in possession two hundred wild ducks with intent to sell the same. State *v.* Poole, 93 Minn. 148.

**Violation of Oyster Law.** — A fine not exceeding one thousand dollars or imprisonment not exceeding five years, the act only fixing the maximum. State *v.* Corson, 67 N. J. L. 178.

**Bribery.** — Confinement in state's prison for six years and six months for bribery. State *v.* Durnam, 73 Minn. 150.

**441.** Statute Authorizing Unlimited Punishment. — See note 1.

**2.** Successive Terms of Imprisonment. — See note 2.

**442.** **3.** Increased Punishment for Second or Subsequent Offense. — See note 2.

**Contempt.** — A sentence of imprisonment for six months and a fine of five hundred dollars for contempt in attempting to bribe witnesses. *Fisher v. McDaniel*, 9 Wyo. 457, 87 Am. St. Rep. 971.

**Conspiracy.** — Ten years confinement in penitentiary for the crime of conspiracy. *Howard v. Fleming*, 191 U. S. 126.

**Failure to Take License for Stage Coaches.** — A fine of one hundred dollars or imprisonment for ninety days for failure to take out license for stage coaches. *Belmar v. Barkalow*, 67 N. J. L. 504.

**Failure to Give Signals at Railroad Crossing.** — A fine of four hundred dollars for failure to give signals of the approach of a train to a highway crossing. *Louisville, etc., R. Co. v. Com.*, 104 Ky. 35.

**Obstructing Railroad Tracks.** — Imprisonment

for not less than one year nor more than ten years for placing obstructions on railroad tracks. *State v. Bisping*, 123 Wis. 267.

**Disturbing Religious Meeting.** — A fine of one hundred dollars and imprisonment in the county jail or state penitentiary for one year at hard labor for disturbing a religious assembly. *State v. Sheppard*, 54 S. Car. 178.

**441. 1. Statute Fixing Minimum Punishment Upheld Though No Maximum Fixed.** — *Latshaw v. State*, 156 Ind. 194; *State v. Constantino*, 76 Vt. 192. See *Handy v. State*, (Tex. Crim. 1904) 80 S. W. Rep. 526.

**2. Cumulative Sentence Punishable.** — *State v. Whitaker*, 160 Mo. 59; *State v. Hamby*, 126 N. Car. 1066.

**442. 2. Cumulative Punishment Authorized.** — *McDonald v. Massachusetts*, 180 U. S. 311.

## CRUELTY TO ANIMALS.

BY GEORGE E. FLEMING.

**444. III. THE STATUTORY OFFENSE—1. Nature of the Offense.** — See notes 4, 6.

**445. 2. What Animals Are Protected.** — See notes 1, 2.

**446. 3. What Acts Are Punishable—*a.* CRUEL OR NEEDLESS KILLING.** — See note 2.

*c.* UNNECESSARILY OR CRUELLY BEATING. — See note 6.

**447. *d.* CRUELLY DRIVING.** — See note 1.

*e.* NEGLECT. — See note 2.

*g.* WORKING ANIMAL INTENDED FOR SLAUGHTER. — See note 4.

**449. *i.* KILLING OR WOUNDING FOR SPORT—(6) Cock Fighting.** — See note 2.

**444. 4. Aiding and Abetting.** — One who aids and abets an act of cruelty to an animal is liable in the same manner as the principal. *Benford v. Sims*, (1898) 2 Q. B. 641, 78 L. T. N. S. 718.

**6. Malice Necessary Ingredient.** — "The beating and torturing must be malicious in order to constitute the offense, but wilful and unlawful cruelty is malice." *Ex p. Mauch*, 134 Cal. 500.

**445. 1. A Cock Is an Animal** within the meaning of the English Cruelty to Animals Act of 1849, § 2. *Allen v. Small*, (1904) 2 Ir. R. 705.

**2. A Dog Is a Domestic Animal**, for the purpose of the Georgia statute prohibiting cruelty to domestic animals. *Wilcox v. State*, 101 Ga. 563.

**446. 2. When Killing Is an Act of Mercy.** — The owner cannot be found guilty of unlawful killing by failure to shelter the animal properly, when the evidence shows that its death was not caused by such failure and that the killing was

done in a humane manner. *Ferrias v. People*, 71 Ill. App. 559.

**Causing Immediate Death by Shooting**, even though needless, has been held in *Alabama* not to fall within the statute. *Horton v. State*, 124 Ala. 80.

**6. Beating.** — *Duncan v. Pope*, 80 L. T. N. S. 120.

**447. 1. Overdriving Not Punishable Unless Wilful.** — *State v. Roche*, 37 Mo. App. 480.

**2. Neglect.** — See *Griffith v. State*, 116 Ga. 835.

**4. The Omission to Cut Off the Hair on the Neck of an Animal** brought to a slaughter-house to be slaughtered is an offense under the statute 12 & 13 Vict., c. 92, § 8. *Edgar v. Spain*, 19 Cox C. C. 719, 84 L. T. N. S. 631.

**449. 2. Cock Fighting Cruel.** — In *Allen v. Small*, (1904) 2 Ir. R. 705, it was held that, a cock being an animal within the meaning of the English Cruelty to Animals Act of 1849, § 2, to cause cocks to fight is an offense under that section.



- 449.** *j.* SURGICAL OPERATIONS. — See note 7.  
**450.** 4. Intent. — See note 1.  
**451.** Evil Intent Implied. — See note 1.  
Knowledge of Suffering. — See note 2.  
**452.** 5. Ownership and Custody of Animal — *a.* OWNERSHIP. — See note 2.  
*b.* CUSTODY. — See note 5.  
**453.** 6. Justification. — See notes 2, 3.  
**455.** IV. SOCIETIES FOR THE PREVENTION OF CRUELTY TO ANIMALS — 1. In General — Public Aid. — See note 1.  
2. Powers of Officers and Agents — *b.* TO KILL INJURED OR DISEASED ANIMAL. — See note 5.

- 458.** [CULL. — See note 6a.]  
CULPABLE. — See note 7.  
**459.** CULTIVATE. — See note 1.  
**461.** [CUMBERSOME. — See note 1a.]

**449.** 7. Docking Horse's Tail Cruelty. — *Bland v. People*, 32 Colo. 319.

**450.** 1. Malicious or Needless Act. — *Compare Ex p. Mauch*, 134 Cal. 500.

An Intention to Commit Cruelty Is No Part of the Offense under the English Cruelty to Animals Act of 1849, § 2. The only question is whether there was cruelty in fact. This rule was laid down where it appeared that the defendant had severely beaten a dog with heavy implements before shooting it, and the defense was that the defendant could have had no intention to commit cruelty because he was trying to destroy the animal, which had been in the habit of barking and running at his children. *Duncan v. Pope*, 80 L. T. N. S. 120.

**451.** 1. Evil Intent Implied. — *Conn. v. Magoon*, 172 Mass. 214.

**2.** Knowledge of Suffering. — See *Greenwood v. Backhouse*, 86 L. T. N. S. 566.

A Veterinary Surgeon is guilty of cruelty to animals if he advises the working of a sick horse. *Benford v. Sims*, (1898) 2 Q. B. 641, 78 L. T. N. S. 718.

**452.** 2. Ownership Immaterial. — *Horton v. State*, 124 Ala. 80.

**5.** A Passenger on a Horse Car, paying fare, cannot be held liable for overdriving the horses or overloading them. *Atkins v. State*, (Miss. 1902) 32 So. Rep. 921.

**453.** 2. When Infliction of Suffering Is Justified by Object in View. — See *State v. Avery*, 44 N. H. 392.

**3.** Protection of Property. — *Miles v. Hutchings*, (1903) 2 K. B. 714; *Armstrong v. Mitchell*, 88 L. T. N. S. 870; *State v. Karstendiek*, 49 La. Ann. 1621.

Destruction of Dangerous Dogs. — An order for the destruction of a dangerous dog need not contain an adjudication by the justices that the dog was not under proper control, nor are the justices required by section 2 of the English Dogs Act of 1871 to give to the owner of the dog the option of keeping the animal under proper control before ordering its destruction. *Rex v. Dymock*, 49 W. R. 618.

**455.** 1. Fines Collected Paid to S. P. C. A. — For the provisions of the *New Jersey* statute

see *Hanna v. New Jersey Soc., etc.*, 63 N. J. L. 303.

**5.** Statute Held Unconstitutional. — See *Goodwin v. Toucey*, 71 Conn. 262.

**458.** 6a. In an action for damages for breach of a contract to sell lumber, the court, per *Fowler, J.*, said: "A *cull* is defined by one of the witnesses as a board full of holes or knots and not considered merchantable." *Sloan v. Allegheny Co.*, 91 Md. 502.

**7.** Culpable Negligence. — *St. Louis, etc., R. Co. v. Bragg*, 66 Ark. 248; *Carter v. Cape Fear Lumber Co.*, 129 N. Car. 203. See also *Bennett v. Bennett*, 93 Me. 241.

**459.** 1. Improved or Cultivated. — See *Voight v. Meyer*, 42 N. Y. App. Div. 350.

Cultivation—Homestead Laws. — In an action for cutting timber on public lands without the intent to put the land in cultivation, in violation of the homestead laws, the court in its charge said: "*Cultivation* means *cultivation*. Making a stock farm or stock range of land is not putting it into *cultivation*. Fitting it for grazing, cutting the trees for the purpose of putting it in condition for grazing purposes, is not putting it in *cultivation*. That is not what the law contemplates when it says *cultivation*. It means plowing and preparing it for crops, or the raising of something that grows from the ground, besides grass." *U. S. v. Niemeyer*, 94 Fed. Rep. 147.

Cultivated Land—Herd Laws. — In *Lorance v. Hillyer*, 57 Neb. 266, the court said: "In the case at bar the lawn or lot of *Hillyer* was *cultivated* land, within the express language of section 8 of the Herd Law, which declares: '*cultivated* lands, within the meaning of this act, shall include all forest trees, fruit trees, and hedge rows planted on said lands.'"

**461.** 1a. A package two and one-half feet high by two wide is *cumbersome* within a rule of a street car company forbidding the carrying of *cumbersome* packages, and a passenger carrying the same may properly be ejected. *Ray v. United Traction Co.*, 96 N. Y. App. Div. 51.

# CUMULATIVE EVIDENCE.

By F. G. BAMMAN.

- 462. I. DEFINITION AND GENERAL NATURE.** — See note 1.  
**464.** Evidence That Is Not Cumulative. — See note 1.  
Evidence of New Fact Respecting the General Point in Issue. — See note 4.  
**466.** Admissions of Party Cumulative of Each Other but Not of Other Testimony. — See notes 1, 2.  
**467. II. POWER OF COURT TO EXCLUDE.** — See notes 3, 4.  
**468.** Court May Exclude Cumulative Evidence to an Uncontroverted Fact. — See note 1.  
Cumulative Evidence on a Controverted Point. — See note 2.  
Limiting Number of Expert Witnesses. — See note 3.  
**469.** Limiting Number of Witnesses to Character or Veracity. — See note 1.  
**471. IV. ADMISSION IN REBUTTAL.** — See notes 1, 2.  
**472. VI. NEWLY DISCOVERED CUMULATIVE EVIDENCE** — 1. Reopening Case to Admit It. — See note 4.

**462. 1. Definition of Cumulative Evidence.** — Offutt v. Gowdy, 18 Ind. App. 602; Hammond v. Evans, 23 Ind. App. 501; Franklin v. Lee, 30 Ind. App. 31; Winfield Bldg., etc., Assoc. v. McMullen, 59 Kan. 493; Brown v. Wheeler, 62 Kan. 676; Berry v. Ross, 94 Me. 270; People v. O'Connor, (Ct. Gen. Sess.) 37 Misc. (N. Y.) 754, affirmed 82 N. Y. App. Div. 55. See also Union Cent. L. Ins. Co. v. Loughmiller, 33 Ind. App. 309; State v. Soper, 148 Mo. 217; Clark v. Gallagher, 74 Vt. 331.

**464. 1. Evidence Different in Kind to Establish Same Point.** — Union Cent. L. Ins. Co. v. Loughmiller, 33 Ind. App. 309; State v. Lowell, 123 Iowa 427; Winfield Bldg., etc., Assoc. v. McMullen, 59 Kan. 493; Berberich v. Louisville Bridge Co., (Ky. 1898) 46 S. W. Rep. 691; Corkery v. Central R. Co., (N. J. 1899) 43 Atl. Rep. 655.

**4. Evidence Tending to Prove a New Fact.** — Twin Springs Placer Co. v. Upper Boise Hydraulic Min. Co., 6 Idaho 687; Mally v. Mally, 114 Iowa 309; Schnee v. Dubuque, 122 Iowa 459; Clark v. Gallagher, 74 Vt. 331.

**466. 1. Verbal Admissions of a Party Cumulative of Each Other.** — Offutt v. Gowdy, 18 Ind. App. 602. See also Union Cent. L. Ins. Co. v. Loughmiller, 33 Ind. App. 309.

**Evidence of Written Admission of a party to the same fact are cumulative of oral admissions.** Brown v. Wheeler, 62 Kan. 676.

**2. Evidence of Admissions of Party Not Cumulative of Testimony of Other Witnesses.** — Bullard v. Bullard, 112 Iowa 423.

**467. 3. Court May Limit Number of Witnesses on Single Point.** — Ragsdale v. Southern R. Co., 121 Fed. Rep. 924; Outcalt v. Johnston, 9 Colo. App. 519; Talbott v. Bedford, (Ky. 1899) 53 S. W. Rep. 294. See also Tobin v. Brimfield, 182 Mass. 117; Siegelman v. Jones, 103 Mo. App. 172; Chicago City R. Co. v. Wall, 93 Ill. App. 411.

A witness who has been examined, but fails to give relevant testimony, is nevertheless one of the number of witnesses to a single point

allowed by the court rules. The examining counsel takes the risk by interrogating the witness. Giordano v. Brandywine Granite Co., 3 Penn. (Del.) 423.

**4. Discretion of Court Must Be Reasonably Exercised.** — Traders' Ins. Co. v. Catlin, 71 Ill. App. 569; Markham v. Herrick, 82 Mo. App. 327.

**468. 1. Exclusion of Cumulative Evidence to an Uncontroverted Fact.** — Maxwell v. State, 129 Ala. 48. See also Bearden v. State, 44 Tex. Crim. 578.

**2. Error to Limit Number of Witnesses on Controverted Point.** — Cooke Brewing Co. v. Ryan, 98 Ill. App. 444; Crane Co. v. Stammers, 83 Ill. App. 329.

**3. Court May Limit Number of Expert Witnesses.** — See Love v. Barnesville Mfg. Co., 3 Penn. (Del.) 152, wherein the court refused to hear one or more expert witnesses as to the condition of yarn, where six lay witnesses had already testified on that point.

It is not error for the court to exclude further experts as to value where the full number agreed to by stipulation between the parties have been called. Chicago Terminal Transfer R. Co. v. Bugbee, 184 Ill. 353.

**469. 1. Court May Limit Number of Witnesses to Character or Veracity.** — Doner v. People, 92 Ill. App. 43. See also State v. Rutherford, 152 Mo. 124; Biester v. State, 65 Neb. 276; Bryant v. State, (Tex. Crim. 1898) 47 S. W. Rep. 373.

**471. 1. Admission of Evidence Not Strictly in Rebuttal Within Discretion of Court.** — Sommer v. Carbon Hill Coal Co., (C. C. A.) 107 Fed. Rep. 230; State v. Johnson, 66 S. Car. 23. See also Southern R. Co. v. Hays, 78 Miss. 310.

**2. Merely Cumulative Evidence Should Not Be Admitted.** — Hilker v. Hilker, 153 Ind. 425; Acklin v. McCalmont Oil Co., 201 Pa. St. 257; Steedman v. South Carolina, etc., R. Co., 66 S. Car. 542.

**472. 4. Reopening Case to Admit Newly Discovered Cumulative Evidence.** — Sisler v. Shaffer, 43 W. Va. 769.

**473. 2. As Ground for a New Trial — a. GENERAL RULE. — See note 1.**

**A Continuance** will ordinarily not be granted for the purpose of enabling a party to secure evidence which is merely cumulative. *State v. Hasty*, 121 Iowa 507; *Dean v. Com.*, 78 S. W. Rep. 1112, 25 Ky. L. Rep. 1876; *Hatfield v. Com.*, (Ky. 1900) 55 S. W. Rep. 679; *State v. Albert*, 109 La. 201; *State v. Robinson*, 106 Tenn. 204; *Bryant v. State*, (Tex. Crim. 1898) 47 S. W. Rep. 373; *Shackelford v. State*, (Tex. Crim. 1899) 53 S. W. Rep. 884; *Wilkerson v. State*, (Tex. Crim. 1899) 57 S. W. Rep. 956; *Gann v. State*, (Tex. Crim. 1900) 59 S. W. Rep. 896; *Cauthern v. State*, (Tex. Crim. 1901) 65 S. W. Rep. 96; *Griminger v. State*, 44 Tex. Crim. 1; *Kelly v. State*, 44 Tex. Crim. 390; *Knowles v. State*, 44 Tex. Crim. 322; *Lively v. State*, (Tex. Crim. 1903) 73 S. W. Rep. 1048; *Williams v. State*, 45 Tex. Crim. 218; *Ray v. State*, (Tex. Crim. 1903) 75 S. W. Rep. 798; *McComas v. State*, (Tex. Crim. 1904) 81 S. W. Rep. 1212. See also *State v. Phillips*, (S. Dak. 1904) 98 N. W. Rep. 171. And see the title CONTINUANCES, 4 ENCYC. OF PL. AND PR. 852, 887.

But in *Texas* it is held that under the statute a first application for continuance for material testimony should not be rejected simply because it is cumulative. *Davis v. State*, (Tex. Crim. 1901) 65 S. W. Rep. 918; *Gilford v. State*, (Tex. Crim. 1903) 78 S. W. Rep. 692.

**473. 1. New Trial Not Granted to Admit Newly Discovered Cumulative Evidence — Alabama.** — *Alabama Midland R. Co. v. Johnson*, 123 Ala. 197.

*Arizona.* — *Ryder v. Leach*, 3 Ariz. 129.

*California.* — *People v. Chrisman*, 135 Cal. 282. See also *People v. Benc*, 130 Cal. 159.

*Colorado.* — See *Outcalt v. Johnston*, 9 Colo. App. 519.

*Connecticut.* — *Selleck v. Head*, 77 Conn. 15.

*Georgia.* — *O'Neil v. State*, 104 Ga. 538; *Reid v. State*, 103 Ga. 572; *Milam v. State*, 108 Ga. 29; *Ponder v. Walker*, 107 Ga. 753; *Wallace v. State*, 110 Ga. 284; *Southern R. Co. v. Pulliam*, 108 Ga. 808; *Macon v. Small*, 108 Ga. 309; *Isham v. State*, 112 Ga. 406; *Tyre v. State*, 112 Ga. 224; *Fordham v. State*, 112 Ga. 228; *Matthews v. Kennedy*, 113 Ga. 378; *Graham v. State*, 113 Ga. 724; *Louisville, etc., R. Co. v. Harrison*, 113 Ga. 1153; *Sims v. Sims*, 113 Ga. 1083; *Windom v. State*, 114 Ga. 36; *Somers v. State*, 116 Ga. 535; *Sturkey v. State*, 116 Ga. 526; *Davis v. State*, 116 Ga. 87; *Watson v. State*, 118 Ga. 83; *Rountree v. State*, 118 Ga. 785; *Harris v. Roan*, 119 Ga. 379; *Tipton v. State*, 119 Ga. 304. See also *Clayton v. State*, 118 Ga. 760.

*Idaho.* — *Knollin v. Jones*, 7 Idaho 466.

*Illinois.* — *Illinois Cent. R. Co. v. Truesdell*, 68 Ill. App. 324; *La Fevre v. Du Brule*, 71 Ill. App. 263; *Crone v. Garst*, 88 Ill. App. 124; *McDavid v. Ellis*, 89 Ill. App. 182; *Bingham v. Spruill*, 97 Ill. App. 374; *Heenan v. Bedmen*, 101 Ill. App. 603; *Miller v. Potter*, 102 Ill. App. 483; *Chicago City R. Co. v. Bohnow*, 108 Ill. App. 346; *Bracewell v. Self*, 109 Ill. App. 140; *Shutt Imp. Co. v. Thompson*, 109 Ill. App. 540; *Conlan v. Mead*, 172 Ill. 113; *Heldmaier v. Taman*, 188 Ill. 283; *Chicago, etc., R. Co. v. Calumet Stock Farm Co.*, 194 Ill. 9, 88 Am.

*St. Rep.* 68; *Lathrop v. People*, 197 Ill. 169; *Graff v. People*, 208 Ill. 312; *People v. McCullough*, 210 Ill. 488.

*Indiana.* — *Offutt v. Gowdy*, 18 Ind. App. 602; *Remy v. Lilly*, 22 Ind. App. 109; *Hammond v. Evans*, 23 Ind. App. 501; *Rinehart v. State*, 23 Ind. App. 419; *Indianapolis v. Mitchell*, 27 Ind. App. 589; *Franklin v. Lee*, 30 Ind. App. 31.

*Iowa.* — *Allbright v. Hannah*, 103 Iowa 98; *Ritchey v. Ritchey*, (Iowa 1899) 79 N. W. Rep. 280; *Sioux City Stock-Yards Co. v. Sioux City Packing Co.*, 110 Iowa 396; *State v. Phillips*, (Iowa 1902) 89 N. W. Rep. 1092; *State v. Blain*, 118 Iowa 466; *Grapes v. Sheldon*, 119 Iowa 112; *Connell v. Connell*, 119 Iowa 602; *Kringle v. Kringle*, 123 Iowa 365.

*Kansas.* — *Brown v. Wheeler*, 62 Kan. 676. See also *Finrock v. Ungeheuer*, 8 Kan. App. 481.

*Kentucky.* — *Richardson v. Huff*, (Ky. 1897) 43 S. W. Rep. 454; *Louisville, etc., R. Co. v. Tinkham*, (Ky. 1898) 44 S. W. Rep. 439; *Miller v. Physe*, (Ky. 1899) 49 S. W. Rep. 776; *Ferrell v. McCoy*, (Ky. 1899) 53 S. W. Rep. 23; *Bragg v. Moore*, (Ky. 1900) 56 S. W. Rep. 163; *Finley v. Curd*, 62 S. W. Rep. 501, 22 Ky. L. Rep. 1912; *Thomas v. Louisville, etc., R. Co.*, 61 S. W. Rep. 43, 22 Ky. L. Rep. 1565; *Oberdorfer v. Newberger*, 67 S. W. Rep. 267, 23 Ky. L. Rep. 2323; *Akers v. Akers*, 69 S. W. Rep. 715, 24 Ky. L. Rep. 636; *Black v. Com.*, 72 S. W. Rep. 772, 24 Ky. L. Rep. 1974; *Curry v. Com.*, 74 S. W. Rep. 1077, 25 Ky. L. Rep. 281; *Richmond v. Martin*, 78 S. W. Rep. 219, 25 Ky. L. Rep. 1516; *Covington v. Bostwick*, 82 S. W. Rep. 569, 26 Ky. L. Rep. 780. See also *Butts v. Christy*, 67 S. W. Rep. 377, 23 Ky. L. Rep. 2355.

*Louisiana.* — *State v. Lejeune*, 52 La. Ann. 463; *State v. Sparks*, 112 La. 418.

*Maine.* — *Berry v. Ross*, 94 Me. 270.

*Michigan.* — *Morin v. Robarge*, 132 Mich. 337, 9 Detroit Leg. N. 635.

*Mississippi.* — *Cousins v. State*, (Miss. 1903) 34 So. Rep. 323.

*Missouri.* — *State v. Soper*, 148 Mo. 217; *State v. Allen*, 171 Mo. 562; *State v. Bates*, 182 Mo. 70; *State v. Carpenter*, 182 Mo. 53.

*Montana.* — *State v. Brooks*, 23 Mont. 146.

*Nebraska.* — *Hoffine v. Ewings*, 60 Neb. 729; *Matoushek v. Dutcher*, (Neb. 1903) 93 N. W. Rep. 1049; *Campion v. Lattimer*, (Neb. 1903) 97 N. W. Rep. 290; *Norbury v. Harper*, (Neb. 1903) 97 N. W. Rep. 438.

*New Jersey.* — *Thomas v. Consolidated Traction Co.*, 62 N. J. L. 36; *Hoban v. Sandford, etc., Co.*, 64 N. J. L. 426.

*New York.* — *Reiffeld v. Delaware, etc., Canal Co.*, 20 N. Y. App. Div. 635; *Piehl v. Albany R. Co.*, 30 N. Y. App. Div. 166, *affirmed* 162 N. Y. 617; *Lee v. Supreme Council, etc.*, 64 N. Y. App. Div. 622; *People v. O'Connor*, (Ct. Gen. Sess.) 37 Misc. (N. Y.) 754, *affirmed* 82 N. Y. App. Div. 55; *Cheever v. Scottish Union, etc., Ins. Co.*, 86 N. Y. App. Div. 331; *Piehl v. Albany R. Co.*, 30 N. Y. App. Div. 166, *affirmed* without opinion 162 N. Y. 617.

*Oklahoma.* — *Douthitt v. Territory*, 7 Okla. 55; *Huster v. Wynn*, 8 Okla. 569; *Harvey v. Territory*, 11 Okla. 156.



**476. Evidence Cumulative of Evidence Known but Not Used at Trial. — See note 1.**

Reasons for the Rule. — See notes 3, 4.

**b. QUALIFICATIONS AND EXCEPTIONS — Of What Evidence the Newly Discovered Evidence Must Be Cumulative. — See note 6.****477. When the Rule Does Not Apply. — See notes 4, 5.****478. See note 1.**

That Evidence Is in Some Respects Cumulative. — See note 2.

*Oregon.* — *State v. Hill*, 39 *Oregon* 90.*Pennsylvania.* — *Loucks v. Lightner*, 11 *York Leg. Rec. (Pa.)* 157; *Kambeitz v. Harrisburg Traction Co.*, 24 *Pa. Co. Ct.* 453.*Texas.* — *Austin v. State*, (Tex. Crim. 1898) 47 *S. W. Rep.* 371; *Adler v. State*, (Tex. Crim. 1899) 50 *S. W. Rep.* 358; *Speights v. State*, 41 *Tex. Crim.* 323; *Luke v. El Paso*, (Tex. Civ. App. 1900) 60 *S. W. Rep.* 363; *Kelly v. State*, 44 *Tex. Crim.* 390; *San Antonio, etc., R. Co. v. Moore*, 31 *Tex. Civ. App.* 371; *Ray v. State*, (Tex. Crim. 1903) 75 *S. W. Rep.* 798; *Thompson v. State*, 45 *Tex. Crim.* 244; *Pelly v. Denison, etc., R. Co.*, (Tex. Civ. App. 1904) 78 *S. W. Rep.* 542; *Oakeo v. Prather*, (Tex. Civ. App. 1904) 81 *S. W. Rep.* 557. See also *Whitfield v. State*, 40 *Tex. Crim.* 14.*Utah.* — *Larsen v. Onesite*, 21 *Utah* 38.*Washington.* — *O'Toole v. Faulkner*, 34 *Wash.* 371, citing 8 *AM. AND ENG. ENCYC. OF LAW* (2d ed.) 472, 473; *Benson v. Hamilton*, 34 *Wash.* 201.*West Virginia.* — *Sisler v. Shaffer*, 43 *W. Va.* 769.*Wisconsin.* — *Clithero v. Fenner*, 122 *Wis.* 356; *Knopke v. Germantown Farmers' Mut. Ins. Co.*, 99 *Wis.* 289.**476. 1. Evidence Cumulative of Evidence Known to Party but Not Used. — O'Neil v. State**, 104 *Ga.* 538.**3. Public Policy Demands that There Be an End of Litigation. — See Conlan v. Mead**, 172 *Ill.* 13; *Kringle v. Kringle*, 123 *Iowa* 365.**4. Contrary Practice Would Encourage Perjury. — Sisler v. Shaffer**, 43 *W. Va.* 769.**6. Evidence Cumulative of Evidence Given by****Moving Party. — O'Toole v. Faulkner**, 34 *Wash.* 371.**477. 4. Conclusive Evidence. — See Lathrop v. People**, 197 *Ill.* 169.**5. Evidence that Would Probably Change the Verdict. — People v. Lapique**, 136 *Cal.* 503; *Parsons v. Lewiston, etc.*, *St. R. Co.*, 96 *Me.* 503; *German Nat. Bank v. Edwards*, 63 *Neb.* 604; *Keister v. Rankin*, 34 *N. Y. App. Div.* 288; *Benta v. Harris*, (N. Y. City Ct. Gen. T.) 27 *Misc. (N. Y.)* 648; *Solowye v. Hazlett*, (N. Y. City Ct. Gen. T.) 35 *Misc. (N. Y.)* 197; *Hagen v. New York Cent., etc., R. Co.*, (Supm. Ct. Spec. T.) 44 *Misc. (N. Y.)* 540, *reversed* 100 *N. Y. App. Div.* 218. See also *Oberlander v. Fixen*, 129 *Cal.* 690; *Franklin v. Lee*, 30 *Ind. App.* 31; *Hess v. Sloane*, 47 *N. Y. App. Div.* 585.Where the party moving for a new trial was deprived of property because of false testimony, the rule prohibiting a new trial for newly discovered cumulative evidence should not be applied. *Halliday v. Lambright*, 29 *Tex. Civ. App.* 226.**478. 1. Evidence Tending to Prove Alibi. — See State v. Bates**, 182 *Mo.* 70. But see *Hatfield v. Com.*, (Ky. 1900) 55 *S. W. Rep.* 679.**But in a Georgia Case. — See Teal v. State**, 119 *Ga.* 102; *Tipton v. State*, 119 *Ga.* 304.**2. Evidence Having Independent and Distinct Bearing upon Issue. — Georgia Southern, etc., R. Co. v. Zarks**, 108 *Ga.* 800. See also *Twin Springs Placer Co. v. Upper Boise Hydraulic Min. Co.*, 6 *Idaho* 687; *Vollkommer v. Nassau Electric R. Co.*, 23 *N. Y. App. Div.* 88.

# CUMULATIVE PUNISHMENT.

By F. G. BAMMAN.

**479. I. DEFINITION.** — See note 1.

**480. II. CONSTITUTIONALITY OF STATUTES PROVIDING FOR — 1. Not Ex Post Facto.** — See note 1.

**481.** See note 1.

**2. Do Not Put Accused Twice in Jeopardy for Same Offense.** — See note 2.

**482. 3. Do Not Provide for Cruel or Unusual Punishments.** — See note 1.

**4. Do Not Deny Equal Protection of Laws.** — See note 2.

**III. AMOUNT OF ADDITIONAL PUNISHMENT.** — See note 3.

**483.** See note 1.

"Double the Time of First Conviction." — See note 2.

**484.** Deprivation of "Good Time." — See note 1.

**IV. WHEN AUTHORIZED — 1. Time of Committing Second Offense —**

**a. AFTER FIRST CONVICTION.** — See note 2.

**486. 2. The Prior Conviction — b. MUST BE FOUND BY JURY.** — See note 3.

**479. 1. Distinguished from Cumulative Sentence.** — *State v. Hamby*, 126 N. Car. 1066, 35 S. E. Rep. 614, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 480.

**480. 1. Not Ex Post Facto.** — *McDonald v. Massachusetts*, 180 U. S. 311; *McDonald v. Com.*, 173 Mass. 322, 73 Am. St. Rep. 293.

**481. 1. Do Not Increase Punishment of Offenses Committed Before Passage.** — *State v. Dale*, 110 Iowa 215.

**2. Not a Second Jeopardy.** — *McDonald v. Massachusetts*, 180 U. S. 311; *Herndon v. Com.*, 105 Ky. 197, 88 Am. St. Rep. 303. See also *Kinney v. State*, 45 Tex. Crim. 500; *White v. Com.*, (Ky. 1899) 50 S. W. Rep. 678.

**Not a Double Punishment.** — Where one was convicted under a statute authorizing a sentence of ten years for a second offense, the fact that the judge stated in the judgment that five years was for conviction on the offense charged, and five years for the prior conviction, does not render it a punishment for the prior conviction, and the explanation renders the judgment merely redundant. *State v. Connors*, 27 Mont. 227.

**482. 1. Cumulative Punishment Not Cruel or Unusual.** — *McDonald v. Massachusetts*, 180 U. S. 311; *McDonald v. Com.*, 173 Mass. 322, 73 Am. St. Rep. 293.

**2. Do Not Deny Equal Protection of Laws.** — *McDonald v. Massachusetts*, 180 U. S. 311; *McDonald v. Com.*, 173 Mass. 322, 73 Am. St. Rep. 293.

**3. Amount of Additional Punishment — Kentucky.** — See *Morrison v. Com.*, (Ky. 1900) 56 S. W. Rep. 516.

**483. 1. Maximum Punishment Imperative.** — See *People v. Burns*, 138 Cal. 159. See also *Hall v. Com.*, 106 Ky. 804.

**2. Double the Time of First Imprisonment.** — Where the jury fixed the punishment for felony

at one year's imprisonment, and also found that the felon had been previously convicted and sentenced to eighteen years imprisonment, it was error to sentence him to thirty-six years imprisonment under such a statute, as it is the province of the jury to fix the punishment within the periods prescribed by law. *Morrison v. Com.*, (Ky. 1900) 56 S. W. Rep. 516. See *Hall v. Com.*, 106 Ky. 894.

**484. 1. As to "Good Time" Statutes,** see the titles PRISONS AND PRISONERS, vol. 22, p. 1307; REPRIEVE, PARDON, AND AMNESTY, vol. 24, p. 559; SENTENCE AND PUNISHMENT, vol. 25, p. 328.

**2. Conviction Must Precede Second Offense.** — *L'Association Pharmaceutique v. Livernois*, 9 Quebec Q. B. 243; *Brown v. Com.*, 61 S. W. Rep. 4, 22 Ky. L. Rep. 1582; *Com. v. Neill*, 16 Pa. Super. Ct. 210; *Kinney v. State*, 45 Tex. Crim. 500.

Under a statute providing for increased punishment for larceny after three prior convictions, but which is silent as to the time of such convictions, it is not necessary that the act charged should be subsequent to the third conviction, and an indictment is not demurrable which alleges an act of larceny committed prior to the third conviction. *State v. Dale*, 110 Iowa 215.

**486. 3. Prior Conviction Must Be Found by Jury.** — *Hall v. Com.*, 106 Ky. 894; *People v. Reilly*, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 45, reversed 36 N. Y. App. Div. 639; *Bandy v. Hehn*, 10 Wyo. 167. See also *Evans v. State*, 150 Ind. 651.

It is necessary to allege and prove a prior conviction in order to sentence one as an habitual criminal. *McDonald v. Com.*, 173 Mass. 322, 73 Am. St. Rep. 293.

Where a former conviction is briefly alleged in the indictment, and the record of such con-

- 487.** See notes 1, 2.  
*c.* EVIDENCE — Record of Former Conviction. — See notes 3, 4.  
**488.** *d.* TIME AND PLACE — Conviction Before Law Providing for Cumulative Punishment Took Effect. — See note 4.  
**489.** Place. — See notes 2, 3.  
*f.* NATURE OF PRIOR OFFENSE. — See note 5.  
**492.** 3. Effect of Pardon for Prior Offense. — See note 2.  
 4. Effect of Cumulation in Prior Punishment. — See note 4.  
**493.** 5. Joint Prosecution. — See note 1.  
 6. Habitual Offender. — See note 2.

viction is introduced in evidence, there is sufficient proof to sustain a judgment for a second offense. *State v. Markuson*, 7 N. Dak. 155.

**Must Be Expressly Found — Kentucky.** — But see *Herndon v. Com.*, 105 Ky. 197, 88 Am. St. Rep. 303; *Oliver v. Com.*, 113 Ky. 228.

**Admission of Previous Conviction — California.** — *People v. McNeill*, 118 Cal. 388.

**Finding of Court as to Prior Conviction.** — *Miller v. State*, (Tex. Crim. 1898) 44 S. W. Rep. 162.

In a late *Georgia* case, *McWhorter v. State*, 118 Ga. 55, it was held that a first conviction need not be alleged, and may not be proved on the trial, as it would tend to the accused's prejudice. After conviction the court may satisfy itself by the record, or hear evidence as to the identity of the person in deciding whether it is a second offense.

**487. 1. Evidence of Prior Conviction Properly Introduced.** — *People v. Sickels*, 156 N. Y. 541. See *State v. Carr*, 146 Mo. 1.

**2. Not Objectionable as Improperly Establishing Bad Character.** — See *McWhorter v. State*, 118 Ga. 55.

**3. Record Admissible.** — See *Com. v. Neill*, 16 Pa. Super. Ct. 210.

"An act inflicting a penalty for a 'second offense,' the indictment must recite the record of the first conviction; and upon the evidence, the record of the first conviction must be proved." *State v. Watts*, 101 Mo. App. 666.

"The extended record would prove the same facts with the same force that the complaint and minutes proved. \* \* \* It is held in *Massachusetts* \* \* \* that the complaint and clerk's minutes are competent evidence of the [prior] judgment." *State v. Cox*, 69 N. H. 246.

**4. Necessity for Production of Record.** — *Bullard v. State*, 40 Tex. Crim. 270.

**488. 4. First Conviction Merely a Part of History of Criminal.** — See *McWhorter v. State*, 118 Ga. 55; *People v. Sickles*, 156 N. Y. 541; *Bandy v. Hehn*, 10 Wyo. 167.

**489. 2. Prior Conviction in Foreign State.** —

A cumulative sentence may be imposed in case of conviction in another county or at a former term of the court. *Miller v. State*, (Tex. Crim. 1898) 44 S. W. Rep. 162.

**3. Laws Inflicting Cumulative Punishment Where Prior Conviction in Foreign State.** — See *McDonald v. Massachusetts*, 180 U. S. 311, where the matter is said to be within the discretion of the legislature. See also *McDonald v. Com.*, 173 Mass. 322, 73 Am. St. Rep. 293.

**5. Offenses Need Not Be of Same Character or Grade.** — See *Com. v. Neill*, 16 Pa. Super. Ct. 210.

**492. 2. Pardon Does Not Relieve from Liability to Cumulative Punishment.** — *Herndon v. Com.*, 105 Ky. 197, 88 Am. St. Rep. 303. See also *Williams v. People*, 196 Ill. 173.

**Contrary Doctrine.** — The effect of a pardon is to obliterate an offense, and a second similar offense committed thereafter is punishable only as a first. *State v. Martin*, 59 Ohio St. 212, 69 Am. St. Rep. 762; *State v. Williams*, 5 Ohio Dec. 545, 7 Ohio N. P. 562.

**4. Cumulation for Second Offense Does Not Prevent Cumulation for Third.** — The fact that cumulative punishment was not imposed for a second offense does not render inapplicable a statute providing a life sentence for the third offense. *Brown v. Com.*, 61 S. W. Rep. 4, 22 Ky. L. Rep. 1582.

"Evidently it was never intended that prior offenses could thus be made to do double duty; that is, that prior cases could be used to enhance the punishment in any given case more than once." *Kinney v. State*, 45 Tex. Crim. 500.

**493. 1. Joint Prosecution.** — See *People v. Kelly*, 120 Cal. 271.

**2. Common and Notorious Thief.** — See *Miller v. State*, (Tex. Crim. 1898) 44 S. W. Rep. 162.

**There Need Not Be an Interval Between the Two Terms Served** to render one convicted a third time a habitual criminal under Mass. Stat. 1887, c. 435, § 1. *Com. v. Richardson*, 175 Mass. 202.



## CUMULATIVE VOTING.

**494. II. IN ELECTION OF OFFICERS OF PRIVATE CORPORATIONS — 1. When Authorized — a. IN GENERAL.** — See note 3.

**495. Must Be Expressly Authorized.** — See note 2.

*b. EFFECT UPON PRE-EXISTING CORPORATION.* — See note 3.

**496. 2. Exercise of Right to Cumulate Votes — a. NUMBER OF VOTES STOCKHOLDER MAY CAST.** — See note 2.

**497. CURATOR.** — See note 3.

[**CURB LINE.** — See note 3*a*.]

**498. [CURREANT.** — See note 1*a*.]

**CURRENCY — CURRENT.** — See note 2.

**503. Other Construction of the Terms.** — See note 3.

**494. 3. Restricted to Private Corporations.** — Com. v. Yetter, 190 Pa. St. 488.

**495. 2. Cumulation Authorized by Statute.** — In the election of directors of a corporation the cumulative voting of shares is authorized by Rev. Stat. Ohio, § 3245, as amended April 23, 1898 (93 O. L. 230), and one receiving a majority of the votes so cast is elected a director, though he does not receive the votes of the holders of a majority of the shares. Schwartz v. State, 61 Ohio St. 497.

Where the stockholders of a state normal school, organized under the Act of May 20, 1857 (P. L. 581), obtained a charter as a private corporation from the Court of Common Pleas in 1893, the vote for the trustees of such a corporation may be cumulated under article 16, section 4 of the Constitution, and the Act of April 25, 1876, P. L. 47. Com. v. Yetter, 190 Pa. St. 488.

**3. Provisions Do Not Affect Pre-existing Corporations with Unalterable Charters.** — The right to cumulate votes at an election for directors exists in the case of a corporation chartered by a decree of the court prior to the adoption of the Constitution of 1874, and of a class described as the first class in the Corporation Act of April 29, 1874, and which, after the adoption of the Constitution, procured amendments of its charter under the Act of April 29, 1874, by a decree of the court. Com. v. Flannery, 203 Pa. St. 28.

**496. 2.** See Schwartz v. State, 61 Ohio St. 497.

**The Motives** which actuated any stockholder in distributing his votes on the cumulative plan are not a subject of inquiry or control by the courts. Chicago Macaroni Mfg. Co. v. Boggianno, 202 Ill. 312.

**497. 3. A Curatorship Differs from an Administration** in that the latter continues in full force until a final settlement occurs, and meanwhile the executor or administrator represents the heirs and creditors of the decedent. State v. Greer, 101 Mo. App. 669.

**3a. The "Curb Line" of a Street** is the dividing line between that portion of the street to be used by horsemen and vehicles, called the roadway, and that portion of the street reserved on each side of the roadway for the use of pedestrians. Topliff v. Chicago, 196 Ill. 215.

**498. 1a.** "Referring to the history and scientific classification of the dried imported *curreant* of commerce, the court, in California, says it is 'a kind of raisin made from a small, seedless grape, grown not only on the island of Zante, but also, and to a much greater extent, on the mainland of Greece, and other neighboring localities. It derives the name of *curreants* from the fact that in times past it was shipped from the city of Corinth, Greece. In German it is called 'Korinthen;' in French, 'raisin de Corinthe;' in Spanish, 'pasas de Corintho.' It is a raisin grape, as distinguished from a shrub *curreant*, with which its name may be confounded, but from which it is entirely distinct—the former belonging to the grapevine family, or *vitis vinifera*, of plants; the latter to the shrub, or *ribes*. \* \* \* On the vine it is a small-sized grape. When picked and dried, it is a dried grape, or kind of raisin.'" Hills Bros. Co. v. U. S., (C. C. A.) 99 Fed. Rep. 264.

**2. Certificates of Deposit.** — See Hatch v. Dexter First Nat. Bank, 94 Me. 348.

**Current Funds Equivalent to Current Money.** — Hatch v. Dexter First Nat. Bank, 94 Me. 348.

**503. 3. Indictment — Embezzlement.** — In Butler v. State, (Tex. Crim. 1904) 81 S. W. Rep. 743, the court said: "As to the allegation '*current* money of the United States' it has recently been held that includes any kind of paper *currency* money of the United States which passes *current* as money under the guaranty of the United States government, and includes not only legal tender notes but national bank bills and gold and silver certificates. Berry v. State, (Tex. Crim. 1904) 80 S. W. Rep. 630."

# CURTESY.

By J. M. GREENFIELD.

**507. I. DEFINITION.** — See note 1.

**509. III. GRADATIONS AND REQUISITES — 2. Requisites — a. IN GENERAL**  
— (1) *Curtesy Initiate.* — See note 1.

(2) *Curtesy Consummate.* — See note 2.

b. MARRIAGE. — See note 3.

**510. c. SEIZIN OF THE WIFE — (1) In General. — See note 2.**

(2) *What Seizin Sufficient* — (a) *Actual Seizin.* — See note 3.

**511. Possession by Cotenant in Common or Coparcener. — See note 1.**

*Estates in Reversion or Remainder — After an Estate of Freehold.* — See note 2.

**512. After a Term for Years. — See note 1.**

*Not Required When Impossible.* — See note 3.

(b) *Constructive Seizin.* — See note 5.

**513. (d) Beneficial Seizin. — See note 5.**

**514. d. BIRTH OF ISSUE — (1) Common Law — (a) Must Be Born Alive. —  
See note 2.**

(c) *Must Be Capable of Inheriting.* — See note 4.

(2) *Statutes — Issue Not Necessary.* — See note 5.

**515. f. CONCURRENCE OF REQUISITES UNNECESSARY — (1) Seizin and Birth of Issue. — See note 2.**

**IV. NATURE AND INCIDENTS — 1. Curtesy Initiate — a. IN GENERAL.**  
— See note 4.

**507. 1. Definition.** — *De Bury v. De Bury*, 2 N. Bruns. Eq. Rep. 278, quoting 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 507. See also *Dozier v. Toalson*, 180 Mo. 546.

**509. 1. Curtesy Initiate.** — *Hampton v. Cook*, 64 Ark. 353, 62 Am. St. Rep. 194; *Zeust v. Staffan*, 16 App. Cas. (D. C.) 141; *Phillips v. Farley*, 112 Ky. 837; *Valentine v. Hutchinson*, (County Ct.) 43 Misc. (N. Y.) 314; *Guernsey v. Lazear*, 51 W. Va. 328; *De Bury v. De Bury*, 2 N. Bruns. Eq. Rep. 278, affirmed 36 N. Bruns. 57.

**2. Curtesy Consummate.** — *Valentine v. Hutchinson*, (County Ct.) 43 Misc. (N. Y.) 314; *Moore v. Iles*, 9 Ohio Cir. Dec. 418, 16 Ohio Cir. Ct. 591; *Guernsey v. Lazear*, 51 W. Va. 328; *De Bury v. De Bury*, 2 N. Bruns. Eq. Rep. 278, affirmed 36 N. Bruns. 57.

**3. Marriage Necessary.** — *De Bury v. De Bury*, 2 N. Bruns. Eq. Rep. 278, affirmed 36 N. Bruns. 57.

**510. 2. Seizin Necessary.** — *Martin v. Trail*, 142 Mo. 85; *Cox v. Boyce*, 152 Mo. 576, 75 Am. St. Rep. 483; *Collins v. Russell*, 96 N. Y. App. Div. 136; *Moore v. Iles*, 9 Ohio Cir. Dec. 418, 16 Ohio Cir. Ct. 591; *De Bury v. De Bury*, 2 N. Bruns. Eq. Rep. 278, affirmed 36 N. Bruns. 57.

**3. Actual Seizin Necessary at Common Law.** — *Martin v. Trail*, 142 Mo. 85; *Dozier v. Toalson*, 180 Mo. 546; *Valentine v. Hutchinson*, (County Ct.) 43 Misc. (N. Y.) 314; *Brown v. Watkins*, 98 Tenn. 454.

**511. 1. Cotenant or Coparcener.** — *Bragg v. Wiseman*, 55 W. Va. 330.

**2. No Curtesy in Reversion or Remainder After Estate of Freehold.** — *Ward v. Ives*, 75 Conn. 598; *Martin v. Trail*, 142 Mo. 85; *Cox v. Boyce*, 152 Mo. 576, 75 Am. St. Rep. 483; *Dozier v. Toalson*, 180 Mo. 546; *Valentine v. Hutchinson*, (County Ct.) 43 Misc. (N. Y.) 314; *Collins v. Russell*, 96 N. Y. App. Div. 136; *Howells v. McGraw*, 97 N. Y. App. Div. 460; *Moore v. Iles*, 9 Ohio Cir. Dec. 418, 16 Ohio Cir. Ct. 591.

**512. 1. After Term for Years.** — *Valentine v. Hutchinson*, (County Ct.) 43 Misc. (N. Y.) 314.

**3. Actual Seizin in Incorporeal Hereditaments Unnecessary.** — See *Dozier v. Toalson*, 180 Mo. 546.

**5. Constructive Seizin Sufficient.** — *Martin v. Trail*, 142 Mo. 85; *Dozier v. Toalson*, 180 Mo. 546.

**After a Descent Cast.** — *Bragg v. Wiseman*, 55 W. Va. 330.

**513. 5. Rivers v. Morris, (Ky. 1904) 78 S. W. Rep. 196.**

**514. 2. Birth of Living Issue.** — *De Bury v. De Bury*, 2 N. Bruns. Eq. Rep. 278, affirmed 36 N. Bruns. 57.

**4. Must Be Capable of Inheriting.** — *De Bury v. De Bury*, 2 N. Bruns. Eq. Rep. 278, affirmed 36 N. Bruns. 57.

**5. Statutes — Issue Unnecessary.** — *Alderson v. Alderson*, 46 W. Va. 242.

**515. 2. Seizin and Birth of Issue Need Not Concure.** — *Zeust v. Staffan*, 16 App. Cas. (D. C.) 141.

**4. Curtesy Initiate — Freehold Estate.** — But

**516.** *b.* VESTED ESTATE. — See notes 1, 3.

*c.* LIABLE FOR DEBTS. — See note 4.

**518.** *Curtesy Consummate* — *a.* IN GENERAL. — See note 1.

*b.* LIABLE FOR DEBTS. — See note 2.

*c.* MAY BE CONVEYED. — See note 3.

*d.* LIABILITY FOR WASTE. — See note 4.

**V. ESTATES TO WHICH INCIDENT** — 1. Estates of Inheritance. —

See note 5.

**520.** 3. Equitable Estates — *a.* IN GENERAL. — See note 1.

**521.** 4. Wife's Separate Estate. — See note 4.

**522.** Curtesy Excluded. — See note 1.

**523.** Husband the Grantor. — See note 1.

**VI. HOW DEFEATED** — 1. By Divorce — *a.* DIVORCE A VINCULO MATRIMONII — (1) *General Rule.* — See note 3.

(2) *Statutes.* — See note 4.

**524.** 2. By Contract. — See notes 1, 2.

see *De Bury v. De Bury*, 2 N. Bruns. Eq. Rep. 278, *affirmed* 36 N. Bruns. 57.

**516.** 1. Is a Vested Estate. — *In re Marquette*, 4 Am. Bankr. Rep. 623; *Zeust v. Staffan*, 16 App. Cas. (D. C.) 141; *Guernsey v. Lazear*, 51 W. Va. 328.

**Necessary That Husband Join in Conveyance.** — *Clay v. Mayr*, 144 Mo. 376.

**3. Legislature Cannot Destroy.** — *In re Marquette*, 4 Am. Bankr. Rep. 623; *Zeust v. Staffan*, 16 App. Cas. (D. C.) 141; *Dillon v. Dillon*, (Ky. 1902) 69 S. W. Rep. 1099.

**Power of Legislature Before Estate Vests.** — *Phillips v. Farley*, 112 Ky. 837.

**4. Subject to Claims of Creditors.** — *Guernsey v. Lazear*, 51 W. Va. 328.

**Exempted from Liability by Statute.** — *Ball v. Woolfolk*, 175 Mo. 278.

**518.** 1. A Right of Action for the Obstruction of a Crossing belongs to a tenant by the curtesy. *Costello v. Grand Trunk R. Co.*, 70 N. H. 403.

**Royalties on Leased Lands** belong to the husband as tenant by the curtesy. *Bubb v. Bubb*, 201 Pa. St. 212.

**2. Liable for Debts.** — *Moore v. Hemp*, (Ky. 1902) 68 S. W. Rep. 1. See also *Shields v. Yellman*, 100 Ky. 655.

**Only Life Interest to Be Sold for Debts.** — *Coquard v. Pearce*, 68 Ark. 93.

**In Ohio** the interest of the husband in the wife's estate after her death is not subject to the lien of a judgment against him or to levy upon execution, but may be applied to the judgment by proceedings in equity. *Maclaren v. Stone*, 9 Ohio Cir. Dec. 794, 18 Ohio Cir. Ct. 854.

**3. May Be Conveyed.** — *Stratton v. Robinson*, 28 Tex. Civ. App. 285. See also *Wear-Boogher Dry Goods Co. v. Smith*, 66 Ark. 600.

**4. Waste.** — *Learned v. Ogden*, 80 Miss. 769, 92 Am. St. Rep. 621; *Bond v. Godsey*, 99 Va. 564.

**Right in Mines.** — It is not waste for a life tenant to work mines in which he has such an interest, and the tenant by the curtesy has a right to royalties arising from mines belonging to the wife although they were unopened at the time of her death. *Alderson v. Alderson*, 46 W. Va. 242.

**The Right to Extract Oil** from the land does not belong to the tenant by the curtesy, and is not acquired by his lessee. *Barnsdall v. Boley*, 119 Fed. Rep. 191.

**5. Curtesy in Estates of Inheritance Only.** — *Hall v. Crabb*, 56 Neb. 392; *Quinn v. Ladd*, 37 Oregon 261; *Waller v. Martin*, 106 Tenn. 341, 82 Am. St. Rep. 882.

**520.** 1. Curtesy — Equitable Estates. — *Miller v. Quick*, 158 Mo. 495; *Kennedy v. Koopmann*, 166 Mo. 87; *Morton's Estate*, 24 Pa. Super. Ct. 246; *Jones v. Jones*, 96 Va. 749.

**Where There Is a Deed of Trust on the Land** but the land has not been sold thereunder, curtesy does not exist in the equity of redemption in the sum of money in excess of the debt, but in the land itself subject to the deed of trust. *Casler v. Gray*, 159 Mo. 588.

**Land Held by the Wife as Trustee** is not subject to curtesy. *Norton v. McDevitt*, 122 N. Car. 755.

**521.** 4. Curtesy in Wife's Separate Estate. — *Kennedy v. Koopmann*, 166 Mo. 87; *Alderson v. Alderson*, 46 W. Va. 242.

**522.** 1. Curtesy May Be Excluded by Express Words. — *Zeust v. Staffan*, 16 App. Cas. (D. C.) 141; *McBreen v. McBreen*, 154 Mo. 323, 77 Am. St. Rep. 758.

**Common-law Rule.** — *McBreen v. McBreen*, 154 Mo. 323, 77 Am. St. Rep. 758.

**523.** 1. When Husband the Grantor. — *Bingham v. Weller*, 113 Tenn. 70; *Jones v. Jones*, 96 Va. 749; *Ratliff v. Ratliff*, 102 Va. 880.

**3. Curtesy Barred by Absolute Divorce.** — *Doyle v. Rolwing*, 165 Mo. 231, 88 Am. St. Rep. 416; *Neff v. Turkle*, 4 Ohio Dec. (Reprint) 314, 1 Cleve. L. Rep. 285.

**4. Pennsylvania.** — Under the Act of May 4, 1895, P. L. 430, desertion of the wife by the husband and failure to provide for her support, will bar his curtesy; but if the desertion was for a cause which would have entitled the husband to a divorce, his curtesy is not defeated thereby. *Hayes's Estate*, 23 Pa. Super. Ct. 570.

**524.** 1. Curtesy Defeated by Agreement. — *Luttrell v. Boggs*, 168 Ill. 361; *Wood v. Reamer*, (Ky. 1904) 82 S. W. Rep. 572; *McBreen v. McBreen*, 154 Mo. 323, 77 Am. St. Rep. 758.

**2. Intention Must Be Clear.** — *McBreen v. Mc-*



**524.** 3. By Joinder in Wife's Conveyance. — See note 3.

**525.** 5. By Wife's Disposition. — See note 1.

**526.** 7. By Alienation in Fee. — See note 1.

11. By Sale to Pay Wife's Debts. — See note 8.

**VII. ABOGATION AND MODIFICATION BY STATUTE — 1. Abrogation. —**

— See note 9.

**527.** 2. Modification. — See note 1.

Effect of Statutes upon Curtesy Initiate. — See note 5.

**528.** CURTILAGE. — See note 1.

**531.** CUSTODY. — See note 1.

**532.** CUSTODY OF THE LAW. — See note 2.

**533.** CUSTOMER. — See note 2.

CUT. — See note 4.

**534.** CUT OFF. — See note 2.

Breen, 154 Mo. 323, 77 Am. St. Rep. 758;  
Kennedy v. Koopmann, 166 Mo. 87.

**524.** 3. Joinder in Mortgage. — See Baker v. Baker, 167 Mass. 575.

**525.** 1. Disposition by Wife. — *Ex p.* Watts, 130 N. Car. 237; Hallyburton v. Slagle, 130 N. Car. 482, rehearing denied 132 N. Car. 947. See also Tiddy v. Graves, 126 N. Car. 620, reversed on rehearing 127 N. Car. 502.

Statutes — District of Columbia. — Zeust v. Staffan, 16 App. Cas. (D. C.) 141.

West Virginia. — See Alderson v. Alderson, 46 W. Va. 242.

Curtesy Not Defeasible by Devise. — Casler v. Gray, 159 Mo. 588.

**526.** 1. Conveys Only Life Estate. — Wear-Boogher Dry Goods Co. v. Smith, 66 Ark. 609. See also Brooks v. Summers, 100 Ky. 620.

A Conveyance by the Husband in Ignorance of His Wife's Interest does not release his rights. Farrand v. Long, 184 Ill. 100.

8. Shaddinger v. Fisher, 2 Ohio Cir. Dec. 381.

Sale Subject to Husband's Curtesy Rights. — See Casler v. Gray, 159 Mo. 588.

Estate by Curtesy Taken Free from Wife's Debts. — Hampton v. Cook, 64 Ark. 353, 62 Am. St. Rep. 194.

9. Abrogated by Statute. — Phillips v. Farley, 112 Ky. 837. See also Moore v. Iles, 9 Ohio Cir. Dec. 418, 16 Ohio Cir. Ct. 591.

**527.** 1. Effect of Married Women's Act. — Hampton v. Cook, 64 Ark. 353, 62 Am. St. Rep. 194; Dillon v. Dillon, (Ky. 1902) 69 S. W. Rep. 1099; *Ex p.* Watts, 130 N. Car. 237; Hallyburton v. Slagle, 130 N. Car. 482, rehearing denied 132 N. Car. 947; Guernsey v. Lazear, 51 W. Va. 328; McNeeley v. South Penn Oil Co., 52 W. Va. 616; De Bury v. De Bury, 2 N. Bruns. Eq. Rep. 278, affirmed 36 N. Bruns. 57. See also Tiddy v. Graves, 126 N. Car. 620, reversed 127 N. Car. 502.

No Vested Right in Future Acquisitions. — A husband has no vested right in the future acquisitions of the wife so as to prevent the application of the constitution and statutes to his right of curtesy. Hallyburton v. Slagle, 132 N. Car. 947.

Statute Not Retroactive. — Clay v. Mayr, 144 Mo. 376.

In Ohio, by statute, a husband has no right to curtesy in the lands of his wife as against

the children of the wife by a former marriage. Blum v. Blum, 60 Ohio St. 41.

5. See De Bury v. De Bury, 2 N. Bruns. Eq. Rep. 278, affirmed 36 N. Bruns. 57.

Current County Expenditures do not mean county expenditures for years other than the year for which the taxes are levied. State v. Payne, 151 Mo. 663.

Current Expenses Identical in Signification with Running Expenses as used in a school law. Stanton v. Board of Education, 68 N. J. L. 496.

Current Year not calendar year. Clark v. Lancaster County, (Neb. 1903) 96 N. W. Rep. 593.

**528.** 1. Fence — Burglary. — Compare State v. Bugg, 66 Kan. 668.

**531.** 1. In State v. Coffin, (Idaho 1903) 74 Pac. Rep. 968, the court said: "As we gather from all the latest and best lexicographers, *custody* means a keeping, guarding, care, watch, inspection, preservation, or security of a thing, and carries with it the idea of the thing being within the immediate personal care and control of the person to whose *custody* it is subjected."

**532.** 2. Property in the Hands of a Receiver is property in the *custody of the law*. The receiver is but the agent through whom the court, for greater facility, acts. *In re New Iberia Cotton Mill Co.*, 109 La. 875.

"The property was in *custodia legis* in the full sense of the law. Property lawfully taken by virtue of legal process is in the *custody of the law*, and property legally in the hands of a receiver cannot be levied upon or interfered with by another officer of the law." Weaver v. Duncan, (Tenn. Ch. 1899) 56 S. W. Rep. 39.

**533.** 2. Customer of a Bank. — In order to constitute a person a *customer* of a bank, within the meaning of section 82 of the Bills of Exchange Act, 1882, it is not necessary that he should have an account at the bank. Great Western R. Co. v. London, etc., Banking Co., (1900) 2 Q. B. 464, affirming (1899) 2 Q. B. 172.

4. "The Cut of the Mill, or 'the product of the mill,' means all merchantable lumber — everything the mill saws, with the exception of culls." *Per* Fowler, J., in Sloan v. Allegheny Co., 91 Md. 502.

**534.** 2. Cut Off — Railroads. — A *cut off* "is defined to be a shorter and straighter road

**534. CYCLONE INSURANCE.** — See note 6.

**535. CY-PRES.** — See note 1.

[**DAILY.** — See note 3a.]

by which the length of a course or passage is reduced. (Standard Dict.; Cent. Dict.)" Erie R. Co. v. Steward, 61 N. Y. App. Div. 484.

**534. 6. Cyclone Insurance.** — See Epiphany Roman Catholic Church v. German Ins. Co., 16 S. Dak. 17; Gilman v. Druse, 111 Wis. 400.

**535. 1.** Lackland v. Walker, 151 Mo. 210; Allen v. Stevens, 33 N. Y. App. Div. 497.

**3a. Daily Includes Sunday.** — In London County Council v. South Metropolitan Gas Co., (1904) 1 Ch. 76, *affirming* (1903) 2 Ch. 532, it was

held that the word *daily* in the Act of 1880 providing for the *daily* testings of the quality of gas by gas examiners must be construed literally, as including Sundays, and that the previous practice under that and the earlier acts was not sufficient to justify the court in departing from that literal construction; and, accordingly, that the gas examiners appointed by the London County Council were entitled to test on Sundays the gas supplied by the company.

## DAMAGES.

By H. N. ELDRIDGE.

**542. I. DEFINITION AND TERMINOLOGY — 3. Compensatory and Exemplary (Punitive and Vindictive) Damages.** — See note 3.

**4. Nominal and Substantial Damages.** — See note 4.

**7. General and Special Damages.** — See note 10.

**543. In Actions for the Breach of Contracts.** — See note 1.

**Special Damages.** — See note 5.

**542. 3.** Wade v. Columbia Electric St. R., etc., Co., 51 S. Car. 296, 64 Am. St. Rep. 676.

"Compensatory Damages" and "Actual Damages" are synonymous terms. Gatzow v. Buening, 106 Wis. 1, 80 Am. St. Rep. 16.

**4.** Foote, etc., Co. v. Malony, 115 Ga. 985. See also Miller v. Southern R. Co., 69 S. Car. 116.

**10. General Damages — United States.** — Fitchburg R. Co. v. Donnelly, (C. C. A.) 87 Fed. Rep. 135; Lillard v. Kentucky Distilleries, etc., Co., (C. C. A.) 134 Fed. Rep. 169.

*Georgia.* — Bibb County v. Ham, 110 Ga. 340.

*Illinois.* — Chicago City R. Co. v. Taylor, 170 Ill. 49, *affirming* 68 Ill. App. 613; Franklin Printing, etc., Co. v. Behrens, 80 Ill. App. 313, *affirmed* 181 Ill. 340; West Chicago St. R. Co. v. Levy, 82 Ill. App. 202, *affirmed* 182 Ill. 525.

*Indiana.* — B. L. Blair Co. v. Rose, 26 Ind. App. 487; Lake Lighting Co. v. Lewis, 29 Ind. App. 164.

*Kansas.* — Cudahy Packing Co. v. Broadbent, (Kan. 1905) 79 Pac. Rep. 126.

*Michigan.* — Beath v. Rapid R. Co., 119 Mich. 512.

*Missouri.* — Lesser v. St. Louis, etc., R. Co., 85 Mo. App. 326; Paquin v. St. Louis, etc., R. Co., 90 Mo. App. 118; St. Louis Trust Co. v. Murmann, 90 Mo. App. 555; Wilbur v. Southwest Missouri Electric R. Co., 110 Mo. App. 689; Thompson v. St. Louis, etc., R. Co., 111 Mo. App. 465.

*Montana.* — Root v. Butte, etc., R. Co., 20 Mont. 354.

*Nebraska.* — Harvard v. Stiles, 54 Neb. 26.

*New York.* — Russell v. Corning Mfg. Co., 49 N. Y. App. Div. 610; Ackman v. Third Ave. R. Co., 52 N. Y. App. Div. 483; Page v. Delaware, etc., Canal Co., 76 N. Y. App. Div. 160;

Dittman v. Edison Electric Illuminating Co., 87 N. Y. App. Div. 68; Kleiner v. Third Ave. R. Co., 162 N. Y. 193, *reversing* 36 N. Y. App. Div. 191; Vuccino v. Brown, (Supm. Ct. App. T.) 46 Misc. (N. Y.) 407; Brown v. Manhattan R. Co., 105 N. Y. App. Div. 395.

*Oregon.* — Dose v. Tooze, 37 Oregon 13; Bussard v. Hibler, 42 Oregon 500; Adcock v. Oregon R., etc., Co., 45 Oregon 173.

*Texas.* — San Antonio, etc., R. Co. v. Weigers, 22 Tex. Civ. App. 344; Galveston, etc., R. Co. v. Scott, 18 Tex. Civ. App. 321; Van Alstyne v. Morrison, (Tex. Civ. App. 1903) 77 S. W. Rep. 655; International, etc., R. Co. v. Pina, 33 Tex. Civ. App. 680; San Antonio, etc., R. Co. v. Callihan, (Tex. Civ. App. 1905) 86 S. W. Rep. 929; Wells, etc., Express v. Boyle, (Tex. Civ. App. 1905) 87 S. W. Rep. 164; Lodwick Lumber Co. v. Taylor, (Tex. Civ. App. 1905) 87 S. W. Rep. 358.

*Utah.* — Croco v. Oregon Short-Line R. Co., 18 Utah 311; North Point Consol. Irrigation Co. v. Utah, etc., Canal Co., 23 Utah 199.

*Virginia.* — Wood v. American Nat. Bank, 100 Va. 306.

*Washington.* — Clukey v. Seattle Electric Co., 27 Wash. 73, *citing* 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 542; Carroll v. Caine, 27 Wash. 402; Stowe v. La Conner Trading, etc., Co., (Wash. 1905) 80 Pac. Rep. 856.

**543. 1.** Shores Lumber Co. v. Starke, 100 Wis. 498.

**5. Special Damages — United States.** — Eisele v. Oddie, 128 Fed. Rep. 941; Fitchburg R. Co. v. Donnelly, (C. C. A.) 87 Fed. Rep. 135; Southern Pac. R. Co. v. Hall, (C. C. A.) 100 Fed. Rep. 760; Lillard v. Kentucky Distilleries, etc., Co., (C. C. A.) 134 Fed. Rep. 169.

*Alabama.* — See also Vandiver v. Waller, (Ala. 1905) 39 So. Rep. 136.

**544. II. GENERAL PRINCIPLES — 1. Compensation the Cardinal Rule —**

**a. THE RULE STATED.** — See note 6.

**545. Damages for Breach of Contract.** — See note 1.

**546. b. RULE THE SAME IN TORT AS IN CONTRACT.** — See note 2.

**d. RIGHTS OF BOTH PARTIES CONSIDERED — PARTY CAUSING THE INJURY AS WELL AS PARTY INJURED.** — See note 4.

*Georgia.* — See *Bibb County v. Ham*, 110 Ga. 340.

*Illinois.* — *West Chicago St. R. Co. v. Levy*, 82 Ill. App. 202, *affirmed* 182 Ill. 525.

*Iowa.* — *Kircher v. Larchwood*, 120 Iowa 578.

*Kentucky.* — *Louisville, etc., R. Co. v. Reynolds*, 71 S. W. Rep. 516, 24 Ky. L. Rep. 1402.

*Maryland.* — *Baltimore City Pass. R. Co. v. Baer*, 90 Md. 97.

*Missouri.* — *Wilbur v. Southwest Missouri Electric R. Co.*, 110 Mo. App. 689; *Thompson v. St. Louis, etc., R. Co.*, 111 Mo. App. 465.

*New York.* — *Ramson v. Metropolitan St. R. Co.*, 78 N. Y. App. Div. 101, *affirmed* 177 N. Y. 578; *Haszlacher v. Third Ave. R. Co.*, (N. Y. City Ct. Gen. T.) 26 Misc. (N. Y.) 865; *Brown v. Manhattan R. Co.*, 105 N. Y. App. Div. 395; *Kleiner v. Third Ave. R. Co.*, 162 N. Y. 193, *reversing* 36 N. Y. App. Div. 191.

*Oregon.* — *Dose v. Tooze*, 37 Oregon 13.

*Texas.* — *Strahorn-Hutton-Evans Commission Co. v. Lackey*, 17 Tex. Civ. App. 205; *Dallas v. Jones*, (Tex. Civ. App. 1898) 54 S. W. Rep. 606, *reversed* 93 Tex. 38; *San Antonio, etc., R. Co. v. Callihan*, (Tex. Civ. App. 1905) 86 S. W. Rep. 929.

*Utah.* — *Croco v. Oregon Short-Line R. Co.*, 18 Utah 311; *North Point Consol. Irrigation Co. v. Utah, etc., Canal Co.*, 23 Utah 199.

*Virginia.* — *Wood v. American Nat. Bank*, 100 Va. 306.

*Washington.* — *Carroll v. Caine*, 27 Wash. 402; *Stowe v. La Conner Trading, etc., Co.*, (Wash. 1905) 80 Pac. Rep. 856.

**544. 6. General Rule — Compensation the Fundamental Principle — *United States.*** — *Hetzel v. Baltimore, etc., R. Co.*, 169 U. S. 26; *Hoyt v. Fuller*, (C. C. A.) 104 Fed. Rep. 192; *Central Coal, etc., Co. v. Hartman*, (C. C. A.) 111 Fed. Rep. 96; *Maguire v. Sheehan*, (C. C. A.) 117 Fed. Rep. 819; *Northern Commercial Co. v. Nestor*, (C. C. A.) 138 Fed. Rep. 383.

*California.* — *Storrs v. Los Angeles Traction Co.*, 134 Cal. 91.

*Colorado.* — *Pueblo v. Timbers*, 31 Colo. 215.

*Connecticut.* — *Barker v. S. A. Lewis Storage, etc., Co.*, (Conn. 1905) 61 Atl. Rep. 363.

*Delaware.* — *Brown v. Wilmington City R. Co.*, 1 Penn. (Del.) 332.

*Illinois.* — *Calumet Electric St. R. Co. v. Van Pelt*, 173 Ill. 70; *Salem v. Webster*, 192 Ill. 369.

*Indiana.* — *Eureka Block Coal Co. v. Wells*, (Ind. App. 1901) 61 N. E. Rep. 236; *Cincinnati, etc., Electric St. R. Co. v. Leonard*, (Ind. App. 1905) 73 N. E. Rep. 932.

*Iowa.* — *McMahon v. Dubuque*, 107 Iowa 62, 70 Am. St. Rep. 143.

*Kentucky.* — *Covington, etc., Bridge Co. v. Goodnight*, (Ky. 1901) 60 S. W. Rep. 415; *Louisville, etc., R. Co. v. Mason*, (Ky. 1903) 72 S. W. Rep. 27.

*Maine.* — *Palmer v. Penobscot Lumbering Assoc.*, 90 Me. 193.

*Michigan.* — *Fye v. Chapin*, 121 Mich. 675; *Reynolds v. Levi*, 122 Mich. 115; *Styles v. Decatur*, 131 Mich. 443.

*Minnesota.* — *Thompson v. Chicago, etc., R. Co.*, 71 Minn. 89.

*Missouri.* — *English v. Missouri Pac. R. Co.*, 73 Mo. App. 232; *Bolton v. Missouri Pac. R. Co.*, 172 Mo. 92; *Rhodes v. Holladay Klotz Land, etc., Co.*, 105 Mo. App. 279; *Narr v. Norman*, (Mo. App. 1905) 88 S. W. Rep. 122; *Waechter v. St. Louis, etc., R. Co.*, (Mo. App. 1905) 88 S. W. Rep. 147.

*Nebraska.* — *Paxton v. Vadbouker*, (Neb. 1901) 96 N. W. Rep. 378.

*New Hampshire.* — *Seavey v. Dennett*, 69 N. H. 479.

*New York.* — *Campbell v. North American Brewing Co.*, 22 N. Y. App. Div. 414; *Metz v. Metropolitan St. R. Co.*, 82 N. Y. App. Div. 168.

*North Carolina.* — *Pender Lumber Co. v. Wilmington Iron Works*, 130 N. Car. 584.

*Oregon.* — *Smitson v. Southern Pac. R. Co.*, 37 Oregon 96, *citing* 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 544.

*Pennsylvania.* — *Pittsburg Sheet Mfg. Co. v. West Penn Sheet Steel Co.*, 201 Pa. St. 150.

*Rhode Island.* — *McNeil v. Lyons*, 20 R. I. 672.

*Tennessee.* — *Hampton v. Co-operative Town Co.*, (Tenn. Ch. 1898) 48 S. W. Rep. 679; *Nashville, etc., R. Co. v. Witherspoon*, 112 Tenn. 128; *Livermore Foundry, etc., Co. v. Union Compress, etc., Co.*, 105 Tenn. 187.

*Texas.* — *Texas, etc., R. Co. v. Putman*, (Tex. Civ. App. 1901) 63 S. W. Rep. 910; *Galveston, etc., R. Co. v. Abbey*, 29 Tex. Civ. App. 211; *Southern Oil Co. v. Scales*, (Tex. Civ. App. 1902) 69 S. W. Rep. 1033; *Ladd v. Ney*, (Tex. Civ. App. 1904) 81 S. W. Rep. 1007; *San Antonio, etc., R. Co. v. Lester*, (Tex. Civ. App. 1904) 84 S. W. Rep. 401; *King v. Griffin*, (Tex. Civ. App. 1905) 87 S. W. Rep. 844.

*Utah.* — *Harrington v. Eureka Hill Min. Co.*, 17 Utah 300.

*Washington.* — *Kruegel v. Kitchen*, 33 Wash. 218, *citing* 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 544.

*West Virginia.* — *Hurxthal v. St. Lawrence Boom, etc., Co.*, 53 W. Va. 87, 97 Am. St. Rep. 954.

**545. 1.** See *South African Reduction Co. v. Peck*, (C. C. A.) 120 Fed. Rep. 88; *Occidental Consol. Min. Co. v. Comstock Tunnel Co.*, 125 Fed. Rep. 244.

**546. 2.** *Heilman v. Pruyn*, 122 Mich. 302, 80 Am. St. Rep. 570, *citing* 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 546.

**4.** *Kincaid v. Price*, 18 Colo. App. 76, *citing* 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 546.



**547.** Loss of Profits in Illegal Business. — See note 3.

**548.** *e.* VARIOUS METHODS OF COMPUTING DAMAGES. — See note 3.

**2.** Requisites to the Recovery of Damages — *a.* GENERALLY. — See note 4.

Plaintiff Must Show Damage, and Extent of It. — See note 6.

**549.** *b.* NECESSITY FOR LEGAL INJURY — No Redress for Unavoidable Accidents. — See note 4.

**551.** *c.* NECESSITY FOR RESULTANT DAMAGE — (2) *Injuria Sine Damno*. — See note 3.

(3) *Legal Presumption of Damage*. — See note 4.

**553.** (4) *Nominal Damages* — Proof of Substantial Damages Where Contract Itself Furnishes Measure. — See note 7.

(a) Nominal Damages as Presumed by Law. — See note 8.

**554.** Actions for the Breach of Contract. — See note 1.

**555.** Nominal Damages Irrespective of Proof of Damage. — See note 1.

**556.** (b) Nominal Damages Where Substantial Damages Shown, but Extent Not Proven. — See note 1.

Same Rule Differently Expressed — Damages for Breach of Contract. — See note 2.

**557.** Damages for Personal Injuries — Loss of Time. — See note 2.

*d.* APPLICATION OF MAXIM, DE MINIMIS NON CURAT LEX. —

See note 5.

**558.** *e.* NOMINAL DAMAGES AGAINST PUBLIC OFFICERS FOR BREACHES OF OFFICIAL DUTY — The General Rule in the United States. — See note 2.

**547.** 3. Loss of Prospective Profits from Sunday Sales will not be considered in jurisdictions where it is illegal to sell on Sunday. Raynor v. Valentin Blatz Brewing Co., 100 Wis. 414.

**548.** 3. Witherbee v. Meyer, 155 N. Y. 446.  
**4.** Bates v. Holbrook, 89 N. Y. App. Div. 556, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 548.

**6.** Damage and Extent Thereof Must Be Shown. — St. Louis, etc., R. Co. v. Stroud, 67 Ark. 112; Mergenthaler Linotype Co. v. Kansas State Printing Co., 61 Kan. 860, 59 Pac. Rep. 1066; St. Louis Clothing Co. v. Hail Dry-Goods Co., 156 Mo. 393; Scott v. Banks, 44 N. Y. App. Div. 28; Gignoux v. Baird, (Supm. Ct. App. T.) 29 Misc. (N. Y.) 740; Haszlacher v. Third Ave. R. Co., (N. Y. City Ct. Gen. T.) 60 N. Y. Supp. 1001; Orient Min. Co. v. Freckleton, 27 Utah 125; Van Alstyne v. Morrison, (Tex. Civ. App. 1903) 77 S. W. Rep. 655; La Fave v. Superior, 104 Wis. 454.

**549.** 4. Arkansas River Packet Co. v. Hobbs, 105 Tenn. 29; Rea v. St. Louis Southwestern R. Co., (Tex. Civ. App. 1903) 73 S. W. Rep. 555.

**551.** 3. *Injuria Sine Damno*. — The Habil, 100 Fed. Rep. 123, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 551.

**4.** Presumption of Damages. — Miller v. Southern R. Co., 69 S. Car. 116, wherein the court below, in overruling a demurrer to the complaint, cited 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 551.

**553.** 7. Haskell v. Osborn, 33 N. Y. App. Div. 127.

**8.** Nominal Damages — Presumption. — Texarkana, etc., R. Co. v. Anderson, 67 Ark. 123; St. Louis, etc., R. Co. v. Woodard, 69 Ark. 659, 64 S. W. Rep. 263; Swift v. Broyles, 115 Ga. 885; Conant v. Jones, 120 Ga. 568; Cothran v. Witham, 123 Ga. 190; Radloff v. Haase, 196

Ill. 365; Bourdette v. Sieward, 107 La. 258; Green v. Farmers' Consol. Dairy Co., 113 La. 869; Marquardt v. Hudson County Gas Co., (N. J. 1905) 59 Atl. Rep. 1054; Camparetti v. Union R. Co., 95 N. Y. App. Div. 66; Coppola v. Kraushaar, 102 N. Y. App. Div. 306; Schwartz v. Schendel, (Supm. Ct. App. T.) 24 Misc. (N. Y.) 733; Miller v. Southern R. Co., 69 S. Car. 116; Davis v. Texas, etc., R. Co., (Tex. Civ. App. 1897) 42 S. W. Rep. 1008; Douglass v. Ohio River R. Co., 51 W. Va. 523.

**554.** 1. Breach of Contract. — McBride v. Sunset Telephone Co., 96 Fed. Rep. 81; Raymond v. Yarrington, 96 Tex. 443, 97 Am. St. Rep. 914; Louisville Bridge Co. v. Louisville, etc., R. Co., 116 Ky. 258; Warren v. Stikeman, 84 N. Y. App. Div. 610; Brincefield v. Allen, 25 Tex. Civ. App. 258; Whitworth v. McKee, 32 Wash. 83.

**555.** 1. Juruick v. Manhattan Optical Co., 66 N. J. L. 380.

**556.** 1. When Extent of Substantial Damages Not Proven. — Chicago, etc., R. Co. v. Woolridge, 72 Ill. App. 551, reversed 174 Ill. 330.

Where the loss is pecuniary, and is present and actual and can be measured, but no evidence is given showing its extent, or from which it can be inferred, the jury can allow nominal damages only. Page v. Delaware, etc., Canal Co., 34 N. Y. App. Div. 618.

**2.** Green v. Farmers' Consol. Dairy Co., 113 La. 869; Grinnell v. Bebb, 126 Mich. 157; Kenderdine Hydro-Carbon Fuel Co. v. Plumb, 182 Pa. St. 463.

**557.** 2. Saperstone v. Rochester R. Co., 25 N. Y. App. Div. 285, 27 Civ. Pro. (N. Y.) 133.

**5.** Nickerson v. Wells-Stone Mercantile Co., 71 Minn. 230; Sloggy v. Crescent Creamery Co., 72 Minn. 316; Pronk v. Brooklyn Heights R. Co., 68 N. Y. App. Div. 390.

**558.** 2. Breach of Official Duty. — Heater v.

**560.** *h.* REVERSAL OF JUDGMENT FOR FAILURE TO ASSESS NOMINAL DAMAGES. — See notes 3, 4, 5.

**561.** III. NATURAL AND PROXIMATE CAUSE AND CONSEQUENCE — 1. General Statement — Remote Consequences. — See note 3.

**567.** 2. Impracticability of General Rules. — See note 8.

**568.** 4. Policy of Rule as to Natural and Proximate Results — The Terms "Natural" and "Proximate." — See note 3.

5. What Is the Natural Cause of a Loss — *a.* IN GENERAL. — See note 5.

**569.** *c.* RESPONSIBILITY OF AUTHOR OF ACT FOR CONSEQUENCES BOTH NATURAL AND PROXIMATE. — See note 3.

**570.** *c.* IF NATURAL AND PROBABLE, NEED NOT BE PROXIMATE. — See note 5.

**571.** 6. What Is the Proximate Cause of a Loss — *a.* DEFINITION. — See notes 2, 3.

**572.** *d.* FACT THAT LOSS WOULD NOT HAVE OCCURRED WITHOUT DEFENDANT'S CONCURRENCE. — See note 3.

Pearce, 59 Neb. 587, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 558.

**560.** 3. Failure to Assess Nominal Damages. — Roberts v. Glass, 112 Ga. 456; Boardman v. Marshalltown Grocery Co., 105 Iowa 445; Nickerson v. Wells-Stone Mercantile Co., 71 Minn. 230; Pronk v. Brooklyn Heights R. Co., 68 N. Y. App. Div. 390; Briggs v. Cook, 99 Va. 280, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 560; Johnson v. Cook, 24 Wash. 474.

4. U. S. v. Withers, (C. C. A.) 130 Fed. Rep. 696.

5. Davis v. Texas, etc., R. Co., (Tex. Civ. App. 1897) 42 S. W. Rep. 1008.

**561.** 3. Natural and Proximate Cause and Consequence — United States. — Coca v. Morris, (C. C. A.) 107 Fed. Rep. 691, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 561.

Alabama. — Vandiver v. Waller, (Ala. 1905) 39 So. Rep. 136.

Georgia. — Central of Georgia R. Co. v. Dorsey, 116 Ga. 719.

Illinois. — Rock Island v. Starkey, 189 Ill. 515; Chandler v. Smith, 70 Ill. App. 658; Dixon v. Scott, 74 Ill. App. 277; North Chicago St. R. Co. v. Brown, 76 Ill. App. 654, affirmed 178 Ill. 187.

Iowa. — Lee v. Burlington, 113 Iowa 356, 86 Am. St. Rep. 379.

Kentucky. — McKay v. Henderson, (Ky. 1903) 71 S. W. Rep. 625.

Minnesota. — Simonson v. Minneapolis, etc., R. Co., 88 Minn. 89; Donnelly v. St. Paul City R. Co., 70 Minn. 278; Sloggy v. Crescent Creamery Co., 72 Minn. 316.

Missouri. — Longan v. Weltmer, 180 Mo. 322; Fuchs v. St. Louis Transit Co., 111 Mo. App. 574.

New Hampshire. — Dow v. Winnepesaukee Gas, etc., Co., 69 N. H. 312, 76 Am. St. Rep. 173.

New York. — Syracuse Solar Salt Co. v. Rome, etc., R. Co., 43 N. Y. App. Div. 203; Ivey v. Brooklyn Heights R. Co., 63 N. Y. App. Div. 311; Newell v. Smith, (Supm. Ct. App. T.) 28 Misc. (N. Y.) 182.

Pennsylvania. — Kinports v. Breon, 193 Pa. St. 309; Smith v. Muncy Creek Tp., 206 Pa. St. 7.

Texas. — Serafina v. Galveston, etc., R. Co., (Tex. Civ. App. 1897) 42 S. W. Rep. 142; Dallas v. Jones, (Tex. Civ. App. 1898) 54 S. W. Rep. 606, reversed 93 Tex. 38; Dallas v. Moore, (Tex. Civ. App. 1903) 74 S. W. Rep. 95; Dallas Consol. Electric St. R. Co. v. Rutherford, (Tex. Civ. App. 1904) 78 S. W. Rep. 558.

Utah. — Croco v. Oregon Short-Line R. Co., 18 Utah 311; North Point Consol. Irrigation Co. v. Utah, etc., Canal Co., 23 Utah 199.

West Virginia. — Peters v. Johnson, 50 W. Va. 644, 88 Am. St. Rep. 909; Normile v. Wheeling Traction Co., (W. Va. 1905) 49 S. E. Rep. 1030.

Wisconsin. — Crouse v. Chicago, etc., R. Co., 104 Wis. 483.

**567.** 8. Ellick v. Wilson, 58 Neb. 589, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 567.

**568.** 3. W — v. Huffman, 12 Ohio Dec. 249, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 568.

5. Sloggy v. Crescent Creamery Co., 72 Minn. 316.

**569.** 3. Reed v. Maley, 115 Ky. 830, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 569.

Damages which are the natural, reasonable, and proximate result of a wrongful act are not too remote to be recovered. It is therefore error to charge that the plaintiff must show that his damage was the usual, direct, and necessary consequence of the wrongful act. Brown Store Co. v. Chattahoochee Lumber Co., 121 Ga. 809.

**570.** 5. Delahanty v. Michigan Cent. R. Co., 7 Ont. L. Rep. 693, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 570.

The Author of the Initial Cause Is Responsible for the Indirect Damages which are its natural consequences. Metropolitan St. R. Co. v. Hudson, (C. C. A.) 113 Fed. Rep. 449.

**571.** 2. Wilber v. Follansbee, 97 Wis. 577.

3. Laidlaw v. Sage, 158 N. Y. 73.

**572.** 3. Fact that Loss Would Not Have Occurred Without Defendant's Concurrence. — Macdonald v. Thibaudeau, 8 Quebec Q. B. 465, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 572.

**572.** *e.* EFFECT OF INTERVENING CAUSES — (1) *Mere Circumstance of Some Intervening Cause — The Primary Cause.* — See note 6.

**573.** (2) *Intervening Acts of Irresponsible Agencies* — (b) *Intervening Acts of Animals.* — See note 2.

**574.** (3) *Intervention of Natural Agencies* — (a) *Concurrence of Natural Forces with Affirmative Acts of Trespass.* — See note 2.

**576.** (4) *Intervening Cause Set in Motion by Original Cause* — (a) *In General.* — See note 2.

**578.** (c) *Intervention of Plaintiff's Own Act.* — See note 4.

**579.** *Injuries in Attempt to Escape Threatened Danger.* — See note 1.

(5) *Where Loss Would Not Have Occurred but for Intervening Cause — Where Intervening Agent Is the More Powerful Producing Cause.* — See note 6.

**580.** *f.* NEAREST WRONGFUL CAUSE — (2) *Independent Illegal Acts of Third Persons.* — See note 2.

(3) *Where Intervening Act Neither Wilful Nor Criminal — Negligence.* — See note 5.

**581.** 7. Natural and Proximate Cause Question of Fact for the Jury. — See note 4.

**582.** 8. What Regarded in Law as Natural and Probable Consequences — *a.* GENERAL RULE IN THE CASE OF CONTRACTS — (1) *Statement of the Rule.* — See note 1.

**572.** 6. *Hickey v. Welch*, 91 Mo. App. 4.

**573.** 2. *Intervening Acts of Animals.* — *Morsman v. Rockland*, 91 Me. 264.

**574.** 2. *Intervention of Natural Agencies.* — *Meyer v. Haven*, 37 N. Y. App. Div. 194.

*Glass Falling from Broken Window.* — The negligence of a person in allowing broken glass to remain in a window is the proximate cause of an injury to a pedestrian on whom the glass falls, notwithstanding a high wind might have been a concurring circumstance. *McMahon v. Dubuque*, 107 Iowa 62, 70 Am. St. Rep. 143.

**576.** 2. *Intervening Cause Set in Motion by Original Cause.* — *Macdonald v. Thibaudeau*, 8 Quebec Q. B. 476, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 576; *Arnold v. Maryville*, 110 Mo. App. 254.

**578.** 4. *Intervention of Plaintiff's Own Act.* — *Postal Tel. Cable Co. v. Hulsey*, 132 Ala. 444 (holding that where the plaintiff, who was in bed with a broken leg caused by the negligence of defendant, rebroke it in turning over on his side, the proximate cause of the re-breaking was the aforesaid negligence); *Reed v. Maley*, 115 Ky. 831, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 578; *Macdonald v. Thibaudeau*, 8 Quebec Q. B. 465, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 578.

**579.** 1. *Illinois Cent. R. Co. v. Haecker*, 110 Ill. App. 106, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 578.

6. *Fishburn v. Burlington, etc., R. Co.*, (Iowa 1904) 98 N. W. Rep. 380.

**580.** 2. *Illegal Acts of Third Persons.* — *Andrews v. Kinsel*, 114 Ga. 390, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 580.

5. *Negligence.* — *Selleck v. Janesville*, 100 Wis. 157, 69 Am. St. Rep. 906. See also *Galveston, etc., R. Co. v. Eaten*, (Tex. Civ. App. 1898) 44 S. W. Rep. 562.

*Negligence of a Physician contributing to an injury does not relieve the defendant from liability, provided care has been used in the*

*selection of the physician.* *Chicago City R. Co. v. Cooney*, 196 Ill. 466, affirming 95 Ill. App. 471; *Joliet v. Le Pla*, 109 Ill. App. 336; *Columbia City v. Langohr*, 20 Ind. App. 395; *Heintz v. Caldwell*, 9 Ohio Cir. Dec. 412, 16 Ohio Cir. Ct. 680; *Arkansas River Packet Co. v. Hobbs*, 105 Tenn. 29; *Dallas v. Meyers*, (Tex. Civ. App. 1900) 55 S. W. Rep. 742.

**581.** 4. *Question for Jury.* — *Ellick v. Wilson*, 58 Neb. 589, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 581.

**582.** 1. *General Rule in Case of Contracts — England.* — *Agius v. Great Western Colliery Co.*, (1899) 1 Q. B. 413.

*Canada.* — *Leggo v. Welland Vale Mfg. Co.*, 2 Ont. L. Rep. 45.

*United States.* — *Central Trust Co. v. Clark*, (C. C. A.) 92 Fed. Rep. 293; *Kelly v. Fahrney*, (C. C. A.) 97 Fed. Rep. 176; *E. W. Bliss Co. v. Buffalo Tin Can Co.*, (C. C. A.) 131 Fed. Rep. 51; *American Bridge Co. v. Camden Interstate R. Co.*, (C. C. A.) 135 Fed. Rep. 323.

*District of Columbia.* — *Fererro v. Western Union Tel. Co.*, 9 App. Cas. (D. C.) 455.

*Georgia.* — *McKenzie v. Mitchell*, 123 Ga. 72. *Illinois.* — *Sanitary Dist. v. McMahon, etc.*, Co., 110 Ill. App. 510; *La Favorite Rubber Mfg. Co. v. Channon Co.*, 113 Ill. App. 491.

*Iowa.* — *Wragg v. Mead*, 120 Iowa 319.

*Mississippi.* — *Leek Milling Co. v. Langford*, 81 Miss. 728; *American Express Co. v. Jennings*, (Miss. 1905) 38 So. Rep. 374.

*Nevada.* — *Barnes v. Western Union Tel. Co.*, 27 Nev. 438.

*New York.* — *Reilly v. Connors*, 65 N. Y. App. Div. 470; *Meyer v. Haven*, 70 N. Y. App. Div. 529; *McGrath v. Horgan*, 72 N. Y. App. Div. 152; *Brown v. Weir*, 95 N. Y. App. Div. 78.

*North Carolina.* — *Herring v. Armwood*, 130 N. Car. 177; *Pender Lumber Co. v. Wilmington Iron Works*, 130 N. Car. 584.

*North Dakota.* — *Hayes v. Cooley*, (N. Dak. 1904) 100 N. W. Rep. 250.



**584.** (4) *Rule as to Liability for All Damages in Contemplation of Parties* — (a) In General. — See note 3.

**587.** Sale of Article with Warranty. — See note 3.

**590.** (b) Damages for Losses on Collateral Contracts and Transactions — *aa.* IN GENERAL. — Losses on or Advantages from Subcontracts Not in Contemplation of Parties, Too Uncertain to Be Recoverable. — See note 1.

*bb.* WHERE COLLATERAL CONTRACT WITHIN CONTEMPLATION OF PARTIES TO PARTICULAR CONTRACT. — See notes 2, 3.

**595.** (6) *What Consequences Parties Presumed to Contemplate.* — See note 3.

**596.** (8) *Consequences Neither Natural Nor Contemplated.* — See note 5.

**598.** *b.* GENERAL RULE IN CASE OF TORTS — (1) *Torts Amounting to Wanton Wrong — Responsibility for All Direct Consequences* — (a) General Rule. — See notes 2, 3.

**600.** Personal Injuries — Mental Pain and Distress. — See note 2.

**602.** (3) *Necessity for Anticipation of Particular Result.* — See note 5.

**605.** *c.* DAMAGES WHICH INJURED PARTY MIGHT HAVE AVOIDED. — See note 2.

*Ohio.* — Champion Ice Mfg., etc., Co. v. Pennsylvania Iron Works Co., 68 Ohio St. 229.

*Pennsylvania.* — Kinports v. Breon, 193 Pa. St. 309.

**584. 3. Damages in Contemplation of Parties** — *England.* — Agius v. Great Western Colliery Co., (1899) 1 Q. B. 413.

*Canada.* — Bruhm v. Ford, 33 Nova Scotia 323.

*United States.* — Kelly v. Fahrney, (C. C. A.) 97 Fed. Rep. 176; Boutin v. Rudd, (C. C. A.) 82 Fed. Rep. 685; Levinski v. Middlesex Banking Co., (C. C. A.) 92 Fed. Rep. 449; Central Trust Co. v. Clark, (C. C. A.) 92 Fed. Rep. 293; DeFord v. Maryland Steel Co., (C. C. A.) 113 Fed. Rep. 72; Lillard v. Kentucky Distilleries, etc., Co., (C. C. A.) 134 Fed. Rep. 169; American Bridge Co. v. Camden Interstate R. Co., (C. C. A.) 135 Fed. Rep. 323.

*Illinois.* — Sanitary Dist. v. McMahon, etc., Co., 110 Ill. App. 510.

*Indiana.* — Acme Cycle Co. v. Clarke, 157 Ind. 271.

*Iowa.* — Wragg v. Mead, 120 Iowa 319.

*Kentucky.* — Bates Mach. Co. v. Norton Iron Works, 113 Ky. 372.

*Minnesota.* — Sloggy v. Crescent Creamery Co., 72 Minn. 316.

*Mississippi.* — American Express Co. v. Jennings, (Miss. 1905) 38 So. Rep. 374, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 584.

*Missouri.* — Wilson v. Russler, 91 Mo. App. 275.

*Nevada.* — Barnes v. Western Union Tel. Co., 27 Nev. 438.

*New Jersey.* — Skirm v. Hilliker, 66 N. J. L. 410.

*New York.* — Witherbee v. Meyer, 155 N. Y. 446; Reilly v. Connors, 65 N. Y. App. Div. 470; Meyer v. Haven, 70 N. Y. App. Div. 529; Boughton v. Petigny, 72 N. Y. App. Div. 76; Wendell v. Walker, (Supm. Ct. App. T.) 87 N. Y. Supp. 142; Brauer v. Oceanic Steam Nav. Co., (Supm. Ct. Tr. T.) 34 Misc. (N. Y.) 127, affirmed 66 N. Y. App. Div. 605; Coppola v. Kraushaar, 102 N. Y. App. Div. 306.

*North Carolina.* — Herring v. Armwood, 130 N. Car. 177.

*North Dakota.* — Hayes v. Cooley, (N. Dak. 1904) 100 N. W. Rep. 250.

*Ohio.* — Champion Ice Mfg., etc., Co. v. Pennsylvania Iron Works Co., 68 Ohio St. 229.

*Tennessee.* — Livermore Foundry, etc., Co. v. Union Compress, etc., Co., 105 Tenn. 187; Chisholm, etc., Mfg. Co. v. U. S. Canopy Co., 111 Tenn. 202.

*Texas.* — Voorheis v. Fry, (Tex. Civ. App. 1899) 52 S. W. Rep. 580; Bounds v. Hickerson, 26 Tex. Civ. App. 608.

*Wisconsin.* — Serfling v. Andrews, 106 Wis. 78.

**587. 3.** Kent v. Halliday, 23 R. I. 186, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 587.

**590. 1.** Voorheis v. Fry, (Tex. Civ. App. 1899) 52 S. W. Rep. 580.

**2. When Collateral Contract Within Contemplation of Parties.** — Bruhm v. Ford, 33 Nova Scotia 323.

**3. Contracts of Sale.** — Baxley v. Tallassee, etc., R. Co., 128 Ala. 183.

**595. 3.** See Serfling v. Andrews, 106 Wis. 78.

**596. 5. Consequences Neither Natural Nor Contemplated.** — St. Louis Southwestern R. Co. v. May, (Tex. Civ. App. 1898) 44 S. W. Rep. 408.

**598. 2.** See Enlow v. Hawkins, (Kan. 1905) 81 Pac. Rep. 189, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 598.

**3. Immaterial that Results Not Foreseen or Expected.** — Watson v. Rinderknecht, 82 Minn. 238, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 598 and supporting the whole text paragraph.

**600. 2.** Birmingham R., etc., Co. v. Ward, 124 Ala. 409.

**602. 5. Particular Result Need Not Have Been Foreseen.** — Watson v. Rinderknecht, 82 Minn. 238, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 598 and supporting the whole text paragraph.

**605. 2. Injured Party Must Exert Himself to Lessen Damages** — *England.* — Columbus Co. v. Clowes, (1903) 1 K. B. 244.

*United States.* — Texas, etc., R. Co. v. White,

**606.** Must Make Reasonable Expenditures to Avoid Loss. — See note 4.

**607.** See note 1.

The Burden of Proof. — See note 6.

**608. IV. UNCERTAIN, CONTINGENT, AND SPECULATIVE DAMAGES — 1.**  
General Rule. — See note 2.

(C. C. A.) 101 Fed. Rep. 928; *Eisele v. Oddie*, 128 Fed. Rep. 941; *Lillard v. Kentucky Distilleries, etc., Co.*, (C. C. A.) 134 Fed. Rep. 169. *Arkansas*. — *St. Louis, etc., R. Co. v. Ayres*, 67 Ark. 371.

*Colorado*. — *Kincaid v. Price*, 18 Colo. App. 73. *Illinois*. — *Scherrer v. Baltzer*, 84 Ill. App. 129, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 605; *Atchison, etc., R. Co. v. Jones*, 110 Ill. App. 645, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 605; *Hartford Deposit Co. v. Calkins*, 186 Ill. 104, reversing 85 Ill. App. 627; *Mt. Sterling v. Crummy*, 73 Ill. App. 572; *Wayne v. Styles*, 94 Ill. App. 615; *Sanitary Dist. v. McMahon, etc., Co.*, 110 Ill. App. 510. *Kentucky*. — *Illinois Cent. R. Co. v. Gheen*, (Ky. 1902) 68 S. W. Rep. 1087.

*Louisiana*. — *Armistead v. Shreveport, etc., R. Co.*, 108 La. 171.

*Massachusetts*. — *Atwood v. Boston Forwarding, etc., Co.*, 185 Mass. 557.

*Michigan*. — *Zibbell v. Grand Rapids*, 129 Mich. 659.

*Minnesota*. — *Gniadck v. Northwestern Imp., etc., Co.*, 73 Minn. 87.

*Missouri*. — *Feary v. Metropolitan St. R. Co.*, 162 Mo. 75; *Miles v. Chicago, etc., R. Co.*, 76 Mo. App. 484; *Plummer v. Milan*, 79 Mo. App. 439; *Creve Coeur Lake Ice Co. v. Tamm*, 90 Mo. App. 189; *Fullerton v. Fordyce*, 144 Mo. 519; *Mahoney v. Kansas City*, 106 Mo. App. 39.

*Montana*. — *Sweeney v. Montana Cent. R. Co.*, 25 Mont. 557, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 605; *Ashley v. Rocky Mountain Bell Telephone Co.*, 25 Mont. 286.

*New York*. — *Blate v. Third Ave. R. Co.*, 44 N. Y. App. Div. 167, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 605; *Brauer v. Oceanic Steam Nav. Co.*, (Supm. Ct. Tr. T.) 34 Misc. (N. Y.) 127, affirmed 66 N. Y. App. Div. 605; *Reisert v. New York*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 413, affirmed 69 N. Y. App. Div. 302, reversed 172 N. Y. 196; *Jager v. New York*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 622, affirmed 75 N. Y. App. Div. 258; *Noble v. American Three Color Co.*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 96; *Mendell v. Willyoung*, (Supm. Ct. App. T.) 42 Misc. (N. Y.) 210; *Zimmerman v. Marrin*, (Supm. Ct. App. T.) 86 N. Y. Supp. 112; *Dunham v. Hastings Pavement Co.*, 95 N. Y. App. Div. 360. See also *Emmerich v. Chegnay*, (Supm. Ct. App. T.) 46 Misc. (N. Y.) 456.

*Oregon*. — *Oldenburg v. Oregon Sugar Co.*, 39 Oregon 573, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 605.

*South Dakota*. — *Overpeck v. Rapid City*, 14 S. Dak. 507.

*Texas*. — *Nading v. Denison, etc., R. Co.*, 22 Tex. Civ. App. 173; *Brown v. Leath*, 17 Tex. Civ. App. 262; *Trinity, etc., R. Co. v. O'Brien*, 18 Tex. Civ. App. 690; *Waco Artesian Water Co. v. Couble*, 19 Tex. Civ. App. 417; *Lackey v. Campbell*, (Tex. Civ. App. 1899) 54 S. W. Rep. 46; *St. Louis Southwestern R. Co. v. Ball*, 28

Tex. Civ. App. 287; *Gulf, etc., R. Co. v. Denison*, (Tex. Civ. App. 1903) 72 S. W. Rep. 70; *Texas Portland Cement Co. v. Poe*, 32 Tex. Civ. App. 469; *Gulf, etc., R. Co. v. Gibbs*, 33 Tex. Civ. App. 214; *Missouri, etc., R. Co. v. Flood*, (Tex. Civ. App. 1904) 79 S. W. Rep. 1106; *Missouri, etc., R. Co. v. Allen*, (Tex. Civ. App. 1905) 87 S. W. Rep. 168.

*Washington*. — *Shaw v. Seattle*, (Wash. 1905) 81 Pac. Rep. 1057.

*West Virginia*. — *Griffith v. Blackwater Boom, etc., Co.*, 55 W. Va. 604.

*Wisconsin*. — *Kellogg v. Malick*, (Wis. 1905) 103 N. W. Rep. 1116.

**606. 4. Reasonable Expenditures Must Be Made.** — *Shelby v. Missouri Pac. R. Co.*, 77 Mo. App. 205; *Dietrich v. Hannibal, etc., R. Co.*, 89 Mo. App. 36.

**607. 1. Extraordinary Efforts to Lessen Damages Not Required of Plaintiff.** — *Arkansas River Packet Co. v. Hobbs*, 105 Tenn. 29.

**6. Burden of Proof.** — *Lillard v. Kentucky Distilleries, etc., Co.*, (C. C. A.) 134 Fed. Rep. 169; *Railway Advertising Co. v. Standard Rock Candy Co.*, 83 N. Y. App. Div. 191, affirmed 178 N. Y. 570; *Brown v. Weir*, 95 N. Y. App. Div. 78.

**608. 2. General Rule — Uncertain, Contingent, and Speculative Damages Not Recoverable — United States.** — *Central Trust Co. v. Clark*, (C. C. A.) 92 Fed. Rep. 293; *Langford v. U. S.*, 95 Fed. Rep. 933; *Central Coal, etc., Co. v. Hartman*, (C. C. A.) 111 Fed. Rep. 96; *De Ford v. Maryland Steel Co.*, (C. C. A.) 113 Fed. Rep. 72; *South African Reduction Co. v. Peck*, (C. C. A.) 120 Fed. Rep. 88; *Chicago, etc., R. Co. v. De Clow*, (C. C. A.) 124 Fed. Rep. 142; *Occidental Consol. Min. Co. v. Comstock Tunnel Co.*, 125 Fed. Rep. 244; *Iron City Toolworks v. Welisch*, (C. C. A.) 128 Fed. Rep. 693; *E. W. Bliss Co. v. Buffalo Tin Can Co.*, (C. C. A.) 131 Fed. Rep. 51.

*Alabama*. — *Nichols v. Rasch*, 138 Ala. 372.

*California*. — *Holt Mfg. Co. v. Thornton*, 136 Cal. 232.

*Delaware*. — *Unruh v. Taylor*, 2 Penn. (Del.) 42; *Truitt v. Fahey*, 3 Penn. (Del.) 573.

*Florida*. — *Hocker v. Western Union Tel. Co.*, (Fla. 1903) 34 So. Rep. 901.

*Georgia*. — *Harris v. Moss*, 112 Ga. 95.

*Illinois*. — *Pittsburgh, etc., R. Co. v. Moore*, 110 Ill. App. 304.

*Indiana*. — *Eureka Block Coal Co. v. Wells*, (Ind. App. 1901) 61 N. E. Rep. 236.

*Iowa*. — *Carragher v. Allen*, 112 Iowa 168; *Hall v. Cedar Rapids, etc., R. Co.*, 115 Iowa 18; *Jordan v. Cedar Rapids, etc., R. Co.*, 124 Iowa 177.

*Kentucky*. — *Carsey v. Farmer*, (Ky. 1904) 79 S. W. Rep. 245.

*Louisiana*. — *Armistead v. Shreveport, etc., R. Co.*, 108 La. 171; *Bourdette v. Sieward*, 107 La. 258; *Jackson v. Doll*, 109 La. 230.

*Maine*. — *National Fibre Board Co. v. Lewiston, etc., Electric Light Co.*, 95 Me. 318.

**610.** Conjectural Probabilities. — See note 3.

**2.** Degree of Certainty Required. — See notes 5, 6.

**611.** See notes 4, 5.

**3.** Most Certain Method of Estimating Damages to Be Adopted. — See note 7.

**612.** More Certain Method of Computation Preferred Though Compensation Incomplete. — See note 2.

**615.** 4. Various Elements of Uncertainty — *c.* UNCERTAINTY AS TO MEASURE OR EXTENT — General Principles. — See note 1.

**616.** 5. Recoverability of Profits as Damages — *a.* GENERAL PRINCIPLES. — See note 3.

**618.** Conflict of Authority. — See note 3.

Profits Dependent upon Fluctuation of Markets. — See note 5.

**619.** For Breach of Contract by a Lessor. — See notes 2, 3.

*Maryland.* — Gossage *v.* Philadelphia, etc., R. Co., (Md. 1905) 61 Atl. Rep. 692.

*Minnesota.* — Olson *v.* Chicago, etc., R. Co., (Minn. 1905) 102 N. W. Rep. 449.

*Missouri.* — English *v.* Missouri Pac. R. Co., 73 Mo. App. 232; Wilson *v.* Russell, 91 Mo. App. 275; Waddell *v.* Metropolitan St. R. Co., (Mo. App. 1905) 88 S. W. Rep. 765.

*Montana.* — Carman *v.* Montana Cent. R. Co., (Mont. 1905) 79 Pac. Rep. 690.

*Nebraska.* — Silurian Mineral Springs Co. *v.* Kuhn, 65 Neb. 646.

*New York.* — Meyer *v.* Haven, 70 N. Y. App. Div. 529; Comerford *v.* Smith, 82 N. Y. App. Div. 638.

*Oklahoma.* — Tootle *v.* Kent, 12 Okla. 674.

*Texas.* — Fowler *v.* Shook, (Tex. Civ. App. 1900) 59 S. W. Rep. 282; Locke *v.* International, etc., R. Co., 25 Tex. Civ. App. 145; Brincefield *v.* Allen, 25 Tex. Civ. App. 258; Raymond *v.* Yarrington, (Tex. Civ. App. 1902) 69 S. W. Rep. 436; Pecos, etc., R. Co. *v.* Williams, 34 Tex. Civ. App. 100. See also Baldwin *v.* Richardson, (Tex. Civ. App. 1905) 87 S. W. Rep. 746.

*Washington.* — Morrison *v.* Northern Pac. R. Co., 34 Wash. 70; Gallamore *v.* Olympia, 34 Wash. 379.

*West Virginia.* — Douglass *v.* Ohio River R. Co., 51 W. Va. 523; Barrett *v.* Raleigh Coal, etc., Co., 55 W. Va. 395.

**Inability to Bear Children** by reason of the injuries sustained is not an element of damage, being too remote and speculative. *Lennox v. Interurban St. R. Co.*, 104 N. Y. App. Div. 110.

**610.** 3. Hampton *v.* Co-operative Town Co., (Tenn. Ch. 1898) 48 S. W. Rep. 679.

**5. Reasonable Certainty Sufficient.** — Chicago, etc., R. Co. *v.* De Clow, (C. C. A.) 124 Fed. Rep. 142; Truitt *v.* Fahey, 3 Penn. (Del.) 573; Waddell *v.* Metropolitan St. R. Co., (Mo. App. 1905) 88 S. W. Rep. 765; Ballard *v.* Kansas City, 110 Mo. App. 391; Kyle *v.* Ohio River R. Co., 49 W. Va. 301, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 610. See also Carrnan *v.* Montana Cent. R. Co., (Mont. 1905) 79 Pac. Rep. 690.

**6.** Bates *v.* Holbrook, 89 N. Y. App. Div. 556, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 548.

**611.** 4. Absolute Certainty Not Required. — Hetzel *v.* Baltimore, etc., R. Co., 169 U. S. 26;

Ironton Land Co. *v.* Butchart, 73 Minn. 39; Gallamore *v.* Olympia, 34 Wash. 379.

**5. Remote Possibility Will Not Defeat Recovery.** — Barrett *v.* Raleigh Coal, etc., Co., 55 W. Va. 395.

**7. Definite Method of Calculation.** — Southern Cotton-Oil Co. *v.* Heffin, (C. C. A.) 99 Fed. Rep. 347, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 611; Pallett *v.* Murphy, 131 Cal. 198, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 611; Reisert *v.* New York, 69 N. Y. App. Div. 306, reversed 174 N. Y. 196, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 611.

**612.** 2. Rule Especially Applicable to Cases of Contract. — Reisert *v.* New York, 69 N. Y. App. Div. 306, reversed 174 N. Y. 196, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 612.

**615.** 1. Holt Mfg. Co. *v.* Thornton, 136 Cal. 232. See also Rugg *v.* Rohrbach, 110 Ill. App. 532.

**616.** 3. Prospective Profits. — Mirandona *v.* Burg, 51 La. Ann. 1190; Gaar *v.* Snook, 1 Ohio Cir. Dec. 142. See also Central Coal, etc., Co. *v.* Hartman, (C. C. A.) 111 Fed. Rep. 96; De Ford *v.* Maryland Steel Co., (C. C. A.) 113 Fed. Rep. 72; Iron City Toolworks *v.* Welisch, (C. C. A.) 128 Fed. Rep. 693; McNeil *v.* Crucible Steel Co., 207 Pa. St. 493; Coyle *v.* Pittsburg, etc., R. Co., 18 Pa. Super. Ct. 235.

**618.** 3. Smith *v.* Curran, 138 Fed. Rep. 160, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 618.

**5.** Carbondale Invest. Co. *v.* Burdick, 58 Kan. 517; Paquin *v.* St. Louis, etc., R. Co., 90 Mo. App. 118; Pender Lumber Co. *v.* Wilmington Iron Works, 130 N. Car. 584; Grubb *v.* Burford, 98 Va. 553; Douglass *v.* Ohio River R. Co., 51 W. Va. 523.

**619.** 2. Breach by Lessor of Contract to Repair. — Mason *v.* Howes, 122 Mich. 329. Compare Raynor *v.* Valentin Blatz Brewing Co., 100 Wis. 414, wherein damages were allowed to a lessee for loss of patronage that he might have received but for the lessor's breach of a contract to repair.

**3.** See Paul *v.* Cragmaz, 25 Nev. 293. But see Fred W. Wolf Co. *v.* Galbraith, (Tex. Civ. App. 1904) 80 S. W. Rep. 648, wherein it was held that profits were recoverable if they were shown to be within the contemplation of the parties and their loss to be the direct result of the breach of contract.



**619.** For Breach of Contract to Furnish, Deliver, or Repair Machinery. — See note 4.

**620.** *b.* REQUISITES TO RECOVERY — (1) *In General* — Ground of Exclusion. — See notes 1, 3.

It Follows, Therefore, as a General Rule. — See note 4.

**621.** (2) *Rule in Case of Contracts* — (a) *Natural and Probable Consequence.* — See note 4.

**622.** (b) *Where Profits the Very Object of the Contract.* — See note 1.

**619.** 4. Breach of Contract to Furnish, Deliver, or Repair Machinery. — *E. W. Bliss Co. v. Buffalo Tin Can Co.*, (C. C. A.) 131 Fed. Rep. 51; *Acme Cycle Co. v. Clarke*, 157 Ind. 271.

But Profits Within the Contemplation of the Parties have been held to be recoverable. *Bates Mach. Co. v. Norton Iron Works*, 113 Ky. 372.

**620.** 1. Rationale of Rule Excluding Profits. — See *Raywood Rice Canal, etc., Co. v. Langford*, 32 Tex. Civ. App. 401.

3. In *Lakeside Paper Co. v. State*, 45 N. Y. App. Div. 113, the court said: "Cases are frequent where they [profits] cannot be satisfactorily proved, or where they were the remote and not the immediate result of the breach, or where they were not within the contemplation of the parties to the contract. In any one of these three categories, lost profits are not recoverable. Some other measure of damages must be resorted to."

4. General Rule — Reasonable Evidence as to Amount — *United States*. — *Central Trust Co. v. Clark*, (C. C. A.) 92 Fed. Rep. 293; *Levinski v. Middlesex Banking Co.*, (C. C. A.) 92 Fed. Rep. 449; *Wells v. National L. Assoc.*, (C. C. A.) 99 Fed. Rep. 222; *Central Coal, etc., Co. v. Hartman*, (C. C. A.) 111 Fed. Rep. 96; *Lazier Gas Engine Co. v. Du Bois*, (C. C. A.) 130 Fed. Rep. 834; *Smith v. Curran*, 138 Fed. Rep. 160, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 620.

*Kansas*. — *Chicago, etc., R. Co. v. Scheinkoenig*, 62 Kan. 57; *States v. Durkin*, 65 Kan. 101.

*Kentucky*. — *New Market Co. v. Embry*, (Ky. 1899) 48 S. W. Rep. 980.

*Louisiana*. — *Armistead v. Shreveport, etc., R. Co.*, 108 La. 171.

*Maine*. — *National Fibre Board Co. v. Lewiston, etc., Electric Light Co.*, 95 Me. 318.

*Maryland*. — *Gossage v. Philadelphia, etc., R. Co.*, (Md. 1905) 61 Atl. Rep. 692.

*Michigan*. — *Hart v. New Haven*, 130 Mich. 187, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 620.

*Missouri*. — *Gildersleeve v. Overstolz*, 90 Mo. App. 518.

*Nebraska*. — *Wittenberg v. Mollyneaux*, 59 Neb. 203; *Silurian Mineral Springs Co. v. Kuhn*, 65 Neb. 646; *Kitchen Bros. Hotel Co. v. Philbin*, (Neb. 1902) 96 N. W. Rep. 487.

*New Jersey*. — *East Jersey Water Co. v. Bigelow*, 60 N. J. L. 201.

*New York*. — See *Witherbee v. Meyer*, 155 N. Y. 446. See also *Benyakar v. Scherz*, 103 N. Y. App. Div. 192.

*North Carolina*. — *Pender Lumber Co. v. Wilmington Iron Works*, 130 N. Car. 584.

*Pennsylvania*. — *Kinderdine Hydro-Carbon Fuel Co. v. Plumb*, 182 Pa. 463.

*South Carolina*. — *Harmon v. Western Union*

*Tel. Co.*, 65 S. Car. 492, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 620.

*Tennessee*. — *Chisholm, etc., Mfg. Co. v. U. S. Canopy Co.*, 111 Tenn. 202.

*Virginia*. — *Consumers Ice Co. v. Jennings*, 100 Va. 719; *Bristol Belt Line R. Co. v. Bullock Electric Mfg. Co.*, 101 Va. 652.

*West Virginia*. — *Kyle v. Ohio River R. Co.*, 49 W. Va. 296.

*Wisconsin*. — *Raynor v. Valentin Blatz Brewing Co.*, 100 Wis. 414; *Logemann v. Pauly*, 100 Wis. 671.

**Judicial Statement of Rule.** — In *Sharpe v. Southern R. Co.*, 130 N. Car. 613, the court said: "Profits become a measure of damages only when they were within the contemplation of the contracting parties and the data of estimation so definite and certain that they can be ascertained reasonably by calculation; in which case the party in fault must have had notice, either of the nature of the contract itself, or by explanation of the circumstances at the time the contract was made, that such damages would ensue from nonperformance."

**621.** 4. *Natural and Probable Consequence* — *United States*. — *Central Trust Co. v. Clark*, (C. C. A.) 92 Fed. Rep. 293; *Farmers' L. & T. Co. v. Eaton*, (C. C. A.) 114 Fed. Rep. 14; *Lillard v. Kentucky Distilleries, etc., Co.*, (C. C. A.) 134 Fed. Rep. 169.

*California*. — *Bryson v. McCone*, 121 Cal. 153. *Georgia*. — *Anderson v. Hilton, etc., Lumber Co.*, 121 Ga. 688.

*Illinois*. — *La Favorite Rubber Mfg. Co. v. Channon Co.*, 113 Ill. App. 491.

*Iowa*. — *Hichhorn v. Bradley*, 117 Iowa 130. *Kentucky*. — *Blood v. Herring*, (Ky. 1901) 61 S. W. Rep. 273; *Carsey v. Farmer*, (Ky. 1904) 79 S. W. Rep. 245.

*Maryland*. — *Gossage v. Philadelphia, etc., R. Co.*, (Md. 1905) 61 Atl. Rep. 692.

*Nebraska*. — *Wittenberg v. Mollyneaux*, 60 Neb. 583; *Schrandt v. Young*, (Neb. 1902) 89 N. W. Rep. 607; *Kitchen Bros. Hotel Co. v. Philbin*, (Neb. 1902) 96 N. W. Rep. 487.

*Nevada*. — *Paul v. Cragnaz*, 25 Nev. 293.

*New York*. — *Enright v. American Belgian Lamp Co.*, 26 N. Y. App. Div. 381; *Cutting v. Miner*, 30 N. Y. App. Div. 457; *Wolff v. Hvass*, (N. Y. Super. Ct. Gen. T.) 11 Misc. (N. Y.) 561, affirmed 159 N. Y. 551; *Noble v. American Three Color Co.*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 96.

*Ohio*. — *Hill v. Anderson*, 9 Ohio Dec. 480. *Oklahoma*. — *Tootle v. Kent*, 12 Okla. 674.

*Texas*. — *Raymond v. Yarrington*, (Tex. Civ. App. 1902) 69 S. W. Rep. 436; *Fred W. Wolf Co. v. Galbraith*, (Tex. Civ. App. 1904) 80 S. W. Rep. 648.

**622.** 1. *Where Profits Object of Contract.* — *Hitchcock v. Anthony*, (C. C. A.) 83 Fed. Rep. 779; *Border City Ice, etc., Co. v. Adams*, 69

**623.** See note 1.

**624.** (c) Profits on Collateral Contracts and Undertakings. — See notes 1, 2.

(d) Breach of Contract of Agency — Commissions on Sales. — See note 3.

**625.** Contrary Doctrine. — See note 3.

(3) *Rule in the Case of Torts — Damages for Interruption of Business.* — See note 5.

**626.** Evidence of Past Profits — Nature and Extent of Business. — See note 1.

**627.** Not Strict Measure of Damages, But a Guide to Jury. — See note 2.

**628.** V. MEASURE OF DAMAGES AND ELEMENTS OF RECOVERY — 1. In General — Difficulty of General Rules. — See note 1.

In the Case of Torts. — See note 4.

**629.** 2. Excessive and Inadequate Damages — a. IN GENERAL. — See notes 2, 3, 4.

Ark. 219; Cleveland, etc., R. Co. v. Wood, 189 Ill. 357, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 622; Miller v. Hahn, 23 N. Y. App. Div. 48; Conway v. Fitzgerald, 70 Vt. 103; Conway v. Mitchell, 97 Wis. 290.

**623. 1. Contract of Employment — United States.** — Central Trust Co. v. Clark, (C. C. A.) 92 Fed. Rep. 293.

Alabama. — Peck-Hammond Co. v. Heifner, 136 Ala. 473, 96 Am. St. Rep. 36.

Indiana. — Hoyle v. Stellwagen, 28 Ind. App. 681; Wood v. Wack, 31 Ind. App. 252.

Kentucky. — Reed v. Illinois Cent. R. Co., (Ky. 1903) 75 S. W. Rep. 200.

Minnesota. — Swanson v. Andrus, 83 Minn. 505.

New Jersey. — Wilson v. Borden, 68 N. J. L. 627; Sullivan v. Moffat, 70 N. J. L. 4.

New York. — Gallagher v. Hirsh, 45 N. Y. App. Div. 467; Jones v. New York, 47 N. Y. App. Div. 39.

South Carolina. — Feaster v. Richland Cotton Mills, 51 S. Car. 143.

South Dakota. — Hickok v. W. E. Adams Co., (S. Dak. 1904) 99 N. W. Rep. 77.

Washington. — Chase v. Smith, 35 Wash. 631.

West Virginia. — Barrett v. Raleigh Coal, etc., Co., 55 W. Va. 395.

Profits on a Building Contract are a basis of damages to a contractor who is deprived of them by breach of the defendant. Jenkins v. Charleston St. R. Co., 58 S. Car. 373.

**624. 1. Collateral Contracts.** — Allison v. Tennessee Coal, etc., R. Co., (Tenn. Ch. 1897) 46 S. W. Rep. 348; A. J. Anderson Electric Co. v. Cleburne Water, etc., Co., (Tex. Civ. App. 1898) 44 S. W. Rep. 929; Schrandt v. Young, (Neb. 1902) 89 N. W. Rep. 607; Bruhm v. Ford, 33 Nova Scotia 323. See also Rhodes v. Holladay-Klotz Land, etc., Co., 105 Mo. App. 279.

**2.** Sun Mfg. Co. v. Egbert, (Tex. Civ. App. 1904) 84 S. W. Rep. 667. See Boughton v. Petigny, 72 N. Y. App. Div. 76.

**3. Contract of Agency — Sales on Commission.** — Allen v. Rouse, 78 Ill. App. 69.

**625. 3.** See Bass v. West, 110 Ga. 705, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 625.

**5. Torts — Damage to Business.** — Paul E. Wolff Shirt Co. v. Frankenthal, 96 Mo. App. 307; Randall v. U. S. Leather Co., 72 N. Y. App. Div. 319, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 625; Read v. Brooklyn Heights

R. Co., 32 N. Y. App. Div. 503; Lakeside Paper Co. v. State, 45 N. Y. App. Div. 112; Wolff v. Hvass, (N. Y. Super. Ct. Gen. T.) 11 Misc. (N. Y.) 561, affirmed 159 N. Y. 551; Tootle v. Kent, 12 Okla. 687, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 625.

**626. 1. Impairment of Earning Capacity — Past Earnings.** — East Jersey Water Co. v. Bigelow, 60 N. J. L. 201, following New Jersey Express Co. v. Nichols, 33 N. J. L. 434, stated in the original note.

**627. 2. Damages for Wrongful Attachment.** — Kyd v. Cook, 56 Neb. 71.

**628. 1. Difficult to Lay Down General Rules.** — Kincaid v. Price, 18 Colo. App. 76, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 628.

**4. Where There Is No Legal Measure of Damages.** — Chicago, etc., R. Co. v. Blaul, 175 Ill. 183; Litchfield v. Whitenack, 78 Ill. App. 364; Springfield Consol. R. Co. v. Hoeffner, 175 Ill. 643, holding that damages for personal injuries "must necessarily be left to the sound discretion and judgment of the jury, basing their exercise of such discretion and judgment upon the evidence in the case, and bringing to bear on such evidence their general knowledge and experience as business men."

**629. 2. Damages Discretionary with Jury — Court Not Ready to Disturb Verdict.** — Western Screw Co. v. Johnson, 86 Ill. App. 89; Chicago, etc., R. Co. v. Pulliam, 111 Ill. App. 305, affirmed 208 Ill. 456; Kalfur v. Broadway Ferry, etc., R. Co., (Supm. Ct. Tr. T.) 23 Misc. (N. Y.) 417, affirmed 34 N. Y. App. Div. 267, 161 N. Y. 660; Missouri, etc., R. Co. v. Nesbit, (Tex. Civ. App. 1905) 88 S. W. Rep. 891.

**The Judge's Discretion Is Not Unconstrained,** but is confined within the latitude fixed by rules and precedents. Quirk v. Siegel-Cooper Co., (Supm. Ct. Tr. T.) 26 Misc. (N. Y.) 246, affirmed 43 N. Y. App. Div. 464.

**3. Ordinarily Appellate Court Will Not Interfere — United States.** — Wood v. Louisville, etc., R. Co., 88 Fed. Rep. 44; Paaauhau Sugar Plantation Co. v. Palapala, (C. C. A.) 127 Fed. Rep. 920.

Illinois. — Underwood v. Vail, 69 Ill. App. 679; Chicago, etc., R. Co. v. Kane, 70 Ill. App. 676; Chicago, etc., R. Co. v. Rathburn, 90 Ill. App. 238, affirmed 190 Ill. 572; Pittsburg, etc., R. Co. v. Smith, 110 Ill. App. 154, reversed 207 Ill. 486.

Kansas. — St. Louis, etc., R. Co. v. Bricker, 65 Kan. 321.

*Minnesota*.—*Christian v. Minneapolis*, 69 Minn. 530.

*Missouri*.—*Malloy v. St. Louis, etc., R. Co.*, 173 Mo. 75; *Lemser v. St. Joseph Furniture Mfg. Co.*, 70 Mo. App. 209.

*Nebraska*.—*Johnson v. Heath*, (Neb. 1904) 98 N. W. Rep. 832.

*New Jersey*.—*Smith v. P. Lorillard Co.*, 67 N. J. L. 361.

*New York*.—*Kalfur v. Broadway Ferry, etc., R. Co.*, 34 N. Y. App. Div. 267, *affirmed* 161 N. Y. 660; *Kraemer v. Metropolitan St. R. Co.*, 51 N. Y. App. Div. 475; *Mowbray v. Brooklyn Heights R. Co.*, 59 N. Y. App. Div. 239; *Weigley v. Kneeland*, 60 N. Y. App. Div. 614, *affirmed* 172 N. Y. 625.

*Texas*.—*Texas Cent. R. Co. v. Fisher*, 18 Tex. Civ. App. 78; *Houston, etc., R. Co. v. Rowell*, (Tex. Civ. App. 1898) 45 S. W. Rep. 763.

**628. 4. Court Will Interfere Only When Amount Indicates Abuse of Discretion on Part of Jury**—*United States*.—*Southern R. Co. v. Craig*, (C. C. A.) 113 Fed. Rep. 79, *citing* 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 629; *Smith v. Pittsburgh, etc., R. Co.*, 90 Fed. Rep. 783; *Western Gas Constr. Co. v. Danner*, (C. C. A.) 97 Fed. Rep. 882; *Occidental Consol. Min. Co. v. Comstock Tunnel Co.*, 125 Fed. Rep. 244; *Porter v. Delaware, etc., R. Co.*, 134 Fed. Rep. 155.

*Alabama*.—*Birmingham R., etc., Co. v. Ward*, 124 Ala. 409.

*Arkansas*.—*St. Louis, etc., R. Co. v. Waren*, 65 Ark. 619.

*California*.—*Clare v. Sacramento Electric Power, etc., Co.*, 122 Cal. 504; *Roche v. Redington*, 125 Cal. 175.

*Colorado*.—*Union Gold Min. Co. v. Crawford*, 29 Colo. 511; *Denver v. Stein*, 25 Colo. 125; *Denver Consol. Electric Co. v. Lawrence*, 31 Colo. 301; *Denver, etc., R. Co. v. Scott*, (Colo. 1905) 81 Pac. Rep. 763.

*Georgia*.—*Augusta v. Owens*, 111 Ga. 464; *Savannah, etc., R. Co. v. Austin*, 104 Ga. 614; *Southern R. Co. v. Bryant*, 105 Ga. 316; *Atlantic, etc., R. Co. v. Douglas*, 119 Ga. 658; *Georgia, etc., R. Co. v. Lassefer*, 122 Ga. 679.

*Idaho*.—*McLean v. Lewiston*, 8 Idaho 472.

*Illinois*.—*North Chicago St. R. Co. v. Anderson*, 70 Ill. App. 336, *affirmed* 176 Ill. 635; *Chicago, etc., R. Co. v. Clausen*, 70 Ill. App. 550, *affirmed* 173 Ill. 100; *Joliet v. Johnson*, 71 Ill. App. 423, *affirmed* 177 Ill. 178; *Chicago, etc., R. Co. v. Binkopski*, 72 Ill. App. 22; *Ava v. Grenawalt*, 73 Ill. App. 633; *Grossman v. Cosgrove*, 75 Ill. App. 385, *affirmed* 174 Ill. 383; *North Chicago St. R. Co. v. Zeiger*, 78 Ill. App. 463, *affirmed* 182 Ill. 9, 74 Am. St. Rep. 157; *Illinois Cent. R. Co. v. Souders*, 79 Ill. App. 41, *reversed* 178 Ill. 585; *North Chicago St. R. Co. v. Hoffart*, 82 Ill. App. 539; *North Chicago St. R. Co. v. Dudgeon*, 83 Ill. App. 528, *affirmed* 184 Ill. 477; *Calumet Electric St. R. Co. v. Jennings*, 83 Ill. App. 612; *Cicero, etc., St. R. Co. v. Brown*, 89 Ill. App. 318, *affirmed* 193 Ill. 274; *Heldmaier v. Rehoh*, 90 Ill. App. 96, *affirmed* 188 Ill. 458; *Illinois Cent. R. Co. v. O'Connor*, 90 Ill. App. 142, *reversed* 189 Ill. 550; *Consolidated Coal Co. v. Oeltjen*, 91 Ill. App. 123, *affirmed* 189 Ill. 85; *Chicago, etc., R. Co. v. McDonnell*, 91 Ill. App. 488, *affirmed* 194 Ill. 82; *Chicago Gen. R. Co.*

*v. McNamara*, 94 Ill. App. 188; *North Chicago St. R. Co. v. Burgess*, 94 Ill. App. 337; *Knickerbocker Ice Co. v. Bernhardt*, 95 Ill. App. 23; *Central R. Co. v. Bannister*, 96 Ill. App. 332, *affirmed* 195 Ill. 48; *Regan v. Reed*, 96 Ill. App. 460; *Chicago, etc., R. Co. v. Spurney*, 97 Ill. App. 570, *affirmed* 197 Ill. 471; *Chicago City R. Co. v. Morse*, 98 Ill. App. 662, *affirmed* 197 Ill. 327; *Chicago Terminal Transfer R. Co. v. Helberg*, 99 Ill. App. 563; *Momence Stone Co. v. Groves*, 100 Ill. App. 98, *affirmed* 197 Ill. 88; *Elgin v. Nofs*, 103 Ill. App. 11, *reversed* 200 Ill. 252; *True, etc., Co. v. Woda*, 104 Ill. App. 15, *affirmed* 201 Ill. 315; *Pittsburgh, etc., R. Co. v. Story*, 104 Ill. App. 132; *Hamilton v. Pittsburgh, etc., R. Co.*, 104 Ill. App. 207; *Chicago v. Merwin*, 105 Ill. App. 168; *Springer v. Schultz*, 105 Ill. App. 544, *affirmed* 205 Ill. 144; *Chicago G. W. R. Co. v. Root*, 106 Ill. App. 164; *Chicago City R. Co. v. Bohnow*, 108 Ill. App. 346; *Wilmette v. Brachle*, 110 Ill. App. 356, *affirmed* 209 Ill. 621; *Chicago City R. Co. v. Anderson*, 182 Ill. 298, *affirming* 80 Ill. App. 71; *North Chicago St. R. Co. v. Zeiger*, 182 Ill. 9, 74 Am. St. Rep. 157.

*Indiana*.—*Mt. Vernon v. Hoehn*, 22 Ind. App. 287, *citing* 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 629; *Courtney v. Clinton*, 18 Ind. App. 620; *Frankfort v. Coleman*, 19 Ind. App. 368, 65 Am. St. Rep. 412; *Decatur v. Stoops*, 21 Ind. App. 397; *Terre Haute, etc., R. Co. v. Sheeks*, 155 Ind. 74; *Van Camp Hardware, etc., Co. v. O'Brien*, 28 Ind. App. 152; *Efroymson v. Smith*, 29 Ind. App. 451; *Southern Indiana R. Co. v. Davis*, 32 Ind. App. 569; *Michigan City v. Phillips*, 163 Ind. 449, *affirmed* (Ind. App. 1904) 69 N. E. Rep. 700.

*Iowa*.—*Palmer v. Cedar Rapids, etc., R. Co.*, 124 Iowa 424, *citing* 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 629; *Wimber v. Iowa Cent. R. Co.*, 114 Iowa 551; *Young v. Gormley*, 120 Iowa 372; *Jordan v. Cedar Rapids, etc., R. Co.*, 124 Iowa 177; *Howard v. Lamon*, 124 Iowa 348; *Rice v. Council Bluffs*, 124 Iowa 639; *Hill v. Glenwood*, 124 Iowa 479; *Pence v. Wabash R. Co.*, 116 Iowa 279.

*Kansas*.—*Atchison, etc., R. Co. v. Lee*, 8 Kan. App. 24; *Southwestern Mineral R. Co. v. Cross*, 7 Kan. App. 506; *Wichita v. Stallings*, 59 Kan. 779, 54 Pac. Rep. 689; *Eureka v. Merrifield*, 9 Kan. App. 579; *Rea-Patterson Milling Co. v. Myrick*, 10 Kan. App. 581, 63 Pac. Rep. 462; *James v. Hayes*, 63 Kan. 133; *Cudahy Packing Co. v. Broadbent*, (Kan. 1905) 79 Pac. Rep. 126.

*Kentucky*.—*Louisville, etc., R. Co. v. Donaldson*, (Ky. 1897) 43 S. W. Rep. 439; *Henderso. v. Burke*, (Ky. 1898) 44 S. W. Rep. 422; *Ludlow v. Troste*, (Ky. 1898) 45 S. W. Rep. 661; *Louisville, etc., R. Co. v. Milet*, (Ky. 1898) 46 S. W. Rep. 498; *Louisville, etc., R. Co. v. Whitley County Ct.*, (Ky. 1899) 49 S. W. Rep. 332; *Chesapeake, etc., R. Co. v. Dixon*, (Ky. 1899) 50 S. W. Rep. 252; *Southern R. Co. v. Barr*, (Ky. 1900) 55 S. W. Rep. 900; *Floyd v. Henderson, etc., Gravel-Road R. Co.*, (Ky. 1900) 56 S. W. Rep. 6; *Donhard v. Shirley*, (Ky. 1900) 56 S. W. Rep. 17; *Frazier v. Malcolm*, (Ky. 1901) 62 S. W. Rep. 13; *Louisville, etc., R. Co. v. Cooper*, (Ky. 1901) 65 S. W. Rep. 795; *Louisville, etc., R. Co. v. Richmond*, (Ky. 1902) 67 S. W. Rep. 25; *Ezell v.*



Outland, (Ky. 1903) 72 S. W. Rep. 784; Richmond v. Martin, (Ky. 1904) 78 S. W. Rep. 219; Louisville v. Keher, (Ky. 1904) 79 S. W. Rep. 270; Louisville, etc., R. Co. v. Smith, (Ky. 1905) 84 S. W. Rep. 755; Louisville Gas Co. v. Page, (Ky. 1905) 86 S. W. Rep. 1112.

*Maine.*—Palmer v. Penobscot Lumbering Assoc., 90 Me. 193.

*Michigan.*—Fye v. Chapin, 121 Mich. 675.

*Minnesota.*—Herbert v. St. Paul City R. Co., 85 Minn. 341; Guthrie v. Minneapolis, etc., R. Co., 87 Minn. 355; Perry v. Tozer, 90 Minn. 431; Plaunt v. Railway Transfer Co., 90 Minn. 499; Fulmore v. St. Paul City R. Co., 72 Minn. 448; Sloniker v. Great Northern R. Co., 76 Minn. 306; Bennett v. Backus Lumber Co., 77 Minn. 198; Fonda v. St. Paul City R. Co., 77 Minn. 336; Durose v. St. Paul City R. Co., 80 Minn. 512; Schultz v. Faribault Consol. Gas, etc., Co., 82 Minn. 100; Gray v. Commutator Co., 85 Minn. 463; Torske v. Commonwealth Lumber Co., 86 Minn. 276; Stauning v. Great Northern R. Co., 88 Minn. 480; Isham v. Broderick, 89 Minn. 397; Clarke v. Philadelphia, etc., Coal, etc., Co., 92 Minn. 418.

*Mississippi.*—Carver v. Jackson, 82 Miss. 583; Cumberland Telephone, etc., Co. v. Pitchford, (Miss. 1901) 30 So. Rep. 41; Yazoo, etc., R. Co. v. Grant, (Miss. 1905) 38 So. Rep. 502.

*Missouri.*—Black v. Missouri Pac. R. Co., 172 Mo. 177; Chouquette v. Southern Electric R. Co., 152 Mo. 257; Bertram v. People's R. Co., 154 Mo. 639; Smiley v. St. Louis, etc., R. Co., 160 Mo. 629; Perrette v. Kansas City, 162 Mo. 238; Chitty v. St. Louis, etc., R. Co., 166 Mo. 435; Pauck v. St. Louis Dressed Beef, etc., Co., 166 Mo. 639; Bane v. Irwin, 172 Mo. 306; Minter v. Bradstreet Co., 174 Mo. 444; Luckel v. Century Bldg. Co., 177 Mo. 608; O'Neill v. Kansas City, 178 Mo. 91; Mitchell v. Wabash R. Co., 97 Mo. App. 411; Stoetzel v. Swearingen, 90 Mo. App. 588; Milledge v. Kansas City, 100 Mo. App. 490; Dawson v. St. Louis Transit Co., 102 Mo. App. 277; Fullerton v. Fordyce, 144 Mo. 519; Nichols v. Nichols, 147 Mo. 387; Chitty v. St. Louis, etc., R. Co., 148 Mo. 64; Dover v. Mississippi River, etc., R. Co., 100 Mo. App. 330; Kennedy v. St. Louis Transit Co., 103 Mo. App. 1; Longan v. Weltmer, 180 Mo. 322; Norton v. Kramer, 180 Mo. 536; McNamara v. St. Louis Transit Co., 106 Mo. App. 349; Wood v. Metropolitan St. R. Co., 181 Mo. 433; Goldsmith v. Holland Bldg. Co., 182 Mo. 597; Taylor v. Grand Ave. R. Co., 185 Mo. 239; Dutro v. Metropolitan St. R. Co., 111 Mo. App. 258; Fischer v. St. Louis, 189 Mo. 567; Waechter v. St. Louis, etc., R. Co., (Mo. App. 1905) 88 S. W. Rep. 147; Smith v. Fordyce, (Mo. 1905) 88 S. W. Rep. 679; Haxton v. Kansas City, (Mo. 1905) 88 S. W. Rep. 714; Rapp v. St. Louis Transit Co., (Mo. 1905) 88 S. W. Rep. 865. *Compare* Newcomb v. New York Cent., etc., R. Co., 182 Mo. 687.

*Nebraska.*—Wainwright v. Satterfield, 52 Neb. 403; New Omaha Thomson-Houston Electric Light Co. v. Rombold, (Neb. 1903) 93 N. W. Rep. 966; Chicago, etc., R. Co. v. Krayenbuhl, (Neb. 1904) 98 N. W. Rep. 44.

*New Jersey.*—Burr v. Pennsylvania R. Co., 64 N. J. L. 30; Fox v. Wharton, 64 N. J. L. 453; McKenna v. North Hudson County R.

Co., 64 N. J. L. 106; Frank v. Pennsylvania R. Co., (N. J. 1903) 55 Atl. Rep. 691.

*New York.*—Clarke v. Westcott, 2 N. Y. App. Div. 503, *affirmed* 158 N. Y. 736; Howell v. Rochester R. Co., 24 N. Y. App. Div. 502; Schaffer v. Baker Transfer Co., 29 N. Y. App. Div. 459; Morrissey v. Westchester Electric R. Co., 30 N. Y. App. Div. 424; Twist v. Rochester, 37 N. Y. App. Div. 307, *affirmed* 165 N. Y. 619; Baird v. New York Cent., etc., R. Co., 64 N. Y. App. Div. 14, *affirmed* 172 N. Y. 637; Jarvis v. Metropolitan St. R. Co., 65 N. Y. App. Div. 490; Sidmonds v. Brooklyn Heights R. Co., 69 N. Y. App. Div. 471; Eberhardt v. Metropolitan St. R. Co., 69 N. Y. App. Div. 560, *affirmed* 174 N. Y. 522; Wells v. New York Cent., etc., R. Co., 78 N. Y. App. Div. 1; Haszlacher v. Third Ave. R. Co., (N. Y. City Ct. Gen. T.) 60 N. Y. Supp. 1001; Willsen v. Metropolitan St. R. Co., (Supm. Ct. Tr. T.) 74 N. Y. Supp. 774; Graham v. Joseph H. Bauland Co., 97 N. Y. App. Div. 141.

*Ohio.*—Lake Shore, etc., R. Co. v. Starkey, 6 Ohio Cir. Dec. 5, 18 Ohio Cir. Ct. 700; Toledo Consol. St. R. Co. v. Rohner, 6 Ohio Cir. Dec. 706; Ashtabula Rapid Transit Co. v. Dagenbach, 11 Ohio Cir. Dec. 307. *Compare* Carl v. Pierce, etc., R. Co., 10 Ohio Cir. Dec. 711, 20 Ohio Cir. Ct. 68.

*Oregon.*—Adcock v. Oregon R., etc., Co., 45 Oregon 173.

*Rhode Island.*—Welch v. Greene, 24 R. I. 519, *citing* 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 629; Blackwell v. O'Gorman Co., 22 R. I. 638; Hill v. Union R. Co., 25 R. I. 565; McNeil v. Lyons, 20 R. I. 672.

*Tennessee.*—Jenkins v. Hankins, 98 Tenn. 545; Western Union Tel. Co. v. Frith, 105 Tenn. 167; Southern Queen Mfg. Co. v. Morris, 105 Tenn. 654; Ornamental Iron, etc., Co. v. Green, 108 Tenn. 161; American Lead Pencil Co. v. Davis, 108 Tenn. 251.

*Texas.*—Missouri, etc., R. Co. v. Dickey, (Tex. Civ. App. 1898) 48 S. W. Rep. 626; International, etc., R. Co. v. Bonatz, (Tex. Civ. App. 1898) 48 S. W. Rep. 767; Galveston, etc., R. Co. v. Bohan, (Tex. Civ. App. 1898) 47 S. W. Rep. 1050; Galveston, etc., R. Co. v. Hynes, 21 Tex. Civ. App. 34; International, etc., R. Co. v. Elkins, (Tex. Civ. App. 1899) 54 S. W. Rep. 931; Postal Tel. Cable Co. v. Coote, (Tex. Civ. App. 1900) 57 S. W. Rep. 912; International, etc., R. Co. v. Woodward, 26 Tex. Civ. App. 389; Gulf, etc., R. Co. v. Shelton, 30 Tex. Civ. App. 72; Missouri, etc., R. Co. v. Stinson, 34 Tex. Civ. App. 285; International, etc., R. Co. v. Pina, 33 Tex. Civ. App. 680; Farley v. Missouri, etc., R. Co., 34 Tex. Civ. App. 81; Houston Transfer Co. v. Renard, (Tex. Civ. App. 1904) 79 S. W. Rep. 838; International, etc., R. Co. v. Walters, (Tex. Civ. App. 1904) 80 S. W. Rep. 668; Southern Kansas R. Co. v. Sage, (Tex. Civ. App. 1904) 80 S. W. Rep. 1038; St. Louis Southwestern R. Co. v. Bolton, (Tex. Civ. App. 1904) 81 S. W. Rep. 123; Texarkana, etc., R. Co. v. Toliver, (Tex. Civ. App. 1904) 84 S. W. Rep. 375; Missouri, etc., R. Co. v. Nesbit, (Tex. Civ. App. 1905) 88 S. W. Rep. 891.

*Utah.*—Croco v. Oregon Short-Line R. Co., 18 Utah 311; Budd v. Salt Lake City R. Co., 23 Utah 515.

**630.** See notes 1, 3.

**631.** *b.* IN PERSONAL INJURY CASES.—See note 1.

*Virginia.*—Southern R. Co. *v.* Oliver, 102 Va. 710.

*Washington.*—Rush *v.* Spokane Falls, etc., R. Co., 23 Wash. 501; Uren *v.* Golden Tunnel Min. Co., 24 Wash. 261; Selby *v.* Vancouver Water Works Co., 32 Wash. 522; Young *v.* O'Brien, 36 Wash. 570; Hart *v.* Cascade Timber Co., (Wash. 1905) 81 Pac. Rep. 738; Shaw *v.* Seattle, (Wash. 1905) 81 Pac. Rep. 1057.

*West Virginia.*—Stevens *v.* Friedman, (W. Va. 1905) 51 S. E. Rep. 132.

*Wisconsin.*—Ray *v.* Lake Superior Terminal, etc., R. Co., 99 Wis. 617; Taylor *v.* Chicago, etc., R. Co., 103 Wis. 27; Nicoud *v.* Wagner, 106 Wis. 67; Hanlon *v.* Milwaukee Electric R., etc., Co., 118 Wis. 210; Duncan *v.* Grand Rapids, 121 Wis. 626; Crouse *v.* Chicago, etc., R. Co., 104 Wis. 473; Yerkes *v.* Northern Pac. R. Co., 112 Wis. 184, 88 Am. St. Rep. 961.

And see the titles APPEALS, 2 ENCYC. OF PL. AND PR. 406; NEW TRIAL, 14 ENCYC. OF PL. AND PR. 755 *et seq.*; and the Supplement thereto.

**630. 1. Where There Has Been Mistake or Misconception**—*England.*—Johnston *v.* Great Western R. Co., (1904) 2 K. B. 250.

*Colorado.*—Colorado City *v.* Smith, 17 Colo. App. 172.

*Illinois.*—Hartford Deposit Co. *v.* Calkins, 186 Ill. 104; Chicago City R. Co. *v.* Gemmill, 209 Ill. 638; Pennsylvania Co. *v.* Greso, 79 Ill. App. 127; Nicholson *v.* O'Donald, 79 Ill. App. 195; Sterling Hydraulic Co. *v.* Galt, 81 Ill. App. 600; Chicago *v.* Baker, 95 Ill. App. 413, *affirmed* 195 Ill. 54; Joliet R. Co. *v.* McPherson, 96 Ill. App. 286, *affirmed* 193 Ill. 629; Swafford *v.* Rosenbloom, 102 Ill. App. 578.

*Indiana.*—Indianapolis St. R. Co. *v.* Robinson, 157 Ind. 414.

*Kentucky.*—Louisville, etc., R. Co. *v.* Whitley County Ct., (Ky. 1899) 49 S. W. Rep. 332; Reliance Textile, etc., Works *v.* Mitchell, (Ky. 1903) 71 S. W. Rep. 425.

*Missouri.*—Bolton *v.* Missouri Pac. R. Co., 172 Mo. 92.

*New York.*—Connor *v.* New York, 28 N. Y. App. Div. 186; Nonan *v.* Obermeyer, etc., Brewing Co., 50 N. Y. App. Div. 377; Terhune *v.* Joseph W. Cody Contracting Co., 72 N. Y. App. Div. 1.

*Virginia.*—Newport News, etc., R., etc., Co. *v.* Bradford, 100 Va. 231, 4 Va. Sup. Ct. 219.

**3. Grossly Inadequate Damages.**—Tathwell *v.* Cedar Rapids, 122 Iowa 50; Henderson *v.* Louisville R. Co., (Ky. 1902) 68 S. W. Rep. 645; Carpenter *v.* Red Cloud, 64 Neb. 126; Tooker *v.* Brooklyn Heights R. Co., 80 N. Y. App. Div. 371.

**631. 1. Damages Held Not Excessive**—*Injuries Producing Permanent and Total or Practically Total Disability.*—Cleveland, etc., R. Co. *v.* Miller, (Ind. 1905) 74 N. E. Rep. 509; Small *v.* Kansas City, 185 Mo. 291 (\$5,000); Deland *v.* Cameron, 112 Mo. App. 704 (\$2,100); Waechter *v.* St. Louis, etc., R. Co., (Mo. App. 1905) 88 S. W. Rep. 147 (\$2,500); Vail *v.* Middlesex, etc., Traction Co., (N. J. 1905) 60 Atl. Rep. 42 (\$5,000); Galveston, etc., R. Co. *v.* Roth, (Tex. Civ. App. 1905) 84 S. W. Rep. 1112 (\$10,500);

International, etc., R. Co. *v.* Vanlandingham, (Tex. Civ. App. 1905) 85 S. W. Rep. 847 (\$25,000); Chicago, etc., R. Co. *v.* Jones, (Tex. Civ. App. 1905) 88 S. W. Rep. 445 (\$6,375 for injuries to wife); St. Louis Southwestern R. Co. *v.* Harkey, (Tex. Civ. App. 1905) 88 S. W. Rep. 506 (\$2,000).

*Fracture of Jaw.*—Miller *v.* Erie R. Co., 34 N. Y. App. Div. 217 (\$6,500).

*Injury to Ear.*—Smith *v.* Day, 136 Fed. Rep. 964 (\$10,000).

*Injuries to Ear and Eye.*—Palmer Transfer Co. *v.* Eaves, (Ky. 1905) 85 S. W. Rep. 750 (\$500).

*Injuries to Scalp and Leg.*—Cameron *v.* Duluth Superior Traction Co., (Minn. 1905) 102 N. W. Rep. 208 (\$2,000).

*Back and Sides Bruised, Ribs Broken, and Spinal Cord Wrenched.*—Missouri, etc., R. Co. *v.* Hay, (Tex. Civ. App. 1905) 86 S. W. Rep. 954 (\$2,000).

*Injuries to Ribs and Hand.*—San Antonio Traction Co. *v.* Sanchez, (Tex. Civ. App. 1905) 84 S. W. Rep. 849 (\$750).

*Stiff Arm.*—Detzur *v.* B. Stroh Brewing Co., 119 Mich. 282 (\$3,500).

*Broken Arm.*—Wahlgren *v.* Market St. R. Co., 132 Cal. 661 (\$1,000).

*Loss of Arm.*—Dutro *v.* Metropolitan St. R. Co., 111 Mo. App. 258 (\$2,500).

*Paralysis of Arm.*—South Covington, etc., R. Co. *v.* Smith, (Ky. 1905) 86 S. W. Rep. 970 (\$4,000).

*Permanent and Serious Injury to Girl's Arm.*—Henderson *v.* White, (Ky. 1899) 59 S. W. Rep. 764 (\$500).

*Loss of Arm by Man Thirty-five Years Old*, who was only qualified for employment requiring both arms. Galveston, etc., R. Co. *v.* Bohan, (Tex. Civ. App. 1898) 47 S. W. Rep. 1050, 12 Am. and Eng. R. Cas. N. S. 490 (\$14,000).

*Loss of Left Arm Above Elbow* by man of twenty-three, earning from \$75 to \$100 per month. Atchison, etc., R. Co. *v.* Sledge, 68 Kan. 321 (\$7,000).

*Loss of Use of Right Arm* by man of twenty-five. O'Keefe *v.* Eighth Ave. R. Co., 33 N. Y. App. Div. 324 (\$8,000).

*Fracture and Dislocation of Elbow.*—Willis *v.* St. Joseph R., etc., Co., 111 Mo. App. 580 (\$1,500).

*Severe Injury to Elbow.*—Louisville Gas Co. *v.* Page, (Ky. 1905) 86 S. W. Rep. 1112 (\$2,000).

*Loss of Fingers.*—Texarkana Table, etc., Co. *v.* Webb, (Tex. Civ. App. 1905) 86 S. W. Rep. 782.

*Fracture of Floating Rib.*—Aslen *v.* Charlotte, 35 N. Y. App. Div. 625 (\$700).

*Hernia.*—Chicago *v.* Harris, 113 Ill. App. 633 (\$3,000).

*Miscarriage.*—Berger *v.* St. Paul City R. Co., (Minn. 1905) 103 N. W. Rep. 724 (\$5,000); Boltz *v.* Sullivan, 101 Wis. 608 (\$2,000).

*Injuries Producing Prolapsus Uteri and Congestion* likely to be permanent. Rippe *v.* Metropolitan St. R. Co., 35 N. Y. App. Div. 321 (\$3,750).

**633. 3. Damages in Actions for Breach of Contract — a. IN GENERAL — Compensation the Fundamental Principle. — See note 1.**

**634.** See note 1.

**635.** See note 1.

**637. d. EXPENSES INCURRED BY INJURED PARTY. — See note 6.**

**638.** See note 1.

**639. Expenditures Must Be Reasonable in Amount and Object. — See note 2.**

**e. MOTIVE AND INTENT OF DEFAULTING PARTY. — See note 5.**

*Injuries to Hip.* — *Lorenz v. New Orleans*, 114 La. 802 (\$2,500).

*Injuries to Hip and Spine.* — *Galveston, etc., R. Co. v. Fry*, (Tex. Civ. App. 1905) 84 S. W. Rep. 664; *Illinois Cent. R. Co. v. Colly*, (Ky. 1905) 86 S. W. Rep. 536 (\$750).

*Injuries to Hip, Knee, and Ankle.* — *San Antonio, etc., R. Co. v. Jackson*, (Tex. Civ. App. 1905) 85 S. W. Rep. 445 (\$4,200).

*Injuries to Hip and Leg.* — *Louisville R. Co. v. De Gore*, (Ky. 1905) 84 S. W. Rep. 326 (\$4,000).

*Injuries to Foot, Hip, and Ribs.* — *Texas, etc., R. Co. v. Leakey*, (Tex. Civ. App. 1905) 87 S. W. Rep. 1168 (\$1,250).

*Injuries to Leg.* — *Conner v. Nevada*, 188 Mo. 148 (\$3,000); *Neves v. Green*, 111 Mo. App. 634 (\$3,000).

*Loss of Leg.* — *Galveston, etc., R. Co. v. Dehnisch*, (Tex. Civ. App. 1900) 57 S. W. Rep. 64 (\$8,000); *Texarkana, etc., R. Co. v. Toliver*, (Tex. Civ. App. 1904) 84 S. W. Rep. 375 (\$19,500).

*Compound Comminuted Fracture of Leg.* — *Campbell v. Railway Transfer Co.*, (Minn. 1905) 104 N. W. Rep. 547 (\$3,000).

*Broken Leg.* — *Wiszynski v. American Sugar-Refining Co.*, (N. J. 1901) 49 Atl. Rep. 530 (\$1,000).

*Usefulness of Arm and Hand Permanently Destroyed.* — *Galveston, etc., R. Co. v. Courtney*, 30 Tex. Civ. App. 544 (\$11,000).

*Loss of Arm and Leg by Small Boy.* — *Louisville, etc., R. Co. v. Chism*, (Ky. 1898) 47 S. W. Rep. 251 (\$5,500).

*Permanent Injuries to Knee Joint.* — *Chicago v. Fitzgerald*, 75 Ill. App. 174 (\$4,500).

*Loss of Foot by Strong Boy of Eighteen.* — *San Antonio, etc., R. Co. v. Green*, 20 Tex. Civ. App. 5 (\$8,000).

*Fracture of Ankle.* — *Miller v. New York*, 104 N. Y. App. Div. 33 (\$2,500).

*Injuries to Foot.* — *Young v. O'Brien*, 36 Wash. 570 (\$1,350).

**Damages Held to Be Excessive.** — *Reynolds v. St. Louis Transit Co.*, 189 Mo. 408 (\$23,400, for injuries resulting in diabetes and paralysis of legs); *Ricker v. Central R. Co.*, (N. J. 1905) 61 Atl. Rep. 89 (\$20,000 for injuries not total).

*Injuries to Head and Spine.* — *Denver, etc., R. Co. v. Scott*, (Colo., 1905) 81 Pac. Rep. 763 (\$48,850).

*Loss of Arm.* — *Struble v. Burlington, etc., R. Co.*, (Iowa 1905) 103 N. W. Rep. 142 (\$12,000); *Louisville, etc., R. Co. v. Lowe*, (Ky. 1904) 80 S. W. Rep. 768 (\$13,000).

*Loss of Leg by Switchman.* — *Galveston, etc., R. Co. v. Bernard*, (Tex. Civ. App. 1900) 57 S. W. Rep. 686 (\$25,000).

*Thigh Bones Broken.* — *Hart v. Cascade*

*Timber Co.*, (Wash. 1905) 81 Pac. Rep. 738 (\$5,000).

*Neurasthenia.* — A verdict in favor of a married woman for \$10,000 was held to be excessive where it appeared that she was merely suffering from neurasthenia which would not be permanent. *Becker v. Albany R. Co.*, 35 N. Y. App. Div. 46.

**Damages Held to Be Inadequate.** — *Fischer v. St. Louis*, 189 Mo. 567 (\$1, for broken ankle which did not heal properly on account of the old age of the plaintiff).

**633. 1. General Rule — Measure of Damages for Breach of Contract.** — *Peck-Hammond Co. v. Heifner*, 136 Ala. 473, 96 Am. St. Rep. 36, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 632; *Coburn v. California Portland Cement Co.*, 114 Cal. 84, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 632; *Scheerschmidt v. Smith*, 74 Minn. 224; *Benyakar v. Scherz*, 103 N. Y. App. Div. 192; *Herman v. William B. Pierce Co.*, 105 N. Y. App. Div. 16; *Waco Artesian Water Co. v. Cauble*, 19 Tex. Civ. App. 417; *Hurxthal v. St. Lawrence Boom, etc., Co.*, 53 W. Va. 102, 97 Am. St. Rep. 954, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 632.

**634. 1.** *Taulbee v. Moore*, 106 Ky. 749; *Straus v. Buchman*, 96 N. Y. App. Div. 274, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 634.

**635. 1.** *Occidental Consol. Min. Co. v. Comstock Tunnel Co.*, 125 Fed. Rep. 244; *Simons v. Wittmann*, (Mo. App. 1905) 88 S. W. Rep. 794, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 635.

**637. 6. Expenses Incurred in Consequence of Breach of Contract Recoverable.** — *Black v. Des Moines Mfg., etc., Co.*, (Iowa 1898) 77 N. W. Rep. 504; *Huntingdon Malleable Iron Co. v. Bills*, 21 Pa. Super. Ct. 556; *Waco Artesian Water Co. v. Cauble*, 19 Tex. Civ. App. 417.

Where a contractor, through his own negligence, brings the work which he has undertaken to perform into such a condition that he is unable to complete it, and thereupon abandons his contract, he becomes liable for the loss resulting to the other contracting party, including the amount reasonably expended in minimizing such loss. *Hammond Oil, etc., Co. v. Feitel*, (La. 1905) 38 So. Rep. 941.

**638. 1. Expenses in Anticipation of Performance.** — *McKenzie v. Mitchell*, 123 Ga. 72; *Swanson v. Andrus*, 83 Minn. 505; *Cutting v. Miner*, 30 N. Y. App. Div. 457; *Hill v. Anderson*, 9 Ohio Dec. 480.

**639. 2. Expenses Must Be Reasonable.** — *Southern Bridge Co. v. Bogenshot*, (Tenn. Ch. 1897) 48 S. W. Rep. 97; *Nading v. Denison, etc., R. Co.*, 22 Tex. Civ. App. 173.

**5. Motive or Intent Not to Be Inquired Into. —**



**640.** 4. Damages in Actions of Tort — *a*. IN GENERAL. — See note 3. Evidence of Financial Condition of Parties. — See notes 5, 6.

**641.** Double and Treble Damages. — See note 1.

*b*. IN PARTICULAR CASES OF TORTS — (2) *Torts to the Person* —

(a) *In General*. — See note 8.

**642.** See notes 1, 2, 3.

*Magnolia Metal Co. v. Gale*, (Mass. 1905) 75 N. E. Rep. 219.

**640.** 3. Damages in Actions of Tort — Compensation the Rule. — Northern Commercial Co. v. Nestor, (C. C. A.) 138 Fed. Rep. 383; Denver, etc., R. Co. v. Scott, (Colo. 1905) 81 Pac. Rep. 763; Hart v. Cascade Timber Co., (Wash. 1905) 81 Pac. Rep. 738.

5. Financial Condition of Parties. — Alabama G. S. R. Co. v. Carroll, (C. C. A.) 84 Fed. Rep. 772; National Biscuit Co. v. Nolan, (C. C. A.) 138 Fed. Rep. 6; Louisville, etc., R. Co. v. Collinsworth, (Fla. 1903) 33 So. Rep. 513; West Chicago St. R. Co. v. Johnson, 77 Ill. App. 142, affirmed 180 Ill. 285; Givens v. Berkley, 108 Ky. 236; Louisville, etc., R. Co. v. Hall, 115 Ky. 567; Southern R. Co. v. McLellan, 80 Miss. 700; Missouri, etc., R. Co. v. Hannig, 91 Tex. 347; Price v. Wright, 35 N. Bruns. 26. But see Ward v. Steffen, 88 Mo. App. 571.

The husband, in an action brought by him for injury to his wife, will not be allowed to testify concerning his poverty. *Dallas v. Moore*, (Tex. Civ. App. 1903) 74 S. W. Rep. 95.

6. Exemplary Damages — Defendant's Financial Ability. — Greenberg v. Western Turf Assoc., 140 Cal. 357; Berryman v. Cox, 73 Mo. App. 67; King v. Hanson, (N. Dak. 1904) 99 N. W. Rep. 1085; Steen v. Friend, 11 Ohio Cir. Dec. 235, 20 Ohio Cir. Ct. 459; Nashville St. R. Co. v. O'Bryan, 104 Tenn. 28; Planters' Oil Co. v. Mansell, (Tex. Civ. App. 1897) 43 S. W. Rep. 913; Trinity, etc., R. Co. v. O'Brien, 18 Tex. Civ. App. 690; Eggett v. Allen, 106 Wis. 633; Cosgriff v. Miller, 10 Wyo. 190, 98 Am. St. Rep. 977. See also Georgia R., etc., Co. v. Benton, 117 Ga. 785. But see Givens v. Berkley, 108 Ky. 236.

**641.** 1. Double and Treble Damages. — Layton v. McConnell, 61 N. Y. App. Div. 447.

Whether Doubling Performed by Jury. — The defendant has no right to demand that the merely ministerial act of doubling the damages shall be performed by the jury; for it is the province of the jury to find facts, and the only question of fact is the plaintiff's actual damages. *Jaquith v. Benoit*, 70 N. H. 1.

8. Torts to the Person. — McLean v. Lewiston, 8 Idaho 472; West Chicago St. R. Co. v. Johnson, 77 Ill. App. 142, affirmed 180 Ill. 285; Hamilton v. Pittsburgh, etc., R. Co., 104 Ill. App. 207; Hill v. Union R. Co., 25 R. I. 565.

No Fixed Measure of Compensation. — Chicago, etc., R. Co. v. Mochell, 96 Ill. App. 178, affirmed 193 Ill. 208, 86 Am. St. Rep. 318.

Disfigurement of the Person is an element of compensatory damages, though money is not an adequate recompense. *St. Louis, etc., R. Co. v. Warren*, 65 Ark. 619. But see Price v. Wright, 35 N. Bruns. 26.

**642.** 1. Western Gas Constr. Co. v. Danner, (C. C. A.) 97 Fed. Rep. 882; Porter v.

Delaware, etc., R. Co., 134 Fed. Rep. 155; Metropolitan West Side El. R. Co. v. Fortin, 107 Ill. App. 157, affirmed 20 Ill. 454; Louisville Gas Co. v. Page, (Ky. 1905) 86 S. W. Rep. 1112; Taylor v. Grand Ave. R. Co., 185 Mo. 239.

2. McAllister v. People's R. Co., 4 Penn. (Del.) 272; Wilman v. People's R. Co., 4 Penn. (Del.) 260, 55 Atl. Rep. 332; Maguire v. St. Louis Transit Co., 103 Mo. App. 459; Ashby v. Elsberry, etc., Gravel Road Co., 111 Mo. App. 79. See also Red River, etc., R. Co. v. Reynolds, (Tex. Civ. App. 1905) 85 S. W. Rep. 1169.

3. Province of Jury — United States. — Wood v. Louisville, etc., R. Co., 88 Fed. Rep. 44; Porter v. Delaware, etc., R. Co., 134 Fed. Rep. 155.

California. — Clare v. Sacramento Electric Power, etc., Co., 122 Cal. 504.

Colorado. — Denver v. Stein, 25 Colo. 125.

Georgia. — Atlantic, etc., R. Co. v. Douglas, 119 Ga. 658.

Illinois. — North Chicago St. R. Co. v. Fitzgibbons, 180 Ill. 466; Chicago City R. Co. v. Mead, 206 Ill. 174, affirming 107 Ill. App. 649; North Chicago St. R. Co. v. Anderson, 70 Ill. App. 336, affirmed 176 Ill. 635; Chicago, etc., R. Co. v. Clausen, 70 Ill. App. 550, affirmed 173 Ill. 100; Springfield Consol. R. Co. v. Hoefner, 71 Ill. App. 162, affirmed 175 Ill. 634; Illinois Cent. R. Co. v. Keller, 77 Ill. App. 474; Griffin Wheel Co. v. Markus, 79 Ill. App. 82, affirmed 180 Ill. 391; Economy Light, etc., Co. v. Sheridan, 103 Ill. App. 145, affirmed 200 Ill. 439.

Indiana. — Chicago, etc., R. Co. v. Thrasher, (Ind. App. 1905) 73 N. E. Rep. 829; Cincinnati, etc., Electric St. R. Co. v. Leonard, (Ind. App. 1905) 73 N. E. Rep. 932.

Iowa. — Palmer v. Cedar Rapids, etc., R. Co., 124 Iowa 424; Rice v. Council Bluffs, 124 Iowa 639.

Kentucky. — Shinkle v. McCullough, 116 Ky. 960, 105 Am. St. Rep. 249; Louisville Gas Co. v. Page, (Ky. 1905) 86 S. W. Rep. 1112.

Maine. — Hastings v. Stetson, 91 Me. 229.

Missouri. — Malloy v. St. Louis, etc., R. Co., 173 Mo. 75; Dunn v. Northeast Electric R. Co., 81 Mo. App. 42; Dover v. Mississippi River, etc., R. Co., 100 Mo. App. 330; Fischer v. St. Louis, 189 Mo. 567.

Tennessee. — American Lead Pencil Co. v. Davis, 108 Tenn. 251.

Texas. — St. Louis Southwestern R. Co. v. Freedman, 18 Tex. Civ. App. 553; Texarkana, etc., R. Co. v. Toliver, (Tex. Civ. App. 1904) 84 S. W. Rep. 375; San Antonio, etc., R. Co. v. Lester, (Tex. Civ. App. 1904) 84 S. W. Rep. 401; St. Louis Southwestern R. Co. v. Smith, (Tex. Civ. App. 1905) 86 S. W. Rep. 943; Missouri, etc., R. Co. v. Nesbit, (Tex. Civ. App. 1905) 88 S. W. Rep. 891.

**642.** Elements Susceptible of Pecuniary Measurement. — See notes 4, 6.

**643.** (b) Recovery for Future Consequences. — See notes 1, 2.

*Utah.* — *Harrington v. Eureka Hill Min. Co.*, 17 *Utah* 300; *North Point Consol. Irrigation Co. v. Utah, etc.*, *Canal Co.*, 23 *Utah* 199; *Budd v. Salt Lake City R. Co.*, 23 *Utah* 515.

*Wisconsin.* — *Bading v. Milwaukee Electric R., etc.*, *Co.*, 105 *Wis.* 480.

**642. 4. Pecuniary Standard Adopted Where Practicable** — *L. W. Pomerene Co. v. White*, (Neb. 1903) 97 *N. W. Rep.* 232. See also *Storrs v. Los Angeles Traction Co.*, 134 *Cal.* 91.

**6. Loss of Eyesight.** — See *Stowe v. La Conner Trading, etc., Co.*, (Wash. 1905) 80 *Pac. Rep.* 856.

**643. 1. Permanent Injuries — Future Consequences** — *United States.* — *Western Union Tel. Co. v. Morris*, (C. C. A.) 83 *Fed. Rep.* 992; *Lafourche Packet Co. v. Henderson*, (C. C. A.) 94 *Fed. Rep.* 871; *The Iroquois*, 113 *Fed. Rep.* 964, *affirmed* (C. C. A.) 118 *Fed. Rep.* 1003; *The Anchoria*, 113 *Fed. Rep.* 982, *affirmed* (C. C. A.) 120 *Fed. Rep.* 1017; *Pouppirt v. Elder Dempster Shipping Co.*, 122 *Fed. Rep.* 983, *reversed* (C. C. A.) 125 *Fed. Rep.* 732; *The City of Portsmouth*, 125 *Fed. Rep.* 264.

*California.* — *Dolan v. Sierra R. Co.*, 135 *Cal.* 435; *Roche v. Redington*, 125 *Cal.* 174.

*Colorado.* — *Denver v. Stein*, 25 *Colo.* 125.

*Delaware.* — *Strattner v. Wilmington City Electric Co.*, 3 *Penn.* (Del.) 245; *Louth v. Thompson*, 1 *Penn.* (Del.) 149; *Murphy v. Hughes*, 1 *Penn.* (Del.) 250; *Karczewski v. Wilmington City R. Co.*, 4 *Penn.* (Del.) 24; *Wilman v. People's R. Co.*, 4 *Penn.* (Del.) 260.

*District of Columbia.* — *Washington, etc., R. Co. v. Patterson*, 9 *App. Cas.* (D. C.) 423.

*Georgia.* — *Bibb County v. Ham*, 110 *Ga.* 340; *Florida Cent., etc., R. Co. v. Pitts*, 112 *Ga.* 846; *Brush Electric Light, etc., Co. v. Simonsohn*, 107 *Ga.* 70; *Georgia, etc., R. Co. v. Lasseter*, 122 *Ga.* 679; *Macon R., etc., Co. v. Streyer*, 123 *Ga.* 279.

*Illinois.* — *North Chicago St. R. Co. v. Shreve*, 171 *Ill.* 438, *affirming* 70 *Ill. App.* 666; *Springer v. Schultz*, 205 *Ill.* 144; *South Chicago City R. Co. v. Walters*, 70 *Ill. App.* 271; *Mt. Sterling v. Crummy*, 73 *Ill. App.* 572; *Illinois Cent. R. Co. v. Souders*, 79 *Ill. App.* 41, *reversed* 178 *Ill.* 585; *Kirk v. Scally*, 79 *Ill. App.* 67; *North Chicago St. R. Co. v. Fitzgibbons*, 79 *Ill. App.* 632, *affirmed* 180 *Ill.* 466; *Chicago City R. Co. v. Anderson*, 80 *Ill. App.* 71, *affirmed* 182 *Ill.* 298; *Spring Valley v. Gavin*, 81 *Ill. App.* 456, *affirmed* 182 *Ill.* 232; *West Chicago St. R. Co. v. Tuerk*, 90 *Ill. App.* 105, *affirmed* 193 *Ill.* 385; *Iroquois Furnace Co. v. McCrea*, 91 *Ill. App.* 337, *affirmed* 191 *Ill.* 340; *Chicago, etc., R. Co. v. McDonnell*, 91 *Ill. App.* 488, *affirmed* 194 *Ill.* 82; *Gundlach v. Schott*, 95 *Ill. App.* 110, *affirmed* 192 *Ill.* 509, 85 *Am. St. Rep.* 348; *Illinois Steel Co. v. Hanson*, 97 *Ill. App.* 469, *affirmed* 195 *Ill.* 106; *Chicago, etc., R. Co. v. Murphy*, 99 *Ill. App.* 126, *affirmed* 198 *Ill.* 462; *Lake St. El. R. Co. v. Burgess*, 99 *Ill. App.* 499, *affirmed* 200 *Ill.* 628; *Brookside Coal Min. Co. v. Hajnal*, 101 *Ill. App.* 175; *Barnett, etc., Co. v. Schlacka*, 110 *Ill. App.* 672, *affirmed* 208 *Ill.* 426; *Riverton Coal Co. v. Shepherd*, 111 *Ill. App.* 294, *affirmed* 207

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*Ill.* 395; *North Chicago St. R. Co. v. Fitzgibbons*, 180 *Ill.* 466; *Hansell-Elcock Foundry Co. v. Clark*, 214 *Ill.* 399.

*Indiana.* — *Indiana Iron Co. v. Cray*, 19 *Ind. App.* 565; *Frankfort v. Coleman*, 19 *Ind. App.* 368, 65 *Am. St. Rep.* 412; *Pittsburgh, etc., R. Co. v. Montgomery*, 152 *Ind.* 1, 71 *Am. St. Rep.* 301; *Louisville, etc., R. Co. v. Williams*, 20 *Ind. App.* 576; *Eureka Block Coal Co. v. Wells*, (Ind. App. 1901) 61 *N. E. Rep.* 236; *Indianapolis St. R. Co. v. Walton*, 29 *Ind. App.* 368; *Baltimore, etc., R. Co. v. Roberts*, (Ind. 1903) 67 *N. E. Rep.* 530; *Cincinnati, etc., Electric St. R. Co. v. Leonard*, (Ind. App. 1905) 73 *N. E. Rep.* 932.

*Iowa.* — *Ankrum v. Marshalltown*, 105 *Iowa* 493; *Lamb v. Cedar Rapids*, 108 *Iowa* 629; *Wilberding v. Dubuque*, 111 *Iowa* 484; *Cotant v. Boone Suburban R. Co.*, 125 *Iowa* 46; *Evans v. Iowa City*, 125 *Iowa* 202.

*Kansas.* — *Missouri Pac. R. Co. v. Johnson*, 59 *Kan.* 776, 53 *Pac. Rep.* 129; *James v. Hayes*, 63 *Kan.* 133.

*Kentucky.* — *Louisville, etc., R. Co. v. McEwan*, (Ky. 1899) 51 *S. W. Rep.* 619; *Reliance Textile, etc., Works v. Mitchell*, (Ky. 1903) 71 *S. W. Rep.* 425, *citing* 8 *AM. AND ENG. ENCYC. OF LAW* (2d ed.) 643; *Belt Electric Line Co. v. Allen*, 102 *Ky.* 551, 80 *Am. St. Rep.* 374; *Henderson v. Burke*, (Ky. 1898) 44 *S. W. Rep.* 422; *Louisville, etc., R. Co. v. Lyon*, (Ky. 1900) 58 *S. W. Rep.* 434; *Covington v. Diehl*, (Ky. 1900) 59 *S. W. Rep.* 492; *Covington, etc., Bridge Co. v. Goodnight*, (Ky. 1901) 60 *S. W. Rep.* 415; *Bowling Green Stone Co. v. Capshaw*, (Ky. 1901) 64 *S. W. Rep.* 507; *Louisville, etc., R. Co. v. Bowlds*, (Ky. 1901) 64 *S. W. Rep.* 957; *Louisville, etc., R. Co. v. Mason*, (Ky. 1903) 72 *S. W. Rep.* 27; *Louisville v. Bailey*, (Ky. 1903) 74 *S. W. Rep.* 688.

*Maine.* — *Jones v. Deering*, 94 *Me.* 165.

*Michigan.* — *Wilton v. Flint*, 128 *Mich.* 156; *Remey v. Detroit United R. Co.*, (Mich. 1905) 104 *N. W. Rep.* 420.

*Minnesota.* — *Fulmore v. St. Paul City R. Co.*, 72 *Minn.* 448; *Sloniker v. Great Northern R. Co.*, 76 *Minn.* 306; *Hunt v. St. Paul City R. Co.*, 89 *Minn.* 448.

*Missouri.* — *Cobb v. St. Louis, etc., R. Co.*, 149 *Mo.* 609; *Smiley v. St. Louis, etc., R. Co.*, 160 *Mo.* 629; *Perrette v. Kansas City*, 162 *Mo.* 238; *Curtis v. McNair*, 173 *Mo.* 270; *Copeland v. Wabash R. Co.*, 175 *Mo.* 650; *Chilton v. St. Joseph*, 143 *Mo.* 192; *Fullerton v. Fordyce*, 144 *Mo.* 519; *Ashby v. Elsberry, etc., Gravel Road Co.*, 111 *Mo. App.* 79; *Kupferschmid v. Southern Electric R. Co.*, 70 *Mo. App.* 438; *Covell v. Wabash R. Co.*, 82 *Mo. App.* 180; *Hansberger v. Sedalia Electric R., etc., Co.*, 82 *Mo. App.* 566; *O'Neill v. Blase*, 94 *Mo. App.* 648; *Eberly v. Chicago, etc., R. Co.*, 96 *Mo. App.* 361.

*Montana.* — *Snook v. Anaconda*, 26 *Mont.* 128.

*Nebraska.* — *Harvard v. Stiles*, 54 *Neb.* 26; *Omaha St. R. Co. v. Emminger*, 57 *Neb.* 240.

*New Jersey.* — *Hires v. Atlantic City R. Co.*, 66 *N. J. L.* 30.

*New York.* — *Shaier v. Broadway Imp. Co.*,

**643. (c) Evidence Admissible — aa. EVIDENCE OF DOMESTIC RELATIONS. — See notes**

3, 4.

22 N. Y. App. Div. 102, *affirmed* 162 N. Y. 641; *Reardon v. Third Ave. R. Co.*, 24 N. Y. App. Div. 163; *Furman v. Brooklyn Heights R. Co.*, 25 N. Y. App. Div. 133; *Hergert v. Union R. Co.*, 25 N. Y. App. Div. 218; *Baker v. New York, etc., R. Co.*, 28 N. Y. App. Div. 316; *Williamson v. Brooklyn Heights R. Co.*, 53 N. Y. App. Div. 399; *Downer v. Metropolitan St. R. Co.*, 54 N. Y. App. Div. 315; *Zingrebe v. Union R. Co.*, 56 N. Y. App. Div. 555; *Leonard v. Brooklyn Heights R. Co.*, 57 N. Y. App. Div. 125; *Maimone v. Dry Dock, etc., R. Co.*, 58 N. Y. App. Div. 383; *Mowbray v. Brooklyn Heights R. Co.*, 59 N. Y. App. Div. 239; *Fox v. Union Turnpike Co.*, 59 N. Y. App. Div. 363; *Ivey v. Brooklyn Heights R. Co.*, 63 N. Y. App. Div. 311; *Clark v. Metropolitan St. R. Co.*, 68 N. Y. App. Div. 49; *Napier v. Brooklyn Heights R. Co.*, 68 N. Y. App. Div. 200; *Bertsch v. Metropolitan St. R. Co.*, 68 N. Y. App. Div. 228, *affirmed* 173 N. Y. 634; *Perry v. Metropolitan St. R. Co.*, 68 N. Y. App. Div. 351; *Sidmonds v. Brooklyn Heights R. Co.*, 69 N. Y. App. Div. 471; *Hunter v. Third Ave. R. Co.*, (Supm. Ct. App. T.) 21 Misc. (N. Y.) 1; *Sloane v. McCauley*, (Supm. Ct. Tr. T.) 33 Misc. (N. Y.) 652; *Koehne v. New York, etc., R. Co.*, 32 N. Y. App. Div. 419, *affirmed* 165 N. Y. 603; *Wallace v. New York City R. Co.*, (Supm. Ct. App. T.) 92 N. Y. Supp. 766; *McNeill v. Interurban St. R. Co.*, (Supm. Ct. App. T.) 92 N. Y. Supp. 767.

*North Carolina.* — *Clark v. Durham Traction Co.*, 138 N. Car. 77.

*Ohio.* — *Wheeling, etc., R. Co. v. Suhrwiar*, 12 Ohio Cir. Dec. 809, 22 Ohio Cir. Ct. 560.

*Pennsylvania.* — *Smedley v. Hestonville, etc.*, Pass. R. Co., 184 Pa. St. 620; *Linn v. Duquesne*, 204 Pa. St. 551, 93 Am. St. Rep. 800.

*Rhode Island.* — *Stone v. Pendleton*, 21 R. I. 332; *McNeil v. Lyons*, 20 R. I. 672.

*South Carolina.* — *Bussey v. Charleston, etc., R. Co.*, 52 S. Car. 438.

*South Dakota.* — *Klingaman v. Fish, etc., Co.*, (S. Dak. 1905) 102 N. W. Rep. 601.

*Tennessee.* — *Ritt v. True Lag Paint Co.*, 108 Tenn. 646.

*Texas.* — *Houston City St. R. Co. v. Medlenka*, 17 Tex. Civ. App. 621; *Missouri, etc., R. Co. v. Chambers*, 17 Tex. Civ. App. 487; *St. Louis Southwestern R. Co. v. Freedman*, 18 Tex. Civ. App. 553; *Galveston, etc., R. Co. v. Scott*, 21 Tex. Civ. App. 24; *Texas, etc., R. Co. v. Scruggs*, 23 Tex. Civ. App. 712; *San Antonio Gas Co. v. Singleton*, 24 Tex. Civ. App. 341; *Galveston, etc., R. Co. v. Hampton*, 24 Tex. Civ. App. 458; *St. Louis Southwestern R. Co. v. Laws*, (Tex. Civ. App. 1901) 61 S. W. Rep. 498; *International, etc., R. Co. v. Woodward*, 26 Tex. Civ. App. 389; *Galveston, etc., R. Co. v. Abbey*, 29 Tex. Civ. App. 211; *Hildenbrand v. Marshall*, 30 Tex. Civ. App. 135; *Chicago, etc., R. Co. v. Armes*, 32 Tex. Civ. App. 32; *Missouri, etc., R. Co. v. Taff*, 31 Tex. Civ. App. 657; *Texas, etc., R. Co. v. Lee*, 32 Tex. Civ. App. 23; *Central Texas, etc., R. Co. v. Luther*, (Tex. Civ. App. 1903) 74 S. W. Rep. 589; *St. Louis Southwestern R. Co. v. Highnote*, (Tex. Civ. App. 1903) 74 S. W. Rep. 920; *Atchison,*

*etc., R. Co. v. Keller*, 33 Tex. Civ. App. 358; *International, etc., R. Co. v. Moynahan*, 33 Tex. Civ. App. 302; *Pecos, etc., R. Co. v. Bowman*, 34 Tex. Civ. App. 98; *Galveston, etc., R. Co. v. Butshek*, 34 Tex. Civ. App. 194; *Texas, etc., R. Co. v. Kelly*, 34 Tex. Civ. App. 21; *Missouri, etc., R. Co. v. Hannig*, 91 Tex. 347; *Red River, etc., R. Co. v. Reynolds*, (Tex. Civ. App. 1905) 85 S. W. Rep. 1169; *Texas, etc., R. Co. v. McDowell*, (Tex. Civ. App. 1905) 88 S. W. Rep. 415.

*Utah.* — *Palmquist v. Mine, etc., Supply Co.*, 25 Utah 257.

*Washington.* — *Uren v. Golden Tunnel Min. Co.*, 24 Wash. 261; *Shaw v. Seattle*, (Wash. 1905) 81 Pac. Rep. 1057.

*Wisconsin.* — *Curren v. A. H. Stange Co.*, 98 Wis. 598; *Ray v. Lake Superior Terminal, etc., R. Co.*, 99 Wis. 617; *Revolinski v. Adams Coal Co.*, 118 Wis. 324.

**Loss of Marriage Prospects** is an element of damage. *Smith v. Pittsburgh, etc., R. Co.*, 90 Fed. Rep. 783.

**643. 2. Consequences Must Be Reasonably Certain — Illinois.** — *Allen B. Wrisley Co. v. Burke*, 203 Ill. 259, *citing* 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 643; *Illinois Iron, etc., Co. v. Weber*, 196 Ill. 526; *Chicago v. Lamb*, 105 Ill. App. 204; *Pittsburgh, etc., R. Co. v. Moore*, 110 Ill. App. 304.

*Iowa.* — *Bailey v. Centerville*, 108 Iowa 20.

*Kentucky.* — *Louisville, etc., R. Co. v. Logsdon*, 114 Ky. 746.

*Minnesota.* — *McBride v. St. Paul City R. Co.*, 72 Minn. 291; *Olson v. Chicago, etc., R. Co.*, (Minn. 1905) 102 N. W. Rep. 449.

*Missouri.* — *Hickey v. Welch*, 91 Mo. App. 4; *Batten v. St. Louis Transit Co.*, 102 Mo. App. 285; *Wilbur v. Southwest Missouri Electric R. Co.*, 110 Mo. App. 689; *Reynolds v. St. Louis Transit Co.*, 189 Mo. 408.

*Nebraska.* — *Chicago, etc., R. Co. v. McDowell*, 66 Neb. 170.

*New York.* — *Noonan v. Obermeyer, etc., Brewing Co.*, 50 N. Y. App. Div. 377; *Jena v. Third Ave. R. Co.*, 50 N. Y. App. Div. 424; *Streng v. Frank Ibert Brewing Co.*, 50 N. Y. App. Div. 542; *Scott v. Yonkers R. Co.*, 51 N. Y. App. Div. 626; *Hoyt v. Metropolitan St. R. Co.*, 73 N. Y. App. Div. 249, *affirmed* 175 N. Y. 502; *Brown v. Manhattan R. Co.*, 82 N. Y. App. Div. 222.

*Ohio.* — *Pennsylvania R. Co. v. Files*, 65 Ohio St. 403.

*Rhode Island.* — *MacGregor v. Rhode Island Co.*, (R. I. 1905) 60 Atl. Rep. 761.

*Texas.* — *Missouri, etc., R. Co. v. Flood*, (Tex. Civ. App. 1902) 70 S. W. Rep. 331; *Lentz v. Dallas*, 96 Tex. 258; *International, etc., R. Co. v. Clark*, 96 Tex. 349.

*Washington.* — See also *Kirkham v. Wheeler-Osgood Co.*, (Wash. 1905) 81 Pac. Rep. 869.

*Wisconsin.* — *Yerkes v. Northern Pac. R. Co.*, 112 Wis. 184, 88 Am. St. Rep. 961; *Kenyon v. Mondovi*, 98 Wis. 50; *Hallum v. Omro*, 122 Wis. 337.

**3. Evidence of Domestic Relations of Plaintiff.** — *Baltimore, etc., R. Co. v. Camp*, (C. C. A.) 81 Fed. Rep. 807; *Metropolitan St. R. Co. v.*



**644. On the Contrary.** — See note 1.

*bb.* PROBABLE DURATION OF LIFE. — See notes 2, 3.

**645. cc.** EVIDENCE OF MORAL CHARACTER. — See notes 2, 3.

Kennedy, (C. C. A.) 82 Fed. Rep. 158; Louisville, etc., R. Co. v. Collinsworth, (Fla. 1903) 33 So. Rep. 513; Quincy Horse R., etc., Co. v. Omer, 101 Ill. App. 155; Union Pac. R. Co. v. Hammerlund, (Kan. 1905) 79 Pac. Rep. 152; Louisville, etc., R. Co. v. Eakin, 103 Ky. 465; Lipp v. Otis, 161 N. Y. 559; Gulf, etc., R. Co. v. Hamilton, 17 Tex. Civ. App. 76; Missouri, etc., R. Co. v. Hannig, 91 Tex. 347; Ft. Worth Iron Works v. Stokes, 33 Tex. Civ. App. 218; Crouse v. Chicago, etc., R. Co., 102 Wis. 196; Sesler v. Rolfe Coal, etc., Co., 51 W. Va. 318. See also Illinois Steel Co. v. Ostrowski, 194 Ill. 376.

**643. 4.** St. Louis, etc., R. Co. v. Adams, (Ark. 1905) 86 S. W. Rep. 287; Atchison, etc., R. Co. v. Ringle, (Kan. 1905) 80 Pac. Rep. 43.

**644. 1.** Youngblood v. South Carolina, etc., R. Co., 60 S. Car. 9, 85 Am. St. Rep. 824.

**2. Probable Duration of Life.** — Denver v. Sherret, (C. C. A.) 88 Fed. Rep. 226; St. Louis, etc., R. Co. v. Waren, 65 Ark. 619; Louisville, etc., R. Co. v. Gordan, (Ky. 1903) 72 S. W. Rep. 311; Tenney v. Rapid City, 17 S. Dak. 283; Missouri, etc., R. Co. v. St. Clair, 21 Tex. Civ. App. 345; International, etc., R. Co. v. Elkins, (Tex. Civ. App. 1899) 54 S. W. Rep. 931; Northern Texas Constr. Co. v. Crawford, (Tex. Civ. App. 1905) 87 S. W. Rep. 223

**Whether Permanent Injury Must Result in Entire Disability.** — In Gulf, etc., R. Co. v. Cooper, 33 Tex. Civ. App. 319, the court said: "The point is made under the eighth assignment that as the injury to plaintiff, though permanent, did not result in entire disability, it was error to allow proof of his life expectancy by the introduction of mortality tables. We are aware that the point has been sustained by our Supreme Court and other Courts of Civil Appeals in this state. Texas Mexican R. Co. v. Douglass, 69 Tex. 699; Honey Grove v. Lamaster, (Tex. Civ. App. 1899) 50 S. W. Rep. 1053; St. Louis, etc., R. Co. v. Nelson, 20 Tex. Civ. App. 536. But in Galveston, etc., R. Co. v. Cooper, 2 Tex. Civ. App. 42, this court, after a review of the authorities, announced a different rule, and the Supreme Court refused a writ of error in the case. We believe the weight of reason is with the rule as then announced, and we are of opinion the refusal of writ of error should be treated as an approval of the doctrine by our courts of last resort." See also San Antonio, etc., R. Co. v. Moore, 31 Tex. Civ. App. 371.

**Probable Duration at the Time of Trial** and not at the time of the injury is the basis on which damages are assessed. Howell v. Lansing City Electric R. Co., (Mich. 1904) 99 N. W. Rep. 406.

**Elements to Be Considered.** — The physical condition of the injured person at the time next preceding the injury, his general health, his avocation in life with respect to danger, his habits, and probably other facts, enter into the question of the probable duration of life. Trott v. Chicago, etc., R. Co., 115 Iowa 80.

**That the Plaintiff Came of a Long-lived Family**

may be shown for the purpose of ascertaining his expectancy of life. Missouri, etc., R. Co. v. Rose, 19 Tex. Civ. App. 470.

**3. Mortality Tables** — *United States.* — Chicago House Wrecking Co. v. Birney, (C. C. A.) 117 Fed. Rep. 54.

*Georgia.* — Central of Georgia R. Co. v. Mosely, 112 Ga. 914; Collins Park, etc., R. Co. v. Ware, 112 Ga. 663; Savannah, etc., R. Co. v. Austin, 104 Ga. 614.

*Indiana.* — Indianapolis v. Marold, 25 Ind. App. 428.

*Iowa.* — Keyes v. Cedar Falls, 107 Iowa 509; Trott v. Chicago, etc., R. Co., 115 Iowa 80.

*Michigan.* — Mott v. Detroit, etc., R. Co., 120 Mich. 127; Leach v. Detroit Electric R. Co., 125 Mich. 373; Foster v. Bellaire, 127 Mich. 13; Wilkins v. Flint, 128 Mich. 262; Haines v. Lake Shore, etc., R. Co., 129 Mich. 475; Lauer v. Palms, 129 Mich. 671; Beattie v. Detroit, (Mich. 1904) 100 N. W. Rep. 574.

*Missouri.* — Wright v. Kansas City, 187 Mo. 678.

*Pennsylvania.* — Kerrigan v. Pennsylvania R. Co., 194 Pa. St. 98; McKenna v. Citizens' Natural Gas Co., 198 Pa. St. 31; Seifred v. Pennsylvania R. Co., 206 Pa. St. 399.

*Rhode Island.* — MacGregor v. Rhode Island Co., (R. I. 1905) 60 Atl. Rep. 761.

*South Carolina.* — Hyland v. Southern Bell Telephone, etc., Co., 70 S. Car. 315.

*Texas.* — Gulf, etc., R. Co. v. Mangham, 95 Tex. 413; Missouri, etc., R. Co. v. Scarborough, 29 Tex. Civ. App. 194; Gulf, etc., R. Co. v. Mangham, 29 Tex. Civ. App. 486; Galveston, etc., R. Co. v. Hubbard, (Tex. Civ. App. 1902) 70 S. W. Rep. 112; Pecos, etc., R. Co. v. Williams, 34 Tex. Civ. App. 100; Consumers' Cotton Oil Co. v. Jonte, (Tex. Civ. App. 1904) 80 S. W. Rep. 847; Texas, etc., R. Co. v. Kelly, 34 Tex. Civ. App. 21; Southern Kansas R. Co. v. Sage, (Tex. Civ. App. 1904) 80 S. W. Rep. 1038; Cameron Mill, etc., Co. v. Anderson, (Tex. 1904) 81 S. W. Rep. 282.

**In the Case of a Minor** his expectancy of life should be based on his actual age, and not on the age of majority. Swift v. Holoubek, 55 Neb. 228.

**Annuity Table Admissible.** — Rooney v. New York, etc., R. Co., 173 Mass. 222; Crouse v. Chicago, etc., R. Co., 102 Wis. 196. But see Kerrigan v. Pennsylvania R. Co., 194 Pa. St. 98.

**Not Admissible Until there Is Evidence of Value of Plaintiff's Devices or Capacity to Earn Money.** — On the trial of an action for personal injuries alleged to be permanent, mortality tables are not proper evidence, and instructions as to their use are inappropriate, unless there be some evidence as to the value of the plaintiff's services or capacity to earn money. Atlanta, etc., R. Co. v. Gardner, 122 Ga. 82.

**645. 2.** Metropolitan St. R. Co. v. Kennedy, (C. C. A.) 82 Fed. Rep. 158.

**3.** St. Louis, etc., R. Co. v. Smith, 34 Tex. Civ. App. 612; Wright v. Kansas City, 187 Mo. 678.

**645.** (d) Physician's Fees, Medical Attendance, and Nursing — *aa.* IN GENERAL. — See note 4.

**645. 4. Recovery for Physician's Fees, Etc. — United States.** — Western Union Tel. Co. *v.* Morris, (C. C. A.) 83 Fed. Rep. 992; Southern Pac. R. Co. *v.* Hall, (C. C. A.) 100 Fed. Rep. 766; Northern Commercial Co. *v.* Nestor, (C. C. A.) 138 Fed. Rep. 383.

*Alabama.* — Montgomery St. R. Co. *v.* Mason, 133 Ala. 508.

*California.* — Storrs *v.* Los Angeles Traction Co., 134 Cal. 91.

*Delaware.* — Knopf *v.* Philadelphia, etc., R. Co., 2 Penn. (Del.) 392; Wilman *v.* People's R. Co., 4 Penn. (Del.) 260.

*District of Columbia.* — Washington, etc., R. Co. *v.* Patterson, 9 App. Cas. (D. C.) 423.

*Georgia.* — Western Union Tel. Co. *v.* Griffith, 111 Ga. 551.

*Illinois.* — Underwood *v.* Vail, 69 Ill. App. 679; Cleveland, etc., R. Co. *v.* Reese, 93 Ill. App. 657; Kellyville Coal Co. *v.* Yehuka, 94 Ill. App. 74; Salem *v.* Webster, 95 Ill. App. 120, affirmed 192 Ill. 369; North Chicago St. R. Co. *v.* Zeiger, 182 Ill. 9, 74 Am. St. Rep. 157.

*Indiana.* — Illinois Cent. R. Co. *v.* Cheek, 152 Ind. 663; Carthage Turnpike Co. *v.* Overman, 19 Ind. App. 309; Eureka Block Coal Co. *v.* Wells, (Ind. App. 1901) 61 N. E. Rep. 236; Lake Shore, etc., R. Co. *v.* Teeters, (Ind. App. 1905) 74 N. E. Rep. 1014.

*Iowa.* — Halley *v.* Tichenor, 120 Iowa 164; Ankrum *v.* Marshalltown, 105 Iowa 493; Wissler *v.* Atlantic, 123 Iowa 11.

*Kentucky.* — Lloyd *v.* Knadler, (Ky. 1900) 58 S. W. Rep. 803; Macon *v.* Paducah St. R. Co., 110 Ky. 680; Illinois Cent. R. Co. *v.* Hanberry, (Ky. 1902) 66 S. W. Rep. 417; Monticello, etc., Turnpike Road Co. *v.* Jones, (Ky. 1902) 69 S. W. Rep. 1073; Reliance Textile, etc., Works *v.* Mitchell, (Ky. 1903) 71 S. W. Rep. 425; Louisville, etc., R. Co. *v.* Mason, (Ky. 1903) 72 S. W. Rep. 27; Louisville, etc., R. Co. *v.* Hall, 115 Ky. 567; West Kentucky Telephone Co. *v.* Pharis, (Ky. 1904) 78 S. W. Rep. 917; Covington *v.* Miles, (Ky. 1904) 82 S. W. Rep. 281; Newport, etc., Turnpike Co. *v.* Pirmann, (Ky. 1904) 82 S. W. Rep. 976; South Covington, etc., R. Co. *v.* Smith, (Ky. 1905) 86 S. W. Rep. 970.

*Michigan.* — Williams *v.* West Bay City, 119 Mich. 395; Styles *v.* Decatur, 131 Mich. 443.

*Minnesota.* — Thompson *v.* Chicago, etc., R. Co., 71 Minn. 89; Watson *v.* Rinderknecht, 82 Minn. 235.

*Missouri.* — Cooney *v.* Southern Electric R. Co., 80 Mo. App. 226; Covell *v.* Wabash R. Co., 82 Mo. App. 180; Eberly *v.* Chicago, etc., R. Co., 96 Mo. App. 361; Moore *v.* Southwest Missouri Electric R. Co., 100 Mo. App. 665; Chitty *v.* St. Louis, etc., R. Co., 148 Mo. 64; McLain *v.* St. Louis, etc., R. Co., 100 Mo. App. 374; Robinson *v.* St. Louis, etc., R. Co., 103 Mo. App. 110; Baxter *v.* St. Louis Transit Co., 103 Mo. App. 597; Ashby *v.* Elsberry, etc., Gravel Road Co., 111 Mo. App. 79; Stanley *v.* Chicago, etc., R. Co., 112 Mo. App. 601; Stolze *v.* St. Louis Transit Co., 188 Mo. 581.

*New Jersey.* — Burr *v.* Pennsylvania R. Co.,

64 N. J. L. 30; Forhman *v.* Consolidated Traction Co., (N. J. 1900) 46 Atl. Rep. 783.

*New York.* — Clarke *v.* Westcott, 2 N. Y. App. Div. 503, affirmed 158 N. Y. 736; Saperstone *v.* Rochester R. Co., 25 N. Y. App. Div. 285; Noonan *v.* Obermeyer, etc., Brewing Co., 50 N. Y. App. Div. 377; Kraemer *v.* Metropolitan St. R. Co., 51 N. Y. App. Div. 475; Downer *v.* Metropolitan St. R. Co., 54 N. Y. App. Div. 315; Mowbray *v.* Brooklyn Heights R. Co., 59 N. Y. App. Div. 239; Gerken *v.* Plimpton, 62 N. Y. App. Div. 35; Nash *v.* Yonkers R. Co., 63 N. Y. App. Div. 315; Sesselmann *v.* Metropolitan St. R. Co., 76 N. Y. App. Div. 336; Leavy *v.* Manhattan Delivery Co., (Supm. Ct. App. T.) 87 N. Y. Supp. 499; Gignoux *v.* Baird, (Supm. Ct. App. T.) 29 Misc. (N. Y.) 740; Brachfeld *v.* Third Ave. R. Co., (Supm. Ct. App. T.) 30 Misc. (N. Y.) 425; Aiello *v.* Aaron, (Supm. Ct. Tr. T.) 33 Misc. (N. Y.) 580.

*North Carolina.* — Clark *v.* Durham Traction Co., 138 N. Car. 77.

*Ohio.* — Alston *v.* C., etc., R. Co., 1 Ohio Cir. Dec. 353; Toledo Electric St. R. Co. *v.* Westenhuber, 12 Ohio Cir. Dec. 22.

*Oregon.* — Turney *v.* Southern Pac. R. Co., 44 Oregon 280; Busch *v.* Robinson, (Oregon 1905) 81 Pac. Rep. 237.

*Pennsylvania.* — Smedley *v.* Hestonville, etc., Pass. R. Co., 184 Pa. St. 620; Schenkel *v.* Pittsburg, etc., Traction Co., 194 Pa. St. 182.

*Rhode Island.* — Stone *v.* Pendleton, 21 R. I. 332.

*South Carolina.* — Brasington *v.* South Bound R. Co., 62 S. Car. 325, 89 Am. St. Rep. 905; Bussey *v.* Charleston, etc., R. Co., 62 S. Car. 438.

*Tennessee.* — Chattanooga Rapid Transit Co. *v.* Walton, 105 Tenn. 415.

*Texas.* — Texas, etc., R. Co. *v.* Syfan, (Tex. Civ. App. 1897) 43 S. W. Rep. 551; Houston, etc., R. Co. *v.* Rowell, (Tex. Civ. App. 1898) 45 S. W. Rep. 763; St. Louis Southwestern R. Co. *v.* Freedman, 18 Tex. Civ. App. 553; Houston, etc., R. Co. *v.* Stuart, (Tex. Civ. App. 1898) 48 S. W. Rep. 799; Dallas *v.* Jones, 93 Tex. 38, (Tex. Civ. App. 1898) 54 S. W. Rep. 606; Galveston, etc., R. Co. *v.* Eckles, 25 Tex. Civ. App. 179; Galveston, etc., R. Co. *v.* Newport, 26 Tex. Civ. App. 583; Cameron Mill, etc., Co. *v.* Anderson, 34 Tex. Civ. App. 229; St. Louis Southwestern R. Co. *v.* Highnote, (Tex. Civ. App. 1904) 84 S. W. Rep. 365; Red River, etc., R. Co. *v.* Reynolds, (Tex. Civ. App. 1905) 85 S. W. Rep. 1169; Texas Cent. R. Co. *v.* Powell, (Tex. Civ. App. 1905) 86 S. W. Rep. 21.

*Utah.* — Mickelson *v.* New East Tintic R. Co., 23 Utah 42.

*Washington.* — Uren *v.* Golden Tunnel Min. Co., 24 Wash. 261; Selby *v.* Vancouver Water Works Co., 32 Wash. 522; Morrison *v.* Northern Pac. R. Co., 34 Wash. 70; Stowe *v.* La Conner Trading, etc., Co., (Wash. 1905) 80 Pac. Rep. 856; Shaw *v.* Seattle, (Wash. 1905) 81 Pac. Rep. 1057. See also Hart *v.* Cascade Timber Co., (Wash. 1905) 81 Pac. Rep. 738.

*Wisconsin.* — Heer *v.* Warren-Scharf Asphalt Paving Co., 118 Wis. 57.

**646.** See note 1.

Reasonableness of Such Expenditures. — See notes 4, 5, 6, 7.

**646. 1.** *Bube v. Birmingham R., etc., Co.*, 140 Ala. 276; *Denver Consol. Tramway Co. v. Riley*, 14 Colo. App. 132; *Morgan v. Dallas County*, 103 Iowa 57; *Cullar v. Missouri, etc., R. Co.*, 84 Mo. App. 347; *Caswell v. North Jersey St. R. Co.*, 69 N. J. L. 226; *Walker v. Philadelphia*, 195 Pa. St. 168, 78 Am. St. Rep. 801; *Dallas v. Moore*, (Tex. Civ. App. 1903) 74 S. W. Rep. 95; *San Antonio Traction Co. v. Menk*, (Tex. Civ. App. 1905) 88 S. W. Rep. 290.

**A Parent's Services as Nurse** are an element of damage in an action brought by him. *Houston, etc., R. Co. v. Reasonover*, (Tex. Civ. App. 1904) 81 S. W. Rep. 329.

But loss to a parent's business due to the fact that he gave up his time to the taking care of his child cannot be considered as an element of damage. *Ceigler v. Hopper-Morgan Co.*, 90 N. Y. App. Div. 379.

**A Wife** may probably recover for medical services rendered to her injured child for which she is liable. *Heater v. Delaware, etc., R. Co.*, 90 N. Y. App. Div. 495.

**The Measure of Damages Where a Daughter Has Given up Her Work** to nurse her mother is not the amount of money which she would have earned in her regular employment. *Dormer v. Alcatraz Paving Co.*, 16 Pa. Super. Ct. 407.

**4. Expenditures Must Be Reasonable** — *Alabama*. — *Alabama G. S. R. Co. v. Siniard*, 123 Ala. 557.

*Illinois*. — *Ava v. Grenawalt*, 73 Ill. App. 633; *Chicago City R. Co. v. Menely*, 79 Ill. App. 679; *Chicago City R. Co. v. Wall*, 93 Ill. App. 411.

*Iowa*. — *Sachra v. Manilla*, 120 Iowa 562.

*Kansas*. — *Hutchinson v. Van Cleve*, 7 Kan. App. 676.

*Kentucky*. — *Louisville, etc., R. Co. v. Logsdon*, 114 Ky. 746.

*Missouri*. — *Posch v. Southern Electric R. Co.*, 76 Mo. App. 601; *Powers v. St. Joseph*, 91 Mo. App. 55.

*New York*. — *Williams v. Brooklyn*, 33 N. Y. App. Div. 539; *Katz v. Brooklyn Heights R. Co.*, (Supm. Ct. App. T.) 35 Misc. (N. Y.) 302.

*Rhode Island*. — *Hill v. Union R. Co.*, 25 R. I. 565.

*Texas*. — *Missouri, etc., R. Co. v. Dickey*, (Tex. Civ. App. 1898) 48 S. W. Rep. 626; *Texas, etc., R. Co. v. Lee*, 21 Tex. Civ. App. 174; *Red River, etc., R. Co. v. Reynolds*, (Tex. Civ. App. 1905) 85 S. W. Rep. 1169; *Texas, etc., R. Co. v. McDowell*, (Tex. Civ. App. 1905) 88 S. W. Rep. 415; *Missouri, etc., R. Co. v. Nail*, 24 Tex. Civ. App. 114.

**5.** *Bowsher v. Chicago, etc., R. Co.*, 113 Iowa 16; *Fleming v. St. Louis, etc., R. Co.*, 89 Mo. App. 129; *Grady v. St. Louis Transit Co.*, 102 Mo. App. 212; *Ball v. Gussenhoven*, 29 Mont. 321; *Tooker v. Brooklyn Heights R. Co.*, 80 N. Y. App. Div. 371; *Missouri, etc., R. Co. v. Cox*, (Tex. Civ. App. 1900) 55 S. W. Rep. 354; *International, etc., R. Co. v. Clark*, 96 Tex. 349; *Galveston, etc., R. Co. v. Perry*, (Tex. Civ. App. 1904) 82 S. W. Rep. 343; *Clukev v. Seattle Electric Co.*, 27 Wash. 70. See also *Klinga-*

*man v. Fish, etc., Co.*, (S. Dak. 1905) 102 N. W. Rep. 601.

**6.** *Chicago City R. Co. v. Miller*, 111 Ill. App. 446; *Goodson v. New York City R. Co.*, (Supm. Ct. App. T.) 94 N. Y. Supp. 10; *Missouri, etc., R. Co. v. Belew*, 22 Tex. Civ. App. 264; *Wheeler v. Tyler Southeastern R. Co.*, 91 Tex. 356; *Houston, etc., R. Co. v. Rowell*, 92 Tex. 147; *Texas, etc., R. Co. v. Taylor*, (Tex. Civ. App. 1900) 58 S. W. Rep. 844; *Gulf, etc., R. Co. v. Bell*, 24 Tex. Civ. App. 579; *International, etc., R. Co. v. Sampson*, (Tex. Civ. App. 1901) 64 S. W. Rep. 692; *Missouri, etc., R. Co. v. Reasor*, 28 Tex. Civ. App. 302; *Houston, etc., R. Co. v. Charwaive*, 30 Tex. Civ. App. 633; *Gulf, etc., R. Co. v. Robinson*, (Tex. Civ. App. 1903) 72 S. W. Rep. 70; *Dallas v. Moore*, (Tex. Civ. App. 1903) 74 S. W. Rep. 95; *St. Louis Southwestern R. Co. v. Highnote*, (Tex. Civ. App. 1903) 74 S. W. Rep. 920; *Missouri, etc., R. Co. v. Harrison*, (Tex. Civ. App. 1903) 77 S. W. Rep. 1036; *Missouri, etc., R. Co. v. Smith*, (Tex. Civ. App. 1904) 82 S. W. Rep. 787.

**Contra**. — *In Western Gas Constr. Co. v. Danner*, (C. C. A.) 97 Fed. Rep. 882, where there was evidence of the amount of the bill for medical attendance, but no direct evidence as to whether the bill was reasonable, it was held that the jury was at liberty to allow to the plaintiff what it considered a reasonable charge for medical attendance. See also *Abbitt v. St. Louis Transit Co.*, 104 Mo. App. 534.

**Evidence Warranting Submission of Amount to Jury**. — Evidence that the plaintiff was attended by physicians, one whom testified that he gave him some liniments and sedatives, and that he thought that twenty-five dollars would be a reasonable amount to cover expenses for medical attention and medicines during his attendance on the plaintiff, is sufficient to warrant the trial court in submitting to the jury the issue as the value of the medicine furnished. *Missouri, etc., R. Co. v. Dickey*, (Tex. Civ. App. 1898) 48 S. W. Rep. 626.

**7. Georgia**. — *Telfair County v. Webb*, 119 Ga. 916.

*Illinois*. — *North Chicago St. R. Co. v. Fitzgibbons*, 180 Ill. 466; *Chicago City R. Co. v. Leach*, 80 Ill. App. 354, affirmed 182 Ill. 359.

*Indiana*. — *American Car, etc., Co. v. Clark*, 32 Ind. App. 644.

*Iowa*. — *Lamb v. Cedar Rapids*, 108 Iowa 629; *Hobbs v. Marion*, 123 Iowa 726; *Morgan v. Dallas County*, 103 Iowa 57.

*Kansas*. — *Cudahy Packing Co. v. Broadbent*, (Kan. 1905) 79 Pac. Rep. 126.

*Kentucky*. — *Louisville, etc., R. Co. v. McCune*, (Ky. 1903) 72 S. W. Rep. 756.

*Massachusetts*. — See *Scullane v. Kellogg*, 169 Mass. 544.

*Missouri*. — *Robertson v. Wabash R. Co.*, 152 Mo. 382; *Waldopfel v. St. Louis Transit Co.*, 102 Mo. App. 524; *Campbell v. Stanberry*, 105 Mo. App. 56; *Howard v. Terminal R. Assoc.*, 110 Mo. App. 574; *Knight v. Kansas City*, (Mo. App. 1905) 87 S. W. Rep. 1192; *Nelson v. Metropolitan, etc., St. R. Co.*, (Mo. App. 1905) 88 S. W. Rep. 781.



**647. Future Expenditures.** — See notes 1, 2.

*bb.* NOT NECESSARY THAT AMOUNTS SHOULD HAVE BEEN ACTUALLY PAID. — See note 3.

**648. Where the Plaintiff Is a Minor.** — See notes 1, 3.

**Married Women.** — See notes 4, 5.

*cc.* WHERE SERVICES GRATUITOUSLY RENDERED. — See note 6.

**Expenses Defrayed by Third Person.** — See note 8.

**Contrary Rule.** — See note 9.

**(e) Loss of Time.** — See note 10.

*New York.* — *Scott v. Banks*, 44 N. Y. App. Div. 28; *Hurley v. Metropolitan St. R. Co.*, 87 N. Y. App. Div. 66; *Dundon v. Interurban St. R. Co.*, (Supm. Ct. App. T.) 87 N. Y. Supp. 460.

*Ohio.* — *Andrews v. Toledo, etc.*, R. Co., 8 Ohio Cir. Dec. 584.

*Pennsylvania.* — *Brown v. White*, 202 Pa. St. 297; *Smith v. Jackson Tp.*, 26 Pa. Super. Ct. 234.

*South Carolina.* — *Farley v. Charleston Basket, etc.*, Co., 51 S. Car. 222.

*Texas.* — *Houston, etc.*, R. Co. *v.* *Kimbell*, (Tex. Civ. App. 1898) 43 S. W. Rep. 1049; *Houston, etc.*, R. Co. *v.* *Pereira*, (Tex. Civ. App. 1898) 45 S. W. Rep. 767; *Houston, etc.*, R. Co. *v.* *Richards*, 20 Tex. Civ. App. 203; *San Antonio, etc.*, R. Co. *v.* *Moore*, 31 Tex. Civ. App. 371; *Central Texas, etc.*, R. Co. *v.* *Smith*, (Tex. Civ. App. 1903) 73 S. W. Rep. 537; *Northern Texas Traction Co. v. Jamison*, (Tex. Civ. App. 1905) 85 S. W. Rep. 305; *St. Louis Southwestern R. Co. v. Haynes*, (Tex. Civ. App. 1905) 86 S. W. Rep. 934.

**647. 1. Future Expenditures.** — *Denver Consol. Traction Co. v. Riley*, 14 Colo. App. 132; *Louisville, etc.*, R. Co. *v.* *Logsdon*, 114 Ky. 746; *Chicago, etc.*, R. Co. *v.* *Krempel*, 103 Ill. App. 1; *Heyde v. St. Louis Transit Co.*, 102 Mo. App. 537; *Hickey v. Welch*, 91 Mo. App. 4; *McKenna v. Brooklyn Heights R. Co.*, 41 N. Y. App. Div. 255; *Crouse v. Chicago, etc.*, R. Co., 104 Wis. 473.

**2.** *Page v. Delaware, etc.*, Canal Co., 34 N. Y. App. Div. 618. See *Klingaman v. Fish, etc.*, Co., (S. Dak. 1905) 102 N. W. Rep. 601.

**3. Payment Need Not Have Been Made.** — *Western Gas Constr. Co. v. Danner*, (C. C. A.) 97 Fed. Rep. 882; *Chicago, etc.*, R. Co. *v.* *Cleminger*, 178 Ill. 536; *Chicago, etc.*, R. Co. *v.* *Harrington*, 77 Ill. App. 499; *Bedford v. Woody*, 23 Ind. App. 401; *Indianapolis St. R. Co. v. Haverstick*, (Ind. App. 1905) 74 N. E. Rep. 34; *Hutchinson v. Van Cleve*, 7 Kan. App. 676; *Hart v. New Haven*, 130 Mich. 181; *Wilbur v. Southwest Missouri Electric R. Co.*, 110 Mo. App. 689; *Omaha St. R. Co. v. Emminger*, 57 Neb. 240; *Wheeler v. Tyler South-eastern R. Co.*, 91 Tex. 356; *San Antonio, etc.*, R. Co. *v.* *Moore*, 31 Tex. Civ. App. 371 *Willis v. Second Ave. Traction Co.*, 189 Pa. St. 430.

**648. 1. Where Plaintiff a Minor.** — *Porter v. Delaware, etc.*, R. Co., 134 Fed. Rep. 155; *Bering Mfg. Co. v. Peterson*, 28 Tex. Civ. App. 194, holding that the burden is upon the minor to show that the medical expenses incurred amount to legal liabilities, chargeable against his estate.

But where the minor never resided with his parents, and nothing was known of their where-

abouts or responsibility, and neither the grandfather nor grandmother, with whom he lived, paid or promised to pay any part of the medical bills, it was held that such expenses were necessities for which the minor's estate was liable and that he could recover therefor. *Illinois Cent. R. Co. v. Jernigan*, 101 Ill. App. 1, affirmed 198 Ill. 297.

**Indebtedness One for "Necessaries."** — An indebtedness for physician's services and nursing is an indebtedness for "necessaries" for which a minor is liable, and he may recover the amount as damages in an action for personal injuries. *Berg v. U. S. Leather Co.*, (Wis. 1905) 104 N. W. Rep. 60.

**3.** See *Koehler v. Interurban St. R. Co.*, (Supm. Ct. App. T.) 88 N. Y. Supp. 1056.

**4. Married Women.** — *Efroymsen v. Smith*, 29 Ind. App. 451; *Elenz v. Conrad*, 115 Iowa 183; *Austin v. Bartlett*, 67 N. Y. App. Div. 312, reversed 178 N. Y. 310; *McNaughton v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 22 Misc. (N. Y.) 700; *Sweeny v. Union R. Co.*, (Supm. Ct. App. T.) 31 Misc. (N. Y.) 472. See also *Becker v. Albany R. Co.*, 35 N. Y. App. Div. 46.

But in *Missouri*, by reason of the statute making a married woman *sui juris*, she may recover for medical expenses incurred. *Hickey v. Welch*, 91 Mo. App. 4.

**A Widow May Recover for the Value of Services Lost** by reason of her injury. *Bradley v. Spickardsville*, 90 Mo. App. 416.

**5.** *West Chicago St. R. Co. v. Carr*, 170 Ill. 478; *Boyle v. Saginaw*, 124 Mich. 348; *Gilson v. Cadillac*, 134 Mich. 189. See also *Vergin v. Saginaw*, 125 Mich. 499; *Willet v. Johnson*, 13 Okla. 563.

**6. Gratuitous Services.** — *Beringer v. Dubuque St. R. Co.*, 118 Iowa 135; *Ohliger v. City of Toledo*, 10 Ohio Cir. Dec. 762, 20 Ohio Cir. Ct. 142.

**8. Expenses Paid by Third Person Recoverable.** — *Chicago, etc.*, R. Co. *v.* *Harrington*, 192 Ill. 9. **9.** *Malott v. Woods*, 109 Ill. App. 512; *Rogers v. Orion*, 116 Mich. 324; *Morris v. Grand Ave. R. Co.*, 144 Mo. 500; *San Antonio v. Porter*, 24 Tex. Civ. App. 444. See also *McGarrahan v. New York, etc.*, R. Co., 171 Mass. 211.

**Nursing and Attendance by Members of the Household** cannot be made an element of recovery in *Pennsylvania* unless such members are hired servants. *Todd v. Second Ave. Traction Co.*, 192 Pa. St. 587.

**10. Recovery for Loss of Time** — *United States*. — *Western Union Tel. Co. v. Morris*, (C. C. A.) 83 Fed. Rep. 992; *Southern Pac. R. Co. v. Hall*, (C. C. A.) 100 Fed. Rep. 760; *Swensen v. Bender*, (C. C. A.) 114 Fed. Rep. 1; *North-*

ern Commercial Co. v. Nestor, (C. C. A.) 138 Fed. Rep. 383.

*Alabama.*—Birmingham R., etc., Co. v. Ward, 124 Ala. 409.

*California.*—Storrs v. Los Angeles Traction Co., 134 Cal. 91.

*Colorado.*—Denver v. Hyatt, 28 Colo. 129.

*Connecticut.*—Maisenbacker v. Society Concordia, 71 Conn. 369, 71 Am. St. Rep. 213.

*Delaware.*—Murphy v. Hughes, 1 Penn. (Del.) 250; Chielinsky v. Hoopes, etc., Co., 1 Marv. (Del.) 273; Knopf v. Philadelphia, etc., R. Co., 2 Penn. (Del.) 392; Adams v. Wilmington, etc., Electric R. Co., 3 Penn. (Del.) 512; Boyd v. Blumenthal, 3 Penn. (Del.) 564; Winkler v. Philadelphia, etc., R. Co., 4 Penn. (Del.) 80; Wilman v. People's R. Co., 4 Penn. (Del.) 260; McAllister v. People's R. Co., 4 Penn. (Del.) 272.

*District of Columbia.*—Washington, etc., R. Co. v. Patterson, 9 App. Cas. (D. C.) 423.

*Georgia.*—Bibb County v. Ham, 110 Ga. 340; Florida Cent., etc., R. Co. v. Pitts, 112 Ga. 846; Macon R., etc., Co. v. Vining, 120 Ga. 511.

*Idaho.*—Giffen v. Lewiston, 6 Idaho 231.

*Illinois.*—West Chicago St. R. Co. v. Foster, 175 Ill. 396; North Chicago St. R. Co. v. Brown, 178 Ill. 187, affirming 76 Ill. App. 654; Chicago City R. Co. v. Anderson, 182 Ill. 298, affirming 80 Ill. App. 71; Wabash R. Co. v. Smillie, 97 Ill. App. 7.

*Indiana.*—Pittsburgh, etc., R. Co. v. Montgomery, 152 Ind. 1, 71 Am. St. Rep. 301; Pittsburgh, etc., R. Co. v. Carlson, 24 Ind. App. 559; Brudi v. Luhrman, 26 Ind. App. 221; Eureka Block Coal Co. v. Wells, (Ind. App. 1901) 61 N. E. Rep. 236; Cincinnati, etc., Electric St. R. Co. v. Leonard, (Ind. App. 1905) 73 N. E. Rep. 932; Lake Shore, etc., R. Co. v. Teeters, (Ind. App. 1905) 74 N. E. Rep. 1014.

*Iowa.*—Ankrum v. Marshalltown, 105 Iowa 493; Stanley v. Cedar Rapids, etc., R. Co., 119 Iowa 526; Halley v. Tichenor, 120 Iowa 164; Sachra v. Manilla, 120 Iowa 562.

*Kansas.*—Chicago, etc., R. Co. v. Sheldon, 6 Kan. App. 347; Missouri Pac. R. Co. v. Johnson, 59 Kan. 776, 53 Pac. Rep. 129; Hiawatha v. Warren, 8 Kan. App. 209; Atchison, etc., R. Co. v. Chance, 57 Kan. 40; James v. Hayes, 63 Kan. 133; Cudahy Packing Co. v. Broadbent, (Kan. 1905) 79 Pac. Rep. 126.

*Kentucky.*—Floyd v. Henderson, etc., Gravel-Road Co., (Ky. 1900) 56 S. W. Rep. 6; Frazier v. Malcoln, (Ky. 1901) 62 S. W. Rep. 13; Bowling Green Stone Co. v. Capshaw, (Ky. 1901) 64 S. W. Rep. 507; Reliance Textile, etc., Works v. Mitchell, (Ky. 1903) 71 S. W. Rep. 425; Louisville, etc., R. Co. v. Logsdon, 114 Ky. 746; Louisville, etc., R. Co. v. Watkins, (Ky. 1903) 71 S. W. Rep. 882; Louisville, etc., R. Co. v. Mason, (Ky. 1903) 72 S. W. Rep. 27; Louisville, etc., R. Co. v. Hall, 115 Ky. 567; Baries v. Louisville Electric Light Co., (Ky. 1904) 80 S. W. Rep. 814; Newport, etc., Turnpike Co. v. Pirmann, (Ky. 1904) 82 S. W. Rep. 976.

*Minnesota.*—Thompson v. Chicago, etc., R. Co., 71 Minn. 89.

*Missouri.*—Perrette v. Kansas City, 162 Mo. 238; Posch v. Southern Electric R. Co., 76 Mo. App. 601; Cooney v. Southern Electric R. Co., 80 Mo. App. 226; Covell v. Wabash R. Co., 82

Mo. App. 180; Lesser v. St. Louis, etc., R. Co., 85 Mo. App. 326; Eberly v. Chicago, etc., R. Co., 96 Mo. App. 361; Grady v. St. Louis Transit Co., 102 Mo. App. 212; Chitty v. St. Louis, etc., R. Co., 148 Mo. 64; Mabrey v. Cape Girardeau, etc., Gravel Road Co., 92 Mo. App. 596; Robinson v. St. Louis, etc., R. Co., 103 Mo. App. 110; Wilbur v. Southwest Missouri Electric R. Co., 110 Mo. App. 689; Reynolds v. St. Louis Transit Co., 189 Mo. 408.

*New Jersey.*—Forhman v. Consolidated Traction Co., (N. J. 1900) 46 Atl. Rep. 783; Schreck v. Jersey City, etc., St. R. Co., (N. J. 1903) 55 Atl. Rep. 650.

*New York.*—Wynne v. Atlantic Ave. R. Co., (Brooklyn City Ct. Gen. T.) 14 Misc. (N. Y.) 394, affirmed 156 N. Y. 702; Gignoux v. Baird, (Supm. Ct. App. T.) 29 Misc. (N. Y.) 740; Robinson v. Metropolitan St. R. Co., (N. Y. City Ct. Gen. T.) 31 Misc. (N. Y.) 171, affirmed (Supm. Ct. App. T.) 65 N. Y. Supp. 1144; Saperstone v. Rochester R. Co., 25 N. Y. App. Div. 285, 27 Civ. Pro. (N. Y.) 133; Morrissey v. Westchester Electric R. Co., 30 N. Y. App. Div. 424; Henn v. Long Island R. Co., 51 N. Y. App. Div. 292; Hurley v. Metropolitan St. R. Co., 87 N. Y. App. Div. 66.

*North Carolina.*—Clark v. Durham Traction Co., 138 N. Car. 77.

*Pennsylvania.*—Musick v. Latrobe, 184 Pa. St. 375; Todd v. Second Ave. Traction Co., 192 Pa. St. 587; Schemkel v. Pittsburg, etc., Traction Co., 194 Pa. St. 182.

*Rhode Island.*—Hill v. Union R. Co., 25 R. I. 565; McNeil v. Lyons, 20 R. I. 672.

*South Carolina.*—Bussey v. Charleston, etc., R. Co., 52 S. Car. 438.

*South Dakota.*—Olson v. Burlington, etc., R. Co., 12 S. Dak. 326; Strait v. Eureka, 17 S. Dak. 326.

*Texas.*—Gulf, etc., R. Co. v. Warner, 22 Tex. Civ. App. 167; Galveston, etc., R. Co. v. Lynch, 22 Tex. Civ. App. 336; Houston, etc., R. Co. v. Rowell, (Tex. Civ. App. 1898) 45 S. W. Rep. 763, 92 Tex. 147; Missouri, etc., R. Co. v. Settle, 19 Tex. Civ. App. 357; Houston, etc., R. Co. v. Hartnett, (Tex. Civ. App. 1898) 48 S. W. Rep. 773; Houston, etc., R. Co. v. Richards, 20 Tex. Civ. App. 203; Texas Brewing Co. v. Dickey, 20 Tex. Civ. App. 606; Texas, etc., R. Co. v. Goldman, (Tex. Civ. App. 1899) 51 S. W. Rep. 275; Texas, etc., R. Co. v. Scruggs, 23 Tex. Civ. App. 712; San Antonio, etc., R. Co. v. Belt, 24 Tex. Civ. App. 281; Galveston, etc., R. Co. v. Hampton, 24 Tex. Civ. App. 458; St. Louis Southwestern R. Co. v. Stonecypher, 25 Tex. Civ. App. 569; International, etc., R. Co. v. Clark, 96 Tex. 349; General Electric Co. v. Murray, 32 Tex. Civ. App. 226; Texas, etc., R. Co. v. Kelly, 34 Tex. Civ. App. 21; International, etc., R. Co. v. Shaughnessy, (Tex. Civ. App. 1904) 81 S. W. Rep. 1026; San Antonio Traction Co. v. Sanchez, (Tex. Civ. App. 1905) 84 S. W. Rep. 849; Williams v. Houston Electric Co., (Tex. Civ. App. 1905) 85 S. W. Rep. 489; Red River, etc., R. Co. v. Reynolds, (Tex. Civ. App. 1905) 85 S. W. Rep. 1169; Houston, etc., R. Co. v. Anglin, (Tex. Civ. App. 1905) 86 S. W. Rep. 785; Dallas Consol. Electric St. R. Co. v. Hardy, (Tex. Civ. App. 1905) 86 S. W. Rep. 1058; Lodwick Lumber Co. v. Taylor, (Tex.

**649.** Plaintiff Receiving Salary. — See note 1.

**650.** See note 1.

Where the Plaintiff Does Not Receive a Stated Sum. — See notes 2, 3.

**651.** Loss of Time During Minority. — See note 3.

Civ. App. 1905) 87 S. W. Rep. 358; International, etc., R. Co. v. Tisdale, (Tex. Civ. App. 1905) 87 S. W. Rep. 1063; Texas, etc., R. Co. v. McDowell, (Tex. Civ. App. 1905) 88 S. W. Rep. 415.

*Washington.* — Gallamore v. Olympia, 34 Wash. 379; Stowe v. La Conner Trading, etc., Co., (Wash. 1905) 80 Pac. Rep. 856; Shaw v. Seattle, (Wash. 1905) 81 Pac. Rep. 1057.

**Recovery by Husband for Loss of His Own Time While Attending Wife.** — Western Union Tel. Co. v. Morris, 10 Kan. App. 61, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 649 [648]; Abbott v. St. Louis Transit Co., 104 Mo. App. 534; Denison, etc., R. Co. v. Barry, (Tex. Civ. App. 1904) 80 S. W. Rep. 634.

**No Distinction Between Loss of Time and Loss of Earnings.** — Stoetzle v. Sweringen, 96 Mo. App. 592.

**Evidence of the Value of Time Lost Must Be Given** in order to warrant a submission of the question to the jury. Haworth v. Kansas City Southern R. Co., 94 Mo. App. 215; Brake v. Kansas City, 100 Mo. App. 611.

**Sick Benefits** received by the plaintiff from any source other than the defendant are not to be considered by the jury in determining the value of time lost by the plaintiff. Baltimore City Pass. R. Co. v. Baer, 90 Md. 97.

**The Fact that the Plaintiff Was Not Engaged in Any Employment** and was not earning anything at the time of the injury does not make it error for the trial judge to charge the jury that it may consider as an element of damage the reasonable value of the plaintiff's service for the time lost by him on account of the injury. Missouri, etc., R. Co. v. Flood, (Tex. Civ. App. 1904) 79 S. W. Rep. 1106.

**A Person of Unsound Mind** may recover for loss of time from labor due to an injury. Gulf, etc., R. Co. v. Holzheuser, (Tex. Civ. App. 1898) 45 S. W. Rep. 188.

**The Value of Services and Amount of Time Lost** must be shown by evidence to warrant a recovery. Gulf, etc., R. Co. v. Robinson, (Tex. Civ. App. 1903) 72 S. W. Rep. 70.

**Evidence of Earning Capacity Is Necessary** to justify submission of question to jury. Kane v. Metropolitan St. R. Co., (Supm. Ct. App. T.) 88 N. Y. Supp. 162; New York Metal Ceiling Co. v. City Homes Imp. Co., (Supm. Ct. App. T.) 88 N. Y. Supp. 233. And the fact that the plaintiff was compelled to put a man to work in his place at twenty-five dollars a week to do the work he had previously done is evidence bearing on the value of the plaintiff's earning capacity. Galveston City R. Co. v. Chapman, (Tex. Civ. App. 1904) 80 S. W. Rep. 856.

**649. 1. Plaintiff Occupying Salaried Position.** — See Southern R. Co. v. Howell, 135 Ala. 639; Karczewski v. Wilmington City R. Co., 4 Penn. (Del.) 24; Elgin v. Anderson, 89 Ill. App. 527; Williams v. Brooklyn, 33 N. Y. App. Div. 539; Russell v. Metropolitan St. R. Co., (Supm. Ct. App. T.) 35 Misc. (N. Y.)

293; Glenn v. Philadelphia, etc., Traction Co., 206 Pa. St. 135; San Antonio, etc., R. Co. v. Brooking, (Tex. Civ. App. 1899) 51 S. W. Rep. 537. See Nashville, etc., R. Co. v. Miller, 120 Ga. 453, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 649 and adopting the view that the wrongdoer cannot take advantage of the employer's act in containing, as a mere gratuity, the plaintiff's salary during the disability.

**Evidence of Earnings in an Employment Which Had Been Abandoned** several years before the injury is inadmissible. West Chicago St. R. Co. v. Maday, 188 Ill. 308.

**Where Wages Are Paid During Disability.** — It has been held that a person injured cannot recover for loss of time, where he continues to receive his wages during the period of disability. Quigley v. Pennsylvania R. Co., 210 Pa. St. 162.

**650. 1.** See Texas, etc., R. Co. v. Syfan, (Tex. Civ. App. 1897) 43 S. W. Rep. 551.

**2. Average Earnings.** — Paul v. Omaha, etc., R. Co., 82 Mo. App. 500; Sluder v. St. Louis Transit Co., 189 Mo. 107. See also Illinois Steel Co. v. Ostrowski, 194 Ill. 376; Lund v. Tyler, 115 Iowa 236, wherein evidence of the prior earnings of a fisherman was admitted.

**Prior Earnings or Profits** may be shown as a basis upon which to admeasure damages in cases of personal injury where the profits are the result of the injured person's personal service. Markowitz v. Metropolitan St. R. Co., (N. Y. City Ct. Gen. T.) 31 Misc. (N. Y.) 175.

**Evidence of Earnings at a Trade Which Had Been Abandoned** some five years before the injury is not admissible. West Chicago St. R. Co. v. Maday, 188 Ill. 308.

**Expense of Employment of Assistants.** — The expense necessarily incurred by a plaintiff in procuring competent help in his business to do the work which would have been performed by himself had he not been disabled is a proper subject for allowance of damages. North Chicago St. R. Co. v. Zeiger, 182 Ill. 9, 74 Am. St. Rep. 157; Adams v. Stadler, 78 Ill. App. 432; Brachfeld v. Third Ave. R. Co., (Supm. Ct. App. T.) 30 Misc. (N. Y.) 425; Haszlacher v. Third Ave. R. Co., (N. Y. City Ct. Gen. T.) 26 Misc. (N. Y.) 865; Willis v. Second Ave. Traction Co., 189 Pa. St. 430.

**3.** Southern Pac. R. Co. v. Hall, (C. C. A.) 100 Fed. Rep. 760; Jordan v. Cedar Rapids, etc., R. Co., 124 Iowa 177, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 650 and upholding the admission of evidence of the profits of the plaintiff's business where it was shown that after the injury complained of the plaintiff was no longer able to conduct his business in the same manner as before; Chicago, etc., R. Co. v. Scheinkoenig, 62 Kan. 57; Chicago, etc., R. Co. v. Posten, 59 Kan. 440; Hart v. New Haven, 130 Mich. 187, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 650.

**651. 3.** Porter v. Delaware, etc., R. Co., 134 Fed. Rep. 155; Tutwiler Coal, etc., Co. v. Enslen, 129 Ala. 336; St. Louis, etc., R. Co.



**651. Loss of Time by Married Woman.** — See notes 4, 5.(f) **Loss or Diminution of Earning Power** — *aa.* IN GENERAL. — See note 7.

*v. Waren*, 65 Ark. 619; *Swift v. Holoubek*, 55 Neb. 228; *Noonan v. Obermeyer*, etc., *Brewing Co.*, 50 N. Y. App. Div. 377; *Hildenbrand v. Marshall*, 30 Tex. Civ. App. 135; *Cameron Mill*, etc., *Co. v. Anderson*, 34 Tex. Civ. App. 229, *affirmed* (Tex. 1904) 81 S. W. Rep. 282; *Gulf*, etc., *R. Co. v. Hall*, 34 Tex. Civ. App. 535. See also *Chesapeake*, etc., *R. Co. v. Davis*, (Ky. 1900) 58 S. W. Rep. 698.

**But the Father May Recover** for a minor son's loss of time. *Bube v. Birmingham R.*, etc., *Co.*, 140 Ala. 276; *Texas*, etc., *R. Co. v. Putman*, (Tex. Civ. App. 1901) 63 S. W. Rep. 910.

**651. 4.** *Frohs v. Dubuque*, 109 Iowa 219; *Elenz v. Conrad*, 115 Iowa 183; *Kroner v. St. Louis Transit Co.*, 107 Mo. App. 41; *L. W. Pomereene Co. v. White*, (Neb. 1903) 97 N. W. Rep. 232; *Becker v. Albany R. Co.*, 35 N. Y. App. Div. 46; *Austin v. Bartlett*, 67 N. Y. App. Div. 312, *reversed* 178 N. Y. 310; *Bading v. Milwaukee Electric R.*, etc., *Co.*, 105 Wis. 480. See also *Wheeler v. Bowles*, 163 Mo. 398; *Long v. McWilliams*, 11 Okla. 562; *Denison*, etc., *R. Co. v. Powell*, (Tex. Civ. App. 1904) 80 S. W. Rep. 1054.

**Contra**, *Giffen v. Lewiston*, 6 Idaho 231 (holding that the time and earnings of both husband and wife are community property, not owned exclusively by the husband, but the common property of both); *West Chicago St. R. Co. v. Carr*, 170 Ill. 478 (holding that by virtue of the *Illinois* statute making the expenses of the family a charge on the property of both husband and wife, the latter may recover for loss of time); *Louisville*, etc., *R. Co. v. Dick*, (Ky. 1904) 78 S. W. Rep. 914, holding that if a married woman is injured by the negligent act of another the same criterion of recovery exists as to her as to a man or single woman.

**A Widow** may recover for loss of time. *Werner v. Chicago*, etc., *R. Co.*, 105 Wis. 300.

**5.** *Bailey v. Centerville*, 108 Iowa 20; *Boyle v. Saginaw*, 124 Mich. 348; *Moran v. New York City R. Co.*, (Supm. Ct. App. T.) 94 N. Y. Supp. 302; *Walker v. Ontario*, 118 Wis. 564. See also *Nelson v. Metropolitan St. R. Co.*, (Mo. App. 1905) 88 S. W. Rep. 781.

**7. Loss or Diminution of Earning Power** — *United States*. — *Alabama G. S. R. Co. v. Carroll*, (C. C. A.) 84 Fed. Rep. 772; *Denver v. Sherret*, (C. C. A.) 88 Fed. Rep. 226; *Maguire v. Sheehan*, (C. C. A.) 117 Fed. Rep. 819; *Peterson v. Roessler*, etc., *Chemical Co.*, 131 Fed. Rep. 156; *Northern Commercial Co. v. Nestor*, (C. C. A.) 138 Fed. Rep. 383.

*Alabama*. — *Birmingham R.*, etc., *Co. v. Ward*, 124 Ala. 409; *Southern Car*, etc., *Co. v. Bartlett*, 137 Ala. 234.

*Arkansas*. — *St. Louis*, etc., *R. Co. v. Waren*, 65 Ark. 619.

*California*. — *Storrs v. Los Angeles Traction Co.*, 134 Cal. 91.

*Colorado*. — *Denver v. Hyatt*, 28 Colo. 129.

*Delaware*. — *Knopf v. Philadelphia*, etc., *R. Co.*, 2 Penn. (Del.) 392; *Adams v. Wilmington*, etc., *Electric R. Co.*, 3 Penn. (Del.) 512; *Boyd v. Blumenthal*, 3 Penn. (Del.) 564; *Wilman v. People's R. Co.*, 4 Penn. (Del.) 260; *Wink-*

*ler v. Philadelphia*, etc., *R. Co.*, 4 Penn. (Del.) 80; *McAllister v. People's R. Co.*, 4 Penn. (Del.) 272.

*Georgia*. — *Augusta v. Owens*, 111 Ga. 464; *Georgia Cotton Oil Co. v. Jackson*, 112 Ga. 620; *Florida Cent.*, etc., *R. Co. v. Pitts*, 112 Ga. 846; *Atlanta Consol. St. R. Co. v. Bates*, 103 Ga. 333; *Macon R.*, etc., *Co. v. Vining*, 120 Ga. 511.

*Illinois*. — *Barnett*, etc., *Co. v. Schlapka*, 208 Ill. 426; *Chicago*, etc., *R. Co. v. Spurney*, 69 Ill. App. 549; *West Chicago St. R. Co. v. James*, 69 Ill. App. 609; *North Chicago St. R. Co. v. Brown*, 76 Ill. App. 654, *affirmed* 178 Ill. 187; *Chicago City R. Co. v. Leach*, 80 Ill. App. 354, *reversed* 182 Ill. 359; *West Chicago St. R. Co. v. Williams*, 87 Ill. App. 548; *Kankakee v. Steinbach*, 89 Ill. App. 513.

*Indiana*. — *Hamilton v. Love*, 152 Ind. 646, 71 Am. St. Rep. 384, *citing* 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 651; *Terre Haute Electric Co. v. Watson*, 33 Ind. App. 124; *Lake Shore*, etc., *R. Co. v. Teeters*, (Ind. App. 1905) 74 N. E. Rep. 1014.

*Iowa*. — *Pence v. Wabash R. Co.*, 116 Iowa 279; *Stomne v. Hanford Produce Co.*, 108 Iowa 137; *Jordan v. Cedar Rapids*, etc., *R. Co.*, 124 Iowa 177; *Fishburn v. Burlington*, etc., *R. Co.*, (Iowa 1905) 103 N. W. Rep. 483.

*Kentucky*. — *Reliance Textile*, etc., *Works v. Mitchell*, (Ky. 1903) 71 S. W. Rep. 425, *citing* 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 651; *South Covington*, etc., *St. R. Co. v. Bolt*, (Ky. 1900) 59 S. W. Rep. 26; *Louisville*, etc., *R. Co. v. Logsdon*, 114 Ky. 746; *Louisville*, etc., *R. Co. v. Hall*, 115 Ky. 567; *Chesapeake*, etc., *R. Co. v. Jordan*, (Ky. 1903) 76 S. W. Rep. 145.

*Massachusetts*. — *McGarrahan v. New York*, etc., *R. Co.*, 171 Mass. 211.

*Michigan*. — *Kingston v. Ft. Wayne*, etc., *R. Co.*, 112 Mich. 40.

*Missouri*. — *Posch v. Southern Electric R. Co.*, 76 Mo. App. 601; *Pryor v. Metropolitan St. R. Co.*, 85 Mo. App. 367; *Eberly v. Chicago*, etc., *R. Co.*, 96 Mo. App. 361; *Chitty v. St. Louis*, etc., *R. Co.*, 148 Mo. 64; *Zongker v. People's Union Mercantile Co.*, 110 Mo. App. 382; *Stolze v. St. Louis Transit Co.*, 188 Mo. 581; *Reynolds v. St. Louis Transit Co.*, 189 Mo. 408; *Nelson v. Metropolitan St. R. Co.*, (Mo. App. 1905) 88 S. W. Rep. 781.

*Montana*. — *Rogan v. Montana Cent. R. Co.*, 20 Mont. 503.

*New Jersey*. — *Forthman v. Consolidated Traction Co.*, (N. J. 1900) 46 Atl. Rep. 783.

*New York*. — *Campbell v. North American Brewing Co.*, 22 N. Y. App. Div. 414; *Morrissey v. Westchester Electric R. Co.*, 30 N. Y. App. Div. 424; *Pickett v. West Monroe*, 47 N. Y. App. Div. 629; *Kaplan v. Metropolitan St. R. Co.*, 52 N. Y. App. Div. 296; *Jones v. Niagara Junction R. Co.*, 63 N. Y. App. Div. 607; *Baird v. New York Cent.*, etc., *R. Co.*, 64 N. Y. App. Div. 14, *affirmed* 172 N. Y. 637; *Hurley v. Metropolitan St. R. Co.*, 87 N. Y. App. Div. 66; *Still v. Nassau Electric R. Co.*, 32 N. Y. App. Div. 276.

**652. bb. EVIDENCE ADMISSIBLE — Comparison of Earnings Before and After Injury. —**

See note 1.

*North Carolina.* — *Jeffries v. Seaboard Air Line R. Co.*, 129 N. Car. 236; *Clark v. Durham Traction Co.*, 138 N. Car. 77.

*Ohio.* — *Michigan Cent. R. Co. v. Waterworth*, 11 Ohio Cir. Dec. 621, 21 Ohio Cir. Ct. 495; *Wheeling, etc., R. Co. v. Suhruir*, 12 Ohio Cir. Dec. 809, 22 Ohio Cir. Ct. 560; *Alliance v. Campbell*, 6 Ohio Cir. Dec. 762.

*Oklahoma.* — *Guthrie v. Thistle*, 5 Okla. 517.

*Pennsylvania.* — *Musick v. Latrobe*, 184 Pa. St. 375; *Wallace v. Pennsylvania R. Co.*, 195 Pa. St. 127; *McKenna v. Citizens' Natural Gas Co.*, 198 Pa. St. 31.

*Texas.* — *Gulf, etc., R. Co. v. Warner*, 22 Tex. Civ. App. 167; *Houston, etc., R. Co. v. McCullough*, 22 Tex. Civ. App. 208; *Galveston, etc., R. Co. v. Lynch*, 22 Tex. Civ. App. 336; *San Antonio, etc., R. Co. v. Weigers*, 22 Tex. Civ. App. 344; *Galveston, etc., R. Co. v. Parrish*, (Tex. Civ. App. 1897) 43 S. W. Rep. 536; *Missouri, etc., R. Co. v. Chambers*, 17 Tex. Civ. App. 487; *Houston, etc., R. Co. v. Rowell*, (Tex. Civ. App. 1898) 45 S. W. Rep. 763; *Houston, etc., R. Co. v. Hartnett*, (Tex. Civ. App. 1898) 48 S. W. Rep. 773; *Houston, etc., R. Co. v. Richards*, 20 Tex. Civ. App. 203; *Texas Brewing Co. v. Dickey*, 20 Tex. Civ. App. 606; *San Antonio, etc., R. Co. v. Beam*, (Tex. Civ. App. 1899) 50 S. W. Rep. 411; *Missouri, etc., R. Co. v. Milam*, 20 Tex. Civ. App. 688; *Galveston, etc., R. Co. v. Hynes*, 21 Tex. Civ. App. 34; *Galveston, etc., R. Co. v. Clark*, 21 Tex. Civ. App. 167; *Missouri, etc., R. Co. v. St. Clair*, 21 Tex. Civ. App. 345; *Galveston, etc., R. Co. v. Kief*, (Tex. Civ. App. 1903) 58 S. W. Rep. 625; *San Antonio, etc., R. Co. v. Belt*, 24 Tex. Civ. App. 281; *Galveston, etc., R. Co. v. Hampton*, 24 Tex. Civ. App. 458; *St. Louis Southwestern R. Co. v. Smith*, (Tex. Civ. App. 1901) 63 S. W. Rep. 1064; *Gulf, etc., R. Co. v. Robinson*, (Tex. Civ. App. 1903) 72 S. W. Rep. 70; *St. Louis Southwestern R. Co. v. Byers*, (Tex. Civ. App. 1902) 70 S. W. Rep. 558; *Central Texas, etc., R. Co. v. Luther*, (Tex. Civ. App. 1903) 74 S. W. Rep. 589; *Southern Kansas R. Co. v. Sage*, (Tex. Civ. App. 1904) 80 S. W. Rep. 1038; *San Antonio, etc., R. Co. v. Lester*, (Tex. Civ. App. 1904) 84 S. W. Rep. 401; *International, etc., R. Co. v. Butcher*, (Tex. 1905) 84 S. W. Rep. 1052; *International, etc., R. Co. v. Tisdale*, (Tex. Civ. App. 1905) 87 S. W. Rep. 1063; *Northern Texas Traction Co. v. Yates*, (Tex. Civ. App. 1905) 88 S. W. Rep. 283; *Alexander v. McGaffey*, (Tex. Civ. App. 1905) 88 S. W. Rep. 462; *St. Louis Southwestern R. Co. v. Smith*, (Tex. Civ. App. 1905) 86 S. W. Rep. 943. See also *Missouri, etc., R. Co. v. Nesbit*, (Tex. Civ. App. 1905) 88 S. W. Rep. 891.

*Utah.* — *Stoll v. Daly Min. Co.*, 19 Utah 271.

*Washington.* — *Shaw v. Seattle*, (Wash. 1905) 81 Pac. Rep. 1057.

*Wisconsin.* — *Renne v. U. S. Leather Co.*, 107 Wis. 305; *Heer v. Warren-Scharf Asphalt Paving Co.*, 118 Wis. 57; *Kenyon v. Mondovi*, 98 Wis. 50; *Hanlon v. Milwaukee Electric R., etc., Co.*, 118 Wis. 210.

**Injuries to Minor.** — A minor may recover for diminished capacity to earn money after he

reaches his majority. *Delaware, etc., R. Co. v. Devore*, (C. C. A.) 114 Fed. Rep. 155; *Fishburn v. Burlington, etc., R. Co.*, (Iowa 1904) 98 N. Y. Rep. 380; *Chicago, etc., R. Co. v. Krayenbuhl*, 65 Neb. 889; *Cameron Mill, etc., Co. v. Anderson*, 34 Tex. Civ. App. 229.

But he may not recover for diminution of earning capacity during minority. *Gulf, etc., R. Co. v. Grisom*, (Tex. Civ. App. 1904) 82 S. W. Rep. 671.

An instruction to the jury that if it finds for the plaintiff, a young child, the measure of damages is a sum of money equal to the difference between what plaintiff will earn after he is twenty-one years old and what he would have earned after his arrival at such age had he not received the injuries described in the proof, not exceeding, however, ten thousand dollars, has been held not to be erroneous. *South Covington, etc., St. R. Co. v. Herrklotz*, 104 Ky. 400.

**Permanent Injuries and Loss of Ability to Earn a Livelihood** constitute one item of damages. *St. Louis, etc., R. Co. v. Bricker*, 65 Kan. 321.

**What Plaintiff Could Have Earned in Any Employment Open to Him** forms an adequate basis for an estimate of the pecuniary damage to his earning power. *Olin v. Bradford*, 24 Pa. Super. Ct. 7.

**Earnings at Time of Injury Not Conclusive.** — The amount that the plaintiff was earning at the precise time of injury is not the exclusive criterion of what it was or would have been thereafter. *Galveston, etc., R. Co. v. Appel*, 33 Tex. Civ. App. 575.

**Evidence of Earnings in a Calling Not Followed at the Time of Injury** is admissible for the purpose of showing earning capacity, notwithstanding the plaintiff at the time of injury was earning less at another occupation. *West Chicago St. R. Co. v. Dougherty*, 209 Ill. 241; *Chicago, etc., R. Co. v. Long*, 26 Tex. Civ. App. 601.

**In the Absence of Evidence** as to the extent of loss of earning power such loss cannot be considered as an element of damages. *Olin v. Bradford*, 24 Pa. Super. Ct. 10.

Where in an action for personal injuries one of the items of the damages claimed was the decreased capacity of the plaintiff to labor and earn money, and the petition alleged that at the time the injuries were received plaintiff was capable of earning and was receiving one hundred dollars per month, evidence that but for the injuries he could earn one hundred and fifty dollars per month was admissible, not as a basis for a recovery at that rate, but as tending to show that plaintiff was capable. *City Electric R. Co. v. Smith*, 121 Ga. 663.

**Circumstances Considered on Question of Earning Power.** — The age of the person, his situation in life, his condition of health and habits of industry, and profits derived from the management of a business resulting from the personal attention and labor of the owner, as distinguished from profits arising from invested capital, may, in proper cases, be considered in determining earning power. *Simpson v. Pennsylvania R. Co.*, 210 Pa. St. 101.

**652. 1. Evidence of Earnings Before and Af-**

**653.** Evidence of Ordinary Pursuits — How Far Prevented from Following Same. — See note 3.

What Plaintiff Able to Earn Since Injury. — See note 4.

**654.** See note 2.

Likelihood of Promotion. — See notes 3, 4.

Where a Plaintiff Has Been Able to Earn as Much Since the Injury. — See note 6.

The Profits of a Business. — See note 7.

**655.** (g) Physical Pain and Suffering — *aa*. IN GENERAL. — See note 4.

ter Injury. — *Denver v. Stein*, 25 Colo. 125; *Comstock v. Connecticut R., etc., Co.*, 77 Conn. 65; *Palmer v. Winona R., etc., Co.*, 78 Minn. 138, 83 Minn. 85; *Keiffert v. Nassau Electric R. Co.*, 51 N. Y. App. Div. 301; *Symons v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 27 Misc. (N. Y.) 502; *Mt. Adams, etc., Inclined Plane R. Co. v. Isaacs*, 10 Ohio Cir. Dec. 49, 18 Ohio Cir. Ct. 177.

**653.** 3. *North Chicago St. R. Co. v. Barber*, 77 Ill. App. 257; *Wynne v. Atlantic Ave. R. Co.*, (Brooklyn City Ct. Gen. T.) 14 Misc. (N. Y.) 394, affirmed 156 N. Y. 702; *McCarthy v. Philadelphia, etc., R. Co.*, 211 Pa. St. 193.

What Occupation Is, and Emoluments Therefrom. — *Heer v. Warren-Scharf Asphalt Paving Co.*, 118 Wis. 63, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 654.

4. But Plaintiff Is Not Required to Show What His Earning Capacity Since the Injury Was, in order for the jury to fix the amount of compensation to which he was entitled by reason of his decreased capacity to earn money. The amount may be determined by the jury from their common knowledge and experience and sense of justice. *Texarkana, etc., R. Co. v. Toliver*, (Tex. Civ. App. 1904) 84 S. W. Rep. 377.

**654.** 2. *Furman v. Brooklyn Heights R. Co.*, 25 N. Y. App. Div. 133; *Gulf, etc., R. Co. v. Bell*, 24 Tex. Civ. App. 579; *Missouri, etc., R. Co. v. Flood*, (Tex. Civ. App. 1902) 70 S. W. Rep. 331.

3. *Southern Indiana R. Co. v. Davis*, 32 Ind. App. 569.

4. *Galveston, etc., R. Co. v. Bohan*, (Tex. Civ. App. 1898) 47 S. W. Rep. 1050.

6. *West Chicago St. R. Co. v. Musa*, 80 Ill. App. 223, affirmed 180 Ill. 130. See also *Chicago Union Traction Co. v. Chugren*, 209 Ill. 429; *Sullivan v. Metropolitan St. R. Co.*, 54 N. Y. App. Div. 632. But see *Duffy v. St. Louis Transit Co.*, 104 Mo. App. 235; *San Antonio, etc., R. Co. v. Turney*, 33 Tex. Civ. App. 626.

7. *Pryor v. Metropolitan St. R. Co.*, 85 Mo. App. 367; *Hewlett v. Brooklyn Heights R. Co.*, 63 N. Y. App. Div. 423; *Heer v. Warren-Scharf Asphalt Paving Co.*, 118 Wis. 62, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 654. See also *Lombardi v. California St. R. Co.*, 124 Cal. 311.

"Where a man not working on a salary, but managing an established business, which is mainly dependent on his personal exertions, has been disabled, and sues to recover damages for the injury, it is competent to show the character and magnitude of the business, and to that end to show the capital and assistance employed in the business, also the quality and amount of the plaintiff's services in the business before the accident, and the amount of

the profits of the business, not for the reason that such profits are in any respect elements of damage, nor that their loss or impairment can be proven because they represent interest on the capital employed, the value of the good will, and perhaps other elements, in addition to the value of the personal services of the plaintiff, but for the reason that all these elements, when known, are truly descriptive of the quality of the service of which the plaintiff was capable before his injury, and thus tend to throw light on his earning capacity. Of course, all of the elements above named are essential, and in the orderly trial of a case the proof of the amount of profits should not be made until the other necessary elements are shown." *Muench v. Heinemann*, 119 Wis. 441; *Heer v. Warren-Scharf Asphalt Paving Co.*, 118 Wis. 57.

Modification of Rule. — In *Wallace v. Pennsylvania R. Co.*, 195 Pa. St. 127, the court said: "We do not assent to the proposition that as proof of the loss of earning capacity it was incompetent for the plaintiff to show a diminution of the profits of her business. This proposition finds support in some statements in the opinion in *Goodhart v. Pennsylvania R. Co.*, 177 Pa. St. 1, 55 Am. St. Rep. 705. In that case much incompetent testimony had been admitted on the question of the measure of damages. Among other things the plaintiff had been allowed to produce expert testimony as to the money value of his earning capacity, and to show the profits of a mercantile business in which some time before his injury he had been engaged as a partner. It was in relation to this testimony that it was said that profits derived from an investment or management of a business enterprise are not earnings, and that the profits of a business with which one is connected cannot therefore be made use of as a measure of his earning power. These statements, while correct as applied to the facts of that case, are altogether too broad for general application, and they are misleading. Profits derived from capital invested in business cannot be considered as earnings, but in many cases profits derived from the management of a business may properly be considered as measuring the earning power. This is especially true where the business is one which requires and receives the personal attention and labor of the owner."

**655.** 4. Bodily Pain and Suffering — *United States*. — *Lafourche Packet Co. v. Henderson*, (C. C. A.) 94 Fed. Rep. 871; *Southern Pac. R. Co. v. Hall*, (C. C. A.) 100 Fed. Rep. 760; *Texas, etc., R. Co. v. White*, (C. C. A.) 101 Fed. Rep. 928; *Delaware, etc., R. Co. v. Devore*, (C. C. A.) 114 Fed. Rep. 155; *Porter v. Delaware, etc., R. Co.*, 134 Fed. Rep. 155; *Southern Pac. R. Co. v. Hetzer*, (C. C. A.) 135 Fed. Rep.



272; *Northern Commercial Co. v. Nestor*, (C. A.) 138 Fed. Rep. 383.

*Alabama*.—*Birmingham R., etc., Co. v. Ward*, 124 Ala. 409; *Alabama G. S. R. Co. v. Burgess*, 119 Ala. 555, 72 Am. St. Rep. 943.

*California*.—*Thomas v. Gates*, 126 Cal. 1; *Storrs v. Los Angeles Traction Co.*, 134 Cal. 91.

*Connecticut*.—*Maisenbacker v. Society Concordia*, 71 Conn. 369, 71 Am. St. Rep. 213.

*Delaware*.—*Mills v. Wilmington City R. Co.*, 1 Marv. (Del.) 269; *Karczewski v. Wilmington City R. Co.*, 4 Penn. (Del.) 24; *Wilman v. People's R. Co.*, 4 Penn. (Del.) 260; *McAllister v. People's R. Co.*, 4 Penn. (Del.) 272.

*District of Columbia*.—*Washington, etc., R. Co. v. Patterson*, 9 App. Cas. (D. C.) 423.

*Georgia*.—*Bibb County v. Ham*, 110 Ga. 340; *Augusta v. Tharpe*, 113 Ga. 152; *Savannah, etc., R. Co. v. Ladson*, 114 Ga. 762; *Brush Electric Light, etc., Co. v. Simonsohn*, 107 Ga. 70; *Macon R., etc., Co. v. Vining*, 120 Ga. 511; *Georgia, etc., R. Co. v. Lasseter*, 122 Ga. 679.

*Idaho*.—*Horn v. Boise City Canal Co.*, 7 Idaho 640.

*Illinois*.—*West Chicago St. R. Co. v. Foster*, 175 Ill. 396; *Cicero, etc., St. R. Co. v. Brown*, 193 Ill. 274; *Chicago, etc., R. Co. v. Kuckkuck*, 197 Ill. 304, 98 Ill. App. 252; *Springfield Consol. R. Co. v. Hoeffner*, 71 Ill. App. 162, *affirmed* 175 Ill. 634; *Alton Paving, etc., Co. v. Hudson*, 74 Ill. App. 612; *Chicago City R. Co. v. Anderson*, 80 Ill. App. 71, *affirmed* 182 Ill. 298; *Metropolitan West Side El. R. Co. v. Kersey*, 80 Ill. App. 301; *Spring Valley v. Gaven*, 81 Ill. App. 456; *Lockport v. Richards*, 81 Ill. App. 533; *Belvidere v. Crichton*, 81 Ill. App. 595; *North Chicago St. R. Co. v. Lehman*, 82 Ill. App. 238; *North Chicago St. R. Co. v. Duebner*, 85 Ill. App. 602; *Cleveland, etc., R. Co. v. Reese*, 93 Ill. App. 657; *Kellyville Coal Co. v. Yehanka*, 94 Ill. App. 74; *Chicago v. Gilfoil*, 99 Ill. App. 88; *Chicago, etc., R. Co. v. Krempel*, 103 Ill. App. 1.

*Indiana*.—*Kalen v. Terre Haute, etc., R. Co.*, 18 Ind. App. 202; *Courtney v. Clinton*, 18 Ind. App. 620; *Pittsburgh, etc., R. Co. v. Carlson*, 24 Ind. App. 559; *Eureka Block Coal Co. v. Wells*, (Ind. App. 1901) 61 N. E. Rep. 236; *Indianapolis St. R. Co. v. Walton*, 29 Ind. App. 368; *Cincinnati, etc., Electric St. R. Co. v. Leonard*, (Ind. App. 1905) 73 N. E. Rep. 932; *Lake Shore, etc., R. Co. v. Teeters*, (Ind. App. 1905) 74 N. E. Rep. 1014.

*Iowa*.—*Parker v. Ottumwa*, 113 Iowa 649; *Pence v. Wabash R. Co.*, 116 Iowa 279; *Louisville, etc., R. Co. v. McEwan*, (Ky. 1899) 51 S. W. Rep. 619; *Cushman v. Carbondale Fuel Co.*, 116 Iowa 618; *Kircher v. Larchwood*, 120 Iowa 578; *Rice v. Council Bluffs*, 124 Iowa 639.

*Kansas*.—*Atchison, etc., R. Co. v. Lee*, 8 Kan. App. 24; *Hiawatha v. Warren*, 8 Kan. App. 209.

*Kentucky*.—*Baltimore, etc., R. Co. v. Hausman*, (Ky. 1900) 54 S. W. Rep. 841; *Floyd v. Henderson, etc., Gravel-Road Co.*, (Ky. 1900) 56 S. W. Rep. 6; *Henderson v. Clayton*, (Ky. 1900) 57 S. W. Rep. 1; *Frazier v. Malcolm*, (Ky. 1901) 62 S. W. Rep. 13; *Bowling Green Stone Co. v. Capshaw*, (Ky. 1901) 64 S. W. Rep. 507; *Louisville, etc., R. Co. v. Shepherd*, (Ky. 1902) 69 S. W. Rep. 1070; *Reliance Textile, etc., Works v. Mitchell*, (Ky. 1903) 71

S. W. Rep. 425; *Louisville, etc., R. Co. v. Logsdon*, 114 Ky. 746; *Louisville, etc., R. Co. v. Mason*, (Ky. 1903) 72 S. W. Rep. 27; *Louisville, etc., R. Co. v. Gordan*, (Ky. 1903) 72 S. W. Rep. 311; *Louisville, etc., R. Co. v. Hall*, 115 Ky. 567; *Chesapeake, etc., R. Co. v. Jordan*, (Ky. 1903) 76 S. W. Rep. 145; *Covington v. Miles*, (Ky. 1904) 82 S. W. Rep. 281.

*Louisiana*.—*Loyacano v. Jurgens*, 50 La. Ann. 441.

*Michigan*.—*Beath v. Rapid R. Co.*, 119 Mich. 512.

*Minnesota*.—*Thompson v. Chicago, etc., R. Co.*, 71 Minn. 89; *Stiller v. Bohn Mfg. Co.*, 80 Minn. 1.

*Mississippi*.—*Yazoo, etc., R. Co. v. Grant*, (Miss. 1905) 38 So. Rep. 502.

*Missouri*.—*Perette v. Kansas City*, 162 Mo. 238; *Chilton v. St. Joseph*, 143 Mo. 192; *Chitty v. St. Louis, etc., R. Co.*, 148 Mo. 64; *Kennedy v. St. Louis Transit Co.*, 103 Mo. App. 1; *Plummer v. Milan*, 79 Mo. App. 439; *Longan v. Weltmer*, 180 Mo. 322; *McNamara v. St. Louis Transit Co.*, 106 Mo. App. 349; *Ashby v. Elsberry, etc., Gravel Road Co.*, 111 Mo. App. 79; *Wright v. Kansas City*, 187 Mo. 678; *Fuchs v. St. Louis Transit Co.*, 111 Mo. App. 574; *Waechter v. St. Louis, etc., R. Co.*, (Mo. App. 1905) 88 S. W. Rep. 147.

*Nebraska*.—*Barr v. Post*, 56 Neb. 698; *Omaha St. R. Co. v. Emminger*, 57 Neb. 240; *South Omaha v. Fennell*, (Neb. 1903) 94 N. W. Rep. 632.

*New Jersey*.—*Terhune v. Koellisch*, (N. J. 1899) 43 Atl. Rep. 655; *Burr v. Pennsylvania R. Co.*, 64 N. J. L. 30.

*New York*.—*McNaughton v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 22 Misc. (N. Y.) 700; *Gignoux v. Baird*, (Supm. Ct. App. T.) 29 Misc. (N. Y.) 740; *Wilhelm v. Brooklyn, etc., R. Co.*, 32 N. Y. App. Div. 637; *Clarke v. Westcott*, 2 N. Y. App. Div. 503, *affirmed* 158 N. Y. 736; *Shaier v. Broadway Imp. Co.*, 22 N. Y. App. Div. 102, *affirmed* 162 N. Y. 641; *Campbell v. North American Brewing Co.*, 22 N. Y. App. Div. 414; *Morrissey v. Westchester Electric R. Co.*, 30 N. Y. App. Div. 424; *Williams v. Brooklyn*, 33 N. Y. App. Div. 539; *Scott v. Banks*, 44 N. Y. App. Div. 28; *Williamson v. Brooklyn Heights R. Co.*, 53 N. Y. App. Div. 399; *French v. Brooklyn Heights R. Co.*, 57 N. Y. App. Div. 204; *Cosselmon v. Dunfee*, 59 N. Y. App. Div. 467, *affirmed* 172 N. Y. 507; *Nash v. Yonkers R. Co.*, 63 N. Y. App. Div. 315; *Austin v. Bartlett*, 67 N. Y. App. Div. 312, *reversed* 178 N. Y. 310; *Kelmer v. Reckitt*, 75 N. Y. App. Div. 180; *Hurley v. Metropolitan St. R. Co.*, 87 N. Y. App. Div. 66; *Travers v. Murray*, 87 N. Y. App. Div. 552.

*North Carolina*.—*Clark v. Durham Traction Co.*, 138 N. Car. 77.

*Ohio*.—*Lake Shore, etc., R. Co. v. Topliff*, 6 Ohio Cir. Dec. 234, 18 Ohio Cir. Ct. 709; *Michigan Cent. R. Co. v. Waterworth*, 11 Ohio Cir. Dec. 621, 21 Ohio Cir. Ct. 495; *Alston v. C., etc., R. Co.*, 1 Ohio Cir. Dec. 353.

*Oklahoma*.—*Guthrie v. Thistle*, 5 Okla. 517. *Pennsylvania*.—*Willis v. Second Ave. Traction Co.*, 189 Pa. St. 430; *Linn v. Duquesne*, 204 Pa. St. 551, 93 Am. St. Rep. 800.

*Rhode Island*.—*Stone v. Pendleton*, 21 R. I. 332.

**656.** See notes 1, 2.

*South Carolina.* — *Bussey v. Charleston, etc.*, R. Co., 52 S. Car. 438.

*Tennessee.* — *American Lead Pencil Co. v. Davis*, 108 Tenn. 251.

*Texas.* — *San Antonio, etc., R. Co. v. Weigers*, 22 Tex. Civ. App. 344; *Texas, etc., R. Co. v. Carr*, 91 Tex. 332; *Missouri, etc., R. Co. v. Chambers*, 17 Tex. Civ. App. 487; *Marshall v. McAllister*, 18 Tex. Civ. App. 159; *Houston, etc., R. Co. v. Rowell*, (Tex. Civ. App. 1898) 45 S. W. Rep. 763; *Ft. Worth, etc., R. Co. v. Bunrock*, (Tex. Civ. App. 1898) 46 S. W. Rep. 70; *St. Louis Southwestern R. Co. v. Freedman*, 18 Tex. Civ. App. 553; *Houston, etc., R. Co. v. Rowell*, 92 Tex. 147; *Missouri, etc., R. Co. v. Settle*, 19 Tex. Civ. App. 357; *Texas Brewing Co. v. Dickey*, 20 Tex. Civ. App. 606; *Missouri, etc., R. Co. v. Milam*, 20 Tex. Civ. App. 688; *Galveston, etc., R. Co. v. Hynes*, 21 Tex. Civ. App. 34; *City R. Co. v. Wiggins*, (Tex. Civ. App. 1899) 52 S. W. Rep. 577; *St. Louis Southwestern R. Co. v. Germany*, (Tex. Civ. App. 1900) 56 S. W. Rep. 586; *Galveston, etc., R. Co. v. Nass*, (Tex. Civ. App. 1900) 57 S. W. Rep. 910; *Missouri, etc., R. Co. v. Nail*, 24 Tex. Civ. App. 114; *Texas, etc., R. Co. v. Scruggs*, 23 Tex. Civ. App. 712; *Galveston, etc., R. Co. v. Hampton*, 24 Tex. Civ. App. 458; *International, etc., R. Co. v. Locke*, (Tex. Civ. App. 1902) 67 S. W. Rep. 1082; *Gulf, etc., R. Co. v. Moore*, 28 Tex. Civ. App. 603; *Galveston, etc., R. Co. v. Jenkins*, 29 Tex. Civ. App. 440; *Galveston, etc., R. Co. v. Collins*, 31 Tex. Civ. App. 70; *Gulf, etc., R. Co. v. Robinson*, (Tex. Civ. App. 1903) 72 S. W. Rep. 70; *Texas, etc., R. Co. v. Hartnett*, 33 Tex. Civ. App. 103; *Texas, etc., R. Co. v. Kelly*, 34 Tex. Civ. App. 21; *Texas Portland Cement, etc., Co. v. Ross*, (Tex. Civ. App. 1904) 81 S. W. Rep. 94; *Galveston, etc., R. Co. v. Perry*, (Tex. Civ. App. 1904) 82 S. W. Rep. 343; *Missouri, etc., R. Co. v. Hannig*, 91 Tex. 347; *St. Louis Southwestern R. Co. v. Highnote*, (Tex. Civ. App. 1904) 84 S. W. Rep. 365; *San Antonio Traction Co. v. Sanchez*, (Tex. Civ. App. 1905) 84 S. W. Rep. 849; *Red River, etc., R. Co. v. Reynolds*, (Tex. Civ. App. 1905) 85 S. W. Rep. 1169; *International, etc., R. Co. v. Tisdale*, (Tex. Civ. App. 1905) 87 S. W. Rep. 1063; *Northern Texas Traction Co. v. Yates*, (Tex. Civ. App. 1905) 88 S. W. Rep. 283.

*Washington.* — *Uren v. Golden Tunnel Min. Co.*, 24 Wash. 261; *Davis v. Tacoma R., etc., Co.*, 35 Wash. 203; *Shaw v. Seattle*, (Wash. 1905) 81 Pac. Rep. 1057.

*Wisconsin.* — *Ray v. Lake Superior Terminal, etc., R. Co.*, 99 Wis. 617; *Heer v. Warren-Scharf Asphalt Paving Co.*, 118 Wis. 57; *Euting v. Chicago, etc., R. Co.*, 120 Wis. 651; *Wysocki v. Wisconsin Lake Ice, etc., Co.*, 121 Wis. 96.

**Married Women** may recover damages for pain and suffering. *Taylor v. Nevada-California-Oregon R. Co.*, 26 Nev. 415.

**Pain and Suffering of Son.** — A father suing for loss of services of his son who has been injured by the negligence of the defendant cannot recover damages for the pain and suffering he has endured. *Baltimore, etc., R. Co. v. Keck*, 89 Ill. App. 72.

**656. 1. Future Pain and Suffering** — *United*

*States.* — *Denver, etc., R. Co. v. Roller*, (C. C. A.) 100 Fed. Rep. 738.

*Arkansas.* — *St. Louis, etc., R. Co. v. Warren*, 65 Ark. 619.

*Delaware.* — *Strattner v. Wilmington City Electric Co.*, 3 Penn. (Del.) 245; *Louth v. Thompson*, 1 Penn. (Del.) 149; *Murphy v. Hughes*, 1 Penn. (Del.) 250; *Knopf v. Philadelphia, etc., R. Co.*, 2 Penn. (Del.) 392; *Adams v. Wilmington, etc., Electric R. Co.*, 3 Penn. (Del.) 512; *Boyd v. Blumenthal*, 3 Penn. (Del.) 564; *Winkler v. Philadelphia, etc., R. Co.*, 4 Penn. (Del.) 80.

*Georgia.* — *Atlantic, etc., R. Co. v. Douglas*, 119 Ga. 658.

*Illinois.* — *Chicago City R. Co. v. Carroll*, 206 Ill. 318; *West Chicago St. R. Co. v. McCallum*, 169 Ill. 240, *affirming* 67 Ill. App. 645; *Chicago City R. Co. v. Taylor*, 68 Ill. App. 613, *affirmed* 170 Ill. 49; *Chicago, etc., R. Co. v. Spurney*, 69 Ill. App. 549; *West Chicago St. R. Co. v. Lups*, 74 Ill. App. 420; *North Chicago St. R. Co. v. Fitzgibbons*, 79 Ill. App. 632, *affirmed* 180 Ill. 466; *Cicero, etc., St. R. Co. v. Brown*, 89 Ill. App. 318, *affirmed* 193 Ill. 274; *Chicago v. Davies*, 110 Ill. App. 427.

*Indiana.* — *Frankfort v. Coleman*, 19 Ind. App. 368, 65 Am. St. Rep. 412; *Pittsburgh, etc., R. Co. v. Montgomery*, 152 Ind. 1, 71 Am. St. Rep. 301.

*Iowa.* — *Shultz v. Griffith*, 103 Iowa 150; *Stomne v. Hanford Produce Co.*, 108 Iowa 137; *Wilberding v. Dubuque*, 111 Iowa 484; *Trott v. Chicago, etc., R. Co.*, 115 Iowa 80; *Beaver v. Eagle Grove*, 116 Iowa 485; *Ashley v. Sioux City*, (Iowa 1903) 93 N. W. Rep. 303; *Stanley v. Cedar Rapids, etc., R. Co.*, 119 Iowa 526; *South Covington, etc., St. R. Co. v. Bolt*, (Ky. 1900) 59 S. W. Rep. 26; *Louisville v. Bailey*, (Ky. 1903) 74 S. W. Rep. 688.

*Michigan.* — *Howell v. Lansing City Electric R. Co.*, (Mich. 1904) 99 N. W. Rep. 406; *Beattie v. Detroit*, (Mich. 1904) 100 N. W. Rep. 574.

*Missouri.* — *Smiley v. St. Louis, etc., R. Co.*, 160 Mo. 629; *Covell v. Wabash R. Co.*, 82 Mo. App. 180; *Hansberger v. Sedalia Electric R., etc., Co.*, 82 Mo. App. 566; *Cravens v. Hunter*, 87 Mo. App. 456; *Eberly v. Chicago, etc., R. Co.*, 96 Mo. App. 361; *Milledge v. Kansas City*, 100 Mo. App. 490; *McLain v. St. Louis, etc., R. Co.*, 100 Mo. App. 374; *Robinson v. St. Louis, etc., R. Co.*, 103 Mo. App. 110; *Duffy v. St. Louis Transit Co.*, 104 Mo. App. 235; *Lackland v. Lexington Coal Min. Co.*, 110 Mo. App. 634; *Ashby v. Elsberry, etc., Gravel Road Co.*, 111 Mo. App. 79; *Wright v. Kansas City*, 187 Mo. 678.

*New Hampshire.* — *Walker v. Boston, etc., R. Co.*, 71 N. H. 271.

*New York.* — *Furman v. Brooklyn Heights R. Co.*, 25 N. Y. App. Div. 133; *Witrak v. Nassau Electric R. Co.*, 52 N. Y. App. Div. 234; *Radjaviller v. Third Ave. R. Co.*, 58 N. Y. App. Div. 11; *Weingarten v. Metropolitan St. R. Co.*, 62 N. Y. App. Div. 364; *Ivey v. Brooklyn Heights R. Co.*, 63 N. Y. App. Div. 311; *Baird v. New York Cent., etc., R. Co.*, 64 N. Y. App. Div. 14, *affirmed* 172 N. Y. 637; *Still v. Nassau Electric R. Co.*, 33 N. Y. App. Div. 276; *Savage*

**657.** *bb.* PECUNIARY COMPENSATION FOR PHYSICAL PAIN AND SUFFERING. — See notes

4 5.

**658.** See note 1.

**5. Mental Pain and Suffering — a. IN GENERAL.** — See note 2.

*v.* Third Ave. R. Co., (N. Y. City Ct. Gen. T.) 25 Misc. (N. Y.) 426.

*Ohio.* — Wheeling, etc., R. Co. *v.* Suhrwiar, 12 Ohio Cir. Dec. 809, 22 Ohio Cir. Ct. 560.

*Oregon.* — Smitson *v.* Southern Pac. R. Co., 37 Oregon 74.

*Pennsylvania.* — Smedley *v.* Hestonville, etc., Pass. R. Co., 184 Pa. St. 620.

*Rhode Island.* — McNeil *v.* Lyons, 20 R. I. 672.

*South Carolina.* — Brasington *v.* South Bound R. Co., 62 S. Car. 325, 89 Am. St. Rep. 905.

*Texas.* — Galveston, etc., R. Co. *v.* Scott, 21 Tex. Civ. App. 24; International, etc., R. Co. *v.* Clark, 96 Tex. 349; San Antonio, etc., R. Co. *v.* Lester, (Tex. Civ. App. 1904) 84 S. W. Rep. 401; Missouri, etc., R. Co. *v.* Nesbit, (Tex. Civ. App. 1905) 88 S. W. Rep. 891.

*Wisconsin.* — Kenyon *v.* Mondovi, 98 Wis. 50; Hallum *v.* Omro, 122 Wis. 337; Bading *v.* Milwaukee Electric R., etc., Co., 105 Wis. 480; Yerkes *v.* Northern Pac. R. Co., 112 Wis. 184, 88 Am. St. Rep. 961.

**A Minor** may recover for future physical pain. Cameron Mill, etc., Co. *v.* Anderson, 34 Tex. Civ. App. 229.

**656. 2. Future Suffering Must Be Reasonably Certain** — *United States.* — Chicago, etc., R. Co. *v.* DeClow, (C. C. A.) 124 Fed. Rep. 142.

*Illinois.* — Chicago Union Traction Co. *v.* Chugren, 209 Ill. 429.

*Iowa.* — Wheeler *v.* Boone, 108 Iowa 235; Bailey *v.* Centerville, 108 Iowa 20; Sanders *v.* O'Callaghan, 111 Iowa 574; Westercamp *v.* Brooks, 115 Iowa 159; Evans *v.* Elwood, 123 Iowa 92; Harrison *v.* Ayrshire, 123 Iowa 528.

*Michigan.* — Ford *v.* City of Des Moines, 106 Mich. 94.

*Missouri.* — Batten *v.* St. Louis Transit Co., 102 Mo. App. 285; Albin *v.* Chicago, etc., R. Co., 103 Mo. App. 308; Maguire *v.* St. Louis Transit Co., 103 Mo. App. 459; Schwend *v.* St. Louis Transit Co., 105 Mo. App. 534; Fuchs *v.* St. Louis Transit Co., 111 Mo. App. 574; Ballard *v.* Kansas City, 110 Mo. App. 391; Waddell *v.* Metropolitan St. R. Co., (Mo. App. 1905) 88 S. W. Rep. 765.

*New York.* — Webb *v.* Union R. Co., 44 N. Y. App. Div. 413; Carter *v.* Nunda, 55 N. Y. App. Div. 501.

*Ohio.* — Root *v.* Monroeville, 4 Ohio Cir. Dec. 53, 16 Ohio Cir. Ct. 617.

*Washington.* — Gallamore *v.* Olympia, 34 Wash. 379. See also Stone *v.* Seattle, 33 Wash. 644.

In *Jordan v. Cedar Rapids, etc., R. Co.*, 124 Iowa 177, the court said: "The question of future pain is generally more or less speculative, because its existence or nonexistence is a matter very largely within the knowledge of the injured person alone; but where there is evidence of a permanent injury, and of present pain produced thereby, the jury may consider such facts, and conclude therefrom that future pain may be suffered, and we know of no case in this state holding a contrary view."

**657. 4. Exact Pecuniary Compensation Not Possible** — *United States.* — Western Gas Constr. Co. *v.* Danner, (C. C. A.) 97 Fed. Rep. 882; Porter *v.* Delaware, etc., R. Co., 134 Fed. Rep. 155.

*Arkansas.* — St. Louis, etc., R. Co. *v.* Waren, 65 Ark. 619.

*Iowa.* — Hobbs *v.* Marion, 123 Iowa 726.

*Kansas.* — James *v.* Hayes, 63 Kan. 133.

*Kentucky.* — Newport, etc., Turnpike Co. *v.* Pirmann, (Ky. 1904) 82 S. W. Rep. 976.

*Maine.* — Ramsdell *v.* Grady, 97 Me. 319.

*Missouri.* — Dawson *v.* St. Louis Transit Co., 102 Mo. App. 277.

*Pennsylvania.* — Todd *v.* Second Ave. Traction Co., 192 Pa. St. 587; Bamford *v.* Pittsburg, etc., Traction Co., 194 Pa. St. 17; Machen *v.* Pittsburg, etc., Pass. R. Co., 13 Pa. Super. Ct. 642.

*Rhode Island.* — Hill *v.* Union R. Co., 25 R. I. 565.

*Texas.* — Houston, etc., R. Co. *v.* Richards, 20 Tex. Civ. App. 203; International, etc., R. Co. *v.* Anchonda, (Tex. Civ. App. 1902) 68 S. W. Rep. 743; Gulf, etc., R. Co. *v.* Shelton, 30 Tex. Civ. App. 72.

5. Todd *v.* Second Ave. Traction Co., 192 Pa. St. 587; Schenkel *v.* Pittsburg, etc., Traction Co., 194 Pa. St. 182.

**658. 1. Estimate Must Be Fair and Reasonable.** — Schenkel *v.* Pittsburg, etc., Traction Co., 194 Pa. St. 182; Renne *v.* U. S. Leather Co., 107 Wis. 305.

**2. General Rule as to Mental Pain and Suffering** — *United States.* — Texas, etc., R. Co. *v.* White, (C. C. A.) 101 Fed. Rep. 928; Porter *v.* Delaware, etc., R. Co., 134 Fed. Rep. 155.

*Alabama.* — Birmingham R., etc., Co. *v.* Ward, 124 Ala. 409; Alabama G. S. R. Co. *v.* Burgess, 119 Ala. 555, 72 Am. St. Rep. 943.

*Arkansas.* — Peay *v.* Western Union Tel. Co., 64 Ark. 538.

*Georgia.* — Brush Electric Light, etc., Co. *v.* Simonsohn, 107 Ga. 70; Nashville, etc., R. Co. *v.* Miller, 120 Ga. 453.

*Idaho.* — Horn *v.* Boise City Canal Co., 7 Idaho 640.

*Illinois.* — West Chicago St. R. Co. *v.* Foster, 175 Ill. 396; Cicero, etc., St. R. Co. *v.* Brown, 193 Ill. 274; Kellyville Coal Co. *v.* Yehuka, 94 Ill. App. 74; Chicago, etc., Electric R. Co. *v.* Krempel, 103 Ill. App. 1.

*Indiana.* — Pittsburgh, etc., R. Co. *v.* Montgomery, 152 Ind. 1, 71 Am. St. Rep. 301; Eureka Block Coal Co. *v.* Wells, (Ind. App. 1901) 61 N. E. Rep. 236; Indianapolis St. R. Co. *v.* Walton, 29 Ind. App. 368; Cincinnati, etc., Electric St. R. Co. *v.* Leonard, (Ind. App. 1905) 73 N. E. Rep. 932; Lake Shore, etc., R. Co. *v.* Teeters, (Ind. App. 1905) 74 N. E. Rep. 1014.

*Iowa.* — Shultz *v.* Griffith, 103 Iowa 150.

*Kansas.* — Atchison, etc., R. Co. *v.* Chance, 57 Kan. 40; Hiawatha *v.* Warren, 8 Kan. App. 209; Manser *v.* Collins, 69 Kan. 290; Cole *v.* Gray, (Kan. 1905) 79 Pac. Rep. 654.



**659.** The Extent of the Damages in Such Cases. — See note 2.

**660.** *b.* FUTURE MENTAL SUFFERING. — See notes 1, 2.

*Kentucky.* — *Baltimore, etc., R. Co. v. Hausman*, (Ky. 1900) 54 S. W. Rep. 841; *South Covington, etc., St. R. Co. v. Bolt*, (Ky. 1900) 59 S. W. Rep. 26; *Frazier v. Malcolm*, (Ky. 1901) 62 S. W. Rep. 13; *Louisville, etc., R. Co. v. Carothers*, (Ky. 1901) 65 S. W. Rep. 833; *Louisville, etc., R. Co. v. Shepherd*, (Ky. 1902) 69 S. W. Rep. 1070; *Reliance Textile, etc., Works v. Mitchell*, (Ky. 1903) 71 S. W. Rep. 425; *Louisville, etc., R. Co. v. Logsdon*, 114 Ky. 746; *Louisville, etc., R. Co. v. Mason*, (Ky. 1903) 72 S. W. Rep. 27; *Louisville, etc., R. Co. v. Gordon*, (Ky. 1903) 72 S. W. Rep. 311; *Chesapeake, etc., R. Co. v. Jordan*, (Ky. 1903) 76 S. W. Rep. 145.

*Michigan.* — *Beath v. Rapid R. Co.*, 119 Mich. 512; *Jackson Sleigh Co. v. Holmes*, 129 Mich. 370; *Styles v. Decatur*, 131 Mich. 443.

*Minnesota.* — *Thompson v. Chicago, etc., R. Co.*, 71 Minn. 89.

*Missouri.* — *Chilton v. St. Joseph*, 143 Mo. 192; *Chitty v. St. Louis, etc., R. Co.*, 148 Mo. 64; *Plummer v. Milan*, 79 Mo. App. 439; *Eberly v. Chicago, etc., R. Co.*, 96 Mo. App. 361.

*Nebraska.* — *Barr v. Post*, 56 Neb. 698; *Omaha St. R. Co. v. Emminger*, 57 Neb. 240.

*Nevada.* — *Barnes v. Western Union Tel. Co.*, 27 Nev. 438, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 658.

*New Hampshire.* — *Walker v. Boston, etc., R. Co.*, 71 N. H. 271.

*New Jersey.* — *Consolidated Traction Co. v. Mullin*, 63 N. J. L. 22.

*New York.* — *Webb v. Yonkers R. Co.*, 51 N. Y. App. Div. 194; *McTague v. Dowst*, 51 N. Y. App. Div. 206; *Wilhelm v. Brooklyn, etc., R. Co.*, 32 N. Y. App. Div. 637.

*North Carolina.* — *Meadows v. Western Union Tel. Co.*, 132 N. Car. 43, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 658; *Coley v. North Carolina R. Co.*, 128 N. Car. 534; *Bowers v. Western Union Tel. Co.*, 135 N. Car. 504; *Hancock v. Western Union Tel. Co.*, 137 N. Car. 497; *Clark v. Durham Traction Co.*, 138 N. Car. 77.

*Ohio.* — *Michigan Cent. R. Co. v. Waterworth*, 11 Ohio Cir. Dec. 621, 21 Ohio Cir. Ct. 495.

*Oklahoma.* — *Guthrie v. Thistle*, 5 Okla. 517.

*Oregon.* — *Smitson v. Southern Pac. R. Co.*, 37 Oregon 74.

*Texas.* — *San Antonio v. Kreusel*, 17 Tex. Civ. App. 594; *Missouri, etc., R. Co. v. Chambers*, 17 Tex. Civ. App. 487; *Houston, etc., R. Co. v. Rowell*, (Tex. Civ. App. 1898) 45 S. W. Rep. 763; *St. Louis Southwestern R. Co. v. Freedman*, 18 Tex. Civ. App. 553; *Trinity, etc., R. Co. v. O'Brien*, 18 Tex. Civ. App. 690; *Houston, etc., R. Co. v. Rowell*, 92 Tex. 147; *Missouri, etc., R. Co. v. Milam*, 20 Tex. Civ. App. 688; *Galveston, etc., R. Co. v. Nass*, (Tex. Civ. App. 1900) 57 S. W. Rep. 910; *Missouri, etc., R. Co. v. Nail*, 24 Tex. Civ. App. 114; *Texas, etc., R. Co. v. Scruggs*, 23 Tex. Civ. App. 712; *Galveston, etc., R. Co. v. Hampton*, 24 Tex. Civ. App. 458; *Gulf, etc., R. Co. v. Moore*, 28 Tex. Civ. App. 603; *Galveston, etc., R. Co. v. Jen-*

*kins*, 29 Tex. Civ. App. 440; *Galveston, etc., R. Co. v. Collins*, 31 Tex. Civ. App. 70; *Gulf, etc., R. Co. v. Robinson*, (Tex. Civ. App. 1903) 72 S. W. Rep. 70; *Texas, etc., R. Co. v. Hartnett*, 33 Tex. Civ. App. 103; *Texas Portland Cement, etc., Co. v. Ross*, (Tex. Civ. App. 1904) 81 S. W. Rep. 94; *St. Louis Southwestern R. Co. v. Highnote*, (Tex. Civ. App. 1904) 84 S. W. Rep. 365; *San Antonio Traction Co. v. Sanchez*, (Tex. Civ. App. 1905) 84 S. W. Rep. 849; *International, etc., R. Co. v. Tisdale*, (Tex. Civ. App. 1905) 87 S. W. Rep. 1063; *Northern Texas Traction Co. v. Yates*, (Tex. Civ. App. 1905) 88 S. W. Rep. 283.

*Vermont.* — *Kidder v. Bacon*, 74 Vt. 275, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 658.

*Washington.* — *Davis v. Tacoma R., etc., Co.*, 35 Wash. 203.

**659. 2. Question for Jury.** — *Young v. Gormley*, 120 Iowa 372; *Lackland v. Lexington Coal Min. Co.*, 110 Mo. App. 634; *Waechter v. St. Louis, etc., R. Co.*, (Mo. App. 1905) 88 S. W. Rep. 147; *Dunn v. Northeast Electric R. Co.*, 81 Mo. App. 42; *Yazoo, etc., R. Co. v. Grant*, (Miss. 1905) 38 So. Rep. 502; *Houston, etc., R. Co. v. Richards*, 20 Tex. Civ. App. 203; *Missouri, etc., R. Co. v. Miller*, 25 Tex. Civ. App. 460.

**Necessity for Evidence to Aid Jury in Estimating Damages for Mental Anguish.** — *Kennedy v. St. Louis Transit Co.*, 103 Mo. App. 1; *International, etc., R. Co. v. Rhoades*, (Tex. Civ. App. 1899) 51 S. W. Rep. 518; *Missouri, etc., R. Co. v. Cox*, (Tex. Civ. App. 1900) 55 S. W. Rep. 354; *Triolo v. Foster*, (Tex. Civ. App. 1900) 57 S. W. Rep. 698.

**Direct Proof Unnecessary.** — Mental suffering need not be shown by direct proof, where the injury is serious and permanent. *International, etc., R. Co. v. Mitchell*, (Tex. Civ. App. 1901) 60 S. W. Rep. 996; *International, etc., R. Co. v. Anchonda*, (Tex. Civ. App. 1902) 68 S. W. Rep. 743; *Galveston, etc., R. Co. v. Hubbard*, (Tex. Civ. App. 1902) 70 S. W. Rep. 1112; *Galveston, etc., R. Co. v. Hubbard*, 33 Tex. Civ. App. 343; *Houston, etc., R. Co. v. Reasonover*, (Tex. Civ. App. 1904) 81 S. W. Rep. 329; *Houston, etc., R. Co. v. Simpson*, (Tex. Civ. App. 1904) 81 S. W. Rep. 353.

In *Hoover v. Haynes*, 65 Neb. 557, the court said: "Ordinarily no direct proof can be had as to the injury to feelings, and mental pain and anguish. These matters must be determined from the circumstances of the case as disclosed by the evidence; but the jury cannot act capriciously, and allow damages for imaginary injuries, not warranted by the evidence. Care should be taken not to allow the jury to be misled in that regard."

**Mental Pain May Be Inferred from Physical Suffering.** — *Galveston City R. Co. v. Chapman*, (Tex. Civ. App. 1904) 80 S. W. Rep. 856.

**660. 1. Future Mental Suffering.** — *United States.* — *Northern Commercial Co. v. Nestor*, (C. C. A.) 138 Fed. Rep. 383.

*Delaware.* — *Strattner v. Wilmington City Electric Co.*, 3 Penn. (Del.) 245.

**660.** Loss of Intellectual Capacity. — See note 3.

**661.** *d.* RECOVERY FOR MENTAL SUFFERING COMPENSATORY DAMAGES. — See note 4.

**662.** *e.* MOTIVE OF WRONGDOER. — See note 2.

*f.* VARIOUS KINDS OF MENTAL SUFFERING — (1) *Mental Suffering in Cases of Bodily Injury* — (a) *In General*. — See note 3.

**663.** (b) *Mental Suffering as an Incident of Bodily Injuries*. — See notes 1, 3.

*Georgia*. — *Atlantic, etc., R. Co. v. Douglas*, 119 Ga. 658.

*Illinois*. — *Chicago v. Davies*, 110 Ill. App. 427.

*Iowa*. — *Ashley v. Sioux City*, (Iowa 1903) 93 N. W. Rep. 303; *Rice v. Council Bluffs*, 124 Iowa 639.

*Minnesota*. — *Fonda v. St. Paul City R. Co.*, 77 Minn. 336.

*Missouri*. — *Smiley v. St. Louis, etc., R. Co.*, 160 Mo. 629; *McLain v. St. Louis, etc., R. Co.*, 100 Mo. App. 374; *Robinson v. St. Louis, etc., R. Co.*, 103 Mo. App. 110; *Covell v. Wabash R. Co.*, 82 Mo. App. 180; *Hansberger v. Sedalia Electric R., etc., Co.*, 82 Mo. App. 566; *Duffy v. St. Louis Transit Co.*, 104 Mo. App. 235; *Lackland v. Lexington Coal Min. Co.*, 110 Mo. App. 634; *Ashby v. Elsberry, etc., Gravel Road Co.*, 111 Mo. App. 79; *Fuchs v. St. Louis Transit Co.*, 111 Mo. App. 574; *Waddell v. Metropolitan St. R. Co.*, (Mo. App. 1905) 88 S. W. Rep. 765.

*Oregon*. — *Smitson v. Southern Pac. R. Co.*, 37 Oregon 96, *citing* 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 660.

*Rhode Island*. — *Cummings v. National, etc., Worsted Mills*, 24 R. I. 390.

*Texas*. — *Texas, etc., R. Co. v. Goldman*, (Tex. Civ. App. 1899) 51 S. W. Rep. 275; *International, etc., R. Co. v. Clark*, 96 Tex. 349; *San Antonio, etc., R. Co. v. Lester*, (Tex. Civ. App. 1904) 84 S. W. Rep. 401.

*Washington*. — *Kirkham v. Wheeler-Osgood Co.*, (Wash. 1905) 81 Pac. Rep. 869.

**Minor May Recover for Future Mental Pain.** — *Cameron Mill, etc., Co. v. Anderson*, 34 Tex. Civ. App. 229.

**660.** 2. It Must Appear with Reasonable Certainty that future mental anguish will result. *Batten v. St. Louis Transit Co.*, 102 Mo. App. 285. See also *Ballard v. Kansas City*, 110 Mo. App. 391.

**3. Loss of Intellectual Capacity.** — *El Paso Electric R. Co. v. Kendall*, (Tex. Civ. App. 1905) 85 S. W. Rep. 61; *Northern Texas Traction Co. v. Yates*, (Tex. Civ. App. 1905) 88 S. W. 283; *Baumann v. C. Reiss Coal Co.*, 118 Wis. 330. See also *Muth v. St. Louis, etc., R. Co.*, 87 Mo. App. 422; *Smith v. Nassau Electric R. Co.*, 57 N. Y. App. Div. 152.

**661.** 4. *Compensatory Damages.* — *Young v. Gormley*, 120 Iowa 372; *Chappell v. Ellis*, 123 N. Car. 259, 68 Am. St. Rep. 822.

**662.** 2. *Injuries Unintentionally Inflicted.* — *Westercamp v. Brooks*, 115 Iowa 159; *Chicago G. W. R. Co. v. Bailey*, 9 Kan. App. 207; *Maguire v. St. Louis Transit Co.*, 103 Mo. App. 459.

**3. Mental Suffering in Case of Bodily Injury** — *United States*. — *Southern Express Co. v. Platten*, (C. C. A.) 93 Fed. Rep. 936.

*Illinois*. — *West Chicago St. R. Co. v. Lups*,

74 Ill. App. 420; *North Chicago St. R. Co. v. Lehman*, 82 Ill. App. 238.

*Indiana*. — *Pittsburgh, etc., R. Co. v. Carlson*, 24 Ind. App. 559.

*Iowa*. — *Botkin v. Cassady*, 106 Iowa 334; *Rice v. Council Bluffs*, 124 Iowa 639.

*Kansas*. — *Atchison, etc., R. Co. v. Lee*, 8 Kan. App. 24; *Ft. Scott, etc., R. Co. v. Lightburn*, 9 Kan. App. 642.

*Massachusetts*. — *Berard v. Boston, etc., R. Co.*, 177 Mass. 179.

*Missouri*. — *Ashby v. Elsberry, etc., Gravel Road Co.*, 111 Mo. App. 79; *Wright v. Kansas City*, 187 Mo. 678; *Waechter v. St. Louis, etc., R. Co.*, (Mo. App. 1905) 88 S. W. Rep. 147.

*Nevada*. — *Barnes v. Western Union Tel. Co.*, 27 Nev. 445, *citing* 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 662.

*New Jersey*. — *Burr v. Pennsylvania R. Co.*, 64 N. J. L. 30.

*New York*. — *Powell v. Hudson Valley R. Co.*, 88 N. Y. App. Div. 133; *Lofink v. Interborough Rapid Transit Co.*, 102 N. Y. App. Div. 275.

*North Carolina*. — *Meadows v. Western Union Tel. Co.*, 132 N. Car. 43, *citing* 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 662.

*North Dakota*. — *Gagnier v. Fargo*, 12 N. Dak. 219.

*Ohio*. — *Cleveland City R. Co. v. Ebert*, 10 Ohio Cir. Dec. 291.

*Pennsylvania*. — *Musick v. Latrobe*, 184 Pa. St. 375.

*South Carolina*. — *Bussey v. Charleston, etc., R. Co.*, 52 S. Car. 438.

*Texas*. — *San Antonio, etc., R. Co. v. Weigers*, 22 Tex. Civ. App. 344; *Red River, etc., R. Co. v. Reynolds*, (Tex. Civ. App. 1905) 85 S. W. Rep. 1169; *Dallas Consol. Electric St. R. Co. v. Hardy*, (Tex. Civ. App. 1905) 86 S. W. Rep. 1053.

*Virginia*. — *Norfolk, etc., R. Co. v. Marpole*, 97 Va. 609, *citing* 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 662.

**A Person of Unsound Mind** may recover for mental suffering growing out of a physical injury. *Gulf, etc., R. Co. v. Holzheuser*, (Tex. Civ. App. 1898) 45 S. W. Rep. 188.

**Reasonable Apprehension of Blood Poisoning.** — *In Butts v. National Exch. Bank*, 99 Mo. App. 168, the court said: "Plaintiff should have been permitted to show as an element of damage that he was in reasonable apprehension of blood poisoning as the possible, if not probable, consequence of his injury. Mental suffering, when a condition of mind produced by physical injury and attending it, is as proper an element of the damage sustained as the actual physical injury accompanying and causing it."

**663.** 1. *Mental Suffering as an Incident of Bodily Injury.* — *Southern Pac. R. Co. v. Hetzer*, (C. C. A.) 135 Fed. Rep. 272; *Chicago*

- 664.** (c) *Mental Suffering for Disfigurement of Person.* — See notes 1, 2.  
 (d) *Mental Suffering for Physical Injuries of Another.* — See notes 3, 5.  
**665.** (2) *Suffering in Apprehension of Bodily Injury* — (a) *Necessity for Bodily Injury.* — See notes 2, 3.  
**666.** See note 1.  
**667.** (d) *Limitation of Rule as to Necessity for Bodily Injury.* — See note 3.  
**668.** (e) *Doctrine that Bodily Injury Unnecessary.* — See note 2.  
 (3) *Humiliation, Indignity, and Insult.* — See note 3.  
**669.** See notes 1, 2, 3.

City R. Co. v. Taylor, 170 Ill. 49, affirming 68 Ill. App. 613; Chicago City R. Co. v. Anderson, 182 Ill. 298, affirming 80 Ill. App. 71; North Chicago St. R. Co. v. Duebner, 85 Ill. App. 602. See also Cole v. Gray, (Kan. 1905) 79 Pac. Rep. 654.

**663.** 3. Louisville, etc., R. Co. v. Hall, 115 Ky. 567.

**664.** 1. *Disfigurement of Person.* — Rockwell v. Eldred, 7 Pa. Super. Ct. 95; Galveston, etc., R. Co. v. Clark, 21 Tex. Civ. App. 167; Gray v. Washington Water Power Co., 30 Wash. 665. See also Georgia, etc., R. Co. v. Lasseter, 122 Ga. 679.

2. Southern Pac. R. Co. v. Hetzer, (C. C. A.) 135 Fed. Rep. 272; Griffen v. Lewiston, 6 Idaho 231; Chicago City R. Co. v. Anderson, 182 Ill. 298, affirming 80 Ill. App. 71; Illinois Cent. R. Co. v. Cole, 165 Ill. 334; Chicago, etc., R. Co. v. Spurney, 69 Ill. App. 549; West Chicago St. R. Co. v. James, 69 Ill. App. 609; Decatur v. Hamilton, 89 Ill. App. 561; Lake St. El. R. Co. v. Gormley, 108 Ill. App. 59.

3. *Mental Suffering for Physical Injury of Another.* — Atchison, etc., R. Co. v. Chance, 57 Kan. 40.

5. *Parent — Child.* — Bube v. Birmingham R., etc., Co., 140 Ala. 276.

**665.** 2. *Necessity for Bodily Injury.* — Blount v. Western Union Tel. Co., 126 Ala. 105; Texarkana, etc., R. Co. v. Anderson, 67 Ark. 123; Terre Haute Electric R. Co. v. Lauer, 21 Ind. App. 466; Lee v. Burlington, 113 Iowa 356, 86 Am. St. Rep. 379; Nelson v. Crawford, 122 Mich. 466, 80 Am. St. Rep. 577; Pullman Co. v. Kelly, (Miss. 1905) 38 So. Rep. 317; Rawlings v. Wabash R. Co., 97 Mo. App. 515; Ward v. West Jersey, etc., R. Co., 65 N. J. L. 383, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 665; Jones v. Brooklyn Heights R. Co., 23 N. Y. App. Div. 141, 5 N. Y. Annot. Cas. 124; Newton v. New York, etc., R. Co., 106 N. Y. App. Div. 415; Cleveland City R. Co. v. Ebert, 10 Ohio Cir. Dec. 291; Jones v. Texas, etc., R. Co., 23 Tex. Civ. App. 65; Denison, etc., R. Co. v. Barry, (Tex. Civ. App. 1904) 80 S. W. Rep. 634.

3. West Chicago St. R. Co. v. Liebig, 79 Ill. App. 567; Morse v. Chesapeake, etc., R. Co., (Ky. 1903) 77 S. W. Rep. 361; Smith v. Postal Tel. Cable Co., 174 Mass. 576, 75 Am. St. Rep. 374; O'Flaherty v. Nassau Electric R. Co., 34 N. Y. App. Div. 74, affirmed 165 N. Y. 624; Huffman v. Toledo, etc., R. Co., 9 Ohio Dec. 749, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 665. See also St. Louis, etc., R. Co. v. Bragg, 69 Ark. 402, 86 Am. St. Rep. 206; Linn v. Duquesne, 204 Pa. St. 551, 93 Am. St. Rep. 800; North German Lloyd Steamship Co. v. Wood, 18 Pa. Super. Ct. 494.

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*But Injuries Received from a Shock* resulting from efficient physical causes may be considered by the jury. A shock is different from fright. Wood v. New York Cent., etc., R. Co., 83 N. Y. App. Div. 604, affirmed 179 N. Y. 557.

**666.** 1. Kalen v. Terre Haute, etc., R. Co., 18 Ind. App. 202; Deming v. Chicago, etc., R. Co., 80 Mo. App. 158, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 666. See also Chicago City R. Co. v. Mauger, 105 Ill. App. 579.

**667.** 3. *Wanton and Intentional Wrongs — Seduction, Slander, Malicious Prosecution, Etc.* — Rawlings v. Wabash R. Co., 97 Mo. App. 515. See also Kalen v. Terre Haute, etc., R. Co., 18 Ind. App. 202.

**668.** 2. *Cases Permitting Recovery.* — Denver, etc., R. Co. v. Roller, (C. C. A.) 100 Fed. Rep. 738; Stewart v. Arkansas Southern R. Co., 112 La. 764; Sanderson v. Northern Pac. R. Co., 88 Minn. 162, 97 Am. St. Rep. 509; Watkins v. Kaolin Mfg. Co., 131 N. Car. 536; Mack v. South Bound R. Co., 52 S. Car. 323, 68 Am. St. Rep. 913; Denison, etc., R. Co. v. Barry, (Tex. Civ. App. 1904) 80 S. W. Rep. 634; Montreal St. R. Co. v. Walker, 13 Quebec K. B. 327, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 668; Duliou v. White, (1901) 2 K. B. 669, disapproving Victorian R. Comrs. v. Coultas, 13 App. Cas. 222. See also Lehigh, etc., R. Co. v. Marchant, (C. C. A.) 84 Fed. Rep. 870; Hickey v. Welch, 91 Mo. App. 4.

In Texas the rule is that a recovery cannot be had for suffering from mere fright, but where physical injury results from the mental shock a recovery can be had. Gulf, etc., R. Co. v. Hayter, 93 Tex. 239, 77 Am. St. Rep. 856, affirming (Tex. Civ. App. 1899) 55 S. W. Rep. 128.

*Damages for Nervous Prostration Due to Fright* caused by the defendants stealthily entering the plaintiff's house in the night-time have been allowed in Iowa. Watson v. Dilts, 116 Iowa 249, 93 Am. St. Rep. 239.

3. *Humiliation — Insult.* — Sechrist v. Jahn, 11 Pa. Super. Ct. 59. Compare Chicago City R. Co. v. Mauger, 105 Ill. App. 579, wherein the court said: "In an action predicated upon negligence to recover for personal injuries thereby sustained, a plaintiff is not entitled to damages for mere humiliation or mental annoyance which he may suffer on account of bodily injuries."

*Shame and Mortification Attending the Use of Crutches* may be considered by the jury on the question of damages. Beath v. Rapid R. Co., 119 Mich. 512.

**669.** 1. Thomas v. Gates, 126 Cal. 1; Forhman v. Consolidated Traction Co., (N. J. 1900) 46 Atl. Rep. 783.



**669.** (4) *Mental Suffering Where Connected with Recognized Cause of Action.* — See note 4.

**670.** See note 1.

**671.** (5) *Mental Suffering Alone as a Cause of Action.* — See note 7.

(6) *Mental Suffering for Injuries to Property.* — See note 9.

**672.** (7) *Mental Suffering in Actions on Contract.* — See notes 1, 2, 3.

**673.** 6. Expenses of Litigation — *a.* AS BETWEEN PARTIES TO THE SUIT IN WHICH INCURRED — Counsel Fees. — See note 4.

**676.** *d.* WHERE INJURIES WANTON OR MALICIOUS. — See note 1.

**680.** VI. PROSPECTIVE DAMAGES AND SUCCESSIVE ACTIONS FOR THE CONSEQUENCES OF THE SAME INJURY — 1. In General — Present Rule. — See note 8.

**681.** 2. Actions for Breach of Contract — Where the Contract Is Entire. — See note 5.

**682.** And in the Case of Continuing Contracts. — See note 1.

Plaintiff Need Not Await Time of Full Performance. — See note 2.

**684.** 3. Actions in Tort — Torts to Property. — See note 1.

**669.** 2. *Rockwell v. Eldred*, 7 Pa. Super. Ct. 95. But see *Malott v. Woods*, 109 Ill. App. 512.

One Ejected from a Street Car may recover for insult and indignity suffered. *Sonnen v. St. Louis Transit Co.*, 102 Mo. App. 271.

**3.** *Maisenbacker v. Society Concordia*, 71 Conn. 369, 71 Am. St. Rep. 213. *Compare Malin v. McCutcheon*, 33 Tex. Civ. App. 387, wherein it was held that a person who was wrongfully excluded from a room assigned to him in a hotel could not recover for the mental anguish resulting from the humiliation.

**4.** Where Mental Suffering a Consequence of Recognized Cause of Action. — *Reed v. Maley*, 115 Ky. 829, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 669; *Davis v. Tacoma R., etc., Co.*, 35 Wash. 203. See also *Texas, etc., R. Co. v. Armstrong*, 93 Tex. 31.

**670.** 1. In Actions for Damages for Personal Injuries. — One's apprehension that by reason of his injuries he may not be able to support his family is not an element of damages for which recovery can be had. *Planters Oil Co. v. Mansell*, (Tex. Civ. App. 1897) 43 S. W. Rep. 913.

**Mental Suffering Arising After Physical Injury.** — Mental suffering cannot be allowed as an element of damages in an action for personal injuries where it is not a part of the actual injury, but arises afterwards from regret, disappointment, or anxiety. *Linn v. Duquesne*, 204 Pa. St. 551, 93 Am. St. Rep. 800.

**671.** 7. *Gatzow v. Buening*, 106 Wis. 1, 80 Am. St. Rep. 17, following *Summerfield v. Western Union Tel. Co.*, 87 Wis. 1, 41 Am. St. Rep. 17, cited in the original note. See *Cole v. Gray*, (Kan. 1905) 79 Pac. Rep. 654; *Howe v. Chicago, etc., R. Co.*, (Mich. 1905) 103 N. W. Rep. 185.

**9.** Torts to Property. — *Chappel v. Ellis*, 123 N. Car. 259, 68 Am. St. Rep. 822 (holding that damages will not be allowed for mental suffering caused by the unlawful seizure and detention of personal property); *Morris v. Williford*, (Tex. Civ. App. 1902) 70 S. W. Rep. 228.

**672.** 1. In Actions for Breach of Contract. — *McBride v. Sunset Telephone Co.*, 96 Fed. Rep. 81; *Cable v. Bowhus*, 11 Ohio Cir. Dec. 526, 21 Ohio Cir. Ct. 53.

2. See *Blount v. Western Union Tel. Co.*, 126 Ala. 105; *Dunn v. Smith*, (Tex. Civ. App. 1903) 74 S. W. Rep. 576.

**3.** The True Principle — Natural and Probable Consequence. — In *Jones v. Texas, etc., R. Co.*, 23 Tex. Civ. App. 65, the court said: "While our courts seem not to have applied the doctrine that damages for mental anguish, unaccompanied by physical injury or injury to property, cannot be recovered, to cases arising from a breach of contract, they have uniformly held that only such damages may be recovered as were reasonably within the contemplation of the parties at the time the contract was entered into."

**673.** 4. Counsel Fees. — *Munson v. Straits of Dover Steamship Co.*, 99 Fed. Rep. 792, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 673, affirmed (C. C. A.) 100 Fed. Rep. 1005, *Donovan v. Johnson*, 13 App. Cas. (D. C.) 356; *Dorris v. Miller*, 105 Iowa 564; *McBride v. St. Paul City R. Co.*, 72 Minn. 291.

**676.** 1. In Cases of Wanton or Malicious Injuries. — *Munson v. Straits of Dover Steamship Co.*, 99 Fed. Rep. 792, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 676, affirmed (C. C. A.) 100 Fed. Rep. 1005; *Hutchinson First Nat. Bank v. Williams*, 62 Kan. 431; *Lurman v. Jarvie*, 82 N. Y. App. Div. 46, affirmed 178 N. Y. 559, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 675; *Gates v. Toledo*, 57 Ohio St. 105.

**680.** 8. Present Rule. — *N. K. Fairbanks Co. v. Bahre*, 213 Ill. 640, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 680.

**681.** 5. When Contract Entire. — *Standard Oil Co. v. Denton*, (Ky. 1902) 70 S. W. Rep. 282; *Hancock v. White Hall Tobacco Warehouse Co.*, 102 Va. 239.

**682.** 1. Continuing Contracts. — *Rathborne, etc., Co. v. Wheelihan*, 82 Minn. 30.

**2.** Need Not Await Expiration of Time for Full Performance. — *Salzgeber v. Mickel*, 37 Oregon 222, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 882.

**684.** 1. Permanent Injury to Real Estate — All Past and Prospective Damages Recoverable. — *Chicago North Shore St. R. Co. v. Payne*, 102 Ill. 247, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 684; *Lake Erie, etc., R. Co. v. Purcell*,

**685.** See note 2.

**686.** See note 1.

**687.** What Injuries Are Permanent. — See note 1.

**688.** Torts to the Person. — See notes 2, 3.

**689.** See note 2.

**691.** VII. MITIGATION OF DAMAGES — 2. Actions for Breach of Contract. — See note 2.

**692.** 3. Actions in Tort — Torts to Real Property. — See note 3.

Torts to the Person. — See note 9.

**693.** See note 1.

**693.** DAMNOSA HEREDITAS. — See note 4.

75 Ill. App. 573; Atchison, etc., R. Co. v. Jones, 110 Ill. App. 626; Wheeling, etc., R. Co. v. Suhrwiar, 10 Ohio Cir. Dec. 715, 20 Ohio Cir. Ct. 558.

**685.** 2. Temporary Injury — Damages to Date of Action Only. — N. K. Fairbanks Co. v. Bahre, 213 Ill. 640, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 685.

**686.** 1. Successive Actions for Subsequent Damages. — Catlin Coal Co. v. Lloyd, 109 Ill. App. 122.

**687.** 1. Tests as to Permanence: Does Whole Injury Result from Original Wrong? — Bowers v. Mississippi, etc., Boom Co., 78 Minn. 402, 79 Am. St. Rep. 395, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 687.

**688.** 2. Torts to the Person — Prospective Damages Recoverable. — Mills v. Wilmington City R. Co., 1 Marv. (Del.) 269; Ayres v. Delaware, etc., R. Co., 158 N. Y. 263, wherein the court said: "As there can be but one recovery, it may include damages not only for what has actually been suffered from the disabling effect of the injury down to the time of the trial, but also for such pain or inconvenience as is reasonably certain in the future. The prospective disablement may be inferred from the nature of the injury, or proved by the opinions of experts." See also *supra*, this title, **643.** 1, 2.

3. Successive Actions Not Maintainable for

Torts to the Person. — Indianapolis St. R. Co. v. Robinson, 157 Ind. 414; Ivey v. Brooklyn Heights R. Co., 63 N. Y. App. Div. 311.

**689.** 2. Lake Lighting Co. v. Lewis, 29 Ind. App. 164.

**691.** 2. Brazell v. Cohn, (Mont. 1905) 81 Pac. Rep. 339.

**692.** 3. Torts to Realty. — Gallagher v. Kingston Water Co., 25 N. Y. App. Div. 82, affirmed 164 N. Y. 602; Williams v. Hathaway, 21 R. I. 566.

9. Torts to the Person. — Texas, etc., R. Co. v. White, (C. C. A.) 101 Fed. Rep. 928; Mt. Sterling v. Crummy, 73 Ill. App. 572; Joliet v. Le Pla, 109 Ill. App. 336; Arkansas River Packet Co. v. Hobbs, 105 Tenn. 29; Robertson v. Texas, etc., R. Co., (Tex. Civ. App. 1904) 79 S. W. Rep. 96; Baldwin v. Lincoln County, 29 Wash. 509; Tompkins v. Pacific Mut. L. Ins. Co., 53 W. Va. 499, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 692; Selleck v. Janesville, 100 Wis. 157, 69 Am. St. Rep. 906.

There Must Be No Unreasonable Delay in procuring needed services of a physician. Webb v. Metropolitan St. R. Co., 89 Mo. App. 604.

**693.** 1. Plummer v. Milan, 79 Mo. App. 439; Galveston, etc., R. Co. v. Hubbard, (Tex. Civ. App. 1902) 70 S. W. Rep. 112. See also Toledo v. Radbone, 23 Ohio Cir. Ct. 268.

**693.** 4. Provident L., etc., Co. v. Fidelity Ins., etc., Co., 203 Pa. St. 82.

## DAMNUM ABSQUE INJURIA.

**694.** I. MEANING OF TERM AND SCOPE OF TREATMENT. — See note 1.

**695.** II. ILLUSTRATIONS AND APPLICATIONS — 1. Injuries Caused by the Exercise of a Right. — See note 4.

Use of One's Own Property or Rights. — See note 5.

**697.** 2. Acts Authorized by Statute. — See note 3.

**698.** 3. Injuries Resulting from Necessary or Compulsory Acts. — See note 1.

4. Injuries Committed by Consent of Injured Party. — See note 4.

**694.** 1. Meaning of Term. — In *West Virginia Transp. Co. v. Standard Oil Co.*, 50 W. Va. 611, 88 Am. St. Rep. 895, the court said: "We must nicely distinguish between *damnum* and *injuria*. We commonly use the words 'injury' and 'damage' indiscriminately; but in the rule above these Latin words are distinct. *Damnum* means only harm, hurt, loss, damage; while *injuria* comes from *in*, 'against,' and *jus*, 'right,' and means something done against the right of the party, producing damage, and has no reference to the fact or amount of damage. Unless a right is violated, though there be damage, it is *damnum absque injuria*."

No Legal Injury unless a Right Is Infringed. — *West Virginia Transp. Co. v. Standard Oil Co.*, 50 W. Va. 611, 88 Am. St. Rep. 895.

**695.** 4. Exercise of a Right. — See *Coyne v. Mississippi*, etc., *Boom Co.*, 72 Minn. 533, 71 Am. St. Rep. 508.

5. Right of Dominion. — *Gottenetroeter v. Kaplemann*, 83 Mo. App. 290.

**697.** 3. Damages Arising from Acts Author-

ized by Statute. — *Austin v. Augusta Terminal R. Co.*, 108 Ga. 671; *Long v. Elberton*, 109 Ga. 28, 77 Am. St. Rep. 363; *Georgia R., etc., Co. v. Maddox*, 116 Ga. 64; *Marietta Chair Co. v. Henderson*, 121 Ga. 399, 104 Am. St. Rep. 156; *Hirth v. Indianapolis*, 18 Ind. App. 673; *Coyne v. Mississippi*, etc., *Boom Co.*, 72 Minn. 533, 71 Am. St. Rep. 508; *Paris Mountain Water Co. v. Greenville*, 53 S. Car. 82; *Lund v. St. Paul*, etc., R. Co., 31 Wash. 292, quoting 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 697. Compare *New York*, etc., R. Co. *v. Hamlet Hay Co.*, 149 Ind. 344; *Taylor v. New York*, etc., R. Co., 27 N. Y. App. Div. 201; *Brandenberg v. Zeigler*, 62 S. Car. 18, 89 Am. St. Rep. 887.

**698.** 1. Failure to perform a contract is *damnum absque injuria*, where such failure was caused by the appointment of a receiver. *Malcomson v. Wappoo Mills*, 88 Fed. Rep. 680.

4. *Cunningham v. Porchet*, 23 Tex. Civ. App. 84, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 698.



# DAMS.

BY L. C. BOEHM.

**700. I. DEFINITION — Flash Boards Are Part of Dams.** — See note 2.

**II. RIGHT TO ERECT AND MAINTAIN DAMS — 1. On Unnavigable Streams — a. AT COMMON LAW — (1) When Party Owns Both Sides of Stream.** — See note 4.

**701. (2) When Party Owns but One Side of the Stream.** — See note 2.

*b. BY STATUTE.* — See note 4.

**Milldam Acts Constitutional.** — See note 5.

**702. Flooding of Mills Not Authorized.** — See note 1.

**2. On Navigable Streams — a. IN GENERAL.** — See note 3.

**703. Statutes Regulating Construction of Dams on Navigable Streams.** — See note 1.

*b. POWER OF STATE TO AUTHORIZE.* — See note 2.

**700. 2. Flash Boards Part of Dams.** — See National Fibre Board Co. v. Lewiston, etc., Electric Light Co., 95 Me. 318.

**4. Floatable Stream — Exclusive Right in Riparian Owner.** — The riparian owner of a stream, navigable only for the purpose of floating logs, has the exclusive right to dam the stream upon his premises. The mere fact that he is informed that another person contemplates erecting such a dam and makes no objection does not amount to a license for its erection; and an injunction will be granted to restrain the maintenance and operation of such dam. *Hallock v. Suitor*, 37 Oregon 9.

**701. 2. Quebec Statutes.** — Rev. Stat. Quebec, art. 5535, and Civ. Code Quebec, art. 503, do not authorize a riparian owner to construct a dam extending to the land of an owner on the opposite side of a river, without the latter's permission, but apply only to the use of watercourses. *Demers v. Beauregard*, 22 Quebec Super. Ct. 273.

**Erection of New Dam in Lien of One Destroyed.** — The plaintiff had sold to the defendant's grantor land bordering on a river with the right to the purchaser of building a mill on it and constructing a dam extending to property of the vendor on the other side of the river. The dam constructed by the purchaser having been carried away by the water, the defendant, who had then acquired the property, built a new dam up the stream in spite of the plaintiff's protests, one end being supported on the plaintiff's land. In an action by the plaintiff for the demolition of the dam and for damages, it was held that before constructing the new dam, the defendant should have requested permission from the plaintiff, and if such permission had been refused, should have applied to the court for authority. *Demers v. Beauregard*, 22 Quebec Super. Ct. 273.

**4. Statutes — Maine.** — *Palmyra v. Waverly Woolen Co.*, 99 Me. 134; *National Fibre Board Co. v. Lewiston, etc., Electric Light Co.*, 95 Me. 318.

*Massachusetts.* — *Brady v. Blackinton*, 174 Mass. 559; *Rourke v. Central Massachusetts*

*Electric Co.*, 177 Mass. 46; *Ludlow Mfg. Co. v. Indian Orchard Co.*, 177 Mass. 61; *Otis Co. v. Ludlow Mfg. Co.*, 186 Mass. 89, 104 Am. St. Rep. 563.

*Michigan.* — *Valentine v. Berrien Springs Water-Power Co.*, 128 Mich. 280, 8 Detroit Leg. N. 637.

*New Hampshire.* — *State v. Sunapee Dam Co.*, 70 N. H. 458.

*Vermont.* — *Avery v. Vermont Electric Co.*, 75 Vt. 235, 98 Am. St. Rep. 818.

**Rights of Lumberman — Nova Scotia Statutes.** — Under the statutes of Nova Scotia a lumberman has no right, without permission, to erect a permanent dam on the land of another in order to facilitate the driving of logs; and such erection, or entry for the purpose of making such erection, is a trespass. *Deal v. Crook*, 39 Can. L. J. 115.

**5. Milldam Acts Are Constitutional.** — *Otis Co. v. Ludlow Mfg. Co.*, 186 Mass. 89, 104 Am. St. Rep. 563.

**702. 1. Milldam Acts Do Not Authorize Flooding Mills Above.** — *National Fibre Board Co. v. Lewiston, etc., Electric Light Co.*, 95 Me. 318; *Palmyra v. Waverly Woolen Co.*, 99 Me. 134.

Under the *Wisconsin* statutes a mill owner is precluded from raising the height of his dam to the injury of the upper mill proprietor. *Evans v. Bacon*, 118 Wis. 380.

**3. Right to Erect Dam in Navigable Waters.** — See *People v. Page*, 39 N. Y. App. Div. 110.

**703. 1. In Michigan.** — See *Valentine v. Berrien Springs Water-Power Co.*, 128 Mich. 280, 8 Detroit Leg. N. 637.

**2. When State May Authorize Dam in Navigable River.** — See *Austin v. Hall*, (Tex. Civ. App. 1900) 58 S. W. Rep. 479.

**Dam Across Outlet of Natural Lake.** — In *State v. Sunapee Dam Co.*, 70 N. H. 458, it was held that the New Hampshire legislature could give to a corporation power to erect a dam at the outlet of Lake Sunapee, for the utilization of its waters, notwithstanding such dam operated to injure the availability of such lake for navigation, fishing, etc. See generally the title **LAKES AND PONDS**.

**704. c. STATUTORY RIGHT TO ERECT, NO PROTECTION AGAINST INJURIES TO A PRIVATE OWNER.** — See note 2.

**3. On Floatable Streams.** — See note 3.

**705. III. RIGHT TO USE OF WATER.** — See note 2.

**706.** See note 1.

**707.** See note 1.

**Rights of Opposite Riparian Owners.** — See note 2.

**708. IV. HOW RIGHTS PERTAINING TO DAMS MAY BE ACQUIRED — 2. By Grant or License — Grant.** — See note 3.

**The Construction of Such Grants or Reservations.** — See note 4.

Only by Exercising the Right of Eminent Domain in a lawful method can the state authorize the damming up of running water. *Leflore County v. Cannon*, 81 Miss. 334. See generally the title **WATERS AND WATERCOURSES**.

**704. 2. Statute Authorizing Dam No Protection Against Injuries to Private Owner.** — *Ennis v. Gilder*, (Tex. Civ. App. 1903) 74 S. W. Rep. 585.

**3. Right to Erect Dam on Floatable Stream.** — *Hallock v. Suitor*, 37 Oregon 9. See also *Crookston Waterworks, etc., Co. v. Sprague*, 91 Minn. 461; *Kretschmar v. Meehan*, 74 Minn. 211 (*following Lamprey v. Nelson*, 24 Minn. 304, stated in the original note).

**Rights and Liabilities of Dam Owner.** — The owner of the alveus of a floatable stream and of the land on both sides of it has the absolute right to erect and maintain a dam for the purpose of operating his mill by the use of the flowing water, and he has this right as an incident to his ownership of the property. Such right must be exercised subject to the rights of other riparian owners to a reasonable use of the water, and subject to the public right of passage. The public right of passage is not a paramount right, but is a right concurrent with that of the riparian owners; and if in the exercise of this public right, lumbermen in driving their logs down the river injure a riparian owner's dam, the burden is on them to show that they adopted all reasonable means and used all reasonable care and skill in order to avoid the injury. *Roy v. Fraser*, 36 N. Bruns. 113, *per Barker, J.*

**Dam on Floatable Stream May Be Obstruction.** — Under the provisions of Rev. Stat. Ont. 1887, c. 120, § 1, prohibiting all persons from preventing the passage of sawlogs and other timber down a river, creek, or stream, by felling trees or placing any other obstruction in or across the same, it has been held that a dam on a floatable stream which diminishes the supply of water so as to interfere with the passage of logs is an obstruction. *Farquharson v. Imperial Oil Co.*, 30 Can. Sup. Ct. 188, *reversing* 29 Ont. 206.

**705. 2. Right to Detain Water.** — *Barneich v. Mercy*, 136 Cal. 205; *Fisher v. Feige*, 137 Cal. 39, 92 Am. St. Rep. 77. See also *Roy v. Fraser*, 36 N. Bruns. 113.

**Limit of Right of Owner of Certain Portion of Water.** — One who regulates the flow of a river by retaining the water in time of freshets and storing it for use in time of drought does not gain an exclusive right to use it, as against another riparian owner. *Dyer v. Cranston Print-Works Co.*, 22 R. I. 506.

**706. 1. Unreasonable Detention Not Allowed.** — *Lone Tree Ditch Co. v. Rapid City Electric, etc., Light Co.*, 16 S. Dak. 451. See also *Roy v. Fraser*, 36 N. Bruns. 113.

**707. 1. Spreading Out the Water.** — *Barneich v. Mercy*, 136 Cal. 205.

**2. Where Only One Riparian Owner Can Use the Water** his use of the whole works no harm to his cotenant and is no cause of complaint. *Dyer v. Cranston Print-Works Co.*, 22 R. I. 506.

**708. 3. Dedication.** — See *Boye v. Albert Lea*, 93 Minn. 121, in which case the facts were held to show a dedication of the right to build and use a dam.

**4. Damages Recoverable under Stipulation.** — Where a deed conveying a portion of the vendor's lands bordering on a stream granted the privilege of constructing dams, etc., in the stream, with the proviso that in case of damages being caused through the construction of any such works, the vendor or his successors in title to the adjoining lands should be entitled to have the damages assessed by arbitrators and that the purchasers should pay the amount awarded, it was held that under the deed the purchasers were liable, not only for damages caused by the flooding of the adjoining lands, but also for all other damages occasioned by the building of dams and other works in the stream by them — as, for instance, the diminution of the force of the water power of a mill built on the adjoining land by another purchaser from the same vendor; and that the provisions of Rev. Stat. Quebec, art. 5535, did not entitle the first purchasers to construct or raise such dams without liability for all damages caused thereby. *Hanelin v. Bannerman*, 31 Can. Sup. Ct. 534.

**For Other Cases of the Construction of Grants and Reservations.** — *Georgia.* — *Nuckolls v. Anderson*, 120 Ga. 677.

*Indiana.* — *Indianapolis Water Co. v. Kingan*, 155 Ind. 476.

*Massachusetts.* — *Forbes v. Com.*, 172 Mass. 289; *Ludlow Mfg. Co. v. Indian Orchard Co.*, 177 Mass. 61.

*Nebraska.* — *Znamanacek v. Jelinck*, (Neb. 1903) 95 N. W. Rep. 28; *Johnson v. Sherman County Irrigation, etc., Co.*, (Neb. 1904) 98 N. W. Rep. 1096.

*New York.* — *Matter of Brookfield*, 176 N. Y. 138.

*Rhode Island.* — *Bradley v. Warner*, 21 R. I. 36.

*South Carolina.* — *Reid v. Courtenay Mfg. Co.*, 68 S. Car. 466.

*West Virginia.* — *Hurxthal v. Hurxthal*, 45 W. Va. 584.

**711.** License. — See note 1.

**712.** 3. By Prescription — *a.* IN GENERAL. — See note 1.

**713.** See note 1.

No Prescriptive Right Where Dam Creates Public Nuisance. — See note 2.

*c.* MEASURE OF PRESCRIPTIVE RIGHT — To Flow Lands. — See note 5.

**714.** Use of Flash Boards. — See note 1.

*d.* LOSS OF PRESCRIPTIVE RIGHT. — See note 3.

**V. LIABILITY FOR INJURIES CAUSED BY ERECTION OF DAM — 1. General Rule.** — See notes 4, 6.

**715.** 2. Specific Applications of the Rule — *a.* FLOODING UPPER LANDS OR MILLS. — See notes 1, 2.

**711.** 1. Rights Acquired by License. — *Johnson v. Sherman County Irrigation, etc., Co.*, (Neb. 1904) 98 N. W. Rep. 1096.

Implication. — A parol grant of an easement, like any other contract, may rest in implication. *Znamanacek v. Jelinck*, (Neb. 1903) 95 N. W. Rep. 28.

Grant of Right to Maintain Flume — Revocation. — Where a lower riparian owner had been permitted for a number of years by an upper owner to take the water power necessary to operate his mill through a flume he had constructed along the river bank, partly on the upper owner's land, connecting with the upper owner's millrace, subject to the contribution of half the expense of keeping the millrace and dam in repair, and these facts had been recognized in deeds and written agreements to which the upper owner was a party, it was held that the upper owner could no longer claim exclusive rights to the enjoyment of such river improvements or require the demolition of the flume, notwithstanding the fact that he was the absolute owner of the strip of land on which the millrace and a portion of the flume were constructed. *Lafrance v. Lafontaine*, 30 Can. Sup. Ct. 20.

What Is Not License to Build. — The exclusive right of a riparian owner to build a dam on his own premises cannot be taken away except by his voluntary act or by condemnatory proceedings; and a mere knowledge on his part that another intends to erect a dam on his premises and a failure to object thereto do not constitute a license for such erection. *Hallock v. Suito*, 37 Oregon 9.

**712.** 1. Right to Detain or Divert the Water. — *Indianapolis Water Co. v. Kingan*, 155 Ind. 476; *Kray v. Muggli*, 77 Minn. 231; *Hall v. State*, 72 N. Y. App. Div. 360; *Brown v. Ontario Talc Co.*, 81 N. Y. App. Div. 273.

Erection of New Dam Not Exceeding Prescriptive Right. — An easement by prescription is not lost by erecting a new dam in place of the old one if the new one is placed on a part of the land belonging to the mill and does not raise the water higher than before. *Forbes v. Com.*, 172 Mass. 289.

But the new dam must not exceed the prescriptive right acquired by the old one. *Lynch v. Troxell*, 207 Pa. St. 162.

**713.** 1. No Easement by Adverse Use for Less than Ten Years. — *Ennis v. Gilder*, (Tex. Civ. App. 1903) 74 S. W. Rep. 585.

2. No Prescriptive Right to Maintain Public

Nuisance. — *People v. Pelton*, 36 N. Y. App. Div. 450, affirmed 159 N. Y. 537.

5. Measure of Right Acquired by Prescription. — *Lynch v. Troxell*, 207 Pa. St. 162.

"A prescriptive right can only be exercised in the manner and to the extent that it has been used during the whole prescriptive period." *Pluchak v. Crawford*, (Mich. 1904) 100 N. W. Rep. 765.

**714.** 1. How Prescriptive Right to Use Flash Boards Acquired. — *National Fibre Board Co. v. Lewiston, etc., Electric Light Co.*, 95 Me. 318; *Ludlow Mfg. Co. v. Indian Orchard Co.*, 177 Mass. 61.

3. Periodic Cessation of Use of the Dam does not show an intention to relinquish the right to use it. *Hall v. State*, 92 N. Y. App. Div. 96.

4. Liability of Dam Owner to Riparian Owner. — The law allowing mill owners to build dams on watercourses for the purpose of operating their mills creates in their favor a legal servitude, and the exercise of this servitude makes them liable to the riparian owner for damages caused thereby. *Laroche v. Price*, 19 Quebec Super. Ct. 403.

6. Injuries Resulting from Unexpected and Unusual Freshets. — *Palmyra v. Waverly Woolen Co.*, 99 Me. 134.

**715.** 1. Flowing Lands of Proprietor Above. — *Lynch v. Troxell*, 207 Pa. St. 162.

**Lumberman's Dam.** — Under Rev. Stat. Ont. (1897), c. 142, providing that all persons shall have the right during the spring, summer, and autumn freshets to float logs, rafts, and timber down all rivers, creeks, and streams, and to construct dams where necessary in order to facilitate their doing so, doing no unnecessary damage to the river, creek, or stream or the banks thereof, it was held that a lumberman was not liable for any damage sustained by a landowner by reason of the erection, maintenance, and use of a dam in the manner, at the time, and for the purpose authorized by the statute, as the statute clearly intended to place the public advantage of allowing lumbermen to use rivers and streams as highways for carrying their logs to market above the private damage and inconvenience which might be caused necessarily to the individual riparian owners by reason of such use of the streams. *Neely v. Peter*, 4 Ont. L. Rep. 293, affirmed 5 Ont. L. Rep. 381.

2. Flowing Back Water on Mill or Reservoir Above. — *National Fibre Board Co. v. Lewiston, etc., Electric Light Co.*, 95 Me. 318; *Hamelin v. Bannerman*, 31 Can. Sup. Ct. 534.



**716.** *b.* CREATING STAGNANT POOL INJURIOUS TO HEALTH. — See note 4.

*c.* DROWNING NEIGHBORING LANDS BY PERCOLATION. — See note 5.

**717.** *d.* DISCHARGING WATER ON LANDS BELOW. — See note 1.

**719.** VII. LIABILITY FOR INJURIES TO DAMS. — See note 3.

**720.** VIII. REMEDIES — 1. Of Persons Injured by a Dam — *a.* INJUNCTION AND ABATEMENT. — See note 1.

When Party Injured May Abate. — See note 2.

**721.** *b.* DAMAGES. — See note 3.

**722.** Nominal Damages. — See note 7.

**723.** Measure of. — See note 1.

**716.** 4. Stagnant Pool Endangering Health. — Texas, etc., *R. Co. v. O'Mahoney*, 24 Tex. Civ. App. 631.

**Criminal Liability.** — Under the *New York* statutes one who dams up water so as to injure another commits a nuisance and may be indicted therefor. *People v. Pelton*, 36 N. Y. App. Div. 450, *affirmed* 159 N. Y. 537.

**5. Drowning Neighboring Lands by Percolation.** — Texas, etc., *R. Co. v. O'Mahoney*, 24 Tex. Civ. App. 631.

**717.** 1. Flooding Lands Below. — *Maxwell v. Shirts*, 27 Ind. App. 529; *Ford Lumber, etc., Co. v. Clark*, 68 S. W. Rep. 443, 24 Ky. L. Rep. 318; *Coleman v. Bennett*, 111 Tenn. 705; *Wright v. Mitten*, 34 N. Bruns. 14, in which last case it was held that the complainant, a married woman, was not estopped by the fact that her husband, while owner of the land and afterwards, had assisted as a laborer in constructing the dam in question.

**719.** 3. Injuries to Dams. — *Turner v. Locy*, 37 Oregon 158; *Roy v. Fraser*, 36 N. Bruns. 113.

**720.** 1. Injunction and Abatement. — *Byers v. Colonial Irrigation Co.*, 134 Cal. 553; *Brown v. Ontario Talc Co.*, 81 N. Y. App. Div. 273; *Candler v. Asheville Electric Co.*, 135 N. Car. 12; *Miner v. Nichols*, 24 R. I. 199.

**Where Title to the Bed of a Stream Was in the State** a dam erected by a riparian owner was abated as a nuisance at the suit of the state, regardless of the question whether the stream was or was not in fact navigable at the time of the suit. *People v. Page*, 39 N. Y. App. Div. 110.

**Compelling Drainage to Facilitate Public Work.** — In *East Montpelier v. Wheelock*, 70 Vt. 391, it was held that a town could, by injunction, compel the owner of a dam to let the water out while a bridge was being built.

**When Injunction Refused.** — In *Coleman v. Le Franc*, 137 Cal. 214, an injunction at the suit of a riparian owner against one who maintained a dam further up the stream was refused on the ground that since riparian owners are entitled to a reasonable use of the stream, an action for an adjustment of such use would be the proper remedy.

So an injunction was denied, and the complainant was left to his remedy at law, where the questions involved were the liability of the defendants and the extent of the injury sustained by the complainant, and the court doubted its jurisdiction to assess the damages. *Saunders v. William Richards Co.*, 2 N. Bruns. Eq. 303.

**No Injunction Where Possibility of Injury Remote.** — Where the defendant built a dam eight feet high and it was shown that no damage would result to the plaintiff unless it was seventy feet high, the court refused to enjoin the maintenance of the dam. *Blair v. Boswell*, 37 Oregon 168.

**Contract for Indemnity of Landowner — Construction.** — Where a company engaged in the construction of a dam entered into a contract with an adjoining landowner, providing that the company should be responsible for and pay all damages caused by flooding the landowner's land, as well as for all other damages caused to him during or by reason of the construction of the dam, it was held that the landowner was entitled to recover only such damages as he might suffer from time to time, and that he was not entitled to compel the construction of protective works to prevent further flooding. *Chambly Mfg. Co. v. Willet*, 34 Can. Sup. Ct. 502.

**2. Abatement by Injured Party.** — *People v. Pelton*, 36 N. Y. App. Div. 450, *affirmed* 159 N. Y. 537. See also *Turner v. Locy*, 37 Oregon 158.

**721.** 3. Person Injured by Dam May Recover Damages. — *Ennis v. Gilder*, (Tex. Civ. App. 1903) 74 S. W. Rep. 585; *Saunders v. William Richards Co.*, 2 N. Bruns. Eq. 303.

**If Damages Not Collected, Dam May Be Abated.** — See *Candler v. Asheville Electric Co.*, 135 N. Car. 12.

**722.** 7. When Nominal Damages May Be Recovered. — *Chaffin v. Fries Mfg., etc., Co.*, 135 N. Car. 95.

**723.** 1. Measure of Damages. — *Rourke v. Central Massachusetts Electric Co.*, 177 Mass. 46; *Hall v. State*, 72 N. Y. App. Div. 360.

**Speculation Profits are Not Recoverable**, but reasonably certain profits may be taken into consideration. *National Fibre Board Co. v. Lewiston, etc., Electric Light Co.*, 95 Me. 318.

**Damage from Use of Flash Boards.** — When a millowner has the right to use flash boards to a certain extent and uses them to a greater extent, he is liable for flooding a mill above only so far as the injury was caused by the illegal use of the flash boards. *National Fibre Board Co. v. Lewiston, etc., Electric Light Co.*, 95 Me. 318.

**Rental Value** is one important consideration in the assessment of damages. *St. Louis Trust Co. v. Bambrick*, 149 Mo. 560.

**Measure of Damages Is Depreciation in Market Value.** — *Illinois Cent. R. Co. v. Lockard*, 112 Ill. App. 423.

**725. 2. Of Dam Owner — *b.* DAMAGES.** — See note 2.

**DANGER — DANGEROUS.** — See note 5.

**Difference Between Value of Property, Before and After Injury.** — *Ennis v. Gilder*, (Tex. Civ. App. 1903) 74 S. W. Rep. 585.

**725. 2. Action for Damages.** — *Roy v. Fraser*, 36 N. Bruns. 113.

**5. Dangerous Place — City Streets.** — *Fox v. Chelsea*, 171 Mass. 297.

## DATE.

**727. I. DEFINITION.** — See note 1.

**728. II. NOT NECESSARY TO VALIDITY OF INSTRUMENTS — 1. In General.** — See note 1.

**2. Deeds.** — See note 2.

**3. Bills, Notes, and Checks.** — See note 5.

**III. ALTERATION OF DATE — Commercial Paper.** — See note 8.

**729. IV. EVIDENCE — 1. Presumptions as to Date — *a.* IN GENERAL.** — See note 3.

**730. *b.* DEEDS.** — See note 1.

**Acknowledgment Contemporaneous with Date.** — See note 2.

**Where Acknowledgment Subsequent.** — See notes 3, 4.

**731. *c.* BILLS, NOTES, AND CHECKS.** — See note 4.

**733. 3. Presumptions Not Conclusive — Parol Evidence — *a.* IN GENERAL.** — See notes 1, 2.

***b.* DEEDS.** — See note 5.

**727. 1. Date of Issue** when applied to notes, bonds, etc., of a series, usually means the arbitrary date fixed as the beginning of the term for which they are to run, without reference to the precise time when convenience or the state of the market may permit of their sale or delivery. *Gage v. McCord*, 5 Ariz. 227.

**728. 1. Instrument Valid Without Date.** — *Byers v. Gilmore*, 10 Colo. App. 79; *W. W. Kimball Co. v. Tasca*, 26 R. I. 565.

**2. Deeds Valid Without Date.** — See *Brice v. Sheffield*, 118 Ga. 128. And see the title DEEDS.

**5. Date Not Essential to Validity of Bills, Notes, and Checks.** — *Breckenridge First State Sav. Bank v. Webster*, 121 Mich. 149. And see the title BILLS OF EXCHANGE AND PROMISSORY NOTES.

**8. Alteration Extinguishes Liability.** — *U. S. Glass Co. v. Mathews*, (C. C. A.) 89 Fed. Rep. 828; *Brannum Lumber Co. v. Pickard*, 33 Ind. App. 484; *McCormick Harvesting Mach. Co. v. Lauber*, 7 Kan. App. 730; *Tranter v. Hibbard*, 108 Ky. 265. See also *Armstrong v. Penn*, 105 Ga. 229. And see the title ALTERATION OF INSTRUMENTS.

**Changing, Erasing, or Inserting Date.** — *Breckenridge First State Sav. Bank v. Webster*, 121 Mich. 149; *Lance v. Calvert*, 21 Pa. Super. Ct. 102.

**729. 3. Presumption Is that Documents Were Made on Day of Date.** — *Leonard v. Fleming*, (N. Dak. 1905) 102 N. W. Rep. 308. See also the title PRESUMPTION.

**730. 1. Presumption Arising from Date of Deed.** — *Williams v. Armstrong*, 130 Ala. 389; *McDougall v. McDougall*, 135 Cal. 316; *Buker*

*v. Carroll*, 1 Penn. (Del.) 559; *McBrayer v. Walker*, 122 Ga. 245; *Dorough v. Equitable Mortg. Co.*, 118 Ga. 178; *Swedish-American Nat. Bank v. Germania Bank*, 76 Minn. 409; *Atlantic City v. New Auditorium Pier Co.*, 63 N. J. Eq. 644; *Ewers v. Smith*, 98 N. Y. App. Div. 289; *Biglow v. Biglow*, 39 N. Y. App. Div. 103; *Leonard v. Fleming*, (N. Dak. 1905) 102 N. W. Rep. 308; *Crossen v. Oliver*, 37 Oregon 514. See also the title DEEDS.

**In California.** — *McDougall v. McDougall*, 135 Cal. 316.

**2. Crossen v. Oliver, 37 Oregon 514.**

**3. Subsequent Acknowledgment.** — *Ewers v. Smith*, 98 N. Y. App. Div. 289; *Biglow v. Biglow*, 39 N. Y. App. Div. 103.

**4. Delivery Presumed as at Date of Acknowledgment.** — *Fitzpatrick v. Brigman*, 130 Ala. 450; *Whiteside v. Watkins*, (Tenn. Ch. 1900) 58 S. W. Rep. 1107.

**731. 4. When Indorsement Is Without Date.** — *Murto v. Lemon*, 19 Colo. App. 314. See also the titles BILLS OF EXCHANGE AND PROMISSORY NOTES; CHECKS.

**733. 1. Parol Evidence Admissible to Contradict Date.** — *District of Columbia v. Camden Iron Works*, 181 U. S. 453; *Buker v. Carroll*, 1 Penn. (Del.) 559; *Lambe v. Manning*, 171 Ill. 612. See also the titles BILLS OF EXCHANGE AND PROMISSORY NOTES; DEEDS; PAROL EVIDENCE; SUNDAYS AND HOLIDAYS.

**2. Written Contracts.** — *District of Columbia v. Camden Iron Works*, 181 U. S. 453.

**5. True Date of Deed Proved Aliunde.** — *Fitzpatrick v. Brigman*, 130 Ala. 450; *Buker v. Carroll*, 1 Penn. (Del.) 559; *Hinson v. Fors-*

**734.** *c.* **BILLS AND NOTES.** — See note 3.

**4. Judicial Notice of Certain Dates.** — See note 6.

dick, (Miss. 1899) 25 So. Rep. 353. See also the title **DEEDS**.

**734.** **3. Illustrations.** — Swedish American Nat. Bank *v.* Germania Bank, 76 Minn. 411, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 734. See also the title **BILLS OF EXCHANGE AND PROMISSORY NOTES**.

**6. Judicial Notice of Date Falling on Sunday.** — Dorough *v.* Equitable Mortg. Co., 118 Ga. 178;

State *v.* Michel, 52 La. Ann. 936, 78 Am. St. Rep. 364; Jordan *v.* Chicago, etc., R. Co., 92 Mo. App. 84; Ryer *v.* Prudential Ins. Co., 85 N. Y. App. Div. 7; Warren *v.* Fountain Square Theater Co., 5 Ohio Dec. 559.

**Judicial Notice Taken of Time.** — Dorough *v.* Equitable Mortg. Co., 118 Ga. 178. See also the title **JUDICIAL NOTICE**.

## DAY.

**737.** **I. DEFINITION.** — See note 1.

**738.** See note 1.

**II. DIES NON JURIDICUS.** — See note 3.

**III. FRACTIONS OF A DAY — 1. General Rule.** — See note 4.

**739.** **2. Specific Applications of the Rule — a. JUDICIAL PROCEEDINGS.** — See note 1.

**741.** *c.* **AGE.** — See note 1.

*d.* **PAYMENT OF DEBTS.** — See notes 2, 3, 4.

**742.** **3. Rule Not Absolute — Exceptions.** — See note 1.

**743.** **Time When Liens Attached or Conveyances Were Executed May Be Shown.** — See note 4.

**745.** **IV. PARTICULAR PERIODS OF TIME CONSIDERED AS ONE DAY — 1. Term of Court.** — See notes 2, 3.

**737.** **1. In the Construction of Statutes.** — The Cervantes, 135 Fed. Rep. 573, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 737; U. S. *v.* Garlinger, 169 U. S. 316; Sexton *v.* Goodwine, 33 Ind. App. 329; Cheek *v.* Preston, 34 Ind. App. 343; State *v.* Michel, 52 La. Ann. 936, 78 Am. St. Rep. 364; People *v.* West Turin, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 470.

**738.** **1. Distinction Between Artificial and Natural Days.** — State *v.* Michel, 52 La. Ann. 936, 78 Am. St. Rep. 364.

**3. Dies Non Juridicus.** — State *v.* Michel, 52 La. Ann. 936, 78 Am. St. Rep. 364; Von De Place *v.* Weller, 64 N. J. L. 155.

**4. The Law Will Not Recognize Fractions of a Day.** — Rose *v.* State, 107 Ga. 697; Sexton *v.* Goodwine, 33 Ind. App. 329; Erwin *v.* Benton, (Ky. 1905) 87 S. W. Rep. 291; Irwin *v.* Irwin, 105 Ky. 632; Board of Councilmen *v.* Farmers' Bank, 105 Ky. 811; State *v.* Michel, 52 La. Ann. 936, 78 Am. St. Rep. 364; State *v.* Stuckey, 78 Mo. App. 533; Aultman, etc., Co. *v.* Syme, 163 N. Y. 54, 79 Am. St. Rep. 565; Tilton *v.* Sterling Coal, etc., Co., 28 Utah 173. See also Kansas City *v.* Gibson, 66 Kan. 501; Matthews *v.* Arthur, 61 Kan. 455.

**739.** **1. In Judicial Proceedings Fractions of a Day Are Not Regarded.** — *Ex p.* Massie, 131 Ala. 62, 90 Am. St. Rep. 20, quoting 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 739; Maxwell *v.* Jacksonville Loan, etc., Co., (Fla. 1903) 34 So. Rep. 255; Sexton *v.* Goodwine, 33 Ind. App. 329; Tilton *v.* Sterling Coal, etc., Co., 28 Utah 173.

**Appeals.** — Bigham *v.* Holliday, 52 S. Car. 528.

**Service of Process, Notices, or Pleadings.** — Bigham *v.* Holliday, 52 S. Car. 528; Martin *v.* Sunset Telephone, etc., Co., 18 Wash. 260.

**741.** **1. Day on Which Voter Reaches Maturity** — In Erwin *v.* Benton, (Ky. 1905) 87 S. W. Rep. 291, it was held that as the law notes no fractions of a day, a man is twenty-one years old and eligible to vote on the day preceding his twenty-first birthday.

**2. An Option to "close by 8th February,"** included February 8th till midnight. Blalock *v.* Clark, 133 N. Car. 306.

**3. In the Payment of Rent.** — Cheek *v.* Preston, 34 Ind. App. 343.

**4. Bills and Notes Payable Any Time on the Last Day of Grace.** — Joergenson *v.* Joergenson, 28 Wash. 477, 92 Am. St. Rep. 888.

**742.** **1. Fractions of a Day Inquired into to Reconcile Conflicting Rights.** — *Ex p.* Massie, 131 Ala. 62, 90 Am. St. Rep. 20, quoting 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 742; Sexton *v.* Goodwine, 33 Ind. App. 329.

**743.** **4. Precise Time of Judgment May Be Shown.** — *Ex p.* Massie, 131 Ala. 62, 90 Am. St. Rep. 20, following Patterson's Appeal, 96 Pa. St. 93.

**745.** **2. Term of Court Sometimes Considered as One Day.** — Coleman *v.* Keenan, 76 Ill. App. 315.

**3. The Fiction Generally Abolished in the United States.** — Coleman *v.* Keenan, 76 Ill. App. 315.



# DE FACTO CORPORATIONS.

BY R. N. CHAFFEE.

**747. I. DEFINITION.** — See note 1.

**748. Effect of Dissolution on Prior Acts.** — See note 2.

**II. THE REQUISITE ELEMENTS** — 1. Generally. — See note 3.

**750. 2. A Valid Law Essential under Which Organization Possible.** — See note 1.

**747. 1. Other Definitions.** — "A *de facto* corporation is one where the proceedings for its organization are irregular or defective, when, by regularity of proceedings to incorporate, it might be one *de jure*." *Guthrie v. Wylie*, 6 Okla. 61, *per Tarsney, J.*

**748. 2.** *Miller v. Perris Irrigation Dist.*, 99 Fed. Rep. 150, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 748.

**Proof of De Facto Corporate Existence.** — The certificate of the secretary of state and a certified copy of the original record with proof of actual user and carrying on of business as a corporation constitute a *prima facie* case of corporate existence *de facto*. *Concord Apartment House Co. v. Alaska Refrigerator Co.*, 78 Ill. App. 682. See also *U. S. Mortgage Co. v. McClure*, 42 Oregon 190.

Introduction in evidence of a certificate of incorporation in a foreign state, with proof of the statute of such state declaring that such certificate shall be taken as evidence of corporate existence, is sufficient to establish at least *de facto* corporate existence. *Petty v. Hayden*, 115 Iowa 212.

Oral testimony that the corporation organized and did business as such is admissible without producing the corporate records or accounting for their loss. *Johnson v. Okerstrom*, 70 Minn. 303.

**3. The Elements of a Corporation De Facto** — *United States*. — *Tulare Irrigation Dist. v. Shepard*, 185 U. S. 1.

*Delaware*. — *Brady v. Delaware Mut. L. Ins. Co.*, 2 Penn. (Del.) 237.

*Illinois*. — *People v. Dyer*, 205 Ill. 578, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 748; *Edwards v. Cleveland Dryer Co.*, 83 Ill. App. 643; *The Joliet v. Frances*, 85 Ill. App. 243; *Stanwood v. Sterling Metal Co.*, 107 Ill. App. 569.

*Indiana*. — *Indiana Bond Co. v. Ogle*, 22 Ind. App. 593; *Doty v. Patterson*, 155 Ind. 60; *Farmers Ins. Co. v. Borders*, 26 Ind. App. 491; *Huntington Mfg. Co. v. Schofield*, 28 Ind. App. 95.

*Minnesota*. — *Johnson v. Okerstrom*, 70 Minn. 303.

*New Jersey*. — *Keyes v. Smith*, 67 N. J. L. 190, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 748.

*Ohio*. — *Shawnee Commercial, etc., Bank Co. v. Miller*, 24 Ohio Cir. Ct. 198.

*Oklahoma*. — *Guthrie v. Wylie*, 6 Okla. 61.

*Oregon*. — *Washington Invest. Assoc. v. Stanley*, 38 Oregon 319, 84 Am. St. Rep. 793.

*South Dakota*. — *Mason v. Stevens*, 16 S. Dak. 320; *State v. Stevens*, 16 S. Dak. 309.

*Wisconsin*. — *Franke v. Mann*, 106 Wis. 118; *Gilkey v. How*, 105 Wis. 41; *Gilman v. Druse*, 111 Wis. 400.

"When persons assume to act as a body, and are permitted by acquiescence of the public and the state to act as if they were legally a particular kind of corporation, for the organization, existence, and continuance of which there is express recognition by general law, such body of persons is a corporation *de facto*, although the particular persons thus exercising the franchise of being a corporation may have been ineligible and incapacitated by the law to do so." *Continental Trust Co. v. Toledo, etc., R. Co.*, 82 Fed. Rep. 642.

"If an association is in the exercise and use of corporate franchises, under color of a legal organization in pursuance of the general law, it is a corporation *de facto* as to third persons dealing with it." *Gunderson v. Illinois Trust, etc., Bank*, 199 Ill. 422.

**Existence of Elements** — **Illustrations.** — Where the only defect in creating a corporation is the failure of the probate judge to record the certificate reciting the requisite subscription to the capital stock and the election of officers and directors and to issue a certificate of incorporation, a corporation *de facto* is formed. *Owensboro Wagon Co. v. Bliss*, 132 Ala. 253, 90 Am. St. Rep. 907.

Where an attempt was made to organize a corporation, articles of association were prepared, and the incorporators assumed to do business as a corporation, a corporation *de facto* was created. *People v. Carter*, 122 Mich. 668.

Where in good faith the original articles of incorporation, instead of a verified copy thereof, were recorded, meetings were held, officers were elected, and business was transacted as a corporation, a corporation *de facto* was created. *Slocum v. Head*, 105 Wis. 431.

**750. 1. Necessity of Law Permitting Organization.** — *Toledo, etc., R. Co. v. Continental Trust Co.*, 95 Fed. Rep. 497, 36 C. C. A. 155; *Davis v. Stevens*, 104 Fed. Rep. 235; *Indiana Bond Co. v. Ogle*, 22 Ind. App. 593; *Farmers Ins. Co. v. Borders*, 26 Ind. App. 491; *Guthrie v. Wylie*, 6 Okla. 61; *Foster v. Hare*, 26 Tex. Civ. App. 177; *Gilkey v. How*, 105 Wis. 41.

**In Absence of Law Permitting Corporation There Is No Estoppel.** — *Indiana Bond Co. v. Ogle*, 22 Ind. App. 593; *Farmers Ins. Co. v. Borders*, 26 Ind. App. 491.

**751.** Cases Contra. — See note 1.

**752.** 3. A Bona Fide Attempt to Organize. — See note 1.

**753.** Filing the Statutory Certificate. — See note 1.

4. Unequivocal Acts of User. — See note 2.

**754.** III. INCIDENTS OF A DE FACTO CORPORATION — 1. Its Existence Cannot Be Attacked Collaterally — *a.* GENERALLY. — See note 2.

**756.** Applications of Rule. — See note 2.

**757.** See note 1.

*b.* FORFEITURE CANNOT BE DECLARED COLLATERALLY. — See

note 3.

**759.** 2. Legislative Recognition Cures Defects. — See note 1.

**Collateral Attack.** — In the absence of a law authorizing the corporation, its corporate existence may be attacked collaterally. *Davis v. Stevens*, 104 Fed. Rep. 235.

**751. 1. Corporations Formed under Unconstitutional or Invalid Laws Recognized.** — *Speer v. Kearney County*, 88 Fed. Rep. 749, 60 U. S. App. 38; *Atty.-Gen. v. Dover*, 62 N. J. L. 138 (municipal corporation). See also *Richards v. Minnesota Sav. Bank*, 75 Minn. 196.

**752. 1. Colorable Compliance Necessary.** — *Johnson v. Okerstrom*, 70 Minn. 303; *Marsh v. Mathias*, 19 Utah 350.

**Maryland — Bonus Tax.** — A corporation cannot exercise corporate powers in Maryland until it has paid the bonus tax required by statute; and a person sued by a corporation may set up that it has not paid such tax, and therefore has no right to sue. *Maryland Tube, etc., Works v. West End Imp. Co.*, 87 Md. 207.

**753. 1. Filing Certificate.** — *Lusk v. Riggs*, (Neb. 1904) 97 N. W. Rep. 1033.

**Cases Contra.** — See *The Joliet v. Frances*, 85 Ill. App. 243.

**2. Acts of User.** — *Stanwood v. Sterling Metal Co.*, 107 Ill. App. 569, quoting 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 753.

**754. 2. Cannot Be Collaterally Attacked — United States.** — *Speer v. Kearney County*, 88 Fed. Rep. 749, 60 U. S. App. 38; *Ryland v. Hollinger*, (C. C. A.) 117 Fed. Rep. 216; *Armour v. E. Bements' Sons*, (C. C. A.) 123 Fed. Rep. 56; *Old Colony Trust Co. v. Wichita*, 123 Fed. Rep. 762, modified (C. C. A.) 132 Fed. Rep. 641.

*Alabama.* — *Harris v. Gateway Land Co.*, 128 Ala. 652.

*California.* — *San Diego Gas Co. v. Frame*, 137 Cal. 441.

*Colorado.* — *Union Pac. R. Co. v. Colorado Postal Tel.-Cable Co.*, 30 Colo. 133, 97 Am. St. Rep. 106.

*Delaware.* — *Wilmington v. Addicks*, 7 Del. Ch. 56.

*Illinois.* — *People v. Dyer*, 205 Ill. 578; *Stanwood v. Sterling Metal Co.*, 107 Ill. App. 569.

*Indiana.* — *Doty v. Patterson*, 155 Ind. 64, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 754; *Indiana Bond Co. v. Ogle*, 22 Ind. App. 593; *Farmers Ins. Co. v. Borders*, 26 Ind. App. 491; *Marion Bond Co. v. Mexican Coffee, etc.*, Co., 160 Ind. 558.

*Maine.* — *Taylor v. Portsmouth, etc.*, St. R. Co., 91 Me. 103, 64 Am. St. Rep. 216.

*Michigan.* — *Kalamazoo v. Kalamazoo Heat, etc.*, Co., 124 Mich. 74; *Wyandotte Electric Light Co. v. Wyandotte*, 124 Mich. 43.

*Nebraska.* — *Otoe County Fair, etc., Assoc. v. Doman*, (Neb. 1901) 95 N. W. Rep. 327.

*New Jersey.* — *Keyes v. Smith*, 67 N. J. L. 190, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 754.

*Oregon.* — *Washington Invest. Assoc. v. Stanley*, 38 Oregon 319, 84 Am. St. Rep. 793.

*Pennsylvania.* — *Pinkerton v. Columbia, etc., Electric R. Co.*, 16 Lanc. L. Rev. 117; *Goodbread v. Philadelphia, etc., Turnpike Co.*, 13 Pa. Super. Ct. 82; *Com. v. Philadelphia County*, 193 Pa. St. 236; *Pinkerton v. Pennsylvania Traction Co.*, 193 Pa. St. 229; *Olyphant Sewage-Drainage Co. v. Olyphant*, 196 Pa. St. 553.

*Utah.* — *Marsh v. Mathias*, 19 Utah 350; *Postal Tel. Cable Co. v. Oregon Short-Line R. Co.*, 23 Utah 474, 90 Am. St. Rep. 705.

*Wisconsin.* — *Gilkey v. How*, 105 Wis. 41.

*Canada.* — *Common v. McArthur*, 29 Can. Sup. Ct. 239, reversing 8 Quebec Q. B. 128.

**Public Corporations and Quasi-Corporations.** — *People v. Linda Vista Irrigation Dist.*, 128 Cal. 477.

**Where there Has Been No Bona Fide Attempt to Organize**, the corporate existence may be attacked collaterally by a person who did not contract with the corporation as such. *Christian, etc., Grocery Co. v. Fruitdale Lumber Co.*, 121 Ala. 340.

**Requisites to Existence of Corporation De Facto Must Be Shown.** — "While it is a settled rule in this state that the legal existence of a corporation *de facto* cannot be questioned collaterally, still the existence of the requisites necessary to constitute a corporation *de facto* must be shown." *Stanwood v. Sterling Metal Co.*, 107 Ill. App. 569, applying the rule where there was no actual user of the corporate franchise, and therefore one of the essential elements of a corporation *de facto* was lacking.

**756. 2. Actions Brought to Protect Corporate Rights.** — *American Steel, etc., Co. v. Wire Drawers, etc.*, Union, 90 Fed. Rep. 608.

**757. 1. Prosecution for Acts Against Corporation.** — "In a criminal prosecution for embezzlement it is sufficient to show that the property embezzled was the property of a corporation *de facto*." *People v. Carter*, 122 Mich. 668, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 757.

**3. Forfeiture Not to Be Collaterally Declared.** — *San Diego Gas Co. v. Frame*, 137 Cal. 441; *Olyphant Sewage-Drainage Co. v. Olyphant*, 196 Pa. St. 553.

**759. 1. Recognition of Corporation as Existing.** — *Mason v. Stevens*, 16 S. Dak. 320.

**760. 3. Exercise of Extraordinary Statute Powers.** — See notes 2, 3.

**4. Estoppel to Deny Corporate Existence** — *a. BY CONTRACT RELATIONS.* — See note 4.

**763. Relations of De Facto Incorporation and Estoppel.** — See note 3.

**764. b. BY MEMBERSHIP, HOLDING OFFICE, ETC.** — (1) *Generally* — *One Who Has Been a Stockholder.* — See note 1.

**765. Estoppel of Director or Officer.** — See note 1.

**766. (2) In Actions on Subscriptions for Stock.** — See note 1.

**767. Where Suit Brought by Receiver or Assignee of Corporation.** — See note 1.

**768. c. BY DEED.** — See note 2.

**760. 2. Collecting Assessments for Benefits to Lands.** — To the same effect as Reclamation Dist. No. 542 *v. Turner*, 104 Cal. 334, stated in the original note, see *People v. Linda Vista Irrigation Dist.*, 128 Cal. 477.

**3. De Facto Corporation Held Empowered to Bring Eminent Domain Proceeding.** — *Morrison v. Forman*, 177 Ill. 427; *Postal Tel.-Cable Co. v. Oregon Short-Line R. Co.*, 23 Utah 474, 90 Am. St. Rep. 705.

**4. One Who Contracts with Corporation Estopped to Deny Its Existence** — *United States.* — *Louisville Trust Co. v. Louisville R. Co.*, 84 Fed. Rep. 539, 56 U. S. App. 208; *Toledo, etc., R. Co. v. Continental Trust Co.*, 95 Fed. Rep. 497, 36 C. C. A. 155; *Manship v. New South Bldg., etc., Assoc.*, 110 Fed. Rep. 845; *American Alkali Co. v. Campbell*, 113 Fed. Rep. 398; *W. L. Wells Co. v. Avon Mills*, 118 Fed. Rep. 190, *reversed* (C. C. A.) 128 Fed. Rep. 369.

*Alabama.* — *Christian, etc., Grocery Co. v. Fruitdale Lumber Co.*, 121 Ala. 340; *Greenville v. Greenville Water Works Co.*, 125 Ala. 625; *Harris v. Gateway Land Co.*, 128 Ala. 652; *Owensboro Wagon Co. v. Bliss*, 132 Ala. 253, 90 Am. St. Rep. 907.

*California.* — *Weill v. Crittenden*, 139 Cal. 488; *California Cured Fruit Assoc. v. Stelling*, 141 Cal. 713.

*Colorado.* — *Grande Ronde Lumber Co. v. Cotton*, 12 Colo. App. 375; *Cripple Creek First Cong. Church v. Grand Rapids School Furniture Co.*, 15 Colo. App. 46.

*Delaware.* — *Brady v. Delaware Mut. L. Ins. Co.*, 2 Penn. (Del.) 237.

*District of Columbia.* — *Ohio Nat. Bank v. Central Constr. Co.*, 17 App. Cas. (D. C.) 524.

*Illinois.* — *Lincoln Park Chapter No. 177 v. Swatek*, 204 Ill. 228.

*Indiana.* — *Doty v. Patterson*, 155 Ind. 60.

*Maine.* — *Seven Star Grange No. 73 v. Ferguson*, 98 Me. 176.

*Minnesota.* — *Richards v. Minnesota Sav. Bank*, 75 Minn. 196.

*Missouri.* — *West Missouri Land Co. v. Kansas City Suburban Belt R. Co.*, 161 Mo. 595.

*Nebraska.* — *Crete Bldg., etc., Assoc. v. Patz*, (Neb. 1901) 95 N. W. Rep. 793.

*New York.* — *Eagle Sav., etc., Co. v. Samuels*, 43 N. Y. App. Div. 386.

*Oregon.* — *Jones v. Hale*, 32 Oregon 465; *Washington Invest. Assoc. v. Stanley*, 38 Oregon 319, 84 Am. St. Rep. 793.

*Pennsylvania.* — *Hooven Mercantile Co. v. Evans Min. Co.*, 193 Pa. St. 28.

*Tennessee.* — *Tennessee Automatic Lighting Co. v. Massey*, (Tenn. Ch. 1899) 56 S. W.

Rep. 35; *Shoun v. Armstrong*, (Tenn. Ch. 1900) 59 S. W. Rep. 790.

*Utah.* — *Jackson v. Crown Point Min. Co.*, 21 Utah 1, 81 Am. St. Rep. 651.

*Washington.* — *Carroll v. Pacific Nat. Bank*, 19 Wash. 639.

**Cases Wherein Doctrine of Estoppel Not Applied.** — Where a party contracts with another, but not as a corporation, he is not as to such contract estopped to deny the corporate existence of such other party. *Christian, etc., Grocery Co. v. Fruitdale Lumber Co.*, 121 Ala. 340.

**763. 3. Operation of De Facto Incorporation and of Estoppel Apparently Not Distinguished.** — *Holt v. Tennent-Stribling Shoe Co.*, 69 Ill. App. 332.

**764. 1. Member of Corporation May Not Deny Its Existence** — *United States.* — *Toledo, etc., R. Co. v. Continental Trust Co.*, 95 Fed. Rep. 497, 36 C. C. A. 155; *Manship v. New South Bldg., etc., Assoc.*, 110 Fed. Rep. 845; *Deitch v. Staub*, (C. C. A.) 115 Fed. Rep. 309.

*Illinois.* — *Curtis v. Tracy*, 169 Ill. 233, 61 Am. St. Rep. 168; *Lincoln Park Chapter No. 177 v. Swatek*, 204 Ill. 228.

*Iowa.* — *Seaton v. Grimm*, 110 Iowa 145.

*Louisiana.* — *Anderson v. Thompson*, 51 La. Ann. 727.

*New York.* — *Regener v. Hubbard*, (Supm. Ct. Tr. T.) 56 N. Y. Supp. 173; *Geneva Mineral Spring Co. v. Coursey*, 45 N. Y. App. Div. 268.

*Utah.* — *Marsh v. Mathias*, 19 Utah 350.

*Wisconsin.* — *Gilman v. Druse*, 111 Wis. 400.

**765. 1. One Who Has Been Corporate Officer Estopped.** — *Curtis v. Tracy*, 169 Ill. 233, 61 Am. St. Rep. 168; *Gay v. Kohlsaat*, 80 Ill. App. 178; *The Joliet v. Frances*, 85 Ill. App. 243; *Seven Star Grange No. 73 v. Ferguson*, 98 Me. 176.

**766. 1. Estoppel in Suit on Stock Subscription.** — *American Alkali Co. v. Campbell*, 113 Fed. Rep. 398; *Torras v. Raeburn*, 108 Ga. 345; *Gardner v. Minneapolis, etc., R. Co.*, 73 Minn. 517; *Davis v. Watkins*, 56 Neb. 288; *United Growers Co. v. Eisner*, 22 N. Y. App. Div. 1; *Rockland, etc., Town F. Ins. Co. v. Bussey*, 48 N. Y. App. Div. 359; *Pennsylvania Milk Producers' Assoc. v. Honeybrook First Nat. Bank*, 20 Pa. Co. Ct. 540; *Victoria-Montreal F. Ins. Co. v. O'Neil*, 5 Quebec Pr. 4, 451. See also *Common v. McArthur*, 29 Can. Sup. Ct. 239, *reversing* 8 Quebec Q. B. 128.

**767. 1. Suit on Stock Subscription by Receiver or Assignee.** — *Fish v. Smith*, 73 Conn. 377, 84 Am. St. Rep. 161.

**768. 2. Estoppel by Deed to or from Corporation.** — *Calkins v. Bump*, 120 Mich. 335; *Otoe County Fair, etc., Assoc. v. Doman*, (Neb. 1901)



**769. d. BY OTHER FACTS. — See note 1.****e. ESTOPPEL OF THE CORPORATION ITSELF. — See note 8.**

95 N. W. Rep. 327; Eagle Sav., etc., Co. v. Samuels, 43 N. Y. App. Div. 386; Jones v. Hale, 32 Oregon 465.

**A Borrowing Member of a Building Association** who has executed his note and mortgage to secure a loan and has assumed the note and mortgage of another is estopped, in a suit by the receiver of the association to foreclose such mortgages, to deny the validity of the incorporation. Deitch v. Staub, (C. C. A.) 115 Fed. Rep. 309.

**769. 1. Suing Corporation as Such.** — Armour v. E. Bemets' Sons, (C. C. A.) 123 Fed. Rep. 56; Etowah Milling Co. v. Crenshaw, 116 Ga. 406; Shoun v. Armstrong, (Tenn. Ch. 1900) 59 S. W. Rep. 790; Clausen v. Head, 110 Wis. 405, 84 Am. St. Rep. 933.

**One Who Claims to Be a General Creditor of a Corporation** is estopped to assert its unauthorized existence. Louisville Trust Co. v. Louisville, etc., R. Co., 84 Fed. Rep. 539, 56 U. S. App. 208; Continental Trust Co. v. Toledo, etc., R. Co., 82 Fed. Rep. 642.

**8. When Corporation Estopped.** — Toledo, etc., R. Co. v. Continental Trust Co., 95 Fed. Rep. 497, 36 C. C. A. 155; Miller v. Perris Irrigation Dist., 99 Fed. Rep. 143; Brady v. Delaware Mut. L. Ins. Co., 2 Penn. (Del.) 237; Gay v. Kohlsaat, 80 Ill. App. 178; Crystal White Soap Co. v. Roseboom, 91 Ill. App. 551; Doty v. Patterson, 155 Ind. 60; Carroll v. Pacific Nat. Bank, 19 Wash. 639.

## DE FACTO OFFICERS.

By HERBERT GANNAWAY.

**773. I. DE FACTO OFFICERS OF PRIVATE CORPORATIONS — 1. Who Are —**

**a. DEFINITION.** — See notes 1, 2.

**774.** See note 2.

**b. WHAT MAY OR MAY NOT GIVE COLOR OF TITLE — (2) Acceptance of Office and Acting as an Officer.** — See note 4.

(3) *Possession of the Corporation's Property.* — See note 5.

**775. (4) Holding Over.** — See note 1.

(6) *Unconstitutional Law or Void Resolution of Corporation.* — See note 3.

**c. INELIGIBLE PERSONS — (2) Stock Qualification.** — See note 5.

**776. d. PERSONS IRREGULARLY CHOSEN — (5) Election by Less than Quorum of Directors.** — See note 5.

(6) *Failure to File Certificate of Election.* — See note 6.

**777. 2. Rights and Powers — a. MAY CONDUCT BUSINESS.** — See note 2.

**778. 3. Liabilities — a. PERSONAL LIABILITY.** — See note 3.

**4. Validity of Acts — a. GENERAL RULE.** — See note 5.

**780.** See notes 1, 2.

**773. 1. Definition.** — Baggot v. Turner, 21 Wash. 339.

**2. Apparent Right to Office.** — See Hudson v. J. B. Parker Mach. Co., 173 Mass. 242.

**774. 2. Persons Irregularly or Illegally Chosen.** — Barrell v. Lake View Land Co., 122 Cal. 129.

**4. Acceptance of Office and Acting as Officer Necessary.** — Hudson v. J. B. Parker Mach. Co., 173 Mass. 242.

**5. Necessity for Possession of Corporate Property.** — Hudson v. J. B. Parker Mach. Co., 173 Mass. 242.

**775. 1. Officer Holding over Regarded as Officer de Facto.** — Hudson v. J. B. Parker Mach. Co., 173 Mass. 242.

**3. Unconstitutional Law or Void Resolution.** — Watson v. McGrath, 111 La. 1100, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 775.

**5. Stock Qualification.** — Hamilton Trust Co.

v. Clemes, 17 N. Y. App. Div. 152, affirmed 163 N. Y. 423.

**776. 5. Election by Less than Quorum of Directors.** — Baggot v. Turner, 21 Wash. 339.

**6. Failure to File Certificate.** — See Schwab v. Frisco Min., etc., Co., 21 Utah 258.

**777. 2. Right to Conduct Business.** — Barrell v. Lake View Land Co., 122 Cal. 129.

**778. 3. Personal Liability.** — Hudson v. J. B. Parker Mach. Co., 173 Mass. 242; Heinze v. South Green Bay Land, etc., Co., 109 Wis. 99.

**5. Acts Binding on Corporation.** — Barrell v. Lake View Land Co., 122 Cal. 129; Hudson v. J. B. Parker Mach. Co., 173 Mass. 242; Hamilton Trust Co. v. Clemes, 17 N. Y. App. Div. 152, affirmed 163 N. Y. 423; Baggot v. Turner, 21 Wash. 339.

**780. 1. Lack of Title Not Available as a Defense by Corporation.** — Barrell v. Lake View Land Co., 122 Cal. 129; Hamilton Trust Co. v.

**781. II. DE FACTO PUBLIC OFFICERS — 1. Who Are — a. DEFINITIONS —**(1) *Lord Ellenborough's Definition.* — See note 5.(2) *Chief Justice Butler's Definition.* — See note 6.**782.** See note 3.**783.** (3) *Other Definitions.* — See note 2.**784. b. PERSONS ACTING WITHOUT APPOINTMENT OR ELECTION —**(1) *There Must Be Appearance of Rightful Authority.* — See note 1.(2) *Reputation of Being Officer.* — See note 2.*How Such Reputation May Be Acquired.* — See note 3.*A Deputy Cannot Become the Principal Officer De Facto.* — See note 6.**785.** (3) *Acquiescence — In General.* — See note 2.**786.** (4) *Possession of Office Necessary.* — See note 2.**c. PERSONS NOT PROPERLY QUALIFIED — (1) Irregularities in Form of Qualification.** — See note 4.(2) *Irregularities Concerning Oath of Office.* — See notes 5, 12.**787.** (3) *Irregularities Concerning Official Bond.* — See notes 4, 5.(4) *Failure to File Appointment, Commission, or Acceptance of Office.* — See note 6.

Clemes, 17 N. Y. App. Div. 152, *affirmed* 163 N. Y. 423; *Heinze v. South Green Bay Land, etc., Co.*, 109 Wis. 99.

**780.** 2. *Stockholders.* — In *Schwab v. Frisco Min., etc., Co.*, 21 Utah 258, it was held that where an assessment by directors duly elected and qualified is essential to create a liability on the stockholders, a stockholder may contest the validity of the acts of *de facto* directors in selling his stock for a delinquent assessment if such stockholder is not chargeable with acquiescence in the acts of the *de facto* officers and the rights of third parties do not intervene.

**781.** 5. *The Definition in the Text Has Been Cited with Approval.* — *Fulton v. Andrea*, 70 Minn. 445; *Oliver v. Jersey City*, 63 N. J. L. 634, 76 Am. St. Rep. 228; *Jones v. Hunlock*, 9 Kulp (Pa.) 328; *Brown v. State*, 42 Tex. Crim. 417, 96 Am. St. Rep. 806, *citing* 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 781 *et seq.*

6. *Chief Justice Butler's Definition* was quoted and approved in *Vanderberg v. Connolly*, 18 Utah 124, *citing* 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 781, and holding that one who had been appointed justice of the peace and had qualified and acted as justice was a *de facto* officer, notwithstanding the statute under which he was appointed might be unconstitutional.

**782.** 3. *Failure to Qualify or Defect in Qualification.* — See *Brown v. State*, 43 Tex. Crim. 414, *citing* 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 782.

**783.** 2. *For Other Definitions* see *Herkimer v. Keeler*, 109 Iowa 680; *Holt County v. Scott*, 53 Neb. 176; *Dredla v. Baache*, 60 Neb. 655; *Morford v. Territory*, 10 Okla. 741.

**784.** 1. *There Must Be Appearance of Rightful Authority.* — *Olson v. Trego County*, 8 Kan. App. 414; *Nall v. Coulter*, (Ky. 1904) 78 S. W. Rep. 110, *quoting* 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 783; *Dredla v. Baache*, 60 Neb. 655; *Haskell v. Dutton*, 65 Neb. 274; *Oliver v. Jersey City*, 63 N. J. L. 634, 76 Am. St. Rep. 228; *Matter of Collins*, 75 N. Y. App. Div. 87; *People v. Dike*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 401, *reversed* 71 N. Y. App.

Div. 622; *Cleveland v. McCanna*, 7 N. Dak. 455, 66 Am. St. Rep. 670.

2. *Must Have Reputation of Being Officer.* — *Herkimer v. Keeler*, 109 Iowa 680; *Brown v. State*, 43 Tex. Crim. 411.

3. *One May Become an Officer De Facto by Acting as Such.* — *Mockett v. State*, (Neb. 1903) 97 N. W. Rep. 588.

6. *Deputy Cannot Acquire Reputation of Being Principal.* — Where a deputy treasurer was required by law in case of vacancy to have charge of the office and act as treasurer until installation of new treasurer, he was held to become treasurer *de facto*. *State v. Ellis*, 111 La. 95; *Watson v. McGrath*, 111 La. 1100.

**785.** 2. *Acquiescence.* — *Vanderberg v. Connolly*, 18 Utah 112.

**786.** 2. *Possession of Office Necessary.* — *Herkimer v. Keeler*, 109 Iowa 680; *Fulton v. Andrea*, 70 Minn. 445; *Dredla v. Baache*, 60 Neb. 655; *Herring v. Pugh*, 126 N. Car. 856, *citing* 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 786.

4. *Irregular Qualification.* — See *Nason v. Fowler*, 70 N. H. 291.

5. *Oath Administered by Unauthorized Person.* — *State v. Powell*, 101 Iowa 382.

12. *Failure to Take Any Oath Whatever.* — *Akers v. Kolkmeier*, 97 Mo. App. 520; *Rosell v. Board of Education*, 68 N. J. L. 498; *Rosell v. Avon by the Sea*, (N. J. 1904) 57 Atl. Rep. 1132.

Where a deputy sheriff refused to take an oath and cut the form of oath from the paper constituting his appointment, and there was no showing that he had performed the duties of deputy sheriff, it was held that he was not a *de facto* officer. *Brown v. State*, 43 Tex. Crim. 411.

**787.** 4. *Failure to Renew His Bond* does not prevent the incumbent of an office from being an officer *de facto*. *Holt County v. Scott*, 53 Neb. 176.

5. *Failure to Give Bond.* — *Metropolitan Nat. Bank v. Commercial State Bank*, 104 Iowa 682; *Willey v. Windham*, 95 Me. 482; *Akers v. Kolkmeier*, 97 Mo. App. 520.

6. *One Who Fails to File His Appointment,*

**788.** *d.* PERSONS NOT ELIGIBLE. — See notes 3, 4.

**789.** See notes 1, 3, 4, 5.

**791.** *e.* LACK OF POWER IN ELECTING OR APPOINTING BODY — (2) *Appointment to Elective Office, or Vice Versa.* — See notes 1, 2.

*f.* PERSONS IRREGULARLY ELECTED OR APPOINTED — (1) *In General.* — See notes 3, 4.

**792.** (2) *Office Not Vacant.* — See notes 1, 2.

**793.** (5) *Possession Pending Contest of Election.* — See note 3.

*g.* PERSONS ELECTED OR APPOINTED UNDER UNCONSTITUTIONAL LAW — (1) *Unconstitutional Mode of Filling Office.* — See note 5.

**794.** (2) *Office Purporting to Be Created by Unconstitutional Law.* — See notes 2, 4.

*h.* WHAT MAY GIVE COLOR OF TITLE — (1) *Significance of Term.* — See notes 5, 7.

**795.** (2) *Presumption of Right to Office.* — See note 1.

**Commission, or Acceptance** of an office may nevertheless be a *de facto* officer. *Brown v. State*, 42 Tex. Crim. 419, 96 Am. St. Rep. 806.

**788. 3. Ineligible Person May Be De Facto Officer.** — *Stokes v. Acklen*, (Tenn. Ch. 1898) 46 S. W. Rep. 316.

**4. Person Not a Householder.** — See *Ikkes v. State*, 8 Ohio Dec. 442, 16 Ohio Cir. Ct. 31.

**789. 1. Defaulter.** — One who is ineligible because of having been convicted of crimes may be *de facto* a member of the house of delegates. *Sheridan v. St. Louis*, 183 Mo. 25.

**3. An Alien** may be a *de facto* officer. *Vicksburg v. Groome*, (Miss. 1898) 24 So. Rep. 306.

**4. Change of Residence.** — To the same effect as the cases stated in the original note, see *Matter of Collins*, 75 N. Y. App. Div. 87; *State v. Hart*, 106 Tenn. 269 (applying the principle to school directors).

**5. Holding an Incompatible Office** does not prevent one from being a *de facto* officer. *In re Corum*, 62 Kan. 271, 84 Am. St. Rep. 382; *Missouri Pac. R. Co. v. Preston*, 63 Kan. 819 (applying the principle to the case of a district judge forbidden by the constitution to hold any other office of profit or trust); *Oliver v. Jersey City*, 63 N. J. L. 634, 76 Am. St. Rep. 228; *State v. Coleman*, 54 S. Car. 282; *Old Dominion Bldg., etc., Assoc. v. Sohn*, 54 W. Va. 101 (notary's acceptance of judgeship).

**791. 1. Appointee to Elective Office Is De Facto Officer.** — *Watson v. McGrath*, 111 La. 1100.

**2. Person Elected to Appointive Office Is De Facto Officer.** — *Pratt v. Breckinridge*, 112 Ky. 1.

**3. Illegal or Irregular Election.** — *Argo v. Flake*, 102 Ga. 531; *Brown v. Flake*, 102 Ga. 528; *Knight v. West Union*, 45 W. Va. 194.

**4. Illegal or Irregular Appointment.** — *Lee v. Wilmington*, 1 Marv. (Del.) 65; *Pratt v. Breckinridge*, 112 Ky. 1; *Canaseraga v. Green*, (County Ct.) 88 N. Y. Supp. 539.

**Form of Appointment.** — See *Abington v. Steinberg*, 86 Mo. App. 639.

**Where Appointment Void.** — Where the appointment is not merely irregular, but is absolutely void, the appointee is not a *de facto* officer. *Brumby v. Boyd*, 28 Tex. Civ. App. 164.

**792. 1. Office Not Vacant.** — *Fulton v. Andrea*, 70 Minn. 445; *McAllister v. Swan*, 16 Utah 1.

Where the office of treasurer of school board expired by law July 15, one elected to the office was held to be neither *de jure* nor *de facto* treasurer before that time. *State v. Dorton*, 145 Mo. 304.

**2. Appointment to Office Not Legally Vacant.** — Where an incumbent of a municipal office is wrongfully removed by the council and another is appointed by the mayor without consent of the council as required by law, he is a mere usurper, and not a *de facto* officer. *Kempster v. Milwaukee*, 97 Wis. 343.

**793. 3. Possession Pending Contest.** — One who is in possession pending proceedings to oust him is a *de facto* officer until actually ousted. *State v. Crowe*, 150 Ind. 455; *Powers v. Com.*, 110 Ky. 386; *Nall v. Coulter*, (Ky. 1904) 78 S. W. Rep. 1110.

**5. Appointment or Election under Unconstitutional Law.** — *Pratt v. Breckinridge*, 112 Ky. 1; *State v. Ellis*, 111 La. 95, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 793; *Watson v. McGrath*, 111 La. 1100; *State Bank v. Frey*, (Neb. 1902) 91 N. W. Rep. 239; *Vanderberg v. Connolly*, 18 Utah, 112.

**794. 2. Unconstitutional Law Can Create No Office.** — *Ex p. Lewis*, (Tex. Crim. 1903) 73 S. W. Rep. 811. See also *infra*, this title, **799. 8 et seq.**

**4. Limitation of Rule.** — *Heck v. Findlay Window Glass Co.*, 8 Ohio Cir. Dec. 757, 16 Ohio Cir. Ct. 111; *State v. Bingham*, 7 Ohio Cir. Dec. 522, 14 Ohio Cir. Ct. 245.

**5. What Is Meant by Color of Title.** — *Nall v. Coulter*, (Ky. 1904) 78 S. W. Rep. 1110, quoting 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 794.

**7. Color of Title Distinguishes De Facto Officer from Usurper.** — *Nall v. Coulter*, (Ky. 1904) 78 S. W. Rep. 1110, quoting 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 794.

**Examples of Circumstances Giving Color of Title.** — See *Jones v. Hunlock*, 9 Kulp (Pa.) 328.

**Examples of Circumstances Not Giving Color of Title.** — Where the mayor and board of aldermen have power to appoint health officers, neither the mayor nor the aldermen alone have such power, and an appointee of either is a usurper and has no color of title. *Brumby v. Boyd*, 28 Tex. Civ. App. 164.

**795. 1. Person Acting as Officer Presumed to Be Lawfully in Office.** — *Landes v. Walls*, 160



**796.** (3) *Entering Office Before Term Begins* — Premature Election. — See note 2.

(4) *Holding Over* — General Rule. — See note 3.

**797.** *Holding Until Successor Takes Possession.* — See note 3.

**798.** *Change in Form of Municipal Government.* — See note 2.

**799.** *i. WHEN THERE CAN BE NO COLOR OF TITLE* — (1) *More than One Claimant.* — See notes 2, 4.

(3) *Judicial Decision Against Right.* — See note 6.

*j. AS TO EXISTENCE OF OFFICE* — (1) *There Must Be an Office in Existence.* — See note 8.

**800.** (2) *Office Irregularly Created.* — See note 2.

**801.** See note 1.

(3) *Conflicting Doctrines as to Whether a De Facto Office Can Exist.*

— See note 5.

**802.** 2. *Rights* — *a. RIGHT TO ACT.* — See note 3.

**803.** *c. RIGHT TO PROTECTION* — (1) *Protection from Interference.* — See note 5.

**805.** *d. OFFICE CONFERS NO PRIVILEGES.* — See notes 4, 5.

**806.** 3. *Duties.* — See notes 1, 2.

Ind. 216; *Elliott v. Burke*, 113 Ky. 479; *State v. Coleman*, 54 S. Car. 282; *Nalle v. Austin*, 23 Tex. Civ. App. 595.

**796.** 2. *Premature Election.* — Where school directors were illegally elected in May instead of in August, and the old directors continued to act until their term expired, such of the old directors as were legally qualified to hold the office were held to be *de jure* officers, while others who lacked the requisite qualifications because of alienage or nonresidence were held to be officers *de facto*. *State v. Hart*, 106 Tenn. 269.

**3. Holding After Term Expires.** — *Waite v. Santa Cruz*, 89 Fed. Rep. 619; *Elliott v. Burke*, 113 Ky. 479; *Hilgert v. Barber Asphalt Paving Co.*, 107 Mo. App. 385; *Oliver v. Jersey City*, 63 N. J. L. 634, 76 Am. St. Rep. 228; *Canaseraga v. Green*, (County Ct.) 88 N. Y. Supp. 539; *Hammondsport Law, etc., Assoc. v. Kinzell*, (County Ct.) 43 Misc. (N. Y.) 505; *Keeling v. Pittsburg, etc., R. Co.*, 205 Pa. St. 31; *Duester v. Zillmer*, 119 Wis. 402.

**797.** 3. *Holding until Successor Takes Possession.* — *Elliott v. Burke*, 113 Ky. 479; *Hammondsport Law, etc., Assoc. v. Kinzell*, (County Ct.) 43 Misc. (N. Y.) 505; *Deuster v. Zillmer*, 119 Wis. 402.

**Members of a City Council.** — *Waite v. Santa Cruz*, 89 Fed. Rep. 619.

**798.** 2. *Change in Form of Municipal Government.* — *Hilgert v. Barber Asphalt Paving Co.*, 107 Mo. App. 385.

**799.** 2. *Office Filled by De Jure Incumbent.* — *Somerset v. Somerset Banking Co.*, 109 Ky. 549; *Fulton v. Andrea*, 70 Minn. 445; *State v. Dorton*, 145 Mo. 304; *Baker v. Hobgood*, 126 N. Car. 149; *Kempster v. Milwaukee*, 97 Wis. 343.

But one who is inducted into and fills an office may be an officer *de facto*, though there is an officer *de jure* who has a present right to the office. *Brinkerhoff v. Jersey City*, 64 N. J. L. 225.

**4. There Cannot Be Two De Facto Officers.** — *Olson v. Trego County*, 8 Kan. App. 414; *Somerset v. Somerset Banking Co.*, 109 Ky.

549; *Powers v. Com.*, 110 Ky. 386; *Fulton v. Andrea*, 70 Minn. 445; *Brumby v. Boyd*, 28 Tex. Civ. App. 164.

**6. Judicial Decision Against Right.** — *Powers v. Com.*, 110 Ky. 386.

**8. There Must Be an Office in Existence.** — *People v. Knopf*, 183 Ill. 410; *In re Norton*, 64 Kan. 842, 91 Am. St. Rep. 255; *Weesner v. Central Nat. Bank*, 106 Mo. App. 668; *State v. Shuford*, 128 N. Car. 588.

**800.** 2. *Office Irregularly Created.* — "An unconstitutional act cannot create an office." *People v. Knopf*, 183 Ill. 410. See also *supra*, this title, **794. 1 et seq.**

**801.** 1. *Legislation Creating Office Not Accepted.* — *Compare Canaseraga v. Green*, (County Ct.) 88 N. Y. Supp. 539.

**5.** *In re Norton*, 64 Kan. 842, 91 Am. St. Rep. 255; *State v. Shuford*, 128 N. Car. 588. See also *People v. Knopf*, 183 Ill. 410.

**802.** 3. *Right to Possession of Office and Property Thereof.* — *Elliott v. Burke*, 113 Ky. 479.

**No Right to Recover Money Expended.** — In *Willey v. Windham*, 95 Me. 482, it was held that a road commissioner *de facto* could not recover from the town for money paid out by him for materials furnished or labor employed, though the town would be liable for materials purchased and labor employed by him on the town's credit.

**803.** 5. *Protection from Interference.* — *Elliott v. Burke*, 113 Ky. 479; *Brown v. State*, 42 Tex. Crim. 419, 96 Am. St. Rep. 806. See generally the title **ARREST, 865. 1, 2.**

**805.** 4. *De Facto Officer Has No Personal Privileges.* — *Stott v. Chicago*, 205 Ill. 281; *State v. Schran*, 82 Minn. 420.

**5. Acts for His Own Benefit Void.** — *Old Dominion Bldg., etc., Assoc. v. Sohn*, 54 W. Va. 101.

**806.** 1. *Can Be Compelled to Perform Duties of Office.* — *Mockett v. State*, (Neb. 1903) 97 N. W. Rep. 588.

**2. Cannot Plead Lack of Title to Avoid Acting.** — *Mockett v. State*, (Neb. 1903) 97 N. W. Rep. 588.

**806.** 4. **Liabilities**—*a.* **PERSONAL LIABILITY**—(1) *Liability for Money Received.*—See note 4.

(2) *Cannot Escape Liability by Denying Title.*—See note 6.

(3) *Criminal Liability.*—See note 7.

**807.** *c.* **LIABILITY OF SURETIES**—(1) *In General.*—See note 5.

**808.** 5. **Right to Compensation as Between De Jure and De Facto Officers**—*a.* **RIGHTS OF DE JURE OFFICER**—(1) *Entitled to Emoluments of Office.*—See note 4.

**809.** See note 1.

**810.** (3) *Right to Recover from De Facto Officer.*—See note 2.

**811.** *But a Clear Title Must Be Shown.*—See note 1.

*Salary.*—See note 2.

**812.** *b.* **RIGHTS OF DE FACTO OFFICER**—(1) *As to Emoluments of Office.*—See notes 4, 5, 6.

**813.** (2) *Rights Pending Contest of Title.*—See notes 1, 2.

**814.** *c.* **PROTECTION AFFORDED BY PAYMENT TO DE FACTO OFFICER**—(1) *General Rule.*—See note 1.

**815.** See note 1.

(2) *Notice of Contest of Title.*—See note 2.

**806.** 4. **Liable for Money Received.**—State *v.* Dorton, 145 Mo. 304; Nason *v.* Fowler, 70 N. H. 291.

**6.** **Cannot Escape Liability by Denying Title.**—State *v.* Dorton, 145 Mo. 304; Holt County *v.* Scott, 53 Neb. 176; Nason *v.* Fowler, 70 N. H. 291.

**7.** **Criminal Liability.**—Nason *v.* Fowler, 70 N. H. 291, an action for false imprisonment.

**807.** 5. **Liability of Sureties.**—State *v.* Ellis, 111 La. 95, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 807; Holt County *v.* Scott, 53 Neb. 176; Nason *v.* Fowler, 70 N. H. 291.

**808.** 4. **De Jure Officer Entitled to Compensation.**—Whitaker *v.* Topeka, 9 Kan. App. 213; Gorley *v.* Louisville, 108 Ky. 789; Stone *v.* Canfield, (Ky. 1900) 55 S. W. Rep. 924; Larsen *v.* St. Paul, 83 Minn. 473; Buschmann *v.* New York, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 607.

**809.** 1. **Doctrine that Actual Services Must Be Rendered.**—Rasmussen *v.* Carbon County, 8 Wyo. 287, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 808 *et seq.*

**810.** 2. **May Recover Emoluments from De Facto Officer.**—Coughlin *v.* McElroy, 74 Conn. 397, 92 Am. St. Rep. 224; Brown *v.* Tama County, 122 Iowa 745; Fenn *v.* Beeler, 64 Kan. 67; Nall *v.* Coulter, (Ky. 1904) 78 S. W. Rep. 1110.

If no salary has been paid to the *de facto* incumbent, the claim is against the municipality, and not against the *de facto* officer. Whitaker *v.* Topeka, 9 Kan. App. 213.

**Case Denying Right to Recover Salary.**—See Rasmussen *v.* Carbon County, 8 Wyo. 287.

**811.** 1. **Must Show Clear Title.**—Stone *v.* Canfield, (Ky. 1900) 55 S. W. Rep. 924; Sheridan *v.* St. Louis, 183 Mo. 25.

**2.** **Entire Salary Recoverable.**—Bledsoe *v.* Colgan, 138 Cal. 34; Fenn *v.* Beeler, 64 Kan. 67; Blydenburgh *v.* Carbon County, 8 Wyo. 303.

**812.** 4. **De Facto Officer Cannot Recover Compensation.**—Stott *v.* Chicago, 205 Ill. 281; Garfield Tp. *v.* Crocker, 63 Kan. 272; State *v.* Schram, 82 Minn. 420; Vicksburg *v.* Groome,

(Miss. 1898) 24 So. Rep. 306; McAllister *v.* Swan, 16 Utah 1.

**5.** **Must Have Legal Title.**—Garfield Tp. *v.* Crocker, 63 Kan. 272.

**6.** **Doctrine that De Facto Officer Is Entitled to Compensation.**—Nall *v.* Coulter, (Ky. 1904) 78 S. W. Rep. 1110; Brinkerhoff *v.* Jersey City, 64 N. J. L. 225; Rasmussen *v.* Carbon County, 8 Wyo. 287.

**813.** 1. **Contrary Doctrine.**—In *Kentucky* it is held that a city is not bound to withhold payment of salary to the incumbent of the office of treasurer during the pendency of contest to try title. Bradley *v.* Georgetown, (Ky. 1904) 82 S. W. Rep. 303.

**2.** **Statutory Provisions.**—Anderson *v.* Brown, 140 Cal. 222; Bledsoe *v.* Colgan, 138 Cal. 34; Wilson *v.* Fisher, 140 Cal. 188.

**814.** 1. **Effect of Payment to De Facto Officer.**—Coughlin *v.* McElroy, 74 Conn. 397, 92 Am. St. Rep. 224; Lee *v.* Wilmington, 1 Marv. (Del.) 65; Brown *v.* Tama County, 122 Iowa 745; Nall *v.* Coulter, (Ky. 1904) 78 S. W. Rep. 1110, quoting 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 813, 814; Bradley *v.* Georgetown, (Ky. 1904) 82 S. W. Rep. 303; Sheridan *v.* St. Louis, 183 Mo. 25.

**But an Officer Wrongfully Removed** may recover his salary, after having first established his right to the office in a suit against the person appointed in his stead. Stone *v.* Canfield, (Ky. 1900) 55 S. W. Rep. 924. And where no one has been appointed in his stead, the officer wrongfully removed may recover salary without first suing to establish his title. Gorley *v.* Louisville, 108 Ky. 789. See also Blydenburgh *v.* Carbon County, 8 Wyo. 303; Rasmussen *v.* Carbon County, 8 Wyo. 287.

**815.** 1. **Laches of De Jure Officer.**—Gorley *v.* Louisville, 108 Ky. 789; Byrnes *v.* St. Paul, 78 Minn. 205, 79 Am. St. Rep. 384; Rasmussen *v.* Carbon County, 8 Wyo. 287.

**2.** **Notice of Contest.**—Compare Rasmussen *v.* Carbon County, 8 Wyo. 287; Blydenburgh *v.* Carbon County, 8 Wyo. 303.

**815.** (3) *Insolvency of De Facto Officer.* — See note 3.

(5) *Payment to Usurper.* — See note 5.

**816.** 6. *Validity of Acts* — a. GENERAL RULE. — See note 1.

**817.** b. ILLUSTRATIONS. — See note 2.

**818.** Judicial Proceedings. — See note 2.

A Service of Process, Notice, or Other Paper. — See note 4.

**819.** The Validity of Taxes. — See note 2.

An Election. — See note 4.

**820.** An Affidavit, Deposition, or Acknowledgment. — See note 1.

A Contract. — See notes 2, 3.

c. WHEN THE RULE DOES NOT APPLY — Injury to Innocent Persons. — See note 6.

Notice of Defects in Title. — See note 7.

**815.** 3. *Insolvency of De Facto Officer.* — *Bradley v. Georgetown*, (Ky. 1904) 82 S. W. Rep. 303; *Rasmussen v. Carbon County*, 8 Wyo. 287.

5. *Payment to Usurper.* — *Larsen v. St. Paul*, 83 Minn. 473; *Kempster v. Milwaukee*, 97 Wis. 343.

**816.** 1. *Acts of De Facto Officer Valid* — *United States*. — *Waite v. Santa Cruz*, 89 Fed. Rep. 619.

*California*. — *Ex p. Fedderwitz*, 130 Cal. xviii, 62 Pac. Rep. 935; *Susanville v. Long*, 144 Cal. 362.

*Georgia*. — *Brown v. Flake*, 102 Ga. 528; *Argo v. Flake*, 102 Ga. 531.

*Illinois*. — *Gale v. Knopf*, 193 Ill. 245.

*Indiana*. — *State v. Crowe*, 150 Ind. 455.

*Iowa*. — *State v. Powell*, 101 Iowa 382; *Metropolitan Nat. Bank v. Commercial State Bank*, 104 Iowa 682.

*Kansas*. — *Missouri Pac. R. Co. v. Preston*, 63 Kan. 819; *Whitaker v. Topeka*, 9 Kan. App. 213; *In re Corum*, 62 Kan. 271, 84 Am. St. Rep. 382.

*Kentucky*. — *Pratt v. Breckinridge*, 112 Ky. 1; *Chambers v. Adair*, 110 Ky. 942.

*Minnesota*. — *Fulton v. Andrea*, 70 Minn. 445; *State v. Schram*, 82 Minn. 420.

*Missouri*. — *Abington v. Steinberg*, 86 Mo. App. 639; *State v. Badger*, 90 Mo. App. 183; *Hilgert v. Barber Asphalt Paving Co.*, 107 Mo. App. 385; *Akers v. Kolkmeier*, 97 Mo. App. 520.

*Nebraska*. — *Dredla v. Baache*, 60 Neb. 655; *Haskell v. Dutton*, 65 Neb. 274; *State Bank v. Frey*, (Neb. 1902) 91 N. W. Rep. 239.

*New Jersey*. — *Oliver v. Jersey City*, 63 N. J. L. 634, 76 Am. St. Rep. 228; *Brinkerhoff v. Jersey City*, 64 N. J. L. 225; *Rosell v. Board of Education*, 68 N. J. L. 498; *Rosell v. Avon by the Sea*, (N. J. 1904) 57 Atl. Rep. 1132.

*New York*. — *Matter of Collins*, 75 N. Y. App. Div. 87; *Canaseraga v. Green*, (County Ct.) 88 N. Y. Supp. 539; *Hammondspont Law, etc., Assoc. v. Kinzell*, (County Ct.) 43 Misc. (N. Y.) 505.

*North Carolina*. — See *Dalby v. Hancock*, 125 N. Car. 325.

*North Dakota*. — *Cleveland v. McCanna*, 7 N. Dak. 455, 66 Am. St. Rep. 670.

*Ohio*. — *Ickes v. State*, 8 Ohio Cir. Dec. 442, 16 Ohio Cir. Ct. 31.

*Oklahoma*. — *Morford v. Territory*, 10 Okla. 741.

*Pennsylvania*. — *Keeling v. Pittsburg, etc., R. Co.*, 205 Pa. St. 31.

*South Carolina*. — *State v. Coleman*, 54 S. Car. 282.

*Tennessee*. — *Stokes v. Acklen*, (Tenn. Ch. 1898) 46 S. W. Rep. 316; *State v. Hart*, 106 Tenn. 269.

*Texas*. — *Nalle v. Austin*, 23 Tex. Civ. App. 595.

*Utah*. — *Vanderberg v. Connolly*, 18 Utah 112.

*West Virginia*. — *Old Dominion Bldg., etc., Assoc. v. Sohn*, 54 W. Va. 101; *Knight v. West Union*, 45 W. Va. 194.

*Wisconsin*. — *Deuster v. Zillmer*, 119 Wis. 402.

**817.** 2. *An Ordinance Signed by a De Facto Mayor* has been sustained as valid. *Keeling v. Pittsburg, etc., R. Co.*, 205 Pa. St. 31.

**818.** 2. *Civil Proceedings of De Facto Judge* — *Missouri Pac. R. Co. v. Preston*, 63 Kan. 819; *Dredla v. Baache*, 60 Neb. 655.

*In Criminal Cases.* — *Ex p. Fedderwitz*, 130 Cal. xviii, 62 Pac. Rep. 935; *In re Corum*, 62 Kan. 271, 84 Am. St. Rep. 382, which cases support the last paragraph of the original note.

4. *Service.* — *Haskell v. Dutton*, 65 Neb. 274; *Hammondspont Law, etc., Assoc. v. Kinzell*, (County Ct.) 43 Misc. (N. Y.) 505.

**819.** 2. *Taxes.* — *Brown v. Flake*, 102 Ga. 528; *Argo v. Flake*, 102 Ga. 531; *Gale v. Knopf*, 193 Ill. 245; *Nason v. Fowler*, 70 N. H. 291; *Rosell v. Board of Education*, 68 N. J. L. 498; *Rosell v. Avon by the Sea*, (N. J. 1904) 57 Atl. Rep. 1132; *Canaseraga v. Green*, (County Ct.) 88 N. Y. Supp. 539.

4. *Elections.* — *State v. Powell*, 101 Iowa 382; *Baker v. Hobgood*, 126 N. Car. 149; *Brinkerhoff v. Jersey City*, 64 N. J. L. 225.

**820.** 1. *Acknowledgment.* — *Stokes v. Acklen*, (Tenn. Ch. 1898) 46 S. W. Rep. 316; *Old Dominion Bldg., etc., Assoc. v. Sohn*, 54 W. Va. 101.

*Probate of Deeds.* — *State Bank v. Frey*, (Neb. 1902) 91 N. W. Rep. 239.

2. *Contracts.* — *Willey v. Windham*, 95 Me. 482.

3. *Bonds.* — *Fulton v. Andrea*, 70 Minn. 445.

6. *Rule Not Allowed to Work Injury to Innocent Persons.* — *Old Dominion Bldg., etc., Assoc. v. Sohn*, 54 W. Va. 101.

7. *Usurper.* — *People v. Dike*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 401, *reversed* 71 N. Y. App. Div. 622; *State v. Shuford*, 128 N. Car. 588.



**821.** See note 1.

Perjury. — See note 5.

**823.** *d.* APPOINTMENT BY DE FACTO OFFICER. — See note 2.

**III. REMOVAL OF DE FACTO OFFICERS — 1. Title Cannot Be Collaterally Attacked —** *a.* GENERAL RULE. — See note 3.

**824.** See note 1.

**825.** *b.* LIMITATIONS — (1) *Inquiry as to Whether De Facto Officer or Usurper.* — See note 2.

(2) *Inquiry as to Existence of Office.* — See note 3.

(3) *When Title Is in Issue.* — See note 5.

**826.** 2. Direct Proceeding Against Officer. — See notes 2, 4.

**827.** 3. When De Facto Officers Will Not Be Removed. — See note 1.

**821. 1. Title Challenged at Outset.** — *People v. Dike*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 401, *reversed* 71 N. Y. App. Div. 622; *Baker v. Hobgood*, 126 N. Car. 149.

**5. Oath Administered by De Facto Officer — Perjury.** — In *Morford v. Territory*, 10 Okla. 741, it was held that perjury may exist though the proceedings were erroneous or voidable.

**823. 2. American Rule —** *Brinkerhoff v. Jersey City*, 64 N. J. L. 225. See also *State v. Badger*, 90 Mo. App. 183, holding that an appointment by a *de facto* mayor was valid as against collateral attack.

**3. Title Cannot Be Collaterally Attacked — Public Officer — California.** — *Susanville v. Long*, 144 Cal. 362, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 823; *Ex p. Fedderwitz*, 130 Cal. xviii, 62 Pac. Rep. 935.

*Georgia.* — *Argo v. Flake*, 102 Ga. 531; *Brown v. Flake*, 102 Ga. 528.

*Illinois.* — *Gale v. Knopf*, 193 Ill. 245.

*Indiana.* — *Landes v. Walls*, 160 Ind. 216; *State v. Crowe*, 150 Ind. 455.

*Kansas.* — In *re Corum*, 62 Kan. 271, 84 Am. St. Rep. 382; *Missouri Pac. R. Co. v. Preston*, 63 Kan. 819; *Garfield Tp. v. Crocker*, 63 Kan. 272.

*Kentucky.* — *Chambers v. Adair*, 110 Ky. 942; *Pratt v. Breckinridge*, 112 Ky. 1.

*Missouri.* — *Akers v. Kolkmeier*, 97 Mo. App. 520.

*Nebraska.* — *Haskell v. Dutton*, 65 Neb. 274; *State Bank v. Frey*, (Neb. 1902) 91 N. W. Rep. 239; *Dredla v. Baache*, 60 Neb. 655; *Holt County v. Scott*, 53 Neb. 176.

*New York.* — *Hammondsport Law, etc., Assoc. v. Kinzell*, (County Ct.) 43 Misc. (N. Y.) 505; *Matter of Guden*, 71 N. Y. App. Div. 422, *affirmed* 171 N. Y. 529.

*North Carolina.* — *State v. Shuford*, 128 N. Car. 588.

*Oklahoma.* — *Morford v. Territory*, 10 Okla. 741.

*South Carolina.* — *State v. Coleman*, 54 S. Car. 282.

*Tennessee.* — *State v. Hart*, 106 Tenn. 269.

*Utah.* — *Vanderberg v. Connolly*, 18 Utah 124.

*West Virginia.* — *Old Dominion Bldg., etc., Assoc. v. Sohn*, 54 W. Va. 101; *Knight v. West Union*, 45 W. Va. 194.

*Wisconsin.* — *Deuster v. Zillmer*, 119 Wis. 402.

**Officers of Corporations.** — *Metropolitan Nat.*

*Bank v. Commercial State Bank*, 104 Iowa 682; *Hamilton Trust Co. v. Clemes*, 17 N. Y. App. Div. 152, *affirmed* 163 N. Y. 423; *Baggot v. Turner*, 21 Wash. 339.

**824. 1. Formal Party to Action.** — *Metropolitan Nat. Bank v. Commercial State Bank*, 104 Iowa 682.

**Contrary Doctrine.** — In *Utah* it is held that when the court has jurisdiction for one purpose, and the right and authority of certain persons, as officers, collaterally appear, it will inquire into and determine such questions. *Schwab v. Frisco Min., etc., Co.*, 21 Utah 258.

**825. 2. De Facto Officer or Usurper.** — *Columbia Mfg. Co. v. Stoddard Mfg. Co.*, 61 Kan. 640; *Fulton v. Andrea*, 70 Minn. 445; *Matter of Duden*, 75 N. Y. App. Div. 422, *affirmed* 171 N. Y. 529; *Ex p. Lewis*, (Tex. Crim. 1903) 73 S. W. Rep. 811.

**3. Existence of Office May Be Collaterally Inquired into.** — *Miner v. Justice's Ct.*, 121 Cal. 264; *In re Norton*, 64 Kan. 842, 91 Am. St. Rep. 255; *Weesner v. Central Nat. Bank*, 106 Mo. App. 668; *State v. Shuford*, 128 N. Car. 588.

**5. Attempt to Secure Benefits.** — *McAllister v. Swan*, 16 Utah 1.

**826. 2. Quo Warranto Is Proper Proceeding.** — *Lee v. Wilmington*, 1 Marv. (Del.) 65; *Whitaker v. Topeka*, 9 Kan. App. 213; *Oliver v. Jersey City*, 63 N. J. L. 634, 76 Am. St. Rep. 228; *Manahan v. Watts*, 64 N. J. L. 465; *State v. Shuford*, 128 N. Car. 588; *Dalby v. Hancock*, 125 N. Car. 325; *Herring v. Pugh*, 126 N. Car. 856.

**4. An Injunction.** — *Argo v. Flake*, 102 Ga. 531; *Brown v. Flake*, 102 Ga. 528; *Chambers v. Adair*, 110 Ky. 942; *Landes v. Walls*, 160 Ind. 216.

The plaintiff in the injunction suit must not only show absence of right in the defendant, but right in himself. *Watson v. McGrath*, 111 La. 1100.

A suit to enjoin even a usurper cannot be maintained by a private citizen, if the injury affects the public generally and inflicts no special wrong on him individually. *Brumby v. Boyd*, 28 Tex. Civ. App. 164.

**A Writ of Prohibition.** — *State v. Ellis*, 111 La. 95.

**827. 1. When De Facto Officers Will Not Be Removed.** — *Elliot v. Burke*, 113 Ky. 479.

## DE MINIMIS NON CURAT LEX.

- 828.** I. DEFINITION. — See note 1.  
II. SPECIFIC APPLICATIONS — 2. Payments. — See note 3.  
3. Tax Proceedings. — See note 4.  
**830.** 5. Contracts — Variance. — See note 2.  
7. Actions for Trifling Injuries. — See notes 4, 5.  
**832.** 8. New Trial Where the Amount in Dispute Is Small. — See note 1.

DE NOVO. — See note 2.

- 833.** DEAD. — See note 1.

**828.** 1. Maxim Applied to Disqualification of Judges. — *Adams v. Minor*, 121 Cal. 372.

3. Fractions Disregarded. — See *Kittredge v. Chillicothe Loan, etc., Assoc.*, 103 Mo. App. 361.

4. But a difference of twelve cents held immaterial. *London, etc., Mortg. Co. v. Gibson*, 77 Minn. 394. And see *Maish v. Arizona*, 164 U. S. 599.

**830.** 2. Maxim Held Not to Apply — Alteration Material. — *Little Rock Trust Co. v. Mortin*, 57 Ark. 277.

Where Contracts Are Substantially Similar There Is No Variance. — See *Seaton v. Tohill*, 11 Colo. App. 211. See *Barnett v. Sweringen*, 77 Mo. App. 64.

4. An Action Will Not Lie for Trifling Injuries. — *St. Louis, etc., R. Co. v. Ferguson*, 57 Ark. 16, 38 Am. St. Rep. 217.

Actions for Injuries to Incorporeal Rights — Diversion of Water. — *Sparks Mfg. Co. v. Newton*, 57 N. J. Eq. 367. And see *St. John v. New York Cent., etc., R. Co.*, 24 N. Y. App. Div. 626, reversed 165 N. Y. 241.

Workmen's Compensation Act — English. — *Chandler v. Smith*, (1899) 2 Q. B. 506.

5. When the Maxim Does Not Apply. — See *Mulrein v. Weisbecker*, 37 N. Y. App. Div. 545.

**832.** 1. New Trial Refused When Matter in Dispute Is Inconsiderable. — *Chicago, etc., Coal Co. v. Streator*, 172 Ill. 435; *Mackin v. Wilson*, (Ky. 1897) 43 S. W. Rep. 247; *Ferguson v.*

*Moore*, (Ky. 1898) 44 S. W. Rep. 113; *Cameron v. McAnaw*, 72 Mo. App. 196; *Kittredge v. Chillicothe Loan, etc., Assoc.*, 163 Mo. App. 361; *Ramsburg v. Kline*, 96 Va. 465.

Omission to Assess Nominal Damages Is No Ground for a New Trial. — *Pronk v. Brooklyn Heights R. Co.*, 68 N. Y. App. Div. 390.

Cases Where the Maxim Was Held Not to Apply. — *Ruble v. Helm*, 57 Ark. 304.

Scintilla of Evidence. — *Offutt v. World's Columbian Exposition*, 175 Ill. 472.

2. *Ex p. Morales*, (Tex. Crim. 1899) 53 S. W. Rep. 107, quoting 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 832.

**833.** 1. Dead Timber on Indian Reservation. — In defining the phrase "*dead* timber" in a United States statute authorizing the President to permit Indians to cut and sell the *dead* timber on a reservation, the court said: "It is hardly probable, we think, that Congress foresaw and intended an interpretation of the phrase '*dead* timber' which would lead to such a result. The phrase was doubtless used by the lawmaker in its ordinary sense, to describe timber which was practically lifeless or mortally hurt, and in such a state of decay that a prudent landowner would ordinarily direct it to be forthwith cut to prevent a further deterioration in value." *U. S. v. Pine River Logging, etc., Co.*, (C. C. A.) 89 Fed. Rep. 907.

# DEAD BODY.

BY BASIL JONES.

## 834. I. RIGHT AND DUTY TO BODY — 1. Right of Property or Possession —

a. IN GENERAL. — See note 1.

835. See notes 1, 2.

**834. 1. At Common Law a Dead Body Is Not Property —** *California*. — *Enos v. Snyder*, 131 Cal. 68, 82 Am. St. Rep. 330.

*Illinois*. — *Palenzke v. Bruning*, 98 Ill. App. 644.

*Kentucky*. — *Hockenhammer v. Lexington*, etc., R. Co., (Ky. 1903) 74 S. W. Rep. 222, quoting 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 834; *Neighbors v. Neighbors*, 112 Ky. 161.

*Michigan*. — *Doxtator v. Chicago*, etc., R. Co., 120 Mich. 596, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 834.

*New Jersey*. — *Toppin v. Moriarty*, 59 N. J. Eq. 115; *Smith v. Shepherd*, 64 N. J. Eq. 401.

*New York*. — *Buchanan v. Buchanan*, (Supm. Ct. Tr. T.) 28 Misc. (N. Y.) 261.

*Pennsylvania*. — *Pettigrew v. Pettigrew*, 207 Pa. St. 313, 99 Am. St. Rep. 795.

*South Carolina*. — *Ex p. McCall*, 68 S. Car. 489.

"It is commonly said, being repeated from the early cases in England, where the whole matter of burials was under the jurisdiction of the ecclesiastical courts, that there can be no property in a corpse. But, inasmuch as there is a legally recognized right of custody, control, and disposition, the essential attribute of ownership, I apprehend that it would be more accurate to say that the law recognizes property in a corpse, but property subject to a trust, and limited in its rights to such exercise as shall be in conformity with the duty out of which the rights arise." *Pettigrew v. Pettigrew*, 207 Pa. St. 313, 99 Am. St. Rep. 795.

**Recovery by Widow for Failure of Carrier to Protect Body.** — A cause of action is set out by a declaration which alleges that a widow desired to have her husband's body carried by a railroad from the place of death to the place of intended burial; that the route was over a railroad to a junction, and thence by a branch of the same road to the destination; that the agent of the company at the initial point would only sell her transportation for the body to the junction, but told her that the company would carry the body to the place of burial, and that at the point of junction she could obtain transportation to the destination; that she paid for such transportation to the junction, and delivered the body, with its accompanying shroud and coffin, to the company; that on arrival at the junction the company's agent had the coffin with the body placed on an open platform in the rain, and allowed it to remain there for several hours while waiting for the second train to arrive, and refused, on request of the wife, to have it placed where it would

be protected from the weather; and that the coffin and shroud were damaged to the extent of seventy-five dollars, and the body was "soaked and otherwise mutilated." *Louisville*, etc., R. Co. v. *Wilson*, 123 Ga. 62.

**Trespass.** — A dead body, after burial, becomes a part of the ground to which it has been committed; and an action of trespass may be maintained by the owner of the lot, in possession, against one who disturbs the grave and removes the body, so long, at least, as the cemetery continues to be used as a place of burial. *Pulsifer v. Douglass*, 94 Me. 556.

**Disposal of Body by Will.** — In absence of statutory provision there is no property in a dead body. It is not a part of the estate of the deceased person, and one cannot by will dispose of that which after his death will be his corpse. *Enos v. Snyder*, 131 Cal. 68, 82 Am. St. Rep. 330.

**835. 1. Right of Burial Is a Legal Right.** — *Louisville*, etc., R. Co. v. *Wilson*, 123 Ga. 66, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 835; *Wright v. Hollywood Cemetery Corp.*, 112 Ga. 884; *Palenzke v. Bruning*, 98 Ill. App. 644; *Hockenhammer v. Lexington*, etc., R. Co., (Ky. 1903) 74 S. W. Rep. 222, quoting 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 835; *Neighbors v. Neighbors*, 112 Ky. 161; *Louisville*, etc., R. Co. v. *Hull*, 113 Ky. 561; *Doxtator v. Chicago*, etc., R. Co., 120 Mich. 596, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 835; *Buchanan v. Buchanan*, (Supm. Ct. Tr. T.) 28 Misc. (N. Y.) 261; *Pettigrew v. Pettigrew*, 207 Pa. St. 313, 99 Am. St. Rep. 795; *Koerber v. Patek*, 123 Wis. 453, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 835.

**2. Party Injured May Sue for Damages.** — *Louisville*, etc., R. Co. v. *Wilson*, 123 Ga. 66, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 835; *Wright v. Hollywood Cemetery Corp.*, 112 Ga. 884; *Palenzke v. Bruning*, 98 Ill. App. 644; *Hockenhammer v. Lexington*, etc., R. Co., (Ky. 1903) 74 S. W. Rep. 222; *Burney v. Children's Hospital*, 169 Mass. 57, 61 Am. St. Rep. 273; *Doxtator v. Chicago*, etc., R. Co., 120 Mich. 596; *Koerber v. Patek*, 123 Wis. 453, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 835.

No person has a legal right to the possession of a corpse because of relationship in the abstract, and it is only where an arrested right, founded on the duty of burial, has been violated before burial, that the person aggrieved may possibly maintain an action at law for the violation. *Buchanan v. Buchanan*, (Supm. Ct. Tr. T.) 28 Misc. (N. Y.) 261.

**Measure of Damages — Recovery Allowed for Mental Suffering.** — *Louisville*, etc., R. Co. v.



**835.** Not Subject to Ecclesiastical Cognizance. — See notes 3, 4.

**836.** *b.* BEFORE BURIAL. — See notes 1, 2, 3, 4.

Hull, 113 Ky. 561; Koerber *v.* Patek, 123 Wis. 452.

But damages cannot be recovered for mental suffering caused by the throwing out of a corpse from a wagon, because of a collision between the wagon and a train, where the body was not mutilated by reason of the accident. Hockenhammer *v.* Lexington, etc., R. Co., (Ky. 1903) 74 S. W. Rep. 222.

**Right to Recover for Injury to Body of Deceased Brother.** — A brother who has undertaken to pay for the transportation of the body of his deceased brother has such an interest in the body as entitles him to damages for an injury occasioned thereto by the negligent act of the carrier while transporting the body for hire. Beam *v.* Cleveland, etc., R. Co., 97 Ill. App. 24.

**Recovery Allowed for Mutilation of Body.** — Buchanan *v.* Buchanan, (Supm. Ct. Tr. T.) 28 Misc. (N. Y.) 261.

**Recovery for Destruction of Amputated Limbs.** — A railroad company is not liable to a widow for failure to deliver to her, after her husband's death, portions of his limbs which were amputated by the company's surgeon because they had been crushed by the cars while he was in the employ of the company, when the operation was performed at a hospital to which he was taken by a policeman in charge of the city ambulance, and the fragments were cremated according to the custom at the hospital, as the company did not assume the obligation, either by its employee who lifted the injured man from the ground, or by the surgeon who amputated his limbs, to deliver the remains, and the whole of them, to his widow, if death should ensue from the injury. Doxtator *v.* Chicago, etc., R. Co., 120 Mich. 596.

**Exemplary Damages.** — In a suit for an unlawful and unwarranted interference with the exercise of such a right of burial, if the injury inflicted upon the plaintiffs was wanton and malicious, or the result of gross negligence, or reckless disregard of the rights of others, equivalent to an intentional violation of them, exemplary damages may be awarded, in estimating which the injury to the natural feelings of the plaintiffs may be taken into consideration. Wright *v.* Hollywood Cemetery Corp., 112 Ga. 884.

**Damages to Body in Course of Transportation Proper Subject-matter for Recoupment in Action to Recover Transportation Charges.** — Beam *v.* Cleveland, etc., R. Co., 97 Ill. App. 24.

**Post Mortem Held with Widow's Consent.** — Where a widow consented to a post mortem examination of her husband's body, for the purpose of ascertaining the cause of his death, the consent so given must be held to have implied a permission to conduct the examination in the usual manner, and if the removal of some of the organs for microscopic examination was necessary or proper to effect the purpose of the post mortem, the persons conducting it were not guilty of an actionable wrong in so doing, unless permission to remove them was expressly withheld at the time the consent to the post mortem was given. A condition in the

consent that no part of the body should be taken away did not necessarily prohibit the taking of a part to the office of the surgeon for examination, if it was duly returned and replaced for burial. Winkler *v.* Hawkes, 126 Iowa 474.

**835. 3. In England Ecclesiastical Courts Had Jurisdiction.** — See Louisville, etc., R. Co. *v.* Wilson, 123 Ga. 62; Neighbors *v.* Neighbors, 112 Ky. 161; Hockenhammer *v.* Lexington, etc., R. Co., (Ky. 1904) 72 S. W. Rep. 222. See also Palenzke *v.* Bruning, 98 Ill. App. 644.

**4. No Ecclesiastical Authority in the United States.** — Louisville, etc., R. Co. *v.* Wilson, 123 Ga. 62; Hockenhammer *v.* Lexington, etc., R. Co., (Ky. 1903) 74 S. W. Rep. 222.

**836. 1. Wishes of Testator Will Prevail.** — O'Donnell *v.* Slack, 123 Cal. 285; Matter of Richardson, (Supm. Ct. Spec. T.) 29 Misc. (N. Y.) 367; Smiley *v.* Bartlett, 8 Ohio Dec. 154; Pettigrew *v.* Pettigrew, 207 Pa. St. 313, 99 Am. St. Rep. 795. Compare McEntee *v.* Bonacum, 66 Neb. 651; Toppin *v.* Moriarty, 59 N. J. Eq. 115.

**Express Wish of Decedent Controlling — Sufficiency of Evidence to Show Wish.** — Matter of Richardson, (Supm. Ct. Spec. T.) 29 Misc. (N. Y.) 367.

**English Rule.** — See Pettigrew *v.* Pettigrew, 207 Pa. St. 313, 99 Am. St. Rep. 795.

**2. Right of Burial Rests in Next of Kin.** — O'Donnell *v.* Slack, 123 Cal. 285; Enos *v.* Snyder, 131 Cal. 68, 82 Am. St. Rep. 330; Wright *v.* Hollywood Cemetery Corp., 112 Ga. 884, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 884; Palenzke *v.* Bruning, 98 Ill. App. 644; Neighbors *v.* Neighbors, 112 Ky. 161; McEntee *v.* Bonacum, 66 Neb. 651; Smith *v.* Shepherd, 64 N. J. Eq. 401; Buchanan *v.* Buchanan, (Supm. Ct. Tr. T.) 28 Misc. (N. Y.) 261; State *v.* Shonhoft, 7 Ohio Cir. Dec. 716; Pettigrew *v.* Pettigrew, 207 Pa. St. 313, 99 Am. St. Rep. 795; Koerber *v.* Patek, 123 Wis. 453.

**Nearness of Kinship Controls.** — In the absence of a surviving husband or widow, the wishes of the next of kin are entitled to be considered, with varying weight according to the nearness of the kinship and the personal relations between them and the decedent, as children of proper age, parent, brothers, and sisters. A more distant relative, or even a friend not connected by ties of blood, may have a superior right to one nearer of kin, owing to circumstances of special intimacy or association with the decedent. Pettigrew *v.* Pettigrew, 207 Pa. St. 313, 99 Am. St. Rep. 795.

**Exceptions to This Rule** arise for the most part out of circumstances of such a nature as would deprive a natural guardian of a living child. The sentiments, sympathies, and wishes of parents and near relatives concerning their deceased children and next of kin will not be set aside at the instance of strangers to the blood, or of distant relatives, without good cause. McEntee *v.* Bonacum, 66 Neb. 650.

**When Next of Kin Is Minor.** — State *v.* Shonhoft, 7 Ohio Cir. Dec. 716.

The right of sepulture in a given cemetery lot existed as to a decedent whose deceased

**837. To Be Decided on Equitable Grounds. — See note 1.****Control of Executor. — See notes 2, 3.****c. AFTER BURIAL. — See notes 4, 5, 6.**

parent was, while in life, the owner thereof, and who as heir at law of that parent inherited an undivided interest in the lot. A grandmother with whom a grandchild having no living parent resided at the time of such grandchild's death had the legal right to cause the body to be buried in a lot wherein there was, relatively to the decedent, a lawful right of sepulture. *Wright v. Hollywood Cemetery Corp.*, 112 Ga. 884.

**836. 3. Husband Controls Rather than Next of Kin.** — *Enos v. Snyder*, 131 Cal. 68, 82 Am. St. Rep. 330; *Neighbors v. Neighbors*, 112 Ky. 161; *Pulsifer v. Douglass*, 94 Me. 556; *McEntee v. Bonacum*, 66 Neb. 651; *Smith v. Shepherd*, 64 N. J. Eq. 401; *Matter of Richardson*, (Supm. Ct. Spec. T.) 29 Misc. (N. Y.) 367; *Pettigrew v. Pettigrew*, 207 Pa. St. 313, 99 Am. St. Rep. 795. See also *O'Donnell v. Slack*, 123 Cal. 285; *Buchanan v. Buchanan*, (Supm. Ct. Tr. T.) 28 Misc. (N. Y.) 261; *Koerber v. Patek*, 123 Wis. 453.

**4. Widow Preferred to Next of Kin.** — *Enos v. Snyder*, 131 Cal. 68, 82 Am. St. Rep. 330; *Louisville, etc., R. Co. v. Wilson*, 123 Ga. 62; *Neighbors v. Neighbors*, 112 Ky. 161; *McEntee v. Bonacum*, 66 Neb. 651; *Matter of Richardson*, (Supm. Ct. Spec. T.) 29 Misc. (N. Y.) 367; *Pettigrew v. Pettigrew*, 207 Pa. St. 313, 99 Am. St. Rep. 795. See also *O'Donnell v. Slack*, 123 Cal. 285; *Buchanan v. Buchanan*, (Supm. Ct. Tr. T.) 28 Misc. (N. Y.) 261; *Koerber v. Patek*, 123 Wis. 453.

**Husband Living Apart from Wife.** — Where a deceased person did not in his lifetime live with his wife, and no executor or administrator has been appointed over his estate, a sister of the deceased has the right to direct and control the burial of his dead body. *Kitchen v. Wilkinson*, 26 Pa. Super. Ct. 75.

**837. 1. The Right Is an Equitable Trust.** — *Toppin v. Moriarty*, 59 N. J. Eq. 115; *Buchanan v. Buchanan*, (Supm. Ct. Tr. T.) 28 Misc. (N. Y.) 261; *Smiley v. Bartlett*, 8 Ohio Dec. 154. See also *Pettigrew v. Pettigrew*, 207 Pa. St. 313, 99 Am. St. Rep. 795.

**Circumstances to Be Considered by Court in Determining Right of Burial.** — *Smiley v. Bartlett*, 8 Ohio Dec. 154.

**2. Right of Executor.** — See *Enos v. Snyder*, 131 Cal. 68, 82 Am. St. Rep. 330, *quoting* 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 837; *Toppin v. Moriarty*, 59 N. J. Eq. 115.

**3.** *Enos v. Snyder*, 131 Cal. 68, 82 Am. St. Rep. 330, *quoting* 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 837; *Koerber v. Patek*, 123 Wis. 453.

**4. Right to Change Place of Burial.** — *Neighbors v. Neighbors*, 112 Ky. 161.

**General Rule.** — The same rules control with regard to the right of removal and reinterment as obtain with regard to the right of burial. The presumption against the right of removal grows stronger with the remoteness of connection with the decedent. And the court always reserves the right to require reasonable cause to be shown for it. *Pettigrew v. Pettigrew*, 207 Pa. St. 313, 99 Am. St. Rep. 795.

**Where Husband Has Consented.** — When the body has been buried in the lot of another with the consent both of the husband and of the owner of the lot, the husband does not have the right, without the consent of the lot owner, to enter thereon and remove the body. *Pulsifer v. Douglass*, 94 Me. 556.

**Contract Not to Remove Not Implied.** — *Matter of Bauer*, 68 N. Y. App. Div. 212.

**Right of Removal under New York Statute.** — *Matter of Bauer*, 68 N. Y. App. Div. 212.

**5.** *Smith v. Shepherd*, 64 N. J. Eq. 401; *Matter of Richardson*, (Supm. Ct. Spec. T.) 29 Misc. (N. Y.) 367; *Pettigrew v. Pettigrew*, 207 Pa. St. 313, 99 Am. St. Rep. 795.

**General Rule.** — As a general rule, where the body is once buried in a suitable place, the surviving husband or wife will not be allowed to remove it against the will of the relatives on whose property it has been buried. Where the husband has once consented to the burial of his wife's body in the burial plot of her parents, and they afterwards desire to remove the body to a suitable place in the same cemetery, and he makes no objection until after the completion of the arrangements, equity will not interfere in his behalf. *Toppin v. Moriarty*, 59 N. J. Eq. 115.

A burial by the consent of those most nearly interested is regarded in law as a final sepulture, which cannot be disturbed, against the will of those who have the right to object (generally the next of kin), on account of change in feeling or circumstances. *Gardner v. Swan Point Cemetery*, 20 R. I. 646, 78 Am. St. Rep. 897.

**Removal Controlled by Court.** — When the duty of furnishing proper burial has been discharged, the right of custody in the surviving husband or wife at once ceases, and the dead body is thereafter in the custody of the law, the change of its resting place and its removal being subject to the control and direction of a court of equity in any case properly before it. *Smith v. Shepherd*, 64 N. J. Eq. 401.

**Removal from Temporary Resting Place.** — Under some circumstances a court of equity, which, in the United States, where there are no ecclesiastical courts, has jurisdiction of controversies relative to the place of burial of a dead body, may permit a husband to remove the body of his deceased wife from the lot of another, as where the burial was not with the intention or understanding that that should be her final resting place. *Pulsifer v. Douglass*, 94 Me. 556.

**Widow Consenting to Permanent Interment of Husband Is Estopped to Remove Body.** — *Matter of Richardson*, (Supm. Ct. Spec. T.) 29 Misc. (N. Y.) 367.

**Sufficiency of Evidence to Show Widow's Consent to Place of Interment of Husband, Selected as Permanent.** — *Matter of Richardson*, (Supm. Ct. Spec. T.) 29 Misc. (N. Y.) 367.

**Injunction to Prevent Removal by Church.** — Injunction will not be granted to prevent the sale of property which a church has allowed to be used as a cemetery, and the removal of the

- 838. 2. Duty of Burial — a. BURIAL OF THE POOR.** — See note 1.  
**b. DUTY OF HUSBAND, WIFE, OR PARENT.** — See note 2.

**839.** See notes 1, 2.

**II. CRIMINAL LIABILITY FOR INJURIES TO BODY — 1. Larceny.** — See note 4.

**2. Disinterring or Disturbing Remains — a. AT COMMON LAW.** — See notes 8, 9, 11.

bodies therefrom and their reinterment elsewhere, where it appears that the cemetery is in a neglected condition and that the removal of the church is contemplated, in which event the cemetery will be left in the midst of the business district. *Ex p. McCall*, 68 S. Car. 489.

**Replevin by Widow** will not lie for body interred in accordance with wishes of deceased. *Buchanan v. Buchanan*, (Supm. Ct. Tr. T.) 28 Misc. (N. Y.) 261.

**837. 6. Husband and Next of Kin.** — *Toppin v. Moriarty*, 59 N. J. Eq. 115; *Gardner v. Swan Point Cemetery*, 20 R. I. 646, 78 Am. St. Rep. 897. See also *Smith v. Shepherd*, 64 N. J. Eq. 401.

**Widow and Children Allowed to Remove Body Against Will of Brothers and Sisters.** — *Neighbors v. Neighbors*, 112 Ky. 161.

**Widow Allowed to Remove Body Against Will of Next of Kin.** — *Pettigrew v. Pettigrew*, 207 Pa. St. 313, 99 Am. St. Rep. 795.

**When Removal by Widow Not Allowed.** — A widow who buried the remains of her deceased husband in a burial plot belonging to his sister, with the consent of the latter, and who prepared the grave for the reception of her own remains after death, with like consent, knowing that the said plot was so occupied that no consent would be given for other interments therein, is not entitled to require the owner of the plot to permit her to remove the remains merely because her husband's children by a former wife (also buried therein) and his children by her cannot be buried there. The fact that the sister, the owner of the plot, refuses to consent to the removal of her brother's remains from said plot for the purpose of burying the same in a plot belonging to the widow, and also refuses to consent to the removal of the remains of the first wife of the deceased for the purpose of burying the same in the plot of the second wife, now his widow, raises no equity justifying a decree requiring the sister to give such consent in either case. *Smith v. Shepherd*, 64 N. J. Eq. 401.

**838. 1. An Act of Necessity.** — *People v. Baumgartner*, 135 Cal. 72; *Wright v. Hollywood Cemetery Corp.*, 112 Ga. 884; *Toppin v. Moriarty*, 59 N. J. Eq. 115. See also *Kitchen v. Wilkinson*, 26 Pa. Super. Ct. 75.

**Attempt to Sell Body Without Authority.** — "The authorities are harmonious on the proposition that the unauthorized disposition and sale of the dead body of a human being for gain and profit is a common-law misdemeanor of high grade, and *malum in se*, and that an unsuccessful attempt to commit that offense is itself a misdemeanor indictable and punishable at the common law." *Thompson v. State*, 105 Tenn. 177, 80 Am. St. Rep. 875.

**Burial of Poor by County, under Indiana Statute.**

— *Sherfey, etc., Co. v. Clay County*, 26 Ind. App. 66.

**Persons on Whom Duty Incumbent under California Statute.** — *Enos v. Snyder*, 131 Cal. 68, 82 Am. St. Rep. 330.

**Duty of County to Bury Pauper under Tennessee Statute.** — *Thompson v. State*, 105 Tenn. 177, 80 Am. St. Rep. 875.

**2. Husband Obligated to Bury Wife.** — *Enos v. Snyder*, 131 Cal. 68, 82 Am. St. Rep. 330; *Pulsifer v. Douglass*, 94 Me. 556; *Toppin v. Moriarty*, 59 N. J. Eq. 115; *Smith v. Shepherd*, 64 N. J. Eq. 401; *Watkins v. Brown*, 89 N. Y. App. Div. 193.

**Liability under California Statute for Failure to Bury.** — *Enos v. Snyder*, 131 Cal. 68, 82 Am. St. Rep. 330.

**Married Woman's Estate Liable for Funeral Expenses.** — *Watkins v. Brown*, 89 N. Y. App. Div. 193.

**Husband Liable Even After Separation.** — *Toppin v. Moriarty*, 59 N. J. Eq. 115.

**839. 1. Wife Must Bury Husband.** — *O'Donnell v. Slack*, 123 Cal. 285; *Smith v. Shepherd*, 64 N. J. Eq. 401.

**2. Father Must Bury Child.** — *Toppin v. Moriarty*, 59 N. J. Eq. 115.

**4. Larceny.** — *Toppin v. Moriarty*, 59 N. J. Eq. 115.

**8. Disturbing Dead Body.** — *People v. Baumgartner*, 135 Cal. 72; *Toppin v. Moriarty*, 59 N. J. Eq. 115.

**Damages Recoverable for Wrongful Disinterment.** — In a suit for damages for wrongfully disinterring a dead body, if the injury has been wanton and malicious, or is the result of gross negligence or a reckless disregard of the rights of others, equivalent to an intentional violation of them, exemplary damages may be awarded, in estimating which the injury to the natural feelings of the plaintiff may be taken into consideration. *Jacobus v. Children of Israel Congregation*, 107 Ga. 518, 73 Am. St. Rep. 141.

"To wantonly or illegally disturb a dead human body seems to have been a separate and different offense from disinterring the body. Frequently the remains of the deceased are placed in a vault above ground, the casket being in plain view through the openwork of the iron vault door. To force this door open, remove the lid of the casket, and take from the body jewelry or money or its vestments, without removing the body, could not be said to be disinterment. It would be an offense at common law, but not the crime of disinterment." *People v. Baumgartner*, 135 Cal. 72.

**9. Improperly Disinterring Body.** — *People v. Baumgartner*, 135 Cal. 72.

**11. For Dissection.** — *People v. Baumgartner*, 135 Cal. 72; *Thompson v. State*, 105 Tenn. 177, 80 Am. St. Rep. 875.



**840.** *b.* BY STATUTE.—See note 1.

**846.** DEAL—DEALER.—See note 4.

**840. 1. Disinterring Dead Body a Statutory Offense.**—*People v. Baumgartner*, 135 Cal. 72; *Williams v. State*, 44 Tex. Crim. 520; *Leach v. State*, 44 Tex. Crim. 523.

**"Disinter" Defined.**—*People v. Baumgartner*, 135 Cal. 72; *People v. Rhew*, 135 Cal. 75.

**Removal of Body from Resting Place Essential.**—*People v. Baumgartner*, 135 Cal. 72; *People v. Rhew*, 135 Cal. 75.

**Liability of Municipal Officers for Removal of Body.**—*State v. McLean*, 121 N. Car. 589.

**Under the Kansas Statute**, the unexplained possession of the body after it has been stolen is *prima facie* evidence of guilty possession, and applies equally to the person charged with receiving, and to the person charged with taking. The possession need not be exclusive, but a joint possession may, in connection with other circumstances, justify a conviction. *State v. Johnson*, 6 Kan. App. 119.

To warrant a conviction under the Kansas statute for knowingly receiving a stolen body, it is only necessary for the jury to find in the evidence, beyond a reasonable doubt, that the body was unlawfully removed from the grave for the purpose of dissection, and that the defendant received the body knowing that it had been so unlawfully removed for that purpose, or knowingly aided, counseled, abetted, or assisted some other person in so doing. *State v. Johnson*, 6 Kan. App. 119.

**The Missouri Statute** does not make the person removing the body guilty of a criminal offense. To render him guilty of the offense prescribed in the statute, it must be made to appear that the removal was made either for the purpose of dissection, or for surgical or anatomical experiment. *State v. Fox*, 148 Mo. 517.

**Sufficiency of Evidence in Prosecution under Missouri Statute.**—*State v. Baker*, 144 Mo. 323; *State v. Fox*, 148 Mo. 517.

**Sufficiency of Evidence Showing Intent under North Carolina Statute.**—*State v. McLean*, 121 N. Car. 589.

**Ohio Revised Statutes, § 3764**, prescribing a penalty against persons, etc., having the unlawful possession of the body of a deceased person, is not directed against cemetery associations or other trustees; nor does it relate to the remains of persons long buried and decomposed. *Carter v. Zanesville*, 50 Ohio St. 170.

**Wisconsin Statute Not Applicable to Exhumation by Public Officer.**—*Hayes v. State*, 112 Wis. 304.

**846. 4.** *State v. Barnes*, 126 N. Car. 1065, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 846, and note; *Egan v. State*, (Tex. Crim. 1902) 68 S. W. Rep. 273.

**Taxation—Manufactory.**—A company manufacturing ice which sells nothing but its own product is not a *dealer* within the meaning of a Texas statute imposing a license tax only upon *dealers* in ice. *Egan v. State*, (Tex. Crim. 1902) 68 S. W. Rep. 273.

**Partnership—Notice of Dissolution.**—*Bouker Contracting Co. v. Scribner*, 52 N. Y. App. Div. 505; *Tobin v. McKinney*, 14 S. Dak. 52.

**Dealer in Spirits—License for the Sale of Spirits in Bond.**—*Tinwell v. Mayhook*, (1904) 2 K. B. 790, 91 L. T. N. S. 145, 53 W. R. 14.

**Intoxicating Liquors—Dealing in with Minors.**—In construing a Wisconsin statute prohibiting any dealing or trafficking in intoxicating liquors with minors, the court said: "The word *deal* was obviously used *ex industria* to include all acts directly with minors in furnishing intoxicating liquors to them. The word *deal* as applied to intercourse *inter partes* includes any transaction of any kind between them. Webst. Dict. \* \* \* In this case plaintiff in error not only handed out the liquor to be drank by the minor, but actually placed the filled glass in his hands, thereby *dealing* with him in the strictest sense of the term, even though it was done at the request and at the expense of another." *Nelson v. State*, 111 Wis. 394.

**Dealer and Keeper of Bar-room Synonymous.**—An indictment "which charges appellant with being a trader in a lawful business, to wit, 'that of a liquor *dealer* or keeper of a bar-room,' is not in the alternative, as insisted by appellant, inasmuch as the words *dealer* and 'keeper' are synonymous, and in the manner here used mean the same thing." *Hofheintz v. State*, (Tex. Crim. 1903) 74 S. W. Rep. 310.

**Taxation—Lumber Dealer.**—The term "lumber *dealer*," in the Revenue Act of 1899, c. 11, § 58, implies an habitual course of *dealing* in lumber, and does not apply to one, engaged in general merchandise, who as occasion requires takes lumber or shingles in payment of a debt, or in exchange for goods he keeps for sale. *State v. Barnes*, 126 N. Car. 1063.

**Dealer in Junk.**—The words of section 29 are "*dealers* in and keepers of shops for the purchase, sale, or barter of junk, old metals, or second-hand articles." The keeper of every shop where old metals are bought by him *deals* there in such metals, and each of the defendants *dealt* in old gold and silver articles by purchasing them at their shops and sending them away to be refined. *Com. v. Hood*, 183 Mass. 196.

## DEATH BY WRONGFUL ACT.

By H. N. ELDRIDGE.

### 855. II. THE RIGHT OF ACTION IN ABSENCE OF STATUTE — 1. General Rule

— No Action. — See note 1.

**855. 1. The Common-law Doctrine** — *Unified States*. — Dueber *v.* Northern Pac. R. Co., 100 Fed. Rep. 424, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 854; Stewart *v.* Baltimore, etc., R. Co., 168 U. S. 445; Matz *v.* Chicago, etc., R. Co., 85 Fed. Rep. 180; Davidow *v.* Pennsylvania R. Co., 85 Fed. Rep. 943; Van Doren *v.* Pennsylvania R. Co., (C. C. A.) 93 Fed. Rep. 260; Louisville, etc., R. Co. *v.* Lansford, (C. C. A.) 102 Fed. Rep. 62; Thompson *v.* Chicago, etc., R. Co., 104 Fed. Rep. 845; Stern *v.* La Compagnie Generale Transatlantique, 110 Fed. Rep. 996; Sanders *v.* Louisville, etc., R. Co., (C. C. A.) 111 Fed. Rep. 708; Peers *v.* Nevada Power, etc., Co., 119 Fed. Rep. 400; Florida Cent., etc., R. Co. *v.* Sullivan, (C. C. A.) 120 Fed. Rep. 799; International Nav. Co. *v.* Lindstrom, (C. C. A.) 123 Fed. Rep. 475; Bowen *v.* Illinois Cent. R. Co., (C. C. A.) 136 Fed. Rep. 306; Swift *v.* Johnson, (C. C. A.) 138 Fed. Rep. 867.

*California*. — Webster *v.* Norwegian Min. Co., 137 Cal. 399, 92 Am. St. Rep. 181; Burk *v.* Arcata, etc., R. Co., 125 Cal. 364, 73 Am. St. Rep. 52.

*Colorado*. — Hindry *v.* Holt, 24 Colo. 464, 65 Am. St. Rep. 235; Denver, etc., R. Co. *v.* Spencer, 27 Colo. 313.

*Connecticut*. — Broughel *v.* Southern New England Telephone Co., 72 Conn. 620.

*Delaware*. — Szymanski *v.* Blumenthal, 3 Penn. (Del.) 558.

*District of Columbia*. — U. S. Electric Light Co. *v.* Sullivan, 22 App. Cas. (D. C.) 115.

*Florida*. — Florida Cent., etc., R. Co. *v.* Foxworth, 41 Fla. 1, 79 Am. St. Rep. 149; Louisville, etc., R. Co. *v.* Jones, (Fla. 1903) 34 So. Rep. 246.

*Georgia*. — Southern Bell Telephone, etc., Co. *v.* Cassin, 111 Ga. 575; Robinson *v.* Georgia R., etc., Banking Co., 117 Ga. 168, 97 Am. St. Rep. 156; Western, etc., R. Co. *v.* Bass, 104 Ga. 390.

*Illinois*. — Foster *v.* St. Luke's Hospital, 191 Ill. 94; Merrihew *v.* Chicago City R. Co., 92 Ill. App. 346; Wetherell *v.* Chicago City R. Co., 104 Ill. App. 357; Mattoon Gas Light, etc., Co. *v.* Dolan, 105 Ill. App. 1.

*Indiana*. — Pittsburgh, etc., R. Co. *v.* Hosea, 152 Ind. 412; Citizens' St. R. Co. *v.* Cooper, 22 Ind. App. 459, 72 Am. St. Rep. 319; Duzan *v.* Myers, 30 Ind. App. 227, 96 Am. St. Rep. 341; Fabel *v.* Cleveland, etc., R. Co., 30 Ind. App. 268; Diebold *v.* Sharpe, 19 Ind. App. 474; Cleveland, etc., R. Co. *v.* Osgood, (Ind. App. 1904) 70 N. E. Rep. 839; Dillier *v.* Cleveland, etc., R. Co., 34 Ind. App. 52; Cleveland, etc., R. Co. *v.* Osgood, (Ind. App. 1905) 73 N. E. Rep. 285.

*Iowa*. — Sachs *v.* Sioux City, 109 Iowa 224;

Major *v.* Burlington, etc., R. Co., 115 Iowa 312, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 855; Romano *v.* Capital City Brick, etc., Co., 125 Iowa 591.

*Kansas*. — Rodman *v.* Missouri Pac. R. Co., 65 Kan. 645.

*Kentucky*. — Lewis *v.* Taylor Coal Co., 112 Ky. 845; Harris *v.* Kentucky Timber, etc., Co., (Ky. 1897) 43 S. W. Rep. 462; Illinois Cent. R. Co. *v.* Josey, 110 Ky. 342, 96 Am. St. Rep. 455; Gregory *v.* Illinois Cent. R. Co., (Ky. 1904) 80 S. W. Rep. 795.

*Maine*. — Bligh *v.* Biddeford, etc., R. Co., 94 Me. 499; McKay *v.* New England Dredging Co., 92 Me. 454.

*Massachusetts*. — Hudson *v.* Lynn, etc., R. Co., 185 Mass. 510.

*Minnesota*. — Watson *v.* St. Paul City R. Co., 70 Minn. 514; Negaubauer *v.* Great Northern R. Co., 92 Minn. 184, 104 Am. St. Rep. 674.

*Mississippi*. — Illinois Cent. R. Co. *v.* Johnson, 77 Miss. 727.

*Missouri*. — Brink *v.* Wabash R. Co., 160 Mo. 87, 83 Am. St. Rep. 459; Behen *v.* St. Louis Transit Co., 186 Mo. 430.

*New Hampshire*. — Poff *v.* New England Telephone, etc., Co., 72 N. H. 164.

*New Jersey*. — Consolidated Traction Co. *v.* Hone, 60 N. J. L. 444; Cooper *v.* Shore Electric Co., 63 N. J. L. 558; McKeering *v.* Pennsylvania R. Co., 65 N. J. L. 57.

*New Mexico*. — Romero *v.* Atchison, etc., R. Co., 11 N. Mex. 679.

*New York*. — Meekin *v.* Brooklyn Heights R. Co., 164 N. Y. 145, 79 Am. St. Rep. 635; McGahey *v.* Nassau Electric R. Co., 51 N. Y. App. Div. 281, affirmed 166 N. Y. 617; Ohnmacht *v.* Mt. Morris Electric Light Co., 66 N. Y. App. Div. 482; Gmaehle *v.* Rosenberg, 83 N. Y. App. Div. 339; Larocque *v.* Conheim, (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 613.

*North Carolina*. — Killian *v.* Southern R. Co., 128 N. Car. 262, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 855; Hartness *v.* Pharr, 133 N. Car. 566, 98 Am. St. Rep. 725; Howell *v.* Yancey County, 121 N. Car. 362; Bradley *v.* Ohio River, etc., R. Co., 122 N. Car. 972; Bolick *v.* Southern R. Co., 138 N. Car. 370.

*North Dakota*. — Haug *v.* Great Northern R. Co., 8 N. Dak. 23, 73 Am. St. Rep. 727; Harshman *v.* Northern Pac. R. Co., (N. Dak. 1905) 103 N. W. Rep. 412, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 855.

*Ohio*. — Helman *v.* Pittsburg, etc., R. Co., 58 Ohio St. 400; Wabash R. Co. *v.* Fox, 64 Ohio St. 133, 83 Am. St. Rep. 739; Baltimore, etc., R. Co. *v.* Hottman, 25 Ohio Cir. Ct. 140; New York, etc., R. Co. *v.* Roe, 25 Ohio Cir. Ct. 628; Alston *v.* C., etc., R. Co., 1 Ohio Cir. Dec. 353.

**856. 2. Extent and Scope of This Rule — a. DEATH NOT INSTANTANEOUS — LOSS OF SERVICES.** — See note 2.

**858. III. RIGHT OF ACTION GIVEN BY STATUTE — 1. Generally.** — See note 2.

**2. Two Classes of Statutes — a. SURVIVAL STATUTES.** — See note 5.

**859. Statutes Creating Right of Action Are Not Necessarily Survival Statutes.** — See note 1.

**b. STATUTES CREATING A NEW CAUSE OF ACTION.** — See note 2.

*Oregon.* — *Perham v. Portland Gen. Electric Co.*, 33 Oregon 451, 72 Am. St. Rep. 730; *Schleiger v. Northern Terminal Co.*, 43 Oregon 4. *Pennsylvania.* — *Edwards v. Gimbel*, 202 Pa. St. 30; *Haughey v. Pittsburg R. Co.*, 210 Pa. St. 367.

*South Carolina.* — *In re Mayo*, 60 S. Car. 401; *Morris v. Spartanburg R., etc., Co.*, 70 S. Car. 279.

*South Dakota.* — *Lintz v. Holy Terror Min. Co.*, 13 S. Dak. 489.

*Tennessee.* — *Whaley v. Catlett*, 103 Tenn. 347; *Haynes v. Walker*, 111 Tenn. 106.

*Texas.* — *Cole v. Parker*, 27 Tex. Civ. App. 563; *Parker v. Dupree*, 28 Tex. Civ. App. 341; *Ellyson v. International, etc., R. Co.*, 33 Tex. Civ. App. 1.

*Utah.* — *Thorpe v. Union Pac. Coal Co.*, 24 Utah 475.

*Vermont.* — *Lazelle v. Newfane*, 70 Vt. 440; *Trow v. Thomas*, 70 Vt. 580.

*Washington.* — *Robinson v. Baltimore, etc., Min., etc., Co.*, 26 Wash. 484.

*West Virginia.* — *Shaw v. Charleston*, (W. Va. 1905) 50 S. E. Rep. 528, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 854 (855).

*Wisconsin.* — *Schmidt v. Menasha Woodenware Co.*, 99 Wis. 300; *Brown v. Chicago, etc., R. Co.*, 102 Wis. 137; *Robertson v. Chicago St., etc., R. Co.*, 122 Wis. 66.

*Canada.* — *Davidson v. Stuart*, 14 Manitoba 74, affirmed on other grounds 34 Can. Sup. Ct. 215.

**856. 2. Party Entitled to Services May Recover.** — *Matz v. Chicago, etc., R. Co.*, 85 Fed. Rep. 180; *Brennan v. Standard Oil Co.*, 187 Mass. 376; *Watson v. St. Paul City R. Co.*, 70 Minn. 514; *Ferguson v. Delaware, etc., Tel., etc., Co.*, (N. J. 1904) 58 Atl. Rep. 74; *U. S. Electric Lighting Co. v. Sullivan*, 22 App. Cas. (D. C.) 115; *Ohnmacht v. Mt. Morris Electric Light Co.*, 66 N. Y. App. Div. 482; *Gulf, etc., R. Co. v. Beall*, (Tex. Civ. App. 1898) 43 S. W. Rep. 605; *Texas, etc., R. Co. v. Harby*, 28 Tex. Civ. App. 24; *Trow v. Thomas*, 70 Vt. 580. See also *Sternenberg v. Mailhos*, (C. C. A.) 99 Fed. Rep. 43; *Atchinson Water Co. v. Price*, 9 Kan. App. 884, 59 Pac. Rep. 677.

**858. 2. Bolick v. Southern R. Co.**, 138 N. Car. 370, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 858. See *Tucker v. State*, 89 Md. 489, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 858; *Killian v. Southern R. Co.*, 128 N. Car. 263, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 858. See also *Strode v. St. Louis Transit Co.*, (Mo. 1905) 87 S. W. Rep. 980, quoting 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 858.

**5. Survival Statute.** — In *Iowa* the statutory provisions "differ materially from those passed

in analogy to Lord Campbell's act, for they do not create a new right of action, but abrogate the common-law rule by which an existing cause of action is terminated on the death of the party entitled to recover." *Romano v. Capital City Brick, etc., Co.*, 125 Iowa 591. See also *Pearson v. Wilcox*, 109 Iowa 123; *Sachs v. Sioux City*, 109 Iowa 224; *Major v. Burlington, etc., R. Co.*, 115 Iowa 309; *Seney v. Chicago, etc., R. Co.*, 125 Iowa 290; *Strode v. St. Louis Transit Co.*, (Mo. 1905) 87 S. W. Rep. 980, quoting 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 858.

The *New Hampshire* statute is a survival statute merely. *Lyon v. Boston, etc., R. Co.*, 107 Fed. Rep. 386; *Hastings Lumber Co. v. Garland*, (C. C. A.) 115 Fed. Rep. 15; *Carney v. Concord St. R. Co.*, 72 N. H. 364.

**Both Classes of Statutes Have Been Held to Exist** in the following jurisdictions:

*Illinois.* — *Wetherell v. Chicago City R. Co.*, 104 Ill. App. 357.

*Louisiana.* — *Eichorn v. New Orleans, etc., R., etc., Co.*, 112 La. 236.

*Michigan.* — *Sweetland v. Chicago, etc., R. Co.*, 117 Mich. 329; *Dolson v. Lake Shore, etc., R. Co.*, 128 Mich. 444; *Jones v. McMillan*, 129 Mich. 86; *Kyes v. Valley Telephone Co.*, 132 Mich. 281; *Oliver v. Houghton County St. R. Co.*, 134 Mich. 367, 104 Am. St. Rep. 607; *Storrie v. Grand Trunk Elevator Co.*, 134 Mich. 297.

*Pennsylvania.* — *McCafferty v. Pennsylvania R. Co.*, 193 Pa. St. 339, 74 Am. St. Rep. 690; *Edwards v. Gimbel*, 202 Pa. St. 30.

*Tennessee.* — *Whaley v. Catlett*, 103 Tenn. 347; *Davidson Benedict Co. v. Severson*, 109 Tenn. 572.

*Wisconsin.* — *Staeffler v. Menasha Woodenware Co.*, 111 Wis. 483; *Schmidt v. Menasha Woodenware Co.*, 99 Wis. 300; *Brown v. Chicago, etc., R. Co.*, 102 Wis. 137.

**859. 1. In re Mayo.** 60 S. Car. 425, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 859.

**2. Lord Campbell's Act — United States.** — *Adams v. Northern Pac. R. Co.*, 95 Fed. Rep. 940, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 859; *Northern Pac. R. Co. v. Adams*, (C. C. A.) 116 Fed. Rep. 324, reversed 192 U. S. 440; *Peers v. Nevada Power, etc., Co.*, 119 Fed. Rep. 400.

*California.* — *Burk v. Arcata, etc., R. Co.*, 125 Cal. 364, 73 Am. St. Rep. 52.

*District of Columbia.* — *U. S. Electric Lighting Co. v. Sullivan*, 22 App. Cas. (D. C.) 115.

*Georgia.* — *Western, etc., R. Co. v. Bass*, 104 Ga. 390.

*Indiana.* — *Pittsburgh, etc., R. Co. v. Hosea*, 152 Ind. 412; *Malott v. Shimer*, 153 Ind. 35, 74 Am. St. Rep. 278.



**861. IV. WHEN THE ACTION WILL LIE — 2. Deceased Must Have Been Entitled to Sue Had He Lived.** — See note 1.

**3. Death Must Have Been Proximate Consequence of Wrongful Act.** — See note 2.

**863. 5. What Is Wilful Neglect.** — See note 4.

**6. Felonious and Intentional Killing.** — See note 5.

*Kansas.* — *Rodman v. Missouri Pac. R. Co.*, 65 Kan. 645.

*Maine.* — *McKay v. New England Dredging Co.*, 92 Me. 454.

*Maryland.* — *Tucker v. State*, 89 Md. 471.

*Mississippi.* — *Bussey v. Gulf, etc.*, R. Co., 79 Miss. 597.

*Missouri.* — *Behen v. St. Louis Transit Co.*, 186 Mo. 430; *Strode v. St. Louis Transit Co.*, (Mo. 1905) 87 S. W. Rep. 980, quoting 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 859.

*Nebraska.* — *Tucker v. Draper*, 62 Neb. 66; *Chicago, etc., R. Co. v. Young*, 58 Neb. 678.

*New Jersey.* — *Cooper v. Shore Electric Co.*, 63 N. J. L. 558.

*New York.* — *Snedeker v. Snedeker*, 164 N. Y. 58; *Hodges v. Webber*, 65 N. Y. App. Div. 170.

*North Carolina.* — *Hartness v. Pharr*, 133 N. Car. 566, 98 Am. St. Rep. 725.

*Ohio.* — *Solor Refining Co. v. Elliott*, 8 Ohio Cir. Dec. 225, 15 Ohio Cir. Ct. 581.

*Oregon.* — *Vaughn v. Bunker Hill, etc., Min., etc., Co.*, 126 Fed. Rep. 895 (construing the Oregon statute).

*South Carolina.* — *Brown v. Southern R. Co.*, 65 S. Car. 260; *In re Mayo*, 60 S. Car. 401.

*Vermont.* — *Lazelle v. Newfane*, 70 Vt. 440.

*West Virginia.* — *Hoover v. Chesapeake, etc.*, R. Co., 46 W. Va. 268.

**861. 1. Essential that Deceased if Alive Would Have Right of Action** — *United States.* — *Northern Pac. R. Co. v. Adams*, 192 U. S. 440; *Indiana v. Gobin*, 94 Fed. Rep. 48; *Erickson v. Pacific Coast Steamship Co.*, 96 Fed. Rep. 80; *Singleton v. Felton*, (C. C. A.) 101 Fed. Rep. 526; *Thompson v. Chicago, etc., R. Co.*, 104 Fed. Rep. 845; *Cincinnati, etc., R. Co. v. Thieband*, (C. C. A.) 114 Fed. Rep. 918. But see *Northern Pac. R. Co. v. Adams*, (C. C. A.) 116 Fed. Rep. 324, *reversed* 192 U. S. 440.

*Alabama.* — *Shannon v. Jefferson County*, 125 Ala. 384.

*Indiana.* — *Malott v. Shimer*, 153 Ind. 35, 74 Am. St. Rep. 278; *Pittsburgh, etc., R. Co. v. Hosea*, 152 Ind. 412; *Dillier v. Cleveland, etc., R. Co.*, 34 Ind. App. 52.

*Michigan.* — *Dolson v. Lake Shore, etc., R. Co.*, 128 Mich. 444.

*Minnesota.* — *Watson v. St. Paul City R. Co.*, 70 Minn. 514.

*Nebraska.* — *Chicago, etc., R. Co. v. Young*, 58 Neb. 678; *Chicago, etc., R. Co. v. Zernecke*, 59 Neb. 689.

*New Jersey.* — *McKeering v. Pennsylvania R. Co.*, 65 N. J. L. 57.

*New York.* — *Hughes v. Auburn*, 161 N. Y. 96; *Sullivan v. Dunham*, 161 N. Y. 290, *affirming* (Supm. Ct. App. Div.) 56 N. Y. Supp. 1117; *Lewin v. Lehigh Valley R. Co.*, 52 N. Y. App. Div. 69, *affirmed* 165 N. Y. 667.

*North Dakota.* — *Cameron v. Great Northern R. Co.*, 8 N. Dak. 618.

*Ohio.* — *Solor Refining Co. v. Elliott*, 8 Ohio Cir. Dec. 225, 15 Ohio Cir. Ct. 581; *Helman v. Pittsburg, etc., R. Co.*, 58 Ohio St. 400; *Alston v. C., etc., R. Co.*, 1 Ohio Cir. Dec. 353.

*Rhode Island.* — *Gorman v. Budlong*, 23 R. I. 169, 91 Am. St. Rep. 629.

*South Carolina.* — *In re Mayo*, 60 S. Car. 401.

*Vermont.* — *Ploof v. Burlington Traction Co.*, 70 Vt. 509.

*West Virginia.* — *Hoover v. Chesapeake, etc.*, R. Co., 46 W. Va. 268.

*Wisconsin.* — *Robertson v. Chicago, etc., R. Co.*, 122 Wis. 66.

*Canada.* — *Holden v. Grand Trunk R. Co.*, 5 Ont. L. Rep. 301.

**2. Defendant's Wrongful Act Must Have Been Proximate Cause** — *United States.* — *The Onoko*, 100 Fed. Rep. 477.

*Delaware.* — *Neal v. Wilmington, etc., Electric R. Co.*, 3 Penn. (Del.) 467; *Di Prisco v. Wilmington City R. Co.*, 4 Penn. (Del.) 527.

*Georgia.* — *Southern R. Co. v. Webb*, 116 Ga. 152.

*Iowa.* — *Pearson v. Wilcox*, 109 Iowa 123.

*Nebraska.* — *Chicago, etc., R. Co. v. Young*, 58 Neb. 678.

*New York.* — *Turner v. Nassau Electric R. Co.*, 41 N. Y. App. Div. 213; *Shortsleeve v. Stebbins*, 77 N. Y. App. Div. 588; *Hoey v. Metropolitan St. R. Co.*, 70 N. Y. App. Div. 60. See also *Grace v. Fassott*, 67 N. Y. App. Div. 443; *McQuade v. Metropolitan St. R. Co.*, 84 N. Y. App. Div. 637; *Koch v. Zimmermann*, 85 N. Y. App. Div. 370.

*North Carolina.* — *Meekins v. Norfolk, etc.*, R. Co., 134 N. Car. 217.

*Ohio.* — *Lake Shore, etc., R. Co. v. Schultz*, 9 Ohio Cir. Dec. 816, 19 Ohio Cir. Ct. 639. See also *Ronker v. St. John*, 11 Ohio Cir. Dec. 434, 21 Ohio Cir. Ct. 39.

*Pennsylvania.* — See *Hoehle v. Allegheny Heating Co.*, 5 Pa. Super. Ct. 21.

*South Carolina.* — *Mason v. Southern R. Co.*, 58 S. Car. 70, 79 Am. St. Rep. 826.

*Canada.* — *Young v. Owen Sound Dredging Co.*, 27 Ont. App. 649.

**Causal Connection — Illustrations.** — *In Daniels v. New York, etc., R. Co.*, 183 Mass. 393, it was held that where the plaintiff's intestate deliberately, and not acting under an uncontrollable impulse, killed himself while insane, such insanity being due to a collision with a train at a railroad crossing, the act of the intestate in killing himself, and not the collision, was the proximate cause of the death, and the railroad company was therefore not liable.

**863. 4. Singleton v. Felton, (C. C. A.) 101 Fed. Rep. 526 (construing the *Kentucky* statute).**

**5. See Rutherford v. Foster, (C. C. A.) 125 Fed. Rep. 187 (construing the *Arkansas* statute); *Western, etc., R. Co. v. Bass*, 104 Ga.**

**864.** Intentional Killing. — See note 2.

**7. Death Instantaneous** — *a.* AS EXCLUDING CAUSE OF ACTION.

— See note 4.

**865.** And This Fact Has Been Held Not Material. — See note 1.

**866.** *b.* EXCLUDES RECOVERY FOR PAIN AND SUFFERING. — See note 1.

*c.* WHAT AMOUNTS TO INSTANTANEOUS DEATH. — See notes 2, 3.

**867. V. DEFENSES TO THE ACTION** — **2. Fellow-servant Doctrine Not Abrogated.** — See note 2.

**3. Contributory Negligence.** — See note 3.

390; Croft v. Smith, (Tex. Civ. App. 1899) 51 S. W. Rep. 1089.

**864. 2.** McKinney v. Carmack, 119 Ga. 467; Hollingsworth v. Warnock, (Ky. 1898) 47 S. W. Rep. 770, 112 Ky. 96. See also Tucker v. State, 89 Md. 471.

**4. Action for Benefit of Estate Brought by Representative.** — In *Michigan*, where both a "survival" statute and a statute creating a new cause of action exist, it is held that if death is instantaneous the administrator can recover damages under the latter statute alone, and that if death is not instantaneous he can recover only under the former statute. *Sweetland v. Chicago*, etc., R. Co., 117 Mich. 329; *Dolson v. Lake Shore*, etc., R. Co., 128 Mich. 444; *Kyes v. Valley Telephone Co.*, 132 Mich. 281; *Oliver v. Houghton County St. R. Co.*, 134 Mich. 367, 104 Am. St. Rep. 607. See also *Sternenberg v. Mailhos*, (C. C. A.) 99 Fed. Rep. 43.

**865. 1. Fact of Instantaneous Death Not Affecting Right of Action** — *Connecticut*. — In Connecticut, by the express language of the statute, the right of action is given whether death follows the wrongful act instantaneously or otherwise. The real cause of action arises from the wrongful act; death is but the effect or circumstance of the act. When that event ensues the effects of the act are, legally speaking, complete. *Broughel v. Southern New England Telephone Co.*, 72 Conn. 617.

*Indiana*. — *Malott v. Shimer*, 153 Ind. 35, 74 Am. St. Rep. 278.

*Maine*. — In Maine it is held that a right of action under the statute can be maintained only where the death is immediate. *Conley v. Portland Gas Light Co.*, 96 Me. 281; *Carrigan v. Stillwell*, 97 Me. 247.

*Massachusetts*. — Stat. Mass. 1887, c. 270, as amended by Stat. Mass. 1892, c. 260, allows recovery by the widow or next of kin of an employee both where the employee is instantly killed or dies without conscious suffering and where the death is not instantaneous or is preceded by conscious suffering. *Knight v. Overman Wheel Co.*, 174 Mass. 455.

*Missouri*. — The Missouri statute permits a recovery though death is not instantaneous. *Matx v. Chicago*, etc., R. Co., 85 Fed. Rep. 180.

*Oregon*. — *Perham v. Portland Gen. Electric Co.*, 33 Oregon 451, 72 Am. St. Rep. 730.

**866. 1.** *Peers v. Nevada Power*, etc., Co., 119 Fed. Rep. 400, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 866.

**2. Appreciable Time Must Intervene.** — *Peers v. Nevada Power*, etc., Co., 119 Fed. Rep. 403, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 866.

**3. Must Be Actual Life.** — *St. Louis*, etc., R. Co. v. Dawson, 68 Ark. 1.

**Unconsciousness Immaterial.** — *Oliver v. Houghton County St. R. Co.*, 134 Mich. 367, 104 Am. St. Rep. 607, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 866.

**867. 2. Negligence of Fellow Servants a Defense.** — *Linck v. Louisville*, etc., R. Co., 107 Ky. 370; *Jackson v. Lincoln Min. Co.*, 106 Mo. App. 441.

**3. Defense of Contributory Negligence Available** — *United States*. — *Boston*, etc., R. Co. v. Hurd, (C. C. A.) 108 Fed. Rep. 116; *The Schooner Robert Lewers Co. v. Kekaunoha*, (C. C. A.) 114 Fed. Rep. 849; *Elliott v. Canadian Pac. R. Co.*, 129 Fed. Rep. 163.

*Arkansas*. — *St. Louis*, etc., R. Co. v. Townsend, 69 Ark. 380.

*California*. — *Schneider v. Market St. R. Co.*, 134 Cal. 482; *Hillebrand v. Standard Biscuit Co.*, 139 Cal. 233.

*Delaware*. — *Maxwell v. Wilmington City R. Co.*, 1 Marv. (Del.) 199.

*Georgia*. — *Georgia R.*, etc., Co. v. Sawyer, 112 Ga. 346; *Griffin v. Brunswick*, etc., R. Co., 113 Ga. 642; *Jones v. Central of Georgia R. Co.*, 116 Ga. 27; *Georgia*, etc., R. Co. v. Mathews, 116 Ga. 424.

*Illinois*. — *Illinois Cent. R. Co. v. Cozby*, 174 Ill. 109, affirming 69 Ill. App. 256; *Chicago*, etc., R. Co. v. Gunderson, 74 Ill. App. 356, affirmed 174 Ill. 495; *Chicago*, etc., R. Co. v. Downey, 85 Ill. App. 175; *Chicago North Shore R. Co. v. Green*, 93 Ill. App. 105.

*Indiana*. — *Chicago*, etc., R. Co. v. Stephenson, 33 Ind. App. 95.

*Iowa*. — *Dalton v. Chicago*, etc., R. Co., 104 Iowa 26.

*Kentucky*. — *Louisville*, etc., R. Co. v. Clark, 105 Ky. 571; *Madisonville v. Pemberton*, (Ky. 1903) 75 S. W. Rep. 229.

*Maine*. — *McDonough v. Grand Trunk R. Co.*, 98 Me. 304.

*Maryland*. — *Western Maryland R. Co. v. State*, 95 Md. 637.

*Massachusetts*. — *Hudson v. Lynn*, etc., R. Co., 185 Mass. 510; *Walsh v. Boston*, etc., R. Co., 171 Mass. 52.

*New Jersey*. — *Rowe v. New York*, etc., Telephone Co., 66 N. J. L. 19.

*New York*. — *Read v. Brooklyn Heights R. Co.*, 32 N. Y. App. Div. 503; *Kane v. Whitaker*, 33 N. Y. App. Div. 416; *Fitzgerald v. New York Cent.*, etc., R. Co., 37 N. Y. App. Div. 127; *Twist v. Rochester*, 37 N. Y. App. Div. 307, affirmed 165 N. Y. 619; *Fowler v. Buffalo Furnace Co.*, 41 N. Y. App. Div. 84, appeal dismissed 160 N. Y. 665; *Boyle v. Degnon-Mc-*

**868.** But Where the Killing Was Wilful or Felonious. — See note 1.  
Imputable Negligence. — See notes 3, 4.

**869.** Where There Are Several Beneficiaries. — See note 1.

4. Accord and Satisfaction — *a.* BY ONE BENEFICIARY — Effect and Validity Of. — See note 3.

Compromise by Beneficiaries Without Consent of Personal Representative. — See note 4.

*b.* BY WIDOW OF DECEASED. — See note 5.

**870.** *c.* BY EXECUTOR OR ADMINISTRATOR. — See note 1.

5. Release — By Decedent. — See notes 2, 3.

Lean Constr. Co., 47 N. Y. App. Div. 311; Seifter v. Brooklyn Heights R. Co., 55 N. Y. App. Div. 10, reversed 169 N. Y. 254; Woodworth v. New York Cent., etc., R. Co., 55 N. Y. App. Div. 23, affirmed 170 N. Y. 589; Tait v. Buffalo R. Co., 55 N. Y. App. Div. 507; Johnson v. Rochester R. Co., 61 N. Y. App. Div. 12; Ericius v. Brooklyn Heights R. Co., 63 N. Y. App. Div. 353; Canning v. Buffalo, etc., R. Co., 28 N. Y. App. Div. 621.

North Carolina. — Powell v. Southern R. Co., 125 N. Car. 370; Cogdell v. Wilmington, etc., R. Co., 130 N. Car. 313.

Ohio. — Schweinfurth v. Cleveland, etc., R. Co., 60 Ohio St. 215; Schausten v. Toledo Consol. St. R. Co., 7 Ohio Cir. Dec. 389, 18 Ohio Cir. Ct. 691.

Rhode Island. — Sweet v. Providence, etc., R. Co., 20 R. I. 785; Lee v. Reliance Mills Co., 21 R. I. 549.

Texas. — Freeman v. Carter, (Tex. Civ. App. 1904) 81 S. W. Rep. 81.

Utah. — Linden v. Anchor Min. Co., 20 Utah 134; Utah Sav., etc., Co. v. Diamond Coal, etc., Co., 26 Utah 299.

Due Care Need Not Be Shown by Direct Evidence, but may be inferred from circumstances. Chicago, etc., R. Co. v. Keely, 103 Ill. App. 205; Chicago, etc., R. Co. v. Huston, 95 Ill. App. 350, affirmed 196 Ill. 480.

**868.** 1. Contributory Negligence No Defense When Homicide Intentional. — Louisville, etc., R. Co. v. Brown, 121 Ala. 221; Louisville, etc., R. Co. v. Orr, 121 Ala. 489; Union Warehouse Co. v. Prewitt, (Ky. 1899) 50 S. W. Rep. 964; Memphis, etc., R. Co. v. Martin, 117 Ala. 367; Chicago, etc., R. Co. v. Stone, 109 Ill. App. 517.

3. Injury to Young Child — Negligence of Beneficiary Bars Action. — St. Louis, etc., R. Co. v. Dawson, 68 Ark. 1; Tucker v. Draper, 62 Neb. 66. See also Brennan v. Standard Oil Co., 187 Mass. 376.

4. Negligence of Beneficiary No Bar. — Carney v. Concord St. R. Co., 72 N. H. 364; Lewin v. Lehigh Valley R. Co., 52 N. Y. App. Div. 69, affirmed 165 N. Y. 667; Ploof v. Burlington Traction Co., 70 Vt. 509. See also Donk Bros. Coal, etc., Co. v. Leavitt, 100 Ill. App. 385.

**869.** 1. Several Beneficiaries — Some Negligent. — Donk Bros. Coal, etc., Co. v. Leavitt, 109 Ill. App. 385.

3. One Beneficiary Cannot Compromise Rights of Others. — Boulden v. Pennsylvania R. Co., 205 Pa. St. 264. See also Oyster v. Burlington Relief Dept., 65 Neb. 789; Baltimore, etc., R. Co. v. Hottman, 25 Ohio Cir. Ct. 140.

4. A Sole Beneficiary may, where no disability exists, make a valid compromise notwithstanding

the right of action is vested in the administrator. Mattoon Gas Light, etc., Co. v. Dolan, 105 Ill. App. 1. See also Cullison v. Baltimore, etc., R. Co., 7 Ohio Dec. 269, where a widow who was the only beneficiary compromised her claim, and then sued as administratrix for the death of the intestate, and it was held that she could not maintain the action.

Settlement Before Appointment of Administrator. — A settlement with the beneficiaries has been held to be a bar to a suit by a personal representative subsequently appointed. Christie v. Chicago, etc., R. Co., 104 Iowa 707.

5. The Tennessee Statute. — Prater v. Tennessee Producers' Marble Co., 105 Tenn. 496.

Under the Indiana Statute it was held that a release by the widow as beneficiary did not bar an action by her as administratrix for the benefit of her children. Cowen v. Ray, (C. C. A.) 108 Fed. Rep. 320.

**870.** 1. Executor May Compromise. — See Pisano v. Shanley Co., 66 N. J. L. 1; O'Brien v. Brooklyn Heights R. Co., 80 N. Y. App. Div. 474.

Compromise Made Before Appointment. — A compromise made by a person before his appointment as administrator is valid where he is the only person entitled to damages. Doyle v. New York, etc., R. Co., 66 N. Y. App. Div. 398.

Consent of Beneficiaries or of the Probate Court Is Not Required as a condition precedent to a compromise by the personal representative. Foot v. Great Northern R. Co., 81 Minn. 493, 83 Am. St. Rep. 395.

When Compromise Made. — Compromise may be made either before or after suit is brought. Foot v. Great Northern R. Co., 81 Minn. 493, 83 Am. St. Rep. 395.

2. When the Statute Is Merely a Survival Statute. — See Southern Bell Telephone, etc., Co. v. Cassin, 111 Ga. 575, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 870; Alston v. C., etc., R. Co., 1 Ohio Cir. Dec. 353.

3. When Right of Action Is Different, but Depends on Right of Deceased to Have Sued. — Thompson v. Ft. Worth, etc., R. Co., 97 Tex. 590. And see Southern Bell Telephone, etc., Co. v. Cassin, 111 Ga. 575, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 870. See also Northern Pac. R. Co. v. Adams, 192 U. S. 440; Solor Refining Co. v. Elliott, 8 Ohio Cir. Dec. 225; Brown v. Chattanooga Electric R. Co., 101 Tenn. 252, 70 Am. St. Rep. 666. Compare Strode v. St. Louis Transit Co., (Mo. 1905) 87 S. W. Rep. 976, quoting 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 870.

The Deceased Must Not Have Been Mentally



**871.** A Release Made by the Deceased in Advance of the Injury. — See notes 1, 2.

**6. Former Recovery — a. AS A BAR TO ACTION — Identity of Right of Action, Etc.** — See note 4.

**872.** Recovery by Deceased Before Death. — See note 2.

Former Recoveries Held No Bar — Causes of Action Distinguished. — See note 3.

**873.** See note 1.

7. Death of Party Entitled to Right of Action. — See note 3.

Statute Provisions for Right Surviving Beneficiary. — See note 4.

**874.** Death Pending Action of One of Several Beneficiaries. — See note 1.

8. Death of Wrongdoer. — See note 3.

**VI. LIMITATION OF THE ACTION — 1. Generally.** — See note 5.

**875.** 2. The Statute Absolute. — See note 1.

3. Effect of Minority of Parties Plaintiff. — See note 2.

**Incompetent** at the time of the release. *Missouri, etc., R. Co. v. Brantley*, 26 Tex. Civ. App. 11.

**871.** 1. See *McKeering v. Pennsylvania R. Co.*, 65 N. J. L. 57. But see *Reg. v. Grenier*, 30 Can. Sup. Ct. 42.

**A Release Made by the Deceased in Consideration of Free Transportation** is not enforceable as against beneficiaries under a wrongful-death statute which creates a new action in favor of beneficiaries therein named. *Adams v. Northern Pac. R. Co.*, 95 Fed. Rep. 938.

2. *Pittsburgh, etc., R. Co. v. Hosea*, 152 Ind. 412.

4. **California.** — *Daubert v. Western Meat Co.*, 139 Cal. 480, 96 Am. St. Rep. 154.

**872.** 2. **Recovery by Deceased — Survivor's Action Barred.** — *McGahey v. Nassau Electric R. Co.*, 51 N. Y. App. Div. 281, *affirmed* 166 N. Y. 617; *Littlewood v. New York*, 89 N. Y. 24, 42 Am. Rep. 271, *overruling* *Schlichting v. Wintgen*, 25 Hun (N. Y.) 626. See also *Davidson Benedict Co. v. Severson*, 109 Tenn. 572.

3. **Action by Deceased Begun in His Lifetime Not a Bar to Suit by Beneficiaries.** — See *Burk v. Arcata, etc., R. Co.*, 125 Cal. 364, 73 Am. St. Rep. 52; *Bolick v. Southern R. Co.*, 138 N. Car. 370; *Brown v. Chicago, etc., R. Co.*, 102 Wis. 137.

**873.** 1. **Under Texas Statute.** — *Galveston, etc., R. Co. v. Contreras*, 31 Tex. Civ. App. 489.

3. See *Schmidt v. Menasha Woodenware Co.*, 99 Wis. 300; *McHugh v. Grand Trunk R. Co.*, 32 Ont. 234, 2 Ont. L. Rep. 600. But see *Cooper v. Shore Electric Co.*, 63 N. J. L. 558.

4. **Statutes Providing for Survivorship.** — See *Dillier v. Cleveland, etc., R. Co.*, 34 Ind. App. 52; *Thomas v. Maysville Gas Co.*, 112 Ky. 569; *Pitkin v. New York Cent., etc., R. Co.*, 94 N. Y. App. Div. 31, holding that on the death of a father who is the sole beneficiary the right of action goes to his estate, and the damages recoverable are such as the father sustained down to his death.

**The Personal Representative of a Deceased Beneficiary May Be Substituted in Pennsylvania** in a suit begun by such beneficiary to recover damages for the death by wrongful act of his son. *Haggerty v. Pittston*, 17 Pa. Super. Ct. 151.

**New York — Continuance by Administrator D. B. N.** — *Hodges v. Webber*, 65 N. Y. App. Div. 170; *Meekin v. Brooklyn Heights R. Co.*, 164 N. Y. 145, 79 Am. St. Rep. 635.

**874.** 1. **When One of Several Beneficiaries**

**Dies.** — See *Morris v. Spartanburg R., etc., Co.*, 70 S. Car. 279; *Texas Loan Agency v. Fleming*, 18 Tex. Civ. App. 668.

3. **In Kentucky** by statute the right of action survives against the personal representative of the wrongdoer. *Morehead v. Bittmer*, 106 Ky. 523.

5. **Time Within Which Action Must Be Brought — England.** — See *Markey v. Tolworth Joint Isolation Hospital Dist. Board*, (1900) 2 Q. B. 454.

**Illinois.** — In Illinois the action must be commenced within two years from the death. *Lake Shore, etc., R. Co. v. Dylinski*, 67 Ill. App. 114.

**Louisiana.** — In Louisiana suit must be brought within a year from the death of the plaintiff's intestate. *Goodwin v. Bodcaw Lumber Co.*, 109 La. 1050.

**New Jersey.** — Under the New Jersey statute suit must be brought within twelve months after death. *Margaret County v. Pacific Coast Borax Co.*, 68 N. J. L. 273.

**New York.** — See *Barnes v. Brooklyn*, 22 N. Y. App. Div. 520.

**Pennsylvania.** — The statutory provision that an action for death by wrongful act shall be brought within one year after such death is not repealed by Const. Pa. 1874, art. 3, § 21. *Bachman v. Philadelphia, etc., R. Co.*, 185 Pa. St. 95.

**Washington.** — In Washington suit must be brought within three years from the time of the injury causing the death. *Robinson v. Baltimore, etc., Min., etc., Co.*, 26 Wash. 484.

**Wisconsin.** — In Wisconsin suit must be brought within two years after the cause of action accrues. *Staefler v. Menasha Woodenware Co.*, 111 Wis. 483.

**875.** 1. *Stern v. La Compagnie Generale Transatlantique*, 110 Fed. Rep. 996; *International Nav. Co. v. Lindstrom*, (C. C. A.) 123 Fed. Rep. 475; *Williams v. Quebec Steamship Co.*, 126 Fed. Rep. 591; *Rodman v. Missouri Pac. R. Co.*, 65 Kan. 652, *citing* 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 875; *Negaubauer v. Great Northern R. Co.*, 92 Minn. 184, 104 Am. St. Rep. 674, *citing* 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 875; *Poff v. New England Telephone, etc., Co.*, 72 N. H. 164. But see *Stephan v. Lake Shore, etc., R. Co.*, 106 Ill. App. 13.

2. **Deceased a Minor — Rule Not Changed.** — *Elliott v. Brazil Block Coal Co.*, 25 Ind. App. 597, *citing* 8 AM. AND ENG. ENCYC. OF LAW (2d ed.)

**876.** 5. When Statute Begins to Run. — See notes 2, 3.

**877.** See note 1.

**878.** 8. Common-law Limitation of a Year and a Day After Injury. — See note 5.

**879.** VII. JURISDICTION — NATURE OF THE ACTION — 1. General Rule — Action Transitory. — See notes 1, 2.

**880.** 2. Where Statute Is Penal. — See note 2.

**881.** 3. Laws of Forum and of Place of Injury Must Permit Suit — Foreign Law Must Be Fully Pleaded. — See note 3.

**882.** 4. Whether the Statutes Must Be Similar. — See notes 2, 3.

875; *Van Victor v. Louisville, etc.*, R. Co., 112 Ky. 445.

**876.** 2. From Time Death Occurs. — *Western, etc.*, R. Co. *v.* *Bass*, 104 Ga. 390; *Chesapeake, etc.*, R. Co. *v.* *Kelley*, (Ky. 1899) 48 S. W. Rep. 993; *Van Victor v. Louisville, etc.*, R. Co., 112 Ky. 445; *Solor Refining Co. v. Elliott*, 8 Ohio Dec. 225, 15 Ohio Cir. Ct. 581.

*Contra.* — In *Ohio, Tennessee, and Washington* the statute begins to run from the date of the injury. *Alston v. C., etc.*, R. Co., 1 Ohio Cir. Dec. 353; *Whaley v. Catlett*, 103 Tenn. 347; *Robinson v. Baltimore, etc.*, Min., etc., Co., 26 Wash. 484.

3. Time Between Death and Qualification of Personal Representative Counted. — *Williams v. Quebec Steamship Co.*, 126 Fed. Rep. 591, construing the *New York* statute; *Radesky v. Sargent*, 77 Conn. 110.

**877.** 1. Statute Suspended While There Is No Person Who Can Sue. — See *Hoover v. Chesapeake, etc.*, R. Co., 46 W. Va. 271, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 877.\*

**878.** 5. *Western, etc.*, R. Co. *v.* *Bass*, 104 Ga. 390; *Hoover v. Chesapeake, etc.*, R. Co., 46 W. Va. 268.

**879.** 1. Action Transitory — *United States.* — *Lyon v. Boston, etc.*, R. Co., 107 Fed. Rep. 386, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 879; *Stewart v. Baltimore, etc.*, R. Co., 168 U. S. 445; *Slater v. Mexican Nat. R. Co.*, 194 U. S. 120; *Davidow v. Pennsylvania R. Co.*, 85 Fed. Rep. 943; *Van Doren v. Pennsylvania R. Co.*, (C. C. A.) 93 Fed. Rep. 260; *Erickson v. Pacific Coast Steamship Co.*, 96 Fed. Rep. 80; *Mexican Nat. R. Co. v. Slater*, (C. C. A.) 115 Fed. Rep. 593, affirmed 194 U. S. 120; *Smith v. Empire State-Idaho Min., etc.*, Co., 127 Fed. Rep. 462; *Leman v. Baltimore, etc.*, R. Co., 128 Fed. Rep. 191; *Brown v. New York, etc.*, R. Co., 136 Fed. Rep. 700; *Williams v. Camden Interstate R. Co.*, 138 Fed. Rep. 571.

*Arkansas.* — *Kansas City Southern R. Co. v. McGinty*, (Ark. 1905) 88 S. W. Rep. 1001.

*Indiana.* — *Fabel v. Cleveland, etc.*, R. Co., 30 Ind. App. 268; *Chicago, etc.*, R. Co. *v.* *La Porte*, 33 Ind. App. 691.

*Iowa.* — *Romano v. Capital City Brick, etc.*, Co., 125 Iowa 591.

*Kansas.* — *Hartley v. Hartley*, (Kan. 1906) 81 Pac. Rep. 505.

*Kentucky.* — *Louisville, etc.*, R. Co. *v.* *Whitlow*, 105 Ky. 1; *Louisville, etc.*, R. Co. *v.* *Pointer*, 113 Ky. 952.

*Massachusetts.* — See *Mulhall v. Fallon*, 176 Mass. 268, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 879.

*Minnesota.* — *Nicholas v. Burlington, etc.*, R.

Co., 78 Minn. 43; *Negaubauer v. Great Northern R. Co.*, 92 Minn. 184, 104 Am. St. Rep. 674.

*Missouri.* — *Riley v. Grand Island Receivers*, 72 Mo. App. 280.

*New York.* — *Lennan v. Hamburg-American Steamship Co.*, 73 N. Y. App. Div. 357; *Dailey v. New York, etc.*, R. Co., (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 539; *Boyle v. Southern R. Co.*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 289.

*North Carolina.* — *Harrill v. South Carolina, etc.*, Extension R. Co., 132 N. Car. 655.

*Ohio.* — *Ott v. Lake Shore, etc.*, R. Co., 10 Ohio Cir. Dec. 85, 18 Ohio Cir. Ct. 395.

*Pennsylvania.* — *Boulden v. Pennsylvania R. Co.*, 205 Pa. St. 264.

*Tennessee.* — *Whitlow v. Nashville, etc.*, R. Co., (Tenn. 1904) 84 S. W. Rep. 618.

*Utah.* — *Thorpe v. Union Pac. Coal Co.*, 24 Utah 475; *Utah Sav., etc.*, Co. *v.* *Diamond Coal, etc.*, Co., 26 Utah 299.

2. A Contrary Rule. — See *Vaughn v. Bunker Hill, etc.*, Min., etc., Co., 126 Fed. Rep. 895 (a case arising in *Oregon*); *McGinnis v. Missouri Car, etc.*, Co., 174 Mo. 225, 97 Am. St. Rep. 553.

**880.** 2. Where the Statute Is Penal. — *Raisor v. Chicago, etc.*, R. Co., 215 Ill. 47; *Matheson v. Kansas City, etc.*, R. Co., 61 Kan. 670, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 880; *Marsh v. Kansas City Southern R. Co.*, 104 Mo. App. 577; *Whitlow v. Nashville, etc.*, R. Co., (Tenn. 1904) 84 S. W. Rep. 618. See also *Boyle v. Southern R. Co.*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 289.

*The Massachusetts Statute* is not strictly penal; and therefore suit may be brought on it in the federal court of another state. *Boston, etc.*, R. Co. *v.* *Hurd*, (C. C. A.) 108 Fed. Rep. 116.

*The Mexican Statute* has been held not to be so penal in character as to justify the United States Circuit Court sitting in *Texas* in refusing to enforce it. *Mexican Nat. R. Co. v. Slater*, (C. C. A.) 115 Fed. Rep. 593, affirmed 194 U. S. 120.

**881.** 3. *Whitlow v. Nashville, etc.*, R. Co., (Tenn. 1904) 84 S. W. Rep. 618. See also *St. Louis, etc.*, R. Co. *v.* *Haist*, 71 Ark. 258, 100 Am. St. Rep. 65.

**882.** 2. Necessity for Similarity Between Statutes. — *St. Louis, etc.*, R. Co. *v.* *Haist*, 71 Ark. 258, 100 Am. St. Rep. 65; *Illinois Cent. R. Co. v. Harris*, (Miss. 1901) 29 So. Rep. 760; *Strauss v. New York, etc.*, R. Co., 91 N. Y. App. Div. 583. See also *Boyle v. Southern R. Co.*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 289.

3. *Whitlow v. Nashville, etc.*, R. Co., (Tenn. 1904) 84 S. W. Rep. 618.

As to Distribution of Damages. — Where the

**883.** But the Better Rule. — See note 2.

**884.** 5. Suits in Admiralty Courts. — See note 1.

Enforcement of Statutory Right of Action in Admiralty Courts. — See note 2.

6. Suits in Federal Courts. — See note 3.

**885.** 7. Death Occurring at Sea. — See note 1.

**VIII. BY WHAT LAW RIGHTS OF PARTIES GOVERNED — 1. The Law of What State — Party Plaintiff — Disposition of Damages Recovered.** — See notes 2, 3.

**886.** As to Statute of Limitations. — See note 1.

2. Law of Place of Injury. — See note 3.

**887. IX. PARTIES AND BENEFICIARIES — WHO ENTITLED TO RIGHT OF ACTION — 1. The Statute Controls.** — See note 3.

a. PLAINTIFF MUST PROVE HIMSELF TO BE WITHIN THE STATUTE. — See note 4.

**888.** b. CONDITIONS PRECEDENT TO RIGHT OF ACTION. — See note 1.

2. Specific Parties — a. HUSBAND. — See note 2.

**889.** Is Not Next of Kin. — See note 1.

statute of one jurisdiction provides that the jury shall apportion the damages recovered, while the statute of the other jurisdiction provides that the damages recovered shall be distributed by the court, there is nevertheless substantial similarity between the statutes. *Stewart v. Baltimore, etc., R. Co., 168 U. S. 445.*

**883.** 2. *Stewart v. Baltimore, etc., R. Co., 168 U. S. 445; Harrill v. South Carolina, etc., Extension R. Co., 132 N. Car. 655; Wabash R. Co. v. Fox, 64 Ohio St. 133, 83 Am. St. Rep. 739.* See also *Slater v. Mexican Nat. R. Co., 194 U. S. 120.*

**884.** 1. Rule in Admiralty Not Different from that at Common Law. — See *The Schooner Robert Lewers Co. v. Kekauoha, (C. C. A.) 114 Fed. Rep. 849; Williams v. Quebec Steamship Co., 126 Fed. Rep. 591.*

2. *The Robert Dollar, 115 Fed. Rep. 226, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 884; Stern v. La Compagnie Generale Transatlantique, 110 Fed. Rep. 996; The Robert Lewers Co. v. Kekauoha, (C. C. A.) 114 Fed. Rep. 849.*

3. Enforcing State Statutes in Federal Courts. — *Law v. Western R. Co., 91 Fed. Rep. 817; Adams v. Northern Pac. R. Co., 95 Fed. Rep. 938; Burrell v. Fleming, (C. C. A.) 109 Fed. Rep. 489; Stern v. La Compagnie Generale Transatlantique, 110 Fed. Rep. 996; Cincinnati, etc., R. Co. v. Thiebaud, (C. C. A.) 114 Fed. Rep. 918; Mexican Nat. R. Co. v. Slater, (C. C. A.) 115 Fed. Rep. 593, affirmed 194 U. S. 120; International Nav. Co. v. Lindstrom, (C. C. A.) 123 Fed. Rep. 475.*

**885.** 1. *Alaska Commercial Co. v. Williams, (C. C. A.) 128 Fed. Rep. 362; Chicago Transit Co. v. Campbell, 110 Ill. App. 366; Lennan v. Hamburg-American Steamship Co., 73 N. Y. App. Div. 357.*

2. Law of the Place Where Injury Occurred Governs as to Who Must Sue. — *Davidow v. Pennsylvania R. Co., 85 Fed. Rep. 943; Erickson v. Pacific Coast Steamship Co., 96 Fed. Rep. 80; Leman v. Baltimore, etc., R. Co., 128 Fed. Rep. 191; Fabel v. Cleveland, etc., R. Co., 30 Ind. App. 268; Thorpe v. Union Pac. Coal Co., 24 Utah 475.*

All Questions Pertaining to the Cause of Action are governed by the *lex loci*. *Wabash R. Co. v.*

*Fox, 11 Ohio Cir. Dec. 148, 20 Ohio Cir. Ct. 440; Ott v. Lake Shore, etc., R. Co., 10 Ohio Cir. Dec. 85.*

The Procedure Prescribed by the Courts of the Forum must be adopted. *Frounfelker v. Delaware, etc., R. Co., 73 N. Y. App. Div. 350; Dailey v. New York, etc., R. Co., (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 539.*

3. Distribution of Damages Governed by Law of State Where Injury Occurred. — *Hartness v. Pharr, 133 N. Car. 566; Lake Shore, etc., R. Co. v. Andrews, 8 Ohio Cir. Dec. 73.* See also *Hartley v. Hartley, (Kan. 1905) 81 Pac. Rep. 505.*

Whether Interest Shall Be Awarded depends upon the law of the place where the injury occurred. *Frounfelker v. Delaware, etc., R. Co., 73 N. Y. App. Div. 350.*

**886.** 1. *International Nav. Co. v. Lindstrom, (C. C. A.) 123 Fed. Rep. 475; Negaubauer v. Great Northern R. Co., 92 Minn. 184, 104 Am. St. Rep. 674; Dailey v. New York, etc., R. Co., (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 539; Dennis v. Atlantic Coast Line R. Co., 70 S. Car. 254.*

3. Law of Place of Injury. — *Whitlow v. Nashville, etc., R. Co., (Tenn. 1904) 84 S. W. Rep. 618.*

**887.** 3. *Romero v. Atchison, etc., R. Co., 11 N. Mex. 679.*

4. *Cleveland, etc., R. Co. v. Osgood, (Ind. App. 1904) 70 N. E. Rep. 839; Thorpe v. Union Pac. Coal Co., 24 Utah 475; Harshman v. Northern Pac. R. Co., (N. Dak. 1905) 103 N. W. Rep. 412.* See also *Swift v. Johnson, (C. C. A.) 138 Fed. Rep. 867.*

**888.** 1. Conditions Precedent to Right of Action to Be Established. — *Louisville, etc., R. Co. v. Jones, (Fla. 1903) 34 So. Rep. 246; Foster v. St. Luke's Hospital, 191 Ill. 94; Assumption v. Campbell, 95 Ill. App. 521.*

2. No Specific Provision for Husband — May Sue Only as Representative. — *Ferguson v. Washington, etc., R. Co., 6 App. Cas. (D. C.) 525.*

**889.** 1. Husband Not Next of Kin to His Wife. — *Gottlieb v. North Jersey St. R. Co., (N. J. 1904) 58 Atl. Rep. 1088.* See also *Snedeker v. Snedeker, 164 N. Y. 58, and see the title NEXT OF KIN, 538, 5, 6.*

*Contra.* — *Atchison, etc., R. Co. v. Townsend, (Kan. 1905) 81 Pac. Rep. 205.*



**889.** *b. WIDOW.* — See note 3.

**891.** *The Remarriage of the Widow.* — See note 2.

*Wife Living Apart from Her Husband.* — See note 3.

*c. PARENT* — (1) *In General.* — See note 4.

**894.** *But the Common-law Right of Action.* — See note 2.

*Father Preferred.* — See note 4.

**895.** See note 1.

**889. 3. Widow's Right of Action** — *United States.* — *Bowen v. Illinois Cent. R. Co.*, (C. C. A.) 136 Fed. Rep. 306.

*Illinois.* — See *Consolidated Coal Co. v. Dombrski*, 106 Ill. App. 641.

*Indiana.* — If the action is under the *Miners' Act* it must be brought by the widow and children, and not by the personal representative. *L. T. Dickason Coal Co. v. Unverferth*, 30 Ind. App. 546.

*Iowa.* — The widow cannot prosecute in her own name. *Major v. Burlington, etc.*, R. Co., 115 Iowa 309.

*Kansas.* — See *Vaughn v. Kansas City Northwestern R. Co.*, 65 Kan. 685.

*Louisiana.* — *Goodwin v. Bodcaw Lumber Co.*, 109 La. 1050.

*Missouri.* — The widow may sue though she has remarried. *Rinard v. Omaha, etc.*, R. Co., 164 Mo. 270; *Geismann v. Missouri Edison Electric Co.*, 173 Mo. 654; *Packard v. Hannibal, etc.*, R. Co., 181 Mo. 421; *Hennessy v. Bavarian Brewing Co.*, 145 Mo. 104, 68 Am. St. Rep. 554.

*New York.* — The personal representative sues for the benefit of the widow and next of kin, all of whom share in the damages recovered. *Snedeker v. Snedeker*, 164 N. Y. 58.

*North Carolina.* — The widow has no right of action in her own name. *Howell v. Yancey County*, 121 N. Car. 362.

*Pennsylvania.* — *Marsh v. Western New York, etc.*, R. Co., 204 Pa. St. 229; *Snyder v. Philadelphia, etc.*, R. Co., 9 Pa. Dist. 3; *Haughey v. Pittsburgh R. Co.*, 210 Pa. St. 367.

*Tennessee.* — *Illinois Cent. R. Co. v. Davis*, 104 Tenn. 442.

**A Wife by a "Common-law Marriage"** and the issue of such marriage are as much entitled to recover damages for the death of the husband and father as though the marriage had been by license duly issued. *Galveston, etc.*, R. Co. v. *Cody*, 20 Tex. Civ. App. 520.

**891. 2. Does Not Affect Her Right of Action nor the Measure of Damages.** — *O. S. Richardson Fueling Co. v. Peters*, 82 Ill. App. 508. See also the *Missouri* cases cited *supra*, this title, **889. 3.**

**3. May Recover.** — *Central of Georgia R. Co. v. Bond*, 111 Ga. 13.

**Living in a State of Prostitution.** — *Contra, Cole v. Mayne*, 122 Fed. Rep. 839, distinguishing the *Missouri* statute from *Lord Campbell's Act*, under which the case of *Stimpson v. Wood*, 59 L. T. N. S. 218, was decided, and holding that, in the absence of divorce, a widow living in adultery is not barred from the right to sue, since no misconduct of the preferred person constitutes a disqualification to maintain the action unless imposed by the legislature which gives the right.

**4. As to Parent's Right of Action** — *California.*

— *Peterman v. Northern Pac. R. Co.*, 105 Fed. Rep. 336, *citing* 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 891, and holding that a parent may sue.

A mother may sue for the death of a minor child if the father has deserted his family. *Delatour v. Mackay*, 139 Cal. 621.

**District of Columbia.** — See *U. S. Electric Lighting Co. v. Sullivan*, 22 App. Cas. (D. C.) 115.

**Florida.** — See *Callison v. Brake*, (C. C. A.) 129 Fed. Rep. 196.

**Georgia.** — *Georgia R., etc., Co. v. Spinks*, 111 Ga. 571; *Smith v. Hatcher*, 102 Ga. 158; *Middle Georgia, etc., R. Co. v. Barnett*, 104 Ga. 582.

A mother cannot recover for the killing of her child unless it appears not only that the child contributed to her support, but that she was dependent upon the child for such support. *Augusta Southern R. Co. v. McDade*, 105 Ga. 134.

In a suit for damages by a father for the killing of his minor child, brought under Civ. Code Ga. (1895), § 3828, it is not necessary, in order for the plaintiff to recover, that he show by the evidence that he depended alone upon the child for his entire support. It is sufficient if he establish partial dependence upon the child's labor, accompanied by substantial contribution therefrom to his maintenance. *Central of Georgia R. Co. v. Henson*, 121 Ga. 462.

In *Crawford v. Southern R. Co.*, 106 Ga. 870, it was held that the question whether a child four and a half years old was capable of rendering any valuable service to its father should be left to the jury.

**Kansas.** — The parent has no right to sue if a personal representative of the deceased has been appointed. *Atchison Water Co. v. Price*, 9 Kan. App. 884, 59 Pac. Rep. 677; *Atchison, etc., R. Co. v. Judah*, 10 Kan. App. 577, 62 Pac. Rep. 711.

**Maine.** — In Maine a parent cannot maintain an action as parent for the loss of services, expenses of burial, etc., due to the instantaneous death of a minor son. *Bligh v. Biddeford, etc.*, R. Co., 94 Me. 499.

**Missouri.** — The mother may sue for the killing of her child where its father is dead. *Lee v. Knapp*, 155 Mo. 610.

**New Jersey.** — The parent as such cannot maintain the action. *Fitzhenry v. Consolidated Traction Co.*, 63 N. J. L. 142.

**North Carolina.** — See *Killian v. Southern R. Co.*, 128 N. Car. 262, *citing* 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 891.

**West Virginia.** — *Shaw v. Charleston*, (W. Va. 1905) 50 S. E. Rep. 528.

**894. 2.** See *Ohnmacht v. Mt. Morris Electric Light Co.*, 66 N. Y. App. Div. 482.

**4. Meaning of Parent — Father Preferred.** — See *Lathrope v. Flood*, 135 Cal. 458.

**895. 1. A Woman Who Has Raised up a Child from Infancy**, but who is not the mother and has

**895.** (2) *Parent of Illegitimate Child.* — See note 3.  
 (5) *Joinder of Parents as Plaintiffs.* — See note 6.

**896.** *d. CHILDREN* — (1) *Generally.* — See note 2.

**897.** *Effect of Minority.* — See note 1.

**898.** *e. GRANDCHILDREN.* — See note 3.

*f. PERSONAL REPRESENTATIVE OF DECEASED* — (1) *In General.*

— See note 5.

not legally adopted it, cannot sue as a "mother" for the death of the child. *Citizens St. R. Co. v. Cooper*, 22 Ind. App. 459, 72 Am. St. Rep. 319.

**Mother Allowed to Sue if Father Deserts Family.** — *Clark v. Northern Pac. R. Co.*, 29 Wash. 139.

**895. 3. Death of Illegitimate Child.** — In *Georgia, Mississippi*, and *South Carolina* the mother of an illegitimate child has no right of action for its death. *Robinson v. Georgia R., etc., Co.*, 117 Ga. 168, 97 Am. St. Rep. 156; *Alabama, etc., R. Co. v. Williams*, 78 Miss. 209, 84 Am. St. Rep. 624. See also *Illinois Cent. R. Co. v. Johnson*, 77 Miss. 727; *McDonald v. Southern R. Co.*, (S. Car. 1905) 51 S. E. Rep. 138. But in *Illinois* an action may be maintained for the benefit of the mother of an illegitimate child. *Security Title, etc., Co. v. West Chicago St. R. Co.*, 91 Ill. App. 332.

**6. Father and Mother May Sue Jointly.** — *Wilson v. Banner Lumber Co.*, 108 La. 590. See also *Whelan v. Rio Grande Western R. Co.*, 111 Fed. Rep. 326.

**896. 2. Right of Action in Favor of Children** — *Georgia.* — A stepfather is not a parent within the meaning of the Georgia statute allowing a child under certain circumstances to recover for the death of a parent. *Marshall v. Macon Sash, etc., Co.*, 103 Ga. 725, 68 Am. St. Rep. 140.

In *Indiana* a son cannot maintain an action for the death of his father. It must be maintained by the personal representative. *Baltimore, etc., R. Co. v. Gillard*, 34 Ind. App. 339.

By the *Louisiana Statute* minor children have a right of action; but the term "minor children" does not include grandchildren. *Walker v. Vicksburgh, etc., R. Co.*, 110 La. 718.

*Mississippi.* — Acts Miss. 1898, p. 82, providing that a sister or brother may sue for the death of a sister or brother, is construed not to include illegitimates. *Illinois Cent. R. Co. v. Johnson*, 64 S. W. Rep. 727.

**897. 1. Includes Only Minor Children.** — The *Louisiana* statute expressly confines the cause of action to a minor child. *Huberwald v. Orleans R. Co.*, 50 La. Ann. 477; *Eichorn v. New Orleans, etc., R., etc., Co.*, 114 La. 712.

**898. 3. "Children"** as used in the *Texas* statute does not include grandchildren. *Houston, etc., R. Co. v. Harris*, (Tex. Civ. App. 1901) 64 S. W. Rep. 227.

**5. Representative's Right of Action** — *Connecticut.* — *Broughel v. Southern New England Telephone Co.*, 72 Conn. 617; *Radezky v. Sargent*, 77 Conn. 110.

*District of Columbia.* — *Ferguson v. Washington, etc., R. Co.*, 6 App. Cas. (D. C.) 525; *Electric Lighting Co. v. Sullivan*, 22 App. Cas. (D. C.) 115.

*Georgia.* — *Atlanta, etc., R. Co. v. Smith*, 119 Ga. 667.

*Illinois.* — *Chicago, etc., R. Co. v. Woolridge*, 174 Ill. 330; *Foster v. St. Luke's Hospital*, 191

Ill. 94; *Security Title, etc., Co. v. West Chicago St. R. Co.*, 91 Ill. App. 332; *Assumption v. Campbell*, 95 Ill. App. 521.

*Indiana.* — *Pittsburgh, etc., R. Co. v. Hosea*, 152 Ind. 412; *Malott v. Shimer*, 153 Ind. 101, 74 Am. St. Rep. 278; *Wabash R. Co. v. Cregen*, 23 Ind. 1; *Baltimore, etc., R. Co. v. Gillard*, 34 Ind. App. 339.

*Iowa.* — *Major v. Burlington, etc., R. Co.*, 115 Iowa 309.

*Kentucky.* — *Lewis v. Taylor Coal Co.*, 112 Ky. 845; *Van Vactor v. Louisville, etc., R. Co.*, 112 Ky. 445; *Thomas v. Maysville Gas Co.*, 112 Ky. 569.

*Maine.* — *Bligh v. Biddeford, etc., R. Co.*, 94 Me. 499; *Carrigan v. Stillwell*, 97 Me. 247.

*Missouri.* — *Behen v. St. Louis Transit Co.*, 186 Mo. 430.

*Nebraska.* — *Chicago, etc., R. Co. v. Oyster*, 58 Neb. 1; *Chicago, etc., R. Co. v. Young*, 58 Neb. 678; *Chicago, etc., R. Co. v. Zerneck*, 59 Neb. 689.

*New Jersey.* — *Fitzhenry v. Consolidated Traction Co.*, 63 N. J. L. 142; *Ferguson v. Delaware, etc., Tel., etc., Co.*, (N. J. 1904) 58 Atl. Rep. 74.

*New York.* — *Lipp v. Otis*, 161 N. Y. 559; *Meekin v. Brooklyn Heights R. Co.*, 164 N. Y. 145, 79 Am. St. Rep. 635; *Barnes v. Brooklyn*, 22 N. Y. App. Div. 520; *Mundt v. Glökner*, 24 N. Y. App. Div. 110, *appeal dismissed* 160 N. Y. 571, 26 N. Y. App. Div. 123; *Hodges v. Webber*, 65 N. Y. App. Div. 170; *Ohnmacht v. Mt. Morris Electric Light Co.*, 66 N. Y. App. Div. 482; *Bruss v. Metropolitan St. R. Co.*, 66 N. Y. App. Div. 554.

*North Carolina.* — *Howell v. Yancey County*, 121 N. Car. 362.

*Ohio.* — *Alston v. Cleveland, etc., R. Co.*, 1 Ohio Cir. Dec. 353; *Solor Refining Co. v. Elliott*, 8 Ohio Dec. 225; *Hardin County v. Coffman*, 10 Ohio Cir. Dec. 91, 18 Ohio Cir. Ct. 254; *Baltimore, etc., R. Co. v. Hottman*, 25 Ohio Cir. Ct. 140; *New York, etc., R. Co. v. Roe*, 25 Ohio Cir. Ct. 628.

*Oregon.* — *Schleiger v. Northern Terminal Co.*, 43 Oregon 4.

*Pennsylvania.* — *Boulden v. Pennsylvania R. Co.*, 205 Pa. St. 264.

*South Carolina.* — *In re Mayo*, 60 S. Car. 401; *Morris v. Spartanburg R., etc., Co.*, 70 S. Car. 279.

*Utah.* — *Pugmire v. Diamond Coal, etc., Co.*, 26 Utah 115.

*Vermont.* — *Ploof v. Burlington Traction Co.*, 70 Vt. 509.

*Washington.* — *Copeland v. Seattle*, 33 Wash. 415.

*Wisconsin.* — *Hubbard v. Chicago, etc., R. Co.*, 104 Wis. 160, 76 Am. St. Rep. 855; *Staefler v. Mensaha Wooden-ware Co.*, 111 Wis. 483.

**900.** (3) *Right of Action in Representative for Benefit of Others.* — See note 4.

**901.** (5) *Conflict of Laws — Foreign Administrator Held to Have No Right to Sue.* — See note 4.

**902.** See note 1.

*g.* **NEXT OF KIN** — (1) *The General Rule — Not Confined to Particular Degree of Consanguinity.* — See note 2.

**903.** *Proof Necessary When Next of Kin's Right of Action Secondary.* — See note 2.

*Canada.* — See *Mummery v. Grand Trunk R. Co.*, 1 Ont. L. Rep. 622.

**The Term "Personal Representative"** includes both executor and administrator. *Adams v. Northern Pac. R. Co.*, 95 Fed. Rep. 940; *Western Union Tel. Co. v. Lipscomb*, 22 App. Cas. (D. C.) 104; *Wittman v. Cincinnati, etc., R. Co.*, 10 Ohio Dec. 563.

So a special administrator is included in the term. *Swan v. Norvell*, 107 Wis. 625. But a special administrator need not be appointed to bring suit. It is sufficient that it be brought by the general administrator of the estate. *Lake Erie, etc., R. Co. v. Charman*, 161 Ind. 95.

**Administrator Not Mere Nominal Plaintiff for All Purposes.** — *Sharp v. Grand Trunk R. Co.*, 1 Ont. L. Rep. 200.

**"Administrator," as Used in the Illinois Statute,** means personal representative, and includes an executor. *Mattoon Gaslight, etc., Co. v. Dolan*, 105 Ill. App. 1.

**900. 4. It Must Appear that Beneficiaries Were in Existence** — *United States.* — *Davidow v. Pennsylvania R. Co.*, 85 Fed. Rep. 943; *Erickson v. Pacific Coast Steamship Co.*, 96 Fed. Rep. 80; *Dueber v. Northern Pac. R. Co.*, 100 Fed. Rep. 424; *Sanders v. Louisville, etc., R. Co.*, (C. C. A.) 111 Fed. Rep. 708.

*California.* — *Webster v. Norwegian Min. Co.*, 137 Cal. 399, 92 Am. St. Rep. 181.

*Georgia.* — *Atlanta, etc., R. Co. v. Smith*, 119 Ga. 667.

*Illinois.* — *Foster v. St. Luke's Hospital*, 191 Ill. 94; *Assumption v. Campbell*, 95 Ill. App. 521; *Foley v. Suburban R. Co.*, 98 Ill. App. 108; *Chicago Terminal Transfer R. Co. v. Helbreg*, 99 Ill. App. 563.

*Indiana.* — *Duzan v. Myers*, 30 Ind. App. 227, 96 Am. St. Rep. 341; *Chicago, etc., R. Co. v. La Porte*, 33 Ind. App. 691.

*Michigan.* — *Rouse v. Detroit Electric R. Co.*, 128 Mich. 149.

*Minnesota.* — *Foot v. Great Northern R. Co.*, 81 Minn. 493, 83 Am. St. Rep. 395.

*Nebraska.* — *Omaha, etc., R. Co. v. Crow*, 54 Neb. 747, 69 Am. St. Rep. 741; *Chicago, etc., R. Co. v. Oyster*, 58 Neb. 1; *Chicago, etc., R. Co. v. Bond*, 58 Neb. 385; *Chicago, etc., R. Co. v. Young*, 58 Neb. 678.

*New Jersey.* — *Hamilton v. Bordentown Electric Light, etc., Co.*, 68 N. J. L. 85; *Zipple v. Sandford, etc., Co.*, (N. J. 1904) 58 Atl. Rep. 176.

*New York.* — *Snedeker v. Snedeker*, 164 N. Y. 58; *Pizzi v. Reid*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 123, reversed 72 N. Y. App. Div. 162; *Boyle v. Southern R. Co.*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 280.

*Ohio.* — *Halloran v. Cleveland, etc., R. Co.*, 4 Ohio Dec. (Reprint) 14, Cleve. L. Rec. 12.

*Tennessee.* — *Southern R. Co. v. Maxwell*, 113 Tenn. 464.

*Wisconsin.* — *Brown v. Chicago, etc., R. Co.*, 102 Wis. 137.

**Under the Washington Statute** the suit is brought by the administrator for the benefit of the estate, and it is not necessary to show the existence of relatives or creditors. *Perham v. Portland Gen. Electric Co.*, 33 Oregon 451, 72 Am. St. Rep. 730.

**901. 4.** See *Sanbo v. Union Pac. Coal Co.*, 130 Fed. Rep. 52, holding that an administrator appointed in *Wyoming* could not sue in *Colorado* for the death of his intestate which occurred in the former state.

**Appointment of Resident Administrator of Non-resident Intestate.** — In *South Carolina* it has been held that a resident administrator of a nonresident intestate might be appointed to carry on in that state a suit against a resident corporation for causing the death there of such intestate, even though the intestate had no estate in *South Carolina*. *In re Mayo*, 60 S. Car. 401.

**902. 1.** *Hodges v. Kimball*, (C. C. A.) 91 Fed. Rep. 845; *Florida Cent., etc., R. Co. v. Sullivan*, (C. C. A.) 120 Fed. Rep. 799; *Chicago Transit Co. v. Campbell*, 110 Ill. App. 366; *Robertson v. Chicago, etc., R. Co.*, 122 Wis. 66. See also *Cincinnati, etc., R. Co. v. Thiebaud*, (C. C. A.) 114 Fed. Rep. 918; *Williams v. Camden Interstate R. Co.*, 138 Fed. Rep. 571.

**2. "Next of Kin" Includes All Those Who Inherit** from the deceased under the statute of descents and distributions. *Atchison, etc., R. Co. v. Ryan*, 62 Kan. 682. *Compare Chicago, etc., R. Co. v. Woolridge*, 174 Ill. 330, wherein it was said that "next of kin" means those standing in that relation in a technical sense.

**A Father Is "Next of Kin"** within the meaning of the *Nebraska* statute, but the mother is not, provided the father has survived the child. *Thompson v. Chicago, etc., R. Co.*, 104 Fed. Rep. 845.

**Next of Kin Includes Father in Minnesota.** — *Swift v. Johnson*, (C. C. A.) 138 Fed. Rep. 867.

**"Next of Kin" of an Adopted Child** are the next of kin by blood, and not the adopted parents. *Heidecamp v. Jersey City, etc., St. R. Co.*, 69 N. J. L. 284, 101 Am. St. Rep. 707.

**When Ascertained.** — The person or persons who are the next of kin of the decedent are ascertained immediately upon the decedent's death. *Mundt v. Glokner*, 26 N. Y. App. Div. 123.

**903. 2. Absence of Prior Named Beneficiaries Must Appear.** — See *Dillier v. Cleveland, etc., R. Co.*, 34 Ind. App. 52. In *New York*, however, the right of action is for the benefit of the husband or wife and next of kin as a class, and the right of the next of kin to share



**903.** (2) *Action Limited to Dependent Next of Kin* — Joinder. — See note 5.

(3) *Legal Duty to Support Not Essential*. — See note 7.

**904.** (4) *Dependency Must Be Actual*. — See note 2.

(6) *Next of Kin Having Expectation of Pecuniary Benefit*. — See note 4.

**905.** *h.* HEIRS OF DECEASED. — See note 1.

*i.* NONRESIDENTS MAY SUE. — See note 3.

**906.** *j.* CREDITORS OF DECEASED. — See note 1.

*k.* ACTION IN NAME OF STATE. — See notes 2, 3.

*l.* WHERE SEVERAL CLASSES ARE NAMED IN THE STATUTE. —

See note 4.

**X. WHO CIVILLY LIABLE — PARTIES DEFENDANT — 2. Corporations.**  
— See note 7.

is not dependent upon the fact that the husband or wife is dead. *Snedeker v. Snedeker*, 164 N. Y. 58.

**903.** 5. *Willis Coal, etc., Co. v. Grizzell*, 198 Ill. 315, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 903.

7. *Deceased Need Not Have Been Legally Bound to Support Beneficiary*. — *Willis Coal, etc., Co. v. Grizzell*, 198 Ill. 316, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 904 [903]; *Atchison, etc., R. Co. v. Ryan*, 62 Kan. 682. See also *U. S. Electric Lighting Co. v. Sullivan*, 22 App. Cas. (D. C.) 115; *Snedeker v. Snedeker*, 164 N. Y. 58.

**904.** 2. *Deceased Need Not Have Been Plaintiff's Sole Support*. — *Willis Coal, etc., Co. v. Grizzell*, 198 Ill. 316, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 904.

4. *Expectation of Benefit*. — *Atchison, etc., R. Co. v. Ryan*, 62 Kan. 682; *Boyden v. Fitchburg R. Co.*, 70 Vt. 125.

**905.** 1. *Under the California Statute* the term "heir" includes a widow. *Knott v. McGilvray*, 124 Cal. 128.

In *Colorado* it is held that the phrase "heir or heirs" does not include all those entitled to share in the estate of a person dying intestate, under the statute of descents and distributions, but means "child or children," and limits the right of action to lineal descendants. *Hindry v. Holt*, 24 Colo. 464, 65 Am. St. Rep. 235.

In *Idaho* "heir" is held not to include the widow. *Vaughn v. Bunker Hill, etc., Min., etc., Co.*, 126 Fed. Rep. 895, construing the Idaho statute.

The Term "Heir" in the Kentucky Statute includes children, whether adults or minors. *Pennsylvania Co. v. Malia*, (Ky. 1899) 49 S. W. Rep. 809.

"Heirs" and "Distributees" in the South Carolina Statute mean the same thing. *Kitchen v. Southern R. Co.*, 68 S. Car. 554.

In *South Dakota* "heir" is held to include a child. *Lintz v. Holy Terror Min. Co.*, 13 S. Dak. 489.

Under the Washington Statute "heir" includes widow and children. *Robinson v. Baltimore, etc., Min., etc., Co.*, 26 Wash. 484; *Manning v. Tacoma R., etc., Co.*, 34 Wash. 406; *Noble v. Seattle*, 19 Wash. 133; *Johnson v. Seattle Electric Co.*, (Wash. 1905) 81 Pac. Rep. 705. See also *Copeland v. Seattle*, 33 Wash. 415.

3. *Rights of Nonresidents*. — *Szymanski v. Blumenthal*, 3 Penn. (Del.) 558. See also *Virginia Iron, etc., Co. v. Tomlinson*, (Va. 1905) 51 S. E. Rep. 362.

*Nonresident Alien May Sue*. — *Davidsson Hill*, (1901) 1 K. B. 606, criticising *Adam v. British, etc., Steamship Co.*, (1898) 2 Q. B. 430; *Hirschkovitz v. Pennsylvania R. Co.*, 138 Fed. Rep. 438; *Bonthron v. Phoenix Light, etc., Co.*, (Ariz. 1903) 71 Pac. Rep. 941; *Kellyville Coal Co. v. Petraytis*, 195 Ill. 215, 88 Am. St. Rep. 193, affirming 95 Ill. App. 635; *Cleveland, etc., R. Co. v. Osgood*, (Ind. App. 1905) 73 N. E. Rep. 285; *Romano v. Capital City Brick, etc., Co.*, 125 Iowa 591; *Mulhall v. Fallon*, 176 Mass. 266, 79 Am. St. Rep. 309; *Vetaloro v. Perkins*, 101 Fed. Rep. 393 (construing the *Massachusetts* statute); *Renlund v. Commodore Min. Co.*, 89 Minn. 41, 99 Am. St. Rep. 534; *Tanas v. Municipal Gas Co.*, 88 N. Y. App. Div. 251. See also *Cleveland, etc., R. Co. v. Osgood*, (Ind. App. 1905) 73 N. E. Rep. 285.

*Nonresident Alien May Not Sue*. — *Brannigan v. Union Gold-Min. Co.*, 93 Fed. Rep. 164 (construing the *Colorado* statute); *McMillan v. Spider Lake Saw Mill, etc., Co.*, 115 Wis. 332.

**906.** 1. *Consolidated Traction Co. v. Hone*, 60 N. J. L. 444. See also *McKay v. New England Dredging Co.*, 92 Me. 454.

2. In *Maryland*. — See *Stewart v. Baltimore, etc., R. Co.*, 168 U. S. 445; *Tucker v. State*, 89 Md. 471.

3. See *Boston, etc., R. Co. v. Hurd*, (C. C. A.) 108 Fed. Rep. 116; *Hudson v. Lynn, etc., R. Co.*, 185 Mass. 510; *Carney v. Concord St. R. Co.*, 72 N. H. 364.

4. *Nonexistence of Persons in Preceding Classes Must Be Alleged and Proved*. — *Cole v. Mayne*, 122 Fed. Rep. 836; *Louisville, etc., R. Co. v. Jones*, (Fla. 1903) 34 So. Rep. 246; *Dillier v. Cleveland, etc., R. Co.*, 34 Ind. App. 52; *Jackson v. Lincoln Min. Co.*, 106 Mo. App. 441; *Case v. Cordell Zinc, etc., Min. Co.*, 103 Mo. App. 477; *Lewis v. Hunlock's Creek, etc., Co.*, 203 Pa. St. 511, 93 Am. St. Rep. 774; *Freeman v. Illinois Cent. R. Co.*, 107 Tenn. 340. See also *Marshall v. Macon Sash, etc., Co.*, 103 Ga. 725, 68 Am. St. Rep. 140; *Atlanta, etc., R. Co. v. Wilson*, 110 Ga. 781; *Citizens St. R. Co. v. Cooper*, 22 Ind. App. 459, 72 Am. St. Rep. 319; *Packard v. Hannibal, etc., R. Co.*, 181 Mo. 421.

7. *Corporations Are Within the Statute*. — *American Tin-Plate Co. v. Guy*, 25 Ind. App. 588;

**907. 3. Municipal Corporations.** — See note 3.

**4. Liability of Principal.** — See note 4.

**908.** See note 1.

**6. Joint Tortfeasors.** — See note 5.

**XI. MEASURE OF DAMAGES** — **1. Distinction Between Survival Actions and Others.** — See note 6.

**909. 2. General Rules** — *a. DAMAGES LIMITED TO PECUNIARY INJURY.* — See note 3.

*Burns v. Merchants, etc., Oil Co.*, 26 Tex. Civ. App. 223; *Parker v. Dupree*, 28 Tex. Civ. App. 341.

**A County Is a Corporation** within the meaning of a statute allowing suits against corporations for wrongful acts causing death. *Shannon v. Jefferson County*, 125 Ala. 384.

**907. 3. Municipal Corporation Not Liable in Absence of Statute.** — *Searight v. Austin*, (Tex. Civ. App. 1897) 42 S. W. Rep. 857. See also *Twyman v. Board of Councilmen*, 78 S. W. Rep. 446, 25 Ky. L. Rep. 1620; *Orth v. Belgrade*, 87 Minn. 237.

**4.** See *Le Blanc v. Sweet*, 107 La. 355, 90 Am. St. Rep. 303; *Cole v. Parker*, 27 Tex. Civ. App. 563.

**908. 1. Where Statute Confines Liability of Principal to a Limited Class of Cases.** — See *Mis-souri, etc.*, R. Co. v. *Freeman*, 97 Tex. 394.

**5.** *Wiest v. Electric Traction Co.*, 200 Pa. St. 148.

**6.** *Kyes v. Valley Telephone Co.*, 132 Mich. 285, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 908.

**909. 3. General Rule as to Measure of Dam-ages** — *United States.* — *Hunt v. Kile*, (C. C. A.) 98 Fed. Rep. 49 (construing the *Illinois* statute); *Thompson v. Chicago, etc.*, R. Co., 104 Fed. Rep. 845; *In re California Nav., etc., Co.*, 110 Fed. Rep. 678; *The Dauntless*, 121 Fed. Rep. 420, modified (C. C. A.) 129 Fed. Rep. 715; *Memphis Consol. Gas, etc., Co. v. Letson*, (C. C. A.) 135 Fed. Rep. 969; *Hirschkovitz v. Penn-sylvania R. Co.*, 138 Fed. Rep. 438; *Swift v. Johnson*, (C. C. A.) 138 Fed. Rep. 867.

*Arkansas.* — *St. Louis, etc.*, R. Co. v. *Hitt*, (Ark. 1905) 88 S. W. Rep. 908.

*California.* — *Fox v. Oakland Consol. St. R. Co.*, 118 Cal. 55, 62 Am. St. Rep. 216; *Hille-brand v. Standard Biscuit Co.*, 139 Cal. 233; *Green v. Southern Pac. R. Co.*, 122 Cal. 563; *Burk v. Arcata, etc.*, R. Co., 125 Cal. 364, 73 Am. St. Rep. 52.

*Colorado.* — *Denver, etc.*, R. Co. v. *Spencer*, 27 Colo. 313; *Denver, etc.*, R. Co. v. *Gunning*, (Colo. 1905) 80 Pac. Rep. 727.

*Illinois.* — *Illinois Cent. R. Co. v. Cozby*, 174 Ill. 109, affirming 69 Ill. App. 256; *Chicago, etc.*, R. Co. v. *Gunderson*, 174 Ill. 495; *Economy Light, etc., Co. v. Stephen*, 187 Ill. 137; *Cleve-land, etc.*, R. Co. v. *Keenan*, 190 Ill. 217; *Muren Coal, etc., Co. v. Howell*, 204 Ill. 515; *Chicago, etc.*, R. Co. v. *Rins*, 203 Ill. 417; *Lake Shore, etc.*, R. Co. v. *Dylinski*, 67 Ill. App. 114; *Falkenau v. Rowland*, 70 Ill. App. 20; *West Chicago St. R. Co. v. Dooley*, 76 Ill. App. 424; *O'Fallon Coal Co. v. Laquet*, 89 Ill. App. 13, affirmed 198 Ill. 125; *St. Louis, etc.*, R. Co. v. *Rawley*, 90 Ill. App. 653; *McNulta v. Jenkins*, 91 Ill. App. 309; *Merrihew v. Chicago City R.*

*Co.*, 92 Ill. App. 346; *Cicero, etc.*, St. R. Co. v. *Boyd*, 95 Ill. App. 510; *Wetherell v. Chicago City R. Co.*, 104 Ill. App. 357; *Raisor v. Chi-cago, etc.*, R. Co., 215 Ill. 47.

*Indiana.* — *Diebold v. Sharp*, 19 Ind. App. 474; *Commercial Club v. Hilliker*, 20 Ind. App. 239; *Duzan v. Myers*, 30 Ind. App. 227, 96 Am. St. Rep. 341; *Consolidated Stone Co. v. Staggs*, (Ind. 1905) 73 N. E. Rep. 695, quoting 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 909.

*Iowa.* — *Hively v. Webster County*, 117 Iowa 672.

*Kansas.* — *Atchison, etc.*, R. Co. v. *Ryan*, 62 Kan. 682; *Missouri Pac. R. Co. v. Moffatt*, 60 Kan. 113, 72 Am. St. Rep. 343; *Atchison, etc.*, R. Co. v. *Townsend*, (Kan. 1905) 81 Pac. Rep. 205.

*Kentucky.* — *Southern R. Co. v. Evans*, (Ky. 1901) 63 S. W. Rep. 445; *Louisville, etc.*, R. Co. v. *Tucker*, (Ky. 1901) 65 S. W. Rep. 453; *Louis-ville, etc.*, R. Co. v. *Sullivan*, (Ky. 1903) 76 S. W. Rep. 525.

*Maine.* — *McKay v. New England Dredging Co.*, 92 Me. 454; *Conley v. Maine Cent. R. Co.*, 95 Me. 149.

*Michigan.* — *Rouse v. Detroit Electric R. Co.*, 128 Mich. 149; *Philip v. Heraty*, 135 Mich. 446.

*Minnesota.* — *Foot v. Great Northern R. Co.*, 81 Minn. 493, 83 Am. St. Rep. 395; *Renlund v. Commodore Min. Co.*, 89 Minn. 41, 99 Am. St. Rep. 534; *Sieber v. Great Northern R. Co.*, 76 Minn. 269.

*Nebraska.* — *Chicago, etc.*, R. Co. v. *Zernecke*, 59 Neb. 689; *Tucker v. Draper*, 62 Neb. 66; *Chicago, etc.*, R. Co. v. *Van Buskirk*, 58 Neb. 252; *Union Pac. R. Co. v. Roeser*, (Neb. 1903) 95 N. W. Rep. 68.

*New Jersey.* — *Geiger v. Worthen, etc.*, Co., 66 N. J. L. 576; *Consolidated Traction Co. v. Hone*, 60 N. J. L. 444; *Graham v. Consolidated Traction Co.*, 62 N. J. L. 90; *May v. West Jersey, etc.*, R. Co., 62 N. J. L. 67; *Cooper v. Shore Electric Co.*, 63 N. J. L. 558; *Grieve v. North Jersey St. R. Co.*, 65 N. J. L. 409; *Hack-ney v. Delaware, etc.*, Tel., etc., Co., 69 N. J. L. 335.

*New Mexico.* — *Cerrillos Coal R. Co. v. De-serant*, 9 N. Mex. 49.

*New York.* — *Cooper v. New York, etc.*, R. Co., 25 N. Y. App. Div. 383; *Sternfels v. Metropolitan St. R. Co.*, 73 N. Y. App. Div. 494, affirmed 174 N. Y. 512; *Fajardo v. New York, etc.*, R. Co., 84 N. Y. App. Div. 354. See also *Meekin v. Brooklyn Heights R. Co.*, 164 N. Y. 145; *Kellogg v. Albany R., etc.*, Co., 72 N. Y. App. Div. 321.

*North Carolina.* — *Mendenhall v. North Caro-lina R. Co.*, 123 N. Car. 275; *Bradley v. Ohio River, etc.*, R. Co., 122 N. Car. 972.

**910.** But Evidence as to Pecuniary Loss Is Immaterial. — See note 4.

*c.* NATURE OF PROOF OF PECUNIARY LOSS REQUIRED. — See notes 7, 8.

*d.* HOW MEASURED — (1) *In General.* — See note 9.

**912.** *e.* PECULIARLY A QUESTION FOR THE JURY. — See note 1.

*North Dakota.* — *Haug v. Great Northern R. Co.*, 8 N. Dak. 23, 73 Am. St. Rep. 727.

*Ohio.* — *Cincinnati St. R. Co. v. Altemoier*, 60 Ohio St. 10; *Bond Hill v. Atkinson*, 9 Ohio Cir. Dec. 185, 16 Ohio Cir. Ct. 470; *Lake Shore, etc., R. Co. v. Reynolds*, 11 Ohio Cir. Dec. 701.

*Pennsylvania.* — *McCafferty v. Pennsylvania R. Co.*, 193 Pa. St. 339, 74 Am. St. Rep. 690; *Waechter v. Second Ave. Traction Co.*, 198 Pa. St. 129; *Lewis v. Hunlock's Creek, etc., Co.*, 203 Pa. St. 511, 93 Am. St. Rep. 774.

*Rhode Island.* — *McCabe v. Narragansett Electric Lighting Co.*, (R. I. 1904) 59 Atl. Rep. 112; *McCabe v. Narragansett Electric Lighting Co.*, (R. I. 1905) 61 Atl. Rep. 667.

*South Carolina.* — *In re Mayo*, 60 S. Car. 401.

*Texas.* — *Ft. Worth, etc., R. Co. v. Morrison*, 93 Tex. 527; *Houston, etc., R. Co. v. White*, 23 Tex. Civ. App. 280; *San Antonio, etc., R. Co. v. Waller*, 27 Tex. Civ. App. 44; *Houston, etc., R. Co. v. Johnson*, 27 Tex. Civ. App. 420; *San Antonio, etc., R. Co. v. Brock*, (Tex. Civ. App. 1904) 80 S. W. Rep. 422; *Galveston, etc., R. Co. v. Perry*, (Tex. Civ. App. 1905) 85 S. W. Rep. 62; *International, etc., R. Co. v. Glover*, (Tex. Civ. App. 1905) 88 S. W. Rep. 515.

*Wisconsin.* — *Rudiger v. Chicago, etc., R. Co.*, 101 Wis. 292; *Innes v. Milwaukee*, 103 Wis. 582; *Luessen v. Oshkosh Electric Light, etc., Co.*, 109 Wis. 94.

**Rule in Alabama.** — See *Louisville, etc., R. Co. v. Jones*, 130 Ala. 456; *Decatur Car Wheel, etc., Co. v. Mehafeey*, 128 Ala. 242.

"**Necessary Injury**" means necessary pecuniary injury. *Knight v. Sadtler Lead, etc., Co.*, 75 Mo. App. 541.

"**Pecuniary Loss**" as to **Lineal Kindred** is held to mean what the life of the deceased was worth in a pecuniary sense to him. *Chicago, etc., R. Co. v. Woolridge*, 174 Ill. 330.

**910. 4.** So under the **South Carolina Statute** evidence of pecuniary loss is unnecessary. *Mason v. Southern R. Co.*, 58 S. Car. 70, 79 Am. St. Rep. 826.

**7.** *Memphis Consol. Gas, etc., Co. v. Letson*, (C. C. A.) 135 Fed. Rep. 969; *Denver, etc., R. Co. v. Gunning*, (Colo. 1905) 80 Pac. Rep. 727; *Consolidated Stone Co. v. Staggs*, (Ind. 1905) 73 N. E. Rep. 695.

**8.** *Chicago, etc., R. Co. v. Ptacek*, 171 Ill. 9; *Snedeker v. Snedeker*, 164 N. Y. 63, wherein the court said: "The statute evidently deals with remote and uncertain damages not recoverable at common law."

**When Pecuniary Loss Presumed.** — Where the relation of husband and wife or parent and child exists between the deceased and the beneficiary the courts of many states presume some pecuniary loss. *Peden v. American Bridge Co.*, 120 Fed. Rep. 523; *Chicago, etc., R. Co. v. Huston*, 196 Ill. 480; *McKechney v. Redmond*, 94 Ill. App. 470; *Locher v. Kluga*, 97 Ill. App. 518; *Korraday v. Lake Shore, etc., R. Co.*, 131 Ind. 261; *Malott v. Shimer*, 153 Ind. 35, 74 Am.

St. Rep. 278; *Haug v. Great Northern R. Co.*, 8 N. Dak. 23, 73 Am. St. Rep. 727.

There is no presumption, however, in the case of collateral kin. *Burk v. Arcata, etc., R. Co.*, 125 Cal. 364, 73 Am. St. Rep. 52; *Falkenau v. Rowland*, 70 Ill. App. 20; *Locher v. Kluga*, 97 Ill. App. 518; *Cleveland, etc., R. Co. v. Drumm*, 32 Ind. App. 547; *Chicago, etc., R. Co. v. Thomas*, (Ind. 1900) 55 N. E. Rep. 861.

**9. Value of Life the Standard.** — *The Dauntless*, 121 Fed. Rep. 420, modified (C. C. A.) 129 Fed. Rep. 715; *Hirschkovitz v. Pennsylvania R. Co.*, 138 Fed. Rep. 438; *Swift v. Johnson*, (C. C. A.) 138 Fed. Rep. 867; *Illinois Cent. R. Co. v. Bartle*, 94 Ill. App. 57; *Meekin v. Brooklyn Heights R. Co.*, 164 N. Y. 145, 79 Am. St. Rep. 635; *International, etc., R. Co. v. McVey*, (Tex. 1905) 87 S. W. Rep. 328. And see generally as to measure of damages *Broughel v. Southern New England Telephone Co.*, 73 Conn. 614, 84 Am. St. Rep. 176.

**In New York** the Code of Civil Procedure provides that the damages may be such a sum as the jury deems to be a fair and just compensation for the pecuniary loss resulting from the decedent's death to the person or persons for whose benefit the action is brought. *Phalen v. Rochester R. Co.*, 31 N. Y. App. Div. 448; *Gubbitosi v. Rothschild*, 75 N. Y. App. Div. 477; *Lipp v. Otis*, 161 N. Y. 569; *Terhune v. Joseph W. Cody Contracting Co.*, 72 N. Y. App. Div. 1; *Sciurba v. Metropolitan St. R. Co.*, 73 N. Y. App. Div. 170; *Fajardo v. New York Cent., etc., R. Co.*, 84 N. Y. App. Div. 359.

In *Hoffman v. New York Cent., etc., R. Co.*, (Supm. Ct. Tr. T.) 42 Misc. (N. Y.) 579, the court said: "At best \* \* \* damages must be more or less speculative, but the statute is intended to give damages for pecuniary loss, not for charity, nor for any sentimental reasons."

**The Rule in Rhode Island** is to ascertain first the gross amount of the prospective income or earnings of the deceased, then to deduct therefrom what he would have to lay out, as a producer, to render the service or to acquire the money that he might be expected to produce, computing such expenses according to his station in life, his means, and his personal habits, and then to reduce the net result so obtained to its present value. *Reynolds v. Narragansett Electric Lighting Co.*, (R. I. 1904) 59 Atl. Rep. 393; *McCabe v. Narragansett Electric Lighting Co.*, (R. I. 1904) 59 Atl. Rep. 112.

**912. 1. Province of Jury.** — *Swift v. Johnson*, (C. C. A.) 138 Fed. Rep. 867; *Denver, etc., R. Co. v. Gunning*, (Colo. 1905) 80 Pac. Rep. 727; *Consolidated Stone Co. v. Staggs*, (Ind. 1905) 73 N. E. Rep. 695; *Eginoire v. Union County*, 112 Iowa 558; *McKay v. New England Dredging Co.*, 92 Me. 454; *Countryman v. Fonda, etc., R. Co.*, 166 N. Y. 201, 82 Am. St. Rep. 640. See also *Cleveland, etc., R. Co. v. Drumm*, 32 Ind. App. 547.



**913. g. ANNUITY AS A BASIS** — But Where There Was No Specific Annuity Lost. — See note 3.

**h. EXACT MATHEMATICAL CALCULATION NOT A PROPER BASIS.** — See note 4.

**914. 3. In Particular Classes of Cases** — *a.* FOR DEATH OF HUSBAND AND PARENT. — See note 2.

**916. Value of Parent's Services in Care and Education of His Children.** — See note 1.

**917. But There Must Be Proof of Such Loss.** — See note 1.

**913. 3. Definite Income, but No Specific Annuity.** — See *Hinsdale v. New York*, etc., R. Co., 81 N. Y. App. Div. 617; *Fajardo v. New York Cent.*, etc., R. Co., 84 N. Y. App. Div. 354; *Mix v. Hamburg-American Steamship Co.*, 85 N. Y. App. Div. 475.

**4. No Precise Mathematical Basis.** — In *re* California Nav., etc., Co., 110 Fed. Rep. 670; *McGhee v. Willis*, 134 Ala. 281; *Coffeyville Min.*, etc., Co. *v. Carter*, 65 Kan. 565; *Missouri Pac. R. Co. v. Moffatt*, 60 Kan. 113, 72 Am. St. Rep. 343; *Fidelity Land*, etc., Co. *v. Buzzard*, 69 Kan. 330; *Oakes v. Maine Cent. R. Co.*, 95 Me. 103; *McKay v. New England Dredging Co.*, 92 Me. 454; *Sieber v. Great Northern R. Co.*, 76 Minn. 269; *Union Pac. R. Co. v. Roeser*, (Neb. 1903) 95 N. W. Rep. 68; *Galveston*, etc., R. Co. *v. Hughes*, 22 Tex. Civ. App. 134; *Merchants*, etc., Oil Co. *v. Burns*, 96 Tex. 573. See also *Cicero*, etc., St. R. Co. *v. Boyd*, 95 Ill. App. 510.

**914. 2. Measure of Damages — Death of Husband and Parent** — *United States.* — *Northern Pac. R. Co. v. Freeman*, (C. C. A.) 83 Fed. Rep. 82, *reversed* 174 U. S. 379; *Memphis Consol. Gas*, etc., Co. *v. Letson*, (C. C. A.) 135 Fed. Rep. 969.

*Delaware.* — *Reed v. Queen Anne's R. Co.*, 4 Penn. (Del.) 413. See also *Cox v. Wilmington City R. Co.*, 4 Penn. (Del.) 162.

*Illinois.* — *O'Fallon Coal*, etc., Co. *v. Laquet*, 198 Ill. 127, *citing* 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 914; *Anthony Ittner Brick Co. v. Ashby*, 198 Ill. 562; *Chicago*, etc., R. Co. *v. Kelly*, 80 Ill. App. 675, *affirmed* 182 Ill. 267. See also *Chicago*, etc., R. Co. *v. Kelly*, 182 Ill. 267.

*Indiana.* — *Pittsburgh*, etc., R. Co. *v. Hosea*, 152 Ind. 412; *Hunt v. Conner*, 26 Ind. App. 41; *Consolidated Stone Co. v. Staggs*, (Ind. 1905) 73 N. E. Rep. 695. See also *Malott v. Shimer*, 153 Ind. 35, 74 Am. St. Rep. 278; *Duzan v. Myers*, 30 Ind. App. 227, 96 Am. St. Rep. 341.

*Kansas.* — *Missouri Pac. R. Co. v. Moffatt*, 60 Kan. 113, 72 Am. St. Rep. 343.

*Kentucky.* — *Louisville*, etc., R. Co. *v. Schumaker*, 112 Ky. 431. See also *Louisville*, etc., R. Co. *v. Taaffe*, 106 Ky. 535.

*Maine.* — *Conley v. Maine Cent. R. Co.*, 95 Me. 149.

*Michigan.* — See *Rouse v. Detroit Electric R. Co.*, 128 Mich. 149.

*Missouri.* — *Jones v. Kansas City*, etc., R. Co., 178 Mo. 528; *Knight v. Sadler Lead*, etc., Co., 75 Mo. App. 541.

*Nebraska.* — *Chicago*, etc., R. Co. *v. Zerneck*, 59 Neb. 689.

*New York.* — See *Beecher v. Long Island R. Co.*, 53 N. Y. App. Div. 324; *Hoffman v. New York Cent.*, etc., R. Co., (Supm. Ct. Tr. T.) 42 Misc. (N. Y.) 579.

*Ohio.* — *New York*, etc., R. Co. *v. Roe*, 25 Ohio Cir. Ct. 628.

*Texas.* — *Louisiana Extension R. Co. v. Carstens*, 19 Tex. Civ. App. 190; *Galveston*, etc., R. Co. *v. Johnson*, 24 Tex. Civ. App. 180; *International*, etc., R. Co. *v. Glover*, (Tex. Civ. App. 1905) 88 S. W. Rep. 515. See also *Houston*, etc., R. Co. *v. Loeffler*, (Tex. Civ. App. 1899) 51 S. W. Rep. 536.

*Wisconsin.* — *Carpenter v. Rolling*, 107 Wis. 559; *Rudiger v. Chicago*, etc., R. Co., 101 Wis. 292; *Bauer v. Richter*, 103 Wis. 412.

**What the Husband Would Have Earned in Wages Is Not the Standard** by which to measure damages suffered by his widow. *Haines v. Pearson*, 107 Mo. App. 481.

**Deprivation of the Possibility of Inheriting After-acquired Property** of the husband and parent may be considered by the jury. *New York*, etc., R. Co. *v. Roe*, 25 Ohio Cir. Ct. 628.

**The Habits and Moral Character of the Widow** cannot be considered in estimating her damages. *Consolidated Stone Co. v. Morgan*, 160 Ind. 241.

**A Daughter Whom Her Father Did Not Support** is nevertheless entitled to substantial damages for his death, where he is legally liable for such support. *International*, etc., R. Co. *v. Culpepper*, 19 Tex. Civ. App. 182.

**Personal Attention of the Husband to Insure the Comfort of His Wife** should be taken into consideration in measuring her loss. *Haines v. Pearson*, 107 Mo. App. 481.

**Recovery for Loss of the Society, Comfort, and Protection of the Husband** may be allowed. *Florida Cent.*, etc., R. Co. *v. Foxworth*, (Fla. 1903) 34 So. Rep. 270.

**916. 1. Loss of Intellectual and Moral Training of Parent.** — *Northern Pac. R. Co. v. Freeman*, (C. C. A.) 83 Fed. Rep. 82, *reversed* 174 U. S. 379; *Hall v. North Pac. Coast R. Co.*, 134 Fed. Rep. 309; *St. Louis*, etc., R. Co. *v. Haist*, 71 Ark. 258, 100 Am. St. Rep. 65; *St. Louis*, etc., R. Co. *v. Hitt*, (Ark. 1905) 88 S. W. Rep. 908; *O'Fallon Coal*, etc., Co. *v. Laquet*, 198 Ill. 127, *citing* 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 914 [916]; *Wabash R. Co. v. Cregan*, 23 Ind. App. 1; *Coffeyville Min.*, etc., Co. *v. Carter*, 65 Kan. 565; *Galveston*, etc., R. Co. *v. Puente*, 30 Tex. Civ. App. 246; *International*, etc., R. Co. *v. McVey*, (Tex. Civ. App. 1904) 81 S. W. Rep. 991; *International*, etc., R. Co. *v. McVey*, (Tex. 1905) 87 S. W. Rep. 328; *Hoadley v. International Paper Co.*, 72 Vt. 79; *Walker v. McNeill*, 17 Wash. 582. See also *McKay v. New England Dredging Co.*, 92 Me. 454. *Compare McCabe v. Narragansett Electric Lighting Co.*, (R. I. 1905) 61 Atl. Rep. 667.

**917. 1. Qualification of General Rule — Fitness of Parent.** — *St. Louis*, etc., R. Co. *v. Townsend*, 69 Ark. 380.

**917. Damages Not Limited to Minority of Children.** — See note 2.

Where Husband Has Deserted His Wife. — See note 4.

For Death of Mother. — See note 5.

**918. b. FOR DEATH OF WIFE.** — See notes 1, 2.**919. c. FOR DEATH OF CHILD.** — See note 2.

**917. 2. Not Confined to Minority of Child.** — San Antonio, etc., R. Co. v. Long, 19 Tex. Civ. App. 649; Proctor v. San Antonio St. R. Co., 26 Tex. Civ. App. 150; Galveston, etc., R. Co. v. Puente, 30 Tex. Civ. App. 246; St. Louis Southwestern R. Co. v. Bowles, 32 Tex. Civ. App. 118; Utah Sav., etc., Co. v. Diamond Coal, etc., Co., 26 Utah 299. See also Rouse v. Detroit Electric R. Co., 128 Mich. 149.

**Damages Confined to Minority of Children in Louisiana** by virtue of a statute allowing only "minor" children to be beneficiaries. Eichorn v. New Orleans, etc., R., etc., Co., 114 La. 712.

**Reasonable Expectation** is the test. Stahler v. Philadelphia, etc., R. Co., 199 Pa. St. 383, 85 Am. St. Rep. 791.

**A Married Daughter** may recover damages for death of her father if she shows pecuniary loss. Texas Pac. R. Co. v. Martin, 25 Tex. Civ. App. 204.

**4. See Gulf, etc., R. Co. v. Delaney, 22 Tex. Civ. App. 427; De Garcia v. San Antonio, etc., R. Co., (Tex. Civ. App. 1903) 77 S. W. Rep. 275.**

**Where the Wife Has Abandoned Her Husband**, who is subsequently killed by the negligence of a railroad company, the fact of such abandonment does not necessarily preclude recovery for damages for his death. The question is for the jury. Houston, etc., R. Co. v. Bryant, 31 Tex. Civ. App. 483.

**5. Death of Mother.** — See Bradley v. Ohio River, etc., R. Co., 122 N. Car. 972; Lazelle v. Newfane, 70 Vt. 440.

Where the only damage alleged is loss of services, a son is not entitled to damages for the death of his mother if it appears that he paid her for her services to him all they were worth. Galveston, etc., R. Co. v. Polk, (Tex. Civ. App. 1901) 63 S. W. Rep. 343.

**918. 1. Loss of Services the Principal Consideration.** — Denver, etc., R. Co. v. Gunning, (Colo. 1905) 80 Pac. Rep. 727; Atchison, etc., R. Co. v. Townsend, (Kan. 1905) 81 Pac. Rep. 205. See Smith v. Lehigh Valley R. Co., 177 N. Y. 379; Waechter v. Second Ave. Traction Co., 198 Pa. St. 129.

**2. All Pecuniary Loss Suffered by Husband and Children** from loss of the society, protection, etc., of the deceased may be considered. Green v. Southern California R. Co., (Cal. 1901) 67 Pac. Rep. 4; Dyas v. Southern Pac. Co., 140 Cal. 296.

**919. 2. Death of Child** — *United States*. — Baltimore, etc., R. Co. v. Hellenthal. (C. C. A.) 88 Fed. Rep. 116. See also Sternenberg v. Mailhos, (C. C. A.) 99 Fed. Rep. 43.

*California*. — Fox v. Oakland Consol. St. R. Co., 118 Cal. 55, 62 Am. St. Rep. 216.

*Colorado*. — Zimmerman v. Denver Consol. Tramway Co., 18 Colo. App. 480.

*District of Columbia*. — Smith v. Cissel, 22 App. Cas. (D. C.) 318.

*Illinois*. — See Chicago G. W. R. Co. v. Root, 106 Ill. App. 164.

*Indiana*. — Pittsburgh, etc., R. Co. v. Hosea, 152 Ind. 412; Cleveland, etc., R. Co. v. Miles, 162 Ind. 646; Southern Indiana R. Co. v. Moore, (Ind. App. 1904) 71 N. E. Rep. 516, 34 Ind. App. 154.

*Kansas*. — Kansas City v. Siese, (Kan. 1905) 80 Pac. Rep. 626.

*Kentucky*. — Smith v. Middleton, 112 Ky. 588, 99 Am. St. Rep. 308.

*Louisiana*. — See La Blanc v. Sweet, 107 La. 355, 90 Am. St. Rep. 303.

*Michigan*. — Miller v. Meade Tp., 128 Mich. 98; Snyder v. Lake Shore, etc., R. Co., 131 Mich. 418; McDonald v. Champion Iron, etc., Co., (Mich. 1905) 103 N. W. Rep. 829.

*Missouri*. — Stumbo v. Duluth Zinc Co., 100 Mo. App. 635; Barnes v. Columbia Lead Co., 107 Mo. App. 608. See also Sharp v. National Biscuit Co., 179 Mo. 553.

*Nebraska*. — See Tucker v. Draper, 62 Neb. 66.

*New Jersey*. — Graham v. Consolidated Traction Co., 62 N. J. L. 90; May v. West Jersey, etc., R. Co., 62 N. J. L. 63; Graham v. Consolidated Traction Co., 64 N. J. L. 10.

*New York*. — Schaffer v. Baker Transfer Co., 29 N. Y. App. Div. 459; Kellogg v. Albany, etc., R., etc., Co., 72 N. Y. App. Div. 321. See also Terhune v. Joseph W. Cody Contracting Co., 72 N. Y. App. Div. 1.

*North Carolina*. — Russell v. Windsor Steamboat Co., 126 N. Car. 968, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 919.

*Ohio*. — Ashtabula Rapid Transit Co. v. Dagenbach, 11 Ohio Cir. Dec. 307.

*Rhode Island*. — Schnable v. Providence Public Market, 24 R. I. 477.

*Texas*. — Cole v. Parker, 27 Tex. Civ. App. 563; Freeman v. Carter, 28 Tex. Civ. App. 571; Texas, etc., R. Co. v. Yarbrough, (Tex. Civ. App. 1903) 73 S. W. Rep. 844; Gulf, etc., R. Co. v. Johnson, (Tex. Civ. App. 1905) 86 S. W. Rep. 34.

*Utah*. — Corbett v. Oregon Short Line R. Co., 25 Utah 449.

*Wisconsin*. — Luessen v. Oshkosh Electric Light, etc., Co., 109 Wis. 94.

**Fixing of Damages Peculiarly for Jury.** — In *Illinois* the fixing of damages for the death of a young child is held to be a matter peculiarly for a jury and is so declared by statute. True, etc., Co. v. Woda, 104 Ill. App. 15, affirmed 201 Ill. 315.

**Evidence of Exact Age of Child Unnecessary on Question of Damages.** — West Chicago St. R. Co. v. Whittaker, 72 Ill. App. 48.

**The Attentions and Kindness of Children to Parents**, though adding nothing to their estate, may be considered. McKay v. New England Dredging Co., 92 Me. 454.

**The Physical Condition of the Father**, as that he has but one arm, cannot be shown, since the father is entitled to recover only for the pecuniary loss suffered by the death of the child. *Illinois Cent. R. Co. v. Bandy*, 88 Ill. App. 629.

- 920.** Recovery Not Limited to Value of Services During Minority. — See note 1.  
**921.** Affirmative Proof Necessary. — See note 1.  
 Deducting Expense of Child's Support. — See note 2.  
**922.** Emancipation of Child — Effect of. — See note 3.  
 In Case of Adult Child. — See note 7.  
*d.* WHERE SUIT IS BY NEXT OF KIN. — See note 8.  
**923.** 4. Prospective Damages. — See notes 2, 3.  
 Expectation of Pecuniary Benefit. — See notes 4, 5.

**The Habits of Energy of the Child** will be considered in estimating damages. *Missouri, etc., R. Co. v. Gilmore*, (Tex. Civ. App. 1899) 53 S. W. Rep. 61.

**When Earning Capacity Cannot Be Considered.** — Under a survival statute, where the damages are for the benefit of the estate, the earning capacity of a minor cannot be considered, as his services do not belong to him. *Carney v. Concord St. R. Co.*, 72 N. H. 364. See also *Linss v. Chesapeake, etc., R. Co.*, 91 Fed. Rep. 964, wherein it was held that in *Kentucky*, which has a survival statute, the value of the child's earning capacity during minority, and the cost of his maintenance and education, are not to be considered.

**No Recovery Can Be Had for the Sorrow or Suffering of the Parents.** — The measure of damages is the fair compensation to the estate of the child for the destruction of his capacity to earn money. *Louisville, etc., R. Co. v. Creighton*, 106 Ky. 42.

**920. 1. Recovery Not Limited to Value of Services During Minority** — *United States*. — *Texas, etc., R. Co. v. Wilder*, (C. C. A.) 92 Fed. Rep. 953; *Peterman v. Northern Pac. R. Co.*, 105 Fed. Rep. 335.

*California*. — *Hillebrand v. Standard Biscuit Co.*, 139 Cal. 233.

*District of Columbia*. — *U. S. Electric Lighting Co. v. Sullivan*, 22 App. Cas. (D. C.) 115.

*Illinois*. — *Chicago, etc., R. Co. v. Beaver*, 199 Ill. 34; *West Chicago St. R. Co. v. Dooley*, 76 Ill. App. 424; *Prendergast v. Chicago City R. Co.*, 114 Ill. App. 157.

*Kansas*. — *Fidelity Land, etc., Co. v. Buzzard*, 69 Kan. 330.

*Massachusetts*. — *Boyle v. Columbian Fire Proofing Co.*, 182 Mass. 93.

*Minnesota*. — *Sieber v. Great Northern R. Co.*, 76 Minn. 269.

*Nebraska*. — *Draper v. Tucker*, (Neb. 1903) 95 N. W. Rep. 1026.

*New York*. — *Swanton v. King*, 72 N. Y. App. Div. 578; *Connaughton v. Sun Printing, etc., Assoc.*, 73 N. Y. App. Div. 316; *Predmore v. Consumer's Light, etc., Co.*, 99 N. Y. App. Div. 551.

*Ohio*. — *Cincinnati St. R. Co. v. Altemeir*, 60 Ohio St. 10.

*Texas*. — *Galveston, etc., R. Co. v. Ford*, 22 Tex. Civ. App. 131; *Houston, etc., R. Co. v. White*, 23 Tex. Civ. App. 280; *International, etc., R. Co. v. Knight*, 91 Tex. 660; *Missouri, etc., R. Co. v. O'Connor*, (Tex. Civ. App. 1904) 78 S. W. Rep. 374; *Galveston, etc., R. Co. v. Power*, (Tex. Civ. App. 1899) 54 S. W. Rep. 629; *San Antonio Traction Co. v. White*, 94 Tex. 468; *Atchison, etc., R. Co. v. Van Belle*, 26 Tex. Civ. App. 511; *International Light, etc., Co. v. Maxwell*, 27 Tex. Civ. App. 294; *Cole v.*

*Parker*, 27 Tex. Civ. App. 563; *Freeman v. Carter*, 28 Tex. Civ. App. 571; *Texas, etc., R. Co. v. Harby*, 28 Tex. Civ. App. 24; *Freeman v. Carter*, (Tex. Civ. App. 1904) 81 S. W. Rep. 81; *St. Louis Southwestern R. Co. v. Shiflet*, 98 Tex. 102; *Ft. Worth, etc., R. Co. v. Morrison*, 93 Tex. 527. See also *Ft. Worth, etc., R. Co. v. Morrison*, (Tex. Civ. App. 1900) 56 S. W. Rep. 931.

*Utah*. — *Beaman v. Martha Washington Min. Co.*, 23 Utah 139.

**921. 1. Affirmative Proof by Parent Must Be Given.** — *Morhart v. North Jersey St. R. Co.*, 64 N. J. L. 236; *Missouri, etc., R. Co. v. Freeman*, (Tex. Civ. App. 1903) 73 S. W. Rep. 542; *Standard Light, etc., Co. v. Muncey*, 33 Tex. Civ. App. 416; *Decker v. McSorley*, 111 Wis. 91; *Davidson v. Stuart*, 14 Manitoba 74, affirmed on other grounds, 34 Can. Sup. Ct. 215. See also *McDonald v. Rex*, 7 Can. Exch. 216.

**2. Expense of Child's Support.** — *Stumbo v. Duluth Zinc Co.*, 100 Mo. App. 635; *Schaffer v. Baker Transfer Co.*, 29 N. Y. App. Div. 459.

**922. 3. Effect of Child's Emancipation.** — See *Cole v. Mayne*, 122 Fed. Rep. 836; *Swift v. Johnson*, (C. C. A.) 138 Fed. Rep. 867; *Elwood Electric St. R. Co. v. Ross*, 26 Ind. App. 258.

**A Father Who Has Abandoned His Child** years before the latter's death by a wrongful act cannot recover damages as "next of kin" under the *Nebraska* statute, as he has suffered no pecuniary loss. *Thompson v. Chicago, etc., R. Co.*, 104 Fed. Rep. 845. See also *Cook v. American E. C., etc., Gunpowder Co.*, 70 N. J. L. 65, holding that a verdict of two thousand five hundred dollars in favor of a father for the death of his thirteen-year-old son was clearly excessive where it appeared that the son had been abandoned by the father, the expectation of substantial pecuniary benefit from the continued life of the son being too remote.

**7. Death of Adult Child.** — *Mulhall v. Fallon*, 176 Mass. 266, 79 Am. St. Rep. 309.

**8. Where Next of Kin Sue.** — See *U. S. Brewing Co. v. Stoltzenberg*, 211 Ill. 531.

**923. 2. Rule in Actions for Death.** — *Barth v. Kansas City El. R. Co.*, 142 Mo. 535.

**3. Matter of Cook**, 126 Iowa 158; *Western Maryland R. Co. v. State*, 95 Md. 637; *Meyer v. Hart*, 23 N. Y. App. Div. 131; *Ingraham v. Samuels*, 71 N. Y. App. Div. 14.

**Where the Deceased Saved a Part of His Wages**, after paying the living expenses of himself and those dependent upon him, the court cannot limit the recovery to the amount he would have contributed to the support of the dependent next of kin. *Bessemer Land, etc., Co. v. Campbell*, 121 Ala. 50, 77 Am. St. Rep. 17.

**4. Expectation of Pecuniary Benefit** — *Flor-*



**924.** 5. Exemplary or Punitive Damages. — See note 2.

**925.** See note 1.

**926.** There Can Be No Recovery of Exemplary Damages unless Actual Damages Are Proven.

— See note 1.

**6. Solatium for Wounded Feelings — a. GENERAL RULE — NO RECOVERY. — See note 2.**

*ida.* — Louisville, etc., R. Co. v. Jones, (Fla. 1903) 34 So. Rep. 246.

*Indiana.* — Diebold v. Sharp, 19 Ind. App. 474.

*Maine.* — Oakes v. Maine Cent. R. Co., 95 Me. 103; McKay v. New England Dredging Co., 92 Me. 454.

*Michigan.* — Olivier v. Houghton County St. R. Co., 134 Mich. 367, 104 Am. St. Rep. 607.

*Minnesota.* — Sieber v. Great Northern R. Co., 76 Minn. 269.

*New Jersey.* — Graham v. Consolidated Traction Co., 62 N. J. L. 90; Craham v. Consolidated Traction Co., 64 N. J. L. 10.

*Ohio.* — New York, etc., R. Co. v. Roe, 25 Ohio Cir. Ct. 628.

*Texas.* — Ft. Worth, etc., R. Co. v. Linthicum, 33 Tex. Civ. App. 375.

*Canada.* — McDonald v. Rex, 7 Can. Exch. 216; Ricketts v. Markdale, 31 Ont. 610; Rombough v. Balch, etc., R. Co., 27 Ont. App. 32.

**Merely Possible Benefits** cannot be considered. Cleveland, etc., R. Co. v. Drumm, 32 Ind. App. 547.

**923.** 5. Walker v. McNeill, 17 Wash. 582.

**924.** 2. When Statute Limits Recovery to the "Pecuniary" Injury Sustained — *United States.* — Peers v. Nevada Power, etc., Co., 119 Fed. Rep. 404, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 924; Swift v. Johnson, (C. C. A.) 138 Fed. Rep. 867.

*California.* — Burk v. Arcata, etc., R. Co., 125 Cal. 364, 73 Am. St. Rep. 52.

*Illinois.* — West Chicago St. R. Co. v. Dooley, 76 Ill. App. 424.

*Kansas.* — Atchison, etc., R. Co. v. Tounsend, (Kan. 1905) 81 Pac. Rep. 205.

*Louisiana.* — Le Blanc v. Sweet, 107 La. 355, 90 Am. St. Rep. 303.

*Maine.* — McKay v. New England Dredging Co., 92 Me. 454; Oakes v. Maine Cent. R. Co., 95 Me. 103.

*New York.* — Meekin v. Brooklyn Heights R. Co., 164 N. Y. 145, 79 Am. St. Rep. 635; Schaffer v. Baker Transfer Co., 29 N. Y. App. Div. 459.

*North Carolina.* — Mendenhall v. North Carolina R. Co., 123 N. Car. 275; Bradley v. Ohio River, etc., R. Co., 122 N. Car. 972.

*Oregon.* — Perham v. Portland Gen. Electric Co., 33 Oregon 451, 72 Am. St. Rep. 730.

*South Carolina.* — Nohrden v. North Eastern R. Co., 54 S. Car. 493; Garrick v. Florida Cent., etc., R. Co., 53 S. Car. 448.

**925.** 1. Recovery Not Limited — **Exemplary Damages Allowed** — *United States.* — Peers v. Nevada Power, etc., Co., 119 Fed. Rep. 404, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 924.

*Alabama.* — Louisville, etc., R. Co. v. Tegner, 125 Ala. 593; McGhee v. McCarley, (C. C. A.) 103 Fed. Rep. 55 (construing the Alabama statute); Louisville, etc., R. Co. v. Lansford,

(C. C. A.) 102 Fed. Rep. 62 (construing the Alabama statute).

*Connecticut.* — Broughel v. Southern New England Telephone Co., 73 Conn. 614, 84 Am. St. Rep. 176.

*Florida.* — Florida Cent., etc., R. Co. v. Foxworth, (Fla. 1903) 34 So. Rep. 270.

*Kentucky.* — Louisville, etc., R. Co. v. Sander, (Ky. 1898) 44 S. W. Rep. 644; Louisville, etc., R. Co. v. Ward, (Ky. 1898) 44 S. W. Rep. 1112; Louisville, etc., R. Co. v. Creighton, 106 Ky. 42; Southern R. Co. v. Barr, (Ky. 1900) 55 S. W. Rep. 900; Illinois Cent. R. Co. v. Josey, 110 Ky. 342, 96 Am. St. Rep. 455; Smith v. Middleton, 112 Ky. 588, 99 Am. St. Rep. 308; Cincinnati, etc., R. Co. v. Cook, 113 Ky. 161; Southern R. Co. v. Otis, (Ky. 1904) 78 S. W. Rep. 480.

*Missouri.* — Cole v. Mayne, 122 Fed. Rep. 836 (construing the Missouri statute); Barth v. Kansas City El. R. Co., 142 Mo. 535; Fischer v. Edward Heitzberg Packing, etc., Co., 77 Mo. App. 108; Coleman v. Himmelberger-Harrison Land, etc., Co., 105 Mo. App. 254. See also Gilfillan v. McCrillis, 84 Mo. App. 576.

*New Mexico.* — Cerrillos Coal R. Co. v. Deserant, 9 N. Mex. 49.

*Tennessee.* — Davidson Benedict Co. v. Severson, 109 Tenn. 572; Louisville, etc., R. Co. v. Satterwhite, 112 Tenn. 185.

*Texas.* — Morgan v. Barnhill, (C. C. A.) 118 Fed. Rep. 24 (construing the Texas statute); Louisiana Extension R. Co. v. Carstens, 19 Tex. Civ. App. 190; Citizens R. Co. v. Washington, 24 Tex. Civ. App. 422.

**926.** 1. Adams v. San Antonio, etc., R. Co., 34 Tex. Civ. App. 413.

**2. Wounded Feelings** — *United States.* — Northern Pac. R. Co. v. Freeman, (C. C. A.) 83 Fed. Rep. 82, reversed 174 U. S. 379; *In re California Nav., etc., Co.*, 110 Fed. Rep. 670; The Dauntless, (C. C. A.) 121 Fed. Rep. 420, modified 129 Fed. Rep. 715; Memphis Consol. Gas, etc., Co. v. Letson, (C. C. A.) 135 Fed. Rep. 969; Swift v. Johnson, (C. C. A.) 138 Fed. Rep. 867.

*California.* — Fox v. Oakland Consol. St. R. Co., 118 Cal. 55, 62 Am. St. Rep. 216; Wales v. Pacific Electric Motor Co., 130 Cal. 521; Keast v. Santa Ysabel Gold Min. Co., 136 Cal. 256; Green v. Southern Pac. R. Co., 122 Cal. 563.

*Colorado.* — Denver, etc., R. Co. v. Spencer, 27 Colo. 313.

*District of Columbia.* — Smith v. Cissel, 22 App. Cas. (D. C.) 318.

*Florida.* — Florida Cent., etc., R. Co. v. Foxworth, 41 Fla. 1, 79 Am. St. Rep. 140.

*Illinois.* — Chicago, etc., R. Co. v. Woolridge, 174 Ill. 330; Chicago, etc., R. Co. v. Rains, 203 Ill. 417; West Chicago St. R. Co. v. Dooley, 76 Ill. App. 424; O'Fallon Coal Co. v. Laquet, 89 Ill. App. 13, affirmed 198 Ill. 125.

**928.** *b.* A MODIFIED DOCTRINE. — See note 1.

**929.** 7. Nominal Damages — *a.* WHEN RECOVERABLE. — See note 1.

*b.* WHEN RECOVERY LIMITED TO SUCH DAMAGES. — See note 3.

**930.** See note 1.

8. Limit Fixed by Statute — *a.* MAXIMUM LIMIT. — See notes 2, 3.

*Indiana.* — Commercial Club *v.* Hilliker, 20 Ind. App. 239; Duzan *v.* Myers, 30 Ind. App. 227, 96 Am. St. Rep. 341.

*Iowa.* — Hively *v.* Webster County, 117 Iowa 672.

*Kansas.* — Atchison, etc., R. Co. *v.* Tounsend, (Kan. 1905) 81 Pac. Rep. 205.

*Kentucky.* — Louisville, etc., R. Co. *v.* Creighton, 106 Ky. 42; Louisville, etc., R. Co. *v.* Schumaker, 112 Ky. 431.

*Maine.* — McKay *v.* New England Dredging Co., 92 Me. 454; Oakes *v.* Maine Cent. R. Co., 95 Me. 103.

*Michigan.* — McDonald *v.* Champion Iron, etc., Co., (Mich. 1905) 103 N. W. Rep. 829.

*Missouri.* — Barth *v.* Kansas City El. R. Co., 142 Mo. 535; Knight *v.* Sadtler Lead, etc., Co., 75 Mo. App. 541; Gilfillan *v.* McCrillis, 84 Mo. App. 576; Haines *v.* Pearson, 107 Mo. App. 481.

*New Jersey.* — Cooper *v.* Shore Electric Co., 62 N. J. L. 558; Hackney *v.* Delaware, etc., Tel., etc., Co., 69 N. J. L. 335.

*New Mexico.* — Cerrillos Coal Co. *v.* Deserant, 9 N. Mex. 49.

*New York.* — Smith *v.* Lehigh Valley R. Co., 177 N. Y. 379; Kellogg *v.* Albany, etc., R., etc., Co., 72 N. Y. App. Div. 321; Sternfels *v.* Metropolitan St. R. Co., 73 N. Y. App. Div. 494, affirmed 174 N. Y. 512.

*North Carolina.* — Mendenhall *v.* North Carolina R. Co., 123 N. Car. 275; Bradley *v.* Ohio River, etc., R. Co., 122 N. Car. 972.

*North Dakota.* — Haug *v.* Great Northern R. Co., 8 N. Dak. 23, 73 Am. St. Rep. 727.

*Ohio.* — Cincinnati, St. R. Co. *v.* Altemeier, 60 Ohio St. 10; Lake Shore, etc., R. Co. *v.* Ehlert, 10 Ohio Cir. Dec. 443, 19 Ohio Cir. Ct. 177; Bond Hill *v.* Atkinson, 9 Ohio Cir. Dec. 185; Toledo R., etc., Co. *v.* Ward, 25 Ohio Cir. Ct. 399. See also Erie R. Co. *v.* McCormick, 24 Ohio Cir. Ct. 86.

*Oregon.* — Perham *v.* Portland Gen. Electric Co., 33 Oregon 451, 72 Am. St. Rep. 730; Schleiger *v.* Northern Terminal Co., 43 Oregon 4.

*Rhode Island.* — Schnable *v.* Providence Public Market, 24 R. I. 477; McCabe *v.* Narragansett Electric Lighting Co., (R. I. 1904) 59 Atl. Rep. 112.

*South Carolina.* — See Nohrden *v.* Northeastern R. Co., 59 S. Car. 107, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 926.

*Tennessee.* — Davidson Benedict Co. *v.* Severson, 109 Tenn. 572; Knoxville, etc., R. Co. *v.* Wyrick, 99 Tenn. 500; Freeman *v.* Illinois Cent. R. Co., 107 Tenn. 340; Illinois Cent. R. Co. *v.* Bentz, 108 Tenn. 670, 91 Am. St. Rep. 763.

*Texas.* — International, etc., R. Co. *v.* Boykin, 32 Tex. Civ. App. 72; San Antonio, etc., R. Co. *v.* Brock, (Tex. Civ. App. 1904) 80 S. W. Rep. 422; Houston, etc., R. Co. *v.* Bowen, (Tex. Civ. App. 1904) 81 S. W. Rep. 80; International, etc., R. Co. *v.* McVey, (Tex. 1905) 87 S. W. Rep. 328.

*Utah.* — Corbett *v.* Oregon Short Line R. Co., 25 Utah 449.

*Vermont.* — Lazelle *v.* Newfane, 70 Vt. 440.

*Virginia.* — See Norfolk, etc., R. Co. *v.* Stevens, 97 Va. 631.

*Washington.* — Walker *v.* McNeill, 17 Wash. 582.

*Wisconsin.* — Rudiger *v.* Chicago, etc., R. Co., 101 Wis. 292.

*Canada.* — McDonald *v.* Rex, 7 Can. Exch. 216.

**928.** 1. Doctrine Modified in Some Jurisdictions. — Nohrden *v.* Northeastern R. Co., 59 S. Car. 107, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 926; Corbett *v.* Oregon Short Line R. Co., 25 Utah 449. See also Beaman *v.* Martha Washington Min. Co., 23 Utah 139.

In Portsmouth St. R. Co. *v.* Peed, 102 Va. 662, an instruction which was approved told the jurors in effect that if they found for the plaintiff they might consider, in estimating the damages, compensation for loss of care, attention, and society, together with such sum as they might deem fair and just by way of solace and comfort for sorrow, suffering, and mental anguish occasioned, not to exceed ten thousand dollars.

**Loss of Comfort, Society, and Love of a Child** should be considered by the jury. Sharp *v.* National Biscuit Co., 179 Mo. 553.

**929.** 1. The Vermont Rule is that nominal damages are not recoverable in the absence of pecuniary injury. Lazelle *v.* Newfane, 70 Vt. 440.

**And in Indiana,** in an action by the administrator for the benefit of the next of kin, no damages are recoverable, in the absence of actual pecuniary loss, whatever the rule might be where the deceased left a widow or minor children, or where the action is by a parent for the death of a minor child. Wabash R. Co. *v.* Cregan, 23 Ind. App. 1.

**3. Only Nominal Damages Recoverable Where there is No Affirmative Proof of Pecuniary Injury.**

— *In re* California Nav., etc., Co., 110 Fed. Rep. 670; Swift *v.* Johnson, (C. C. A.) 138 Fed. Rep. 867; Alabama Mineral R. Co. *v.* Jones, 121 Ala. 113; Chicago, etc., R. Co. *v.* Gunderson, 174 Ill. 495; Atchison, etc., R. Co. *v.* Ryan, 62 Kan. 682; St. Louis, etc., R. Co. *v.* Blinn, 10 Kan. App. 468; Missouri Pac. R. Co. *v.* Moffatt, 60 Kan. 113, 72 Am. St. Rep. 343; Countryman *v.* Fonda, etc., R. Co., 166 N. Y. 201, 82 Am. St. Rep. 640. See also Diebold *v.* Sharp, 19 Ind. App. 474.

**Nominal Damages May Be Inferred in New York** where it appears that the decedent left a widow and two brothers. Pizzi *v.* Reid, 72 N. Y. App. Div. 162.

**930.** 1. Where Deceased Left No Distributees. — Tutwiler Coal, etc., Co. *v.* Enslin, 129 Ala. 336.

**2. Statutory Maximum Limit.** — In Colorado, Illinois, and Minnesota the maximum limit is five thousand dollars. Denver, etc., R. Co. *v.* Spencer, 25 Colo. 9; Hunt *v.* Kile, (C. C. A.) 98 Fed. Rep. 49 (under the Illinois statute);

- 931.** *c.* A FIXED PENALTY — MISSOURI STATUTE. — See note 4.  
**932.** 9. Excessive Damages. — See note 1.

*Watson v. St. Paul City R. Co.*, 70 Minn. 514. In *Kansas* and *Ohio* it is ten thousand dollars. *Coffeyville Min.*, etc., *Co. v. Carter*, 65 Kan. 565; *Pennsylvania R. Co. v. Paul*, (C. C. A.) 126 Fed. Rep. 157 (under the Ohio statute).

The Constitutional Provision of Wyoming prohibiting the making of statutes limiting the amount of damages to be recovered is prospective, and does not affect the statute limiting damages for death by wrongful act to five thousand dollars. *Mestas v. Diamond Coal, etc., Co.*, 12 Wyo. 414.

**930. 3. Damages Not Limited** — *New York*. — *Hoffman v. New York Cent., etc., R. Co.*, (Supm. Ct. Tr. T.) 42 Misc. (N. Y.) 579. But the abolition of the statutory limitation did not change the rule of damages. *Phalen v. Rochester R. Co.*, 31 N. Y. App. Div. 448; *Howell v. Rochester R. Co.*, 24 N. Y. App. Div. 502.

**931. 4. To What Cases the Missouri Statute Applies.** — See *Marsh v. Kansas City Southern R. Co.*, 104 Mo. App. 577.

**932. 1. Excessive Damages** — *United States*. — *Hirschkovitz v. Pennsylvania R. Co.*, 138 Fed. Rep. 438 (\$3,500).

*Alabama*. — *Northern Alabama R. Co. v. Mansell*, 138 Ala. 548 (\$10,000).

*California*. — *Fox v. Oakland Consol. St. R. Co.*, 118 Cal. 55, 62 Am. St. Rep. 216 (\$6,000).

*Colorado*. — *Denver, etc., R. Co. v. Spencer*, 27 Colo. 313 (\$5,000).

*Illinois*. — *Leiter v. Kinnare*, 68 Ill. App. 558 (\$5,000); *Illinois Cent. R. Co. v. Bandy*, 88 Ill. App. 629 (\$4,000); *Chicago, etc., R. Co. v. Downey*, 96 Ill. App. 398 (\$5,000); *Chicago Terminal Transfer R. Co. v. Helbreg*, 99 Ill. App. 563 (\$5,000).

*Indiana*. — *Commercial Club v. Hilliker*, 20 Ind. App. 239 (\$2,750).

*Iowa*. — *Hively v. Webster County*, 117 Iowa 674, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 933 (\$6,000).

*Kentucky*. — *Louisville, etc., R. Co. v. Creighton*, 106 Ky. 42 (\$17,500 and \$10,500); *Board of Internal Imp. v. Moore*, (Ky. 1902) 66 S. W. Rep. 417 (\$15,000); *Illinois Cent. R. Co. v. Watson*, (Ky. 1904) 78 S. W. Rep. 175 (\$18,000).

*Louisiana*. — *Wilson v. Banner Lumber Co.*, 108 La. 590 (\$3,333).

*Maine*. — *Ward v. Maine Cent. R. Co.*, 96 Me. 136 (\$2,031.81); *McKay v. New England Dredging Co.*, 92 Me. 454 (\$20,000).

*Mississippi*. — *Cumberland Telephone, etc., Co. v. Pitchford*, (Miss. 1901) 30 So. Rep. 41 (\$25,000).

*Missouri*. — *Barnes v. Columbia Lead Co.*, 107 Mo. App. 608 (\$3,000).

*New Jersey*. — *May v. West Jersey, etc., R. Co.*, 62 N. J. L. 67 (\$3,000); *Graham v. Consolidated Traction Co.*, 64 N. J. L. 10 (\$5,000); *Grieve v. North Jersey St. R. Co.*, 65 N. J. L. 409 (\$900); *Rowe v. New York, etc., Telephone Co.*, 66 N. J. L. 19 (\$5,126); *Rafferty v. Erie R. Co.*, 66 N. J. L. 444 (\$5,000); *Geiger v. Worthen, etc., Co.*, 66 N. J. L. 576 (\$7,000); *Garbaccio v. Jersey City, etc., St. R. Co.*, (N. J. 1902) 53 Atl. Rep. 707 (\$3,600); *Frank v.*

*Pennsylvania R. Co.*, (N. J. 1903) 55 Atl. Rep. 691 (\$10,000); *Cook v. American E. C., etc., Gunpowder Co.*, 70 N. J. L. 65 (\$2,500); *Fleming v. Label*, (N. J. 1904) 59 Atl. Rep. 27 (\$2,000).

*New York*. — *Cooper v. New York, etc., R. Co.*, 25 N. Y. App. Div. 383 (\$15,000); *Schaffer v. Baker Transfer Co.*, 29 N. Y. App. Div. 459 (\$6,000); *Smith v. Lehigh Valley R. Co.*, 61 N. Y. App. Div. 46, reversed 170 N. Y. 394 (\$10,000); *O'Connor v. Union R. Co.*, 67 N. Y. App. Div. 99 (\$7,000); *Kellogg v. Albany, etc., R., etc., Co.*, 72 N. Y. App. Div. 321 (\$9,500); *Connaughton v. Sun Printing, etc., Assoc.*, 73 N. Y. App. Div. 316 (\$5,250); *Stevens v. Union R. Co.*, 75 N. Y. App. Div. 602, affirmed 176 N. Y. 607 (\$15,000); *Wells v. New York Cent., etc., R. Co.*, 78 N. Y. App. Div. 1 (\$3,500); *Stillings v. Metropolitan St. R. Co.*, 84 N. Y. App. Div. 201, affirmed 177 N. Y. 344 (\$10,000); *Hoffman v. New York Cent., etc., R. Co.*, (Supm. Ct. Tr. T.) 42 Misc. (N. Y.) 579 (\$18,000).

*Ohio*. — *Bond Hill v. Atkinson*, 9 Ohio Cir. Dec. 185, 16 Ohio Cir. Ct. 470 (\$2,500); *Erie R. Co. v. McCormick*, 24 Ohio Cir. Ct. 86 (\$5,200).

*Rhode Island*. — *Sweet v. Providence, etc., R. Co.*, 20 R. I. 785 (\$2,500).

*Texas*. — *Galveston, etc., R. Co. v. Johnson*, 24 Tex. Civ. App. 180 (\$17,500); *International, etc., R. Co. v. Jones*, (Tex. Civ. App. 1901) 60 S. W. Rep. 978 (\$1,500); *Trinity Valley R. Co. v. Stewart*, (Tex. Civ. App. 1901) 62 S. W. Rep. 1085 (\$8,600); *Atchison, etc., R. Co. v. Van Belle*, 26 Tex. Civ. App. 511 (\$8,000); *San Antonio, etc., R. Co. v. Waller*, 27 Tex. Civ. App. 44 (\$20,000); *Southern Pac. R. Co. v. Winton*, 27 Tex. Civ. App. 503 (\$1,000).

*Washington*. — *Walker v. McNeill*, 17 Wash. 582 (\$40,000); *Vowell v. Issaquah Coal Co.*, 31 Wash. 103 (\$10,000).

*Wisconsin*. — *Rudiger v. Chicago St., etc., R. Co.*, 101 Wis. 292 (\$4,000); *Innes v. Milwaukee*, 103 Wis. 582 (\$3,000).

*Canada*. — *Runciman v. Star Line Steamship Co.*, 35 N. Bruns. 123 (\$3,500).

**For Instances of Awards of Damages Held Not Excessive** see the following cases:

*United States*. — *Voelker v. Chicago, etc., R. Co.*, 116 Fed. Rep. 867, reversed (C. C. A.) 129 Fed. Rep. 522 (\$9,000); *The O. L. Hallenbeck*, 119 Fed. Rep. 468 (\$500); *The Charlotte*, 124 Fed. Rep. 989, affirmed (C. C. A.) 128 Fed. Rep. 38 (\$1,600).

*Alabama*. — *McGhee v. Willis*, 134 Ala. 281 (\$2,000).

*Arkansas*. — *St. Louis, etc., R. Co. v. Cleere*, (Ark. 1905) 88 S. W. Rep. 995 (\$13,190).

*Connecticut*. — *Hesse v. Meriden, etc., Tramway Co.*, 75 Conn. 571 (\$5,000).

*Georgia*. — *Western, etc., R. Co. v. Hyer*, 113 Ga. 776 (\$5,300).

*Idaho*. — *York v. Pacific, etc., R. Co.*, 8 Idaho 574 (\$2,000).

*Illinois*. — *Terre Haute, etc., R. Co. v. Williams*, 69 Ill. App. 392, affirmed 172 Ill. 379, 64 Am. St. Rep. 44 (\$5,000); *West Chicago St. R.*



**935. XII. ELEMENTS TO BE CONSIDERED IN ESTIMATING DAMAGES — 2. Matters Relating to Beneficiaries — c. PLAINTIFF'S INHERITANCE FROM DECEASED NOT CONSIDERED.** — See note 8.

**936. Distribution Changed by Deceased's Death.** — See note 2.

*d. INSURANCE LEFT BY DECEASED.* — See note 3.

*Co. v. Foster*, 74 Ill. App. 414, *affirmed* 175 N. Y. 396 (\$3,000); *Chicago Edison Co. v. Moren*, 86 Ill. App. 152, *affirmed* 185 Ill. 571 (\$5,000); *Cicero, etc., St. R. Co. v. Boyd*, 95 Ill. App. 510 (\$5,000); *Chicago, etc., R. Co. v. Keely*, 103 Ill. App. 205 (\$5,000); *O'Fallon Coal Co. v. Laquet*, 89 Ill. App. 13, *affirmed* 198 Ill. 125 (\$2,500); *True, etc., Co. v. Woda*, 104 Ill. App. 15, *affirmed* 201 Ill. 315 (\$2,250); *Chicago G. W. R. Co. v. Root*, 106 Ill. App. 164 (\$5,000).

*Indiana*. — *Malott v. Shimer*, 153 Ind. 35, 74 Am. St. Rep. 278 (\$5,000); *Chicago, etc., R. Co. v. Stephenson*, 33 Ind. App. 95 (\$1,600).

*Iowa*. — *Farrell v. Chicago, etc., R. Co.*, 123 Iowa 690 (\$3,000); *Egnoire v. Union County*, 112 Iowa 558 (\$2,500).

*Kentucky*. — *Chesapeake, etc., R. Co. v. Dixon*, 104 Ky. 608 (\$10,000); *Union Warehouse Co. v. Prewitt*, (Ky. 1899) 50 S. W. Rep. 964 (\$12,000); *Louisville, etc., R. Co. v. Scott*, 108 Ky. 392 (\$9,000); *Chesapeake, etc., R. Co. v. Duper*, (Ky. 1902) 67 S. W. Rep. 15 (\$500); *Louisville, etc., R. Co. v. Mulfinger*, (Ky. 1904) 80 S. W. Rep. 499 (\$8,000).

*Maine*. — *McCarthy v. Clafin*, 99 Me. 290 (\$5,000).

*Minnesota*. — *Gray v. St. Paul City R. Co.*, 87 Minn. 280 (\$2,750); *Siebert v. Great Northern R. Co.*, 76 Minn. 269 (\$2,500); *Swanson v. Oakes*, 93 Minn. 404 (\$2,700).

*Missouri*. — *Lee v. Knapp*, 155 Mo. 610 (\$3,500); *Jones v. Kansas City, etc., R. Co.*, 178 Mo. 528 (\$5,000); *Riley v. Grand Island Receivers*, 72 Mo. App. 280 (\$1,500); *Stumbo v. Duluth Zinc Co.*, 100 Mo. App. 635 (\$1,500); *Haines v. Pearson*, 107 Mo. App. 481 (\$2,500); *Young v. Waters-Pierce Oil Co.*, 185 Mo. 634 (\$5,000).

*Nebraska*. — *Omaha v. Bowman*, 63 Neb. 333 (\$1,525); *Chicago, etc., R. Co. v. Young*, (Neb. 1903) 93 N. W. Rep. 922 (\$1,100).

*New Jersey*. — *Cameron v. Jersey City, etc., R. Co.*, 70 N. J. L. 633 (\$6,540).

*New York*. — *Wallace v. Third Ave. R. Co.*, 36 N. Y. App. Div. 57 (\$9,000); *Fitzgerald v. New York Cent., etc., R. Co.*, 37 N. Y. App. Div. 127 (\$3,500); *Twist v. Rochester*, 37 N. Y. App. Div. 307, *affirmed* 165 N. Y. 619 (\$5,000); *Beecher v. Long Island R. Co.*, 53 N. Y. App. Div. 324 (\$10,000); *Douglass v. Northern Cent. R. Co.*, 59 N. Y. App. Div. 470 (\$10,000); *Johnson v. Rochester R. Co.*, 61 N. Y. App. Div. 12 (\$1,000); *Morris v. Metropolitan St. R. Co.*, 63 N. Y. App. Div. 78, *affirmed* 170 N. Y. 592 (\$7,500); *Reilly v. Brooklyn Heights R. Co.*, 65 N. Y. App. Div. 453 (\$15,000); *Racine v. Erie R. Co.*, 69 N. Y. App. Div. 437 (\$6,000); *Ingratia v. Samuels*, 71 N. Y. App. Div. 14 (\$4,000); *Sternfels v. Metropolitan St. R. Co.*, 73 N. Y. App. Div. 494, *affirmed* 174 N. Y. 512 (\$25,000); *Buckley v. New York, etc., R. Co.*, 73 N. Y. App. Div. 587 (\$5,000); *Lane v. Brooklyn Heights R. Co.*, 85 N. Y. App. Div. 85, *affirmed* 178 N. Y. 623 (\$25,000); *Phalen v. Rochester R. Co.*, 31 N. Y.

App. Div. 448 (\$800); *Quinn v. Pietro*, 38 N. Y. App. Div. 484 (\$2,000); *Coolidge v. New York*, 99 N. Y. App. Div. 175 (\$22,000).

*Ohio*. — *Baltimore, etc., R. Co. v. Hottman*, 25 Ohio Cir. Ct. 140 (\$5,500); *Toledo R., etc., Co. v. Ward*, 25 Ohio Cir. Ct. 399 (\$3,000); *Ashtabula Rapid Transit Co. v. Dagenbach*, 11 Ohio Cir. Dec. 307 (\$1,000).

*Tennessee*. — *Southern Queen Mfg. Co. v. Morris*, 105 Tenn. 654 (\$7,500); *Louisville, etc., R. Co. v. Satterwhite*, 112 Tenn. 185 (\$17,000).

*Texas*. — *Galveston, etc., R. Co. v. Hughes*, 22 Tex. Civ. App. 134 (\$5,000); *Gulf, etc., R. Co. v. Delaney*, 22 Tex. Civ. App. 427 (\$5,000); *Missouri, etc., R. Co. v. Ferris*, 23 Tex. Civ. App. 215 (\$10,000); *San Antonio, etc., R. Co. v. Engelhorn*, 24 Tex. Civ. App. 324 (\$500); *Gulf, etc., R. Co. v. Royall*, 18 Tex. Civ. App. 86 (\$2,000); *Texas Loan Agency v. Fleming*, 18 Tex. Civ. App. 668 (\$20,000); *San Antonio, etc., R. Co. v. Long*, 19 Tex. Civ. App. 649 (\$1,000 and \$250); *Ft. Worth, etc., R. Co. v. Kime*, 21 Tex. Civ. App. 271 (\$15,000); *Texas, etc., R. Co. v. Spence*, (Tex. Civ. App. 1899) 52 S. W. Rep. 562 (\$870); *International, etc., R. Co. v. Knight*, (Tex. Civ. App. 1899) 52 S. W. Rep. 640 (\$1,500); *Missouri, etc., R. Co. v. Gilmore*, (Tex. Civ. App. 1899) 53 S. W. Rep. 61 (\$2,000); *Citizens R. Co. v. Washington*, 24 Tex. Civ. App. 422 (\$1,777); *Taylor, etc., R. Co. v. Warner*, (Tex. Civ. App. 1900) 60 S. W. Rep. 442 (\$3,750); *Galveston, etc., R. Co. v. Davis*, 27 Tex. Civ. App. 279 (\$17,000); *Gulf, etc., R. Co. v. Brown*, 33 Tex. Civ. App. 269 (\$5,000); *Missouri, etc., R. Co. v. Jones*, (Tex. Civ. App. 1904) 80 S. W. Rep. 852 (\$10,416); *International, etc., R. Co. v. McVey*, (Tex. Civ. App. 1904) 81 S. W. Rep. 991 (\$20,000); *Texas, etc., R. Co. v. Shoemaker*, (Tex. Civ. App. 1904) 81 S. W. Rep. 1019 (\$2,572); *Galveston, etc., R. Co. v. Perry*, (Tex. Civ. App. 1905) 85 S. W. Rep. 62 (\$15,000).

**935. 8. Plaintiff's Inheritance Not to Be Considered.** — *Chicago, etc., R. Co. v. Holmes*, (Neb. 1903) 94 N. W. Rep. 1007; *Stahler v. Philadelphia, etc., R. Co.*, 199 Pa. St. 383, 85 Am. St. Rep. 791; *Wiest v. Electric Traction Co.*, 200 Pa. St. 148.

**936. 2. Distribution of Estate Changed by Death of Deceased.** — *Stahler v. Philadelphia, etc., R. Co.*, 199 Pa. St. 383, 85 Am. St. Rep. 791.

**3. Evidence as to Insurance Left by Deceased.** — *Clune v. Ristine*, (C. C. A.) 94 Fed. Rep. 745; *Illinois Cent. R. Co. v. Prickett*, 210 Ill. 140; *Galveston, etc., R. Co. v. Cody*, 20 Tex. Civ. App. 520; *Lipscomb v. Houston, etc., R. Co.*, 95 Tex. 5.

**Death Benefits.** — The defendant will not be allowed to show in mitigation of damages that the deceased was a member of its relief department, and that his mother as his beneficiary received the death benefits to which his membership therein entitled her. *Boulden v. Pennsylvania R. Co.*, 205 Pa. St. 264.

**937. e.** LOSS OF PENSION MONEY AND COMMISSIONS. — See note 2.

**f.** REMARRIAGE OF PLAINTIFF. — See note 4.

**g.** PECUNIARY CONDITION OF PLAINTIFF OR BENEFICIARY — When Such Evidence Admissible. — See note 5.

**938.** When Such Evidence Inadmissible. — See note 2.

Competency of Such Evidence Questioned. — See note 3.

**h.** PROOF THAT DECEASED FURNISHED SUPPORT FOR PLAINTIFF. — See note 4.

**939. i.** DISTINCTION BETWEEN DEPENDENCY ARISING FROM MORAL OBLIGATION AND THAT ARISING FROM LEGAL DUTY. — See note 3.

**940. j.** EXPECTANCY OF LIFE OF BENEFICIARY. — See notes 2, 3.

**k.** NUMBER AND AGES OF DECEDENT'S CHILDREN. — See note 4.

**941. l.** OTHER FAMILY RELATIONS. — See note 2.

**937. 2. Loss of Pension Money.** — Geary v. Metropolitan St. R. Co., 73 N. Y. App. Div. 441.

**4. Remarriage of the Wife** does not affect the amount of damages to which she is entitled for the death of her former husband. Chicago, etc., R. Co. v. Driscoll, 207 Ill. 9, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 937 and affirming 107 Ill. App. 615; Consolidated Stone Co. v. Morgan, 160 Ind. 241; Chicago, etc., R. Co. v. Lagerkrans, 65 Neb. 566; International, etc., R. Co. v. Boykin, (Tex. Civ. App. 1905) 85 S. W. Rep. 1163.

**5. Showing Pecuniary Condition of Plaintiff or Beneficiary.** — Fowler v. Buffalo Furnace Co., 41 N. Y. App. Div. 84, appeal dismissed 160 N. Y. 665; Cincinnati St. R. Co. v. Alteimer, 60 Ohio St. 10; Citizens R. Co. v. Washington, 24 Tex. Civ. App. 422. See also Galveston, etc., R. Co. v. Davis, 22 Tex. Civ. App. 335.

**Pecuniary Condition of a Father** may be shown as a reasonable ground of expectation on his part of pecuniary assistance from his child who was killed. International, etc., R. Co. v. Knight, (Tex. Civ. App. 1899) 52 S. W. Rep. 640.

**938. 2. Pittsburgh, etc., R. Co. v. Kinnare,** 203 Ill. 388, affirming 105 Ill. App. 566. See also Green v. Southern Pac. R. Co., 122 Cal. 563; Lipp v. Otis, 161 N. Y. 559.

**3. Doctrine that Such Evidence Is Not Admissible at All on Measure of Damages.** — See Southern R. Co. v. Evans, (Ky. 1901) 63 S. W. Rep. 445; South Omaha Water-Works Co. v. Vocasek, 62 Neb. 710; Lake Shore, etc., R. Co. v. Reynolds, 11 Ohio Cir. Dec. 701.

**4. Evidence of Support Furnished to Plaintiff Admissible.** — Chicago, etc., R. Co. v. Gunderson, 174 Ill. 495; Economy Light, etc., Co. v. Stephen, 187 Ill. 137, affirming 87 Ill. App. 220; St. Louis, etc., R. Co. v. Dorsey, 189 Ill. 251, explaining Chicago, etc., R. Co. v. Woolridge, 174 Ill. 330; Pittsburgh, etc., R. Co. v. Kinnare, 203 Ill. 388, affirming 105 Ill. App. 566; Seifter v. Brooklyn Heights R. Co., 55 N. Y. App. Div. 10, reversed 169 N. Y. 254; Cincinnati St. R. Co. v. Alteimer, 60 Ohio St. 10.

**That the Plaintiff Has a Wife and Children Living** is competent evidence in an action for the death of his son, it being claimed that the deceased at the time of his injury was contributing to his father's assistance in the performance of the latter's legal duty of supporting the mother and other children. South Omaha Water-Works Co. v. Vocasek, 62 Neb. 710.

**That the Intestate's Mother Was a Widow** has been held to be a fact relevant to show that she stood in a relation of dependency, and therefore would probably have received contribution from him had he lived. Louisville, etc., R. Co. v. Jones, 130 Ala. 456.

**939. 3. Legal Claim on Deceased for Support Not Essential.** — U. S. Electric Lighting Co. v. Sullivan, 22 App. Cas. (D. C.) 115; Smith v. Michigan Cent. R. Co., (Ind. App. 1905) 73 N. E. Rep. 928.

**Rule in Illinois — Distinction Material Only as Affecting Degree of Proof.** — Chicago, etc., R. Co. v. Ptacek, 171 Ill. 9.

**940. 2. When Beneficiary's Expectancy of Life Is to Be Shown.** — The Dauntless, 121 Fed. Rep. 420, modified (C. C. A.) 129 Fed. Rep. 715; Fidelity Land, etc., Co. v. Buzzard, 69 Kan. 330; International, etc., R. Co. v. Knight, (Tex. Civ. App. 1898) 45 S. W. Rep. 167. See also Sieber v. Great Northern R. Co., 76 Minn. 269; Houston, etc., R. Co. v. White, 23 Tex. Civ. App. 280. *Contra*, Louisville, etc., R. Co. v. Taaffe, 106 Ky. 535.

**3. Expectancy of Both Parties.** — See Hunt v. Kile, (C. C. A.) 98 Fed. Rep. 49; Rouse v. Detroit Electric R. Co., 128 Mich. 149. *Compare* Emery v. Philadelphia, 208 Pa. St. 492, wherein evidence of the expectancy of life of a widow was excluded in an action by her for damages for the death of her husband.

**4. Proof of Number and Ages of Children.** — Louisville, etc., R. Co. v. Banks, 132 Ala. 471; Coffeyville Min., etc., Co. v. Carter, 65 Kan. 565; Fisher v. Central Lead Co., 156 Mo. 479; Illinois Cent. R. Co. v. Davis, 104 Tenn. 442. But see Pittsburgh, etc., R. Co. v. Kinnare, 203 Ill. 388; Chicago, etc., R. Co. v. Woolridge, 174 Ill. 330; St. Louis, etc., R. Co. v. Rawley, 90 Ill. App. 653; Louisville, etc., R. Co. v. Eakin, 103 Ky. 465; Southern R. Co. v. Evans, (Ky. 1901) 63 S. W. Rep. 445.

**Evidence Not Essential.** — But while evidence of the ages of minor children of the deceased may be admissible it is not essential to the recovery of damages suffered by the children. Alabama Mineral R. Co. v. Jones, 121 Ala. 113.

**941. 2. Relations Existing Between the Deceased and His Family** as bearing upon the question of pecuniary injury suffered by them in his death may be shown. Union Pac. R. Co. v. Sternberger, 8 Kan. App. 131.

**942.** *m.* COST OF SUPPORTING FAMILY OF DECEASED. — See notes 1, 2.  
**3.** *Matters Relating to Deceased — b.* HEALTH OF DECEASED. — See note 5.

**948.** *c.* LIKELIHOOD OF DECEDENT'S MARRYING. — See note 1.

*d.* CHANCES FOR PROMOTION OF DECEASED. — See note 2.

*f.* PECUNIARY CONDITION OF DECEASED. — See notes 4, 5.

**944.** *g.* HOUSEHOLD EXPENSES OF DECEASED. — See note 1.

*h.* AGE, OCCUPATION, HABITS, CHARACTER, AND ABILITY OF DECEASED. — See note 2.

**942. 1. Cost of Support.** — *McCracken v. Consolidated Traction Co.*, 201 Pa. St. 384.

**2. How Far Such Evidence Is Competent.** — See *Mix v. Hamburg-American Steamship Co.*, 85 N. Y. App. Div. 475.

**5. Health of Deceased May Be Shown as Bearing on His Expectancy of Life and His Earning Capacity.**

— *Northern Pac. R. Co. v. Freeman*, (C. C. A.) 83 Fed. Rep. 82, *reversed* 174 U. S. 379; *Memphis Consol. Gas, etc., Co. v. Letson*, 135 Fed. Rep. 969; *Wilcox v. Wilmington City R. Co.*, 2 Penn. (Del.) 157; *Baltimore, etc., R. Co. v. Golway*, 6 App. Cas. (D. C.) 143; *Coffeyville Min., etc., Co. v. Carter*, 65 Kan. 565; *Chesapeake, etc., R. Co. v. Dupee*, (Ky. 1902) 67 S. W. Rep. 15; *Oakes v. Maine Cent. R. Co.*, 95 Me. 103; *Connor v. New York*, 28 N. Y. App. Div. 186; *Wallace v. Third Ave. R. Co.*, 36 N. Y. App. Div. 57; *Fitzgerald v. New York Cent., etc., R. Co.*, 37 N. Y. App. Div. 127; *Racine v. Erie R. Co.*, 69 N. Y. App. Div. 437; *Coley v. Statesville*, 121 N. Car. 301; *Galveston, etc., R. Co. v. Hughes*, 22 Tex. Civ. App. 134.

**943. 1. Likelihood of Marriage.** — See *Hively v. Webster County*, 117 Iowa 672.

**That the Deceased Was "Paying Attention" to a Young Woman** at the time of his death is inadmissible for the purpose of showing that he was likely to marry. *Fritz v. Western Union Tel. Co.*, 25 Utah 263.

**2. Chances of Promotion — Such Evidence Not Admissible.** — *Central of Georgia R. Co. v. Perkerson*, 112 Ga. 926, *citing* 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 943. See also *Hively v. Webster County*, 117 Iowa 672; *Fajardo v. New York Cent., etc., R. Co.*, 84 N. Y. App. Div. 354. But see *Geary v. Metropolitan St. R. Co.*, 73 N. Y. App. Div. 441.

**Promotion of Fireman.** — It has been held that evidence is admissible that the deceased was a locomotive fireman and was in the line of promotion to the position of engineer. *Galveston, etc., R. Co. v. Ford*, (Tex. Civ. App. 1898) 46 S. W. Rep. 77.

**4. Evidence of Pecuniary Condition of Deceased Inadmissible.** — *Chicago, etc., R. Co. v. Hambel*, (Neb. 1902) 89 N. W. Rep. 643.

**5. Contrary View.** — *Tutwiler Coal, etc., Co. v. Enslen*, 129 Ala. 336; *Oakes v. Maine Cent. R. Co.*, 95 Me. 103. See also *Brunswick, etc., R. Co. v. Wiggins*, 113 Ga. 842; *Lazelle v. Newfane*, 70 Vt. 440.

**944. 1. Household Expenses of Deceased.** — *Erius v. Brooklyn Heights R. Co.*, 63 N. Y. App. Div. 353.

**2. Evidence of Age, Occupation, Habits, etc., of Deceased — United States.** — *Northern Pac. R. Co. v. Freeman*, (C. C. A.) 83 Fed. Rep. 82, *reversed* 174 U. S. 379; *Hunt v. Kila*, (C. C.

A.) 98 Fed. Rep. 49; *Florida Cent., etc., R. Co. v. Sullivan*, (C. C. A.) 120 Fed. Rep. 799; *Memphis Consol. Gas, etc., Co. v. Letson*, (C. C. A.) 135 Fed. Rep. 969.

*Arkansas.* — *St. Louis, etc., R. Co. v. Hitt*, (Ark. 1905) 88 S. W. Rep. 908.

*Delaware.* — *Wilcox v. Wilmington City R. Co.*, 2 Penn. (Del.) 157; *Crocker v. Pusey, etc., Co.*, 3 Penn. (Del.) 1; *Maxwell v. Wilmington City R. Co.*, 1 Marv. (Del.) 199; *Tully v. Philadelphia, etc., R. Co.*, 3 Penn. (Del.) 455; *Neal v. Wilmington, etc., Electric R. Co.*, 3 Penn. (Del.) 467.

*District of Columbia.* — *Baltimore, etc., R. Co. v. Golway*, 6 App. Cas. (D. C.) 143.

*Illinois.* — *Chicago, etc., R. Co. v. Ptacek*, 171 Ill. 9; *Chicago, etc., R. Co. v. Woolridge*, 174 Ill. 330; *North Chicago St. R. Co. v. Irwin*, 202 Ill. 345; *Chicago, etc., R. Co. v. Rains*, 203 Ill. 417; *Terre Haute, etc., R. Co. v. Williams*, 69 Ill. App. 392, *affirmed* 172 Ill. 379, 64 Am. St. Rep. 44.

*Kansas.* — *Coffeyville Min., etc., Co. v. Carter*, 65 Kan. 565.

*Kentucky.* — *Louisville, etc., R. Co. v. Milet*, (Ky. 1898) 46 S. W. Rep. 498.

*Maine.* — *Oakes v. Maine Cent. R. Co.*, 95 Me. 103; *McKay v. New England Dredging Co.*, 92 Me. 454.

*Missouri.* — *Gilfillan v. McCrillis*, 84 Mo. App. 576; *Knight v. Sadtler Lead, etc., Co.*, 91 Mo. App. 574.

*New Mexico.* — *Cerrillos Coal R. Co. v. Deserant*, 9 N. Mex. 49.

*New York.* — *Mix v. Hamburg-American Steamship Co.*, 85 N. Y. App. Div. 475; *Trehune v. Joseph W. Cody Contracting Co.*, 72 N. Y. App. Div. 1; *Swanton v. King*, 72 N. Y. App. Div. 578.

*North Carolina.* — *Mendenhall v. North Carolina R. Co.*, 123 N. Car. 275; *Burns v. Ashboro, etc., R. Co.*, 125 N. Car. 304; *Watson v. Seaboard Air Line R. Co.*, 133 N. Car. 188; *Benton v. North Carolina R. Co.*, 122 N. Car. 1007.

*Ohio.* — *Bond Hill v. Atkinson*, 9 Ohio Cir. Dec. 185.

*Tennessee.* — *Davidson Benedict Co. v. Severson*, 109 Tenn. 572.

*Texas.* — *Galveston, etc., R. Co. v. Hughes*, 22 Tex. Civ. App. 134; *Houston, etc., R. Co. v. White*, 23 Tex. Civ. App. 280.

*Virginia.* — *Norfolk, etc., R. Co. v. Cheatwood*, 103 Va. 356.

**Contra.** — In *Alabama* such evidence is not admitted, on the ground that the damages recoverable in that state are punitive and not compensatory. *Louisville, etc., R. Co. v. Tegner*, 125 Ala. 593. Compare *Tutwiler Coal, etc., Co. v. Enslen*, 129 Ala. 336.



**947.** *i. EXPECTANCY OF LIFE OF DECEASED — (1) An Important Element.* — See note 1.

(2) *How Shown — Mortality Tables.* — See note 3.

**948.** See note 1.

But Such Tables Are Not Conclusive. — See note 2.

The Value of Such Tables. — See note 3.

**949.** (4) *Other Evidence.* — See note 3.

*j. VALUE OF DECEDENT'S SERVICES.* — See note 7.

**Evidence of Habits of Deceased Admitted.** — *McIlwaine v. Metropolitan St. R. Co.*, 74 N. Y. App. Div. 496; *Coley v. Statesville*, 121 N. Car. 301; *Standlee v. St. Louis Southwestern R. Co.*, 25 Tex. Civ. App. 340.

In *Sternfels v. Metropolitan St. R. Co.*, 73 N. Y. App. Div. 499, affirmed 174 N. Y. 512, the court said: "It is perfectly evident that a defendant would be authorized to show, when it is sought to charge it in damages for negligent injury causing death, that the deceased was vile in habits, uniformly sought bad associations, contributed nothing to the support of his family or the culture of his children, did not perform the duties of a husband and father properly, either by pecuniary assistance or by moral association and help; that he was without property, earning power, or ability, and discharged none of the duties which by common consent devolved upon him as a reputable member of society. All of these facts would bear pertinently and directly upon the value of the life and the consequent pecuniary injury entailed on account of the death."

**947. 1. Deceased's Expectancy of Life — United States.** — *Northern Pac. R. Co. v. Freeman*, (C. C. A.) 83 Fed. Rep. 82, reversed 174 U. S. 379; *Hunt v. Kile*, (C. C. A.) 98 Fed. Rep. 49; *Florida Cent., etc., R. Co. v. Sullivan*, (C. C. A.) 120 Fed. Rep. 799; *Memphis Consol. Gas, etc., Co. v. Letson*, (C. C. A.) 135 Fed. Rep. 969.

*Alabama.* — *Tutwiler Coal, etc., Co. v. Enslin*, 129 Ala. 336; *Louisville, etc., R. Co. v. Brown*, 121 Ala. 221; *Decatur Car Wheel, etc., Co. v. Mehaffey*, 128 Ala. 242.

*District of Columbia.* — *Baltimore, etc., R. Co. v. Golway*, 6 App. Cas. (D. C.) 143.

*Kansas.* — *Coffeyville Min., etc., Co. v. Carter*, 65 Kan. 565.

*Kentucky.* — *Louisville, etc., R. Co. v. Milet*, (Ky. 1898) 46 S. W. Rep. 498; *Southern R. Co. v. Evans*, (Ky. 1901) 63 S. W. Rep. 445; *Chesapeake, etc., R. Co. v. Dupee*, (Ky. 1902) 67 S. W. Rep. 15.

*Maryland.* — *Western Maryland R. Co. v. State*, 95 Md. 637.

*Minnesota.* — *Sieber v. Great Northern R. Co.*, 76 Minn. 269.

*New Hampshire.* — *Carney v. Concord St. R. Co.*, 72 N. H. 364.

*New Mexico.* — *Cerrillos Coal R. Co. v. Deserant*, 9 N. Mex. 49.

*New York.* — *Swanton v. King*, 72 N. Y. App. Div. 578; *Hinsdale v. New York, etc., R. Co.*, 81 N. Y. App. Div. 617; *Mix v. Hamburg-American Steamship Co.*, 85 N. Y. App. Div. 475.

*North Carolina.* — *Watson v. Seaboard Air Line R. Co.*, 133 N. Car. 188; *Benton v. North Carolina R. Co.*, 122 N. Car. 1007.

*Tennessee.* — *Davidson Benedict Co. v. Severson*, 109 Tenn. 572.

**3. Mortality Tables — Arkansas.** — *St. Louis, etc., R. Co. v. Hiitt*, (Ark. 1905) 88 S. W. Rep. 908.

*California.* — *Keast v. Santa Ysabel Gold Min. Co.*, 136 Cal. 256.

*Connecticut.* — *Nelson v. Branford Lighting, etc., Co.*, 75 Conn. 548.

*Iowa.* — *Pearl v. Omaha, etc., R. Co.*, 115 Iowa 535.

*Michigan.* — *Jones v. McMillan*, 129 Mich. 86; *Philip v. Heraty*, 135 Mich. 446.

*Nebraska.* — *Friend v. Burleigh*, 53 Neb. 674; *Chicago, etc., R. Co. v. Hambel*, (Neb. 1902) 89 N. W. Rep. 643.

*New Jersey.* — *Camden, etc., R. Co. v. Williams*, 61 N. J. L. 646.

*North Carolina.* — *Coley v. Statesville*, 121 N. Car. 301.

*Pennsylvania.* — *Emery v. Philadelphia*, 208 Pa. St. 492.

*Rhode Island.* — *Sweet v. Providence, etc., R. Co.*, 20 R. I. 785; *Reynolds v. Narragansett Electric Lighting Co.*, (R. I. 1904) 59 Atl. Rep. 393.

*Texas.* — *Galveston, etc., R. Co. v. Burnett*, (Tex. Civ. App. 1897) 42 S. W. Rep. 314; *San Antonio, etc., R. Co. v. Engelhorn*, 24 Tex. Civ. App. 324; *Galveston, etc., R. Co. v. Johnson*, 24 Tex. Civ. App. 180; *International, etc., R. Co. v. McVey*, (Tex. Civ. App. 1904) 81 S. W. Rep. 991.

**948. 1. Tables May Be Proven by Standard Reprints.** — *Atchison, etc., R. Co. v. Ryan*, 62 Kan. 682.

**2. Such Tables Not Conclusive.** — *Western, etc., R. Co. v. Clark*, 117 Ga. 548; *Farrell v. Chicago, etc., R. Co.*, 123 Iowa 690. See also *Norfolk, etc., R. Co. v. Phillips*, 100 Va. 362; *Galveston, etc., R. Co. v. Hughes*, 22 Tex. Civ. App. 134.

**Life Tables Are Only Approximate**, and a jury may reasonably conclude that the duration of life would have been much longer and that the earning capacity would have extended over a greater period. *Sternfels v. Metropolitan St. R. Co.*, 73 N. Y. App. Div. 494, affirmed 174 N. Y. 512.

**3. Mortality Tables Not Absolutely Necessary.** — In *Haines v. Pearson*, 100 Mo. App. 556, it was held that though mortality tables are proper evidence, they are not the only evidence, and a proper case may be made out without their use.

**949. 3. Proof of Parents' Longevity.** — *Rincicotti v. John J. O'Brien Contracting Co.*, 77 Conn. 617. *Contra*, *Hinsdale v. New York, etc., R. Co.*, 81 N. Y. App. Div. 617.

**7. Earning Capacity of Deceased Considered.** — *Hunt v. Kile*, (C. C. A.) 98 Fed. Rep. 49; *Louisville, etc., R. Co. v. Jones*, 130 Ala. 456; *Max-*

**950.** See note 1.

*k. PHYSICAL AND MENTAL SUFFERING OF DECEASED — (1) In General — When to Be Considered.* — See note 4.

**951.** When Not to Be Considered. — See note 1.

**953.** 5. Other Suits Pending Arising Out of Same Accident. — See note 4.

6. Specific Items — *a. FUNERAL EXPENSES.* — See note 5.

**954.** *b. MEDICAL EXPENSES.* — See notes 1, 2.

**955.** *c. INTEREST ON DAMAGES.* — See note 4.

well *v. Wilmington City R. Co.*, 1 Marv. (Del.) 199; Pittsburgh, etc., *R. Co. v. Kinnare*, 203 Ill. 388; Oakes *v. Maine Cent. R. Co.*, 95 Me. 103; United Electric Light, etc., *Co. v. State*, (Md. 1905) 60 Atl. Rep. 248; Meyer *v. Hart*, 23 N. Y. App. Div. 131; Seifter *v. Brooklyn Heights R. Co.*, 55 N. Y. App. Div. 10, reversed 169 N. Y. 254; Hinsdale *v. New York, etc., R. Co.*, 81 N. Y. App. Div. 617; Fajardo *v. New York Cent., etc., R. Co.*, 84 N. Y. App. Div. 354; Mix *v. Hamburg-American Steamship Co.*, 85 N. Y. App. Div. 475.

**In the Case of the Death of a Minor** his earning capacity during minority is competent evidence to show what his earnings would have been had he lived to and beyond maturity. Tutwiler Coal, etc., *Co. v. Enslin*, 129 Ala. 336.

**Profits of a Partnership** in which the deceased was a member cannot be shown. McCracken *v. Consolidated Traction Co.*, 201 Pa. St. 384.

**Proof of Earnings Within a Reasonable Period of Time Prior to Death** is admissible. It need not be confined to what the deceased actually earned at the very time of death. Central of Georgia *R. Co. v. Perkerson*, 112 Ga. 923. But see Hamman *v. Central Coal, etc., Co.*, 156 Mo. 232, wherein it was held that what the deceased earned at the time of his death, and not what he earned the year before, is the test of his earning capacity.

**Present Value of Net Income.** — The measure of damages for loss of the life of the plaintiff's intestate is the present value of his net income, and this is to be ascertained by deducting the cost of living and expenditure from his net gross income, and then estimating the present value of the accumulation from such net income, based upon his expectation of life. In applying this rule to enable the jury properly to estimate the reasonable expectation of pecuniary advantage from the continuance of the life of the deceased, it should consider his age, habits, industry, means, business qualifications, skill, and his reasonable expectation of life. Benton *v. North Carolina R. Co.*, 122 N. Car. 1007. See also McLamb *v. Wilmington, etc., R. Co.*, 122 N. Car. 862; Watson *v. Seaboard Air Line R. Co.*, 133 N. Car. 188; Coley *v. Statesville*, 121 N. Car. 301.

**950. 1. Proof Must Be Limited to Value of Services at Time of Death.** — Wilcox *v. Wilmington City R. Co.*, 2 Penn. (Del.) 157.

**4. Physical and Mental Suffering of Deceased — Arkansas.** — St. Louis, etc., *R. Co. v. Dawson*, 68 Ark. 1.

**Connecticut.** — See Broughel *v. Southern New England Telephone Co.*, 73 Conn. 614, 84 Am. St. Rep. 176.

**Illinois.** — Wetherell *v. Chicago City R. Co.*, 104 Ill. App. 357.

**Kentucky.** — Louisville, etc., *R. Co. v. Mini-*

ard, (Ky. 1899) 50 S. W. Rep. 962; Louisville *R. Co. v. Will*, (Ky. 1902) 66 S. W. Rep. 628.

**Louisiana.** — Le Blanc *v. Sweet*, 107 La. 355, 90 Am. St. Rep. 303; Illinois Cent. *R. Co. v. Harris*, (Miss. 1901) 29 So. Rep. 760 (construing the Louisiana statute).

**Maine.** — See Ramsdell *v. Grady*, 97 Me. 319.

**Michigan.** — Kyes *v. Valley Telephone Co.*, 132 Mich. 281; Olivier *v. Houghton County St. R. Co.*, 134 Mich. 367, 104 Am. St. Rep. 607.

**Pennsylvania.** — McCafferty *v. Pennsylvania R. Co.*, 193 Pa. St. 339, 74 Am. St. Rep. 690.

**Tennessee.** — Wabash Screen Door *Co. v. Black*, (C. C. A.) 126 Fed. Rep. 721; Davidson Benedict *v. Severson*, 109 Tenn. 572.

See also Hastings Lumber *Co. v. Garland*, (C. C. A.) 115 Fed. Rep. 15.

**951. 1. When Suffering of Deceased Not Considered.** — Florida Cent., etc., *R. Co. v. Foxworth*, 41 Fla. 1, 79 Am. St. Rep. 149; Wetherell *v. Chicago City R. Co.*, 104 Ill. App. 357; McKay *v. New England Dredging Co.*, 92 Me. 454; Oakes *v. Maine Cent. R. Co.*, 95 Me. 103; Cerrillos Coal *R. Co. v. Deserant*, 9 N. Mex. 49; Meekin *v. Brooklyn Heights R. Co.*, 164 N. Y. 145, 79 Am. St. Rep. 635; Schleiger *v. Northern Terminal Co.*, 43 Oregon 4; McCafferty *v. Pennsylvania R. Co.*, 193 Pa. St. 339, 74 Am. St. Rep. 690; Corbett *v. Oregon Short Line R. Co.*, 25 Utah 449.

**953. 4. Pendency of Other Suits Arising from Same Accident Not Provable.** — Stumbo *v. Duluth Zinc Co.*, 100 Mo. App. 635.

**5. Funeral Expenses Are Recoverable.** — Swift *v. Johnson*, (C. C. A.) 138 Fed. Rep. 867; Southern Indiana *R. Co. v. Moore*, (Ind. App. 1904) 71 N. E. Rep. 516; O'Malley *v. McLean*, 113 Ky. 1; Le Blanc *v. Sweet*, 107 La. 355, 90 Am. St. Rep. 303; Sieber *v. Great Northern R. Co.*, 76 Minn. 269; Meyer *v. Hart*, 23 N. Y. App. Div. 131; Citizens *R. Co. v. Washington*, 24 Tex. Civ. App. 422. See also Missouri, etc., *R. Co. v. Evans*, 16 Tex. Civ. App. 68; Portsmouth St. *R. Co. v. Peed*, 102 Va. 662. *Contra*, Consolidated Traction *Co. v. Hone*, 60 N. J. L. 444; McDonald *v. Rex*, 7 Can. Exch. 216.

**954. 1. Medical Expenses, Nursing, etc., Recoverable.** — Southern Indiana *R. Co. v. Moore*, (Ind. App. 1904) 71 N. E. Rep. 516; International, etc., *R. Co. v. Boykin*, 32 Tex. Civ. App. 72. See also Sieber *v. Great Northern R. Co.*, 76 Minn. 269.

**2. Medical Expenses Held Not Recoverable.** — Bond Hill *v. Atkinson*, 9 Ohio Cir. Dec. 185; McDonald *v. Rex*, 7 Can. Exch. 216. See also Bradley *v. Ohio River, etc., R. Co.*, 122 N. Car. 972; Portsmouth St. *R. Co. v. Peed*, 102 Va. 662.

**955. 4. New York Statute.** — Meekin *v. Brooklyn Heights R. Co.*, 164 N. Y. 145, 79 Am. St. Rep. 635.

**955. XIII. DISTRIBUTION AND APPORTIONMENT OF RECOVERY — 1. By Whom Made.** — See note 6.

**956.** By the Court or Jury. — See note 1.

2. When Subject to Debts of Deceased. — See notes 2, 3.

**957. 3. How Distributed** — Where the Statute Is a Survival Statute. — See note 1. Party Authorized to Sue May Employ Counsel. — See note 3. Among Whom the Distribution Is to Be Made. — See note 4.

**958.** Specific Beneficiaries Named by the Statute. — See note 1.

**955. 6. Distribution Fixed by the Jury.** — International, etc., R. Co. *v.* Lehman, (Tex. Civ. App. 1903) 72 S. W. Rep. 619; Texas Midland R. Co. *v.* Crowder, 25 Tex. Civ. App. 536; Shippers Compress, etc., Co. *v.* Davidson, (Tex. Civ. App. 1904) 80 S. W. Rep. 1032; Norfolk, etc., R. Co. *v.* Stevens, 97 Va. 631.

As to Distribution in the District of Columbia and Maryland see Stewart *v.* Baltimore, etc., R. Co., 168 U. S. 445.

**956. 1. Court May Distribute Where Jury Fails to Do So.** — Missouri, etc., R. Co. *v.* Evans, 16 Tex. Civ. App. 68. See also Burkholder *v.* Grand Trunk R. Co., 5 Ont. L. Rep. 428.

**2. Recovery a Part of Decedent's Estate.** — Thomas *v.* Maysville Gas Co., 112 Ky. 569.

In Iowa it is provided by statute that "when a wrongful act produces death, damages recovered therefor shall be disposed of as personal property belonging to the estate of the deceased; but if the deceased leaves a husband, wife, child, or parent it shall not be liable for the payment of debts." Romano *v.* Capital City Brick, etc., Co., 125 Iowa 591. See also Matter of Cook, 126 Iowa 158.

**3. When Not Subject to Decedent's Debts.** — Chicago, etc., R. Co. *v.* Oyster, 58 Neb. 1. See also O'Malley *v.* McLean, 113 Ky. 1.

**957. 1. Recovery to Be Distributed as Personal Assets of Decedent's Estate.** — In Iowa it is provided by statute that the money recovered shall "be disposed of as personal property belonging to the estate." Matter of Cook, 126 Iowa 158; Romano *v.* Capital City Brick, etc., Co., 125 Iowa 591. And a similar provision is

made in the Oregon statute giving a right of action to the personal representatives. Schlei-ger *v.* Northern Terminal Co., 43 Oregon 4.

**3.** See Matter of Snedeker, 95 N. Y. App. Div. 149.

**4. Among Whom Distributed.** — Romano *v.* Capital City Brick, etc., Co., 125 Iowa 591. See also Meekin *v.* Brooklyn Heights R. Co., 164 N. Y. 145, 79 Am. St. Rep. 635.

The Word "Children" in 3 Code Ga., §§ 3828, 3829, relating to the distribution of the damages recovered, has reference to minor children. Coleman *v.* Hyer, 113 Ga. 420.

**Failure to Name All Beneficiaries in the Petition** does not prevent those omitted from recovering their share of the judgment. Oyster *v.* Burlington Relief Dept., etc., Co., 65 Neb. 789.

**The Statute of Iowa** which provides that, when a wrongful act produces death, damages recovered therefor shall be disposed of as personal property belonging to the estate of the deceased, leaves damages to be disposed of according to the law of the domicile of the deceased. Hartley *v.* Hartley, (Kan. 1905) 81 Pac. Rep. 505.

**958. 1. Statute Naming Beneficiaries — Damages to Be Awarded Directly.** — Casady *v.* Grimmelman, 108 Iowa 695.

In New York the personal representative recovers damages exclusively for the benefit of the decedent's husband or wife and next of kin, and when such damages are collected they must be distributed by the plaintiff as if they were unbequeathed assets, left in his hands after payment of all debts and expenses of administration. Snedeker *v.* Snedeker, 164 N. Y. 58.



# DEBENTURES.

By H. N. ELDRIDGE.

**961. I. DEFINITION AND NATURE** — 1. In England and Canada — Evidences of Debt Issued by Corporation. — See note 2.

Debentures Creating Charge on Property of Company. — See note 6.

**962. Mere Floating Securities.** — See note 1.

Debentures Not Charging Property. — See note 5.

**963. Debenture Stock.** — See note 2.

2. In the United States. — See note 3.

**II. ISSUE OF DEBENTURES** — 1. Power of Company to Issue — *a.* IN GENERAL. — See note 4.

**964. *b.* PROPERTY THAT MAY BE CHARGED.** — See note 3.

Power to Charge Unpaid Capital. — See notes 5, 6.

*c.* CHARTER OR STATUTORY RESTRICTIONS. — See note 7.

**965. 2. Agreement to Issue.** — See note 5.

**967. 5. Requirement of Registration.** — See note 1.

**961. 2. The Debenture Contains Prima Facie the Whole Contract** between the company and the debenture holder, and the prospectus cannot be looked to for the purpose of interpreting the contract. *In re Chicago, etc., Granaries Co.*, (1898) 1 Ch. 263.

**6. Sometimes Called Mortgage Debentures.** — See *In re Johnston Foreign Patents Co.*, (1904) 2 Ch. 234.

**962. 1. Are Mere "Floating Securities."** — *In re Borax Co.*, (1901) 1 Ch. 326; *Nelson v. Faber*, (1903) 2 K. B. 367. See also *Wallace v. Evershed*, (1899) 1 Ch. 891; *In re Vivian*, (1900) 2 Ch. 654; *Re Farmers' Loan, etc., Co.*, 30 Ont. 337.

**5. Debentures Not Creating Charge.** — See *Re Farmers' Loan, etc., Co.*, 30 Ont. 337.

**963. 2. Debenture Stock.** — See *In re Wrexham, etc., R. Co.*, (1899) 1 Ch. 440; *Cornbrook Brewery Co. v. Law Debenture Corp.*, (1904) 1 Ch. 103; *Walker v. Elmore's German, etc., Metal Co.*, 85 L. T. N. S. 767.

**3. Debenture Defined.** — See *Barton Nat. Bank v. Atkins*, 72 Vt. 33.

**4. Power to Issue in General.** — *Re Farmers Loan, etc., Co.*, 30 Ont. 337.

**Power to Cancel Unissued Debentures and to Issue Fresh Debentures in Their Place.** — A company which has power to exchange and vary its debentures and has, in pursuance of an agreement to issue debentures as security for a loan, sealed but not issued or registered those debentures, can retain and cancel them and issue other debentures to the lender; and the other debentures, if registered within twenty-one days from the date when they were sealed, will be valid. *In re Defries*, (1904) 1 Ch. 37.

**964. 3. Property Subject to Charge — After-acquired Property.** — *Wallace v. Evershed*, (1899) 1 Ch. 891; *In re Vivian*, (1900) 2 Ch. 654; *In re Russian Spratts Patent*, (1898) 2 Ch. 149.

**The Word "Property" Includes the Good Will**

**or Business of a Company.** — *In re Leas Hotel Co.*, (1902) 1 Ch. 332.

**5. The Word "Property" Does Not Include Unpaid Capital.** — *In re Russian Spratts Patent*, (1898) 2 Ch. 149.

**6. *In re Mayfair Property Co.***, (1898) 2 Ch. 28. See also *In re Johnson*, (1902) 2 Ch. 101.

**7. Debentures Issued Jointly by Three Companies.** — Three companies, each of which had general power to borrow on mortgage or debentures, issued twenty-five mortgage debentures for one thousand pounds each. The debentures were headed in the names of the three companies, and were stated to be an issue by the companies jointly. The three companies thereby jointly and severally agreed to pay to the debenture holders the principal sum and interest, and they thereby charged with such payments their several undertakings and all their present and future properties and assets. The debentures were issued in pursuance of resolutions of the boards of directors of the three companies, who were in each case the same persons, and the moneys advanced were paid to a joint banking account, and were appropriated in different amounts to each company. Orders had been made for the winding up of each company, and the debenture holders had brought an action to enforce their security. It was held, that, having regard to the several obligations of the companies respectively, assuming it was *ultra vires* for the companies to issue debentures jointly, the debentures were a valid charge against each company to the extent to which the money advanced came to the coffers of that company. *In re Johnston Foreign Patents Co.*, (1904) 2 Ch. 234.

**965. 5. Agreement to Issue.** — *Pegge v. Neath, etc., Tramways Co.*, (1898) 1 Ch. 183; *Simultaneous Colour Printing Syndicate v. Foweraker*, (1901) 1 K. B. 771.

**967. 1. Debentures Sealed but Not Issued**

**968. III. RIGHTS AND LIABILITIES OF HOLDERS — 3. Lien or Charge —**

*a. IN GENERAL.* — See note 3.

**969. *b. MORTGAGE OR PLEDGE NOTWITHSTANDING DEBENTURES.* —**  
See note 1.

**970. *c. SALE OF PROPERTY AND PAYMENT OF DEBTS.* —** See notes 1, 2.

*d. EXECUTION BY OTHER CREDITORS.* — See note 3.

*e. AGREEMENT TO CHARGE.* — See note 6.

**972. *h. EXTENT OF CHARGE.* —** See note 1.

**971. 5. Priority as Between Debentures.** — See note 1.

**975. 7. Assignment and Transfer — *a. IN GENERAL.* —** See note 1.

Prior to the Taking Effect of the Companies Act, 1900, Requiring Registration of debentures, were held to be unaffected by such act and valid without registration. *In re Spiral Globe*, (1902) 2 Ch. 209.

**Where Debentures of the Same Series Are Issued at Different Times** only the first issue need be registered if the registration is made in accordance with the Companies Act, 1900. *In re Harrogate Estates*, (1903) 1 Ch. 498.

**Extension of Time for Registration.** — The Companies Act, 1900, allows an extension of time for registration of debentures where the omission to register is "accidental, or due to inadvertence, or to some other sufficient cause, or is not of a nature to prejudice the position of creditors or shareholders of the company, or that on other grounds it is just and equitable to grant relief." It is held that an order extending the time for such registration ought to contain the words: "But that this order be without prejudice to the rights of parties acquired prior to the time when the debentures shall be actually registered." *In re Joplin Brewery Co.*, (1902) 1 Ch. 79; *In re Spiral Globe*, (1902) 1 Ch. 396; *In re Abrahams*, (1902) 1 Ch. 695; *In re Anglo-Oriental Carpet Mfg. Co.*, (1903) 1 Ch. 914. See *In re Johnson*, (1902) 2 Ch. 101.

**968. 3. Charge on Property in General.** — *Wallace v. Evershed*, (1899) 1 Ch. 891; *In re Muudslay*, (1900) 1 Ch. 602; *In re Vivian*, (1900) 2 Ch. 654; *Nelson v. Faber*, (1903) 2 K. B. 367.

**969. 1. Priority as Between Debenture Holders and Mortgagees.** — *In re Castell*, (1898) 1 Ch. 315. It appeared that in 1885 a limited company issued a series of debentures charged upon all its property both present and future, such charge to be a floating security, but so that the company was not to be at liberty to create any mortgage or charge upon its freehold or leasehold hereditaments in priority to the said debentures. In 1895 the company deposited the title deeds of some of its property with its bankers, on a memorandum of charge under seal, as a security for an overdraft. When this charge was given, the bank had no notice of the existence of the debentures and made no inquiries. In 1896 a debenture holders' action to enforce the security was commenced, in which an inquiry as to priorities was directed. It was held that the debenture holders, having left the title deeds with the company so as to enable it to deal with its property as if it had been encumbered, could not set up their prior charge against the equitable mortgage to the bank; that the bank had not been guilty of negligence, and,

having a stronger equity than the debenture holders, was entitled to priority.

**970. 1. Sale of Property.** — See *In re Borax Co.*, (1901) 1 Ch. 326.

**Sale of One of Three Businesses.** — The objects of a company comprised the carrying on of three distinct businesses, supplemental to one another. The court refused to restrain the sale of one business at the instance of debenture holders having a floating charge on the whole undertaking, there being nothing in the debentures or in the deed of trust prohibiting such a sale made in good faith. *In re Vivian*, (1900) 2 Ch. 654.

**2. Payment of Debts.** — *Robinson v. Burnell's Vienna Bakery Co.*, (1904) 2 K. B. 624.

**3. Unsecured Execution Creditors.** — *Davey v. Williamson*, (1898) 2 Q. B. 194. See also *Simultaneous Colour Printing Syndicate v. Poweraker*, (1901) 1 K. B. 771; *Robinson v. Burnell's Vienna Bakery Co.*, (1904) 2 K. B. 624.

**As to Debts Due the Company from a Foreign Concern** there is no equity in favor of debenture holders as against unsecured execution creditors of the company. See *In re Maudslay*, (1900) 1 Ch. 602.

**Effect of Irregularity in Issue of Debentures in Hands of Bona Fide Holder for Value.** — The rights of a bona fide holder for value of a debenture, which is in proper form and charges all the property of the company as security for the debenture debt, prevail over those of an execution creditor, even where the debenture is issued without authority, no directors of the company having been appointed and no resolution to issue debentures passed; provided that the holder had no notice of any irregularity in the issue of the debenture. *Duck v. Tower Galvanizing Co.*, (1901) 2 K. B. 314.

**6. Effect of Agreement to Charge.** — See *Pegge v. Neath, etc., Tramways Co.*, (1898) 1 Ch. 183.

**972. 1. Extent of Charge in General.** — See *Nelson v. Faber*, (1903) 2 K. B. 367.

**974. 1. Priority Between Debenture Holders and Creditors in Bankruptcy Act.** — Where before the date on which the Preferential Payments in Bankruptcy Amendment Act, 1897, went into effect, a winding-up order had been made against a company which had issued debentures creating a floating charge, and a receiver had been appointed in an action for realization of the debentures, it was held that the act was not retrospective, and did not apply so as to give priority over the debenture holders to the preferential creditors referred to in the act. *In re Waverley Type Writer*, (1898) 1 Ch. 699.

**975. 1. The Purchase by a Company of Its**

**975.** Registration of Transfers. — See note 2.

**978.** IV. REMEDIES OF HOLDERS — 2. Actions by Holders and Appointment of Receiver. — See note 3.

**979.** Appointment of Receiver by Debenture Holders or Trustees. — See note 2.

Own Debentures Extinguishes the Debt for which they were given, and if they are then resold, the purchaser acquires no right to share with other debenture holders of the same series in the distribution of the proceeds of the security. *In re Routledge*, (1904) 2 Ch. 474.

**975.** 2. Registrations May Be Required, However, by the Terms of the Debentures. — See *In re Goy*, (1900) 2 Ch. 149.

**978.** 3. Effect of Action on Issue of Further Debentures of Same Series. — The issue of a writ in a debenture holders' action does not so fix the security as to deprive the company of the power of issuing further debentures of the same series. The point of time which does fix the security is the appointment of a receiver or the commencement of a winding up. *Re Hubbard*, 79 L. T. N. S. 666.

As to the Powers and Liabilities of Receivers and Managers, Etc. — See *Hand v. Blow*, 82 L. T. N. S. 750.

**979.** 2. Appointment of Receiver by Debenture Holders. — *In re Vimbos*, (1900) 1 Ch. 470.

Appointment Must Be Exercised in Interest of Debenture Holders Alone. — Where a company issued a series of debentures, each of which contained a condition that, at any time after the principal moneys thereby secured should have become payable, a certain corporation (one of the debenture holders) might by writing appoint a receiver of all or any part of the property thereby charged, and in exercise of this power the corporation, who were also shareholders in the company, appointed a receiver; it was held, that the corporation were trustees of this power on behalf of all the debenture holders, and were bound to exercise it in their interest alone, and that as it was shown that the appointment had been made in the interest of the shareholders, and not in that of the debenture holders, the court had jurisdiction to interfere to carry out the trust, and accordingly to appoint its own receiver. *In re Maskelyne British Typewriter*, (1898) 1 Ch. 133.

## DEBT.

**983.** I. GENERAL DEFINITIONS. — See note 1.

**985.** Debt Distinguished from Demand. — See note 1.

**986.** Debt and Liability Distinguished. — See note 1.  
Debtor. — See notes 4, 5.

**987.** II. TIME OF PAYMENT. — See note 1.

III. CONTINGENT LIABILITIES. — See note 2.

**983.** 1. Guaranty Trust Co. *v.* Galveston City R. Co., (C. C. A.) 107 Fed. Rep. 311; *Brown v. Cairns*, 107 Iowa 730, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 983, 984, 986; *In re Penobscot Lumbering Assoc.*, 93 Me. 391.

**Blackstone.** — *McDonald v. Tefft-Weller Co.*, (C. C. A.) 128 Fed. Rep. 381; *Sonnesyn v. Akin*, 12 N. Dak. 227.

**Bouvier's Definition.** — *Swanson v. Ottumwa*, 118 Iowa 161; *Harris v. Larsen*, 24 Utah 139.

**Anderson's Definition.** — *Tompkins v. Augusta Southern R. Co.*, 102 Ga. 436; *Harris v. Larsen*, 24 Utah 139.

**Webster's Definition.** — *Harris v. Larsen*, 24 Utah 139.

For Other Definitions, see *Arapahoe County v. Fidelity Sav. Assoc.*, 31 Colo. 47; *Reynolds v. Waterville*, 92 Me. 292.

**Broad Meaning.** — The obligation lawfully contracted by a woman not a free trader, in the state of Florida, is a debt within the Federal Bankruptcy Act. *McDonald v. Tefft-Weller Co.*, (C. C. A.) 128 Fed. Rep. 381.

**Right of Creditor.** — *Campbell v. Indianapolis*, 155 Ind. 186.

**Debt and Claim.** — *Hill v. Graham*, 11 Colo. App. 536.

**985.** 1. *Hill v. Graham*, 11 Colo. App. 536.

**986.** 1. *In re Van Orden*, 2 Am. Bankr. Rep. 803, 96 Fed. Rep. 86, quoting 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 986; *Hill v. Graham*, 11 Colo. App. 536; *Reynolds v. Waterville*, 92 Me. 292.

4. *Sonnesyn v. Akin*, 12 N. Dak. 227.

5. *Guaranty Trust Co. v. Galveston City R. Co.*, (C. C. A.) 107 Fed. Rep. 311; *Sonnesyn v. Akin*, 12 N. Dak. 227.

In construing the *California* Civ. Code, providing that a debtor may give a preference to creditors, the court said: "The term debtor is a broad one and must include corporations likewise with individuals and partnerships." *Merced Bank v. Ivett*, 127 Cal. 135.

**English Bankruptcy Act.** — See *In re A. B.*, (1900) 1 Q. B. 541.

**987.** 1. *Guaranty Trust Co. v. Galveston City R. Co.*, (C. C. A.) 107 Fed. Rep. 311; *Keller v. Scranton*, 200 Pa. St. 130, 86 Am. St. Rep. 708.

2. **Contingent Liabilities.** — *Swanson v. Ottumwa*, 118 Iowa 161; *Guaranty Trust Co. v.*



**989.** Indorsers, Sureties, Etc. — See note 1.

**990.** IV. LIABILITY FOR UNLIQUIDATED DAMAGES — 1. For Breach of Contract — *c.* LIABILITY OF STOCKHOLDERS AND OFFICERS OF CORPORATIONS. — See note 4.

**991.** *d.* LIABILITY ON A POLICY OF INSURANCE. — See note 1.

**2.** For Tort — *a.* IN GENERAL. — See note 2.

Insolvency. — See note 3.

**992.** Imprisonment for Debt. — See notes 1, 2.

**993.** *b.* ATTACHMENT, GARNISHMENT, ETC. — See note 3.

**994.** *d.* VERDICT AND JUDGMENT. — See note 3.

**995.** V. OBLIGATIONS WHICH HAVE BEEN HELD TO BE OR NOT TO BE DEBTS — 1. Taxes. — See note 2.

**996.** Tax a Debt. — See note 2.

Assessment and Deduction of Indebtedness. — See note 3.

**997.** **2.** Fines and Penalties. — See note 1.

**3.** Costs. — See note 3.

**999.** **4.** Miscellaneous Examples — Alimony. — See note 5.

Judgment. — See note 6.

**1000.** Other Examples. — See note 1.

**1002.** VII. LIMITATION OF MUNICIPAL INDEBTEDNESS. — See note 2.

Galveston City R. Co., (C. C. A.) 107 Fed. Rep. 311.

**Rent.** — Brown *v.* Cairns, 107 Iowa 730.

**989.** **1.** Liability as Surety Held a Debt. — Merchants' Nat. Bank *v.* Eyre, 107 Iowa 16, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 988 [989].

**990.** **4.** Liability of Stockholders and Officers. — Rosenbaum *v.* U. S. Credit System Co., 61 N. J. L. 543.

**991.** **1.** Policy of Insurance. — See Rosenbaum *v.* U. S. Credit System Co., 61 N. J. L. 549.

**2.** Torts. — Compare *In re* Penobscot Lumbering Assoc., 93 Me. 391.

**3.** Insolvency — Trespass. — Compare Brouillard's Petition, 20 R. I. 617.

**992.** **1.** Imprisonment for Debt. — Knutte *v.* Superior Ct., 134 Cal. 660.

**Same** — Admiralty Practice. — Stone *v.* Murphy, 86 Fed. Rep. 158.

**2.** Ripon Knitting Works *v.* Schreiber, 101 Fed. Rep. 810, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 992.

**993.** **3.** Attachment, Garnishment, Etc. — Sonnesyn *v.* Akin, 12 N. Dak. 227.

**994.** **3.** Homestead. — Harris *v.* Larsen, 24 Utah 139.

**995.** **2.** Taxes. — State *v.* Travelers Ins. Co., 70 Conn. 590, 66 Am. St. Rep. 138; Grunewald *v.* Cedar Rapids, 118 Iowa 222; Rosenbloom *v.* State, 64 Neb. 342; Hanson County *v.* Gray, 12 S. Dak. 124, 76 Am. St. Rep. 591; Danforth *v.* McCook County, 11 S. Dak. 258, 74 Am. St. Rep. 808; Burnham *v.* Milwaukee, 98 Wis. 128; Hewitt *v.* Traders' Bank, 18 Wash. 326; Plymouth County *v.* Moore, 114 Iowa 700.

**License Taxes.** — A constitutional provision inhibiting imprisonment for debt has no application to the case of a license tax. Rosenbloom *v.* State, 64 Neb. 342.

**996.** **2.** Taxes Held to Be Debts. — State *v.*

Travelers' Ins. Co., 70 Conn. 590, 66 Am. St. Rep. 138.

**3.** Deductions — Stock — Building and Loan Associations. — Arapahoe County *v.* Fidelity Sav. Assoc., 31 Colo. 47.

**997.** **1.** Fines and Penalties. — Rosenbloom *v.* State, 64 Neb. 342.

**Imprisonment for Debt.** — Rosenbloom *v.* State, 64 Neb. 342.

**3.** Contra. — A judgment for costs against an executor is not a debt of the decedent within § 2749 of the New York Code Civ. Pro., for the payment of which decedent's real estate may be sold. Matter of Foley, 39 N. Y. App. Div. 248.

**999.** **5.** Alimony — Insolvency. — Compare *In re* Van Orden, 96 Fed. Rep. 86.

**Same** — Imprisonment for Debt. — Alimony or maintenance is not a debt within the meaning of the constitutional inhibition against imprisonment for debt. Bronk *v.* State, 43 Fla. 461, 99 Am. St. Rep. 119. And see State *v.* King, 40 La. Ann. 1503.

**6.** Judgments. — *Ex p.* Gerrish, 42 Tex. Crim. 117, quoting 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 999; Harris *v.* Larsen, 24 Utah 139.

**1000.** **1.** Debts of Decedents — Executors and Administrators. — See Matter of Gilman, 92 N. Y. App. Div. 462, affirmed 178 N. Y. 606.

**1002.** **2.** Floating Debt. — Wilcoxon *v.* Bluffton, 153 Ind. 267.

**Special Assessments.** — Swanson *v.* Ottumwa, 118 Iowa 161.

**Unpaid Instalments.** — See Brown *v.* Corry, 17 Pa. Co. Ct. 490, affirmed 175 Pa. St. 528. See Burnham *v.* Milwaukee, 98 Wis. 128.

**Assuming Liability for Damages to Abutting Property** caused by the building of a viaduct is a debt within the Pennsylvania constitution. Keller *v.* Scranton, 200 Pa. St. 130, 86 Am. St. Rep. 708.

# DEBTS OF DECEDENTS.

BY BRISCOE B. CLARK.

## 1007. I. WHAT CONSTITUTE CLAIMS AGAINST DECEDENT'S ESTATE —

### 1. Claims Based on Contracts of Decedent — a. IN GENERAL. — See note 1.

**1007. 1. Estate Bound by Contracts of Decedent** — *California*. — Thompson v. Oreña, 134 Cal. 26.

*Illinois*. — Caldwell v. Guyer, 89 Ill. App. 110, reversed 189 Ill. 581.

*Kansas*. — Story v. McCormick, (Kan. 1904) 78 Pac. Rep. 819 (claim against stepfather for rent of house of stepdaughter).

*Missouri*. — Wabash R. Co. v. Ordelheide, 88 Mo. App. 589.

*Nebraska*. — *In re* Devries, (Neb. 1903) 97 N. W. Rep. 590; Gillett v. Sweeney, (Neb. 1903) 97 N. W. Rep. 795.

*New York*. — Ritchie v. Bennett, 35 N. Y. App. Div. 68; Clift v. Mercer, 79 N. Y. App. Div. 369 (interest on claim).

*North Carolina*. — Calloway v. Angel, 127 N. Car. 414; Baker v. Dawson, 131 N. Car. 227 (medical services rendered to tenants of decedent); Fisher v. Southern L. & T. Co., 138 N. Car. 90.

*Pennsylvania*. — Crowley's Estate, 7 Pa. Dist. 322; *In re* Breeswine, 11 York Leg. Rec. (Pa.) 141; Brubaker's Estate, 17 Lanc. L. Rev. (Pa.) 390.

*South Carolina*. — Horne v. McRae, 53 S. Car. 51.

*Tennessee*. — Cate v. Cate, (Tenn. Ch. 1897) 43 S. W. Rep. 365 (monument ordered by decedent).

*Texas*. — Flannery v. Chidgey, 33 Tex. Civ. App. 638 (services rendered). See, however, Tiboldi v. Palms, 34 Tex. Civ. App. 318, affirmed 97 Tex. 414.

*Vermont*. — Brown v. Dunn, 75 Vt. 264.

*West Virginia*. — Hurxthal v. St. Lawrence Boom, etc., Co., 53 W. Va. 87, 97 Am. St. Rep. 954.

*Wisconsin*. — Dodge v. O'Dell, 106 Wis. 296 (claim for board and attendance); Fitch v. Huntington, (Wis. 1905) 102 N. W. Rep. 1066.

**Necessaries.** — Borum v. Bell, 132 Ala. 85; Waldron v. Davis, 70 N. J. L. 788 (services in taking care of a lunatic).

**Money Paid for Benefit of Decedent.** — Litchfield v. Carpenter, (Ky. 1899) 49 S. W. Rep. 22. But the voluntary payment by a stranger of debts of a decedent creates no claim against the estate. Falls v. Jones, 107 Mo. App. 357. See also Genet v. Willock, 93 N. Y. App. Div. 588.

**An Obligation Payable on or After the Death of the Obligor** is enforceable against his estate. Woods v. Matlock, 19 Ind. App. 364; Fitzgerald v. English, 73 Minn. 266; Stevenson v. Long, 23 Pa. Co. Ct. 391 (bond payable after death of obligor).

**Judgments.** — *Ex p.* Goldsmith, 68 S. Car. 528. See generally the title JUDGMENTS AND DECREES, 785. 2 et seq.

**Interest on Claims.** — See Anderson v. Northrop, 44 Fla. 479; Ryans v. Hospes, 167 Mo. 342. And see the title INTEREST, 1010. 2.

The rate of interest on a claim after allowance is the contract rate which the claim bore before maturity. Richardson v. Diss, 127 Cal. 58.

**A Provision for Attorney's Fees** in case of collection by action is binding on a decedent's estate. Gillett v. McFarland, 106 Iowa 746; Rowe's Estate, 22 Pa. Super. Ct. 597; Nease v. James, (Tex. Civ. App. 1903) 72 S. W. Rep. 87.

**A Stockholder's Statutory Liability** for debts of the corporation survives against his estate. Kirtley v. Holmes, (C. C. A.) 107 Fed. Rep. 1; Lanigan v. North, 69 Ark. 62; Morse v. Gillette, 93 Ill. App. 23, affirmed 191 Ill. 371; Barton Nat. Bank v. Atkins, 72 Vt. 33.

**A Decree of Divorce Awarding an Annuity to the Wife from the Husband's Estate** creates a claim against such estate. Hassaurek v. Markbreit, 68 Ohio St. 554.

**An Allowance for Attorney Fees in Divorce Proceedings** has been held not to be enforceable against the husband's estate. Kellogg v. Stoddard, 89 N. Y. App. Div. 137, reversing (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 92.

**Breach of Covenant of Warranty of Title.** — Wiggins v. Pender, 132 N. Car. 628.

**Contract of Indemnity.** — Emerson v. Paine, 176 Mass. 391.

**Claims of Executors or Administrators.** — Matter of Towne, 143 Cal. 507 (services rendered to decedent).

**A Release of Claims by a Creditor** under agreement with his debtor is binding upon the creditor in favor of the administrator. Freehold First Nat. Bank v. Thompson, 61 N. J. Eq. 188.

**An Offer by the Decedent Accepted After His Death** creates no claim against his estate. Riner v. Husted, 13 Colo. App. 523.

**Sufficiency of Evidence to Support Claim** — *Colorado*. — McKay v. Belknap Sav. Bank, 27 Colo. 50 (payment of interest on note is *prima facie* proof of validity of note).

*Georgia*. — Willis v. Sutton, 116 Ga. 283 (claim of executor).

*Illinois*. — McDonald v. Danahy, 196 Ill. 133, affirming 96 Ill. App. 380; Smythe v. Evans, 209 Ill. 376 (claim of executor or administrator); Kingan v. Burns, 104 Ill. App. 661.

*Iowa*. — Murphy v. McCarthy, 108 Iowa 38 (burden of proving payments for services is on estate); *In re* Reeve, 111 Iowa 260; Curd v. Wisser, 120 Iowa 743; Stickley v. Hanson, (Iowa 1905) 102 N. W. Rep. 514.

*Kansas*. — Haffamier v. Hund, 10 Kan. App. 579, 63 Pac. Rep. 659.

*Kentucky*. — Ponder v. Boaz, 67 S. W. Rep. 833, 23 Ky. L. Rep. 2429, note; Allsop v. De-

**1008. Under a Contract of Employment. — See note 3.**  
**Unenforceable Contracts. — See notes 5, 6.**

posit Bank, 69 S. W. Rep. 1102, 24 Ky. L. Rep. 762; *Galloway v. Galloway*, 70 S. W. Rep. 48, 24 Ky. L. Rep. 857; *Weber v. Weber*, 76 S. W. Rep. 507, 25 Ky. L. Rep. 908; *Cox v. Higginbotham*, 76 S. W. Rep. 1079, 25 Ky. L. Rep. 1057; *Finley v. Keinningham*, 79 S. W. Rep. 236, 25 Ky. L. Rep. 1955.

*Louisiana.* — *Moise's Succession*, 107 La. 717; *Lacoste's Succession*, 108 La. 57 (services rendered by physician); *Oubre's Succession*, 109 La. 516; *Alexander's Succession*, 110 La. 1027.

*Maryland.* — *Duckworth v. Duckworth*, 98 Md. 92; *Justis v. Justis*, 99 Md. 69.

*Michigan.* — *Clancy v. Leach*, 125 Mich. 630, 7 Detroit Leg. N. 662; *Crampton v. Newton*, 132 Mich. 149, 9 Detroit Leg. N. 570; *Shane v. Shearnsmith*, (Mich. 1904) 100 N. W. Rep. 123.

*Missouri.* — *Graham v. Rapp*, 105 Mo. App. 590.

*New Hampshire.* — *Ela v. Ela*, 70 N. H. 163.

*New Jersey.* — *Goetz v. Walters*, (N. J. 1904) 59 Atl. Rep. 19.

*New York.* — *McGrath v. Alger*, 43 N. Y. App. Div. 496 (services of attorney); *Porter v. Rhoades*, 48 N. Y. App. Div. 635, *appeal dismissed* 170 N. Y. 583; *Weidman v. Thompson*, 53 N. Y. App. Div. 22 (claim for services by domestic); *Marggraf v. McLean*, (N. Y. City Ct. Gen. T.) 31 Misc. (N. Y.) 820; *Breed v. Breed*, 55 N. Y. App. Div. 121; *Matter of Clarke*, 57 N. Y. App. Div. 430; *Barrett v. Bailey*, 59 N. Y. App. Div. 300 (claim for services); *Coale v. Coale*, 63 N. Y. App. Div. 32; *Matter of Furniss*, 86 N. Y. App. Div. 96 (claim for services); *Matter of Neil*, (Surrogate Ct.) 35 Misc. (N. Y.) 254; *Matter of Hamilton*, 70 N. Y. App. Div. 73, *affirmed* 172 N. Y. 652, *reversing* (Surrogate Ct.) 34 Misc. (N. Y.) 607 (claim of wife for boarding husband); *Matter of Sudds*, 75 N. Y. App. Div. 612; *Hart v. Tuite*, 75 N. Y. App. Div. 323; *Matter of Wait*, (Surrogate Ct.) 39 Misc. (N. Y.) 74, 12 N. Y. Annot. Cas. 141; *Matter of Warner*, (Surrogate Ct.) 39 Misc. (N. Y.) 432; *Matter of Wilmot*, (Surrogate Ct.) 39 Misc. (N. Y.) 686 (claim for board); *Matter of Pray*, (Surrogate Ct.) 40 Misc. (N. Y.) 516 (claim for services); *Matter of Miles*, (Surrogate Ct.) 33 Misc. (N. Y.) 147, *reversed* 61 N. Y. App. Div. 562, *affirmed* 170 N. Y. 75; *Matter of Steenwerth*, 97 N. Y. App. Div. 116; *Matter of Marcellus*, 165 N. Y. 70; *Matter of Bradbury*, 105 N. Y. App. Div. 250; *Linden v. Thieriot*, 105 N. Y. App. Div. 405; *Maisenhelder v. Crispell*, 105 N. Y. App. Div. 219; *Mulhern v. Carrard*, (Supm. Ct. App. Div.) 94 N. Y. Supp. 741.

*Oregon.* — *Goltra v. Penland*, 45 Oregon 254 (sufficiency of corroboration of claimant under Oregon statutes); *In re Morgan*, (Oregon 1904) 77 Pac. Rep. 608.

*Pennsylvania.* — *Trinick's Estate*, 8 Pa. Dist. 126; *Marschall's Estate*, 8 Pa. Dist. 313; *Watson's Estate*, 8 Pa. Dist. 341; *Hess's Estate*, 9 Pa. Dist. 19; *Patterson's Estate*, 9 Pa. Dist. 259 (claim for board, lodging, etc.); *Curley's Estate*, 9 Pa. Dist. 276, 23 Pa. Co. Ct. 659 (burden of proof — claim for board and lodging); *Mutchmore's Estate*, 9 Pa. Dist. 293, 24

Pa. Co. Ct. 257; *Atkinson's Estate*, 9 Pa. Dist. 404; *Staub's Estate*, 11 Pa. Super. Ct. 447; *Johnston's Estate*, 12 York Leg. Rec. (Pa.) 181 (claim for board and attendance); *Fehl's Estate*, 13 Pa. Super. Ct. 601; *Fiscus's Estate*, 13 Pa. Super. Ct. 615; *Geiger's Estate*, 14 Pa. Super. Ct. 523; *Ewing's Estate*, 18 Lanc. L. Rev. (Pa.) 73 (uncorroborated testimony of disinterested witness); *Simonds's Estate*, 31 Pittsb. Leg. J. (N. S.) 291; *In re Miller*, 188 Pa. St. 214; *Wilkinson's Estate*, 192 Pa. St. 117; *Clymer's Estate*, 202 Pa. St. 580 (proof of signature of decedent to note); *Payne's Estate*, 204 Pa. St. 535; *Brown's Estate*, 210 Pa. St. 493.

*Rhode Island.* — *Gorton v. Johnson*, 23 R. I. 138 (claim for services).

*Tennessee.* — *Treece v. Carr*, (Tenn. Ch. 1900) 58 S. W. Rep. 1078; *Kernell v. Crutcher*, (Tenn. Ch. 1901) 61 S. W. Rep. 1045 (delay in asserting claim).

*West Virginia.* — *Faulkner v. Thomas*, 48 W. Va. 148 (delay in asserting claim in decedent's lifetime not conclusive against claim).

*Wisconsin.* — *Gudden v. Gudden*, 113 Wis. 297.

**Stale Demands — Sufficiency of Proof to Sustain.** — *Rogge's Succession*, 50 La. Ann. 1220.

**Sufficiency of Evidence to Show Consideration for Note.** — *Van Buskirk v. Hoy*, 114 Mich. 425.

**Uncorroborated Testimony of the Claimant is not, as a matter of law, sufficient.** *Rawlinson v. Scholes*, 79 L. T. N. S. 350; *In re Griffin*, 79 L. T. N. S. 442; *Doidge v. Mimms*, 13 Manitoba, 48; *Re Blank*, 5 N. W. Ter. 230; *Nottingham v. Lynchburg Trust, etc., Bank*, (Va. 1898) 29 S. E. Rep. 684.

**Sufficiency of Corroboration of Claimant's Testimony.** — *Wilson v. Howe*, 5 Ont. L. Rep. 323; *In re Jelly*, 6 Ont. L. Rep. 481.

**The Burden of Proof is, of course, on the claimant.** *Barthe v. Rogers*, 127 Cal. 52; *Schele v. Wagner*, 163 Ind. 20 (authority of agent to execute note); *Indiana Trust Co. v. Byram*, (Ind. App. 1904) 72 N. E. Rep. 670 (execution of note); *Dewhurst v. Shepherd*, 102 Ky. 239.

**Claims of Executors and Administrators are strictly scrutinized.** *In re Dimmick*, 111 La. 655; and must be established by legal evidence as in case of other creditors, *Matter of Furniss*, 86 N. Y. App. Div. 96.

**Consideration.** — Note must be based on a valuable consideration. *Strevell v. Jones*, 106 N. Y. App. Div. 334. Contract must be supported by a valuable consideration. *Strevell v. Jones*, (Surrogate Ct.) 92 N. Y. Supp. 719.

Claim arising out of failure of life tenant to pay taxes assessed against the land is a valid claim against the estate. *Penn v. Penn*, (Ky. 1905) 87 S. W. Rep. 306.

**1008. 3.** *Pugh v. Baker*, 127 N. Car. 2, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 82. Compare *Zinnell v. Bergdoll*, 19 Pa. Super. Ct. 508, wherein a contract for the employment of a farm laborer was held to be terminated by the death of the employer.

**5. Contract Must Have Been Binding on Decedent.** — *Matter of Warner*, 53 N. Y. App. Div. 565 (note given to wife without considera-



- 1009.** *Contracts Not Enforceable at Law.* — See note 1.  
*b. PERSONAL CONTRACTS.* — See note 2.  
*Agency Contract.* — See note 3.
- 1010.** *c. JOINT CONTRACTS* — (1) *In General.* — See note 2.  
*Judgments.* — See note 4.
- 1012.** (2) *Remedy in Equity* — Whether Estate of Deceased Partner Primarily Liable. — See note 3.
- 1013.** (3) *Statutory Liability.* — See note 1.  
 Whether Joint Action Maintainable Against Survivor and Representative. — See note 3.
- 1015.** *d. CONTRACTS OF SURETYSHIP* — (2) *Joint Contract* — (b) *Contribution Between Sureties.* — See note 4.
- 1017.** *g. AGREEMENTS TO MAKE WILL* — (1) *In General.* — See note 6.
- 1018.** See note 2.  
 (2) *Requisites of Agreement* — (c) *Statute of Frauds* — *aa. IN GENERAL.* — But an Agreement to Devise Specific Lands. — See note 8.
- 1019.** *Recovery on Quantum Meruit.* — See note 2.  
*bb. PART PERFORMANCE.* — See note 3.  
 (3) *Enforcement of Agreement* — (a) *Action at Law* — *aa. IN GENERAL.* — See note 5.

tion); Kline's Estate, 9 Pa. Dist. 386; Scott's Estate, 14 York Leg. Rec. (Pa.) 77 (voluntary note); Sutch's Estate, 31 Pittsb. Leg. J. N. S. 123 (voluntary note); McKown's Estate, 198 Pa. St. 102 (voluntary note not delivered).

**Statement of Admission of Indebtedness as Distinguished from Enforceable Obligation.** — Matter of Hamilton, (Surrogate Ct.) 34 Misc. (N. Y.) 607, reversed 70 N. Y. App. Div. 73.

**1005. 6. No Claim from Contract of Infant.** — Merwin's Appeal, 72 Conn. 167 (liability of ward's estate on contract with conservator).

**1009. 1. Husband and Wife — Contracts Between.** — Grimes v. Reynolds, 184 Mo. 679, affirming 94 Mo. App. 578.

**Money Lent to Wife.** — A husband has a valid claim against his wife's estate for money lent to her. Grimes v. Reynolds, 94 Mo. App. 578.

**2. An Agreement to Care for Children of the Promisor's Wife** by a former husband, without specifying any time of contract, terminates on the death of the promisor. Hinklebein v. Totten, 60 S. W. Rep. 641, 22 Ky. L. Rep. 1357.

**3. Agency Contract.** — See Stark v. Hart, 22 Tex. Civ. App. 543 (attorney and client). See generally the title AGENCY, 1223. 1 *et seq.*

**1010. 2. Survival of Joint Contracts.** — Matter of Robinson, 40 N. Y. App. Div. 23.

**4. Judgment on Tort.** — Compare Matter of Blackford, 35 N. Y. App. Div. 330; Altgelt v. Elmendorf, (Tex. Civ. App. 1904) 84 S. W. Rep. 412.

**1012. 3. Thompson v. White,** 25 Colo. 226; Booth Bros., etc., Granite Co. v. Baird, 83 N. Y. App. Div. 495, citing Potts v. Dounce, 173 N. Y. 335.

**1013. 1. Statutory Liability.** — Allen v. Stovall, 94 Tex. 618, holding that the repeal of the statutes does not affect liability of the estate on a prior contract.

**Partnership Indebtedness.** — See Freeman v. Pullen, 119 Ala. 235; Thompson v. White, 25 Colo. 226.

**3. Joinder Not Allowed.** — Matter of Robinson, 40 N. Y. App. Div. 23.

**1015. 4. Contribution Between Sureties.** — Connolly v. Dolan, 22 R. I. 60, 84 Am. St. Rep. 816 (expenses incurred by cosurety in defending suit).

**Failure to Name Executor in Covenant.** — Broadwell v. Banks, 134 Fed. Rep. 470.

**Leases.** — Broadwell v. Banks, 134 Fed. Rep. 470.

**1017. 6. Agreements to Make Wills Are Valid.** — Banks v. Howard, 117 Ga. 94, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) p. 1017 *et seq.*; Woods v. Matlock, 19 Ind. App. 364; Hinklebein v. Totten, (Ky. 1901) 60 S. W. Rep. 641; Morrissey v. Morrissey, 180 Mass. 480; Finn v. Sowders, (Mich. 1905) 103 N. W. Rep. 177; Gall v. Gall, 27 N. Y. App. Div. 173, appeal dismissed 160 N. Y. 696; Waddell v. Waddell, (Tenn. Ch. 1897) 42 S. W. Rep. 46.

**1018. 2. Contract Must Be Clearly Proved.** — Cochrane v. McEntee, (N. J. 1896) 51 Atl. Rep. 279, holding that the uncorroborated testimony of the claimant is insufficient to prove the agreement.

**8. Contracts for Sale of Land.** — Cochrane v. McEntee, (N. J. 1896) 51 Atl. Rep. 279.

**Divisibility of Agreement.** — A parol agreement to make a will disposing in a particular manner of all of the testator's personality and realty, being invalid as to the provision with regard to the realty, and indivisible, is invalid *in toto*. Martin v. Martin, 108 Wis. 284, 81 Am. St. Rep. 895.

**1019. 2. Recovery on Quantum Meruit.** — Morrissey v. Morrissey, 180 Mass. 480; Martin v. Martin, 108 Wis. 284, 81 Am. St. Rep. 895.

**3. Part Performance — Rendition of Services.** — Compare Martin v. Martin, 108 Wis. 284, 81 Am. St. Rep. 895, following Wright v. Wright, 99 Mich. 170.

**An Advance of Money** is insufficient part performance to take the agreement out of the statute of frauds. Cochrane v. McEntee, (N. J. 1896) 51 Atl. Rep. 279.

**5. Action at Law.** — Ranks v. Howard, 117 Ga. 94, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1019.

**1020.** *cc.* STATUTE OF LIMITATIONS. — See note 4.

(b) *Specific Performance.* — See note 5.

**1021.** *h.* SERVICES RENDERED DECEDENT — (1) *In General* — Implied Contract for Compensation. — See notes 4, 5, 6.

*Express Contract.* — See note 7.

*Services Rendered in Expectation of Legacy.* — See note 8.

**1022.** See note 1.

*Direction or Intention to Pay.* — See notes 2, 3.

(2) *Services Between Members of Same Family* — Presumptions. — See note 4.

**1020. 4. Statute of Limitations.** — *Banks v. Howard*, 117 Ga. 94, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1020; *Morrissey v. Morrissey*, 180 Mass. 480. See also *Matter of Goss*, 98 N. Y. App. Div. 489. But in *Martin v. Martin*, 108 Wis. 284, 81 Am. St. Rep. 895, where an agreement to devise real estate to an adopted child was invalid for want of a written memorandum, it was held that the running of the statute of limitations against an action to recover for the value of the services of the child was not postponed until the death of the promisor.

**5. Specific Performance.** — *Banks v. Howard*, 117 Ga. 94, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1019 *et seq.*

**1021. 4. Services Rendered Decedent** — *Arkansas*. — *Lewis v. Lewis*, (Ark. 1905) 87 S. W. Rep. 134.

*Connecticut*. — *Huntington's Appeal*, 73 Conn. 582.

*District of Columbia*. — *Tuohy v. Trail*, 19 App. Cas. (D. C.) 79.

*Georgia*. — *Phinazee v. Bunn*, 123 Ga. 230.

*Kansas*. — *Bonebrake v. Tauer*, 67 Kan. 827.

*Michigan*. — *Van Slambrook v. Little*, 127 Mich. 61, 3 Detroit Leg. N. 229; *Shane v. Shearsmith*, (Mich. 1904) 100 N. W. Rep. 123; *Luizzi v. Brady*, (Mich. 1905) 103 N. W. Rep. 574.

*Missouri*. — *Ryans v. Hespes*, 167 Mo. 342; *Truesdail v. Truesdail*, 72 Mo. App. 155; *Graham v. Rapp*, 105 Mo. App. 590.

*New Hampshire*. — *Elwell v. Roper*, 72 N. H. 254.

*New York*. — *Kellogg v. Ogden*, 27 N. Y. App. Div. 214; *Leahy v. Campbell*, 70 N. Y. App. Div. 127; *Matter of Furniss*, 86 N. Y. App. Div. 96; *Lane v. Calby*, 95 N. Y. App. Div. 11; *Matter of Bradbury*, 105 N. Y. App. Div. 250; *Strevell v. Jones*, 106 N. Y. App. Div. 334.

*North Carolina*. — *Whitaker v. Whitaker*, 138 N. Car. 205.

*Oregon*. — See *Re McCullough*, 31 Oregon 86 (voluntary services rendered without expectation of compensation).

*Pennsylvania*. — *Harper's Estate*, 196 Pa. St. 137; *Bugh's Estate*, 23 Pa. Co. Ct. 660, 9 Pa. Dist. 276; *Currey's Estate*, 26 Pa. Super. Ct. 479.

*South Carolina*. — *Horne v. McRae*, 53 S. Car. 51.

*Tennessee*. — *Montgomery v. Clark*, (Tenn. Ch. 1898) 46 S. W. Rep. 466.

*Texas*. — *Von Carlowitz v. Bernstein*, 28 Tex. Civ. App. 8.

*Wisconsin*. — *Leitgabel v. Belt*, 108 Wis. 107.

**Support Procured by Fraud as to Financial Con-**

**dition.** — Where the decedent, by fraudulent representations that she was destitute, induced others to support her for several years, it was held that recovery might be had against her estate for the support so furnished. *Eggers v. Anderson*, 63 N. J. Eq. 264.

**Voluntary Services**, though rendered under a mistake as to conditions, create no claim against the estate. *Royston v. McCulley*, (Tenn. Ch. 1900) 59 S. W. Rep. 725.

**5.** *Gall v. Gall*, 27 N. Y. App. Div. 173, *appeal dismissed* 160 N. Y. 696 (will providing for compensation revoked by marriage of testator).

**6.** See *Moore v. Smith*, 121 Ga. 479.

**7.** *Laird v. Laird*, 127 Mich. 24, 8 Detroit Leg. N. 217; *In re Johnson*, (Supm. Ct. App. Div.) 52 N. Y. Supp. 1081; *Howard v. Drexler*, 14 Pa. Super. Ct. 59; *Normile v. Osborne*, 207 Pa. St. 367.

**8. Expectation of Legacy.** — *Matter of Hanson*, 133 Cal. 38 (gratuitous services rendered to decedent constitute no claim against his estate); *Littell's Estate*, 50 La. Ann. 299; *Matter of O'Neill*, 49 N. Y. App. Div. 414; *Engle's Estate*, 9 Pa. Dist. 743; *Von Carlowitz v. Bernstein*, 28 Tex. Civ. App. 8.

**1022. 1. Expectation of Legacy After Rendition of Services.** — *Neish v. Gannon*, 198 Ill. 219, *affirming* 98 Ill. App. 248; *Wessinger v. Roberts*, 67 S. Car. 240 (nature of services as affecting presumption).

**2.** *Stadermann v. Heins*, 78 N. Y. App. Div. 563; *Fehl's Estate*, 13 Pa. Super. Ct. 601.

**3.** *Smith v. Birdsall*, 106 Ill. App. 264; *In re Bryant*, 73 Vt. 240.

**4. Services Between Members of Same Family Presumed to Be Gratuitous** — *Alabama*. — *Borum v. Bell*, 132 Ala. 85.

*Illinois*. — *Gall v. Stark*, 98 Ill. App. 121.

*Indiana*. — *Fuller v. Fuller*, 21 Ind. App. 42; *Ellis v. Baird*, 31 Ind. App. 295.

*Kansas*. — *Jones v. Humphreys*, 10 Kan. App. 545.

*Kentucky*. — *Gaunce v. Barlow*, 70 S. W. Rep. 284, 24 Ky. L. Rep. 929; *Dance v. Magruder*, (Ky. 1904) 80 S. W. Rep. 1120; *Green v. Green*, (Ky. 1904) 82 S. W. Rep. 1011.

*Louisiana*. — *Benton's Succession*, 106 La. 494; *Oubre's Succession*, 109 La. 516.

*Massachusetts*. — *Johnson v. Kimball*, 172 Mass. 398; *Marple v. Morse*, 180 Mass. 508 (services rendered by son to mother in last illness in ignorance that she had property).

*Michigan*. — *Decker v. Kanous*, 129 Mich. 146, 8 Detroit Leg. N. 905.

*Minnesota*. — *McCord v. Knowlton*, 79 Minn. 299.

**1023.** Presumption Rebuttable. — See note 1.

**1024.** Proof of Claim. — See note 2.

**2. Funeral Expenses — a. IN GENERAL — General Rule.** — See note 3.

*Missouri.* — Compare *Sprague v. Sea*, 152 Mo. 327.

*New York.* — Matter of Jones, (Surrogate Ct.) 28 Misc. (N. Y.) 338; *Wamsley v. Wamsley*, 48 N. Y. App. Div. 330; Matter of Pearl, 62 N. Y. App. Div. 519; Matter of De Freest, (Surrogate Ct.) 41 Misc. (N. Y.) 535 (claim by grandparents against father for support of his child).

*Pennsylvania.* — Rogan's Estate, 10 Kulp (Pa.) 138; *In re Dettenmaier*, 13 Pa. Super. Ct. 170; *Eckert's Estate*, 18 Lanc. L. Rev. (Pa.) 58.

*Vermont.* — *In re Bryant*, 73 Vt. 240.

*West Virginia.* — Hanly v. Potts, 52 W. Va. 263.

*Wisconsin.* — Martin v. Martin, 108 Wis. 284, 81 Am. St. Rep. 895.

See also the title IMPLIED OR QUASI CONTRACTS, **1084. 1 et seq.**

**Persons in Loco Parentis.** — *Smith v. Birdsall*, 106 Ill. App. 264.

**Services to Mother-in-Law.** — *Rock v. Rock*, 105 N. Y. App. Div. 157.

**Immaterial that Residences Separate.** — Services rendered to the decedent by her daughter may be presumed to have been gratuitous, though they did not reside in the same house. *Wessinger v. Roberts*, 67 S. Car. 240.

**1023. 1. Presumption Rebuttable — District of Columbia.** — *Tuohy v. Trail*, 19 App. Cas. (D. C.) 79.

*Illinois.* — *Sherman v. Whiteside*, 190 Ill. 576, affirming 93 Ill. App. 572; *Neish v. Gannon*, 198 Ill. 219, affirming 98 Ill. App. 248; *Jones v. Adams*, 81 Ill. App. 183; *Martin v. Martin*, 89 Ill. App. 147; *Overbeck v. Ahlmeier*, 106 Ill. App. 606.

*Indiana.* — *Boyd v. Starbuck*, 18 Ind. App. 310; *Hamilton v. Hamilton*, 26 Ind. App. 114 (question for jury); *Masters v. Jones*, 158 Ind. 647 (adult daughters taking care of insane father).

*Iowa.* — *Harrison v. Harrison*, 124 Iowa 525.

*Michigan.* — *Laird v. Laird*, 127 Mich. 24, 8 Detroit Leg. N. 217.

*Missouri.* — *Truesdail v. Truesdail*, 72 Mo. App. 155; *Wood v. Flanery*, 89 Mo. App. 632; *Shannon v. Carter*, 99 Mo. App. 134.

*New York.* — Matter of Dailey, (Surrogate Ct.) 43 Misc. (N. Y.) 552; Matter of Hamilton, 172 N. Y. 652, affirming 70 N. Y. App. Div. 73 (claim of wife for board furnished to husband).

*Ohio.* — *In re Skelton*, 11 Ohio Cir. Dec. 372; *Hinkle v. Sage*, 67 Ohio St. 256.

*Pennsylvania.* — *Embree's Estate*, 18 Lanc. L. Rev. (Pa.) 57.

*South Carolina.* — *Wessinger v. Roberts*, 67 S. Car. 240.

*Tennessee.* — *Waddell v. Waddell*, (Tenn. Ch. 1897) 42 S. W. Rep. 46.

*Vermont.* — *McDowell v. McDowell*, 75 Vt. 401, 98 Am. St. Rep. 831.

*Virginia.* — *Lightner v. Speck*, (Va. 1897) 28 S. E. Rep. 326.

*Wisconsin.* — *Leitgabel v. Belt*, 108 Wis. 107.

**1024. 2. Clear Proof Required — Indiana.** — *Pease v. Christman*, 158 Ind. 642.

*Maryland.* — *Duckworth v. Duckworth*, 98 Md. 92.

*Michigan.* — *Decker v. Kanous*, 129 Mich. 146, 8 Detroit Leg. N. 905.

*New York.* — Matter of Hamilton, (Surrogate Ct.) 34 Misc. (N. Y.) 607, reversed 70 N. Y. App. Div. 73 (claim of wife for boarding husband); Matter of Liddle, (Surrogate Ct.) 35 Misc. (N. Y.) 173; *Meehan v. Heffernan*, 73 N. Y. App. Div. 615; Matter of Warner, (Surrogate Ct.) 39 Misc. (N. Y.) 432; *Platt v. Hollands*, 85 N. Y. App. Div. 231; Matter of Goss, 98 N. Y. App. Div. 489.

*Pennsylvania.* — *Kelly's Estate*, 6 Pa. Dist. 685; *Weaver's Estate*, 182 Pa. St. 349; *Flood's Estate*, 8 Pa. Dist. 634, 23 Pa. Co. Ct. 304; *Shaffer's Estate*, 6 Lack. Leg. N. (Pa.) 137.

*Tennessee.* — *Bratcher v. Bratcher*, (Tenn. Ch. 1900) 62 S. W. Rep. 1108 (uncorroborated testimony of son claiming for services to father held to be insufficient).

*Wisconsin.* — *Martin v. Martin*, 108 Wis. 284, 81 Am. St. Rep. 895.

**3. Estate Liable for Funeral Expenses — California.** — See *O'Donnell v. Slack*, 123 Cal. 285.

*Iowa.* — *Foley v. Brocksmitt*, 119 Iowa 457.

*Louisiana.* — *McNeely v. McNeely*, 50 La. Ann. 823.

*Massachusetts.* — *Marple v. Morse*, 180 Mass. 508.

*New York.* — *Huhna v. Theller*, (Supm. Ct. App. T.) 35 Misc. (N. Y.) 296 (estate of adopted daughter is liable for her funeral expenses in relief of her adopting father). Compare Matter of Franklin, (Surrogate Ct.) 26 Misc. (N. Y.) 107; Matter of Schulz, (Surrogate Ct.) 26 Misc. (N. Y.) 688; Matter of Kalbfleisch, 78 N. Y. App. Div. 464.

*Oregon.* — *In re Osburn*, 36 Oregon 8.

*Pennsylvania.* — *Harding's Estate*, 7 Pa. Dist. 679 (loan for funeral expenses); *Lutton's Estate*, 17 Pa. Super. Ct. 342; *Campbell's Estate*, 24 Pa. Co. Ct. 480, 9 Pa. Dist. 729; *Parry's Estate*, 188 Pa. St. 38 (cost of transporting decedent's body from foreign country).

*Rhode Island.* — *O'Reilly v. Kelly*, 22 R. I. 151, 84 Am. St. Rep. 833.

And see further the title EXECUTORS AND ADMINISTRATORS, **905. 1 et seq.** **1262. 1 et seq.**

**Ability of Married Woman's Estate.** — In *Tennessee* it is held that the funeral expenses of a married woman, though ordered by her husband, are enforceable against her estate. *Nashville Trust Co. v. Carr*, (Tenn. Ch. 1900) 62 S. W. Rep. 204, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1024-1026. See, however, *Kenyon v. Brightwell*, 120 Ga. 606, and see generally the title EXECUTORS AND ADMINISTRATORS, **1262. 2 et seq.**

**Community Property.** — Funeral expenses paid by the decedent's widow are a charge on the community property as against the sole property of the husband. *Gilroy v. Richards*, 26 Tex. Civ. App. 355.



**1025.** Where Credit Is Given to the Person Who Orders the Funeral. — See note 2. Estate Only Secondarily Liable. — See note 3.

View that Estate Not Liable for Funeral Expenses. — See note 4.

*b.* WHAT CONSTITUTE FUNERAL EXPENSES. — See note 5.

**1026.** Illustration Showing Distinction. — See notes 3, 5.

**1027.** 4. Torts of Decedent — *a.* IN GENERAL — Benefit Accruing to Tortfeasor's Estate. — See note 4.

**1028.** *b.* STATUTORY CHANGES. — See note 2.

**1029.** *c.* PARTICULAR ACTIONS — (4) *Seduction*. — See note 4.

**1030.** (9) *Conversion*. — See note 4.

**1031.** (17) *Deceit*. — See note 5.

**1032.** 5. Taxes — Accruing Before Death. — See note 3.

Taxes, However, Accruing After the Death. — See note 4.

6. Breaches of Trust. — See note 5.

**1033.** II. ORDER OF PAYMENT OF DEBTS — 1. In General. — See notes 1, 2.

Interest on Funeral Expenses. — Matter of Cummins, 143 Cal. 525.

**1025.** 2. Credit Extended to Third Person. — Kenyon v. Brightwell, 120 Ga. 606. See also Johnson v. Kimball, 172 Mass. 398.

3. Husband Entitled to Reimbursement. — Pache v. Oppenheim, 93 N. Y. App. Div. 221, reversing on other grounds (Supm. Ct. App. T.) 84 N. Y. Supp. 926; Matter of Very, (Surrogate Ct.) 24 Misc. (N. Y.) 139. See, however, Kenyon v. Brightwell, 120 Ga. 606.

4. New York. — Hoxter v. Lavery, 51 N. Y. App. Div. 74.

5. What Constitute Funeral Expenses. — Foley v. Brocksmit, 119 Iowa 457; Marple v. Morse, 180 Mass. 508 (purchase of burial lot); Matter of Kiernan, (Surrogate Ct.) 38 Misc. (N. Y.) 394; Matter of Smith, 75 N. Y. App. Div. 339; *In re Osburn*, 36 Oregon 8; Cullen's Estate, 7 Pa. Dist. 394, affirmed 8 Pa. Super. Ct. 494; *In re Santee*, 9 Kulp (Pa.) 142; Campbell's Estate, 24 Pa. Co. Ct. 480, 9 Pa. Dist. 729; O'Reilly v. Kelly, 22 R. I. 151, 84 Am. St. Rep. 833 (flowers).

**1026.** 3. Tombstone — Allowance to Representative Therefor. — Sinnott v. Kenaday, 14 App. Cas. (D. C.) 1, reversed 179 U. S. 606 (purchase of burial lot and monument); Cullen's Estate, 8 Pa. Super. Ct. 494.

5. Liability of Estate for Tombstone. — Compare Pease v. Christman, 158 Ind. 642, wherein a claim by a widow for the cost of a tombstone erected by her over the grave of her husband was allowed.

**1027.** 4. Benefit Accruing to Estate. — Wineburgh v. U. S. Steam, etc., R. Advertising Co., 173 Mass. 60, 73 Am. St. Rep. 261 (misappropriation by officer of corporation of corporate funds).

**1028.** 2. Statutes Changing Common-law Rule. — See Hunter v. Boyd, 3 Ont. L. Rep. 183. A Claim for the Obstruction of a Right of Way survives against the estate under the Rhode Island statute. Randall v. Brayton, 26 R. I. 233.

**1029.** 4. *Seduction*. — See Gilman v. Maxwell, 79 Minn. 377.

**1030.** 4. Action for Conversion Survives by Statute. — Schmitt v. Jacques, 26 Tex. Civ. App. 125 (liability of estate for conversion by administrator through sale of property not belonging to estate).

**1031.** 5. Fraudulent Representations. — *In re Duncan*, (1899) 1 Ch. 387. See, however, Eggers v. Anderson, 63 N. J. Eq. 264, where the decedent by fraudulent representations as to her financial condition had secured charitable support.

**1032.** 3. Taxes. — Graham v. Russell, 152 Ind. 186; Penn v. Penn, (Ky. 1905) 87 S. W. Rep. 306; Matter of Franklin, (Surrogate Ct.) 26 Misc. (N. Y.) 107; Decker's Estate, 22 Pa. Co. Ct. 46; Fitzgerald v. Standish, 102 Tenn. 383.

Assessments. — Compare Matter of Hewett, (Surrogate Ct.) 40 Misc. (N. Y.) 322, wherein an assessment in New York city was held not to be a personal charge against a decedent's estate.

4. Taxes Accruing After Decedent's Death. — Fitzgerald v. Standish, 102 Tenn. 383.

5. Breaches of Trust — Estate Liable. — Stanley v. Pence, 160 Ind. 636; Fowler v. Hebbard, 40 N. Y. App. Div. 108 (misappropriation of ward's estate by guardian).

**1033.** 1. Authority of Court to Change Order of Payment. — Ford v. Stuart First Nat. Bank, 100 Ill. App. 70 (power of court to reclassify claim); Peter's Succession, 114 La. 952; Fisher v. Southern L. & T. Co., 138 N. Car. 90; *In re Osburn*, 36 Oregon 8; Gardner v. Gardner, 47 W. Va. 368.

Interest on Preferred Claim. — Where a claim against an estate is preferred, interest accruing on the claim is also entitled to preference. Eddy v. People, 187 Ill. 304.

Claims for "Provisions" Furnished to Decedent. — Under the Louisiana Code, giving a privilege to claims for provisions furnished to the decedent or his family during the six months preceding his death, the word "provisions" means supplies furnished by retail dealers, such as bakers, butchers, grocers, etc. Moise's Succession, 107 La. 717.

Law in Force at Death Controls. — There is no such thing as the acquiring of a vested right to have the estate of a deceased person administered or distributed in accordance with laws existing at the time when a debt accrues. The law in force at the time of the death of the testator or intestate will control as regards priority of claims against the estate. Chicago Title, etc., Co. v. McGlew, 90 Ill. App. 58, 193 Ill. 457.

**1033.** Foreign Creditors. — See note 4.

**1034.** Equitable Assets. — See note 1.

**2. Classification of Debts — a. IN GENERAL — In the United States. —**

See note 6.

**1035.** *b. PARTICULAR CLASSES OF DEBTS — (1) Funeral Expenses. —*

See note 6.

**1036.** (2) *Expenses of Administration. —* See notes 1, 2.

**1037.** (3) *Expenses of Last Illness — (a) In General. —* See note 1.

(b) *What Constitute Expenses of Last Illness —* Meaning of Term "Last Illness,"

— See note 4.

**1038.** (4) *Judgments and Decrees — (a) In General — aa. JUDGMENTS. —* See note 1.

*What Judgments Entitled to Preference. —* See note 4.

**1039.** *bb. DECREES. —* See note 7.

*Finality of Decree. —* See note 8.

**1040.** (b) *Priority Between Judgments. —* See notes 1, 2.

**1042.** (5) *Specialty Debts — (b) What Constitute Specialty Debts — cc. VOLUNTARY BOND. —* See note 5.

(6) *Rent — (a) In General. —* See note 8.

**1033.** 2. *Authority of Decedent to Change Such Order. —* Little Falls Nat. Bank *v.* King, 53 N. Y. App. Div. 541.

*Nor Can the Executor change the order of payment. Harriman v. Tyndale, 184 Mass. 534.*

**4. Foreign and Domestic Creditors Share Pari Passu. — Ramsay *v.* Ramsay, 97 Ill. App. 270, affirmed 196 Ill. 179**

**1034.** 1. *Elstroth v. Young, 88 Mo. App. 418.*

**6. Statutory Preferences. —** The legislature has full power to regulate the priorities in the payment of claims against decedents' estates, even as affects indebtedness incurred prior to the enactment of the statute; and where a statute fixes generally the order in which decedents' debts shall be paid, the estates of persons dying after the enactment of such statute are governed thereby both as regards claims accruing before and those accruing after the enactment of the statute. *Chicago Title, etc., Co. v. McGlew, 193 Ill. 457, affirming 90 Ill. App. 58.*

**1035.** 6. *Funeral Expenses. —* Walley *v.* Gentry, 68 Mo. App. 298; *Matter of Kipp, 70 N. Y. App. Div. 567, 10 N. Y. Annot. Cas. 456; Matter of Kalbfleisch, 78 N. Y. App. Div. 464 (retroactive effect of statute); Lutton's Estate, 10 Kulp (Pa.) 161.*

*Funeral Expenses of a Deceased Daughter of the decedent will not be allowed in Pennsylvania to have priority over lien claims against the decedent's estate. Fulton's Estate, 7 Pa. Dist. 262.*

**1036.** 1. *Elstroth v. Young. 88 Mo. App. 418.*

*Priority Over Specific Liens. —* Day *v.* Davis, (Ky. 1898) 47 S. W. Rep. 769 (mortgage); *In re Horsfall, 20 Mont. 495.*

**2.** *Ferguson v. Woods, (Wis. 1905) 102 N. W. Rep. 1094.*

**1037.** 1. *Expenses of Last Illness. —* McNeely *v.* McNeely, 50 La. Ann. 823; *Haley's Succession, 50 La. Ann. 840; Spiro v. Leibenguth, 51 La. Ann. 152.*

*In the Absence of Statute the expenses of the last illness have no preference. Grace v. Smith, 14 Hawaii 144, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1037.*

*Medical Services Rendered to Decedent. —* Under the *North Carolina* statute the preference of claims for "medical services within the twelve months prior to the decease" is given only for medical services to the decedent personally and not for such services rendered to other persons on the credit of the decedent, such as services to his wife, child, or tenant. *Baker v. Dawson, 131 N. Car. 227.*

**4. Services Not Limited to Those Rendered in Extremes. —** *Succession of Schmidt, 108 La. 293 (medical attendance extending over a period of six months — decedent dying from Bright's disease); Staggers's Estate, 8 Pa. Super. Ct. 260 (services by physician extending over a period of one and a half years allowed); Wasson's Estate, 8 Pa. Dist. 480.*

*Services to the Family of the Decedent are not privileged. Spiro v. Leibenguth, 51 La. Ann. 152.*

**1038.** 1. *Judgments. —* *Matter of Blackford, 35 N. Y. App. Div. 330 (statutory preference).*

**4. Dormant Judgment. —** *Tonnies v. McIntyre, 82 Mo. App. 268.*

**1039.** 7. *Decrees Rank with Judgments. —* *Matter of Smith, 122 Cal. 462.*

**8. Decree Must Be Final. —** *Rutledge v. Simpson, 141 Mo. 290 (order of probate court).*

*A Decree Awarding Alimony is entitled to the preference given to judgments and decrees, as it has the requisite character of finality. Matter of Smith, 122 Cal. 462.*

**1040.** 1. *No Priority at Common Law Between Judgments. —* McCausland *v.* O'Callaghan, (1904) 1 Ir. R. 376. See generally the title JUDGMENTS AND DECREES, 790, 5 *et seq.*

**2.** *Morton v. Adams, 124 Cal. 229, 71 Am. St. Rep. 53; Ambrose v. Byrne, 61 Ohio St. 146.*

**1042.** 5. *Old Chancery Rule Abolished in England. —* Voluntary creditors and creditors for value share under the English Judicature Act, 1875, § 10, *pari passu*, and the old rule of the Court of Chancery that creditors for valuable consideration took precedence over those whose debts were not founded upon a valuable consideration does not prevail. *In re Whitaker, (1901) 1 Ch. 9.*

**1043.** (b) What Constitute Claims for Rent. — See note 1.

(7) *Wages*. — See note 9.

**1044.** (8) *Fiduciary Debts* — (a) In General — Following Trust Funds. — See note 5.

Preference of Fiduciary Debts. — See note 6.

**1045.** Statutory Provision. — See note 1.

(b) What Are Trust Funds. — See notes 3, 4.

**1047.** (9) *Public Debts* — (b) What Constitute Public Debts. — See note 6.

**1048.** Taxes. — See notes 4, 5.

**1049.** (10) *Simple Contract Liabilities* — (a) In General. — See note 1.

(b) Liquidated Demands and Open Accounts. — See note 3.

**1050.** (11) *Priority Dependent on Exhibiting or Filing Claims* — (a) In General. — See note 2.

(b) Exhibition and Filing — What Necessary. — See note 5.

**1051.** (12) *Secured Claims*. — See note 5.

**1042.** 8. Statutory Provisions. — Wade v. Peacock, 121 Ga. 816.

**1043.** 1. An Innkeeper's Claim for the Rent of a Room is not entitled to priority as a claim for rent. Ferris's Estate, 7 Pa. Dist. 425, 28 Pittsb. L. J. N. S. (Pa.) 444.

9. *Wages*. — In re Heywood, (1897) 2 Ch. 593; Chicago Title, etc., Co. v. McGlew, 193 Ill. 457, affirming 90 Ill. App. 58 (effect of intermingling claim for wages and money loaned in account).

Claims for Services of Minors rendered to the decedent are not entitled to preference under the Kentucky statute. Story v. Story, 62 S. W. Rep. 865, 22 Ky. L. Rep. 1869, reaffirming (Ky. 1901) 61 S. W. Rep. 279.

**1044.** 5. Following Trust Funds. — Officer v. Officer, (Iowa 1904) 101 N. W. Rep. 484; Deering Harvester Co. v. Keifer, 11 Ohio Cir. Dec. 270, 20 Ohio Cir. Ct. 311; Matter of Belt, 29 Wash. 535, 92 Am. St. Rep. 916. See generally the title TRUSTS AND TRUSTEES, **1108**. 10 *et seq.*

6. Trust Funds — Not Earmarked. — Rockwood v. School Dist., 70 N. H. 388 (misappropriation of funds by treasurer of school district).

Dissipation of Personalty by Life Tenant. — Quicksall v. Chew, (N. J. 1897) 38 Atl. Rep. 442.

**1045.** 1. Ramsay v. Whitbeck, 183 Ill. 550; Eddy v. People, 187 Ill. 304; Deiterman v. Ruppel, 200 Ill. 199; Felsenthal v. Kline, 214 Ill. 121; Jarrett v. Johnson, 216 Ill. 212.

3. Technical Trusts Only Included. — Ford v. Stuart First Nat. Bank, 100 Ill. App. 70, reversed 201 Ill. 120, holding that a claim for money placed in an agent's hand for investment was not entitled to a preference. Felsenthal v. Kline, 214 Ill. 121, following Svanoe v. Jurgens, 144 Ill. 507; Wilson v. Kirby, 88 Ill. 566; Shipherd v. Furness, 153 Ill. 590.

4. Money Received as Executor. — Jarrett v. Johnson, 216 Ill. 212.

**1047.** 6. A Debt to a School District has been held not to be entitled to a preference. Rockwood v. School Dist., 70 N. H. 388.

**1048.** 4. Taxes Assessed After Death of Decedent. — Graham v. Russell, 152 Ind. 186.

5. Parochial and Local Rates are entitled to a preference in England by virtue of statutory provision. In re Heywood, (1897) 2 Ch. 593.

**1049.** 1. A Claim for the Purchase Price on

a Conditional Sale of goods to the decedent, the title to remain in the seller until the purchase price was paid, has been held not to be a preferred claim against the estate, though the executor, in ignorance of the title to the goods, sold them as the property of the decedent. In re Osburn, 36 Oregon 8.

3. Kelley v. Terhune, 113 Ga. 365, holding that the assent of the debtor to the correctness of the account liquidates the claim.

**1050.** 2. Exhibiting Claims. — Walley v. Gentry, 68 Mo. App. 298; Bell v. Farmers' etc., Nat. Bank, 33 Tex. Civ. App. 408.

Absence of Coexecutors from State. — Under the Texas statute giving a preference to claims filed within twelve months, and further providing that the time during which an executor or administrator is absent from the state shall be added to such twelve months, in the case of joint executors only the time during which both of the executors were absent can be added to the twelve months. Adoue v. Gonzales, 22 Tex. Civ. App. 73.

5. Mailing a Claim to the Executor for Classification within the statutory time is not a sufficient presentation to entitle it to rank with those presented within that time, where it is not received by the executor until the statutory time has elapsed. Adoue v. Gonzales, 22 Tex. Civ. App. 73.

**1051.** 5. Judgment Lien. — Morton v. Adams, 124 Cal. 229, 71 Am. St. Rep. 53; Wolfe v. Robbins, 10 Kan. App. 222; Valentine v. Britton, 127 N. Car. 57; O'Brien's Estate, 19 Pa. Co. Ct. 467 (payment from insurance money on building destroyed after death of decedent).

The presentation and allowance of a judgment against a decedent does not affect the priority of the judgment to the extent of the lien. Morton v. Adams, 124 Cal. 229, 71 Am. St. Rep. 53.

Mortgages. — Milward v. Shields, (Ky. 1897) 43 S. W. Rep. 184, 39 L. R. A. 506; Day v. Davis, (Ky. 1898) 47 S. W. Rep. 769.

The Montana statute entitles the mortgagee to payment of the amount of his mortgage from the proceeds of the mortgaged property in preference to the general expenses of administration. In re Horsfall, 20 Mont. 495.

Chattel Mortgage. — Mathew v. Mathew, 138 Cal. 334.

Pledge — Necessity of Possession. — A pledge



**1052.** See notes 1, 2, 3.

Mortgages — Statutory Preference. — See notes 4, 5.

**1053.** (13) *Partnership Debts* — General Rule. — See note 4.

**1055.** 4. Preference by Executor or Administrator — (a) IN GENERAL. — See note 3.

**1057.** 5. Retainer — a. BY EXECUTOR OR ADMINISTRATOR — (1) *In General*. — See notes 3, 4.

**1059.** (3) *Extent of Right of Retainer*. — See note 3.

(4) *Out of What Assets Right May Be Exercised* — (a) *Specific Property*. — See note 4.

**1060.** (b) *Retainer from Equitable Assets*. — See note 1.

that is incomplete for want of possession by the pledgee cannot be perfected after the death of the pledgor by taking possession so as to entitle the claim to a preference, since in ascertaining the rank of the creditors of the decedent the legal situation is to be taken as it was at the moment of his death. *Gragard's Succession*, 106 La. 298.

**Attachment Lien.** — *Lafferty v. Lafferty*, (Mich. 1905) 102 N. W. Rep. 626.

**1052.** 1. *In re* McMurdo, (1902) 2 Ch. 684 (right to prove in with other creditors where security has depreciated); *Woolley v. Johnson*, 102 Ky. 155; *Nickerson v. Chase*, 90 Me. 296.

**Security Furnished by Third Persons.** — *Browne v. Browne*, (1904) 1 Ir. R. 299.

**2. Waiver of Lien.** — *Matter of Turner*, 128 Cal. 388 (allowance of claim); *Nickerson v. Chase*, 90 Me. 296. See, however, *Funk v. Seehorn*, 99 Mo. App. 587 (lien of cotenant for contribution from deceased cotenant); *Sutherland v. Elmendorf*, 24 Tex. Civ. App. 137.

Mere presentation of the claim is not a waiver of the mortgage lien. *Mathew v. Mathew*, 138 Cal. 334 (chattel mortgage); *National L. Ins. Co. v. Fitzgerald*, 61 Neb. 692.

**3.** *Matter of McDougald*, 146 Cal. 196. See *Lofland v. Cowger*, 68 Ark. 274; *Sutherland v. Elmendorf*, 24 Tex. Civ. App. 137.

**4.** See *Swift v. Harley*, 20 Ind. App. 614 (mortgage assumed by decedent).

**5.** *Matter of McDougald*, 146 Cal. 196.

**Contribution Between Mortgagees in Satisfying Preferred Claims.** — The *Texas* statute places all mortgage and other lien creditors upon the same footing, except that it gives to each mortgage or lien creditor preference in respect to the very property mortgaged to him. Hence, where both realty and personalty are mortgaged, the mortgagee of realty cannot insist that, in the satisfaction of superior claims, the mortgaged personalty shall be exhausted before resort to the mortgaged realty. Both classes of property must contribute ratably. *Barnes v. Scottish-American Mortg. Co.*, 29 Tex. Civ. App. 443.

**1053.** 4. *Judgment Against Partner on Firm Debt*. — See *Matter of Blackford*, 35 N. Y. App. Div. 330 (judgment against deceased partner for partnership tort). *Rush v. Kelley*, 34 Ind. App. 449; *Peters's Succession*, 114 La. 952; *Zieschang v. Helmke*, (Tex. Civ. App. 1904) 84 S. W. Rep. 436; *King v. Battaglia*, (Tex. Civ. App. 1905) 84 S. W. Rep. 839.

**1055.** 3. *An Executor's or Administrator's Right of Preference* stands on the same footing as his right of retainer, and can be exercised only as between creditors of equal degree; a

simple contract creditor cannot be preferred to a specialty creditor. *In re Hankey*, (1899) 1 Ch. 541. See generally the title EXECUTORS AND ADMINISTRATORS, 912. 2 *et seq.*

**1057.** 3. *Retainer*. — *Davies v. Parry*, (1899) 1 Ch. 602, 68 L. J. Ch. 346, 47 W. R. 429; *In re Langley*, 68 L. J. Ch. 361; *In re Belham*, (1901) 2 Ch. 52, *affirming* 84 L. T. N. S. 300; *In re Fludyer*, (1898) 2 Ch. 562, 79 L. T. N. S. 298; *Hasluck v. Clark*, (1899) 1 Q. B. 699, *affirming* (1898) 2 Q. B. 28.

**The Position of an Administrator** with respect to the right of retainer is not to be differentiated from that of an executor. *In re Belham*, 84 L. T. N. S. 300, *affirmed* (1901) 2 Ch. 52.

**Receipt of Assets Necessary to Exercise of Right.** — The right of retainer, as the name itself implies, is applicable only to a fund which the legal representative has actually or constructively got into his possession. *Pulman v. Meadows*, (1901) 1 Ch. 233. See also *In re Rhoades*, (1899) 2 Q. B. 347, *affirming* (1899) 1 Q. B. 905; *Jordan v. Hardie*, 131 Ala. 72.

**4. Reason for Doctrine of Retainer.** — *In re Hayward*, (1901) 1 Ch. 221, *approving In re Dunning*, 54 L. J. Ch. 900; *In re Ridley*, (1904) 2 Ch. 774.

**1059.** 3. *Cannot Retain as Against Superior Debt*. — *In re Hankey*, (1899) 1 Ch. 541; *In re Rhoades*, (1899) 2 Q. B. 347, *affirming* (1899) 1 Q. B. 905.

The provision in a creditor's administration bond that he will pay all debts ratably and proportionately and according to the priority required by law does not deprive the creditor-administrator of his right of retainer as against other debts of equal degree. *Davies v. Parry*, (1899) 1 Ch. 602; *In re Belham*, (1901) 2 Ch. 52, *affirming* 84 L. T. N. S. 300.

**4. Where the Executor's Claim Largely Exceeded the Value of His Testator's Estate**, it was held that he might retain the entire assets *in specie* without first realizing on them. *In re Gilbert*, (1898) 1 Q. B. 282, 77 L. T. N. S. 775.

**1060.** 1. *No Right to Retain from Equitable Assets*. — *In re Hayward*, (1901) 1 Ch. 221; *In re Rhoades*, (1899) 2 Q. B. 347, *affirming* (1899) 1 Q. B. 905.

**Proceeds of Realty.** — In *England* the executor cannot retain from the proceeds of realty sold. *In re Williams*, (1904) 1 Ch. 52.

In *Ontario*, where an executor allows real estate assets to pass from his possession and control by failing to register a caution within twelve months, in accordance with statutory requirements, his right of retainer is lost as to such assets. *In re Starr*, 2 Ont. L. Rep. 762.

**1060.** (5) *For What Debts Retainer May Be Exercised* — (a) Character of Debt — Claims Barred by Limitations. — See notes 5, 6.

**1061.** (b) Character in Which Claim Is Owing to Executor. — See note 3.

(6) *Time Within Which Right Must Be Exercised*. — See notes 4, 5, 6.

**1062.** c. STATUTORY LIMITATIONS. — See notes 3, 4.

### III. PRESENTATION OF CLAIMS. — 2. What Claims Must Be Presented

— a. IN GENERAL. — See note 7.

**1063.** See note 2.

**Right of Retainer Out of Funds in Court.** — See *Pulman v. Meadows*, (1901) 1 Ch. 233; *In re Langley*, 68 L. J. Ch. 361; *Taaffe v. Taaffe*, (1902) 1 Ir. R. 148.

**1060. 5. Claims Barred by Limitations — May Not Retain.** — *Taylor v. Crook*, 136 Ala. 354, 96 Am. St. Rep. 26; *Farrow v. Nevin*, 44 Oregon 496. See also *Willis v. Sutton*, 116 Ga. 283; *Beckham v. Beckham*, 113 Ga. 381, *distinguishing Baker v. Bush*, 25 Ga. 594, 71 Am. Dec. 193; *Eckert's Estate*, 18 Lanc. L. Rev. (Pa.) 58; *Hartz's Estate*, 20 Lanc. L. Rev. (Pa.) 25.

**6. May Retain.** — *Brown v. Greene*, 181 Mass. 109, 92 Am. St. Rep. 404. See also *In re Starr*, 2 Ont. L. Rep. 762.

**1061. 3. For a Claim Payable to an Executor as Trustee.** — *Davies v. Parry*, (1899) 1 Ch. 602.

**The Executor of a Sole Trustee** upon whom the duties of the trust devolve, and who has never acted in the trust, may refuse to exercise the right of retainer for a debt from his decedent to the trust estate in favor of the *cestui que trust*. *In re Ridley*, (1904) 2 Ch. 774.

**A Cestui Que Trust.** — *Contra*, that where there are trustees competent to sue for the debt, the right of retainer does not exist. *In re Hayward*, (1901) 1 Ch. 221, *following In re Dunning*, 54 L. J. Ch. 900.

**Claim Payable to Corporation — Manager of Corporation Appointed Administrator.** — The manager of a corporate creditor, to whom letters of administration have been granted as an individual, and not for the use of the corporation, has no right of retainer for a debt due to the corporation. *In re Richards*, (1901) 2 Ch. 399.

**4. Retainer After Decree for Administration of Assets.** — *Davies v. Parry*, (1899) 1 Ch. 602, 68 L. J. Ch. 346, 47 W. R. 429; *In re Hankey*, (1899) 1 Ch. 541.

**5. Taaffe v. Taaffe**, (1902) 1 Ir. R. 148; *In re Langley*, 68 L. J. Ch. 361, holding it immaterial that the order for payment into court was on the application of the executor.

**6. Receivership.** — *Taaffe v. Taaffe*, (1902) 1 Ir. R. 148.

But the executor may retain from assets received before the appointment of the receiver, even after payment of the assets over to the receiver, as such payment is of no greater effect than a payment into court. *In re Rhoades*, (1899) 2 Q. B. 347, 68 L. J. Q. B. 804, 80 L. T. N. S. 742, 47 W. R. 561.

**1062. 3. Statutes.** — By statute the debt or claim of an executor or administrator sometimes has no preference over other debts of the same class, and the representative is prohibited from retaining any part of the property of the estate in satisfaction thereof until the debt or claim shall have been proved to and allowed by

the courts. *Matter of Marcellus*, 165 N. Y. 70, *affirming* 25 N. Y. App. Div. 621. See also *Matter of Arkenburgh*, 58 N. Y. App. Div. 583.

But the right of retainer by an executor is recognized in *Massachusetts*. *Brown v. Greene*, 181 Mass. 109, 92 Am. St. Rep. 404.

See further *infra*, this title, **1072. 3, 4; 1093. 6.**

**4. The Georgia Statute** (3 Code Ga. 1895, § 2423), provides that "if the administrator is himself a creditor, he cannot retain his own debt, but must share with others of equal dignity." *Beckham v. Beckham*, 113 Ga. 381.

**7. What Claims Must Be Presented.** — *In re Gladough*, 1 Alaska 649 (claim arising out of partnership); *Berryhill v. Casquette*, 88 Minn. 281 (claim arising out of contract).

**Equitable Claims.** — A claim for a stockholder's liability for corporate debts, though the amount has not been determined and can be determined only by a suit in equity, must be presented under the *California* statute. *Barthe v. Rogers*, 127 Cal. 52, *disapproving Neis v. Farquharson*, 9 Wash. 517. See also *Morse v. Pacific R. Co.*, 191 Ill. 356, *affirming* 93 Ill. App. 31. *Contra in Vermont*, *Barton Nat. Bank v. Atkins*, 72 Vt. 33. And in *Illinois* a claim against stockholders of a national bank for liability for corporate debts need not be presented. *Mortimer v. Potter*, 213 Ill. 178.

**Claims Arising on Contracts.** — See *Clark v. Gates*, 84 Minn. 381.

**Claims for Breach of Warranty in Sales of Personality** must be presented. *Clark v. Gates*, 84 Minn. 381.

**A Claim Against a Surety on a Bond** which was breached during the surety's life must be presented. *Municipal Ct. v. Whaley*, (R. I. 1904) 57 Atl. Rep. 1061.

**A Claim for Funeral Expenses** need not be presented in *California*. *Potter v. Lewin*, 123 Cal. 146.

**A Claim for Damages for Obstruction of a Right of Way** must be presented. *Randall v. Brayton*, 26 R. I. 233.

**Expenses of Last Illness.** — Under the *Iowa* statute giving a preference to the expenses of the last illness of the decedent, and placing in the fourth class claims presented within the first six months of administration, and further providing that claims of the fourth class not presented within one year shall be barred, the failure to present a claim constituting a part of the expenses of the last illness of the decedent is not barred by the failure to present it within one year, though such failure may result in the loss of the statutory preference. *Wolfe v. Knapp*, (Iowa 1905) 103 N. W. Rep. 369.

**1063. 2. The Claim of a Nonresident Creditor** must be presented. *Winter v. Winter*, 101 Wis.

**1063. Claim for Specific Property.** — See note 3.

*b. JUDGMENTS* — (1) *In General.* — See note 4.

(2) *Judgments Constituting Liens.* — See note 5.

*c. CLAIMS ON WHICH ACTIONS WERE PENDING.* — See note 7.

**1064. *d. DEBTS INCURRED BY REPRESENTATIVE.*** — See note 3.

*e. CLAIMS AGAINST A DECEASED FIDUCIARY* — (1) *In General.*

— See note 4.

**1065. *g. WIDOW'S AWARD OR ALLOWANCE.*** — See note 2.

*h. CONTINGENT CLAIMS* — (1) *Necessity for Presentation* — Statutes Requiring Presentation. — See note 4.

Presentation Not Required. — See note 6.

**1066. See note 1.**

(2) *What Constitute Contingent Claims* — (a) *In General.* — See note 2.

494; *Fields v. Mundy*, 106 Wis. 383, 80 Am. St. Rep. 39.

**1063. 3. Owner of Specific Property Need Not Present Claim.** — *Hunnicut v. Higginbotham*, 138 Ala. 472, 100 Am. St. Rep. 45 (trover against executor for conversion of specific moneys); *Sprague v. Walton*, 145 Cal. 228 (money capable of identification); *Bramell v. Adams*, 146 Mo. 70; *Rice v. Connelly*, 71 N. H. 382; *Quicksail v. Chew*, (N. J. 1897) 38 Atl. Rep. 442; *Barlow v. Anglin*, (Tex. Civ. App. 1898) 45 S. W. Rep. 857; *Curran v. Texas Land, etc., Co.*, 24 Tex. Civ. App. 499 (recovery of land on breach of contract of sale); *Schmitt v. Jacques*, 26 Tex. Civ. App. 125 (trover for value of specific property sold by administrator). See also *Haven v. Haven*, 181 Mass. 573.

**A Claim for Specific Property Held in Trust** need not be presented. *Elizalde v. Elizalde*, 137 Cal. 634 (money).

**Claim for Accounting Between Partners.** — Under the *Wisconsin* statute with regard to the presentation of claims, the failure of a partner to present a claim with regard to partnership property against the estate of a deceased partner does not bar his right to an accounting with regard to such property, though it may bar his right to recover from the assets of the deceased partner's estate any balance due him on the accounting after the distribution of the partnership property. *Stehn v. Hayssen*, (Wis. 1905) 102 N. W. Rep. 1074.

**4. Judgments — Presentation or Filing Necessary.** — *Beekman v. Richardson*, 150 Mo. 430; *Wenker v. Thompson*, 96 Mo. App. 59, following *McPaul v. Haley*, 166 Mo. 56; *Fields v. Mundy*, 106 Wis. 383, 80 Am. St. Rep. 39 (judgment of sister state). See also *Martin County Nat. Bank v. Bird*, 92 Minn. 110.

**A Judgment Recovered Against the Executor or Administrator** as such need not be presented. *Gewe v. Hanszen*, 85 Mo. App. 136. But judgments against executors or administrators are to be presented to the probate court for classification under the *Missouri* statute. *Ryans v. Boogher*, 169 Mo. 673.

**Judgment of Foreign States.** — The necessity for presenting a judgment of a sister state is not affected by the federal constitutional provision requiring full faith and credit to be given to such judgment. *Fields v. Mundy*, 106 Wis. 383, 80 Am. St. Rep. 39.

**5. Judgments Constituting Liens.** — *Ambrose v. Byrne*, 61 Ohio St. 146.

**7. Claims the Subject of Pending Actions** must be presented to the representative under Code Civ. Pro. Cal., § 1502. *Vermont Marble Co. v. Black*, 123 Cal. 21; *Frazier v. Murphy*, 133 Cal. 91.

**1064. 3. Claims Founded on Acts of Representatives.** — *King v. Battaglia*, (Tex. Civ. App. 1905) 84 S. W. Rep. 839.

**4. Claims Against Fiduciary Must Be Presented.** — *McIlroy Banking Co. v. Dickson*, 66 Ark. 327; *Bramell v. Adams*, 146 Mo. 70.

**1065. 2. Rush v. Kelley**, 34 Ind. App. 449.

**4. Presentation of Contingent Claims Required.** — *Morrow v. Barker*, 119 Cal. 65; *Easton v. Somerville*, 111 Iowa 164, 82 Am. St. Rep. 502; *Barto v. Stewart*, 21 Wash. 605, the last case holding that a claim for a stockholder's liability for corporate debts must be presented though the amount of the claim is undetermined.

But a claim which did not exist until after the expiration of the statutory period for presenting claims is not barred thereby. *Matter of Macdonald*, 29 Wash. 422.

**6. Contingent Claims Not Requiring Presentation** — *United States*. — *Rankin v. Big Rapids*, (C. C. A.) 133 Fed. Rep. 670.

*Illinois*. — *Mackin v. Haven*, 187 Ill. 480, affirming 88 Ill. App. 434.

*Indiana*. — *Whitern v. Krick*, 31 Ind. App. 577.

*Iowa*. — *Security F. Ins. Co. v. Hansen*, 104 Iowa 264. See also *Pratt v. Fishwild*, 121 Iowa 642.

*Mississippi*. — *Savings, etc., Assoc. v. Tartt*, 81 Miss. 276.

*Nebraska*. — *Stichter v. Cox*, 52 Neb. 532.

*New Jersey*. — *Field v. Thistle*, 58 N. J. Eq. 339.

*Texas*. — *National Guarantee L. & T. Co. v. Fly*, 29 Tex. Civ. App. 533.

*Wisconsin*. — *South Milwaukee Co. v. Murphy*, 112 Wis. 614.

**Happening of Contingency — Effect.** — *Hunt v. Burns*, 90 Minn. 172.

While a contingent claim against the estate of the deceased person need not be presented, still, if the event whereby it becomes absolute happens before the expiration of the time within which claims may be presented, the claim must be presented or it will be barred. *Jorgenson v. Larson*, 85 Minn. 134.

**1066. 1. Jorgenson v. Larson**, 85 Minn. 134.

**2. Definition of Contingent Claims.** — *Matter of McDougald*, 146 Cal. 196; *Easton v. Somer-*



**1067.** Uncertainty of Claim. — See note 2.

(b) *Claims Arising Out of Contract of Suretyship* — *bb.* CLAIMS IN FAVOR OF SURETIES. — See note 8.

**1068.** *i.* PUBLIC DEBTS — (1) *Debts Due the United States.* — See note 4.

(2) *Debts Due the States.* — See note 6.

Taxes. — See note 8.

**1069.** *k.* DEBTS NOT DUE. — See note 5.

**1070.** 1. SECURED CLAIMS — (1) *In General.* — See note 1.

View that Presentation Is Necessary. — See note 2.

(2) *Claims Secured by Mortgage* — (a) *In General.* — See note 3.

**1071.** Doctrine that Lien Lost by Failure to Present. — See note 1.

ville, 111 Iowa 164, 82 Am. St. Rep. 502 (claim of ward before majority for improper investment by guardian of funds on mortgage); *Stichter v. Cox*, 52 Neb. 532; *Brown v. Dunn*, 75 Vt. 264.

**Stockholder's Liability.** — *Rankin v. Big Rapids*, (C. C. A.) 133 Fed. Rep. 670.

**Assumption of Mortgage.** — *Stichter v. Cox*, 52 Neb. 532; *Field v. Thistle*, 58 N. J. Eq. 339, following *Terhune v. White*, 34 N. J. Eq. 98.

**A Stockholder's Liability for Corporate Debts** was held to be contingent in *Mortimer v. Potter*, 213 Ill. 178 (stockholder of national bank); *Hazlett v. Blakely*, (Neb. 1903) 97 N. W. Rep. 808; *Matter of Macdonald*, 29 Wash. 422; *South Milwaukee Co. v. Murphy*, 112 Wis. 614.

**Breach of Contract of Sale of Realty.** — Where a landowner enters into an agreement for the sale of his land, in which the wife does not join, damages for breach upon his death cease to be contingent upon the absolute refusal of the widow to convey as to her statutory third therein. *Jorgensen v. Larson*, 85 Minn. 134.

**Absolute Guaranty.** — Liability on the absolute guaranty of the debt of another is not contingent so as to excuse the failure to present. *National Guarantee L. & T., etc., Co. v. Fly*, 29 Tex. Civ. App. 533.

**A Claim for Rent to Accrue** under a lease to terminate upon destruction of the leased premises is contingent. *Mackin v. Haven*, 187 Ill. 480, affirming 88 Ill. App. 434.

**Covenant Against Incumbrances.** — A claim for damages for breach of a covenant against incumbrances is contingent prior to a substantial breach. *Whittern v. Krick*, 31 Ind. App. 577. See also *McClure v. Dee*, 115 Iowa 546, 91 Am. St. Rep. 181 (nominal breach).

**1067. 2.** See *Crosby v. Montclair Circuit Judge*, 125 Mich. 24, 7 Detroit Leg. N. 399.

**8. The Claim of a Surety on a Guardian's Bond** against the principal for indemnification has been held to be contingent. *Savings, etc., Assoc. v. Tartt*, 81 Miss. 276.

**1068. 4. Debts Due United States.** — *U. S. v. Fidelity Trust Co.*, 121 Fed. Rep. 766, 58 C. C. A. 42.

**6. A Claim by a County** must be presented. *Matter of Jacob*, 119 Iowa 176.

**8. Taxes.** — *Graham v. Russell*, 152 Ind. 186; *Cullop v. Vincennes*, 34 Ind. App. 667.

**1069. 5. Claims Must Be Presented though Not Due.** — *Morrow v. Barker*, 119 Cal. 65; *Johnson v. Tryon*, 78 Ill. App. 158 (claims may be presented before maturity); *McElroy v. Brooke*, 104 Ill. App. 220 (claims not due may

be presented for allowance); *Bassett v. Drew*, 176 Mass. 141; *State v. Browning*, 102 Mo. App. 455. See also *Brown v. Dunn*, 75 Vt. 264 (claim payable on death of third person). Compare *Kentucky Title Co. v. English*, (Ky. 1899) 50 S. W. Rep. 968.

**A Liability on a Stock Subscription Subject to Call** need not be presented in *Nebraska*. *Fitzgerald v. Union Sav. Bank*, 65 Neb. 97.

**The Wisconsin Statute** expressly provides for the presentation of claims accruing after the death of the decedent within a certain time after their maturity. *Michel Brewing Co. v. Wightman*, 97 Wis. 657.

**1070. 1. A Mortgagee's Right to Foreclose** is not affected by the death of the mortgagor. *National L. Ins. Co. v. Fitzgerald*, 61 Neb. 692, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1069.

**Vendor's Lien.** — In *Texas* a vendor's lien is not lost by failure to present a claim. *Curran v. Texas Land, etc., Co.*, 24 Tex. Civ. App. 499; *Ferguson v. McCrary*, 20 Tex. Civ. App. 529, holding that the claim need not be presented against the estate of a subsequent purchaser. See also *Brandenburg v. Norwood*, (Tex. Civ. App. 1901) 66 S. W. Rep. 587.

**2. Presentation Necessary.** — Compare *McIlroy Banking Co. v. Dickson*, 66 Ark. 327.

**3. Mortgage Lien Not Affected by Nonpresentation.** — *Townsend v. Thompson*, 24 Colo. 411 (deed of trust); *Swift v. Harley*, 20 Ind. App. 614 (mortgage assumed by decedent); *Kirman v. Powning*, 25 Nev. 378, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1070; *Matter of Eadie*, (Surrogate Ct.) 39 Misc. (N. Y.) 117 (mortgage held by executor); *Gleason v. Hawkins*, 32 Wash. 464. See also *Smith's Estate*, 194 Pa. St. 259.

**Loss of Interest through Failure to Present.** — Under the *Kentucky* statute a mortgagee, in order to enable him to claim interest on his mortgage after the death of the mortgagor, must present his claim within a year. *Guill v. Corinth Deposit Bank*, (Ky. 1902) 68 S. W. Rep. 870.

**1071. 1.** *Matter of Turner*, 128 Cal. 388; *Wilson v. Harris*, 91 Tex. 427; *Texas Loan Agency v. Dingee*, 33 Tex. Civ. App. 118.

**Mortgage on Exempt Property — Homestead.** — Under the *California* statute it is not necessary to present a claim secured by a mortgage on the homestead if the homestead was not selected and declared to be such prior to the death of the mortgagor, but was instead set apart by the court. *Browne v. Sweet*, 127 Cal. 332.

**1072.** (3) *Claims Secured by Deed of Trust with Power of Sale.* — See note 2.

*m.* CLAIMS OF EXECUTOR OR ADMINISTRATOR. — See notes 3, 4.

**3. Manner of Presentation** — *a.* BY WHOM TO BE MADE. — See note 5.

**1073.** See notes 2, 3.

**1074.** *b.* TO WHOM MADE. — See notes 1, 2.

*c.* SUFFICIENCY OF PRESENTATION — (1) *In General.* — See notes 3, 4, 5, 6.

**Mortgage Purchasing at Judicial Sale.** — It has been held that where the mortgagee fails to present his mortgage and purchases the mortgaged property at its sale under order of the court, he is not entitled to have the amount of the mortgage indebtedness applied in satisfaction of his bid. *Matter of Turner*, 128 Cal. 388; *Pereles v. Leiser*, 119 Wis. 347.

**1072. 2. Power of Sale.** — *Miles v. Coleman Nat. Bank*, (Tex. Civ. App. 1904) 84 S. W. Rep. 284.

**3. Statutes Requiring Representative's Claims to Be Presented to Courts.** — *Gallivan v. Jones*, (C. C. A.) 102 Fed. Rep. 423 (construing the *California* statute); *Farrow v. Nevin*, 44 Oregon 496; *Strickland v. Sandmeyer*, 21 Tex. Civ. App. 351. See also *In re Ward*, 12 Ohio Cir. Dec. 44, 21 Ohio Cir. Ct. 753; *Eckert's Estate*, 18 Lanc. L. Rev. 58. And see *infra*, this title, **1093. 6.**

*In New York* an executor or administrator is prohibited from retaining any part of the property of the decedent in satisfaction of his claim until it has been established in the courts; but this may be done by proof to the surrogate and allowance by him on the judicial settlement of the account. *Matter of Marcellus*, 165 N. Y. 70, *affirming* 25 N. Y. App. Div. 621; *Matter of Arkenburgh*, 58 N. Y. App. Div. 583; *Matter of Warner*, (Surrogate Ct.) 39 Misc. (N. Y.) 432. Thus, a widow, the sole executrix of a will, cannot set off the amount of her statutory exemption or pay herself out of the funds of the estate. The proper time to adjust the matter is on the judicial settlement of her account. *Matter of Warner*, 53 N. Y. App. Div. 565.

**Retainer Against Real Estate.** — An executor or administrator cannot exercise his right of retainer against land or its proceeds, until his claim is established, after adversary proceedings commenced within the period of limitations. *Taylor v. Crook*, 136 Ala. 354.

**Proof of Claim — Burden of Proof.** — An executor or administrator having a claim against the estate of his decedent has the burden of proving it in the same manner and with the same degree of strictness as any other creditor. *Hood v. Maxwell*, 66 S. W. Rep. 276, 23 Ky. L. Rep. 1791; *In re Dimmick*, 111 La. 655; *Matter of Smith*, 75 N. Y. App. Div. 339; *Matter of Furniss*, 86 N. Y. App. Div. 96; *Matter of Gill*, (Surrogate Ct.) 42 Misc. (N. Y.) 457, *affirmed* without opinion (Supm. Ct. App. Div.) 81 N. Y. Supp. 1005; *McCann's Estate*, 11 Pa. Dist. 244; *Leavell v. Smith*, 99 Va. 374; *Scott v. Porter*, 99 Va. 553.

A personal representative, being the custodian of the books and papers of his decedent, has the burden of proving title to documentary evi-

dence showing him to be a creditor of the estate. *Simonds's Estate*, 201 Pa. St. 413, *affirming* 31 Pittsb. Leg. J. N. S. (Pa.) 291, *citing* *McGeary's Appeal*, (Pa. 1886) 5 Cent. Rep. 852. See also *Trimmer v. Darden*, 61 S. Car. 220. *Compare* *Ike's Estate*, 200 Pa. St. 202, *citing* *Kuhlman's Estate*, 178 Pa. St. 48.

**4. May Retain and Prove on Final Accounting.** — *Willis v. Sutton*, 116 Ga. 283.

**5. By Whom Presentation to Be Made.** — *Thomson v. Black*, 200 Ill. 465, *affirming* 102 Ill. App. 304 (claim on bond of deceased executor); *Kline's Estate*, 9 Pa. Dist. 386 (committee of lunatic).

**1073. 2. Presentation by Stranger.** — *Rayburn v. Rayburn*, 130 Ala. 217; *Jones v. Peebles*, 130 Ala. 269.

**3. Fitzgerald v. Union Sav. Bank**, 65 Neb. 97 (assignee).

**1074. 1. Coexecutors.** — *Carrington v. Odom*, 124 Ala. 529. See also *Cross v. Long*, 66 Kan. 293, *citing* 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1074.

**2. Change in Administration.** — *Parks v. Lubbock*, (Tex. Civ. App. 1899) 50 S. W. Rep. 466, *reversed* 92 Tex. 635.

**3. Statutory Requirements Strictly Construed.** — *Miller v. Ewing*, 68 Ohio St. 176 (exhibiting note by showing it to executor and demanding part payment).

**Filing Claim with Executor.** — Under the *North Carolina* statute, preventing the bar against claims filed with the executor, the presentation of a note to the executor, the validity of which he acknowledges and upon which he makes part payment, is a sufficient filing though the note is not left in possession of the executor. *Hinton v. Pritchard*, 126 N. Car. 8, *citing* *Stone-street v. Frost*, 123 N. Car. 640, where a sheriff presented an execution issued before the decedent's death to the administrator and demanded payment, and the claim was admitted to be correct.

**4. Strict Compliance Necessary Where Requirements Express.** — *Corson v. Waller*, 104 Mo. App. 621 (failure to state amount of claim). See also *Cheairs v. Cheairs*, 81 Miss. 662.

Under the *Missouri* statute (Rev. Stat. Mo. 1899, § 188) a person presenting a claim based on a note must set out a copy of the note. *Waltemar v. Schnick*, 102 Mo. App. 133.

**5. Form of Presentation.** — *Altgelt v. Elmen-dorf*, (Tex. Civ. App. 1905) 86 S. W. Rep. 41.

**Failure to Object to the Form of presentation** may amount to a waiver of defects. See *Ross v. Knox*, 71 N. H. 249.

**6. Jones v. Peebles**, 130 Ala. 269; *Borum v. Bell*, 132 Ala. 85; *Ross v. Knox*, 71 N. H. 249.

**1075.** Description of Claim. — See note 2.

(2) *Institution of Suit as a Presentation* — (a) *In General*. — See note 7.

**1076.** (3) *Knowledge of Personal Representative*. — See notes 4, 5.

**1077.** (5) *Presentation by Filing Claim* — (a) *In General* — *Statement of Claim*. — See note 5.

**1078.** 4. *Time of Presentation* — a. *IN GENERAL*. — See note 8.

**1079.** b. *RUNNING OF TIME* — (1) *In General*. — See notes 1, 4.

(2) *Exceptions and Interruptions* — (a) *In General*. — See notes 7, 8.

**1080.** See notes 1, 3.

**1075.** 2. *Sufficiency of Description of Claim*. — Maurer v. King, 127 Cal. 114; Goltra v. Penland, 42 Oregon 18.

*The Presentation of a Copy of the Contract*. — McFarland v. Fairlamb, 18 Wash. 601; Olympia First Nat. Bank v. Root, 19 Wash. 111.

*Insufficient Descriptions*. — See Barthe v. Rogers, 127 Cal. 52; Etchias v. Orena, 127 Cal. 588; Anderson v. Williams, 26 R. I. 64, holding that a person presenting a claim for services for a specified period cannot sue for services rendered outside of such period or for a greater amount than the claim presented.

*Statement of Claim Secured by Mortgage*. — See Moore v. Russell, 133 Cal. 297, 85 Am. St. Rep. 166, wherein the statement was held to be sufficient.

In presenting a claim secured by mortgage a description of the mortgage also is required, under the *California* statute, in order to constitute a presentation of the mortgage, though the copy of the note recites that it is secured by mortgage. Matter of Turner, 128 Cal. 388.

*Particulars of Claim Not Due*. — Under the *California* statute requiring the claimant, where the claim is not due, to state "the particulars of such claim," a claim on a note not due which sets out a copy of the note, and therefore shows on its face that the claim is not due, is sufficient. Landis v. Woodman, 126 Cal. 454.

*Power of Executor to Demand Production of Note* — See Olympia First Nat. Bank v. Root, 19 Wash. 111.

*Amendment of Claim*. — See Matter of Turner, 128 Cal. 388; Corson v. Waller, 104 Mo. App. 621.

**7. Institution of Suit Sufficient Presentation**. — Lytle v. Davidson, 67 S. W. Rep. 34, 23 Ky. L. Rep. 2262 (demurrer waives presentation); Gewe v. Hanszen, 85 Mo. App. 136; Waltemar v. Schnick, 102 Mo. App. 133; McLeod v. Graham, 132 N. Car. 473.

**1076.** 4. *Definiteness of Knowledge Required*. — In Dime Sav. Bank v. McAlenney, 76 Conn. 141, proof that at some time unknown and in some way unknown knowledge of the existence of the claim came to the executor was held to be insufficient to show presentation.

**5. Knowledge Insufficient**. — Borum v. Bell, 132 Ala. 85; Morse v. Pacific R. Co., 191 Ill. 356, affirming 93 Ill. App. 31. See, however, Matter of Gill, (Surrogate Ct.) 42 Misc. (N. Y.) 457, wherein it appeared that the executor distributed the estate during the time for presentation though he had knowledge of the claim not presented.

**1077.** 5. *Statement of Claim*. — Parker v. Eufaula Nat. Bank, 121 Ala. 516; Matter of

McDougald, 146 Cal. 196; Carter v. Pierce, 114 Ill. App. 589; Woods v. Matlock, 19 Ind. App. 364; Hyatt v. Bonham, 19 Ind. App. 256; Masters v. Jones, 158 Ind. 647 (basing claim on implied instead of express contract); Stanley v. Pence, 160 Ind. 636, rehearing denied 160 Ind. 645; Harrison v. Harrison, 124 Iowa 525; King v. Brewer, 121 Mich. 339; Foster v. Shaffer, 84 Miss. 197 (claim for "legal advice and services rendered, five hundred dollars," sufficient); Fitzgerald v. Union Sav. Bank, 65 Neb. 97. See, however, *In re Gill*, (Supm. Ct. App. Div.) 91 N. Y. Supp. 1095, affirming (Surrogate Ct.) 42 Misc. (N. Y.) 457; Kirman v. Powning, 25 Nev. 378, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1077.

*Prima Facie Liability*. — McCulloch v. Smith, 24 Ind. App. 536, 79 Am. St. Rep. 281.

*Amendment of Claim*. — After the time for presentation of claims has expired, an amendment cannot be allowed increasing the amount of a claim. Winchell v. Sanger, 73 Conn. 399. See also Matter of Turner, 128 Cal. 388 (holding that a claim on a note cannot be amended so as to include a mortgage securing the note); Hendron v. Kinner, 110 Iowa 544.

**1078.** 8. *Time Dependent on Statutes*. — Aycock v. Johnson, 119 Ala. 405; Tinker v. Babcock, 204 Ill. 571; Seery v. Murray, 107 Iowa 384.

*Retroactive Operation of Statute*. — The *Alabama* statute (Civ. Code Ala., § 130) shortening the time within which claims against decedents' estates shall be presented did not have a retroactive effect so as to shorten the period for the presentation of claims against estates in process of administration at the time of the passage of the act. Morrisett v. Carr, 127 Ala. 277.

**1079.** 1. *Time Runs from Notice to Present Claims*. — Mason's Appeal, 75 Conn. 406.

*Delay in Filing Proof of Publication of the Notice* does not prevent the running of the *Oregon* statute from the time of publication. Conant's Estate, 43 Oregon 530.

**4. From Grant of Letters of Administration**. — Aycock v. Johnson, 119 Ala. 405.

*Before Administration Granted*. — Baker v. Halleck, 128 Mich. 180, 8 Detroit Leg. N. 569 (holding that the time does not begin to run before the appointment of an administrator though such appointment is not made until twelve years after the decedent's death); Gleason v. Hawkins, 32 Wash. 464.

**7. Butler v. Templeton**, 115 Wis. 382 (appeal from probate of will does not affect time for presentation of claims).

**8. Infants**. — Boyle v. Boyle, 126 Iowa 167.

**1080.** 1. *Infants Excepted from Operation of*



**1081.** (3) *Extension of Time.* — See notes 3, 4, 6.

**1082.** 5. *Notice for Presentation of Claims — Necessity for Notice.* — See note 1.

*Publication of Notice.* — See note 6.

**1083.** 6. *Excuses for Failure to Present Claims — a. IN GENERAL.* — See notes 1, 2, 3.

**1084.** *d. ADMINISTRATION INDEPENDENT OF COURT.* — See note 1.

*e. STATUTORY PROVISIONS — Peculiar Circumstances.* — See note 2.

*Effect of Negligence — Settlement of Estate.* — See note 3.

*Statute.* — *Whetstone v. McQueen*, 137 Ala. 301.

**1080.** 3. *Absence of Creditor from State.* — A creditor who was absent from the state only one day during the four weeks of publication of notice to creditors, and who after his return to the state received actual knowledge of the fact of publication, with ample time in which to present his claim, is not excused for failure to present by Code Civ. Pro. Cal., § 1493, providing that when it appears that the claimant had no notice, by reason of being out of the state, his claim may be presented at any time before the decree of distribution is entered. *MacGowan v. Jones*, 142 Cal. 593.

**1081.** 3. *Extension for Good Cause.* — *Fitzgerald v. Chariton First Nat. Bank*, 64 Neb. 260.

4. *Compare State v. Probate Ct.*, 79 Minn. 257, wherein a refusal to extend the time was held to be an abuse of the discretion of the probate court.

6. *A Proceeding to Revive the Time for presentation must be taken in Nebraska.* *Fitzgerald v. Chariton First Nat. Bank*, 64 Neb. 260.

**1082.** 1. *Notice to Present Claims Essential.* — *Easton v. Somerville*, 111 Iowa 164, 82 Am. St. Rep. 502; *Valentine v. Britton*, 127 N. Car. 57; *In re Ward*, 12 Ohio Cir. Dec. 44, 21 Ohio Cir. Ct. 753; *McFarland v. Fairlamb*, 18 Wash. 601; *Stewart v. Snyder*, 27 Ont. App. 423, affirmed 30 Ont. 110.

*Burden of Proof.* — *McConaughy v. Wilsey*, 115 Iowa 589.

6. *Publication Before the Order Fixing the Time for Presentation is invalid.* *Ribble v. Furmin*, (Neb. 1904) 98 N. W. Rep. 420.

*Newspaper in Which Notice Must Be Published.* — Under the *California* statute the notice must be published in some newspaper of the county, where there is such a paper. *Brouse v. Law*, 127 Cal. 152.

**1083.** 1. *No Excuse for Failure to Present Claim.* — *Morrow v. Barker*, 119 Cal. 65 (death of creditor after death of debtor); *Cockrell v. Seasongood*, (Miss. 1902) 33 So. Rep. 77 (ignorance of requirement of presentation and misleading conduct of administrator); *Beekman v. Richardson*, 150 Mo. 430 (ignorance of decedent's death). See, however, *In re Cowan*, 28 Pittsb. Leg. J. N. S. (Pa.) 119.

Action of court in allowing claims to be filed after statutory period held unauthorized. *Nebraska Wesleyan University v. Bowen*, (Neb. 1905) 103 N. W. Rep. 275.

*Ignorance of the Existence of the Claim does not excuse presentation.* *Municipal Court v. Whaley*, (R. I. 1904) 57 Atl. Rep. 1061; *Melton v. Martin*, 28 Mont. 150 (ignorance of existence of claim for money paid by mistake).

But under the *Nevada* statute, if the claimant

has no knowledge of the claim, he is entitled, after the expiration of the time for presentation, to present his claim at any time before the filing of the final account. *Pacific States Sav., etc., Co. v. Fox*, 25 Nev. 229.

*Nonresidence of the Creditor* has been held to be no excuse for failure to present the claim. *Winter v. Winter*, 101 Wis. 494; *Fields v. Mundy*, 106 Wis. 383, 80 Am. St. Rep. 39; *Hale v. Coffin*, (C. C. A.) 120 Fed. Rep. 470, affirming 114 Fed. Rep. 567.

*Approval of Claim by Executor.* — The fact that a claim is presented to an executor or administrator who approves it, but subsequently notifies the claimant that it must be filed with the clerk of probate, does not excuse the claimant from so filing the claim within the statutory time. *Smith v. Sprout*, (Tenn. Ch. 1900) 58 S. W. Rep. 376.

2. *Assurance that Claim Is Good.* — *Stebbins v. Scott*, 172 Mass. 356.

3. *Promise to Pay.* — *Bambrick v. Bambrick*, 157 Mo. 423 (promise made by administratrix before her appointment).

**1084.** 1. *Administration Independent of Court.* — *Matter of Macdonald*, 29 Wash. 422. See also *Albertson v. Prewitt*, (Ky. 1899) 49 S. W. Rep. 196 (nonappointment of administrator).

2. *Peculiar Circumstances.* — See *Henry v. Day*, 114 Iowa 454 (holding that failure to present a claim because of fraudulent representations of the executor as to the financial condition of the estate authorized the court to grant relief); *Matter of Jacob*, 119 Iowa 176, holding that the mere fact that the estate is unsettled is not sufficient.

*Ignorance of Executor's Appointment* is not ground for relief. *Hawkeye Ins. Co. v. Lisker*, 122 Iowa 341.

3. *Negligence of Claimant.* — *Potter v. Brentlinger*, 117 Iowa 536 (forgetfulness of existence of claim for goods sold); *Bentley v. Starr*, 123 Iowa 657; *Matter of Jacob*, 119 Iowa 176.

*Negligence of an Agent* is not ground for relief. *Hawkeye Ins. Co. v. Lisker*, 122 Iowa 341. But such negligence in connection with the agent's false representation that the claim has been filed is ground for granting relief. *Manatt v. Reynolds*, 114 Iowa 688.

*Culpable Neglect — Maine Statute.* — Under the Maine statute (Rev. Stat. 1883, c. 87, § 19) which provides that "if the Supreme Judicial Court, upon a bill in equity filed by a creditor whose claim had not been prosecuted within the time limited by the preceding sections, is of opinion that justice and equity require it, and that such creditor is not chargeable with culpable neglect in not prosecuting his claim within the time so limited it may give him judgment for the amount of his claim," etc., the term

**1084.** Sufficiency of Circumstances — How Determined. — See note 5.

7. Waiver of Presentation. — See note 8.

**1085.** See note 1.

8. Verification of Claims — *a.* IN GENERAL. — See notes 2, 3.

Verification Only Prerequisite to Costs. — See note 4.

**1086.** *b.* WHAT CLAIMS MUST BE VERIFIED. — See note 1.

*c.* BY WHOM VERIFIED — Personal Verification Required. — See note 4.

By Agent. — See note 5.

Affidavit Need Not Disclose that Affiant Is Agent. — See note 6.

**1087.** Verification by Corporation. — See note 3.

"culpable neglect" is less than gross carelessness but more than failure to use ordinary care. It is a culpable want of watchfulness and diligence, the unreasonable inattention and inactivity of creditors who slumber on their rights. *Holway v. Ames*, (Me. 1905) 60 Atl. Rep. 897.

**1084. 5. Question for Court — Review of Discretion.** — In *Iowa*, though the question whether relief shall be granted is largely within the discretion of the trial court, the decision of the court refusing relief will be reversed where such discretion is abused. *Manatt v. Reynolds*, 114 Iowa 688.

But under the *New Hampshire* statute which authorizes the Supreme Court to give judgment for claims not presented within the time limited, when justice and equity require it, the decision of the court that justice and equity do not require judgment for a claim not presented is a determination of a question of fact and is not subject to review. *Libby v. Hutchinson*, 72 N. H. 190.

**8. Waiver of Formal Presentation.** — *Cox v. Higginbotham*, 76 S. W. Rep. 1079, 25 Ky. L. Rep. 1057; *Hamilton v. Wright*, (Ky. 1905) 87 S. W. Rep. 1093; *Merino v. Munoz*, 99 N. Y. App. Div. 201.

**Contest of Claim.** — *Wencker v. Thompson*, 96 Mo. App. 59.

**1085. 1. Executor Cannot Waive Presentation When Failure to Present Bars Claim.** — *Winchell v. Sanger*, 73 Conn. 399, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1091; *Dime Sav. Bank v. McAlenney*, 76 Conn. 141 (part payment by executor does not revive claim not presented); *Fitzgerald v. Chariton First Nat. Bank*, 64 Neb. 260; *Crouse v. Frybarger*, 12 Ohio Cir. Dec. 254, 22 Ohio Cir. Ct. 315. See, however, *In re Pennock*, 122 Iowa 622, where the executor was held to be entitled to credit for claims paid though not properly filed against the estate; *In re Morgan*, (Oregon 1905) 78 Pac. Rep. 1029 (failure to set up defense of nonpresentation).

**Administrator Cannot Obtain Allowance on Accounting.** — It is not within the power of an administrator to waive compliance with the statute, pay a claim himself, and then, long after it has been barred, present it as a debit item in his final account and have it allowed by the court. *Gilman v. Maxwell*, 79 Minn. 377.

**Legatees and Distributees** may, as affects themselves, waive presentation of claims, as where they give to claimants an order on a certain fund for payment of claims. *Drye v. Medley*, 74 S. W. Rep. 272, 24 Ky. L. Rep. 2500.

**2. Statute Requiring Verification Is Imperative.** — *Williams v. Gerber*, 75 Mo. App. 18; *Anderson v. Cochran*, 93 Tex. 583; *McFarland v. Fairlamb*, 18 Wash. 601.

In *Alabama*, where the statute provides for presenting claims to the executor or filing them in the probate court, it is not necessary that claims presented to the executor or administrator be verified. *Peevey v. Farmers', etc., Nat. Bank*, 132 Ala. 82; *Rayburn v. Rayburn*, 130 Ala. 217; *Nicholas v. Sands*, 136 Ala. 267.

**Additional Statement of Claim.** — *Pence v. Young*, 22 Ind. App. 427, citing *Taggart v. Tevanny*, 1 Ind. App. 339.

**Presumption on Appeal.** — That a claim presented to the probate court for allowance was properly verified will be presumed on appeal where the record is silent with regard thereto. *Wood v. Flanery*, 89 Mo. App. 632.

**The Original Affidavit** must accompany the claim; a copy is insufficient. *Ash v. Clark*, 32 Wash. 390.

**3. Waiver of Verification.** — Compare *Seymour v. Goodwin*, (N. J. 1904) 59 Atl. Rep. 93 where a claim was in fact verified, but was presented without verification.

**4. Compare Lyon v. Logan County Bank**, 78 S. W. Rep. 454, 25 Ky. L. Rep. 1668.

**1086. 1. What Claims Must Be Verified.** — *Hood v. Maxwell*, (Ky. 1902) 66 S. W. Rep. 276 (claim of executor or administrator).

**Claims for Recovery of Usury Paid to the Administrator** need not be verified in *Kentucky*; only claims against the decedent must be verified. *Crenshaw v. Duff*, 113 Ky. 912.

**4. Under the Arkansas Statute**, if the affidavit is made by one other than the claimant it must show that the affiant is acquainted with the facts sworn to. *Lanigan v. North*, 69 Ark. 62.

**5. Sufficiency of Affidavit by Attorney.** — Under Code Civ. Pro. Mont., § 2604, which provides that when the affidavit is made by a person other than the claimant he must set forth in the affidavit the reason why it is not made by the claimant, an affidavit by the attorney of a claimant showing that the claimant is a corporation and that none of its officers resides in the county sufficiently shows the reason why the affidavit is not made by the claimant. *Empire State Min. Co. v. Mitchell*, 29 Mont. 55.

**6. Affidavit Not Showing Affiant to Be Agent.** — *Empire State Min. Co. v. Mitchell*, 29 Mont. 55.

But when required by statute it is otherwise. *Dawson v. Wombles*, 104 Mo. App. 272.

**1087. 3. Verification by Corporation.** — *Lanigan v. North*, 69 Ark. 62 (must be by cashier or treasurer).

**1087.** 2. SUFFICIENCY OF AFFIDAVIT — The Exact Language of the Statute Need Not Be Used. — See note 7.

**1088.** All Material Allegations Must Appear. — See note 1.

Must Be on Affiant's Own Knowledge. — See note 5.

Signature by Affiant. — See note 7.

**1089.** 9. Effect of Failure to Present Claim — *a.* IN GENERAL — Provisions of Several Statutes Stated. — See notes 1, 2, 3, 4, 5.

**1090.** What Property Regarded as New Assets. — See note 1.

*b.* CLAIM NOT PRESENTED AS OFFSET — Claim Not Available as Set-off. — See note 2.

Available as Set-off. — See note 4.

*c.* EFFECT ON LIABILITY OF THIRD PERSONS. — See note 6.

**1087.** 7. Substantial Compliance with Statute Sufficient. — *Griffith v. Lewin*, 129 Cal. 596; *Guerian v. Joyce*, 133 Cal. 405; *Crocker-Woolworth Nat. Bank v. Carle*, 133 Cal. 409 (verification of claim not due); *Waltemar v. Schnick*, 102 Mo. App. 133.

**1088.** 1. Omission of Material Allegations. — *Dewhurst v. Shepherd*, 102 Ky. 239 (omission of reasons for believing claim to be just); *Cheairs v. Cheairs*, 81 Miss. 662; *Strickland v. Sandmeyer*, 21 Tex. Civ. App. 351.

Amendment of Affidavit. — See *Dawson v. Wombles*, 104 Mo. App. 272.

**5.** Affidavit Need Not Show Source of Knowledge. — *Dawson v. Wombles*, 104 Mo. App. 272.

**7.** When Signing by Affiant Not Necessary. — Compare *Anderson v. Cochran*, 93 Tex. 583.

**1089.** 1. Debt Extinguished. — See *Wilson v. Harris*, 91 Tex. 427 (discharge of trust deed securing claim not presented); *Miers v. Betterton*, 18 Tex. Civ. App. 430.

Loss of Interest. — Under the *Kentucky* statute it has been held that interest is not forfeited by failure to demand payment of the administrator within twelve months after his appointment where the notes sued on would not have matured for several years except for the exercise of an option to declare the entire debt to be due on default in the payment of certain interest and premium, and the claim was filed within twelve months after such default. *Jones v. Louisville Sav., etc., Co.*, 58 S. W. Rep. 534, 22 Ky. L. Rep. 570; *Guill v. Corinth Deposit Bank*, 68 S. W. Rep. 870, 24 Ky. L. Rep. 482.

Statutory Power of Court of Equity to Allow Claim Not Presented Within Required Time. — See *Hodge v. Hodge*, 90 Me. 505, 60 Am. St. Rep. 285.

**2.** Recovery Against Estate Barred — *California*. — *Morrow v. Barker*, 119 Cal. 65.

*Connecticut*. — *Winchell v. Sanger*, 73 Conn. 399.

*Illinois*. — *Schneider v. Foote*, 71 Ill. App. 410.

*Massachusetts*. — *Stebbins v. Scott*, 172 Mass. 356.

*Michigan*. — *Paw Paw First Nat. Bank v. Sherman*, 117 Mich. 602.

*Minnesota*. — *O'Brien v. Larson*, 71 Minn. 371; *Gilman v. Maxwell*, 79 Minn. 377; *Jorgenson v. Larson*, 85 Minn. 134.

*Missouri*. — *Farmers' Sav. Bank v. Burgin*, 73 Mo. App. 108; *Beekman v. Richardson*, 150 Mo. 430.

*New Jersey*. — *Cunningham v. Stanford*, 69

*N. J. L.* 9; *Seymour v. Goodwin*, (*N. J.* 1904) 59 Atl. Rep. 93.

*Rhode Island*. — *Thompson v. Hoxsie*, 25 R. I. 377; *Anderson v. Williams*, 26 R. I. 64.

*South Dakota*. — *Thurber v. Miller*, 11 S. Dav. 124.

*Wisconsin*. — *Fields v. Mundy*, 106 Wis. 383, 80 Am. St. Rep. 39.

The Repeal of a Statute barring claims not presented prevents the claim from being barred where the time for presentation had not expired at the time of the repeal. *Ryans v. Boogher*, 169 Mo. 673.

**3.** Prerequisite to Action. — *McFarland v. Fairlamb*, 18 Wash. 601.

Under the *California* statute failure to present the claim is merely matter in abatement, and if presentation is made within the required time, though after action, the executor cannot object. *Bemmerly v. Woodward*, 124 Cal. 568.

**4.** For Benefit of Administrator as to Assets Administered Upon. — *Hill v. Mayes*, (*Ky.* 1904) 79 S. W. Rep. 276 (holding that a creditor not presenting his claim cannot compel contribution from other creditors who receive assets from the estate); *New York v. Gorman*, 26 N. Y. App. Div. 191.

**5.** Property Not Inventoried — Recovery Against Barred. — *Townsend v. Thompson*, 24 Colo. 411; *Morse v. Gillette*, 93 Ill. App. 23, affirmed 191 Ill. 371; *Tinker v. Babcock*, 107 Ill. App. 78, affirmed 204 Ill. 571.

Property "Accounted for." — See *Auburn State Bank v. Brown*, 172 Ill. 284, affirming 72 Ill. App. 584 (conveyance of land to devisee).

**1090.** 1. Profits from Continuance of Business. — Profits received by an executor or administrator from the continuance of the business of the partnership in which the decedent was a partner are regarded as new assets within the meaning of the *Massachusetts* statute providing the time within which creditors may proceed against new assets. *Copeland v. Fifield*, 180 Mass. 223.

**2.** Claim Not Presented Cannot Be Set Off. — *Schaberg v. McDonald*, 60 Neb. 493; *Emson v. Allen*, 62 N. J. L. 491.

**4.** Set-off of Judgment. — In *Minnesota* failure of a judgment creditor of the decedent to present his judgment as a claim does not deprive him of the right to set it off against a judgment in favor of the administrator. *Martin County Nat. Bank v. Bird*, 92 Minn. 110.

**6.** Happening of Contingency — Effect. — *Schurmeier v. Connecticut Mut. L. Ins. Co.*, (*C. C. A.*) 137 Fed. Rep. 42.



**1091.** *d.* WHO MAY TAKE ADVANTAGE OF FAILURE TO PRESENT CLAIM. — See note 1.

*e.* UPON JURISDICTION OF FEDERAL COURTS. — See note 2.

**1092.** IV. DETERMINATION AND ENFORCEMENT OF CLAIMS — 2. American System — Allowance of Claims by Executors. — See note 2.

Allowance with Approval of Probate Court. — See note 3.

**1093.** Allowance by Probate Court. — See note 1.

Claims Rejected by Executor. — See note 2.

**1091.** 1. Creditors. — Where the estate is insolvent other creditors may raise the defense of failure to present a claim. *Smith v. Sprout*, (Tenn. Ct. 1900) 58 S. W. Rep. 376.

As to Who May Appeal, see *Hammers v. Sanders*, 106 Mo. App. 100.

2. Jurisdiction of Federal Court Not Affected. — Central Nat. Bank v. Fitzgerald, 94 Fed. Rep. 16; *Schurmeier v. Connecticut Mut. L. Ins. Co.*, (C. C. A.) 137 Fed. Rep. 42.

**1092.** 2. Burden of Proof. — Matter of Warrin, (Surrogate Ct.) 28 Misc. (N. Y.) 695 (claim allowed against objection of other creditors). See also Matter of Myers, 36 N. Y. App. Div. 625. But see *Re Chambers*, 38 Oregon 131.

What Constitutes Allowance — Failure to Reject. — *Contra*, under the Nevada statute, *Kirman v. Powning*, 25 Nev. 387, rehearing denied 25 Nev. 397. See also under the Rhode Island statute *Municipal Ct. v. Wilbour*, 23 R. I. 95. And see further *infra*, this title, **1095.** 1, note *Nonaction upon Claim*.

As to what constitutes an allowance in *New York*, see Matter of Edmonds, 47 N. Y. App. Div. 229; Matter of Eichman, (Surrogate Ct.) 33 Misc. (N. Y.) 322.

Payment of Part of a Claim. — Matter of Miles, (Surrogate Ct.) 33 Misc. (N. Y.) 147, reversed 61 N. Y. App. Div. 562, affirmed 170 N. Y. 75.

Reference of Disputed Claims. — See *Lounsbury v. Sherwood*, 53 N. Y. App. Div. 318 (amendment of claim).

Effect of Allowance. — See Matter of Miles, 170 N. Y. 75, reversing 61 N. Y. App. Div. 562 (power of surrogate to order payment of claims allowed).

3. Compromise of Claim by Executor with Approval of Probate Court. — See Matter of Norton, 178 N. Y. 606, affirming 92 N. Y. App. Div. 462.

**1093.** 1. Allowance of Claims by Probate Court — *Colorado*. — *McAllister v. Irwin*, 31 Colo. 254 (claim against cosurety for contribution).

*Illinois*. — *Starrett v. Brosseau*, 208 Ill. 408; *Deiterman v. Ruppel*, 200 Ill. 199 (power of probate court to allow equitable claims).

*Michigan*. — *In re Vedders*, 122 Mich. 439.

*Minnesota*. — *O'Brien v. Larsen*, 71 Minn. 371.

*Missouri*. — *Wabash R. Co. v. Ordelheide*, 172 Mo. 436.

*Nebraska*. — *McCormick v. McCormick*, 53 Neb. 255; *Dredla v. Baache*, 60 Neb. 655; *Harman v. Harman*, 62 Neb. 452 (appeal by surety who has paid claim against decedent from disallowance of claim).

*South Dakota*. — *In re Carver*, 10 S. Dak. 600.

Effect of Allowance by Probate Court. — Jack-

son v. Gorman, 70 Ark. 88 (conclusion in proceedings for sale of land); *James v. Gibson*, (Ark. 1904) 84 S. W. Rep. 485; *Cross v. Long*, 66 Kan. 293 (consent of coexecutor to allowance); *McCord v. Knowlton*, 79 Minn. 299, following *Barber v. Bowen*, 47 Minn. 118; *Clark v. Thias*, 173 Mo. 628 (conclusive in suit to set aside a fraudulent conveyance to decedent); *Funk v. Seehorn*, 99 Mo. App. 587; *McGrew v. State Bank*, 60 Neb. 716; *Weadock v. Ray*, 111 Wis. 489. See, however, *Black v. Elliott*, 63 Kan. 211, 88 Am. St. Rep. 239 (not binding on heir or devisee in proceedings to enforce claims against real estate of decedent); *In re Barker*, 26 Mont. 279.

Collateral Attack. — An allowance of a claim by the probate court is not subject to collateral attack. *Clark v. Bettelheim*, 144 Mo. 258.

Set-off. — See *Holliday v. Nolan*, 93 Mo. App. 403 (equitable set-off against claim cannot be interposed in probate court).

Strangers in Interest Cannot Contest the allowance by the court. *Semper v. Coates*, 93 Minn. 80.

Power of Probate Court to Set Aside Allowance. — *Mason v. Gaither*, 106 Mo. App. 354.

Setting Aside Allowance in Equity. — *Lyle v. Anderson*, 123 Mich. 601.

As to Setting Aside an Allowance for Collusion between the creditor and the executor or administrator, see *Scott v. Penn*, 68 Ark. 492; *Sherman v. Whiteside*, 93 Ill. App. 572, affirmed 190 Ill. 576; *Elting v. Biggs*, 173 Ill. 368, affirming 68 Ill. App. 204.

Correction by Probate Court of Its Classification of Claims. — *McPherson v. Wolfley*, 9 Kan. App. 67, reversed 61 Kan. 492.

Appeal from Allowance. — One of coexecutors may appeal under *Michigan* statute. *Hammond v. Frazer*, (Mich. 1905) 103 N. W. Rep. 996.

Appeal from Disallowance. — *Charmley v. Charmley*, (Wis. 1905) 103 N. W. Rep. 1106.

2. Summary Determination of Rejected Claims. — *Stuart v. Stuart*, 70 Minn. 46; *Hart v. Hart*, 45 N. Y. App. Div. 280 (right to costs); Matter of Edmonds, 47 N. Y. App. Div. 229 (necessity for consent of parties to trial by Surrogate's Court); Matter of Warrin, 56 N. Y. App. Div. 414 (claimant must accept allowance as a whole or establish entire claim); *In re Smith*, (N. Dak. 1904) 101 N. W. Rep. 890 (jurisdiction of County Court to allow claims rejected); *In re Morgan*, (Oregon 1904) 77 Pac. Rep. 608; (Oregon 1905) 78 Pac. Rep. 1029 (jurisdiction of County Court).

Appeals from Decision of Commissioners. — *Cossar v. Truesdale*, 69 N. H. 490 (filing declaration); *Hurlburt v. Miller*, 72 Vt. 110 (right to jury trial on appeal); *Thorp v. Thorp*, 75 Vt. 34.

Appointment of Commissioners to Pass on Claim.

**1093.** Action Required to Establish Claim. — See note 3.

Claims of Executors. — See note 4.

The Right of Retainer Has Been Abrogated. — See note 6.

**1094.** 4. Limitation of Actions on Rejected Claims — *a.* IN GENERAL. — See note 3.*b.* CONSTRUCTION OF STATUTE. — See note 5.**1095.** *d.* THE REJECTION — (1) *In General* — Must Be Unequivocal and Absolute. — See note 1.

Rejection in Part. — See note 4.

— *McGowan v. Peabody*, 20 R. I. 582 (time of appointment).

**Disputed Claims — Submission to Surrogate.** — *Matter of Browne*, (Surrogate Ct.) 35 Misc. (N. Y.) 366; *Matter of Ingraham*, (Surrogate Ct.) 35 Misc. (N. Y.) 577 (costs); *Matter of Kirby*, (Surrogate Ct.) 36 Misc. (N. Y.) 312 (consent of parties necessary); *Matter of Coonley*, (Surrogate Ct.) 38 Misc. (N. Y.) 219 (costs); *Matter of Warner*, (Surrogate Ct.) 39 Misc. (N. Y.) 432 (consent of parties necessary); *Matter of Huntington*, (Surrogate Ct.) 39 Misc. (N. Y.) 477; *Matter of Reinach*, (Surrogate Ct.) 41 Misc. (N. Y.) 78; *Clark v. Hyland*, 88 N. Y. App. Div. 392.

*Effect of Allowance by Surrogate — Not Subject to Collateral Attack.* — *Sutherland v. St. Lawrence County*, (Supm. Ct. Tr. T.) 42 Misc. (N. Y.) 38, reversed 101 N. Y. App. Div. 299.

**Reference of Disputed Claims.** — *Davis v. Gallagher*, 37 N. Y. App. Div. 627, 29 Civ. Pro. (N. Y.) 149 (costs); *Brainerd v. De Graef*, (Supm. Ct. Spec. T.) 29 Misc. (N. Y.) 560 (costs); *Matter of Raab*, 47 N. Y. App. Div. 33 (costs); *Matter of Post*, (Surrogate Ct.) 30 Misc. (N. Y.) 551 (costs); *Matter of Browne*, (Surrogate Ct.) 35 Misc. (N. Y.) 362 (judgment is not such a claim as may be rejected and referred); *Osborne v. Parker*, 66 N. Y. App. Div. 277 (costs); *Simons v. Steele*, 82 N. Y. App. Div. 202, affirmed 177 N. Y. 542; *Matter of Ingraham*, (Surrogate Ct.) 35 Misc. (N. Y.) 577 (costs); *Domeyer v. Hoes*, 99 N. Y. App. Div. 294 (costs); *Simons v. Steele*, 177 N. Y. 542, affirming 81 N. Y. App. Div. 202 (defense of statute of limitations).

A claim for funeral expenses is not referable. *Genet v. Willock*, 93 N. Y. App. Div. 588.

**1093. 3. Actions to Establish Claim.** — *Strasbourg v. Dallam*, 93 Md. 712; *In re Barker*, 26 Mont. 279 (claim rejected by probate court, action must be brought on claim, and appeal from rejection will not lie). *Matter of Whitehead*, 38 N. Y. App. Div. 319; *Municipal Ct. v. Wilbour*, 23 R. I. 95; *Marx v. Freeman*, 21 Tex. Civ. App. 529.

**Effect of Approval by Probate Court.** — See *Hendron v. Kinner*, 110 Iowa 544.

**4. Right to Retain and Prove on Accounting.** — See *Matter of Weeks*, 23 N. Y. App. Div. 151 (sufficiency of evidence to support claim of executor); *Starbuck v. Farmers' L. & T. Co.*, 28 N. Y. App. Div. 308. See also *supra*, this title, 1972. 4.

**6. Retainer Abrogated — Presentation to Probate Court Necessary.** — See *In re Pennock*, 122 Iowa 622; *Matter of Marcellus*, 165 N. Y. 70, affirming (Supm. Ct. App. Div.) 65 N. Y. Supp.

1139; *Farrow v. Nevin*, 44 Oregon 496; *Reed v. Hume*, 25 Utah 248.

**1094. 3. Limitation of Actions on Rejected Claims.** — See generally *Underwood v. Brown*, (Ariz. 100) 60 Pac. Rep. 700; *Matter of Von der Lieth*, (Surrogate Ct.) 25 Misc. (N. Y.) 255; *Miller v. Ewing*, 68 Ohio St. 176; *Saxton v. Musselman*, 17 S. Dak. 35 (claim rejected need not be filed in County Court before action thereon); *Marx v. Freeman*, 21 Tex. Civ. App. 429.

**Claim Not Due.** — See *Moore v. Russell*, 133 Cal. 297, 85 Am. St. Rep. 166.

**What Constitutes Claim Not Due.** — If a claim is one which would become due upon presentation, it is a claim then due within the meaning of the *California* statute requiring actions on claims due to be brought within three months after rejection, and cannot be considered as one not due so as to require action to be brought within two months after rejection. *Maurer v. King*, 127 Cal. 114.

**5. Statute Strictly Construed.** — Compare *Miller v. Ewing*, 68 Ohio St. 176.

**1095. 1. Rejection Must Be Unequivocal and Final.** — *Matter of Eichman*, (Surrogate Ct.) 33 Misc. (N. Y.) 322 (holding that a mere statement by the executor, no matter how formally made, that he doubts the justice of a claim and invites a reference of it is not a dispute or rejection which will start the running of the statute); *Matter of Fonda*, (Surrogate Ct.) 38 Misc. (N. Y.) 407 (consent to reference after rejection); *Matter of Brown*, 76 N. Y. App. Div. 185 (consent to reference after rejection).

**Nonaction upon Claim.** — Under the *Arizona* and *North Dakota* statutes the failure of the executor or administrator to act upon the claim for ten days after presentation is equivalent to a rejection, and it is held that after the expiration of ten days from presentation without action by the administrator, the statute commences to run as upon rejected claims. *Underwood v. Brown*, (Ariz. 1900) 60 Pac. Rep. 700; *Farwell v. Richardson*, 10 N. Dak. 34; *In re Smith*, (N. Dak. 1904) 101 N. W. Rep. 890.

In *Oregon* the neglect of an executor or administrator to allow a claim within a reasonable time may constitute a sufficient rejection to enable the claimant to sue for its establishment, and nonaction for six months without excuse for the delay is, as a matter of law, unreasonable. *Goltra v. Penland*, 45 Oregon 254.

See further *supra*, this title, 1092. 2, note *What Constitutes Allowance — Failure to Reject*.

**4. Allowance of Part of Claim as Disallowance of Balance.** — *Jones v. Walden*, 145 Cal. 523.

**1095.** (2) *By Whom Rejection May Be Made* — The Attorney for the Estate. — See note 8.

**1096.** (3) *Notice of Rejection.* — See note 1.  
g. WAIVER OF STATUTE. — See note 5.

**1097.** V. PROPERTY LIABLE FOR PAYMENT OF DEBTS — 2. Property Primarily Liable. — See note 3.

3. Marshaling Assets. — See note 5.

**1098.** VI. LIABILITY OF HEIR, DEVISEE, DISTRIBUTE, AND LEGATEE — 1. Common Law — a. LIABILITY OF HEIR. — See note 4.

**1099.** 2. Statutory Modification. — See notes 1, 2.

**1095.** 8. Attorney May Notify of Rejection. — *Miller v. Ewing*, 68 Ohio St. 176.

**1096.** 1. Notice of Rejection Essential. — *Doidge v. Mimms*, 13 Manitoba 48, holding further that notice of rejection must be by a duly qualified administrator, and notice by a foreign administrator before qualification is insufficient.

Notice to Attorney of Creditor held sufficient. *Lockwood v. Dillenbeck*, 104 N. Y. App. Div. 71, *disapproving* *Van Sann v. Farley*, 4 Daly (N. Y.) 165.

**5.** Allowance of a Claim by the Administrator After Rejection will not interrupt the running of the statute from the time of rejection. *Farwell v. Richardson*, 10 N. Dak. 34.

**1097.** 3. Exhaustion of Personalty Before Recourse to Realty — *Georgia*. — *Fretwell v. Fretwell*, 114 Ga. 303.

*Illinois*. — *Richardson v. Richardson*, 87 Ill. App. 354.

*New Jersey*. — *Ford v. Westervelt*, 55 N. J. Eq. 485; *Bird v. Hawkins*, 58 N. J. Eq. 229.

*North Carolina*. — *Mahoney v. Stewart*, 123 N. Car. 106; *Baptist Female University v. Borden*, 132 N. Car. 476.

*Pennsylvania*. — *Peters's Estate*, 16 Pa. Super. Ct. 462.

*Tennessee*. — *Boring v. Jobe*, (Tenn. Ch. 1899) 53 S. W. Rep. 763 (waste of personalty by executor); *Nashville Trust Co. v. Carr*, (Tenn. Ch. 1900) 62 S. W. Rep. 204 (claim for funeral expenses).

*West Virginia*. — *Mathews v. Tyree*, 53 W. Va. 298.

*Canada*. — *Re Hopkins*, 32 Ont. 315.

*Compare* *Cooper v. Ives*, 62 Kan. 395 (existence of personal assets in foreign jurisdiction).

**5.** Order of Application of Assets. — *Virgin v. Virgin*, 91 Ill. App. 188, *affirmed* 189 Ill. 144; *Siefke v. Siefke*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 77; *Pearson v. Pearson*, 59 S. Car. 367, 82 Am. St. Rep. 846.

**1098.** 4. Liability of Land in Hands of Purchaser from Heirs — See *Florida Mortg., etc., Co. v. Finlayson*, (C. C. A.) 91 Fed. Rep. 13; *Parks v. Smoot*, 105 Ky. 63. See also Generally the title HEIRS AND DEVISEES, 10 ENCYC. OF PL. AND PR. 21 *et seq.* and the Supplement thereto.

**1099.** 1. *Compare* *McClure v. Dee*, 115 Iowa 546, 91 Am. St. Rep. 181.

**2.** Real Estate Assets by Statute. — See the title EXECUTORS AND ADMINISTRATORS, 838. 1 *et seq.*



1. [DECEIT. — See note *a*.]

2. DECISION. — See note 1.

4. DECLARATION OF TRUST. — See note 2.

1. *a*. In *Hall v. State*, 134 Ala. 118, a prosecution for seduction, the court said that "*deception* is the act of deceiving, the intentional misleading of another by falsehood spoken or acted."

2. 1. *Opinions and Decisions Distinguished.* — *Craig v. Bennett*, 158 Ind. 9; *Coffey v. Gamble*, 117 Iowa 545. See also *OPINION*.

*Distinguishing from Judgment or Decree—Equivalent to Finding—New Trial.* — *Allen v. Adams*, 150 Ind. 409; *Gates v. Baltimore, etc.*, R. Co., 154 Ind. 338; *Hubbs v. State*, 20 Ind. App. 181; *Wolverton v. Wolverton*, 163 Ind. 26; *Coffey v. Gamble*, 117 Iowa 545; *Clement v. Hartzell*, 60 Kan. 319; *Board of Education v. State*, 7 Kan. App. 620; *Cobban v. Hecklen*, 27 Mont. 245; *Buckeye Pipe Line Co. v. Fee*, 62 Ohio St. 543.

*Decision of the Collector.* — *U. S. v. Beebe*, 117 Fed. Rep. 679.

*Expulsion from Beneficial Society.* — Under a provision in the constitution of a beneficial order that any member who deems himself aggrieved by a *decision* of the order is within three months entitled to appeal to the grand committee, the expulsion of a member without notice and hearing is a *decision*. *Kohler v. Klein*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 353.

An Order of the Probate Court classifying a demand allowed against the estate of a deceased person is a *decision*, and a subsequent order vacating it and assigning the demand to a different class is likewise a *decision*, and may be appealed from by the aggrieved party under the statute regulating appeals from probate courts. *Wolfley v. McPherson*, 61 Kan. 492.

4. 2. *Declaration of Trust.* — *Griffith v. Maxfield*, 66 Ark. 521.

## DECLARATIONS (IN EVIDENCE).

By P. B. MCKENZIE.

5. II. BY PARTIES TO ACTION — 1. Self-serving Declarations. — See note 2.

6. 3. Expressions of Intention. — See note 2.

III. BY THIRD PERSONS — 1. General Rule. — See note 3.

8. 2. Declarations Against Interest — Declarations Against Interest Made by Person Deceased. — See note 1.

5. 2. *Nonadmissibility of Self-serving Declarations* — *United States*. — *Staunton v. Goshorn*, 94 Fed. Rep. 52, 36 C. C. A. 75.

*Alabama.* — *Butler v. Butler*, 133 Ala. 377; *Lynn v. Bean*, (Ala. 1904) 37 So. Rep. 515; *Chastang v. Chastang*, (Ala. 1904) 37 So. Rep. 799.

*California.* — *Gabriel v. Suisun Bank*, 145 Cal. 266; *Western Union Oil Co. v. Newlove*, 145 Cal. 772.

*Colorado.* — *Rarick v. Vandevier*, 11 Colo. App. 116.

*Indiana.* — *Foster v. Honan*, 22 Ind. App. 252.

*Kansas.* — *Union Pac. R. Co. v. Hammerlund*, (Kan. 1905) 79 Pac. Rep. 152.

*Kentucky.* — *Boltz v. Miller*, 64 S. W. Rep. 630, 23 Ky. L. Rep. 991; *Louisville, etc., R. Co. v. Smith*, (Ky. 1905) 84 S. W. Rep. 755.

*Missouri.* — *Wilson v. Hobbs*, 73 Mo. App. 656; *Swope v. Ward*, 185 Mo. 316.

*Nebraska.* — *Stewart v. Demming*, 54 Neb. 7.

*New York.* — *Morgan v. Warner*, 45 N. Y. App. Div. 424, affirmed 162 N. Y. 612.

*North Carolina.* — *Ratliff v. Ratliff*, 131 N. Car. 425.

*Pennsylvania.* — *Delaney v. Thompson*, 1 Dauphin Co. Rep. (Pa.) 41; *Kittanning v. Kittanning Consol. Natural Gas Co.*, 26 Pa. Super. Ct. 355.

*South Dakota.* — *Seim v. Krause*, 13 S. Dak. 530.

*Texas.* — *Thomson v. Hubbard*, 22 Tex. Civ. App. 101.

*Wisconsin.* — *Martin v. Eastman*, 109 Wis. 286.

See also the titles *ADMISSION*, 675. 3; *HEARSAY EVIDENCE*, 310. 3.

A Declaration as to an Engagement of Marriage. — *Leibrandt v. Sorg*, (Cal. 1901) 65 Pac. Rep. 318.

6. 2. *Declarations Showing Intent.* — *U. S. v. Gentry*, 119 Fed. Rep. 70, 55 C. C. A. 658; *Tuohy v. Trail*, 19 App. Cas. (D. C.) 79; *Goldstein v. Morgan*, 122 Iowa 27; *Bigelow v. Bear*, 64 Kan. 887, 68 Pac. Rep. 73; *McDonald v. McDonald*, 86 Mo. App. 122; *Landon v. Preferred Acc. Ins. Co.*, 167 N. Y. 577; *Gunn v. Wynne*, (Tex. Civ. App. 1897) 43 S. W. Rep. 290.

3. *Declarations of Third Persons in General.* — *Lissak v. Crocker Estate Co.*, 119 Cal. 442; *Daniel v. Hannah*, 106 Ga. 91; *Clack v. Southern Electrical Supply Co.*, 72 Mo. App. 506; *Knapp v. Hanley*, 108 Mo. App. 353; *Downey v. Owen*, 98 N. Y. App. Div. 411; *Johnson v. Cole*, 178 N. Y. 364; *Jensen v. McCormick*, 20 Utah 362, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 6. See also the titles *ADMISSIONS*, 672. 1, 675. 3; *HEARSAY EVIDENCE*, 312. 2.

8. 1. *Declarations Against Interest Made by Person Deceased* — *England*. — *Blandy-Jenkins*

**8. Declarant Must Be Dead.**— See note 3.

**9. Character of Interest in Declarant Requisite.**— See note 2.

**Knowledge Requisite on Part of Declarant.**— See note 4.

**Absence of Motive to Falsify Facts Declared Necessary.**— See note 5.

**3. Declarations as to Matters of Public or General Interest.**— See note 6.

**11. Knowledge Necessary on Part of Declarant—As to Matters of Public Interest.**— See note 6.

**12. 6. Declarations Relative to Possession.**— See note 6.

*v. Dunraven*, (1899) 2 Ch. 121, 68 L. J. Ch. 589.

*Alabama.*— *Locklayer v. Locklayer*, 139 Ala.

354.

*California.*— *Donnelly v. Rees*, 141 Cal. 56.

*Illinois.*— *German Ins. Co. v. Bartlett*, 188 Ill. 165, 80 Am. St. Rep. 172.

*Indiana.*— *Keesling v. Powell*, 149 Ind. 372.

*Louisiana.*— *Trouilly's Succession*, 52 La. Ann. 276.

*Maine.*— *Walsh v. Wheelwright*, 96 Me. 174.

*Minnesota.*— *Halvorsen v. Moon*, etc., Lumber Co., 87 Minn. 21, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 8; *Dixon v. Union Iron Works*, 90 Minn. 492.

*Missouri.*— *Waddell v. Waddell*, 87 Mo. App. 216.

*Nebraska.*— *Seyfer v. Otoe County*, 66 Neb. 566; *Quinby v. Ayres*, (Neb. 1901) 95 N. W. Rep. 464.

*New Hampshire.*— *Fellows v. Fellows*, 69 N. H. 339.

*New York.*— *Card v. Moore*, 173 N. Y. 598; *Sparling v. Wells*, 24 N. Y. App. Div. 584; *Merkle v. Beidleman*, 30 N. Y. App. Div. 14, reversed 165 N. Y. 21; *McDonald v. Wesendonck*, (Supm. Ct. App. T.) 30 Misc. (N. Y.) 601; *Matter of Woodward*, 69 N. Y. App. Div. 286.

*Pennsylvania.*— *Caldwell v. Caldwell*, 24 Pa. Super. Ct. 230.

*Texas.*— *White v. Holman*, 25 Tex. Civ. App. 152; *Lord v. New York L. Ins. Co.*, 95 Tex. 216, 93 Am. St. Rep. 827.

*Utah.*— *Scott v. Crouch*, 24 Utah 377.

*Wisconsin.*— *Kreckeberg v. Leslie*, 111 Wis. 462.

**Contra.**— The *Massachusetts* rule has been altered by statute. *Mulhall v. Fallon*, 176 Mass. 266, 79 Am. St. Rep. 309; *Stocker v. Foster*, 178 Mass. 591; *Dixon v. New England R. Co.*,

179 Mass. 242; *O'Driscoll v. Lynn*, etc., R. Co., 180 Mass. 187.

**8. 3. Death of Declarant Necessary.**— *Halvorsen v. Moon*, etc., Lumber Co., 87 Minn. 21, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 8.

**9. 2. Character of Interest in Declarant Necessary.**— *Halvorsen v. Moon*, etc., Lumber Co., 87 Minn. 21, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 8 [9].

**4. Knowledge Necessary on Part of Declarant.**— *Halvorsen v. Moon*, etc., Lumber Co., 87 Minn. 21, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 8 [9].

**5. Absence of Motive to Falsify Facts Declared Necessary.**— *German Ins. Co. v. Bartlett*, 188 Ill. 165, 80 Am. St. Rep. 172; *Halvorsen v. Moon*, etc., Lumber Co., 87 Minn. 21, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 8 [9]; *McDonald v. Wesendonck*, (Supm. Ct. App. T.) 30 Misc. (N. Y.) 601.

**6. Declarations as to Matters of Public or General Interest.**— *Monterey v. Jacks*, 139 Cal. 542; *Hartford v. Maslen*, 76 Conn. 599.

**11. 6. Knowledge—As to Matters of Public Interest.**— *Hartford v. Maslen*, 76 Conn. 599.

**12. 6. Declarations as to Possession.**— *Johnson v. Amberson*, 140 Ala. 342, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 12; *Beasley v. Howell*, 117 Ala. 499; *Walter v. Brown*, 115 Iowa 360; *Ohde v. Hoffman*, (Iowa 1902) 90 N. W. Rep. 750; *New York L. Ins. Co. v. Johnson*, 72 S. W. Rep. 762, 24 Ky. L. Rep. 1867; *Phillips v. Laughlin*, 99 Me. 26, 105 Am. St. Rep. 253; *Boynton v. Miller*, 144 Mo. 681; *Leary v. Corvin*, 63 N. Y. App. Div. 151; *Ratliff v. Ratliff*, 131 N. Car. 425; *Weatherford First Nat. Bank v. Bruce*, (Tex. Civ. App. 1900) 55 S. W. Rep. 126. See also the titles ADVERSE POSSESSION, 891. 2 et seq.; RES GESTÆ, 688. 7 et seq.

## DECOY LETTERS.

**15. 1. Definition.** — See note 1.

**II. EMBEZZLEMENT OF LETTER OR CONTENTS.** — See note 2.

**16. Letter "Intended to Be Conveyed by Mail."** — See note 2.

**17. See note 1.**

**15. 1. Lawfulness of Decoy Letters.** — Scott v. U. S., 172 U. S. 343. See also Bromberger v. U. S., (C. C. A.) 128 Fed. Rep. 346.

**2. No Defense to Indictment for Embezzlement that Letter Was a Decoy.** — Scott v. U. S., 172 U. S. 343; Bromberger v. U. S., (C. C. A.) 128 Fed. Rep. 346, *distinguishing* U. S. v. Hall, 76 Fed. Rep. 566, cited in 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 15.

**16. 2. Letter Intended to Be Intercepted.** —

Bromberger v. U. S., (C. C. A.) 128 Fed. Rep. 346.

Rev. Stat. U. S., § 5468, provides that the fact that a letter has been deposited in any post office or any authorized depository for mail matter shall be evidence that it was intended to be conveyed by mail within the statutes. Scott v. U. S., 172 U. S. 343; Bromberger v. U. S., (C. C. A.) 128 Fed. Rep. 346.

**17. 1. Addressed to a Fictitious Person.** — Scott v. U. S., 172 U. S. 343.

## DEDICATION.

By J. L. McREE.

**21. I. DEFINITION, NATURE, AND HISTORY — 1. Definition.** — See note 1.

**2. Nature** — *a.* AT COMMON LAW. — See notes 3, 4, 5.

**22. The Dedication May Be Either Express or Implied.** — See note 1.

**Nature of Interest Acquired by Public.** — See note 2.

**Statute of Frauds.** — See note 3.

**21. 1. Definition.** — Patrick v. Young Men's Christian Assoc., 120 Mich. 185; Athens v. Burkett, (Tenn. Ch. 1900) 59 S. W. Rep. 404, *quoting* 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 21; Gate City v. Richmond, 97 Va. 337.

Dedication is the setting apart of land for the public use. San Antonio v. Sullivan, 23 Tex. Civ. App. 619.

**For Other Definitions of the Term,** see Hartley v. Vermillion, (Cal. 1902) 70 Pac. Rep. 273; People v. Myring, 144 Cal. 351; Kent v. Pratt, 73 Conn. 573; South Berwick v. York County, 98 Me. 108; Close v. Swanson, 64 Neb. 389; Culmer v. Salt Lake City, 27 Utah 252.

**3. Dedication Is of Nature of Gift.** — Georgia R., etc., Co. v. Atlanta, 118 Ga. 486; Athens v. Burkett, (Tenn. Ch. 1900) 59 S. W. Rep. 404, *quoting* 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 21.

**4. Davenport v. Buffington,** (C. C. A.) 97 Fed. Rep. 234; Atty.-Gen. v. Vineyard Grove Co., 181 Mass. 509; Athens v. Burkett, (Tenn. Ch. 1900) 59 S. W. Rep. 404, *quoting* 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 21.

**5. No Grantee in Esse Necessary.** — Riverside v. MacLain, 210 Ill. 308, 102 Am. St. Rep. 164; Lonaconing Midland, etc., R. Co. v. Consolidation Coal Co., 95 Md. 630; Patrick v. Young Men's Christian Assoc., 120 Mich. 185; Athens v. Burkett, (Tenn. Ch. 1900) 59 S. W. Rep. 404, *quoting* 9 AM. AND ENG. ENCYC. OF LAW (2d

ed.) 21; Gillean v. Frost, 25 Tex. Civ. App. 371.

**22. 1. Dedication May Be Express or Implied** — *California.* — Sussman v. San Luis Obispo County, 126 Cal. 536; People v. Myring, 144 Cal. 351.

*Connecticut.* — Kent v. Pratt, 73 Conn. 573.

*Illinois.* — Guttery v. Glenn, 201 Ill. 275.

*Minnesota.* — Hurley v. West St. Paul, 83 Minn. 401.

*Nebraska.* — Close v. Swanson, 64 Neb. 389.

*Tennessee.* — Athens v. Burkett, (Tenn. Ch. 1900) 59 S. W. Rep. 404.

*Texas.* — San Antonio v. Sullivan, 23 Tex. Civ. App. 619.

*Utah.* — Schettler v. Lynch, 23 Utah 315; Culmer v. Salt Lake City, 27 Utah 252.

*Virginia.* — Richmond v. Gallego Mills Co., 102 Va. 165.

*Washington.* — Thurston County v. Walker, 27 Wash. 500.

**2. Nature of Interest Acquired by Public.** — Sanitary Dist. v. Adam, 179 Ill. 406; Athens v. Burkett, (Tenn. Ch. 1900) 59 S. W. Rep. 404.

**3. Statute of Frauds.** — Stewart v. Conley, 122 Ala. 185, *citing* 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 22; Alden Coal Co. v. Challis, 200 Ill. 229; Mann v. Bergmann, 203 Ill. 406; Burkitt v. Battle, (Tenn. Ch. 1900) 59 S. W. Rep. 420; Athens v. Burkett, (Tenn. Ch. 1900) 59 S. W.



**23. II. FOR WHAT PURPOSES — 1. General Rule — Use of Public Generally.** — See note 8.

**24. 2. Roads, Streets, and Bridges — Need Not Be a Thoroughfare.** — See note 2.

**26. 3. Public Squares.** — See note 1.

The Uses to Which Lands So Dedicated May Be Applied. — See note 2.

An Unrestricted Dedication. — See note 3.

If the Dedication Is an Express One. — See note 4.

**27. 4. Wharves and Landings.** — See note 1.

**5. Charitable and Religious Uses — a. CHURCHES AND RELIGIOUS BODIES.** — See note 2.

**28. b. CEMETERIES.** — See note 1.

c. SCHOOLS. — See note 2.

**29. III. WHO MAY DEDICATE — 1. Generally — The Owner.** — See note 1.

A Mortgagor. — See note 3.

**30. One in Possession under an Incomplete Title.** — See note 1.

Rep. 404; *Schettler v. Lynch*, 23 Utah 315; *Seattle v. Hill*, 23 Wash. 92.

**There Is No Particular Form or Ceremony Necessary** — *Illinois*. — *Alden Coal Co. v. Chalis*, 200 Ill. 229; *Guttery v. Glenn*, 201 Ill. 275; *Wormley v. Wormley*, 207 Ill. 411.

*Iowa*. — *Philbrick v. University Place*, 106 Iowa 352.

*Maryland*. — *Lonaconing Midland, etc., R. Co. v. Consolidation Coal Co.*, 95 Md. 630.

*Pennsylvania*. — *Spring v. Pittsburg*, 204 Pa. St. 530; *Waters v. Philadelphia*, 208 Pa. St. 189.

*Tennessee*. — *Athens v. Burkett*, (Tenn. Ch. 1900) 59 S. W. Rep. 404; *Burkitt v. Battle*, (Tenn. Ch. 1900) 59 S. W. Rep. 429.

*Texas*. — *Bellar v. Beaumont*, (Tex. Civ. App. 1900) 55 S. W. Rep. 410; *San Antonio v. Sullivan*, 23 Tex. Civ. App. 619.

*Utah*. — *Schettler v. Lynch*, 23 Utah 315.

*Washington*. — *Seattle v. Hill*, 23 Wash. 92; *Thurston County v. Walker*, 27 Wash. 500.

**23. 8. Railroads.** — *Southern R. Co. v. Standiford*, (Ky. 1899) 53 S. W. Rep. 668. See also *Kansas City, etc., R. Co. v. Baker*, 183 Mo. 312, holding that land may be dedicated for a depot site.

**24. 2. A Court or Cul-de-Sac.** — *Gilfillan v. Shattuck*, 142 Cal. 27; *Rock Island v. Starkey*, 91 Ill. App. 592, reversed 189 Ill. 515, on other grounds; *Coe College v. Cedar Rapids*, (Iowa 1901) 87 N. W. Rep. 444; *Smith v. Union Switch, etc., Co.*, 31 Pittsb. Leg. J. N. S. (Pa.) 21.

**26. 1. Public Squares and Parks.** — *Conrad v. West End Hotel, etc., Co.*, 126 N. Car. 776; *Mahon v. Luzerne County*, 9 Kulp (Pa.) 453; *Gillern v. Frost*, 25 Tex. Civ. App. 371.

**The Word "Park" Written upon a Block of Land, Etc.** — *Riverside v. MacLain*, 210 Ill. 308, 102 Am. St. Rep. 164.

**Where Lands Are Platted and Blocks Marked "Public Square."** — *Com. v. Connellsville*, 201 Pa. St. 154.

**Recreation Grounds.** — *Tyne Imp. Com'rs v. Imrie*, 81 L. T. N. S. 174.

**2. Uses to Which the Land Dedicated May Be Put.** — *Fessler v. Union*, (N. J. 1903) 56 Atl. Rep. 272; *Com. v. Connellsville*, 201 Pa. St. 154.

**3. Buildings — Roads — Fences.** — *Guttery v. Glenn*, 201 Ill. 275; *Riverside v. MacLain*, 210 Ill. 308, 102 Am. St. Rep. 164; *Com. v. Connellsville*, 201 Pa. St. 154.

**4. Erection of Public Buildings.** — *Mahon v. Luzerne County*, 197 Pa. St. 1.

**27. 1. Wharves, Docks, Landings.** — *California Nav., etc., Co. v. Union Transp. Co.*, 126 Cal. 433; *Pittsburg v. Epping-Carpenter Co.*, 194 Pa. St. 318; *Pittsburgh v. Epping-Carpenter Co.*, 29 Pittsb. Leg. J. N. S. (Pa.) 255.

**2. Churches and Religious Bodies.** — *Patrick v. Young Men's Christian Assoc.*, 120 Mich. 185.

**28. 1. Cemeteries.** — *Wormley v. Wormley*, 207 Ill. 411, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 28.

**2. Board of Education v. Kansas City**, 62 Kan. 374.

**29. 1. Owner of the Land** — *Alabama*. — *Johnson v. Dadeville*, 127 Ala. 249, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 28.

*Arkansas*. — *Beebe v. Little Rock*, 68 Ark. 39.

*California*. — *California Nav., etc., Co. v. Union Transp. Co.*, 126 Cal. 433; *San Francisco v. Grote*, 120 Cal. 59.

*Illinois*. — *Edwardsville v. Barnsback*, 66 Ill. App. 381.

*Louisiana*. — *State v. Morgan's Louisiana, etc., Steamship Co.*, 111 La. 120.

*Maine*. — *South Berwick v. York County*, 98 Me. 108.

*Minnesota*. — *State v. Chicago, etc., R. Co.*, 85 Minn. 416.

*Missouri*. — *Longworth v. Sedevic*, 165 Mo. 221.

*Nebraska*. — *Lewis v. Lincoln*, 55 Neb. 1.

*New York*. — *Buffalo v. Delaware, etc., R. Co.*, 68 N. Y. App. Div. 488, affirmed 178 N. Y. 561; *Klug v. Jeffers*, 88 N. Y. App. Div. 246.

*Tennessee*. — *Athens v. Burkett*, (Tenn. Ch. 1900) 59 S. W. Rep. 404.

**3. Mortgagor.** — *Gregory v. Ann Arbor*, 127 Mich. 458, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 29; *Newport News, etc., R. Co. v. Lake*, 101 Va. 334.

**On the Foreclosure of a Mortgage.** — *Alton v. Fishback*, 181 Ill. 396.

**30. 1. Dedication by One in Possession of Government Lands Before Patent Issued.** — *Deadwood v. Whittaker*, 12 S. Dak. 515.

**Dedication Before Application for Entry Made.** — Land dedicated before a formal application is made for an entry will be protected from trespassing claimants. *Macintosh v. Nome*, 1 Alaska 492.

**30.** Trustee. — See note 2.

Agent. — See note 3.

A Tenant or Lessee. — See note 4.

**31.** Executor — Administrator — Guardian — Commissioner in Partition. — See note 4.

**32.** Married Women — Persons under Disability. — See notes 1, 2.

State — Municipality. — See note 3.

**33.** Private Corporations. — See note 1.

2. Parties to the Dedication. — See note 2.

**34.** IV. WHAT CONSTITUTES A DEDICATION — 1. General Requisites —

Statutes — The Incidents of a Common-law Dedication. — See note 1.

**35.** Statutes. — See note 1.

**36.** Defective Statutory Dedication — Valid as Common-law Dedication. — See note 1.

**30.** 2. Trustees. — *Roberts v. Mathews*, 137 Ala. 523.

**3.** Agents. — *Athens v. Burkett*, (Tenn. Ch. 1900) 59 S. W. Rep. 404.

An agent's authority to dedicate must be clearly shown. *California Nav., etc., Co. v. Union Transp. Co.*, 126 Cal. 433.

**4.** Knowledge on Part of Landlord. — *New Haven v. New York, etc., R. Co.*, 72 Conn. 225.

**31.** 4. Executors Having a General Power to Sell. — *Hohokus Tp. v. Erie R. Co.*, 65 N. J. L. 353.

**32.** 1. Dedication by Married Woman. — *Corsicana v. Zorn*, 97 Tex. 317.

A dedication may be established by equitable estoppel. *Johnson City v. Wolfe*, 103 Tenn. 227.

**2.** Persons under Disability. — But if the person, as soon as the disability is removed, objects to the user, there can be no dedication. *Herman v. Highway Com'rs*, 109 Ill. App. 61.

**3.** The State. — *Davenport v. Buffington*, (C. C. A.) 97 Fed. Rep. 234; *Snowden v. Loree*, (C. C. A.) 122 Fed. Rep. 493, *affirmed* 128 Fed. Rep. 419.

**33.** 1. By Private Corporations. — *Southern Pac. R. Co. v. Pomona*, 144 Cal. 339, *citing* 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 33; *Sussman v. San Luis Obispo County*, 126 Cal. 536; *Pittsburgh, etc., R. Co. v. Crown Point*, 150 Ind. 536; *Hast v. Piedmont, etc., R. Co.*, 52 W. Va. 396, *citing* 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 33.

**2.** Necessary Parties — The Owner and the Public. — *Sacramento v. Clunie*, 120 Cal. 29; *Los Angeles v. Kysor*, 125 Cal. 463; *Anaheim v. Langenberger*, 134 Cal. 608; *Simpson v. Mikkelsen*, 196 Ill. 575; *Athens v. Burkett*, (Tenn. Ch. 1900) 59 S. W. Rep. 404; *Hast v. Piedmont, etc., R. Co.*, 52 W. Va. 396.

**The Public an Everlasting Grantee.** — *Athens v. Burkett*, (Tenn. Ch. 1900) 59 S. W. Rep. 404.

**Grantee Need Not Be Incorporated.** — The fee remains in abeyance until the corporation comes into existence. *North Chillicothe v. Burr*, 185 Ill. 322.

**Where the Dedication Is Directly to the Public.** — *Stewart v. Conley*, 122 Ala. 185, *citing* 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 34; *Com. v. Llewellyn*, 14 Pa. Super. Ct. 214.

**34.** 1. Incidents of Common-law Dedication. — *Woollacott v. Chicago*, 187 Ill. 504, *citing* 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 34; *Atlantic City v. Groff*, 68 N. J. L. 672, *citing* 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 34; *Schettler v. Lynch*, 23 Utah 315, *quoting* 9 AM.

AND ENG. ENCYC. OF LAW (2d ed.) 34; *Seattle v. Hill*, 23 Wash. 92, *citing* 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 34.

**All that Seems Necessary Is that the Owner Shall Clearly Manifest an Intention.** — *Lonaconing Midland, etc., R. Co. v. Consolidation Coal Co.*, 95 Md. 630; *Winslow v. Cincinnati*, 9 Ohio Dec. 89, 8 Ohio N. P. 47; *Wormley v. Wormley*, 207 Ill. 411.

**Accurate Description.** — The property dedicated must be so designated that it can be located and the extent ascertained. *Sanders v. Riverside*, (C. C. A.) 118 Fed. Rep. 720.

"To make a good dedication either under the statute or at common law requires a definite and certain description of that which is proposed to be dedicated." *Edwardsville v. Barnsback*, 66 Ill. App. 381.

**No Writing Is Necessary** to make a valid declaration of dedication. *Hast v. Piedmont, etc., R. Co.*, 52 W. Va. 396, *citing* 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 34.

**35.** 1. Statutes. — *Rock Island, etc., R. Co. v. Johnson*, 204 Ill. 488; *Coe College v. Cedar Rapids*, 120 Iowa 541; *St. Joseph v. Schulz*, 132 Mich. 214, *citing* 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 35; *Smith v. St. Paul*, 72 Minn. 472; *San Antonio v. Sullivan*, 23 Tex. Civ. App. 619; *Columbia, etc., R. Co. v. Seattle*, 33 Wash. 513.

**Acknowledgment.** — *Owen v. Brookport*, 208 Ill. 35; *Garfield Tp. v. Herman*, 66 Kan. 256; *Nodine v. Union*, 42 Oregon 613.

Where a plat is acknowledged and executed by an attorney in fact — the law requiring the owner to execute and acknowledge it — there is no statutory dedication. *Thompson v. Maloney*, 199 Ill. 276, 93 Am. St. Rep. 133; *Rusk v. Berlin*, 173 Ill. 634.

The signing and acknowledging of the plat by an agent when the statutes require that the owner shall perform these acts, does not effect a statutory dedication. *Russell v. Lincoln*, 200 Ill. 511.

Failure of one of three owners to acknowledge the plat is fatal. *Alton v. Fishback*, 181 Ill. 396.

**An Acknowledgment Made Before a Clerk of Court.** — *Davenport, etc., Bridge R., etc., Co. v. Johnson*, 188 Ill. 472.

**Certificate.** — *Augusta v. Tyner*, 197 Ill. 242.

**36.** 1. Common-law Dedication Not Prohibited. — *Colorado.* — *Leadville v. Coronado Min. Co.*, 29 Colo. 17.

*Illinois.* — *Rusk v. Berlin*, 173 Ill. 634; *Clark v. McCormick*, 174 Ill. 164; *Sanitary Dist. v.*

**37. 2. Intent of Owner — a. ESSENTIAL. — See note 1.***b. HOW SHOWN. — See note 2.***38. A Deed or Other Writing Is Unnecessary. — See note 1.**

Adam, 179 Ill. 406; Alton *v.* Fishback, 181 Ill. 396; Woodburn *v.* Sterling, 184 Ill. 208; North Chillicothe *v.* Burr, 185 Ill. 322; Eisendrath *v.* Chicago, 192 Ill. 320; Augusta *v.* Tyner, 197 Ill. 242; Russell *v.* Lincoln, 200 Ill. 511; Rock Island, etc., R. Co. *v.* Johnson, 204 Ill. 488.

Indiana. — Strunk *v.* Pritchett, 27 Ind. App. 582.

Iowa. — Coe College *v.* Cedar Rapids, (Iowa 1901) 87 N. W. Rep. 444.

Missouri. — McGinnis *v.* St. Louis, 157 Mo. 191.

New York. — Matter of Hunter, 164 N. Y. 365.

Ohio. — Dauber *v.* Scott, 2 Ohio Cir. Dec. 179; Winslow *v.* Cincinnati, 9 Ohio Dec. 89, 6 Ohio N. P. 47; Winslow *v.* Cincinnati, 9 Ohio Dec. 89, 6 Ohio N. P. 47.

Oregon. — Nodine *v.* Union, 42 Oregon 613.

South Dakota. — Sweatman *v.* Bathrick, 17 S. Dak. 138.

Washington. — Seattle *v.* Hill, 23 Wash. 92, quoting 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 36.

Wisconsin. — Smith *v.* Beloit, 122 Wis. 396.

**37. 1. Intent Essential — England.** — Chinnock *v.* Hartley Wintney Rural Council, 63 J. P. 327; Simpson *v.* Atty.-Gen., (1904) A. C. 476; Chinnock *v.* Hartley Wintney Rural Council, 63 J. P. 327.

Canada. — See Gauthier *v.* Monarque, 19 Quebec Super. Ct. 94; Jones *v.* Asbestos, 19 Quebec Super. Ct. 168.

United States. — London, etc., Bank *v.* Oakland, (C. C. A.) 90 Fed. Rep. 691.

Arkansas. — Beebe *v.* Little Rock, 68 Ark. 39.

California. — Los Angeles *v.* Kysor, 125 Cal. 463; Niles *v.* Los Angeles, 125 Cal. 572; Hartley *v.* Vermillion, (Cal. 1902) 70 Pac. Rep. 273; California Nav., etc., Co. *v.* Union Transp. Co., 126 Cal. 433; San Francisco *v.* Grote, 120 Cal. 59.

Colorado. — Leadville *v.* Coronado Min. Co., 29 Colo. 17.

Connecticut. — Kent *v.* Pratt, 73 Conn. 573; New York, etc., R. Co. *v.* Fair Haven, etc., R. Co., 70 Conn. 610.

Georgia. — Georgia R., etc., Co. *v.* Atlanta, 118 Ga. 486.

Illinois. — Chicago *v.* Borden, 190 Ill. 430; Woodburn *v.* Sterling, 184 Ill. 208; Woollacott *v.* Chicago, 187 Ill. 504; Alden Coal Co. *v.* Challis, 200 Ill. 229; Russell *v.* Chicago, etc., Electric R. Co., 205 Ill. 155.

Indiana. — Evansville, etc., R. Co. *v.* State, 149 Ind. 276; Pittsburgh, etc., R. Co. *v.* Noftsgar, 26 Ind. App. 614; Lightcap *v.* North Judson, 154 Ind. 43.

Iowa. — Youngerman *v.* Polk County, 110 Iowa 731; Coe College *v.* Cedar Rapids, 120 Iowa 541; Mt. Vernon *v.* Young, 124 Iowa 517.

Kentucky. — Owensboro *v.* Muster, 111 Ky. 856; Riley *v.* Buchanan, 116 Ky. 625.

Maryland. — Lonaconing Midland, etc., R. Co. *v.* Consolidation Coal Co., 95 Md. 630; Baltimore *v.* Northern Cent. R. Co., 88 Md. 427.

Minnesota. — Hurley *v.* West St. Paul, 83 Minn. 401; Benson *v.* St. Paul, etc., R. Co., 73 Minn. 481.

Montana. — Farlin *v.* Hill, 27 Mont. 27.

Nebraska. — Close *v.* Swanson, 64 Neb. 389; Langan *v.* Whalen, (Neb. 1903) 93 N. W. Rep. 393.

New York. — Matter of Hunter, 163 N. Y. 542, 79 Am. St. Rep. 616; Klug *v.* Jeffers, 88 N. Y. App. Div. 246.

Pennsylvania. — Cotter *v.* Philadelphia, 194 Pa. St. 496.

Tennessee. — Athens *v.* Burkett, (Tenn. Ch. 1900) 59 S. W. Rep. 404; Burkitt *v.* Battle, (Tenn. Ch. 1900) 59 S. W. Rep. 429; State *v.* Hamilton, 109 Tenn. 276.

Texas. — Bellar *v.* Beaumont, (Tex. Civ. App. 1900) 55 S. W. Rep. 410; De George *v.* Goosby, 33 Tex. Civ. App. 187.

Utah. — Whittaker *v.* Ferguson, 16 Utah 240; Culmer *v.* Salt Lake City, 27 Utah 252; Schettler *v.* Lynch, 23 Utah 315.

Vermont. — Clarendon *v.* Rutland R. Co., 75 Vt. 6.

Virginia. — Gate City *v.* Richmond, 97 Va. 337.

Washington. — Seattle *v.* Hill, 23 Wash. 92; Columbia, etc., R. Co. *v.* Seattle, 33 Wash. 513.

West Virginia. — Jarvis *v.* Grafton, 44 W. Va. 453.

Wisconsin. — Randall *v.* Rovelstad, 105 Wis. 410.

**2. How Intent Shown.** — Intention may be shown in every conceivable way in which the intentions could be manifested. Sussman *v.* San Luis Obispo County, 126 Cal. 536; Anaheim *v.* Langenberger, 134 Cal. 608; Clark *v.* McCormick, 174 Ill. 164; Lee *v.* Harris, 206 Ill. 428, 99 Am. St. Rep. 176; Schettler *v.* Lynch, 23 Utah 315.

An agreement entered into and acted on by adjoining landowners to give twenty feet to the highway amounts to a dedication. Pedlow *v.* Renfrew, 27 Ont. App. 611.

A letter to the authorities signifying a desire to give the land for widening the street, when accepted, amounts to a dedication. Lansburgh *v.* District of Columbia, 8 App. Cas. (D. C.) 10.

The intention of the owner may be implied from the declarations, acts, or conduct of the landowner. Evansville, etc., R. Co. *v.* State, 149 Ind. 276.

**38. 1. Deeds and Writings Unnecessary —** United States. — London, etc., Bank *v.* Oakland, (C. C. A.) 98 Fed. Rep. 691; Holmes *v.* Cleveland, etc., R. Co., 93 Fed. Rep. 100.

Colorado. — McIntyre *v.* El Paso County, 15 Colo. App. 78; Leadville *v.* Coronado Min. Co., 29 Colo. 17.

Illinois. — Clark *v.* McCormick, 174 Ill. 164; Woodburn *v.* Sterling, 184 Ill. 208; Russell *v.* Lincoln, 200 Ill. 511; Wormley *v.* Wormley, 207 Ill. 411.

Kentucky. — Spurrier *v.* Bland, (Ky. 1899) 49 S. W. Rep. 467; Riley *v.* Buchanan, 116 Ky. 625; Halley *v.* Scott County Fiscal Ct., 78 S. W. Rep. 149, 25 Ky. L. Rep. 1471.



**38.** Intent Must Clearly and Positively Appear. — See note 2.

**39.** All Acts of Owner Admissible. — See note 1.

**40.** Acts Showing an Intent — Setting Out and Working a Road. — See note 1.

**41.** *c.* WHEN ESTOPPED TO DENY. — See note 1.

*Maryland.* — Lonaconing Midland, etc., R. Co. *v.* Consolidation Coal Co., 95 Md. 630.

*Missouri.* — Whyte *v.* St. Louis, 153 Mo. 90, quoting 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 38.

*Tennessee.* — Burkitt *v.* Battle, (Tenn. Ch. 1900) 59 S. W. Rep. 429.

*Texas.* — San Antonio *v.* Sullivan, 23 Tex. Civ. App. 619; Corsicana *v.* Anderson, 33 Tex. Civ. App. 596.

*West Virginia.* — Hast *v.* Piedmont, etc., R. Co., 52 W. Va. 396, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 38.

*Canada.* — Westmount *v.* Warminton, 9 Quebec Q. B. 101.

**38. 2. Evidence to Prove Intent Must Be Clear and Unequivocal** — *United States.* — London, etc., Bank *v.* Oakland, (C. C. A.) 90 Fed. Rep. 691.

*California.* — Los Angeles *v.* Kysor, 125 Cal. 463; Niles *v.* Los Angeles, 125 Cal. 572; Hartley *v.* Vermillion, (Cal. 1902) 79 Pac. Rep. 273.

*Colorado.* — Leadville *v.* Coronado Min. Co., 29 Colo. 17.

*Connecticut.* — Kent *v.* Pratt, 73 Conn. 573.

*Illinois.* — Carlinville *v.* Castle, 177 Ill. 105, 69 Am. St. Rep. 212; Chicago *v.* Borden, 190 Ill. 430; Woodburn *v.* Sterling, 184 Ill. 208; Alden Coal Co. *v.* Challis, 200 Ill. 229; Russell *v.* Chicago, etc., Electric R. Co., 205 Ill. 155.

*Indiana.* — German Bank *v.* Brose, 32 Ind. App. 77.

*Iowa.* — Mt. Vernon *v.* Young, 124 Iowa 517.

*Kentucky.* — Spurrier *v.* Bland, (Ky. 1899) 49 S. W. Rep. 467.

*Nebraska.* — Close *v.* Swanson, 64 Neb. 389.

*New Jersey.* — Atlantic City *v.* Groff, 68 N. J. L. 670.

*New York.* — Klug *v.* Jeffers, 88 N. Y. App. Div. 246.

*Oregon.* — Spencer *v.* Peterson, 41 Oregon 257.

*Tennessee.* — Athens *v.* Burkett, (Tenn. Ch. 1900) 59 S. W. Rep. 404, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 38; Burkitt *v.* Battle, (Tenn. Ch. 1900) 59 S. W. Rep. 429.

*Virginia.* — Gate City *v.* Richmond, 97 Va. 337.

*Washington.* — Columbia, etc., R. Co. *v.* Seattle, 33 Wash. 513; Seattle *v.* Hill, 23 Wash. 92.

*West Virginia.* — Hast *v.* Piedmont, etc., R. Co., 52 W. Va. 396, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 38.

**39. 1. Acts and Declarations of Owner Admissible** — *United States.* — London, etc., Bank *v.* Oakland, (C. C. A.) 90 Fed. Rep. 691.

*California.* — Smith *v.* Glenn, 129 Cal. xviii, 62 Pac. Rep. 180. Statements made on behalf of a private corporation are admissible. Sussman *v.* San Luis Obispo County, 126 Cal. 536.

*Connecticut.* — Kent *v.* Pratt, 73 Conn. 573.

*Illinois.* — Alden Coal Co. *v.* Challis, 200 Ill. 229; Seidschlag *v.* Antioch, 207 Ill. 280.

*Indiana.* — Pittsburgh, etc., R. Co. *v.* Nottsger, 26 Ind. App. 614; Evansville, etc., R. Co.

*v.* State, 149 Ind. 276; Pittsburgh, etc., R. Co. *v.* Crown Point, 150 Ind. 536.

*Iowa.* — Quick *v.* Cotman, 124 Iowa 102, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 39.

*Minnesota.* — Boye *v.* Albert Lea, 93 Minn. 121.

*New York.* — Matter of Hunter, 163 N. Y. 542, 79 Am. St. Rep. 616.

*Texas.* — Scott *v.* Rockwall County, (Tex. Civ. App. 1899) 49 S. W. Rep. 932; Grace *v.* Walker, 95 Tex. 39.

**Evidence of an Interruption of User** may be considered in ascertaining the intention of the owner. Chinnock *v.* Hartley Wintney Rural Council, 63 J. P. 327.

**40. 1. Circumstances Showing Intent.** — *Eureka v. McKay*, 123 Cal. 666; *Hull v. Cedar Rapids*, 111 Iowa 466; *Finnegan v. St. Joseph*, 123 Mich. 330; *McGinnis v. St. Louis*, 157 Mo. 191; *Deadwood v. Whittaker*, 12 S. Dak. 515; *Gilleau v. Frost*, 25 Tex. Civ. App. 371; *Seattle v. Hill*, 23 Wash. 92; *Thurston County v. Walker*, 27 Wash. 500; *Bates v. Beloit*, 103 Wis. 90.

**Constructing Fences and Buildings Along Line of Street.** — *Woodburn v. Sterling*, 184 Ill. 208.

If the owner sets back his fence and declares that his purpose in so doing is to widen the street, an intention to dedicate is shown. *Bellar v. Beaumont*, (Tex. Civ. App. 1900) 55 S. W. Rep. 410.

**Intent Must Be a Present One.** — *Atlantic City v. Groff*, 68 N. J. L. 670.

**Failure to Enclose.** — *Chicago v. Borden*, 190 Ill. 430, supporting the third paragraph of the original note.

**Intention Expressed.** — An express reservation of the streets to the use of the owners of the lots fronting thereon will prevent a dedication where it is stated that the streets are not for public use. *Whyte v. St. Louis*, 153 Mo. 80.

**Setting Fences Back Shows Intent.** — *Hunt v. Tolles*, 75 Vt. 48.

**Working Road under Public Authorities** amounts to a dedication by the owner. *Burks v. Ferriell*, 80 S. W. Rep. 483, 26 Ky. L. Rep. 35.

**41. 1. Owner Estopped to Deny** — *United States.* — *Kruger v. Constable*, 116 Fed. Rep. 722, affirmed (C. C. A.) 128 Fed. Rep. 908; *Snowden v. Loree*, 122 Fed. Rep. 493, affirmed (C. C. A.) 128 Fed. Rep. 419.

*Colorado.* — *McIntyre v. El Paso County*, 15 Colo. App. 78; *Leadville v. Coronado Min. Co.*, 29 Colo. 17.

*Connecticut.* — Kent *v.* Pratt, 73 Conn. 573.

*Illinois.* — *Woollacott v. Chicago*, 187 Ill. 504, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 41; *Alden Coal Co. v. Challis*, 200 Ill. 220, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 41; *Barney v. Lincoln Park*, 203 Ill. 397; *Mann v. Bergmann*, 203 Ill. 406; *Corning v. Woolner*, 206 Ill. 190.

*Indiana.* — *Evansville, etc., R. Co. v. State*, 149 Ind. 276; *Pittsburgh, etc., R. Co. v. Crown*

**42. d. EVIDENCE TO REBUT — Barring Way.** — See notes 1, 2.

Payment of Taxes. — See note 3.

Conveying as Private Property. — See note 4.

**43. 3. Acceptance — a. NECESSITY OF.** — See note 1.**44. Under the Provisions of Some of the Statutes.** — See note 1.

Point, 150 Ind. 536; *Cromer v. State*, 21 Ind. App. 502; Pittsburgh, etc., R. Co. v. Noftsger, 26 Ind. App. 614.

*Kentucky*. — *Riley v. Buchanan*, 116 Ky. 625.

*Maryland*. — *Lonaconing Midland, etc., R. Co. v. Consolidation Coal Co.*, 95 Md. 630.

*North Carolina*. — *Hughes v. Clark*, 134 N. Car. 457.

*Oregon*. — *Oregon City v. Oregon, etc., R. Co.*, 44 Oregon 165.

*Tennessee*. — *Johnson City v. Wolfe*, 103 Tenn. 277.

*Texas*. — *San Antonio v. Sullivan*, 23 Tex. Civ. App. 619; *Corsicana v. Anderson*, 33 Tex. Civ. App. 596.

*Utah*. — *Whittaker v. Ferguson*, 16 Utah 240; *Schettler v. Lynch*, 23 Utah 315.

*Virginia*. — *Norfolk v. Nottingham*, 96 Va. 34.

*West Virginia*. — *Hast v. Piedmont, etc., R. Co.*, 52 W. Va. 396, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 34.

**A Purchaser of Land Who Has Knowledge of a Dedication.** — *McGinnis v. St. Louis*, 157 Mo. 191; *Witman v. Smeltzer*, 16 Pa. Super. Ct. 285; *Higgins v. Sharon*, 5 Pa. Super. Ct. 92; *Wickham v. Twaddell*, 25 Pa. Super. Ct. 188; *Bellar v. Beaumont*, (Tex. Civ. App. 1900) 55 S. W. Rep. 410.

**Remote Vendees** are estopped from denying a dedication by their vendors. *Faller v. Latonia*, 74 S. W. Rep. 287, 24 Ky. L. Rep. 2476.

**42. 1. Evidence to Rebut Intent to Dedicate.** — See *Friern Barnet Urban Council v. Richardson*, 62 J. P. 547.

**2. Erecting Bars and Gates.** — *New Windsor v. Stocksdales*, 95 Md. 196; *Thurstun County v. Walker*, 27 Wash. 500.

**Evidence of Continued Claim of Title.** — *Gate City v. Richmond*, 97 Va. 337.

**3. Rendering for Taxes and Payment of Taxes.** — The erroneous levy of taxes against the dedicator does not effect the dedication of the street. *Westmount v. Warminton*, 9 Quebec Q. B. 101.

**4. Conveying as Private Property.** — *Lightcap v. North Judson*, 154 Ind. 43.

**43. 1. Acceptance Essential — United States.** — *Kruger v. Constable*, 116 Fed. Rep. 722, affirmed (C. C. A.) 128 Fed. Rep. 908.

*Alabama*. — *Stewart v. Conley*, 122 Ala. 179, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 43.

*California*. — *Niles v. Los Angeles*, 125 Cal. 572; *Anaheim v. Langenberger*, 134 Cal. 608.

*Connecticut*. — *Kent v. Pratt*, 73 Conn. 573; *New York, etc., R. Co. v. Fair Haven, etc., R. Co.*, 70 Conn. 610.

*Georgia*. — *Georgia R., etc., Co. v. Atlanta*, 118 Ga. 486; *Kelsoe v. Oglethorpe*, 120 Ga. 951, 102 Am. St. Rep. 138.

*Illinois*. — *Alden Coal Co. v. Challis*, 200 Ill. 229, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 43; *Russell v. Lincoln*, 200 Ill. 511, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.)

43; *Carlinville v. Castle*, 177 Ill. 105, 69 Am. St. Rep. 212; *Chicago v. Borden*, 190 Ill. 430; *Woodburn v. Sterling*, 184 Ill. 208; *Woollacott v. Chicago*, 187 Ill. 504; *Rock Island v. Starkey*, 189 Ill. 515; *Thompson v. Maloney*, 199 Ill. 276, 93 Am. St. Rep. 133; *Russell v. Chicago, etc., Electric R. Co.*, 205 Ill. 155; *Owen v. Brookport*, 208 Ill. 35; *Edwardsville v. Barnsback*, 66 Ill. App. 381.

*Indiana*. — *Strunk v. Pritchett*, 27 Ind. App. 582, quoting 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 43; *Lightcap v. North Judson*, 154 Ind. 43; *Peoria, etc., R. Co. v. Attica, etc., R. Co.*, 154 Ind. 218; *Indianapolis v. Church Extension*, 28 Ind. App. 319; *Huntington v. Townsend*, 29 Ind. App. 269.

*Iowa*. — *Sarver v. Chicago, etc., R. Co.*, 104 Iowa 59; *Uptagraff v. Smith*, 106 Iowa 385.

*Kentucky*. — *Schuster v. Barber Asphalt Paving Co.*, 74 S. W. Rep. 226, 24 Ky. L. Rep. 2346; *Riley v. Buchanan*, 116 Ky. 625.

*Maine*. — *Chapin v. Maine Cent. R. Co.*, 97 Me. 151.

*Massachusetts*. — *Slater v. Gunn*, 170 Mass. 509; *Moffatt v. Kenny*, 174 Mass. 311.

*Michigan*. — *Conkling v. Mackinaw City*, 120 Mich. 67; *Gregory v. Ann Arbor*, 127 Mich. 454.

*Nebraska*. — *Close v. Swanson*, 64 Neb. 389.

*New Jersey*. — *Pease v. Paterson, etc., Traction Co.*, 69 N. J. L. 165.

*New York*. — *Matter of Hunter*, 163 N. Y. 542, 79 Am. St. Rep. 616; *Buffalo v. Delaware, etc., R. Co.*, 68 N. Y. App. Div. 488, affirmed 178 N. Y. 561.

*Ohio*. — *Lunkenheimer Co. v. Cincinnati*, 23 Ohio Cir. Ct. 617.

*Pennsylvania*. — *Com. v. Shoemaker*, 14 Pa. Super. Ct. 194; *Com. v. Llewellyn*, 14 Pa. Super. Ct. 214; *Washington Female Seminary v. Washington*, 18 Pa. Super. Ct. 555; *Pittsburg v. Epping-Carpenter Co.*, 194 Pa. St. 318.

*Tennessee*. — *Athens v. Burkett*, (Tenn. Ch. 1900) 59 S. W. Rep. 404; *State v. Hamilton*, 109 Tenn. 276.

*Texas*. — *Bellar v. Beaumont*, (Tex. Civ. App. 1900) 55 S. W. Rep. 410; *San Antonio v. Sullivan*, 23 Tex. Civ. App. 619.

*Utah*. — *Culmer v. Salt Lake City*, 27 Utah 252.

*Virginia*. — *Norfolk v. Nottingham*, 96 Va. 34; *Newport News, etc., R., etc., Co. v. Lake*, 101 Va. 334; *Richmond v. Gallego Mills Co.*, 102 Va. 165.

*Washington*. — *Seattle v. Hill*, 23 Wash. 92. *West Virginia*. — *Hast v. Piedmont, etc., R. Co.*, 52 W. Va. 396, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 43.

*Wisconsin*. — *Smith v. Beloit*, 122 Wis. 396.

*Canada*. — *Moore v. Woodstock Woollen Mills Co.*, 20 Can. Sup. Ct. 627.

**44. 1. Statutes — Acceptance Unnecessary.** — *London, etc., Bank v. Oakland*, (C. C. A.) 90 Fed. Rep. 691.

**45. b. BY IMPLICATION — WHEN DEDICATION BENEFICIAL.** — See notes 1, 2.

**47. c. BY OFFICIAL ACTS — Power of Local Government to Accept.** — See note 1.

**48. Different Acts Showing Acceptance.** — See note 1.

**45. 1. Acceptance Implied When Dedication Beneficial.** — *Beebe v. Little Rock*, 68 Ark. 39; *Alden Coal Co. v. Challis*, 200 Ill. 229, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 45; *Wormley v. Wormley*, 207 Ill. 411; *Owen v. Brookport*, 208 Ill. 35; *German Bank v. Brose*, 32 Ind. App. 77; *Louisville v. Snow*, 107 Ky. 536; *Raynor v. Syracuse University*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 83.

**2. No Formal Acceptance Necessary — Alabama.** — *Stewart v. Conley*, 122 Ala. 179.

**Colorado.** — *Durango v. Davis*, 13 Colo. App. 285.

**Illinois.** — *Alden Coal Co. v. Challis*, 200 Ill. 229, quoting 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 45; *Sullivan v. Tichenor*, 179 Ill. 97; *Woodburn v. Sterling*, 184 Ill. 208; *Rock Island v. Starkey*, 189 Ill. 515; *Eisendrath v. Chicago*, 192 Ill. 320.

**Iowa.** — *Coe College v. Cedar Rapids*, (Iowa 1901) 87 N. W. Rep. 444.

**Kansas.** — *McAlpine v. Chicago G. W. R. Co.*, 68 Kan. 207.

**Kentucky.** — *Louisville v. Snow*, 107 Ky. 536; *South Covington, etc., St. R. Co. v. Newport, etc.*, *Turnpike Co.*, 110 Ky. 691; *Riley v. Buchanan*, 116 Ky. 625.

**New Jersey.** — *Atlantic City v. Groff*, 64 N. J. L. 527; *Hohokus Tp. v. Erie R. Co.*, 65 N. J. L. 353; *South Amboy v. New York, etc., R. Co.*, 66 N. J. L. 623.

**New York.** — *Matter of Hunter*, 47 N. Y. App. Div. 102, reversed 163 N. Y. 542, 79 Am. St. Rep. 616.

**Oregon.** — *Oregon City v. Oregon, etc., R. Co.*, 44 Oregon 165.

**South Carolina.** — *Chaffee v. Aiken*, 57 S. Car. 507.

**Texas.** — *Gillean v. Frost*, 25 Tex. Civ. App. 371; *Heffron v. Galveston*, 33 Tex. Civ. App. 52.

**47. 1. Acceptance by Municipal Authorities.** — *Moffatt v. Kenny*, 174 Mass. 311; *Atlantic City v. Atlantic City Steel-Pier Co.*, 62 N. J. Eq. 139.

Acceptance by the municipal authorities is not necessary. *Pittsburg v. Epping-Carpenter Co.*, 194 Pa. St. 318.

**In Incorporated Towns the Common Council, Etc.** — *Matter of Hunter*, 163 N. Y. 542, 79 Am. St. Rep. 616; *Seattle v. Hill*, 23 Wash. 92, quoting 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 46; *Pedlow v. Renfrew*, 27 Ont. App. 611.

**48. 1. Acts Showing Acceptance — Colorado.** — *Durango v. Davis*, 13 Colo. App. 285; *Leadville v. Coronado Min. Co.*, 29 Colo. 17.

**Illinois.** — *Woodburn v. Sterling*, 184 Ill. 208; *Alden Coal Co. v. Challis*, 200 Ill. 229; *Rock Island v. Starkey*, 91 Ill. App. 592, reversed in 189 Ill. 515 upon other grounds; *Woollacott v. Chicago*, 187 Ill. 504; *Shirk v. Chicago*, 195 Ill. 208; *Owen v. Brookport*, 208 Ill. 35.

**Indiana.** — *Hall v. Breyfogle*, 162 Ind. 494; *Pittsburgh, etc., R. Co. v. Crown Point*, 150 Ind. 536.

**Missouri.** — *Longworth v. Sedevic*, 165 Mo. 221.

**New York.** — *Matter of Hunter*, 47 N. Y. App. Div. 102, reversed 163 N. Y. 542, 79 Am. St. Rep. 616.

**South Carolina.** — *Chaffee v. Aiken*, 57 S. Car. 507.

**Virginia.** — *Richmond v. Gallego Mills Co.*, 102 Va. 165.

**Washington.** — *Seattle v. Hill*, 23 Wash. 92.

**West Virginia.** — *Jarvis v. Grafton*, 44 W. Va. 453.

**Wisconsin.** — *Bates v. Beloit*, 103 Wis. 90.

**Canada.** — *Westmount v. Warminton*, 9 Quebec Q. B. 101.

**Opening, Grading, and Keeping in Repair.** — By opening the street and grading and keeping it in repair acceptance may be shown. *New Windsor v. Stockdale*, 95 Md. 196.

**Such Use as Public Necessity Demands** is sufficient to show acceptance. *Keokuk v. Cosgrove*, 116 Iowa 189.

**Desultory Use by Private Persons No Acceptance.** — *Rolling v. Emrich*, 122 Wis. 134.

**Authorizing the Construction of a Railroad Along a Street** is evidence of acceptance. *Michigan Cent. R. Co. v. Bay City*, 129 Mich. 264; *People's Traction Co. v. Atlantic City*, (N. J. 1904) 57 Atl. Rep. 972; *Raynor v. Syracuse University*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 83.

**Constructing Sewers and Water Mains in Street.** — *Scanlan v. Montreal*, 17 Quebec Super. Ct. 363; *Matter of Hunter*, 163 N. Y. 542, 79 Am. St. Rep. 616.

**Marking Out and Platting.** — *Finucan v. Ramsden*, 95 N. Y. App. Div. 626; *Corsicana v. Anderson*, 33 Tex. Civ. App. 596; *Exterkamp v. Covington Harbor Co.*, 104 Ky. 796.

**The Fact of the Town Limits Being Extended.** — *Hughes v. Clark*, 134 N. Car. 457.

**Assessment and Receipt of Taxes.** — *Eisendrath v. Chicago*, 192 Ill. 320; *Smith v. Union Switch, etc., Co.*, 31 Pittsb. Leg. J. N. S. (Pa.) 21; *Toledo v. Converse*, 11 Ohio Cir. Dec. 468; *Lunkenheimer Co. v. Cincinnati*, 23 Ohio Cir. Ct. 617; *German Bank v. Brose*, 32 Ind. App. 77; *Hanger v. Des Moines*, 109 Iowa 480; *Hull v. Cedar Rapids*, 111 Iowa 466; *Chaffee v. Aiken*, 57 S. Car. 507; *Ashland v. Chicago, etc., R. Co.*, 105 Wis. 398; *Gillean v. Frost*, 25 Tex. Civ. App. 371; *Uniontown v. Berry*, 72 S. W. Rep. 295, 24 Ky. L. Rep. 1692.

An assessor has no authority to accept a dedication. *Chicago v. Borden*, 190 Ill. 430.

The mere taxing of the property will not estop the city from setting up the dedication. *Daiber v. Scott*, 2 Ohio Cir. Dec. 179.

**Digging a Public Well.** — Digging a public well is evidence of acceptance. *Dallas v. Gibbs*, 27 Tex. Civ. App. 275.

**Fixing the Grade by Ordinance.** — *Matter of Hunter*, 163 N. Y. 542, 79 Am. St. Rep. 616.

**Prosecution for Obstructing.** — *Anaheim v. Langenberger*, 134 Cal. 608.

An action by the municipal authorities to obtain possession of the property amounts to



**50.** There May Be an Acceptance of Part and Not of All. — See note 2.

*d.* TIME WITHIN WHICH ACCEPTANCE MUST TAKE PLACE. —

See note 3.

**52.** *f.* WHERE MANNER PRESCRIBED BY STATUTE. — See note 1.

**V. EVIDENCE OF DEDICATION — 1. Generally — Question of Fact.** — See

note 2.

**53.** Mixed Question of Law and Fact. — See note 1.

**55.** 2. Deeds and Other Writings — Formal Conveyance to Public. — See note 1.

Where a Lot Is Described in a Deed as Bounded by a Street. — See note 2.

an acceptance. *Atlantic City v. Groff*, 64 N. J. L. 527.

**Ejectment.** — Bringing an action of ejectment amounts to an acceptance. *Atlantic City v. Snee*, 68 N. J. L. 39.

**50.** 2. There May Be an Acceptance and Appropriation in Part. — *Augusta v. Tyner*, 197 Ill. 242; *Indianapolis v. Church Extension*, 28 Ind. App. 319.

But it must clearly appear that the city did not intend to accept all of the streets. *Lee v. Harris*, 206 Ill. 428, 99 Am. St. Rep. 176.

A failure to open and improve a part of a new street does not operate as a rejection of that part. *Hall v. Breyfogle*, 162 Ind. 494, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 50-56.

**3. Acceptance Must Be Within a Reasonable Time.** — *Niles v. Los Angeles*, 125 Cal. 572; *Manitori v. International Trust Co.*, 30 Colo. 467; *Edwardsville v. Barnsbac.*, 66 Ill. App. 381; *Lee v. Harris*, 206 Ill. 428, 99 Am. St. Rep. 176; *Sarvis v. Caster*, 116 Iowa 710, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 50; *Raynor v. Syracuse University*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 83; *Niagara Falls v. New York Cent., etc., R. Co.*, 41 N. Y. App. Div. 93, affirmed 168 N. Y. 610; *Ashland v. Chicago, etc., R. Co.*, 105 Wis. 398.

**Illustrations.** — It is not necessary to an acceptance that every street should be forthwith opened when platted. *Augusta v. Tyner*, 197 Ill. 242.

It is not necessary that the acceptance should be immediate. *Pittsburg v. Epping-Carpenter Co.*, 194 Pa. St. 318.

The question of what is a reasonable time is for the jury, and they must take into consideration all of the circumstances surrounding the case — size of the town, population, and necessity for the use of the property. *Chaffee v. Aiken*, 57 S. Car. 507.

**Acceptance May Be Immediate.** — *Matter of Hunter*, 163 N. Y. 542, 79 Am. St. Rep. 616.

**Acceptance Must Be Within a Reasonable Time.** — Acceptance when the growth of the town demands it will be sufficient. *Hall v. Breyfogle*, 162 Ind. 494, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 50.

**52.** 1. Where a Statute Requires an Acceptance to Be Made in a Particular Way. — *Moffatt v. Kenny*, 174 Mass. 311.

Where a statute requires an acceptance to be made in a peculiar way it is held to be for the protection of the city and not a limitation upon its powers. *Leadville v. Coronado Min. Co.*, 29 Colo. 17.

**2. Question of Fact — California.** — *Niles v. Los Angeles*, 125 Cal. 572; *Los Angeles v. Kysor*, 125 Cal. 463; *Sussman v. San Luis*

*Obispo County*, 126 Cal. 536; *Smith v. Glenn*, 129 Cal. xviii, 62 Pac. Rep. 180; *Hartley v. Vermillion*, (Cal. 1902) 70 Pac. Rep. 273.

*Illinois.* — *Gerhards v. Johnson*, 105 Ill. App. 65; *Woodburn v. Sterling*, 184 Ill. 208.

*Maryland.* — *New Windsor v. Stocksdales*, 95 Md. 196.

*Michigan.* — *Finnegan v. St. Joseph*, 123 Mich. 330.

*Minnesota.* — *Boye v. Albert Lea*, 93 Minn. 121. *Nebraska.* — *Langan v. Whalen*, (Neb. 1903) 93 N. W. Rep. 393.

*New Jersey.* — *Palen v. Ocean City*, 64 N. J. L. 669; *De Long v. Spring Lake, etc., Co.*, 65 N. J. L. 1; *Atlantic City v. Groff*, 68 N. J. L. 670.

*South Carolina.* — *Chaffee v. Aiken*, 57 S. Car. 507.

**The Burden of Proof.** — *Kansas City v. Banks*, 9 Kan. App. 885, 61 Pac. Rep. 333; *Boye v. Albert Lea*, 93 Minn. 121; *Columbia, etc., R. Co. v. Seattle*, 33 Wash. 513.

**53.** 1. Mixed Question of Law and Fact. — *German Bank v. Brose*, 32 Ind. App. 77; *Robertson v. Meyer*, 59 N. J. Eq. 366.

**Cases Showing Dedication.** — *Bennett v. Mitchell County*, 111 Ga. 847; *Pittsburgh v. Epping-Carpenter Co.*, 29 Pittsb. Leg. J. N. S. (Pa.) 255; *Kirkman v. Nashville*, (Tenn. Ch. 1899) 55 S. W. Rep. 1072; *Whittaker v. Ferguson*, 16 Utah 240.

**Cases in Which the Facts Were Held Insufficient to Show a Dedication.** — *Niles v. Los Angeles*, 125 Cal. 572; *Slater v. Gunn*, 170 Mass. 509; *Benson v. St. Paul, etc., R. Co.*, 73 Minn. 481; *Diamond v. Smith*, 27 Tex. Civ. App. 558.

**55.** 1. Formal Conveyance to Public. — *Whyte v. St. Louis*, 153 Mo. 80; *First German Reformed Church v. Summit County*, 23 Ohio Cir. Ct. 553.

A deed to a right of way providing that it shall revert to the public amounts to a dedication. *Silverthorn v. Parsons*, 8 Ohio Cir. Dec. 349.

**2. Deeds Between Private Individuals — Recognition of Rights of Public — California.** — *Eureka v. Gates*, 137 Cal. 89.

*Illinois.* — *McDonald v. Stark*, 176 Ill. 456.

*Maryland.* — *Baltimore v. Northern Cent. R. Co.*, 88 Md. 427.

*Missouri.* — *Whyte v. St. Louis*, 153 Mo. 80; *Longworth v. Sedevic*, 165 Mo. 221.

*New York.* — *Matter of Hunter*, 163 N. Y. 542, 79 Am. St. Rep. 616; *Matter of Curran*, 38 N. Y. App. Div. 82.

*Pennsylvania.* — *Schrack's Estate*, 9 Pa. Dist. 149; *Com. v. Shoemaker*, 14 Pa. Super. Ct. 194.

*Rhode Island.* — *Baker v. Barry*, 22 R. I. 471.

*Tennessee.* — *State v. Hamilton*, 109 Tenn. 276.

**56.** Mere Reference to Street for Purpose of Description. — See note 1.  
Private Ways. — See note 2.

**57.** 3. Platting and Sale of Lots. — See note 1.

**59.** The Filing or Recording of a Plat. — See note 2.

**60.** Interpretation of Plat — Effect to Be Given to All Lines and Marks. — See note 1.  
Particular Purpose of Dedication Must Appear. — See note 3.

*West Virginia.* — Pence v. Bryant, 54 W. Va. 263.

**56. 1. Mere Reference.** — Owensboro v. Mus-ter, 111 Ky. 856.

A call in a deed for a certain alley as a boundary is not conclusive of the fact of the dedication of such alley or of the acceptance thereof by the public. *Com. v. Llewellyn*, 14 Pa. Super. Ct. 214.

**2. Mention of Private Ways for Benefit of Parties.** — Taft v. Tarpey, 125 Cal. 376.

**Parties to Deed Alone Can Insist on the Dedication.** — Cincinnati v. McMakin, 8 Ohio Dec. 691.

**57. 1. Effect of Platting and Selling Lands — United States.** — Kruger v. Constable, (C. C. A.) 116 Fed. Rep. 722, affirmed 128 Fed. Rep. 908.

*Colorado.* — Manitou v. International Trust Co., 30 Colo. 467.

*Illinois.* — Woollacott v. Chicago, 187 Ill. 504, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 57; Rusk v. Berlin, 173 Ill. 634; Clark v. McCormick, 174 Ill. 164; McDonald v. Stark, 176 Ill. 456; North Chillicothe v. Burr, 185 Ill. 322; Eisendrath v. Chicago, 192 Ill. 320; Augusta v. Tyner, 197 Ill. 242; Thompson v. Maloney, 199 Ill. 276, 93 Am. St. Rep. 133; Russell v. Lincoln, 200 Ill. 511; Mann v. Bergmann, 203 Ill. 406; Russell v. Chicago, etc., Electric R. Co., 205 Ill. 155; Edwardsville v. Barnsback, 66 Ill. App. 381.

*Indiana.* — Hall v. Breyfogle, 168 Ind. 494.

*Louisiana.* — Calhoun v. Colfax, 105 La. 416; Lafitte v. New Orleans, 52 La. Ann. 2099.

*Maryland.* — Baltimore v. Northern Cent. R. Co., 88 Md. 427; Richardson v. Davis, 91 Md. 390.

*Michigan.* — Conkling v. Mackinaw City, 120 Mich. 67.

*Minnesota.* — Smith v. St. Paul, 72 Minn. 472.

*New Jersey.* — Palen v. Ocean City, 64 N. J. L. 669; South Amboy v. New York, etc., R. Co., 66 N. J. L. 623; Cleveland v. Bergen Bldg., etc., Co., (N. J. 1903) 55 Atl. Rep. 117.

*New York.* — Klug v. Jeffers, 88 N. Y. App. Div. 246; Matter of Hunter, 163 N. Y. 542, 79 Am. St. Rep. 616, reversing 47 N. Y. App. Div. 102, and affirming (Supm. Ct. Spec. T.) 28 Misc. (N. Y.) 314.

*North Carolina.* — Conrad v. West End Hotel, etc., Co., 126 N. Car. 776; Davis v. Morris, 132 N. Car. 435; Hughes v. Clark, 134 N. Car. 457.

*Ohio.* — Wright v. Oberlin, 23 Ohio Cir. Ct. 509.

*Oregon.* — Spencer v. Peterson, 41 Oregon 257; Nodine v. Union, 42 Oregon 613; Oregon City v. Oregon, etc., R. Co., 44 Oregon 165.

*Pennsylvania.* — Richardson v. McKeesport, 31 Pitsb. Leg. J. N. S. (Pa.) 52; Smith v. Union Switch, etc., Co., 17 Pa. Super. Ct. 444.

*South Dakota.* — Sweatman v. Bathrick, 17 S. Dak. 138.

*Tennessee.* — Athens v. Burkett, (Tenn. Ch. 1900) 59 S. W. Rep. 404.

*Texas.* — San Antonio v. Sullivan, 23 Tex. Civ. App. 619; Ostrom v. Arnold, 24 Tex. Civ. App. 192; Heffron v. Galveston, 33 Tex. Civ. App. 52; Corsicana v. Anderson, 33 Tex. Civ. App. 596.

*Utah.* — Schettler v. Lynch, 23 Utah 315.

*Virginia.* — Newport News, etc., R. Co., v. Lake, 101 Va. 334.

*West Virginia.* — Hast v. Piedmont, etc., R. Co., 52 W. Va. 396, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 57.

*Wisconsin.* — Smith v. Beloit, 122 Wis. 396.

*Canada.* — Westmount v. Warminton, 9 Quebec. Q. B. 101; Geoffrion v. Montreal Park, etc., R. Co., 20 Quebec Super. Ct. 559. See also Daly v. Robertson, 1 N. W. Ter. 427.

The platting and selling of lands is only evidence of a dedication. *Los Angeles v. Kysor*, 125 Cal. 463.

**59. 2. Filing Plat.** — Kruger v. Constable, 116 Fed. Rep. 722, affirmed (C. C. A.) 128 Fed. Rep. 908; Sacramento v. Clunie, 120 Cal. 29; Niles v. Los Angeles, 125 Cal. 572; Anaheim v. Langenberger, 134 Cal. 608; Woodburn v. Sterling, 184 Ill. 208; Woollacott v. Chicago, 187 Ill. 504; Russell v. Chicago, etc., Electric R. Co., 205 Ill. 155; Huntington v. Townsend, 29 Ind. App. 269; Loughman v. Long Island R. Co., 83 N. Y. App. Div. 629; San Antonio v. Sullivan, 23 Tex. Civ. App. 619; Ashland v. Chicago, etc., R. Co., 105 Wis. 398.

A recorded plan does not effect a dedication until used by the public or purchase of the lots. *Pittsburg v. Epping-Carpenter Co.*, 194 Pa. St. 318.

**60. 1. If Possible, Some Meaning Should Be Ascribed to All the Lines Appearing upon a Plat.** — Guttery v. Glenn, 201 Ill. 275; Boehler v. Des Moines, 111 Iowa 417.

**3. Leaving Spaces Unmarked.** — London, etc., Bank v. Oakland, (C. C. A.) 90 Fed. Rep. 691; Manitou v. International Trust Co., 30 Colo. 467; Mt. Vernon v. Young, 124 Iowa 517; Coe College v. Cedar Rapids, (Iowa 1901) 87 N. W. Rep. 444; Oregon City v. Oregon, etc., R. Co., 44 Oregon 165; Baker v. Barry, 22 R. I. 471, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 60.

The coloring of a triangular piece of land on a map at the intersection of two streets the same as the streets and failing to number it is not conclusive of an intention to dedicate. *Toledo v. Converse*, 11 Ohio Cir. Dec. 468.

**Lands Adjacent to a River or Other Body of Water.** — Boehler v. Des Moines, 111 Iowa 417; Holmes v. Cleveland, etc., R. Co., 93 Fed. Rep. 100; Oregon City v. Oregon, etc., R. Co., 44 Oregon 165. But see Uniontown v. Berry, 72 S. W. Rep. 295, 24 Ky. L. Rep. 1692.

A wharf marked on a plat is not thereby dedi-

- 62.** Effect of Certain Words. — See note 1.  
**63.** Parol Evidence to Explain Plat. — See note 1.  
 Rights Acquired by Purchasers with Reference to a Plat. — See note 2.  
**64.** See note 1.  
 Obligations of Grantor. — See note 2.  
**65.** See note 1.

cated to the public. *Palen v. Ocean City*, 64 N. J. L. 669.

**Submerged Lands.** — Submerged land may be dedicated to the public use. *Gillean v. Frost*, 25 Tex. Civ. App. 371.

**62. 1. Certain Words Construed.** — *Fessler v. Union*, (N. J. 1903) 56 Atl. Rep. 272.

**Public Square.** — Where the term "public square" is used on a plat it effects an unrestricted dedication to the public. *Com. v. Connelleville*, 201 Pa. St. 154.

**"Reserved Public Square."** — *Youngerman v. Polk County*, 110 Iowa 731.

**"Seminary Square" or "College Square."** — *Forbes v. Board of Education*, 7 Kan. App. 452; *Board of Education v. Kansas City*, 62 Kan. 374.

**The Term "Reserved."** — *Cleveland v. Bergen Bldg., etc., Co.*, (N. J. 1903) 55 Atl. Rep. 117.

**"Grace Court" Synonymous with "Grace Square."** — *Conrad v. West End Hotel, etc., Co.*, 126 N. Car. 776.

**"Land Marked Street."** — Upon a plat a lot was marked "street" and the deeds to abutting lots were to the "land marked street," and it was held that this lot so marked was not dedicated. *Downes v. Dimock, etc., Co.*, 75 N. Y. App. Div. 513.

**Central Park.** — Designating a plot of ground on a plat at "Central Park" does not constitute a dedication. *Los Angeles v. Kysor*, 125 Cal. 463.

**"Hotel Site."** — Marking a lot in a plat "hotel site" does not prevent its use for other purposes, as it is no guarantee to purchasers of lots that it will be so used. *Hanes v. West End Hotel, etc., Co.*, 129 N. Car. 311.

**"Reserved for Depot Grounds,"** amounts to a dedication. *Kansas City, etc., R. Co. v. Baker*, 183 Mo. 312.

**63. 1. Parol Evidence.** — *Strunk v. Pritchett*, 27 Ind. App. 582. *Contra*, *Baltimore, etc., R. Co. v. Seymour*, 154 Ind. 17.

**2. Rights of Purchasers** — *Alabama*. — *Roberts v. Mathews*, 137 Ala. 523, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 63, 64.

*Colorado*. — *Manitou v. International Trust Co.*, 30 Colo. 467.

*Florida*. — *Price v. Stratton*, (Fla. 1903) 33 So. Rep. 644.

*Illinois*. — *Woollacott v. Chicago*, 187 Ill. 504; *Rusk v. Berlin*, 173 Ill. 634; *Clark v. McCormick*, 174 Ill. 164; *McDonald v. Stark*, 176 Ill. 456; *Eisendrath v. Chicago*, 192 Ill. 320; *Augusta v. Tyner*, 197 Ill. 242; *Alden Coal Co. v. Challis*, 200 Ill. 229; *Corning v. Woolner*, 206 Ill. 190; *Riverside v. MacLain*, 210 Ill. 308, 102 Am. St. Rep. 164.

*Indiana*. — *Hall v. Breyfogle*, 162 Ind. 494; *Huntington v. Townsend*, 29 Ind. App. 269; *Strunk v. Pritchett*, 27 Ind. App. 582.

*Iowa*. — *Keokuk v. Cosgrove*, 116 Iowa 189.

*Maryland*. — *Richardson v. Davis*, 91 Md. 399.

*Minnesota*. — *Smith v. St. Paul*, 72 Minn. 472.

*New Jersey*. — *Hohokus Tp. v. Erie R. Co.*, 65 N. J. L. 353; *Fessler v. Union*, (N. J. 1903) 56 Atl. Rep. 272; *Zeller v. Littell*, (N. J. 1904) 58 Atl. Rep. 377.

*New York*. — *Raynor v. Syracuse University*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 83; *Niagara Falls v. New York Cent., etc., R. Co.*, 41 N. Y. App. Div. 93, affirmed 168 N. Y. 610.

*North Carolina*. — *Collins v. Ashville Land Co.*, 128 N. Car. 563, 83 Am. St. Rep. 720; *Hanes v. West End Hotel, etc., Co.*, 129 N. Car. 311; *Hughes v. Clark*, 134 N. Car. 457.

*Oregon*. — *Nodine v. Union*, 42 Oregon 613.

*Pennsylvania*. — *Osterheldt v. Philadelphia*, 195 Pa. St. 355; *Wickham v. Twaddell*, 25 Pa. Super. Ct. 188; *Witman v. Smeltzer*, 16 Pa. Super. Ct. 285.

*Tennessee*. — *State v. Hamilton*, 109 Tenn. 276.

*Texas*. — *Loustanau v. Robertson*, 21 Tex. Civ. App. 85; *Corsicana v. Zorn*, 97 Tex. 317.

*Virginia*. — *Norfolk v. Nottingham*, 96 Va. 34.

*West Virginia*. — *Pence v. Bryant*, 54 W. Va. 263.

*Wisconsin*. — *Smith v. Beloit*, 122 Wis. 396. The grantor cannot effect a dedication by filing a plat which shows a street over his neighbor's land adjoining his property. *Klug v. Jeffers*, 88 N. Y. App. Div. 246.

**64. 1. Davenport, etc., Bridge R., etc., Co. v. Johnson, 188 Ill. 472; *Thompson v. Maloney*, 199 Ill. 276, 93 Am. St. Rep. 133; *Owen v. Brookport*, 208 Ill. 35; *Bright v. Palmer*, (Ky. 1898) 47 S. W. Rep. 590; *Sweatman v. Bathrick*, 17 S. Dak. 138; *Hamilton County v. Rape*, 101 Tenn. 222; *Brown v. Baraboo*, 98 Wis. 273; *Smith v. Beloit*, 122 Wis. 396.**

**So Where the Street Is Bounded on One Side by a Navigable River.** — *Snowden v. Loree*, 122 Fed. Rep. 493, affirmed (C. C. A.) 128 Fed. Rep. 419; *Sanitary Dist. v. Adams*, 179 Ill. 406.

**But Where a Parcel of Land Is Reserved for the Purpose of a Park** the owners of the abutting lots are entitled to have it remain unoccupied. *McDonald v. Stark*, 176 Ill. 456.

**A Purchaser Before Acceptance by the Public.** — *Wheeler v. Benjamin*, 136 Cal. 51; *Clark v. McCormick*, 174 Ill. 164; *Raynor v. Syracuse University*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 83.

**Purchaser of Lots May Not Deny a Dedication.** — *Price v. Stratton*, (Fla. 1903) 33 So. Rep. 644; *Lafitte v. New Orleans*, 52 La. Ann. 2099; *Ralston v. Weston*, 46 W. Va. 544, 76 Am. St. Rep. 834, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 64; *Jarvis v. Grafton*, 44 W. Va. 452; *Calhoun v. Colfax*, 105 La. 416.

**2. Obligations of Grantor.** — *Roberts v. Mathews*, 137 Ala. 523, 97 Am. St. Rep. 56; *Wickham v. Twaddell*, 25 Pa. Super. Ct. 188; *Corsicana v. Anderson*, 33 Tex. Civ. App. 596; *Seattle v. Hill*, 23 Wash. 92; *Corning v. Woolner*, 206 Ill. 190.

**65. 1. Owner Not Entitled to Damages When**



**65.** Rights Acquired by the Public in the Streets and Squares Appearing upon a Plat. — See notes 2, 3.

**66.** 4. Effect of User — Shows Both Intent of Owner and Acceptance by Public. — See note 2.

**67.** For Prescriptive Period. — See note 1.

Ways by Prescription. — See note 2.

**68.** When Time Not Essential. — See note 1.

**Street Opened.** — *Baltimore v. Northern Cent. R. Co.*, 88 Md. 427; *Morris v. Philadelphia*, 199 Pa. St. 357.

**Whenever the Public Interest Requires, Streets May Be Opened.** — *Russell v. Lincoln*, 200 Ill. 511; *Ashland v. Chicago*, etc., R. Co., 105 Wis. 398.

**65. 2. Acceptance Necessary — United States.** — *Kruger v. Constable*, 116 Fed. Rep. 722, affirmed (C. C. A.) 128 Fed. Rep. 908.

*California.* — *Los Angeles v. Kysor*, 125 Cal. 463; *Niles v. Los Angeles*, 125 Cal. 572.

*Colorado.* — *Manitou v. International Trust Co.*, 30 Colo. 467; *Leadville v. Coronado Min. Co.*, 29 Colo. 17.

*Illinois.* — *Augusta v. Tyner*, 197 Ill. 242; *Russell v. Chicago*, etc., Electric R. Co., 205 Ill. 155.

*Michigan.* — *Conkling v. Mackinaw City*, 120 Mich. 67.

*Tennessee.* — *State v. Hamilton*, 109 Tenn. 276.

*Texas.* — *Gilleen v. Frost*, 25 Tex. Civ. App. 371.

*Virginia.* — *Newport News*, etc., R., etc., Co. v. Lake, 101 Va. 334.

*West Virginia.* — *Pence v. Bryant*, 54 W. Va. 263.

*Wisconsin.* — *Smith v. Beloit*, 122 Wis. 396.

**3. Rights Acquired by Public Generally.** — *Hohokus Tp. v. Erie R. Co.*, 65 N. J. L. 353; *McGinnis v. St. Louis*, 157 Mo. 191.

Until there has been an acceptance or user by the public generally they acquire no right. *Sacramento v. Clunie*, 120 Cal. 29.

The platting of land grants the street to public use. *Osterheldt v. Philadelphia*, 195 Pa. St. 355; *Pittsburg v. Epping-Carpenter Co.*, 194 Pa. St. 318.

In platted additions to a town, when streets are laid out thereon, the fee belongs to the public. *State v. Spokane St. R. Co.*, 19 Wash. 518, 67 Am. St. Rep. 739.

**66. 2. User Shows Intent of Owner and Acceptance by Public — England.** — *Atty.-Gen. v. Esher Linoleum Co.*, (1901) 2 Ch. 647; *Chinnock v. Hartley Wintney Rural Council*, 63 J. P. 327. See also *Abercromby v. Fermoy Town Com'rs*, (1900) 1 Ir. R. 302.

*Canada.* — See *Pedlow v. Renfrew*, 31 Ont. 499, 27 Ont. App. 611.

*United States.* — *London*, etc., Bank v. Oakland, (C. C. A.) 90 Fed. Rep. 691; *Holmes v. Cleveland*, etc., R. Co., 93 Fed. Rep. 100.

*California.* — *Sussman v. San Luis Obispo County*, 126 Cal. 536; *Hartley v. Vermillion*, 141 Cal. 330.

*Illinois.* — *Sullivan v. Tichenor*, 179 Ill. 97; *Rock Island v. Starkey*, 180 Ill. 515; *Alden Coal Co. v. Challis*, 200 Ill. 229.

*Indiana.* — *Hammond v. Maher*, 30 Ind. App. 286; *Cromer v. State*, 21 Ind. App. 502; *German Bank v. Brose*, 32 Ind. App. 77.

*Iowa.* — *Hanger v. Des Moines*, 109 Iowa 480, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 66; *Mason City v. Day*, (Iowa 1899) 78 N. W. Rep. 198.

*Kentucky.* — *Larkin v. Ryan*, 76 S. W. Rep. 168, 25 Ky. L. Rep. 613; *Barrier v. Rice*, 76 S. W. Rep. 169, 25 Ky. L. Rep. 661; *Magruder v. Potter*, 77 S. W. Rep. 919, 25 Ky. L. Rep. 1336; *Riley v. Buchanan*, 116 Ky. 625.

*Maryland.* — *New Windsor v. Stocksedale*, 95 Md. 196.

*Michigan.* — *Conkling v. Mackinaw City*, 120 Mich. 67.

*Minnesota.* — *Boye v. Albert Lea*, 93 Minn. 121.

*New York.* — *Matter of Hunter*, 163 N. Y. 542, 79 Am. St. Rep. 616.

*Ohio.* — *Daiber v. Scott*, 2 Ohio Cir. Dec. 179; *Wright v. Oberlin*, 23 Ohio Cir. Ct. 509.

*Oregon.* — *Oregon City v. Oregon*, etc., R. Co., 44 Oregon 165.

*Pennsylvania.* — *Schrack's Estate*, 9 Pa. Dist. 149; *Philadelphia v. Peters*, 18 Pa. Super. Ct. 388.

*South Dakota.* — *Deadwood v. Whittaker*, 12 S. Dak. 515; *Sweatman v. Bathrick*, 17 S. Dak. 138.

*Tennessee.* — *Hill v. Hoffman*, (Tenn. Ch. 1899) 58 S. W. Rep. 929; *Burkitt v. Battle*, (Tenn. Ch. 1900) 59 S. W. Rep. 429.

*Utah.* — *Schettler v. Lynch*, 23 Utah 315.

*Vermont.* — *Clarendon v. Rutland R. Co.*, 75 Vt. 6.

*Virginia.* — *Richmond v. Gallego Mills Co.*, 102 Va. 165.

*West Virginia.* — *Pence v. Bryant*, 54 W. Va. 263.

*Wisconsin.* — *Brown v. Baraboo*, 98 Wis. 273.

**67. 1. Presumption from User for Prescriptive Period.** — *People v. Myring*, 144 Cal. 351; *District of Columbia v. Robinson*, 14 App. Cas. (D. C.) 512, affirmed 180 U. S. 92; *Chicago v. Borden*, 190 Ill. 430; *Pittsburgh*, etc., R. Co. v. Crown Point, 150 Ind. 536; *Burlington*, etc., R. Co. v. Columbus Junction, 104 Iowa 110; *Lewis v. Lincoln*, 55 Neb. 1; *Waters v. Philadelphia*, 208 Pa. St. 189; *Heiminck v. Edmonton*, 2 N. W. Ter. 101.

**2. Ways by Prescription.** — *Hartley v. Vermillion*, (Cal. 1902) 70 Pac. Rep. 273; *Hast v. Piedmont*, etc., R. Co., 52 W. Va. 396, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 67.

**68. 1. User with Consent of Owner — Length of Time Not Material.** — *London*, etc., Bank v. Oakland, (C. C. A.) 90 Fed. Rep. 691; *Stewart v. Conley*, 122 Ala. 179; *District of Columbia v. Robinson*, 14 App. Cas. (D. C.) 512, affirmed 180 U. S. 92; *Alden Coal Co. v. Challis*, 200 Ill. 229; *Seidschlag v. Antioch*, 207 Ill. 280; *German Bank v. Brose*, 32 Ind. App. 77; *Cromer v. State*, 21 Ind. App. 502; *Hammond v. Maher*, 30 Ind. App. 286; *Waters v. Philadelphia*, 208

**69.** Use Alone Does Not Constitute a Dedication. — See note 1.  
Character of User Necessary. — See note 2.

**70.** Way Originally Private. — See note 1.

Way for Convenience of Owner. — See note 2.

Way to Owner's Place of Business. — See note 3.

**71.** Dedication Not Presumed from Travel over Uninclosed Lands. — See note 1.

Variations in Line of Travel. — See note 2.

**72.** Character of Land. — See note 1.

**73.** Whether User Alone Sufficient to Make Local Government Liable for Repairs. — See note 1.

**VI. EFFECT OF DEDICATION — 1. Nature of Interest Acquired by the Public — a. COMMON-LAW DEDICATION. — See note 2.**

**74.** See note 1.

Pa. St. 189; *Johnson City v. Wolfe*, 103 Tenn. 277; *Schettler v. Lynch*, 23 Utah 315.

**69. 1. Use Alone Not Sufficient.** — *Chinnock v. Hartley Wintley Rural Council*, 63 J. P. 327; *Piggott v. Goldstraw*, 84 L. T. N. S. 94, 65 J. P. 259; *Heiminck v. Edmonton*, 28 Can. Sup. Ct. 501; *Moffatt v. Kenny*, 174 Mass. 311; *Lewis v. Lincoln*, 55 Neb. 1; *Postal v. Martin*, (Neb. 1903) 95 N. W. Rep. 8; *Morris, etc., R. Co. v. Jersey City*, 63 N. J. Eq. 45; *Toledo v. Converse*, 11 Ohio Cir. Dec. 468; *De George v. Goosby*, 33 Tex. Civ. App. 187; *Randall v. Rovelstad*, 105 Wis. 410.

**2. User Must Be by Public Generally.** — *Rock Island v. Starkey*, 189 Ill. 515; *Richmond v. Gallego Mills Co.*, 102 Va. 165.

**User Must Be Adverse.** — *Niles v. Los Angeles*, 125 Cal. 572; *Chicago v. Borden*, 190 Ill. 430; *Burlington, etc., R. Co. v. Columbus Junction*, 104 Iowa 110; *Pittsburgh, etc., R. Co. v. Crown Point*, 150 Ind. 536.

**The Presumption of Law.** — *Moffatt v. Kenny*, 174 Mass. 311.

**Permissive User — California.** — *Hartley v. Vermillion*, (Cal. 1902) 70 Pac. Rep. 273.

*Illinois.* — *Chicago v. Borden*, 190 Ill. 430.

*Indiana.* — *German Bank v. Brose*, 32 Ind. App. 77.

*Iowa.* — *Dodge v. Hart*, 113 Iowa 685; *Fairchild v. Stewart*, 117 Iowa 734; *Quick v. Cotman*, 124 Iowa 102.

*New York.* — *Buffalo v. Delaware, etc., R. Co.*, 68 N. Y. App. Div. 488, *affirmed* 178 N. Y. 561.

*Pennsylvania.* — *Waters v. Philadelphia*, 208 Pa. St. 189; *Jackson v. Boggs*, 28 Pittsb. Leg. J. N. S. (Pa.) 364.

*Washington.* — *Columbus, etc., R. Co. v. Seattle*, 33 Wash. 513.

**Character of User Necessary.** — A use which would follow the character of the place and the settlement of the community is sufficient. *Winslow v. Cincinnati*, 9 Ohio Dec. 89, 6 Ohio N. P. 47.

**70. 1. Ways Originally Private.** — *California Nav., etc., Co. v. Union Transp. Co.*, 126 Cal. 433; *Gilfillan v. Shattuck*, 142 Cal. 27; *Chicago v. Borden*, 190 Ill. 430; *Dodge v. Hart*, 113 Iowa 685; *Quick v. Cotman*, 124 Iowa 102; *Ferdinando v. Scranton*, 190 Pa. St. 321; *Culmer v. Salt Lake City*, 27 Utah 252.

**2. Ways for Owner's Convenience.** — *Chicago v. Borden*, 190 Ill. 430; *Buffalo v. Delaware, etc., R. Co.*, 68 N. Y. App. Div. 488, *affirmed* 178 N. Y. 561, *quoting* 9 AM. AND ENG. ENCYC. OF

LAW (2d ed.) 70; *Cherry v. Howe*, 9 Ohio Cir. Dec. 131, 17 Ohio Cir. Ct. 246; *Waters v. Philadelphia*, 208 Pa. St. 189.

**3. Ways to Owner's Place of Business.** — *Baltimore, etc., R. Co. v. Seymour*, 154 Ind. 17.

**Wharves.** — *Morris, etc., R. Co. v. Jersey City*, 63 N. J. Eq. 45.

**Approaches to Railroad Station.** — *Georgia R., etc., Co. v. Atlanta*, 118 Ga. 486. See *Pittsburgh, etc., R. Co. v. Crown Point*, 150 Ind. 536, where the approach to the station was kept up by the public and it was held to be dedicated.

**71. 1. Uninclosed Lands.** — *Belmore v. Kent County Council*, [1901] 1 Ch. 873, 84 L. T. N. S. 523, 65 J. P. 456; *Chicago v. Borden*, 190 Ill. 430; *Whittaker v. Ferguson*, 16 Utah 240.

**2. Variation in Line of Travel.** — *Randall v. Rovelstad*, 105 Wis. 410.

**72. 1. Character of Land in Question Important.** — *Chinnock v. Hartley Wintley Rural Council*, 63 J. P. 327; *London, etc., Bank v. Oakland*, (C. C. A.) 90 Fed. Rep. 691; *Coe College v. Cedar Rapids*, (Iowa 1901) 87 N. W. Rep. 444.

**73. 1. User Sufficient to Render Local Government Liable for Repairs of Ways Used.** — *Hammond v. Maher*, 30 Ind. App. 286; *Louisville v. Snow*, 107 Ky. 536; *Pittsburg v. Epping-Carpenter Co.*, 194 Pa. St. 318.

**User Alone Not Sufficient to Bind the Local Government.** — *Kruger v. Constable*, 116 Fed. Rep. 722, *affirmed* (C. C. A.) 128 Fed. Rep. 908; *Burlington, etc., R. Co. v. Columbus Junction*, 104 Iowa 110; *Matter of Hunter*, 47 N. Y. App. Div. 102, *reversed* 163 N. Y. 542, 79 Am. St. Rep. 616; *Clarendon v. Rutland R. Co.*, 75 Vt. 6; *Hast v. Piedmont, etc., R. Co.*, 52 W. Va. 396.

**2. Common-law Dedication Only an Easement Acquired — Illinois.** — *Clark v. McCormick*, 174 Ill. 164; *Davenport, etc., Bridge R., etc., Co. v. Johnson*, 188 Ill. 472; *Augusta v. Tyner*, 197 Ill. 242; *Russell v. Lincoln*, 200 Ill. 511; *Owen v. Brookport*, 208 Ill. 35.

*Michigan.* — *Patrick v. Young Men's Christian Assoc.*, 120 Mich. 185, *citing* 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 73; *Conkling v. Mackinaw City*, 120 Mich. 67.

*Missouri.* — *Kansas City v. Scarritt*, 169 Mo. 471.

*Tennessee.* — *State v. Taylor*, 107 Tenn. 455; *Hamilton County v. Rape*, 101 Tenn. 222; *Athens v. Burkett*, (Tenn. Ch. 1900) 59 S. W. Rep. 404.

**74. 1. The Fee Itself May Pass.** — *Patrick v. Young Men's Christian Assoc.*, 120 Mich. 192

**74. b. STATUTORY DEDICATION.** — See note 2.

Unless Expressly Prohibited by the Statute. — See note 4.

**75. c. PARTIAL AND LIMITED DEDICATIONS** — May Annex Conditions. — See note 1.

Extent of Right to Impose Conditions. — See note 2.

**76. d. LIMITS AND BOUNDARIES, HOW DETERMINED** — Question of Fact. — See note 1.

Width of Roads and Streets. — See note 2.

**77. Accretions.** — See note 2.**2. Revocability of Dedication** — Where Rights Acquired on Faith of Dedication. — See note 3.**78. Until Acceptance** — Mere Offer. — See note 1.

citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 74.

**74. 2. Under Statutes Fee Passes** — *Colorado*.— *Leadville v. Coronado Min. Co.*, 29 Colo. 17. *Illinois*. — *Clark v. McCormick*, 174 Ill. 164; *Woodburn v. Sterling*, 184 Ill. 208; *Woollacott v. Chicago*, 187 Ill. 504; *Davenport, etc., Bridge R., etc., Co. v. Johnson*, 188 Ill. 472; *Shirk v. Chicago*, 195 Ill. 298; *Russell v. Lincoln*, 200 Ill. 511; *Owen v. Brookport*, 208 Ill. 35.*Iowa*. — *Blennerhassett v. Forest City*, 117 Iowa 680; *Lake City v. Fulkerson*, 122 Iowa 569.*Kansas*. — *Harden v. Metz*, 10 Kan. App. 341, affirmed 62 Kan. 867.*Michigan*. — *Patrick v. Young Men's Christian Assoc.*, 120 Mich. 185.*Ohio*. — *Callen v. Columbus Edison Electric Light Co.*, 66 Ohio St. 166.*South Dakota*. — *Sweatman v. Bathrick*, 17 S. Dak. 138.**4.** *Patrick v. Young Men's Christian Assoc.*, 120 Mich. 192, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 74.**75. 1. Right to Make Adjoining Owners Pay for Access to Dedicated Property.** — *Palmer v. Jones*, 2 Ont. L. Rep. 632.**Passageway for Stock.** — See *Agne v. Seitsinger*, 104 Iowa 482.**2. Right to Impose Conditions Limited.** — *State v. Spokane St. R. Co.*, 19 Wash. 518, 67 Am. St. Rep. 739.**76. 1. Extent of Dedication** — Question of Fact. — *Hurley v. West St. Paul*, 83 Minn. 401; *Sullivan v. Tichenor*, 179 Ill. 97; *Rudolph v. Ackerman*, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 698, reversed 58 N. Y. App. Div. 596.**2. Width of Roads and Streets.** — *Harvey v. Truro Rural Dist. Council*, (1903) 2 Ch. 638; *Belmore v. Kent County Council*, (1901) 1 Ch. 873; *Caldwell v. Galt*, 27 Ont. App. 162; *State v. Thompson*, 91 Mo. App. 329; *Wright v. Oberlin*, 23 Ohio Cir. Ct. 509; *Pittsburg v. Epping-Carpenter Co.*, 194 Pa. St. 318; *Com. v. Llewellyn*, 14 Pa. Super. Ct. 214; *Com. v. Shoemaker*, 14 Pa. Super. Ct. 194; *Madison v. Mayers*, 97 Wis. 390, 65 Am. St. Rep. 127.**Where the Municipal Authorities Lay Out a Narrower Street.** — *London, etc., Bank v. Oakland*, (C. C. A.) 90 Fed. Rep. 691; *McDonald v. Stark*, 176 Ill. 456; *Atlantic City v. Snee*, 68 N. J. L. 39.**77. 2. Accretions.** — *Holmes v. Cleveland*, etc., R. Co., 93 Fed. Rep. 100.**3. General Rule** — Irrevocable — *United States*. — *London, etc., Bank v. Oakland*, (C. C. A.) 90 Fed. Rep. 691; *Davenport v. Buffington*, (C.*C. A.*) 97 Fed. Rep. 234; *Snowden v. Loree*, 122 Fed. Rep. 493, affirmed (C. C. A.) 128 Fed. Rep. 419.*Alabama*. — *Stewart v. Conley*, 122 Ala. 179.*Colorado*. — *McIntyre v. El Paso County*, 15 Colo. App. 78.*District of Columbia*. — *Oettinger v. District of Columbia*, 18 App. Cas. (D. C.) 375.*Georgia*. — *Atlanta R., etc., Co. v. Atlanta Rapid Transit Co.*, 113 Ga. 481.*Illinois*. — *Woodburn v. Sterling*, 184 Ill. 208; *Seidschlag v. Antioch*, 207 Ill. 280.*Indiana*. — *Evansville, etc., R. Co. v. State*, 149 Ind. 276.*Maryland*. — *Lonaconing Midland, etc., R. Co. v. Consolidation Coal Co.*, 95 Md. 630.*New Jersey*. — *De Long v. Spring Lake, etc., Co.*, 65 N. J. L. 1; *Atlantic City v. Groff*, 64 N. J. L. 527; *Fessler v. Union*, (N. J. 1903) 56 Atl. Rep. 272.*New York*. — *Matter of Hunter*, 163 N. Y. 542, 79 Am. St. Rep. 616, reversing 47 N. Y. App. Div. 102, and affirming (Supm. Ct. Spec. T.) 28 Misc. (N. Y.) 314.*North Carolina*. — *Hughes v. Clark*, 134 N. Car. 457.*Pennsylvania*. — *Osterheldt v. Philadelphia*, 195 Pa. St. 355; *Pittsburg v. Epping-Carpenter*, 194 Pa. St. 318; *Richardson v. McKeesport*, 18 Pa. Super. Ct. 199; *Smith v. Union Switch, etc., Co.*, 17 Pa. Super. Ct. 444.*Tennessee*. — *Johnson City v. Wolfe*, 103 Tenn. 277.*Texas*. — *Dallas v. Gibbs*, 27 Tex. Civ. App. 275; *Corsicana v. Anderson*, 33 Tex. Civ. App. 596; *Corsicana v. Zorn*, 97 Tex. 317.*Washington*. — *Seattle v. Hill*, 23 Wash. 92.**78. 1. Before Acceptance** — When Offer Revocable — *United States*. — *Davenport v. Buffington*, (C. C. A.) 97 Fed. Rep. 234.*Arkansas*. — *Beebe v. Little Rock*, 68 Ark. 39.*California*. — *Anaheim v. Langenberger*, 134 Cal. 608; *Los Angeles v. Kysor*, 125 Cal. 463; *Niles v. Los Angeles*, 125 Cal. 572.*Colorado*. — *Manitou v. International Trust Co.*, 30 Colo. 467.*Illinois*. — *Woodburn v. Sterling*, 184 Ill. 208; *Russell v. Lincoln*, 200 Ill. 511; *Hewes v. Crete*, 68 Ill. App. 305.*Indiana*. — *Lightcap v. North Judson*, 154 Ind. 43.*Maryland*. — *Story v. Ulman*, 88 Md. 244.*New York*. — *Buffalo v. Delaware, etc., R. Co.*, 68 N. Y. App. Div. 488, affirmed 178 N. Y. 561, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 78; *Matter of Hunter*, 163 N. Y. 542, 79



- 78.** How Revocation Effected. — See note 2.
- 79.** 3. Use of Dedicated Property Limited. — See note 1.  
Uses to Which Roads and Streets May Be Applied. — See note 2.
- 80.** Lands Dedicated for Erection of Public Buildings. — See note 1.  
Change of Use. — See note 2.
- 4.** Rights and Liabilities of the Public — Powers of the Legislature. — See note 3.
- 81.** Dedicator's Right of Reversion — Right of Abutters. — See note 1.  
Powers of Local Governing Bodies. — See note 2.
- 82.** See note 1.  
Local Government Cannot Release Public Rights. — See note 2.
- 83.** Liability for Proper Care. — See note 2.
- 84.** VII. ADVERSE POSSESSION, MISUSER, ABANDONMENT, AND REVERSION —
- 3.** Misuser — Remedy for Misuser or Diversion. — See notes 7, 9.
- 85.** 4. Reversion — Misuser Does Not Work Reversion. — See note 2.

Am. St. Rep. 616; *Rudolph v. Ackerman*, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 698, *reversed* 58 N. Y. App. Div. 596; *Niagara Falls v. New York Cent., etc., R. Co.*, 41 N. Y. App. Div. 93, *affirmed* 168 N. Y. 610.

*Tennessee*. — *Athens v. Burkett*, (Tenn. Ch. 1900) 57 S. W. Rep. 404; *State v. Hamilton*, 109 Tenn. 276.

*Virginia*. — *Norfolk v. Nottingham*, 96 Va. 34; *Newport News, etc., R., etc., Co. v. Lake*, 101 Va. 334.

**78.** 2. How Revocation May Be Effected. — *Hewes v. Crete*, 68 Ill. App. 305. See also *Rudolph v. Ackerman*, 58 N. Y. App. Div. 596, *reversing* (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 698.

A revocation cannot be effected by placing a temporary obstruction across the street. *Richardson v. McKeesport*, 18 Pa. Super. Ct. 199.

A revocation may be effected by the conveyance of the land as private property. *Sacramento v. Clunie*, 120 Cal. 29; *Los Angeles v. Kysor*, 125 Cal. 463.

**79.** 1. General Rule as to Uses of Property Dedicated. — *Rowzee v. Pierce*, 75 Miss. 846, 65 Am. St. Rep. 625.

A street cannot be used as a wharf. *California Nav., etc., Co. v. Union Transp. Co.*, 126 Cal. 433.

**2.** Uses to Which Dedicated Roads and Streets May Be Put. — *Magee v. Overshiner*, 150 Ind. 127, 65 Am. St. Rep. 358.

A portion of the street may be set apart as a park or to be used as a grass plot. *Shirk v. Chicago*, 195 Ill. 298.

An alley which has been used for passage cannot be used to load drays in. *Friedlander v. Condict*, (Supm. Ct. Spec. T.) 29 Misc. (N. Y.) 7.

**80.** 1. Lands for Erection of Buildings. — *Rowzee v. Pierce*, 75 Miss. 846, 65 Am. St. Rep. 625.

**2.** Change of Use. — *Lee v. Harris*, 206 Ill. 428, 99 Am. St. Rep. 176; *Board of Education v. Kansas City*, 62 Kan. 383, *quoting* 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 80.

**3.** Power of Legislature — as to Rights of the Public. — *De Long v. Spring Lake, etc., Co.*, 65 N. J. L. 1; *South Amboy v. New York, etc., R. Co.*, 66 N. J. L. 623; *Mahon v. Luzerne County*, 197 Pa. St. 1; *Pittsburg v. Epping-Carpenter Co.*, 194 Pa. St. 318.

**81.** 1. Limits of Legislative Power. — *Fessler v. Union*, (N. J. 1903) 56 Atl. Rep. 272.

**2.** Municipal Management and Control. — *Fessler v. Union*, (N. J. 1903) 56 Atl. Rep. 272.

**82.** 1. Enforcement of Rights. — *Johnson City v. Wolfe*, 103 Tenn. 277.

**2.** Release of Public Rights. — *Pence v. Bryant*, 54 W. Va. 263.

Municipality Cannot Alien or Make Liable for Debts. — *Douglass v. Montgomery*, 118 Ala. 599; *Beebe v. Little Rock*, 68 Ark. 39; *McIntyre v. El Paso County*, 15 Colo. App. 78; *Uniontown v. Berry*, 72 S. W. Rep. 295, 24 Ky. L. Rep. 1692; *Fessler v. Union*, (N. J. 1903) 56 Atl. Rep. 272; *Pittsburg v. Epping-Carpenter Co.*, 194 Pa. St. 318; *State v. Taylor*, 107 Tenn. 455; *Gillean v. Frost*, 25 Tex. Civ. App. 371; *Ashland v. Chicago, etc., R. Co.*, 105 Wis. 398. See also *Blennerhassett v. Forest City*, 117 Iowa 680.

City Has Right to Convey. — *Lake City v. Fulkerson*, 122 Iowa 569.

**83.** 2. Care and Maintenance — Streets and Roads. — *Fessler v. Union*, (N. J. 1903) 56 Atl. Rep. 272.

**84.** 7. Misuser — Rights of Dedication. — *Douglass v. Montgomery*, 118 Ala. 599.

**9.** Owners of Lots Abutting upon Lands Dedicated to Public Use — *Alabama*. — *Douglass v. Montgomery*, 118 Ala. 599; *Stewart v. Conley*, 122 Ala. 179.

*Illinois*. — *Riverside v. MacLain*, 210 Ill. 308, 102 Am. St. Rep. 164.

*Mississippi*. — *Rowzee v. Pierce*, 75 Miss. 846, 65 Am. St. Rep. 625.

*Missouri*. — *Longworth v. Sedevic*, 165 Mo. 221.

*Texas*. — *Dallas v. Gibbs*, 27 Tex. Civ. App. 275.

Any One Interested May Sue. — *Davenport v. Buffington*, (C. C. A.) 97 Fed. Rep. 234; *McIntyre v. El Paso County*, 15 Colo. App. 78; *Larkin v. Ryan*, 76 S. W. Rep. 168, 25 Ky. L. Rep. 613.

**85.** 2. Misuser Does Not Work Reversion. — *McAlpine v. Chicago G. W. R. Co.*, 68 Kan. 207; *Patrick v. Young Men's Christian Assoc.*, 120 Mich. 185; *Armstrong v. St. Marys*, 11 Ohio Cir. Dec. 453; *Pittsburg v. Epping-Carpenter Co.*, 194 Pa. St. 318; *Dallas v. Gibbs*, 27 Tex. Civ. App. 275.

Nonuser Does Not Work Reversion. — *Chaffee*

- 85.** Reversion to Original Owner. — See note 3.  
 Reversion to Purchasers of Abutting Lots. — See note 4.

**86. DEDUCT.** — See note 2.

*v. Aiken*, 57 S. Car. 507; *Ashland v. Chicago*, etc., R. Co., 105 Wis. 398.

**85. 3. When Land Reverts to Dedicator.** — *McIntyre v. El Paso County*, 15 Colo. App. 78; *McAlpine v. Chicago G. W. R. Co.*, 68 Kan. 207; *Halley v. Scott County Fiscal Ct.*, 78 S. W. Rep. 149, 25 Ky. L. Rep. 1471; *Patrick v. Young Men's Christian Assoc.*, 120 Mich. 185; *Rowzee v. Pierce*, 75 Miss. 846, 65 Am. St. Rep. 625; *Downes v. Dimock*, etc., Co., 75 N. Y. App. Div. 513; *State v. Taylor*, 107 Tenn. 455; *Dallas v. Gibbs*, 27 Tex. Civ. App. 275.

**4. Reversion to Abutters.** — *Callen v. Columbus Edison Electric Light Co.*, 66 Ohio St. 166.

**Reversion When Dedication a Statutory One.** — In *Iowa* the title does not revert either to the original or abutting owner. *Lake City v. Fulkerson*, 122 Iowa 569.

**86. 2. Deductions — Exemptions — Taxation.** — "*Deductions* and exemptions are two separate and distinct things, having no connection. A *deduction* is the taking of the subtrahend from the minuend. It is a subtraction. Exemption is an immunity or privilege—it is freedom from a charge of burden to which others are subject." *State v. Smith*, 158 Ind. 553.

## DEEDS.

BY ALBERT BENHAM.

**91. I. DEFINITIONS AND DISTINCTIONS — 2. Deeds of Conveyance — c. DEEDS AND WILLS DISTINGUISHED — (1) The Intention.** — See note 6.

**92. (2) Evidence of Intention — A Good Consideration.** — See note 3.

Operative Words with Warranty. — See note 4.

The Reservation of a Life Interest. — See note 5.

Vesting Postponed until Grantor's Death. — See note 6.

Delivery. — See note 7.

**93. d. DEEDS AND EXECUTORY AGREEMENTS DISTINGUISHED — (1) The Intention Controls.** — See note 2.

(2) *Effect of Operative Words — When Inserted.* — See note 3.

**97. III. VARIOUS SPECIES OF DEEDS CLASSIFIED AND DEFINED — 1. Deeds of Indenture and Deeds Poll — Deeds Poll.** — See note 10.

**99. 2. Common-law Forms of Conveyance — a. ORIGINAL DEEDS — (1) Feoffment — (d) Feoffments Obsolete.** — See note 4.

**91. 6. The Grantor's Intention Controls —**  
*Alabama.* — *Whitten v. McFall*, 122 Ala. 619.  
*Arkansas.* — *Cribbs v. Walker*, (Ark. 1905) 85 S. W. Rep. 244.

*Georgia.* — *Griffith v. Douglas*, 120 Ga. 582.  
*Illinois.* — *Wilenou v. Handlon*, 207 Ill. 104.  
*Indiana.* — *Emmons v. Harding*, 162 Ind. 154;  
*Kelley v. Shimer*, 152 Ind. 290.

*Missouri.* — *Murphy v. Gabbert*, 166 Mo. 596, 89 Am. St. Rep. 733.

*North Dakota.* — *Arnegaard v. Arnegaard*, 7 N. Dak. 475.

*Tennessee.* — *Horn v. Broyles*, (Tenn. Ch. 1900) 62 S. W. Rep. 297.

*Texas.* — *De Bajligethy v. Johnson*, 23 Tex. Civ. App. 272.

*West Virginia.* — *Lauck v. Logan*, 45 W. Va. 251.

**92. 3. Postponing Judgment in Deed.** — *Bowler v. Bowler*, 176 Ill. 541; *Ranken v. Donovan*, 46 N. Y. App. Div. 225, *affirmed* 166 N. Y. 626.

**4. Effect of Operative Words.** — *Adair v. Craig*, 135 Ala. 332; *Bowler v. Bowler*, 176 Ill. 541; *Pennington v. Lawson*, (Ky. 1901) 65 S. W. Rep. 120; *Lauck v. Logan*, 45 W. Va. 251.

**5. Reservation of Life Interest Consistent with a Present Vesting of Title.** — *Cribbs v. Walker*, (Ark. 1905) 85 S. W. Rep. 244; *Watkins v. Nugen*, 118 Ga. 375; *Bogan v. Swearingen*, 199 Ill. 454; *Latimer v. Latimer*, 174 Ill. 418; *Kelley v. Shimer*, 152 Ind. 290; *Webb v. Webb*, (Iowa 1905) 104 N. W. Rep. 438; *Ricker v. Brown*, 183 Mass. 424; *Sibley v. Somers*, 62 N. J. Eq. 595; *Horn v. Broyles*, (Tenn. Ch. 1900) 62 S. W. Rep. 297; *Matthews v. Moses*, 21 Tex. Civ. App. 494.

**6. In Texas, Etc.** — *Matthews v. Moses*, 21 Tex. Civ. App. 494.

**7. Delivery.** — *Kirkwood v. Smith*, 212 Ill. 395; *Latimer v. Latimer*, 174 Ill. 418; *Webb v. Webb*, (Iowa 1905) 104 N. W. Rep. 438; *Sibley v. Somers*, 62 N. J. Eq. 595.

**93. 2. Intention Controls.** — *Mineral Development Co. v. James*, 97 Va. 403.

**3. Further Conveyance Contemplated.** — *Mineral Development Co. v. James*, 97 Va. 403.

**97. 10. Deeds Poll Effective to Convey Lands.** — *Fleming v. Cohen*, 186 Mass. 323, 104 Am. St. Rep. 572.

**99. 4. Livery of Seizin Dispensed With.** — *Beard v. White*, 120 Ga. 1018; *Latimer v. Lati-*

**101. 3. Conveyances under the Statute of Uses — *b*. COVENANT TO STAND SEIZED — (1) *Nature and Origin*. — See note 6.**

**102. *c*. BARGAIN AND SALE — (2) *After Statute of Uses — Valuable Consideration Essential*. — See note 5.**

**105. 4. Quitclaim Deeds — *a*. GENERALLY. — See note 2.**

**106. *b*. CONVEYS ONLY A PRESENT INTEREST. — See notes 1, 2.**

**107. See note 1.**

**108. IV. REQUISITES AND COMPONENT PARTS — 1. The Parties — Grantor and Grantee — *a*. THE GRANTOR — (1) *Designation and Identity* — Naming Joint Grantors. — See note 5. See generally on this question the title SEPARATE PROPERTY OF MARRIED WOMEN.**

**109. (2) *Power to Convey* — (*a*) *General Rule — Capacity to Contract*. — See note 1.**

**The Lex Loci Rei Sitæ. — See note 2.**

**111. (*b*) *Coverture* — *cc*. ENABLING STATUTES. — See note 2.**

***ad*. JOINDER OF HUSBAND — As Joint Grantor. — See note 5.**

**112. To Evidence Assent. — See note 1.**

**113. Statutes Requiring Husband's Assent in Writing. — See note 1.**

**114. (*c*) *Infancy* — *aa*. GENERAL RULE. — See note 2.**

mer, 174 Ill. 418; Lauck v. Logan, 45 W. Va. 251.

**101. 6.** See Ricker v. Brown, 183 Mass. 424, supporting the proposition that it is not necessary that there should be any relationship of blood or marriage between the grantor and grantee.

**102. 5. A Valuable Consideration, Etc. —** Catlin Coal Co. v. Lloyd, 180 Ill. 406, 72 Am. St. Rep. 216, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 102.

**105. 2. Instances of Estates Conveyed by Quitclaim — Fee Simple. —** Pittsburgh, etc., R. Co. v. Garlick, 11 Ohio Cir. Dec. 337, 20 Ohio Cir. Ct. 561.

**Equitable Title. —** A quitclaim deed is sufficient to rest in the grantee the equitable title to tax-sale certificates owned by the grantor. Leavitt v. Bell, 55 Neb. 57.

**Fee Subject to Prior Equities. —** Hill v. Grant, (Tex. Civ. App. 1898) 44 S. W. Rep. 1016.

**Title Conveyed. —** Under a quitclaim deed the grantee takes only such interest or title as the grantor has at the time the latter executes such deed. Wetzstein v. Largey, 27 Mont. 212.

**Where a Grantor in a Quitclaim Deed Has No Interest, Nothing Passes. —** Ocean Causeway v. Gilbert, 54 N. Y. App. Div. 118; Gray v. Williams, 130 N. Car. 53.

**106. 1. A Quitclaim Deed Gives "Color of Title." —** Johnson v. Girtman, 115 Ga. 794.

**Implies a Doubtful Title. —** Butte Hardware Co. v. Frank, 25 Mont. 352, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 106.

**Quitclaim with Warranty. —** Flash v. Herndon, (Tex. Civ. App. 1898) 44 S. W. Rep. 608.

**A Quitclaim Deed Conveys Only Such Interest as Grantor Has, and Not the Land. —** Hill v. Grant, (Tex. Civ. App. 1898) 44 S. W. Rep. 1016.

**2. Subsequently Acquired Interests Do Not Pass. —** Lewis v. Shearer, 189 Ill. 184; Benton v. Sentell, 50 La. Ann. 869; Troxell v. Stevens, 57 Neb. 329; State v. Kemmerer, 14 S. Dak. 175, quoting 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 106.

**107. 1. The Intention Controls. —** Allen v. Hall, 31 Colo. 206.

**108. 5. Husband and Wife as Cogrants. —** A deed naming only the wife in the granting clause, but signed by both husband and wife, is void under the Alabama statute relating to conveyances by married women. Johnson v. Goff, 116 Ala. 648.

**109. 1. White v. White, 60 N. J. Eq. 104. Presumption of Capacity. —** Nowlen v. Nowlen, 122 Iowa 541; Paulus v. Reed, 121 Iowa 224; McPeck v. Graham, 56 W. Va. 200; Farnsworth v. Noffsinger, 46 W. Va. 410.

**2. The Law of the Place Where the Land Is Situated, Etc. —** Smith v. Ingram, 130 N. Car. 100.

**111. 2. Statutory Formalities Must Be Observed. —** Weber v. Tanner, (Ky. 1901) 64 S. W. Rep. 741; Smith v. Ingram, 130 N. Car. 100.

**In Missouri** it is held that a deed of a married woman conveying her common-law estate is not void and can be enforced against her. Moston v. Stow, 91 Mo. App. 554.

**5. Disability of Coverture Not Removed by Statute — Joining as Grantor. —** Johnson v. Goff, 116 Ala. 648; Weber v. Tanner, (Ky. 1901) 64 S. W. Rep. 741; Dietrich v. Hutchinson, 73 Vt. 138, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 111; Morgan v. Snodgrass, 49 W. Va. 393, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 111.

**Wife's Deed Not Enforced in Equity as Agreement to Sell. —** Davis v. Watson, 89 Mo. App. 15; Furnish v. Lilly, (Ky. 1905) 84 S. W. Rep. 734; McNulty v. Ellison, (Tex. Civ. App. 1903) 71 S. W. Rep. 670.

**112. 1. The Husband Has No Vested Interest in Wife's Separate Estate. —** Morgan v. Snodgrass, 49 W. Va. 393, quoting 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 112.

**113. 1. Statutes Providing for Written Assent. —** In Smith v. Bruton, 137 N. Car. 79, it was held that a married woman can be bound as to her land by her deed duly executed with the written assent of her husband.

**114. 2. Mortgages. —** Hetterich v. Porter, 11 Ohio Cir. Dec. 145, 20 Ohio Cir. Ct. 110; Citizens Bldg., etc., Assoc. v. Arvin, 207 Pa. St. 293; Rocks v. Cornell, 21 R. I. 532.



- 114.** *Infant's Deed Voidable Only.* — See note 3.  
*bb. AFFIRMANCE AND DISAFFIRMANCE* — (*aa. Act of Election.* — See note 5.)
- 115.** See note 2.  
*To Disaffirm Requires Some Positive Act.* — See notes 4, 5.
- 116.** *To Affirm.* — See notes 2, 3.
- 117.** (*bb. Time of Election* — *Reasonable Time* — *Acquiescence.* — See note 2.)
- 118.** *Statute of Limitations.* — See note 1.
- 119.** (*d. Insanity* — *aa. GENERAL RULE* — *Lunatics' Deeds Voidable.* — See notes 2, 3, 4.)
- 120.** See notes 1, 2, 4.

**114. 3. Infants' Deeds Voidable, Not Void.** — O'Rourke v. Hall, 38 N. Y. App. Div. 538, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 114; Sayles v. Christie, 187 Ill. 420; Shroyer v. Pittenger, 31 Ind. App. 158; Hiles v. Hiles, (Ky. 1904) 82 S. W. Rep. 580; Weeks v. Wilkins, 134 N. Car. 516.

**5. Election Cannot Be Made Before Majority.** — Shroyer v. Pittenger, 31 Ind. App. 158.

**115. 2. Heirs or Legal Representatives May Disaffirm.** — O'Rourke v. Hall, 38 N. Y. App. Div. 538, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 115; Linville v. Greer, 165 Mo. 380.

**4. Shroyer v. Pittenger,** 31 Ind. App. 158.

**5. A Warranty Deed of the Same Land to Another, Etc.** — Estep v. Estep, (Ky. 1903) 73 S. W. Rep. 777.

**116. 2. Infant's Deed Valid until Avoided.** — Eagan v. Scully, 173 N. Y. 581.

**3. Positive Acts of Affirmance — A Deed of Affirmance, Etc.** — Where a grantor with full knowledge of all the facts, by writing ratifies the deed, about eight months after becoming of age, such ratification is binding. Keller v. Lamb, 202 Pa. St. 412.

**Failure to Disaffirm.** — Combs v. Noble, (Ky. 1900) 58 S. W. Rep. 707; Kinard v. Proctor, 68 S. Car. 279; Johnston v. Gerry, 34 Wash. 524.

**Renting from Grantee.** — Where a grantor, who had executed a deed before he was of age, rented the land from the grantee after attaining majority, he was held to have ratified the conveyance. Ingram v. Ison, (Ky. 1904) 80 S. W. Rep. 787.

**117. 2. Shroyer v. Pittenger,** 31 Ind. App. 158; Weeks v. Wilkins, 134 N. Car. 516.

**Facts Held Not to Excuse Delay — Coverture.** — Gaskins v. Allen, 137 N. Car. 426, where it was held that when the infant is under the disability of coverture, the three years for disaffirmance begin to run when the disability is renewed.

**118. 1. Doctrine of Mere Acquiescence Rejected Altogether.** — Shipp v. McKee, 80 Miss. 741, 92 Am. St. Rep. 616; Linville v. Greer, 165 Mo. 380.

**119. 2. Deeds of Insane Persons Voidable — Connecticut.** — Coburn v. Raymond, 76 Conn. 484, 100 Am. St. Rep. 1000.

*Georgia.* — Woolley v. Gaines, 114 Ga. 123, quoting 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 119.

*Indiana.* — Aetna L. Ins. Co. v. Sellers, 154 Ind. 370, 77 Am. St. Rep. 481.

*Kansas.* — Waller v. Julius, 68 Kan. 314, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 119, 120.

*Kentucky.* — Logan v. Vanarsdall, (Ky. 1905) 86 S. W. Rep. 981; Arnett v. Owens, (Ky. 1901) 65 S. W. Rep. 151.

*Nebraska.* — Gingrich v. Rogers, (Neb. 1903) 96 N. W. Rep. 156.

*Nevada.* — Robinson v. Kind, 25 Nev. 261.

*New York.* — Blinn v. Schwarz, 177 N. Y. 252, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 119.

*North Carolina.* — Allred v. Smith, 135 N. Car. 443.

*Texas.* — Williams v. Sapieha, 94 Tex. 430.

*Wisconsin.* — French Lumbering Co. v. Theriault, 107 Wis. 627, 81 Am. St. Rep. 856.

"But this rule grows out of practical considerations, and is for the benefit of innocent grantees for value. One who takes a deed paying nothing for it and knowing the grantor to be insane is not within its reason and is not protected by it." Waller v. Julius, 68 Kan. 314.

**3. May Be Avoided After Restoration to Sanity.** — Whether a deed executed by an insane person is void, or voidable only, it may be set aside by the insane person after his restoration to sanity, or it may be set aside by a vendee to whom such insane person conveys the premises after his restoration to sanity. Clay v. Hammond, 199 Ill. 370, 93 Am. St. Rep. 146.

**4. Heirs or Legal Representatives May Avoid.** — Good v. Floyd, (Tenn. Ch. 1898) 48 S. W. Rep. 687; Mann v. Keene Guaranty Sav. Bank, (C. C. A.) 86 Fed. Rep. 51.

**120. 1. Only Privies in Blood or the Legal Representatives** of a deceased insane grantor can avoid his deed. Hunt v. Rabitoay, 125 Mich. 137, 84 Am. St. Rep. 563.

**2. The Legal Guardian of a Lunatic.** — Taylor v. Klein, 47 N. Y. App. Div. 343, affirmed 170 N. Y. 571.

**4. An Act of Ratification After the Restoration to Reason** must appear to have been the intelligent act of the grantor, who with full knowledge of the conveyance clearly evinces an intention to abide by and be bound by it. Beasley v. Beasley, 180 Ill. 163.

**Lapse of Time.** — Where the grantor was in business eleven years after making a conveyance, and before he was committed to an asylum was rash in his conduct, high-tempered, and erratic in his transactions, this was not sufficient to set aside the deed for insanity. Falk v. Wittram, 120 Cal. 479.

**Retaining the Consideration.** — A mortgage or conveyance of land in good faith, for a fair consideration, made by an insane person before a finding of lunacy, wherein no advantage is taken by the purchaser or mortgagee, will not be set aside by a mere showing of incapacity,

**121.** View that Lunatics' Deeds Void. — See note 1.

**122.** *bb.* PARTIAL INSANITY — MENTAL WEAKNESS. — See notes 1, 2.

**123.** Monomaniacs. — See note 1.

when the consideration has not been returned to the purchaser, and no offer made to return the same. *Brown v. Cory*, 9 Kan. App. 702.

**121. 1. Deeds of Insane Persons Held Absolutely Void.** — *Dougherty v. Powe*, 127 Ala. 580, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 120, 121; *Wilkinson v. Wilkinson*, 129 Ala. 279; *Galloway v. Hendon*, 131 Ala. 280; *Waller v. Julius*, 68 Kan. 314, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 120, 121; *Sander v. Savage*, 75 N. Y. App. Div. 333.

**A Power of Attorney** to convey land executed by a lunatic is void. *Plaster v. Rigney*, (C. C. A.) 97 Fed. Rep. 12.

**122. 1. When Mental Weakness Becomes Legal Incapacity.** — The test of mental capacity necessary to enable a grantor to make a valid deed is that he is capable of understanding in a reasonable manner the nature and effect of the act in which he is engaged. *Ring v. Lawless*, 190 Ill. 520; *Stringfellow v. Hanson*, 25 Utah 480.

To set aside a deed for mental incapacity it must be shown that the grantor was laboring under such a degree of mental infirmity as rendered him incapable of understanding and protecting his own interests. *Lassiter v. Lassiter*, (Ky. 1901) 63 S. W. Rep. 477.

**Mere Weakness of Mind** alone, without fraud or undue influence, is not sufficient to invalidate a conveyance. *Paulus v. Reed*, 121 Iowa 224; *Tichy v. Simicek*, (Neb. 1903) 95 N. W. Rep. 629.

**Aged Persons.** — Lack of power to execute a conveyance cannot be inferred from extreme age. It must be alleged and proved that the grantor was mentally incapacitated at the time the deed was executed. *Carnegie v. Diven*, 31 Oregon 366.

The fact that the grantor is aged, in ill health and very much enfeebled, will not raise a presumption of mental incapacity. *Springer v. Springer*, 132 Cal. xviii, 64 Pac. Rep. 470; *Phelan v. Hyland*, 197 Ill. 395; *Babcock v. Clark*, 79 N. Y. App. Div. 502; *Chadd v. Moser*, 25 Utah 369.

**As Illustrating These Principles**, see the following cases wherein the partial mental weakness was held sufficient to avoid contract. *Bodelsen v. Swensen*, 206 Ill. 68; *Beasley v. Beasley*, 180 Ill. 163; *Chaslavka v. Mechalek*, 124 Iowa 69; *Galt v. Provan*, 108 Iowa 561; *Talbott v. Bedford*, (Ky. 1899) 53 S. W. Rep. 294; *Thomas v. Crawford*, 118 Mich. 253; *Collins v. Toppin*, 65 N. J. Eq. 439; *Jones v. Galbraith*, (Tenn. Ch. 1900) 59 S. W. Rep. 350; *Winn v. Winn*, (Tex. Civ. App. 1904) 80 S. W. Rep. 110.

**Cases in Which Mental Weakness Was Held Not a Ground of Avoidance** — *Alabama*. — *Harrison v. Harrison*, 126 Ala. 323.

*Georgia*. — *Richardson v. Adams*, 110 Ga. 425.

*Iowa*. — *Griesy v. Veldhouse*, (Iowa 1904) 101 N. W. Rep. 741; *Crooks v. Smith-Peterson*, 123 Iowa 439; *Chidester v. Turnbull*, 117 Iowa 168; *Jacobson v. Nealand*, 122 Iowa 372; *Brown v. Cole*, 126 Iowa 711; *Nowlen v. Nowlen*, 122 Iowa 541.

*Kentucky*. — *Nichols v. King*, (Ky. 1902) 68 S. W. Rep. 133.

*Michigan*. — *Ramsdell v. Ramsdell*, 128 Mich. 110; *Hayman v. Wakeham*, 133 Mich. 363.

*Missouri*. — *Carter v. Dilley*, 167 Mo. 564; *Studybaker v. Cofield*, 159 Mo. 596; *Cutts v. Young*, 147 Mo. 587; *McKissock v. Groom*, 148 Mo. 459; *Fitzpatrick v. Weber*, 168 Mo. 562.

*Nebraska*. — *Aldrich v. Steen*, (Neb. 1904) 98 N. W. Rep. 445; *Smith v. Smith*, (Neb. 1902) 89 N. W. Rep. 799.

*New York*. — *Hoey v. Hoey*, 53 N. Y. App. Div. 208.

*Ohio*. — *Zeltner v. Bodman German Protestant Widows' Home*, 1 Ohio Dec. 306.

*Pennsylvania*. — *Moorhead v. Scovel*, 210 Pa. St. 446.

*South Carolina*. — *Revels v. Revels*, 64 S. Car. 256.

*South Dakota*. — *Apland v. Pott*, 16 S. Dak. 185.

*Tennessee*. — *Ridley v. Chrisman*, (Tenn. Ch. 1901) 62 S. W. Rep. 661.

*Virginia*. — *Beverage v. Ralston*, 98 Va. 625.

*Washington*. — *Ford v. Jones*, 22 Wash. 111.

*Wisconsin*. — *Marking v. Marking*, 106 Wis. 292.

**Inference of Fraud as Against Weak-minded Person.** — *Odell v. Moss*, 130 Cal. 352; *Clay v. Hammond*, 199 Ill. 370, 93 Am. St. Rep. 146; *Bennett v. Bennett*, 65 Neb. 432; *Rosevear v. Sullivan*, 47 N. Y. App. Div. 421; *Swanstrom v. Day*, (Supm. Ct. Spec. T.) 46 Misc. (N. Y.) 311; *Parrish v. Parrish*, 33 Oregon 486.

**Undue Influence.** — The inadequacy of the consideration, coupled with the relation the parties sustained to each other, is sufficient to throw suspicion on the transaction, and cast on the beneficiary thereof the burden of showing that no advantage was taken, and that the transaction was fair and conscionable. *Stevens v. Stevens*, 10 Kan. App. 259.

If mental weakness is taken advantage of to procure a conveyance by inequitable means, the conveyance may be set aside. *Bennett v. Bennett*, 65 Neb. 432; *Elmstedt v. Nicholson*, 186 Ill. 580; *Hammell v. Hyatt*, 59 N. J. Eq. 174.

**Inadequate Consideration or Evidence of Fraud.** — *Gatje v. Armstrong*, 145 Cal. 370; *Walker v. Shepard*, 210 Ill. 100; *Coffey v. Sullivan*, 63 N. J. Eq. 296; *Jones v. Galbraith*, (Tenn. Ch. 1900) 59 S. W. Rep. 350; *Stephens v. Ozbourne*, 107 Tenn. 572, 89 Am. St. Rep. 957.

**A Deaf and Dumb Person, Etc.** — *Ricky v. Barnes*, 168 Mo. 600.

**2. Necessary Degree of Mental Weakness a Question of Fact.** — *Springer v. Springer*, 132 Cal. xviii, 64 Pac. Rep. 470; *Phelan v. Hyland*, 197 Ill. 395; *Babcock v. Clark*, 79 N. Y. App. Div. 502; *Kime v. Addlesperger*, 24 Ohio Cir. Ct. 397.

**123. 1. Deeds of Monomaniacs.** — "The question is whether that insane delusion, if a person has it, is a moving cause to some act which would not have been done except for that delusion." *Meigs v. Dexter*, 172 Mass. 217.

**Insane Delusion.** — Where the conveyances are

**123.** *cc.* TEMPORARY MENTAL WEAKNESS. — See note 2.

Subsequent Mental Failure. — See note 3.

*dd.* INTOXICATION. — See notes 4, 5.**124.** Ratification. — See note 3.(3) *Freedom of Will*—(a) *Undue Influence*. — See notes 4, 5.

the result of insane delusions, they will be set aside as not the acts of a sound mind. *Sedgwick v. Jack*, 111 Iowa 745.

Where one laboring under insane delusions assigns property to another in consideration of the latter caring for him and furnishing him necessities, the assignments will not be set aside, unless the considerations are restored. *Gilgallon v. Bishop*, 46 N. Y. App. Div. 350.

**123. 2. Lucid Interval.**—*Ramsdell v. Ramsdell*, 128 Mich. 110; *McPeck v. Graham*, 56 W. Va. 200.

**The Burden of Proving a Lucid Interval** by clear and satisfactory evidence is on an interested party claiming an advantage by reason of it. *Gingrich v. Rogers*, (Neb. 1903) 96 N. W. Rep. 156.

**3. Evidence of Subsequent Mental Failure Admissible.** — But see *Swanstrom v. Day*, (Supm. Ct. Spec. T.) 46 Misc. (N. Y.) 311, where it was held that a finding and order on a lunacy inquisition made over a year after the conveyance, was not presumptive evidence that the grantor was incompetent when he conveyed.

**4. Extent of Intoxication.** — *Oakley v. Shelly*, 129 Ala. 467.

To avoid a deed on the ground of intoxication, the grantor must have been so drunk as to have dethroned reason, memory, and judgment, and impaired his mental faculties to an extent that would render him *non compos mentis* for the time being, especially where there is no pretense that any person connected with the transaction aided in or procured the drunkenness. *Wells v. Houston*, 23 Tex. Civ. App. 629.

A person addicted to the habitual and excessive use of intoxicating liquor is not incompetent to convey property, unless it appears that actual intoxication dethroned the reason or that his understanding was so impaired as to render him mentally unsound when the act was performed. *Burnham v. Burnham*, 119 Wis. 509, 100 Am. St. Rep. 895.

**Undue Influence or Advantage.** — *More v. More*, 133 Cal. 489; *Hardy v. Dyas*, 203 Ill. 211.

**Extent of Intoxication.**—In the following cases it was held that no such intoxication was shown as to avoid the act of the person intoxicated: *Schuur v. Rodenback*, 133 Cal. 85; *Curtis v. Kirkpatrick*, (Idaho 1904) 75 Pac. Rep. 760; *Watts v. Vansant*, 99 Md. 577; *Coombe v. Carthew*, 59 N. J. Eq. 638; *Burnham v. Burnham*, 119 Wis. 509, 100 Am. St. Rep. 895. But in *Hardy v. Dyas*, 203 Ill. 211, the intoxication was held sufficiently extreme to work an avoidance.

**5. Intoxication Alone Held Not Ground of Avoidance.** — *Wells v. Houston*, 23 Tex. Civ. App. 629.

**124. 3. Ratification After Becoming Sober.** — *Oakley v. Shelly*, 129 Ala. 467; *Wells v. Houston*, 23 Tex. Civ. App. 629.

**4. Undue Influence.** — Where the grantor was old, and living with his daughter, who cared for

him, and he of his own volition executed a deed to her, it was held that the deed was not procured by undue influence. *Whitten v. McFall*, 122 Ala. 619.

Where it is shown that the grantor understood the nature and effect of his conveyance, he will be held competent, and to set aside his deed it must be shown that undue influence was exerted at the time he executed the deed. *Curtis v. Kirkpatrick*, (Idaho 1904) 75 Pac. Rep. 760.

The fraud or undue influence which will avoid a deed must be directly connected with the execution of the instrument. *Pittenger v. Pittenger*, 208 Ill. 582.

Where the grantor was eighty years old, and feeble in mind and body, and he made a deed to a stranger in blood, such deed will be set aside as obtained by undue influence. *Johnson v. Stonestreet*, (Ky. 1902) 66 S. W. Rep. 621.

Undue influence is that degree of importunity which deprives one of his free agency, such as that which he is too weak or too feeble to resist, and such as will render the instrument executed under its supremacy not his free and unconstrained act. *Frush v. Green*, 86 Md. 494.

In order to set aside a deed for undue influence it must be shown that such influence was exercised in the procurement of the execution of the instrument. *McKissock v. Groom*, 148 Mo. 459.

If a mother conveys her property to her son in her lifetime, while fully competent to act, and without any fraud or undue influence existing, the conveyance will be valid. But if a person who is old, feeble, weak in mind, vacillating in will, living in close confidential relations with another, makes a conveyance of valuable property to such other person, the transaction is presumptively fraudulent, and the burden of proof is upon the person seeking to take advantage of such transaction to show that no fraud or undue influence was exercised. *Schwingle v. Anthes*, (Neb. 1904) 98 N. W. Rep. 676.

Undue influence will be inferred from the circumstance that the grantor was partially incapacitated by mental infirmity, or was subject to the controlling influence of the grantee, where the deed was without consideration, and the grantee acquired an undue advantage under it. *Baugh v. Buckles*, 1 Ohio Cir. Dec. 607.

Where a mother, in consideration of care, attention, and assistance, and an agreement to provide for her during life, deeds property to her children, undue influence will not be presumed. *Chadd v. Moser*, 25 Utah 369.

When a person who is legally competent to contract makes a gift to his child in consideration of love and affection, where the child cares for and waits upon the parent, comforts and administers to the parent's wants, undue influence will not be inferred. *Stringfellow v. Hanson*, 25 Utah 480.

**No Consideration.** — Where there is no con-



sideration or an inadequate one, a presumption of undue influence arises. *Odell v. Moss*, 130 Cal. 352.

**Burden of Proof.**—The burden is on the party claiming incapacity to show the condition of the grantor at the time the deed was made. *Kime v. Addlesperger*, 24 Ohio Cir. Ct. 397.

The burden of proof is on the party seeking to establish the fact of undue influence for the purpose of having a conveyance or a will set aside, and the evidence must show that the influence was such as to overcome the will of the grantor, and to destroy to some extent at least his free agency. And it must appear that the undue influence was exercised at the time the act referred to was done. *Mallow v. Walker*, 115 Iowa 238, 91 Am. St. Rep. 158; *Stringfellow v. Hanson*, 25 Utah 500, citing 9 Am. and Eng. Encyc. of Law (2d ed.) 124. See also *Reeves v. Howard*, 118 Iowa 121; *Erwin v. Hedrick*, 52 W. Va. 537; *Farnsworth v. Noffsinger*, 46 W. Va. 410; *Drinkwine v. Gruelle*, 120 Wis. 628.

**124. 5. What Are Fiduciary or Confidential Relations.**—The existence of a confidential or fiduciary relation may give rise to suspicion, and if, on consideration of all the facts and circumstances bearing on the good faith and fairness of the transaction between the parties standing in such relation to each other, a reasonable suspicion exists that confidence was reposed and has been abused, the transaction should be set aside; but the suspicion may be shown to be unfounded and the transaction regarded as valid. *Kellogg v. Peddicord*, 181 Ill. 22; *Moran v. Sullivan*, 12 App. Cas. (D. C.) 137.

**Instances — A Son.**—*Rickman v. Meier*, 213 Ill. 507; *Ball v. Ball*, 214 Ill. 255; *Forrestel v. Forrestel*, 110 Iowa 614; *Lockwood v. Lockwood*, 124 Mich. 627; *Disbrow v. Disbrow*, 31 N. Y. App. Div. 624, affirmed 164 N. Y. 564; *Dean v. Dean*, 42 Oregon 290.

Where the mother was aged, illiterate, ignorant, and infirm, and made a deed to her son, thinking she was executing a will, such deed will be set aside, it being also shown that there was no consideration and the son procured such deed by deception. *Wille v. Wille*, 57 S. Car. 413.

Where a father was induced and influenced in making a deed to his son by devotion, affection, and gratitude, the fact that the son occupied a fiduciary relation is not sufficient to annul the deed, where the free will of the grantor was not overcome. *Sawyer v. White*, (C. C. A.) 122 Fed. Rep. 223.

Where a woman over eighty years of age, of an easily influenced mental disposition, conveys all of her property to her stepson, stripping herself entirely of both the corpus and income of her property, such conveyance will be set aside for undue influence. *Hart v. Hart*, 57 N. J. Eq. 543.

Where a conveyance is made by a father to his son, and it is shown that the son waited on, cared for, and supported his father for nine years before the execution of the deed, undue influence will not be presumed, nor will the deed be set aside. *Carney v. Carney*, 196 Pa. St. 34.

Where the relation of trust and confidence existing between grantors and grantee is the

relation of parent and child, and the parents are aged and ignorant and inferior in intellect to the child, and by reason of the relation of trust and by misrepresentation the deeds are procured, such conveyances will be set aside. *Brummond v. Krause*, 8 N. Dak. 573.

See also *Britton v. Britton*, 23 Pa. Co. Ct. 89, wherein it was held that a conveyance of property by a mother to a son will not be set aside at her suit, where it appears that no undue influence was exerted by the son, that the mother was to receive an annual payment equal to the rental of the land, and that the son agreed to farm the land and gave up an intention to educate himself.

**Daughter.**—A conveyance by a man eighty years old of all his property will be set aside for undue influence where it appears that there was a confidential relation existing, and undue influence was exerted. *White v. Daly*, (N. J. 1904) 58 Atl. Rep. 929.

Where a mother conveyed land to her daughters who cared for her and attended to her, and there is an agreement and lien on the land for the mother's support during her life, such conveyance will not be set aside for fraud and undue influence. *Rixey v. Rixey*, 103 Va. 414.

**A Stepfather** in whom the stepson had reposed great trust and confidence, the deed being obtained by fraudulent representations. *Givan v. Masterson*, 152 Ind. 127.

**A Mother** of strong will who persuaded her daughter, a girl under age, of weak mind, and under the control of said mother, and influenced her to execute a deed. *Sayles v. Christie*, 187 Ill. 420.

**Husband and Wife.**—Where a grantee and grantor of land stand in fiduciary relations to each other, as husband and wife, for example, and the deed is executed without consideration other than the promise, express or implied, of the grantee to hold the land for the purpose of carrying out an express trust in favor of the grantor, the confidence which induced the transaction having arisen from the fiduciary relations, the grantee's failure to keep such promise, gives the grantor the right to avoid the deed. *Jones v. Jones*, 140 Cal. 587.

Where a husband by threats compelled his wife on the day of her death to make a deed of property to him, such deed is not her voluntary act, and will be set aside. *Dooley v. Holden*, 53 N. Y. App. Div. 625. See also *Reilly v. Reilly*, 63 N. Y. App. Div. 169.

Where a husband conveys all his property to his wife, a woman of great worldly experience who had been twice married, and his children by another wife were not allowed to converse with him privately before his death, when his mind was feeble and weak, there is a presumption of undue influence which would vacate the deed. *Disch v. Timm*, 101 Wis. 179.

**Brother and Sister.**—A confidential relation may exist between brother and sister where the latter reposes in the former "especial confidence and trust." *Odell v. Moss*, 130 Cal. 352.

Where a deed was executed a few hours before the grantor's death, giving property to his brother, such conveyance will be set aside where it was shown that the grantor was mentally and physically unable to understand the nature of the transaction. *Hepler v. Hosack*, 197 Pa. St. 631.

**125.** (b) **Duress.** — See note 1.

Laches. — See note 4.

(c) **Fraud.** — See note 5.

**A Niece** who had cared for her uncle who had become addicted to the drinking habit and had been driven away from home by his wife and children. *Ryan v. Ryan*, 174 Mo. 279.

**A Friend.** — A white man, who was intelligent, induced an illiterate old colored woman who had great confidence in him to execute deeds of conveyance. *Cannon v. Gilmer*, 135 Ala. 302.

Where one who stood in confidential relations with a woman who had little business experience induced her to make a deed of conveyance, such deed will be set aside where the consideration was for less than the value of the lands, and the grantor made the deed through fear of foreclosure. *Smith v. Firth*, 53 N. Y. App. Div. 369. See also *Holland v. John*, 60 N. J. Eq. 435.

**Boarder.** — The relation of boarder in the family of a defendant raises no trust or confidential relation so as to affect the validity of a deed from the boarder to the defendant. *Real Estate Title Ins., etc., Co. v. Maguire*, 17 Montg. Co. Rep. (Pa.) 25.

**Clergyman and Parishioner.** — Where a spiritual adviser obtains a devise or grant from a member of his flock, the burden is on him to show the entire good faith of the transaction, and where undue influence is exerted such conveyance will be set aside. *Good v. Zook*, 116 Iowa 582.

**An Agent** who was the confidential adviser of a person of weak mind, and who procured the execution of a deed by fraud or undue influence. *German Sav., etc., Co. v. De Lashmutt*, 83 Fed. Rep. 33.

**125. 1. Duress.** — *Ice v. Ice*, (Ky. 1904) 83 S. W. Rep. 135; *Allen v. Leflore County*, 78 Miss. 671; *Benn v. Pritchett*, 163 Mo. 560; *Havorka v. Havlik*, (Neb. 1903) 93 N. W. Rep. 990; *Van Dyke v. Wood*, 60 N. Y. App. Div. 208; *Pride v. Baker*, (Tenn. Ch. 1901) 64 S. W. Rep. 329; *Gray v. Freeman*, (Tex. Civ. App. 1905) 84 S. W. Rep. 1105; *Medearis v. Granberry*, (Tex. Civ. App. 1905) 84 S. W. Rep. 1070; *Hodges v. Hodges*, 27 Tex. Civ. App. 537.

**4. Right to Avoid Barred by Laches.** — *Horn v. Beatty*, 85 Miss. 504.

**5. Circumstances Amounting to Fraud** — *United States*. — *Hanley v. Sweeny*, (C. C. A.) 109 Fed. Rep. 712.

*Alabama*. — *Cannon v. Gilmer*, 135 Ala. 302; *Treadwell v. Torbert*, 122 Ala. 297.

*California*. — *More v. More*, 133 Cal. 489; *Donnelly v. Rees*, 141 Cal. 56; *Gatje v. Armstrong*, 145 Cal. 370.

*Connecticut*. — *Brett v. Cooney*, 75 Conn. 338.

*Florida*. — *Stackpole v. Hancock*, 40 Fla. 362.

*Georgia*. — *Lanfair v. Thompson*, 112 Ga. 487; *Casey v. Howard*, 105 Ga. 198.

*Illinois*. — *Rice v. Silverston*, 170 Ill. 342; *Wenegar v. Bollenbach*, 180 Ill. 222; *Thomas v. Whitney*, 186 Ill. 225; *Fabrice v. Von Der Brelie*, 190 Ill. 460; *Shea v. Teufert*, 207 Ill. 222; *Harris v. Deemont*, 207 Ill. 583; *Walker v. Shepard*, 210 Ill. 100; *Irwin v. Sample*, 213 Ill.

160; *Vollenweider v. Vollenweider*, 216 Ill. 197.

*Indiana*. — *Gwan v. Masterson*, 152 Ind. 127.

*Iowa*. — *Spurrier v. McClintock*, 104 Iowa 79; *Bruguier v. Pepin*, 106 Iowa 432; *Jordan v. Cathcart*, 126 Iowa 600.

*Kansas*. — *Brown v. Brown*, 62 Kan. 666; *Stevens v. Stevens*, 10 Kan. App. 259.

*Kentucky*. — *Combs v. Combs*, (Ky. 1901) 65 S. W. Rep. 13; *Barry v. Murphy*, (Ky. 1902) 70 S. W. Rep. 276; *Highland v. Highland*, (Ky. 1903) 73 S. W. Rep. 791; *Combs v. Davidson*, (Ky. 1903) 74 S. W. Rep. 261; *Turner v. Washburn*, (Ky. 1904) 80 S. W. Rep. 460.

*Maine*. — *Tribou v. Tribou*, 96 Me. 305.

*Maryland*. — *Keeler v. Gill*, 92 Md. 190.

*Massachusetts*. — *Westlake v. Dunn*, 184 Mass. 260, 100 Am. St. Rep. 557.

*Michigan*. — *Hubert v. Traeder*, (Mich. 1905) 102 N. W. Rep. 283.

*Missouri*. — *James v. Groff*, 157 Mo. 402; *Snyder v. Arn*, 187 Mo. 165; *Obst v. Unnerstall*, 184 Mo. 383; *Dashner v. Buffington*, 170 Mo. 260.

*Nebraska*. — *Brun v. Brun*, 64 Neb. 782.

*New Hampshire*. — *Cook v. Lee*, 72 N. H. 569.

*New Jersey*. — *Hammell v. Hyatt*, 59 N. J. Eq. 174; *Coffey v. Sullivan*, 63 N. J. Eq. 296.

*New York*. — *Wilcox v. American Telephone, etc., Co.*, 176 N. Y. 115, 98 Am. St. Rep. 650; *Anderson v. Carter*, 24 N. Y. App. Div. 462, *affirmed* 165 N. Y. 624; *Quimby v. Clock*, 44 N. Y. App. Div. 616; *McClellan v. Grant*, 83 N. Y. App. Div. 599, *affirmed* 181 N. Y. 581; *Babcock v. Clark*, 79 N. Y. App. Div. 502; *Jones v. Jones*, (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 360.

*North Carolina*. — *Troxler v. New Era Bldg. Co.*, 137 N. Car. 51.

*North Dakota*. — *Brummond v. Krause*, 8 N. Dak. 573.

*Oregon*. — *Parrish v. Parrish*, 33 Oregon 486.

*Pennsylvania*. — *Hoch v. Hoeh*, 197 Pa. St. 387; *Neuhauser v. Schrepfer*, 30 Pittsb. Leg. J. N. S. (Pa.) 399.

*Rhode Island*. — *Kelley v. Radakin*, 24 R. I. 101.

*Tennessee*. — *Stephens v. Ozbourne*, 107 Tenn. 572, 89 Am. St. Rep. 957; *Jones v. Galbraith*, (Tenn. Ch. 1900) 59 S. W. Rep. 350.

*Texas*. — *Hodges v. Hodges*, 27 Tex. Civ. App. 537.

*Washington*. — *Stack v. Nolte*, 29 Wash. 188, 69 Pac. Rep. 753; *Jones v. Steelman*, 22 Wash. 636.

*West Virginia*. — *O'Connor v. O'Connor*, 45 W. Va. 354.

*Wisconsin*. — *Horton v. Lee*, 106 Wis. 439; *Shawvan v. Shawvan*, 110 Wis. 590; *Lockwood v. Allen*, 113 Wis. 474.

**Circumstances Held Not Fraudulent** — *United States*. — *Fowler v. Fowler*, 135 Fed. Rep. 405; *De Roux v. Girard*, 105 Fed. Rep. 798, *affirmed* (C. C. A.) 112 Fed. Rep. 80.

*Arkansas*. — *Blanks v. Clark*, 68 Ark. 98; *Oxford v. Hopson*, (Ark. 1904) 83 S. W. Rep. 942.

**127.** (5) *Title to Convey* — (a) *General Rule — Grantor Must Have Title.* — See note 5.

**128.** See note 1.

(b) *Equitable Construction — After-acquired Title.* — See note 4.

**131.** *b. THE GRANTEE* — (1) *Qualifications of Grantee — A Person in Esse.* — See note 4.

**132.** (2) *Designation of Grantee.* — See notes 8, 9.

**133.** See note 1.

*Illinois.* — *Jones v. Foster*, 175 Ill. 459; *Kennedy v. Kennedy*, 194 Ill. 346; *Albrecht v. Hunecke*, 196 Ill. 127.

*Iowa.* — *Wilcox v. Mann*, 115 Iowa 91; *Brown v. Cole*, 126 Iowa 711.

*Kentucky.* — *Fretwell v. Fretwell*, (Ky. 1901) 62 S. W. Rep. 1017.

*Louisiana.* — *Harris v. Harris*, 109 La. 913.

*Maryland.* — *Watts v. Vansant*, 99 Md. 577.

*Michigan.* — *Parsons v. Detroit, etc.*, R. Co., 122 Mich. 462; *Loviolette v. Butler*, 124 Mich. 580.

*Missouri.* — *Joyce v. Growney*, 154 Mo. 253; *Wilson v. Jackson*, 167 Mo. 135.

*Nebraska.* — *Tichy v. Simicek*, (Neb. 1903) 95 N. W. Rep. 629.

*New Jersey.* — *Coombe v. Carthew*, 59 N. J. Eq. 638; *Lozier v. Hill*, (N. J. 1904) 59 Atl. Rep. 234.

*New York.* — *Brehm v. Gushal*, (Supm. Ct. Spec. T.) 31 Misc. (N. Y.) 112; *Stewart v. Dunn*, 77 N. Y. App. Div. 631; *Absalon v. Sickinger*, 102 N. Y. App. Div. 383.

*North Dakota.* — *Heyrock v. Surerus*, 9 N. Dak. 28; *Leonard v. Fleming*, (N. Dak. 1905) 102 N. W. Rep. 308.

*Oregon.* — *State v. Blize*, 37 Oregon 404.

*Pennsylvania.* — *Harvey v. Knapp*, 194 Pa. St. 219; *Zeok v. Mercantile Trust Co.*, 194 Pa. St. 388; *Simon's Estate*, 20 Pa. Super. Ct. 450.

*South Carolina.* — *Johnson v. Franklin*, 58 S. Car. 394; *Huntley v. Welsh*, 64 S. Car. 233; *Revels v. Revels*, 64 S. Car. 256.

*Tennessee.* — *Driver v. White*, (Tenn. Ch. 1898) 51 S. W. Rep. 994; *Maney v. Morris*, (Tenn. 1900) 57 S. W. Rep. 442; *Martin v. Winton*, (Tenn. Ch. 1901) 62 S. W. Rep. 180.

*Texas.* — *Goar v. Thompson*, 19 Tex. Civ. App. 330; *Wells v. Houston*, 23 Tex. Civ. App. 629; *Harrington v. Clafin*, 28 Tex. Civ. App. 100.

*Virginia.* — *Beverage v. Ralston*, 98 Va. 625.

*West Virginia.* — *Stuart v. Neely*, 50 W. Va. 508.

*Wisconsin.* — *Winn v. Itzel*, (Wis. 1905) 103 N. W. Rep. 220; *Marking v. Marking*, 106 Wis. 292; *Baumann v. Lupinski*, 108 Wis. 451; *Haynes v. Harriman*, 117 Wis. 132.

**Laches.** — *Laches* of the grantor will render binding a deed fraudulently procured. *Becht v. Becht*, 168 Mo. 525.

**127.** 5. *Wade v. Brown*, (Ark. 1905) 87 S. W. Rep. 639.

**128.** 1. *Conveys Grantor's Interest.* — *In re Bauernschmidt*, 97 Md. 65, quoting 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 127, 128.

4. *After-acquired Title Inures to Grantee.* — *Benton v. Sentell*, 50 La. Ann. 869; *Troxell v. Stevens*, 57 Neb. 329.

A Sheriff's Deed will not pass an after-acquired

interest of the defendant in the execution. *Wilson v. Fisher*, 172 Mo. 10.

**131.** 4. *Grantee Must Exist.* — *Hewitt v. New York, etc.*, R. Co., 70 Conn. 637; *Davis v. Hollingsworth*, 113 Ga. 210, 84 Am. St. Rep. 233, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 131; *Miller v. McAlister*, 197 Ill. 72.

**132.** 8. *Grantee, How Designated.* — *Westchester F. Ins. Co. v. Jennings*, 70 Ill. App. 539; *Henniges v. Paschke*, 9 N. Dak. 489, 81 Am. St. Rep. 588, quoting 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 132.

**Deed Void Without Grantee.** — *Van Dyck v. Van Dyck*, 119 Ga. 830; *Mickey v. Barton*, 194 Ill. 446; *Westlake v. Dunn*, 184 Mass. 260, 100 Am. St. Rep. 557; *Clark v. Butts*, 73 Minn. 361.

9. **The "Heirs" of a Deceased Person.** — Where it was the intention of the grantor in the deed, by the word "heirs" is meant "children." *Shirey v. Clark*, 72 Ark. 539.

A deed to A and on her death to her children then living, share and share alike, "and in case of the death of any such children, then to their heir or heirs," the words "heir or heirs" mean the person who would by the statute succeed to the real estate in case of intestacy, and are not synonymous with "children." *Hochstein v. Berghauser*, 123 Cal. 681. See also *Seymour v. Bowles*, 172 Ill. 521; *Hill v. Jackson*, (Tex. Civ. App. 1899) 51 S. W. Rep. 357.

See generally HEIR, HEIRS, AND THE LIKE.

**"Bodily Heirs."** — Where there was a conveyance to a man and wife, and at their death to the wife's bodily heirs, the words "bodily heirs" were held to mean "children." *Yokley v. Superior Drill Co.*, (Ky. 1904) 80 S. W. Rep. 1153.

**Description Held Insufficient.** — "The inhabitants" of two districts. *Hunt v. Tolles*, 75 Vt. 48.

**"Children" and "Issue."** — These words in a deed are held to mean legitimate children or issue unless the context is such as to require a different meaning. *Johnstone v. Taliaferro*, 107 Ga. 6; *Hall v. Cressey*, 92 Me. 514; *Brabham v. Day*, 75 Miss. 923.

**133.** 1. *Mistake or Omission in Name.* — Where there is a mistake in the initials of the grantee's name in one part of the deed, but the correct name is in other parts, and it appears with almost absolute certainty that the deed is the grantee's, such incorrect initials will be rejected and the deed construed according to the intention of the parties. *Kansas City, etc., R. Co. v. Smith*, 156 Mo. 608.

Where the grantee's name was "Halladay" but the deed was to "Halliday," it can be shown *alimunde* the latter is the person intended. *Halladay v. Gass*, 51 N. Y. App. Div. 539.

**"Senior."** — The addition or suffix "Sr." is



**135.** Filling Blanks. — See note 1.

**137.** 4. The Writing — *b.* WHAT CONSTITUTES A SUFFICIENT WRITING — (2) *Formal Component Parts* — (a) *The Premises* — *bb.* *THE GRANTING CLAUSE* — *Operative Words.* — See note 5.

**138.** Expressing Intention with Nontechnical Words. — See note 1.

An Entire Absence of Operative Words. — See note 2.

**139.** (b) *The Habendum.* — See notes 1, 2.

General Principles of Construction. — See notes 4, 5, 6, 7.

**140.** See note 1.

**141.** Express Estate in Premises Followed by Repugnant or Unlawful Habendum. — See note 1.

no part of the name of a person. The identity of name is *prima facie* evidence of identity of person, and it devolves upon him who denies the identity to overcome the presumption. *Hunt v. Searcy*, 167 Mo. 158.

**A Mistake in the Name of a Corporation, Etc.** — *Church of Christ v. Christian Church*, 193 Ill. 144.

**135. 1. Filling Blanks.** — *Westlake v. Dunn*, 184 Mass. 260, 100 Am. St. Rep. 557.

Where the grantee's name was left blank in a deed at the request of such grantee, and said grantee went into possession and assumed the ownership of the property, there was sufficient delivery and acceptance. *Frayer v. Holtom*, 8 Kan. App. 718. Compare the cases cited *supra*, this title, **132. 8.**

**Written Authority Necessary to Fill Blank Left for Grantor's Name.** — *Logan v. Miller*, 106 Iowa 511; *Exchange Nat. Bank v. Fleming*, 63 Kan. 139; *Farmers' Bank v. Worthington*, 145 Mo. 91; *Thummel v. Holden*, 149 Mo. 677; *Platt v. McClong*, (N. J. 1901) 49 Atl. Rep. 1125; *Lund v. Thackery*, (S. Dak. 1904) 99 N. W. Rep. 856.

**137. 5. Operative Words of the Various Forms of Conveyance.** — The use of the words "sell and convey" in a deed implies a conveyance in fee in the absence of any restrictions. *St. Louis Land, etc., Assoc. v. Fueller*, 182 Mo. 93. **Necessity of Appropriate Words.** — *Lee v. Scott*, 26 Ohio Cir. Ct. 799, *quoting* 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 137.

**138. 1. Nontechnical Words Held Sufficient.** — "I hereby transfer my rights, titles, and good will," etc., is sufficient to pass title if such was the intention of the grantor, to be collected from the entire instrument. *Sharpe v. Brantley*, 123 Ala. 105.

**Question of Intention.** — To pass the title to land, words must be used sufficient to show an intention of the parties to convey, and neither under the common law nor the statute is any set form or arrangement of words necessary. *Interstate Bldg., etc., Assoc. v. Agricola*, 124 Ala. 474.

There must appear on the face of the instrument enough to indicate an intention to convey an interest in the property described. But while proper words are necessary, "grant," "bargain," "sell," and other technical words need not be used. *Horton v. Murden*, 117 Ga. 72.

**"Convey."** — The word "convey" is equivalent to the word "grant." *Uhl v. Ohio River R. Co.*, 51 W. Va. 106; *Chapman v. Charter*, 46 W. Va. 769.

**"Assignments."** — *Whalon v. North Platte Canal, etc., Co.*, 11 Wyo. 347, *citing* 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 137, 138.

**2. Absence of Operative Words.** — Where there are no words of conveyance in the contract it cannot take effect as a deed, or interest in lands or agreement to convey a title or estate. *Irwin v. Powell*, 188 Ill. 107.

**139. 1. Office of Habendum.** — *Chamberlain v. Runkle*, 28 Ind. App. 607, *citing* 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 139.

**2. Chamberlain v. Runkle**, 28 Ind. App. 607, *citing* 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 139.

**4. General Principles of Construction — Intention.** — In construing deeds of conveyance the same rules of interpretation apply as to other instruments of writing. The court is in duty bound to endeavor to sustain the true intention of the parties. *Hale v. Docking*, 6 Kan. App. 283, *affirming* 60 Kan. 856, 55 Pac. Rep. 1100.

**5. Premises and Habendum Harmonized if Possible.** — *Chamberlain v. Runkle*, 28 Ind. App. 607, *citing* 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 139; *Martin v. Jones*, 62 Ohio St. 519.

**6. Durand v. Higgins**, 67 Kan. 124, *citing* 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 139, 140; *Blackwell v. Blackwell*, 124 N. Car. 269.

**Question of Intention.** — But see *Huie v. McDaniel*, 105 Ga. 319, where it was held that the rigid enforcement of the ancient rule, that of two repugnant clauses in a deed the former would prevail, would not be respected, but the deed would be construed as other contracts, and the intention of the grantor as manifested by the writing would be enforced.

**7. A Repugnant Habendum Is Void.** — *Lamb v. Medsker*, (Ind. App. 1905) 74 N. E. Rep. 1012; *Durand v. Higgins*, 67 Kan. 124, *citing* 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 139, 140; *Hall v. Wright*, (Ky. 1905) 87 S. W. Rep. 1129; *Hunter v. Patterson*, 142 Mo. 310; *Chicago Lumbering Co. v. Powell*, 120 Mich. 51; *Blackwell v. Blackwell*, 124 N. Car. 271, *citing* 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 139, 140; *Hads v. Tiernan*, 25 Pa. Super. Ct. 14.

**140. 1. Habendum May Explain, but Cannot Be Repugnant.** — *Chamberlain v. Runkle*, 28 Ind. App. 607, *citing* 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 139; *Lamb v. Medsker*, (Ind. App. 1905) 74 N. E. Rep. 1012; *Durand v. Higgins*, 67 Kan. 124, *citing* 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 139, 140.

**141. 1. Express Estate in Premises Followed by Repugnant Habendum.** — *Harriot v. Harriot*, 25 N. Y. App. Div. 245.

**142.** Implied Estate in Premises Followed by Express Estate in Habendum. — See note 1.

(d) The Reddendum — A Reservation Must Be to the Grantor. — See note 5.  
5. Execution — a. READING. — See note 8.

**143.** Manner of Reading. — See note 2.

Misreading. — See note 3.

**144.** b. SIGNING — (2) *Statute of Frauds* — (e) Signature by Mark. — See note 2.

(3) *Signature by Agent*. — See note 4.

**145.** Ratification. — See note 1.

**146.** c. SEALING — (2) *What Is a Seal*. — See notes 4, 5.

**147.** (3) *Necessity for a Seal, and Effect of Its Omission*. — See notes 1, 2.

**148.** d. ATTESTATION — (1) *Attesting Witnesses at Common Law*. — See note 1.

(2) *Who May Be a Subscribing Witness*. — See note 4.

**149.** (3) *The Number of Witnesses Required*. — See note 3.

(4) *The Act of Attesting*. — See note 4.

**142. 1.** Implied Fee in Premises Yields to Express Limitation in Habendum. — Beedy v. Finney, 118 Iowa 279, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 141.

**5. Reservation Cannot Be Made to Stranger.** — Burchard v. Walther, 58 Neb. 542, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 142.

**Exception and Reservation Distinguished.** — Whether a provision is a reservation or an exception does not depend on the use of a particular word, "but upon the nature and effect of the provision itself." Smith v. Furbish, 68 N. H. 123.

All of the words of the grant must be considered, and if their meaning is uncertain or ambiguous, then all the circumstances surrounding the transaction, in order that it may be ascertained whether the grantor parted with the title, but retained to himself some right or interest in the thing granted, in which case there would be a reservation, or whether the grantor retained to himself a part of the premises described as granted, which would constitute an exception. Mount v. Hambley, (Supm. Ct. Spec. T.) 22 Misc. (N. Y.) 454, affirmed 33 N. Y. App. Div. 103.

**8. Reading.** — Martin v. Winton, (Tenn. 1901) 62 S. W. Rep. 180; Lewis v. Whitworth, (Tex. Civ. App. 1899) 54 S. W. Rep. 1077.

**143. 2. Must Comprehend the Deed.** — Brun v. Brun, 64 Neb. 782.

**3. Misreading.** — Sibley v. Holcomb, 104 Ky. 670.

**144. 2. Signature by Mark.** — Elston v. Roop, 133 Ala. 336; Langenbeck v. Louis, 140 Cal. 406; Horton v. Murden, 117 Ga. 72; Timber v. Desparois, (S. Dak. 1904) 101 N. W. Rep. 879.

**4. Signature by Another in Grantor's Presence and with His Consent.** — Middlebrook v. Barefoot, 121 Ala. 644, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 144; Middlesboro Waterworks v. Neal, 105 Ky. 586; Northwestern Loan, etc., Co. v. Jonasen, 11 S. Dak. 573, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 144.

**145. 1. Ratification.** — Becht v. Becht, 168 Mo. 530, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 145; Lyman v. Smith, 4 Lack.

Leg. N. (Pa.) 207; Northwestern Loan, etc., Co. v. Jonasen, 11 S. Dak. 573.

**146. 4. Statutes Permitting Scroll or Device.** — G. V. B. Min. Co. v. Hailey First Nat. Bank, (C. C. A.) 95 Fed. Rep. 23; Hazleton Nat. Bank v. Kintz, 24 Pa. Super. Ct. 456.

In *South Carolina* the mere word "seal" written below the signature is sufficient though there is no scroll or other symbol of a seal. Cook v. Cooper, 59 S. Car. 560.

**5. Strictness of Common Law as to Seal Relaxed by Judicial Construction.** — Brown v. Commercial F. Ins. Co., 21 App. Cas. (D. C.) 325.

**147. 1. Seal Necessary to Constitute Deed in Absence of Statute.** — Boggess v. Scott, 48 W. Va. 320, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 147.

**Effect of Record of Unsealed Deed.** — Dana v. Jones, 91 N. Y. App. Div. 496, where it was held that the absence of seal on the record is not conclusive as to the presence of the seal on the original deed.

**2. Seal Recited but Not Affixed.** — Under the *Georgia* statute an instrument which on its face appears by the parties to have been intended as a deed of conveyance is not invalidated by the omission of a seal. Vizard v. Moody, 119 Ga. 918.

The *South Carolina* statute of 1899 provides that whenever it shall appear from the attestation clause or other parts of any instrument in writing that the parties intended it to be a sealed instrument it shall be so construed though no seal was actually attached. Cook v. Cooper, 59 S. Car. 560.

**148. 1. Witnesses Not Essential at Common Law.** — Arrington v. Arrington, 122 Ala. 510.

**4. Competent Witnesses Required.** — A grantee in a deed of conveyance is not competent to attest it as a witness. Cropt v. Thornton, 125 Ala. 391.

**149. 3. Statutory Requirements as to Witnesses.** — Parken v. Safford, (Fla. 1904) 37 So. Rep. 567.

In *Georgia* a deed not attested by two witnesses is not properly admissible to record; still it is sufficient to bind the parties and their heirs or privies. Howard v. Russell, 104 Ga. 230.

**4. Need Not See Grantor Sign.** — Elstor v. Roop,

**150.** *f. DELIVERY* — (1) *Necessary to Pass Title.* — See note 5.

**152.** *Time Title Passes.* — See notes 1, 2.

**153.** See notes 1, 2.

133 Ala. 336, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 149.

**150. 5. Necessity of Delivery** — *United States.* — Guaranty Trust Co. v. Galveston City R. Co., (C. C. A.) 107 Fed. Rep. 311, quoting 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 150. To the same point see the following cases: *Alabama.* — Williams v. Armstrong, 130 Ala. 389; Fitzpatrick v. Brigman, 130 Ala. 450.

*Delaware.* — Smith v. May, 3 Penn. (Del.) 233.

*Florida.* — Ellis v. Clark, 39 Fla. 714.

*Georgia.* — Stallings v. Newton, 110 Ga. 875.

*Illinois.* — Walter v. Way, 170 Ill. 96; McClun v. McClun, 176 Ill. 376; Morris v. Caudle, 178 Ill. 9, 69 Am. St. Rep. 282; Walls v. Ritter, 180 Ill. 616; Lanphier v. Desmond, 187 Ill. 370; Dagley v. Black, 197 Ill. 53; Bogan v. Swearingen, 199 Ill. 454; Van der Aa v. Van Drunen, 208 Ill. 108.

*Indiana.* — Osborne v. Eslinger, 155 Ind. 351, 20 Am. St. Rep. 240; Fireman's Fund Ins. Co. v. Dunn, 22 Ind. App. 332; Mortgage Trust Co. v. Moore, 150 Ind. 465.

*Iowa.* — Erler v. Erler, 124 Iowa 726.

*Kentucky.* — Sutton v. Gibson, (Ky. 1905) 84 S. W. Rep. 335.

*Maine.* — Egan v. Horrigan, 96 Me. 46.

*Michigan.* — Barron v. Mercure, 132 Mich. 439; Bisard v. Sparks, 133 Mich. 587.

*Missouri.* — Carter v. Dilley, 167 Mo. 564; Powell v. Banks, 146 Mo. 620; Marshall v. Hartzfelt, 98 Mo. App. 178; Peters v. Berke-meier, 184 Mo. 393; Dohmen v. Schlieff, 179 Mo. 593.

*Nebraska.* — Schneider v. Vogler, (Neb. 1904) 97 N. W. Rep. 1018.

*North Carolina.* — Tarlton v. Griggs, 131 N. Car. 216.

*Ohio.* — Clay v. Cline, 9 Ohio Cir. Dec. 871, 18 Ohio Cir. Ct. 89.

*Oregon.* — Swank v. Swank, 37 Oregon 439.

*Pennsylvania.* — *In re Nicholls*, 190 Pa. St. 308; Benedick v. Benedick, 187 Pa. St. 351.

*Tennessee.* — Wilson v. Winters, 108 Tenn. 398.

*Texas.* — Garner v. Risinger, (Tex. Civ. App. 1904) 81 S. W. Rep. 343; Blackman v. Schierman, 21 Tex. Civ. App. 517; McCartney v. McCartney, (Tex. Civ. App. 1899) 53 S. W. Rep. 388, reversed 93 Tex. 359; Koppelman v. Koppelman, 94 Tex. 40.

**To Be Delivered During the Grantor's Life.** — *Lundy v. Mason*, 174 Ill. 505; Schaeffer v. Anchor Mut. F. Ins. Co., 113 Iowa 652; Hooper v. Vanstrum, 92 Minn. 406; Barnard v. Thurston, 86 Minn. 343.

**But May Be Accepted After the Grantor's Death.** — Thompson v. Calhoun, 216 Ill. 161.

**152. 1. Deed Takes Effect from Delivery** — *United States.* — Guaranty Trust Co. v. Galveston City R. Co., (C. C. A.) 107 Fed. Rep. 311, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 152, 153.

*California.* — Reed v. Smith, 125 Cal. 491; San Diego Gas Co. v. Frame, 137 Cal. 441.

*Delaware.* — Buker v. Carroll, 1 Penn. (Del.) 559; Smith v. May, 3 Penn. (Del.) 233.

*Georgia.* — Beard v. White, 120 Ga. 1018.

*Illinois.* — Lanphier v. Desmond, 187 Ill. 370.

*Iowa.* — Reeves v. Howard, 118 Iowa 121.

*Michigan.* — Dyer v. Skadan, 128 Mich. 352, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 152.

*Minnesota.* — Kammrath v. Kidd, 89 Minn. 380, 99 Am. St. Rep. 603.

*Oklahoma.* — Powers v. Rude, 14 Okla. 381.

*Texas.* — Phoenix Ins. Co. v. Neal, 23 Tex. Civ. App. 427.

**2. Date of Deed Presumed Date of Delivery.** — *Alabama.* — Williams v. Armstrong, 130 Ala. 389, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 152.

*California.* — McDougall v. McDougall, 135 Cal. 316.

*Delaware.* — Buker v. Carroll, 1 Penn. (Del.) 559.

*Georgia.* — McBrayer v. Walker, 122 Ga. 245.

*Iowa.* — Furenes v. Eide, 109 Iowa 511, 77 Am. St. Rep. 545; Hall v. Cardell, 111 Iowa 206.

*Kentucky.* — Bunnell v. Bunnell, 111 Ky. 566; Shoptaw v. Ridgway, (Ky. 1901) 60 S. W. Rep. 723.

*Minnesota.* — Cummings v. Newell, 86 Minn. 130; Schweigel v. L. A. Shakman Co., 78 Minn. 142.

*New Jersey.* — Atlantic City v. New Auditorium Pier Co., 63 N. J. Eq. 644.

*New York.* — Ewers v. Smith, 98 N. Y. App. Div. 289; Hulse v. Bacon, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 455, affirmed 40 N. Y. App. Div. 89; Biglow v. Biglow, 39 N. Y. App. Div. 103.

*North Dakota.* — Schweinber v. Great Western Elevator Co., 9 N. Dak. 113, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 152; Leonard v. Fleming, (N. Dak. 1905) 102 N. W. Rep. 308.

*Oregon.* — Crossen v. Oliver, 37 Oregon 522, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 152.

**Mistake in Date of Acknowledgment.** — The fact that the certificate of acknowledgment was dated earlier than the deed is immaterial where it is clearly shown that the date of acknowledgment is erroneous, and that it was made when the deed was dated, as the conflict in dates arises from a mere clerical error. Mosier v. Momsen, 13 Okla. 41.

**153. 1. Date of Acknowledgment Held Controlling.** — Guaranty Trust Co. v. Galveston City R. Co., (C. C. A.) 107 Fed. Rep. 311, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 152, 153; Bailey v. Selden, 124 Ala. 403; White-side v. Watkins, (Tenn. Ch. 1900) 58 S. W. Rep. 1107.

**2. True Date May Always Be Proved.** — Guaranty Trust Co. v. Galveston City R. Co., (C. C. A.) 107 Fed. Rep. 311, quoting 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 153; Fitzpatrick v. Brigman, 130 Ala. 450; Buker v. Carroll, 1 Penn. (Del.) 559; Furenes v. Eide, 109 Iowa 511, 77 Am. St. Rep. 545; Blair State Bank v.



**153.** (2) *What Is Delivery* — (a) *Definition*. — See note 3.

(b) *Need Not Be Manual*. — See note 4.

**154.** (c) *A Question of Intention*. — See note 1.

Bunn, 61 Neb. 464; Crossen v. Oliver, 37 Oregon 522, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 153.

**153. 3. Definition.** — Fitzpatrick v. Brigman, 130 Ala. 454, quoting 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 153; Walls v. Ritter, 180 Ill. 616; Shields v. Bush, 189 Ill. 534, 82 Am. St. Rep. 474; Baker v. Hall, 214 Ill. 364; Emmons v. Harding, 162 Ind. 154; Hudson v. Redford, (Ky. 1902) 67 S. W. Rep. 35, quoting 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 153; Martin v. Bates, (Ky. 1899) 50 S. W. Rep. 38, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 153; Bunnell v. Bunnell, 111 Ky. 566; Perkins v. Thompson, 123 N. Car. 175.

**4. Manual Delivery Unnecessary** — Illinois. — Weaver v. Weaver, 182 Ill. 292, 74 Am. St. Rep. 173, quoting 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 153; Rodemeier v. Brown, 169 Ill. 347, 61 Am. St. Rep. 176; Brady v. Huber, 197 Ill. 291, 90 Am. St. Rep. 161.

Kansas. — Kelsa v. Graves, 64 Kan. 777.

Kentucky. — Martin v. Bates, (Ky. 1899) 50 S. W. Rep. 38, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 153; Shoptaw v. Ridgway, (Ky. 1901) 60 S. W. Rep. 723; Bunnell v. Bunnell, 111 Ky. 566.

Michigan. — Holmes v. McDonald, 119 Mich. 563, 75 Am. St. Rep. 430.

Minnesota. — Chastek v. Souba, 93 Minn. 418.

Mississippi. — Young v. Elgin, (Miss. 1900) 27 So. Rep. 595.

New Jersey. — Hildebrand v. Willig, 64 N. J. Eq. 249.

Ohio. — Wright v. Werden, 8 Ohio Dec. 1, 7 Ohio N. P. 122.

Tennessee. — Gray v. Ward, (Tenn. Ch. 1898) 52 S. W. Rep. 1028; Wilson v. Winter, 108 Tenn. 398.

Texas. — McCartney v. McCartney, (Tex. Civ. App. 1899) 53 S. W. Rep. 388, reversed 93 Tex. 359.

West Virginia. — Adams v. Baker, 50 W. Va. 249.

**Delivery to the Agent of the Grantee, Etc.** — Coleman v. Coleman, 216 Ill. 261; Hathaway v. Cass, 84 Minn. 192; Schlicher v. Kieler, 61 N. J. Eq. 394; Bond v. Wilson, 129 N. Car. 325; Swank v. Swank, 37 Oregon 439.

**154. 1. Test of Delivery Is Grantor's Intention to Divest Himself of Title** — Alabama. — Arrington v. Arrington, 122 Ala. 510.

Arkansas. — Cribbs v. Walker, (Ark. 1905) 85 S. W. Rep. 244, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 154.

California. — Kenniff v. Caulfield, 140 Cal. 34.

Delaware. — Smith v. May, 3 Penn. (Del.) 233.

Illinois. — Weaver v. Weaver, 182 Ill. 292, 74 Am. St. Rep. 173, quoting 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 154; Latimer v. Latimer, 174 Ill. 418; Walls v. Ritter, 180 Ill. 616; Pratt v. Griffin, 184 Ill. 514; Hollenbeck v. Hollenbeck, 185 Ill. 101; Shields v. Bush, 189 Ill. 534, 82 Am. St. Rep. 474; Baker v. Hall, 214 Ill. 364; Fouts v. Bell, 172 Ill. 345; Cole-

man v. Coleman, 216 Ill. 261; Carter v. Carter, 77 Ill. App. 559.

Indiana. — Emmons v. Harding, 162 Ind. 154.

Kansas. — Seifert v. Seifert, 66 Kan. 732; Weuester v. Folin, 60 Kan. 334; Kelsa v. Graves, 64 Kan. 777.

Kentucky. — Martin v. Bates, (Ky. 1899) 50 S. W. Rep. 38, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 153; Shoptaw v. Ridgway, (Ky. 1901) 60 S. W. Rep. 723; Bunnell v. Bunnell, 111 Ky. 566; Ewing v. Stanley, (Ky. 1902) 69 S. W. Rep. 724; Sutton v. Gibson, (Ky. 1905) 84 S. W. Rep. 335.

Michigan. — Jenkinson v. Brooks, 119 Mich. 108; Dyer v. Skadan, 128 Mich. 348, 92 Am. St. Rep. 461; Merchant v. Guilds, 129 Mich. 168; Gardiner v. Gardiner, 134 Mich. 90; Thomas v. Sullivan, (Mich. 1904) 101 N. W. Rep. 528.

Minnesota. — Barnard v. Thurston, 86 Minn. 343; Hooper v. Vanstrum, 92 Minn. 406; Chastek v. Souba, 93 Minn. 418.

Mississippi. — Hall v. Waddill, 78 Miss. 16. Missouri. — McNear v. Williamson, 166 Mo. 358, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 153, 154; Bunn v. Stuart, 183 Mo. 375, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 153-161; Powell v. Banks, 146 Mo. 620; Marshall v. Hartzfelt, 98 Mo. App. 178.

Nebraska. — Home F. Ins. Co. v. Collins, 61 Neb. 198; Brown v. Hartman, 57 Neb. 341.

New Jersey. — Hildebrand v. Willig, 64 N. J. Eq. 249.

North Carolina. — Tarlton v. Griggs, 131 N. Car. 216.

Pennsylvania. — Cameron v. Gray, 202 Pa. St. 566.

Rhode Island. — Johnson v. Johnson, 24 R. I. 571, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 154.

Tennessee. — Galbreath v. Galbreath, (Tenn. Ch. 1900) 64 S. W. Rep. 361.

Texas. — McClendon v. Brockett, 32 Tex. Civ. App. 150; King v. Hill, (Tex. Civ. App. 1903) 75 S. W. Rep. 550; Ford v. Boone, 32 Tex. Civ. App. 550; Houston Land, etc., Co. v. Hubbard, (Tex. Civ. App. 1905) 85 S. W. Rep. 474.

West Virginia. — Adams v. Baker, 50 W. Va. 249; Gaines v. Keener, 48 W. Va. 56.

Wisconsin. — Kittoe v. Willey, 121 Wis. 548.

**Evidence.** — Rodemeier v. Brown, 169 Ill. 347, 61 Am. St. Rep. 176; Kuhn v. Kuhn, (Ky. 1902) 69 S. W. Rep. 1077.

Where a deed is executed and delivered without any qualification or any intention to withdraw it, the delivery is sufficient. Thomson v. Flint, etc., R. Co., 131 Mich. 95.

The delivery of a deed may always be shown by parol testimony. Fulton v. Priddy, 123 Mich. 298, 81 Am. St. Rep. 201; Coulson v. Coulson, 180 Mo. 709.

Intention to deliver may be established by the conduct of both grantor and grantee, and where both had treated a transaction as complete, but the deed was retained by the grantor, it was held equivalent to a delivery, and the grantor was depository for the grantee. Gray v. Ward,

**155. Wrongful Delivery Vests No Title.** — See note 1.

Ratification of Wrongful Delivery. — See note 2.

(d) With Right to Recall. — See note 3.

**156. (3) For Inspection and Examination.** — See note 2.

(4) For the Grantee's Use. — See note 3.

**157. See note 1.**

(Tenn. Ch. 1898) 52 S. W. Rep. 1028; *Ford v. Boone*, 32 Tex. Civ. App. 550; *Bunnell v. Bunnell*, 111 Ky. 566; *Sargent v. Cooley*, 12 N. Dak. 7.

**155. 1. Possession Wrongfully Procured by Grantee No Delivery** — *United States*. — *Hanley v. Sweeny*, (C. C. A.) 109 Fed. Rep. 712.

*Illinois*. — *Lundy v. Mason*, 174 Ill. 505; *Maratta v. Anderson*, 172 Ill. 377.

*Indiana*. — *Schaefer v. Purviance*, 160 Ind. 63. *Iowa*. — *Barnes v. Barnes*, 113 Iowa 435.

*Michigan*. — *Gardiner v. Gardiner*, 134 Mich. 90.

*Pennsylvania*. — *McNicholas v. Moran*, 204 Pa. St. 165.

*Texas*. — *Gatt v. Shive*, (Tex. Civ. App. 1904) 8e S. W. Rep. 303.

*West Virginia*. — *McConnell v. Rowland*, 48 W. Va. 277, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 155; *Gaines v. Keener*, 48 W. Va. 56.

A deed delivered without the consent of the grantor has no more effect to pass title than if it were a forgery or had been stolen. *Houston Land, etc., Co. v. Hubbard*, (Tex. Civ. App. 1905) 85 S. W. Rep. 474.

**2. Negligence Constituting an Estoppel.** — *Houston Land, etc., Co. v. Hubbard*, (Tex. Civ. App. 1905) 85 S. W. Rep. 474; *Carusi v. Savary*, 6 App. Cas. (D. C.) 330. But see *Garner v. Risinger*, (Tex. Civ. App. 1904) 81 S. W. Rep. 343, where it was held that the grantor was not negligent in leaving a deed signed by him among his papers in a drawer to which the grantee got access and procured the deed, and such grantor was not estopped from asserting title as against an innocent purchaser.

**Ratification.** — *Harkness v. Cleaves*, 113 Iowa 140; *Van Auker v. Mizner*, (Neb. 1902) 90 N. W. Rep. 637.

**3. Delivery Not Consistent with Intention to Recall** — *California*. — *Kenney v. Parks*, 137 Cal. 527.

*Illinois*. — *Spacy v. Ritter*, 214 Ill. 266; *McClun v. McClun*, 176 Ill. 376; *Hawes v. Hawes*, 177 Ill. 409.

*Indiana*. — *Stout v. Stout*, 28 Ind. App. 502; *Fifer v. Rachels*, 27 Ind. App. 654.

*Kentucky*. — *Sutton v. Gibson*, (Ky. 1905) 84 S. W. Rep. 335.

*Massachusetts*. — *Joslin v. Goddard*, 187 Mass. 165.

*Michigan*. — *Thomas v. Sullivan*, (Mich. 1904) 101 N. W. Rep. 528.

*Missouri*. — *Bunn v. Stuart*, 183 Mo. 275, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 155; *Mudd v. Dillon*, 166 Mo. 110.

*New Hampshire*. — *Stockwell v. Williams*, 68 N. H. 75.

*New York*. — *Newton v. Newton*, 52 N. Y. App. Div. 96.

*North Carolina*. — *Tarlton v. Griggs*, 131 N. Car. 216.

*Pennsylvania*. — *Cameron v. Gray*, 202 Pa. St. 566; *Benedick v. Benedick*, 187 Pa. St. 351; *In re Nicholls*, 190 Pa. St. 308.

*South Dakota*. — *Van Dyke v. Grigsby*, 11 S. Dak. 30.

**Delivery to Agent of Grantor.** — Delivery to the agent of the grantor is not sufficient where no directions are given by the grantor as to delivery to the grantee, and nothing is said by the grantor to indicate that the agent was to take as agent or trustee for the grantee. *Lange v. Cullinan*, 205 Ill. 365.

A deed left in the hands of the grantor's agent to be held until the purchase money is paid is not a delivery to the grantee. *Soward v. Moss*, 59 Neb. 71.

Where a vendor delivered the deed to his agent, who was also the agent of the vendee, to be delivered to the latter on payment of the purchase price of the land, but the vendee failed to perform his part of the contract, whereupon the vendor rescinded the contract, there was no delivery, though the agent placed the deed on record. *Mason v. Strickland*, (Neb. 1905) 103 N. W. Rep. 458.

**Grantor Has No Further Control After Delivery.** — *Smith v. May*, 3 Penn. (Del.) 233; *Clark v. Clark*, 183 Ill. 448, 75 Am. St. Rep. 115; *Hagan v. Waldo*, 168 Ill. 646; *Schweigel v. L. A. Shakman Co.*, 78 Minn. 142; *Arnegard v. Arnegard*, 7 N. Dak. 475; *McCartney v. McCartney*, (Tex. Civ. App. 1899) 53 S. W. Rep. 388, reversed 93 Tex. 359.

**156. 2. Return to Grantor for Correction Does Not Affect Delivery.** — *Barkey v. Johnson*, 90 Minn. 33.

**3. Delivery to Third Person for Grantee's Use** — *Illinois*. — *Rodemeier v. Brown*, 169 Ill. 347, 61 Am. St. Rep. 176; *Walter v. Way*, 170 Ill. 96; *Fletcher v. Shepherd*, 174 Ill. 262; *Clark v. Clark*, 183 Ill. 448, 75 Am. St. Rep. 115; *Phelan v. Hyland*, 197 Ill. 395; *Bogan v. Swearingen*, 199 Ill. 454; *Oliver v. Wilhite*, 201 Ill. 552.

*Indiana*. — *Stout v. Rayl*, 146 Ind. 379; *Osborne v. Eslinger*, 155 Ind. 351, 80 Am. St. Rep. 240; *Horne v. Lowe*, 159 Ind. 406.

*Kansas*. — *Wuester v. Folin*, 60 Kan. 334.

*Kentucky*. — *Martin v. Bates*, (Ky. 1899) 50 S. W. Rep. 38.

*Michigan*. — *Meech v. Wilder*, 130 Mich. 29.

*Minnesota*. — *Barnard v. Thurston*, 86 Minn. 343.

*Missouri*. — *Marshall v. Hartzfelt*, 98 Mo. App. 178; *Peters v. Berkemeir*, 184 Mo. 393.

*Nebraska*. — *Gustin v. Michelson*, 55 Neb. 22.

*New York*. — *Taylor v. Smith*, 61 N. Y. App. Div. 623.

*Wisconsin*. — *Kittoe v. Willey*, 121 Wis. 548.

**Time the Deed Takes Effect.** — *Swisher v. Palmer*, 106 Ill. App. 432.

**157. 1. Georgia.** — *Jenkins v. Southern R. Co.*, 109 Ga. 35.

**157.** (5) *To Third Party to Deliver After Grantor's Death.*—See note 2.

**158.** See note 1.

(6) *By Several Grantors or to Several Grantees.*—See note 2.

**159.** See note 1.

(7) *Presumption of Delivery*—(a) *From Deed in Grantee's Possession.*—See notes 2, 3.

*Illinois.*—Pratt v. Griffin, 184 Ill. 514; Hollenbeck v. Hollenbeck, 185 Ill. 101; Bogan v. Swearingen, 199 Ill. 454; Lange v. Cullinan, 205 Ill. 365; Spacy v. Ritter, 214 Ill. 266.

*Indiana.*—Stout v. Rayl, 146 Ind. 379; Osborne v. Eslinger, 155 Ind. 351, 80 Am. St. Rep. 240; Emmons v. Harding, 162 Ind. 154; Fifer v. Rachels, 27 Ind. App. 654; Stout v. Stout, 28 Ind. App. 502.

*Iowa.*—Barnes v. Barnes, 113 Iowa 435.

*Massachusetts.*—Joslin v. Goddard, 187 Mass. 165.

*Michigan.*—Reason v. Jones, 119 Mich. 672; Dyer v. Skadan, 128 Mich. 348, 92 Am. St. Rep. 461; Merchant v. Guilds, 129 Mich. 168; Meech v. Wilder, 130 Mich. 29.

*Minnesota.*—Barnard v. Thurston, 86 Minn. 343.

*Mississippi.*—Hall v. Waddill, 78 Miss. 16.  
*Missouri.*—Powell v. Banks, 146 Mo. 620; Mudd v. Dillon, 166 Mo. 110; Peters v. Berke-meier, 184 Mo. 393.

*North Carolina.*—Bond v. Wilson, 129 N. Car. 325; Tarlton v. Griggs, 131 N. Car. 216.

*North Dakota.*—Arnegard v. Arnegard, 7 N. Dak. 475.

*Rhode Island.*—Johnson v. Johnson, 24 R. I. 571.

*Wisconsin.*—Kittoe v. Willey, 121 Wis. 548.

**157. 2. Delivery to Take Effect After Grantor's Death.**—*California.*—Schurr v. Roden-back, 133 Cal. 85; Wilhoit v. Salmon, 146 Cal. 444.

*Illinois.*—Latimer v. Latimer, 174 Ill. 418; Bogan v. Swearingen, 199 Ill. 454; Thompson v. Calhoun, 216 Ill. 161; Kirkwood v. Smith, 212 Ill. 395.

*Indiana.*—Stout v. Rayl, 146 Ind. 379; St. Clair v. Marquell, 461 Ind. 56.

*Iowa.*—White v. Watts, 118 Iowa 549, cit-  
ing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.)  
157; Dettmer v. Behrens, 106 Iowa 585, 68 Am.  
St. Rep. 326; Lippold v. Lippold, 112 Iowa 134,  
84 Am. St. Rep. 331; Albrecht v. Albrecht, 121  
Iowa 521.

*Kansas.*—Seifert v. Seifert, 66 Kan. 732.

*Kentucky.*—Shoptaw v. Ridgway, (Ky. 1901)  
60 S. W. Rep. 723; Nuckols v. Stone, (Ky.  
1905) 87 S. W. Rep. 799.

*Michigan.*—Jenkinson v. Brooks, 119 Mich.  
108; Fulton v. Priddy, 123 Mich. 298, 81 Am.  
St. Rep. 201; Meech v. Wilder, 130 Mich. 29;  
Walterhouse v. Walterhouse, 130 Mich. 89; Wil-  
liams v. Williams, 133 Mich. 21.

*New Jersey.*—Schlicher v. Keeler, 61 N. J.  
Eq. 394.

*New York.*—Wilcox v. Henderson First M.  
E. Church, 104 N. Y. App. Div. 576; Ranken  
v. Donovan, 46 N. Y. App. Div. 225, affirmed  
166 N. Y. 626.

*North Dakota.*—Arnegard v. Arnegard, 7  
N. Dak. 475.

*Ohio.*—Wright v. Werden, 8 Ohio Dec. 1,  
7 Ohio N. P. 122.

*Oregon.*—Payne v. Hallgarth, 33 Oregon 430.

*South Carolina.*—Copeland v. Copeland, 60  
S. Car. 142, quoting 9 AM. AND ENG. ENCYC. OF  
LAW (2d ed.) 157.

*Texas.*—Billings v. Warren, 21 Tex. Civ.  
App. 77; Griffis v. Payne, 92 Tex. 293.

*Virginia.*—Schreckhise v. Wiseman, 102 Va.  
9, quoting 9 AM. AND ENG. ENCYC. OF LAW (2d  
ed.) 157.

**158. 1.** Bogan v. Swearingen, 199 Ill. 454;  
Albrecht v. Albrecht, 121 Iowa 521; Dettmer  
v. Behrens, 106 Iowa 585, 68 Am. St. Rep. 326;  
Bisard v. Sparks, 133 Mich. 587; Gatt v. Shive,  
(Tex. Civ. App. 1904) 82 S. W. Rep. 303; Ward  
v. Russell, 121 Wis. 77; Williams v. Daubner,  
103 Wis. 521, 74 Am. St. Rep. 902.

**2. Delivery to Secure Signature of Additional Grantor.**—Wisconsin, etc., R. Co. v. McKenna,  
(Mich. 1905) 102 N. W. Rep. 281.

**159. 1. Delivery to One of Several Grantees Is Delivery to All.**—Smith v. May, 3 Penn.  
(Del.) 236, citing 9 AM. AND ENG. ENCYC. OF  
LAW (2d ed.) 159; Webb v. Webb, (Iowa 1905)  
104 N. W. Rep. 438; Boswell v. Boswell, (Ky.  
1898) 45 S. W. Rep. 454; Wetherington v.  
Williams, 134 N. Car. 276.

**2. Delivery Presumed from Grantee's Possession**  
—*Illinois.*—Inman v. Swearingen, 198 Ill. 437;  
Henry v. Henry, 215 Ill. 205; Doan v. Hostetler,  
215 Ill. 635; Adam v. Tolman, 77 Ill. App. 179,  
affirmed 180 Ill. 61.

*Iowa.*—Furenes v. Eide, 109 Iowa 511, 77  
Am. St. Rep. 545, citing 9 AM. AND ENG. ENCYC.  
OF LAW (2d ed.) 159; Schaeffer v. Anchor Mut.  
F. Ins. Co., 113 Iowa 652; Nowlen v. Nowlen,  
122 Iowa 541.

*Kentucky.*—Jacoby v. Nichols, (Ky. 1901)  
62 S. W. Rep. 734; Shoptaw v. Ridgway, (Ky.  
1901) 60 S. W. Rep. 723.

*Michigan.*—Wilbur v. Grover, (Mich. 1905)  
103 N. W. Rep. 583.

*North Carolina.*—Perkins v. Thompson, 123  
N. Car. 175.

*Oregon.*—Swank v. Swank, 37 Oregon 439;  
South Portland Land Co. v. Munger, 36 Oregon  
467.

*Pennsylvania.*—Clauer v. Clauer, 22 Pa.  
Super. Ct. 395.

*South Carolina.*—McGee v. Wells, 62 S.  
Car. 472.

*Tennessee.*—Galbreath v. Galbreath, (Tenn.  
Ch. 1900) 64 S. W. Rep. 361.

*Texas.*—Gonzales v. Adoue, 94 Tex. 126,  
citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.)  
159; McClendon v. Brockett, 32 Tex. Civ. App.  
150.

Where a deed was manually delivered by the  
grantor to the grantee, who gave it to her  
brother to keep for her, and the grantor re-  
served no control over the deed and retained no



- 159.** (b) From Registration. — See note 4.  
**160.** See note 1.

right to withdraw or cancel it, there was sufficient delivery. *Fischer v. Union Trust Co.*, (Mich. 1904) 101 N. W. Rep. 852.

**Possession by Grantor.** — Where the grantor reserves an interest in the property conveyed, he has an interest in the presentation of the deed, and the fact that the deed is found in his possession does not raise a presumption of nondelivery. But when the presumption applies it is only *prima facie* and subject to be rebutted by positive proof of delivery. *Cribbs v. Walker*, (Ark. 1905) 85 S. W. Rep. 244.

**159. 3. Presumption May Be Rebutted.** — *Smith v. May*, 3 Penn. (Del.) 236, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 159; *Schaefer v. Anchor Mut. F. Ins. Co.*, (Iowa 1904) 100 N. W. Rep. 857; *Barron v. Mercure*, 132 Mich. 439; *Perkins v. Thompson*, 123 N. Car. 175; *Cameron v. Gray*, 202 Pa. St. 566; *Gaines v. Keener*, 48 W. Va. 56.

**4. Effect of Recording Deed — Alabama.** — *Gulf Red Cedar Lumber Co. v. O'Neal*, 131 Ala. 117, 90 Am. St. Rep. 22; *Tennessee Coal, etc., R. Co. v. Wheeler*, 125 Ala. 538.

*California.* — *Davis v. Pacific Imp. Co.*, 118 Cal. 45.

*Florida.* — *Ellis v. Clark*, 39 Fla. 714.

*Georgia.* — *Allen v. Hughes*, 106 Ga. 775; *Horton v. Smith*, 115 Ga. 66.

*Illinois.* — *Brady v. Huber*, 197 Ill. 291, 90 Am. St. Rep. 161, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 159; *Abbott v. Abbott*, 189 Ill. 488, 82 Am. St. Rep. 470; *Valter v. Blavka*, 195 Ill. 610; *Le Fleure v. Seivert*, 98 Ill. App. 234.

*Indiana.* — *Fireman's Fund Ins. Co. v. Dunn*, 22 Ind. App. 332.

*Iowa.* — *Nowlen v. Nowlen*, 122 Iowa 541, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 159; *Luckhart v. Luckhart*, 120 Iowa 248; *Erler v. Erler*, 124 Iowa 726; *Webb v. Webb*, (Iowa 1905) 104 N. W. Rep. 438.

*Kansas.* — *Kelsa v. Graves*, 64 Kan. 777.

*Kentucky.* — *Morrison v. Fletcher*, (Ky. 1905) 84 S. W. Rep. 548.

*Maine.* — *Egan v. Harrigan*, 96 Me. 46.

*Maryland.* — *Dayton v. Stewart*, 99 Md. 643.

*Michigan.* — *Holmes v. McDonald*, 119 Mich. 563, 75 Am. St. Rep. 430.

*Missouri.* — *Whitaker v. Whitaker*, 175 Mo. 1; *McReynolds v. Grubb*, 150 Mo. 352, 73 Am. St. Rep. 448; *Peters v. Berkemeier*, 184 Mo. 393.

*Nebraska.* — *Home F. Ins. Co. v. Collins*, 61 Neb. 198.

*New Jersey.* — *Hildebrand v. Willig*, 64 N. J. Eq. 249.

*New York.* — *Halladay v. Gass*, 51 N. Y. App. Div. 539; *Obermeyer v. Jung*, 51 N. Y. App. Div. 247; *Clements v. Beale*, 53 N. Y. App. Div. 416; *Edlich v. Gminder*, 65 N. Y. App. Div. 496; *Williams v. Van Geison*, 76 N. Y. App. Div. 592.

*North Carolina.* — *Perkins v. Thompson*, 123 N. Car. 175.

*Oregon.* — *South Portland Land Co. v. Munger*, 36 Oregon 467.

*Pennsylvania.* — *Cameron v. Gray*, 202 Pa. St. 566.

*South Carolina.* — *McGee v. Wells*, 52 S. Car. 472.

*Tennessee.* — *Horn v. Broyles*, (Tenn. Ch. 1900) 62 S. W. Rep. 297.

*Texas.* — *Heintz v. Thayer*, (Tex. Civ. App. 1899) 50 S. W. Rep. 175, reversed 92 Tex. 658; *McCartney v. McCartney*, (Tex. Civ. App. 1899) 53 S. W. Rep. 388, reversed 93 Tex. 359.

The recording of a deed which imposes an obligation on the grantee to assume and pay a pre-existing mortgage is not *prima facie* evidence of its delivery and acceptance, though it may be such evidence when the deed does not establish any contract against the grantee. *Kellogg v. Cook*, 18 Wash. 516.

The recording of a deed is not necessarily a delivery, but a circumstance which may be looked to, with other circumstances, in determining whether or not there has been a delivery. *Johnson v. Johnson*, (Tex. Civ. App. 1905) 85 S. W. Rep. 1023.

**Registration Constructive Delivery.** — A deed acknowledged and filed for record on the same day is a constructive delivery, and the execution of the instrument is held to date from that day. *Blackmore v. Crutcher*, (Tenn. Ch. 1898) 46 S. W. Rep. 310. And see the title RECORDING ACTS.

**Further Evidence Required to Effect Delivery.** — *Knox v. Clark*, 15 Colo. App. 356; *Shields v. Bush*, 189 Ill. 534, 82 Am. St. Rep. 474; *Fireman's Fund Ins. Co. v. Dunn*, 22 Ind. App. 332.

**The Fact that a Deed Is on Record Is Only Prima Facie Evidence of Delivery.** — *Smith v. May*, 3 Penn. (Del.) 236, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 159; *Valter v. Blavka*, 195 Ill. 610; *Fletcher v. Shepherd*, 174 Ill. 262; *Gustin v. Michelson*, 55 Neb. 22; *Sweetland v. Buell*, 164 N. Y. 541, 79 Am. St. Rep. 676; *Wetherington v. Williams*, 134 N. Car. 276; *Cumberland Land Co. v. Daniel*, (Tenn. Ch. 1899) 52 S. W. Rep. 448; *Thomason v. Hays*, (Tenn. Ch. 1901) 62 S. W. Rep. 336; *Smith v. Smith*, 116 Wis. 570.

The presumption of a delivery of a deed which arises from the proof of a record, standing alone, is far from conclusive. The presumption of nondelivery must prevail where it appears that the grantor for forty years had possession, made improvements, paid taxes, and that the grantee had lived thirty-six years after the grantor, but remained silent all the while. *Mannix v. Riordan*, 75 N. Y. App. Div. 135.

**160. 1. Intention of Recording May Be Explained.** — *Stallings v. Newton*, 110 Ga. 875; *Fireman's Fund Ins. Co. v. Dunn*, 22 Ind. App. 332; *Erler v. Erler*, 124 Iowa 726; *Neel v. Neel*, 65 Kan. 858, 69 Pac. Rep. 162; *Coppage v. Murphy*, (Ky. 1902) 68 S. W. Rep. 416; *Hogadone v. Grange Mut. F. Ins. Co.*, 133 Mich. 339; *Hooper v. Vanstrum*, 92 Minn. 406; *Koppelman v. Koppelman*, 94 Tex. 40.

**Instruction to Register Not to Record.** — Where there is no actual delivery to the vendee, and the register is instructed by the vendee not to record it until further notice, there is no constructive delivery. *Turberville v. Fowler*, 101 Tenn. 88.

**161.** *g.* ACCEPTANCE — (1) *In General.* — See note 2.

**162.** See note 1.

(2) *Presumption in Favor of Infants.* — See notes 2, 3.

(3) *Presumption in Favor of Adults.* — See note 4.

**163.** See note 1.

*h.* REDELIVERY — With Intent to Revest Title. — See note 2.

**161. 2. Acceptance on Grantee's Part Is Essential.** — *Colorado.* — *Lexington Gold Min. Co. v. Jefferson Min. Co.*, 16 Colo. App. 520; *Knox v. Clark*, 15 Colo. App. 356.

*Florida.* — *Parken v. Safford*, (Fla. 1904) 37 So. Rep. 567.

*Georgia.* — *Stallings v. Newton*, 110 Ga. 875.

*Illinois.* — *Pratt v. Griffin*, 184 Ill. 514; *Brady v. Huber*, 197 Ill. 291, 90 Am. St. Rep. 161; *Dagley v. Black*, 197 Ill. 53; *Coleman v. Coleman*, 216 Ill. 261; *Jummel v. Mann*, 80 Ill. App. 288, affirmed 183 Ill. 523; *Santee v. Day*, 111 Ill. App. 495.

*Kentucky.* — *Sutton v. Gibson*, (Ky. 1905) 84 S. W. Rep. 335.

*Massachusetts.* — *Meigs v. Dexter*, 172 Mass. 217.

*Minnesota.* — *Barnard v. Thurston*, 86 Minn. 343.

*Missouri.* — *McNear v. Williamson*, 166 Mo. 358, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 161; *Powell v. Banks*, 146 Mo. 620; *Marshall v. Hartzfelt*, 98 Mo. App. 178; *Wells v. Hobson*, 91 Mo. App. 379.

*North Dakota.* — *McManus v. Commow*, 10 N. Dak. 340; *Arnegaard v. Arnegaard*, 7 N. Dak. 475.

*Tennessee.* — *Galbreath v. Galbreath*, (Tenn. Ch. 1900) 64 S. W. Rep. 361, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 161; *Wilson v. Winters*, 108 Tenn. 398.

*Texas.* — *King v. Hill*, (Tex. Civ. App. 1903) 75 S. W. Rep. 550; *McCartney v. McCartney*, (Tex. Civ. App. 1899) 53 S. W. Rep. 388, reversed 93 Tex. 359.

**Tender of Deed.** — *Hare v. Murphy*, 60 Neb. 135.

**Intervening Equities.** — *Knox v. Clark*, 15 Colo. App. 356; *Clark v. Clark*, 183 Ill. 448, 75 Am. St. Rep. 115; *Kingman v. Cornell-Tebbetts Mach., etc. Co.*, 150 Mo. 313, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 161.

**162. 1. Proof of Acceptance.** — *Kenniff v. Caulfield*, 140 Cal. 34; *Horner v. Lowe*, 159 Ind. 406, quoting 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 161; *Martin v. Bates*, (Ky. 1899) 50 S. W. Rep. 38; *Wood v. Howk*, (Ky. 1904) 70 S. W. Rep. 1184; *Taylor v. Smith*, 61 N. Y. App. Div. 633.

**Lapse of Time.** — After the lapse of over forty years and the possession of the land under the deed for that length of time, the presumption of the acceptance is conclusive. *Jones v. Hightower*, 107 Ky. 5.

**2. Acceptance by Person under Disability.** — *Alabama.* — *Arrington v. Arrington*, 122 Ala. 510.

*Illinois.* — *Chapin v. Nott*, 203 Ill. 341; *Coleman v. Coleman*, 216 Ill. 261.

*Iowa.* — *Hall v. Cardell*, 111 Iowa 206.

*Kansas.* — *Haddon v. Neighborger*, 9 Kan. App. 529, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 162.

*Kentucky.* — *Locknane v. Hoskins*, (Ky. 1902) 69 S. W. Rep. 719; *Lay v. Lay*, (Ky. 1902) 66 S. W. Rep. 371; *Hacker v. Hoover*, (Ky. 1902) 66 S. W. Rep. 382; *Malone v. Lebus*, 116 Ky. 975.

*Missouri.* — *McNear v. Williamson*, 166 Mo. 358; *Coulson v. Coulson*, 180 Mo. 709; *Marshall v. Hartzfelt*, 98 Mo. App. 178.

*Texas.* — *McCartney v. McCartney*, (Tex. Civ. App. 1899) 53 S. W. Rep. 388, reversed 93 Tex. 359.

**3.** *Jenkins v. Southern R. Co.*, 109 Ga. 35.

**4. Presumption of Acceptance of Beneficial Deed Delivered to Third Person.** — *Illinois.* — *Baker v. Hall*, 214 Ill. 364.

*Indiana.* — *Emmons v. Harding*, 162 Ind. 154.

*Iowa.* — *White v. Watts*, 118 Iowa 549.

*Kansas.* — *Wuester v. Folin*, 60 Kan. 338, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 162.

*Kentucky.* — *Young v. Milward*, 109 Ky. 123.

*Michigan.* — *Holmes v. McDonald*, 119 Mich. 563, 75 Am. St. Rep. 430.

*Minnesota.* — *Barnard v. Thurston*, 86 Minn. 343; *Hooper v. Vanstrum*, 92 Minn. 406.

*Missouri.* — *Kingman v. Cornell-Tebbetts Mach., etc. Co.*, 150 Mo. 313, quoting 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 162; *Peters v. Berkemeier*, 184 Mo. 393.

*New York.* — *Edlich v. Gminder*, 65 N. Y. App. Div. 496; *National Bank v. Bonnell*, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 541, affirmed 46 N. Y. App. Div. 302; *Obermeyer v. Jung*, 51 N. Y. App. Div. 247.

*North Dakota.* — *Arnegaard v. Arnegaard*, 7 N. Dak. 475.

**Need Not Be Affirmatively Shown.** — *Fireman's Fund Ins. Co. v. Dunn*, 22 Ind. App. 332; *Pennington v. Lawson*, (Ky. 1901) 65 S. W. Rep. 120; *Whitaker v. Whitaker*, 175 Mo. 1, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 162.

**Reconveyance by Grantee.** — The act of reconveying the property by the grantee is evidence of the fact that it was accepted, besides the deed being beneficial to the grantee. *Williams v. Smith*, (Ky. 1901) 60 S. W. Rep. 940.

**Retained by Father.** — A father executed and recorded a deed to his daughters, after which he handed the deed to one of his daughters and told her to place it among his papers. The grantees were not present and did not know of its being executed and recorded until handed to the daughter. It was held that there was no delivery. *Wilenou v. Handlon*, 207 Ill. 104.

**Not for Grantee's Benefit.** — *Swisher v. Palmer*, 106 Ill. App. 432; *Kellogg v. Cook*, 18 Wash. 516.

**163. 1. Authorities Requiring Positive Evidence of Acceptance.** — *Dagley v. Black*, 197 Ill. 53; *Swisher v. Palmer*, 106 Ill. App. 432.

**2. After Delivery Title Divested Only by Condition in Deed.** — *Papst v. Hamilton*, 133 Cal.

**164.** See notes 1, 2.

Without Intent to Revest Title. — See note 3.

**165. DEEM.** — See note 2.**167. DEFALCATION.** — See note 1.**DEFAMATION — DEFAMATORY.** — See note 3.**DEFAULT.** — See note 4.**168.** See notes 1, 2.**169. DEFEASANCE.** — See notes 2, 3.**172. DEFECT — DEFECTIVE.** — See note 2.**174. DEFENDANT.** — See note 1.**176. DEFENSE.** — See notes 1, 2.**178. DEFINE.** — See note 3.**179. DEFINITE.** — See note 1.

631; *Union College v. New York*, 65 N. Y. App. Div. 553, *affirmed* 173 N. Y. 38, 93 Am. St. Rep. 569; *Sargent v. Cooley*, 12 N. Dak. 7, *quoting* 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 163; *Powers v. Rude*, 14 Okla. 381.

**Destruction After Delivery.** — The destruction of a deed after delivery does not divest the title of the grantee. *Brown v. Hartman*, 57 Neb. 341.

**164. 1. Redelivery Will Not Revest Title.** — *Kirkwood v. Smith*, 212 Ill. 395; *Fletcher v. Shepherd*, 174 Ill. 262; *St. Clair v. Marquell*, 161 Ind. 56; *McCrum v. McCrum*, (Iowa 1905) 103 N. W. Rep. 771.

**2. Redelivery Held to Create Estoppel.** — *Shepley v. Leidig*, 189 Ill. 197; *Peterson v. Carson*, (Tenn. Ch. 1898) 48 S. W. Rep. 383.

**3. Redelivery Without Intent to Revest Title.** — *Hudson v. Redford*, (Ky. 1902) 67 S. W. Rep. 35; *Hall v. Dobbin*, 119 Mich. 106; *Tabor v. Tabor*, (Mich. 1904) 99 N. W. Rep. 4; *Blackford v. Olmstead*, (Mich. 1905) 104 N. W. Rep. 47; *St. Joseph v. Baker*, 86 Mo. App. 310; *Brown v. Hartman*, 57 Neb. 341; *McGuire v. McGuire*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 259, *affirmed* 81 N. Y. App. Div. 636; *Smith v. James*, 22 Tex. Civ. App. 154; *McClendon v. Brockett*, 32 Tex. Civ. App. 150.

**165. 2. Revenue Laws.** — *U. S. v. Loeb*, 99 Fed. Rep. 723.

**Right of Suffrage — Inhabitant of Soldiers' Home.** — *Powell v. Spackman*, 7 Idaho 692; *Cory v. Spencer*, 67 Kan. 648.

**167. 1. Public Officers — Defalcation.** — *In re Butts*, 120 Fed. Rep. 970.

**3. Mosnat v. Snyder**, 105 Iowa 500.

**4. Practice.** — *Forgotton v. Becker*, (Supm. Ct. App. T.) 39 Misc. (N. Y.) 813.

**168. 1. Default Judgment.** — *Clark v. Great Northern R. Co.*, 30 Mont. 464, *citing* 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 168.

**2. Omission.** — *In re Woods*, (1898) 1 Ch. 435; *Davis v. Silverman*, 98 N. Y. App. Div. 305, *quoting* 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 168.

**169. 2. Miller v. Quick**, 158 Mo. 495, *quoting* 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 169.

**3. Same Parties.** — *Miller v. Quick*, 158 Mo. 495.

**172. 2. Haney-Campbell Co. v. Preston Creamery Assoc.**, 119 Iowa 198.

**Defect of Parties.** — *Walter v. Mitchell*, 25

Mont. 385; *Tew v. Wolfsohn*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 54, *affirmed* 174 N. Y. 272.

**Defective Highway — Sidewalk.** — *Lane v. Lewiston*, 91 Me. 292 (leaving road machine on road); *Carpenter v. Rolling*, 107 Wis. 559 (leaving log on a road).

**Same — Barriers.** — *San Antonio v. Porter*, 24 Tex. Civ. App. 444; *Peake v. Superior*, 106 Wis. 403.

**Defective Title.** — *Place v. People*, 192 Ill. 160.

**174. 1. Jewett Car Co. v. Kirkpatrick Constr. Co.**, 107 Fed. Rep. 622.

**Collective Word — Singular and Plural.** — *McMahon v. Perkins*, 22 R. I. 116.

**Nominal Defendant.** — *Miller v. Meeker*, 54 Neb. 452.

**176. 1. Technical Signification.** — *Jewett Car Co. v. Kirkpatrick Constr. Co.*, 107 Fed. Rep. 624; *Cullen v. Woolverton*, 65 N. J. L. 283, *quoting* 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 175 [176].

**Denial Not a Defense.** — In the nomenclature of pleading a denial is not a *defense*. *Burkert v. Bennett*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 318; *Dunlap v. Stewart*, (Supm. Ct. Spec. T.) 75 N. Y. Supp. 1085.

**2. Popular Meaning.** — *Jewett Car Co. v. Kirkpatrick Constr. Co.*, 107 Fed. Rep. 624; *Whitfield v. Aetna L. Ins. Co.*, 125 Fed. Rep. 270; *Bodie v. Charleston, etc.*, R. Co., 66 S. Car. 317.

**Set-off.** — See *Naylor v. Smith*, 63 N. J. L. 596.

**Distinguished from Counterclaim.** — *Lafond v. Lassere*, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 77.

**178. 3. Defined Channel — Subterranean Waters.** — *Los Angeles v. Pomeroy*, 124 Cal. 597; *Medano Ditch Co. v. Adams*, 29 Colo. 317; *Deadwood Cent. R. Co. v. Barker*, 14 S. Dak. 558; *Miller v. Black Rock Springs Imp. Co.*, 99 Va. 757.

**Powers of a Municipality.** — *Robert Boyd Paving, etc., Co. v. Ward*, (C. C. A.) 85 Fed. Rep. 35.

**179. 1. Definite Failure of Issue.** — *Cain v. Robertson*, 27 Ind. App. 198; *Woodlief v. Duckwall*, 10 Ohio Cir. Dec. 686.

**Definitely Fixed.** — *Southern Pac. R. Co. v. U. S.*, (C. C. A.) 109 Fed. Rep. 913.

**Definite Location of Right of Way.** — See *Jamestown, etc., R. Co. v. Jones*, 177 U. S. 125.



**180. DEFRAUD.** — See note 3.

**181.** See note 1.

**Definite Judgment, Order, or Decree.** — "The word *definite* preceding the words 'judgment, order, or decree,' in section 59 of the Act of June 4, 1901, is not to be taken in the ordinary sense as 'clear or unambiguous,' but in the sense of *definitive* as opposed to interlocutory." *Kurrie v. Cottingham*, 209 Pa. St. 12.

**180. 3. Fraudulent Conveyances — Defraud — Hinder — Delay.** — *Monroe Mercantile Co. v. Arnold*, 108 Ga. 457; *Edgell v. Smith*, 50 W.

Va. 349; *Deseret Nat. Bank v. Kidman*, 25 Utah 392.

**Scheme to Defraud — Postal Acts.** — Sending letters through the mail threatening to accuse of crime is a scheme to *defraud* within the meaning of Rev. Stat. U. S., § 5480. *U. S. v. Horman*, 118 Fed. Rep. 780.

**181. 1.** *Horman v. U. S.*, (C. C. A.) 116 Fed. Rep. 354, quoting 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 180; *Deseret Nat. Bank v. Kidman*, 25 Utah 392.

## DEL CREDERE AGENCY.

**182. I. DEFINITION AND NATURE — 1. Definition.** — See note 1.

**183. 3. Contract Not Within Statute of Frauds.** — See note 4.

**II. RIGHTS OF PRINCIPAL — 1. Right to Proceeds of Sale Received by Agent.** — See note 5.

**2. Right to Collect from Purchaser.** — See note 7.

**186. IV. LIABILITY OF AGENT — 1. Nature of Liability — Whether as Surety or Guarantor — In the United States.** — See note 3.

**188. DELAY.** — See note 2.

**189. DELIBERATE — DELIBERATION.** — See note 4.

**190. Time.** — See note 1.

**191.** See note 1.

**192. Premeditation and Deliberation Distinguished.** — See note 1.

**194. DELINQUENT.** — See note 1.

**182. 1. Definition.** — See *Southern Grocery Co. v. Davis*, 132 N. Car. 98, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 182.

**183. 4. Not Within Statute of Frauds.** — *Bullowa v. Orgo*, 57 N. J. Eq. 428.

**5. Consignor Does Not Part with Title.** — *Cushman v. Snow*, 186 Mass. 169; *Southern Grocery Co. v. Davis*, 132 N. Car. 98, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 183.

**7. Principal May Collect from Purchaser.** — *Cushman v. Snow*, 186 Mass. 169.

**186. 3. Liability of Agent Does Not Exclude Liability of Purchaser.** — *Cushman v. Snow*, 186 Mass. 169.

**188. 2.** *Deseret Nat. Bank v. Kidman*, 25 Utah 392.

**Hinder or Delay Creditors — Whether Synonymous with Defraud.** — *Monroe Mercantile Co. v. Arnold*, 108 Ga. 457.

**Delay and Discrimination Are Synonymous** as used in Rev. Stat. Tex., § 4574, providing that every railroad company which shall fail or refuse, under such regulations as may be prescribed by the commission, to receive and transport without delay or discrimination the passengers, tonnage, and cars, loaded or empty, of any connecting line of railroad shall be deemed guilty of unjust discrimination. *Gulf, etc., R. Co. v. Lone Star Salt Co.*, 26 Tex. Civ. App. 531.

**189. 4. Other Definitions.** — *Hawaii v. Ya-*

*mane*, 12 Hawaii 203; *State v. Lindgrind*, 33 Wash. 440; *State v. Dodds*, 54 W. Va. 289.

**Cool State of Blood — Missouri.** — *State v. McKenzie*, 144 Mo. 40; *State v. Harper*, 149 Mo. 514; *State v. Grant*, 152 Mo. 70; *State v. Tettaton*, 159 Mo. 354; *State v. Furgerson*, 162 Mo. 668; *State v. Jackson*, 167 Mo. 291; *State v. Taylor*, 171 Mo. 465; *State v. Privitt*, 175 Mo. 207.

**Same — New Mexico.** — *Territory v. Gonzales*, (N. Mex. 1902) 68 Pac. Rep. 925.

**Same — Cold-blooded Murder.** — *State v. Spotted Hawk*, 22 Mont. 33.

**190. 1. Appreciable Time.** — *State v. Greenleaf*, 71 N. H. 606.

**191. 1. Length of Time Immaterial.** — *Marzen v. People*, 173 Ill. 43; *State v. Greenleaf*, 71 N. H. 606; *State v. Bonofiglio*, 67 N. J. L. 242; *State v. Zdanowicz*, 69 N. J. L. 619; *Territory v. Gonzales*, (N. Mex. 1902) 68 Pac. Rep. 925; *State v. Foster*, 130 N. Car. 666.

**Intent.** — See *State v. Bonofiglio*, 67 N. J. L. 242.

**192. 1. Deliberate and Premeditate Held Equivalent.** — *Cook v. State*, (Fla. 1903) 35 So. Rep. 665.

**Grand Jury.** — *Sims v. State*, (Tex. Crim. 1898) 45 S. W. Rep. 705.

**194. 1.** *Cleveland Retail Grocers' Assoc. v. Exton*, 10 Ohio Cir. Dec. 145 (an action for libel).

**194. DELIRIUM.**—See note 2.

**DELIVER.**—See note 4.

**195. DELUSION.**—See note 2.

**194. 2.** Supreme Lodge, etc., *v. Lapp*, (Ky. 1903) 74 S. W. Rep. 657. See also *Parish v. State*, 139 Ala. 16.

**4. Title.**—*Johnson v. Johnson*, 24 R. I. 571.

**195. 2.** *Skinner v. Farquharson*, 32 Can. Sup. Ct. 76, quoting 9 AM. AND ENG. ENCYC.

OF LAW (2d ed.) 195; *Berry Will Case*, 93 Md. 588, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 195; *Merritt v. State*, 39 Tex. Crim. 70.

**Other Definitions.**—*Matter of Kendrick*, 130 Cal. 360; *Medill v. Snyder*, 61 Kan. 15.

## DEMAND.

BY W. H. BUCHANAN.

**198. I. DEFINITION**—In Comprehensive Sense.—See note 1.

**199. II. NECESSITY OF DEMAND**—**1. For Recovery on Contracts**—*a. AS AGAINST PROMISOR*—(2) *Contracts to Pay Money*—Where Amount Is Specific.—See notes 1, 2, 3.

*Agreements to Pay "on Demand."*—See note 5.

**200. Where Amount Is Indefinite.**—See note 2.

*Necessity of Demand for Recovery of Bank Deposit.*—See note 4.

(3) *Contracts Other than for Payment of Money*—(a) *In General.*—See notes 5, 6.

**204. (c) Contracts of Sale of Personal Property**—Contract to Deliver on Request or Without Specification of Time.—See notes 1, 2.

(d) *Contracts to Convey Land*—Contract to Convey "on Demand."—See note 5. Where No Time of Performance Is Designated.—See note 6.

**205. Action for Specific Performance.**—See note 1.

**207. 2. For Recovery on Quasi Contracts**—*b. MONEY PAID THROUGH FRAUD OR DURESS.*—See note 2.

**198. 1. Demand in Broad Sense Defined.**—*Vandolah v. McKee*, 99 Mo. App. 342.

**199. 1. Demand Unnecessary on Contracts to Pay Money at Specified Time and Place.**—*Gray v. Robertson*, 174 Ill. 242; *Taylor v. Smith*, 24 N. Y. App. Div. 519, reversed 164 N. Y. 399; *Gall v. Gall*, 120 Wis. 270, quoting 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 199.

**2. No Demand Required on Contracts to Pay Money Generally.**—*Matter of Allen*, 116 Iowa 697; *Bertha v. Sparks*, 19 Ind. App. 431; *Gilmore v. Ward*, 22 Ind. App. 106; *Gall v. Gall*, 120 Wis. 270, quoting 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 199.

**3. Debtor to Seek Out Creditor Within State.**—*Matter of Allen*, 116 Iowa 697; *Gall v. Gall*, 120 Wis. 270, quoting 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 199.

**5. Institution of Suit a Sufficient Demand on Contracts to Pay Money "on Demand."**—*Florsheim v. Palmer*, 99 Ill. App. 559; *Matter of Allen*, 116 Iowa 697.

**200. 2. Where Amount of Money Contracted to Be Paid Is Indefinite.**—*Florsheim v. Palmer*, 99 Ill. App. 559; *Matter of Allen*, 116 Iowa 697.

**4. Necessity of Demand for Recovery of Bank Deposit.**—*Schinotti v. Whitney*, 130 Fed. Rep. 780; *Hales v. Seamen's Sav. Bank*, 28 N. Y. App. Div. 407.

**5. Necessity of Demand Where Contract Other than for the Payment of Money Is to Be Dis-**

**charged "on Demand."**—*Ingram v. Bussey*, 133 Ala. 539; *Roder v. Toilettes Co.*, (Supm. Ct. App. T.) 37 Misc. (N. Y.) 779.

**6. Necessity of Demand Where No Time of Performance Is Stipulated in Contract Other than the Payment of Money.**—*Adkins v. Ferrell*, (Ky. 1897) 42 S. W. Rep. 1145; *Neilsen v. Mayer*, (Supm. Ct. App. T.) 85 N. Y. Supp. 1069; *Gammon v. Bunnell*, 22 Utah 421.

**204. 1. Necessity of Demand in Case of Contracts to Deliver Goods on Request.**—*Roder v. Toilettes Co.*, (Supm. Ct. App. T.) 37 Misc. (N. Y.) 779.

**2. An Agreement to Deliver the Articles on a Certain Date if Possible, and, if not possible, to deliver them during the following year, requires a demand to be made as a prerequisite to a suit for nondelivery of the goods.** *Thompson v. Easton*, 73 N. Y. App. Div. 114.

**5. Contract to Convey Land to Be Performed "on Demand."**—See *Maris v. Masters*, 31 Ind. App. 235; *Elsbury v. Shull*, 32 Ind. App. 556.

**6. Necessity of Demand of Conveyance Where Contract Designated No Time of Performance.**—*Maris v. Masters*, 31 Ind. App. 235.

**205. 1. Demand Not a Prerequisite to Action for Specific Performance.**—*Maris v. Masters*, 31 Ind. App. 235; *Elsbury v. Shull*, 32 Ind. App. 556.

**207. 2. Necessity of Demand to Recover Money Paid Through Fraud of Payee.**—*Marshall*

**208.** *c.* MONEY PAID THROUGH MISTAKE — But as a General Rule, Where the Money Is Innocently Received. — See note 1.

*f.* WHERE PROPERTY IS TORTIOUSLY WITHHELD AND TORT IS WAIVED. — See note 7.

**209.** III. CIRCUMSTANCES DISPENSING WITH DEMAND — 2. Denial of Liability or Refusal of Performance. — See notes 4, 5.

**210.** 3. Inability to Perform Obligation. — See note 2.

**211.** IV. MODE OF MAKING DEMAND — No Particular Form of Language Necessary. — See notes 5, 6.

**212.** Prior Suit as Demand. — See note 1.

Necessity of Demand in Writing. — See note 3.

**214.** VII. TIME OF DEMAND. — See note 3.

**216.** DEMENTIA. — See note 2.

**217.** DEMISE. — See note 1.

**219.** DEMONSTRATIVE LEGACIES. — See note 1.

*v.* De Cordova, 26 N. Y. App. Div. 615; Hansen *v.* Allen, 117 Wis. 61, *citing* 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 207.

**208.** 1. Necessity of Demand to Recover Money Innocently Received Through Mistake. — Gregory *v.* Clabrough, 129 Cal. 475.

7. Where Property Is Tortiously Withheld and Tort Is Waived. — Farmer's, etc., Bank *v.* Bennett, 120 Ga. 1012; Whitcomb *v.* Stringer, (Ind. App. 1902) 64 N. E. Rep. 636, *citing* 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 208.

**209.** 4. Object of Demand. — Bell *v.* Stevens, 116 Iowa 451; Stanford *v.* Coram, 26 Mont. 285, *citing* 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 209; McGuire *v.* Williams, 123 N. Car. 349; Thompson *v.* Thompson, 11 N. Dak. 208, *citing* 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 209; Thompson *v.* Whitney, 20 Utah 1, *citing* 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 209; Hopkins *v.* International Lumber Co., 33 Wash. 181.

5. Where Demand Would Be Unavailing. — Ward *v.* Montgomery, 67 Ill. App. 346; Loeb *v.* Stern, 99 Ill. App. 637, *affirmed* 198 Ill. 371; Whitcomb *v.* Stringer, (Ind. App. 1902) 64 N. E. Rep. 636, *citing* 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 208; Stanford *v.* Coram, 26 Mont. 285, *citing* 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 209; McGuire *v.* Williams, 123 N. Car. 349; Thompson *v.* Thompson, 11 N. Dak. 208, *citing* 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 209; Thompson *v.* Whitney, 20 Utah 1, *citing* 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 209; Hopkins *v.* International Lumber Co., 33 Wash. 181. See also Ingram *v.* Bussey, 133 Ala. 539.

**210.** 2. Inability to Perform Obligation as Executing Demand. — Schinotti *v.* Whitney, 130 Fed. Rep. 780; Murphy *v.* Dernberg, 84 N. Y.

App. Div. 101, *citing* 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 210.

**211.** 5. Statutory Requirement as to Mode of Demand. — Vandolah *v.* McKee, 99 Mo. App. 342.

6. No Formal Language Necessary to Constitute Demand as General Rule. — Miller *v.* Slaght, 11 Colo. App. 358; Stringham *v.* Davis, 23 Wash. 568. See also Ehrich *v.* Durkee, 18 Colo. App. 502; Bell *v.* Stevens, 116 Iowa 451.

If a Creditor Calls for Payment on a certain day, and such call is known to the debtor, to whom notice has been given that it would be made, there is sufficient evidence of a demand. Schlimbach *v.* McLean, 83 N. Y. App. Div. 157, *affirmed* 178 N. Y. 600.

**212.** 1. Prior Suit as Demand. — Bell *v.* Stevens, 116 Iowa 451, *citing* 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 212.

3. Western Union Cold Storage Co. *v.* Erme-ling, 73 Ill. App. 394. See also Bell *v.* Stevens, 116 Iowa 451.

**214.** 3. Time of Demand. — Neilsen *v.* Mayer, (Supm. Ct. App. T.) 85 N. Y. Supp. 1069.

**216.** 2. Pyott *v.* Pyott, 90 Ill. App. 221. See also Hamon *v.* Hamon, 180 Mo. 685.

**217.** 1. Covenants. — Georgia R., etc., Co. *v.* Maddox, 116 Ga. 64; Mershon *v.* Williams, 63 N. J. L. 398, *citing* 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 217; Koch *v.* Hustis, 113 Wis. 599.

Same — When Covenants Not Implied. — Meday *v.* Rutherford, 65 N. J. L. 645.

**219.** 1. Demonstrative Legacy. — Kenaday *v.* Sinnott, 179 U. S. 606; Merriam *v.* Merriam, 80 Minn. 254; Crawford *v.* McCarthy, 159 N. Y. 514; Matter of Fisher, 93 N. Y. App. Div. 186.



# DEMURRAGE.

BY A. W. VARIAN.

**221. I. DEFINITION AND NATURE** — Express Contract for Demurrage. — See note 1.

**223.** Demurrage in Cases of Tort. — See note 1.

Detention of Railroad Cars, Etc. — See note 2.

**II. EXPRESS CONTRACTS AS TO TIME** — 1. Liability of Charterer or Freightier — *a.* IN GENERAL. — See notes 5, 6.

**226.** *f.* PROVISION FOR CESSATION OF LIABILITY. — See note 2.

**227.** Construction of Clauses Together. — See note 1.

**228.** Damages in the Nature of Demurrage. — See note 3.

2. Liability of Consignees and Their Assignees — *a.* PROVISION IN BILL OF LADING. — See note 5.

**229.** Assignees of Bill of Lading. — See note 1.

*b.* IN THE ABSENCE OF PROVISION IN BILL OF LADING. — See notes 3, 4.

**221. 1. Definition and Nature** — Express Contract. — *Morgan v. Garfield, etc., Coal Co.,* 113 Fed. Rep. 520.

**223. 1. In Cases of Tort.** — *H. M. Loud, etc., Lumber Co. v. Peter,* 11 Ohio Cir. Dec. 155, 20 Ohio Cir. Ct. 73.

**2. Detention of Railroad Cars, Grain Sacks, Etc.** — *The Columbia, (C. C. A.)* 109 Fed. Rep. 660; *Dixon v. Central of Georgia R. Co.,* 110 Ga. 173; *Schumacher v. Chicago, etc., R. Co.,* 207 Ill. 199; *New Orleans, etc., R. Co. v. George,* 82 Miss. 710; *Darlington v. Missouri Pac. R. Co.,* 99 Mo. App. 1; *Pennsylvania R. Co. v. Midvale Steel Co.,* 201 Pa. St. 624, 88 Am. St. Rep. 836; *Swan v. Louisville, etc., R. Co.,* 106 Tenn. 229.

**5. Express Contract in General.** — *Maclay v. Spillers,* 6 Com. Cas. (Eng.) 217; *Richardson v. Samuel,* (1898) 1 Q. B. 261; *Hog v. Burns, Sc. Ct. of Sess.* 5 F. 1189; *Gabler v. McChesney,* 60 N. Y. App. Div. 583.

**Continuance of Demurrage Obligation.** — Where demurrage commences to be payable under a charter-party owing to the default of the charterers in failing to provide a berth at the port of loading, the obligation to pay demurrage continues in the absence of any default of the shipowner until the completion of the loading. Thus where a ship was chartered to go to a foreign port for a cargo, the charterers guaranteeing a cargo and berth ready at the port of shipment, and owing to their inability to provide a berth the ship went on demurrage and while lying at anchor waiting for a berth was run into by another vessel, and the ship was properly taken by her captain to another port for repair, and during her absence for that purpose a berth fell vacant which would have been assigned to her, and after her return to the port of loading she was kept waiting six weeks longer for a berth, and the shipowners claimed demurrage for the six weeks but not for the period during which the ship was absent for

repairs, it was held that on the return of the ship to the port of loading, the demurrage period was resumed without any break in the continuity of the demurrage obligation, and that the charterers were liable to pay demurrage from that date until the loading was completed. *Tyne, etc., Shipping Co. v. Leech,* (1900) 2 Q. B. 12.

**6. Delay in Unloading.** — *Sheridan v. Penn Collieries Co.,* 128 Fed. Rep. 204.

**226. 2. Provision for Cessation of Charterer's Liability.** — *Forsyth v. Sutherland,* 31 Nova Scotia 391.

**Demurrage for Delay in Loading Not Released by Cesser Clause.** — When demurrage arises for delay in loading the vessel, the consignee of the cargo is not liable therefor. The only person the shipowners can look to for such demurrage is the original charterer, as he is not discharged from liability therefor by the cesser clause in the charter-party. *Forsyth v. Sutherland,* 31 Nova Scotia 391.

**227. 1. Construing Provisions Together.** — *Crossman v. Burrill,* 179 U. S. 100; *Schmidt v. Keyser, (C. C. A.)* 88 Fed. Rep. 799.

**228. 3. Crossman v. Burrill, 179 U. S. 100.**

**5. Consignee's Liability.** — *Taylor v. Fall River Ironworks,* 124 Fed. Rep. 826; *Durchman v. Dunn,* 101 Fed. Rep. 606; *Gabler v. McChesney,* 60 N. Y. App. Div. 583, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 228.

**This Rule Does Not Apply** where the consignee is the owner of the goods, and they have been transported under a different contract with him by the carrier, and the goods are delivered without any new understanding. *Burns v. Burns, (C. C. A.)* 131 Fed. Rep. 238.

**229. 1. Assignee of Bill of Lading.** — See *Crossman v. Burrill,* 179 U. S. 100.

**3. Provision in Bill of Lading Necessary.** — *Crossman v. Burrill,* 179 U. S. 100.

**4. Crossman v. Burrill, 179 U. S. 100; *Gra-***

**230.** Whether the Bill of Lading Provides for Demurrage. — See note 1.

**3. Lay Days and Computation Thereof** — *a. DEFINITIONS* — “Days of Demurrage.” — See note 3.

*b. COMMENCEMENT OF LAY DAYS* — (1) *In General.* — See note 4.

**231.** (2) *For Loading.* — See note 1.

(3) *For Unloading.* — See note 3.

**232.** (4) *Inability to Reach Dock.* — See note 1.

(5) *Particular Provisions Governing Commencement of Lay Days*

— (b) *Dock or Berth to Be Provided by Charterer, Freightor, or Consignee.* — See note 4.

**234.** (c) *Discharge Near Dock* — “Always Afloat,” Etc. — See note 1.

(6) *Notice of Arrival and Readiness of Vessel.* — See note 3.

**235.** *c. MEANING OF “WORKING DAYS,” “DAYS,” “RUNNING DAYS,” ETC.* — *Working Days.* — See note 2.

ham *v.* Planters' Compress Co., 129 Fed. Rep. 253.

**230.** 1. *Bills of Lading Not Providing for Payment of Demurrage.* — Crossman *v.* Burrill, 179 U. S. 100, followed in Graham *v.* Planters' Compress Co., 129 Fed. Rep. 253.

**3. Days of Demurrage.** — See Jonasen *v.* Keyser, (C. C. A.) 112 Fed. Rep. 443.

**4. Clear Day.** — A charter-party giving the charterers one “clear day” after notice before the commencement of the lay days, entitles the charterer to a day which he may lawfully utilize to prepare cargo for delivery. Sunday is not such a day. The Assyria, (C. C. A.) 98 Fed. Rep. 316.

**231.** 1. *When No Time Is Specified — Loading.* — Modesto *v.* Dupre, 86 L. T. N. S. 560; Ardan Steamship Co. *v.* Weir, Sc. Ct. of Sess. 6 F. 294.

**3. Readiness to Discharge in General.** — New Ruperra Steamship Co. *v.* Two Thousand Tons Coal, 124 Fed. Rep. 937; The St. Bernard, 105 Fed. Rep. 994.

**232.** 1. *Inability to Reach Dock — Awaiting Turn.* — The Derwent, 84 L. T. N. S. 360; Modesto *v.* Dupre, 86 L. T. N. S. 560, following Tharsis Sulphur, etc., Co. *v.* Morel, (1891) 2 Q. B. 647, 61 L. J. Q. B. 11, 40 W. R. 58; The Viola, 90 Fed. Rep. 750.

**4. Dock to Be Provided by Charterer or Consignee.** — Aktieselskabet Ingledwood *v.* Millar's Karri, etc., 88 L. T. N. S. 559.

**234.** 1. *Inability to Complete Loading.* — Under a charter-party requiring the ship to proceed to a certain port or as near thereto as she could safely get, and there load as customary, always afloat, at such wharf, jetty, or anchorage as the charterers' agent might direct, and it appeared that owing to her draft the ship could not have loaded fully at the jetty designated by the charterers' agent, but that according to the custom of the port she would have been moved when partly loaded from the jetty to an anchorage where the loading could have been completed, it was held that the lay days did not begin to run until the ship was at the designated jetty, and that the fact that she could not fully load there made no difference. Aktieselskabet Ingledwood *v.* Millar's Karri, etc., 88 L. T. N. S. 559.

**Charterer Bound Only to Load Within Reasonable Time.** — Shipowners, equally with charterers, must be taken to know the natural conditions as to the depth of water in the dock of

a named port. Thus, where a charter-party provided that the ship should go to a particular dock or as near thereto as she could safely go, and there load a cargo “always afloat, as and where ordered by the charterers,” and the ship went there, but after partially loading left because the period of spring tides had so far elapsed that it had become impossible to complete the loading of the ship before the return of the neap tides, it was held that the only obligation on the part of the charterers was to load within a reasonable time, and that they were not bound to find a berth where the ship could load immediately. Carlton Steamship Co. *v.* Castle Mail Packets Co., (1898) A. C. 486, affirming (1897) 2 Q. B. 485.

**3. Notice Required by Contract.** — Modesto *v.* Dupre, 86 L. T. N. S. 560.

**False Notice.** — The St. Bernard, 105 Fed. Rep. 994.

**235.** 2. *“Working Days” and “Colliery Working Days.”* — A working day is merely a day which is not a holiday and does not include a day on which work is suspended because of a strike. Nor by use of the term “colliery working day” are days occupied by strikes in the collieries excluded. Saxon Steamship Co. *v.* Union Steamship Co., 83 L. T. N. S. 106.

**Working Day Is Twelve Hours.** — Where the charter-party provided that the ship was to be loaded in “nine working days” and to be discharged as customary “per like working day, \* \* \* loading time to count from 6 A. M. after the ship is at the custom house and ready, \* \* \* demurrage over and above the said lying days at sixteen shilling eight pence per hour, \* \* \* the steamer to work day and night if required to do so” at the port of discharge, it was held that the working day at the port of loading was a day of twelve hours from 6 A. M., and not a day of twenty-four hours, and that therefore the ship was on demurrage from 6 A. M. of the last day. Mein *v.* Ottmann, Sc. Ct. of Sess. 6 F. 276.

**“Working Days of Twenty-four Hours.”** — Where the charter-party provided that the charterers were “to be allowed three hundred and fifty tons per working day of twenty-four hours” it was held that the charterers were entitled to twenty-four hours in which to load or discharge each three hundred and fifty tons. The court held that it was evidently the intention of the parties to have a conventional day of twenty-four hours, which might be made up

- 236.** *d.* FRACTIONS OF DAYS. — See note 4.  
*e.* SUNDAYS AND HOLIDAYS. — See note 6.  
**237.** *f.* APPORTIONMENT BETWEEN LOADING AND UNLOADING. — See note 2.  
**4.** Provisions for "Dispatch," "Quick Dispatch," Etc. — See note 3.  
**238.** Awaiting Turn. — See note 1.  
**5.** Provisions for "Customary Dispatch," Etc. — See note 2.  
**239.** See note 1.  
Duty to Provide Berth. — See notes 4, 5.  
Awaiting Turn. — See note 6.  
**241.** 6. Provisions for Loading or Unloading in Turn — Custom and Usage of the Port. — See note 2.

of broken portions of time in several days added together. The parties intended to put the various portions together and to ascertain the number of days by dividing the total number of hours by twenty-four. *Forest Steamship Co. v. Iberian Iron Ore Co.*, 81 L. T. N. S. 563, affirming 79 L. T. N. S. 240.

**Usage and Custom.** — *Hagerman v. Norton*, (C. C. A.) 105 Fed. Rep. 996.

**Rainy and Stormy Days.** — *Hagerman v. Norton*, (C. C. A.) 105 Fed. Rep. 996.

**The Effect of Unloading on a Holiday** is to consider the case as though the vessel had so much less cargo to discharge on her stipulated lay days. *The James Baird*, 90 Fed. Rep. 669.

**236. 4. When Fractions of a Day Are to Be Taken into Account.** — Where the charter-party provided that the cargo should be discharged at the average rate of not less than two hundred and ten tons per working day, and that demurrage should be paid at a specified rate for the time employed "beyond the time allowed for discharging," and, at the average rate of discharge prescribed, the time occupied should have been eleven and one-quarter days, it was held that under a proper construction of the charter-party, fractions of a day were to be taken into account, and that demurrage began to run on the expiration of the eleven and one-quarter days. *Yeoman v. Rex*, (1904) 2 K. B. 429.

**6. Saturday Half-holidays.** — See *Perry v. Spickles' Sugar Refining Co.*, 110 Fed. Rep. 777.

**237. 2. Option of Average Days for Loading and Discharging.** — A charter-party provided that the charterers were to have "the option of average days for loading and discharging \* \* \* dispatch money at the rate of ten shillings per hour to be paid for any time saved in loading or discharging, to be settled in loading or discharging ports respectively." The vessel was loaded in the time allowed, and the charterers claimed dispatch money for the days saved, and the amount so due was indorsed on the charter-party. At the port of discharge the lay days were exceeded and the shipowners claimed demurrage. It was held that the charterers could not exercise their option of averaging days of loading and discharging, because the question of how the time saved at the port of loading was to be treated must be considered as closed when the vessel sailed from that port, and therefore the shipowners were entitled to claim demurrage in full. *Oakville Steamship Co. v. Holmes*, 48 W. R. 152, 5 Com. Cas. (Eng.) 48.

**3. "Dispatch," Quick Dispatch, Etc.** — *The Arne*, (1904) P. 154; *Iroquois Furnace Co. v. Elphicke*, 200 Ill. 411; *Ten Thousand and Eighty-two Oak Ties*, 87 Fed. Rep. 935.

**Alternative Methods of Discharge.** — Where a charter-party provided that a cargo of logs should be discharged at a specified dock "with all dispatch, as fast as steamer can deliver as customary," and it appeared that the more usual method at that dock was to discharge such a cargo into railway trucks, but that it was practicable to discharge into lighters, it was held that it was the duty of the receivers of the cargo to discharge into lighters if railway trucks could not be obtained. *Rodenacker v. May*, 6 Com. Cas. (Eng.) 37.

**238. 1. Awaiting Turn.** — *Maclay v. Spillers*, 6 Com. Cas. (Eng.) 217; *Ten Thousand and Eighty-two Oak Ties*, 87 Fed. Rep. 935.

**2. "Customary" Dispatch or Quick Dispatch.** — *Shamrock Steamship Co. v. Storey*, 81 L. T. N. S. 413; *Lyle Steamship Co. v. Cardiff*, (1900) 2 Q. B. 638, 83 L. T. N. S. 329; *The James Baird*, 90 Fed. Rep. 669.

**Only Reasonable Dispatch under the Circumstances Is Required.** — A stipulation in a charter-party that the cargo is to be discharged "with customary steamship dispatch as fast as the steamer can \* \* \* deliver during the ordinary working hours of the respective ports, but according to the custom of the respective ports," is not tantamount to fixing a definite number of days or hours during which the discharge is to be completed. To create such a liability the days or hours must be specified in plain terms. This construction of the clause is not affected by a special exception covering strikes, lockouts, or epidemics. Demurrage is not due if the discharge is effected with the utmost dispatch practicable, having regard to the custom of the port, facilities for delivery, and all other circumstances not brought about by, or within the control of, the person whose duty it is to take delivery. *Hulthen v. Stewart*, (1903) A. C. 389, affirming (1902) 2 K. B. 199.

**239. 1. Effect of Custom Not Expressly Provided For.** — *Lyle Shipping Co. v. Cardiff*, (1900) 2 Q. B. 638.

**4. Duty to Provide Berth.** — See *The James Baird*, 90 Fed. Rep. 669.

**5. The Derwent**, 84 L. T. N. S. 360.

**6. Awaiting Turn.** — *The Viola*, 90 Fed. Rep. 750.

**241. 2. Provision for Unloading in Turn.** — *Harrowing v. Dupré*, 7 Com. Cas. (Eng.) 157;



**242.** 7. Causes of Delay — *a.* IN GENERAL. — See note 3.

**244.** *e.* ACT OF GOD, THE ELEMENTS, AND THE PUBLIC ENEMY. — See note 2.

**245.** *f.* CAUSES OF DELAY EXCEPTED BY THE CONTRACT — (2) *Inability to Supply or Take Away Cargo.* — See note 1.

**246.** (4) *Delay Not Caused by Fault of Charterer, Freightier, or Consignee.* — See note 3.

**247.** Wrong or Negligence Not Necessary to "Default." — See notes 1, 2.

**248.** *g.* CONTRACT IMPOSING ON MASTER DUTY TO LOAD OR UNLOAD. — See note 1.

Donnell *v.* Amoskeag Mfg. Co., (C. C. A.) 118 Fed. Rep. 10.

**Construction of Phrase "In Regular Turn."** — The words "in regular turn" in a charter-party, *prima facie* mean the regular turn of the port of loading, but it may be shown either by construction of the charter-party itself or by evidence that the words were intended to have a different meaning. Thus where a charter-party provided that the ship should proceed to a designated port and there "in the usual and customary manner, load in regular turn from Brown's Duckenfield Colliery, or any of the collieries the said freighters may name," and it appeared that by the regulations and customs of the port a loading berth could not be obtained until a loading order from the colliery was lodged, it was held, upon construction of the charter-party and with reference to the rules and customs of the port, that the words "in regular turn" must be taken to mean the regular turn of the colliery. *Barque Quilpue v. Brown*, (1904) 2 K. B. 264. See also *Jones v. Green*, (1904) 2 K. B. 275; *Ardan Steamship Co. v. Weir*, Sc. Ct. of Sess. 6 F. 294.

**Several Berths.** — Where the consignee has several vessels waiting to discharge cargo of the same generic class, he should generally give them, in turn, the first available berths and not assign them arbitrarily to some particular berth. *Evans v. Blair*, (C. C. A.) 114 Fed. Rep. 616.

**242. 3. Cause of Delay Generally Immaterial.** — *Lyle Shipping Co. v. Cardiff*, (1900) 2 Q. B. 638, 83 L. T. N. S. 329; *Hagar v. Elmslie*, (C. C. A.) 107 Fed. Rep. 511.

**244. 2. Tempestuous Weather.** — *Atlantic, etc., Steamship Co. v. Guggenheim*, 123 Fed. Rep. 330.

**Collision.** — *Tyne, etc., Shipping Co. v. Leech*, (1900) 2 Q. B. 12.

**245. 1. Causes Preventing Taking Cargo to and from Vessel.** — *Durchmann v. Dunn*, (C. C. A.) 106 Fed. Rep. 950, *affirming* 101 Fed. Rep. 606.

**246. 3. "Causes Beyond His Control"** include only causes which are *eiusdem generis* with the other causes excepted in the clause. *Richardson v. Samuel*, 77 L. T. N. S. 479.

Under such an exception the charterer is not liable for delay in discharging caused by the actual firing of an enemy's ships of war upon the forts in the harbor, directly affecting the vessel and making the discharge of the vessel dangerous and impossible. *Crossman v. Burrill*, 179 U. S. 100, *reversing* (C. C. A.) 130 Fed. Rep. 763.

**Exception as to Fire.** — Where the charter-party provided that a certain number of days

should be allowed for loading and discharging the cargo, after which demurrage was to be paid at a specified rate per running day, and the charter-party also contained an exception clause excepting, amongst other things, fire, and while the vessel was discharging, a fire broke out in her cargo, necessitating the removal of the vessel for a time from her discharging berth, it was held that the exception of fire inured to the benefit of the charterer as well as of the shipowner; so as to excuse the charterer from payment of demurrage in respect of the delay caused by the fire. *Newman, etc., Steamship Co. v. British, etc., Steamship Co.*, (1903) 1 K. B. 262, *following* *Barrie v. Peruvian Corp.*, 2 Com. Cas. (Eng.) 50.

**Failure of Railway to Supply Cars.** — A charter-party provided that the charterer was not to be responsible for "detention by railways, scarcity of wagons \* \* \* or other causes beyond his control." The cargo was not discharged until sixteen days after the ship was berthed, owing to the failure of the Caledonian Railway Company (by whose line the consignees had directed the charterer to forward the goods) to supply wagons until the latter part of the sixteen days. In an action by the ship-owners against the charterer for demurrage, wherein the plaintiffs claimed that the charterer ought to have forwarded the goods by the North British Railway Company's line, and that in any event the charterer was liable because the reason why the Caledonian Railway Company did not at first furnish wagons was that the consignees were detaining too many of that company's wagons at their works, the court held that the delay in discharging the cargo was due to detention by railways and scarcity of wagons beyond the charterer's control, and that he was not liable for demurrage. *Mein v. Ottmann*, Sc. Ct. of Sess. 6 F. 276.

**An Unauthorized Holiday** taken by the laborers in a colliery at which the vessel is to be loaded is within an exception of the charter-party that the charterers shall not be liable for any time lost through riots, strikes, lockouts, "or any cause beyond the control of the charterers." *In re Allison*, 20 Times L. Rep. 584.

**247. 1. Wrong or Negligence Not Necessary to Constitute Default.** — *Ten Thousand and Eighty-two Oak Ties*, 87 Fed. Rep. 935.

**2. Public Enemies.** — *Crossman v. Burrill*, 179 U. S. 100, *reversing* *Burrill v. Crossman*, 65 Fed. Rep. 104, *affirmed* (C. C. A.) 69 Fed. Rep. 747.

**248. 1. Option of Charterer to Unload and Store Goods.** — Where a bill of lading given by the charterers of a ship provided that the goods

- 218.** *h.* **FAULT OF SHIPOWNER OR HIS AGENT.** — See note 2.  
 Unreadiness of Vessel, Etc. — See note 4.
- 250.** **Other Cases.** — See notes 4, 8.
- 252.** **8. Effect of Custom and Usage** — When Not Inconsistent with Contract. — See note 1.  
 Validity and Proof of Custom or Usage. — See note 3.
- 253.** See note 1.
- III. IMPLIED CONTRACT AS TO TIME** — 1. Liability of Charterer or Freighter — Delay in Unloading. — See note 3.  
 Delay in Loading or Going to Sea. — See note 4.
- 254.** **2. Liability of Consignees and their Assignees** — *a.* **LIABILITY AT COMMON LAW.** — See note 1.  
 Consignee as the Freighter. — See note 3.
- 256.** **3. Only Reasonable Diligence Required.** — See note 1.  
 What Is a Reasonable Time or Reasonable Diligence. — See note 2.
- 4. Causes of Delay** — *a.* **FAULT OF CHARTERER, FREIGHTER, OR CONSIGNEE.** — See note 4.

should "be taken from the ship by consignees \* \* \* immediately after arrival as fast as steamer can deliver or the same will be transhipped into lighters, or landed or warehoused at the expense and risk of the proprietors of such goods," it was held, in an action by the charterers against the consignees for detention of the ship during the discharge, that the consignees were liable because the terms of the bill of lading empowering the charterers to transship, land, or warehouse the goods did not take away their ordinary right to bring an action for detention if delivery of the goods was not taken by the consignees as fast as was provided by the bill of lading. *The Arne*, (1904) P. 154.

**248. 2. Fault or Negligence of Shipowner.** — *Gabler v. McChesney*, 60 N. Y. App. Div. 583, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 248. See also *Doherty v. Peal*, (Supm. Ct. App. T.) 25 Misc. (N. Y.) 487.

**4. Holding Cargo for Nonpayment of Freight or Demurrage.** — A shipowner who has a lien on the cargo for freight or for demurrage due for the charterer's delay in loading, cannot, when he has an opportunity of unloading the cargo, keep the cargo on the ship and then claim demurrage for the detention of the ship. *Modesto v. Dupre*, 86 L. T. N. S. 560.

**250. 4. Refusal of Master to Sign Bills of Lading.** — *Wood v. Sewall*, 128 Fed. Rep. 141; *The Assyria*, (C. C. A.) 98 Fed. Rep. 316.

**8. Failure to Keep the Vessel at the Dock** ready to discharge the cargo will deprive the vessel of its claim for demurrage. *Gabler v. McChesney*, 60 N. Y. App. Div. 583.

**252. 1. Custom or Usage Not Inconsistent with Contract.** — *Northmoor Steamship Co. v. Harland*, (1903) 2 Ir. R. 657; *Arden Steamship Co. v. Weir*, Sc. Ct. of Sess. 6 F. 294; *Cargo of The Joseph W. Brooks*, 122 Fed. Rep. 881; *Donnell v. Amoskeag Mfg. Co.*, (C. C. A.) 118 Fed. Rep. 10.

**3. An Unreasonable Custom as to the Rate at Which the Cargo May Be Discharged** will not be permitted to deprive the shipowner of the right to damage. *Sea Steamship Co. v. Price*, 8 Com. Cas. (Eng.) 292.

**253. 1. Proof of Custom or Usage.** — See *Sea*

*Steamship Co. v. Price*, 8 Com. Cas. (Eng.) 292.

**3. Implied Contract as to Time — Liability of Charterer or Shipper.** — *Carlton Steamship Co. v. Castle Mail Packets Co.*, (1898) A. C. 486; *Arden Steamship Co. v. Weir*, Sc. Ct. of Sess. 6 F. 294; *Jameson v. Sweeney*, (N. Y. City Ct. Gen. T.) 29 Misc. (N. Y.) 584, 32 Misc. (N. Y.) 645. See also *Hulthen v. Stewart*, (1902) 2 K. B. 199.

**4. Detaining Vessel from Going to Sea.** — *Donnell v. Amoskeag Mfg. Co.*, (C. C. A.) 118 Fed. Rep. 10.

**254. 1. Consignee's Liability at Common Law.** — *Graham v. Planters' Compress Co.*, 129 Fed. Rep. 253; *Merritt, etc., Derrick, etc., Co. v. Vogeman*, 127 Fed. Rep. 770; *Williscroft v. Cargo of The Cyrenian*, 123 Fed. Rep. 169; *Jameson v. Sweeney*, (N. Y. City Ct. Gen. T.) 29 Misc. (N. Y.) 584, 32 Misc. (N. Y.) 645.

A consignee without notice of the provisions of the charter is not liable for the specific sum for a detention beyond the time provided in the charter to discharge, but is liable for damages for undue delay in taking his goods, according to the ordinary rules of law which govern in the absence of specific agreement. *Crossman v. Burrill*, 179 U. S. 100.

**3. When Consignee Is the Freighter.** — *Graham v. Planters' Compress Co.*, 129 Fed. Rep. 253.

**256. 1. Only Reasonable Diligence Required.** — *Jones v. Green*, (1904) 2 K. B. 275; *Price v. Morse Ironworks, etc., Co.*, 120 Fed. Rep. 445; *Donnell v. Amoskeag Mfg. Co.*, (C. C. A.) 118 Fed. Rep. 10; *Morgan v. Garfield, etc., Coal Co.*, 113 Fed. Rep. 520; *Ionia Transp. Co. v. Two Thousand and Ninety-Eight Tons Coal*, 128 Fed. Rep. 514; *Corrigan v. Iroquois Furnace Co.*, (C. C. A.) 100 Fed. Rep. 870.

**Burden of Proof.** — *Williscroft v. Cargo of The Cyrenian*, 123 Fed. Rep. 169.

**2. Reasonable Time in General.** — *Ionia Transp. Co. v. Two Thousand and Ninety-eight Tons Coal*, 128 Fed. Rep. 514; *Corrigan v. Iroquois Furnace Co.*, (C. C. A.) 100 Fed. Rep. 870; *Wood v. Keyser*, 84 Fed. Rep. 688.

**4. Fault of Charterer, Freighter, or Consignee.** — *Jameson v. Sweeney*, (N. Y. City Ct. Gen. T.) 29 Misc. (N. Y.) 584.

**258.** *b.* DELAY WITHOUT FAULT OF CHARTERER, FREIGHTER, OR CONSIGNEE — Acts of Third Persons or the Government. — See note 2.

Unloading in Turn. — See note 4.

**259.** *c.* FAULT OF SHIPOWNER OR HIS AGENT — Readiness of Vessel. — See note 4.

5. Waiver or Settlement by Shipowner or His Agent. — See note 5.

**260.** 6. Effect of Custom and Usage. — See note 2.

**261.** IV. DEMURRAGE OR DAMAGES IN CASES OF TORT — Collision Cases. — See note 2.

V. DAMAGES FOR DETENTION OF RAILROAD CARS, ETC. — See note 4.

**262.** See note 2.

VI. AMOUNT OF DEMURRAGE OR DAMAGES — 1. Express Contract for Demurrage. — See note 4.

**263.** 2. Damages in the Nature of Demurrage — In General. — See note 1.

Usual Net Earnings of Vessel. — See note 2.

**264.** 3. Damages in Cases of Tort — Cases of Collision. — See note 8.

**267.** Probable Net Earnings. — See note 1.

Rate of Demurrage Fixed by Contract. — See note 3.

**269.** VII. LIEN — 1. At Common Law and in Equity. — See note 3.

2. In Admiralty. — See note 4.

**270.** 5. For Detention of Railroad Cars, Etc. — See note 4.

**274.** DENTIST. — See note 2.

**258.** 2. Strikes. — Wood *v.* Keyser, 84 Fed. Rep. 688.

4. Unloading in Turn. — Jones *v.* Green, (1904) 2 K. B. 275; McArthur Bros. Co. *v.* Six Hundred and Twenty-two Thousand Seven Hundred and Fourteen Feet Lumber, 131 Fed. Rep. 389.

**259.** 4. Readiness of Vessel. — See Jameson *v.* Sweeney, (N. Y. City Ct. Gen. T.) 32 Misc. (N. Y.) 645.

5. Delivery of Cargo Not Waiver of Demurrage. — Iroquois Furnace Co. *v.* Elphicke, 200 Ill. 411.

**260.** 2. Failure to Observe Usages and Customs. — Donnell *v.* Amoskeag Mfg. Co., (C. C. A.) 118 Fed. Rep. 10.

**261.** 2. Collision Cases. — The Columbia, (C. C. A.) 109 Fed. Rep. 660, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 261.

4. Detention of Railroad Cars. — Dixon *v.* Central of Georgia R. Co., 110 Ga. 173, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 261; Schumacher *v.* Chicago, etc., R. Co., 207 Ill. 199, affirming 108 Ill. App. 520; New Orleans, etc., R. Co. *v.* George, 82 Miss. 710; Darlington *v.* Missouri Pac. R. Co., 99 Mo. App. 1; Pennsylvania R. Co. *v.* Midvale Steel Co., 201 Pa. St. 624, 88 Am. St. Rep. 836; Swan *v.* Louisville, etc., R. Co., 106 Tenn. 229.

**262.** 2. Charges Must Be Reasonable. — Schumacher *v.* Chicago, etc., R. Co., 108 Ill. App. 520, affirming 207 Ill. 199.

4. Express Contract for Demurrage. — Where the provision of the contract amounts to a penalty, the penalty will not be imposed unless the case clearly comes within the purpose which it intended to accomplish. Continental Coal Co. *v.* Bowne, (C. C. A.) 115 Fed. Rep. 945.

**263.** 1. Damages in the Nature of Demurrage. — Keyser *v.* Jurvelius, (C. C. A.) 122 Fed. Rep. 218. See also Price *v.* Morse Ironworks, etc., Co., 120 Fed. Rep. 445.

2. Usual Net Earnings. — Keyser *v.* Jurvelius,

(C. C. A.) 122 Fed. Rep. 218; Elphicke *v.* Iroquois Furnace Co., 102 Ill. App. 138, affirmed 200 Ill. 411.

**264.** 8. Collision — Delay for Repairs. — The Bulgaria, 83 Fed. Rep. 312; H. M. Loud, etc., Lumber Co. *v.* Peter, 11 Ohio Cir. Dec. 155, 20 Ohio Cir. Ct. 73.

**267.** 1. The Average Net Earnings of the vessel may be resorted to where there is no agreed rate of demurrage for vessels of her class or no way of determining the charter value of the vessel. Thompson *v.* Winslow, 130 Fed. Rep. 1001, affirmed (C. C. A.) 134 Fed. Rep. 546; The Bulgaria, 83 Fed. Rep. 312.

There must be evidence of the market value of the vessel or of her net earnings. Chicago *v.* Hawgood, etc., Transp. Co., 110 Ill. App. 34.

3. Specified Rate of Demurrage. — The Columbia, (C. C. A.) 109 Fed. Rep. 660.

**269.** 3. No Lien at Common Law. — Taylor *v.* Fall River Ironworks, 124 Fed. Rep. 826.

4. Lien in Admiralty. — Ten Thousand and Eighty-two Oak Ties, 87 Fed. Rep. 935.

**270.** 4. Lien for Detention of Railroad Cars — Contra. — Dixon *v.* Central of Georgia R. Co., 110 Ga. 173; Schumacher *v.* Chicago, etc., R. Co., 207 Ill. 199, affirming 108 Ill. App. 520; New Orleans, etc., R. Co. *v.* George, 82 Miss. 710; Darlington *v.* Missouri Pac. R. Co., 99 Mo. App. 1.

Contract. — Swan *v.* Louisville, etc., R. Co., 106 Tenn. 229.

**274.** 2. Dentist as Surgeon. — In State *v.* Beck, 21 R. I. 293, the court said: "Dentistry is now a well-recognized branch of surgery. A *dentist* is a dental surgeon. He performs surgical operations upon the teeth and jaw, and, as incidental thereto, upon the flesh connected therewith. His sphere of operations then, as before intimated, is included in the larger one of the physician and surgeon."



**275. DEPARTMENT.** — See note 2.

**276. DEPARTURE.** — See note 2.

**277. DEPENDENT.** — See note 1.

But a Dentist Is Not an Itinerant Doctor, physician, or surgeon within the meaning of a licensing statute. *Cherokee v. Perkins*, 118 Iowa 405.

**275. 2. Departments or Branches of Service — Fellow-servant Rule.** — See *St. Louis, etc., R. Co. v. Furry*, (C. C. A.) 114 Fed. Rep. 903. And see the title FELLOW SERVANTS.

**Department Report.** — See *Gillette v. Peabody*, 19 Colo. App. 356.

**276. 2. Departure in Pleading.** — *Nelson v. Montgomery First Nat. Bank*, 139 Ala. 578; *Jamieson House Furnishing Co. v. Brainard*, 16 Colo. App. 509; *Midland Steel Co. v. Citizens Nat. Bank*, 26 Ind. App. 71.

**277. 1. Dependants — Workmen's Compensation Act.** — By section 7, subsection 2, of the Workmen's Compensation Act, 1897, the word *dependants* means, "in England and Ireland, such members of the workman's family specified in the Fatal Accidents Act, 1846, as were

wholly or in part *dependent* upon the earnings of the workman at the time of his death." It was held that, in order to bring himself within the act as a *dependant*, an applicant for compensation must show that he was to some extent *dependent* upon the earnings of the deceased workman for the ordinary necessities of life, having regard to his class and position in life; it is insufficient that he merely derived pecuniary benefit from such earnings. Whether an applicant is in that sense a *dependant* is a question of fact in each particular case. *Simmons v. White*, (1899) 1 Q. B. 1005; *Main Colliery Co. v. Davies*, (1900) A. C. 358.

**The Word Dependence as Used in a Homestead Statute** is not restricted to support and maintenance — food and clothing. It is intended to include moral and mental training, and that care and nurture which would be prompted by the feelings of affection. *American Nat. Bank v. Cruger*, 31 Tex. Civ. App. 17.

## DEPOSIT.

By O. D. ESTEE.

**280. I. DEFINITION AND NATURE.** — See note 1.

**284. III. NATURE AND ESSENTIALS OF THE CONTRACT OF DEPOSIT —**

**4. Requisites of the Contract — b. CUSTODY MUST BE GRATUITOUS.** — See note 2.

**285. IV. RIGHTS AND OBLIGATIONS OF THE PARTIES — 2. Of the Depositary — a. RIGHTS OF THE DEPOSITARY — (1) Against the Depositor — (c) Right to Use Thing Deposited.** — See note 6.

**286. (d) Right to Dispose of Thing Deposited.** — See note 1.

(2) *Against Third Persons.* — See note 4.

**287. See note 1.**

**b. DUTIES AND LIABILITIES OF THE DEPOSITARY — (1) To Keep the Thing Deposited with Reasonable Care — (a) In General — Depositary Bound to Slight Diligence Only.** — See note 2.

**280. 1. Deposit Defined.** — *Bissell v. Harris*, (Neb. 1901) 95 N. W. Rep. 779.

**284. 2. Keeping Must Be Without Reward.** — *Bissell v. Harris*, (Neb. 1901) 95 N. W. Rep. 779.

**285. 6.** If the depositor permits the depositary to use the deposit for a certain purpose, the depositary has no right to use it for a different purpose, and if loss is occasioned by such use, he is liable therefor. *Cartlidge v. Sloan*, 124 Ala. 596.

**286. 1.** *Ball-Barnhart-Putman Co. v. Lane*, 135 Mich. 275; *Nichols v. Montjeau*, 132 Mich. 582; *Oyler v. Renfro*, 86 Mo. App. 321; *Sowden v. Kessler*, 76 Mo. App. 581.

**If the Depositary Pledges the Goods.** — *Shafer v. Lacy*, 121 Cal. 574; *Scollans v. Rollins*, 179 Mass. 346, 88 Am. St. Rep. 386. See also *Worthington v. Vette*, 77 Mo. App. 445.

If a depositary wrongfully pledges goods with

a third party, the depositor may recover them without paying the charges of the third party for keeping them. *Hassett v. Sanborn*, 62 N. Y. App. Div. 588.

**4. Depositary May Maintain Action Against Wrongdoer.** — See *Latouche v. Leclerc*, 17 Quebec Super. Ct. 181.

**287. 1. Action by Depositor.** — Where goods are attached by a creditor of the depositary, the depositor may have the attachment set aside. *Anderson v. Heile*, (Ky. 1901) 64 S. W. Rep. 849.

**2. Depositary Required to Exercise Slight Care.** — *McKenna v. Walker*, 85 Mo. App. 570; *King v. Exchange Bank*, 106 Mo. App. 1; *Bissell v. Harris*, (Neb. 1901) 95 N. W. Rep. 779; *Krumsky v. Loeser*, (Supm. Ct. App. T.) 37 Misc. (N. Y.) 504; *De Lemos v. Cohen*, (Supm. Ct. App. T.) 28 Misc. (N. Y.) 579.

**Banks as Depositaries.** — *Smith v. Elizabethport Banking Co.*, 69 N. J. L. 288.

**288.** See note 1.

**289.** Unavoidable or Accidental Loss. — See notes 3, 4.

**290.** (c) Circumstances Modifying Liability — *aa.* SPECIAL CONTRACT. — See note 7.  
*bb.* ASSENT OF DEPOSITOR. — See note 10.

**291.** (d) Negligence a Question for Jury. — See note 2.

**293.** V. TERMINATION OF THE DEPOSIT. — See note 3.

**Leaving Baggage in Hotel.** — Where a party delivered goods to a hotel porter but never became a guest of the hotel, the hotel was a gratuitous depositary and so not liable for the loss of the goods unless such loss was occasioned by its gross negligence. *Tulane Hotel Co. v. Holohan*, 112 Tenn. 214.

**288. 1. What Is Reasonable Care Depends on Circumstances.** — *Schneps v. Sturm*, (Supm. Ct. App. T.) 25 Misc. (N. Y.) 168.

**289. 3. Loss by Fire.** — The depositary is not liable for the loss of goods by a fire that was not due to any neglect on his part. *Leggo v. Welland Vale Mfg. Co.*, 2 Ont. L. Rep. 45.

**4. Loss by Robbery or Theft.** — *Bissell v. Harris*, (Neb. 1901) 95 N. W. Rep. 779; *Smith v. Elizabethport Banking Co.*, 69 N. J. L. 88.

**290. 7. Notice of Limitation of Liability.** — A notice posted in a retail clothing store that the proprietor will not be "responsible for articles left in the dressing closets" does not affect any customer who did not see or have his attention directed to the notice. *Hunter v. Reed*, 12 Pa. Super. Ct. 112.

**10.** *Cantancarito v. Siegel-Cooper Co.*, (Supm. Ct. App. T.) 23 Misc. (N. Y.) 664.

**291. 2. Negligence a Question for Jury.** — *Schneps v. Sturm*, (Supm. Ct. App. T.) 25 Misc. (N. Y.) 168.

**293. 3. Termination by Depositary.** — *De Lemos v. Cohen*, (Supm. Ct. App. T.) 28 Misc. (N. Y.) 579.

## DEPOSITIONS.

By H. O'B. COOPER.

**297. I. DEFINITION AND NATURE — 1. General Sense — Distinguished from Affidavit.** — See note 2.

**299. II. ORIGIN AND DEVELOPMENT OF THIS MODE OF TAKING TESTIMONY — 2. In Courts of Equity — The English Court of Chancery.** — See note 1.

**300. 5. Construction of Statutes — Strict Compliance.** — See note 1.

**301. III. THE COMMISSIONER OR MAGISTRATE — 1. Magistrates and Officers Empowered to Take Depositions — a. IN GENERAL.** — See note 1.

*b.* JUSTICES OF THE PEACE. — See note 2.

*d.* CONSULAR AND DIPLOMATIC OFFICERS. — See note 4.

*e.* NOTARIES PUBLIC. — See note 5.

**297. 2. Baker v. Magrath**, 106 Ga. 421, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 297, and supporting the whole text paragraph.

**299. 1. Courts of Equity.** — See *Dickerson v. Askew*, 82 Miss. 436.

**300. 1. Strict Compliance with Statute.** — *Hacker v. U. S.*, 37 Ct. Cl. 86; *Dunbar v. De Groff*, 1 Alaska 25; *Wheeler v. Burckhardt*, 34 Oregon 507, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 300; *People's Nat. Bank v. Mulkey*, 94 Tex. 395. See also *North American Transp., etc., Co. v. Howells*, (C. C. A.) 121 Fed. Rep. 694.

**State Statutes and Constitution — Federal Courts Follow State Courts.** — *West v. Louisiana*, 194 U. S. 258.

**301. 1. As to the Illinois and Nebraska Statutes.** — See *Provident Sav. L. Assur. Soc. v. Cannon*, 103 Ill. App. 534, affirmed 201 Ill. 260; *Olmsted v. Edison*, (Neb. 1904) 98 N. W. Rep. 415 (county judge).

**In Oregon** either party may take the testimony

of a witness in an action at law before any person who is authorized to administer oaths. *Wheeler v. Burckhardt*, 34 Oregon 507.

**Judicial Authority.** — Where a commission issues from a foreign court to a person not vested with judicial authority, the proceedings before him, in the absence of statutes, are voluntary. *Martin v. People*, 77 Ill. App. 311.

**2. Justice of the Peace.** — See *Wilson v. Welch*, 12 Colo. App. 185.

**4. Consul — Depositions for State Court.** — In the absence of statute a United States consul in a foreign port is not authorized to act as a notary in taking depositions for use in a state court, and such depositions are inadmissible. *In re Herckelrath*, 1 Ohio Dec. 696, 7 Ohio N. P. 537.

**5. Notaries Public.** — *Wilson v. Welch*, 12 Colo. App. 185.

**Notary Incompetent — Cross-examination No Waiver.** — *Knickerbocker Ice Co. v. Gray*, (Ind. 1904) 72 N. E. Rep. 869.

**301.** 2. Blank Commission — Consent of Parties. — See note 3.

3. Identity of Commissioner — Misnomer. — See notes 5, 6.

**305.** 4. Qualifications of Commissioner — *b.* ATTORNEYS AND COUNSEL. —

See note 3.

*c.* PERSONS INTERESTED IN SUIT OR RELATED TO A PARTY. —

See note 7.

**307.** 6. Compensation — Amount. — See note 7.

When Entitled. — See note 8.

**308.** IV. REASONS FOR TAKING DEPOSITIONS — 1. In General. — See note 1.

These Reasons Are Set Forth in the Statutes. — See note 2.

**309.** 2. Residence Out of the Jurisdiction — Witnesses. — See note 1.

Fact of Nonresidence Must Clearly Appear. — See note 2.

**304.** 3. Appearance at the Taking and Cross-examination constitute a waiver. *Womack v. Gross*, 135 N. Car. 378.

5. Commissioner's Name. — When the commission was issued to "A. C. Strong," a deposition taken and certified by "Alfred C. Strong," as notary for the county named, was held not to be thereby rendered inadmissible. *Brown v. Ellis*, 103 Fed. Rep. 834.

6. Person to Whom Commission Issued Must Execute. — *Brown v. Ellis*, 103 Fed. Rep. 834; *Kroell v. State*, 139 Ala. 1; *Provident Sav. L. Assur. Soc. v. Cannon*, 103 Ill. App. 534, *affirmed* 201 Ill. 260; *Claverie v. Gory*, 4 N. W. Ter. 470.

Where Two Commissioners Were Named depositions taken by only one were held to be inadmissible. *Montgomery St. R. Co. v. Mason*, 133 Ala. 509. But that the statutory requirement of two commissioners may be waived by the parties, see *Rooney v. Southern Bldg., etc., Assoc.*, 115 Ga. 400.

**305.** 3. Attorneys and Counsel Disqualified. — *Hacker v. U. S.*, 37 Ct. Cl. 86; *Swink v. Anthony*, 96 Mo. App. 420; *Testard v. Butler*, 20 Tex. Civ. App. 106.

Relationship Must Exist When Deposition Is Taken. — *McGrew v. Wilson*, (Tex. Civ. App. 1900) 57 S. W. Rep. 63.

7. Disqualification on Ground of Interest. — *Hacker v. U. S.*, 37 Ct. Cl. 86; *Knickerbocker Ice Co. v. Gray*, (Ind. 1904) 72 N. E. Rep. 869 (stenographer of party's attorney incompetent); *Massachusetts Mut. Acc. Assoc. v. Dudley*, 15 App. Cas. (D. C.) 472 (deputy of deponent incompetent). Compare *Palmer v. Hudson River State Hospital*, 10 Kan. App. 98, holding that under the *Kansas* statutes a notary public was not disqualified to take depositions by reason of the fact alone that he was the plaintiff's bookkeeper.

**307.** 7. Commissioner's Compensation — Amount. — *Manning v. Standard Theatre*, 83 Mo. App. 627; *Paxson v. MacDonald*, 97 Mo. App. 165.

Stenographer. — When the stenographer owes his employment to the commissioner, and must look to him for his pay, there should be no allowance made for his compensation. *Manning v. Standard Theatre*, 83 Mo. App. 627.

8. When Entitled to Compensation. — See *Paxson v. MacDonald*, 97 Mo. App. 165; *Nite v. State*, 41 Tex. Crim. 340.

Under Rev. Stat. U. S., § 847, an examiner is not entitled to triple fees for attendance where a deposition is executed in triplicate for use

in three cases, though where the witness is sworn and each exhibit is marked in each of the three cases he is entitled to three fees therefor, and is also entitled to ten cents per folio for the copies certified and filed in the second and third cases. *Waterman v. Lockwood*, 128 Fed. Rep. 174.

**308.** 1. Reason for Taking Must Appear. — *Laidlaw v. Stimson*, 67 N. Y. App. Div. 545.

The Materiality of the Evidence to be taken must appear in the affidavits. *Burnell v. Coles*, (Supm. Ct. App. T.) 23 Misc. (N. Y.) 615, 26 Misc. (N. Y.) 810; *Matter of Garvey*, 33 N. Y. App. Div. 134; *Johnson v. New Home Sewing Mach. Co.*, 62 N. Y. App. Div. 157.

Oath of Attorney as to Materiality — Sufficient on Information and Belief. — *Fitzpatrick v. Montgomery Bank*, 127 Ala. 589.

Where No Action Has Been Commenced a witness cannot be examined under Code Civ. Pro. N. Y., §§ 871-876, to enable the prospective plaintiff to frame his complaint. *Long Island Bottlers' Union v. Bottling Brewers' Protective Assoc.*, 65 N. Y. App. Div. 459.

2. Enumeration of Reasons — Federal Statutes. — *Zych v. American Car, etc., Co.*, 127 Fed. Rep. 723.

**309.** 1. Witnesses — Residence Out of Jurisdiction. — *State v. Maddison*, 50 La. Ann. 679; *Laidlaw v. Stimson*, 67 N. Y. App. Div. 545; *People v. Goodman*, (Ct. Gen. Sess.) 43 Misc. (N. Y.) 508; *Mercantile Nat. Bank v. Sire*, 100 N. Y. App. Div. 459; *Boise v. Atchison, etc.*, R. Co., 6 Okla. 243; *Cunnius v. Reading School Dist.*, 25 Pa. Co. Ct. 17, *affirmed* 21 Pa. Super. Ct. 340. See also *Mason v. Chicago Title, etc., Co.*, 77 Ill. App. 19; *Gilmore v. Butts*, 61 Kan. 315.

The Term "Nonresident Witness," as used in Rev. Stat. Ill. 1874, p. 493, means one who is outside of the county or state. *Gardner v. Meeker*, 169 Ill. 40.

Deposition of Resident — Tennessee Statute. — Under the Tennessee statute the deposition of a resident of the county where the suit is pending may be taken by either party, but the other party may thereafter summon the deponent, who must then be examined as if summoned by the party taking his deposition. *Sherrod v. Hughes*, 110 Tenn. 311.

2. Fact of Nonresidence Must Clearly Appear. — *Burnell v. Coles*, (Supm. Ct. App. T.) 26 Misc. (N. Y.) 810.

Statement of Whereabouts of Witness Required. — *Brown v. Russell*, 58 N. Y. App. Div. 218.

An Affidavit by the Attorney not showing why



**310. 3. Distance from the Place of Trial.** — See note 1.

How Shown. — See note 3.

**4. Witness About to Depart.** — See note 4.**311. 5. Age or Infirmary of the Witness.** — See notes 1, 2.**7. Necessity for Taking.** — See note 4.

**312. V. DEPOSITIONS IN PERPETUAM MEMORIAM REI** — Power Inherent in Equity — When Exercised. — See note 1. See generally the title PERPETUATION OF TESTIMONY, 16 ENCYC. OF PL. AND PR. 352.

Forms of Law under Which Taken to Be Followed. — See note 3.

**313. VI. COMPULSORY DEPOSITION BY ADVERSE PARTY.** — See note 3.

How Production of Such Testimony Enforced. — See note 4.

**314. VII. DEPOSITIONS IN CRIMINAL CASES** — 1. Generally — Express Statutory Authorization. — See note 3.

it was not made by the party is insufficient, especially when he does not swear that the parties are not within the state, but merely that they are nonresidents. *Fox v. Peacock*, 97 N. Y. App. Div. 500.

**Prima Facie Evidence of Nonresidence**, sufficient to allow the admission of a deposition in evidence, was held to appear where a witness testified to the nonresidence of the deponent and the deponent himself also testified in his deposition that he was a nonresident and it was so stated in the return. *Oliver v. Columbia*, etc., R. Co., 65 S. Car. 1.

**Continuance of Nonresidence Presumed.** — Texas, etc., R. Co. *v. Reagan*, (C. C. A.) 118 Fed. Rep. 815.

**310. 1. Witnesses Resident Distant from Place of Trial** — United States Statutes. — On the removal of a cause from a state to a federal court, a deposition taken for use in the state court is not admissible where the deponent lives within one hundred miles of the federal court. Texas, etc., R. Co. *v. Wilder*, (C. C. A.) 92 Fed. Rep. 953.

**State Statutes.** — By the Kentucky statute the witness must reside at least twenty miles from the county seat. *Powers v. Powers*, (Ky. 1899) 52 S. W. Rep. 845; Louisville, etc., R. Co. *v. Shaw*, (Ky. 1899) 53 S. W. Rep. 1048.

**3. How Distance Computed.** — The distance from the place of trial is to be determined by the usual, ordinary, and shortest route of public travel, and not by a mathematically straight line between the place of residence and the place of trial. *Jennings v. Menaugh*, 118 Fed. Rep. 612. To the same effect see *Powers v. Powers*, (Ky. 1899) 52 S. W. Rep. 845.

**Affidavit as to Distance Is Sufficient.** — Louisville, etc., R. Co. *v. Shaw*, (Ky. 1899) 53 S. W. Rep. 1048.

**4. Witnesses About to Depart.** — Code Civ. Pro. N. Y., § 872, applies only to witnesses, and not to parties. *Trotter v. Brevoort*, (Supm. Ct. Spec. T.) 29 Misc. (N. Y.) 662.

**311. 1. Witness Aged or Infirm.** — Taylor *v. Mallory*, 96 Va. 18.

Code Civ. Pro. N. Y., § 872, applies only to witnesses not parties. *Trotter v. Brevoort*, (Supm. Ct. Spec. T.) 29 Misc. (N. Y.) 662.

**2. Actual Disablement.** — *Johnson v. New Home Sewing Mach. Co.*, 62 N. Y. App. Div. 157; Taylor *v. Mallory*, 96 Va. 18.

**Proof of Continuance of Disability** is necessary before a deposition can be read, under the

Oregon statute, which requires that the infirmity must continue in order that the deposition be used. *Carter v. Wakeman*, 45 Oregon 427.

**4. Necessity for Taking.** — *Shannon Mfg. Co. v. McCaulley*, (Del. 1902) 56 Atl. Rep. 367; *Burnell v. Coles*, (Supm. Ct. App. T.) 23 Misc. (N. Y.) 615; *Matter of Garvey*, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 353; *Boyes v. Bossard*, 87 N. Y. App. Div. 606; *Wilcox v. Stern*, 89 N. Y. App. Div. 14; *People v. Goodman*, (Ct. Gen. Sess.) 43 Misc. (N. Y.) 508; *McPherson v. Riter-Conley Mfg. Co.*, 35 Nova Scotia 429; *McLeod v. Insurance Co.*, 32 Nova Scotia 481. See also *Laidlaw v. Stimson*, 67 N. Y. App. Div. 545.

**312. 1. Depositions in Perpetuam.** — *Matter of Fulton*, 75 N. Y. App. Div. 623; *Matter of White*, 44 N. Y. App. Div. 119. See also *Lawson v. Rowley*, 185 Mass. 171; *American Express Co. v. Bradford*, 82 Miss. 130; *Meekins v. Norfolk*, etc., R. Co., 136 N. Car. 1.

**Right Must Be Certain.** — "The right, which the statute contemplates the perpetuation of testimony concerning, is a present right, either vested or contingent, and the proceeding cannot be supported to protect a mere possibility or expectancy; the right must be certain, though future." *Hanford v. Ewen*, 79 Ill. App. 327.

**An Election Contest** is not within Stat. Minn. 1894, c. 73, tit. 4, providing for the perpetuation of testimony. *State v. Elliott*, 75 Minn. 391.

**3. Forms of Law Strictly Followed.** — *Green v. Compagnia Generale Italiana*, 82 Fed. Rep. 490, affirmed (C. C. A.) 102 Fed. Rep. 650; *In re Hafer*, 12 Ohio Cir. Dec. 102, 21 Ohio Cir. Ct. 445.

**313. 3. Papers Called for** must be relevant and material. *Dancel v. Goodyear Shoe Machinery Co.*, 128 Fed. Rep. 753; *Simpler's Petition*, 10 Pa. Dist. 141.

**4. Contempt Proceedings** will lie for failure to produce the testimony required. *In re Rauh*, 65 Ohio St. 128.

**314. 3. Criminal Cases** — Express Statute. — U. S. *v. French*, 117 Fed. Rep. 976; *Young v. State*, 90 Md. 579; *People v. Goodman*, (Ct. Gen. Sess.) 43 Misc. (N. Y.) 508; *Watkins v. U. S.*, 5 Okla. 729; *Nite v. State*, 41 Tex. Crim. 340; *State v. Hunter*, 18 Wash. 670.

**Admissibility** — Diligence to Find Witness. — Under the California and Kentucky statutes providing that the deposition of a witness may be used if it is shown to the satisfaction of the

- 314.** 2. Origin and Development — State Statutes. — See note 5.
- 315.** 3. Confronting the Accused with the Witnesses Against Him — *b.* IN THE UNITED STATES — CONSTITUTIONAL GUARANTY. — See notes 4, 5.
4. Strict Compliance with Statutes. — See note 6.
- 316.** VIII. ISSUE OF THE COMMISSION — 1. By What Courts. — See note 2.
- 317.** 2. Settling Interrogatories — *a.* PROPRIETY AND MATERIALITY. — See note 1.
- b.* OBJECTIONS. — See note 2.
- 318.** *c.* FILING AND NOTICE — According to the Ancient English Equity Practice. — See note 1.
- But in the United States. — See note 3.
3. Oral Examination. — See note 4.
- 319.** 4. Naming the Witness — Open Commission. — See note 2.

court that he cannot be found after due diligence, the question whether due diligence has been used is for the court. *People v. Lewandowski*, 143 Cal. 574; *Dean v. Com.*, (Ky. 1904) 78 S. W. Rep. 1112.

**314.** 5. Idaho Statutes — Deposition in Preliminary Examination. — The admission, as evidence, upon the trial of a person charged with a criminal offense, of the depositions of witnesses taken on the preliminary examination of such person, upon such charge, is not permissible, under the statutes of Idaho. *State v. Potter*, 6 Idaho 584.

**315.** 4. United States — Constitutional Provisions. — *Minder v. Georgia*, 183 U. S. 559; *U. S. v. French*, 117 Fed. Rep. 976.

The Federal Constitution contains no specific provision that it shall be necessary in a state court that the defendant shall be confronted with the witnesses against him in criminal trials. *West v. Louisiana*, 194 U. S. 258.

5. *West v. Louisiana*, 194 U. S. 258; *People v. Goodrich*, 142 Cal. 216; *State v. Maddison*, 50 La. Ann. 679.

Waiver of the right may be made by stipulation. *Ex p. Kindt*, 32 Oregon 474.

**6.** Strict Compliance with Requirements. — *Young v. State*, 90 Md. 579; *People v. Goodman*, (Ut. Gen. Sess.) 43 Misc. (N. Y.) 508.

**316.** 2. What Courts May Issue the Commission. — In *New York* a justice's court has authority, under Code Civ. Pro. N. Y., §§ 828, 2980, to issue a commission to take the testimony of a party to the action. *Murphy v. Sullivan*, (County Ct.) 77 N. Y. Supp. 950. So the Surrogate's Court may issue a commission to take the testimony of nonresident witnesses in a proceeding pending in that court. *Matter of Wallace*, 71 N. Y. App. Div. 284.

**317.** 1. Propriety and Materiality of Interrogatories to Be Settled Before Commission Issues. — *Elliott v. Garrett*, (1902) 1 K. B. 870. See also *Israel v. Israel*, 54 N. Y. App. Div. 408; *Matter of Dittman*, 65 N. Y. App. Div. 343; *Cator v. Chamberlain*, (Tex. Civ. App. 1902) 68 S. W. Rep. 196.

Illustrations. — See *Dana v. Cosmopolitan Shipping Co.*, 131 Fed. Rep. 158.

Purpose and Effect of Settlement. — The settlement of the interrogatories is in no sense a decision that they are competent or proper, and the judge has no power to change or amend them, or to reject any of them. The settlement is required only for the purpose of authenticating the interrogatories as the ones which the

commissioner is authorized to propound to the witness. *Wanamaker v. Megraw*, 168 N. Y. 125.

Abuse of Cross-examination. — While ordinarily the court will reserve all questions upon the settlement of interrogatories and cross-interrogatories until the trial, yet where the right to cross-examine is grossly abused, the court will restrict the examination to that which is properly cross-examination. *Treadwell v. Greene*, 89 N. Y. App. Div. 60.

2. When Objections to Be Made. — In *Georgia* no exception to a written interrogatory on the ground that it is a leading question can prevail unless it be filed with the interrogatories before the issuing of the commission. *Franks v. Gress Lumber Co.*, 111 Ga. 87.

Laches in moving to suppress a commission, as in failing to move until after the case has been put on the short-cause calendar, is ground for denying the motion. *Hartwig v. American Malting Co.*, 74 N. Y. App. Div. 140, *affirmed* 175 N. Y. 489; *Wilcox v. Stern*, 89 N. Y. App. Div. 14; *Valentine v. Rose*, (Supm. Ct. App. T.) 45 Misc. (N. Y.) 342.

Leading Interrogatories are objectionable. See *Missouri*, etc., *R. Co. v. Baker*, (Tex. Civ. App. 1904) 81 S. W. Rep. 67.

Presence of Counsel No Objection. — *In re Arrowsmith*, 206 Ill. 352.

**318.** 1. Presumption as to Filing. — In the absence of evidence interrogatories are presumed to have been filed before the date fixed for issuance of the *dedimus*. *Haish v. Dreyfus*, 111 Ill. App. 44.

3. Notice to Adverse Party. — *Wilkinson v. Wilkinson*, 133 Ala. 381. See also *Murphy v. Sullivan*, (County Ct.) 77 N. Y. Supp. 950.

Cross-interrogatories. — *Dunbar v. De Groff*, 1 Alaska 25; *Union Iron, etc., Co. v. Sonnefeld*, 113 La. 436.

Notice of What Is to Be Proved. — When a party sues out interrogatories the other party is entitled to reasonable notice of what he expects to prove. *White v. Jones*, 105 Ga. 26.

4. Where Oral Examination Is Necessary to Do Justice to the party it should be allowed. *McC Campbell v. McC Campbell*, 103 Ky. 745. See also *Gardner v. Meeker*, 160 Ill. 40.

Oral Examination Discretionary with Court. — *Frounfelker v. Delaware, etc., R. Co.*, 81 N. Y. App. Div. 67.

Oral Cross-examination was allowed in *Parsons v. Middleton*, 6 Pa. Dist. 53.

**319.** 2. Open Commission — Witness Not



**320.** 5. Formalities of Issue — *a.* THE COMMISSION — Waiver. — See note 3.

**321.** *b.* APPLICATION. — See note 2.

*c.* SEAL — SIGNATURE OF CLERK. — See note 3.

**322.** IX. FORMALITIES AFTER ISSUE AND BEFORE TAKING TESTIMONY —

1. Notice — *a.* IN GENERAL. — See note 1.

Effect of Lack of Proper Notice. — See note 2.

Opportunity of Adverse Party to File Cross-interrogatories. — See note 3.

**323.** *c.* CONTENTS OF NOTICE — Name of Magistrate or Commissioner. — See note 3.

The Names of the Witnesses. — See note 4.

**324.** Time of Taking Testimony. — See note 4.

**Named.** — *Thalman v. Importers, etc., Nat. Bank*, 74 N. Y. App. Div. 629; *Stewart v. Russell*, 66 N. Y. App. Div. 542; *Matter of Anderson*, 84 N. Y. App. Div. 268. See also *Lazarus v. Schroder*, 49 N. Y. App. Div. 393.

In *New York* an open commission to take depositions out of the state will not be granted except for the strongest and most convincing reasons. *Predigested Food Co. v. Scott*, 28 N. Y. App. Div. 59.

**Discretionary with Court — No Review on Appeal.** — *Burnell v. Coles*, (Supm. Ct. App. T.) 23 Misc. (N. Y.) 615.

In a *Breach of Promise Suit* an open commission has been held to be proper. *Burnell v. Coles*, (N. Y. City Ct. Gen. T.) 25 Misc. (N. Y.) 409.

**320.** 3. How Commission May Be Waived. — See *Zych v. American Car, etc., Co.*, 127 Fed. Rep. 723.

Where There Is No Agreement to Waive a commission, a deposition taken on interrogatories executed without the issuance of a commission may, in *Georgia*, be excluded from evidence. *Merchants Nat. Bank v. Vandiver*, 108 Ga. 768.

**321.** 2. Application Must Show Names of Witnesses and Subject-matter and Materiality of Testimony. — *Lazarus v. Schroeder*, 49 N. Y. App. Div. 393.

**Allegation that Testimony Will Be Read.** — It is not necessary to make the express allegation in the application that the testimony will be read on the trial. It is sufficient if such inference is necessarily drawn from facts alleged and the statements made. *Jacobs v. Mexican Sugar Refining Co.*, (Supm. Ct. Spec. T.) 45 Misc. (N. Y.) 56.

**Laches of Applicant.** — See *Coombs v. Bodkin*, 81 Minn. 245.

**3. Seal of the Court.** — *Matter of Garvey*, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 353.

**Affixing the Seal Nunc pro Tunc is error.** The *Oriental v. Barclay*, 16 Tex. Civ. App. 193.

**No Seal Is Required by the North Carolina Statute** when the commission is within the county. *McArter v. Rhea*, 122 N. Car. 614.

**322.** 1. General Rule as to Notice. — The *Westminster*, 96 Fed. Rep. 766; *Wilkinson v. Wilkinson*, 133 Ala. 381; *Dunbar v. De Groff*, 1 Alaska 25; *Vaught v. Murray*, (Ky. 1903) 71 S. W. Rep. 924; *Wheeler v. Burckhardt*, 34 Oregon 507; *Thomson v. Hubbard*, 22 Tex. Civ. App. 101.

**General Notice by Commissioner.** — Where a commissioner to whom a cause has been re-

ferred, by interlocutory decree, in his regular proceedings to report matters so referred, takes the depositions of witnesses, his general notice of such proceedings is sufficient, without a special notice from him or the adverse party that such depositions will be taken. *Geiser Mfg. Co. v. Chewing*, 52 W. Va. 523.

**2. Where Proper Notice Not Given.** — *Green v. Compagnia Generale Italiana*, 82 Fed. Rep. 490, *affirmed* (C. C. A.) 102 Fed. Rep. 650; *Wilkinson v. Wilkinson*, 133 Ala. 381; *Indiana Baptist Pub. Co. v. Ayer*, 34 Ind. App. 284; *Black v. Marsh*, 31 Ind. App. 53; *Kentucky Union Co. v. Lovely*, 110 Ky. 295; *Front Rank Steel Range Co. v. Jeffers*, 79 Mo. App. 174; *Gilbough v. Stahl Bldg. Co.*, 16 Tex. Civ. App. 448; *Thomson v. Hubbard*, 22 Tex. Civ. App. 101. See also *Thayer Cent. Bank v. Thayer*, 184 Mo. 61.

**Ex Parte Deposition Inadmissible.** — *Ft. Worth Live-Stock Commission Co. v. Hitson*, (Tex. Civ. App. 1898) 46 S. W. Rep. 915.

**Notice to Defendant Affected.** — Where there are several defendants, and a deposition affects only one of them, notice to that one alone is sufficient. *Louisville Rock Co. v. Cain*, (Ky. 1904) 82 S. W. Rep. 619.

**Claim Against Estate.** — In taking a deposition in support of a claim filed against an estate, it is not necessary to notify every person who has an ultimate interest in the distribution of the property. It is sufficient to notify the executor and any other person who may have appeared to resist the claim. *Deuterman v. Ruppel*, 103 Ill. App. 106, *affirmed* 200 Ill. 199.

**3. Opportunity to File Cross-interrogatories.** — *Moore v. Heineke*, 119 Ala. 627. See also *Thomson v. Hubbard*, 22 Tex. Civ. App. 101.

**323.** 3. Name of Magistrate or Commissioner. — *Wheeler v. Burckhardt*, 34 Oregon 507; *Chase v. Watson*, 75 Vt. 385.

**4. Names of Witnesses.** — *Wheeler v. Burckhardt*, 34 Oregon 507. See also *Burnell v. Coles*, (Supm. Ct. App. T.) 26 Misc. (N. Y.) 810. And see *infra* this title, **343.** 2.

**A Misnomer is immaterial** if not misleading. *Galveston, etc., R. Co. v. Morris*, 94 Tex. 505. But where the depositions of *J. T. Longley*, *Jonathan S. Potter*, *S. Orren Tyrrell*, and *A. H. Berlin* were taken under notice to take those of *J. T. Langley*, *John Potter*, *Ode Terrell*, and *G. Berlin*, the variance was held to be fatal. *Harlan v. Richmond*, 108 Iowa 161.

**324.** 4. Time of Taking Testimony Must Be Stated. — *Wilkinson v. Wilkinson*, 133 Ala. 381; *Thibodeaux v. Thibodeaux*, 112 La. 906; *Wheeler v. Burckhardt*, 34 Oregon 507.



**325.** Place of Taking Testimony. — See note 1.

**326.** *d.* LENGTH OF NOTICE. — See notes 1, 2.

Allowance for Travel. — See note 3.

**327.** *f.* TO WHOM GIVEN — SERVICE — Attorney. — See note 3.

**329.** By Whom Service to Be Made. — See note 2.

**330.** *g.* WAIVER OF NOTICE OR OF DEFECTS THEREIN. — See notes 1, 2, 3, 4.

2. Attendance of Witnesses. — See note 5.

**331.** 3. Swearing the Witnesses. — See notes 1, 2.

**332.** X. TAKING TESTIMONY — 1. By What Law Governed. — See note 1.

**333.** 3. Direct Examination. — See note 1.

4. Cross-examination. — See note 2.

**325.** 1. Place Should Be Specified. — *Wilkinson v. Wilkinson*, 133 Ala. 381; *Indiana Baptist Pub. Co. v. Ayer*, 34 Ind. App. 284; *Thibodeaux v. Thibodeaux*, 112 La. 906; *Wheeler v. Burckhardt*, 34 Oregon 507.

**326.** 1. Length of Notice. — *Swink v. Anthony*, 107 Mo. App. 601.

The Law of the State Where the Action Is Pending governs the length of notice required. *In re Wogan*, 103 Mo. App. 146.

New Jersey Rule — Four Days. — *Stokes v. Hardy*, (N. J. 1904) 58 Atl. Rep. 650.

In Oregon the notice must be three days, unless the court or judge by order prescribes a shorter time. *Wheeler v. Burckhardt*, 34 Oregon 507.

South Carolina Statute — "Not Less than Ten Days." — *Williams v. Halford*, 67 S. Car. 296. But see *Williams v. Halford*, 64 S. Car. 396.

2. Reasonableness Depends upon Circumstances of Each Case. — *Drosowski v. Supreme Council*, etc., 114 Mich. 178; *Payne v. Bell*, 98 Va. 294.

"The Chief Features to be considered in determining whether a certain notice is or is not reasonable are distance, number of witnesses, and facility of communication, and to obtain proper representation." *American Exch. Nat. Bank v. Spokane Falls First Nat. Bank*, (C. C. A.) 82 Fed. Rep. 961.

3. Allowance for Travel. — *American Exch. Nat. Bank v. Spokane Falls First Nat. Bank*, (C. C. A.) 82 Fed. Rep. 961; *In re Wogan*, 103 Mo. App. 146; *Swink v. Anthony*, 107 Mo. App. 601.

Time Fixed by Statute in Virginia. — *Payne v. Bell*, 98 Va. 294.

**327.** 3. Attorney of Record. — *U. S. Life Ins. Co. v. Ross*, (C. C. A.) 102 Fed. Rep. 722; *Railey v. Railey*, (Ky. 1902) 66 S. W. Rep. 414; *Diedrich v. Diedrich*, (Neb. 1903) 94 N. W. Rep. 536. See also *The Westminster*, 96 Fed. Rep. 766. Compare *McClatchy v. McClatchy*, 10 Ohio Cir. Dec. 262, where the notice was held to be valid though a person unknown to the record accepted service.

**329.** 2. By Whom Service to Be Made. — Under the *Massachusetts* statute an officer qualified to serve civil process or a disinterested person may serve the notice. *O'Connell v. Dow*, 182 Mass. 541.

**330.** 1. Waiver. — *Bird v. Halsy*, 87 Fed. Rep. 671; *Clogg v. McDaniel*, 89 Md. 416. See also *Ex p. Kindt*, 32 Oregon 474.

Filing Interplea Is Waiver Where Depositions on File. — *Miller v. Campbell Commission Co.*, 13 Okla. 75.

Waiver of Notice Not Binding on Subsequent Trial of Same Case. — *Armeny v. Madson*, etc., Co., 111 Ill. App. 621.

2. Appearance as Waiver. — *Bird v. Halsy*, 87 Fed. Rep. 671; *Erwin v. Bailey*, 123 N. Car. 628; *Willeford v. Bailey*, 132 N. Car. 402; *Babcock v. Ormsby*, (S. Dak. 1904) 100 N. W. Rep. 759; *Re Turner*, 71 Vt. 382.

Formal Defects in the notice are waived by appearance. *McArter v. Rhea*, 122 N. Car. 614.

3. Cross-examination as Waiver. — *Erwin v. Bailey*, 123 N. Car. 628; *Willeford v. Bailey*, 132 N. Car. 402; *Babcock v. Ormsby*, (S. Dak. 1904) 100 N. W. Rep. 759. See also *Tinkham v. Hallam*, 106 Ill. App. 144.

4. When Objection to Be Made. — *Bird v. Halsy*, 87 Fed. Rep. 671; *Missouri*, etc., R. Co. v. Wilder, 3 Indian Ter. 85; *Ostenson v. Severnson*, 126 Iowa 197; *Hoyberg v. Henske*, 153 Mo. 63; *Savage v. Gaut*, (Tenn. Ch. 1900) 57 S. W. Rep. 170.

Time of Objection Prescribed by Statute. — See *Record Pub. Co. v. Merwin*, 115 Mich. 10; *Simonds v. Cash*, (Mich. 1904) 99 N. W. Rep. 754.

5. Attendance of Witnesses. — *Burns v. Superior Ct.*, 140 Cal. 1; *Crocker v. Conrey*, 140 Cal. 213.

Nonresident — Attendance Not Compelled by Attachment. — *State v. Kennan*, 33 Wash. 247.

**331.** 1. Witnesses to Be Sworn. — *Payne v. Long*, 121 Ala. 385, holding that where no oath was administered the deposition is inadmissible.

2. Additional Requirements by Parties Unenforceable. — *Knapp v. American Hand-Sewed Shoe Co.*, 63 Kan. 698.

**332.** 1. Mode of Taking Testimony — By What Law Governed. — *Midland Steel Co. v. Citizens' Nat. Bank*, 34 Ind. App. 107; *In re Wogan*, 103 Mo. App. 146.

Federal Courts Following State Practice. — *International Tooth Crown Co. v. Carter*, 112 Fed. Rep. 396.

Depositions in a Case Pending on Appeal from a justice's court to a County Court, in *Colorado*, are to be taken in the manner provided for depositions in cases brought originally in the County Court. *Wilson v. Welch*, 12 Colo. App. 185.

**333.** 1. Leading Questions — Striking Out of Answer Discretionary with Trial Judge. — *State Bank v. Carr*, 130 N. Car. 479.

2. Opportunity for Cross-examination. — *Wilkinson v. Wilkinson*, 133 Ala. 381; *Payne v. Long*, 121 Ala. 385; *Wolters v. Rossi*, (Cal. 1899) 57 Pac. Rep. 73; *Bonnie v. Perry*, (Ky. 1904) 78

**334.** See note 1.

5. Incomplete Depositions. — See note 2.

6. Excluding Testimony. — See note 4.

**335.** See note 1.

**336.** 7. Writing Down Answers. — See note 1.

8. Signature of Witness. — See notes 2, 3.

**337.** See note 1.

9. Exhibits. — See note 2.

S. W. Rep. 208; *Ewell v. Tye*, (Ky. 1903) 76 S. W. Rep. 875; *Alexander v. Edgerly*, 92 Minn. 263; *Bates v. Bates*, 94 Mo. App. 70; *Thomson v. Hubbard*, 22 Tex. Civ. App. 101. See also *Rex v. Laurin*, 6 Can. Crim. Cas. (Quebec) 135; *Diedrich v. Diedrich*, (Neb. 1903) 94 N. W. Rep. 536.

**Unreasonable Interference by the Commissioner** will cause the deposition to be suppressed. *Hacker v. U. S.*, 37 Ct. Cl. 86.

**Obnoxious Cross-examination Disallowed.** — See *Treadwell v. Greene*, 89 N. Y. App. Div. 60.

**Exclusion of Cross-examination until Direct Examination Read.** — See *Von Tobel v. Stetson*, etc., *Mill Co.*, 32 Wash. 683.

**Application for Cross-examination Must Be Duly Made.** — *Kelly v. Moore*, 22 App. Cas. (D. C.) 9, *affirmed* 196 U. S. 38.

**No Appearance After Notice — Witness Not Required to Appear for Cross-examination.** — *Slocum v. Brown*, 105 Iowa 209.

**Cross-examination Refused — New Commission Issued.** — *Zink v. Wells*, 72 Ill. App. 605.

**Oral Cross-examination.** — Where the interrogatories filed are so numerous and cover so many transactions that it would be difficult to frame cross-interrogatories properly to develop the answers, leave may be granted to attend the execution of the commission and cross-examine orally. *Parsons v. Middleton*, 9 Pa. Dist. 53.

**334. 1. Waiver.** — *Griffith v. McCandless*, 9 Kan. App. 794; *Union Iron*, etc., *Co. v. Sonnenfeld*, 113 La. 436.

**2. Incomplete Depositions — When Inadmissible** — See *Thibault v. Poulin*, 22 Quebec Super Ct. 371.

**4. Under the Texas Statute** (Rev. Stat. 1895, art. 2296) the witness may state any facts "connected with the cause and pertinent to the issue to be tried," and although an answer may not be responsive to the question, if it is otherwise admissible, it will not be stricken out. *Heintz v. O'Donnell*, 17 Tex. Civ. App. 21.

**335. 1. Fayerweather v. Ritch, 89 Fed. Rep. 529; *Hetzel v. Easterly*, 96 N. Y. App. Div. 517; *Matter of Searls*, 22 N. Y. App. Div. 140, *reversed* 155 N. Y. 333. See also *Houston*, etc., *R. Co. v. Ritter*, 16 Tex. Civ. App. 482. *Compare Matter of Randall*, 90 N. Y. App. Div. 192; *Sherman Oil*, etc., *Co. v. Dallas Oil*, etc., *Co.*, (Tex. Civ. App. 1903) 77 S. W. Rep. 961.**

**336. 1. Typewriting.** — Depositions typewritten from shorthand notes are admissible. *Wolfert v. Stiebel*, 6 Ohio Dec. 388. See also *Kyle v. Craig*, 125 Cal. 107; *Slocum v. Brown*, 105 Iowa 209.

**2. Deposition to Be Read Over to Witness — Signing.** — *Louisville*, etc., *R. Co. v. Carter*, (Ky. 1902) 66 S. W. Rep. 508; *Faith v. Ulster*, etc., *R. Co.*, 70 N. Y. App. Div. 303; *Zehner v.*

*Lehigh Coal*, etc., *Co.*, 187 Pa. St. 487, 67 Am. St. Rep. 586; *Shepherd v. Snodgrass*, 47 W. Va. 79. See also *Louisville Rock Co. v. Cain*, (Ky. 1904) 82 S. W. Rep. 619; *Zehner v. Lehigh Coal*, etc., *Co.*, 20 Pa. Co. Ct. 29, *reversed* 187 Pa. St. 487, 67 Am. St. Rep. 586; *Rex v. Laurin*, 5 Can. Crim. Cas. (Quebec) 545.

**Presumption Conclusive Where Witness Signed and Certificate Recites Reading.** — *Cheney v. Woodworth*, 13 Colo. App. 176.

**3. Signing Essential for Admissibility.** — *Louisville*, etc., *R. Co. v. Carter*, (Ky. 1902) 66 S. W. Rep. 508; *Louisville Rock Co. v. Cain*, (Ky. 1904) 82 S. W. Rep. 619; *Faith v. Ulster*, etc., *R. Co.*, 70 N. Y. App. Div. 303; *In re Hafer*, 12 Ohio Cir. Dec. 102, 21 Ohio Cir. Ct. 445; *Zehner v. Lehigh Coal*, etc., *Co.*, 187 Pa. St. 487, 67 Am. St. Rep. 586.

**Identification of the Signature of the witness** sufficiently appears by the certificate of the notary to the effect that he had sworn and examined the witness. *Sonneborn v. Southern R. Co.*, 65 S. Car. 502. See also *Harzburg v. Southern R. Co.*, 65 S. Car. 539.

**Signing Prevented by Injuries to Hands.** — See *Rex v. Holloway*, 65 J. P. 712.

**Sufficiency of Signature.** — Where the answers of the witness to direct and cross interrogatories were fastened together, it was held that his signature to the direct answers was intended for both. *Missouri*, etc., *R. Co. v. Denton*, (Tex. Civ. App. 1902) 68 S. W. Rep. 336.

**Where the Stenographer Was Sworn**, it was held under the *Iowa* statute that the witness need not sign a deposition taken in shorthand. *Slocum v. Brown*, 105 Iowa 209.

**Refusal to Sign for Inaccuracies.** — A witness has a right to refuse to sign his deposition until the transcript is corrected as indicated by him, and is in no contempt when he refuses to sign after the notary declines to make indicated corrections. *Matter of Hafer*, 65 Ohio St. 170.

**337. 1. Where Magistrate Certifies that Witness Was Sworn to Truth of Deposition.** — *Wallen v. Cummings*, 88 Ill. App. 45, *affirmed* 187 Ill. 451; *Shepherd v. Snodgrass*, 47 W. Va. 79.

**2. Admission of Exhibits Discretionary with Court.** — *Moffat-West Drug Co. v. Byrd*, 1 Indian Ter. 612.

**Exhibits May Be Identified Although Not Attached to Deposition.** — *Black v. Webber*, (Neb. 1901) 96 N. W. Rep. 606.

**Failure to Attach May Be Waived.** — *Simonds v. Cash*, (Mich. 1904) 99 N. W. Rep. 754.

**Reference to Exhibits Attached to a Deposition in Another Case sufficient.** *Pope v. Anthony*, (Tex. Civ. App. 1902) 68 S. W. Rep. 521.

**Withdrawal of Deposition for Attaching Exhibit.** — It is competent for a party, with the permission of the court, to withdraw a deposition and



**338.** See note 1.

Copies May Be Attached. — See note 2.

**339.** 10. Continuances. — See note 2.**340.** 11. Compelling Testimony. — See note 1.

Where Witness Does Not Answer Fully and Fairly. — See note 3.

**341.** See note 1.

Irresponsive Answers. — See note 3.

**342.** 12. Foreign Language — Interpreter. — See note 1.

attach an exhibit. But this should be done before trial, and is for the sound discretion of the court. *Crane Co. v. Neel*, 104 Mo. App. 177.

**338.** 1. *Bird v. Halsy*, 87 Fed. Rep. 671; *U. S. v. Fifty Boxes, etc.*, *Lace*, 92 Fed. Rep. 601; *Crane Co. v. Neel*, 104 Mo. App. 177.

**The Enclosing and Sealing** of exhibits, and their direction to the clerk, are mandatory under the *Missouri* statute. *Crane Co. v. Neel*, 104 Mo. App. 177.

**Purpose of Requirement.** — The requirement of a statute that all exhibits produced to the officer, or which shall be proved or referred to by any witness, shall be indorsed and sealed up with the deposition, etc., and directed to the clerk, is for the protection of the parties and to prevent fraud and substitution. *Metropolitan Nat. Bank v. Merchants Nat. Bank*, 77 Ill. App. 316, *affirmed* 182 Ill. 367, 74 Am. St. Rep. 180.

2. *George Adams, etc., Co. v. South Omaha Nat. Bank*, (C. C. A.) 123 Fed. Rep. 641; *Talladega First Nat. Bank v. Chafin*, 118 Ala. 246; *Metropolitan Nat. Bank v. Merchants Nat. Bank*, 77 Ill. App. 316, *affirmed* 182 Ill. 367, 74 Am. St. Rep. 180.

**339.** 2. Continuances — When Warranted. — *Bueb v. Dreesen*, 104 Ill. App. 409. See also *St. Louis, etc., R. Co. v. Skaggs*, (Tex. Civ. App. 1903) 74 S. W. Rep. 783.

**Notice of Time of Continuance Essential.** — *Bauer v. State*, 144 Cal. 740.

**Continuance for Insufficient Notice.** — Continuance is proper when the notice was too short to allow attendance. *In re Wogan*, 103 Mo. App. 146.

**Unwarranted Continuance.** — Where a commissioner on his own motion and without consent of defendant adjourns over a day on which he might have lawfully taken depositions, he is without authority to proceed with the further taking of the depositions. *Matter of Green*, 86 Mo. App. 216.

**Reliance on a Witness's Promise to Appear**, and failing to subpoena him, will not entitle a party as of right to a continuance if the witness does not appear. *Hughes v. Humphreys*, 102 Ill. App. 194.

**340.** 1. Witness Compellable to Testify. — *Crocker v. Conrey*, 140 Cal. 213; *Smith v. Ferrario*, 105 Ga. 51; *Chicago First Nat. Bank v. Graham*, 175 Mass. 179; *Lawson v. Rowley*, 185 Mass. 171; *Ex p. Gfeller*, 178 Mo. 248; *Olmsted v. Edson*, (Neb. 1904) 98 N. W. Rep. 415; *Bradley's Petition*, 71 N. H. 54; *Matter of Press Pub. Co.*, 67 N. J. L. 172; *Robinson v. McConnell*, 10 Ohio Cir. Dec. 797, 19 Ohio Cir. Ct. 716. See also *Bernard v. Guidry*, 109 La. 451.

**Question Must Be Material.** — *Ladenburg v. Pennsylvania R. Co.*, 66 N. J. L. 187.

**Not Compelled to Disclose Confidential Communications.** — *Matter of Shawmut Min. Co.*, 94 N. Y. App. Div. 156.

**No Contempt for Refusing to Answer Impertinent Questions.** — *People v. Leubischer*, (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 495, *affirmed* 34 N. Y. App. Div. 577, *appeal dismissed* 157 N. Y. 721.

**Federal Statute — Cause Must Be at Issue.** — *Flower v. MacGinniss*, (C. C. A.) 112 Fed. Rep. 377 (under Rev. Stat. U. S., § 863).

**Notary Without Authority — No Contempt.** — *Martin v. People*, 77 Ill. App. 311.

**Judicial Capacity of Notary.** — In *Missouri*, in taking depositions, a notary acts in a judicial capacity in determining whether or not a witness is privileged from answering certain questions. *Swink v. Anthony*, 96 Mo. App. 420.

**Testimony for Use Out of State.** — In *New York*, in the case of testimony taken within the state for use out of the state, the commissioner taking the testimony, and not a justice of the Supreme Court, is the proper officer to punish for failure to testify. *Matter of Searls*, 155 N. Y. 333, *reversing* 22 N. Y. App. Div. 140. See also *Matter of Canter*, 82 N. Y. App. Div. 103.

**3.** Excluding Deposition Where Witness Does Not Answer Fully and Fairly. — *Bird v. Halsy*, 87 Fed. Rep. 671.

**341.** 1. Discretion of Court. — *Galveston, etc., R. Co. v. Baumgarten*, 31 Tex. Civ. App. 253.

**Impertinent Questions.** — *People v. Leubischer*, (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 495, *affirmed* 34 N. Y. App. Div. 577, *appeal dismissed* 157 N. Y. 721; *Ex p. Turner*, 11 Ohio Dec. 251, 8 Ohio N. P. 241.

**Where the Matter Is Substantially Stated in Another Part of the Deposition** refusal to answer is not ground for exclusion. *Shannon v. Castner*, 21 Pa. Super. Ct. 294.

**Imperfect and Evasive Answers.** — See *De Walt v. Houston, etc.*, R. Co., 22 Tex. Civ. App. 403.

**3.** Irresponsive Answers. — *Southern Home Bldg., etc., Assoc. v. Riddle*, 129 Ala. 562; *Electric Lighting Co. v. Rust*, 131 Ala. 484; *Sherman Oil, etc., Co. v. Dallas Oil, etc., Co.*, (Tex. Civ. App. 1903) 77 S. W. Rep. 961. See also *Scott v. Sproul*, 2 N. Bruns. Eq. Rep. 81; *Waters Pierce Oil Co. v. Davis*, 24 Tex. Civ. App. 508; *Garner v. Risinger*, (Tex. Civ. App. 1904) 81 S. W. Rep. 343.

**Irrelevant and Immaterial Answers** may be stricken out. *Missouri, etc., R. Co. v. Melugin*, (Tex. Civ. App. 1901) 63 S. W. Rep. 338.

**An Irresponsive Answer Responsive to a Subsequent Interrogatory** is admissible. *Houston, etc., Cent. R. Co. v. Bell*, (Tex. Civ. App. 1903) 73 S. W. Rep. 56, *affirmed* 97 Tex. 71.

**342.** 1. Interpreter. — *Meyer v. Rothe*, 13



**343.** 13. Re-examination. — See note 1.

14. Identity of Witness. — See note 2.

**344.** 16. Time of Taking — Depositions After Time Limited. — See note 2.  
Term Time or Certain Number of Days Before. — See note 3.

**345.** Suit Pending — Defendant in Court — Issues Joined. — See notes 1, 2.  
Extension of Time. — See note 3.

**346.** XI. FORMALITIES AFTER TAKING TESTIMONY — 1. Certificate — What the Certificate Should Show. — See note 2.

App. Cas. (D. C.) 97. See also *People v. Lewandowski*, 143 Cal. 574.

**343.** 1. Discretion of Trial Judge. — *O'Callaghan v. O'Brien*, 116 Fed. Rep. 934, reversed (C. C. A.) 125 Fed. Rep. 657; *Leonard v. St. John*, 101 Va. 752. See also *Louisville Rock Co. v. Cain*, (Ky. 1904) 82 S. W. Rep. 619.

Admission of Second Deposition Discretionary with Court. — *Fredonia Nat. Bank v. Tommei*, 131 Mich. 674.

Retaking Allowed to Prevent Injustice from Misunderstanding. — *Young v. Young*, (Tenn. Ch. 1900) 64 S. W. Rep. 319.

Leave of Court. — In *Nebraska* there is no statutory provision which requires leave of court to entitle a party to take a second deposition of the same witness for use in the same case. *Peycke v. Shinn*, (Neb. 1903) 94 N. W. Rep. 135.

But it is a general rule that a deposition once taken cannot be retaken without leave of the court, which will always be granted whenever justice seems to require it. And when a deposition not excepted to has been retaken without leave of the court, it may or may not be read, at the discretion of the court. *McKell v. Collins Colliery Co.*, 46 W. Va. 625.

Grounds for Re-examination. — "To permit a party to take and retake a deposition, particularly that of his adversary, without showing that something had been unavoidably overlooked in the former deposition, would open the door to a great abuse and should not be allowed in practice." *Matter of Hafer*, 65 Ohio St. 172.

Admissibility of Copy of First Deposition. — A witness on re-examination may read over a copy of his prior deposition and subscribe his name thereto as and for his deposition. *Samuel v. Hostetter Co.*, (C. C. A.) 118 Fed. Rep. 257.

**2. Identity of Witness.** — *Texas*, etc., R. Co. v. Walker, 25 Tex. Civ. App. 216; *Galveston*, etc., R. Co. v. Morris, (Tex. Civ. App. 1901) 60 S. W. Rep. 813; *Galveston*, etc., R. Co. v. Sanchez, (Tex. Civ. App. 1901) 65 S. W. Rep. 893. See also *supra*, this title, **323**, 4, **336**, 3.

Identification Made by Reference to Commission and Certificate. — See *Gulf*, etc., R. Co. v. Lyman, 27 Tex. Civ. App. 22.

**344.** 2. Where Taken After Expiration of Time Limited. — *Emerson Co. v. Nimocks*, 88 Fed. Rep. 280.

Consent of Parties. — See *Sharpless v. Warren*, (Tenn. Ch. 1899) 58 S. W. Rep. 407.

**3. Taken During Term at Which Cause Is Pending.** — See *Donovan v. Hibbler*, (Neb. 1902) 92 N. W. Rep. 637.

**345.** 1. Suit Pending and Defendant in Court. — *Henning v. Boyle*, 112 Fed. Rep. 307; *North American Transp.*, etc., Co. v. Howells, (C. C.

A.) 121 Fed. Rep. 694; *White v. White*, 22 R. I. 602.

After Service of Summons depositions may be taken. *In re Robinson*, 7 Ohio Dec. 763, 7 Ohio N. P. 105; *In re Rauh*, 65 Ohio St. 128. See also *Jacobs v. Mexican Sugar Refining Co.*, (Supm. Ct. Spec. T.) 45 Misc. (N. Y.) 56.

Waiver in One Suit Does Not Extend to Subsequent Suit. — *Reed v. Goold*, 102 Va. 37.

Depositions by Person Not a Party. — In *Riviere v. Wilkens*, 31 Tex. Civ. App. 454, depositions taken by a person before he became a party to the suit were suppressed, it also appearing that there were nonresident defendants, who had been served by publication, and who had not answered in person or by an attorney of their own selection.

**2. Cause Must Be at Issue.** — *Stevens v. Missouri*, etc., R. Co., 104 Fed. Rep. 934; *Flower v. MacGinniss*, (C. C. A.) 112 Fed. Rep. 377; *Henderson v. Hall*, 134 Ala. 455.

Testimony under Commission — Case Need Not Be at Issue. — *Union Iron*, etc., Co. v. Sonnefeld, 113 La. 436.

**3. Extending Time for Taking Depositions.** — Compare *Giraud v. Montreal*, 3 Quebec Pr. 160.

**346.** 2. What Certificate Should State — Effect as Evidence. — *American Exch. Nat. Bank v. Spokane Falls First Nat. Bank*, (C. C. A.) 82 Fed. Rep. 961; *U. S. v. Fifty Boxes*, etc., *Lace*, 92 Fed. Rep. 601; *The Saranac*, 132 Fed. Rep. 936; *Dunbar v. De Groff*, 1 Alaska 25; *Wise v. Collins*, 121 Cal. 147; *Clogg v. McDaniel*, 89 Md. 416; *Walley v. Gentry*, 68 Mo. App. 298; *Faith v. Ulster*, etc., R. Co., 70 N. Y. App. Div. 303; *Bobilya v. Bruddy*, 68 Ohio St. 373; *Minard v. Stillman*, 35 Oregon 259; *Riser v. Southern R. Co.*, 67 S. Car. 419; *Kinkade v. Howard*, (S. Dak. 1904) 99 N. W. Rep. 91; *Barber v. Geer*, 26 Tex. Civ. App. 89, 94 Tex. 581; *Texas*, etc., R. Co. v. Walker, 25 Tex. Civ. App. 216; *Shepherd v. Snodgrass*, 47 W. Va. 79. See also *Little Rock Grain Co. v. Brubaker*, 89 Mo. App. 1.

Recital of Appointment. — Where the notary's certificate recites that he is a notary public, indicates the date of expiration of his commission, and is authenticated by his seal, no further recital of his appointment is needed. *Yarnal v. Hupp*, (Neb. 1902) 90 N. W. Rep. 645.

Swearing of Witness. — It is no valid objection to the certificate of the officer that he did not certify that the witnesses were sworn as well after as before testifying. *Donovan v. Hibbler*, (Neb. 1902) 92 N. W. Rep. 637.

Certificate to Several Depositions. — Where one certificate to the depositions of several witnesses merely stated that they were "sworn and subscribed to," which would be true if only one witness had sworn and subscribed, it was

- 347.** 2. Caption — Reading Caption with Certificate. — See note 1.
- 348.** 3. Transmission — Prescribed Method to Be Followed. — See note 1.  
Retention by Magistrate until Deposited in Court or until Sealed. — See note 2.
- Delivery by Commissioner into Court. — See note 4.
- 349.** Receipt. — See note 1.  
Substantial Compliance with the Statute. — See note 2.
4. Filing — Deposition to Be Filed Within Certain Time. — See note 3.
- 350.** See note 1.  
Not Marked as "Filed." — See note 2.
5. Amendment — Commissioner's Return. — See note 3.
- 351.** 6. Lost Deposition — Copy Admissible. — See note 4.

held to be fatally defective. *Missouri, etc., R. Co. v. Hennesey*, 20 Tex. Civ. App. 316.

**Reading Answers to Witness.** — In general, the certificate must show that the answers were read over to the witness. *Louisville Rock Co. v. Cain*, (Ky. 1904) 82 S. W. Rep. 619.

But the requirement of Civ. Code Ga., § 2032, that the certificate shall state that the deposition when completed was read over to the witness and corrected by him if he so desired, applies only to depositions taken in the state. *St. Vincent's Inst. v. Davis*, 129 Cal. 20.

**Seal of Notary to Certificate Not Essential.** — *Brown v. Ellis*, 103 Fed. Rep. 834. See also *Louisville, etc., R. Co. v. Heilprin*, 95 Ill. App. 402; *Wallingford v. Western Union Tel. Co.*, 60 S. Car. 201.

**The Want of a Jurat** to depositions is a fatal omission. *Zehner v. Lehigh Coal, etc., Co.*, 20 Pa. Co. Ct. 29, reversed 187 Pa. St. 487, 67 Am. St. Rep. 586.

**Certificate Not Conclusive of Facts Stated.** — *O'Connell v. Dow*, 182 Mass. 541.

**Certificate Raises Presumption of Regularity.** — *Cheney v. Woodworth*, 13 Colo. App. 176.

**Failure to Indorse Names of Parties on Depositions Immaterial.** — *Indiana, etc., R. Co. v. Wilson*, 77 Ill. App. 603.

**347. 1. Reading Caption with Certificate to Show Compliance with Statute.** — *Missouri, etc., R. Co. v. Denton*, (Tex. Civ. App. 1902) 68 S. W. Rep. 336; *Barber v. Geer*, 26 Tex. Civ. App. 89. See also *Wallingford v. Western Union Tel. Co.*, 60 S. Car. 201.

**Identity of Witnesses** may be shown by reference to the commission and certificate. *Gulf, etc., R. Co. v. Lyman*, 27 Tex. Civ. App. 22.

**348. 1. Transmission of Depositions.** — *The Saranac*, 132 Fed. Rep. 936; *Dunbar v. De Groff*, 1 Alaska 25. See also *U. S. v. Fifty Boxes, etc.*, *Lace*, 92 Fed. Rep. 601; *Thomas v. Nebraska Moline Plow Co.*, 56 Neb. 383.

**Immediate Transmission Not Required.** — *Ukiah Bank v. Mohr*, 130 Cal. 268.

**2. To Be Retained by Magistrate.** — *Louisville, etc., R. Co. v. Heilprin*, 95 Ill. App. 402.

**4. Delivery into Court by Commissioner.** — See *The Saranac*, 132 Fed. Rep. 936.

**349. 1. Opening by Clerk Without Order of Court.** — Where it does not appear that any harm was done by the thoughtless act of a clerk in opening a deposition without a special order of court, the deposition will not be suppressed. *Hughes v. Humphreys*, 102 Ill. App. 194.

**Package in Bad Order.** — Although the package

containing the depositions arrives in bad order, if all the legal requisites have been complied with, and the depositions themselves are neither separated nor mutilated, it is not proper to suppress them. *Commercial Nat. Bank v. Atkinson*, 62 Kan. 775.

**2. Substantial Compliance Sufficient.** — *Keys v. Flemister*, 111 Ga. 874; *Standard Oil Co. v. Doyle*, (Ky. 1904) 82 S. W. Rep. 271.

**3. Provisions as to Filing.** — *Louisville, etc., R. Co. v. Heilprin*, 95 Ill. App. 402; *Kentucky Union Co. v. Lovely*, 110 Ky. 295; *Central Bank v. Thayer*, 184 Mo. 61; *Thomas v. Nebraska Moline Plow Co.*, 56 Neb. 383; *Faith v. Ulster, etc.*, *R. Co.*, 70 N. Y. App. Div. 303; *Herman v. Schlesinger*, 114 Wis. 382, 91 Am. St. Rep. 922. See also *McCormick Harvesting Mach. Co. v. Laster*, 81 Ill. App. 316; *Equitable Loan, etc., Co. v. Smith*, (Ky. 1901) 65 S. W. Rep. 609; *Central Bank v. Thayer*, 184 Mo. 61.

**Court May Order Filing.** — *Carr v. Adams*, (N. H. 1899) 45 Atl. Rep. 1084.

**The Kansas Statute**, Civ. Code Kan., § 361, provides that depositions intended to be read in evidence must be filed at least one day before the day of trial, but this does not apply to mere hearings on motions, where they are treated as affidavits. *Santa Fe Bank v. Haskell County Bank*, 59 Kan. 354.

**350. 1. Rule as to Filing Not Always Strictly Enforced.** — See *Sharpless v. Warren*, (Tenn. Ch. 1899) 58 S. W. 407.

**In Texas** there is no rule requiring a party or his attorney to file depositions before trial. *Gulf, etc., R. Co. v. Bell*, 24 Tex. Civ. App. 579.

**If Failure to File Is Due to Inadvertence** an attorney should be allowed to file *nunc pro tunc* on showing payment of fees, especially where no injury to the other party is shown. *Israel v. Israel*, 46 N. Y. App. Div. 89.

**Depositions Withdrawn — Refiling.** — In *Nebraska*, where depositions have been withdrawn from a case, to entitle them to be read on the trial they must be refiled in accordance with the provisions of Code Civ. Pro. Neb., § 387. *Peycke v. Shinn*, (Neb. 1903) 94 N. W. Rep. 135.

**2. Depositions Not Entered or Marked as "Filed."** — *Fire Assoc. v. Masterson*, (Tex. Civ. App. 1904) 83 S. W. Rep. 49.

**3. Amendment of Commissioner's Return.** — *Florence Oil, etc., Co. v. Reeves*, 13 Colo. App. 95.

**351. 4. Where Deposition Lost — Copy.** — *Gilmore v. Butts*, 61 Kan. 315, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 351.



**352. XII. ADMISSIBILITY IN EVIDENCE — 1. In General — Irregularities —**

**Waiver.** — See note 1.

**Discretion of Court.** — See note 2.

**Objections to Be Specified.** — See note 5.

**352. 1. Irregularities — Objections — Waiver** — *United States*. — *Bird v. Halsy*, 87 Fed. Rep. 671; *Rahtjen's American Composition v. Holzappel's Compositions Co.*, 97 Fed. Rep. 949; *Brown v. Ellis*, 103 Fed. Rep. 834; *Samuel v. Hostetter Co.*, (C. C. A.) 118 Fed. Rep. 257.

*Alabama*. — *Sowell v. Brewton Bank*, 119 Ala. 92; *Electric Lighting Co. v. Rust*, 131 Ala. 484.

*California*. — *Kyle v. Craig*, 125 Cal. 107; *People v. Lewandowski*, 143 Cal. 574.

*Colorado*. — *Florence Oil, etc., Co. v. Reeves*, 13 Colo. App. 95.

*District of Columbia*. — *Meyer v. Rothe*, 13 App. Cas. (D. C.) 97.

*Illinois*. — *Illinois Cent. R. Co. v. Foulks*, 191 Ill. 57; *Catlin v. Traders Ins. Co.*, 83 Ill. App. 40; *C. H. Albers Commission Co. v. Sessel*, 87 Ill. App. 378, affirmed 193 Ill. 153; *Hughes v. Humphreys*, 102 Ill. App. 194; *Pittsburgh, etc., R. Co. v. Story*, 104 Ill. App. 132.

*Indian Territory*. — *Missouri, etc., R. Co. v. Wilder*, 3 Indian Ter. 85; *Missouri, etc., R. Co. v. Elliott*, 2 Indian Ter. 407.

*Iowa*. — *Matthews v. J. H. Luers Drug Co.*, 110 Iowa 231; *Cathcart v. Rogers*, 115 Iowa 30; *Ostenson v. Severson*, 126 Iowa 197.

*Kansas*. — *Clark v. Ellithorpe*, 7 Kan. App. 337.

*Kentucky*. — *Louisville, etc., R. Co. v. Shaw*, (Ky. 1899) 53 S. W. Rep. 1048; *Dean v. Phillips*, (Ky. 1901) 61 S. W. Rep. 10.

*Mississippi*. — *Owens v. Owens*, 84 Miss. 673.

*Missouri*. — *Hoyberg v. Henske*, 153 Mo. 63; *Little Rock Grain Co. v. Brubaker*, 89 Mo. App. 1.

*New York*. — *Wanamaker v. Megraw*, 48 N. Y. App. Div. 54, reversed 168 N. Y. 125.

*North Carolina*. — *Brittain v. Hitchcock*, 127 N. Car. 400; *Willeford v. Bailey*, 132 N. Car. 402; *Womack v. Gross*, 135 N. Car. 378.

*North Dakota*. — *Anderson v. Grand Forks First Nat. Bank*, 6 N. Dak. 497.

*Oregon*. — *Davis v. Emmons*, 32 Oregon 389; *Oliver v. Oregon Sugar Co.*, 45 Oregon 77.

*Pennsylvania*. — *Shannon v. Castner*, 21 Pa. Super. Ct. 294.

*Tennessee*. — *McKarsie v. Citizens Bldg., etc., Assoc.*, (Tenn. Ch. 1899) 53 S. W. Rep. 1007.

*Texas*. — *McMahan v. Veasey*, (Tex. Civ. App. 1900) 60 S. W. Rep. 333; *Taylor, etc., R. Co. v. Warner*, (Tex. Civ. App. 1900) 60 S. W. Rep. 442; *Gill v. First Nat. Bank*, (Tex. Civ. App. 1901) 61 S. W. Rep. 146; *McGrew v. Wilson*, (Tex. Civ. App. 1900) 57 S. W. Rep. 63; *Claffin v. Harrington*, 23 Tex. Civ. App. 345; *Caffey v. Cooksey*, 19 Tex. Civ. App. 145.

*Virginia*. — *Meyers v. Falk*, 99 Va. 385.

See also *Union Iron, etc., Co. v. Sonnefield*, 113 La. 436; *Stull v. Stull*, (Neb. 1901) 96 N. W. Rep. 196.

**Objections to Matters of Substance** may in many cases be made at the trial. *Moore v. Monroe Refrigerator Co.*, 128 Ala. 621; *Southern Home*

*Bldg., etc., Assoc. v. Riddle*, 129 Ala. 562; *Hennessy v. Metropolitan L. Ins. Co.*, 74 Conn. 699; *Love v. McElroy*, 106 Ill. App. 294. Thus it his testimony on the ground that he is incompetency of the witness, *C. H. Albers Commission Co. v. Sessel*, 193 Ill. 153; *Mason v. Willhite*, (Tenn. Ch. 1900) 61 S. W. Rep. 298; for the incompetency of the testimony, *Wanamaker v. Megraw*, 168 N. Y. 125 (under Code Civ. Pro. N. Y., § 911); and for the lack of authority of the justice, *Claverie v. Gory*, 4 N. W. Ter. 470, may be made for the first time at the trial.

**But Objections to Matters of Form** must be made before trial. *Hennessy v. Metropolitan L. Ins. Co.*, 74 Conn. 699; *Tri-City R. Co. v. Brennan*, 108 Ill. App. 471.

**The Nebraska Statute**, Code Civ. Pro. Neb. § 390, provides that no exception, other than for incompetency or irrelevancy, shall be required, unless made and filed before the commencement of the trial. *Woodard v. Cutter*, (Neb. 1901) 96 N. W. Rep. 54.

**Where the Notary Is Incompetent** cross-examination is no waiver of the irregularity. *Knickerbocker Ice Co. v. Gray*, (Ind. 1904) 72 N. E. Rep. 869.

**Incompetency of Witness — Cross-Examination.** — By cross-examining a witness who is objected to as incompetent, a party does not waive his objections, but may urge them at the trial. *Bentley v. Bentley*, (Neb. 1904) 101 N. W. Rep. 976; *Mason v. Willhite*, (Tenn. Ch. 1900) 61 S. W. Rep. 298.

**Reservation of Right to Object.** — "An objection to a deposition, on the ground that a deponent's statement therein is not legitimate evidence, ought generally to be made when the deposition is taken, but such objection may sometimes be made at the trial. The parties hereto having reserved the right to interpose objections at the trial for the reasons specified, the deposition, when produced, was open to any objection that might have been taken to the testimony of the deponent if he had been called as a witness." *Aldrich v. Columbia Southern R. Co.*, 39 Oregon 263.

**By Appearing at the Taking** of the deposition of an adverse witness, and not then objecting to his testimony on the ground that he is incompetent to testify, a party does not waive the right to make such objection at the trial of the case when the deposition is offered in evidence. *Griffith v. McCandless*, 9 Kan. App. 794.

**2. Discretion as to Depositions Taken After Party Closed Case.** — See *Davis v. Collins*, 69 S. Car. 460.

**5. Objections Must Be Specified.** — *Persons v. Beling*, 116 Fed. Rep. 877, affirmed (C. C. A.) 126 Fed. Rep. 449; *Clark v. Ellithorpe*, 7 Kan. App. 337; *Neosho Valley Invest. Co. v. Han-num*, 63 Kan. 621; *Louisville, etc., Packet Co. v. Bottorff*, (Ky. 1904) 77 S. W. Rep. 920; *Brewer v. Bowersox*, 92 Md. 567; *Neland v. Dealy*, 11 N. Dak. 529; *Wojciechowski v. John-kowski*, 16 Pa. Super. Ct. 444; *Riser v. Southern*



**352.** Suppressed Deposition. — See note 7.

**2.** Attendance of Witness Impossible — *a.* GENERAL RULE — Condition Must Be Fulfilled. — See note 10.

**353.** But This Rule Is Not Universal. — See note 1.

**355.** *c.* ILL HEALTH. — See note 1.

**356.** 3. Offered Against the Party Taking It. — See note 3.

**357.** Party Adopting Deposition Taken by Adverse Party. — See note 1.

R. Co., 67 S. Car. 419; Ward *v.* Cameron, 97 Tex. 466.

**352.** 7. Suppressed Deposition. — Long *v.* Fields, 31 Tex. Civ. App. 241; Joy *v.* Liverpool, etc., Ins. Co., 32 Tex. Civ. App. 433.

**10.** General Rule — Witness Must Be Beyond Reach of Process or Unable to Attend. — U. S. Life Ins. Co. *v.* Ross, (C. C. A.) 102 Fed. Rep. 722; Handy *v.* Smith, 77 Conn. 165; Sewell *v.* Purnell, 1 Marv. (Del.) 152; State *v.* Maddison, 50 La. Ann. 679; Green *v.* Middlesex Valley R. Co., 31 N. Y. App. Div. 412; Cunningham *v.* Cunningham, 121 N. Car. 413; Cunniss *v.* Reading School Dist., 25 Pa. Co. Ct. 17, affirmed 21 Pa. Super. Ct. 340; Hughes *v.* Chicago, etc., R. Co., 122 Wis. 258; Demers *v.* Mathieu, 14 Quebec Super. Ct. 249. See also Gilmore *v.* Butts, 61 Kan. 315; Mercantile Nat. Bank *v.* Sire, 100 N. Y. App. Div. 459; Matter of Fulton, 75 N. Y. App. Div. 623.

**Presence of Witness at Place of Trial Without Knowledge of Party.** — It is not reversible error for the court to refuse to strike out a deposition, admitted without objection, solely on the ground that the deponent had appeared in court during the trial and after its admission. Some reason must be given alleging surprise at the ability of the witness to attend, and showing that failure to object was due to misinformation or lack of knowledge as to ability of witness to appear and give oral evidence. Flannery *v.* Central Brewing Co., 70 N. J. L. 715.

**Witness in Court — Impeachment.** — Where a witness is known to be present in court his deposition can be used only for impeachment after he has testified. Texas, etc., R. Co. *v.* Watson, 112 Fed. Rep. 402, affirmed 190 U. S. 287.

**Where a Witness Is Unable to Talk and Physically Unable to Remain in Court,** his deposition is admissible. Willeford *v.* Bailey, 132 N. Car. 402.

**Where the Deponent Testified and Was Cross-examined,** error in previously admitting his deposition was held to be harmless. Missouri, etc., Co. *v.* St. Clair, 21 Tex. Civ. App. 345.

**Proof of Absence.** — Where from the deposition of a witness it appears that he is a non-resident of the county, it is unnecessary for the party offering the deposition in evidence to prove that such witness is not present in court or in the county. Chicago, etc., R. Co. *v.* Krayenbuhl, (Neb. 1904) 98 N. W. Rep. 44.

**Due Diligence in Finding the Witness** is a question for the trial court. People *v.* Lewandowski, 143 Cal. 574.

**Witness Called in Rebuttal — Deposition Not Stricken Out.** — Searle *v.* Lead, 10 S. Dak. 405.

**353.** 1. Rule in Some States — Deposition Admissible Though Deponent in Court. — Edmonson *v.* Kentucky Cent. R. Co., (Ky. 1898) 46 S. W. Rep. 679, reversed 105 Ky. 479; Louis-

ville *v.* Muldoon, (Ky. 1899) 49 S. W. Rep. 791; Louisville, etc., R. Co. *v.* Stenberger, (Ky. 1902) 69 S. W. Rep. 1094; Fire Assoc. *v.* Masterson, (Tex. Civ. App. 1904) 83 S. W. Rep. 49; San Antonio St. R. Co. *v.* Renken, 15 Tex. Civ. App. 229.

**Admission Discretionary with Court.** — Galveston, etc., R. Co. *v.* Burnett, (Tex. Civ. App. 1897) 42 S. W. Rep. 314.

**Where the Deponent Testifies at the Trial,** his deposition may be read in Texas to sustain him. Wilson *v.* Wilson, (Tex. Civ. App. 1904) 79 S. W. Rep. 839.

**355.** 1. Ill Health of Witness. — Styles *v.* Decatur, 131 Mich. 443; Taylor *v.* Taylor, (Mich. 1904) 101 N. W. Rep. 832; Kirton *v.* Bull, 168 Mo. 622; Taylor *v.* Mallory, 96 Va. 18.

**Ill Health of Husband of Witness No Excuse.** — Boise *v.* Atchison, etc., R. Co., 6 Okla. 243.

**Proof of Infirmary and Inability to Appear — Consent to Use of Typewritten Copy No Waiver of Proof.** — Carter *v.* Wakeman, 45 Oregon 427.

**356.** 3. Deposition Offered Against Party Taking It. — Arnold *v.* Garth, 106 Fed. Rep. 13, modified (C. C. A.) 115 Fed. Rep. 468; McCormick Harvesting Mach. Co. *v.* Laster, 81 Ill. App. 316; St. Bernard Coal Co. *v.* Southard, (Ky. 1903) 76 S. W. Rep. 167; Hamilton Brown Shoe Co. *v.* Milliken, 62 Neb. 116; Ulrich *v.* McConaughy, 63 Neb. 10; Wallace *v.* Leber, 69 N. J. L. 312; Providence Mach. Co. *v.* Browning, 70 S. Car. 148; Everett *v.* Kemp, (Tex. Civ. App. 1904) 80 S. W. Rep. 534; Kruger *v.* Spachek, 22 Tex. Civ. App. 307; Nashville First Nat. Bank *v.* Edwards, (Tex. Civ. App. 1904) 81 S. W. Rep. 541; Western Union Tel. Co. *v.* Lovely, 29 Tex. Civ. App. 584.

**May Be Offered by Either Party.** — Curtis *v.* Parker, 136 Ala. 217.

**Evidence of Party Offering** — "The mere taking of a deposition does not make it evidence for either party. Though it may be offered by either, when offered it is the evidence of the party offering it, regardless of at whose instance it was taken." Maldaner *v.* Smith, 102 Wis. 30.

**Deposition Supplemented by Oral Examination** — It is competent for a chancellor, in a proper case, where the deposition of a party has been taken, and the party taking it refuses to read it in the trial, to allow the other party to read it, and then supplement the examination by oral evidence of the witness. Continental Nat. Bank *v.* Nashville First Nat. Bank, 1 Tenn. Ch. App. 449.

**As to the North Dakota Statute** see Fargo First Nat. Bank *v.* Minneapolis, etc., Elevator Co., 11 N. Dak. 280.

**357.** 1. Reading Deposition Taken by Adverse Party — Adoption Thereof. — Western Union Tel. Co. *v.* Lovely, 29 Tex. Civ. App. 584; Von

**357.** 4. Taken in Another Suit Between the Same Parties — *a.* IN GENERAL. — See note 2.

**358.** See note 1.

**359.** 5. Taken Between Other Parties — *a.* IN ANOTHER SUIT. — See note 1.

**360.** *b.* IN THE SAME SUIT. — See note 1.

*c.* DEATH OF PARTY. — See note 2.

**361.** *d.* OFFERED TO CONTRADICT A WITNESS OR AS AN ADMISSION. — See note 2.

**362.** 6. Competency of the Witness — *b.* MODERN RULE AS TO INTEREST. — See note 2.

**363.** *c.* INTEREST ACQUIRED OR LOST AFTER TAKING AND BEFORE TRIAL. — See note 1.

7. Competency of the Testimony — Subject to the General Rules of Evidence. — See note 5.

*Tobel v. Stetson, etc., Mill Co., 32 Wash. 683.* See also *Cudlip v. New York Evening Journal Pub. Co., 180 N. Y. 85.* *Compare Horld v. Gulf, etc., R. Co., (Tex. Civ. App. 1903) 76 S. W. Rep. 227.*

**Original Party May Impeach.** — *McCormick Harvesting Mach. Co. v. Laster, 81 Ill. App. 316.*

**Party Taking Deposition Not Estopped by It.** — *Von Tobel v. Stetson, etc., Mill Co., 32 Wash. 683.*

**357. 2. Depositions Taken in Another Suit Between Same Parties.** — *Spann v. Torbert, 130 Ala. 541; Florence Oil, etc., Co. v. Reeves, 13 Colo. App. 95; Bates v. Bates, 94 Mo. App. 70; Heyworth v. Miller Grain, etc., Co., 174 Mo. 171; Mabe v. Mabe, 122 N. Car. 552; Oliver v. Columbia, etc., R. Co., 65 S. Car. 1; Providence Mach. Co. v. Browning, 70 S. Car. 148; St. Louis Southwestern R. Co. v. Hengst, (Tex. Civ. App. 1904) 81 S. W. Rep. 832; Miller v. Gillespie, 54 W. Va. 450.*

**Contra — Texas Statute.** — *People's Nat. Bank v. Mulkey, 94 Tex. 395; People's Nat. Bank v. Mulkey, (Tex. Civ. App. 1901) 61 S. W. Rep. 528.*

**The General Rule** is that the admissibility, on trial of a second action, of a deposition taken in a former one is made to turn upon the identity of the matters in issue, and the opportunity of the party against whom the deposition is offered to cross-examine the witness, rather than upon the perfect mutuality of the parties. *Watson v. St. Paul City R. Co., 76 Minn. 358.*

**Issues Must Be the Same.** — *Reed v. Gold, 102 Va. 37.*

**Admissible by Agreement.** — See *Parlin, etc., Co. v. Hutson, 198 Ill. 389; Acme Mfg. Co. v. Reed, 197 Pa. St. 359, 80 Am. St. Rep. 832.*

**Consolidation of Suits** does not render depositions taken in them inadmissible. *Wolters v. Rossi, 126 Cal. 644.*

**Effect of Amendment.** — A change in the names of the plaintiffs, by amendment, does not render inadmissible depositions theretofore admissible. *Williams v. Holt, 170 Mass. 351.* So the addition of new parties by amendment does not furnish ground for excluding depositions. See *Salmer v. Lathrop, 10 S. Dak. 216.* But depositions as to a matter not covered by the pleadings when taken cannot be read to support an amended bill afterwards filed, *Edgell v.*

*Smith, 50 W. Va. 349; or to support an answer afterwards filed setting up such matter, if objected to, Goldsmith v. Goldsmith, 46 W. Va. 426.*

**On Appeal** depositions in the trial court may be read. *In re Arrowsmith, 206 Ill. 352.*

**358. 1. Privies.** — *Bates v. Bates, 94 Mo. App. 70; St. Louis Southwestern R. Co. v. Hengst, (Tex. Civ. App. 1904) 81 S. W. Rep. 832; Cummings v. Moore, 27 Tex. Civ. App. 555; Miller v. Gillispie, 54 W. Va. 450.*

**359. 1. Between Other Parties in Another Suit.** — *Wolters v. Rossi, (Cal. 1899) 57 Pac. Rep. 73; Alexander v. Edgerly, 92 Minn. 263; Bates v. Bates, 94 Mo. App. 70; Central Bank v. Thayer, 184 Mo. 61.*

**Admissible by Agreement.** — See *Miller v. Gillispie, 54 W. Va. 450; Reg. v. St. Clair, 3 Can. Crim. Cas. (Ont.) 551.*

**360. 1. In Same Suit — No Notice and No Opportunity to Cross-examine.** — See *Smyser v. Franck, (Ky. 1898) 47 S. W. Rep. 1071*, holding that depositions are not admissible as against a defendant in a cross-petition who was not a party when they were taken.

**2. Death of Party — Statutes.** — *Smith v. Billings, 76 Ill. App. 454, affirmed 177 Ill. 446; Newman v. Blades, (Ky. 1900) 54 S. W. Rep. 849.*

**361. 2. Deposition Offered to Contradict a Witness or as an Admission.** — *Gubernator v. Rettalack, 86 Mo. App. 184; Rosenfeld v. Siegfried, 91 Mo. App. 169; Rex v. Laurin, 5 Can. Crim. Cas. (Quebec) 545.*

**362. 2. Waiver.** — By appearing at the taking of the deposition and not objecting to the competency of the witness, a party does not waive the right to make such objection at the trial, when the deposition is offered in evidence. *Griffith v. McCandless, 9 Kan. App. 794.* See also *In re Souldard, 141 Mo. 642.*

**363. 1. General Rule — Disqualification Relates to Time of Deposition.** — *Wells v. New England Mut. L. Ins. Co., 187 Pa. St. 166.*

**5. Competency — Illustrative Cases.** — *Norman Printers Supply Co. v. Ford, 77 Conn. 461; Matthews v. J. H. Luers Drug Co., 110 Iowa 231; Griffith v. McCandless, 9 Kan. App. 794; Bodley v. Finley, 111 Ky. 618; Bonnie v. Perry, (Ky. 1904) 78 S. W. Rep. 208; Drosdowski v. Supreme Council, etc., 114 Mich. 178; Gubernator v. Rettalack, 86 Mo. App. 184; Bates v.*

**364.** Where Part Inadmissible, Rest Not Necessarily Excluded. — See note 1.

**365.** 8. Offering Part of a Deposition. — See notes 1, 2.

**366.** DEPOT. — See note 1.

**367.** DEPRIVE. — See note 5.

Bates, 94 Mo. App. 70; Whitlatch v. Fidelity, etc., Co., 21 N. Y. App. Div. 124; Oliver v. Columbia, etc., R. Co., 65 S. Car. 1; Lang v. Ingalls Zinc Co., (Tenn. Ch. 1898) 49 S. W. Rep. 288; Mayton v. Sonnefield, (Tex. Civ. App. 1898) 48 S. W. Rep. 608; San Antonio, etc., R. Co. v. Lynch, (Tex. Civ. App. 1900) 55 S. W. Rep. 517; Taylor, etc., R. Co. v. Warner, (Tex. Civ. App. 1900) 60 S. W. Rep. 442; Wells-Fargo, etc., Express v. Waites, (Tex. Civ. App. 1900) 60 S. W. Rep. 582; International, etc., R. Co. v. Dalwigh, (Tex. Civ. App. 1898) 48 S. W. Rep. 527.

**Waiver by Filing Deposition.** — See *In re* Soulard, 141 Mo. 642.

**That a Statute Making the Testimony Incompetent**, passed subsequent to the taking, does not render the deposition incompetent after the deponent's death, see Wells v. New England Mut. L. Ins. Co., 187 Pa. St. 166.

**364. 1. Part Inadmissible — Unobjectionable Part Admitted.** — Sherman Oil, etc., Co. v. Dallas Oil, etc., Co., (Tex. Civ. App. 1903) 77 S. W. Rep. 961.

**365. 1. Offering Part of Deposition — Right of Adversary to Read Residue.** — Terre Haute Electric R. Co. v. Lauer, 21 Ind. App. 466. See also Little Rock Grain Co. v. Brubaker, 89 Mo. App. 1.

**Court May Order Whole to Be Read.** — Watson v. St. Paul City R. Co., 76 Minn. 358.

**Whole Offered at Instance of Court and Part Read — Whole Becomes Part of Record.** — Knauer v. McKoon, 19 Pa. Super. Ct. 539.

**An Incompetent Portion** cannot be read over objection. Kramer v. Kramer, 80 N. Y. App. Div. 20.

**Admissions of the Adverse Party** in a deposition may be read by the other party without his being compelled to read the whole deposition. Watson v. Winston, (Tex. Civ. App. 1897) 43 S. W. Rep. 852.

**Deposition as to Several Transactions.** — A part of a deposition may be introduced as to one transaction, to the exclusion of the rest touching other transactions, if all relating to such transaction is read. Mecartney v. Smith, 10 Kan. App. 580, 62 Pac. Rep. 540.

**2. Rule in Some Jurisdictions — All Must Be Read or None.** — Orland Bank v. Fennell, 133

Cal. 475; Walkley v. Clarke, 107 Iowa 451. See also Hamilton Brown Shoe Co. v. Milliken, 62 Neb. 116.

**Isolated Portions.** — A party to an action has no right to read excerpts or isolated portions of a deposition on the trial of an action. Gussner v. Hawk, (N. Dak. 1904) 101 N. W. Rep. 898.

**Adversary's Deposition — Excerpts.** — The right to introduce a deposition taken by an adversary does not extend to introducing mere excerpts in isolated parts, but the court may, in its discretion, require all to be read, or may permit parts relating to distinct transactions to be read; but in doing so the party should be required to read all the evidence which relates to such transactions. Fargo First Nat. Bank v. Minneapolis, etc., Elevator Co., 11 N. Dak. 280.

**366. 1.** Hill v. St. Louis Southwestern R. Co., (Tex. Civ. App. 1903) 75 S. W. Rep. 876. And see the title STATIONS (RAILROAD).

**Platform.** — Hill v. St. Louis Southwestern R. Co., (Tex. Civ. App. 1903) 75 S. W. Rep. 876.

**Term Implies Building.** — The term *depot* in a deed of a right of way in consideration of a *depot*, includes not only the idea of a stopping place but of a building for passengers and freight. Arkansas Cent. R. Co. v. Smith, 71 Ark. 189.

In Karnes v. Drake, 103 Ky. 134, the court said: "When we speak of a *depot* at a railroad we mean a building which is used for the accommodation and protection of railway passengers or freight."

Construing a Texas statute imposing on railroads the duty of keeping their *depots* or passenger houses lighted and warmed, the court said: "The places required to be lighted, warmed, and open are *depots* or passenger houses, and it is obvious that these do not include platforms or other places where passengers are expected to get on and off trains. The word *depot*, like 'passenger house,' as used in this statute, means some character of house or building that can be warmed and opened, as well as lighted." Gulf, etc., R. Co. v. Barnett, 10 Tex. Civ. App. 626.

**367. 5. Deprive — Eminent Domain.** — State v. Associated Press, 159 Mo. 410; Myer v. Adam, 63 N. Y. App. Div. 540.



# DEPUTY.

BY GEORGE G. ALBAN.

**369. I. DEFINITION.** — See note 1.

Distinguished from Assistant. — See note 3.

**II. WHETHER DEPUTY IS A PUBLIC OFFICER** — General Deputy. — See note 5.

**370. III. APPOINTMENT AND QUALIFICATION** — 1. What Duties May Be Deputed — Ministerial Duties. — See note 1.

**372. Statutes.** — See note 2.

2. Modes and Formalities — *a.* IN GENERAL. — See note 3.

**373. *b.* DEPUTATION BY PAROL — RATIFICATION — As Affecting Validity of Deputy's Acts in Reference to Third Persons** — General Deputy. — See note 2.

Special Deputy. — See note 4.

*c.* TAKING OATH OF OFFICE. — See note 5.

**374. 3. Competency of Deputy.** — See note 2.

**375. 4. By Whom Appointment May Be Made.** — See notes 2, 3.

**369. 1. Deputy Defined.** — *White v. Hill*, 125 N. Car. 200, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 369; Appointment of Deputy Secretary of Internal Affairs, 29 Pa. Co. Ct. 219, quoting 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 369; *Rowan v. Chenoweth*, 49 W. Va. 291, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 369.

**3. Deputy Distinguished from Assistant.** — *Butler v. Milwaukee*, 119 Wis. 529, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 369.

**5. General Deputy Not a Public Officer at Common Law.** — *Stephenson v. Salisbury*, 53 W. Va. 366, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 369.

**370. 1. Deputation of Ministerial Duties.** — *Tietjen v. Merchants' Nat. Bank*, 117 Ga. 503, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 370; *Taylor v. Canyon County*, 7 Idaho 177, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 370.

**Deputy Constable.** — A constable in the *Indian Territory* has no power to appoint a deputy. *Helms v. U. S.*, 2 Indian Ter. 505.

**Special Deputy.** — In *Texas*, a sheriff has power to appoint a special deputy, and one so appointed is at least a *de facto* officer, and his acts as such are valid. *Trammel v. Shelton*, 18 Tex. Civ. App. 366.

**372. 2. Under the laws of Idaho**, no county officers other than sheriff, auditor, recorder, and clerk of the District Court are allowed deputies. *Fremont County v. Brandon*, 6 Idaho 482.

**3. Failure to Follow the Statute** will not render the acts of the deputy void. He is nevertheless a *de facto* deputy. *Commercial Bank v. Sandford*, 103 Fed. Rep. 98; *Orchard v. Peake*, 69 Kan. 510 (which involved the violation of a directory provision of the statute); *Williamson v. Lake County*, 17 S. Dak. 353; *Broach v. Garth*, (Tex. Civ. App. 1899) 50 S. W. Rep. 594. But see *Bruce v. Endicott*, 16 Colo. App. 506.

The appointment of a deputy is valid, though it is signed by the sheriff as an individual and not as sheriff. *Guernsey v. Tuthill*, 12 S. Dak. 584.

**373. 2. Deputy Clerk of Court.** — *Abington v. Steinberg*, 86 Mo. App. 639.

**4. Indorsement of Appointment on Writ to Be Executed.** — In *Kansas* it is held that when a special deputy is appointed to serve a summons, his authority must be indorsed on the writ. *Baxter v. Yeagley*, 8 Kan. App. 657.

**5. Failure of a Deputy to Take and File the Oath** required by law does not render his acts as deputy invalid. *Stephens v. State*, 106 Ga. 116.

But where one appointed deputy sheriff refuses to take the oath of office, and there is no showing that he exercised the duties of the office, he is not even a *de facto* officer. *Brown v. State*, 43 Tex. Crim. 411.

**374. 2. Civil Service.** — A deputy sheriff comes within the exempt class, under the civil service laws of *New York*, and is not subject to competitive classification. *Blust v. Collier*, 62 N. Y. App. Div. 478.

**375. 2. Limitation on Power to Appoint.** — The statute in *Texas* allowing sheriffs to appoint three deputies only in one justice precinct, is directory, and its violation by the sheriff will not render invalid the act of an extra deputy appointed. *Trammel v. Shelton*, 18 Tex. Civ. App. 366.

Under the laws of *Illinois* a sheriff may enroll as many deputies as may, in his judgment, be required, and such deputies are liable to fine and imprisonment for a refusal to act when called upon. *Philips v. Christian County*, 87 Ill. App. 481.

**3. Statutory Requirement of Consent of Designated Board or Officers to Appointment.** — In *Montana* the power of the sheriff to appoint deputies is subject to the approval of the county commissioners. *Johb v. Meagher County*, 20 Mont. 424.

**Under the Constitution of Idaho.** — *Taylor v. Canyon County*, 6 Idaho 466, 7 Idaho 171.

**375.** 6. Appointment of Subdeputy. — See note 6.

**376.** 7. Sale of Deputation — Under Statute. — See note 5.

**377.** At Common Law. — See note 2.

**378.** See note 1.

**379.** IV. NATURE AND EXTENT OF AUTHORITY — 1. General Deputy. — See note 4.

**382.** V. TERMINATION OF AUTHORITY — 1. Expiration of Principal's Term. — See note 2.

2. Death of Principal. — See note 6.

**383.** 3. Removal from Office. — See note 1.

Agreement that Deputy Should Hold Office During Continuance of Term of Principal. — See note 2.

4. Acceptance of Incompatible Office. — See note 3.

VI. COMPENSATION — Statutory Allowance of Fees out of Public Treasury. — See note 5.

**375.** 6. Appointment of Special Deputy by Deputy. — *Gehrke v. Foreman*, 177 Ill. 618.

**376.** 5. American Decisions under Authority of English Statute Against Sale of Deputation. — *White v. Cook*, 51 W. Va. 206, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 376.

**377.** 2. Sale of Deputation Illegal at Common Law. — *Stephenson v. Salisbury*, 53 W. Va. 366, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 376.

**378.** 1. Where Principal Reserves a Portion of Profits from Deputation. — A contract that, in consideration of the appointment, the sheriff is to receive a portion of the fees of the deputy, is valid. *Stephenson v. Salisbury*, 53 W. Va. 366, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 376.

**379.** 4. Powers of General Deputy Commensurate with Those of Principal. — *Richardson v. Hahn*, 63 Neb. 294; *Young v. Wood*, 63 Neb. 291; *Union Trust Co. v. Davis*, 64 Neb. 340; *Canada v. Territory*, 12 Okla. 409.

Principal Disqualified. — In *Alabama*, where the sheriff who is living is disqualified, a deputy cannot act for him. *Lipscomb v. State*, 76 Miss. 223.

May Sell under Decree of Foreclosure. — A sale of real estate may be made, under a decree of foreclosure of a mortgage, by a deputy sheriff instead of the sheriff. *Bell v. Omaha Sav. Bank*, (Neb. 1901) 95 N. W. Rep. 486; *Post v. Smith*, (Neb. 1901) 95 N. W. Rep. 500.

Deputy Consul-General. — An acknowledgment of a mortgage taken by a deputy consul-general is valid. *Stewart v. Linton*, 204 Pa. St. 207.

Where Officer Pro Tem. Is Provided For in the case of the absence of the principal officer, the deputy of the latter cannot act in such a case. *Douglass v. Prowell*, 130 Ala. 580.

**382.** 2. Termination of Deputation by Expiration of Principal's Term of Office. — *State v. Barrows*, 71 Minn. 178; *Brady v. French*, 9 Ohio Dec. 195, 6 Ohio N. P. 122; *In re Re-indexing Judgment Dockets*, 1 Dauphin Co. Rep. (Pa.) 390.

6. Termination of Deputy's Authority by Principal's Death. — *White v. Hill*, 125 N. Car. 200, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 382.

**383.** 1. Removal of Deputy from Office. — *Horstman v. Adamson*, 101 Mo. App. 119; *White*

*v. Hill*, 125 N. Car. 200, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 383; *Stephenson v. Salisbury*, 53 W. Va. 366, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 383.

2. Agreement for Continuance in Office During Principal's Term. — *Horstman v. Adamson*, 101 Mo. App. 119.

3. Termination of Deputy's Authority by Acceptance of Incompatible Office. — One holding the office of constable cannot at the same time fill the position of deputy sheriff, but his acts as such deputy would be valid, as he would be a *de facto* officer. *Broach v. Garth*, (Tex. Civ. App. 1899) 50 S. W. Rep. 594.

5. Statutory Allowance of Fees Out of Public Treasury. — Where statutory provision is made for the payment of a deputy by the county, he is an officer of the county and may maintain an action against the county for his salary. *Sortedahl v. Polk County*, 84 Minn. 509.

Under a statute providing that the county shall pay for the subsistence of special deputy sheriffs while on duty, such deputy may recover the value of meals eaten at his own table. *Christian County v. Merrigan*, 191 Ill. 484.

Change of Compensation During Tenure of Office. — Where a statute is enacted providing that deputies shall be paid by their principals instead of by the county, as theretofore, those deputies in office at the time of the passage of the law are entitled to the salaries as provided by the old law. *McPhail v. Jefferds*, 130 Cal. 480.

Sheriff May Recover Amount Paid Deputies. — Where the employment of a deputy is authorized a sheriff may recover from the county the salary paid such deputy. *Taylor v. Canyon County*, 7 Idaho 171. See also *Beck v. Erie County*, 157 N. Y. 151.

Failure to Allow Compensation for Deputy. — Where a county board fails to fix the amount to be allowed for deputy sheriff hire, the sheriff has the right to retain out of the fees collected by him the reasonable amount which he has paid for necessary deputy hire. *People v. Darrah*, 84 Ill. App. 515.

Extra Services. — Under a statute making eight hours a workday, a deputy sheriff may not recover for extra services, in the absence of an express agreement. *Christian County v. Merrigan*, 191 Ill. 484.

- 384.** Principal Responsible in Absence of Statute. — See note 1.  
Compensation Determined by Contract. — See note 3.

In the Absence of Contract. — See note 4.

VII. LIABILITY OF DEPUTY — 1. To Principal — *a.* ON BOND —

- (1) *In General.* — See note 7.

- 387.** *d.* LIABILITY OF DEPUTY'S SURETIES. — See note 1.

- 390.** VIII. LIABILITY OF PRINCIPAL FOR ACTS OF DEPUTY — 1. Civilly —  
*b.* TO THIRD PERSONS — (1) *In General.* — See note 6.

- 392.** Unofficial Acts — Torts. — See note 2.

Contracts. — See note 3.

- 393.** Meaning of "Official Act." — See note 2.

- 395.** [DERAIL SWITCH. — See note 5*a.*]

DERELICT. See note 7.

- 397.** DERELICTION. — See note 2.

- 398.** DERIVE. — See note 1.

[DERRICK. — See note 1*a.*]

DESCEND. — See note 2.

- 399.** DESCENDANT. — See notes 1, 2, 3.

**384.** 1. Deputy constables are simply the assistants or agents of the constables who appointed them, and in the absence of statutory provision cannot be paid out of the public treasury. *Newton v. Luzerne County*, 12 Pa. Dist. 695, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 384.

3. *Compensation Determined by Contract.* — When a deputy's compensation is fixed by contract, the mere fact that the sheriff relieved him of certain duties does not affect his right to recover the compensation agreed upon. *Davis v. Baker*, 45 W. Va. 455.

4. *Recovery on Quantum Meruit in Absence of Contract.* — *Mayfield v. Moore*, 139 Ala. 417, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 384.

7. *Liability of Deputy to Principal on Bond.* — *Gorman v. Finn*, 56 N. Y. App. Div. 155, affirmed 171 N. Y. 628.

**387.** 1. *Principal's Noncompliance with the Law.* — The fact that the principal fails to properly examine the accounts of his deputy, as required by law, will not release the deputy's bondsmen from liability for the latter's default. *Williams v. Lyman*, (C. C. A.) 88 Fed. Rep. 237.

**390.** 6. *Liability of Principal to Third Person for Acts of Deputy.* — Case *v. Hulsebush*, 122 Ala. 212; *Stephens v. Head*, 138 Ala. 455; *Foley v. Martin*, 142 Cal. 256, 100 Am. St. Rep. 123.

**392.** 2. *Nonliability of Principal for Unofficial Torts of Deputy.* — *Ramsey v. Burns*, 27 Mont. 158, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 392; *Com. v. Hurt*, 64 S. W. Rep. 911, 65 S. W. Rep. 610, 23 Ky. L. Rep. 1171; *Maddox v. Hudgeons*, 31 Tex. Civ. App. 291.

3. *Nonliability of Principal on Deputy's Unofficial Contracts.* — *Munis v. Oliver*, 24 Pa. Super. Ct. 64, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 392.

**393.** 2. *Official Acts Are Those Done Colore Officii.* — *Ramsey v. Burns*, 27 Mont. 158, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 393.

A sheriff is liable for the acts of his deputy done under color of his office. *Stephens v. Wilson*, 115 Ky. 27.

**395.** 5*a.* "A *derail switch* is a device which when set will cause a car running loose on the side track to run off its rails to the ground before reaching the main track." *Per Valliant, J.*, in *Jones v. Kansas City, etc., R. Co.*, 178 Mo. 537.

7. *Derelict.* — The *Canada*, 92 Fed. Rep. 196; The *Pinmore*, 121 Fed. Rep. 425, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 395, 396.

**397.** *Sapp v. Frazier*, 51 La. Ann. 1718.

**398.** 1. The Term "Derived from" as Used in Chemistry "signifies that the body to which the term is applied bears a certain chemical relation to the one from which it is said to be *derived*; being a typical group of chemical atoms, which group, more or less modified, appears in every substance said to be *derived* from it." *Farbenfabriken v. U. S.*, (C. C. A.) 102 Fed. Rep. 605.

1*a.* A *derrick* has been defined as an "apparatus for lifting and moving heavy weights." *Cent. Dict. and Encyc.*; *Kelly v. Jutte, etc., Co.*, (C. C. A.) 104 Fed. Rep. 957.

2. *Harrington v. Gibson*, 109 Ky. 752.

In the *Sense of Pass or Go To.* — *Stratton v. McKinnie*, (Tenn. Ch. 1900) 62 S. W. Rep. 636.

**399.** 1. *Waldron v. Taylor*, 52 W. Va. 284, quoting 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 399.

Other Definitions. — *Neilson v. Brett*, 99 Va. 673.

*Descendants Confined to Legitimates.* — *Giles v. Wilhoit*, (Tenn. Ch. 1898) 48 S. W. Rep. 269.

2. *Collaterals.* — *Waldron v. Taylor*, 52 W. Va. 284, quoting 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 399.

3. *Ancestors.* — *Waldron v. Taylor*, 52 W. Va. 284, quoting 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 399.

*Descendants and Issue Synonymous.* — *Wilson v. Wilson*, 76 N. Y. App. Div. 232; *In re Waln*, 189 Pa. St. 631; *Waldron v. Taylor*, 52 W. Va. 284. See also the title *ISSUE (DESCENDANTS)*.

*Issue — Descendants — Children.* — *Wilson v. Wilson*, 76 N. Y. App. Div. 232. See also the title *CHILD — CHILDREN*.



- 400. DESCENT.** — See note 1.  
**402. DESCRIPTION.** — See note 3.  
**403. DESERVING.** — See note 5.  
**404. DESIGN.** — See note 1.  
**405. DESIRE.** — See note 5.  
**406. DESTINATION.** — See note 3.  
**DESTROY.** — See note 6.  
**408. DETAIL.** — See notes 2, 3.  
**409. DETAIN.** — See note 1.

**Grandchildren.** — *Levering v. Orrick*, 97 Md. 139; *Waldron v. Taylor*, 52 W. Va. 284.

**400. 1.** *Hudnall v. Ham*, 172 Ill. 76; *Meadowcroft v. Winnebago County*, 181 Ill. 504.

**402. 3. Description of Nets — Fishery Acts.** — By section 39 of the Salmon Fishery Act, 1873, a board of conservators may make by-laws to determine (*inter alia*) "the length, size, and description of nets \* \* \* for taking salmon." A by-law made under this section which prohibited the use of particular kinds of nets was held not to be *ultra vires*, since the word *description* did not limit the board of conservators to making regulations as to the characteristics of the particular kinds of nets. *Clayton v. Peirse*, (1904) 1 K. B. 424.

**403. 5. Deserving.** — See *Fay v. Howe*, 136 Cal. 599.

**404. 1.** *Sullivan v. State*, 100 Wis. 283; *Perugi v. State*, 104 Wis. 230.

**Design, in the View of the Patent Law**, is that characteristic of a physical substance which, by means of lines, images, configuration, and the like, taken as a whole, makes an impression, through the eye, upon the mind of the observer. *Pelouze Scale, etc., Co. v. American Cutlery Co.*, (C. C. A.) 102 Fed. Rep. 918. And see the title **PATENTS**.

**405. 5. Desire — Precatory Words.** — *Matter of Pforr*, 144 Cal. 121; *Matter of Copeland*, (Surrogate Ct.) 38 Misc. (N. Y.) 402.

**406. 3.** "The *destination du père de famille* is the use which the owner has intentionally established on a particular part of his property in favor of another part, and which is equal to a title with respect to perpetual and apparent servitudes thereon; and by this *destination du père de famille* is meant the disposition which the owner of two or more estates has made for their respective use. In

relation to such a servitude, permanence of *destination*, and the *caractère de perpétuité* are the essential prerequisites of their establishment. If the owner of two estates, between which there exists an apparent and continuous servitude, sell one of those estates without any mention being made of same in the title, it shall continue to exist in favor of or upon the estate which has been sold. The *destination* made by the owner is equivalent to title with regard to apparent and continuous servitudes." *Woodcock v. Baldwin*, 51 La. Ann. 989.

**6. Insurance.** — *Manchester F. Assur. Co. v. Feibelman*, 118 Ala. 308.

**Contract.** — The word *destroyed* in a contract for the lease of fire extinguishers providing for liability in case they were damaged or *destroyed* is used without limitation and includes a destruction by fire. *Rapid Safety Fire Extinguisher Co. v. Hay-Budden Mfg. Co.*, (Supm. Ct. App. T.) 37 Misc. (N. Y.) 556.

**408. 2. The Word Detail, as Used in a Reorganization Agreement**, means minor particulars necessary to complete a reorganization, but consistent with the original plan, and lawful and honest. *United Water Works Co. v. Omaha Water Co.*, 164 N. Y. 53.

**3. Police Force.** — *Upshur v. Baltimore*, 94 Md. 743.

**409. 1. Detention with Intent to Have Carnal Knowledge.** — To *detain* is to stop, to delay, to restrain from proceeding; and to take the crutch of a cripple girl, or to hold her by the hand, while pleading with her for carnal knowledge, is a *detention*, within the meaning of the statute prohibiting detaining a woman against her will with intent to have carnal knowledge with her. *Paynter v. Com.*, (Ky. 1900) 55 S. W. Rep. 687.

# DETECTIVES.

BY BASIL JONES.

## **410. I. APPOINTMENT, REGULATION, AND POWERS — 1. Private Detectives.**

— See note 1.

## **411. III. CONDUCT OF DETECTIVE AS A DEFENSE — 1. Deception by Detective No Justification for a Criminal Offense. — See note 5.**

## **412. IV. EVIDENCE OF DETECTIVES — 1. In General. — See note 3.**

## **415. DETERMINABLE FEES. — See note 4.**

## **DETERMINE — DETERMINATION. — See note 5.**

## **416. See note 2.**

**410. 1. Licensing, Regulation, and Powers of Private Detectives.** — *People v. Weiler*, 179 N. Y. 46; *McClain v. Lawrence County*, 14 Pa. Super. Ct. 273.

**Liability for Malicious Arrest and False Imprisonment.** — *Pinkerton v. Martin*, 82 Ill. App. 589.

**Private Detective Required to Obtain License under New York Statute.** — *People v. St. Clair*, 90 N. Y. App. Div. 239, reversed 179 N. Y. 578.

**Liability for Unwarranted Interference.** — Where a licensed private detective, or an employee of one so licensed, for purposes of his own, or upon employment for hire, persists in following another to ascertain and report where he goes and what he does, and constantly shadows him in public and private places in such a manner that the person shadowed observes the actions of the detective, in default of legal justification, the detective, in persisting in this conduct, is guilty of disorderly conduct within the meaning of the *New York Penal Code*, § 675, as amended by New York Laws 1901, c. 327, p. 657. *People v. Weiler*, 179 N. Y. 46.

**"Shadowing" by Private Detective as Disorderly Conduct.** — A private detective who is employed to "shadow" a person is not guilty of disorderly conduct where he neither approached nor in any way interfered with the person shadowed, and the latter was not aware that he was being shadowed until he was informed by other persons. *People v. Weiler*, 179 N. Y. 46.

**411. 5. Presence of Detective Not a Defense.** — On the trial of one charged with burglary, the mere fact that one who was present with and assisted him in the burglary was a detective is not a defense, if the detective did not instigate the crime, and it was committed as to every ingredient of it by the criminal. *State v. Currie*, (N. Dak. 1905) 102 N. W. Rep. 875.

**Acts of Detective Not Imputed to Accused.** — Where a detective apparently assists in a burglary for the purpose of securing evidence of the same and other offenses, the acts of

the detective are not to be imputed to the criminal, as they are not acting in a common purpose. Nevertheless, if the offense is committed by the person charged as to every element thereof, he may be found guilty, notwithstanding the complicity of the detective. *State v. Currie*, (N. Dak. 1905) 102 N. W. Rep. 875.

**412. 3. Fact that Detective Is a Hired Witness to Be Considered.** — In a criminal prosecution, where the state relies upon the evidence of detectives employed for the purpose of procuring testimony against the accused, it is reversible error to instruct the jury that they should give to the testimony of such detectives "the same consideration as to any other testimony in the case, giving it such weight as, considering the nature of the same, their opportunities for knowing the facts of which they testify, and their appearance and demeanor upon the witness stand, and all the other elements which go to their credibility, including their interest and bias, and to give their testimony such weight as, under all circumstances, the same is, in your judgment, entitled to receive." *Frude v. State*, 66 Neb. 244.

**Greater Care to Be Used in Weighing Evidence of Detectives.** — Where detectives testify for the state in a criminal prosecution, their testimony should be weighed with greater care than that given by disinterested witnesses, and the jury should be substantially so instructed by the court in its charge. *Kastner v. State*, 58 Neb. 767.

**415. 4. Weed v. Woods.** 71 N. H. 581.

**5. In the Sense of Computed.** — In a logging contract providing that the defendant's proportion of the net expense of booming and of the ten per cent. of the net cost is "to be determined by the proportion" which its logs bear to the whole amount of logs handled, the word means simply ascertained or computed. *Rumford Falls Boom Co. v. Rumford Falls Paper Co.*, 96 Me. 104.

**416. 2. Adjudge and Determine Synonymous.** — See *Griffin v. U. S.*, 33 Ct. Cl. 228.

# DEVIATION (IN MARINE INSURANCE).

By A. W. VARIAN.

- 419.** I. DEFINITION AND GENERAL PRINCIPLES — Definition. — See note 1.  
**422.** II. WHAT CONSTITUTES DEVIATION — 2. Departure. — See note 2.  
**431.** III. CAUSES EXCUSING WHAT WOULD OTHERWISE BE A DEVIATION  
— 1. Departures and Delays from Necessity — *f.* To SUCCOR THE DISTRESSED  
— Medical Attention for the Sick. — See note 1.  
**436.** 2. Justified by Usage — Usage Must Be Established. — See note 4.  
**441.** V. TIME POLICIES — 2. Warranty Not to Use Ports and Places. — See  
note 2.  
Intention to Violate Warranty. — See note 3.  
3. Insured to Sail in Certain Waters. — See note 4.  
**447.** XI. EFFECT OF DEVIATION. — See note 5.  
**448.** DEVICE. — See note 3.  
**450.** DEVISEE. — See note 1.  
DEVOLVE. — See note 3.  
**452.** DICTUM. — See note 2.

**419.** 1. Definition of Deviation. — The Iroquois, (C. C. A.) 118 Fed. Rep. 1003, *affirmed* 194 U. S. 240.

**422.** 2. Touching at Intermediate Port Without Leave. — Mannheim Ins. Co. v. Atlantic, etc., R. Co., 11 Quebec K. B. 200.

**431.** 1. To Secure Assistance for Sick on Board. — The Iroquois, (C. C. A.) 118 Fed. Rep. 1003, *affirmed* 194 U. S. 240.

**436.** 4. Particular Instances Do Not Establish Usage. — See Cogswell v. Chubb, 157 N. Y. 709, *affirming* 1 N. Y. App. Div. 93.

**441.** 2. Warranty Not to Use Ports and Places. — Where the vessel was "prohibited from the river and gulf of St. Lawrence, ports in Newfoundland, Northumberland straits, Cape Breton, and Black Sea," it was held that the prohibition extended not only to the ports of Cape Breton but also to its waters. Lovett v. China Mut. Ins. Co., 174 Mass. 108.

**3.** *Contra.* — See Thames, etc., Marine Ins. Co. v. O'Connell, (C. C. A.) 86 Fed. Rep. 150.

**4.** Insured to Sail in Certain Waters. — Under a policy whereby the ship was "warranted \* \* \* [to] navigate only the waters of the bay and harbor of New York, the North and East rivers, and inland waters of New Jersey," it was held that the insurers were not liable for injury sustained while the vessel was in Rondout creek, two and one-half miles from the Hudson river. Hastorf v. Greenwich Ins. Co., 132 Fed. Rep. 122.

And in Kirk v. Home Ins. Co., 92 N. Y. App. Div. 26, it was held that a vessel lost in Bridgeport harbor was not covered by a policy of insurance in which the vessel was "warranted confined to \* \* \* the waters of New Haven harbor and adjacent inland waters."

A vessel wrecked on a shoal, about one and one-half miles from the nearest mainland, was

held to be covered by a policy confining it to "all inland and Atlantic coast waters." St. Paul F. & M. Ins. Co. v. Knickerbocker Steam Towage Co., (C. C. A.) 93 Fed. Rep. 931.

There is a breach of a warranty "to navigate only the inland waters of the United States and Canada," where the vessel goes upon the open ocean ten miles off from the Sandy Hook lighthouse. Cogswell v. Chubb, 157 N. Y. 709, *affirming* 1 N. Y. App. Div. 93.

**447.** 5. Effect of Deviation. — Cogswell v. Chubb, 157 N. Y. 709, *affirming* 1 N. Y. App. Div. 93.

**448.** 3. Device — Patent Law. — See Heap v. Greene, (C. C. A.) 91 Fed. Rep. 792. And see the title PATENTS.

Device — Statute Prohibiting Swindling. — See State v. Smith, 82 Minn. 342.

**450.** 1. Devisee and Legatee. — Hale v. Coffin, 114 Fed. Rep. 579; People v. Petrie, 191 Ill. 510.

**3.** By Operation of Law. — San Jose First Nat. Bank v. Menke, 128 Cal. 108; Babcock v. Maxwell, 29 Mont. 31.

**452.** 2. Dorr v. Hunter, 183 Ill. 436, *citing* 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 452. See also Carstairs v. Cochran, 95 Md. 488; State v. Brookhart, 113 Iowa 250.

Nothing is *obiter*, strictly so called, except matters not within the questions presented — mere statements or observations by the judge in writing the opinion, the result of turning aside for the time to some collateral matter by way of illustration. Brown v. Chicago, etc., R. Co., 102 Wis. 137, *following* Buchner v. Chicago, etc., R. Co., 60 Wis. 264.

United States Courts. — *In re* Woodruff, 96 Fed. Rep. 323. See also L. Bucki, etc., Lumber Co. v. Fidelity, etc., Co., (C. C. A.) 109 Fed. Rep. 393.



**454. [DIE UNMARRIED. See UNMARRIED.]****DIES NON.** — See note 2.**DIFFERENCE.** — See note 4.**456. DILIGENCE.** — See note 1.**457. DILIGENTLY.** — See note 1.**DIRECT.** — See note 9.**459. See note 1.****DIRECT EVIDENCE.** — See note 4.**460. DIRECTLY.** — See note 2.**462. DISABILITY.** — See note 2.**463. DISBURSEMENT.** — See note 4.**464. DISCHARGE.** — See note 2.**467. DISCONTINUE.** — See note 4.**454. 2. Havens v. Stiles, 8 Idaho 250.**

**4. Arbitration and Award — Contract.** — In *Fravert v. Fesler*, 11 Colo. App. 391, the court said: "The word *difference*, as the parties employed it, means disagreement or dispute. Unless there was some disagreement or dispute there was nothing to arbitrate. Mere failure of one to pay a debt owing to another does not constitute a *difference* between them in the sense in which the term was used here."

**456. 1. Relative Term.** — *Rue v. Quinn*, 137 Cal. 651; *Ennis v. Eden Mills Paper Co.*, 65 N. J. L. 577; *Perham v. Portland Gen. Electric Co.*, 33 Oregon 451.

**Degrees of Diligence.** — *Birmingham First Nat. Bank v. Newport First Nat. Bank*, 116 Ala. 520; *Ennis v. Eden Mills Paper Co.*, 65 N. J. L. 586, quoting 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 456.

**Ordinary Diligence.** — *Knopf v. Philadelphia*, etc., R. Co., 2 Penn. (Del.) 392.

**Reasonable Diligence.** — *Haines v. Lake Shore*, etc., R. Co., 129 Mich. 475.

**457. 1.** In *Ennis v. Eden Mills Paper Co.*, 65 N. J. L. 586, the court said: "The language of the statute is 'prosecute his claim *diligently*.' The adverb used is a word of indefinite signification. It does not mean that the suit shall be prosecuted in strict conformity with the prescribed procedure. The omission to enter judgment for a day or a week after, by strict practice, it was due, would not invalidate the judgment."

**9. Direct Distinguished from Contingent.** — *Matter of Van Alstine*, 26 Utah 193.

**Direct and Consequential Distinguished.** — *Sadlier v. New York*, (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 78.

**Insurance — Direct Damages.** — *Hustace v. Phenix Ins. Co.*, 175 N. Y. 292; *Insurance Co. of North America v. Leader*, 121 Ga. 260.

**Direct and Collateral Attack.** — *Smith v. Morrill*, 12 Colo. App. 233; *Schneider v. Sellers*, 25 Tex. Civ. App. 226; *Scudder v. Cox*, (Tex. Civ. App. 1904) 80 S. W. Rep. 872.

**Direct and Proximate Not Synonymous.** — *Wills v. Ashland Light, etc., Co.*, 108 Wis. 261.

**459. 1.** See *Davis v. Chase*, 159 Ind. 242; *People v. Guggenheimer*, (Supm. Ct. Spec. T.) 28 Misc. (N. Y.) 735.

**Directed Held Not to Be Imperative.** — In *Upshur v. Baltimore*, 94 Md. 757, in construing a statute providing for the policing of a city

park the court said: "The police commissioners are *directed*, and in section 758 they are 'required,' to make the detail; but neither of these words, in view of the whole context and the entire surroundings, creates an imperative, absolute duty, admitting of no discretion."

**4. Direct Evidence.** — *Lake County v. Neilon*, 44 Oregon 14; *Beason v. State*, 43 Tex. Crim. 442.

**460. 2. State v. Conley, 22 R. I. 400.** In this case the court said: "The presiding justice properly ruled that *direct* means straight, that a circuitous way or a crooked way was not a *direct* way, and that an entrance to a bar-room requiring a circuitous or crooked route of travel from the highway to the bar-room was an entrance 'other than *directly* from a public traveled way.'"

**462. 2. Death Is Not a Disability** within the terms of a policy of accident insurance providing for weekly payment during total *disability*. *Burnett v. Railway Officials*, etc., Ins. Co., 107 Tenn. 185.

**463. 4. Costs.** — *Hennepin County v. Wright County*, 84 Minn. 267.

**464. 2. Discharge of a Guardian.** — *Cook v. Ceas*, 143 Cal. 221; *Goble v. Simeral*, (Neb. 1903) 93 N. W. Rep. 236.

**Discharge and Compromise.** — See *Rivers v. Blom*, 163 Mo. 442.

**Discharge from Military Service.** — "In the military service the word *discharge* is the word applied to an order ending the service of an officer at his own request. But in other connections it conveys the notion of a movement beginning with the superior and more or less adverse to the object, as, for instance, when we speak of *discharging* a servant. Usually it is a slightly discrediting verb." *U. S. v. Sweet*, 189 U. S. 473.

**467. 4. Discontinuing the License.** — The lessee of a public house covenanted to conduct the business so as to afford no ground for "*discontinuing* the license." It was held that read with the context *discontinuing* meant not refusing to renew but forfeiting the license. *Bryant v. Hancock*, (1899) A. C. 442, *affirming* (1898) 1 Q. B. 716.

**The Phrase Discontinue in Office** is equivalent to "remove from office" under a by-law of a corporation authorizing directors to *discontinue* certain officers in office. *Darrab v. Wheeling Ice, etc., Co.*, 50 W. Va. 417.

- 468. DISCOUNT.** — See notes 2, 3.  
**472. DISCOVERT.** — See note 3.  
**DISCOVERY.** — See note 4.  
**473. DISCRETION.** — See notes 2, 3.  
**474. DISEASE.** — See note 4.

**468. 2.** *Camden First Nat. Bank v. Carleton*, 43 N. Y. App. Div. 6, *quoting* 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 468.

**3.** *Camden First Nat. Bank v. Carleton*, 43 N. Y. App. Div. 6.

**472. 3. Limitation of Actions.** — *Southworth v. Brownlow*, 84 Miss. 410, *citing* 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 472.

**4. Discovery of Fraud.** — *Black v. Black*, 64 Kan. 689.

**Mines and Mining Claims.** — *Miller v. Chrisman*, 140 Cal. 40.

**473. 2. Haupt v. Independent Tel. Messenger Co.**, 25 Mont. 122, *quoting* 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 473; *Marsh v.*

*Griffin*, 123 N. Car. 660; *Cleveland Telephone Co. v. Chagrin Falls*, 14 Ohio Dec. 453, *citing* 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 473; *Sharp v. Greene*, 22 Wash. 677.

**Other Definitions.** — *Stewart v. Stewart*, 28 Ind. App. 378; *Citizens St. R. Co. v. Heath*, 29 Ind. App. 395; *Goodwin v. Prime*, 92 Me. 355.

**3. Rio Grande County v. Lewis**, 28 Colo. 378; *Scott v. Laporte*, 162 Ind. 34; *Farrelly v. Cole*, 60 Kan. 356.

**474. 4. Insurance — Temporary Disorder.** — See *Preferred Acc. Ins. Co. v. Muir*, (C. C. A.) 126 Fed. Rep. 926; *Breese v. Metropolitan L. Ins. Co.*, 37 N. Y. App. Div. 152.

## DISFRANCHISEMENT.

By W. H. CROW.

- 479. I. INTRODUCTORY — 3. Proof of Disfranchisement.** — See note 3.  
**II. THE POWER TO DISFRANCHISE — 1. Incident to What Bodies —**  
**b. VOLUNTARY UNINCORPORATED ASSOCIATIONS.** — See note 7.  
**480. 2. How Conferred — c. BY AGREEMENT OF MEMBERS.** — See note 8.  
**481. The Constitution and By-laws.** — See note 1.  
**3. Exercise of the Power — a. GROUNDS AND CAUSES — (2) Implied**  
**Grounds — (b) Other Instances.** — See note 9.  
**482. 3. Breach of Society Regulations — (a) In General — Unreasonable By-laws.**  
 — See note 4.  
**(b) Validity of By-laws Providing Grounds for Disfranchisement — aa. IN GENERAL.**  
 — See notes 6, 7.

**479. 3.** *Seehorn v. Supreme Council*, etc., 95 Mo. App. 233.

**7. Property Rights — Due Process of Law.** — A member of a Masonic lodge cannot enjoin his trial by the lodge for expulsion on the ground that his property rights will be taken without due process of law. *Franklin v. Burnham*, (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 566. See also *Moore v. National Council*, etc., 65 Kan. 452.

**480. 8. Contract of Membership.** — *Green v. Board of Trade*, 174 Ill. 585. See also *Berlin v. Eureka Lodge No. 9*, 132 Cal. 294.

**481. 1. Ignorance of Provision No Excuse.** — The fact that the member was not aware of a provision in the constitution that membership should be forfeited by engaging in the liquor business is no excuse for noncompliance with the provision. *People v. Grand Lodge*, etc., (Supm. Ct. Tr. T.) 32 Misc. (N. Y.) 528.

**9. Invalid Grounds.** — A question of financial differences between members, concerning the association only indirectly and involving no moral turpitude, cannot be made the basis for expulsion. *De Hart v. Good Will Hook*, etc., Co. No. 1, 61 N. J. L. 507.

Refusal of a treasurer to give up the books to a committee is not cause for expulsion in the absence of any by-law to that effect. *Connell v. Stalker*, (Supm. Ct. App. T.) 21 Misc. (N. Y.) 609.

In the absence of any provision in the charter or by-laws covering the point, a member cannot be expelled for issuing a manifesto, addressed to the other members, complaining of the management. *Weiss v. Musical Mut. Protective Union*, 189 Pa. St. 446, 69 Am. St. Rep. 820.

An expulsion of a member for refusal to arbitrate and proceeding to file a mechanic's lien is unlawful in the absence of any provision to that end in the charter or by-laws. *Miller v. Builders' League*, 29 N. Y. App. Div. 630.

**482. 4. Unreasonable By-laws.** — *Green v. Board of Trade*, 174 Ill. 585; *Brown v. Supreme Ct.*, etc., 66 N. Y. App. Div. 259, *affirmed* 176 N. Y. 132; *Fay v. Supreme Tent*, etc., (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 427; *Murray v. Supreme Hive*, etc., 112 Tenn. 664.

**6. Evans v. Chamber of Commerce**, 86 Minn. 448; *State v. St. Louis Medical Soc.*, 91 Mo. App. 76; *Lamarche v. Le Club de Chasse*, etc., 19 Quebec Super. Ct. 470.

**482.** *bb. VALID GROUNDS — (aa) Nonpayment of Dues.* — See note 8.

**483.** *But Such Provisions Are Not Generally Self-executing.* — See note 1. Waiver. — See note 5.

**485.** *(bb) Moral Delinquencies.* — See notes 3, 10.

**487.** *(cc) Change of Status.* — See note 1.

*cc. GROUNDS OF DOUBTFUL VALIDITY — (aa) Ineligibility.* — See note 5.

**489.** *dd. INVALID GROUNDS — (bb) In Expulsion from Commercial Exchange.* — See note 2.

**490.** *b. WHO MAY EXERCISE — (2) Designated Officers.* — See note 2.

**491.** *c. MODE OF EXERCISE — (1) In General — Waiver.* — See note 2.

**Validity of By-laws.** — Where an amendment to the by-laws was not properly enacted in accordance with the constitution, it was held that a member could not be expelled lawfully under such amended by-law. *Deuble v. Grand Lodge*, etc., 66 N. Y. App. Div. 323, affirmed 172 N. Y. 665.

**Construction of By-Laws.** — By-laws providing that a member shall be expelled for impugning the honor of the society in word or deed give to the society no jurisdiction to expel a member because of the loss of certain suits against the society which such member assisted in defending as one of a committee appointed by the society for that purpose. *Radice v. Italian-American Christopher Columbus Soc.*, 67 N. J. L. 196.

**482. 7.** *U. S. v. Metropolitan Club*, 11 App. Cas. (D. C.) 180; *Moore v. National Council*, etc., 65 Kan. 452; *Farmer v. Board of Trade*, 78 Mo. App. 557; *Seehorn v. Supreme Council*, etc., 95 Mo. App. 233; *People v. Manhattan Chess Club*, (Supm. Ct. Tr. T.) 23 Misc. (N. Y.) 500, affirmed 34 N. Y. App. Div. 631; *Johansen v. Blume*, 53 N. Y. App. Div. 526; *People v. Grand Lodge*, etc., (Supm. Ct. Tr. T.) 32 Misc. (N. Y.) 528; *Young v. Eames*, 78 N. Y. App. Div. 229, affirmed 181 N. Y. 542. See also *infra*, this title, **496. 7 et seq.**

**Failure to Submit Claim to Arbitration.** — A by-law of a benefit society, ordering the expulsion of a member who has sued the society instead of submitting his claim to a board of arbitration established by the society's charter, was held not to be unreasonably oppressive or against public order, and the expulsion of the member thereunder was held to be lawful. *L'Union St. Joseph*, etc., *v. Cabana*, 10 Quebec K. B. 325.

**8. Nonpayment of Dues.** — *Marshall v. Grand Lodge*, etc., 133 Cal. 686; *Supreme Conclave*, etc., *v. Warwick*, 110 Ga. 388; *Rubino v. Fraterna Assoc.*, (Supm. Ct. App. T.) 29 Misc. (N. Y.) 339; *Cowan v. New York Caledonian Club*, 46 N. Y. App. Div. 288.

**483. 1. Not Self-executing.** — *Warwick v. Supreme Conclave*, etc., 107 Ga. 115; *Railway Pass.*, etc., *Mut. Aid*, etc., *Assoc. v. Leonard*, 82 Ill. App. 214; *Independent Order of Foresters v. Haggerty*, 86 Ill. App. 31; *Rogers v. Union Benev. Soc.*, 111 Ky. 508; *Puhr v. Grand Lodge*, etc., 77 Mo. App. 47; *Lewis v. Western Funeral Ben. Assoc.*, 77 Mo. App. 586; *Harris v. Wilson*, 86 Mo. App. 406; *Westchester Golf Club v. Pinkney*, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 338; *Rhule v. Diamond Colliery Accidental Fund*, 5 Lack. Leg. N. (Pa.) 101.

**When Self-executing.** — By-laws may be made self-executing by an express provision that no

action by the association or its officers shall be required. *Marshall v. Grand Lodge*, etc., 133 Cal. 686. Thus, the use of the words "shall stand suspended" has been held to provide for *ipso facto* forfeiture. *Chapple v. Sovereign Camp*, etc., 64 Neb. 55. See also *Parker v. Bankers L. Assoc.*, 86 Ill. App. 315; *National Union v. Shipley*, 92 Ill. App. 355; *Feiber v. Supreme Council*, etc., 112 La. 960; *Smith v. Sovereign Camp*, etc., 179 Mo. 119; *Lavin v. Grand Lodge*, etc., 104 Mo. App. 1; *Paster v. Nagelsmith*, (Supm. Ct. App. T.) 30 Misc. (N. Y.) 791; *Sparkman v. Supreme Council*, etc., 57 S. Car. 16.

**5. Accepting Dues After Default.** — *Flicek v. High Court*, etc., 90 Ill. App. 344; *Supreme Lodge*, etc., *v. Hammerl*, 94 Ill. App. 164; *Supreme Council*, etc., *v. Winters*, 108 Ky. 141; *Lord v. National Protective Soc.*, 129 Mich. 335; *Sparkman v. Supreme Council*, etc., 57 S. Car. 16; *Supreme Tribe of Ben Hur v. Hall*, 24 Ind. App. 316, 79 Am. St. Rep. 262; *Seehorn v. Supreme Council*, etc., 95 Mo. App. 233; *Lavin v. Grand Lodge*, etc., 104 Mo. App. 1; *McClure v. Supreme Lodge*, etc., 41 N. Y. App. Div. 131. See also *People v. Sciacca Assoc.*, 56 N. Y. App. Div. 341.

Retention of money, paid to cover delinquencies, by a subordinate lodge will not act as a waiver by the grand lodge of the right to compel certain proofs before reinstatement. *Marshall v. Grand Lodge*, etc., 133 Cal. 686.

**485. 3. Engaging in Liquor Business.** — *People v. Grand Lodge*, etc., (Supm. Ct. Tr. T.) 32 Misc. (N. Y.) 528.

**10. Feigning Sickness, etc. — *Slater v. Supreme Lodge*, etc., 88 Mo. App. 177.**

**487. 1. Change of Status.** — *Bunch v. Tennessee Mfg. Co.'s Operatives' Voluntary Relief Assoc.*, (Tenn. Ch. 1900) 62 S. W. Rep. 240.

**5. Ineligibility.** — Though a member of a beneficial association be ineligible because he is under the age specified in the by-laws, yet if the society accepts assessments after knowledge of his age it waives the right to object. *Supreme Lodge*, etc., *v. Davis*, 26 Colo. 252.

**489. 2. Refusal to Arbitrate.** — *Contra*, holding that a by-law providing for the expulsion of a member of an exchange for refusing to submit to arbitration is valid. *Evans v. Chamber of Commerce*, 86 Minn. 448.

**490. 2. Rules of Voluntary Association.** — *Brandenburg v. Jefferson Club Assoc.*, 88 Mo. App. 148.

**491. 2. Waiver of Irregularities.** — *Railway Pass.*, etc., *Mut. Aid*, etc., *Assoc. v. Leonard*, 82 Ill. App. 214; *Moore v. National Council*, etc., 65 Kan. 452; *Dimmer v. Supreme Council*, etc.,



**491.** (2) *By-laws Governing Procedure* — (b) *Strict Construction*. — See note 6.

**492.** (3) *Notice* — *Disfranchisement Without Previous Notice*. — See note 1.

*Where By-laws Silent* — *Reasonable Notice*. — See note 3.

*Personal Service*. — See note 4.

*Waiver*. — See note 7.

**493.** *As to Form*. — See note 5.

**494.** (4) *Hearing*. — See note 1.

(5) *Presenting Copy of Charges*. — See notes 5, 6, 7.

**495.** (7) *Effect of Society's Action* — *The Society Acts in a Quasi-judicial Capacity*. — See notes 2, 3.

*But an Invalid Proceeding*. — See note 4.

### III. REDRESS FOR WRONGFUL DISFRANCHISEMENT — 1. Reinstatement

— *a. BY APPEAL TO SOCIETY'S TRIBUNAL*. — See note 6.

12 Ohio Cir. Dec. 413, 22 Ohio Cir. Ct. 366; *Murray v. Supreme Hive, etc.*, 112 Tenn. 664.

**491.** 6. *Strictly Construed*. — See *Woodmen of the World v. Gilliland*, 11 Okla. 384.

**492.** 1. *Notice Jurisdictional*. — *Shelden v. National Masonic Acc. Assoc.*, 122 Mich. 403; *Seehorn v. Supreme Council, etc.*, 95 Mo. App. 233; *Zangen v. Krakauer Young Men's Christian Assoc.*, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 332; *Weinberg v. Independent Order, etc.*, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 205; *Fay v. Supreme Tent, etc.*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 427; *Doggett v. United Order of Golden Cross*, 126 N. Car. 477; *Pepin v. Societe St. Jean Baptiste*, 24 R. I. 550; *Cotton Jammers, etc., Assoc. No. 2 v. Taylor*, 23 Tex. Civ. App. 367.

**What Is Sufficient Notice.** — Where notice of the trial by a committee as required by the by-laws is given to the member, no further notice, such as of the ballot for expulsion, is necessary. *Doljanin v. Austrian Benev. Soc.*, 137 Cal. 165.

And further as to what constitutes sufficient notice, see *Drum v. Benton*, 13 App. Cas. (D. C.) 245.

3. *Where By-laws Silent as to Notice*. — *Cotton Jammers, etc., Assoc. v. Taylor*, 23 Tex. Civ. App. 369, *citing* 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 492.

4. *A Notice by Registered Letter*, required by the by-laws, must actually be received by the member, and his expulsion cannot be caused by the society where such notice is returned by the post office with the information that the member could not be found at the address given. *Weinberg v. Independent Order, etc.*, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 205. But see *Bettenhasser v. Templars of Liberty*, 58 N. Y. App. Div. 61, wherein it was held that in view of a uniform and long-continued practice to mail the notices this would be considered a proper mode.

7. *Waiver of Irregularities in Notice*. — *Moore v. National Council, etc.*, 65 Kan. 452; *Miller v. U. S. Grand Lodge, etc.*, 72 Mo. App. 499.

**493.** 5. *Form of Notice*. — A notice falsely stating the time after which the member will stand suspended for nonpayment will not render his nonpayment a forfeiture. *Bridges v. National Union*, (Minn. 1898) 77 N. W. Rep. 411.

**494.** 1. *Right to Hearing Inviolable*. — See *Lurman v. Jarvie*, 82 N. Y. App. Div. 37, *affirmed* 178 N. Y. 559; *Cheney v. Ketcham*, 7 Ohio Dec. 183. But compare *Supreme Con-*

*clave, etc. v. Warwick*, 110 Ga. 388; *Feiber v. Supreme Council, etc.*, 112 La. 960.

Where it conclusively appears that the member could not derive any beneficial result from such a hearing, a by-law which fails to give to him the right is not altogether null and void. *Berkhout v. Supreme Council, etc.*, 62 N. J. L. 103.

**Representation by Counsel.** — A provision in a by-law that the member shall not have the right to be represented by professional counsel is not unreasonable. *Green v. Board of Trade*, 174 Ill. 585.

5. *Copy of the Charges*. — *Byram v. Sovereign Camp, etc.*, 108 Iowa 430, 75 Am. St. Rep. 263; *Weiss v. Musical Mut. Protective Union*, 189 Pa. St. 446, 69 Am. St. Rep. 820; *Pepin v. Societe St. Jean Baptiste*, 24 R. I. 550.

6. *Byram v. Sovereign Camp, etc.*, 108 Iowa 430, 75 Am. St. Rep. 265.

7. *Where the Member Has Actual Notice* of the particular charge he cannot object that it was not formally stated. *Pepin v. Societe St. Jean Baptiste*, 24 R. I. 550.

**495.** 2. *Effect of Society's Action*. — *Froelich v. Musicians Mut. Ben. Assoc.*, 93 Mo. App. 383.

3. *U. S. v. Metropolitan Club*, 11 App. Cas. (D. C.) 180; *Green v. Board of Trade*, 174 Ill. 585; *Brandenburger v. Jefferson Club Assoc.*, 88 Mo. App. 148; *Slater v. Supreme Lodge, etc.*, 88 Mo. App. 177; *People v. Manhattan Chess Club*, (Supm. Ct. Tr. T.) 23 Misc. (N. Y.) 500, *affirmed* 34 N. Y. App. Div. 631; *Newkirch v. Keppler*, 56 N. Y. App. Div. 225, *affirmed* 174 N. Y. 509; *L'Union St. Joseph, etc., v. Cabana*, 10 Quebec K. B. 324.

4. See *Doljanin v. Austrian Benev. Soc.*, 137 Cal. 165.

6. *Appeal a Prerequisite of Suit*. — *Johansen v. Blume*, 53 N. Y. App. Div. 526; *Brandenburger v. Jefferson Club Assoc.*, 88 Mo. App. 148; *Byram v. Sovereign Camp, etc.*, 108 Iowa 430, 75 Am. St. Rep. 265; *Modern Woodmen of America v. Taylor*, 67 Kan. 368; *Schryver v. Columbia Lodge, etc.*, 2 Ohio Cir. Dec. 238; *Godin v. Supreme Ct., etc.*, 4 Rev. de Jur. 236.

**Considerations Excusing Appeal Within Society.** — If the proceeding in the minor tribunal of the society is absolutely void the member will not be compelled to make his appeal to the higher tribunal of the society, but can proceed directly in a court of law. *Langnecker v. Grand Lodge, etc.*, 111 Wis. 279, 87 Am. St. Rep. 860, See

**496.** See note 2.

*b.* THROUGH JUDICIAL INTERFERENCE—(1) *In General.*—See note 7.

**497.** See note 1.

**499.** (3) *In Disfranchisement from Masonic Bodies*—Legal Status of Masons.—See note 4.

**500.** See note 1.

(4) *Character of the Remedy*—(a) Legal—*aa.* MANDAMUS—(*aa.*) *When Granted.*—See note 2.

**501.** The Application.—See note 1.

(*bb.*) *When Denied*—Waiver.—See note 9.

**502.** (b) *Equitable*—*aa.* DECREE OF RESTORATION, ETC.—See notes 4, 5.

*bb.* INJUNCTION.—See note 8.

**503.** 2. Damages—*a.* RIGHT OF RECOVERY.—See note 9.

**504.** DISHERISON.—See note 12.

[DISINTER.—See note 12*a.*]

also Railway Pass., etc., Mut. Aid, etc., Assoc. v. Leonard, 82 Ill. App. 214; Women's Catholic Order of Foresters v. Haley, 86 Ill. App. 330.

So if the lower tribunal in the society has so prejudiced the case of the expelled member that appeal to the higher tribunal will be useless, the courts will not require such appeal as a step preliminary to jurisdiction. State v. Grand Lodge, etc., 70 Mo. App. 456.

Where the provisions for appeal within the society are unreasonable the expelled member need not comply with them before applying to the courts for a writ of mandamus. Weiss v. Musical Mut. Protective Union, 189 Pa. St. 446, 69 Am. St. Rep. 820.

A member of a trade union illegally expelled will not be first required to appeal within the order, when such action would require his going a long distance, and it appears that the papers necessary to effect the appeal were refused to him. Corregan v. Hay, 94 N. Y. App. Div. 71.

**496.** 2. Weiss v. Musical Mut. Protective Union, 189 Pa. St. 446, 69 Am. St. Rep. 820.

**7.** Judicial Interference Not Favored.—Green v. Board of Trade, 174 Ill. 585; Froelich v. Musicians Mut. Ben. Assoc., 93 Mo. App. 383; Grand Castle, etc., v. Bridgeton Castle No. 13, etc., (N. J. 1898) 40 Atl. Rep. 849; Austin v. Dutcher, 56 N. Y. App. Div. 393. See also *supra*, this title, 482, 7.

**497.** 1. Where Necessary to Prevent Abuse.—See Brown v. Supreme Ct., etc., 66 N. Y. App. Div. 259, *affirmed* 176 N. Y. 132.

**499.** 4. The Courts Will Not Interfere to prevent the trial and expulsion of a Mason for libel. Franklin v. Burnham, (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 566.

**500.** 1. Findings of Masonic Tribunal Conclusive.—Franklin v. Burnham, (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 566.

**2.** Mandamus Usually Available.—Radice v. Italian-American Christopher Columbus Soc., 67 N. J. L. 196; Cheney v. Ketcham, 7 Ohio Dec. 183; Weiss v. Musical Mut. Protective Union, 189 Pa. St. 446, 69 Am. St. Rep. 820.

**501.** 1. Berlin v. Eureka Lodge No. 9, 132 Cal. 204.

**9.** Acceptance of Dues Refunded.—The right of a member to object to an alleged wrong-

ful suspension will be waived by his accepting without objection dues returned by the society. Hand v. Supreme Council, etc., 44 N. Y. App. Div. 484, *affirmed* 167 N. Y. 600.

**502.** 4. Jurisdiction of Equity.—Froelich v. Musicians Mut. Ben. Assoc., 93 Mo. App. 383.

**5.** Restoration.—A court of equity will not decree restoration where the plaintiff's right is doubtful, as where it is not clear whether he was ever a full member of the association. Potter v. Sheffer, (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 46.

**8.** Injunction.—See Central Stock, etc., Exch. v. Board of Trade, 196 Ill. 396, *affirming* 98 Ill. App. 212.

Where the act of the society in expelling a member is in pursuance of a by-law which is not against public policy or unreasonable, an injunction will not lie. Board of Trade v. Central Stock, etc., Exch., 98 Ill. App. 212, *affirmed* 196 Ill. 396.

**503.** 9. Damages.—Connell v. Stalker, (Supm. Ct. App. T.) 21 Misc. (N. Y.) 609; Cheney v. Ketcham, 7 Ohio Dec. 183; Ellis v. Alta Friendly Soc., 16 Pa. Super. Ct. 607.

**Necessity of Malice.**—In Lurman v. Jarvie, 82 N. Y. App. Div. 37, *affirmed* 178 N. Y. 559, it was held that a member of a commercial exchange, expelled without a proper hearing, could not recover damages in the absence of proof of malice.

**504.** 12. Abernethy v. Orton, 42 Oregon 437.

**12*a.* Disinterring Dead Body.**—In construing California Penal Code, § 290, providing that every person who *disinters* the dead body of a human being without authority of law is guilty of a felony, the court said: "To lay bare the coffin resting at the bottom of an ordinary grave, and to take off the lid of the coffin and appropriate money or jewelry found on the body, would not, we think, be to *disinter* the body, as that term is commonly understood. \* \* \* *Disinter* is defined, 'to unbury; to take out of the grave; to disintomb, to exhume.' (Worcester.) Much the same definitions are given by Webster, and also by the Encyclopedic Dictionary. *Disinter* is not a technical word, nor has it acquired a

- 504. DISINTERESTED.** — See note 13.  
**505. DISMISS.** — See note 1.  
**507. DISORDERLY CONDUCT.** — See note 1.

peculiar meaning in law; it must, therefore, 'be construed according to the context and approved usage of the language.' \* \* \* I think there can be little doubt that the common understanding of the act 'to *disinter* a buried human body' is not only to expose it to the elements where it lies, but to remove it. The statute is aimed at the crime commonly called 'body-snatching.' *People v. Baumgartner*, 135 Cal. 72.

**504. 13. Fire Insurance.** — *Hall v. Western Assur. Co.*, 133 Ala. 637; *Insurance Co. of North America v. Hegewald*, 161 Ind. 631.

**505. 1. Final.** — See *Lewis v. Smith*, 21 R. I. 324.

**507. 1. Disorderly Conduct.** — See *People v. State Reformatory for Women*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 237; *Matter of Newkirk*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 404.

## DISORDERLY HOUSES.

By H. W. HOYE.

- 509. DEFINITION AND NATURE** — 1. **At Common Law.** — See note 1.  
**510. 2. Statutory Offenses.** — See note 3.  
**511. 5. Municipal Ordinances** — *a. IN GENERAL.* — See note 3.  
**512. II. THE HOUSE OR PLACE.** — See notes 4, 5, 6.  
**513. III. THE DISORDER OR IMPROPER CONDUCT** — 2. **Annoyance or Injury to the Public** — *a. IN GENERAL.* — See note 2.  
**517. 3. Nature and Effect of the Conduct or Disorder** — *e. ENCOURAGEMENT OF IDLENESS AND DISORDER.* — See note 1.  
**5. Disorder Wholly Inside the House.** — See note 3.  
**518. 8. Effect of License.** — See note 5.  
**9. Particular Kinds of Disorderly Houses** — *b. BAWDY HOUSES AND HOUSES OF ILL FAME, ETC.* — See note 7.

**509. 1. Definition.** — *State v. Horn*, 83 Mo. App. 50. See also *State v. McGahan*, 48 W. Va. 438.

**510. 3. New York — Keeping Place for Smoking of Opium.** — To convict of the offense of keeping a "place where opium \* \* \* is smoked by other persons," under Penal Code N. Y., § 388, it must be shown not only that opium was smoked, but that it was smoked by persons other than the defendant. *People v. Reed*, 46 N. Y. App. Div. 625.

The Word "Keeping" implies a continuous offense. *Rex v. Keeping*, 34 Nova Scotia 442.

**511. 3. New Orleans — Notice to Abandon.** — See *New Orleans v. Chappuis*, 105 La. 179, 105 La. 206.

**512. 4. Nature of Place Must Be Specified.** — Under a statute defining a common bawdy house as a "house, room, or set of rooms, or place of any kind kept for the purposes of prostitution," it was held to be necessary that a conviction for keeping "a disorderly house, that is to say a bawdy house," should show further particulars of the offense by specifying whether the place kept for prostitution was a "house," "room," "set of rooms," or other "place," so as to ascertain if it came within the terms of the statute. *Rex v. Shepherd*, 6 Can. Crim. Cas. (Nova Scotia) 463.

**5. A Covered Wagon** is a "house" within the meaning of the Iowa statute. *State v. Chauvet*, 111 Iowa 687, 82 Am. St. Rep. 539. And the

same has been held under the Texas act. *Tracey v. State*, 42 Tex. Crim. 494. See also generally DWELLING, DWELLING HOUSE, ETC., 353. 1 *et seq.*; HOUSE, 767. 2 *et seq.*

**6. A Tent, Shed, Camp,** or other place may be brought within a statute forbidding the keeping of a bawdy house, provided it is used for the purpose defined by the statute. *Rex v. Shepherd*, 6 Can. Crim. Cas. (Nova Scotia) 463, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 512.

**513. 2. Injury to the Public Essential.** — See *Heard v. State*, 113 Ga. 444, wherein the evidence was held to be sufficient to establish the offense.

**Statutory Nuisances.** — See *Brown v. Toledo*, 5 Ohio Dec. 210.

**517. 1. Encouragement of Idleness, Etc.** — *State v. Ireton*, 80 Minn. 340.

**3. Disorder Wholly Inside the House.** — A saloon used by lewd women for purposes of assignation is a disorderly house although the public is not openly disturbed thereby. *State v. Ireton*, 80 Minn. 340.

**518. 5. No Justification for Keeping Place in Disorderly Manner.** — *Kissel v. Lewis*, 156 Ind. 233.

**7. Bawdy Houses.** — *De Forest v. U. S.*, 11 App. Cas. (D. C.) 458 (holding that the offense was committed although the keeper did not commit acts of immorality); *Rex v. Young*, 14 Manitoba 58, 6 Can. Crim. Cas. 42.



**519.** See note 1.

A Single Act. — See note 4.

**520.** Prostitution by Proprietor. — See note 1.

**521.** *c.* TIPLING HOUSES AND SALOONS. — See note 3.

**522.** Sale of Liquor in Violation of Law. — See note 2.

**523.** *d.* GAMING HOUSES. — See note 2.

**524.** *e.* PLACES OF AMUSEMENT AND SPORT — Statutes. — See note 2.

**526.** IV. THE KEEPING — 1. In General. — See note 1.

2. Inmates and Frequenters. — See notes 2, 4.

3. Knowledge. — See note 5.

4. Keeping for Lucre or Gain. — See note 7.

**527.** 6. Lessors and Lessees — *a.* LIABILITY OF LESSORS. — See note 3.

**528.** See note 1.

*b.* KNOWLEDGE OR PARTICIPATION NECESSARY. — See note 3.

**530.** *c.* LIABILITY OF LESSEES. — See note 1.

"A bawdy house, or brothel, is a house of ill-fame, kept for the resort and commerce of lewd people of both sexes." *State v. Horan*, 83 Mo. App. 47.

A Woman Who Harbors Prostitutes who she knows are plying their commerce in her house is liable as the keeper of a house of ill fame. *State v. Wilson*, 124 Iowa 264.

**519. 1.** Disorder Need Not Be Perceptible from outside. *De Forest v. U. S.*, 11 App. Cas. (D. C.) 458.

**4.** Single Act of Intercourse. — *State v. Irwin*, 117 Iowa 469.

**520.** 1. Prostitution by Proprietor. — *Rex v. Young*, 14 Manitoba 58, 6 Can. Crim. Cas. 42, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 520.

Under the Texas Statute. — *Bates v. State*, 45 Tex. Crim. 420.

**521. 3.** Disorderly Tippling Houses and Saloons. — *Kissel v. Lewis*, 156 Ind. 233; *State v. Golding*, 28 Ind. App. 233; *State v. Ireton*, 89 Minn. 340; *Jannone v. State*, (N. J. 1900) 45 Atl. Rep. 1032; *State v. Morehead*, 22 R. I. 272; *State v. McGahan*, 48 W. Va. 438.

**522. 2.** The Unlawful Sale of Liquor constitutes the place of sale a disorderly house under the *New Jersey* statutes. *Parker v. State*, 61 N. J. L. 308. And see the title INTOXICATING LIQUORS, 318. 3 *et seq.*

**523. 2.** Common Gaming Houses Indictable at Common Law. — *Thrower v. State*, 117 Ga. 753; *Rex v. Hanrahan*, 3 Ont. L. Rep. 659, 5 Can. Crim. Cas. 430. And see the title GAMING HOUSES, 697. 1 *et seq.*

**524. 2.** English Statutes. — The landlord of a hotel, by merely permitting his customers on many occasions to sing in one of the public rooms of the hotel and to use the piano which he has there, does not thereby keep or use such room for public "singing, music, or other public entertainment of the like kind," within the meaning of the Public Health Act of 1890, § 51, so as to require a music license. *Brearley v. Moreley*, (1899) 2 Q. B. 121.

**526. 1.** Control and Management by Accused. — See *State v. Hörn*, 83 Mo. App. 47.

Only the Owner, Lessee, or Tenant Is Liable under the *Texas* statutes. *Bates v. State*, 45 Tex. Crim. 420; *Cook v. State*, 42 Tex. Crim. 539; *Humphries v. State*, (Tex. Crim. 1902) 68 S. W. Rep. 681; *Morse v. State*, (Tex. Crim.

1898) 47 S. W. Rep. 989. See also *Sparks v. State*, (Tex. Crim. 1899) 51 S. W. Rep. 1120.

**2.** Residing in House. — See *Com. v. Schoen*, 25 Pa. Super. Ct. 211.

**4.** Frequenters. — See *People v. New York State Reformatory*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 92.

Resorting to House of Ill Fame. — *State v. Shaw*, 125 Iowa 422.

Living in House of Ill Fame. — See *Webber v. Harding*, 153 Ind. 408, where a statute making it an offense to live in a house of ill fame was held not to be unconstitutional.

Massachusetts — Frequenting Opium Den. — See *Com. v. Kane*, 173 Mass. 477.

**5.** Knowledge of Unlawful Use Must Be Shown. — *State v. McLaughlin*, 160 Mo. 33. See also *Bass v. State*, (Tex. Crim. 1902) 66 S. W. Rep. 558; *Stratton v. State*, (Tex. Crim. 1898) 44 S. W. Rep. 506.

**7.** Lucre or Gain Not Necessary — Bawdy Houses. — *State v. Parks*, 61 N. J. L. 438.

**527. 3.** Renting for Purpose of Disorderly House. — *Kessler v. State*, 119 Ga. 303, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 527; *Fields v. Brown*, 188 Ill. 115, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 627; *Reg. v. Roy*, 9 Quebec Q. B. 312, 3 Can. Crim. Cas. 472.

Actual Lease Need Not Be Proved. — Under the *Texas* statutes, where the owner knowingly permits prostitutes to ply their calling in his house, it is not necessary to show any actual lease or rental to them. *Stratton v. State*, (Tex. Crim. 1898) 44 S. W. Rep. 506.

Sham Sale. — Where the defendant claims that he is not the owner of the house, having sold it to the actual keeper, the state may show that the transaction was merely a colorable sale for the purpose of evading the statute, and that the contract was really one of leasing. This need not be established by direct evidence, but may be inferred from facts and circumstances. *State v. Emblem*, 56 W. Va. 678.

**528. 1.** Statutes. — *Kessler v. State*, 119 Ga. 301.

**3.** Knowledge or Participation Necessary. — *Reg. v. Roy*, 9 Quebec Q. B. 312, 3 Can. Crim. Cas. 472.

**530. 1.** Who Is a Tenant. — To be liable as a tenant under the *Texas* statute, one must have some right of tenancy by virtue of a contract, express or implied; and a mere trespasser who

**530.** 7. Principal and Agent, and Master and Servant — Agents and Servants. — See note 3.

**531.** 8. Partners. — See note 1.

9. Husband and Wife — A Married Woman. — See note 4.

**V. EVIDENCE** — 1. Competency of Evidence — *a.* REPUTATION OF HOUSE. — See note 6.

**532.** Cases Excluding Such Evidence. — See note 1.

Statutes. — See note 3.

**533.** *b.* CHARACTER AND REPUTATION OF INMATES AND FREQUENTERS. — See note 5.

*c.* CONDUCT AND CONVERSATION OF INMATES AND FREQUENTERS. — See note 6.

**535.** *d.* CHARACTER AND REPUTATION OF THE ACCUSED. — See note 1.

**536.** *h.* TIME COVERED BY THE EVIDENCE. — See note 3.

2. Sufficiency of Evidence — Disorderly Character of the House. — See note 5.

**537.** That the Accused Was the Keeper. — See notes 4, 5.

Knowledge. — See note 6.

**538.** VI. QUESTIONS OF LAW AND FACT. — See note 1.

procures a temporary entrance to a house and uses it, without profit, for a short time to enable himself and others to have intercourse with a prostitute is not a tenant. *Bates v. State*, 45 Tex. Crim. 420.

For Evidence held to be sufficient to show that the defendant was a lessee or tenant of the premises, see *Carlton v. State*, (Tex. Crim. 1899) 51 S. W. Rep. 213.

**530.** 3. Liability of Agent or Servant. — See *Ponder v. State*, 115 Ga. 831.

**531.** 1. Partners. — See *Ponder v. State*, 115 Ga. 831.

**4. Bawdy House — No Presumption of Coercion.** — *State v. Jones*, 53 W. Va. 615, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 531. See also *Com. v. Whipple*, 181 Mass. 343.

**6. Evidence of Reputation Held Admissible.** — *Howard v. People*, 27 Colo. 396; *Com. v. Murr*, 7 Pa. Super. Ct. 391, 42 W. N. C. (Pa.) 263; *Com. v. Sarves*, 17 Pa. Super. Ct. 407; *Com. v. Bunnell*, 20 Pa. Super. Ct. 51; *Frazier v. State*, (Tex. Crim. 1904) 81 S. W. Rep. 532. See also *Brown v. Toledo*, 5 Ohio Dec. 210.

**532.** 1. Evidence of Reputation of House Not Competent. — *Parker v. People*, 94 Ill. App. 650, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 531-533.

**3. Statutes Declaring Evidence of Reputation Competent.** — *State v. Steen*, 125 Iowa 307. See also *State v. Beebe*, 115 Iowa 128.

**Statute Constitutional.** — *State v. Wilson*, 124 Iowa 264.

**533.** 5. Character and Reputation of Inmates and Frequenters. — *Demartini v. Anderson*, 127 Cal. 33; *Howard v. People*, 27 Colo. 396; *State v. Steen*, 125 Iowa 307; *State v. Horn*, 83 Mo. App. 50; *Com. v. Sarves*, 17 Pa. Super. Ct. 407; *Com. v. Bunnell*, 20 Pa. Super. Ct. 54; *Com. v. Eagles*, 10 Kulp (Pa.) 107.

**6. Conduct and Conversation Away from the House.** — In *State v. McGahan*, 48 W. Va. 438, it was held to be error to admit evidence of acts occurring one hundred and fifty feet from the house of the defendant, where there was nothing to show that the person who did them had been at the defendant's house on that day.

**535.** 1. Admissible with Other Evidence. —

*Howard v. People*, 27 Colo. 396; *Dailey v. State*, (Tex. Crim. 1900) 55 S. W. Rep. 823. See also *State v. Beebe*, 115 Iowa 128.

**536.** 3. Evidence Covering Time Prior to Offense Charged. — *Parker v. People*, 94 Ill. App. 648; *Frazier v. State*, (Tex. Crim. 1904) 81 S. W. Rep. 532.

**Reputation Subsequent to Filing of Complaint** — It is erroneous to admit evidence of the general reputation of the house at a time subsequent to the filing of the complaint. The proof must be confined to facts prior to that time. *Brady v. State*, (Tex. Crim. 1900) 57 S. W. Rep. 647.

**5. Circumstantial Evidence Sufficient.** — *State v. Steen*, 125 Iowa 307.

**537.** 4. Circumstantial Evidence of Keeping. — *Hamilton v. State*, (Tex. Crim. 1900) 60 S. W. Rep. 39. See also *Ponder v. State*, 115 Ga. 831.

For evidence held to be sufficient to establish ownership, see *Frazier v. State*, (Tex. Crim. 1904) 81 S. W. Rep. 532.

**5. Reputation Not Alone Sufficient.** — *Humphries v. State*, (Tex. Crim. 1902) 68 S. W. Rep. 681.

**6. Circumstantial Evidence of Knowledge.** — *State v. Steen*, 125 Iowa 307. See also *De Forest v. U. S.*, 11 App. Cas. (D. C.) 458.

For evidence held to be sufficient to charge the accused with knowledge of the character of the women, see *Brown v. State*, (Tex. Crim. 1898) 48 S. W. Rep. 176.

Evidence that a number of citizens had petitioned the keeper of a disorderly house to leave the locality, and that she continued to stay, is admissible to show knowledge on her part. *Walker v. Com.*, (Ky. 1904) 79 S. W. Rep. 191.

**538.** 1. In a Prosecution for Leasing a house to another to be kept as a house of ill fame, if the defendant offers in evidence the contract and claims that the transaction was a sale rather than a letting, it is the court's duty, on the request of the defendant, to interpret the contract and instruct the jury as to its character. *State v. Emblem*, 44 W. Va. 521. For a sufficient performance of this duty by the court, see *State v. Emblem*, 56 W. Va. 678.

**540. DISPOSE.** — See note 3.

**542. DISPOSING MIND.** — See note 1.  
**DISPUTE.** — See note 3.

**543. DISSECTION.** — See note 1.  
**DISSEIZIN.** — See note 2.

**540. 3. Attachment.** — See Builders', etc., Supply Co. v. Lucas, 119 Ala. 202.

**Dispose of — Will.** — Mace v. Mace, 95 Me. 283.

**Same — Estate.** — Dalrymple v. Leach, 192 Ill. 51.

**Mortgage.** — Rutherford Land, etc., Co. v. Sannrock, 60 N. J. Eq. 471.

**542. 1. Disposing Mind and Memory.** — Fulbright v. Perry County, 145 Mo. 432.

**3. A dispute** which arises from the denial of the right of a natural gas company to make excavations in a street in order to reach and

repair its pipes without paying a certain license fee to a borough is a *dispute* within the meaning of the 12th section of the Act of May 29, 1885, which gives the courts power to define the duties of natural gas companies as to relaying and repairing their pipes. Ft. Pitt Gas. Co. v. Sewickley, 198 Pa. St. 201.

**543. 1.** See Sudduth v. Travelers' Ins. Co., 106 Fed. Rep. 822.

**2.** Bond v. O'Gara, 177 Mass. 139; Carpenter v. Coles, 75 Minn. 9.

**Other Definitions.** — Roberts v. Niles, 95 Me. 244.

## DISSOLUTION OF CORPORATIONS.

BY JOHN C. MYERS.

**545. I. DEFINITION.** — See note 1.

**546. II. HOW A CORPORATION MAY BE DISSOLVED — 1. In General.** — See note 1.

**2. Repeal of Charter — a. IN GENERAL.** — See note 2.

**548. b. RIGHT OF REPEAL AS AFFECTED BY CONSTITUTIONAL PROVISIONS — (2) Repeal of Corporate Charters as Impairing Obligation of Contracts — (a) In General.** — See note 2.

**(b) Charters of Private Corporations — aa. GENERAL RULES — The Charter a Contract.** — See note 3.

**Imposition of New Conditions of Forfeiture.** — See note 4.

**549. Change in Remedy of Creditors or Stockholders.** — See note 2.

**cc. WHERE RIGHT OF REPEAL IS RESERVED.** — See note 5.

**545. 1. Dissolution Defined.** — "A dissolution of a corporation within the contemplation of the law is the death of the corporation. It means a disintegration, a separation, a going out of business." Theis v. Spokane Falls Gas Light Co., 34 Wash. 23.

**546. 1. Corporation May Be Dissolved by Surrender of Franchises.** — Law v. Rich, 47 W. Va. 634, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 546.

**2. Repeal by Legislature — United States.** — Economy Bldg., etc., Assoc. v. Paris Ice Mfg. Co., 113 Ky. 246.

**548. 2. General Rule as to Impairment of Obligation of Contracts.** — People v. Rose, 207 Ill. 352; Morrison v. Clark, 24 Mont. 515; Chincelamouche Lumber, etc., Co. v. Com., 100 Pa. St. 438; Kehr's Petition, 23 Pa. Co. Ct. 460.

**3. Charter Is Contract Between Government and Corporators.** — Kehr's Petition, 23 Pa. Co. Ct. 460.

**4. Imposing New Conditions of Forfeiture.** — Compare People v. Rose, 207 Ill. 352; Philadelphia, etc., R. Co.'s Petition, 187 Pa. St. 123.

**New Evidence of Nonuser.** — A statute making a failure to file certain reports *prima facie* evi-

dence of nonuser is not unconstitutional as to existing corporations, though before such statute such failure was not proof at all of nonuser; but the legislature could not make such evidence conclusive. People v. Rose, 207 Ill. 352.

**549. 2. Provision for Survival of Rights of Creditors and Stockholders — Change in Remedy.** — Persons v. Gardner, 42 N. Y. App. Div. 490.

**5. Reservation of Right of Repeal.** — Wilmington City R. Co. v. Wilmington, etc., R. Co., (Del. Ch. 1900) 46 Atl. Rep. 12; Chincelamouche Lumber, etc., Co. v. Com., 100 Pa. St. 438.

**Reservation of Power to Repeal, Alter, or Modify.** — The reservation of a power to add to, alter, amend, or repeal a charter authorizes the proper legislative body to make any addition, alteration, or amendment which does not substantially impair vested rights or directly impede the accomplishment of the purpose of the grant, and which the legislative body deems proper to secure the best interests of the public. Union Pac. R. Co. v. Mason City, etc., R. Co., (C. C. A.) 128 Fed. Rep. 230; McKee v. Chautauque Assembly, (C. C. A.) 130 Fed. Rep. 536.



- 550.** See notes 2, 3.  
**Power of Repeal May Be Absolute or Conditional.** — See note 6.
- 551.** See notes 1, 2.  
*dd.* RIGHT OF REPEAL IN THE EXERCISE OF POLICE POWER. — See note 4.  
 (c) **Charters of Public Corporations.** — See note 7.
- 553.** 3. **Happening of Condition or Contingency Prescribed by Charter** — a. **WHETHER CHARTER PROVISIONS ARE OR ARE NOT SELF-EXECUTING.** — See notes 4, 5.  
**555.** See note 1.  
**556.** b. **INCLINATION OF COURTS IN CONSTRUCTION OF CLAUSES PRESCRIBING CONDITION OR CONTINGENCY.** — See note 1.  
 c. **EFFECT WHERE CHARTER PROVISIONS ARE NOT SELF-EXECUTING.** — See note 3.  
**557.** 4. **Natural Death of All the Members or Loss of Integral Part** — b. **NATURAL DEATH OF ALL THE MEMBERS.** — See note 3.  
**558.** c. **LOSS OF AN INTEGRAL PART** — (1) *In General* — **Inherent Power of Revival.** — See note 2.  
 Neglect to Exercise Corporate Functions. — See note 4.  
 (2) *Failure to Elect Officers or Directors.* — See note 5.  
**560.** (3) *Concentration of All the Stock in the Hands of One Person.* — See note 2.

**550.** 2. **Reservation of Right of Repeal in North Carolina Constitution.** — See *Matthews v. Corporation Com'rs*, 97 Fed. Rep. 400.

3. *Yates v. People*, 207 Ill. 316; *People v. Rose*, 207 Ill. 352; *Wilmington City R. Co. v. Wilmington, etc., R. Co.*, (Del. Ch. 1900) 46 Atl. Rep. 12; *Chincleclamouche Lumber, etc., Co. v. Com.*, 100 Pa. St. 438.

**A Void or Unconstitutional Law Is Not a Part of the Contract;** hence it cannot be contended that the violation of such a law authorizes forfeiture. *State v. Shippers Compress, etc., Co.*, (Tex. Civ. App. 1902) 67 S. W. Rep. 1049, affirmed 95 Tex. 603.

**6. Power of Repeal May Be Absolute.** — *Wilmington City R. Co. v. Wilmington, etc., R. Co.*, (Del. Ch. 1900) 46 Atl. Rep. 12.

**551. 1. Power of Repeal May Be Conditional.** — *American Surety Co. v. Great White Spirit Co.*, 58 N. J. Eq. 526.

2. *American Surety Co. v. Great White Spirit Co.*, 58 N. J. Eq. 526.

**4. Dissolution in Judicial Proceeding at Instance of State.** — See *State v. Louisiana Debenture Co.*, 51 La. Ann. 1795; *State v. New Orleans Debenture Redemption Co.*, 51 La. Ann. 1827; *State v. Debenture Guarantee, etc., Co.*, 51 La. Ann. 1874.

**7. In Case of Public Corporations.** — *State v. Washington Steam Fire Co.*, 76 Miss. 449.

**553. 4. Question of Legislative Intent.** — *Utah, etc., R. Co. v. Utah, etc., R. Co.*, 110 Fed. Rep. 879.

**5. Provisions Held Self-executing.** — *Utah, etc., R. Co. v. Utah, etc., R. Co.*, 110 Fed. Rep. 879; *Wilmington City R. Co. v. Wilmington, etc., R. Co.*, (Del. Ch. 1900) 46 Atl. Rep. 12; *Yates v. People*, 207 Ill. 316; *Maine Shore Line R. Co. v. Maine Cent. R. Co.*, 92 Me. 476; *Nicolai v. Maryland Agricultural, etc., Assoc.*, 96 Md. 323; *State v. Spartanburg, etc., R. Co.*, 51 S. Car. 129.

**555. 1. Provisions Held Not Self-executing.** — *People v. Rose*, 207 Ill. 352; *Stolze v. Manitowoc Terminal Co.*, 100 Wis. 208.

**556. 1. Courts Opposed to Forfeiture Ipso Facto.** — *Nicolai v. Maryland Agricultural, etc., Assoc.*, 96 Md. 323, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 555; *State v. Spartanburg, etc., R. Co.*, 51 S. Car. 129.

**As a General Rule** the mere breach of a charter constitution or failure to comply with a charter provision will not *ipso facto* work a dissolution of the corporation. *Wilmington City R. Co. v. Wilmington, etc., R. Co.*, (Del. Ch. 1900) 46 Atl. Rep. 12; *Stolze v. Manitowoc Terminal Co.*, 100 Wis. 208.

**3. Effect Where Provision Not Self-Executing.** — *Utah, etc., R. Co. v. Utah, etc., R. Co.*, 110 Fed. Rep. 879; *Wilmington City R. Co. v. Wilmington, etc., R. Co.*, (Del. Ch. 1900) 46 Atl. Rep. 12; *People v. Rose*, 207 Ill. 352; *Nicolai v. Maryland Agricultural, etc., Assoc.*, 96 Md. 323.

**557. 3. Fact Must Be Clearly Shown.** — A corporation should not be held to be dissolved by the death of its members unless there be unmistakable evidence of such fact. *Nicolai v. Maryland Agricultural, etc., Assoc.*, 96 Md. 323.

**558. 2. Where There Is Inherent Power of Revival.** — *Richards v. Minnesota Sav. Bank*, 75 Minn. 196.

**4. Mere Neglect to Exercise Corporate Functions.** — *Richard v. Minnesota Sav. Bank*, 75 Minn. 196; *Geneva Mineral Spring Co. v. Coursey*, 45 N. Y. App. Div. 268. Compare *Chincleclamouche Lumber, etc., Co. v. Com.*, 100 Pa. St. 438.

**5. Failure to Elect Officers.** — *Williard v. Spartanburg, etc., R. Co.*, 124 Fed. Rep. 796; *Youree v. Home Town Mut. Ins. Co.*, 180 Mo. 153; *Geneva Mineral Spring Co. v. Coursey*, 45 N. Y. App. Div. 268.

**560. 2. Acquisition of All the Stock by One Person.** — *Louisville Gas Co. v. Kaufman*, 105 Ky. 131; *George T. Stagg Co. v. Taylor*, 113 Ky. 709; *Monongahela Bridge Co. v. Pittsburgh, etc., Traction Co.*, 196 Pa. St. 25, 79 Am. St. Rep. 685.

**560.** 5. Surrender of Franchises — *a.* IN GENERAL. — See note 6.

**561.** *b.* HOW A SURRENDER IS MADE. — See notes 2, 3.

**562.** See notes 1, 2.

*c.* NECESSITY FOR ACCEPTANCE OF SURRENDER — (1) *In General* — Acceptance Essential. — See note 3.

**563.** Strictly Private Corporations. — See note 1.

Quasi-public Corporations. — See note 4.

(2) *Nonuser, Sale of Property, or Insolvency.* — See note 5.

**564.** Mere Nonuser. — See note 1.

**565.** See note 2.

Transfer of Corporate Property. — See notes 3, 4, 5.

#### Corporation Kept Alive for Fraudulent Purposes.

— The rule does not apply when the organization is attempted to be kept alive as a mere shield for wrongdoing or for the perpetration of fraud. *Louisville Gas Co. v. Kaufman*, 105 Ky. 131.

**560.** 6. Surrender of Franchise. — *Economy Bldg., etc., Assoc. v. Paris Ice Mfg. Co.*, 113 Ky. 246; *Manchester St. R. Co. v. Williams*, 71 N. H. 312.

**561.** 2. The Right to Dissolve Is Vested in the Corporation, and not in minority stockholders. *Williams v. Nall*, 108 Ky. 21.

**3.** Surrender by Petition Filed in Court. — *Huntington v. Chesapeake, etc., R. Co.*, 98 Fed. Rep. 459; *Sullivan County R. Co. v. Connecticut River Lumber Co.*, 76 Conn. 464; *In re Liquidation of Grant, etc., Furniture Co.*, 51 La. Ann. 1254; *Matter of Dolgeville Electric Light, etc., Co.*, 160 N. Y. 500; *Matter of Broadway Ins. Co.*, 23 N. Y. App. Div. 282; *North Fairmount Bldg., etc., Co. v. Rehn*, 8 Ohio Dec. 594, 6 Ohio N. P. 185; *Fitch v. Sprague Carriage Co.*, 10 Ohio Dec. 341, 7 Ohio N. P. 413; *Fitch v. Sprague Carriage Co.*, 10 Ohio Cir. Dec. 520, 19 Ohio Cir. Ct. 296; *In re Lincoln Market Co.*, 190 Pa. St. 124; *Matter of Titusville Oil Exch.*, 8 Pa. Super. Ct. 304; *New York Nat. Exch. Bank v. Metropolitan Sav. Bank*, 28 Wash. 553; *Law v. Rich*, 47 W. Va. 634.

**Strict Compliance with Statutes Necessary.** — Strict compliance with the procedure prescribed by statute is a condition precedent to the exercise of the right of voluntary dissolution. *Economy Bldg., etc., Assoc. v. Paris Ice Mfg. Co.*, 113 Ky. 246.

**562.** 1. A Minority of the Stockholders cannot procure dissolution. *Taylor v. Decatur Mineral, etc., Co.*, 112 Fed. Rep. 449; *McKleroy v. Gadsden Land, etc., Co.*, 126 Ala. 184.

**When the Purpose Is to Defraud Minority Stockholders,** and the corporation is a going concern, the majority stockholders will not be permitted to dissolve the corporation. *Theis v. Spokane Falls Gas Light Co.*, 34 Wash. 23.

**In New Jersey** a corporation may be dissolved by vote of the holders of two-thirds of the stock; and such action, when properly taken, is not reviewable by the courts. *Windmuller v. Standard Distilling, etc., Co.*, 114 Fed. Rep. 491.

**In New York,** under section 57 of the Stock Corporation Law (Laws N. Y. 1900, c. 760), the holders of two-thirds of the stock of a corporation other than a moneyed corporation may dissolve the corporation voluntarily, without application to the court. *Janeway v. Burn*, 91 N. Y. App. Div. 165, *affirmed* 180 N. Y. 560.

**In Washington** a corporation may be dissolved by a vote of the holders of two-thirds of its stock. *New York Nat. Exch. Bank v. Metropolitan Sav. Bank*, 28 Wash. 553; *Theis v. Spokane Falls Gas Light Co.*, 34 Wash. 23.

**2. Unanimous Action Unnecessary.** — *Arents v. Blackwell's Durham Tobacco Co.*, 101 Fed. Rep. 338, *affirmed* 48 C. C. A. 765. *Compare Theis v. Spokane Falls Gas Light Co.*, 34 Wash. 23.

**3. General Rule — Acceptance Necessary.** — *Richards v. Minnesota Sav. Bank*, 75 Minn. 196; *Geneva Mineral Springs Co. v. Coursey*, 45 N. Y. App. Div. 268.

**Competent Evidence of Acceptance.** — That the legislature granted an amendment to a corporation's charter, on an assurance that all the stockholders of another corporation desired to surrender its franchises, is competent evidence of the assent of the state. *Manchester St. R. Co. v. Williams*, 71 N. H. 312, in which case, however, the court expressly refrained from deciding whether such assent was necessary.

**563.** 1. Private Corporations — Right to Discontinue. — *McKleroy v. Gadsden Land, etc., Co.*, 126 Ala. 184; *Noble v. Gadsden Land, etc., Co.*, 133 Ala. 250, 91 Am. St. Rep. 27.

**4. Private Corporation Cannot in Any Event Dissolve So as to Discharge Itself from Liabilities.** — See *Economy Bldg., etc., Assoc. v. Paris Ice Mfg. Co.*, 113 Ky. 246.

**5.** *Law v. Rich*, 47 W. Va. 634, *citing* 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 563.

**564.** 1. Nonuser. — *Lamar v. Allison*, 101 Ga. 270; *Richards v. Minnesota Sav. Bank*, 75 Minn. 196; *State v. National School of Osteopathy*, 76 Mo. App. 439; *Morrison v. Clark*, 24 Mont. 515; *Geneva Mineral Springs Co. v. Coursey*, 45 N. Y. App. Div. 268; *State v. Spartanburg, etc., R. Co.*, 51 S. Car. 129; *Tennessee Mountain Petroleum, etc., Co. v. Ayers*, (Tenn. Ch. 1897) 43 S. W. Rep. 744; *Law v. Rich*, 47 W. Va. 634.

**Nonuser Not Equivalent to Surrender.** — *Contra*, *Chincleclamouche Lumber, etc., Co. v. Com.*, 100 Pa. St. 438, holding that complete failure to exercise any corporate power — an absolute nonuser of franchises — is equivalent to a surrender.

**565.** 2. Failure to Hold Corporate Meetings. — *Williard v. Spartanburg, etc., R. Co.*, 124 Fed. Rep. 796; *Morrison v. Clark*, 24 Mont. 515; *Geneva Mineral Springs Co. v. Coursey*, 45 N. Y. App. Div. 268.

**3. Possession of Property Not Essential to Corporate Existence.** — *Forrester v. Boston, etc., Consol. Copper, etc., Min. Co.*, 21 Mont. 544, *citing* 9 AM. AND ENG. ENCYC. OF LAW (2d ed.)

**566.** Insolvency — Bankruptcy. — See note 2.

(3) *Appointment of Receiver.* — See note 5.

**567.** (4) *Doctrine under Statutes Providing Certain Remedies for Creditors.* — See note 2.

**568.** Leading Case — Comments. — See note 2.

*d.* HOW ACCEPTANCE OF SURRENDER IS MADE — (1) *In General.* — See note 5.

**569.** (3) *Surrender by Consolidation.* — See note 1.

6. *Expiration of Time Limited in Charter.* — See note 3.

7. *Forfeiture of Franchises in Proper Judicial Proceeding* — *a.* IN GENERAL. — See note 6.

**570.** See notes 1, 2.

565; Weigand *v.* Alliance Supply Co., 44 W. Va. 133.

**565. 4. Transfer of Corporate Property** — *United States.* — Williard *v.* Spartanburg, etc., R. Co., 124 Fed. Rep. 796.

*Georgia.* — Lamar *v.* Allison, 101 Ga. 270.

*Kansas.* — Attica State Bank *v.* Benson, 8 Kan. App. 566.

*Kentucky.* — See George T. Stagg Co. *v.* Taylor, 113 Ky. 709.

*Maryland.* — Nicolai *v.* Maryland Agricultural, etc., Assoc., 96 Md. 323.

*Minnesota.* — Richards *v.* Minnesota Sav. Bank, 75 Minn. 196.

*Montana.* — Forrester *v.* Boston, etc., Consol. Copper, etc., Min. Co., 21 Mont. 544, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 565.

*Nebraska.* — Wehn *v.* Fall, 55 Neb. 547, 70 Am. St. Rep. 397.

*New Hampshire.* — Kidd *v.* New Hampshire Traction Co., 72 N. H. 273.

*New Jersey.* — Coler *v.* Tacoma R., etc., Co., 65 N. J. Eq. 347.

*West Virginia.* — Weigand *v.* Alliance Supply Co., 44 W. Va. 133.

**Disposition of Part of Property.** — Where a corporation, after ceasing to do business and disposing of most of its property, exercised acts of absolute ownership and dominion over the property of which it did not dispose, it was held that it was not dissolved. Witherow *v.* Slayback, 158 N. Y. 649, 70 Am. St. Rep. 507.

**A Sale by the Stockholders of a Majority of the Stock** of a corporation is not a transfer of the property of the corporation. Com. *v.* Punxsutawney Water Co., 197 Pa. St. 569.

**In New Jersey** it has been held that a corporation which has sold all its property and parted with all its franchises except that of being a corporation is defunct for all purposes outside of the winding up of its affairs, as it is in the exact condition contemplated by the statute as that of a dissolved corporation. Coler *v.* Tacoma R., etc., Co., 65 N. J. Eq. 347.

**5. When Transfer Defeats Object of Creation.** — Forrester *v.* Boston, etc., Consol. Copper, etc., Min. Co., 21 Mont. 544, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 565; Geneva Mineral Springs Co. *v.* Coursey, 45 N. Y. App. Div. 268.

**566. 2. Insolvency.** — Ready *v.* Smith, 170 Mo. 163; Rosenbaum *v.* U. S. Credit System Co., 61 N. J. L. 543.

**An Assignment for the Benefit of Creditors** does not of itself work dissolution. Law *v.* Rich, 47 W. Va. 634.

**5. Effect of Appointment of Receiver.** — Sidway

*v.* Missouri Land, etc., Co., 101 Fed. Rep. 481; Rosenbaum *v.* U. S. Credit System Co., 61 N. J. L. 543; Stolze *v.* Manitowoc Terminal Co., 100 Wis. 208.

**567. 2. Statutes Providing Certain Remedies for Creditors.** — Sleeper *v.* Norris, 59 Kan. 555. See also Kidd *v.* New Hampshire Traction Co., 72 N. H. 273.

But the corporation is not dissolved for any other purpose than that of enabling creditors to enforce the individual liability of stockholders. Sleeper *v.* Norris, 59 Kan. 555; Salina Nat. Bank *v.* Prescott, 60 Kan. 490.

**568. 2.** Sidway *v.* Missouri Land, etc., Co., 101 Fed. Rep. 481.

**5.** Sullivan County R. Co. *v.* Connecticut River Lumber Co., 76 Conn. 464; *In re Liquidation of Grant, etc., Furniture Co.*, 51 La. Ann. 1254.

**569. 1. When the Statutes Do Not Authorize Consolidation,** an attempted consolidation will not work a dissolution. Topeka Paper Co. *v.* Oklahoma Pub. Co., 7 Okla. 220.

**3. Expiration of Time Limited in Charter.** — Topeka Paper Co. *v.* Oklahoma Pub. Co., 7 Okla. 20; Kehr's Petition, 23 Pa. Co. Ct. 466.

**Educational Institutions Not Included.** — Rev. Stat. Mo. 1855, c. 34, § 1, providing that the existence of a corporation is limited to twenty years, when no period of limitation is expressed in its charter, does not apply to an educational institution, as in its very nature such institutions are designed to be perpetual. State *v.* Westminster College, 175 Mo. 52.

**Where a Corporation Created for a Temporary Purpose Accomplished Such Purpose,** paid its debts, and distributed its assets among its stockholders, it was held that there was a virtual dissolution, and that fifty years thereafter a suit could not be maintained in its behalf or in behalf of its stockholders. Holmes *v.* Cleveland, etc., R. Co., 93 Fed. Rep. 100.

**A Provision for Perpetual Succession** does not keep a corporation alive after the expiration of the time limited for its existence. Kehr's Petition, 23 Pa. Co. Ct. 460.

**6. Forfeiture in Judicial Proceeding.** — Dittman *v.* Distilling Co. of America, 64 N. J. Eq. 537.

**570. 1.** Lincoln Park Chapter No. 177, etc., *v.* Swatek, 105 Ill. App. 604, affirmed 204 Ill. 228; Dudley *v.* Dakota Hot Springs Co., 11 S. Dak. 559.

In many states the writs of scire facias and quo warranto and proceedings by information in the nature of quo warranto have been abol-



**570.** Nature of the Proceeding. — See notes 3, 4.

**571.** *b. GROUNDS FOR JUDGMENT OF FORFEITURE* — (1) *General Doctrine* — Violation of Express Provisions. — See note 1.

**572.** Breach of Implied Conditions. — See note 1.

**573.** (2) *Qualifications of General Doctrine*. — See notes 3, 4.

**574.** See notes 1, 2.

(3) *Nonuser or Misuser* — (a) *In General* — Breach of Conditions Express or Implied. — See note 3.

**575.** Instances. — See note 1.

**576.** Suspension of Specified Time. — See notes 1, 2.

ished, and the remedies formerly obtainable in those forms may be obtained by civil actions. See *Atty.-Gen. v. Holly Shelter R. Co.*, 134 N. Car. 481; *State v. Red River Turnpike Co.*, 112 Tenn. 615. And see the titles *QUO WARRANTO*, vol. 23, p. 594; *SCIRE FACIAS*, 19 ENCYC. OF PL. AND PR. 258; and the Supplements thereto.

**570. 2. The Judgment Should Oust the Corporation from Its Franchises**, except the franchise to be a corporation, which remains for purposes of suing and being sued, etc. *Grey v. Newark Plank-Road Co.*, 65 N. J. L. 603.

**3. Analogous to Criminal Proceeding.** — "The forfeiture of a franchise is a severe remedy. It is in a civil action what capital punishment is in the criminal law. Courts proceed with great caution in such matters." *Ashland v. Ashland Water Co.*, 110 Wis. 94.

**4. Courts Regard Forfeiture with Disfavor.** — *State v. Southern Bldg., etc., Assoc.*, 132 Ala. 50; *State v. New Orleans Water Supply Co.*, 111 La. 1049; *State v. Twin Village Water Co.*, 98 Me. 214; *Nicolai v. Maryland Agricultural, etc., Assoc.*, 96 Md. 323.

**571. 1. Grounds of Forfeiture — General Rule** — *Illinois Trust, etc., Bank v. Doud*, (C. C. A.) 105 Fed. Rep. 123; *State v. New Orleans Water Works Co.*, 107 La. 1.

**572. 1. Breach of Implied Conditions.** — *Illinois Trust, etc., Bank v. Doud*, (C. C. A.) 105 Fed. Rep. 123; *Eel River R. Co. v. State*, 155 Ind. 433; *State v. Debenture Guarantee, etc., Co.*, 51 La. Ann. 1874; *State v. Twin Village Water Co.*, 98 Me. 214.

**Construction of Alleged Breaches of Implied Conditions.** — *State v. Twin Village Water Co.*, 98 Me. 214.

**573. 3. Public Interest Must Be Concerned.** — *Illinois Trust, etc., Bank v. Doud*, (C. C. A.) 105 Fed. Rep. 123; *State v. Southern Bldg., etc., Assoc.*, 132 Ala. 50; *People v. Rosenstein-Cohn Cigar Co.*, 131 Cal. 153; *Eel River R. Co. v. State*, 155 Ind. 433. See also *State v. New Orleans Water Works Co.*, 107 La. 1; *State v. Twin Village Water Co.*, 98 Me. 214.

**4. Where the Act or Omission Concerns Corporations Simply.** — *State v. Southern Bldg., etc., Assoc.*, 132 Ala. 50; *Noble v. Gadsden Land, etc., Co.*, 133 Ala. 250, 91 Am. St. Rep. 27.

**Illegal Assessments on the Capital Stock** do not justify forfeiture. *People v. Rosenstein-Cohn Cigar Co.*, 131 Cal. 153.

**574. 1. State v. Southern Bldg., etc., Assoc., 132 Ala. 50.**

**2. Only Violations of the Essence of the Contract Warrant Forfeiture.** — *State v. Southern Bldg., etc., Assoc.*, 132 Ala. 50; *People v. Rosenstein-Cohn Cigar Co.*, 131 Cal. 153. See also *Eel*

*River R. Co. v. State*, 155 Ind. 433; *State v. New Orleans Water Works Co.*, 107 La. 1; *Ashland v. Ashland Water Co.*, 110 Wis. 94; *Jackson v. Crown Point Min. Co.*, 21 Utah 1, 81 Am. St. Rep. 651.

**Failure to Perform a Duty That Is Not Fundamental** is not ground of forfeiture. *Jackson v. Crown Point Min. Co.*, 21 Utah 1, 81 Am. St. Rep. 651.

**3. Forfeiture for Nonuser or Misuser — General Rule** — *Alabama*. — *Bloch v. O'Conner Min., etc., Co.*, 129 Ala. 528.

*Illinois*. — *Bixler v. Summerfield*, 195 Ill. 147; *People v. Rose*, 207 Ill. 352; *Shellabarger Mill, etc., Co. v. Willing*, 81 Ill. App. 30.

*Indiana*. — *Eel River R. Co. v. State*, 155 Ind. 433.

*Louisiana*. — *State v. Louisiana Debenture Co.*, 51 La. Ann. 1795; *State v. New Orleans Debenture Redemption Co.*, 51 La. Ann. 1827; *State v. Debenture Guarantee, etc., Co.*, 51 La. Ann. 1874; *State v. New Orleans Water Works Co.*, 107 La. 1; *State v. New Orleans Water Supply Co.*, 111 La. 1049.

*Minnesota*. — *Richards v. Minnesota Sav. Bank*, 75 Minn. 196.

*Ohio*. — *State v. Capital City Dairy Co.*, 62 Ohio St. 350; *State v. Toledo R., etc., Co.*, 23 Ohio Cir. Ct. 603.

*Pennsylvania*. — *Chincleclamouche Lumber, etc., Co. v. Com.*, 100 Pa. St. 438.

*West Virginia*. — *Law v. Rich*, 47 W. Va. 634, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 574.

*Wisconsin*. — *Ashland v. Ashland Water Co.*, 110 Wis. 94.

**A Combination the Object of Which Is to Stifle Competition** is unlawful, and justifies the dissolution of a corporation entering therein. *San Antonio Gas Co. v. State*, 22 Tex. Civ. App. 118; *Crystal Ice, etc., Co. v. State*, 23 Tex. Civ. App. 293. See also *State v. Shippers Compress, etc., Co.*, 95 Tex. 603.

**Forfeiture of Charter for Fraud in Obtaining It.** — See *State v. Shippers Compress, etc., Co.*, (Tex. Civ. App. 1902) 67 S. W. Rep. 1049, affirmed 65 Tex. 603.

**575. 1. Illinois Trust, etc., Bank v. Doud, (C. C. A.) 105 Fed. Rep. 123.**

**576. 1. Suspension for Certain Period.** — In *Kansas*, cessation of business for a year operates as a dissolution for the single purpose of enabling creditors to enforce the individual liability of stockholders. For all other purposes the corporation continues to exist in the eye of the law. *Whitman v. Citizens' Bank*, (C. C. A.) 110 Fed. Rep. 503.

In *West Virginia*, suspension for more than

**577.** Acts Which Amount to a Virtual Surrender. — See note 1.

**578.** (c) Doctrine that Nonuser or Misuser Must Be Wilful or Intentional. — See note 2.

**579.** See note 1.

**580.** (4) *Insolvency as a Ground of Forfeiture.* — See note 3.

**582.** c. CAUSE OF FORFEITURE MUST BE JUDICIALLY ASCERTAINED AND JUDGMENT RENDERED — General Rule. — See note 3.

**584.** Jurisdiction of Courts of One State as to Corporation Created by Another State. — See notes 2, 3.

**585.** d. EFFECT OF JUDGMENT OF FORFEITURE. — See note 2.

**586.** c. TO WHAT EXTENT JUDGMENT OF FORFEITURE MATTER OF JUDICIAL DISCRETION — Breach of Implied Conditions. — See note 3.

**588.** g. EFFECT OF PROVISION FOR COLLATERAL PENALTY — No Bar to Forfeiture. — See note 1.

**589.** h. EFFECT OF FORFEITURE OF ONE OF SEVERAL FRANCHISES — When Franchises Not Interdependent. — See notes 1, 2.

two years is ground for forfeiture. Law v. Rich, 47 W. Va. 634.

**576. 2. Temporary Suspension May Be Advisable** for stockholders' interests. Law v. Rich, 47 W. Va. 634.

**Failure to Begin Operations.**—Failure to organize and begin the transaction of its business within a specified time from the date of incorporation is ground for dissolution under the statutes of some states. *People v. Rosenstein-Cohn Cigar Co.*, 131 Cal. 153 (one year); *People v. Ramapo Water Co.*, 51 N. Y. App. Div. 145 (two years).

**Failure to Exercise Added Power.**—Under the provision of the *Pennsylvania* Constitution, art. 16, § 1, that "all existing charters or grants of special or exclusive privileges under which a *bona fide* organization shall not have taken place and business been commenced in good faith at the time of the adoption of this constitution shall thereafter have no validity," it was held that a corporation properly organized and doing business at the adoption of the constitution did not incur the penalty of forfeiture by neglecting to exercise an added power or privilege with which it was thereafter clothed. *Philadelphia, etc., R. Co.'s Petition*, 187 Pa. St. 123.

**577. 1. Acts Amounting to Virtual Surrender.** — *Eel River R. Co. v. State*, 155 Ind. 433.

**578. 2. Rule that Nonuser or Misuser Must Be Wilful or Intentional.** — *State v. Southern Bldg., etc., Assoc.*, 132 Ala. 50; *State v. Twin Village Water Co.*, 98 Me. 214; *State v. Washington Steam Fire Co.*, 76 Miss. 449; *Ashland v. Ashland Water Co.*, 110 Wis. 94. See also *State v. New Orleans Water Works Co.*, 107 La. 1.

**A Corporation Formed to Aid a Municipal Corporation** in the discharge of its public functions may be dissolved when it ceases to discharge the duties for which it was created, though guilty of no positive wrong or wilful neglect. *State v. Washington Steam Fire Co.*, 76 Miss. 449.

**579. 1.** *State v. National School of Osteopathy*, 76 Mo. App. 439; *San Antonio Gas Co. v. State*, 22 Tex. Civ. App. 118.

**580. 3. Insolvency.** — *Shellabarger Mill, etc., Co. v. Willing*, 81 Ill. App. 30; *Pierce v. Old Dominion Copper Min., etc., Co.*, (N. J. 1904)

58 Atl. Rep. 319; *Matter of Lenox Corp.*, 57 N. Y. App. Div. 515, *affirmed* 167 N. Y. 623; *People v. Manhattan Real Estate, etc., Co.*, 175 N. Y. 133 (insolvency or inability to pay debts); *North Fairmount Bldg., etc., Co. v. Rehn*, 8 Ohio Dec. 594, 6 Ohio N. P. 185.

**Insolvency, Without Fraud, Waste, or Extravagance**, is not ground for dissolution at the instance of minority stockholders. *Worth Mfg. Co. v. Bingham*, (C. C. A.) 116 Fed. Rep. 785.

**582. 3. Judgment of Forfeiture Necessary — General Rule.** — *Bloch v. O'Conner Min., etc., Co.*, 129 Ala. 528; *Lamar v. Allison*, 101 Ga. 270; *People v. Rose*, 207 Ill. 352; *Topeka Paper Co. v. Oklahoma Pub. Co.*, 7 Okla. 220; *Kehr's Petition*, 23 Pa. Co. Ct. 460; *Law v. Rich*, 47 W. Va. 634.

**584. 2. Corporations Created by Another State.** — *Compare American Tribune New Colony Co. v. Schuler*, 34 Tex. Civ. App. 560.

**3. Determination as to Dissolution in Another State.** — *Morgan v. New York Nat. Bldg., etc., Assoc.*, 73 Conn. 151. See also *Baldwin v. Johnson*, 95 Tex. 85.

**Presumption as to Dissolution.** — It has been held that there is no presumption in Massachusetts that the statutes of New York give power to any court of New York to dissolve a corporation. *Olds v. City Trust, etc., Co.*, 185 Mass. 500, 102 Am. St. Rep. 356.

**585. 2. Extent of the Judgment.** — *Eel River R. Co. v. State*, 155 Ind. 433. See also *McKee v. Chautauqua Assembly*, (C. C. A.) 130 Fed. Rep. 536.

**586. 3. Petition for Voluntary Dissolution.** — The question whether the petition of stockholders for the dissolution of their corporation shall be granted "without prejudice to the public welfare, or the interests of the corporators" is largely addressed to the sound discretion of the court having jurisdiction of the proceeding. *Matter of Titusville Oil Exch.*, 8 Pa. Super. Ct. 304.

**588. 1. Collateral Penalty Provided — Effect.** — *State v. Capital City Dairy Co.*, 62 Ohio St. 350; *State v. Toledo R., etc., Co.*, 23 Ohio Cir. Ct. 603.

**589. 1. Forfeiture of One of Several Privileges — Common Law.** — *Illinois Trust, etc., Bank v. Doud*, (C. C. A.) 105 Fed. Rep. 123; *State v. Twin Village Water Co.*, 98 Me. 214.



**590. i. FORFEITURE OF CORPORATE FRANCHISES FOR ACTS OF AGENTS**

— **General Rules of Agency Apply.** — See note 1.

**591. j. CAUSE OF FORFEITURE NOT TO BE TAKEN ADVANTAGE OF COLLATERALLY — General Rule.** — See note 4.**593. Actual Dissolution as Distinguished from Cause of Forfeiture.** — See note 1.**594. k. WHO MAY PROCEED TO ENFORCE FORFEITURE — In the Absence of Statute.** — See note 1.**595. By Statute in Some States.** — See notes 2, 3.

**589. 2.** *Grey v. Newark Plank-Road Co.*, 65 N. J. L. 603; *Coler v. Tacoma R., etc., Co.*, 65 N. J. Eq. 347.

**590. 1.** **The Sale by Stockholders of a Majority of the Stock** of a corporation is not ground for forfeiture. *Com. v. Punxsutawney Water Co.*, 197 Pa. St. 569.

**591. 4. Necessity for Direct Proceeding.** — *Utah, etc., R. Co. v. Utah, etc., R. Co.*, 110 Fed. Rep. 879; *Bloch v. O'Conner Min., etc., Co.*, 129 Ala. 528; *Lincoln Park Chapter No. 177, etc., v. Swatek*, 105 Ill. App. 604, *affirmed* 204 Ill. 228; *Nicolai v. Maryland Agricultural, etc., Assoc.*, 96 Md. 323; *Philadelphia, etc., R. Co.'s Petition*, 187 Pa. St. 123; *Monongahela Bridge Co. v. Pittsburgh, etc., Traction Co.*, 196 Pa. St. 25, 79 Am. St. Rep. 685; *Dudley v. Dakota Hot Springs Co.*, 11 S. Dak. 559; *Jackson v. Crown Point Min. Co.*, 21 Utah 1, 81 Am. St. Rep. 651.

**When Forfeiture Is Not Necessary Consequence.** — In a proceeding by a street-railway company to condemn a right of way over a roadbed of a turnpike company, it was held that the defendant could question the exercise of a right by the petitioner, where an adverse determination would not necessarily involve the forfeiture of the petitioner's charter. *Philadelphia, etc., R. Co.'s Petition*, 187 Pa. St. 123.

**593. 1. Actual Dissolution.** — *Wilmington City R. Co. v. Wilmington, etc., R. Co.*, (Del. Ch. 1900) 46 Atl. Rep. 12; *Kehr's Petition*, 23 Pa. Co. Ct. 460, *citing* 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 593.

**594. 1. General Rule — Proceeding Must Be by the State** — *United States*. — *New Orleans Debenture Redemption Co. v. Louisiana*, 180 U. S. 320; *Utah, etc., R. Co. v. Utah, etc., R. Co.*, 110 Fed. Rep. 879.

*Illinois*. — *Coquard v. National Linseed Oil Co.*, 171 Ill. 480; *Lincoln Park Chapter No. 177 v. Swatek*, 204 Ill. 228, *affirming* 105 Ill. App. 604.

*Kentucky*. — *Oldham v. Mt. Sterling Imp. Co.*, 103 Ky. 529.

*Louisiana*. — *State v. New Orleans Debenture Redemption Co.*, 51 La. Ann. 1827; *State v. Debenture Guarantee, etc., Co.*, 51 La. Ann. 1874.

*Maryland*. — *Nicolai v. Maryland Agricultural, etc., Assoc.*, 96 Md. 323.

*New Jersey*. — *Dittman v. Distilling Co. of America*, 64 N. J. Eq. 537.

*Pennsylvania*. — *Philadelphia, etc., R. Co.'s Petition*, 187 Pa. St. 123.

*South Dakota*. — *Dudley v. Dakota Hot Springs Co.*, 11 S. Dak. 559.

*Tennessee*. — *Coal Creek Min., etc., Co. v. Tennessee Coal, etc., Co.*, 106 Tenn. 651.

*West Virginia*. — *Law v. Rich*, 47 W. Va. 634.

**Necessity for Leave of Court.** — In *North Carolina* the attorney-general cannot, of his own motion, bring an action to annul a charter for fraud in its procurement. He cannot proceed for that purpose until he obtains leave of the Supreme Court or one of the justices thereof. *Atty.-Gen. v. Holly Shelter R. Co.*, 134 N. Car. 481.

**595. 2. Statutes.** — *People v. Ramapo Water Co.*, 51 N. Y. App. Div. 145.

In *Indiana* the information may be filed by a county prosecuting attorney, on his own relation. *Eel River R. Co. v. State*, 155 Ind. 433.

In *New York* the attorney-general may, of his own motion, maintain an action to dissolve a corporation for insolvency and certain other causes specified in Code Civ. Pro. N. Y., § 1785. *People v. Manhattan Real Estate, etc., Co.*, 175 N. Y. 133.

In *Tennessee* the proceeding may be instituted by any person, on giving security for costs; but the relator must obtain the consent of the attorney-general to the use of the name of the state, and the state has the right to control the proceeding after its institution. The state may at any time discontinue the proceeding, though the relator has incurred considerable costs. *State v. Red River Turnpike Co.*, 112 Tenn. 615.

In *Wisconsin*, under Stat. Wis. 1898, § 3241, an action may be brought by the attorney-general or any private person in the name of the state, on leave granted by the Supreme Court. *Ashland v. Ashland Water Co.*, 110 Wis. 94.

**Must Be Judgment Creditors.** — See *Gallagher v. Asphalt Co. of America*, 65 N. J. Eq. 258.

**The Attorney-General May Proceed of His Own Motion**, without waiting for a relator, where the statute leaves to him no discretion as to the dissolution of a corporation under certain circumstances, but makes it his absolute duty to proceed. *People v. Mercantile Co-operative Bank*, 53 N. Y. App. Div. 295; *People v. Manhattan Real Estate, etc., Co.*, 74 N. Y. App. Div. 535, *reversed* 175 N. Y. 133.

**3. In Illinois** a simple contract creditor may file a bill for the dissolution of a corporation. *Northam v. Atherton*, 67 Ill. App. 230.

In *New Jersey* any stockholder or creditor may bring a proceeding for forfeiture, under some circumstances. *Pierce v. Old Dominion Copper Min., etc., Co.*, (N. J. 1904) 58 Atl. Rep. 319.

**A Creditor Who Is Also a Stockholder** may maintain an action to dissolve a corporation, when he proceeds in his capacity as creditor, and not as a stockholder. *Michelson v. Pierce*, 107 Wis. 85.

**Nature of Proceeding.** — Whether the statutory action is brought by a stockholder or creditor, or by the attorney-general, the essential nature



**596.** *l.* WAIVER OF FORFEITURE BY STATE — (1) *In General.* — See note 7.

**597.** (2) *Where Corporation Has Been Actually Dissolved.* — See note 2.

**601.** *m.* JURISDICTION OF EQUITY TO DECREE DISSOLUTION. — See note 2.

**602.** See note 1.

**603.** See note 1.

**III. EFFECT OF DISSOLUTION — 2. The Ancient Doctrine — At Common Law — a.** EFFECT UPON CORPORATE PROPERTY AND DEBTS — **Realty Reverted to Grantors** — **Personalty Bona Vacantia** — **Debts Extinguished.** — See note 5.

**604.** See note 1.

**606.** **Revival of Corporation — Effect on Debts.** — See note 2.

**b.** EFFECT UPON PENDING SUITS AND THE SUBSEQUENT INSTITUTION OF SUITS — **Abatement.** — See note 3.

and object of the action are the same. Hence a complaining stockholder or creditor acts as the representative of all other stockholders and creditors, and also as the representative of the public interest, discharging in effect a public function, such as is usually committed to the attorney-general. *Pierce v. Old Dominion Copper Min., etc., Co.*, (N. J. 1904) 58 Atl. Rep. 319; *Gallagher v. Asphalt Co. of America* (N. J. 1904) 58 Atl. Rep. 403.

**596.** **7. State May Waive Forfeiture.** — *Utah, etc., R. Co. v. Utah, etc., R. Co.*, 110 Fed. Rep. 879.

**597.** **2. Actual Dissolution.** — *Yates v. People*, 207 Ill. 316.

**601.** **2. No General Jurisdiction in Equity — United States.** — *Jacobs v. Mexican Sugar Co.*, 130 Fed. Rep. 589, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 601; *Arents v. Blackwell's Durham Tobacco Co.*, 101 Fed. Rep. 338, affirmed 48 C. C. A. 765; *Sidway v. Missouri Land, etc., Co.*, 101 Fed. Rep. 481; *Taylor v. Decatur Mineral, etc., Co.*, 112 Fed. Rep. 449. *Alabama.* — *McKleroy v. Gadsden Land, etc., Co.*, 126 Ala. 184; *Noble v. Gadsden Land, etc., Co.*, 133 Ala. 250, 91 Am. St. Rep. 27.

*Delaware.* — *Wilmington City R. Co. v. Wilmington, etc., R. Co.*, (Del. Ch. 1900) 46 Atl. Rep. 12.

*Georgia.* — *Gibson v. Thornton*, 107 Ga. 545, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 601.

*Iowa.* — *Stewart v. Pierce*, 116 Iowa 733.

*Illinois.* — *Bixler v. Summerfield*, 195 Ill. 147.

*Maine.* — *Ulmer v. Maine Real Estate Co.*, 93 Me. 324.

*Maryland.* — *Nicolai v. Maryland Agricultural, etc., Assoc.*, 96 Md. 323.

*New Jersey.* — *Dittman v. Distilling Co. of America*, 64 N. J. Eq. 537.

*New York.* — *Matter of Coleman*, 174 N. Y. 373.

*Ohio.* — *North Fairmount Bldg., etc., Assoc. v. Rehn*, 8 Ohio Dec. 594, 6 Ohio N. P. 185.

*South Dakota.* — *Dudley v. Dakota Hot Springs Co.*, 11 S. Dak. 559.

*West Virginia.* — *Law v. Rich*, 47 W. Va. 634, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 601.

*Wisconsin.* — *Harrigan v. Gilchrist*, 121 Wis. 127.

**Decree of Dissolution Justified Only by Express**

**Statute.** — *Olds v. City Trust, etc., Co.*, 185 Mass. 500, 102 Am. St. Rep. 356.

**Right to Administer Assets of Dissolved Corporation.** — To the point that equity has power, independently of statute, to administer the assets of a dissolved corporation, see *Harrigan v. Gilchrist*, 121 Wis. 127.

**602.** **1. Statutes.** — *Jacobs v. Mexican Sugar Co.*, 130 Fed. Rep. 589; *Matter of Titusville Oil Exch.*, 10 Pa. Super. Ct. 496.

In *Illinois*, under section 25, of the Corporation Act, a corporation may, under some circumstances, be dissolved by a court of equity for doing an act which its charter does not authorize it to do, or which its charter or a statute expressly prohibits it from doing. Thus, a corporation may be dissolved for violating a provision against holding real property for purposes of investment. *Bixler v. Summerfield*, 195 Ill. 147. But as to a holding of real property not justifying dissolution, see *Bixler v. Summerfield*, 210 Ill. 66.

In *Pennsylvania* the Court of Common Pleas, in the exercise of its equitable powers, may decree the dissolution of a corporation for profit organized under the Act of April 29, 1874. *New Castle Wire Co.'s Case*, 18 Pa. Super. Ct. 257.

**603.** **1.** *Harrigan v. Gilchrist*, 121 Wis. 127.

**5. General Rule as to Effect of Dissolution upon Property and Debts.** — See *In re Taylor's Agreement Trusts*, (1904) 2 Ch. 737; *MacRae v. Kansas City Piano Co.*, 69 Kan. 457, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 603; *Economy Bldg., etc., Assoc. v. Paris Ice Mfg. Co.*, 113 Ky. 246; *Shayne v. Evening Post Pub. Co.*, 168 N. Y. 70, 85 Am. St. Rep. 654; *Stiles v. Laurel Fork Oil, etc., Co.*, 47 W. Va. 838. Compare *In re Higginson*, (1899) 1 Q. B. 325.

**604.** **1.** *State v. Fidelity L. & T. Co.*, 113 Iowa 439.

**606.** **2.** Compare *Sullivan County R. Co. v. Connecticut River Lumber Co.*, 76 Conn. 464, holding that where the effect of a judgment of dissolution in a statutory proceeding was to extinguish claims against the corporation, the court had authority, on a proper showing, to set aside the judgment and revive the corporation for the purpose of permitting the enforcement of just, and the resistance of unjust, demands against it.

**3. Pending Suits Abate.** — *Morgan v. New York*

**607.** Subsequent Suits — Issuance of Execution. — See notes 1, 2.

**608.** Suits Pending in Another State. — See note 1.

**3. The Existing Rule — In Equity and under Statutes — a. EFFECT UPON CORPORATE PROPERTY AND DEBTS — (1) Private Corporations — (a) In General — Trust Funds. — See note 4.**

**609.** Statutes. — See note 2.

Bldg., etc., Assoc., 73 Conn. 151; *State v. Fidelity L. & T. Co.*, 113 Iowa 439; *MacRae v. Kansas City Piano Co.*, 69 Kan. 457; *Shayne v. Evening Post Pub. Co.*, 168 N. Y. 70, 85 Am. St. Rep. 654; *Matter of D. G. Yuengling Brewing Co.*, 24 N. Y. App. Div. 223; *Matter of Stewart*, (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 32, *affirmed* 86 N. Y. App. Div. 627; *Insurance Com'r v. United F. Ins. Co.*, 22 R. I. 377; *Stiles v. Laurel Fork Oil, etc., Co.*, 47 W. Va. 838, *citing* 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 606.

**Consent Judgment After Dissolution.** — An agreement made after dissolution by the corporation or its counsel, consenting to the entry of a judgment against it, is absolutely void. *Insurance Com'r v. United F. Ins. Co.*, 22 R. I. 377.

**607. 1. Subsequent Suits.** — *Fitts v. National L. Assoc.*, 130 Ala. 413; *Singer, etc., Stone Co. v. Hutchinson*, 176 Ill. 48; *Baldwin v. Johnson*, 95 Tex. 85; *Stiles v. Laurel Fork Oil, etc., Co.*, 47 W. Va. 838, *citing* 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 607.

**A Judgment Against a Dissolved Corporation Is a Nullity**, and may be attacked either by appeal or collaterally. Such attack, however, must be by some one interested in having the judgment reversed. *Austen v. Columbian Lubricants Co.*, (Supm. Ct. App. T.) 87 N. Y. Supp. 497.

**Cause of Action Accruing After Dissolution.** — "A cause of action cannot be said to have been created in favor of a corporation which had passed out of existence before the cause of action came into being." *Kinney v. Reid Ice-Cream Co.*, 57 N. Y. App. Div. 206.

**2. Execution Cannot Be Issued on Judgment Obtained Before Dissolution.** — *MacRae v. Kansas City Piano Co.*, 69 Kan. 457.

**608. 1. Suits Pending in Another State Abate.** — *Fitts v. National L. Assoc.*, 130 Ala. 413; *Morgan v. New York Nat. Bldg., etc., Assoc.*, 73 Conn. 151; *Singer v. Hutchinson*, 183 Ill. 606, 75 Am. St. Rep. 133. See also *Baldwin v. Johnson*, 95 Tex. 85. *Compare Olds v. City Trust, etc., Co.*, 185 Mass. 500, 102 Am. St. Rep. 356.

**4. Equity — Trust Fund Doctrine — United States.** — *Boyd v. Hankinson*, (C. C. A.) 92 Fed. Rep. 49; *Jacobs v. Mexican Sugar Co.*, 130 Fed. Rep. 589.

*Alabama.* — *Noble v. Gadsden Land, etc., Co.*, 133 Ala. 250, 91 Am. St. Rep. 27.

*Illinois.* — *Singer, etc., Stone Co. v. Hutchinson*, 176 Ill. 48; *Shellabarger Mill, etc., Co. v. Willing*, 81 Ill. App. 30.

*Iowa.* — *Stewart v. Pierce*, 116 Iowa 733.

*New Jersey.* — *Gallagher v. Asphalt Co. of America*, 65 N. J. Eq. 258.

*Tennessee.* — *Connecticut Mut. L. Ins. Co. v. Dunscomb*, 108 Tenn. 724, 91 Am. St. Rep. 769, *citing* 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 608.

*West Virginia.* — *Stiles v. Laurel Fork Oil, etc., Co.*, 47 W. Va. 838.

*Wisconsin.* — *Harrigan v. Gilchrist*, 121 Wis. 127.

**Jurisdiction Not Dependent on Statute.** — The practice of administering the affairs of an insolvent corporation for the benefit of its creditors does not depend on a statute. So far as the statutes go, they are confirmatory or in aid of the law as it was formerly understood. *Harrigan v. Gilchrist*, 121 Wis. 127.

**609. 2. Trustees to Wind Up Corporation — United States.** — *Boyd v. Hankinson*, (C. C. A.), 92 Fed. Rep. 49; *Anglo-American Land Mortg., etc., Co. v. Cheshire Provident Inst.*, 124 Fed. Rep. 464, *affirmed* (C. C. A.) 132 Fed. Rep. 968.

*Alabama.* — *Buckley v. Anderson*, 137 Ala. 325.

*Connecticut.* — *Ward v. Connecticut Pipe Mfg. Co.*, 71 Conn. 345.

*Georgia.* — *Lamar v. Allison*, 101 Ga. 270.

*Idaho.* — *Clow v. Redman*, 6 Idaho 568.

*Illinois.* — *Northam v. Atherton*, 67 Ill. App. 230.

*Iowa.* — *State v. Fogerty*, 105 Iowa 32; *State v. Fidelity L. & T. Co.*, 113 Iowa 439; *Stewart v. Pierce*, 116 Iowa 733.

*Minnesota.* — *Sage v. Crowley*, 83 Minn. 314.

*Missouri.* — *Youree v. Home Town Mut. Ins. Co.*, 180 Mo. 153.

*New Jersey.* — *American Surety Co. v. Great White Spirit Co.*, 58 N. J. Eq. 526; *Rosenbaum v. U. S. Credit System Co.*, 61 N. J. L. 543; *Gallagher v. Asphalt Co. of America*, 65 N. J. Eq. 258.

*New York.* — *Ludington v. Thompson*, 153 N. Y. 499; *Moore v. Potter*, 155 N. Y. 481, 63 Am. St. Rep. 692; *Shayne v. Evening Post Pub. Co.*, 168 N. Y. 70, 85 Am. St. Rep. 654; *Matter of Simonds Mfg. Co.*, 39 N. Y. App. Div. 576; *Janeway v. Burn*, 91 N. Y. App. Div. 165, *affirmed* 180 N. Y. 560.

*Ohio.* — *Smith v. Johnson*, 57 Ohio St. 486.

*Pennsylvania.* — *In re Lincoln Market Co.*, 190 Pa. St. 124.

*South Dakota.* — *Root v. Sweeney*, 12 S. Dak. 43.

*Tennessee.* — *Connecticut Mut. L. Ins. Co. v. Dunscomb*, 108 Tenn. 724, 91 Am. St. Rep. 769.

*Texas.* — *San Antonio Gas Co. v. State*, 24 Tex. Civ. App. 118; *Aldridge v. Pardee*, 24 Tex. Civ. App. 254.

*Washington.* — *New York Nat. Exch. Bank v. Metropolitan Sav. Bank*, 28 Wash. 553.

*West Virginia.* — *Griffith v. Blackwater Boom, etc., Co.*, 46 W. Va. 56; *Stiles v. Laurel Fork Oil, etc., Co.*, 47 W. Va. 838.

**Trustees Derive Authority from Statute, Not from Court.** — *Root v. Sweeney*, 12 S. Dak. 43.

**Removal of Statutory Trustees.** — Where it was provided by statute that on the dissolution of a corporation its directors should be trustees for



**610.** Corporate Assets Liable for Corporate Obligations. — See note 1.

**612.** (b) Effect of Statutory Provisions as Superseding Right to Resort to Equity. — See note 6.

**613.** *b.* EFFECT UPON PENDING SUITS AND THE SUBSEQUENT INSTITUTION OF SUITS. — See note 5.

the creditors and shareholders, it was held that the court should not remove them and appoint a receiver in their stead, unless it was made to appear that the person complaining had been or was about to be injured by an unwarranted procedure on the part of such trustees. *Ferrell v. Evans*, 25 Mont. 444.

Where the Statute Vests Title of the Corporation's Property in the Directors of the corporation, in trust for its creditors, upon dissolution, an execution sale after dissolution passes no title to the purchasers. *Aldridge v. Pardee*, 24 Tex. Civ. App. 254.

In Illinois, by statute, a corporation whose charter has expired for any reason whatever retains its corporate capacity for two years thereafter for the sole purpose of collecting debts due to it and selling and conveying its property. The statute applies as well to corporations created after its passage as to those created before. *Singer v. Hutchinson*, 183 Ill. 606, 75 Am. St. Rep. 133.

Under the Iowa Statute, a corporation may continue to hold property until its affairs are wound up. *State v. Fogerty*, 105 Iowa 32.

**610. 1. Dissolution Does Not Extinguish Debts or Contracts** — *United States*. — *Boyd v. Hankinson*, (C. C. A.) 92 Fed. Rep. 49; *Bradley Salt Co. v. Norfolk Importing, etc., Co.*, (C. C. A.) 101 Fed. Rep. 681.

*Kansas*. — *Salina Nat. Bank v. Prescott*, 60 Kan. 490.

*Kentucky*. — *Economy Bldg., etc., Assoc. v. Paris Ice Mfg. Co.*, 113 Ky. 246.

*Louisiana*. — *Fleitas v. New Orleans*, 51 La. Ann. 1.

*New Jersey*. — *Grey v. Newark Plank Road Co.*, 65 N. J. L. 603.

*New York*. — *Moore v. Potter*, 155 N. Y. 481, 63 Am. St. Rep. 692; *Janeway v. Burn*, 91 N. Y. App. Div. 165, affirmed 180 N. Y. 560.

*Ohio*. — *Smith v. Johnson*, 57 Ohio St. 486.

*Tennessee*. — *Connecticut Mut. L. Ins. Co. v. Dunscomb*, 108 Tenn. 724, 91 Am. St. Rep. 769.

*West Virginia*. — *Griffith v. Blackwater Boom, etc., Co.*, 46 W. Va. 56, holding, however, that the executory contracts of a corporation perish with it, when it is forced into involuntary liquidation and dissolution.

**Effect of Dissolution upon Judgment Lien.** — *Matter of Coleman*, 174 N. Y. 373.

**Contracts of Employment — Voluntary and Involuntary Dissolution.** — In *Pennsylvania* it is held that on the involuntary dissolution of a corporation its contracts with its employees terminate. *Loucheim v. Clawson Printing, etc., Co.*, 12 Pa. Super. Ct. 55. But in *New Jersey* it is held that even after the involuntary dissolution of a corporation, an employee may maintain an action for breach of contract, as he stands on the same footing as other creditors and should be allowed to share in the trust fund arising from the corporation's assets. *Rosenbaum v. U. S. Credit System Co.*, 61 N. J. L. 543, criticising *People v. Globe Mut. L.*

*Ins. Co.*, 91 N. Y. 174, stated in the original note.

**Corporation Cannot Distribute Its Property Without Paying Its Debts.** — *Rosenbaum v. U. S. Credit System Co.*, 61 N. J. L. 543.

**Claimant in Action of Tort as Creditor.** — See *Shayne v. Evening Post Pub. Co.*, 168 N. Y. 70, 85 Am. St. Rep. 654.

**612. 6. Effect of Statutes upon Right to Resort to Equity.** — *Gallagher v. Asphalt Co. of America*, 65 N. J. Eq. 258; *Matter of Dolgeville Electric Light, etc., Co.*, 160 N. Y. 500; *Matter of Simonds Mfg. Co.*, 39 N. Y. App. Div. 576; *North Fairmount Bldg., etc., Assoc. v. Rehn*, 8 Ohio Dec. 594, 6 Ohio N. P. 185; *Robison v. Cleveland City R. Co.*, 7 Ohio Dec. 312; *Stiles v. Laurel Fork Oil, etc., Co.*, 47 W. Va. 838. See also *Matter of Coleman*, 174 N. Y. 373. *Compare Ludington v. Thompson*, 153 N. Y. 499; *Harrigan v. Gilchrist*, 121 Wis. 127.

**613. 5. The Alabama Statute**, providing that the existence of a corporation shall continue for five years after dissolution for the purpose of suing and being sued, does not authorize the bringing of an action against a foreign corporation which has been dissolved by the state which created it. *Fitts v. National L. Assoc.*, 130 Ala. 413.

In Illinois, by statute, a corporation exists for two years after expiration of its charter, and its capacity to be sued for liabilities accruing prior to its dissolution continues without limitation as to time, except such as is provided by the general statute of limitations. *Singer, etc., Stone Co. v. Hutchinson*, 176 Ill. 48.

Under the Maine Statute providing that a corporation, after the repeal of its charter, should continue to exist for three years "to prosecute and defend suits," it was held that a pending action abated at the expiration of the three years. *Maine Shore Line R. Co. v. Maine Cent. R. Co.*, 92 Me. 476.

In Nebraska, by Statute, a suit brought by a corporation does not abate by its dissolution, and by comity the benefit of the statute extends to a foreign corporation. *Schmitt, etc., Co. v. Mahoney*, 60 Neb. 20.

In New Jersey, a corporation continues to exist for the purposes of suing and being sued, winding up its affairs, disposing of its property, and dividing its capital, but not for the purpose of continuing the business for which it was established. *Grey v. Newark Plank Road Co.*, 65 N. J. L. 603; *Coler v. Tacoma R., etc., Co.*, 65 N. J. Eq. 347.

In New York the provisions of section 5 of the Business Corporations Law (Laws N. Y. 1892, c. 691) apply only to corporations organized under that act, and do not operate to prevent the abatement, after dissolution, of an action for personal injuries against a corporation organized under the general law. *Matter of D. G. Yuengling Brewing Co.*, 24 N. Y. App. Div. 223.

As to the Statutory Rule in Virginia, see Brad-



**614.** See note 1.

**DISSOLVE.** — See note 4.

**DISTANCE.** — See note 5.

**615. DISTILLED SPIRITS.** — See note 1.

**DISTILLER.** — See note 2.

**616. DISTINCT — DISTINCTIVE.** — See note 1.

**DISTINGUISH.** — See note 2.

ley Salt Co. v. Norfolk Importing, etc., Co., (C. C. A.) 101 Fed. Rep. 681.

**614. 1. In Kansas,** when a corporation is dissolved under the statute for cessation of business, it continues to exist for the purpose of being sued. *Whitman v. Citizens' Bank*, (C. C. A.) 110 Fed. Rep. 503.

**In Kentucky,** under a statute providing that on voluntary dissolution a corporation should continue to act as such for the purpose of closing up its business, but for no other purpose, it was held that until its debts were paid the corporation continued to exist for the purpose of being sued. *Economy Bldg., etc., Assoc. v. Paris Ice Mfg. Co.*, 113 Ky. 246.

And under the *Kentucky* statute providing that while the privileges and franchises granted to corporations chartered thereunder might be changed or repealed, no amendment should impair other rights previously vested, it was held that the prohibition applied not only to the rights of the corporations, but also to persons having claims against the corporations, so that the repeal of a corporation's charter did not affect pending suits or the institution of subsequent suits against it. *Board of Councilmen v. Deposit Bank*, (C. C. A.) 124 Fed. Rep. 18.

**4. Dissolve Marriage.** — In construing California Civil Code, § 61, declaring that the subsequent marriage is void from its inception unless "the former marriage has been annulled

or *dissolved*, provided, that in case it be *dissolved*, the decree of divorce must have been rendered and made at least one year prior to such subsequent marriage," the court said: "The section thus speaks for itself, and when the verb *dissolve* is used, as relating to the first marriage, it means, and can only mean, a *dissolution* of the marriage—a divorce." *Matter of Wood*, 137 Cal. 132.

**5. Measurement of Distance.** — *Rouleau v. Pouliot*, 36 Can. Sup. Ct. 227, quoting 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 614.

**615. 1. Distilled Spirits.** — *U. S. v. Ridenour*, 119 Fed. Rep. 411.

**2. Distiller.** — *U. S. v. Ridenour*, 119 Fed. Rep. 411.

**616. 1. Distinct Municipal Corporations for School Purposes.** — "It will be observed that the statute that establishes school corporations provides that they shall be '*distinct*' municipal corporations for school purposes.' The word *distinct*, as used in the statute, is used to differentiate the school corporation from the civil corporation, and not to separate school corporations into *distinct* classes." *Per Gillett, J.*, in *State v. Ogan*, 159 Ind. 121.

**Distinctive Fancy Word — English Trademark Act.** — *In re Faulder*, (1902) 1 Ch. 125; *Wellcome v. Thompson*, (1904) 1 Ch. 736.

**2. Elections.** — *Bliss v. Woolley*, 68 N. J. L. 51. See also *Tombaugh v. Grogg*, 156 Ind. 355.

# DISTRESS.

BY L. C. BOEHM.

- 618. I. DEFINITION.** — See note 1.
- 619. III. DISTRESS FOR RENT** — **1. Characteristics and Object.** — See note 1. *Becoming Unpopular in the United States.* — See note 3.
- 620. 2. Prerequisites to the Right of Distress** — *a. AN ACTUAL DEMISE.* — See notes 1, 2.
- 622. b. A CERTAIN RENT.** — See note 1.
- 623. c. THE RENT MUST BE DUE AND UNPAID.** — See note 2.
- 624. When the Tenant Is About to Remove His Goods from the Premises.** — See note 1. *Previous Demand Not Necessary.* — See note 2.
- 3. For What a Distress May Be Made.** — See note 3.
- 625. 4. How the Right to Distrain May Be Extinguished, Suspended, or Avoided** — *c. BY EVICTION OF THE TENANT* — (1) *By the Landlord.* — See note 3.

**618. 1. Distress Defined.** — *Dick v. Winkler*, 12 Manitoba 624.

**619. 1. Remedy by Distress May Be Enlarged by Contract of Parties.** — *Dinner v. McAndrews*, 10 Pa. Dist. 221.

**3. Remedy Abolished in Certain States.** — *Noxon v. Glaze*, 11 Colo. App. 503.

**Constitutionality and Construction of Statutes.** — The *Kentucky* statute is not unconstitutional as allowing the tenant's property to be taken without due process of law. *Garnett v. Jennings*, (Ky. 1898) 44 S. W. Rep. 382.

**620. 1. An Actual Demise a Prerequisite.** — *Majors v. Goodrich*, (Tex. Civ. App. 1900) 54 S. W. Rep. 919; *Lowther v. Johnson*, 34 Can. L. J. 430.

**A Landlord May Proceed Against a Subtenant**, in *Georgia*, even when the subtenant had given his note for the rent and the note had been transferred to a third party. *Barlow v. Jones*, 117 Ga. 412. See also *Fountain v. Whitehead*, 119 Ga. 241.

**Under a Void Lease**, as for example a lease of a house for purposes of prostitution, void under the *Texas* statute, there is no right to distrain. *Burton v. Dupree*, 19 Tex. Civ. App. 275.

**Mining Lease or License to Mine.** — In *Malcomson v. Wappoo Mills*, 85 Fed. Rep. 907, an indenture conveying the exclusive right to enter on certain land and mine phosphate rock and other minerals for a term of five years was held to be a lease, and not a mere license to mine, and therefore to confer on the lessor the right to distrain for his rent.

**2. Tenancy at Will.** — "There being a tenancy at will at a fixed rent, there is, as incident to it, the right to distrain, and the covenant for quiet enjoyment must be read as subject to the right to distrain." *Pegg v. Supreme Ct.*, etc., 1 Ont. L. Rep. 97.

**622. 1. Certain Rent Payable in Money Produce, or Service.** — *Dick v. Winkler*, 12 Manitoba 624, where the lease provided that the landlord should receive all the wheat grown on the premises, sell it, and retain one-half of the proceeds.

**623. 2. Rent Must Be in Arrear.** — *Weber v. Vernon*, 2 Penn. (Del.) 359; *Dauchy Iron Works v. McKim Gasket, etc., Co.*, 85 Ill. App. 584; *Bonaparte v. Thayer*, 95 Md. 548; *Whitelock v. Cook*, 31 Ont. 463.

**In a Prosecution for the Offense of Obstructing a Distress** it devolves on the prosecution to prove the existence of all the ingredients which go to make up the offense, one of which is the legality of the distress. Thus, it is necessary to show that rent was due and in arrears at the time of the distraint. *Rex v. Harron*, (1903) 40 Can. L. J. 27.

**624. 1. Tenant Removing or About to Remove.** — *Hill v. Coats*, 109 Ill. App. 266; *Manis v. Flood*, 19 Tex. Civ. App. 591; *Riggs v. Gray*, 31 Tex. Civ. App. 268; *Allen v. Brunner*, 33 Tex. Civ. App. 128.

**In Kentucky.** — See *Thomson v. Tilton*, 59 S. W. Rep. 485, 22 Ky. L. Rep. 1004.

**In Louisiana.** — See *Millot v. Conrad*, 112 La. 928.

**Statute Strictly Construed.** — *Hill v. Coats*, 109 Ill. App. 266.

**2. Previous Demand Not Essential to Right of Distress.** — *Weber v. Vernon*, 2 Penn. (Del.) 359; *Keeley Brewing Co. v. Mason*, 102 Ill. App. 381.

**3. A Distress May Be Made Only for Rent.** — *Tanton v. Boomgaarden*, 89 Ill. App. 500, *citing* 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 624; *Hays v. Wilkinsburg, etc., St. R. Co.*, 204 Pa. St. 488, holding that a covenant relating to the use of the premises, but not to the payment to the lessor for the use — such as a covenant to pay water rent to the municipality — was not enforceable by distress.

**625. 3. Eviction by Landlord Extinguishes the Right of Distress.** — *Rex v. Davitt*, 7 Can. Crim. Cas. (Ont.) 514, holding, however, that the offense of fraudulent removal of a tenant's goods to evade distress for rent under Rev. Stat. Ont., c. 342, does not extend to removal and surrender of possession taking place after the termination of the tenancy by the landlord's notice to quit.

**626.** *e.* BY CONTRACT. — See note 5.

*f.* BY TENDER. — See notes 7, 8.

**627.** Tender After Distress Before Impounding. — See note 1.

**628.** *g.* BY ACCORD AND SATISFACTION. — See note 1.

*i.* WHEN ONE DISTRESS BARS A SECOND. — See notes 3, 4.

*k.* EFFECT OF THE DEATH OF THE TENANT. — See note 8.

**629.** See note 1.

*l.* EFFECT OF TAKING A NOTE OR OTHER SECURITY FOR THE RENT — Suspends the Right of Distress. — See note 4.

After the Note Becomes Due. — See note 5.

**630.** *m.* EFFECT OF A SET-OFF. — See note 1.

*5.* Who Is Entitled to the Remedy, and Who May Execute It — *a.* THE LANDLORD OR HIS AGENT. — See notes 2, 3.

**632.** *g.* ASSIGNEES AND PURCHASERS. — See note 3.

**633.** *6.* When a Distress May Be Made — Statute Allowing Distress After Term Expired. — See note 6.

**626.** *5.* Right to Distrain May Be Lost by Contract. — *Mooers v. Manzer*, 36 N. Bruns. 205.

Where a Lessee Contracts to Purchase the Reversion, equity will not distrain pending the performance of the contract, but if by delay or abandonment of the contract the lessee loses his right to specific performance the right to distress will be renewed. *Ellis v. Wright*, 76 L. T. N. S. 522.

**7.** Tender Need Not Be Kept Good. — *Bonaparte v. Thayer*, 95 Md. 548.

**8.** Landlord Cannot Distrain After a Legal Tender. — *Bonaparte v. Thayer*, 95 Md. 548.

**627.** *1.* Tender Before Impounding Will Render Further Detention Unlawful. — *McPherson v. James*, 69 Ill. App. 337.

**628.** *1.* Accord and Satisfaction Bars Distress. — See *Smith v. Price*, 22 Tex. Civ. App. 296, wherein the landlord was held liable for seizing the crops of a subtenant for rent due from the tenant, after he had accepted a payment from the subtenant in full satisfaction of all claims.

*3.* Two Distresses Cannot Be Made for Same Rent. — *McDonald v. Fraser*, 14 Manitoba 582, holding, however, that after a distress for a month's rent, it is not illegal to make another distress for the next month's rent, though it was due and in arrears at the time of the first distress.

*4.* Cannot Abandon First Distress and Levy Another. — See *McDonald v. Fraser*, 14 Manitoba 582.

*8.* Right to Distrain Not Extinguished by Death of Tenant. — *Brown v. Howell*, 66 N. J. L. 25.

Effect of Presenting Claim Against Estate. — Where the landlord distrained and the tenant's widow gave a claimant's bond for the property seized, it was held that the acceptance by the landlord of his *pro rata* share on his claim for rent as a general creditor of the estate did not prevent his proceeding on the claimant's bond for the balance. *Mitchell v. Donigan*, (Ky. 1900) 56 S. W. Rep. 970.

**629.** *1.* Liability for Distress Before Administration Granted. — While the right to distrain is suspended pending the appointment of an administrator, yet if a distress is actually levied, the subsequently appointed administrator has no

right of action therefor provided the distress would have been lawful if at the time it was made he had been administrator. *Brown v. Howell*, 66 N. J. L. 25.

*4.* Taking the Tenant's Note Suspends the Right of Distress. — *Colpitts v. McCullough*, 32 Nova Scotia 502.

*5.* Dishonored Bill of Exchange Given by Company. — Where a landlord accepted from a company, which was not an assignee of the lease but was in occupation of the demised premises, a bill of exchange in payment of overdue rent, and the bill was dishonored, and subsequently the company went into voluntary liquidation, it was held that the landlord was not entitled to distrain, as he had a right to prove his claim in the liquidation proceedings. But as the goods sought to be distrained on are charged in favor of debenture holders to an amount exceeding their value, the court refused to restrain the distress at the instance of the liquidator. *In re Harpur's Cycle Fittings Co.*, (1900) 2 Ch. 731.

**630.** *1.* In Illinois it has been held that the tenant might set off against the warrant all legal demands against the landlord for previous years even though the distress was only for the current year. *Kellogg v. Boehme*, 71 Ill. App. 643.

*2.* The Landlord May Distrain in Person. — *Robelen v. National Bank*, 1 Marv. (Del.) 346.

*3.* Distress May Be Made by a Bailiff. — *Robelen v. National Bank*, 1 Marv. (Del.) 346.

Parol Authority to Bailiff Sufficient. — *M'Geary v. Raymond*, 17 Pa. Super. Ct. 308.

**632.** *3.* Assignee May Distrain. — *Keeley Brewing Co. v. Mason*, 102 Ill. App. 381.

Must Be Assignee of Reversion. — A mere assignment of the arrears of rent is not enough to give the assignee a right to distress. *Manis v. Flood*, 19 Tex. Civ. App. 591. So in *Hutsell v. Deposit Bank*, 102 Ky. 410, the statute was held not to apply to the assignee of a note for rent who was not also assignee of the reversion. But see *Coker v. Britt*, 78 Miss. 583, holding that the administrator of an assignee of a rent note could distrain under the *Mississippi* statute.

**633.** *6.* Statute — Distress May Be Made Within Six Months After Term Expires. — *Dick v. Winkler*, 12 Manitoba 624.



- 635.** 7. Where a Distress May Be Made. — See note 1.  
**637.** Statute Not Applicable to a Stranger's Goods. — See note 2.  
**638.** 8. What May Be Distrained — *a.* GENERAL RULE — PROPERTY OF STRANGERS ON PREMISES. — See note 2.  
**640.** Stranger's Property Exempted in Several States. — See note 2.  
**645.** *b.* EXCEPTIONS TO THE RULE — (6) *Things Exempted for the Benefit of Trade and Commerce* — Goods Sent to Agent or Commission Merchant. — See note 5.  
**646.** (7) *Goods in the Custody of the Law.* — See note 3.  
**649.** (8) *Choses in Action.* — See note 3.  
**650.** (9) *Things Privileged under Exemption Laws.* — See note 2.  
 9. How to Distrain. — See notes 3, 4.  
**651.** 10. What Amount of Distress May Be Taken. — See note 5.  
 11. Special Property Acquired by Levy. — See note 7.  
**652.** 12. Care and Disposal of Distress — *a.* LANDLORD'S DUTY AS TO THINGS DISTRAINED. — See notes 1, 3.

**635.** 1. Generally Distress Must Be Made on Premises. — *Whitelock v. Cook*, 31 Ont. 463, holding further, in an action by a tenant to recover damages from his landlord for a distraint away from the premises, that "where the property in goods is not transferred, but the possession of them only parted with, to a pretended but not a real purchaser, the transferee is not precluded from asserting and maintaining his title as against the pretended transferee, though the object of what was done was to defraud creditors, if in fact no creditor has been defrauded."

**637.** 2. Stranger's Goods Cannot Be Taken After Removal. — See *Baer v. Kuhl*, 8 Pa. Dist. 389.

*Stranger's Goods on Sidewalk Not Distraivable* — *Robelen v. National Bank*, 1 Marv. (Del.) 346; *Pickering v. Breen*, 22 Pa. Super. Ct. 4.

The Goods of a Tenant's Wife are not distraivable in *Pennsylvania* after removal from the premises. *Ball v. Penn.*, 10 Pa. Super. Ct. 544.

**638.** 2. What Things Are Subject to Distress. — *Robelen v. National Bank*, 1 Marv. (Del.) 346; *Bogert v. Batterton*, 6 Pa. Super. Ct. 468; *Delp v. Hoffman*, 7 Pa. Dist. 256, 28 Pittsb. Leg. J. N. S. (Pa.) 315; *Booth v. Hoening*, 7 Pa. Dist. 529; *Huffard v. Akers*, 52 W. Va. 21; *Dimock v. Miller*, 30 Nova Scotia 74; *McKercher v. Gervais*, 12 Quebec Super. Ct. 336.

*Under-tenant.* — A subtenant's crops are not distraivable for rent due from the tenant, where the landlord has previously accepted a payment from the subtenant in satisfaction of all claims against him. *Smith v. Price*, 22 Tex. Civ. App. 296.

**640.** 2. The Personal Representation of a Deceased Tenant is not a "stranger" within the meaning of the *New Jersey* act. *Brown v. Howell*, 66 N. J. L. 25.

**645.** 5. Goods Sent to Be Sold on Commission. — *Clothier v. Braithwaite*, 22 Pa. Super. Ct. 521; *Wanamaker v. Carter*, 22 Pa. Super. Ct. 625; *Tinware Mfg. Co. v. Duff*, 15 Pa. Super. Ct. 383. But see *Dorsh v. Lea*, 18 Pa. Super. Ct. 447.

**646.** 3. A Bankrupt's Goods are in the custody of the law and exempt from distress as soon as he has been adjudicated a bankrupt, although no trustee has been selected. *In re Duble*, 117 Fed. Rep. 794, *disapproving* *Butler*

*v. Morgan*, 8 W. & S. (Pa.) 53, stated in the original note.

*Furniture Specifically Bequeathed* by one who owed no debts cannot be regarded as in the custody of the law where the legatee has continued to live in the same house and more than a year has elapsed since the death of the testator. *Fidelity Trust Co. v. Cook*, 25 Pa. Super. Ct. 142.

**649.** 3. Liquor License Not Distraivable. — *In re Myers*, 102 Fed. Rep. 869.

**650.** 2. Waiver of Exemption. — Movables declared by law to be nonseizable, belonging to a person who resides with the lessee of a house, cannot be seized for rent by the lessor together with the movables of the lessee, though the lessee has renounced by the lease the exemption from seizure conferred on him by the law. In such case notice to the owner is not required, as such notice is necessary only in the case of a third person placing on the leased premises effects seizable by law. *Nolin v. Ratté*, 17 Quebec Super. Ct. 182.

3. Seizure May Be Actual or Constructive. — *Robelen v. National Bank*, 1 Marv. (Del.) 346; *St. Anthony, etc., Elevator Co. v. Bottineau County*, 9 N. Dak. 350, *quoting* 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 650.

4. Notice of Claim and Forbidding Removal of Goods Sufficient. — *Smith v. Haight*, 4 N. W. Ter. 387.

*Use of Article by Tenant After Distraint.* — Where a piano, hired by the tenant, was seized for rent by the landlord, and left by him in the custody of the tenant's wife with instructions not to allow it to be removed, it was held that there was a legal distraint. It was also held that the subsequent use of the piano by the tenant's family did not constitute such a misuse of the property as to avoid the distress or to entitle the owner of the piano to resume possession thereof. *Dimock v. Miller*, 30 Nova Scotia 74.

**651.** 5. Excessive Distress Not Permitted. — *Smith v. Hoopes*, 1 Penn. (Del.) 177; *McKee v. Sims*, (Tex. Civ. App. 1898) 45 S. W. Rep. 37.

7. Levy Gives Landlord a Special Property. — *Jones v. Howard*, 99 Ga. 451, 59 Am. St. Rep. 231.

**652.** 1. Things Distrained Must Be Properly Cared for. — *Weber v. Vernon*, 2 Penn. (Del.)

**652.** *c.* NOTICE AND APPRAISEMENT. — See note 7.

**653.** Appraisement After Notice. — See note 2.

**654.** *d.* SALE. — See note 4.

When Sale Must Be Made. — See note 5.

**655.** Validity of Sale. — See note 5.

**13.** Abandonment of Distress — Suspension of Proceedings at Tenant's Request.

— See note 7.

**656.** **15.** Liability for an Unlawful Distress. — See notes 5, 6, 7.

**657.** See note 1.

Bailiff of Landlord Liable. — See note 2.

Landlord Liable for Bailiff's Acts. — See notes 3, 4, 5.

359, holding that where the property is injured after the seizure the burden is on the landlord to show himself free from negligence.

If the Goods Are Left in the Tenant's Custody he cannot recover for any loss that accrued by reason of his own negligence in taking care of them. *Thomas v. Judy*, (Tex. Civ. App. 1898) 44 S. W. Rep. 890.

**652.** **3.** A Cow Must Be Milked, and the milk must be accounted for if used. *Weber v. Vernon*, 2 Penn. (Del.) 359.

**7.** Notice of Distress and Inventory. — *Brown v. Howell*, 66 N. J. L. 25. See also *Howard v. Bartlett*, 70 Vt. 314.

**653.** **2.** The Omission of the Appraisement invalidates the sale under the *Pennsylvania* statute. *Hazlett v. Mangel*, 9 Pa. Super. Ct. 139.

Want of Appraisement Is Mere Irregularity. — "The want of appraisement cannot be invoked against a distress regularly made; it can only affect the sale, and is to be considered as nothing more than an irregularity, and in an action grounded upon an irregularity in the sale the tenant cannot recover unless he proves actual damages." This rule was applied where an appraisement was made but the appraisers were not sworn in the manner required by law before acting. *McDonald v. Fraser*, 14 Manitoba 582.

**654.** **4.** Goods Could Not Be Sold at Common Law. — See *Brown v. Howell*, 66 N. J. L. 25; *Dick v. Winkler*, 12 Manitoba 624.

**5.** Bona Fide Delay Does Not Vitiates Distress. — Mere delay in the sale of goods distrained for rent does not prejudice the distress, if there is no fraud or collusion between the landlord and the tenant to defeat the rights of third persons. *Anderson v. Henry*, 29 Ont. 719.

**655.** **5.** Sale under Distress Irregularly Conducted. — *Brown v. Harris*, 67 N. J. L. 207, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 655.

In *Pennsylvania* such a sale is held to be void. *Hazlett v. Mangel*, 9 Pa. Super. Ct. 139.

**7.** Abandonment a Question for Jury. — *Moore v. Manzer*, 36 N. Bruns. 205.

Leaving Goods in Possession of Tenant. — Where the goods distrained are left by the landlord's bailiff on the demised premises in the possession of the tenant, the taking of a bond from the tenant, conditioned that he shall keep, produce, and deliver the goods and not remove or allow them to be removed from the premises, is not evidence of an abandonment of the seizure, but, on the contrary, indicates an intention not to abandon. Pending the distress, the goods taken

are in the custody of the law, and are not liable to seizure under a chattel mortgage, provided there is no fraud in the transaction and no intention or contrivance exists to prejudice the mortgagee. *Anderson v. Henry*, 29 Ont. 719.

**656.** **5.** Liability for Irregularity in Mode of Procedure. — *Harris v. Shaw*, 17 Pa. Super. Ct. 1.

It Is a Question for the Jury to determine whether any rent was due so as to authorize the distress. *Bonaparte v. Thayer*, 95 Md. 548.

**6.** Liability for Excessive Distress. — *Weber v. Vernon*, 2 Penn. (Del.) 359; *McKee v. Sims*, (Tex. Civ. App. 1898) 45 S. W. Rep. 37; *Dick v. Winkler*, 12 Manitoba 624.

The Fact that the Distrainer Acted from Malicious Motives will not make him liable if the distress is reasonable. *Weber v. Vernon*, 2 Penn. (Del.) 359.

Action for Illegal Distress. — Where the action was brought on the theory that the distress was altogether illegal it was held that no damages could be recovered on the ground of excessiveness if the distress was in fact properly and legally made. *Bonaparte v. Thayer*, 95 Md. 548.

**7.** Liability for Unlawful Distress or Wrongful Detainer. — *Tinware Mfg. Co. v. Duff*, 15 Pa. Super. Ct. 383.

**657.** **1.** Landlord May Not Exempt Himself from Liability by Contract. — *Watson v. Boswell*, 25 Tex. Civ. App. 379.

**2.** Bailiff Liable. — *Riggin v. Becker*, 9 Pa. Dist. 439.

**3.** Liability of Landlord for Bailiff's Conduct. — *Weber v. Vernon*, 2 Penn. (Del.) 359.

**4.** Where Bailiff Acts Within Scope of His Authority. — *McBride v. Hamilton Provident, etc., Soc.*, 29 Ont. 161.

Landlord Not Liable for Bailiff's Unauthorized Acts. — *Ellis v. Lamb*, 24 Pa. Co. Ct. 150, 9 Pa. Dist. 491, 31 Pittsb. Leg. J. N. S. (Pa.) 44; *Riggin v. Becker*, 9 Pa. Dist. 439. See also *McKee v. Sims*, (Tex. Civ. App. 1898) 45 S. W. Rep. 37.

**5.** Ratification of Unauthorized Act of Bailiff. — Where the distraint was made more than six months after the expiration of the term, under a warrant given to the bailiff before such expiration, and there was no direct evidence that the landlord was aware of the illegal act of his bailiff in distraining at the time he did, but the landlord learned of the fact of seizure after it had been made and permitted the sale to go on without making any inquiry, and thereafter accepted the proceeds of the sale, it was held that the landlord was liable in damages to the tenant, as he either ratified the bailiff's illegal act with

**658.** 16. Measure of Damages in Actions for Unlawful Distress — *a.* WHERE DISTRAINOR IS A TRESPASSER AB INITIO. — See notes 2, 3.

*b.* WHERE DISTRESS MERELY IRREGULAR. — See note 5.

**659.** See note 1.

*c.* WHERE DISTRESS IS EXCESSIVE. — See note 2.

*d.* EXEMPLARY DAMAGES. — See note 4.

**660.** [DISTRESSED SEAMEN. — See note 1*a.*]

[DISTRIBUTED IN DIVIDEND. — See note 1*b.*]

DISTRIBUTE. — See note 2.

DISTRIBUTION. — See note 3.

**661.** DISTRICT. — See note 3.

knowledge of the circumstances or intended to adopt all the bailiff's acts without inquiry as to any irregularities which he might have committed. *Dick v. Winkler*, 12 Manitoba 624.

**658.** 2. Distress Unlawful from Beginning. — *Majors v. Goodrich*, (Tex. Civ. App. 1900) 54 S. W. Rep. 919.

Double Damages for Distraining for Rent Not Due. — See *Garnett v. Jennings*, (Ky. 1898) 44 S. W. Rep. 382.

3. Interest for Detention. — See *Thomas v. Judy*, (Tex. Civ. App. 1898) 44 S. W. Rep. 890.

5. Irregular Distress — Special Damages Recoverable. — *Pegg v. Supreme Ct.*, etc., 1 Ont. L. Rep. 97.

**659.** 1. No Right of Action Unless Special Damage Shown. — *Brown v. Howell*, 68 N. J. L. 292; *McDonald v. Fraser*, 14 Manitoba 582.

2. Excessive Distress — Measure of Damages. — *McTeer v. Young*, (Tex. Civ. App. 1898) 44 S. W. Rep. 194.

Where the Goods Are Destroyed by Fire, after an excessive distress, the tenant is entitled to damages to the value of the excess of the distress. Such damages are not too remote. *Ernscliffe v. Lethbridge*, 37 Can. L. J. 123.

4. When Exemplary Damages Recoverable. — *Weber v. Vernon*, 2 Penn. (Del.) 359; *Thomas v. Gibbons*, 21 Pa. Super. Ct. 635; *Weber v. Loper*, 16 Montg. Co. Rep. (Pa.) 70; *Hatchell*

*v. Chandler*, 62 S. Car. 380. See also *Garnett v. Jennings*, (Ky. 1898) 44 S. W. Rep. 382.

**660.** 1*a.* Distressed Seamen. — A seaman who is shipwrecked abroad from a British ship is a *distressed seaman* within the meaning of sections 191, 193 of the Merchant Shipping Act, 1894, and section 4 of the Merchant Shipping (Mercantile Marine Fund) Act, 1898, notwithstanding that he has in his possession money of his own which is more than sufficient to maintain him and provide him with a passage home. *Board of Trade v. Sailing Ship Glenpark*, (1903) 2 K. B. 324.

1*b.* The words *distributed in dividend* in the English Bankruptcy Act mean *distributed in dividend* out of assets realized by the trustee. *In re Christie*, (1900) 1 Q. B. 5.

2. Distributee and Heir Synonymous Terms. — *Kitchen v. Southern R. Co.*, 68 S. Car. 554.

3. Distribution — Mechanics' Liens. — *Fairbairn v. Moody*, 116 Mich. 65; *Blitz v. Fields*, 118 Mich. 85.

**661.** 3. County and District. — *State v. McDonald*, 109 Wis. 506.

District — In the Sense of Township. — See *Brown v. Radnor Tp. Electric Light Co.*, 208 Pa. St. 453.

District — Civil Service Law. — See *People v. Shea*, 73 N. Y. App. Div. 232.

District Officers. — *Merwin v. Boulder County*, 29 Colo. 169.



# DISTURBING MEETINGS.

By F. G. BAMMAN.

**665. III. THE MEETING OR ASSEMBLY — 1. In General.** — See note 2.

3. Schools. — See note 4.

**666. 6. Lyceums.** — See note 4.

**668. 7. Meetings Assembled for Public Worship — b. WHAT CONSTITUTES A CHURCH OR RELIGIOUS ASSEMBLY.** — See note 5.

**669. c. TIME DURING WHICH CONGREGATION PROTECTED.** — See notes 3, 4, 5.

d. PLACE OF DISTURBANCE. — See note 6.

**670. IV. CONSTITUENTS OF OFFENSE — 1. The Act of Disturbance — a. IN GENERAL.** — See note 1.

b. ACT OF DISTURBANCE OF RELIGIOUS WORSHIP — (2) *The Congregation Must Have Been Disturbed.* — See note 4.

**671. Disturbance of One Worshiper — Or the Minister.** — See note 2.

(3) *The Congregation Must Have Been Conducting Itself in a Lawful Manner.* — See note 4.

**673. 2. The Intent.** — See notes 1, 2.

**675. VII. EVIDENCE — 1. Proof Devolving upon the State.** — See note 1.

**665. 2. Disturbance at a "Public Place."** — Brock v. State, (Tex. Crim. 1898) 44 S. W. Rep. 516.

**Meeting at Church for Social and Moral Purposes.** — In *Pennsylvania* it is an offense to disturb a "meeting held at a church for social and moral purposes." Com. v. Gennerette, 10 Pa. Super. Ct. 598.

**Meeting Must Have Been for Lawful Purpose.** — State v. Steele, 74 Mo. App. 5.

**A Meeting of Electors** called by one of the candidates does not come within the protection of a statute which makes it an offense to disturb, interrupt, or disquiet any assemblage met for religious worship or for any moral, social, or benevolent purpose. Rex v. Lavoie, 6 Can. Crim. Cas. (Montreal) 39, 21 Quebec Super. Ct. 128.

**4. Disturbance of Schools.** — See McCright v. State, 110 Ga. 261.

**666. 4. Schoolhouse Used as a Lyceum.** — See Brock v. State, (Tex. Crim. 1898) 44 S. W. Rep. 516.

**668. 5. Minter v. State, 104 Ga. 743.** See also Green v. State, (Tex. Crim. 1900) 56 S. W. Rep. 915.

In *Missouri* it must appear that the place was one set apart for religious worship. State v. Ellis, 71 Mo. App. 269.

**Rehearsing Religious Songs.** — The fact that people are assembled for the purpose of receiving instruction in singing religious songs does not necessarily in law constitute an assembly for the purpose of religious worship. Adair v. State, 134 Ala. 183.

**669. 3. Time During Which Congregation Protected from Disturbance.** — See Adair v. State, 134 Ala. 183.

**4. Where Religious Services Were Closed.** — Minter v. State, 104 Ga. 743.

**5. Question of Law and Fact.** — Whether one or more members of an assembly had discon-

nected and separated from the meeting is a question of fact for the jury. Adair v. State, 134 Ala. 183.

A religious meeting cannot be said to be disturbed ten minutes after the services have been concluded and the lights have been extinguished. State v. Davis, 126 N. Car. 1059.

**6. Place of Disturbance — "At or Near" the Place of Worship.** — Holmes v. State, 39 Tex. Crim. 231. See also Adair v. State, 134 Ala. 183; Minter v. State, 104 Ga. 743.

**670. 1. The Disturbance.** — Nichols v. State, 103 Ga. 61; Brock v. State, (Tex. Crim. 1898) 44 S. W. Rep. 516. See also Minter v. State, 104 Ga. 743; Green v. State, (Tex. Crim. 1900) 56 S. W. Rep. 915.

**4. The Congregation Must Be Disturbed.** — Cox v. State, 136 Ala. 94.

"A disturbance of at least a considerable part of the congregation by making a noise that could be heard all over the house would certainly be a disturbance contemplated by the statute." Clark v. State, (Tex. Crim. 1904) 78 S. W. Rep. 1078.

**671. 2. Disturbance of One Worshiper an Indictable Offense.** — Nichols v. State, 103 Ga. 61.

**4. Congregation Must Be Conducting Itself in a Lawful Manner.** — See Brock v. State, (Tex. Crim. 1898) 44 S. W. Rep. 516.

**673. 1. Wilful Intent Essential.** — Adair v. State, 134 Ala. 183; State v. Dahlstrom, 90 Minn. 72.

**Meaning of "Wilful."** — "'Wilful' \* \* \* means with evil intent, or without reasonable grounds for believing the act to be lawful." Holmes v. State, 39 Tex. Crim. 231.

**2. Intent Presumed.** — See Harvey v. State, (Tex. Crim. 1898) 44 S. W. Rep. 151.

**675. 1. Place of Assembly Must Be Proved.** — Minter v. State, 104 Ga. 743. See also McCright v. State, 110 Ga. 261; Clark v. State, (Tex. Crim. 1904) 78 S. W. Rep. 1078.

# DIVIDENDS.

By L. C. BOEHM.

**680. I. DEFINITION AND NATURE.** — See note 1.

**681.** See note 1.

**II. FROM WHAT PAYABLE — EARNINGS — "Net Profits."** — See note 8.

**683. III. DISCRETION OF DIRECTORS AS TO USE OF CORPORATE PROFITS —**

**1 In General.** — See note 1.

**2. Charter Limitations.** — See note 2.

**680. 1. Declared from Profits.** — *Alsop v. De Koven*, 107 Ill. App. 190, *affirmed* 205 Ill. 309.

But the term "dividend" is also applied to a division of capital. *Larwill v. Burke*, 10 Ohio Cir. Dec. 605, 19 Ohio Cir. Ct. 513.

**"Dividend" and "Interest" Distinguished.** — "Interest" is not an apt word to express the return to which a shareholder is entitled in respect of shares paid up in due course and not by way of advance. Interest is compensation for delay in payment, and is not accurately applied to the share of profits of trading, although it may be used as an inaccurate mode of expressing the measure of the share of those profits." *Bond v. Barrow Hematite Steel Co.*, (1902) 1 Ch. 353.

**681. 1. Declaration Necessary to Existence of Dividend.** — *Alsop v. De Koven*, 107 Ill. App. 190, *affirmed* 205 Ill. 309; *Robertson v. Bucklen*, 107 Ill. App. 369; *Cleveland Trust Co. v. Lander*, 10 Ohio Cir. Dec. 452, 19 Ohio Cir. Ct. 271. See also *Matter of Kane*, 64 N. Y. App. Div. 566; *Com. v. Western Union Tel. Co.*, 2 Dauphin Co. Rep. (Pa.) 30.

**A By-law** providing that a dividend of eight per cent. should be paid annually on the preferred stock out of the net earnings, and the balance of the net profits paid as dividends on the common stock, was held to be in effect an appropriation of the net proceeds arising from the company's business. *Seattle Trust Co. v. Pitner*, 18 Wash. 401.

**8. Dividends Payable from Surplus.** — "Until the corporation has a surplus in its treasury a stockholder cannot say that there is any definite sum due to him from the corporation, nor insist on a dividend being declared." *Leary v. Columbia River, etc., Nav. Co.*, 82 Fed. Rep. 775, *per Hanford, J.* See also *Bingham v. Marion Trust Co.*, 27 Ind. App. 247; *Dykman v. Keeney*, 10 N. Y. App. Div. 610, *affirmed* 160 N. Y. 677; *People v. Knight*, 96 N. Y. App. Div. 120.

**Stocks of Other Companies** held by the corporation are not in a legal sense surplus to be divided among the stockholders, but are capital. *Burden v. Burden*, 159 N. Y. 287.

**Building and Loan Association.** — Preferred stockholders of a building and loan association are entitled to dividends out of profits only; and after the association has become insolvent no dividends can be paid. *Wilson v. Parvin*, (C. C. A.) 119 Fed. Rep. 652.

**The Phrase "Profits Available for Dividend"** means the net profits after making any deduction which the directors may properly make before declaring a dividend, as the setting aside of a reserve fund. *Fisher v. Black, etc., Pub. Co.*, (1901) 1 Ch. 174.

The question what is profit available for dividend depends upon the result of the whole accounts fairly taken for the year, capital as well as profit and loss, and though dividends may be paid out of earned profits in proper cases, notwithstanding a depreciation of capital, a realized accretion to the estimated value of one item of the capital assets cannot be deemed to be profit divisible among the shareholders without reference to the result of the whole accounts fairly taken. *Foster v. New Trinidad Lake Asphalt Co.*, (1901) 1 Ch. 208.

**683. 1. Burland v. Earle, (1902) A. C. 83, *modifying* 27 Ont. App. 540; *Robertson v. Bucklen*, 107 Ill. App. 369; *Lillard v. Oil, etc., Co.*, (N. J. 1903) 56 Atl. Rep. 254. See also *Carter v. Crehore*, 12 Hawaii 309.**

**The Mere Fact that a Corporation Has a Large Surplus** on hand is not sufficient of itself to give to a single stockholder a right to come into court and compel a dividend of that surplus. *Trimble v. American Sugar Refining Co.*, 61 N. J. Eq. 340; *Burden v. Burden*, 159 N. Y. 287.

**Banking Corporation — Statutory Requirement.** — The *Missouri* statute requiring the directors of a banking institution to set apart a surplus out of dividends earned is mandatory. *Lapsley v. Merchants Bank*, 105 Mo. App. 98.

**2. Charter Limitations as to Use of Profits.** — *Bigbee, etc., River Packet Co. v. Moore*, 121 Ala. 379.

**Maximum Rate Fixed by Act of Incorporation.** — Where a gas company is prohibited by special act from paying a dividend in excess of a certain rate, fixed by a sliding scale dependent on the price charged for gas, it cannot properly pay dividends at the rate thus fixed free from income tax. In calculating the maximum dividend payable, income tax thereon must be included. *Atty.-Gen. v. Ashton Gas Co.*, (1904) 2 Ch. 621.

As to the right of a waterworks company under the English Waterworks Clauses Act of 1847 to declare dividends in excess of the rate fixed by the statute, for the purpose of making up deficiencies in prior dividends, see *Lamplough v. Kent Waterworks Co.*, (1903) 1 Ch. 575, *affirmed* (1904) A. C. 27.

**683.** IV. EQUALITY OF STOCKHOLDERS — 1. As to Dividends. — See note 4.

**684.** See note 1.

2. As to Option to Take New Stock — *a.* IN GENERAL — Market Value of New Shares. — See note 3.

**685.** Delay of Stockholder — Waiver. — See note 2.

*b.* AS TO RIGHT TO TAKE ORIGINAL STOCK — Not Applicable to Original Stock. — See note 4.

**686.** V. DISCRETION OF DIRECTORS AS TO DECLARING DIVIDENDS — 1. In General. — See notes 6, 7.

**687.** 2. On Common Stock. — See notes 1, 2.

**688.** 3. On Preferred Stock — When Question Relates to Existence of Profits. — See notes 2, 3.

**689.** 4. Proceedings to Enforce Payment. — See note 1.

VI. NATURE OF CORPORATION'S OBLIGATION AFTER DECLARATION — 1. In General. — See note 6.

**690.** See note 2.

**683.** 4. Dividends Must Be Without Discrimination as to Stockholders of Same Class. — *National Salt Co. v. Ingraham*, (C. C. A.) 122 Fed. Rep. 40; *Storrow v. Texas Consol. Compress, etc., Assoc.*, (C. C. A.) 87 Fed. Rep. 612; *Hartley v. Pioneer Iron Works*, 87 N. Y. App. Div. 115, reversed 181 N. Y. 73, quoting 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 683. See also *Redhead v. Iowa Nat. Bank*, 123 Iowa 336.

Directors Cannot Declare Dividends on Their Own Stock to Exclusion of Other Stock. — *Latimer v. Equitable Loan, etc., Assoc.*, 78 Mo. App. 463, 2 Mo. App. Rep. 264.

**684.** 1. Right of Stockholder to Maintain Action at Law. — See *Willcox v. Trenton Potteries Co.*, 64 N. J. Eq. 173.

Stockholder Can Maintain Bill for Accounting. — *Cook County Brick Co. v. Kaehler*, 83 Ill. App. 448.

3. Option to Subscribe for New Stock. — *Jones v. Concord, etc., R. Co.*, 67 N. H. 119; *Way v. American Grease Co.*, 60 N. J. Eq. 263; *Electric Co. of America v. Edison Electric Illuminating Co.*, 200 Pa. St. 516. And see the title STOCK AND STOCKHOLDERS, 947. 7 *et seq.*

Entitled to Purchase at Par. — *Hammond v. Edison Illuminating Co.*, 131 Mich. 79, 100 Am. St. Rep. 582.

**685.** 2. Waiver. — *Hoyt v. Shenango Valley Steel Co.*, 207 Pa. St. 208. And see the title STOCK AND STOCKHOLDERS, 949. 6, 7, 8.

Stockholder Must Show Demand and Offer to Subscribe. — *Bonnet v. Eagle Pass First Nat. Bank*, 24 Tex. Civ. App. 613.

4. *Crosby v. Stratton*, 17 Colo. App. 212. And see the title STOCK AND STOCKHOLDERS, 948. 9, 10.

**686.** 6. Generally Question of Internal Management. — *Burland v. Earle*, (1902) A. C. 83, 71 L. J. P. C. 1; *Bond v. Barrow Hæmatite Steel Co.*, (1902) 1 Ch. 353; *In re Crichton's Oil Co.*, (1902) 2 Ch. 86; *Reynolds v. Mt. Vernon Bank*, 158 N. Y. 740, affirming 6 N. Y. App. Div. 62.

Time for Declaring and Paying Dividends. — In *New Jersey*, unless fixed times for the payment of dividends on preferred stock are designated by the charter or by-laws, such payment must be made during the month following the close of the fiscal year; and the directors cannot, in the absence of such designation, declare

and pay quarterly dividends on the preferred stock on days selected by them. And where the corporate charter provides that the dividend upon the common stock shall be declared after the close of the fiscal year, the directors have no power to declare such dividend before the close of the fiscal year. *Marquand v. Federal Steel Co.*, 95 Fed. Rep. 725.

7. Courts Reluctant to Override Directors. — *Bond v. Barrow Hæmatite Steel Co.*, (1902) 1 Ch. 353. See also *Watson v. Columbia Mut. Bldg., etc., Assoc.*, 71 N. Y. App. Div. 498.

Where the Directors Are Guilty of Fraud or Bad Faith, or a wilful abuse of their discretionary powers, either in declaring or in refusing to declare a dividend, a court of equity will interfere and compel the proper action. *Morey v. Fish Bros. Wagon Co.*, 108 Wis. 520.

**687.** 1. Where There Is No Bad Faith. — See *Lowry v. Farmers' L. & T. Co.*, 56 N. Y. App. Div. 408, affirmed 172 N. Y. 137.

Refusal of the Directors to Declare must be shown. *Maeder v. Buffalo Bill's Wild West Co.*, 132 Fed. Rep. 280.

2. Fraudulent or Ulterior Motives of Directors. — *Storrow v. Texas Consol. Compress, etc., Mfg. Assoc.*, (C. C. A.) 87 Fed. Rep. 612. See also *Burden v. Burden*, 159 N. Y. 287; *Matter of Rogers*, 161 N. Y. 108.

Diversion of Profits. — See *Earle v. Burland*, 27 Ont. App. 540.

**688.** 2. Question of Existence of Profits. — See *Bond v. Barrow Hæmatite Steel Co.*, (1902) 1 Ch. 353; *In re Crichton's Oil Co.*, (1902) 2 Ch. 86.

3. Where the Court Will Order Declaration of Dividend. — *Storrow v. Texas Consol. Compress, etc., Assoc.*, (C. C. A.) 87 Fed. Rep. 612; *Crichton v. Webb Press Co.*, 113 La. 167, 104 Am. St. Rep. 500.

**689.** 1. Jurisdiction of Equity. — *Griffing v. A. A. Griffing Iron Co.*, 61 N. J. Eq. 269.

6. Where Fund Segregated. — *Hunt v. O'Shea*, 69 N. H. 600; *McGill v. Holmes*, (N. Y. City Ct. Gen. T.) 23 Misc. (N. Y.) 524; *Albany Fertilizer, etc., Co. v. Arnold*, 103 Ga. 145.

No Interest on Dividends until Demand. — *Cochran v. McGee*, (Ky. 1899) 53 S. W. Rep. 510.

**690.** 2. Where There Is No Segregation. — See *Price v. Morning Star Min. Co.*, 83 Mo.



- 690.** 2. Stockholder's Right of Action. — See note 3.  
**691.** Necessity of Demand. — See note 1.  
 Statute of Limitations. — See note 2.  
 3. Right of Corporation to Set Off Debt of Shareholder — **May Set Off** —  
 Lien. — See note 3.  
**692.** VII. RELATION OF DIRECTORS TO DIVIDEND AFTER DECLARATION —  
 1. Rescission of Declaration of Cash Dividend. — See note 2.  
 2. Rescission of Declaration of Stock Dividend. — See note 5.  
**693.** VIII. STOCK DIVIDENDS — 1. In General — Nature and Legality. — See  
 note 1.  
**695.** 2. Constitutional Inhibitions — Accumulated Money Surplus. — See note 1.  
 IX. PROPERTY DIVIDENDS. — See note 3.  
 X. SCRIP DIVIDENDS — 1. General Nature. — See note 5.  
**697.** XI. PREFERRED STOCK — 1. In General. — See note 4.  
**698.** 2. Holders Entitled to Dividends Only from Earnings. — See notes 3, 5.  
**700.** 4. Cumulative Dividends. — See note 1.

App. 470; Hunt v. O'Shea, 69 N. H. 600; Clark v. Campbell, 23 Utah 569, holding that the declaration of a dividend converts a stockholder into a creditor for that amount and that he has the right to share on a par with other creditors.

**690.** 3. Action by Stockholder Against Corporation for Dividends. — Larwill v. Burke, 10 Ohio Cir. Dec. 605, 19 Ohio Cir. Ct. 513.

A stockholder who accepts a dividend declared and paid in lieu of a prior illegally declared dividend which has not been paid has no standing to recover the dividend first declared. Albany Fertilizer, etc., Co. v. Arnold, 103 Ga. 145.

**Stockholder Entitled to Accounting in Equity After Declaration of Dividend.** — Cook County Brick Co. v. Kaehler, 83 Ill. App. 448.

**Actual Declaration of Dividend Necessary.** — It is a condition precedent to the right to maintain an action to recover a dividend that a dividend has been actually declared; and this rule applies as well to shares on which a fixed preferential dividend is payable as to ordinary shares. Bond v. Barrow Hæmatite Steel Co., (1902) 1 Ch. 353.

**691.** 1. Demand of Payment Necessary. — Maeder v. Buffalo Bill's Wild West Co., 132 Fed. Rep. 280.

**2. Statute of Limitations.** — Larwill v. Burke, 10 Ohio Cir. Dec. 605, 19 Ohio Cir. Ct. 513.

But in *England* it is held that the arrears of dividend are in the nature of a specialty, and are not simple contract debts; hence, the right of a shareholder in a limited company to sue for the arrears of dividends on ordinary shares is not barred by limitation until the lapse of twenty years from the declaration of the dividend. There is no relation of trustee and *cestui que trust* between the company and the individual shareholders to prevent the statute of limitations from running. *In re Artisans' Land, etc., Corp.*, (1904) 1 Ch. 796; *In re Drogheda Steam Packet Co.*, (1903) 1 Ir. R. 512.

**3. Right of Corporation to Set Off Debt of Shareholder.** — Andrews v. Kentucky Citizens' Bldg., etc., Assoc., (Ky. 1902) 70 S. W. Rep. 409.

**692.** 2. Where the Directors Have Not Made an Absolute Declaration of a Dividend, they may, before the payment of the dividend, reconsider the question whether the dividend should be

made, though they have advertised that a dividend has been declared and have set aside a sum of money for its payment. *Lagunas Nitrate Co. v. Schroeder*, 85 L. T. N. S. 22.

**5. Rule as to Stock Dividends.** — See *Lagunas Nitrate Co. v. Schroeder*, 85 L. T. N. S. 22.

**693.** 1. Power of Corporation to Make Stock Dividend. — Carter v. Crehore, 12 Hawaii 309.

**What Constitutes Stock Dividend.** — An issue of new stock constitutes a stock dividend where such new shares represent earnings or profits, but not where the number of shares is numerically increased without representing any increase in value. *Com. v. Western Union Tel. Co.*, 2 Dauphin Co. Rep. (Pa.) 30.

**695.** 1. Alsop v. DeKoven, 107 Ill. App. 190, affirmed 205 Ill. 309.

**3. Dividend May Be Declared in Cash or Other Property.** — Carter v. Crehore, 12 Hawaii 309.

**5. Scrip Dividend — General Nature.** — Upon the issuance of scrip certificates which are to be redeemed out of surplus, no division of that surplus is effected, but it still remains in the company. *Adams v. Shields*, 9 Ohio Cir. Dec. 558, 17 Ohio Cir. Ct. 129.

**697.** 4. Contract of Preference. — See Scott v. Baltimore, etc., R. Co., 93 Md. 475, holding that preferred stock does not share over or beyond the preference stated in the charter; *Pronick v. Spirits Distributing Co.*, 58 N. J. Eq. 97, holding that dividends on preferred stock cannot be changed except in accordance with the charter.

**698.** 3. *Storrow v. Texas Consol. Compress, etc., Assoc.*, (C. C. A.) 87 Fed. Rep. 612.

**5. The Voluntary Dissolution of the company terminates a guaranty to pay a specified dividend on the stock.** *Mason v. Standard Distilling, etc., Co.*, 85 N. Y. App. Div. 520. See generally the title DISSOLUTION OF CORPORATIONS, 603, 2 et seq.

**700.** 1. Where Preferred Stockholder Has Claim on Subsequent Dividends for Deficiency. — *Storrow v. Texas Consol. Compress, etc., Assoc.*, (C. C. A.) 87 Fed. Rep. 612.

**Arrears Payable Only Out of Profits "Available for Dividends."** — *In re Crichton's Oil Co.*, (1902) 2 Ch. 86.

**Cancellation of Arrears of Dividend.** — The memorandum of association of a company provided that the preference shareholders should

**700. XII. CONTRACT TO PAY INTEREST ON STOCK SUBSCRIPTIONS.** — See note 3.

**701. XIII. PAYMENT OF DIVIDENDS OUT OF CAPITAL** — 1. Right of Stockholders to Enjoin. — See note 4.

**702. 2. Rights of Creditors Against Stockholders** — Trust-fund Doctrine. — See note 1.

**703. 3. Nonliability When Dividend Lawfully Made.** — See note 2.

**5. Statutory Liability of Stockholders** — Statutes Limiting Stockholder's Liability to Amount Received. — See note 6.

**705. 6. Liability of Directors** — *a. IN GENERAL* — FRAUD OR NEGLIGENCE. — See note 2.

**706. If Guilty Neither of Fraud Nor of Such Negligence.** — See note 1.

**707. *b. STATUTORY LIABILITY* — (2) *Extent of Liability.*** — See note 3.

be entitled to receive out of the profits a fixed cumulative preferential dividend of five per cent. per annum. The articles of association provided that all or any of the rights and privileges attached to any class of shares might be modified by an extraordinary resolution passed at a general meeting of the holders of shares of that class. By a resolution duly passed at a meeting of the preference shareholders held at a time when the dividends due on the preference shares were two years in arrears, the preference shareholders agreed to a scheme for reduction of capital proposed by the directors whereby such arrears were cancelled and the future profits distributable as dividends were appropriated in order of priority to the payment, first, of cumulative dividends of five per cent. on the preference shares; second, of five per cent. on the ordinary shares; third, of any surplus *pari passu* to holders of both classes of shares. In a petition by the company the court confirmed the scheme, holding that it was not *ultra vires* to cancel the arrears of preference dividend in the manner proposed. *In re Oban*, etc., Distilleries, Sc. Ct. Sess. 5 F. 1140.

**700. 3. Interest on Stock Subscriptions.** — See *Louisville*, etc., R. Co. *v.* Hart County, 115 Ky. 186.

**701. 4. Enjoining Payment of Dividends from Capital.** — *Coquard v. National Linseed Oil Co.*, 171 Ill. 480. See also *Schoenfeld v. American Can Co.*, (N. J. 1903) 55 Atl. Rep. 1044.

**Where Capital Has Become Impaired.** — The payment of dividends out of a balance to the credit of the profit and loss account of a corporation is not a payment from the capital stock, though such capital has theretofore become impaired. *Bond v. Barrow Hæmatite Steel Co.*, (1902) 1 Ch. 353.

**702. 1. Following Capital into Hands of Stockholders.** — *In re National Bank*, (1899) 2 Ch. 629, 68 L. J. Ch. 634; *Grant v. Southern Contract Co.*, 104 Ky. 781. And see generally the title STOCK AND STOCKHOLDERS, 1007. 6 *et seq.*

**Dividends Paid by Insolvent Bank.** — The liability of a stockholder, under Rev. Stat. Wis. (1898), § 2024, to repay dividends paid to him while the bank was insolvent, is owed to the corporation, but may be enforced by a creditor if the corporation refuses to proceed. *Gager v. Paul*, 111 Wis. 638.

**703. 2. Unless Fraudulent Intent or Insolvency** at the time of declaring the dividend be

shown, general creditors of the corporation can assert no valid claim to such dividends. *New Hampshire Sav. Bank v. Richey*, 121 Fed. Rep. 956; *Great Western Min., etc., Co. v. Harris*, (C. C. A.) 128 Fed. Rep. 321.

**6. Where Liable for Amount Received.** — *American Steel*, etc., Co. *v.* Eddy, 130 Mich. 266.

**705. 2. What Is Not Payment Out of Capital.** — *In re National Bank*, (1899) 2 Ch. 629, 68 L. J. Ch. 634.

**Estoppel of Stockholders Accepting Dividend.** — Where the directors of a company declared and paid a dividend out of the company's capital, it was held that though the declaration of the dividend was *ultra vires*, an action to compel the directors to repay to the company the amount of the dividend could not be maintained by shareholders who received their respective shares of the dividend with full knowledge of all the facts and still retained such shares; and this though the action was brought in behalf of the general body of the shareholders. *Towers v. African Tug Co.*, (1904) 1 Ch. 558.

**Payment of Dividends Out of Capital Indictable Offense.** — *Taylor v. Com.*, 75 S. W. Rep. 244, 25 Ky. L. Rep. 374. See generally the title OFFICERS AND AGENTS OF PRIVATE CORPORATIONS, 896. 5.

**706. 1. Where Guilty of Neither Fraud Nor Culpable Negligence.** — *In re National Bank*, (1899) 2 Ch. 629, 68 L. J. Ch. 634, *affirmed sub nom. Dovey v. Cory*, (1901) A. C. 477, holding that where a director of a joint stock banking company, in assenting to the payment of dividends out of capital, honestly relied on the judgment, information, and advice of the general manager of the bank and of the chairman of the board of directors, by whose statements he was misled, and whose integrity, skill, and competence he had no reason to suspect, he was not negligent of his duty as director and was not liable for the amounts so paid out.

**Nonliability for Fraud of Codirectors.** — See *Lucas v. Fitzgerald*, 20 Times L. Rep. 16.

**707. 3. Joint and Several Liability.** — See *Schoenfeld v. American Can Co.*, (N. J. 1903) 55 Atl. Rep. 1044; *Williams v. Brewster*, 117 Wis. 370.

**Construction of New York Statute.** — See *Dykman v. Keeney*, 10 N. Y. App. Div. 610, *affirmed* 160 N. Y. 677.

**Power of One State to Enforce Statute of Another.** — See *Hutchinson v. Stadler*, 85 N. Y. App. Div. 424.

**709.** (4) *Exoneration of Dissenting Directors.* — See note 1.

(5) *Strict Construction of Statutory Liability.* — See note 2.

(6) *Proceedings to Enforce Liability* — At Law. — See note 4.

**710.** XIV. RIGHTS OF LIFE TENANT AND REMAINDERMAN — 1. Cash Dividends from Earnings of Corporation — *a.* IN GENERAL — Present Rule. — See note 4.

**712.** *b.* WHEN PORTION OF EARNINGS MADE BEFORE CREATION OF TRUST — (3) *Apportionment of Bonus* — (b) *Pennsylvania Rule of Ascertainment.* — See note 3.

**713.** *c.* DOCTRINE THAT LIFE TENANT ENTITLED TO ALL EARNINGS DISTRIBUTED IN FORM OF CASH — (1) *In General* — Power of Directors. — See note 1.

**714.** 2. Stock Dividends — *a.* WHEN EARNINGS MADE BEFORE CREATION OF TRUST. — See note 6.

**715.** *b.* WHEN EARNINGS MADE SINCE CREATION OF TRUST — (2) *Apportionment of Stock.* — See note 5.

**716.** *c.* DOCTRINE THAT ALL STOCK DIVIDENDS ARE CAPITAL — Whether Profits Earned Before or After Trust. — See note 3.

**717.** Mere Fact of Increase of Capital Stock at Time of Dividend. — See note 1.

*d.* DOCTRINE THAT ALL STOCK DIVIDENDS FROM EARNINGS ARE INCOME. — See note 2.

**718.** 3. Option to Subscribe for New Shares — Corpus of Estate. — See note 1.

**719.** 5. When Life Tenancy Expires Between Dividend Days — No Apportionment. — See note 1.

**709.** 1. What Constitutes Assent. — Williams *v.* Brewster, 117 Wis. 370.

2. Enforcement Out of State. — A statute imposing liability on directors is not penal in the sense that it will not be enforced by the courts of a sister state. *Hutchinson v. Stadler*, 85 N. Y. App. Div. 424.

4. At Law. — See *Schoenfeld v. American Can Co.*, (N. J. 1903) 35 Atl. Rep. 1044.

**710.** 4. Present Rule. — *Carter v. Crehore*, 12 Hawaii 309; *Alsop v. De Koven*, 107 Ill. App. 190, affirmed 205 Ill. 309; *Lyman v. Pratt*, 183 Mass. 58; *Simpson v. Millsaps*, 80 Miss. 239, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 710.

**712.** 3. Pennsylvania Rule. — Where a life tenant, by virtue of his right as stockholder, was entitled to subscribe to another corporation, he was held to be entitled to such stock and profits as against the remainderman. *Wright's Estate*, 24 Pa. Co. Ct. 376, 9 Pa. Dist. 447.

**713.** 1. Cases Giving Life Tenant All Earnings Distributed in Form of Cash. — *Alsop v. De Koven*, 107 Ill. App. 190, affirmed 205 Ill. 309; *Walker v. Walker*, 68 N. H. 407. See also *Lowry v. Farmers' L. & T. Co.*, 56 N. Y. App. Div. 408, affirmed 172 N. Y. 137.

**714.** 6. Stock Dividends — Earnings Before Creation of Trust. — *Blinn v. Gillett*, 208 Ill. 473, 100 Am. St. Rep. 234.

**715.** 5. Apportionment of Stock. — See *Carter v. Crehore*, 12 Hawaii 309, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 715.

Apportionment with Regard to Source of Dividend — Whether Capital or Earnings. — A testator bequeathed as part of his residuary estate shares of stock in a corporation to trustees in trust to pay the income thereof to certain persons for life with remainder over. The corporation subsequently issued a stock dividend of two shares of new stock for every three shares of old stock, and appropriated as payment there-

for at par an equal amount of its net earnings, all of which had accumulated since the death of the testator. The old stock was at a premium of over four hundred dollars a share before the issuance of the new stock, and after the new issue the stock was at a premium of over two hundred dollars a share. The court held that so much of the new stock held by the trustees as represented earnings — that is, up to the par value of the new stock — should go to the life tenants, and that the balance, representing the right to take the new stock at par or the depreciation in the value of the old stock, should be held as part of the corpus of the trust. *Carter v. Crehore*, 12 Hawaii 309.

**716.** 3. Doctrine that All Stock Dividends Are Capital. — *Alsop v. De Koven*, 107 Ill. App. 190, affirmed 205 Ill. 309; *Lyman v. Pratt*, 183 Mass. 58.

**717.** 1. *Lyman v. Pratt*, 183 Mass. 58, following *Davis v. Jackson*, 152 Mass. 58, 23 Am. St. Rep. 801, stated in the original note.

2. New York and Kentucky Rule. — In *Chester v. Buffalo Car Mfg. Co.*, 70 N. Y. App. Div. 443, the rule was declared to be that "if the company pays money or issues stock as a distribution of profits it will ordinarily go to the life tenant. If it issues stock as capital and appropriates its surplus as an increase of the capital stock of the concern such issue will be held to inure to the benefit of the remainderman." See also *McLouth v. Hunt*, 154 N. Y. 179; *Lowry v. Farmer's L. & T. Co.*, 56 N. Y. App. Div. 408, affirmed 172 N. Y. 137, reversing (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 334; *Matter of Roberts*, (Surrogate Ct.) 40 Misc. (N. Y.) 512.

**718.** 1. Option to Subscribe for New Shares. — *Carter v. Crehore*, 12 Hawaii 309, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 718; *Alsop v. De Koven*, 107 Ill. App. 190, affirmed 205 Ill. 309; *Walker v. Walker*, 68 N. H. 407.

**719.** 1. Expiration of Life Tenancy Between



**719.** 6. Distribution of Capital. — See note 3.

**720.** 7. Distribution of Both Capital and Earnings. — See note 1.

**XV. RIGHT TO DIVIDENDS AS BETWEEN SUCCESSIVE OWNERS OF STOCK**

— 1. In General. — See note 4.

**721.** 2. Time of Declaration. — See note 1.

**722.** DIVISION FENCE. — See note 2.

**Dividend Days.** — Mann *v.* Anderson, 106 Ga. 823, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 719.

**719.** 3. Distribution of Corporate Capital. — Carter *v.* Crehore, 12 Hawaii 309; Walker *v.* Walker, 68 N. H. 407. See also Matter of Rogers, 161 N. Y. 108.

**Dividend Arising from Sale of Corporate Property.** — The fact that the dividend is in the form of stock of other companies, taken in payment, does not affect the rule. Mercer *v.* Buchanan, 132 Fed. Rep. 501.

**720.** 1. New York — Assets Apportioned. — Where at the dissolution of a corporation its assets were twenty times what they were at the death of the testator, it was held that the stock in a new company, taken in payment for a transfer of its plant and raw material, and a dividend of one hundred per cent. paid on the old stock, might be presumed sufficiently to represent the corporate capital in the absence of evidence to the contrary; and that the rest of the corporate assets might be regarded as earnings and allotted to life tenants. Matter of Rogers, 161 N. Y. 108. See also Tuttle *v.* Paterson First Nat. Bank, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 318.

4. Transferee Entitled to All Dividends Thereafter Declared. — Mann *v.* Anderson, 106 Ga. 823, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 720; Louisville, etc., R. Co. *v.* Hart County, 116 Ky. 186; Real Estate Trust Co. *v.*

Bird, 90 Md. 229; Price *v.* Morning Star Min. Co., 83 Mo. App. 470; Houser *v.* Richardson, 90 Mo. App. 134.

As to a Pledgee's Right to Collect Dividends, see the title PLEDGE AND COLLATERAL SECURITY, **907.** 2 *et seq.*

**Reservation of Future Dividends Impossible.** — See Marble *v.* Van Wert Nat. Bank, 2 Ohio Cir. Dec. 265.

**Donee of Stock.** — When the by-laws of a bank provide that the bank may withhold dividends from a stockholder indebted to it, a donee of the debtor's stock cannot recover the dividends. Bellevue Bank *v.* Higbee, 2 Ohio Cir. Dec. 512.

**Transfer under Decree — Effect of Reversal.** — Where executors transferred stock in pursuance of a decree of distribution, and the transferee had notice of the pendency of an appeal from such decree, it was held that, after a reversal of the decree, the executors were entitled to recover dividends which had been paid on the stock in the meantime. Ashton *v.* Zeila Min. Co., 134 Cal. 408.

**721.** 1. Transfer of Stock Does Not Carry Dividends Declared but Not Payable until Future Date. — Groh *v.* Groh, 80 N. Y. App. Div. 85, reversed 177 N. Y. 8; Clark *v.* Campbell, 23 Utah 569.

**By Special Contract,** of course, the rule may be altered. See Price *v.* Morning Star Min. Co., 83 Mo. App. 470.

**722.** 2. Hoar *v.* Hennessy, 29 Mont. 253.

# DIVORCE.

By JOHN SIMPSON.

- 727. I. ORIGIN, NATURE, AND GENERAL PRINCIPLES — 2. Whether Part of Our Common Law** — Principles Applicable to Statutory Causes for Divorce. — See note 4.
- 3. Marriage and Divorce Defined — Marriage Defined.** — See notes 5, 6.
- 728. 4. Public Policy Concerning Divorce.** — See note 6.
- 729. 5. The Staté as a Party in Divorce Suit.** — See notes 2, 3, 4.  
Court Not Bound by the Pleadings. — See notes 5, 7, 8, 9, 10.
- 6. Statutes Relating to Divorce — Object of Divorce Statutes.** — See note 15.
- 730. Retrospective Interpretation.** — See note 2.
- 731. II. FORMS OF DIVORCE — LEGISLATIVE AND JUDICIAL — Constitutional Prohibitions Against Legislative Divorce.** — See note 1.
- 732. III. RESIDENCE AND DOMICIL — 1. Residence Required by Statute — Actual Residence for Certain Time.** — See note 5.

**727. 4. In Maryland.** — A court of equity sitting as a divorce court will be governed by the rules and principles of the ecclesiastical courts of England so far as they are consistent with the Code. *Fisher v. Fisher*, 93 Md. 298, 95 Md. 314, 93 Am. St. Rep. 334.

**5. Marriage Not a Contract.** — *Allen v. Allen*, 73 Conn. 54, 84 Am. St. Rep. 135; *Eikenbury v. Eikenbury*, 33 Ind. App. 69.

**6. A Legal Status.** — *Eikenbury v. Eikenbury*, 33 Ind. App. 69.

**728. 6. Decker v. Decker, 193 Ill. 288, 86 Am. St. Rep. 325, quoting 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 728.**

**729. 2. The State as a Party.** — See *Decker v. Decker*, 193 Ill. 288, 86 Am. St. Rep. 325, quoting 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 729; *Fisher v. Fisher*, 95 Md. 314, 93 Am. St. Rep. 334; *Bachelor v. Bachelor*, 30 Wash. 639.

**3. Decker v. Decker, 193 Ill. 288, 86 Am. St. Rep. 325, quoting 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 729; *Breedlove v. Breedlove*, 27 Ind. App. 560, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 729; *Eikenbury v. Eikenbury*, 33 Ind. App. 69; *Fisher v. Fisher*, 95 Md. 314, 93 Am. St. Rep. 334; *Knott v. Knott*, (N. J. 1903) 54 Atl. Rep. 559; *Earle v. Earle*, 43 Oregon 293; *Bachelor v. Bachelor*, 30 Wash. 639.**

**4. Smith v. Smith, 145 Cal. 615; *Grannis v. Superior Ct.*, 146 Cal. 245; *Berry v. Berry*, 145 Cal. 784; *Decker v. Decker*, 193 Ill. 288, 86 Am. St. Rep. 325, quoting 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 729; *Eikenbury v. Eikenbury*, 33 Ind. App. 69; *Fisher v. Fisher*, 95 Md. 314, 93 Am. St. Rep. 334; *Knott v. Knott*, (N. J. 1903) 54 Atl. Rep. 559; *Goldner v. Goldner*, 49 N. Y. App. Div. 395; *Gorham v. Gorham*, 40 N. Y. App. Div. 564; *Smith v. Smith*, 10 N. Dak. 219.**

**The Commonwealth or Public Is Always the Unnamed Third Party to a Divorce Suit**, and on its behalf the court or the master appointed by it will take up the investigation of any fact properly averred, the determination of which is ma-

terial to the issue. *Akers v. Akers*, 22 Pa. Co. Ct. 550.

**5. Pleadings of the Parties.** — *Grannis v. Superior Ct.*, 146 Cal. 245; *Decker v. Decker*, 193 Ill. 288, 86 Am. St. Rep. 325, quoting 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 729, notes 2 to 10; *Breedlove v. Breedlove*, 27 Ind. App. 560, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 729; *Eikenbury v. Eikenbury*, 33 Ind. App. 69; *Fisher v. Fisher*, 95 Md. 314, 93 Am. St. Rep. 334; *Smith v. Smith*, 10 N. Dak. 219.

**7. Knott v. Knott, (N. J. 1903) 54 Atl. Rep. 559.**

**8. Jones v. Jones, 20 App. Cas. (D. C.) 38; *Drayton v. Drayton*, 54 N. J. Eq. 298; *Smith v. Smith*, 10 N. Dak. 219.**

**9. Hunter v. Hunter, 132 Cal. 473; *Merrill v. Merrill*, 41 N. Y. App. Div. 347.**

**Where Court Ought Not to Interpose.** — In a case of cruelty to a wife the circumstances may be such that the court ought not, on its own motion, to raise the defense of condonation on behalf of the husband. *McClanahan v. McClanahan*, 104 Tenn. 217.

**10. Court's Own Proceedings in Previous Action.** — The court will, on its own motion, take notice of its own proceedings and records in a previous action for divorce between the parties. *Fisher v. Fisher*, 95 Md. 314, 93 Am. St. Rep. 334.

**15. Divorce Can Be Granted on Statutory Grounds Only.** — *Gardner v. Gardner*, 9 N. Dak. 192; *Johnson v. Johnson*, 107 Wis. 186, 81 Am. St. Rep. 836.

Where the defendant knowingly enters into a second marriage it does not give the innocent party to the first marriage a ground of action in addition to the ground of adultery, under Shannon's Code, § 4201, subd. 2. *Moore v. Moore*, 102 Tenn. 148.

**730. 2. Dabney v. Dabney, 20 App. Cas. (D. C.) 440.**

**731. 1. Constitutional Prohibitions.** — *In re Christiansen*, 17 Utah 412, 70 Am. St. Rep. 794.

**732. 5. Actual Residence for Certain Time**

**733.** Continuous Residence — Statutory Period. — See notes 2, 3.

Absence Without Change of Domicil. — See note 4.

**734.** 2. Residence and Domicil Distinguished — Both Required. — See notes 1, 2.

3. Mere Residence Insufficient. — See note 3.

Statutes Require Not Only Residence but Domicil. — See notes 4, 6, 9.

**735.** 4. Domicil Without Actual Residence Insufficient. — See note 1.

Actual Residence Required of Wife. — See note 2.

5. Residence for Purpose of Obtaining Divorce. — See note 3.

**736.** See note 1.

**Required.**— *Blandy v. Blandy*, 20 App. Cas. (D. C.) 535; *Henrichs v. Henrichs*, 84 Mo. App. 27; *Carter v. Carter*, 88 Mo. App. 302; *Johnson v. Johnson*, 95 Mo. App. 329.

**Different Causes of Divorce.**— The periods of residence required by the statute may be different for different causes of divorce. *Davis v. Davis*, 132 Ala. 219.

**733.** 2. Residence Must Be Continuous. — *Downs v. Downs*, 23 App. Cas. (D. C.) 381.

3. Residence for Full Statutory Period. — *Salzbrun v. Salzbrun*, 81 Minn. 287; *Thelen v. Thelen*, 75 Minn. 433; *Van Alstine v. Van Alstine*, 23 Wash. 310.

4. Temporary Absence. — *De Tolna v. De Tolna*, 135 Cal. 575; *Morehouse v. Morehouse*, 70 Conn. 420; *Harris v. Harris*, 83 N. Y. App. Div. 123; *Moore v. Moore*, 130 N. Car. 333; *Summerville v. Summerville*, 31 Wash. 411.

**A Sailor in Actual Service** does not lose his actual residence by his involuntary absence. *Radford v. Radford*, (Ky. 1904) 82 S. W. Rep. 391.

**734.** 1. Both Residence and Domicil Required. — *Michael v. Michael*, 34 Tex. Civ. App. 630.

2. *Downs v. Downs*, 23 App. Cas. (D. C.) 381.

3. Residence Without Domicil Insufficient. — *Andrews v. Andrews*, 188 U. S. 14; *Streitwolf v. Streitwolf*, 181 U. S. 179; *Berry v. Berry*, 145 Cal. 784; *Andrews v. Andrews*, 176 Mass. 92; *Shirk v. Shirk*, 75 Mo. App. 573; *Sweeney v. Sweeney*, 62 N. J. Eq. 357; *McGean v. McGean*, 60 N. J. Eq. 21; *Tracy v. Tracy*, 60 N. J. Eq. 25.

4. "Residence" Construed as "Domicil." — *Streitwolf v. Streitwolf*, 181 U. S. 179; *Downs v. Downs*, 23 App. Cas. (D. C.) 381; *Andrews v. Andrews*, 176 Mass. 92 (construing the *North Dakota* statute); *Hamill v. Talbott*, 81 Mo. App. 210; *Graham v. Graham*, 9 N. Dak. 88; *Smith v. Smith*, 10 N. Dak. 219.

**Foreign Born Resident.**— *Bona fide* residence and citizenship for one year, under the *Colorado* statute (Laws 1893, p. 239, § 6), include a foreign born resident for that period who has declared his intention to become an American citizen. *Cairnes v. Cairnes*, 29 Colo. 260, 93 Am. St. Rep. 55.

6. "Actual Bona Fide Inhabitant." — *Michael v. Michael*, 34 Tex. Civ. App. 630. See also *Needles v. Needles*, (Tex. Civ. App. 1900) 54 S. W. Rep. 1070.

9. "Inhabitants of the State." — *Kempson v. Kempson*, 63 N. J. Eq. 783, 92 Am. St. Rep. 682.

**735.** 1. Mere Domicil Insufficient. — *Michael v. Michael*, 34 Tex. Civ. App. 630.

2. Actual Residence by Wife Necessary. — In *New York* proof that the plaintiff has formed

an intention of residing in the state and has carried it into effect by actual residence is sufficient. *Doeme v. Doeme*, 96 N. Y. App. Div. 284.

3. Residence for Purpose of Procuring Divorce — *United States*. — *Streitwolf v. Streitwolf*, 181 U. S. 179.

*California*. — *Berry v. Berry*, 145 Cal. 784.

*Colorado*. — *Branch v. Branch*, 30 Colo. 499.

*Iowa*. — *Lawrence v. Nelson*, 113 Iowa 277; *Beeman v. Kitzman*, 124 Iowa 86.

*Minnesota*. — *Thelen v. Thelen*, 75 Minn. 433.

*New Jersey*. — *Streitwolf v. Streitwolf*, 58 N. J. Eq. 563, 58 N. J. Eq. 569, 78 Am. St. Rep. 630; *Dumont v. Dumont*, (N. J. 1900) 45 Atl. Rep. 107; *McGean v. McGean*, 60 N. J. Eq. 21; *Tracy v. Tracy*, 60 N. J. Eq. 25; *Grover v. Grover*, 63 N. J. Eq. 771; *Sweeney v. Sweeney*, 62 N. J. Eq. 357; *Wallace v. Wallace*, 62 N. J. Eq. 509, 65 N. J. Eq. 359; *Miller v. Miller*, 66 N. J. Eq. 436, 58 Atl. Rep. 188; *Watkinson v. Watkinson*, (N. J. 1904) 58 Atl. Rep. 384; *Kempson v. Kempson*, 58 N. J. Eq. 94; *Huettinger v. Huettinger*, (N. J. 1899) 43 Atl. Rep. 574. See also *Magowan v. Magowan*, 57 N. J. Eq. 195. In *Pohlman v. Pohlman*, 60 N. J. Eq. 28, it was held that actual residence within the state for the statutory period, even without the *animus manendi* was sufficient to give the court jurisdiction, where the defendant was served within the jurisdiction, and voluntarily appeared.

*North Dakota*. — *Graham v. Graham*, 9 N. Dak. 88; *Smith v. Smith*, 10 N. Dak. 219.

*Tennessee*. — *Turpin v. Turpin*, (Tenn. Ch. 1899) 58 S. W. Rep. 763.

**Prompt Application for Divorce Arouses Suspicion.** — *Grover v. Grover*, 63 N. J. Eq. 771; *Hunter v. Hunter*, 64 N. J. Eq. 277.

**Divorce Obtained in Another State — Massachusetts Statute.** — *Andrews v. Andrews*, 176 Mass. 92.

The full faith and credit clause of the Federal Constitution is not violated by giving effect to this statute. *Andrews v. Andrews*, 188 U. S. 14.

**736.** 1. Intention of Permanently Residing in State — But Main Purpose to Obtain Divorce. — *Wallace v. Wallace*, 65 N. J. Eq. 359, reversing 62 N. J. Eq. 509, and *distinguishing* *Sweeney v. Sweeney*, 62 N. J. Eq. 357; *Hunter v. Hunter*, 64 N. J. Eq. 277; *Matter of Hall*, 61 N. Y. App. Div. 266; *Smith v. Smith*, 10 N. Dak. 219.

**But the Unsupported Testimony of the Petitioner** is not sufficient to establish an intention to remain permanently. *McGean v. McGean*, 60 N. J. Eq. 21; *Tracy v. Tracy*, 60 N. J. Eq. 25; *Hunter v. Hunter*, 64 N. J. Eq. 277.



**736.** 6. Domicil of Wife — Unity of Domicil. — See notes 2, 3.

Separate Domicil After Cause for Divorce. — See note 5.

**737.** Domicil After Desertion. — See note 3.

**738.** Right of Nonresident Wife to Sue Husband at His Domicil. — See notes 3, 4. Evidence. — See note 5.

**739.** See notes 2, 3.

**IV. JURISDICTION — 1. Jurisdiction as Derived from Statute — b. CONSTITUTIONS AND STATUTES CONFERRING JURISDICTION.** — See note 5.

**741.** f. VENUE AS TO COUNTIES — Determined by Domicil and Not by Place of Offense. — See note 1.

**736.** 2. Wife's Domicil Ordinarily that of Husband. — *Atherton v. Atherton*, 181 U. S. 155; *Boreing v. Boreing*, 114 Ky. 522; *Isaacs v. Isaacs*, (Neb. 1904) 99 N. W. Rep. 268; *Power v. Power*, 65 N. J. Eq. 93; *Harris v. Harris*, 83 N. Y. App. Div. 123; *Moore v. Moore*, 130 N. Car. 333.

3. *Isaacs v. Isaacs*, (Neb. 1904) 99 N. W. Rep. 268; *Howland v. Granger*, 22 R. I. 1.

5. Wife Having Cause for Divorce May Acquire Separate Domicil. — *Iowa*. — *Sylvester v. Sylvester*, 109 Iowa 401.

*Louisiana*. — *Benton's Succession*, 106 La. 494.

*New Jersey*. — *Tracy v. Tracy*, 62 N. J. Eq. 807, reversing 60 N. J. Eq. 25.

*New York*. — Matter of *Colebrook*, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 139, reversed 41 N. Y. App. Div. 625; *Gray v. Gray*, 143 N. Y. 354; *Doeme v. Doeme*, 96 N. Y. App. Div. 284.

*Oregon*. — *McFarlane v. Cornelius*, 43 Oregon 513.

*Texas*. — *Michael v. Michael*, 34 Tex. Civ. App. 630.

Rule Applies Whether Wife Plaintiff or Defendant. — *McGrew v. Mutual L. Ins. Co.*, 132 Cal. 85, 84 Am. St. Rep. 20.

Wife's Present Domicil Remains When Husband Abandons Her. — Where the husband abandons the wife and removes to another state, her domicil remains where she continues to reside. *Railey v. Railey*, (Ky. 1902) 66 S. W. Rep. 414.

**737.** 3. Deserted Wife May Acquire New Domicil in Another State. — *Tracy v. Tracy*, 62 N. J. Eq. 807, reversing 60 N. J. Eq. 25; *Moak v. Moak*, (N. J. 1901) 48 Atl. Rep. 394.

The rule operates to bar the wife's action for divorce in the state of her deserting husband's domicil, from which she has removed and in which she has not again acquired a domicil by her own actual residence for the statutory period. *Michael v. Michael*, 34 Tex. Civ. App. 630.

**738.** 3. Where Nonresident Wife Must Sue. — *Salzbrun v. Salzbrun*, 81 Minn. 287; *Gebhard v. Gebhard*, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 1.

Venue When Wife Has Been Compelled to Change Her Domicil. — It was held that the court had jurisdiction where the wife, who had been compelled to go to another state in order to earn a living, brought suit in the county where the husband resided and where the alleged cause of divorce arose — the wife having no other residence within the state. *Ames v. Ames*, 7 Pa. Super. Ct. 456, 21 Pa. Co. Ct. 257.

4. Nonresident Wife May Obtain Divorce on Cross-bill. — *Wells v. Wells*, 11 App. Cas. (D. C.) 392; *Berdolt v. Berdolt*, 56 Neb. 792; *Atkins v. Atkins*, 13 Neb. 271; *Fisk v. Fisk*, 24 Utah 333; *Kane v. Kane*, 35 Wash. 517.

Rule Applies to Nonresident Husband Defendant. — *Pine v. Pine*, (Neb. 1904) 100 N. W. Rep. 938.

5. Proof of Domicil. — *Grover v. Grover*, 63 N. J. Eq. 771; *Sweeney v. Sweeney*, 62 N. J. Eq. 357; *Wallace v. Wallace*, 62 N. J. Eq. 509; *Smith v. Smith*, 10 N. Dak. 219; *Van Alstine v. Van Alstine*, 23 Wash. 310.

In *Indiana* the Statute Requires proof of residence by two resident freeholders and householders in the state. *Becker v. Becker*, 160 Ind. 407; *Cummins v. Cummins*, 30 Ind. App. 671; *Roshniakowski v. Roshniakowski*, 34 Ind. App. 128; *Driver v. Driver*, 153 Ind. 88.

**739.** 2. *Andrews v. Andrews*, 188 U. S. 14; *Salzbrun v. Salzbrun*, 81 Minn. 287; *Smith v. Smith*, 10 N. Dak. 219; *English v. English*, 19 Pa. Super. Ct. 586.

Decree Obtained on Fraudulent Admission of Residence Will Not Be Set Aside in Another State. — But a decree of divorce, obtained on fraudulent admission of residence in another state, will not be set aside in a state where neither of the parties has residence or domicil or had residence at the time the decree complained of was rendered. *Turpin v. Turpin*, (Tenn. Ch. 1899) 58 S. W. Rep. 763.

3. *Burgess v. Burgess*, 71 N. H. 293.

5. Statutes Conferring Jurisdiction. — The jurisdiction of the district courts of *Nebraska* is limited by the statutes by which it is conferred. *Aldrich v. Steen*, (Neb. 1904) 100 N. W. Rep. 311, affirming (Neb. 1904) 98 N. W. Rep. 445.

In *New York* the courts have no jurisdiction over the subject of divorce, except such as they derive from statute. *Lynde v. Lynde*, 41 N. Y. App. Div. 280, affirmed 162 N. Y. 405; *Walker v. Walker*, 155 N. Y. 77.

In *Utah* a territorial act purporting to confer jurisdiction to grant divorce on probate courts was held void in *In re Christiansen*, 17 Utah 412, 70 Am. St. Rep. 794.

**741.** 1. Venue Determined by Domicil. — *Branch v. Branch*, 30 Colo. 499; *White v. White*, 2 Indian Ter. 35; *Sylvester v. Sylvester*, 109 Iowa 401; *Aldrich v. Steen*, (Neb. 1904) 100 N. W. Rep. 311; modifying (Neb. 1904) 98 N. W. Rep. 445; *Gambe v. Gambe*, 22 Pa. Co. Ct. 23; *Knowles v. Knowles*, 31 Pittsb. Leg. J. N. S. (Pa.) 100; *Fackner v. Fackner*, 9 Pa. Dist. 739; *Gibbs v. Gibbs*, 26 Utah 382; *Bachelor v. Bachelor*, 30 Wash. 639; *Kane v. Kane*, 35 Wash. 517.

- 741.** Separate Domicil of Wife in Another County. — See note 2.  
**2.** Jurisdiction as Derived from Domicil — *a.* MARRIAGE RELATION CONTROLLED BY STATE LAWS. — See note 4.  
**742.** *b.* STATE CONTROL IS LIMITED TO CITIZENS. — See note 1.  
*c.* DOMICIL THE TRUE TEST OF JURISDICTION. — See note 3.  
 Jurisdiction Over Status of the Applicant. — See notes 5, 6.  
**743.** See notes 1, 2.  
**744.** *d.* DOMICIL OF ONE PARTY — Jurisdiction Over Status of One Person. — See notes 1, 3.  
 Contra — Jurisdiction Over Marriage Relation. — See notes 4, 5.

**Right to Change of Venue.** — *People v. District Ct.*, 30 Colo. 123; *Hurning v. Hurning*, 80 Minn. 373.

**Waiver of Objection to Venue.** — *Gibbs v. Gibbs*, 26 Utah 382. See also *Kane v. Kane*, 35 Wash. 517. *Contra*, *People v. District Ct.*, 30 Colo. 123; *Branch v. Branch*, 30 Colo. 499.

**Minnesota — Residence Not Jurisdictional.** — If the plaintiff is a resident of the state, the fact that the action is brought in a county in which she does not reside is not jurisdictional. *Cochran v. Cochran*, 93 Minn. 284.

**741. 2. Separate Domicil of Wife in Another County.** — *Sylvester v. Sylvester*, 109 Iowa 401. 4. *Hekking v. Pfaff*, (C. C. A.) 91 Fed. Rep. 60.

**742. 1. The Text Is Supported by the Following Decisions** — *United States*. — *Bell v. Bell*, 181 U. S. 175.

*California*. — *Berry v. Berry*, 145 Cal. 784.

*District of Columbia*. — *Blandy v. Blandy*, 20 App. Cas. (D. C.) 535.

*Iowa*. — *Beeman v. Kitzman*, 124 Iowa 86.

*Louisiana*. — *Blake v. Dudley*, 111 La. 1096.

*Minnesota*. — *Thelen v. Thelen*, 75 Minn. 433.

*New Hampshire*. — *Burgess v. Burgess*, 71 N. H. 293.

*New Jersey*. — *Watkinson v. Watkinson*, (N. J. 1904) 58 Atl. Rep. 384; *Potts v. Potts*, (N. J. 1900) 45 Atl. Rep. 701.

*North Dakota*. — *Smith v. Smith*, 10 N. Dak. 219.

*Pennsylvania*. — *Addis v. Addis*, 20 Pa. Co. Ct. 365; *English v. English*, 19 Pa. Super. Ct. 586.

3. *Hull v. Hull*, 23 Pa. Co. Ct. 73, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 742-3.

**6. Domicil at the Time of Offense.** — In *Pennsylvania* a court of common pleas has jurisdiction of a divorce suit brought by a person domiciled within the state, though at the time of the occurrence of the cause of the divorce the parties, or one of them, were domiciled in another state or country. *Hull v. Hull*, 8 Pa. Dist. 420, 23 Pa. Co. Ct. 73.

**6. Place Where the Offense was Committed.** — *England*. — *Armytage v. Armytage*, (1898) P. 178.

*Louisiana*. — The cause for divorce must have occurred within the state. *Nicholas v. Maddox*, 52 La. Ann. 1493.

*Michigan*. — Desertion is presumed to have taken place within the state when the parties were actually domiciled within the state at the time of the abandonment. *Jamison v. Ramsey*, 128 Mich. 315.

*New Hampshire*. — *Burgess v. Burgess*, 71 N. H. 293. See also *Harrington v. Harrington*, 68 N. H. 360.

*New Jersey*. — Divorce will not be granted in New Jersey for a desertion occurring in New York, unless it continued for the statutory period after the plaintiff had removed to New Jersey. *Brand v. Brand*, (N. J. 1904) 59 Atl. Rep. 570.

*New York*. — In New York under Code Civ. Pro., § 1756, the parties must have been resident in the state when the offense of adultery was committed. *Harris v. Harris*, 83 N. Y. App. Div. 123.

*Pennsylvania*. — *Flower v. Flower*, 8 Pa. Dist. 694; *Flower v. Flower*, 17 Lanc. L. Rev. 108; *McCarthy v. McCarthy*, 31 Pittsb. Leg. J. N. S. (Pa.) 100. But see *Hull v. Hull*, 23 Pa. Co. Ct. 73, 8 Pa. Dist. 420, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 742-3.

*Tennessee*. — *Carter v. Carter*, 113 Tenn. 509.

*Utah*. — *Gibbs v. Gibbs*, 26 Utah 382.

**743. 1. The Offense Need Not Be a Cause for Divorce Where Committed.** — *Hull v. Hull*, 23 Pa. Co. Ct. 73, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 742-743.

**2. Place of Marriage Immaterial.** — *Hull v. Hull*, 23 Pa. Co. Ct. 73, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 742-743.

**744. 1. Separate Domicils in Different States.** — *Felt v. Felt*, 57 N. J. Eq. 101; *Felt v. Felt*, 59 N. J. Eq. 606, 83 Am. St. Rep. 612; *Hull v. Hull*, 23 Pa. Co. Ct. 73, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 743-4; *Turpin v. Turpin*, (Tenn. Ch. 1899) 58 S. W. Rep. 763; *Kane v. Kane*, 35 Wash. 517; *Goore v. Goore*, 24 Wash. 139.

3. *Atherton v. Atherton*, 181 U. S. 155 (following *Pennoyer v. Neff*, 95 U. S. 714, affirming 3 Sawy. (U. S.) 274).

4. *In New York*. — *Winston v. Winston*, 34 N. Y. App. Div. 460, affirmed 165 N. Y. 553. And see next note following.

**5. Divorce in Another State — Defendant Domiciled in New York.** — *Winston v. Winston*, 34 N. Y. App. Div. 460, affirmed 165 N. Y. 553; *Starbuck v. Starbuck*, 62 N. Y. App. Div. 437, reversed 173 N. Y. 503; *Matter of Swales*, 60 N. Y. App. Div. 599, affirmed 172 N. Y. 651; *Lynde v. Lynde*, 41 N. Y. App. Div. 280, affirmed 162 N. Y. 405, 76 Am. St. Rep. 332; *Hamilton v. Hamilton*, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 336; *Gebhard v. Gebhard*, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 1; *Bell v. Bell*, 181 U. S. 175.

The same view prevails in *North Carolina* and *South Carolina*. *Atherton v. Atherton*, 181 U. S. 155.

**The Rule Does Not Apply** where the defendant had no domicil in New York. *Lacey v. Lacey*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 196.



**745. 3. Proceedings in Rem and in Personam.**— See note 1.

Proceedings in Personam. — See notes 2, 3.

Proceedings in Rem. — See note 4.

Status of Plaintiff. — See notes 5, 6, 7, 8, 9, 10.

**746. 4. Appearance Without Domicil.**— See note 1.

**V. CAUSES FOR DIVORCE**—1. **Adultery**—*b. DIVORCE STATUTES*—**Distinction as to Offense by Husband.**— See notes 5, 7.

**745. 1. Divorce Suit May Be Either in Rem or in Personam**—*Indiana.*— Day *v.* Nottingham, 160 Ind. 408.

*Iowa.*— Rea *v.* Rea, 123 Iowa 241.

*Missouri.*— Hamill *v.* Talbott, 81 Mo. App. 210.

*New Jersey.*— Felt *v.* Felt, 57 N. J. Eq. 101.

*Oregon.*— McFarlane *v.* McFarlane, 43 Oregon 477; McFarlane *v.* Cornelius, 43 Oregon 513.

*Pennsylvania.*— Hull *v.* Hull, 23 Pa. Co. Ct. 73, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 745.

*Utah.*— Gibbs *v.* Gibbs, 26 Utah 382.

*Washington.*— State *v.* Rhoades, 29 Wash. 68, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 745; Goore *v.* Goore, 24 Wash. 139.

Where the defendant was personally served outside of South Dakota, where the divorce was granted, it was held that his nonappearance did not render the decree invalid when brought in question in a *New Jersey* court. Potts *v.* Potts, (N. J. 1899) 42 Atl. Rep. 1055.

**2. When in Personam.**— State *v.* Rhoades, 29 Wash. 61, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 745.

**3. State *v.* Rhoades,** 29 Wash. 61, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 745.

**4. When in Rem.**— Atherton *v.* Atherton, 181 U. S. 155; Railey *v.* Railey, (Ky. 1902) 66 S. W. Rep. 414; Felt *v.* Felt, 57 N. J. Eq. 101; Hull *v.* Hull, 23 Pa. Co. Ct. 73, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 745; State *v.* Rhoades, 29 Wash. 61, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 745.

**Based on Necessity.**— In Streitwolf *v.* Streitwolf, 58 N. J. Eq. 563, 78 Am. St. Rep. 630, affirmed 58 N. J. Eq. 569, it was said that the only ground upon which service out of the jurisdiction can safely be put as the foundation for a decree of divorce is that of necessity.

**Constitutionality of Statute Authorizing Proceeding in Rem.**— "We are of opinion that this commonwealth has the right to, and by proper and effective legislation has authorized proceedings to determine the status of one of its own citizens towards a nonresident, and that the same is everywhere binding within this commonwealth, though made without personal notice to or service of process on said nonresident. \* \* \* But while it may, by proper judicial proceedings, adjudge the status of its citizens towards a nonresident, it may not extend the effects thereof beyond its own boundaries and fix a status upon a nonresident, without notice or consent, nor may it without notice or jurisdiction of the person affect vested property rights of said nonresident." Hull *v.* Hull, 8 Pa. Dist. 420, 23 Pa. Co. Ct. 73.

**5. Atherton *v.* Atherton,** 181 U. S. 155; Hamill *v.* Talbott, 81 Mo. App. 210; Felt *v.* Felt, 57 N. J. Eq. 101; Felt *v.* Felt, 59 N. J. Eq. 606, 83 Am. St. Rep. 612; Hull *v.* Hull, 23 Pa. Co.

Ct. 73, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 745.

**Extraterritorial Effect of Proceedings.**— Where the husband went to another state after his wife had become insane, and obtained a divorce on the ground of desertion, without personal service on her, it was held that though the divorce might be valid in the jurisdiction where it was granted, it was not valid in the jurisdiction from which the husband removed and in which the wife resided. Com. *v.* Stevens, 25 Pa. Co. Ct. 68.

**6. Jurisdiction of Status of Plaintiff Only.**— Bedal *v.* Lake, (Idaho 1904) 77 Pac. Rep. 638; Lynn *v.* Sentel, 183 Ill. 382, 75 Am. St. Rep. 110; Hull *v.* Hull, 23 Pa. Co. Ct. 73, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 745; Gibbs *v.* Gibbs, 26 Utah 382.

**7. Judgment in Personam as to Costs.**— Rea *v.* Rea, 123 Iowa 241; Johnson *v.* Matthews, 124 Iowa 255; Massey *v.* Stimmel, 6 Ohio Dec. 549, 5 Ohio N. P. 29; McFarlane *v.* McFarlane, 43 Oregon 477; Hull *v.* Hull, 23 Pa. Co. Ct. 73, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 745.

**8. Judgment in Personam as to Alimony.**— Rea *v.* Rea, 123 Iowa 241; Johnson *v.* Matthews, 124 Iowa 255; Hamill *v.* Talbott, 81 Mo. App. 210; Massey *v.* Stimmel, 6 Ohio Dec. 549, 5 Ohio N. P. 29; McFarlane *v.* McFarlane, 43 Oregon 477; Hull *v.* Hull, 23 Pa. Co. Ct. 73, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 745; Gibbs *v.* Gibbs, 26 Utah 382; Smith *v.* Smith, 74 Vt. 20, 93 Am. St. Rep. 882.

**9. Custody of Children.**— Hull *v.* Hull, 23 Pa. Co. Ct. 73, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 745.

**10. Prohibition Against Marriage.**— Hull *v.* Hull, 23 Pa. Co. Ct. 73, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 745.

**746. 1. Appearance Without Domicil.**— Andrews *v.* Andrews, 188 U. S. 14; Andrews *v.* Andrews, 176 Mass. 92; Aldrich *v.* Steen, (Neb. 1904) 98 N. W. Rep. 445; Grover *v.* Grover, 63 N. J. Eq. 771; Lynde *v.* Lynde, 162 N. Y. 405; Smith *v.* Smith, 10 N. Dak. 219; Gibbs *v.* Gibbs, 26 Utah 382.

**Estoppel to Deny Validity.**— A plaintiff who has invoked the jurisdiction of a state and obtained a divorce thereunder, is estopped to deny the validity of the decree as to her in the courts of another state. Matter of Swales, 60 N. Y. App. Div. 599, affirmed 172 N. Y. 651.

**5. Wife Cannot Have Divorce for Adultery Without Desertion.**— A wife has no right to refuse without cause to allow her husband to have sexual intercourse with her, and if she refuses to live under the same roof with him except on his undertaking not to exercise his full marital rights, he is justified in separating himself from her, and in so doing is not guilty of desertion "without reasonable excuse," though



**747. c. CONDUCT CONSTITUTING ADULTERY — (1) Fornication.** — See note 2.

(2) *Sodomy.* — See note 4.

(3) *Marriage under Mistake of Fact.* — See note 6.

**748. (4) Marriage under Mistake of Law.** — See notes 1, 3, 4.

**749. d. EVIDENCE — (1) Circumstantial Evidence — (a) In General.** — See note 1.

(b) *Sufficiency of the Evidence — Circumstances Leading to Conclusion.* — See note 2.

**750. Interpretation Always in Favor of Innocence.** — See notes 1, 2.

*Whether a Necessary Conclusion.* — See notes 3, 5.

(c) *Rule of Reasonable Doubt — Proof Beyond Reasonable Doubt Not Required.* — See note 6.

**751. (d) Preponderance of Evidence.** — See note 2.

(e) *Elements of Circumstantial Evidence — aa. IN GENERAL — One Element Insufficient.* — See note 6.

**752. bb OPPORTUNITY — Visiting House of Ill Fame.** — See note 1.

*Living Together — Occupying Same Bed.* — See notes 2, 3, 4.

he commits adultery while separated from her. *Synge v. Synge*, (1901) P. 317.

**Respondent Guilty of Rape, though Convicted of Indecent Assault Only.** — A wife may obtain a divorce from her husband on the ground of rape if the court is satisfied from the evidence that he has actually committed that offense, though he has been prosecuted for, and convicted of, criminal assault or indecent assault only. *Coffey v. Coffey*, (1898) P. 169; *Bosworthick v. Bosworthick*, 86 L. T. N. S. 121.

**746. 7. North Carolina — Separating and Living in Adultery.** — *Setzer v. Setzer*, 128 N. Car. 170, 83 Am. St. Rep. 666.

**747. 2. Fornication.** — The act must have been committed since the marriage. *Stanley v. Stanley*, 115 Ga. 990.

**4. Poler v. Poler**, 32 Wash. 400, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 747.

**6. Mistake as to Divorce — Negligence.** — The fact that, after the second marriage, the defendant filed a bill seeking a divorce against her first husband, alleging his residence in South America, is sufficient to show that she entered into the second marriage in the knowledge or belief that her first husband was living. *Rayl v. Rayl*, (Tenn. Ch. 1900) 64 S. W. Rep. 309.

**748. 1. Void Marriage — Mistake of Law.** — Marriage performed before the formal filing of a decree of divorce is not a void marriage. *People v. Booth*, 121 Mich. 131.

**3. Marriage Pending Appeal.** — See *Clayton v. Clayton*, 59 N. J. Eq. 310.

**4. Void Divorce.** — *Dumont v. Dumont*, (N. J. 1900) 45 Atl. Rep. 107; *Osterhoudt v. Osterhoudt*, (Supm. Ct. Spec. T.) 28 Misc. (N. Y.) 285, affirmed 48 N. Y. App. Div. 74, appeal dismissed 168 N. Y. 358; *Hamilton v. Hamilton*, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 336; *Winston v. Winston*, 34 N. Y. App. Div. 460, affirmed 165 N. Y. 553.

**749. 1. Heyman v. Heyman**, 210 Ill. 524; *Jennings v. Jennings*, 85 Mo. App. 290; *Griffin v. Griffin*, 18 Utah 98.

**2. Lord Stowell's Rule.** — *Fitzhugh v. Fitzhugh*, 15 App. Cas. (D. C.) 121; *Heyman v. Heyman*, 210 Ill. 524; *Stiles v. Stiles*, 167 Ill. 576; *Zumbiel v. Zumbiel*, 113 Ky. 841; *Shufeldt v. Shufeldt*, 86 Md. 519; *Feinberg v. Feinberg*, (N. J. 1905) 59 Atl. Rep. 880; *Harris v. Harris*, 83 N. Y. App. Div. 123; *Schulze v. Schulze*, 83 N. Y. App. Div. 375. See also *Hickerson v. Hickerson*, (Tenn. Ch. 1899) 52 S. W. Rep. 1019.

**750. 1. Interpretation Favorable to Innocence.** — *Arcenaux v. Arcenaux*, 106 La. 792; *Wells v. Wells*, 116 Iowa 59; *Pettus v. Pettus*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 315; *Conway v. Conway*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 414.

**2. Poillon v. Poillon**, 78 N. Y. App. Div. 127.

**3. Rule that Offense Must Be Established as a Necessary Conclusion.** — Abandonment does not necessarily imply adultery. *Isaacs v. Isaacs*, (Supm. Ct. Spec. T.) 29 Misc. (N. Y.) 557.

**5. See Roth v. Roth**, 90 N. Y. App. Div. 87.

**6. Proof Beyond Reasonable Doubt Not Required.** — *Lenning v. Lenning*, 176 Ill. 180; *Wilson v. Wilson*, (N. J. 1898) 41 Atl. Rep. 355; *Farnsworth v. Farnsworth*, 8 Ohio Dec. 171.

**751. 2. Preponderance of Evidence.** — *Lenning v. Lenning*, 176 Ill. 180, affirming 73 Ill. App. 224; *Heyman v. Heyman*, 210 Ill. 524; *Stiles v. Stiles*, 167 Ill. 576.

**6. Hartopp v. Hartopp**, 71 L. J. P. 78, 87 L. T. N. S. 188; *Post v. Post*, (N. J. 1902) 52 Atl. Rep. 1102; *Conway v. Conway*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 414; *Pettus v. Pettus*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 315.

**752. 1. Goldie v. Goldie**, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 389.

Where the defendant occupies a room with one of the inmates, adultery will be inferred. *Marous v. Marous*, 86 Ill. App. 597.

**2. Suspected Parties Living Together as Husband and Wife.** — *Fischer v. Fischer*, 131 Mich. 441; *Griffin v. Griffin*, (Tex. Civ. App. 1902) 67 S. W. Rep. 514.

**Boarding with Women of Ill Repute.** — The fact that the husband, without cause other than the trivial domestic troubles that are incidental to most marriages, leaves his home and boards with a woman of ill repute is sufficient to raise a presumption of adultery, though no specific

- 753.** Meeting in Room with Locked Doors. — See notes 1, 2.  
 Improper Conduct of Wife. — See note 3.  
 Opportunity While Incapacitated. — See note 7.  
*cc.* DISPOSITION OF DEFENDANT — Character of Defendant. — See notes 8, 9.
- 754.** Other Acts Showing Adulterous Disposition. — See note 3.
- 755.** See note 1.  
*dd.* DISPOSITION OF PARAMOUR — Character of Particeps Criminis. — See note 2.  
 (f) Conduct Showing Mutual Intent — Mere Proof of Opportunity. — See note 4.
- 756.** Aversion of Parties — Affection for Paramour. — See notes 1, 2.  
 Concealment of Intimacy. — See note 3.  
 Conduct on Discovery. — See note 6.  
 Letters of Suspected Parties. — See note 7.
- 757.** See note 1.  
 Undue Familiarities — Intimacy. — See note 2.  
 Familiarities at Other Times. — See notes 3, 4.  
 Familiarities with Relatives and Others. — See note 5.

acts are proved. *Leedale v. Leedale*, 8 Ohio Dec. 334.

**752. 3. Occupying Same Room.** — *Arcenau v. Arcenau*, 106 La. 792, quoting 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 752, note 3; *Jennings v. Jennings*, 85 Mo. App. 290.

**But Occupying Different Beds in the Same Room** on one occasion will not give rise to the presumption. *Arcenau v. Arcenau*, 106 La. 792.

**Occupying Adjoining Rooms** with a communicating door in a hotel raises a presumption of adultery. *Harris v. Harris*, 83 N. Y. App. Div. 123.

**4. Occupying the Same Bed.** — *Arcenau v. Arcenau*, 106 La. 792, quoting 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 752, note 4; *Fischer v. Fischer*, 131 Mich. 441.

**753. 1. Parties Alone in Room — Doors Not Locked.** — *Compare* *Feinberg v. Feinberg*, (N. J. 1905) 59 Atl. Rep. 880.

**2. Where Doors Locked.** — But the circumstances may be insufficient to allow of their inference of adultery. *Isaacs v. Isaacs*, (Supm. Ct. Spec. T.) 29 Misc. (N. Y.) 557.

**3. Wife Visited by Paramour in Absence of Husband.** — *Stiles v. Stiles*, 167 Ill. 576; *Bizer v. Bizer*, 110 Iowa 248; *Brown v. Brown*, 62 N. J. Eq. 29; *White v. White*, 64 N. J. Eq. 84; *Matthews v. Matthews*, (N. J. 1904) 58 Atl. Rep. 1047; *Feinberg v. Feinberg*, (N. J. 1905) 59 Atl. Rep. 880.

**7. Effect of Incapacity of One of Parties.** — Mere impaired health will not suffice where physicians testify that it does not interfere with her sexual enjoyment. *Bizer v. Bizer*, 110 Iowa 248.

**8. Character of Defendant.** — *Harris v. Harris*, 83 N. Y. App. Div. 123.

**Evidence of Good Character Admissible.** — *Warner v. Warner*, 69 N. H. 137. See also *Hilker v. Hilker*, 153 Ind. 425.

**9. Where the defendant's general character** is not questioned, evidence of his good character is immaterial. Though presumed in his favor, it is only a circumstance in the case, and not a defense. *Poler v. Poler*, 32 Wash. 400.

**754. 3. Acts of Adultery Before and After Act Alleged.** — *Wales v. Wales*, (1900) Prob. 63, 69 L. J. P. 34; *Matthews v. Matthews*, (N. J. 1904) 58 Atl. Rep. 1047; *Roth v. Roth*, 90 N. Y. App.

Div. 87. See also *Schwab v. Schwab*, 96 Md. 592, 94 Am. St. Rep. 598.

**755. 1. Budd v. Budd**, 55 N. Y. App. Div. 113.

**2. Character of Paramour.** — *Heyman v. Heyman*, 210 Ill. 524.

**4. Mutual Intent.** — *Farrier v. Farrier*, (N. J. 1904) 58 Atl. Rep. 1079; *Brown v. Brown*, 63 N. J. Eq. 348, reversing 62 N. J. Eq. 29.

**756. 1. Mutual Aversion of Husband and Wife.** — *Zumbiel v. Zumbiel*, 113 Ky. 841; *Feinberg v. Feinberg*, (N. J. 1905) 59 Atl. Rep. 880.

A wife's withholding herself entirely from her husband while showing affection for the *particeps criminis* tends to confirm the proof of her guilt. *Bizer v. Bizer*, 110 Iowa 248.

**2. Mutual Affection of Offender and Particeps Criminis.** — *Bizer v. Bizer*, 110 Iowa 248; *Brown v. Brown*, 62 N. J. Eq. 29.

**3. Concealing Visits of the Paramour.** — *Matthews v. Matthews*, (N. J. 1904) 58 Atl. Rep. 1047; *Feinberg v. Feinberg*, (N. J. 1905) 59 Atl. Rep. 880.

**6. Conduct of Suspected Parties When Discovered in Compromising Situation.** — *Matthews v. Matthews*, (N. J. 1904) 58 Atl. Rep. 1047. But see *Farnsworth v. Farnsworth*, 8 Ohio Dec. 171.

**7. Letters of the Parties.** — *Stiles v. Stiles*, 167 Ill. 576; *Bizer v. Bizer*, 110 Iowa 248; *Goeger v. Goeger*, 59 N. J. Eq. 15; *Gruninger v. Gruninger*, 190 Pa. St. 633; *Evans v. Evans*, (Tenn. Ch. 1900) 57 S. W. Rep. 367.

**757. 1. Letters from Paramour Not Received or Retained.** — Letters to a wife are not admissible in the absence of evidence of whom they were written by, and of their receipt by the wife. *Donnelly v. Donnelly*, (Ky. 1904) 78 S. W. Rep. 182.

**2. Undue Familiarities.** — *Stiles v. Stiles*, 167 Ill. 576; *Brown v. Brown*, 62 N. J. Eq. 29.

**Such Evidence Is Not Conclusive** of adulterous disposition where the circumstances are consistent with innocence. *Brown v. Brown*, 63 N. J. Eq. 348, reversing 62 N. J. Eq. 29.

**3. Evidence of Familiarities Before Act Charged.** — *Shufeldt v. Shufeldt*, 86 Md. 519.

**4. Evidence of Familiarities After Act Charged.** — *Matthews v. Matthews*, (N. J. 1904) 58 Atl. Rep. 1047.

**5. Familiarities Between Near Relatives.** — *Poillon v. Poillon*, 78 N. Y. App. Div. 127.

**757.** (g) Circumstances Incompatible with Innocence — *aa. LIVING TOGETHER AS HUSBAND AND WIFE.* — See note 9.

**758.** *cc. VENEREAL DISEASE AFTER MARRIAGE.* — See notes 2, 4.

(2) *Time and Place of Offense — Identity of Defendant.* — See note 5.

**759.** Variance in Proof of Particular Offense or of Person Charged. — See notes 2, 3, 4. Identity of Defendant. — See note 5.

**760.** (4) *Conviction of Adultery — Record as Evidence.* — See note 3.

(6) *Witnesses as to Adultery — (a) Character and Credibility — Court May Disregard Testimony of Any Witness.* — See note 7.

**761.** Opinion of Witness. — See notes 4, 5.

(b) Testimony of Defendant. — See note 7.

Effect of Failure to Testify. — See note 8.

Denial of Suspected Parties. — See note 10.

**762.** See note 4.

(c) Testimony of Paramour — Competency. — See note 7.

Credibility — See notes 9, 10, 11.

Corroboration — Necessity For. — See note 13.

**763.** Admissions of Paramour. — See note 2.

(d) Detectives. — See notes 4, 5, 6.

**757.** 9. Living Together as Husband and Wife. — Griffin v. Griffin, (Tex. Civ. App. 1902) 67 S. W. Rep. 514.

**758.** 2. Venereal Disease After Marriage. — Thornton v. Thornton, (N. J. 1904) 58 Atl. Rep. 647; Baker v. Baker, 195 Pa. St. 407.

4. Or, *vice versa*, that the husband has contracted the disease from the wife. Thornton v. Thornton, (N. J. 1904) 58 Atl. Rep. 647.

5. Evidence of the Time of the Adultery. — Shufeldt v. Shufeldt, 86 Md. 519; Krauss v. Krauss, 73 N. Y. App. Div. 509; Farnsworth v. Farnsworth, 8 Ohio Dec. 171.

It Must Appear that the Offense Was Committed After the Marriage. — Pessolano v. Pessolano, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 16.

**759.** 2. Knowlden v. Knowlden, (N. J. 1902) 52 Atl. Rep. 377, *citing* 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 759.

3. Goldie v. Goldie, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 389; Budd v. Budd, 55 N. Y. App. Div. 113.

4. See Schwab v. Schwab, 96 Md. 592, 94 Am. St. Rep. 598.

5. Identity of Defendant. — Knowlden v. Knowlden, (N. J. 1902) 52 Atl. Rep. 377; Pessolano v. Pessolano, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 16; Bigelow v. Bigelow, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 265.

**760.** 3. Record of Conviction of Adultery. — Knott v. Knott, (N. J. 1903) 54 Atl. Rep. 559.

7. Witnesses — Disregarding Testimony Of. — Brown v. Brown, 63 N. J. Eq. 348, *reversing* 62 N. J. Eq. 29; Schulze v. Schulze, 83 N. Y. App. Div. 375.

**761.** 4. Present Rule. — Barnett v. Barnett, (Ky. 1901) 64 S. W. Rep. 844. See the next note below.

Rule Applies Where Cause Alleged Is Cruelty. — House v. House, 102 Va. 235.

5. Bizer v. Bizer, 110 Iowa 248. See the preceding note.

7. Fries v. Fries, (Supm. Ct. Tr. T.) 34 Misc. (N. Y.) 478; Griffin v. Griffin, 18 Utah 98.

8. Failure of Defendant to Testify. — Million v.

Million, 106 Mo. App. 680; Harris v. Harris, 83 N. Y. App. Div. 123.

10. Denial of Defendant. — Where the defendant denies having made a confession of adultery, but does not deny writing incriminating letters, a divorce will be warranted. Gruninger v. Gruninger, 190 Pa. St. 633.

**762.** 4. Bizer v. Bizer, 110 Iowa 248; Griffin v. Griffin, 18 Utah 98.

7. Paramour a Competent Witness. — Arcenau v. Arcenau, 106 La. 792; Goeger v. Goeger, 59 N. J. Eq. 15.

9. Credibility of Paramour's Testimony. — Jewell v. Jewell, 96 N. Y. App. Div. 633; Fries v. Fries, (Supm. Ct. Tr. T.) 34 Misc. (N. Y.) 478; Lutz v. Lutz, (Supm. Ct. Spec. T.) 28 Misc. (N. Y.) 393; Griffin v. Griffin, 18 Utah 98.

10. Glaser v. Glaser, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 231; Delling v. Delling, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 122; Fawcett v. Fawcett, (Supm. Ct. Spec. T.) 29 Misc. (N. Y.) 673; Engleman v. Engleman, 97 Va. 487.

11. Feinberg v. Feinberg, (N. J. 1905) 59 Atl. Rep. 880.

13. Present Rule. — Dollins v. Dollins, (Ky. 1904) 83 S. W. Rep. 95; Jewell v. Jewell, 96 N. Y. App. Div. 633; Glaser v. Glaser, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 231; Delling v. Delling, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 122; Fawcett v. Fawcett, (Supm. Ct. Spec. T.) 29 Misc. (N. Y.) 673; Heckel v. Heckel, 8 Pa. Dist. 27.

**763.** 2. Confessions of Paramour. — Budd v. Budd, 55 N. Y. App. Div. 113. See also Ivison v. Ivison, (Supm. Ct. Spec. T.) 29 Misc. (N. Y.) 240, where the confessions of the defendant and paramour were held insufficient to entitle the plaintiff to divorce, without evidence of the statutory requirements of absence of connivance of the plaintiff.

4. Testimony of Detectives. — Fries v. Fries, (Supm. Ct. Tr. T.) 34 Misc. (N. Y.) 478.

5. Brown v. Brown, 62 N. J. Eq. 29; Winston v. Winston, 34 N. Y. App. Div. 460, *affirmed* 165 N. Y. 553.



**764.** (e) Prostitutes and Other Disreputable Witnesses. — See notes 2, 3, 5, 6.  
 2. Sodomy or Buggery. — See notes 8, 9.

3. Desertion — *a.* DEFINITION. — See note 10.

**765.** *c.* STATUTES RELATING TO DESERTION — INTERPRETATION. — See notes 3, 4, 5.

**766.** *d.* JURISDICTION — PLACE OF DESERTION. — See notes 5, 7.

*e.* PERIOD OF DESERTION — COMMENCEMENT AND DURATION — Commencement. — See note 8.

Duration — Interruption by Cohabitation. — See note 9.

**763.** 6. *Brown v. Brown*, 63 N. J. Eq. 348, reversing 62 N. J. Eq. 29; *Schulze v. Schulze*, 83 N. Y. App. Div. 375; *Hickerson v. Hickerson*, (Tenn. Ch. 1899) 52 S. W. Rep. 1019.

**Amateur Detectives.** — The statement in the text applies to witnesses acting as amateur detectives. *Donnelly v. Donnelly*, 50 N. Y. App. Div. 453.

**764.** 2. **Testimony of Prostitutes.** — *Gibert v. Randazzo*, 112 La. 1055; *Goeger v. Goeger*, 59 N. J. Eq. 15; *Hickerson v. Hickerson*, (Tenn. Ch. 1899) 52 S. W. Rep. 1019.

3. See *Fisher v. Fisher*, 93 Md. 298.

5. *Matthews v. Matthews*, (N. J. 1904) 58 Atl. Rep. 1047.

6. *Burch v. Burch*, 80 N. Y. App. Div. 55. See also *Bizer v. Bizer*, 110 Iowa 248.

8. *Poler v. Poler*, 32 Wash. 400, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 764.

9. Divorce will be granted for this offense under 2 Ballinger's Ann. Codes & Stat. Wash., § 5716, as a "cause deemed by the court sufficient, and the court shall be satisfied that the parties can no longer live together." *Poler v. Poler*, 32 Wash. 400, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 764.

10. **Definitions of Desertion.** — *Deisler v. Deisler*, 59 N. Y. App. Div. 207; *Ogilvie v. Ogilvie*, 37 Oregon 171, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 764.

"Desertion means the cessation of cohabitation brought about by the fault or act of one of the parties. Therefore, the conduct of the parties must be considered. If there is good cause or reasonable excuse, it seems to me there was no desertion at all in law." *Per Jeune, P.*, in *Frowd v. Frowd*, (1904) P. 177.

**765.** 3. **Wilful Desertion.** — *De Armond v. De Armond*, 66 Ark. 601.

**Wilful Desertion Requires Both Noncohabitation and Intent to Desert.** — *Tillis v. Tillis*, 55 W. Va. 198.

**An Intentional Desertion Is Wilful**, within the meaning of the term as defined by the statute. *Ogilvie v. Ogilvie*, 37 Oregon 171, following *Benkert v. Benkert*, 32 Cal. 467.

**Sufficient Charge.** — A charge of "voluntary separation," with intent to desert, and that the defendant did desert and continued to desert, sufficiently states a charge of "wilful desertion." *Sheridan v. Sheridan*, 134 Cal. 88.

4. **Obstinate Desertion** — *New Jersey*. — *Sweeney v. Sweeney*, 62 N. J. Eq. 357; *Howell v. Howell*, 63 N. J. Eq. 293; *Sarfaty v. Sarfaty*, 59 N. J. Eq. 193; *Wright v. Wright*, (N. J. 1899) 43 Atl. Rep. 447; *Gates v. Gates*, 59 N. J. Eq. 100; *Loux v. Loux*, 57 N. J. Eq. 561.

5. **Malicious Desertion** — *Pennsylvania*. — *Gordon v. Gordon*, 208 Pa. St. 186; *Allen v.*

*Allen*, 194 Pa. St. 419; *Whelan v. Whelan*, 183 Pa. St. 293.

The desertion must be wilful and malicious. *Hull v. Hull*, 14 Pa. Super. Ct. 520.

As to what constitutes wilful and malicious desertion, see *Kilmartin v. Kilmartin*, 20 Pa. Super. Ct. 199; *Faunce v. Faunce*, 20 Pa. Super. Ct. 220.

*Tennessee*. — *Shannon's Code Tenn.*, § 4201, subs. 4, has adopted the words "wilful or malicious" desertion instead of "wilful and malicious," and it is now held that where the desertion is wilful malice need not be shown. *McBride v. McBride*, 111 Tenn. 616.

**766.** 5. **Period Not Interrupted by Removal of Plaintiff to Another State.** — In *New Jersey* the whole period of desertion must have continued while either the plaintiff or the defendant was a resident in the state. *Abele v. Abele*, 62 N. J. Eq. 644; *Grover v. Grover*, 63 N. J. Eq. 771.

7. **Under the Statutes in Some States.** — *Nicholas v. Maddox*, 52 La. Ann. 1493; *Harrington v. Harrington*, 68 N. H. 360.

8. **When Period of Desertion Commences.** — *Moak v. Moak*, (N. J. 1901) 48 Atl. Rep. 394; *Proudlove v. Proudlove*, (N. J. 1900) 46 Atl. Rep. 951; *Whinyates v. Whinyates*, (N. J. 1898) 41 Atl. Rep. 363; *Middleton v. Middleton*, 187 Pa. St. 612; *Trotter v. Trotter*, 30 Pittsb. Leg. J. N. S. (Pa.) 109.

Where the separation commences by mutual consent, the period begins to run from the date of an unaccepted offer of reconciliation. *Howard v. Howard*, 134 Cal. 346.

**When Period Terminates.** — The innocent party is entitled to a decree on the day following the expiry of the statutory period. *Ulrey v. Ulrey*, 80 Mo. App. 48.

**Commencement of Suit.** — The period terminates with the commencement of the action by service of the summons on the defendant, not with the filing of the complaint. *Stocking v. Stocking*, 76 Minn. 292.

**Desertion Must Be for Entire Statutory Period.** — Desertion is not established until it is proved that it has been persisted in for the statutory period. Such proof is, of course, impossible until the expiration of the period. Hence proof of desertion for twenty months does not justify a divorce under a statute fixing the period for which relief will be given at two years. *Sweeney v. Sweeney*, 9 Pa. Dist. 672.

9. **Desertion Must Be Continuous.** — *Kay v. Kay*, (1904) P. 382; *Tracey v. Tracey*, (N. J. 1899) 43 Atl. Rep. 713; *Ogilvie v. Ogilvie*, 37 Oregon 171; *McKay v. McKay*, 24 Tex. Civ. App. 629.

**Pendency of Suit on Other Grounds.** — The separation of the parties pending a suit for adultery by the husband against the wife is not wrongful,

**767.** See note 1.

**Interruption by Imprisonment.** — See note 2.

**Interruption by Consent to Separation.** — See notes 3, 4, 5, 6.

**f. RIGHT TO FIX NEW DOMICIL — Refusal to Remove — Desertion by Wife.** — See note 7.

**768.** See notes 1, 2.

**Refusal by Husband.** — See note 3.

**g. DUTY OF COHABITATION.** — See notes 4, 5, 6.

**769. h. PARTIAL DESERTION — PERFORMANCE OF SOME DUTIES — (1) Whether an Abnegation of All Duties.** — See note 2.

and the period of desertion does not commence to run so as to ground a subsequent suit for desertion by the wife until the entry of final judgment in the suit by the husband. *Hurning v. Hurning*, 80 Minn. 373.

**Interruption by Divorce Suit.** — *Johnson v. Johnson*, 65 N. J. Eq. 606.

The pendency of a divorce suit based on false charges will not interrupt the period of desertion against the plaintiff therein. *Weigel v. Weigel*, 63 N. J. Eq. 677.

**Pendency of Suit for Nullity No Interruption.** — *Hitchcock v. Hitchcock*, 15 App. Cas. (D. C.) 81.

**767. 1. Adding Periods Before and After Condonation.** — *Tracey v. Tracey*, (N. J. 1899) 43 Atl. Rep. 713.

**2. The Time During Which a Wife Was Judicially Found to Be Insane** cannot be included in computing the period of desertion. *Blandy v. Blandy*, 20 App. Cas. (D. C.) 535.

**Husband Absconding to Avoid Criminal Proceedings.** — Where it appeared that more than two years before a wife's petition for dissolution, her husband had formed an adulterous connection with another woman, had absconded in order to avoid criminal proceedings, after falsely stating to his wife that he intended to be away a short time only, and after absconding had concealed his address from his wife, the court found him guilty of desertion. *Wynne v. Wynne*, (1898) P. 18.

**3. Articles of Separation.** — *Barclay v. Barclay*, 98 Md. 366; *Mondean v. Mondean*, 30 Pittsb. Leg. J. N. S. (Pa.) 364; *Alleman v. Alleman*, 2 Dauphin Co. Rep. (Pa.) 209. But see *Power v. Power*, (N. J. 1904) 58 Atl. Rep. 192.

A written agreement, after three months' desertion, not induced by collusion or fault of the deserted husband, making provision for the support of the wife in consideration of her relinquishing her property rights, does not show the husband's assent to the separation. *Ogilvie v. Ogilvie*, 37 Oregon 171.

**4. Division of Property.** — The rule will not be applied where consent cannot be inferred from the circumstances. *Ogilvie v. Ogilvie*, 37 Oregon 171.

**5. Offer to Return.** — *Ault v. Ault*, 29 Colo. 149; *Jerolaman v. Jerolaman*, (N. J. 1903) 54 Atl. Rep. 166; *Loux v. Loux*, 57 N. J. Eq. 561.

**6. Intent to Return.** — *Hall v. Hall*, 77 Mo. App. 600.

**7. Husband's Right to Fix New Domicil.** — *Roby v. Roby*, (Idaho 1904) 77 Pac. Rep. 213; *Schuman v. Schuman*, 93 Mo. App. 99; *Isaacs v. Isaacs*, (Neb. 1904) 99 N. W. Rep. 268.

In California the husband's right is limited to

choosing "a reasonable place." *Vosburg v. Vosburg*, 136 Cal. 195.

**768. 1. Wife's Refusal to Follow Husband.** — *Isaacs v. Isaacs*, (Neb. 1904) 99 N. W. Rep. 268; *Heaton v. Heaton*, 23 Pa. Co. Ct. 218.

**Request by Husband Necessary.** — *Vosburg v. Vosburg*, 136 Cal. 195; *Gunther v. Gunther*, (N. J. 1904) 57 Atl. Rep. 1015.

**2. Excuse for Not Following Husband.** — The husband's offer of a home must be *bona fide*. *Ball v. Ball*, 23 Pa. Co. Ct. 307; *Heaton v. Heaton*, 23 Pa. Co. Ct. 218.

Where the husband has not provided a home at the new domicil the wife is not guilty of desertion in refusing to follow him. *Horn v. Horn*, 17 Pa. Super. Ct. 486.

Where the parties had always lived with the wife's mother and the husband left the wife, and there was no evidence that he furnished or offered to furnish her with the means to come to him, her refusal to follow him was held to be no bar to an action by the wife for abandonment and failure to provide. *Turner v. Turner*, 26 Ind. App. 677.

**3. Refusal of Husband to Follow Wife.** — An ante-nuptial agreement by the husband to reside in a certain state is not binding on him. *Isaacs v. Isaacs*, (Neb. 1904) 99 N. W. Rep. 268.

**4. Refusal to Cohabit.** — *De Armond v. De Armond*, 66 Ark. 601.

In *Illinois* refusal to cohabit is not a cause for divorce. *Severns v. Severns*, 107 Ill. App. 141.

**There May Be Desertion Without Previous Cohabitation.** — Thus, where a husband and wife separated immediately after their marriage, and never cohabited, but it appeared that it was the husband who refused to cohabit, the wife having been always willing to do so, the court found that the husband had been guilty of desertion. *De Laubenque v. De Laubenque*, (1899) P. 42.

**5. Hall v. Hall**, (N. J. 1902) 53 Atl. Rep. 455.

**6. The Departure of the Wife from the Conjugal Residence**, and her refusal to live with her husband, constitute a serious offense against him and warrant him in demanding a separation *de corps* with exemption from the obligation to maintain her. *Doyon v. Riopel*, 17 Quebec Super. Ct. 488.

**769. 2. Continuing Support Does Not Excuse Desertion.** — *Power v. Power*, (N. J. 1904) 58 Atl. Rep. 192; *Abele v. Abele*, 62 N. J. Eq. 644; *Gates v. Gates*, 60 N. J. Eq. 486, *affirming* 59 N. J. Eq. 100.

**Payment under Order of Court.** — Payment of an allowance under an order of court will not bar an action for wilful desertion "with total

**769.** (2) *Refusal of Marital Rights.* — See notes 3, 4.

**770.** (3) *Continuing to Reside in Same House.* — See note 1.

2. **MISCONDUCT CAUSING SEPARATION** — (1) *Driving Innocent Party from Home.* — See note 2.

**771.** (2) *Misconduct Must Be a Cause for Divorce.* — See notes 1, 2, 3.

**772.** *Leaving Home Without Cause for Divorce.* — See note 1.

(3) *Leaving for Failure to Support.* — See note 2.

neglect of duty." *Tirrell v. Tirrell*, 72 Conn. 567.

**769. 3. Refusal to Cohabit.** — *Synge v. Synge*, (1900) P. 180, 69 L. J. P. 106, 83 L. T. N. S. 224, *affirmed* (1901) P. 317.

In *California* this is a statutory cause for divorce. *Vosburg v. Vosburg*, 136 Cal. 195; *Fink v. Fink*, 137 Cal. 559.

**4. Refusal of Sexual Intercourse Not Desertion.** — *McKinney v. McKinney*, 9 Ohio Dec. 655; *Pratt v. Pratt*, 75 Vt. 432.

While not deciding the question, the court leaned to this view in *Hires v. Hires*, 61 N. J. Eq. 491.

Such a refusal is never a cause for divorce where the wife was suffering from female diseases. *Branscheid v. Branscheid*, 27 Wash. 368.

**770. 1. Residing in Same House.** — *Zumbiel v. Zumbiel*, 113 Ky. 841. This doctrine was questioned, though the case was not decided on the point, in *Hires v. Hires*, 61 N. J. Eq. 491.

**2. Misconduct Causing Separation Is Desertion.** — *Koch v. Koch*, (1899) P. 221; *Sickert v. Sickert*, (1899) P. 278; *Curlett v. Curlett*, 106 Ill. App. 81, *citing* 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 772; *Hall v. Hall*, (Ky. 1903) 77 S. W. Rep. 668; *Lister v. Lister*, 65 N. J. Eq. 109; *Setzer v. Setzer*, 128 N. Car. 170, 83 Am. St. Rep. 666; *Krug v. Krug*, 22 Pa. Super. Ct. 572; *Howe v. Howe*, 16 Pa. Super. Ct. 193, *reversing* 23 Pa. Co. Ct. 363. See also *Charter v. Charter*, 84 L. T. N. S. 272.

In *G— v. G—*, (N. J. 1903) 56 Atl. Rep. 736, it was held that there must also be failure to support.

**The Circumstances** must show that the defendant was in fault. *Renk v. Renk*, (N. J. 1897) 38 Atl. Rep. 427.

**If the Husband Gives Up the House and Tells the Wife She Must Find a Home for Herself** he is guilty of desertion. *Brown v. Brown*, 79 L. T. N. S. 102.

**771. 1. A Cause for Divorce Is the Only Justifiable Cause for Separation.** — Neither parsimony, indifference, nor dissatisfaction is sufficient. *Hitchcock v. Hitchcock*, 15 App. Cas. (D.C.) 81.

**2. Adultery Justifies a Separation by the Innocent Party.** — *Koch v. Koch*, (1899) P. 221; *Sickert v. Sickert*, (1899) P. 278.

**Adultery Elsewhere than at Home No Justification.** — Adultery of the husband at places other than the dwelling place does not constitute desertion. *Lake v. Lake*, 65 N. J. Eq. 544.

**3. Cruelty Sufficient as a Cause for Divorce Justifies a Separation.** — *Lister v. Lister*, 65 N. J. Eq. 109; *Howe v. Howe*, 16 Pa. Super. Ct. 193, *reversing* 23 Pa. Co. Ct. 363.

**Refusal of Marital Rights.** — See *Stevens v. Stevens*, 210 Ill. 362.

In *England* the causeless withholding of marital rights justifies the husband in separating himself from his wife. *Synge v. Synge*, (1900)

P. 180, 69 L. J. P. 106, 83 L. T. N. S. 224, *affirmed* (1901) P. 317. *Synge v. Synge*, 70 L. J. P. 97, (1901) P. 317, 85 L. T. N. S. 83.

**"The 'Reasonable Cause' Which Justifies a Wife's Desertion and Abandonment of Her Husband** must be such as would entitle her to a divorce, and that is defined by the statute itself to be such cruel and barbarous treatment as endangers her life, or which offers such indignities to her person as to render her condition intolerable and life burdensome." *Howe v. Howe*, 16 Pa. Super. Ct. 193, *reversing* 23 Pa. Co. Ct. 363.

**Husband's Cruelty Justifies Wife in Leaving Home.** — "Desertion under the statute is the wilful abandonment without cause of one party by the other and against the will of the party abandoned, for the period of two years. If the husband's conduct is so cruel towards his wife that she cannot live with him in safety to her health or without peril to her life, and for such reason she leaves him and abandons his home, she does not thereby commit the crime of desertion. In such a case she does not leave her husband or his home in consequence of any wilfulness on her part, but is compelled by the cruelty of the husband and against her own will so to do. The desertion in such a case is upon his part, and not upon hers. He as completely commits the crime of desertion, when by his cruel conduct he compels her for safety to leave him and his home, as when he wilfully and without cause abandons her. \* \* \* When the wife is obliged by the cruelty or violence of her husband to leave him for safety and to avoid personal injury, her compulsory flight amounts to desertion by him. The burden of proof is upon her to show that her abandonment was not voluntary but that she was compelled to leave by his treatment or command." *Howe v. Howe*, 16 Pa. Super. Ct. 193, *reversing* 23 Pa. Co. Ct. 363.

**772. 1. Misconduct Not a Cause for Divorce Not Sufficient.** — *Barnett v. Barnett*, 27 Ind. App. 466; *Grove v. Grove*, 79 Mo. App. 142; *Proudlove v. Proudlove*, (N. J. 1900) 46 Atl. Rep. 951; *Lammertz v. Lammertz*, 59 N. J. Eq. 649. See also *Sarfaty v. Sarfaty*, 59 N. J. Eq. 193.

Coolness of manner or want of expressions of affection is not sufficient. *Schuman v. Schuman*, 93 Mo. App. 99.

The affliction of the husband by a loathsome venereal disease, contracted before the marriage is no justification for the wife's leaving him. *Crane v. Crane*, (N. J. 1899) 45 Atl. Rep. 270.

**Poverty of Husband no Excuse for Desertion.** — *Freeman v. Freeman*, 94 Mo. App. 504.

**2. Separation Caused by a Failure to Support Is Desertion.** — The failure must have continued for the statutory period. *Branch v. Branch*, 30 Colo. 499.



**773.** *j.* OFFER TO RETURN — REFUSAL — When Offer of Reconciliation Necessary. — See note 3.

Offer Must Be in Good Faith. — See note 5.

**774.** Unreasonable and Improper Conditions. — See note 1.  
Offer Necessary After Separation by Consent. — See note 2.

**775.** Effect of Declining Offer. — See notes 1, 2,  
When Offer Too Late. — See note 3.

**New Jersey — Failure to Support Does Not Justify Separation.** — *Proudlove v. Proudlove*, (N. J. 1900) 46 Atl. Rep. 951; *Moak v. Moak*, (N. J. 1901) 48 Atl. Rep. 394; *Farrier v. Farrier*, (N. J. 1904) 58 Atl. Rep. 1079. See also *Renk v. Renk*, (N. J. 1897) 38 Atl. Rep. 427.

But the character of the support given by a husband is relevant as an indication of a wilful intention to abandon his wife. *Hires v. Hires*, 61 N. J. Eq. 491.

So also is his complete failure to make any provision for his wife during his absence for the statutory period. *Howell v. Howell*, 63 N. J. Eq. 293.

**Pennsylvania — Failure to Support Does Not Justify Separation.** — *Leshner v. Leshner*, 9 Pa. Dist. 69.

**Contra.** — *Gumbert v. Gumbert*, 30 Pitts. Leg. J. N. S. (Pa.) 110.

**773. 3.** *Herr v. Herr*, 17 Lanc. L. Rev. 209.

**5. Good Faith of Offer to Return — England.** — *Martin v. Martin*, 78 L. T. N. S. 568.

**California.** — *Howard v. Howard*, 134 Cal. 346; *Woolard v. Woolard*, 18 App. Cas. (D. C.) 326.

**Illinois.** — *Paul v. Paul*, 75 Ill. App. 383; *Stevens v. Stevens*, 210 Ill. 362.

**New Jersey.** — *Abele v. Abele*, 62 N. J. Eq. 644; *Lister v. Lister*, 65 N. J. Eq. 109; *Fred v. Fred*, (N. J. 1904) 58 Atl. Rep. 611.

**Oregon.** — *Ogilvie v. Ogilvie*, 37 Oregon 171.

**Pennsylvania.** — *Gordon v. Gordon*, 208 Pa. St. 186, 23 Pa. Super. Ct. 261; *Chambers v. Chambers*, 20 Pa. Co. Ct. 41.

**774. 1. Improper Conditions in Offer.** — *Sarfaty v. Sarfaty*, 59 N. J. Eq. 193; *Hitzeman v. Hitzeman*, 106 Ill. App. 459.

The wife is justified in refusing to accept an offer to live with her husband along with a housekeeper of whose character she is suspicious. *Abele v. Abele*, 62 N. J. Eq. 644; *Fred v. Fred*, (N. J. 1904) 58 Atl. Rep. 611.

Where a husband refuses to give up an adulterous *liaison* with a servant, his wife is entitled to refuse his request that she return. *Koch v. Koch*, (1899) P. 221, 68 L. J. P. 90.

**2. When Request to Return Necessary — Colorado.** — *Ault v. Ault*, 29 Colo. 149.

**District of Columbia.** — *Woolard v. Woolard*, 18 App. Cas. (D. C.) 326.

**Iowa.** — *McElhaney v. McElhaney*, 125 Iowa 333.

**Missouri.** — *Wathen v. Wathen*, 101 Mo. App. 286.

**New Jersey.** — *Gates v. Gates*, 59 N. J. Eq. 100; *Brand v. Brand*, (N. J. 1904) 59 Atl. Rep. 570; *Hunt v. Hunt*, (N. J. 1905) 59 Atl. Rep. 642; *Briggs v. Briggs*, (N. J. 1905) 59 Atl. Rep. 878; *Currier v. Currier*, (N. J. 1904) 59 Atl. Rep. 4; *Gunther v. Gunther*, (N. J. 1904) 57

Atl. Rep. 1015; *Wood v. Wood*, 63 N. J. Eq. 688.

**Pennsylvania.** — *Thorpe v. Thorpe*, 30 Pitts. Leg. J. N. S. (Pa.) 133, 13 York Leg. Rec. (Pa.) 103.

**Request Unnecessary Where It Would Be Unavailing.** — *Hall v. Hall*, 60 N. J. Eq. 469; *Lister v. Lister*, 65 N. J. Eq. 109; *Hall v. Hall*, (N. J. 1902) 53 Atl. Rep. 455.

**Request Excused Only When It Would Be Unavailing.** — *Hall v. Hall*, 65 N. J. Eq. 709, modifying on this point (N. J. 1902) 53 Atl. Rep. 455, and following 60 N. J. Eq. 469.

**Request by Wife.** — *Wilson v. Wilson*, 66 N. J. Eq. 237; *Lister v. Lister*, 65 N. J. Eq. 109; *Jerolaman v. Jerolaman*, (N. J. 1903) 54 Atl. Rep. 166; *Van Wart v. Van Wart*, 57 N. J. Eq. 598.

**775. 1. Refusal of Offer to Return.** — *Kefauver v. Kefauver*, (Ky. 1900) 57 S. W. Rep. 467; *Goodhues v. Goodhues*, 90 Md. 292; *Meier v. Meier*, (N. J. 1904) 59 Atl. Rep. 234; *Loux v. Loux*, 57 N. J. Eq. 561; *Ogilvie v. Ogilvie*, 37 Oregon 171; *Musgrave v. Musgrave*, 185 Pa. St. 260; *Peifer v. Peifer*, 22 Pa. Co. Ct. 593; *McGowan v. McGowan*, (Tex. Civ. App. 1899) 50 S. W. Rep. 399.

**Party Refusing Not Entitled to Decree.** — *McMullin v. McMullin*, 140 Cal. 112.

**2. Refusal of Reconciliation Is Desertion.** — *McMullin v. McMullin*, 140 Cal. 112; *Howard v. Howard*, 134 Cal. 346; *Ault v. Ault*, 29 Colo. 149; *Ashburn v. Ashburn*, 101 Mo. App. 365; *Gates v. Gates*, 59 N. J. Eq. 100; *Faunce v. Faunce*, 20 Pa. Super. Ct. 220.

**Refusal Not Necessarily Desertion.** — On a certain date a wife living apart from her husband went to his house accompanied by a policeman and asked to be taken back. The husband refused, whereupon the wife took out a summons for desertion under the summary jurisdiction (married women) Act of 1895. At the hearing of the summons the husband offered evidence of circumstances occurring prior to the date of the wife's demand and the husband's refusal, for the purpose of proving that such refusal did not constitute desertion, but the magistrates declined to receive the evidence on the ground that the husband's refusal constituted desertion. On appeal it was held that the evidence should have been received, as the refusal to take back the wife did not necessarily in itself amount to desertion but was simply a circumstance tending to prove the desertion. *Wassell v. Wassell*, 81 L. T. N. S. 496.

**3. Delay in Making Offer.** — *McMullin v. McMullin*, (Cal. 1902) 71 Pac. Rep. 108.

**Delay in Accepting Offer.** — And if an offer of reconciliation is made in good faith it must be accepted before the right of action accrues to be available as a defense. *Howard v. Howard*, 134 Cal. 346.

**775.** *k. DEFENSES* — (1) *Consent and Acquiescence of Plaintiff* — *Mutual Agreement or Consent*. — See note 4.

**776.** See note 1.

**777.** *Willingness to Receive Deserter*. — See notes 1, 2.

(2) *Misconduct of Plaintiff* — *Party in Fault*. — See notes 3, 4.

**778.** See note 1.

(3) *Involuntary Absence*. — See note 3.

**779.** See note 1.

(4) *Separation Pending Suit*. — See notes 3, 4.

(5) *Separation by Decree* — *Decree for Separation or for Alimony or Support*.

— See note 6.

**775.** *4. Separation by Consent* — *California*. — *McMullin v. McMullin*, 140 Cal. 112; *Howard v. Howard*, 134 Cal. 346.

*Colorado*. — *Ault v. Ault*, 29 Colo. 149.

*Maryland*. — *Barclay v. Barclay*, 98 Md. 366, quoting 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 775.

*Missouri*. — *Schuman v. Schuman*, 93 Mo. App. 99; *Rodgers v. Rodgers*, 84 Mo. App. 197; *Hall v. Hall*, 77 Mo. App. 600; *Wathen v. Wathen*, 101 Mo. App. 286.

*New Jersey*. — *Currier v. Currier*, (N. J. 1904) 59 Atl. Rep. 4; *Power v. Power*, 65 N. J. Eq. 93; *Moak v. Moak*, (N. J. 1901) 48 Atl. Rep. 394; *Gates v. Gates*, 59 N. J. Eq. 100; *Potts v. Potts*, (N. J. 1899) 42 Atl. Rep. 1055.

*Pennsylvania*. — *Middleton v. Middleton*, 187 Pa. St. 612; *Herr v. Herr*, 17 Lanc. L. Rev. 209.

*Articles of Separation* — *Consent Inferred*. — *Barclay v. Barclay*, 98 Md. 366; *Mondean v. Mondean*, 30 Pittsb. Leg. J. N. S. (Pa.) 364; *Alleman v. Alleman*, 2 Dauphin Co. Rep. (Pa.) 209.

Articles of separation will not have this effect where the wife, though signing them, dissents to the separation. *Power v. Power*, (N. J. 1904) 58 Atl. Rep. 192.

**776.** *1. Ault v. Ault*, 29 Colo. 149; *Hunt v. Hunt*, (N. J. 1905) 59 Atl. Rep. 642; *Grover v. Grover*, 63 N. J. Eq. 771; *McGean v. McGean*, 63 N. J. Eq. 285, affirming 60 N. J. Eq. 21; *Sarfaty v. Sarfaty*, 59 N. J. Eq. 193; *Loux v. Loux*, 57 N. J. Eq. 561.

In *Ogilvie v. Ogilvie*, 37 Oregon 171, it was doubted whether the doctrine laid down in these cases applied where the deserted party is entirely blameless.

*Assent to Separation*. — Assent will be presumed unless the complaint has requested the deserter to return. *Wright v. Wright*, (N. J. 1899) 43 Atl. Rep. 447.

**777.** *1. Willingness to Accept Offer*. — *Hitchcock v. Hitchcock*, 15 App. Cas. (D. C.) 81.

*Suit for Divorce as Evidence of Unwillingness to Receive Deserter*. — The filing and prosecution of a petition for the dissolution of the marriage before the expiration of the statutory period show an unwillingness to receive the deserter back, and will preclude the complainant from maintaining the proceeding on the ground of desertion. *Kay v. Kay*, (1904) P. 382.

*2. Unwillingness Not Known to the Party Deserting*. — *Hitchcock v. Hitchcock*, 15 App. Cas. (D. C.) 81; *Ogilvie v. Ogilvie*, 37 Oregon 171. See also *Grover v. Grover*, 63 N. J. Eq. 771.

*Unwillingness Due to Sufficient Cause*. — *Wilson v. Wilson*, 66 N. J. Eq. 237; *Lister v. Lister*,

65 N. J. Eq. 109; *Jerolaman v. Jerolaman*, (N. J. 1903) 54 Atl. Rep. 166; *Van Wart v. Van Wart*, 57 N. J. Eq. 598.

*3. The Party Who Has Provoked a Separation by Cruel Treatment* is not entitled to a decree. *Haight v. Haight*, (Iowa 1900) 82 N. W. Rep. 443; *Hale v. Hale*, (Ky. 1903) 73 S. W. Rep. 784; *Baier v. Baier*, 91 Minn. 165; *Smithkin v. Smithkin*, 62 N. J. Eq. 161.

*Mere Separation* does not necessarily constitute desertion. The conduct of the parties must be considered. If there is good cause or reasonable excuse for the separation, there is no desertion in law. *Frowd v. Frowd*, (1904) P. 177.

*4. Stocking v. Stocking*, 76 Minn. 292, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 777.

*Contra*. — *Mendenhall v. Mendenhall*, 12 Pa. Super. Ct. 290.

**778.** *1. Acquiescence in the Separation*. — *Ault v. Ault*, 29 Colo. 149; *Barnett v. Barnett*, 27 Ind. App. 466; *Sarfaty v. Sarfaty*, 59 N. J. Eq. 193.

*The Failure to Make Overtures Towards a Reconciliation*. — *Smithkin v. Smithkin*, 62 N. J. Eq. 161.

The manner of the deserting party's departure may render these unnecessary. *Lammertz v. Lammertz*, 59 N. J. Eq. 649.

*3. Absence on Business*. — *Campbell v. Campbell*, 73 Mo. App. 579.

**779.** *1. Insanity*. — *Blandy v. Blandy*, 20 App. Cas. (D. C.) 535; *Campbell v. Campbell*, 73 Mo. App. 579.

*3. Separation Protracted by Divorce Suit*. — A suit on false grounds will not have the effect of interrupting the period of desertion. *Weigel v. Weigel*, 63 N. J. Eq. 677.

*The Running of the Period of Desertion Will Be Interrupted* by the filing of a suit for separation on that ground before the expiration of the period, unless the deserter has been guilty of such conduct that he is not entitled to be received back. *Kay v. Kay*, (1904) P. 382.

*4. Separation Pending Annulment Suit*. — But not where the desertion is not caused by the suit. *Hitchcock v. Hitchcock*, 15 App. Cas. (D. C.) 81.

*6. Decree of Separation*. — *Taylor v. Taylor*, 72 N. H. 597.

*Arrest and Sentence for Desertion*. — An order of the Court of Quarter Sessions of the Peace in a proceeding for desertion against a husband by his wife will not bar his right to a divorce for her desertion during the statutory period where she has refused his repeated efforts to persuade her to return. *Whelan v. Whelan*, 183 Pa. St. 293.

**780.** 1. EVIDENCE. — See notes 1, 2, 3, 4, 5.

**781.** See note 1.

4. Voluntary Separation — Not Desertion — A Distinct Cause for Divorce. —

See notes 2, 3.

**782.** 8. Failure or Neglect to Support — Period of Neglect. — See note 1.

Ability of Husband. — See note 4.

Inadequate Provision for Support. — See note 9.

Neglect During Separation. — See notes 12, 13.

Involuntary Neglect — Insanity. — See note 14.

**783.** 10. Gross Neglect of Duty. — See notes 3, 5.

**780.** 1. *Stocking v. Stocking*, 76 Minn. 292; *Hall v. Hall*, 77 Mo. App. 600; *Wood v. Wood*, 63 N. J. Eq. 688; *Smithkin v. Smithkin*, 62 N. J. Eq. 161; *Ogilvie v. Ogilvie*, 37 Oregon 171; *Hannigan v. Hannigan*, 14 York Leg. Rec. (Pa.) 18.

2. *Intent to Desert* — *Maryland*. — *Goodhues v. Goodhues*, 90 Md. 292; *Gill v. Gill*, 93 Md. 652.

*Missouri*. — *Boos v. Boos*, 88 Mo. App. 530. *New Jersey*. — *Oliver v. Oliver*, (N. J. 1904) 57 Atl. Rep. 1033; *Lake v. Lake*, 65 N. J. Eq. 544; *Wood v. Wood*, 63 N. J. Eq. 688; *Grover v. Grover*, 63 N. J. Eq. 771; *Whinyates v. Whinyates*, (N. J. 1898) 41 Atl. Rep. 363.

*Pennsylvania*. — *Horn v. Horn*, 17 Pa. Super. Ct. 486; *Corbin v. Corbin*, 30 Pittsb. Leg. J. N. S. (Pa.) 110; *Shannon v. Shannon*, 7 Pa. Dist. 552.

*West Virginia*. — *Tillis v. Tillis*, 55 W. Va. 198.

The intention may be shown by the acts and circumstances attending the separation. *Ogilvie v. Ogilvie*, 37 Oregon 171.

The admission of the defendant of her intention was held sufficient in *Allen v. Allen*, 194 Pa. St. 419.

Where after cohabitation for one night, and separation for a few days by mutual consent, the defendant wrote the plaintiff that the marriage was not binding and that he would not recognize it, it was held that his intention to desert was sufficiently proved. *McGean v. McGean*, 60 N. J. Eq. 21.

**Presumption of Intent to Desert.** — *Alward v. Alward*, 65 N. J. Eq. 28.

3. *Colorado*. — *Ault v. Ault*, 29 Colo. 149.

*District of Columbia*. — *McDonough v. McDonough*, 20 App. Cas. (D. C.) 46; *Bergheimer v. Bergheimer*, 17 App. Cas. (D. C.) 381.

*Idaho*. — *Roby v. Roby*, (Idaho 1904) 77 Pac. Rep. 213.

*Indiana*. — *Barnett v. Barnett*, 27 Ind. App. 466.

*Missouri*. — *Schuman v. Schuman*, 93 Mo. App. 99; *Hall v. Hall*, 77 Mo. App. 600.

*New Jersey*. — *Currier v. Currier*, (N. J. 1904) 59 Atl. Rep. 4; *Wood v. Wood*, 63 N. J. Eq. 688; *Grover v. Grover*, 63 N. J. Eq. 771; *McGean v. McGean*, 63 N. J. Eq. 285, *affirming* 60 N. J. Eq. 21; *Smithkin v. Smithkin*, 62 N. J. Eq. 161; *Moak v. Moak*, (N. J. 1901) 48 Atl. Rep. 394; *Sarfaty v. Sarfaty*, 59 N. J. Eq. 193; *Loux v. Loux*, 57 N. J. Eq. 561.

*Pennsylvania*. — *Middleton v. Middleton*, 187 Pa. St. 612; *Corbin v. Corbin*, 30 Pittsb. Leg. J. N. S. (Pa.) 110.

4. **Proof of Circumstances at Time of Desertion.**

— *Sweeney v. Sweeney*, 62 N. J. Eq. 357; *Edmiston v. Edmiston*, 8 Pa. Dist. 679; *Pote v. Pote*, 8 Pa. Dist. 660, 23 Pa. Co. Ct. 327; *Hannigan v. Hannigan*, 14 York Leg. Rec. (Pa.) 18; *Tillis v. Tillis*, 55 W. Va. 198.

Where the witnesses have no personal information whether the plaintiff abandoned the defendant or the defendant the plaintiff, divorce will not be granted. *Gray v. Gray*, (Ky. 1900) 56 S. W. Rep. 652.

**Facts Must Be Shown from Which the Court May Legally Infer the Breach of Obligation.** — *Hull v. Hull*, 14 Pa. Super. Ct. 520.

5. **General Conduct of Parties Before and After Separation.** — *Turner v. Turner*, 26 Ind. App. 677; *Gill v. Gill*, 93 Md. 652; *Gunther v. Gunther*, (N. J. 1904) 57 Atl. Rep. 1015 *Howell v. Howell*, 63 N. J. Eq. 293; *Corbin v. Corbin*, 30 Pittsb. Leg. J. N. S. (Pa.) 110; *Trotter v. Trotter*, 30 Pittsb. Leg. J. N. S. (Pa.) 109.

**781.** 1. *Trotter v. Trotter*, 30 Pittsb. Leg. J. N. S. (Pa.) 109.

2. **Voluntary Separation.** — *Williams v. Williams*, 122 Wis. 27.

**Living Apart for Five Years.** — *Boreing v. Boreing*, 114 Ky. 522.

The application may be by the party whose fault caused the separation. *Clark v. Clark*, (Ky. 1899) 53 S. W. Rep. 644.

The separation must be proved, whether denied or not. *Gibbons v. Gibbons*, (Ky. 1900) 54 S. W. Rep. 710.

3. *Williams v. Williams*, 122 Wis. 27.

**782.** 1. In *Pennsylvania* the fact that the wife is compelled to support herself does not entitle her to a divorce. *Leshner v. Leshner*, 9 Pa. Dist. 69.

4. **Ability of Husband.** — *Berry v. Berry*, 145 Cal. 784; *Freeman v. Freeman*, 94 Mo. App. 504.

9. *Downey v. Downey*, 135 Mich. 265.

12. *Roby v. Roby*, (Idaho 1904) 77 Pac. Rep. 213. See also *Roth v. Roth*, 15 Pa. Super. Ct. 192.

13. **Must Be Request for Support and Refusal.** — Where the wife has left the husband there must be a request by her for support and a refusal by the husband. *Barnett v. Barnett*, 27 Ind. App. 466.

14. **The Fact that the Husband Is Insane and unable to receive or provide for his wife is not a ground for a judicial separation from bed and board.** *Dineen v. McLeod*, 5 Quebec Pr. 391; *Deneen v. McLeod*, 21 Quebec Super. Ct. 54.

**783.** 3. **Gross Neglect of Duty.** — Refusal to consummate the marriage is not "gross neglect." *McKinney v. McKinney*, 9 Ohio Dec. 655.

Gross neglect of duty is an omission or for-



- 783.** 11. Divorce Obtained in Another State. — See note 7.  
 12. Cruelty — *a.* DEFINITIONS — At the Common Law. — See note 8.  
**784.** The Definition Given by Sir William Scott. — See note 3.  
**785.** Later Definitions. — See note 2.  
**786.** *b.* STATUTORY TERMS — "Inhuman Treatment Endangering Life." — See note 3.  
 Cruel and Abusive Treatment. — See note 4.  
**787.** *c.* PERSONAL VIOLENCE — As a Test of Cruelty. — See notes 2, 5.  
**788.** Personal Violence Not a Test of Cruelty — Present Rule. — See notes 5, 7.  
**789.** Gross Acts of Violence or Cruelty. — See note 4.  
**790.** See notes 1, 2, 3, 4.  
 Whether Persistent and Habitual. — See notes 8, 9.

bearance to perform those duties imposed by the marriage relation. The words "any gross neglect" have clearly an import in *Ohio* and if proven constitute a substantial ground for divorce irrespective of any other ground named in the statute. Extreme cruelty or habitual drunkenness is not gross neglect of duty, as cruelty or drunkenness is the commission of an act, while gross neglect is an omission or forbearance to perform an act which the highest ties or marital relation require to be performed. While the gross neglect must continue for some time it is not necessary that it should continue for three years. It may consist of a single inhuman and gross act of neglect on a single day, or again may consist of gross or inhuman acts of neglect for many days, months, or years. *Schwartz v. Schwartz*, 6 Ohio Dec. 525.

**783.** 5. A single act of neglect for one day is sufficient. *McKinney v. McKinney*, 9 Ohio Dec. 655.

**7.** *Hull v. Hull*, 8 Pa. Dist. 420, 23 Pa. Co. Ct. 73, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 783.

**8. Cruelty.** — *Maschaur v. Maschaur*, 23 App. Cas. (D.C.) 87; *Berdolt v. Berdolt*, 56 Neb. 792.

**784.** 3. Definition in *Evans v. Evans*. — *Morehouse v. Morehouse*, 70 Conn. 420; *McMahon v. McMahon*, 186 Pa. St. 485.

**785.** 2. American Definitions. — *Ring v. Ring*, 118 Ga. 183; *Smith v. Smith*, 119 Ga. 239.

**Extreme Cruelty.** — "Direct bodily injury, either actual or threatened, and reasonably to be apprehended." *Hart v. Hart*, 68 N. H. 478.

**786.** 3. Inhuman Treatment Endangering Life — *Iowa*. — *Schaffer v. Schaffer*, 106 Iowa 492; *Blair v. Blair*, 106 Iowa 269; *Harkins v. Harkins*, (Iowa 1904) 99 N. W. Rep. 154; *Wells v. Wells*, 116 Iowa 59; *Shook v. Shook*, 114 Iowa 592.

**4. Cruel and Abusive Treatment.** — See *Bonney v. Bonney*, 175 Mass. 7, 78 Am. St. Rep. 473.

**787.** 2. Only Violence or Apprehension of Violence Is Cruelty. — *House v. House*, 102 Va. 235.

"To entitle a wife to divorce for cruel and barbarous treatment, it is well settled that there must be actual personal violence, or a reasonable apprehension of it, or such a course of treatment as endangers life and health and renders cohabitation unsafe." *Howe v. Howe*, 16 Pa. Super. Ct. 193, reversing 23 Pa. Co. Ct. 363.

**5. Illinois.** — There must be acts of physical violence. *Maddox v. Maddox*, 189 Ill. 152, 82 Am. St. Rep. 431.

**Massachusetts.** — There must be reasonable apprehension of injury to health. *Bonney v. Bonney*, 175 Mass. 7, 78 Am. St. Rep. 473.

**788.** 5. Misconduct Tending to Impair the Health is Sufficient. — *Barrett v. Barrett*, 20 Times L. Rep. 73.

**7 Georgia.** — *Smith v. Smith*, 119 Ga. 239; *Ring v. Ring*, 118 Ga. 183.

**Iowa.** — *Harkins v. Harkins*, (Iowa 1904) 99 N. W. Rep. 154; *Wells v. Wells*, 116 Iowa 59; *Blair v. Blair*, 106 Iowa 269.

**Kentucky.** — *Zumbiel v. Zumbiel*, 113 Ky. 841.

**Michigan.** — *Creyts v. Creyts*, 133 Mich. 4.

**Mississippi.** — *Pierce v. Pierce*, (Miss. 1905) 38 So. Rep. 46.

**Nebraska.** — *Berdolt v. Berdolt*, 56 Neb. 792, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 788; *Walton v. Walton*, 57 Neb. 102.

**Oregon.** — *Benfield v. Benfield*, 44 Oregon 94.

**Pennsylvania.** — *Howe v. Howe*, 16 Pa. Super. Ct. 193, reversing 23 Pa. Co. Ct. 363.

**Virginia.** — *Owens v. Owens*, 96 Va. 191.

**789.** 4. Attempt to Kill. — *Torlotting v. Torlotting*, 97 Mo. App. 183.

**790.** 1. Attempt to Poison. — *Motley v. Motley*, 93 Mo. App. 473.

**Compelling a Wife to Take Dangerous Drugs** and urging her to consent to a criminal operation to procure abortion, along with other acts of cruelty, were held sufficient grounds for divorce in *Braun v. Braun*, 194 Pa. St. 287, 75 Am. St. Rep. 699.

**2. Kicking.** — *Crabtree v. Crabtree*, (Ky. 1905) 85 S. W. Rep. 211.

**3. Striking with Hand or Weapon** — *Illinois*. — *Miles v. Miles*, 101 Ill. App. 406, dismissed 200 Ill. 524.

**Iowa.** — *Berry v. Berry*, 115 Iowa 543.

**Kentucky.** — *Crabtree v. Crabtree*, (Ky. 1905) 85 S. W. Rep. 211; *Howlett v. Howlett*, (Ky. 1902) 70 S. W. Rep. 404.

**Michigan.** — *Stark v. Stark*, 129 Mich. 153.

**Minnesota.** — *Cochran v. Cochran*, 93 Minn. 284.

**Missouri.** — *Strahorn v. Strahorn*, 82 Mo. App. 580.

**Nebraska.** — *Tietken v. Tietken*, 60 Neb. 138; *Walton v. Walton*, 57 Neb. 102.

**Virginia.** — *Trimble v. Trimble*, 97 Va. 217.

**4. Choking.** — *Walton v. Walton*, 57 Neb. 102; *Lister v. Lister*, 65 N. J. Eq. 109; *Roelke v. Roelke*, 103 Wis. 204.

**8. What Constitutes Persistent Cruelty.** — It seems that a number of acts of cruelty committed in one day may amount to persistent cruelty. *Broad v. Broad*, 78 L. T. N. S. 687.

**790.** Single Act of Cruelty Sometimes Sufficient. — See note 10.

**791.** Threats of Violence. — See note 2.

It Is a Question of Fact. — See note 3.

*d.* INJURIES TO HEALTH — Neglect During Sickness. — See note 4.

**792.** Communicating Venereal Disease. — See note 1.

Abuse of Marital Rights. — See note 3.

**793.** The Persistent and Unjustifiable Refusal of Marital Rights. — See notes 1, 2, 3.

**794.** *e.* MENTAL SUFFERING AS A TEST OF CRUELTY — At Common Law. — See note 1.

Injury to Health — Physical Injury. — See note 2.

**790.** 9. Howlett v. Howlett, (Ky. 1902) 70 S. W. Rep. 404.

**10. One Act Held Sufficient.** — Torlotting v. Torlotting, 97 Mo. App. 183; Roelke v. Roelke, 103 Wis. 204.

**One Act Not Sufficient under the Circumstances.** — Saterlee v. Saterlee, 28 Colo. 290; Hagood v. Hagood, (Tenn. Ch. 1897) 48 S. W. Rep. 122; Dority v. Dority, (Tex. Civ. App. 1901) 62 S. W. Rep. 106.

**One Act Not Sufficient — Under Statute.** — Goodhues v. Goodhues, 90 Md. 292.

**One Act Not "Extreme and Repeated Cruelty."** — Werres v. Werres, 102 Ill. App. 360; Kline v. Kline, 104 Ill. App. 274; Luther v. Luther, 87 Ill. App. 241.

The question whether two or more acts of violence constitute cruelty is for the jury. Lenning v. Lenning, 176 Ill. 180.

**791.** 2. Threats Creating Apprehension of Violence. — Barrett v. Barrett, 20 Times L. Rep. 73; Blair v. Blair, 106 Iowa 269; Wabeke v. Wabeke, (Iowa 1904) 98 N. W. Rep. 559; Benfield v. Benfield, 44 Oregon 94. See also Tietken v. Tietken, 60 Neb. 138.

**3. Threats in Mere Passion — Abusive Language.** — House v. House, 102 Va. 235.

**4. Neglect During Sickness.** — Breedlove v. Breedlove, 27 Ind. App. 560; Berry v. Berry, 115 Iowa 543; Bailey v. Bailey, 121 Mich. 236; Goodman v. Goodman, 80 Mo. App. 274.

**Neglect by a Wife during the husband's sickness** where he can afford to hire a nurse is not such conduct as to injure his health. Bonney v. Bonney, 175 Mass. 7, 78 Am. St. Rep. 473.

**792.** 1. Communicating Venereal Disease. — Trammell v. Vaughan, 158 Mo. 214, 81 Am. St. Rep. 302, quoting 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 792; Goodman v. Goodman, 80 Mo. App. 274; McMahan v. McMahan, 186 Pa. St. 485; Fitzgerald v. Fitzgerald, 22 Pa. Co. Ct. 490.

**3. Abuse of Marital Rights.** — Harkins v. Harkins, (Iowa 1904) 99 N. W. Rep. 154.

Such excessive intercourse as to be injurious to the health of a delicate wife is cruel and inhuman treatment. Gardner v. Gardner, 104 Tenn. 410, 78 Am. St. Rep. 924; McAllister v. McAllister, 28 Wash. 613.

**Excessive Sexual Intercourse During Pregnancy Is Cause for Divorce.** — White v. White, 135 Mich. 271.

Proof of controversy or physical resistance by the wife is unnecessary. Ridley v. Ridley, (Iowa 1904) 100 N. W. Rep. 1122.

The wife is *ex necessitate rei* a competent witness to such treatment. Maget v. Maget, 85 Mo. App. 6.

The uncorroborated evidence of the wife is not sufficient to prove excessive sexual intercourse. Weigel v. Weigel, 60 N. J. Eq. 322.

**793.** 1. Refusal of Marital Rights. — Varner v. Varner, 35 Tex. Civ. App. 381, quoting 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 793.

In California this is a cause for divorce, under Civil Code, § 96, "when health and physical condition does not make such refusal reasonably necessary." There must be evidence of the defendant's health and physical condition before a divorce will be granted. Hayes v. Hayes, 144 Cal. 625.

**2.** McKinney v. McKinney, 9 Ohio Dec. 655; Varner v. Varner, 35 Tex. Civ. App. 381, quoting 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 793. See also Loomer v. Loomer, (Neb. 1905) 102 N. W. Rep. 759.

The voluntary castration of the husband after marriage is not a ground for divorce. Berger v. Berger, 23 Pa. Co. Ct. 232.

**3.** Varner v. Varner, 35 Tex. Civ. App. 381, quoting 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 793.

**794.** 1. Berdolt v. Berdolt, 56 Neb. 792.  
**2. Mental Suffering Sufficient if It Injures the Health — California.** — Franklin v. Franklin, 140 Cal. 607; Curl v. Curl, 130 Cal. 638; Smith v. Smith, 124 Cal. 651; Kuhl v. Kuhl, 124 Cal. 57; Blair v. Blair, 122 Cal. 57; Andrews v. Andrews, 120 Cal. 184.

*District of Columbia.* — Ogden v. Ogden, 11 App. Cas. (D. C.) 104, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 794 *et seq.*

*Georgia.* — There must be an apprehension of danger to life, limb, or health. Ring v. Ring, 118 Ga. 183, criticising Myrick v. Myrick, 67 Ga. 771; Smith v. Smith, 119 Ga. 239.

*Illinois.* — Maddox v. Maddox, 189 Ill. 152, 82 Am. St. Rep. 431. Cruelty does not always consist wholly of physical violence. Severns v. Severns, 107 Ill. App. 141.

*Iowa.* — Wells v. Wells, 116 Iowa 59; Shook v. Shook, 114 Iowa 592; Ellithorpe v. Ellithorpe, (Iowa 1904) 100 N. W. Rep. 328; Harkins v. Harkins, (Iowa 1904) 99 N. W. Rep. 154.

*Kentucky.* — Zumbiel v. Zumbiel, 113 Ky. 841.  
*Louisiana.* — Olberding v. Gohres, 107 La. 715.

*Massachusetts.* — There must be apprehension of injury to health. Bonney v. Bonney, 175 Mass. 7, 78 Am. St. Rep. 473.

*Michigan.* — Creyts v. Creyts, 133 Mich. 4.  
*Mississippi.* — Personal violence is not now necessary. Pierce v. Pierce, (Miss. 1905) 38 So. Rep. 46.

*Missouri.* — Maget v. Maget, 85 Mo. App. 6.

**796.** See note 1.

The Test of Mental Suffering Is Injury to the Health. — See note 3.

**797.** Under Some Statutes Grievous Mental Suffering. — See note 2.

*f. ILL TREATMENT PRODUCING MENTAL SUFFERING — (1) False and Malicious Charge of Adultery.* — See notes 3, 4.

**798.** Creating Apprehension of Violence. — See notes 1, 2.

Apprehension of Injury to Health. — See notes 4, 5, 6, 7.

**799.** See notes 1, 2.

Words Denoting Adultery. — See notes 6, 7, 8.

*Nebraska.* — *Berdolt v. Berdolt*, 56 Neb. 792; *Ellison v. Ellison*, 65 Neb. 412.

*Nevada.* — *Gardner v. Gardner*, 23 Nev. 207.

*New Hampshire.* — Direct bodily injury, actual or threatened, must be shown. *Hart v. Hart*, 68 N. H. 478.

*New Jersey.* — Danger to health and life not only from mental worry and strain over the husband's neglect, but from a liability to acts of physical violence, due to his quick and ungovernable temper, was held sufficient in *Streitwolf v. Streitwolf*, (N. J. 1900) 47 Atl. Rep. 14.

*North Carolina.* — *Green v. Green*, 131 N. Car. 533, 92 Am. St. Rep. 788.

*North Dakota.* — Grievous mental suffering may be sufficient though productive of no perceptible bodily injury. *Mahnken v. Mahnken*, 9 N. Dak. 188; *De Roche v. De Roche*, 12 N. Dak. 17.

*Oregon.* — The husband's demand that the brother of his wife, who had furnished part of the purchase money of their house, and lived with them, should pay board, is not cruel and inhuman treatment of the wife justifying a divorce. *Mendelson v. Mendelson*, 37 Oregon 163.

Cruel treatment may consist of abusive language and improper conduct as well as personal violence. *Benfield v. Benfield*, 44 Oregon 94.

*Washington.* — There must be injury to health or person. *Stanley v. Stanley*, 24 Wash. 460.

**Adultery of Husband with Servants in House.** — Where the wife's health was completely shattered by reason of the disgrace and shock arising from the conduct of her husband, a clergyman, in maintaining adulterous relations with servants in the house, and from his conviction thereof in a criminal proceeding, it was held that there was legal cruelty, which, taken in connection with the adultery, entitled the wife to a divorce. *Thompson v. Thompson*, 85 L. T. N. S. 172.

**796. 1.** *Ogden v. Ogden*, 11 App. Cas. (D. C.) 104, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 794 *et seq.*

**3. Mental Suffering Must Impair Health.** — *Wells v. Wells*, 116 Iowa 59; *Harkins v. Harkins*, (Iowa 1904) 99 N. W. Rep. 154; *Bonney v. Bonney*, 175 Mass. 7, 78 Am. St. Rep. 473; *McKay v. McKay*, 24 Tex. Civ. App. 629; *Stanley v. Stanley*, 24 Wash. 460; *Johnson v. Johnson*, 107 Wis. 186, 81 Am. St. Rep. 836.

**Uncongeniality.** — Mutual repugnancy is not a cause for divorce. *Wells v. Wells*, 116 Iowa 59.

**797. 2. Grievous Mental Suffering** — *California.* — *Smith v. Smith*, 124 Cal. 651; *Kuhl v. Kuhl*, 124 Cal. 57.

**3. The Husband's False Accusation of Adultery** made in the presence of witnesses may be evi-

dence of cruelty. *Walker v. Walker*, 77 L. T. N. S. 715.

**4. False and Malicious Charge of Adultery.** — *Andrews v. Andrews*, 120 Cal. 184; *Ray v. Ray*, 106 Ga. 260; *Driver v. Driver*, (Ind. 1898) 52 N. E. Rep. 401; *Berdolt v. Berdolt*, 56 Neb. 792, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 797; *Walton v. Walton*, 57 Neb. 102; *Israel v. Israel*, 54 N. Y. App. Div. 408; *Braun v. Braun*, 194 Pa. St. 287, 75 Am. St. Rep. 699.

**798. 1. Creating Apprehension of Violence** — *Iowa.* — *Haight v. Haight*, (Iowa 1900) 82 N. W. Rep. 443; *Blair v. Blair*, 106 Iowa 269.

*Kentucky.* — *Harl v. Harl*, (Ky. 1903) 73 S. W. Rep. 756.

*Minnesota.* — *Cochran v. Cochran*, 93 Minn. 284; *Clark v. Clark*, 86 Minn. 249.

*New Jersey.* — *Garcin v. Garcin*, 62 N. J. Eq. 189; *Streitwolf v. Streitwolf*, (N. J. 1900) 47 Atl. Rep. 14.

*Pennsylvania.* — *Oxley v. Oxley*, 191 Pa. St. 474.

*Tennessee.* — *McClanahan v. McClanahan*, 104 Tenn. 217.

*Virginia.* — *Owens v. Owens*, 96 Va. 191.

**2. Saterlee v. Saterlee**, 28 Colo. 290; *Harkins v. Harkins*, (Iowa 1904) 99 N. W. Rep. 154; *Garcin v. Garcin*, 62 N. J. Eq. 189.

**4. Mental Suffering from Charges Sufficient When Health Impaired.** — *Turner v. Turner*, 122 Iowa 113.

**5. Bryan v. Bryan**, 137 Cal. xix, 70 Pac. Rep. 304; *De Roche v. De Roche*, 12 N. Dak. 17.

Much depends upon the particular woman. *Smith v. Smith*, 124 Cal. 651.

**6. Such Charges Are Indignities Rendering the Condition Intolerable.** — *Smith v. Smith*, 92 N. Y. App. Div. 442; *Green v. Green*, 131 N. Car. 533, 92 Am. St. Rep. 788.

The charge must be made maliciously. *Goodman v. Goodman*, 80 Mo. App. 274.

**7. Accusation Made in Presence of Children.** — *Cochran v. Cochran*, 93 Minn. 284; *Schweikert v. Schweikert*, 108 Mo. App. 477; *Smith v. Smith*, 92 N. Y. App. Div. 442; *De Roche v. De Roche*, 12 N. Dak. 17. See also *Gagneaux v. Desonier*, 51 La. Ann. 1095.

**799. 1. Accusation Made in Presence of Third Persons.** — *Bryan v. Bryan*, 137 Cal. xix, 70 Pac. Rep. 304; *Harkins v. Harkins*, (Iowa 1904) 99 N. W. Rep. 154; *Haight v. Haight*, (Iowa 1900) 82 N. W. Rep. 443; *Harl v. Harl*, (Ky. 1903) 73 S. W. Rep. 756; *Smith v. Smith*, 92 N. Y. App. Div. 442.

**2. Accusation Made in Letters to Wife.** — *Green v. Green*, 131 N. Car. 533, 92 Am. St. Rep. 788.

**6. Shook v. Shook**, 114 Iowa 592; *Walton v. Walton*, 57 Neb. 102; *De Roche v. De Roche*, 12 N. Dak. 17.

**7. Shook v. Shook**, 114 Iowa 592; *Walton v.*



**799.** Charge of Adultery in Divorce Suit. — See note 9.

Justification — Truth of Charge or Reasonable Cause. — See notes 10, 11.

(2) *Charge of Impotence.* — See note 12.(3) *Charge of Crime.* — See note 15.**800.** (4) *Commission of Crime.* — See note 2.(6) *Other Causes for Divorce as Cruelty* — Desertion as Cruelty. — See notes 6, 7.**801.** Drunkenness or Adultery as Cruelty. — See note 1.

Gross Neglect of Duty — Indignities. — See notes 3, 4.

(7) *Vile, Abusive, and Profane Language.* — See notes 5, 6.(8) *Conduct Causing Unhappiness.* — See note 7.**802.** *g. CRUELTY BY DISREGARD OF MUTUAL RIGHTS* — Management of Household. — See note 5.**803.** Chastisement of Wife. — See note 1.

Punishing Child. — See notes 6, 7.

Walton, 57 Neb. 102; De Roche v. De Roche, 12 N. Dak. 17.

**799. 8.** Turner v. Turner, 122 Iowa 113; Berry v. Berry, 115 Iowa 543; Green v. Green, 131 N. Car. 533, 92 Am. St. Rep. 788; Braun v. Braun, 194 Pa. St. 287, 75 Am. St. Rep. 699; Owens v. Owens, 96 Va. 191.**9. Charge of Adultery in Divorce Suit.** — Haight v. Haight, (Iowa 1900) 82 N. W. Rep. 443; Israel v. Israel, 54 N. Y. App. Div. 408.

In Kefauver v. Kefauver, (Ky. 1900) 57 S. W. Rep. 467, an unfounded charge of unchastity against the wife in a divorce suit was held to entitle her to a divorce from bed and board, under Ky. Stat., § 2121, but not to an absolute divorce.

**10. Truth of Charge a Justification.** — Fuller v. Fuller, 108 Ga. 256; Evans v. Evans, (Tenn. Ch. 1900) 57 S. W. Rep. 367.

If the Husband Condoned His Wife's Adultery by living with her thereafter, it is possible that a subsequent accusation of adultery in the presence of third persons may amount to cruelty. Walker v. Walker, 77 L. T. N. S. 715.

**11. Indiscreet Conduct of Wife a Defense.** — Ashburn v. Ashburn, 101 Mo. App. 365.

12. Berdolt v. Berdolt, 56 Neb. 792.

15. Andrews v. Andrews, 120 Cal. 184; Shook v. Shook, 114 Iowa 592.

**800. 2. Commission of Crime.** — This also applies to commission of crime by the wife. Weaver v. Weaver, 74 N. Y. App. Div. 591, affirmed 178 N. Y. 621.**6. Desertion Creating Mental Suffering.** — Driver v. Driver, (Ind. 1898) 52 N. E. Rep. 401.**7. Desertion and Leaving the Wife Without Suitable Maintenance.** — Desertion by the husband of his wife for a less period than would justify a divorce for desertion does not entitle the wife to divorce for extreme cruelty. Murnan v. Murnan, 128 Mich. 680.**801. 1. Habitual Drunkenness May Be Cruelty.** — Excessive use of intoxicants not amounting to habitual drunkenness may be a contributory cause to extreme cruelty. Tietken v. Tietken, 60 Neb. 138.

“Habitual intoxication” is a form of cruelty under the California statute. Kepfler v. Kepfler, 134 Cal. 255.

Under the Georgia Statute habitual drunkenness and cruelty are separate grounds of action. Ring v. Ring, 112 Ga. 854.

**Marriage with Knowledge of Drunkenness.** — If a woman marry a drunkard with full knowledge of his habits in that behalf, she is not on that account to be held to have taken the risk of everything that might happen to her as a result of his continued drunken habits. Walker v. Walker, 77 L. T. N. S. 715.**3. In re Gross Neglect,** 8 Ohio Dec. 701.**4.** But a petition alleging the wife's neglect of household duties, causeless scolding, and bad temper, and dissipation of the husband's property, was held to state a cause of action for divorce for cruel and inhuman treatment, in Spitzmesser v. Spitzmesser, 26 Ind. App. 532.**5. Vile, Profane, or Abusive Language.** — Shuster v. Shuster, (Neb. 1902) 92 N. W. Rep. 203; Hart v. Hart, 68 N. H. 478; Weigel v. Weigel, 60 N. J. Eq. 322; Mendelson v. Mendelson, 37 Oregon 163. *Contra*, Womack v. Womack, 73 Ark. 281. And see Bailey v. Bailey, 121 Mich. 236.

In O'Sullivan v. O'Sullivan, 35 Wash. 481, such conduct by the wife was held to be sufficient ground for a divorce.

**6.** Berry v. Berry, 115 Iowa 543; Ellison v. Ellison, 65 Neb. 412; Hart v. Hart, 68 N. H. 478. See also O'Brien v. O'Brien, 36 Oregon 95.**7. Conduct Occasioning Unhappiness.** — Downey v. Downey, 135 Mich. 265.**Refusal to Speak.** — Spitzmesser v. Spitzmesser, 26 Ind. App. 532; Bailey v. Bailey, 121 Mich. 236.

But a husband cannot complain if his wife does not engage in a conversation which she knows, from his intoxicated condition, will terminate in a quarrel. Saterlee v. Saterlee, 28 Colo. 290.

**The Sullen, Morose Disposition** of the husband will not justify a divorce where it does not seriously impair the wife's health. Johnson v. Johnson, 107 Wis. 186, 81 Am. St. Rep. 836.**The Habitual Use of Morphine** is not alone such cruel treatment as to justify a divorce. Ring v. Ring, 118 Ga. 183; Smith v. Smith, 119 Ga. 239.**802. 5. Right to Exclude Wife's Associates.** — Weigel v. Weigel, 60 N. J. Eq. 322.**803. 1. Chastising Wife.** — Glenn v. Glenn, 87 Mo. App. 377; O'Brien v. O'Brien, 36 Oregon 95.**6.** Still less to exercise his reasonable paren-

**803.** Protecting Wife from Cruelty of Child. — See note 8.

**804.** Requiring Wife to Labor. — See notes 2, 4.

**805.** *h.* CRUELTY BY THE WIFE TO HUSBAND — Husband May Obtain Divorce for Cruelty. — See note 1.

What Misconduct or Ill Treatment by Wife Sufficient. — See notes 2, 3.

Charge of Adultery — Distinction as to Husband. — See note 6.

**806.** See note 1.

Neglect of Duty — Disagreeable Conduct of Wife. — See notes 2, 4.

*i.* JUSTIFICATION — MISCONDUCT OF PLAINTIFF — Provocation by Plaintiff. — See note 5.

Conduct of Plaintiff — Retaliation. — See note 8.

**807.** See note 1.

Fighting and Quarreling. — See notes 2, 3.

*j.* INTENT — Wilful and with Intent to Injure. — See note 5.

tal authority. *Cunningham v. Cunningham*, 22 Tex. Civ. App. 6.

**803.** 7. *Creyts v. Creyts*, 133 Mich. 4.

**8.** Husband Responsible for Cruelty of Children. — See, however, *Nickerson v. Nickerson*, 34 Oregon 5.

Husband Responsible for Cruelty of His Mother. — *Dakin v. Dakin*, (Neb. 1901) 95 N. W. Rep. 781, *approving Day v. Day*, 84 Iowa 224.

**804.** 2. *Cuneo v. De Cuneo*, 24 Tex. Civ. App. 436.

4. *Stark v. Stark*, 129 Mich. 153.

**805.** 1. *Severns v. Severns*, 107 Ill. App. 141; *Spitzmesser v. Spitzmesser*, 26 Ind. App. 532. See also *Schaffier v. Schaffier*, 106 Iowa 492.

Urging the Husband to Insure His Life for the Wife's Benefit is not an act of cruelty. *Saterlee v. Saterlee*, 28 Colo. 290.

2. *Severns v. Severns*, 107 Ill. App. 141.

Slight Acts of Violence. — See *Loomer v. Loomer*, (Neb. 1905) 102 N. W. Rep. 759.

3. *House v. House*, 102 Va. 235. See also *Hart v. Hart*, 68 N. H. 478.

6. A false charge of infidelity by a wife is not cruelty unless wantonly or maliciously made. *Saterlee v. Saterlee*, 28 Colo. 290.

**806.** 1. *Ogden v. Ogden*, 11 App. Cas. (D. C.) 104; *Shy v. Shy*, 104 Mo. App. 122.

2. Neglect of Duty by Wife. — *Bauerle v. Bauerle*, 31 Pittsb. Leg. J. N. S. (Pa.) 262.

Neglect of Household Duties by the wife may be an element of cruelty. *Spitzmesser v. Spitzmesser*, 26 Ind. App. 532.

4. *Branscheid v. Branscheid*, 27 Wash. 368.

5. Provocation by Plaintiff — *Illinois*. — *Luther v. Luther*, 87 Ill. App. 241.

*Iowa*. — *Sylvester v. Sylvester*, 109 Iowa 401; *May v. May*, 108 Iowa 1, 75 Am. St. Rep. 202; *Schaffier v. Schaffier*, 106 Iowa 492.

*Kentucky*. — *Lambert v. Lambert*, (Ky. 1901) 63 S. W. Rep. 614; *Fightmaster v. Fightmaster*, (Ky. 1901) 60 S. W. Rep. 918.

*Louisiana*. — *Weaver v. Weaver*, 110 La. 265.

*Minnesota*. — *Baier v. Baier*, 91 Minn. 165.

*Missouri*. — *Coe v. Coe*, 98 Mo. App. 472.

*Nebraska*. — *Shuster v. Shuster*, (Neb. 1902) 92 N. W. Rep. 203.

*New York*. — *Powers v. Powers*, 84 N. Y. App. Div. 588.

*Oregon*. — *Jones v. Jones*, 44 Oregon 586; *Mendelson v. Mendelson*, 37 Oregon 163.

*Tennessee*. — *Smith v. Smith*, (Tenn. Ch. 1899) 53 S. W. Rep. 1000.

*Texas*. — *Cunningham v. Cunningham*, 22 Tex. Civ. App. 6.

*Virginia*. — *House v. House*, 102 Va. 235.

*Washington*. — *Stanley v. Stanley*, 24 Wash. 460.

*Canada*. — *Raymond v. Bossé*, 12 Quebec Super. Ct. 173.

In *Georgia* it has been held that there can be no justification of conduct constituting ground for divorce, though "like conduct" may be a bar to the granting of a decree. *Fuller v. Fuller*, 108 Ga. 256.

8. *Walton v. Walton*, 37 Neb. 102.

**807.** 1. Violence or Cruelty Disproportionate to the Provocation. — *Duhon v. Duhon*, 110 La. 240; *O'Brien v. O'Brien*, 36 Oregon 95; *Young v. Young*, (Tenn. Ch. 1900) 57 S. W. Rep. 438; *McClanahan v. McClanahan*, 104 Tenn. 217.

A wife whose drinking habits had never produced *delirium tremens* or *mania à potu*, and who was shown to have reformed, had not acquired such a strong and deep-seated taste for intoxicants as to constitute a defense in a suit against her husband for divorce for extreme cruelty. *Streitwolf v. Streitwolf*, (N. J. 1900) 47 Atl. Rep. 14.

2. Fighting and Quarreling. — *Anderberg v. Anderberg*, (Iowa 1902) 91 N. W. Rep. 1071; *Gardner v. Gardner*, 9 N. Dak. 192; *Jones v. Jones*, 44 Oregon 586; *Young v. Young*, (Tenn. Ch. 1900) 57 S. W. Rep. 438; *Cunningham v. Cunningham*, 22 Tex. Civ. App. 6; *McAllister v. McAllister*, 28 Wash. 613; *Stanley v. Stanley*, 24 Wash. 460.

3. *Blair v. Blair*, 106 Iowa 269; *Pozo v. Connor*, 107 La. 453; *Mahnken v. Mahnken*, 9 N. Dak. 188.

In *Mayer v. Mayer*, (N. J. 1901) 49 Atl. Rep. 1078, where both spouses made and proved charges of violence and abusive language, divorce was granted against the husband as the most in fault.

5. Ill Treatment — Intent. — *Ring v. Ring*, 118 Ga. 183.

An application by a husband to have his wife adjudged insane is not cruelty entitling her to a divorce, where it was induced by a belief that her statements attributing improper conduct to him were induced by an unsettled mind. *Reichert v. Reichert*, 124 Mich. 694.

**808.** Drunkenness. — See notes 1, 2.

*k.* EVIDENCE — Declarations — *Res Gestæ*. — See note 5.

Marks of Violence. — See notes 6, 7.

**809.** Proof of Acts of Cruelty Not Alleged. — See notes 5, 6.

Sufficiency of the Evidence — Probability of Future Ill Treatment the Test. — See note 7.

**810.** Variance. — See note 1.

All Acts Charged Need Not Be Proved. — See note 2.

Relevant Facts — Plaintiff's Physical Condition. — See note 3.

Character and Age of the Parties. — See notes 4, 5, 6, 7, 8.

Also the Relative Ages of the Parties. — See note 9.

**811.** Occasional Display of Temper. — See note 1.

13. Habitual Cruelty Indicating Settled Aversion. — See note 2.

14. Conduct Rendering It Unsafe and Improper to Cohabit — As Compared with Cruelty. — See notes 3, 6.

**808.** 1. Cruelty Resulting from Drunkenness. — *Ellithorpe v. Ellithorpe*, (Iowa 1904) 100 N. W. Rep. 328; *Harl v. Harl*, (Ky. 1903) 73 S. W. Rep. 736; *Tietken v. Tietken*, 60 Neb. 138.

2. Excessive use of intoxicants may be a contributory cause to extreme cruelty, though it may not of itself be sufficient to sustain a charge of habitual drunkenness. *Tietken v. Tietken*, 60 Neb. 138.

5. Declarations as Evidence. — *Howe v. Howe*, 16 Pa. Super. Ct. 193, reversing 23 Pa. Co. Ct. 363.

6. Bruises and Marks of Violence. — *Luther v. Luther*, 87 Ill. App. 241; *Lister v. Lister*, 65 N. J. Eq. 109; *Streitwolf v. Streitwolf*, (N. J. 1900) 47 Atl. Rep. 14; *Howe v. Howe*, 16 Pa. Super. Ct. 193, reversing 23 Pa. Co. Ct. 363; *Roelke v. Roelke*, 103 Wis. 204.

7. *Lister v. Lister*, 65 N. J. Eq. 109.

**809.** 5. Proof of Acts of Cruelty Not Alleged. — *Shoup v. Shoup*, 106 Ill. App. 167; *Branscheid v. Branscheid*, 27 Wash. 368.

Where the defendant cross-examines the plaintiff as to a pleasure trip on which he had taken her to show kind treatment, she will be permitted on re-examination to show his ill treatment of her on that occasion, though the act of ill treatment is not alleged. *Breedlove v. Breedlove*, 27 Ind. App. 560.

6. *Westphal v. Westphal*, 81 Minn. 242.

Proof of the Whole Conduct of the Parties Is Admissible. — *Hill v. Hill*, 112 La. 770; *Powers v. Powers*, 84 N. Y. App. Div. 588.

The whole married life of the parties may be the subject of inquiry. *Penningroth v. Penningroth*, 72 Mo. App. 329.

7. Divorce Is for Protection, Not Punishment. — *Weigel v. Weigel*, 60 N. J. Eq. 322; *Bauerle v. Bauerle*, 31 Pittsb. Leg. J. N. S. (Pa.) 262.

**810.** 1. Proof of the Substance of the Charge Sufficient. — *Breedlove v. Breedlove*, 27 Ind. App. 560.

2. *McKibbin v. McKibbin*, 139 Cal. 448; *Haight v. Haight*, (Iowa 1900) 82 N. W. Rep. 443.

3. Plaintiff's Physical Condition. — *Harkins v. Harkins*, (Iowa 1904) 99 N. W. Rep. 154; *Berry v. Berry*, 115 Iowa 543; *Haight v. Haight*, (Iowa 1900) 82 N. W. Rep. 443; *Sylvester v. Sylvester*, 109 Iowa 401; *Tripp v. Tripp*, 78 Mo. App. 413; *De Roche v. De Roche*, 12 N.

Dak. 17. See also *Gardner v. Gardner*, 23 Nev. 207; *Owens v. Owens*, 96 Va. 191; *McAllister v. McAllister*, 28 Wash. 613.

Cruelty During Pregnancy. — *Westphal v. Westphal*, 81 Minn. 242.

4. Character as Affecting Future Conduct. — *Shuster v. Shuster*, (Neb. 1902) 92 N. W. Rep. 203.

5. *Shuster v. Shuster*, (Neb. 1902) 92 N. W. Rep. 203.

6. *Sylvester v. Sylvester*, 109 Iowa 401; *Raymond v. Bossé*, 12 Quebec Super. Ct. 173.

7. *Berry v. Berry*, 115 Iowa 543; *Mahnken v. Mahnken*, 9 N. Dak. 188.

8. *Roelke v. Roelke*, 103 Wis. 204.

Circumstances to Be Considered. — To justify the court in decreeing a separation *de corps*, it is necessary that the acts charged against the defendant should have been continuous and of more than ordinary gravity. In passing on the ill usage of which the defendant is accused, the court should take into consideration the condition, education, and social position of the consorts. Acts of violence and ill usage charged against the defendant should be dealt with in connection with the circumstances, places and times of their commission. If they took place several years previously, if they were isolated acts or if the consorts continued to live together after they were committed, they will not be sufficient to justify a separation *de corps*. Nor should the court decree separation if the injuries complained of by the defendant are more serious than those charged by the complainant. *Raymond v. Bossé*, 12 Quebec Super. Ct. 173.

9. Ages of Parties. — *Wolverton v. Wolverton*, 163 Ind. 26; *Shook v. Shook*, 114 Iowa 592.

**811.** 1. *Hagood v. Hagood*, (Tenn. Ch. 1897) 48 S. W. Rep. 122.

2. *Harl v. Harl*, (Ky. 1903) 73 S. W. Rep. 756; *Zumbiel v. Zumbiel*, 113 Ky. 841; *Bristow v. Bristow*, (Ky. 1899) 51 S. W. Rep. 819.

3. Conduct Rendering Cohabitation Unsafe and Improper — *Tennessee*. — It is within the discretion of the court to grant a divorce from bed and board or from the bonds of matrimony for this cause. *McClanahan v. McClanahan*, 104 Tenn. 217.

6. *Hagood v. Hagood*, (Tenn. Ch. 1897) 48 S. W. Rep. 122; *Johnson v. Johnson*, 107 Wis. 186, 81 Am. St. Rep. 836.



**811. 15. Indignities Rendering Condition Intolerable — As a Form of Cruelty.** — See note 8.

**812.** See notes 2, 4.

**Statutory Terms — Test of Degree of Misconduct.** — See notes 6, 7, 8, 9.  
**Indignities Defined.** — See note 10.

**813. Isolated Act.** — See note 1.

**Misconduct Constituting Indignity.** — See note 2.

**16. Public Defamation.** — See note 4.

**18. Habitual Drunkenness — Statutory Terms.** — See note 8.

**811. 8. Indignities Rendering Condition Intolerable.** — *McCann v. McCann*, 91 Mo. App. 1; *Endsley v. Endsley*, 89 Mo. App. 596; *Lynch v. Lynch*, 87 Mo. App. 32; *Tripp v. Tripp*, 78 Mo. App. 413; *Connelly v. Connelly*, 98 Mo. App. 95. The decree may, in the discretion of the court, be from bed and board or from the bonds of matrimony. *McClanahan v. McClanahan*, 104 Tenn. 217.

**812. 2. Krug v. Krug**, 22 Pa. Super. Ct. 572.

**4. Krug v. Krug**, 22 Pa. Super. Ct. 572.

**6. Louisiana.** — *Duhon v. Duhon*, 110 La. 240.

**7. North Carolina.** — *Green v. Green*, 131 N. Car. 533, 92 Am. St. Rep. 788.

**8. Indignities Rendering Life Burdensome — Washington.** — Abusive conduct by the wife will justify a divorce for this cause. *O'Sullivan v. O'Sullivan*, 35 Wash. 481.

**9. Pennsylvania.** — *McMahan v. McMahan*, 186 Pa. St. 485; *Krug v. Krug*, 22 Pa. Super. Ct. 572; *Baker v. Baker*, 195 Pa. St. 407.

**The Fact that a Wife Was Living Apart from Her Husband** at the time of the alleged indignities is not *per se* and under all circumstances a conclusive bar to a divorce sought on the ground that her husband had "offered such indignities to her person as to render her condition intolerable and life burdensome, and thereby force her to withdraw from his house and family." *Roth v. Roth*, 15 Pa. Super. Ct. 192.

**Withdrawal from House for Cause Other than Indignities Suffered.** — Where the wife sought a divorce on the ground that her husband had offered such indignities to her person as to render her condition intolerable and life burdensome, thereby forcing her to withdraw from his house and family, and it appeared from the evidence that the husband had a loathsome disease, which he had communicated to his wife, it was held that she was entitled to a divorce, though at the time she withdrew from his house she was ignorant of the existence of the disease and its communication to her, and her withdrawal was in consequence of other misconduct of her husband which did not constitute an indignity to her person. In delivering the opinion, the court said: "It is the indignity to her person whereby life and health are imperiled that constitutes the offense, and the withdrawal from his home is only the natural consequence of the act. It is an incident to the requisite and not an essential feature and ingredient of it. It is a 'thereby' engrafted upon the statute law in recognition of an unvarying principle of human nature. His own conduct, as well as his concealment from her of her ailment was a fraud practiced upon her innocence and credulity, and as it vitiates everything

touched by its nettle, her withdrawal under the circumstances and discovery of it subsequently to the commission of the offense ought not to deprive her of a decree in her favor to which she in our opinion is justly entitled. The test, it seems to us, is the justification for, rather than the actual withdrawal. The reasons given for her withdrawal probably do not justify her in so doing, so far as they relate to or affect the ground of complaint in the libel. But the offense which warrants a decree having been committed, her discovery of it after the withdrawal is no reason for refusing the decree. Her ignorance of the shocking treatment deliberately visited upon her by her husband ought not to arrest a liberation from the marriage relations — a continuance of which would blight every purpose for which it is ordained, and wreck every life subjected to its perpetuation." *Fitzgerald v. Fitzgerald*, 22 Pa. Co. Ct. 490.

**10. What Constitutes an Indignity.** — *McGee v. McGee*, 72 Ark. 355.

**Consorting Publicly with Another Woman** is an indignity entitling the wife to a divorce. *Penn-ingroth v. Penningroth*, 72 Mo. App. 329.

**Continual Abuse** may constitute a sufficient cause. *Slaughter v. Slaughter*, 106 Mo. App. 104.

**Giving Notice to Tradesmen Not to Supply the Wife** with goods on credit, where she has not been inordinately extravagant, was held a humiliation entitling her to a divorce in *Young v. Young*, (Tenn. Ch. 1900) 57 S. W. Rep. 438.

**An Accusation that the Husband Was Diseased** and had infected the wife and her child, is not an indignity where not made maliciously. *Goodman v. Goodman*, 80 Mo. App. 274.

**Refusing to Ask a Brother to Leave the Parties' Home** is not an indignity. *Goodman v. Goodman*, 80 Mo. App. 274.

**Failure to Support a Wife Who Has Deserted Her Husband** without justifiable cause is not an indignity. *Roth v. Roth*, 15 Pa. Super. Ct. 192.

**813. 1. Isolated Act.** — *Lynch v. Lynch*, 87 Mo. App. 32; *Van Horn v. Van Horn*, 82 Mo. App. 79; *Selly v. Selly*, 24 Pa. Co. Ct. 286; *Roth v. Roth*, 15 Pa. Super. Ct. 192; *Krug v. Krug*, 22 Pa. Super. Ct. 572; *Bloom v. Bloom*, 22 Pa. Co. Ct. 433; *Hagood v. Hagood*, (Tenn. Ch. 1897) 48 S. W. Rep. 122.

**2. False Charges of Adultery.** — *Tripp v. Tripp*, 78 Mo. App. 413; *Lynch v. Lynch*, 87 Mo. App. 32.

They may be excused by the plaintiff's indiscreet conduct. *Ashburn v. Ashburn*, 101 Mo. App. 365.

**4. Public Defamation.** — *Oberding v. Gohres*, 107 La. 715; *Gagneaux v. Desonier*, 51 La. Ann. 1095; *Linzy v. Linzy*, 51 La. Ann. 630.

**8. Habitual Drunkenness and Cruelty** are sepa-

**814.** See notes 1, 2.

Definition. — See notes 5, 6, 7.

Nature and Extent of Habit. — See notes 8, 9.

**815.** Habit Acquired After Marriage. — See note 2.

**20. Conviction and Imprisonment for Crime — As a Cause for Divorce. —**  
See note 6.

Nature of the Crime. — See notes 7, 8, 9.

**816.** 21. Inability to Live Together. — See note 4.

**VI. DISCRETIONARY DIVORCES. —** See note 6.

**VII. SPECIAL DEFENSES TO DIVORCE SUIT — 1. Recrimination —** Def-  
inition. — See note 8.

**817.** General Principles — Maxim of Suitor with Clean Hands. — See notes 1, 2.

rate grounds of divorce under the *Georgia* statute. *Ring v. Ring*, 112 Ga. 854, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 813.

**814. 1. Habitual Intemperance. —** *Kepfler v. Kepfler*, 134 Cal. 205; *Ring v. Ring*, 112 Ga. 854, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 813; *Gagneaux v. Desonier*, 51 La. Ann. 1095.

Habitual intemperance is a cause for divorce in *New Hampshire*. *Hart v. Hart*, 68 N. H. 478.

**2.** *Ring v. Ring*, 112 Ga. 854, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 813.

It is not necessary, within the meaning of the *Georgia* Code, to show that the defendant was continuously and constantly drunk. *Fuller v. Fuller*, 108 Ga. 256.

**5.** *Ring v. Ring*, 112 Ga. 854, quoting 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 814; *Bizer v. Bizer*, 110 Iowa 248, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 814; *McCann v. McCann*, 91 Mo. App. 1; *Glenn v. Glenn*, 87 Mo. App. 377; *Million v. Million*, 106 Mo. App. 680.

**6.** *Bizer v. Bizer*, 110 Iowa 248, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 814; *Ishler v. Ishler*, 81 Mo. App. 567.

**7.** *Ring v. Ring*, 112 Ga. 854, quoting 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 814.

Evidence of the party's good reputation for sobriety before marriage is inadmissible. *Sullivan v. Sullivan*, 92 Me. 84.

**8. Habit Must Be Fixed. —** *Bizer v. Bizer*, 110 Iowa 248, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 814; *Hart v. Hart*, 68 N. H. 478.

**9. Habit Must Be Continuous. —** *Acker v. Acker*, 22 App. Cas. (D. C.) 353; *Marons v. Marons*, 86 Ill. App. 597; *Bizer v. Bizer*, 110 Iowa 248, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 814.

**After Commencement of Action. —** Evidence of habitual intemperance after the commencement of the action and up to the time of the trial may be admitted in the discretion of the court. *Allen v. Allen*, 73 Conn. 54, 84 Am. St. Rep. 135.

**815. 2. Habit Acquired After Marriage. —** See *Smith v. Smith*, (Tenn. Ch. 1899) 53 S. W. Rep. 1000; *Hickerson v. Hickerson*, (Tenn. Ch. 1899) 52 S. W. Rep. 1019.

**6.** Nor is it cruel or inhuman treatment. *Dion v. Dion*, 92 Minn. 278.

**7. Larceny. —** *Harrington v. Harrington*, 68 N. H. 360.

**8. Infamous Crime. —** Manslaughter is also an infamous crime within the *Indiana* statute, which is now repealed. *Sutherlin v. Sutherlin*, 27 Ind. App. 301.

**Burglary** has been held to be an "infamous crime" within such a statute. *Hess v. Hess*, 22 Pa. Co. Ct. 135.

**9. Separate Sentences Not Added Together. —** It appears that two sentences of one year and six months each, one for larceny and the other for receiving stolen goods, cannot be added together in computing the period of two years. *Kauffman v. Kauffman*, 24 Pa. Super. Ct. 437.

**816. 4. Sylvester v. Sylvester**, 109 Iowa 401; *House v. House*, 102 Va. 235; *Stanley v. Stanley*, 24 Wash. 460.

**6.** Under this *Washington* statute a divorce will be granted for the offense of sodomy. *Poler v. Poler*, 32 Wash. 400.

**8. Recrimination Defined. —** *Fisher v. Fisher*, 93 Md. 298, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 816.

**817. 1. Fisher v. Fisher**, 93 Md. 298, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 816, 95 Md. 314, 93 Am. St. Rep. 334; *Tracey v. Tracey*, (N. J. 1899) 43 Atl. Rep. 713.

**2. Divorce Not Granted to Both Parties. —** *Womack v. Womack*, 73 Ark. 281; *Shoup v. Shoup*, 106 Ill. App. 167; *Fisher v. Fisher*, 93 Md. 298, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 816; *Wells v. Wells*, 108 Mo. App. 88; *Costello v. Costello*, 191 Pa. St. 379.

This applies if misconduct of the plaintiff appears from the evidence in a previous divorce suit between the parties. *Fisher v. Fisher*, 93 Md. 298.

**Both Parties in Fault — Court May Grant Divorce to One. —** Where there was a difference in the degree of the guiltiness of the parties it was held in *Crews v. Crews*, 68 Ark. 158, that the court might, in its discretion, grant a divorce from bed and board to one.

**Statutory Rule in England. —** "In case the court shall be satisfied on the evidence that the case of the petitioner has been proved, and shall not find that the petitioner has been in any manner accessory to or conniving at the adultery of the other party to the marriage, or has condoned the adultery complained of, or that the petition is presented or prosecuted in collusion with either of the respondents, then the court shall pronounce a decree declaring such marriage to be dissolved; provided always that the court shall not be bound to pronounce such decree if it shall find that the petitioner has during the marriage been guilty of adultery, or if the petitioner shall, in the opinion of the court, have been guilty of unreasonable delay in presenting or prosecuting such petition, or of cruelty towards the other party to the marriage, or of



**818. Statutes.** — See note 1.

having deserted or wilfully separated himself or herself from the other party before the adultery complained of, and without reasonable excuse, or of such wilful neglect or misconduct as has conduced to the adultery." 20 & 21 Vict., c. 85, § 31 (Matrimonial Causes Act, 1857).

The object of Parliament in enacting this section, which gives the court discretion to grant a decree of dissolution of marriage to a petitioner guilty of adultery, was that the old practice of the House of Lords on divorce bills should be followed in this respect rather than the maxim of *compensatio criminis* adapted from the civil law by the ecclesiastical courts. There is now no specific limitation to the discretion of the court, and the category of cases for its exercise is not a fixed one. While the discretion is judicial and not arbitrary, the class of cases for its exercise may from time to time be extended. The discretion cannot, on principles of justice, be exercised in favor of a petitioner whose guilt has in any serious degree contributed to the misconduct of the respondent; nor is a respondent to be allowed to evade the consequences of misconduct by alleging misconduct of the petitioner for which the respondent has been in any serious degree responsible. Thus, a wife who leaves her husband because she has transferred her affections to another man, and whose husband correctly assumes this to be so, is in a serious degree responsible for the subsequent misconduct of her husband, and will not be permitted, in a petition for divorce filed by her husband, to evade the consequences of her own misconduct by alleging that of her husband. *Constantinidi v. Constantinidi*, (1903) P. 246.

In order for the cruelty of a petitioning husband to bar his claim for a divorce, it must either have led to the respondent's adultery, or have been entirely wanton and unprovoked in its character. *Pryor v. Pryor*, (1900) P. 157.

If it appears to the court, as a result of the evidence, that a petitioner has been guilty of such wilful neglect or misconduct as has conduced to the adultery complained of, the court, taking cognizance of it, may dismiss the petition, though no charge of such neglect or misconduct has been pleaded. Tacit acquiescence on the part of the petitioning husband may amount to such neglect or misconduct. *Robinson v. Robinson*, (1903) P. 155.

Where, after a divorce *nisi* in an undefended case, the king's proctor brings the adultery of the petitioner to the notice of the court, but it is clear that the adultery of the petitioner has not in any way conduced to the adultery of the respondent on which the decree *nisi* was granted, the court, in the exercise of its discretion, may reject the intervention of the king's proctor and allow the petitioner to retain the decree. *Coombs v. Coombs*, 73 L. J. P. 23.

In a petition by the wife, where it appears that the petitioner committed adultery after the adultery and desertion of her husband, if she fails to show that her husband's misconduct directly conduced to her adultery, she fails to make out a case that will justify the court in exercising its discretion of granting her a decree for divorce. *Shaw v. Shaw*, 20 Times L. Rep. 795.

If the adultery of the petitioner was not directly caused by the misconduct of the respondent, the court may refuse to grant her a decree, though her adultery may have been more or less pardonable. *Wyke v. Wyke*, (1904) P. 149.

A wife, who had been driven by her husband's threats and cruelty to earn money for his benefit by prostitution, left him in 1890 and resorted to other acts of prostitution to supplement her insufficient income, and from 1892 to 1895 cohabited with a certain man as his wife. She led a respectable life from 1895 to the time of filing a petition in 1899 for dissolution of the marriage on the ground of her husband's adultery and cruelty. The court held that under the circumstances her misconduct was the continuing result of the original misconduct of her husband, and that, though she was not under his control at the time, his misconduct had conduced to her adultery from 1892 to 1895, and that therefore the court was justified in exercising its discretion by granting a decree in her favor. *Burdon v. Burdon*, (1901) P. 52.

It has been held that if a wife has committed several acts of adultery with a co-respondent, and the husband has been guilty of conduct conducing to some of these acts, the husband will not lose his right to a divorce if the first of the adulterous acts occurred prior to his conducing conduct. *Millard v. Millard*, 78 L. T. N. S. 471.

In a petition by the husband, where it appeared that the petitioner, in the honest belief that his wife was dead, had formed a *liaison* with another woman, which continued until he learned that his wife was living in adultery with another man, whereupon the petitioner filed a petition for divorce, and the petitioner's evidence showed that he had had adulterous relations with his paramour since the filing of his petition, notwithstanding the fact that his solicitors had warned him not to renew his relations with her *pendente lite*, the court refused to exercise its discretion in the petitioner's favor, and dismissed his petition. *Hynes v. Hynes*, 20 Times L. Rep. 781.

Where the petitioner married another woman without making a sufficient effort to ascertain whether his first wife was still alive, and after discovering that she was alive and was living in adultery with another man he continued to live with his second wife for five or six years before filing his petition, it was held that it was not a case in which the court would exercise its discretion by granting him relief. *Pegg v. Pegg*, 20 Times L. Rep. 353.

In *British Columbia* it has been held that where a husband separates from his wife on account of her intemperance, but makes no provision for her support, he is not entitled to a divorce on the ground of adultery committed by her after the separation. *Forrest v. Forrest*, 8 *British Columbia* 19.

In *Quebec* it seems that in an action by the husband for separation *de corps* the defendant cannot plead facts showing that she herself has a right to a separation *de corps* from her husband. *Privé v. Bradley*, 5 Rev. Leg. N. S. 229.

**818. 1. Statutes Limiting Doctrine of Re-creation** — *Illinois*. — *Stiles v. Stiles*, 167 Ill. 576, reversing 62 Ill. App. 408,



**818.** Any Cause for Divorce Is Sufficient Recrimination. — See note 3.

**819.** Misconduct Need Not Be the Same. — See note 1.

Adultery. — See notes 2, 3, 4, 5, 8, 9.

**820.** Desertion. — See notes 2, 3, 4.

Cruelty. — See notes 5, 6.

**821.** Sufficiency of Misconduct. — See notes 1, 2.

Condoned Offense. — See note 3.

**822.** 2. Condonation — Definition. — See note 1.

Requires Reunion and Reconciliation. — See note 2.

**823.** Reconciliation Must Be with Knowledge of the Misconduct. — See notes 2, 3, 4, 5.

**818.** 3. *Lenning v. Lenning*, 176 Ill. 180; *Anderberg v. Anderberg*, (Iowa 1902) 91 N. W. Rep. 1071.

Impotence is not a bar to a divorce for adultery. *G — v. G —*, (N. J. 1903) 56 Atl. Rep. 736.

**819.** 1. *Eikenbury v. Eikenbury*, 33 Ind. App. 69; *Bordeaux v. Bordeaux*, 30 Mont. 36; *Earle v. Earle*, 43 Oregon 293; *Hugo v. Hugo*, 21 Pa. Co. Ct. 607, 9 Kulp (Pa.) 280; *Moore v. Moore*, 102 Tenn. 148.

It Must Be a Statutory Ground for Divorce. — *McCannon v. McCannon*, 73 Vt. 147.

**2. A Cause for Absolute Divorce Is a Bar in a Suit for Separation.** — *Decker v. Decker*, 193 Ill. 288, 86 Am. St. Rep. 325, quoting 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 819; *Costello v. Costello*, 191 Pa. St. 379. See also *Shaw v. Shaw*, 20 Times L. Rep. 795.

**3.** *Lenning v. Lenning*, 73 Ill. App. 224, affirmed 176 Ill. 180; *Lawlor v. Lawlor*, 76 Mo. App. 637; *Thornton v. Thornton*, (N. J. 1904) 58 Atl. Rep. 647; *Knott v. Knott*, (N. J. 1903) 54 Atl. Rep. 559; *White v. White*, 64 N. J. Eq. 84; *Winston v. Winston*, 165 N. Y. 553; *Rayl v. Rayl*, (Tenn. Ch. 1900) 64 S. W. Rep. 309.

But under certain circumstances though both parties are guilty of adultery, the court in the exercise of its discretion may grant a divorce. *Pilnik v. Numizinski*, 16 Quebec Super. Ct. 231.

**4. Adultery Bars Divorce for Cruelty.** — *Decker v. Decker*, 193 Ill. 288, 86 Am. St. Rep. 325, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 819; *Fisher v. Fisher*, 93 Md. 298; *Gardner v. Gardner*, 9 N. Dak. 192; *Rayl v. Rayl*, (Tenn. Ch. 1900) 64 S. W. Rep. 309.

**5. Adultery Bars Divorce for Desertion.** — *Eikenbury v. Eikenbury*, 33 Ind. App. 69; *Tracey v. Tracey*, (N. J. 1899) 43 Atl. Rep. 713; *Deisler v. Deisler*, 59 N. Y. App. Div. 207; *Earle v. Earle*, 43 Oregon 293.

**8.** *Mendenhall v. Mendenhall*, 12 Pa. Super. Ct. 290.

**9. Adultery to Be Established by Satisfactory Evidence.** — *Knott v. Knott*, (N. J. 1903) 54 Atl. Rep. 559; *Mendenhall v. Mendenhall*, 12 Pa. Super. Ct. 290.

It need not be established beyond reasonable doubt. *Lenning v. Lenning*, 176 Ill. 180.

**820.** 2. **Where a Plaintiff Is Guilty of Desertion.** — *Bordeaux v. Bordeaux*, 30 Mont. 36; *Rapp v. Rapp*, (N. J. 1904) 58 Atl. Rep. 167; *Whinyates v. Whinyates*, (N. J. 1898) 41 Atl. Rep. 363; *Moore v. Moore*, 102 Tenn. 148.

**3.** *Fink v. Fink*, 137 Cal. 550.

**4.** *Walker v. Walker*, 172 Mass. 82; *McCannon v. McCannon*, 73 Vt. 147.

**5. Cruelty Bars Divorce for Adultery.** — *Frieske v. Frieske*, (Mich. 1904) 101 N. W. Rep. 632; *Bordeaux v. Bordeaux*, 30 Mont. 36.

**6. Cruelty a Bar to Divorce for Cruelty.** — *Womack v. Womack*, 73 Ark. 281; *Shoup v. Shoup*, 106 Ill. App. 167; *Hartwell v. Hartwell*, 25 Utah 41.

In *Texas* it is held that the cruelty must be of the same general character as that of the defendant, though it need not be of equal degree. *Bohan v. Bohan*, (Tex. Civ. App. 1900) 56 S. W. Rep. 959.

**821.** 1. **Misconduct Must Constitute a Statutory Cause for Divorce.** — In *North Carolina* adultery by the husband on two occasions only does not constitute recrimination against the wife, as it is not a statutory cause for divorce against the husband in that state. *House v. House*, 131 N. Car. 140.

**2.** *Mahnken v. Mahnken*, 9 N. Dak. 188.

The cruelty need not be equal in degree to that of the defendant. *Bohan v. Bohan*, (Tex. Civ. App. 1900) 56 S. W. Rep. 959.

**3. Condoned Offense.** — *Wabeke v. Wabeke*, (Iowa 1904) 98 N. W. Rep. 559; *Million v. Million*, 106 Mo. App. 680.

**822.** 1. **Condonation Defined.** — *Andrews v. Andrews*, 120 Cal. 184; *Moorhouse v. Moorhouse*, 90 Ill. App. 401; *Wolverton v. Wolverton*, 163 Ind. 26; *Ellithorpe v. Ellithorpe*, (Iowa 1904) 100 N. W. Rep. 328; *Owens v. Owens*, 96 Va. 191.

"Condonation is not absolute forgiveness; it is forgiveness on an implied condition that the misconduct shall not be repeated." *Town v. Town*, 7 British Columbia 122.

**2. Forgiveness Insufficient Without Reconciliation and Reunion.** — *Creech v. Creech*, 126 Mich. 267, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 822; *Osborn v. Osborn*, 174 Mass. 399; *Goeger v. Goeger*, 59 N. J. Eq. 15.

**Where Forgiveness Unnecessary.** — In *Rogers v. Rogers*, (N. J. 1904) 58 Atl. Rep. 822, it was held that where cohabitation had taken place after adultery known to the plaintiff, forgiveness was unnecessary to constitute condonation.

**823.** 2. **Condonation Not Inferred Unless Injured Party Has Knowledge of Facts.** — *Connelly v. Connelly*, 98 Mo. App. 95; *White v. White*, 64 N. J. Eq. 84; *Harris v. Harris*, 83 N. Y. App. Div. 123; *Deisler v. Deisler*, 59 N. Y. App. Div. 207.

**3. Whether Condonation of One Offense Includes Others Unknown.** — This rule will not apply where the condonation is general, and not of specific acts. *Moorhouse v. Moorhouse*, 90 Ill. App. 401.

**4.** *Wilkins v. Wilkins*, (N. J. 1904) 58 Atl.

**824.** What Causes May Be Condoned. — See note 1.  
Cruelty. — See note 2.

**825.** See note 1.

Desertion. — See notes 2, 3.

Repetition of Offense or a New Cause for Divorce Absolves Condonation. — See note 4.

**826.** See notes 1, 2.

Revivor of Condoned Cruelty. — See note 3.

Rep. 821; *Harris v. Harris*, 83 N. Y. App. Div. 123; *Merrill v. Merrill*, 41 N. Y. App. Div. 347.

**823.** 5. *Apgar v. Apgar*, (N. J. 1904) 59 Atl. Rep. 230.

**824.** 1. **Adultery.** — *Hyman v. Hyman*, (1904) P. 403; *Wabeke v. Wabeke*, (Iowa 1904) 98 N. W. Rep. 559; *Bordeaux v. Bordeaux*, 30 Mont. 36; *Rogers v. Rogers*, (N. J. 1904) 58 Atl. Rep. 822; *Watkinson v. Watkinson*, (N. J. 1904) 58 Atl. Rep. 384; *Schaab v. Schaab*, 66 N. J. Eq. 334; *Clayton v. Clayton*, 59 N. J. Eq. 310; *Costello v. Costello*, 191 Pa. St. 379; *Bloom v. Bloom*, 22 Pa. Co. Ct. 433.

Permitting the wife to sleep with him on one occasion is a condonation by the husband of her known adultery. *Toulson v. Toulson*, 93 Md. 754.

**2. Cruelty.** — *Abbott v. Abbott*, 192 Ill. 439; reversing 95 Ill. App. 52; *Wolverton v. Wolverton*, 163 Ind. 26; *Breedlove v. Breedlove*, 27 Ind. App. 560; *May v. May*, 108 Iowa 1, 75 Am. St. Rep. 202; *Hill v. Hill*, 112 La. 770; *Osborn v. Osborn*, 174 Mass. 399; *Fullhart v. Fullhart*, 109 Mo. App. 705; *Streitwolf v. Streitwolf*, (N. J. 1900) 47 Atl. Rep. 14; *Dority v. Dority*, (Tex. Civ. App. 1901) 62 S. W. Rep. 106; *Owens v. Owens*, 96 Va. 191.

**Endurance of Continued Ill Treatment Raises No Presumption** of condonation against the wife. *McChanahan v. McChanahan*, 104 Tenn. 217.

**Not Inferred from One Act of Sexual Intercourse.** — *Wolverton v. Wolverton*, 163 Ind. 26.

**Articles of Separation** will not bar a suit for divorce for cruelty occurring prior to their execution, in the absence of some stipulation implying condonation. *Potts v. Potts*, (N. J. 1899) 42 Atl. Rep. 1055.

**825.** 1. **California.** — *Hunter v. Hunter*, 132 Cal. 473.

**2. Desertion May Be Condoned by a Renewal of Cohabitation.** — *Williams v. Williams*, (1904) P. 145; *Hitchcock v. Hitchcock*, 15 App. Cas. (D. C.) 81; *Willard v. Willard*, 98 Va. 465.

**3. Consent to Separation** will be inferred in some cases from the fact that the husband continued to pay the wife a monthly allowance. *Raddatz v. Raddatz*, 11 Ohio Dec. 55, 8 Ohio N. P. 123.

**4. Repetition of Offense or Commission of New Cause for Divorce — England.** — *Houghton v. Houghton*, (1903) P. 150; *Paine v. Paine*, (1903) P. 263; *Copsey v. Copsey*, 91 L. T. N. S. 363.

**Illinois.** — *Moorhouse v. Moorhouse*, 90 Ill. App. 401.

**Maryland.** — *Fisher v. Fisher*, 93 Md. 298, quoting 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 825.

**Massachusetts.** — *Osborn v. Osborn*, 174 Mass. 399.

**New Jersey.** — *Apgar v. Apgar*, (N. J. 1904)

59 Atl. Rep. 230; *Schaab v. Schaab*, 66 N. J. Eq. 334; *Streitwolf v. Streitwolf*, (N. J. 1900) 47 Atl. Rep. 14; *Seeburger v. Seeburger*, 57 N. J. Eq. 631.

**New York.** — *Deisler v. Deisler*, 59 N. Y. App. Div. 207.

**North Dakota.** — *Gardner v. Gardner*, 9 N. Dak. 192.

**Virginia.** — *Owens v. Owens*, 96 Va. 191.

**826.** 1. **Whether Repetition of Condoned Offense Necessary to Work Revivor.** — *Moorhouse v. Moorhouse*, 90 Ill. App. 401; *Fisher v. Fisher*, 93 Md. 298, quoting 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 825; *Crech v. Crech*, 126 Mich. 267, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 826 and notes; *Cochran v. Cochran*, 93 Minn. 284, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 825.

**Adultery May Revive Condoned Desertion.** — *Paine v. Paine*, (1903) P. 263.

**Condoned Cruelty May Be Revived by Adultery.** — *Dowling v. Dowling*, (1898) P. 228.

**2. Moorhouse v. Moorhouse**, 90 Ill. App. 401; *Fisher v. Fisher*, 93 Md. 298, quoting 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 825; *Crech v. Crech*, 126 Mich. 267, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 826 and notes.

**Misconduct Must Be of Nature Justifying Separation.** — In *Quebec*, under articles 196 and 197 of the Civil Code, the plaintiff in an action for separation from bed and board is not entitled to introduce evidence regarding the misconduct of her husband prior to her last reconciliation with him, until she has proved some fact which, if not of sufficient gravity of itself to justify a separation, will at least strongly support the demand therefor. *Courteau v. Skelly*, 20 Quebec Super. Ct. 216. Compare *Town v. Town*, 7 British Columbia 122.

**Desertion Revives Condoned Adultery.** — Where a wife commits adultery and is taken back by her husband, but she deserts him after the condonation, such desertion revives the condoned adultery and entitles the husband to petition for a dissolution of the marriage. *Copsey v. Copsey*, 91 L. T. N. S. 363. See also *Houghton v. Houghton*, (1903) P. 150.

**3. Revivor of Condoned Cruelty.** — *Abbott v. Abbott*, 192 Ill. 439, reversing 95 Ill. App. 52; *Crech v. Crech*, 126 Mich. 267, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 826 and notes; *Cochran v. Cochran*, 93 Minn. 284, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 825; *Osborn v. Osborn*, 174 Mass. 399; *Streitwolf v. Streitwolf*, (N. J. 1900) 47 Atl. Rep. 14; *Deisler v. Deisler*, 59 N. Y. App. Div. 207.

**Cruelty Revives Condoned Adultery.** — *Fisher v. Fisher*, 93 Md. 298.

**Revivor of Habitual Drunkenness.** — See *Cope v. Cope*, 103 Mo. App. 260.

**Violent and Harsh Treatment Which Would Not**

- 828.** Presumption as Against Wife. — See note 1.  
Evidence. — See note 2.
- 829.** See note 1.  
**3.** Connivance — Definition. — See note 2.  
In the Nature of Estoppel. — See note 3.  
Applies to Subsequent Acts. — See notes 4, 5.
- 830.** Misconduct Constituting Connivance. — See notes 2, 3.
- 831.** See notes 1, 2, 4.  
Evidence. — See note 6.
- 832.** See note 5.  
**4.** Collusion — Definition. — See note 6.
- 833.** Bars a Meritorious Cause for Divorce. — See note 2.

of Itself Constitute a Ground for Separation may be sufficient to revive condoned cruelty and thereby justify a decree for separation. *Town v. Town*, 7 British Columbia 122.

**828. 1. Presumption as Against Wife.** — *Miles v. Miles*, 101 Ill. App. 406, dismissed 200 Ill. 524; *Ellithorpe v. Ellithorpe*, (Iowa 1904) 100 N. W. Rep. 328; *Fisher v. Fisher*, 93 Md. 298; *Creyts v. Creyts*, 133 Mich. 4; *Diedrich v. Diedrich*, (Neb. 1903) 94 N. W. Rep. 536; *Wilkins v. Wilkins*, (N. J. 1904) 58 Atl. Rep. 821; *Merrill v. Merrill*, 41 N. Y. App. Div. 347; *McChanahan v. McChanahan*, 104 Tenn. 217.

**Voluntary Resumption of Cohabitation by the Wife** will condone cruelty. *Fullhart v. Fullhart*, 109 Mo. App. 705.

**2. Express Agreement to Condone.** — See *Creech v. Creech*, 126 Mich. 267.

**Agreement for Separation.** — *Contra*, *Potts v. Potts*, (N. J. 1899) 42 Atl. Rep. 1055.

**Burden of Proof.** — *Goeger v. Goeger*, 59 N. J. Eq. 15; *Merrill v. Merrill*, 41 N. Y. App. Div. 347; *Hann v. Hann*, 58 N. J. Eq. 211.

**Mere Promise of Forgiveness**, without any actual acts of reinstatement, is not sufficient. *Goeger v. Goeger*, 59 N. J. Eq. 15.

**829. 1. Condonation Will Be Presumed** — *Womack v. Womack*, 73 Ark. 281. *Georgia.* — *Stanley v. Stanley*, 115 Ga. 990. *Indiana.* — *Wolverton v. Wolverton*, 163 Ind. 26.

*Iowa.* — *May v. May*, 108 Iowa 1, 75 Am. St. Rep. 202.

*Missouri.* — *Fullhart v. Fullhart*, 109 Mo. App. 705.

*Montana.* — *Bordeaux v. Bordeaux*, 30 Mont. 36.

*New Jersey.* — *Rogers v. Rogers*, (N. J. 1904) 58 Atl. Rep. 822; *Watkinson v. Watkinson*, (N. J. 1904) 58 Atl. Rep. 384; *Toulson v. Toulson*, 93 Md. 754; *Clayton v. Clayton*, 59 N. J. Eq. 310.

*New York.* — *Merrill v. Merrill*, 41 N. Y. App. Div. 347.

**Such Presumption May Be Overcome** where it does not appear that, though temporarily occupying the same bed, the parties renewed sexual intercourse. *Hann v. Hann*, 58 N. J. Eq. 211.

**Condonation of a long-continued course of ill treatment** is not shown by the wife's necessary forbearance during that period. *Breedlove v. Breedlove*, 27 Ind. App. 560.

**2. Connivance Defined.** — *Barclay v. Barclay*, 98 Md. 366, quoting 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 829.

**Knowingly Introducing the Wife to Lewd Com-**

**pany** will constitute connivance under the *Pennsylvania* statute of March 13, 1815, section 7. *Costello v. Costello*, 191 Pa. St. 379.

**3.** *Barclay v. Barclay*, 98 Md. 366, quoting 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 829.

**4. Connivance Not a Bar as to Prior Acts.** — *Millard v. Millard*, 78 L. T. N. S. 471.

**5. Bar as to Subsequent Acts.** — *Contra*, *Viertel v. Viertel*, 99 Mo. App. 710.

**830. 2. Entrapping Innocent Party Is Connivance.** — *May v. May*, 108 Iowa 1, 75 Am. St. Rep. 202; *Torlotting v. Torlotting*, 82 Mo. App. 192; *Armstrong v. Armstrong*, (Supm. Ct. Spec. T.) 45 Misc. (N. Y.) 260; *Costello v. Costello*, 191 Pa. St. 379.

**Where Detectives** or other persons employed by the husband procure others to commit adultery with the wife, the connivance of the husband will be presumed and a decree will not be granted on such evidence. *Thornton v. Thornton*, (N. J. 1904) 58 Atl. Rep. 647.

**3. Watching Guilty Party Without Interfering Is Not Connivance.** — *Torlotting v. Torlotting*, 82 Mo. App. 192. But see *Brown v. Brown*, 63 N. J. Eq. 348, reversing 62 N. J. Eq. 29.

**831. 1. Desertion as Conducting to Adultery.** — But see *Moore v. Moore*, 102 Tenn. 148, where it was held that desertion and abandonment of a wife to a state of want was an inducement to her adultery.

**2. Driving Wife to Prostitution.** — *Burdon v. Burdon*, (1901) P. 52, 69 L. J. P. 118; *Heidrich v. Heidrich*, 22 Pa. Super. Ct. 72.

**4. License Presumed from Too Ready Forgiveness.** — *Viertel v. Viertel*, 86 Mo. App. 494.

**6. Presumption in Favor of Innocence.** — *Thornton v. Thornton*, (N. J. 1904) 58 Atl. Rep. 647; *Warn v. Warn*, 59 N. J. Eq. 642; *Lutz v. Lutz*, (Supm. Ct. Spec. T.) 28 Misc. (N. Y.) 393.

**832. 5.** *Warn v. Warn*, 59 N. J. Eq. 642, distinguishing *Hedden v. Hedden*, 21 N. J. Eq. 61; *Cane v. Cane*, 39 N. J. Eq. 148.

**6. Collusion — Definition.** — Collusion does not exist without an understanding or agreement between the parties. *Drayton v. Drayton*, 54 N. J. Eq. 298.

Collusion is "an agreement between a husband and wife to procure a judgment dissolving the marriage contract, which judgment, if the facts were known, the court would not grant." *Doeme v. Doeme*, 96 N. Y. App. Div. 284.

**833. 2. Dismissal of Case.** — Although the court may suspect collusion from the examination of the witness, it is error to refuse to hear further testimony offered and to dismiss the case. *Blinn v. Blinn*, 113 Iowa 83.



- 834.** Contract Facilitating Divorce. — See note 1.  
Evidence. — See note 2.
- 835.** See note 2.  
The Evidence of Connivance Must Be Clear. — See notes 5, 6.
- 836.** See notes 3, 4, 5.  
5. Delay — Statute of Limitations — Mere Delay Insufficient. — See note 9.
- 837.** See note 1.  
Presumption of Connivance or Condonation. — See note 2.  
Explanation of Delay. — See notes 3, 5.
- 838.** Presumption as Against Wife. — See note 4.  
Statute of Limitations. — See note 5.

**834.** 1. Contract Facilitating Divorce. — *France v. France*, 79 N. Y. App. Div. 291; *Cowan v. Cowan*, (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 754; *Palmer v. Palmer*, 26 Utah 31, 99 Am. St. Rep. 820.

Taking steps to facilitate the proceedings by arrangement with the defendant was held not to be collusion in *Dodge v. Dodge*, 98 N. Y. App. Div. 85.

**Compromise After Commencement of Suit, Abandoned Before Trial.** — A collusive agreement made subsequent to the commencement of the suit, but afterwards abandoned, will be considered at the trial as never having existed. *Shirk v. Shirk*, 75 Mo. App. 573.

**2. When Collusion Presumed.** — *Cowan v. Cowan*, (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 754.

**835.** 2. *Latshaw v. Latshaw*, 18 Pa. Super. Ct. 465.

The collusion cannot be set up by petition by the defendant who has defaulted in a suit for adultery, the petition being filed long after the death of the co-respondent. *Brigham*, Petitioner, 176 Mass. 223.

**5. Evidence of Connivance Must Be Clear.** — *McFarlane v. Cornelius*, 43 Oregon 513.

**A Mere Willingness on Both Sides that a divorce be granted is not connivance.** *Pohlman v. Pohlman*, 60 N. J. Eq. 28.

**New York — Statutory Requirements.** — Where there is no evidence of the statutory requirements of an absence of connivance on the part of the plaintiff or of her desire for a divorce the court is not warranted in granting a decree. *Iverson v. Iverson*, (Supm. Ct. Spec. T.) 29 Misc. (N. Y.) 240.

**Where Suspicion of Collusion Only, Further Proof Should Be Allowed.** — If there is merely a suspicion of collusion, the trial court, though properly refusing to confirm a referee's report in favor of the plaintiff, should allow the plaintiff to submit further proof. *Galloway v. Galloway*, 92 N. Y. App. Div. 300.

**6. English v. English**, 19 Pa. Super. Ct. 586.

**Willingness of Defendant to Submit to Service of Process.** — Where the libellant averred in her libel that she "now is and for one whole year last past has been a citizen and resident of the state of Pennsylvania" and that on a certain date, while the parties were domiciled in the state of New York, the respondent wilfully and maliciously deserted the libellant and persisted in such desertion for the term of two years last past, and "that she expects to be able to have the subpoena issued in this case served upon the respondent within the common-

wealth of Pennsylvania and the jurisdiction of this honorable court, and this without collusion," it was held that the gratuitous averment negating collusion was not such evidence of collusion or of fraud as justified the court in refusing to issue process, as the libellant's sworn statement should have been taken to be true until the contrary appeared. *Shepard v. Shepard*, 18 Pa. Super. Ct. 467.

**836.** 3. *Clopton v. Clopton*, 11 N. Dak. 212.  
**4. Agreement for Division of Property** combined with nonappearance in the suit is not a collusive agreement. *Burgess v. Burgess*, 17 S. Dak. 44.

Where a decree of divorce has been entered on the defendant's default, her subsequent appearance and consent that the decree shall stand, provided she receives a share of the community property, does not constitute collusion. *Hereu v. Hereu*, 6 Ariz. 270.

**The Compromise of Independent Actions** by the wife for the recovery of her property from the husband is not sufficient to establish collusion arising from coercion. *Doeme v. Doeme*, 96 N. Y. App. Div. 284.

**5.** *Jones v. Jones*, 20 App. Cas. (D. C.) 38.  
**9. Statute.** — *Thompson v. Thompson*, 121 Cal. 11.

**837.** 1. **English Divorce Act, as to Delay.** — As to facts which will excuse delay, see *Johnson v. Johnson*, (1901) P. 193, 70 L. J. P. 44, 84 L. T. N. S. 725.

**2. Presumption of Connivance or Condonation.** — An unexplained delay of twenty-five years is fatal. *Barker v. Barker*, 63 N. J. Eq. 593.

**3. Lack of Funds.** — *Barker v. Barker*, 63 N. J. Eq. 593.

**5. Absence of Plaintiff.** — *Barker v. Barker*, 63 N. J. Eq. 593.

**838.** 4. **Presumption Not so Strong as Against Wife.** — *Barker v. Barker*, 63 N. J. Eq. 593.

A wife is not barred by delay who files a bill for review of a decree of divorce in less than a year on account of condonation while the bill was pending, although the husband has married again. *Clayton v. Clayton*, 59 N. J. Eq. 310.

**5. Where Divorce Statute of Limitations Not Applicable.** — Under Ky. Stat., § 2117, providing that a divorce may be had where the parties have lived separate for "five consecutive years next before the application" a divorce will be granted where the parties have not cohabited for eleven years, notwithstanding Ky. Stat., § 2120, providing that actions for divorce must be brought within five years of the doing of the act complained of. *Clark v. Clark*, (Ky. 1899) 53 S. W. Rep. 644.

**839. VIII. GENERAL DEFENSES — 2. Void Marriage — Prior Marriage Undissolved.** — See note 2.

3. Insanity. — See note 3.

**840. 4. Drunkenness — Delirium.** — See note 1.

**841. 6. Res Judicata — Doctrine Applicable to Decrees of Divorce.** — See notes 2, 3.

**842.** See note 1.

Decree Rendered in Another State. — See notes 4, 5.

**844. IX. EVIDENCE — 2. Confessions and Admissions — Admissibility.** — See note 4.

**839. 2. Prior Marriage Undissolved.** — Rayl v. Rayl, (Tenn. Ch. 1900) 64 S. W. Rep. 309.

Where the marriage is not void, but only voidable, as from impotence, which has been ratified by living together for many years, that cannot be set up as a defense to a suit for divorce for adultery. *G — v. G —*, (N. J. 1903) 56 Atl. Rep. 736.

**3. Cruelty While Insane.** — Clowry v. Clowry, 8 Ohio Cir. Dec. 652, 16 Ohio Cir. Ct. 302.

**If the Defendant Is Capable of Understanding** the nature and consequences of acts of cruelty at the time they are committed, they are not excused by eccentricity or mental derangement not amounting to insanity. *Wolverton v. Wolverton*, 163 Ind. 26.

**Insanity as a Defense to Desertion.** — A husband cannot obtain a divorce on the ground of desertion if it is shown that his wife is insane and unable to protect herself in the proceedings. *Com. v. Stevens*, 25 Pa. Co. Ct. 68.

Insanity occurring subsequent to a completed period of desertion is no defense to an action for divorce for desertion. *Fisher v. Fisher*, 54 W. Va. 146. See also *Harrigan v. Harrigan*, 135 Cal. 397, 87 Am. St. Rep. 118.

Inability of a husband, interdicted for insanity, to provide for a wife is not ground for separation from bed and board. *Deneen v. McLeod*, 21 Quebec Super. Ct. 54.

**Adultery While Insane.** — See *Schieck v. Schieck*, (Neb. 1903) 97 N. W. Rep. 474.

**840. 1. Drunkenness Not a Defense to Charge of Cruelty.** — *Jerolaman v. Jerolaman*, (N. J. 1903) 54 Atl. Rep. 166; *Hartwell v. Hartwell*, 25 Utah 41.

**841. 2. Cummins v. Cummins**, 30 Ind. App. 671.

**3. Matters Which Might Have Been Litigated.** — *Murray v. Murray*, 153 Ind. 14; *Phillips v. Phillips*, 69 Kan. 324; *Railey v. Railey*, (Ky. 1902) 66 S. W. Rep. 414; *Deidesheimer v. Deidesheimer*, 74 Mo. App. 234.

**Exceptions.** — A defendant in a divorce case who does not charge adultery of the plaintiff as a defense is not barred from bringing an action for alienating his wife's affections, based on such adultery. *Knickerbocker v. Worthing*, (Mich. 1904) 101 N. W. Rep. 540.

The doctrine of *res judicata* does not apply to a decree tainted with fraud as regards the custody of children, and it may be set aside in that respect. *Trammell v. Trammell*, (Tex. Civ. App. 1904) 80 S. W. Rep. 119.

Though the decree awarding the custody of children is *res judicata* on that point, new facts may create new issues. *People v. Hickey*, 86 Ill. App. 20.

**Alleging Other and Prior Causes for Divorce Not Included in First Bill.** — *Contra*, where it is

shown that the plaintiff was ignorant of the prior causes when the first bill was brought. *Viertel v. Viertel*, 99 Mo. App. 710.

**842. 1. Divorce for Causes Arising Since Decree.** — *Howard v. Howard*, 134 Cal. 346.

**4. Decree of Divorce in Another State.** — *Felt v. Felt*, 59 N. J. Eq. 606, 83 Am. St. Rep. 612; *Felt v. Felt*, 57 N. J. Eq. 101; *Potts v. Potts*, (N. J. 1899) 42 Atl. Rep. 1055.

**5. Decree Void for Want of Jurisdiction Not a Bar.** — *Bell v. Bell*, 181 U. S. 175; *Streitwolf v. Streitwolf*, 181 U. S. 179; *Lake v. Lake*, 65 N. J. Eq. 544; *Dumont v. Dumont*, (N. J. 1900) 45 Atl. Rep. 107; *Streitwolf v. Streitwolf*, 58 N. J. Eq. 569; *Streitwolf v. Streitwolf*, 58 N. J. Eq. 563, 78 Am. St. Rep. 630; *Potts v. Potts*, (N. J. 1900) 45 Atl. Rep. 701; *Osterhoudt v. Osterhoudt*, (Supm. Ct. Spec. T.) 28 Misc. (N. Y.) 285, affirmed 48 N. Y. App. Div. 74, appeal dismissed 168 N. Y. 358; *Winston v. Winston*, 165 N. Y. 553; *Andrews v. Andrews*, 176 Mass. 92; *Thelen v. Thelen*, 75 Minn. 433. See also *Davenport v. Davenport*, (N. J. 1904) 58 Atl. Rep. 535.

**Decree Obtained in Another State by Fraud.** — *Potts v. Potts*, (N. J. 1900) 45 Atl. Rep. 701; *Magowan v. Magowan*, 57 N. J. Eq. 195, reversing 57 N. J. Eq. 322; *Kempson v. Kempson*, 63 N. J. Eq. 783, 92 Am. St. Rep. 682.

**Mormon "Church Divorce."** — The "church divorce" of the Mormon church is not a valid divorce. *Hilton v. Roylance*, 25 Utah 129, 95 Am. St. Rep. 821.

**An Injunction** will be granted to restrain the further prosecution of a divorce suit based on a fraudulent claim of residence. *Huettinger v. Huettinger*, (N. J. 1899) 43 Atl. Rep. 574; *Streitwolf v. Streitwolf*, 58 N. J. Eq. 563, 78 Am. St. Rep. 630; *Kempson v. Kempson*, 58 N. J. Eq. 94.

**844. 4. Confessions and Admissions — California.** — *McMullin v. McMullin*, 140 Cal. 112.

*Michigan.* — *Rosecrance v. Rosecrance*, 127 Mich. 322.

*Nebraska.* — *Schieck v. Schieck*, (Neb. 1903) 97 N. W. Rep. 474.

*New York.* — *Stewart v. Stewart*, 51 N. Y. App. Div. 629.

*North Dakota.* — *Gardner v. Gardner*, 9 N. Dak. 192.

*Oregon.* — *Earle v. Earle*, 43 Oregon 293.

*Pennsylvania.* — *Baker v. Baker*, 195 Pa. St. 407; *Allen v. Allen*, 194 Pa. St. 419; *Gruninger v. Gruninger*, 190 Pa. St. 633.

*West Virginia.* — *Tillis v. Tillis*, 55 W. Va. 198.

**Letters by the Defendant** to his wife containing confessions of adultery are competent evidence of guilt. *Gardner v. Gardner*, 9 N. Dak. 192; *Stewart v. Stewart*, 51 N. Y. App. Div. 629.

**845.** See note 1.

Corroboration. — See note 2.

**846.** Statutes Prohibiting Divorce Based on Confessions and Admissions. — See note 1.

Weight and Credibility. — See notes 5, 7.

Default or Decree Pro Confesso. — See note 8.

Stipulation or Admission of Facts. — See notes 9, 10.

3. Proof of Marriage — Admission of Marriage. — See notes 12, 14.

**847.** 4. Proof of Causes for Divorce — Degree of Proof. — See notes 2, 3.

**Statutes Excluding Admissions.** — Admissions are competent evidence to defeat a divorce, notwithstanding section 8, c. 64, of the *West Virginia Code* of 1899. *Tillis v. Tillis*, 55 W. Va. 198.

**845.** 1. *Kloman v. Kloman*, 62 N. J. Eq. 153.

**2. Confessions and Admissions Entitled to Little Weight.** — *Grannis v. Superior Ct.*, 146 Cal. 245, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 845; *Hatton v. Hatton*, 136 Cal. 353; *Rosecrance v. Rosecrance*, 127 Mich. 322; *Fisher v. Fisher*, 95 Md. 314, 93 Am. St. Rep. 334, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 845; *Rogers v. Rogers*, (N. J. 1904) 58 Atl. Rep. 822; *Barker v. Barker*, 63 N. J. Eq. 593; *Garcin v. Garcin*, 62 N. J. Eq. 189; *Diederichs v. Diederichs*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 591; *Jewell v. Jewell*, 96 N. Y. App. Div. 633.

**Corroborative Evidence Required.** — *Hayes v. Hayes*, 144 Cal. 625; *In re Christiansen*, 17 Utah 412, 70 Am. St. Rep. 794.

The testimony of the husband alone is insufficient to establish the confession of a wife that she has committed adultery. *Perkins v. Perkins*, 59 N. J. Eq. 515.

**846.** 1. **Statutes Prohibiting Divorces Based on Confessions.** — *Fisher v. Fisher*, 95 Md. 314, 93 Am. St. Rep. 334, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 845; *Iverson v. Iverson*, (Supm. Ct. Spec. T.) 29 Misc. (N. Y.) 240.

**5. Corroborated Confession, Collusion Disproved.** — *Stewart v. Stewart*, 51 N. Y. App. Div. 629; *Fowler v. Fowler*, (Supm. Ct. Spec. T.) 29 Misc. (N. Y.) 670; *Gardner v. Gardner*, 9 N. Dak. 192; *Gruninger v. Gruninger*, 190 Pa. St. 633. See also *Diederichs v. Diederichs*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 591.

**7. Confession Vitiating by Fraud or Duress.** — *Perkins v. Perkins*, 59 N. J. Eq. 515.

**8. Default.** — *Eikenbury v. Eikenbury*, 33 Ind. App. 69; *Meyer v. Meyer*, 60 Kan. 859, 57 Pac. Rep. 550; *Rosecrance v. Rosecrance*, 127 Mich. 322; *Seeley v. Seeley*, 64 N. J. Eq. 1; *Diederichs v. Diederichs*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 591; *Jewell v. Jewell*, 96 N. Y. App. Div. 633; *Henderson v. Henderson*, 83 N. Y. App. Div. 449; *Earle v. Earle*, 43 Oregon 293. See also *Smith v. Smith*, 15 Pa. Super. Ct. 366.

The rule also applies to a party's nonappearance at the trial owing to unavoidable accident. *Smith v. Smith*, 145 Cal. 615.

**9. Residence.** — *Smith v. Smith*, 10 N. Dak. 219; *English v. English*, 19 Pa. Super. Ct. 586.

**10. Marriage.** — *Contra*, *Clopton v. Clopton*, 11 N. Dak. 212.

**12.** In *Clopton v. Clopton*, 11 N. Dak. 212, it was held that section 2757, Rev. Codes 1899, requiring corroboration of a defendant's admission, does not apply to proof of the marriage.

**14. Cohabitation and Repute as Evidence of**

**Marriage.** — *Hite v. Hite*, (Cal. 1898) 55 Pac. Rep. 900; *Cuneo v. De Cuneo*, 24 Tex. Civ. App. 436; *Summerville v. Summerville*, 31 Wash. 411.

**The Presumption** is in favor of the validity of the marriage. *Wagoner v. Wagoner*, 128 Mich. 635.

**A Marriage Will Not Be Presumed** where it appears that the cohabitation was illicit and of meretricious origin. *Harron v. Harron*, 128 Cal. 308; *Cuneo v. De Cuneo*, 24 Tex. Civ. App. 436.

The presumption will not arise where one of the parties is already legally married to another. *Moore v. Moore*, 102 Tenn. 148.

**847.** 2. **Complete and Satisfactory Proof Required — California.** — *Hatton v. Hatton*, 136 Cal. 353.

*Idaho.* — *Stover v. Stover*, 6 Idaho 493.

*Iowa.* — *Wells v. Wells*, 116 Iowa 59.

*Kentucky.* — *Fightmaster v. Fightmaster*, (Ky. 1901) 60 S. W. Rep. 918.

*Louisiana.* — *Kemp v. McArthur*, 110 La. 248.

*Michigan.* — *Parkinson v. Parkinson*, 134 Mich. 434.

*Missouri.* — *Glenn v. Glenn*, 87 Mo. App. 377.

*New York.* — *Gorham v. Gorham*, 40 N. Y. App. Div. 564.

*Ohio.* — *Farnsworth v. Farnsworth*, 8 Ohio Dec. 171.

*Pennsylvania.* — *Rishel v. Rishel*, 24 Pa. Super. Ct. 303.

*Tennessee.* — *Smith v. Smith*, (Tenn. Ch. 1899) 53 S. W. Rep. 1000.

*Texas.* — *Dority v. Dority*, (Tex. Civ. App. 1901) 62 S. W. Rep. 106; *Barrett v. Barrett*, (Tex. Civ. App. 1901) 61 S. W. Rep. 951; *Cunningham v. Cunningham*, 22 Tex. Civ. App. 6.

*Virginia.* — *House v. House*, 102 Va. 235.

**Only a Preponderance of Evidence Necessary.** — *Shoup v. Shoup*, 106 Ill. App. 167.

**Preponderance of Evidence Necessary.** — *Luther v. Luther*, 87 Ill. App. 241; *Gardner v. Gardner*, 9 N. Dak. 192.

The testimony of three uncontradicted witnesses to the defendant's adultery was held sufficient, the characters of the witnesses being certified to by the examiner, in *Blanton v. Blanton*, (Ky. 1900) 59 S. W. Rep. 518.

**Evidence Confined to Cause Alleged.** — *Tracey v. Tracey*, (N. J. 1899) 43 Atl. Rep. 713.

**Proof Must Establish Existence of Ground.** — Where divorce is sought on a statutory ground, the applicant must establish with sufficient certainty each and every ingredient claimed by the statute as an element of the ground. All the ingredients must coexist in the proof or no divorce can be granted. *Smith v. Smith*, 15 Pa. Super. Ct. 366.

**3.** *Wabeke v. Wabeke*, (Iowa 1904) 98 N. W. Rep. 559; *Wilson v. Wilson*, (N. J. 1898) 41



- 847. X. WITNESSES — 1. Number of Witnesses Required.** — See note 5.  
**2. Corroborative Evidence — Necessity of.** — See note 6.  
**848.** See notes 1, 2.  
 Circumstantial Evidence as Corroboration. — See note 3.  
**3. Parties as Witnesses — Competency.** — See note 6.  
**849.** Testimony as to Misconduct Admissible. — See note 2.  
 Parties Incompetent. — See note 3.  
 Statutes Permitting Parties to Testify. — See notes 4, 5, 6.  
**850. 4. Communications Between Husband and Wife.** — See note 2.

Atl. Rep. 355; *Farnsworth v. Farnsworth*, 8 Ohio Dec. 171. See also *Diedrich v. Diedrich*, (Neb. 1903) 94 N. W. Rep. 536.

**847. 5. Contra.** — *Kline v. Kline*, 104 Ill. App. 274.

Under the *Kentucky* statute (§ 2119) two witnesses, or one and strong corroborating circumstances, are necessary to sustain a charge of adultery or lewdness. *Barnett v. Barnett*, (Ky. 1901) 64 S. W. Rep. 844.

**6. Courts Act Reluctantly on Uncorroborated Testimony of Party.** — *Kepfler v. Kepfler*, 134 Cal. 205; *Maget v. Maget*, 85 Mo. App. 6; *Krug v. Krug*, 22 Pa. Super. Ct. 572. See also *English v. English*, 19 Pa. Super. Ct. 586.

**848. 1. Corroborative Evidence Held Essential.** — *Womack v. Womack*, 73 Ark. 281; *Kline v. Kline*, 104 Ill. App. 274; *Ashburn v. Ashburn*, 101 Mo. App. 365; *Currier v. Currier*, (N. J. 1904) 59 Atl. Rep. 4; *Feinberg v. Feinberg*, (N. J. 1905) 59 Atl. Rep. 880; *Sabin v. Sabin*, (N. J. 1905) 59 Atl. Rep. 627; *Hunt v. Hunt*, (N. J. 1905) 59 Atl. Rep. 642; *Corder v. Corder*, (N. J. 1904) 59 Atl. Rep. 309; *Cotter v. Cotter*, (N. J. 1904) 58 Atl. Rep. 73; *Watkinson v. Watkinson*, (N. J. 1904) 58 Atl. Rep. 384; *Farrier v. Farrier*, (N. J. 1904) 58 Atl. Rep. 1079; *Gunther v. Gunther*, (N. J. 1904) 57 Atl. Rep. 1015; *Lister v. Lister*, 65 N. J. Eq. 109; *Wood v. Wood*, 63 N. J. Eq. 688; *Seeley v. Seeley*, 64 N. J. Eq. 1; *Grover v. Grover*, 63 N. J. Eq. 771; *Garcin v. Garcin*, 62 N. J. Eq. 189; *McGean v. McGean*, 63 N. J. Eq. 285, *affirming* 60 N. J. Eq. 21; *Kloman v. Kloman*, 62 N. J. Eq. 153; *Moak v. Moak*, (N. J. 1901) 48 Atl. Rep. 394; *Hires v. Hires*, 61 N. J. Eq. 491; *Weigel v. Weigel*, 60 N. J. Eq. 322; *Tracy v. Tracy*, 60 N. J. Eq. 25; *Tracey v. Tracey*, (N. J. 1899) 43 Atl. Rep. 713; *Hunter v. Hunter*, 64 N. J. Eq. 277. See also *Edmiston v. Edmiston*, 8 Pa. Dist. 679.

**2. Corroboration Required by Statute — California.** — *Grannis v. Superior Ct.*, 146 Cal. 245; *Berry v. Berry*, 145 Cal. 784; *Hayes v. Hayes*, 144 Cal. 625; *Hatton v. Hatton*, 136 Cal. 353; *Kuhl v. Kuhl*, 124 Cal. 57.

*Maryland.* — *Goodhues v. Goodhues*, 90 Md. 292.

*Minnesota.* — *Clark v. Clark*, 86 Minn. 249.  
*Washington.* — *McAllister v. McAllister*, 28 Wash. 613.

**The North Dakota Statute**, § 2757, Rev. Codes 1899, does not apply to a party's testimony as to the marriage, which does not require corroboration. *Clopton v. Clopton*, 11 N. Dak. 212.

**3. Corroboration by Circumstantial Evidence.** — *McMullin v. McMullin*, 140 Cal. 112; *Westphal v. Westphal*, 81 Minn. 242; *Wallace v. Wallace*, 65 N. J. Eq. 359; *Hall v. Hall*, 43 Oregon 619; *Baker v. Baker*, 195 Pa. St. 407. See also

*Howe v. Howe*, 16 Pa. Super. Ct. 193, *reversing* 23 Pa. Co. Ct. 363.

Express corroboration of every item of the evidence is not required. *Clark v. Clark*, 86 Minn. 249; *Clopton v. Clopton*, 11 N. Dak. 212.

**6. Party May Testify as to Sexual Abuse.** — *Ridley v. Ridley*, (Iowa 1904) 100 N. W. Rep. 1122; *Maget v. Maget*, 85 Mo. App. 6; *Gardner v. Gardner*, 104 Tenn. 410, 78 Am. St. Rep. 924.

**849. 2.** *Gardner v. Gardner*, 104 Tenn. 410, 78 Am. St. Rep. 924.

In *Kentucky*, under Civ. Code Prac., § 606, the wife cannot testify to the husband's cruelty. *Fightmaster v. Fightmaster*, (Ky. 1901) 60 S. W. Rep. 918.

**3. Parties Are Incompetent.** — *Bergheimer v. Bergheimer*, 17 App. Cas. (D. C.) 381; *Lambert v. Lambert*, (Ky. 1901) 63 S. W. Rep. 614; *Fightmaster v. Fightmaster*, (Ky. 1901) 60 S. W. Rep. 918.

**4. Express Provisions Relating to Divorce.** — *Rosecrance v. Rosecrance*, 127 Mich. 322; *Seago v. Seago*, (Tex. Civ. App. 1901) 64 S. W. Rep. 941; *Talbot v. Guilmartin*, 10 Quebec K. B. 564.

**Pennsylvania Statute.** — See *Costello v. Costello*, 191 Pa. St. 379.

**5. Statute Permitting Testimony in Proof of Marriage Only.** — Under section 5 of the *New Jersey* act concerning evidence (P. L. 1900, p. 363) a party is competent, though not compellable, to give evidence for the other in a divorce suit. *Schaab v. Schaab*, 66 N. J. Eq. 334.

In *Broom v. Broom*, 130 N. Car. 562, it was held that such a statute does not prevent a wife from disproving her adultery.

**Under New York Code, § 831.** — *Goldie v. Goldie*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 389. See also *Valentine v. Valentine*, 87 N. Y. App. Div. 156.

This does not make it competent for the husband to rebut evidence of his connivance in his wife's adultery. *Lutz v. Lutz*, (Supm. Ct. Spec. T.) 28 Misc. (N. Y.) 393.

Parties are competent witnesses only to prove the marriage and disprove adultery. *Budd v. Budd*, 55 N. Y. App. Div. 113.

In *Pennsylvania* where personal service has been had in a divorce suit either party may testify fully against the other, but where the case proceeds on publication after two returns of *non est inventus*, neither party may testify to any fact other than that of marriage. *Pelton v. Pelton*, 23 Pa. Co. Ct. 582.

**6. In New Hampshire** the testimony of parties has always been received. *Warner v. Warner*, 69 N. H. 437.

**850. 2. Communications During Existence of Marriage Privileged.** — *Hall v. Hall*, 77 Mo. App. 600.

**850.** To What Communications Privilege Extends. — See note 4.  
 5. Privileged Communications to Physicians and Attorneys. — See note 6.

6. Relatives, Children, etc., as Witnesses — Relatives, Servants, and Friends as Witnesses. — See note 8.

Children as Witnesses. — See note 10.

**851.** See note 2.

**XI. DECREES OF DIVORCE — 2. Decree Nisi — Nature.** — See note 4.

**852.** 3. Decree of Separation — Nature and Duration. — See note 2.

Separation Limited or Perpetual under Statute. — See note 4.

Discretion of Court in Framing Decree. — See note 6.

Effect of Decree of Separation on Marriage Relation. — See note 9.

Capacity to Sue. — See note 13.

**853.** Statutes Providing or Authorizing a Change in Property Rights or Separation. — See notes 5, 6.

4. Decree of Divorce from the Bonds of Matrimony — Effect on Marriage Relation. — See note 7.

**854.** See notes 1, 2.

Wife's Name After Divorce. — See notes 3, 4.

Disability of Coverture. — See note 6.

Wife May Not Testify Concerning Vile, Abusive, or Profane Language. — *Schweikert v. Schweikert*, 108 Mo. App. 477.

**850.** 4. *Fuller v. Fuller*, 177 Mass. 184, 83 Am. St. Rep. 273.

6. Communications to Physicians. — *Contra*, *Banigan v. Banigan*, (R. I. 1904) 59 Atl. Rep. 313.

8. *Parkinson v. Parkinson*, 134 Mich. 434; *Feinberg v. Feinberg*, (N. J. 1905) 59 Atl. Rep. 880; *Brown v. Brown*, 63 N. J. Eq. 348, *reversing* 62 N. J. Eq. 29.

10. In *Casey v. Casey*, 116 Iowa 655, divorce was granted on the testimony of the children, in addition to that of the plaintiff.

Divorce Granted Solely on Testimony of Parties' Grown Sons. — *Duhon v. Duhon*, 110 La. 240.

**851.** 2. *Mayer v. Mayer*, (N. J. 1901) 49 Atl. Rep. 1078.

4. Louisiana. — *Nicholas v. Maddox*, 52 La. Ann. 1493; *Hill v. Hill*, 114 La. 117.

**852.** 2. Effects Separate until Reconciliation. — See *Linzay v. Linzay*, 51 La. Ann. 630.

4. The Arkansas Statute (Sand. & H. Dig., § 2505) authorizes a divorce from bed and board as in the ecclesiastical courts of England. *Crews v. Crews*, 68 Ark. 158.

6. Court's Discretion under Statute. — *Wolf v. Wolf*, 121 Ga. 113; *Salzbrun v. Salzbrun*, 81 Minn. 287; *McKnight v. McKnight*, (Neb. 1904) 98 N. W. Rep. 62.

9. Marriage Not Dissolved. — *State v. Judge*, 114 La. 44; *G— v. G—*, (N. J. 1903) 56 Atl. Rep. 736; *Drum v. Drum*, 69 N. J. L. 557.

**853.** 5. In Louisiana a divorce from bed and board dissolves the community of effects. *Duhon v. Duhon*, 110 La. 240; *Linzay v. Linzay*, 51 La. Ann. 630.

6. Court Authorized to Provide for Settlement of Property Rights. — *Gallager v. Gallager*, 101 Wis. 202.

7. Divorce from Bond of Matrimony Releases All Marriage Obligation. — *Atherton v. Atherton*, 181 U. S. 155; *Campbell v. Campbell*, 115 Ky.

656; *Eldred v. Eldred*, 62 Neb. 613; *De Roche v. De Roche*, 12 N. Dak. 17; *Curtis v. Curtis*, 200 Pa. St. 255.

Divorce Determines All Property Rights up to its date. *Natcher v. Clark*, 151 Ind. 368.

Michigan — When Decree Takes Effect. — A marriage subsequent to a decree of divorce is valid although the decree was not formally filed until three days after the marriage. *People v. Booth*, 121 Mich. 131.

**854.** 1. Both Parties Free to Marry Again. — *Matter of Wood*, 137 Cal. 129.

2. Guilty Party Prohibited from Marrying. — *Barfield v. Barfield*, 139 Ala. 290; *Braun v. Braun*, 194 Pa. St. 287, 75 Am. St. Rep. 699.

Permission of Court. — *Matter of Salmon*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 251.

Guilty Party May Marry in Another State. — *Buelna v. Ryan*, 139 Cal. 630; *Matter of Wood*, 137 Cal. 129; *Whippen v. Whippen*, 171 Mass. 560; *Petit v. Petit*, (Supm. Ct. Spec. T.) 45 Misc. (N. Y.) 155; *Willey v. Willey*, 22 Wash. 115, 79 Am. St. Rep. 923.

3. Right of Divorced Peeress to Use Title After Remarriage. — Where the marriage of a commoner with a peer of the realm has been dissolved at the instance of the wife, and she afterwards, on marrying a commoner, continues to use the title which she acquired by her first marriage, though she has no legal right to use it, she does not thereby commit such a legal wrong against her former husband, or so affect his enjoyment of the incorporeal hereditament he possesses in his title, as to entitle him, in the absence of malice, to an injunction restraining her use of the title. *Cowley v. Cowley*, (1901) A. C. 450.

4. Decree Authorizing Change of Name. — The decree may authorize the wife to resume her maiden name. See *Benton's Succession*, 106 La. 494.

6. Wife Divorced A Vinculo May Sue Former Husband. — *Jackson v. Jackson*, 135 Mich. 549.

**855. XII. PROPERTY RIGHTS AFTER DISSOLUTION OF MARRIAGE — 1. Effect on Nonvested Property Rights.** — See note 1.

3. Life Insurance. — See note 3.

**856. 5. Dower.** — See notes 3, 4, 5.

**857. Statutes.** — See notes 1, 4, 5.

Dower After Divorce in Another State. — See note 6.

**858. 6. Curtesy.** — See notes 1, 3.

**859. 8. Homestead Rights.** — See notes 2, 4.

**860. Rights of Divorced Husband in Homestead.** — See note 3.

Exemption as Against Creditors. — See note 4.

9. Community Property. — See notes 6, 7.

**861. XIII. RESTORATION AND DIVISION OF PROPERTY — 1. Restoration of Wife's Property — Statutes Permitting Restoration of Wife's Property.** — See note 4.

**862. 2. Division of Property — Statutes Authorizing.** — See note 2.

**855. 1. Divorce Cuts Off All Nonvested Rights.** — *Hatch v. Small*, 61 Kan. 242; *Jacobs v. Gaskill*, 69 Kan. 872; *Durland v. Durland*, 67 Kan. 734.

Vested Interests are not disturbed by the decree unless the instrument under which the vesting occurs so provides. *Buttler v. Buttler*, (N. J. 1904) 56 Atl. Rep. 722.

**Husband's Right to Select Homestead.** — The inchoate right of a husband to select a homestead from the separate property of his wife is devested by a decree of divorce in her favor. *Klump v. Klump*, 58 Neb. 748.

**Widow's Exemption from Decedent's Estate.** — A decree of divorce *a mensa et thoro* with an order for alimony, granted at the suit of the wife, will defeat her claim to the three hundred dollars exemption out of the estate of her husband at his death. *Evans's Estate*, 21 Pa. Super. Ct. 430.

**3. Insurance Payable to Wife After Divorce.** — *Martin v. Modern Woodmen of America*, 111 Ill. App. 99; *Grego v. Grego*, 78 Miss. 443; *Supreme Commandery, etc., v. Everding*, 11 Ohio Cir. Dec. 419, 20 Ohio Cir. Ct. 689; *In re Insurance Policy*, 5 Ohio Dec. 561, 7 Ohio N. P. 527.

But the wife's interest as assignee in a policy on her husband's life ceases with divorce, except in respect of premiums paid by her. *Hatch v. Hatch*, (Tex. Civ. App. 1904) 80 S. W. Rep. 411.

**856. 3. Statutes Preserving Wife's Right of Dower.** — *Kirkpatrick v. Kirkpatrick*, 197 Ill. 144; *Hatch v. Small*, 61 Kan. 242, quoting 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 856; *Bufe v. Bufo*, 88 Mo. App. 627.

**Relinquishment of Right.** — The wife may relinquish the right of dower preserved to her by statute when the divorce is granted, or at any time thereafter. *Julier v. Julier*, 62 Ohio St. 90.

**4. Statutes Preserving Dower on Divorce for Fault of Husband.** — *Brown's Appeal*, 72 Conn. 148; *Hatch v. Small*, 61 Kan. 242, quoting 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 856; *Walton v. Walton*, 57 Neb. 102; *De Witt v. DeWitt*, 67 Ohio St. 340.

**5. The Right to Dower Is Terminated by Divorce.** — *Hatch v. Small*, 61 Kan. 242, quoting 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 856; *Allen v. Austin*, 21 R. I. 254.

**857. 1. Barkman v. Barkman**, 94 Ill. App. 440.

**4. Statutes Providing for Assignment of Dower on Divorce.** — *Keith v. Mellenthin*, 92 Minn. 527, 104 Am. St. Rep. 679.

**5. Lands Acquired by Husband After Divorce.** — *Nichols v. Park*, 78 N. Y. App. Div. 95.

**6. New York — Decree in Another State Must Be for Adultery to Bar Dower.** — *Starbuck v. Starbuck*, 62 N. Y. App. Div. 437, reversed 173 N. Y. 503.

**858. 1. Curtesy Barred.** — *Jacobs v. Gaskill*, 69 Kan. 872; *Durland v. Durland*, 67 Kan. 734; *Doyle v. Rolwing*, 165 Mo. 231, 88 Am. St. Rep. 416, quoting 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 858.

**3. Doyle v. Rolwing**, 165 Mo. 231, 88 Am. St. Rep. 416.

**859. 2. Klump v. Klump**, 58 Neb. 748.

**4. After Divorce, Wife Retains No Interest in Homestead.** — It appears that this applies although the statute directs that the decree shall vest the title to the homestead in the innocent wife, if in fact the decree is silent on the subject. *Moore v. Ward*, 107 Tenn. 731.

**860. 3. No Homestead Right Against Alimony Decree to Be a Specific Lien.** — The circumstances of the wife's age and health may make the direction of such a lien unjustifiable. *Frackelton v. Frackelton*, 103 Wis. 673.

**4. In Iowa** the homestead of a wife who has obtained a decree of divorce against her husband which is silent as to the homestead, is exempt against her creditors although she leases it to strangers without abandoning the intention of resuming personal occupancy. *In re Pope*, 98 Fed. Rep. 722.

**6. When Husband and Wife Tenants in Common After Divorce.** — *Williamson v. Gore*, (Tex. Civ. App. 1903) 73 S. W. Rep. 563; *Moor v. Moor*, 24 Tex. Civ. App. 150; *Benfield v. Benfield*, 44 Oregon 94.

**7. Moor v. Moor**, 24 Tex. Civ. App. 150.

**861. 4. Kentucky.** — *Crabtree v. Crabtree*, (Ky. 1905) 85 S. W. Rep. 211; *Irwin v. Irwin*, 107 Ky. 24. See also *Gooding v. Gooding*, 104 Ky. 755.

The court may refuse to restore to a guilty wife the property which the husband has acquired from her during the marriage. *Dollins v. Dollins*, (Ky. 1904) 83 S. W. Rep. 95.

**Nebraska.** — *Berdolt v. Berdolt*, 56 Neb. 792.

**Washington.** — *Matter of Cave*, 26 Wash. 213, 90 Am. St. Rep. 736.

**862. 2. California.** — *Gorman v. Gorman*,



**863.** Power to Provide for Maintenance Includes Power to Divide Property. — See note 1.

Statutes Authorizing Alimony but Not Division. — See note 4.

**864.** Nature and Amount of Award. — See notes 2, 3.

Title Granted on Division. — See notes 4, 5.

Division Impracticable. — See note 7.

Both Alimony and Portion of Property. — See note 9.

Considerations in Making Estimate. — See notes 10, 11.

**865.** Amount Affected by Conduct of Parties. — See note 1.

Share of Guilty Wife. — See note 2.

Division of Community Property, Homestead, Separate Property. — See notes 4, 7.

Fraudulent Conveyances. — See notes 9, 10.

**866.** XIV. CUSTODY AND SUPPORT OF CHILDREN — 2. Custody Pending Suit. — See note 5.

134 Cal. 378; *Huellmantel v. Huellmantel*, 124 Cal. 583. See also *Sun Ins. Co. v. White*, 123 Cal. 196.

**Oklahoma.** — Under the Oklahoma statute the court has the power to award a guilty wife alimony so that she may not be left destitute. *Pauly v. Pauly*, 14 Okla. 1.

**Oregon.** — Under the Oregon statute the court cannot partition the land; the parties hold it as tenants in common. *Benfield v. Benfield*, 44 Oregon 94.

**Texas.** — *Gebhart v. Gebhart*, (Tex. Civ. App. 1901) 61 S. W. Rep. 964; *Ex p. Latham*, (Tex. Civ. App. 1904) 82 S. W. Rep. 1046; *Long v. Long*, 29 Tex. Civ. App. 536.

**Wisconsin.** — *Williams v. Williams*, 122 Wis. 27; *Lindenmann v. Lindenmann*, 118 Wis. 175; *Martin v. Martin*, 112 Wis. 314; *Hoernig v. Hoernig*, 109 Wis. 229; *Roelke v. Roelke*, 103 Wis. 204; *McChesney v. McChesney*, 91 Wis. 268.

**863. 1. Iowa.** — *Casey v. Casey*, 116 Iowa 655.

**Illinois.** — *Champion v. Myers*, 207 Ill. 308; *Van Vleet v. De Witt*, 200 Ill. 153.

Under the Illinois statute conveyance of property equitably belonging to one spouse, the title of which is held by the other, may be compelled. *Heyman v. Heyman*, 210 Ill. 524.

**4. Agreement of Parties.** — The court may set aside the agreement of the parties concerning the division of the property. *Richardson v. Richardson*, 36 Wash. 272.

**864. 2. Gorman v. Gorman, 134 Cal. 378; *Smith v. Smith*, 124 Cal. 651; *Dollins v. Dollins*, (Ky. 1904) 83 S. W. Rep. 95.**

**3. Alimony may be decreed to a guilty husband.** *McDonald v. McDonald*, 117 Iowa 307.

**4. Granting Wife Life Estate.** — *Crabtree v. Crabtree*, (Ky. 1905) 85 S. W. Rep. 211.

Under *Texas Rev. Stat.*, art. 2980, providing that neither party shall be divested of the title to real property, a decree giving the wife the whole of the community property will be modified so as to give her an undivided half of the real property in fee and a life interest in the whole. *Long v. Long*, 29 Tex. Civ. App. 536.

**5. Ex p. Latham, (Tex. Civ. App. 1904) 82 S. W. Rep. 1046.**

**7. Mere Division Is Not for the Interest of the Parties.** — *Huellmantel v. Huellmantel*, 124 Cal. 583.

**9.** See *Palica v. Palica*, 114 Wis. 236.

**10. Manner of Acquiring Property Considered.** *Heyman v. Heyman*, 210 Ill. 524; *McDonald v. McDonald*, 117 Iowa 307; *O'Sullivan v. O'Sullivan*, 35 Wash. 481; *Lindenmann v. Lindenmann*, 118 Wis. 175; *Von Trott v. Von Trott*, 118 Wis. 29; *Hoernig v. Hoernig*, 109 Wis. 229; *Roelke v. Roelke*, 103 Wis. 204; *McChesney v. McChesney*, 91 Wis. 268.

**11. Condition of Parties — Support of Children.** — *Crabtree v. Crabtree*, (Ky. 1905) 85 S. W. Rep. 211; *Williams v. Williams*, 122 Wis. 27; *Von Trott v. Von Trott*, 118 Wis. 29; *Martin v. Martin*, 112 Wis. 314; *Hoernig v. Hoernig*, 109 Wis. 229.

**865. 1. Conduct of Parties.** — *Gorman v. Gorman*, 134 Cal. 378; *Richardson v. Richardson*, 36 Wash. 272; *Lindenmann v. Lindenmann*, 118 Wis. 175.

**2.** Under some circumstances the court will refuse alimony to a wife guilty of adultery. *Dollins v. Dollins*, (Ky. 1904) 83 S. W. Rep. 95.

**4. Division of Community Property.** — *Beard v. Beard*, 57 Neb. 754; *Ex p. Latham*, (Tex. Civ. App. 1904) 82 S. W. Rep. 1046; *Richardson v. Richardson*, 36 Wash. 272; *O'Sullivan v. O'Sullivan*, 35 Wash. 481.

**California Statute.** — *Smith v. Smith*, 124 Cal. 651.

**7. Homestead.** — *Hoernig v. Hoernig*, 109 Wis. 229.

*Shannon's Code Tenn.*, § 3810, directing the vesting title in an innocent wife by the decree, is not self-executing, and where the decree is silent on the subject the wife loses all rights therein. *Moore v. Ward*, 107 Tenn. 731.

**9.** *Van Vleet v. De Witt*, 200 Ill. 153; *Zumbiel v. Zumbiel*, (Ky. 1904) 83 S. W. Rep. 598; *Hill v. Hill*, 112 La. 770; *Bradley v. Ramsey*, (Tex. Civ. App. 1901) 65 S. W. Rep. 1112; *Kane v. Kane*, 35 Wash. 517.

**10. Suit by Divorced Wife to Set Aside Fraudulent Conveyance by Husband.** — *McFaddin v. McFaddin*, 134 Ala. 337; *Tully v. Tully*, 137 Cal. 60; *Ex p. Latham*, (Tex. Civ. App. 1904) 82 S. W. Rep. 1046; *Schultye v. Schultye*, (Tex. Civ. App. 1901) 66 S. W. Rep. 56, *affirmed* 95 Tex. 352. See also *Ruffenach v. Ruffenach*, 13 Colo. App. 102; *Richmond v. Smith*, 117 Wis. 290.

**866. 5. Child to Be Kept Within Jurisdiction.** — Where the court has acquired jurisdiction

**867. 3. Custody Where Divorce Is Denied.** — See notes 6, 7.

**4. Custody After Divorce — Agreement as to Custody.** — See note 8.

**The Welfare of the Children Controls.** — See note 9.

**868. See note 1.**

**When Mother Preferred.** — See notes 2, 3.

in the suit, the departure of the children from the state does not deprive the court of jurisdiction to fix their custody. *State v. Rhoades*, 29 Wash. 61.

**867. 6.** The power was exercised, though a decree of divorce was denied, in *Power v. Power*, 65 N. J. Eq. 93.

**7. Statutes Permitting Award of Custody Where Divorce Denied.** — *Garrett v. Garrett*, 114 Iowa 439; *Defee v. Defee*, (Tex. Civ. App. 1899) 51 S. W. Rep. 274; *Stanley v. Stanley*, 24 Wash. 460. See also *Hickerson v. Hickerson*, (Tenn. Ch. 1899) 52 S. W. Rep. 1019.

**8. Agreement of Parties Not Conclusive on Court.** — *Lowrey v. Lowrey*, 108 Ga. 766; *Pearce v. Pearce*, 30 Mont. 269; *Norval v. Zinsmaster*, 57 Neb. 158, 73 Am. St. Rep. 500.

Such an agreement will bind the father unless he can show that the welfare of the child will be promoted by a change. *Fletcher v. Hickman*, 50 W. Va. 244, 88 Am. St. Rep. 862.

**9. Child's Welfare Controls Father's Common-law Rights.** — *Fletcher v. Fletcher*, (Ky. 1900) 54 S. W. Rep. 953; *Arne v. Holland*, 85 Minn. 401; *Meyer v. Meyer*, 100 Va. 228, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 867; *Cariens v. Cariens*, 50 W. Va. 113, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 867; *Fletcher v. Hickman*, 50 W. Va. 244, 88 Am. St. Rep. 862, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 867.

**The Father's Right** cannot be ignored by the court where circumstances show that he is the fittest guardian. *Edwards v. Edwards*, (Ky. 1901) 64 S. W. Rep. 726.

**868. 1. Child's Welfare Controlling Consideration** — *California*. — *Crater v. Crater*, 135 Cal. 633.

*District of Columbia*. — *Wells v. Wells*, 11 App. Cas. (D. C.) 392.

*Georgia*. — *Williams v. Crosby*, 118 Ga. 296.

*Illinois*. — *People v. Hickey*, 86 Ill. App. 20.

*Indiana*. — *Stone v. Stone*, 158 Ind. 628.

*Kentucky*. — *Crabtree v. Crabtree*, (Ky. 1905) 85 S. W. Rep. 211; *Goodridge v. Goodridge*, (Ky. 1903) 76 S. W. Rep. 164; *Masterson v. Masterson*, (Ky. 1903) 71 S. W. Rep. 490; *Irwin v. Irwin*, 105 Ky. 632.

*Minnesota*. — *Arne v. Holland*, 85 Minn. 401.

*Missouri*. — *In re Steele*, 107 Mo. App. 567; *Ashburn v. Ashburn*, 101 Mo. App. 365; *West v. West*, 94 Mo. App. 683.

*New York*. — *Van Buren v. Van Buren*, 75 N. Y. App. Div. 615; *Osterhoudt v. Osterhoudt*, (Supm. Ct. Spec. T.) 28 Misc. (N. Y.) 285, affirmed 48 N. Y. App. Div. 74, appeal dismissed 168 N. Y. 358; *McGown v. McGown*, 29 N. Y. App. Div. 628.

*Ohio*. — *Coons' Application*, 11 Ohio Cir. Dec. 208.

*Utah*. — *Griffin v. Griffin*, 18 Utah 98.

*Virginia*. — *Meyer v. Meyer*, 100 Va. 228, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 867.

*West Virginia*. — *Fletcher v. Hickman*, 50 W.

Va. 244, 88 Am. St. Rep. 862, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 867; *Cariens v. Cariens*, 50 W. Va. 113, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 867.

**2. Custody of Daughter** — *Illinois*. — *People v. Hickey*, 86 Ill. App. 20.

*Indiana*. — *Breedlove v. Breedlove*, 27 Ind. App. 560.

*Iowa*. — *Ostheimer v. Ostheimer*, 125 Iowa 523; *Bizer v. Bizer*, 110 Iowa 248.

*New Jersey*. — *Feinberg v. Feinberg*, (N. J. 1905) 59 Atl. Rep. 880; *Abele v. Abele*, 62 N. J. Eq. 644; *Wilson v. Wilson*, (N. J. 1898) 41 Atl. Rep. 355.

*New York*. — *Israel v. Israel*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 335; *Osterhoudt v. Osterhoudt*, (Supm. Ct. Spec. T.) 28 Misc. (N. Y.) 285, affirmed 48 N. Y. App. Div. 74, appeal dismissed 168 N. Y. 358.

*North Dakota*. — *De Roche v. De Roche*, 12 N. Dak. 17.

Where the wife obtains a divorce with the unrestricted custody of an infant daughter, the domicile of the child is that of the mother. *Fox v. Hicks*, 81 Minn. 197.

**3. Very Young Children Usually Confided to Mother** — *Illinois*. — *People v. Hickey*, 86 Ill. App. 20.

*Indiana*. — *Breedlove v. Breedlove*, 27 Ind. App. 288.

*Kentucky*. — *Crabtree v. Crabtree*, (Ky. 1905) 85 S. W. Rep. 211; *Baker v. Baker*, (Ky. 1905) 85 S. W. Rep. 729; *Railey v. Railey*, (Ky. 1902) 66 S. W. Rep. 414; *Fletcher v. Fletcher*, (Ky. 1900) 54 S. W. Rep. 953; *Bristow v. Bristow*, (Ky. 1899) 51 S. W. Rep. 819.

*Louisiana*. — *Bursha v. Lane*, 105 La. 112.

*Missouri*. — *Million v. Million*, 106 Mo. App. 680; *Freeman v. Freeman*, 94 Mo. App. 504.

*New Jersey*. — *Power v. Power*, (N. J. 1904) 58 Atl. Rep. 192 (where the children were ten and five years old).

*New York*. — *Israel v. Israel*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 335; *People v. Winston*, 65 N. Y. App. Div. 231.

*Texas*. — *Long v. Long*, 29 Tex. Civ. App. 536; *Wetz v. Wetz*, 27 Tex. Civ. App. 597.

*Utah*. — *Griffin v. Griffin*, 18 Utah 98.

*Virginia*. — *Meyer v. Meyer*, 100 Va. 228; *Trimble v. Trimble*, 97 Va. 217.

*Washington*. — *Richardson v. Richardson*, 36 Wash. 272.

*West Virginia*. — *Cariens v. Cariens*, 50 W. Va. 113.

Where the father obtained a divorce for his wife's adultery, and it was proved that the latter had no visible means of support except remittance from a paramour, the custody of the young children was given to the father. *Evans v. Evans*, (Tenn. Ch. 1900) 57 S. W. Rep. 367.

A mother who has been awarded the custody of children cannot, by will, deprive the father of their custody after her death. *Matter of Nell*, 20 Wash. 652.

**869.** See note 1.

**Guilt or Innocence of Party.** — See notes 2, 3.

**870.** Custody Given to Third Person. — See notes 1, 2, 3.

**Consulting Wishes of Child.** — See note 4.

**Duration of Custody.** — See notes 5, 6.

**869. 1. Health of Child — Custody Granted to Mother.** — *Koontz v. Koontz*, 25 Wash. 336.

**2. Custody Usually Awarded to Innocent Party** — *Illinois*. — *Stevens v. Stevens*, 210 Ill. 362; *Stiles v. Stiles*, 167 Ill. 576.

*Iowa*. — *Casey v. Casey*, 116 Iowa 655.

*Kentucky*. — *Hall v. Hall*, (Ky. 1903) 77 S. W. Rep. 668; *Harl v. Harl*, (Ky. 1903) 73 S. W. Rep. 756.

*Michigan*. — *Creyts v. Creyts*, 133 Mich. 4.

*Mississippi*. — *Randall v. Randall*, (Miss. 1900) 28 So. Rep. 19.

*Missouri*. — *Helbing v. Helbing*, 80 Mo. App. 327; *Ashburn v. Ashburn*, 101 Mo. App. 365; *Penningroth v. Penningroth*, 72 Mo. App. 329. *New York*. — *Stewart v. Stewart*, 51 N. Y. App. Div. 629; *McGown v. McGown*, 29 N. Y. App. Div. 628.

*Tennessee*. — *Evans v. Evans*, (Tenn. Ch. 1900) 37 S. W. Rep. 367.

*Utah*. — *Stover v. Stover*, 24 Utah 92; *Griffin v. Griffin*, 18 Utah 98.

*Virginia*. — *Owens v. Owens*, 96 Va. 191.

*West Virginia*. — *Cariens v. Cariens*, 50 W. Va. 113.

**3.** *Linzy v. Linzy*, 51 La. Ann. 630; *Jennings v. Jennings*, 85 Mo. App. 290, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 869; *Feinberg v. Feinberg*, (N. J. 1905) 59 Atl. Rep. 880; *Power v. Power*, 65 N. J. Eq. 93.

**Adulterous Mother an Unfit Custodian.** — *McGown v. McGown*, 29 N. Y. App. Div. 628; *Goodridge v. Goodridge*, (Ky. 1903) 76 S. W. Rep. 164.

**Custody of Children Where Wife Procures Invalid Divorce and Marries Again.** — But under the same circumstances the custody was given to the mother in *Osterhoudt v. Osterhoudt*, (Supm. Ct. Spec. T.) 28 Misc. (N. Y.) 285, affirmed 48 N. Y. App. Div. 74, appeal dismissed 168 N. Y. 358.

**The Custody May Be Given to the Father** although divorce was granted against him. *West v. West*, 94 Mo. App. 683.

**Custody of Daughter Given to Father.** — *Masterson v. Masterson*, (Ky. 1903) 71 S. W. Rep. 490.

In *Crater v. Crater*, 135 Cal. 633, the custody of a very young daughter was given to the father, although he had been guilty of extreme cruelty to the mother, where the mother had married again, and it was shown that the child while in her custody was learning the use of profane language.

**Custody of Infant Son** may be given to the defendant father, with custody to the mother during two months in each year. *Mansfield v. Mansfield*, (Ky. 1899) 54 S. W. Rep. 16.

**Custody of a Son Approaching Manhood** may be given to the father, though he is the guilty party. *Irwin v. Irwin*, 105 Ky. 632.

**870. 1. Granting Custody to Third Party — Power Limited by Statute.** — *Wood v. Wood*, 61 N. Y. App. Div. 96.

**2. Unfitness of Parents Must Be Proved.** — *Nor-*

*val v. Zinsmaster*, 57 Neb. 158, 73 Am. St. Rep. 500; *Matter of Neff*, 20 Wash. 652.

**3. Custody Given to Third Person for Child's Welfare.** — *Smith v. Smith*, 101 Ill. App. 187; *Arne v. Holland*, 85 Minn. 401; *In re Steele*, 107 Mo. App. 567; *Stover v. Stover*, 24 Utah 92.

**4. Wishes of Child.** — *Israel v. Israel*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 335. See also *Randall v. Randall*, (Miss. 1900) 28 So. Rep. 19; *Norval v. Zinsmaster*, 57 Neb. 158, 73 Am. St. Rep. 500; *Matter of Neff*, 20 Wash. 652.

**When Child's Wishes Not Followed.** — In *Edwards v. Edwards*, (Ky. 1901) 64 S. W. Rep. 726, it was held that the preferences of the children would not be allowed to alter the rights of the parties, in the absence of proof of their substantial foundation.

**5. Duration of Custody — California.** — *De Lenos' Application*, 143 Cal. 313; *Crater v. Crater*, 135 Cal. 633.

*Colorado*. — *Stevens v. Stevens*, 31 Colo. 188.

*Illinois*. — *Chase v. Chase*, 70 Ill. App. 572.

*Indiana*. — *Breedlove v. Breedlove*, 27 Ind. App. 560.

*Indian Territory*. — *Culwell v. Franks*, 3 Indian Ter. 548.

*Iowa*. — *Ostheimer v. Ostheimer*, 125 Iowa 523.

*Kentucky*. — *Baker v. Baker*, (Ky. 1905) 85 S. W. Rep. 729; *Goodridge v. Goodridge*, (Ky. 1903) 76 S. W. Rep. 164; *Masterson v. Masterson*, (Ky. 1903) 71 S. W. Rep. 490; *Conrad v. Conrad*, (Ky. 1901) 64 S. W. Rep. 674; *Fletcher v. Fletcher*, (Ky. 1900) 54 S. W. Rep. 953; *Mansfield v. Mansfield*, (Ky. 1899) 54 S. W. Rep. 16; *Bristow v. Bristow*, (Ky. 1899) 52 S. W. Rep. 818.

*Louisiana*. — *Bursha v. Lane*, 105 La. 112.

*Minnesota*. — *Arne v. Holland*, 85 Minn. 401.

*Missouri*. — *Cole v. Cole*, 89 Mo. App. 228; *In re Kohl*, 82 Mo. App. 442.

*New Jersey*. — *Feinberg v. Feinberg*, (N. J. 1905) 59 Atl. Rep. 880; *Power v. Power*, 65 N. J. Eq. 93; *Wilson v. Wilson*, (N. J. 1898) 41 Atl. Rep. 355.

*New York*. — *Israel v. Israel*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 335.

*North Carolina*. — *Setzer v. Setzer*, 129 N. Car. 296.

*Oregon*. — *McFarlane v. McFarlane*, 43 Oregon 477.

*Washington*. — *Koontz v. Koontz*, 25 Wash. 336; *Matter of Neff*, 20 Wash. 652.

**Modification on Court's Own Motion.** — The court may of its own motion modify the order. *Pearce v. Pearce*, 30 Mont. 269.

The insertion of the words "until the further order of the court" in the decree is not necessary to reserve to the court the power to modify. *Stone v. Stone*, 158 Ind. 628.

**Court Continues Parens Patriae During Minority.** — The decree of divorce is not final as to the custody of the children; the court's duty as *parens patriae* continues during their minority. *Williams v. Crosby*, 118 Ga. 296.



**870.** Custody Not Exclusive — Access to Guilty Party. — See notes 7, 8, 9.

**871.** Effect of Decree Awarding Custody to One Parent on Other Parent's Right of Access. — See notes 1, 2.

Removal from State. — See notes 3, 4.

**5.** Support of Children — Support Where Decree Contains No Provision as to Custody. — See note 5.

**Change of Conditions.** — Though the decree is *res judicata* on the subject, new facts may create new issues. *People v. Hickey*, 86 Ill. App. 20. And only facts showing such changed conditions can be considered. *Wilson v. Elliott*, 32 Tex. Civ. App. 483.

A decree as to the custody of children will not be altered unless on proof of material facts, unknown at the date of the decree, showing that the welfare of the child demands a change. *Cariens v. Cariens*, 50 W. Va. 113. To the same effect see *Tobin v. Tobin*, 29 Ind. App. 382; *Stone v. Stone*, 158 Ind. 628; *West v. West*, 94 Mo. App. 683.

**Modifying Decree of Court of Another State.** — The court of the child's domicile may modify the decree of the court of another state as to its custody, where the situation and character of the parties have changed. *Wilson v. Elliott*, 96 Tex. 472, 97 Am. St. Rep. 928.

**Disposition of Children on Death of Custodian.** — Where the wife after procuring a divorce was awarded the custody of her child, and thereafter died, leaving a will providing that her mother (the child's grandmother) should be the child's guardian, it was held, that the court had jurisdiction to award the custody of the child to the father on a petition for habeas corpus, filed by him, as the order in the divorce suit as to the custody was a continuing order, retaining the child in the arms of the law as between the parties to the divorce proceeding, but not conferring on the mother authority to appoint a testamentary guardian. *Coons' Application*, 11 Ohio Cir. Dec. 208.

**870. 6.** May Award Custody During Minority. — *McKay v. Superior Ct.*, 120 Cal. 143; *Stone v. Stone*, 158 Ind. 628.

**7.** Parent Deprived of Custody Allowed Access — *Indiana*. — *Breedlove v. Breedlove*, 27 Ind. App. 560.

*Kentucky*. — *Goodridge v. Goodridge*, (Ky. 1903) 76 S. W. Rep. 164; *Harl v. Harl*, (Ky. 1903) 73 S. W. Rep. 756; *Edwards v. Edwards*, (Ky. 1901) 64 S. W. Rep. 726; *McFerran v. McFerran*, (Ky. 1899) 51 S. W. Rep. 307; *Irwin v. Irwin*, 105 Ky. 632.

*Louisiana*. — *Linzy v. Linzy*, 51 La. Ann. 630.

*New Jersey*. — *Feinberg v. Feinberg*, (N. J. 1905) 59 Atl. Rep. 880; *Power v. Power*, 65 N. J. Eq. 93; *Abele v. Abele*, 62 N. J. Eq. 644; *Wilson v. Wilson*, (N. J. 1898) 41 Atl. Rep. 355.

*New York*. — *Stewart v. Stewart*, 51 N. Y. App. Div. 629.

*Washington*. — *Koontz v. Koontz*, 25 Wash. 336.

*Canada*. — *Delisle v. Pillet*, 17 Quebec Super. Ct. 75.

**Custody on Certain Days Granted to Father.** — *Osterhoudt v. Osterhoudt*, (Supm. Ct. Spec. T.) 28 Misc. (N. Y.) 285, affirmed 48 N. Y. App. Div. 74, appeal dismissed 168 N. Y. 358.

This will not be granted if it appears from

the father's conduct that it would not be for the welfare of the child. *Griffin v. Griffin*, 18 Utah 98.

**Visit of Father Limited to One Day a Week.** — *Bristow v. Bristow*, (Ky. 1899) 52 S. W. Rep. 818.

**8.** Access Should Be Granted to the Guilty Party. — *Breedlove v. Breedlove*, 27 Ind. App. 560; *McGown v. McGown*, 29 N. Y. App. Div. 628; *McClanahan v. McClanahan*, 104 Tenn. 217.

**Reluctance of Court to Declare Unfitness of Guilty Party.** — In a petition by a wife, the petitioner, after securing a judicial separation and the custody of the children, prayed for a declaration that the respondent was a person unfit to have the custody of the children, under the terms of the Guardianship of Infants Act, 1886 (49 & 50 Vict., c. 27, § 7), which gives the court power to make such a declaration and provides that the parent so declared to be unfit shall not, on the death of the other parent, be entitled as of right to the custody or guardianship of such children. The court, in refusing to make the declaration, said: "Adultery, desertion, and cruelty are the common incidents of suits instituted for judicial separation; but it does not follow, as a matter of course, that the party found guilty should be forever deprived of the custody of his children. The court is not inclined to cast such a stigma upon a husband without a very strong case is made out against him." *Woolnoth v. Woolnoth*, 86 L. T. N. S. 598.

**9.** Access Refused to Guilty Party. — *Woodhouse v. Woodhouse*, 89 N. Y. App. Div. 88.

**871. 1.** Right to Access Although No Provision in Decree. — See *Breedlove v. Breedlove*, 27 Ind. App. 560.

**2.** *Breedlove v. Breedlove*, 27 Ind. App. 560.

**3.** Prohibiting Removal from State. — *Smith v. Smith*, 101 Ill. App. 187; *Freeman v. Freeman*, 94 Mo. App. 504; *Wilson v. Elliott*, 32 Tex. Civ. App. 483.

**4.** *Griffin v. Griffin*, 18 Utah 98.

The decree may be modified for the same reason. *Freeman v. Freeman*, 94 Mo. App. 504.

**5.** Father Continues Liable for Support. — *Domonet v. Burkart*, 23 App. Cas. (D. C.) 308; *Steele v. People*, 88 Ill. App. 186; *Meyers v. Meyers*, 91 Mo. App. 151; *Rankin v. Rankin*, 83 Mo. App. 335; *Lukowski v. Lukowski*, 108 Mo. App. 204; *Shannon v. Shannon*, 97 Mo. App. 119; *Eldred v. Eldred*, 62 Neb. 613; *Dolloff v. Dolloff*, 67 N. H. 512; *McFarlane v. McFarlane*, 43 Oregon 477.

Where the decree provides for the support of a minor child by the father, but is silent as to its custody, the father's statutory rights and duties remain unchanged. *Glynn v. Glynn*, 8 N. Dak. 233.

The liability of the father is, in some cases, based on the ground that the divorce does not terminate his obligation. *Ostheimer v. Ostheimer*, 125 Iowa 523.

- 871.** Liability to Divorced Wife for Children's Support. — See notes 6, 7.  
When Custodian Must Support. — See note 8.
- 872.** Where Wife Has Asked for Custody Only. — See note 1.  
Remedy of Wife Awarded Custody Without Maintenance. — See note 2.
- 873.** See note 1.  
Maintenance Presumed to Have Been Litigated. — See note 2.  
Father's Right of Custody and Duty to Support Reciprocal. — See notes 3, 4.
- 875. DOCKET.** — See note 1.  
**DOCK.** — See note 4.

**871. 6. Husband's Liability to Divorced Wife for Child's Support.** — Rankin v. Rankin, 83 Mo. App. 335; Dolloff v. Dolloff, 67 N. H. 512. See also Griffin v. Griffin, 18 Utah 98.

**Limitation on Husband's Liability.** — "While it cannot be questioned that where the marriage is dissolved by divorce, and the decree as in this case makes no provision for the custody and support of the children of the marriage, the father's duty and obligation continues, as at common law; on the other hand this duty is reciprocal to the right of the father to the custody and services of his children, and if in such case he is deprived thereof by the voluntary assumption of their custody by the mother, such custody must, in the absence of evidence to the contrary, be presumed to carry with it the obligation to support them." After laying down this rule the court held that no promise of the father to compensate the mother for supporting the child could be implied, because, while the father was legally entitled to the custody of the child, he refrained from enforcing his right, not because the child refused to quit the mother and live with him, but because the mother of her own voluntary choice retained its custody, assuming the right to support it according to her own judgment, and disregarded the father's expressed willingness to assist in its maintenance; also, that after refusing such offer of assistance the mother could not, ten years after divorce, reopen the case and secure an order directing the father to reimburse her for expenses so incurred, as her remedy, if any she had (which the court doubted), was in a court of law and not in the equity court where she procured the divorce. *Demonet v. Burkart*, 23 App. Cas. (D. C.) 308.

**7. Wife Retaining Custody After Divorce for Her Fault.** — *State v. Phillips*, 1 Penn. (Del.) 11; *Glynn v. Glynn*, 84 Me. 465. *Contra*, Rankin v. Rankin, 83 Mo. App. 335.

**8. Party Awarded Custody Generally Liable for Support.** — *Selfridge v. Paxton*, 145 Cal. 713; *McKay v. McKay*, 125 Cal. 65; *Wilson v. Wilson*, (N. J. 1898) 41 Atl. Rep. 355.

**Husband Liable After Divorce for His Fault.** — In *Missouri* the doctrine laid down in *Pretzinger v. Pretzinger*, 45 Ohio St. 452, is followed. *McCloskey v. McCloskey*, 93 Mo. App. 393.

*Contra* in *Delaware*, where, under the Act of April 13, 1887, the father remains liable, under such circumstances, for the support of the children. *State v. Rogers*, 2 Marv. (Del.) 439.

**872. 1. Wife Asking for Children's Custody Only, Liable for Their Support.** — *McKay v. McKay*, 125 Cal. 65. *Contra*, *Tobin v. Tobin*, 29 Ind. App. 382; *McCloskey v. McCloskey*, 93 Mo. App. 393.

A wife may open the decree as to mainte-

nance of a child of the marriage born thereafter. *Shannon v. Shannon*, 97 Mo. App. 119.

**2. Modification of Decree.** — *Meyers v. Meyers*, 91 Mo. App. 151; *Shannon v. Shannon*, 97 Mo. App. 119. But see *Lukowski v. Lukowski*, 108 Mo. App. 204.

In *California* the decree cannot now be modified under Code, §§ 138, 139. *McKay v. McKay*, 125 Cal. 65. *Comp. Miles v. Miles*, 65 Kan. 676.

**General Doctrine — Jurisdiction over Custody and Support of Children a Continuing One —** *Colorado*. — *Stevens v. Stevens*, 31 Colo. 188.

*Illinois*. — *Hilliard v. Anderson*, 197 Ill. 549; *Konitzer v. Konitzer*, 112 Ill. App. 326.

*Indiana*. — *Tobin v. Tobin*, 29 Ind. App. 382.

*Iowa*. — *Ostheimer v. Ostheimer*, 125 Iowa 523.

*New Jersey*. — *Feinberg v. Feinberg*, (N. J. 1905) 59 Atl. Rep. 880; *White v. White*, 65 N. J. Eq. 741.

*Oregon*. — *McFarlane v. McFarlane*, 43 Oregon 477; *Henderson v. Henderson*, 37 Oregon 141, 82 Am. St. Rep. 741.

**873. 1. Contra**, *Lukowski v. Lukowski*, 108 Mo. App. 204; *Ditmar v. Ditmar*, 27 Wash. 13, 91 Am. St. Rep. 817.

**2. Maintenance Presumed to Have Been Considered.** — *Shattuck v. Shattuck*, 135 Cal. 192; *Salomon v. Salomon*, 101 N. Y. App. Div. 588. But see *Tobin v. Tobin*, 29 Ind. App. 382; *Lukowski v. Lukowski*, 108 Mo. App. 204; *Shannon v. Shannon*, 97 Mo. App. 119.

**3. Selfridge v. Paxton**, 145 Cal. 713; *Garrett v. Garrett*, 114 Iowa 439.

The rejection by a minor, with consent of her mother, of the father's offer to support her in his home, was held to bar any claim by the mother for her maintenance, in *Henry v. Henry*, (Ky. 1903) 76 S. W. Rep. 130.

**4. Father Deprived of Child's Services Not Liable for Support.** — *Glynn v. Glynn*, 94 Me. 465. But see *Liebold v. Liebold*, 158 Ind. 60, holding that where the father's conduct has rendered it proper to deprive him of the custody of the child, he is still liable for its support.

**875. 1. Docketing and Filing Not Convertible Terms.** — *Bird v. Gilliam*, 123 N. Car. 63.

**4. "A dock** is an artificial basin in connection with a harbor, used for the reception of vessels, in the taking on or discharging of their cargoes, and provided with gates for preventing the rise and fall of the waters occasioned by the tides, and keeping a uniform level within the docks. A dry dock \* \* \* is smaller, and provided with machinery for pumping out the water in order that the vessel may be repaired." *The Robert W. Parsons*, 108 U. S. 17.

**Dock, Wharf, or Quay — Workmen's Compensation Act.** — See *Hennessey v. McCabe*, (1900) 1 Q. B. 491; *Kenny v. Harrison*, (1902) 2 K. B. 168.

# DOCUMENTARY EVIDENCE.

BY ROLLO N. CHAFFEE.

**880. IV. PUBLIC DOCUMENTS — 1. Admissibility — a. OFFICIAL PUBLIC DOCUMENTS — (1) *In General.* — See note 5.**

**Requisites to Admissibility.** — See note 6.

(2) *State Papers.* — See note 7.

**881.** See note 1.

**882.** (4) *Legislative Journals.* — See note 4.

**883.** (6) *Official Registers.* — See notes 1, 2.

(7) *Official Reports.* — See note 3.

**880. 5.** *McKinstry v. Collins*, 74 Vt. 155, quoting 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 880.

**6. Requisites to Admissibility.** — In order to be admissible in evidence as a public document, a document must be made for the purpose of use by the public and of being kept public so that the persons concerned may have access to it. Reports made to a department of the government and maps and plans made for the use of the department are not admissible as public documents. *Mercer v. Denne*, (1904) 2 Ch. 534.

**7. Executive Documents Admissible in Evidence.** — *McPeck v. Western Union Tel. Co.*, 107 Iowa 356, 70 Am. St. Rep. 205.

**881. 1. Census Reports.** — *State v. Neal*, 25 Wash. 264. To the same effect is *Dublin v. Bray Tp.*, (1900) 2 Ir. R. 88.

**Confederate Archives** preserved by the United States government are competent and persuasive, though not conclusive, evidence of the matters stated therein. *Oakes v. U. S.*, 174 U. S. 778.

**882. 4. Legislative Journals Admissible.** — *State v. Burlington*, etc., R. Co., 60 Neb. 741; *Milwaukee County v. Isenring*, 109 Wis. 9.

**A List of Foreign Corporations** published by the secretary of state in the public volumes of the acts of the legislature is not admissible, there being no law requiring the publication of such list. *State v. Missio*, 105 Tenn. 218. See also the title **RECORDS**, 189. 5.

**883. 1. Official Registers.** — *State v. Donovan*, 10 N. Dak. 203; *State v. Hall*, 16 S. Dak. 6.

**Illustrations.** — A bill of lading signed by a captain, a license to sail, and a certificate of the custom-house official that the vessel had paid its tax for hospital dues, executed as the laws of maritime nations generally require, are documents of a public nature, made by persons in discharge of their public duty and are admissible upon the same ground as that of official registers. *Grace v. Browne*, 86 Fed. Rep. 155, 57 U. S. App. 236.

A coroner's inquisition on the body of a person, being a public record, is admissible to show cause of death. *Knights Templars*, etc., L. Indemnity Co. v. Crayton, 110 Ill. App. 648, affirmed 209 Ill. 550; *National Woodenware*, etc., Co. v. Smith, 108 Ill. App. 477.

**2. Birth Register.** — A certified copy of an entry of a register of births, made pursuant to the statute, 6 & 7 Wm. IV., c. 86, is evidence of all the contents of the entry, including not merely the fact of the birth, but also of the actual date thereof. *Goodrich's Estate*, (1904) P. 138, disapproving *In re Wintle*, L. R. 9 Eq. 373.

**A Certificate of Baptism** attests only the filiation of the person named therein, but not that the parents of such person were man and wife, which fact can be proved only by the marriage certificate or other similar document. *Connolly v. Consumers' Cordage Co.*, 6 Quebec Pr. 150.

**3. Official Reports.** — *Independent School Dist. v. Hubbard*, 110 Iowa 58, 80 Am. St. Rep. 271; *Nichols v. Chicago*, etc., R. Co., 125 Mich. 394, 7 Detroit Leg. N. 558; *Gwyn Harper Mfg. Co. v. Carolina Cent. R. Co.*, 128 N. Car. 280, 83 Am. St. Rep. 675; *Bardsley v. Sternberg*, 18 Wash. 612. See further the title **RECORDS**, 174. 5 *et seq.*

A verified report, made by the probate judge and two examiners, of the examination of the county treasurer's office has been held in *Kansas* not to be competent to prove the condition of the treasury when the examination was made. *State v. Krause*, 58 Kan. 651.

**Reports of Postmasters** are made admissible in evidence in the courts of the United States by Rev. Stat. U. S., § 889. *McBride v. U. S.*, 101 Fed. Rep. 821, 42 C. C. A. 38.

**The Report of the Officers of a National Bank to the Comptroller of the Currency** is incompetent alone to determine the actual value of the bank's stock. *Patterson v. Plummer*, 10 N. Dak. 95.

**The Annual Reports of the Selectmen** to the town are admissible, notwithstanding these officers might have been called as witnesses, and the original books of town accounts could have been had. *Watson v. New Milford*, 72 Conn. 561, 77 Am. St. Rep. 345.

**A Surveyor's Report**, made under an Act of Parliament, is a public document, and, if produced from the proper custody, is admissible as evidence. *Evans v. Merthyr Tydfil Urban Dist. Council*, (1899) 1 Ch. 241.

**A Report Not Intended for Public Scrutiny or Use**, but made merely for use by a department of the government, is not admissible as a public record. *Mercer v. Denne*, (1904) 2 Ch. 534.



**884.** (8) *Official Certificates*. — See note 2.

Under Statutes. — See notes 4, 6, 7, 8.

(9) *Municipal Records*. — See note 9.

**885.** *b. UNOFFICIAL DOCUMENTS OF A PUBLIC CHARACTER — (2) Books of Literature, History, Science, and Art — (a) Books of General Literature*. — See note 5.

**886.** *Dictionaries*. — See note 1.

(b) *Histories*. — See note 2.

**887.** (c) *Scientific Books — aa. GENERALLY — Books of Science Generally Inadmissible*. — See note 2.

**888.** *Grounds of Exclusion*. — See note 1.

*Reading Scientific Books in Argument Before Jury*. — See note 3.

**884. 2. In Absence of Statute Certificates Not Admissible**. — *Sykes v. Beck*, 12 N. Dak. 242.

**4. Certificates Evidence under Statutes**. — In a suit by a physician against the county for services performed for the poor, a certificate of the board of health, attached to the physician's statement, becomes part of the claim, and as such is admissible. *Lacy v. Kossuth County*, 106 Iowa 16.

**6. Certificate of Officer Not Evidence of Facts to Which He Is Not Authorized to Certify**. — The certificate of the comptroller of the city of Chicago is not admissible to show the bonded indebtedness of the city. *Chicago v. English*, 80 Ill. App. 163, affirmed 180 Ill. 476.

**7. Certificate as to Matters Collateral to Record**. — An officer's certificate of the nonexistence on the records of certain facts is inadmissible. *Sykes v. Beck*, 12 N. Dak. 242.

So a certificate tending to show that a certain paper had not been recorded is inadmissible in evidence. *Chicago, etc., R. Co. v. Vance*, 64 Kan. 686.

**8. Certificate as to Result of Record**. — *Sykes v. Beck*, 12 N. Dak. 242.

A certificate of the clerk of the county court that a certain judgment record was indexed is not admissible in evidence. *Lindsey v. State*, 27 Tex. Civ. App. 540.

**9. Municipal Records**. — *Columbus v. Ogletree*, 102 Ga. 293; *Galveston, etc., R. Co. v. Washington*, 25 Tex. Civ. App. 600.

Minutes of council proceedings are admissible in evidence although not signed by the city clerk, the clerks testifying that they are the records of the council meetings as they purport to be, and that he wrote them pursuant to his official duties. *State v. Badger*, 90 Mo. App. 183.

**A Book of City Ordinances**. — See *McCaffrey v. Thomas*, 4 Penn. (Del.) 437; *Westfield Cigar Co. v. Insurance Co. of North America*, 169 Mass. 382; *Jackson v. Kansas City, etc., R. Co.*, 157 Mo. 621, 80 Am. St. Rep. 650; *Stiasny v. Metropolitan St. R. Co.*, 58 N. Y. App. Div. 172, affirmed 172 N. Y. 656; *Missouri, etc., R. Co. v. Owens*, (Tex. Civ. App. 1903) 75 S. W. Rep. 579. See further the titles **ORDINANCES**, **1004. 4 et seq.**; **RECORDS**, **206. 5**.

A book containing the city ordinances is not admissible in evidence without proof that it was printed and published by the authority of the city council. *International, etc., R. Co. v. Hall*, 35 Tex. Civ. App. 545.

An ordinance of a city is not a public record so as to make it competent evidence for all

purposes. *Saetelle v. Metropolitan L. Ins. Co.*, 81 Mo. App. 509.

**A Certified Copy of a Village Ordinance** in pamphlet form is admissible in evidence. *Chicago, etc., R. Co. v. Beaver*, 96 Ill. App. 558, affirmed 199 Ill. 34.

**885. 5. Books of Literature Generally Inadmissible**. — Extracts from parliamentary authors are not admissible to show that certain proceedings were regular and according to parliamentary usage. *Cranfill v. Hayden*, 22 Tex. Civ. App. 656.

**An Entry in a City Directory** is not competent to prove that a person is an officer in a certain corporation. *Tichenor v. Newman*, 186 Ill. 264.

**Standard Encyclopædias Admissible**. — *Atchison, etc., R. Co. v. Ryan*, 62 Kan. 682.

**886. 1. Dictionaries as Evidence**. — In *Banco De Sonora v. Banker's Mut. Casualty Co.*, (Iowa 1903) 95 N. W. Rep. 232, parts of *Bouvier's Law Dictionary*, stating that the civil law is the foundation of the law of Mexico, and certain other countries, and that an adult, under the civil law, is a male infant who has attained the age of fourteen years, were admitted in evidence.

**2. By Statute in Utah**, historical works relating to the Mormon church are admissible in evidence. *Hilton v. Roylance*, 25 Utah 129.

**887. 2. Scientific Books Inadmissible in Evidence**. — *State v. Peterson*, 110 Iowa 647; *State v. Carpenter*, 124 Iowa 5; *Van Skike v. Potter*, 53 Nev. 28; *Foggett v. Fischer*, 23 N. Y. App. Div. 207; *McEvoy v. Lommel*, 78 N. Y. App. Div. 324; *Brady v. Shirley*, 14 S. Dak. 447, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 886 [887]; *Wright v. State*, (Tex. Crim. 1898) 44 S. W. Rep. 513.

It is not error to refuse to admit in evidence extracts from a book purporting to contain the opinion of experts on special diseases of horses. *Cook v. Coffey*, 103 Ga. 384.

**888. 1. Grounds of Exclusion**. — *Bixby v. Omaha, etc., R., etc., Co.*, 105 Iowa 293, 67 Am. St. Rep. 299; *Van Skike v. Potter*, 53 Neb. 28; *Brady v. Shirley*, 14 S. Dak. 447.

**3. Reading of Scientific Books to Jury Permitted in Some States**. — See *Timothy v. State*, 130 Ala. 68, holding that while it is competent to put in evidence "passages from standard medical works pertaining to wounds and personal physical conditions under inquiry," it is not permissible to read from such works passages that do not pertain to medicine or surgery, for example, accounts of experiments with firearms

**890.** *bb.* BOOKS OF EXACT SCIENCE. — See note 2.

Life or Mortality Tables. — See note 3.

Tide Tables. — See note 4.

**891.** 2. Mode of Proof. — See note 1.

V. DOCUMENTS OF A MIXED NATURE — 2. Corporation Books —

*a.* GENERALLY — Corporation Books Evidence of Corporate Acts. — See note 6.

**893.** Corporation Books Only Prima Facie Evidence. — See note 2.

*c.* AS BETWEEN THE CORPORATION AND ITS MEMBERS. — See note 4.

**894.** See note 1.

**895.** *d.* AS BETWEEN MEMBERS. — See note 1.

*f.* AS AGAINST STRANGERS. — See note 6.

**896.** *g.* AS EVIDENCE OF MEMBERSHIP. — See note 1.

*h.* BOOKS OF ACCOUNT. — See note 6.

to determine the distance at which burns and powder marks will appear.

**Matter to be Regulated by Discretion of Court.** — See *State v. Soper*, 148 Mo. 217.

In Interrogating Medical Experts counsel may incorporate in their questions quotations from medical works. *Williams v. Nally*, (Ky. 1898) 45 S. W. Rep. 874.

**890.** 2. *Bixby v. Omaha*, etc., R., etc., Co., 105 Iowa 293, 67 Am. St. Rep. 299.

Tables Showing the Qualities and Strength of Timber, taken from the reports of the United States department of agriculture, "Kent's Mechanical Engineer's Pocketbook," or "Johnson's Strains in Frame Structures," have been held to be admissible. *Western Assur. Co. v. J. H. Mohlman Co.*, 83 Fed. Rep. 811, 51 U. S. App. 577.

The Table of Rates of Interest in other states, printed in the Pamphlet Acts of the General Assembly, is admissible in *Alabama*. *Holley v. Coffee*, 123 Ala. 406.

3. Annuity Tables are admissible for like purposes as mortality tables. *Crouse v. Chicago*, etc., R. Co., 102 Wis. 196.

4. Tide Tables Admissible. — *Cherry Point Fish Co. v. Nelson*, 25 Wash. 558.

**891.** 1. A Marriage in Ireland May Be Proved in England by a copy of an entry in the register of marriages, duly certified by the clergyman of the church where the marriage was solemnized. *Whitton v. Whitton*, (1900) P. 178.

6. Books of Corporation Evidence of Its Acts and Proceedings. — *Hayden v. Williams*, 96 Fed. Rep. 279, 37 C. C. A. 479; *Booth v. Dexter Steam Fire Engine Co.*, 118 Ala. 369; *Signa Iron Co. v. Brown*, 171 N. Y. 488; *Rochester Folding Box Co. v. Browne*, 55 N. Y. App. Div. 444, affirmed 179 N. Y. 542.

The Written By-laws of a Private Corporation Are Documents, subject to the general rules as to the production and proof of documentary evidence. *Knights, etc. v. Weber*, 101 Ill. App. 488.

A Record of a Stockholders' Meeting is admissible as an admission on the part of the corporation. *Clarke v. Warnick Cycle Mfg. Co.*, 174 Mass. 434.

**893.** 2. See *Davison v. West Oxford Land Co.*, 126 N. Car. 704, holding that entries in the minute books of a corporation which form no part of the minutes of any meeting, and

were made without authority are inadmissible against the corporation. A corporation is not bound, as to third persons, by matters fraudulently interpolated in its records.

4. Corporation Books Admissible as Between Corporation and Members. — *Trainor v. German-American Sav., etc., Assoc.*, 204 Ill. 616, quoting 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 893; *United Growers Co. v. Eisner*, 22 N. Y. App. Div. 1.

**894.** 1. Corporation Books Not Evidence of Private Dealings with Members. — *Trainor v. German-American Sav., etc., Assoc.*, 204 Ill. 616, quoting 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 893, and approving the whole text paragraph. See also *Hayden v. Williams*, 96 Fed. Rep. 279, 37 C. C. A. 479.

**895.** 1. Between Members. — *Brown v. Ellis*, 103 Fed. Rep. 834. See also *Hayden v. Williams*, 96 Fed. Rep. 279, 37 C. C. A. 479; *Trainor v. German-American Sav., etc., Assoc.*, 204 Ill. 616, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 895.

6. Corporation Books Not Evidence Against Strangers. — *Hayden v. Williams*, 96 Fed. Rep. 279, 37 C. C. A. 479. See also *Signa Iron Co. v. Brown*, 171 N. Y. 488.

**896.** 1. Corporation Books Not Generally Evidence of Membership. — Where a person signed a subscription to stock in the "National Express Company," which had no legal corporate existence, entries in the stock books of the "National Express and Transportation Company" are inadmissible to show his membership in the latter company. *National Express, etc., Co. v. Morris*, 15 App. Cas. (D. C.) 262.

6. Admissibility of Corporation Books of Account — Illustrations. — The books of a bank are admissible in evidence to show the state of account of a depositor who kept no pass book. *Bastrop State Bank v. Levy*, 106 La. 589, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 896.

Books kept under the supervision of the president of a bank are admissible, in a proceeding against him for accepting a deposit with knowledge of the insolvency of the bank, to show the condition of the bank and the president's knowledge thereof, although they are not admissible as books of account. *State v. Easton*, 113 Iowa 516, 86 Am. St. Rep. 389.

The books of account of a corporation are not *per se* evidence of an indebtedness against the

**897.** *i.* REQUISITES TO ADMISSION.— See note 2.

**898.** VI. PRIVATE DOCUMENTS — 3. Letters and Telegrams. — See note 3.

**899.** Copies — Letter-Books. — See notes 1, 2.

Telegrams. — See note 3.

**4. Pictures and Photographs.** — See notes 6, 8, 9. See also the titles EVIDENCE; IDENTITY; PHOTOGRAPHS.

corporation in an action to charge the directors thereof with liability by reason of their failure to file the annual statement. *Minor v. Crosby*, 76 N. Y. App. Div. 561.

**897. 2. Duly Certified Copies of Corporate Records.** — Under Civ. Code Ga. (1895), § 5236, a duly certified abstract from the book of minutes of a business corporation of the state is admissible. *Maynard v. Interstate Bldg., etc., Assoc.*, 112 Ga. 443.

**The Minutes of Stockholders' Meetings**, consisting of separate sheets of paper pinned to the leaves of the record book, this being their only identification, are inadmissible. *McConnell v. Combination Min., etc., Co.*, 30 Mont. 239, 104 Am. St. Rep. 703.

**Bank Books** which are identified by the cashier are admissible in evidence although it is not shown by the person making the entries therein that they are correct. *Continental Nat. Bank v. Nashville First Nat. Bank*, 108 Tenn. 374.

**898. 3. Letters Admitted in Evidence** — *Alabama*. — *Baird Lumber Co. v. Devlin*, 124 Ala. 245.

*California*. — *Ryland v. Heney*, 130 Cal. 426.

*Colorado*. — *Denver v. Cochran*, 17 Colo. App. 75.

*Connecticut*. — *Beach v. Travelers Ins. Co.*, 73 Conn. 118; *Deep River Nat. Bank's Appeal*, 73 Conn. 341.

*Florida*. — *Eatman v. State*, (Fla. 1904) 37 So. Rep. 576.

*Georgia*. — *Sanders v. State*, 113 Ga. 267.

*Illinois*. — *Consolidated Perfume Co. v. National Bank*, 86 Ill. App. 642; *Raphael v. Hartman*, 87 Ill. App. 634; *Grayville Water Works v. Burdick*, 109 Ill. App. 520; *Morehouse v. Terrill*, 111 Ill. App. 460; *Dick v. Zimmerman*, 207 Ill. 636.

*Iowa*. — *Matter of Myers*, 111 Iowa 584; *Kocher v. Palmetier*, 112 Iowa 84.

*Louisiana*. — *State v. Renaud*, 50 La. Ann. 662.

*Maryland*. — *Prudential Ins. Co. v. Devoe*, 98 Md. 584.

*Massachusetts*. — *Koplan v. Boston Gas Light Co.*, 177 Mass. 15.

*Missouri*. — *State v. Soper*, 148 Mo. 217; *State v. Dean*, 85 Mo. App. 473.

*Nebraska*. — *People's Nat. Bank v. Geisthardt*, 55 Neb. 232.

*New York*. — *White v. McNulty*, 26 N. Y. App. Div. 173, *affirmed* 164 N. Y. 582; *People v. Fletcher*, 44 N. Y. App. Div. 199.

*North Carolina*. — *Southern L. & T. Co. v. Benbow*, 131 N. Car. 413.

*Oregon*. — *State v. McDaniel*, 39 Oregon 161.

*South Dakota*. — *Reynolds v. Hinrichs*, 16 S. Dak. 602; *State v. Coleman*, 17 S. Dak. 594.

*Texas*. — *Collins v. State*, (Tex. Crim. 1899) 51 S. W. Rep. 216; *Orange Rice Mill Co. v. McIlhinney*, 33 Tex. Civ. App. 592.

*Utah*. — *Cooney v. McKinney*, 25 Utah 329.

*Vermont*. — *State v. Marsh*, 70 Vt. 288.

*Virginia*. — *Richmond Union Pass. R. Co. v. New York, etc., R. Co.*, 95 Va. 386.

*Wisconsin*. — *Monteith v. State*, 114 Wis. 165.

**Proper Authentication** is, of course, essential. *Foushee v. Owen*, 122 N. Car. 360; *State v. Hall*, 14 S. Dak. 161. See also *Norberg v. Plummer*, 58 Neb. 410.

**Date Not Essential.** — A letter is admissible in evidence although it is not dated; the date can be established *aliunde* by parol evidence. *State v. Allen*, 113 La. 705.

**Where the Letter Offered Is Fairly Self-explanatory**, that to which it is an answer need not be offered. *New Hampshire Trust Co. v. Korsmeyer Plumbing, etc., Co.*, 57 Neb. 784.

**A Postal Registry Receipt** for a letter is admissible to show the receipt of the letter by the addressee. *Underwriters' F. Assoc. v. Henry*, (Tex. Civ. App. 1904) 79 S. W. Rep. 1072.

**Signatures** to letters are sufficiently proved where a witness testifies that she saw the party write once, and that she is positive they are genuine. *Broadrick v. Broadrick*, 25 Pa. Super. Ct. 225.

**Letters Not Admitted.** — For illustrations of incompetency of letters as evidence under particular circumstances, see *Clarkson v. Kerber*, 84 Ill. App. 658; *Lingg v. State*, 28 Ind. App. 248; *Donnelly v. Donnelly*, 78 S. W. Rep. 182, 25 Ky. L. Rep. 1543; *Reynolds v. Phillips*, (Neb. 1901) 95 N. W. Rep. 491; *Janin v. Cheney*, 44 N. Y. App. Div. 110; *Fonshee v. Owen*, 122 N. Car. 360; *Southern L. & T. Co. v. Benbow*, 135 N. Car. 303; *Hannan v. Greenfield*, 36 Oregon 97; *Norris v. Hartford F. Ins. Co.*, 57 S. Car. 358; *Barber v. Geer*, 23 Tex. Civ. App. 531.

**899. 1. A Longhand Copy of a Letter** is admissible in evidence the same as letterpress copies. *Grant v. Dreyfus*, (Cal. 1898) 52 Pac. Rep. 1074.

**2. Letterpress Copies.** — *Scott v. Bailey*, 73 Vt. 49.

A letter book is admissible to show that it contained no entry relating to the forwarding of certain drafts. *Continental Nat. Bank v. Moore*, 83 N. Y. App. Div. 419.

Letters found in a letter book, if complete in themselves, are admissible, though some of the letters appear to be missing from the book. *U. S. v. La Abra Silver Min. Co.*, 32 Ct. Cl. 462, *affirmed* 175 U. S. 423.

**3. Telegrams.** — *Farnsworth v. Nevada Co.*, 102 Fed. Rep. 578, 42 C. C. A. 509; *Western Twine Co. v. Wright*, 11 S. Dak. 521. And see the title TELEGRAPHS AND TELEPHONES, 1087. 2 *et seq.*

**6. Photographs Admitted as Evidence of Identity.** — *Considine v. U. S.*, 112 Fed. Rep. 342, 50 C. C. A. 272; *State v. Hasty*, 121 Iowa 507; *State v. Fulkerson*, 97 Mo. App. 599; *Lamb v. State*, (Neb. 1903) 95 N. W. Rep. 1050. See also *State v. Miller*, 43 Oregon 325; *Com. v. Keller*, 191 Pa. St. 122 (admissible to show size of person).



**900.** See notes 1, 2, 3.

**5. Maps, Plans, and Diagrams — Maps of the Locus in Quo.** — See note 5.

**901.** See notes 1, 2, 3, 4.

**899. 8. Evidence of Physical Condition of Person.** — People's Gas Light, etc., Co. v. Amphlett, 93 Ill. App. 194; Davis v. Seaboard Air Line R. Co., 136 N. Car. 115; Monson v. State, (Tex. Crim. 1901) 63 S. W. Rep. 647.

Photographs of a deceased person, taken after the body had been removed from the scene of a homicide, showing the nature and location of the wounds, was admissible in evidence. Smith v. Territory, 11 Okla. 669.

Where Injuries Are Capable of a Verbal Description a photograph is inadmissible. Cirello v. Metropolitan Express Co., (Supm. Ct. App. T.) 88 N. Y. Supp. 932.

**A Photograph Which Is Indecent and Improper** will not be admitted. Guhl v. Whitcomb, 109 Wis. 69, 83 Am. St. Rep. 889.

**9. X-ray Photographs Admissible.** — Miller v. Minturn, (Ark. 1904) 83 S. W. Rep. 918; Chicago, etc., Electric R. Co. v. Spence, 213 Ill. 220, 104 Am. St. Rep. 213; Geneva v. Burnett, 65 Neb. 464, 101 Am. St. Rep. 628; Carlson v. Benton, 66 Neb. 486, holding that X-ray photographs are admissible in evidence when it is shown that they fairly represent the object or objects under investigation, and criticising as too narrow the rule adopted in Bruce v. Beall, 99 Tenn. 303, stated in the original note.

**900. 1. Photographs of the Locus in Quo.** — Photographs taken after an accident and before the conditions are materially changed are admissible. Maynard v. Oregon R., etc., Co., (Oregon 1904) 78 Pac. Rep. 983. See also Chicago, etc., R. Co. v. Lawrence, 96 Ill. App. 635; Lake Erie, etc., R. Co. v. Wilson, 189 Ill. 89; Huntington v. Lusch, 33 Ind. App. 476; Leeds v. New York Telephone Co., 79 N. Y. App. Div. 121, reversed 178 N. Y. 118; Beardslee v. Columbia Tp., 188 Pa. St. 496, 68 Am. St. Rep. 883; San Antonio v. Talerico, (Tex. Civ. App. 1903) 78 S. W. Rep. 28.

Photographs taken some three weeks after an accident, and shown to be correct representations of the premises where the accident happened, except that snow was on the ground at the time when they were taken, are admissible in evidence. Fitzgerald v. Hedstrom, 98 Ill. App. 109.

A photograph of wrecked machinery, taken immediately after an accident, is admissible to show the condition of the wreck. Livermore Foundry, etc., Co. v. Union Compress, etc., Co., 105 Tenn. 187.

Photographs and pictures of a machine may be introduced before the jury to illustrate the statements of witnesses. Record v. Chickasaw Coöperage Co., 108 Tenn. 657.

But photographs of the *locus in quo* are not admissible where it appears that there have been changes so that they do not represent the true conditions at the time to which the inquiry is directed. Iroquois Furnace Co. v. McCrea, 101 Ill. 340; Chicago, etc., R. Co. v. Corson, 198 Ill. 98; Harris v. Quincy, 171 Mass. 472. See also Wabash R. Co. v. Farrell, 79 Ill. App. 508.

Pictures which are not photographic represen-

tations, but are artistic reproductions of situations carefully planned by a witness, are inadmissible. Fore v. State, 75 Miss. 727.

Where the jury has viewed the premises, photographs are inadmissible, being secondary evidence. Dobson v. Philadelphia, 7 Pa. Dist. 321.

**2. Photographs of Handwriting.** — People v. Mooney, 132 Cal. 13; Paducah First Nat. Bank v. Wisdom, 111 Ky. 135. See further the title HANDWRITING, 274. 2 *et seq.*

**3. Photographs of Public Records.** — Leathers v. Salvor Wrecking, etc., Co., 2 Woods (U. S.) 682, cited in original note. See also State v. Miller, 43 Oregon 325; Grooms v. State, 40 Tex. Crim. 319. And see the title HANDWRITING, 274. 3, 4.

**5. Maps and Diagrams of Scene of Accident Admissible.** — Southern Pac. Co. v. Hall, 100 Fed. Rep. 760, 41 C. C. A. 50. See also Cunningham v. Fair Haven, etc., R. Co., 72 Conn. 244. And see the titles EVIDENCE, 539. 1; RECORDS, 173. 9 *et seq.*

A plan introduced by a witness who did not profess to know anything about the situation and condition of the place at the time of the accident is admissible, where other testimony in the case tends to show that the situation was as shown upon the plan. Hyde v. Swanton, 72 Vt. 242.

It is not essential to the admissibility of a diagram that it should have been prepared by the witness testifying. Koon v. Southern R. Co., 69 S. Car. 101.

**901. 1. Maps of Locus in Quo in Criminal Cases.** — Burton v. State, 115 Ala. 1; Mann v. State, 134 Ala. 1; Ragland v. State, 71 Ark. 65; State v. Shaw, 73 Vt. 149; State v. Hunter, 18 Wash. 670. See also the title MURDER and MANSLAUGHTER, 228. 6.

A diagram is admissible in evidence although made by the state's solicitor, it being otherwise proved to be correct. Jarvis v. State, 138 Ala. 17.

**2. Maps Admissible to Show Condition and Situation of Premises.** — A map was held to be admissible to show the location of a house in Bodine v. Andrews, 47 N. Y. App. Div. 495.

A map issued by the authority of the department of the interior is admissible to show the general nature of the land in controversy, its elevation and surroundings, and its situation with relation to lands which were proven to be mineral. U. S. v. Van Winkle, 113 Fed. Rep. 903, 51 C. C. A. 533.

Government surveys are admissible for like purposes. Hall v. Connecticut Mut. L. Ins. Co., 76 Minn. 401.

**3. Diagrams as Evidence of Locus in Quo — Diagram to Enable Witness to Explain Positions.** — See Franklin v. Engel, 34 Wash. 480.

**4. Maps Admitted to Explain and Illustrate Other Testimony.** — Jordan v. Duke, 6 Ariz. 55; Rawlins v. State, 40 Fla. 155; Lake St. El. R. Co. v. Burgess, 200 Ill. 628; State v. Smith, 68 N. J. L. 609; Arrowood v. South Carolina, etc., R. Co., 126 N. Car. 629; State v. Wilcox, 132

- 901.** Requisites to Admission. — See note 5.  
**902.** 6. Private Entries and Memoranda — *a.* IN GENERAL. — See note 1.  
**903.** *b.* BOOKS OF ACCOUNT — (1) *Of a Party* — (a) Admissibility —  
*aa.* INDEPENDENTLY OF STATUTE — At Common Law. — See note 1.  
**904.** See note 2.  
 Admissible in This Country. — See note 3.

N. Car. 1120; *Smith v. Bunch*, 31 Tex. Civ. App. 541, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 900, 901; *State v. Hunter*, 18 Wash. 670.

**901.** 5. Authentication of Maps, Etc. — *Mercker v. Denne*, (1904) 2 Ch. 534; *Jordan v. Duke*, 6 Ariz. 55.

**902.** 1. See *Drumm-Flato Commission Co. v. Gerlach Bank*, 107 Mo. App. 426, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 901.

**903.** 1. As Recognizing the Admissibility of Books of Account, at common law, see *Haines v. Christie*, 28 Colo. 502; *Byerts v. Robinson*, 9 N. Mex. 427; *Harmon v. Decker*, 41 Oregon 587.

**904.** 2. Entries Against Interest. — Entries made by a merchant in his books should be accepted as presumably representing the facts truly and correctly, and unless error be established by legal proof to the contrary they are evidence against him. *Resther v. Matte*, 13 Quebec K. B. 198.

Book entries which are made by a party or under his supervision are admissible against his as admissions. Second Borrowers, etc., *Bldg. Assoc. v. Cochrane*, 103 Ill. App. 29.

**Entries Against Interest Made by Deceased Person.** — It has been held that in taking accounts between a mortgagor and a deceased mortgagee, an account book kept by the latter in his own handwriting containing entries of payments made to him by the mortgagor, as well as disbursements made by him on account of the mortgaged property, is admissible in evidence on behalf of the mortgagee's executors as containing entries against interest. It would seem that when the book is admitted, it may be evidence not only of the entries which are against interest but also of the accounts of which such entries form an integral and essential part. *Hudson v. The Barge Swiftsure*, 82 L. T. N. S. 389.

**3. Books of Account Admitted in United States.** — In the Federal Court book entries introduced in order to show the earnings of a vessel prior to a collision, and not to prove an account, have been held to be admissible although there was no evidence on the part of the persons who originally made the entries therein as to their correctness. *The William H. Bailey*, 103 Fed. Rep. 799, affirmed (C. C. A.) 111 Fed. Rep. 1006.

**Alabama.** — That books of entries are not admissible unless shown to be correct, see *Wagar Lumber Co. v. Sullivan Logging Co.*, 120 Ala. 558; *Lane v. May, etc., Hardware Co.*, 121 Ala. 296; *Baird Lumber Co. v. Devlin*, 124 Ala. 245. See also *Alabama Constr. Co. v. Wagon*, 137 Ala. 388.

Book entries of a mortgagee showing amounts paid on the mortgage by the mortgagor are inadmissible in evidence, it not being shown that they were ever assented to as correct by the

mortgagor or that the witness knew them to be correct at or about the time they were made. *Rarden v. Cunningham*, 136 Ala. 263.

**California.** — Account books are admissible to show the skill required in keeping them. *Crusoe v. Clark*, 127 Cal. 341.

Books of account are admissible to show the condition of account between buyer and seller where the books were kept by the seller. *Banning v. Marleau*, 121 Cal. 240.

Entries in a book kept by a sheriff in the usual course of business as it was actually transacted are admissible in evidence as original entries. *Hesser v. Rowley*, 139 Cal. 410.

So account books are admissible to corroborate other testimony. *Bushnell v. Simpson*, 119 Cal. 658.

**Corporation Books.** — The books of a corporation are admissible to show the negligence and the extent of the liability of its general manager whose duty it was, under the by-laws, to cause a correct set of accounts to be kept. *San Pedro Lumber Co. v. Reynolds*, 121 Cal. 74.

**Connecticut.** — Entries in a book showing deliveries of merchandise by the defendant to the plaintiffs, though also containing memoranda concerning other matter, are admissible as entries in a book account, where the defendant testifies that the book was his account book, and the only one he kept, and that the entries therein were made at the time of the deliveries. *Handy v. Smith*, 77 Conn. 165.

**Idaho.** — Entries in an account book, kept by a person since deceased, are inadmissible in evidence where it is not shown that the entries were made against the interests of the person making them, or that they were made in a professional capacity and in the ordinary course of professional conduct, or that they were made in the performance of a duty specially enjoined by law. *Kent v. Richardson*, 8 Idaho 750.

**Louisiana.** — Book entries of deposits, made by a bank cashier since deceased, his handwriting being proven, and there being evidence showing that these entries comprised all the deposits of the defendant, who kept no pass book, are admissible to show the state of the defendant's deposit account. *Bastrop State Bank v. Levy*, 106 La. 589, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 905, 906.

Book accounts kept under the supervision of a coexecutor by a bookkeeper employed by the succession are admissible as a commencement of proof. *Magi's Succession*, 107 La. 208.

**Maine.** — The settled rule does not allow proof of money charges of more than forty shillings (six dollars and sixty-seven cents) by means of a book account as independent evidence. *Waldron v. Priest*, 96 Me. 36.

**Maryland.** — Entries made by an interested party are not generally admissible. *Gill v. Staylor*, 93 Md. 453.

**Massachusetts.** — The book of a gas company,

containing the original entries of leaks and repairs along a certain line of pipes, is admissible to show that the company had established an adequate system for protecting the public against the danger of escaping gas. *Koplan v. Boston Gas Light Co.*, 177 Mass. 15.

*A Time Book.*—See *Healey v. Wellesley*, etc., St. R. Co., 176 Mass. 440.

**Michigan.**—To the same effect as *Jackson v. Evans*, 8 Mich. 476, stated in the original note, see *Union Cent. L. Ins. Co. v. Smith*, 119 Mich. 171; *Cameron Lumber Co. v. Somerville*, 129 Mich. 552, 8 Detroit Leg. N. 1064.

**Mississippi.**—Where the ground of an attachment is that the defendant had assigned his property with intent to defraud his creditors, his books of account are admissible to show who his creditors are, and in what amounts they are such creditors. *Meridian Fertilizer Factory v. Bush*, 77 Miss. 697.

**Missouri.**—To the same effect as the cases in the original note declaring "the present practice in this state," see *Missouri Electric Light, etc., Co. v. Carmody*, 72 Mo. App. 534; *Gubernator v. Rettalack*, 86 Mo. App. 184; *Borgess Invest Co. v. Vette*, 142 Mo. 560, 64 Am. St. Rep. 567.

That account books are admissible for the party by whom they are kept when the entries are made contemporaneously with the transactions recorded as part of the *res gesta*, see *Stephan v. Metzger*, 95 Mo. App. 609.

The account books of the stockholders of a corporation are competent evidence as admissions of overvaluation of property used for stock payments. *Steam Stone Cutter Co. v. Scott*, 157 Mo. 620.

**New Hampshire.**—Books of account are admissible to prove charges not exceeding six dollars and sixty-seven cents. *Remick v. Rumery*, 69 N. H. 601.

Books of account of an insurance agent, since deceased, are admissible to show policies issued to third persons. *Roberts v. Rice*, 69 N. H. 472.

**New Jersey.**—Books are admissible in the party's favor as evidence of goods sold, work done, and materials furnished. *Diamant v. Coloty*, 66 N. J. L. 295, 300.

**New York.**—In support of the general rule stated in the first paragraph of the original note, see *Shipman v. Glynn*, 31 N. Y. App. Div. 425; *Wright v. Hicks*, 61 N. Y. App. Div. 489; *Hodnett v. Gault*, 64 N. Y. App. Div. 163; *Rathborne v. Hatch*, 80 N. Y. App. Div. 115; *Smith v. Smith*, 163 N. Y. 168.

One whose business is simply to keep books is not a clerk. *Hurley v. Macey*, 94 N. Y. App. Div. 9.

Entries in a cash book made by the plaintiff's clerk are admissible to show the amount of certain checks, where the plaintiff had at the time of the entries compared them with the checks. *Clark v. National Shoe, etc., Bank*, 164 N. Y. 498.

Entries in the books of a bank can be proven only by the clerk who made them or saw them being made, and knew them to be correctly made at the time. In no event can such entries be admitted in evidence, nor testified to by any one, unless that person testifies from personal knowledge as to the correctness of the

entries. *Horowitz v. Jacobs*, (N. Y. City Ct. Gen. T.) 34 Misc. (N. Y.) 402.

Where a stevedore testified that he gave to his bookkeeper correct information, on a slip of paper, of the number of tons of coal delivered, from which the bookkeeper made the entries in the firm books, it is competent for the bookkeeper to read the entry made in the book. *Bloomington Min. Co. v. Brooklyn Hygienic Ice Co.*, 58 N. Y. App. Div. 66, affirmed 171 N. Y. 673.

Statements of account, made from the books of the plaintiff and offered in his behalf, though incompetent as independent evidence, are admissible to explain declarations of the parties, such statements having been submitted to the defendant. *Davis Provision Co. v. Fowler*, 20 N. Y. App. Div. 626, affirmed 163 N. Y. 580.

The records or ledgers of a clearing house which are made from the clearing-house sheets are competent evidence where the clearing-house clerk testifies that they are accurate and that he made them from the clearing-house sheets themselves. *Prout v. Chisolm*, 21 N. Y. App. Div. 54.

The rule relating to the admission of shop books of services rendered, or the sale and delivery of merchandise on credit, does not apply to account books of a broker, showing sales to and purchases of third persons, in an action between him and his principal. *Rathborne v. Hatch*, 80 N. Y. App. Div. 115.

Stub entries in a check book are not competent to prove an indebtedness to the drawer of the checks. *Simons v. Steele*, 82 N. Y. App. Div. 202, affirmed 177 N. Y. 542.

Slips from a cash register are not books of account. *Cullinan v. Moncrief*, 90 N. Y. App. Div. 538.

Entries are not admissible as part of the *res gesta*, even though made at the time of a given transaction by one of the parties in his own books, when made without the knowledge of the other party. *Linden v. Thieriot*, 96 N. Y. App. Div. 256.

The books of a bank, made in the regular course of business, are competent to show embezzlement by the cashier, it being shown that all false entries were made by the cashier and that entries made by the other clerks were correct. *State Bank v. Brown*, 96 N. Y. App. Div. 441.

The admissibility of a book kept by a guardian containing his account with his ward does not depend upon the rules of law which admit in evidence trader's books of account. *Fowler v. Hebbard*, 40 N. Y. App. Div. 108.

*The Proof that the Party Kept Correct Books* should be made by witnesses who have dealt with him and settled accounts by his books. *Rathborne v. Hatch*, 80 N. Y. App. Div. 115.

But the testimony of several witnesses that they settled bills rendered to them, and the testimony of the plaintiff that such bills were correct copies of the books, is not a compliance with the rule. *Stone v. Cronin*, 72 N. Y. App. Div. 565.

*A Time Book* kept by a contractor is admissible to show the date of the final completion of the contract. *Cornell v. Standard Oil Co.*, 91 N. Y. App. Div. 345.

But a time book is inadmissible where there



- 910.** Books Admitted from Necessity. — See note 1.  
**911.** Rule Construed Strictly. — See note 1.  
**912.** *bb.* UNDER STATUTES PERMITTING A PARTY TO TESTIFY. — See note 3.  
**913.** *cc.* UNDER STATUTES MAKING SUCH BOOKS COMPETENT EVIDENCE. — See note 1.

is no evidence that it was made by the witness in the performance of his duties, or that it was made at the time when the men were employed, and the witness does not testify as to its correctness. *People v. Wilmarth*, 29 N. Y. App. Div. 612, affirmed 156 N. Y. 566.

**Pennsylvania.** — As to the admissibility of account books as evidence of professional services, see *Staggers's Estate*, 8 Pa. Super. Ct. 260.

Where the plaintiff, as manager, was to receive a certain compensation, less expenses, books of account kept under his direction are admissible as *prima facie* evidence of such expenses. *Kane v. Schuylkill F. Ins. Co.*, 199 Pa. St. 198.

A book which is not one of the regular books of a firm, containing only an account with the defendant, in which the entries were not made at the time when the work was done, and in which charges are lumped, is not admissible as a book of original entries. *McKnight v. Newell*, 207 Pa. St. 562.

**Rhode Island.** — In an action to recover for services rendered as collector of rents for a corporation, admission of the plaintiff's book showing the collections made is proper. *Flynn v. Columbus Club*, 21 R. I. 534.

So a book of accounts for rents was held to be properly admitted in evidence where a lessee, in a suit against him by the lessor, first examined the lessor's agent, who made the entries, as to its contents. *Almy v. Allen*, 22 R. I. 595.

The books of a real-estate agent, containing entries relating to business transacted for a particular principal, and also for other customers, are not admissible as books of the principal. *McKeen v. Providence County Sav. Bank*, 24 R. I. 542.

**South Carolina.** — The books of an absconding trustee are admissible to prove that certain funds in his hands were used to purchase certain notes. *Freeman v. Bailey*, 50 S. Car. 241.

**Texas.** — There is a conflict of authority upon the proposition as to whether a suppletory oath is essential to the admission of books of account. See *Duty v. Storrs*, (Tex. Civ. App. 1902) 70 S. W. Rep. 357; *Rogers v. O'Barr*, (Tex. Civ. App. 1904) 81 S. W. Rep. 750.

**Virginia.** — On the question whether credit was extended to the defendant or to another, the ledger of the plaintiff is admissible to prove that the account sued on was charged to the defendant at the time when the goods were delivered. *Richmond Union Pass. R. Co. v. New York, etc., R. Co.*, 95 Va. 386.

**910. 1. Books of Account Admitted from Necessity.** — *Bushnell v. Simpson*, 119 Cal. 658; *Harrold v. Smith*, 107 Ga. 851; *Galbraith v. Starks*, 79 S. W. Rep. 1191, 25 Ky. L. Rep. 2090; *Gregory v. Jones*, 101 Mo. App. 270; *West Branch Lumberman's Exch. v. American Cent. Ins. Co.*, 9 Pa. Dist. 363. See also *Dewing v. Hutton*, 48 W. Va. 582.

**911. 1. Books of Account Inadmissible Where Better Evidence Is Obtainable.** — *Textile Pub. Co. v. Smith*, (Supm. Ct. App. T.) 31 Misc. (N.

Y.) 271; *Hall v. Wood*, 187 Pa. St. 18, 67 Am. St. Rep. 563. See also *infra*, this title, **929. 4.**

**912. 3. Effect of Statutes Permitting Parties to Testify.** — *Smith v. Smith*, 163 N. Y. 168.

The *Colorado* statute providing that no party to a proceeding directly interested in the event thereof shall be allowed to testify therein of his own motion, or in his own behalf, when any adverse party defends as the heir of a deceased person, does not apply to books of account between a party to a proceeding and a deceased person. *Haines v. Christie*, 28 Colo. 502.

**913. 1. Statutory Provisions Governing Admission of Books of Account — Colorado.** — That a foundation must be laid as provided in the statute, see *Haines v. Christie*, 28 Colo. 502.

**Connecticut.** — As to the admissibility of account books under Gen. Stat. Conn. 1902, § 981, see *Handy v. Smith*, 77 Conn. 165.

**Georgia.** — "It seems to be a condition precedent to the admission of such books that the person offering them should be engaged in a regular business, and keeping daily entries of the same, of which business the books are the records." *Bass v. Gobert*, 113 Ga. 262.

It is necessary to prove that the books are genuine and had actually been kept by the firm in the transaction of its business, and, in addition, there ought to be proof showing with reasonable certainty that they were accurately kept. *Cody v. Gainesville First Nat. Bank*, 103 Ga. 789.

There must be a substantial compliance with the conditions prescribed by the Civil Code in regard to the preliminary proof of books of entry. *Talbolton R. Co. v. Gibson*, 106 Ga. 229.

In an action on a note, entries from the books of the defendant, showing that at the time of the maturity of the note he had charged the plaintiff with certain lumber, priced at slightly more than the amount of the note, and had afterwards credited the plaintiff with the note, and showing also that subsequently the plaintiff was charged with certain other lumber, and credited with cash payment, are admissible in evidence. *Blackshear v. Dekle*, 120 Ga. 766.

A sale and delivery of goods may be proved by the introduction of books of account. *Harrold v. Smith*, 107 Ga. 849.

**Illinois.** — That the statute merely enlarges the former rule admitting books of account, see *Weigle v. Brautigam*, 74 Ill. App. 285; *Perry State Bank v. Elledge*, 99 Ill. App. 307.

As to what is a sufficient compliance with the statute, see *Trainor v. German-American Sav., etc., Assoc.*, 204 Ill. 616.

An order book, mostly in the handwriting of a clerk not sworn, containing orders for goods, some of which were not filled and some of which were not to be furnished by the defendant, is inadmissible in evidence. *Brooks v. Funk*, 85 Ill. App. 631.

Book entries are inadmissible in evidence where it is not shown that such entries were correct when made. *West Chicago St. R. Co. v. Moras*, 111 Ill. App. 531. Thus, account books

**917. (b) Requisites to Admission — *aa*, IN GENERAL — No Mode Is Prescribed by Law in Which a Book Must Be Kept. — See notes 1, 2.**

of a partnership are inadmissible where the only testimony is that a person connected with the firm has stated that such account books are correct and show all the business transactions of the firm. *Gormley v. Hartray*, 92 Ill. App. 115.

An account book containing accounts and memoranda of settlements made by the parties to the litigation, there being testimony showing that such memoranda were made in the presence of both parties and retained by one of them, under proper proof, is admissible in evidence. *McDavid v. Ellis*, 78 Ill. App. 381.

A statement of account rendered by a person since deceased and found among his papers is not *prima facie* evidence against the estate of the person charged thereby, there being no evidence tending to show his knowledge or approval of its existence or contents. *O'Donoghue v. Title Guarantee, etc., Co.*, 79 Ill. App. 263.

A railroad company's record of the inspection of its engines is not admissible in evidence, not being a book of account. *Baltimore, etc., R. Co. v. Tripp*, 175 Ill. 251.

**Iowa.** — An account book is not admissible unless it is properly identified and established as genuine. *Willson v. Morse*, 117 Iowa 581.

In a prosecution for embezzlement, entries made by a clerk without the consent or authority of the defendant are inadmissible against him. *State v. Ames*, 119 Iowa 680.

The books of account of a school-district treasurer are admissible as evidence of indebtedness against the official and his sureties. *Independent School Dist. v. Hubbard*, 110 Iowa 58, 80 Am. St. Rep. 271.

**Kansas.** — If the sales made are regularly reported to the bookkeeper, and from such reports, or from orders or other temporary memoranda of the salesman, the entries are promptly and faithfully made by the bookkeeper, the book is entitled to be read in evidence when duly verified by the one who kept it. *State v. Stephenson*, 69 Kan. 405, 105 Am. St. Rep. 171.

An entry made by an agent upon his account books, showing a payment made to him for his principal, is competent evidence, as against the payor, of the fact and nature of such payment, it being shown that such entry was made contemporaneously with the occurrence of the events, and was correct. *Hastie v. Burrage*, 69 Kan. 560.

**Minnesota.** — Under Stat. Minn. 1894, § 5738, account books may be introduced in evidence after laying the foundation provided for, and are then *prima facie* evidence as against third parties of the charges contained therein. And the application of this statute is not limited to cases where the charges so made and the accounts so kept are between both parties, or between all the parties to the action. *Union Cent. L. Ins. Co. v. Prigge*, 90 Minn. 370.

The statute applies to a case where the accounts are between a party to the action and third parties. *Coleman v. Retail Lumbermen's Ins. Assoc.*, 77 Minn. 31.

But without a substantial compliance with the statute, account books are inadmissible as evi-

dence of an alleged indebtedness. *Wimmer v. Key*, 87 Minn. 402.

The books kept by a duly authorized agent of a party to the action are admissible. *General Convention, etc., v. Torkelson*, 73 Minn. 401; *Dexter v. Berge*, 76 Minn. 216.

**Nebraska.** — Books of account are receivable in evidence only when verified in the manner prescribed by the statute. *Donner v. State*, (Neb. 1904) 100 N. W. Rep. 305; *McDonald v. Buckstaff*, 56 Neb. 88.

A storage book, which was made by the plaintiff himself, containing an entry of the transactions of a mill with its customers, made at the time of the transactions, and containing consecutive entries, being delivered to the defendant by the plaintiff when the mill was turned over to him, for the purpose of enabling the defendant to settle with the customers of the mill, is admissible in evidence, this being a sufficient foundation. *Anderson v. Kannon*, (Neb. 1904) 99 N. W. Rep. 824.

For other cases decided under the *Nebraska* statute, see *Atkins v. Seeley*, 54 Neb. 688; *Cather v. Damerell*, (Neb. 1904) 99 N. W. Rep. 35.

*Entries Admissible as Admissions.* — *Globe Sav. Bank v. National Bank of Commerce*, 64 Neb. 413.

**New Mexico.** — See *Byerts v. Robinson*, 9 N. Mex. 427.

**North Carolina.** — Where defendants are accused of cheating and acting fraudulently, entries made by them in their books which are legally in the possession of another are competent evidence against them. *State v. Mallett*, 125 N. Car. 718.

**Ohio.** — Where goods were sold to two persons, the seller can introduce his books, showing a charge to both, though they had no knowledge of such entry. *McGee v. Cleveland Organ Co.*, 4 Ohio Dec. (Reprint) 481, 2 Cleve. L. Rep. 220.

Entries of payments made on a note are inadmissible in an action on the note, not being proper subject-matter of a book account. *Kennedy v. Dodge*, 10 Ohio Cir. Dec. 360, 19 Ohio Cir. Ct. 425.

The stubs in a book of notes are not admissible as book accounts to prove the purpose or effect of the notes which were given. *Mathias Planing-Mill Co. v. Hazen*, 11 Ohio Cir. Dec. 54, 20 Ohio Cir. Ct. 287.

**Wisconsin.** — See generally *Kelly v. Crawford*, 112 Wis. 368; *Brown v. Warner*, 116 Wis. 358 (as to entries made by a clerk).

Book entries made in the regular course of business, contemporaneous with the transaction to which they relate, and connected with such transaction, are admissible under Stat. Wis. 1898, § 4189. *Milwaukee Trust Co. v. Warren*, 112 Wis. 505; *Kelley v. Crawford*, 112 Wis. 368.

In the prosecution of a bookkeeper for embezzlement, books for the keeping of which he was responsible are admissible against him although the entries themselves may have been made by subordinate employees. *Secor v. State*, 118 Wis. 627.

**917. 1. No Mode of Keeping Books Prescribed.** — *Holden v. Spier*, 65 Kan. 412; *State v.*



- 917.** The Material, Form, and Construction. — See note 6.
- 918.** *bb.* THE BOOKS MUST BE BOOKS OF ORIGINAL ENTRY — (*aa*) Generally. — See note 3.
- (*bb*) Entries Transcribed from Temporary Memoranda. — See note 4.
- 919.** Memoranda Made by Employee. — See note 1.
- Mode of Proving Entries. — See note 2.
- 920.** (*cc*) Copies — Ledger — Copies of Accounts. — See notes 1, 2. See generally the title SECONDARY EVIDENCE.
- 921.** A Ledger. — See notes 3, 4, 5, 6.
- 922.** The Mere Fact that a Book Is Kept in Ledger Form. — See note 2.
- cc.* ENTRIES MUST BE MADE IN THE REGULAR COURSE OF BUSINESS. — See note 3.
- Single Entry Inadmissible. — See note 4.

Stephenson, 69 Kan. 405, 105 Am. St. Rep. 171; Cather v. Damerell, (Neb. 1904) 99 N. W. Rep. 35; Remick v. Rumery, 69 N. H. 601.

**917. 2. How Competency of Book Decided.** — Holden v. Spier, 65 Kan. 412; Remick v. Rumery, 69 N. H. 601.

**6. Scraps of Paper.** — See West Branch Lumberman's Exch. v. American Cent. Ins. Co., 9 Pa. Dist. 363.

An original entry may be made upon a diary or a book or paper, and be entitled to be received as independent evidence. Post v. Kenerson, 72 Vt. 341, 82 Am. St. Rep. 948.

**Accounts Kept on the Fly Leaf of a Bible** have been held to be admissible. Stephan v. Metzger, 95 Mo. App. 609.

**918. 3. Books Must Be Books of Original Entry.** — Chandler v. Pomeroy, 87 Fed. Rep. 262; Bradley v. Gardner, 87 Ill. App. 404; Frick v. Kabaker, 116 Iowa 494; Montgomery County v. Bean, 82 S. W. Rep. 240, 26 Ky. L. Rep. 568; Owen v. Bray, 80 Mo. App. 526; Shipman v. Glynn, 31 N. Y. App. Div. 425; Harmon v. Decker, 41 Oregon 587, 93 Am. St. Rep. 748; Duty v. Storrs, (Tex. Civ. App. 1902) 70 S. W. Rep. 357.

The records and minutes of a secretary of a loan association are not competent evidence of the charges made therein, not being books of original entry. Folsom Bldg., etc., Assoc. v. Gogel, 24 Pa. Super. Ct. 539.

**4. Other Temporary Memoranda.** — Diamant v. Colloty, 66 N. J. L. 295, 300; Heery's Estate, 10 Kulp (Pa.) 226.

"Stack sheets," used to record the number of tons of straw in stacks, and prepared from scale tickets, are admissible as original documents. Chicago, etc., R. Co. v. American Strawboard Co., 190 Ill. 268.

**Memoranda Made on Slips of Paper** containing reports of work done cannot be regarded as books of original entry, and independently are not admissible, but when offered in connection with the books of account of the business they are competent evidence. Diamant v. Colloty, 66 N. J. L. 295, 300.

**919. 1. Memoranda Made by Servant or Employee.** — Heery's Estate, 10 Kulp (Pa.) 226.

**2. Mode of Proving Transcribed Entries.** — Trainor v. German-American Sav., etc., Assoc., 204 Ill. 616, quoting 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 919.

Where the entries in a ledger were made from slips, made out in duplicate by the clerks who made the sales, one of them being sent to

the bundle counter and the other to the book-keeper, it was held that the party introducing the ledger must prove that no entries were made except from the slips; that no such slips were sent to the bookkeeper except when the goods, accompanied by a duplicate slip, were sent to the bundle counter; and that all goods sent to the bundle counter were delivered. Taylor-Woolfenden Co. v. Atkinson, 127 Mich. 633, 8 Detroit Leg. N. 480.

**920. 1. Copy Inadmissible.** — Smith v. Castle, 81 N. Y. App. Div. 638.

**2. Copy Admissible When Original Is Lost or Destroyed.** — Hodnett v. Gault, 64 N. Y. App. Div. 163.

A copy of a book account may be admitted in evidence although the person interested therein voluntarily, but in good faith, destroyed the account. Stephan v. Metzger, 95 Mo. App. 609.

**921. 3. Ledger Inadmissible.** — Ledger accounts which do not appear *prima facie*, and are not shown, to have been the original entries made contemporaneously with the sales and payments noted in them are inadmissible. Talladega First Nat. Bank v. Chaffin, 118 Ala. 246.

A ledger is inadmissible in evidence where it is not shown by whom the entries were made or when they were made. Bingham County v. Wooding, 6 Idaho 284.

**4. Ledger Held Admissible.** — See Estes v. Jackson, (Ky. 1899) 53 S. W. Rep. 271.

**5. Ledger as Secondary Evidence.** — Burr v. Shute, 25 Ohio Cir. Ct. 735.

**6. Production of Ledger with Book of Original Entries.** — Hughes v. Clark, 109 Ill. App. 107.

**922. 2. Book May Be in Ledger Form.** — State v. Stephenson, 69 Kan. 405, 105 Am. St. Rep. 171; Anonymous, (Supm. Ct. App. T.) 21 Misc. (N. Y.) 656.

**3. Entries Must Be Made in Regular Course of Business.** — Norman Printers' Supply Co. v. Ford, 77 Conn. 461; Bradley v. Gardner, 87 Ill. App. 404; Galbraith v. Starks, 79 S. W. Rep. 1191, 25 Ky. L. Rep. 2090; Montgomery County v. Bean, 82 S. W. Rep. 240, 26 Ky. L. Rep. 568; People v. Wilmarth, 29 N. Y. App. Div. 612, affirmed 156 N. Y. 566; Harmon v. Decker, 41 Oregon 587, 93 Am. St. Rep. 748; Duty v. Storrs, (Tex. Civ. App. 1902) 70 S. W. Rep. 357.

**The Book Must Be a Registry of Business Actually Done.** — J. Snow Hardware Co. v. Loveman, 131 Ala. 221.

**4. Single Entry Inadmissible.** — But a docu-



- 922.** *dd.* TIME WITHIN WHICH ENTRIES MUST BE MADE. — See note 5.
- 923.** Transcribed Entries. — See note 2.
- 924.** *ee.* ENTRIES MUST BE MADE FROM PERSONAL KNOWLEDGE. — See note 1.
- 925.** Where Bookkeeper Makes Entries on Information of Other Employees. — See note 1.
- Correctness of Items Furnished for Entry Must Be Established. — See note 3.
- 926.** *ff.* THE BOOK MUST BE REGULAR ON ITS FACE. — See note 1.
- 927.** Regularity a Question for the Court. — See note 2.
- gg.* MISCELLANEOUS REQUIREMENTS AND CONSIDERATIONS — (*aa.*) *The Book Must Contain Charges.* — See note 3.
- Charges Must Be Specific and Particular — Effect of Custom. — See note 4.
- 928.** See note 1.
- (*bb.*) *The Whole Book Must Be Given in Evidence.* — See note 2.
- (*cc.*) *Where Some Entries Incompetent, Others Competent.* — See note 5.
- 929.** (*c.*) What May Be Proved by Books of Account — *aa.* GENERALLY. — Items Must Be Insusceptible of Proof by Other Evidence. — See note 4.
- 930.** Items Must Be Subjects of Book Account. — See note 1.

ment containing one account, kept correctly in other respects, may not be discarded as testimony because only one account appears therein. *Stephan v. Metzger*, 95 Mo. App. 609.

**922. 5. Entries Must Be Made at the Time of the Transaction.** — *Wagar Lumber Co. v. Sullivan Logging Co.*, 120 Ala. 558; *Lane v. May*, etc., *Hardware Co.*, 121 Ala. 296; *Norman Printers' Supply Co. v. Ford*, 77 Conn. 461; *Wells v. Hobson*, 91 Mo. App. 379; *People v. Wilmarth*, 29 N. Y. App. Div. 612, *affirmed* 156 N. Y. 566; *Shipman v. Glynn*, 31 N. Y. App. Div. 425; *Harmon v. Decker*, 41 Oregon 587, 93 Am. St. Rep. 748; *McGarry's Estate*, 9 Pa. Dist. 172; *McKnight v. Newell*, 207 Pa. St. 562; *Duty v. Storrs*, (Tex. Civ. App. 1902) 70 S. W. Rep. 357; *Union Electric Co. v. Seattle Theatre Co.*, 18 Wash. 213.

**923. 2. Illustrations.** — Where entries are copied from time books kept by numerous laborers, and some of the entries are not made until long after the transaction to which they relate, they are not admissible in evidence. *Schnellbacher v. Frank McLaughlin Plumbing Co.*, 108 Ill. App. 486.

**924. 1. Entries Must Be Made from Personal Knowledge.** — *Union Electric Co. v. Seattle Theatre Co.*, 18 Wash. 213; *Shipman v. Glynn*, 31 N. Y. App. Div. 425.

**925. 1. Where Bookkeeper Makes Charges on Information of Salesman.** — *Rogers v. O'Barr*, (Tex. Civ. App. 1904) 81 S. W. Rep. 750, *citing* 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 925.

Where the person directing the form of the entry was accessible and the bookkeeper who made the entry had no knowledge of the facts the account book was held not to be admissible. *Butler v. Estrella Raisin Vineyard Co.*, 124 Cal. 239.

**3. Correctness of Items Furnished Should Be Proved.** — *West Chicago St. R. Co. v. Moras*, 111 Ill. App. 534, *citing* 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 925; *Schnellbacher v. Frank McLaughlin Plumbing Co.*, 108 Ill. App. 486.

**926. 1. Books Must Be Regular on Their Face.** — *State v. Collins*, 1 Marv. (Del.) 536.

A Mutilated Book is not entitled to credit. *Harrold v. Smith*, 107 Ga. 849.

Old and Shopworn Books. — Books of account which have become shopworn from use are ad-

missible, although their covers and some outside leaves are lost, there being no indication of any fraud or purpose to destroy entries. The condition of the books is a matter affecting their weight and credibility with the jury. *Weigle v. Brautigam*, 74 Ill. App. 285.

**927. 2. Regularity a Question for Court.** — *State v. Collins*, 1 Marv. (Del.) 536.

**3. Books Must Contain Charges.** — *Foreman's Estate*, 20 Pa. Co. Ct. 627, 7 Pa. Dist. 214.

**4. Charges Must Be Specific.** — Book entries which are mere lumping charges are inadmissible. *McKnight v. Newell*, 207 Pa. St. 562; *Foreman's Estate*, 20 Pa. Co. Ct. 627, 7 Pa. Dist. 214, holding inadmissible, as failing to show the performance or value of services, an entry in a surgeon's book as follows: "Jan. 7, 1893. John R. Foreman, snared off anterior internal polypoid."

Where book entries furnished nothing by which the propriety of the prices charged can be tested or criticised by witnesses familiar with the transaction, they are inadmissible in evidence. *McGarry's Estate*, 9 Pa. Dist. 172.

**928. 1. Custom as to Making Charges.** — See *Staggers's Estate*, 8 Pa. Super. Ct. 260.

**2. Book Admissible Against Party Introducing It.** — See *Rowan v. Chenoweth*, 49 W. Va. 287, 87 Am. St. Rep. 796.

**5. Admissibility of Book Not Affected by Incompetent Entries Therein.** — *Armstrong v. Landers*, 1 Penn. (Del.) 449; *Stephan v. Metzger*, 95 Mo. App. 609.

**929. 2. Books of Account Inadmissible to Prove Items Admitting of Other Proof.** — *Dewing v. Hutton*, 48 W. Va. 582, *citing* 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 929. See also *supra*, this title, **911. 1.**

**Illustrations.** — The books of a bank are admissible in evidence to show the state of account of a depositor who kept no pass book. *Bastrop State Bank v. Levy*, 106 La. 589, *citing* 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 929.

**930. 1. Illustrations.** — Payments made on a note are not a proper subject-matter of a book account. *Kennedy v. Dodge*, 10 Ohio Cir. Dec. 360, 19 Ohio Cir. Ct. 425.

Premiums collected on insurance policies are not a proper subject of book account. *Wissa-*

**931.** *cc.* MONEY LOANED AND EXPENDED. — See notes 1, 2.

And if the Payment or Loaning of Money Is Within the Ordinary Business of the Party. — See note 4.

**932.** *dd.* DELIVERY TO THIRD PERSON. — See note 1.

Goods Furnished to Third Person — Showing to Whom Credit Given. — See note 3.

**933.** *ff.* SPECIAL CONTRACT — Performance. — See note 2.

*gg.* BOOKS OF ACCOUNT AFFIRMATIVE EVIDENCE ONLY. — See note 4.

**934.** See note 1.

(d) Weight as Evidence — Books of Account Prima Facie Evidence. — See notes 3, 4.

**935.** Books of Account Not Exclusive Evidence — Parol Evidence. — See note 6.

*Hickon Mut. F. Ins. Co. v. Wannemacher*, 15 Pa. Super. Ct. 580.

**Money Received.** — See *Second Borrowers*, etc., *Bldg. Assoc. v. Cochrane*, 103 Ill. App. 29.

**Advancements.** — Book entries of advancements made, when shown to have been made by the ancestor, are evidence both of the fact of advancement and of the intention with which it was given. *Whisler v. Whisler*, 117 Iowa 712.

**931. 1. Books of Account Not Evidence of Money Loaned or Expended.** — *Harrold v. Smith*, 107 Ga. 851, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 931; *Rothschild v. Sessell*, 103 Ill. App. 274; *Galbraith v. Starks*, 79 S. W. Rep. 1191, 25 Ky. L. Rep. 2090; *Hauser v. Levins*, 62 N. J. L. 518; *Simons v. Steele*, 82 N. Y. App. Div. 202, affirmed 177 N. Y. 542; *Brown v. Bronson*, 93 N. Y. App. Div. 312.

In *Oregon* books of account are held to be inadmissible to show a loan of money in large sums. *Harmon v. Decker*, 41 Oregon 587, 93 Am. St. Rep. 748.

**2. Books Admissible to Prove Money Loaned or Expended.** — *Stephan v. Metzger*, 95 Mo. App. 609, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 931, as to the general rule in the absence of statute, but holding that under the *Missouri* statute the rule is otherwise. But see *Gregory v. Jones*, 101 Mo. App. 270.

In *Michigan* books of an insurance company are held to be admissible to prove the amount due to the company from its agent. *Union Cent. L. Ins. Co. v. Smith*, 119 Mich. 171.

**4. Account Books Admissible to Prove Cash Payments in Ordinary Course of Business.** — *Harmon v. Decker*, 41 Oregon 587, 93 Am. St. Rep. 748. See also *Galbraith v. Starks*, 79 S. W. Rep. 1191, 25 Ky. L. Rep. 2090.

**932. 1. Account Books Generally Inadmissible to Prove Delivery to Third Person.** — See *Coleman v. Retail Lumbermen's Ins. Assoc.*, 77 Minn. 31, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 932.

**3. Account Books Admissible to Show Person Credited.** — Book entries are not competent evidence in the plaintiff's own favor for the purpose of showing that credit was given to the defendant, and not to another firm to which the defendant claims that he gave the order for certain goods. *Textile Pub. Co. v. Smith*, (Supm. Ct. App. T.) 31 Misc. (N. Y.) 271.

And in *Massachusetts*, in an action for rent the plaintiff's account book is not admissible to show to whom he credited the payments of rent. *Cooley v. Collins*, 186 Mass. 507.

**933. 2. Account Book Not Evidence of Special**

**Contract.** — *J. Snow Hardware Co. v. Loveman*, 131 Ala. 221; *Collins v. Shaw*, 124 Mich. 474; *Fifth Mut. Bldg. Soc. v. Holt*, 184 Pa. St. 572.

**4. Books of Account Not Admissible to Prove a Negative.** — *Scott v. Bailey*, 73 Vt. 49.

But where the records of accounts are voluminous, and an examination of the books could not conveniently be made in court, schedules made by an expert are admissible to show, not alone what the books did contain, but what they should have contained and did not contain. *San Pedro Lumber Co. v. Reynolds*, 121 Cal. 74.

**934. 1. Books Admitted as Negative Evidence in Special Cases.** — To the same effect as *Union School Furniture Co. v. Mason*, 3 S. Dak. 147, stated in the original note, see *Handy v. Smith*, 77 Conn. 165.

Tax books for one year are admissible to show that they do not contain a certain entry. *Griffin v. Wise*, 115 Ga. 610.

**3. Books of Account Prima Facie Evidence.** — *Chandler v. Pomeroy*, 87 Fed. Rep. 262; *Simpson v. Denver First Nat. Bank*, 129 Fed. Rep. 257, 63 C. C. A. 371; *Cutler's Appeal*, 74 Conn. 35; *Union Cent. L. Ins. Co. v. Prigge*, 90 Minn. 370; *Dewing v. Hutton*, 48 W. Va. 582, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 934.

**Person Charged Not Bound to Prove Incorrectness.** — In an action for goods sold and delivered, it was held that an entry in the plaintiff's books showing that the defendant was indebted to him in a certain amount, coupled with proof that the plaintiff did sell the goods to the defendant, and that the books were regularly kept, was not sufficient to put the defendant, who denied his indebtedness, to proof of the incorrectness of such entry. *Garth v. Montreal Park, etc., R. Co.*, 18 Quebec Super. Ct. 463.

**Stipulation that Pass Book Shall Not Be Conclusive.** — In an action for goods sold and delivered, where it appeared that there was a notice printed on the pass book containing entries of the goods sold that the book was not to be conclusive as to the amount of the purchaser's indebtedness, and it further appeared that the book contained errors and discrepancies, it was held that the plaintiff was not precluded from making proof by its books of the actual amount of the defendant's indebtedness. *Montreal Brewing Co. v. Jones*, 16 Quebec Super. Ct. 422.

**4. Charge Not Conclusive Regarding to Whom Credit Given.** — *Welch v. Ricker*, 69 Vt. 239.

**935. 6. Evidence to Explain Account Books.** — *Simpson v. Denver First Nat. Bank*, 129 Fed. Rep. 257, 63 C. C. A. 371.

**936.** See note 1.

(e) *Function of Court and Jury.* — See note 2.

(2) *Partnership Books* — (a) *Generally.* — See note 3.

**937.** (3) *Of Third Persons* — (a) *In General.* — See note 6.

**938.** See note 1.

(b) *Entries Against Interest.* — See note 2.

(c) *Entries Constituting Part of the Res Gestæ.* — See note 3.

(d) *Entries in the Course of Business.* — See note 4.

**939.** (e) *Necessity for Death of Party Making Entry.* — See note 2.

(4) *Book Entries Used as Memoranda.* — See note 3.

**940.** (5) *Bank Pass Books.* — See note 1.

**941.** See note 1.

**936. 1.** Compare *Anderson v. Walker*, (Tex. Civ. App. 1899) 49 S. W. Rep. 937, holding that entries on a bank's books showing a certain amount to the credit of a depositor may be contradicted by parol.

**2. Function of Court and Jury.** — *Frick v. Kabaker*, 116 Iowa 494; *Dewing v. Hutton*, 48 W. Va. 582, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 936. See also *Cody v. Gainesville First Nat. Bank*, 103 Ga. 789.

**3. Partnership Books** are admissible in an action with a third person to show the date when the partnership began business as such. *Cody v. Gainesville First Nat. Bank*, 103 Ga. 789.

In a suit against persons alleged to have been partners, the plaintiff, having proved the partnership, may introduce a bank book issued to him by the firm in which transactions with the firm as a bank were entered. *Arnold v. Hart*, 75 Ill. App. 165, affirmed 176 Ill. 442.

**937. 6. Books of Third Persons Generally Inadmissible.** — *West Chicago St. R. Co. v. Moras*, 111 Ill. App. 531; *Haas v. Chubb*, 67 Kan. 789, quoting 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 937; *Carlton v. Carey*, 83 Minn. 232, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 937; *Coleman v. Retail Lumbermen's Ins. Assoc.*, 77 Minn. 31, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 937.

**938. 1.** *Haas v. Chubb*, 67 Kan. 789, quoting 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 937.

**2. Entries Against Interest.** — *Hudson v. The Barge Swiftsure*, 82 L. T. N. S. 389, 9 Asp. M. Cas. 65; *Bradshaw v. Widdrington*, (1902) 2 Ch. 430; *McKeen v. Providence County Sav. Bank*, 24 R. I. 542.

**Where Children Are Contesting Their Father's Will**, his books of account are admissible as declarations of the deceased, with reference to the disposition of his property before executing the will. *Matter of Perkins*, 109 Iowa 217.

**3. Knowledge of Plaintiff Essential.** — In *Linden v. Thieriot*, 96 N. Y. App. Div. 256, it was held that books of entry of a person afterwards deceased, introduced by the defendant, are in-

admissible as part of the *res gestæ* where they were made without the plaintiff's knowledge.

**4. Entries in the Course of Business Admissible.** — *Denver v. Cochran*, 17 Colo. App. 75, citing 9 AM. AND ENG. ENCYC. OF LAW (2d ed.) 938, and holding that in an action against a city for injury resulting from a defective sidewalk, a letter written by a city official, since deceased, in the line of his duty, showing his knowledge of the defect, is admissible to show such knowledge on the part of the city. *Meyer v. Brown*, 130 Mich. 449, 9 Detroit Leg. N. 104; *McKeen v. Providence County Sav. Bank*, 24 R. I. 542.

**939. 2. Necessity for Death of Party Making Entry.** — In *Haas v. Chubb*, 67 Kan. 789, the rule was stated to be that entries made by a third person in the ordinary course of business, and by one whose duty it was to make them, are admissible in evidence in some cases, but only after the decease of the person who made them.

And in *Bentley v. Falker*, 24 N. Y. App. Div. 560, the court, in holding the exclusion of certain book entries to have been error, declared that they came within the rule that "all entries or memoranda made (by deceased persons) in their course of business or duty, by any one who would at the time have been a competent witness of the fact which he registers, are competent."

**3. Book Entries Admissible to Support or Contradict a Witness.** — See *Gill v. Staylor*, 93 Md. 453.

**940. 1. Bank Books Admissible in Evidence.** — *Nicholson v. Randall Banking Co.*, 130 Cal. 533; *Atlanta Trust, etc., Co. v. Close*, 115 Ga. 939; *Arnold v. Hart*, 75 Ill. App. 165, 176 Ill. 442. See also *Paducah First Nat. Bank v. Wisdom*, 111 Ky. 135.

**941. 1. Entries in Bank Books Only Prima Facie Evidence.** — *Anderson v. Walker*, (Tex. Civ. App. 1899) 49 S. W. Rep. 937, holding that an entry on the books of a bank showing a credit of a certain sum in the account of a depositor, or a written statement given by the bank showing a like credit, stands on the same footing with entries in a bank passbook, and may be explained or contradicted as a receipt.



1. [DOGGER. — See note 1a.]  
DOING BUSINESS. — See note 3.
- DOLLAR. — See note 4.
3. DOMAIN. — See note 2.
4. DOMESTIC. — See notes 2, 3.

1. 1a. "The term *dogger* is given to men who stand opposite the log as it is being sawed up, and kick off with their feet, and onto the rollers, slabs from the logs as they are cut." *Per* Nicholls, C. J., in *Rucks v. Minden Lumber Co.*, 109 La. 934.

3. In *State v. Bradford Sav. Bank, etc., Co.*, 71 Vt. 234, the court said: "When the Bradford Savings Bank & Trust Company was enjoined from *doing business* in the suit instituted by the state inspector of finance, it ceased to transact its ordinary business, or any other, and ceased to be *doing business* in this state, within the meaning of [Vermont Statutes] section 583, and consequently ceased to be liable to pay this franchise tax."

4. In construing a statute authorizing the issue of bonds to the extent of "twenty-six million dollars," the court said: "The word *dollar*, the only word used in the law which limits the word 'bond,' may be defined to be the unit of value of money as enacted by the Congress of the United States, and at the time of the passage of the law in question, as well as at the present time, the *dollar* of the United States consisted of a legal tender currency *dollar* redeemable in gold or silver coin of the United States, and the gold coin and silver coin of the United States. So that a bond of the city of Cincinnati, payable in *dollars*, might be paid either in legal tender currency, or gold or silver coin, and therefore a bond payable in gold *dollars* would be a limitation on the *dollars* used in the statute, in that it would exclude the payment of said

bond in legal tender currency or silver coin." *Cincinnati v. Anderson*, 6 Ohio Cir. Dec. 594, *affirmed* 34 Cinc. L. Bul. 170.

Indictment—Larceny.—*People v. Lammerts*, 164 N. Y. 137.

3. 2. *Barker v. Harvey*, 181 U. S. 481. See also *Rush v. Thompson*, 2 Indian Ter. 557.

4. 2. A Page-boy in a Hotel, who sleeps on the premises, and who is principally employed as a messenger, but partly also in assisting to dust the reception rooms, is not within the exemption in section 10 in favor of "any person wholly employed as a *domestic* servant." *Savoy Hotel Co. v. London County Council*, (1900) 1 Q. B. 665.

3. Domestic Purposes—Water.—*Barnard Castle Urban Dist. Council v. Wilson*, (1902) 2 Ch. 746; *South West Suburban Water Co. v. Guardians of Poor*, (1904) 2 K. B. 174; *Crawford Co. v. Hathaway*, (Neb. 1903) 93 N. W. Rep. 781.

Domestic Fixtures.—See *Wright v. Du Bignon*, 114 Ga. 765.

Domestic Message.—"Where the initial and terminal points are both in the same state, and the telegram is transmitted over the wires of the same company, and concerns only citizens of that state, the message is a *domestic* message, and its character, in that respect, is not altered by the circumstance that the line passes in part over territory of another state. Nor is it affected by the fact that the company has established a relay office in such other state." *Per* Whittle, J., in *Western Union Tel. Co. v. Reynolds*, 100 Va. 464.

## DOMICIL.

By X. P. HUDDY.

### 8. I. DEFINITION AND GENERAL CONSIDERATIONS.—See note 1.

Domicil and Residence Distinguished.—See note 2.

8. 1. Definition.—*Corel v. Chicago, etc., R. Co.*, 123 Fed. Rep. 452, *citing* 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 8; *In re Garneau*, (C. C. A.) 127 Fed. Rep. 677; *In re Williams*, 3 Am. Bankr. Rep. 677, *citing* 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 7 [8]; *Plant v. Harrison*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 649; *Hascall v. Hafford*, 107 Tenn. 355, 89 Am. St. Rep. 952; *Dormitzer v. German Sav., etc., Soc.*, 23 Wash. 132, *citing* 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 7 [8].

Other Definitions.—Domicil is a residence at any particular place, with positive presumptive proof of an intention to remain there an unlimited time, and to constitute it two things must concur, residence and intention, but it does not depend upon citizenship or presence at the place of abode. *Lesh v. Lesh*, 13 Pa. Dist. 537.

Domicil Means Home.—*King v. King*, 155 Mo. 406.

Definition Criticised.—In *Graham v. Graham*, 9 N. Dak. 88, Wallin, J., after quoting Mr. Bishop's definition of domicil as "the place where the person has fixed his habitation without any present intention of removing therefrom," says: "This definition, while it has met with the approval of some courts, is in our judgment too narrow, unless the intention to remove be limited to the time of fixing the residence. The mere fact of an existing intention to remove from the place where one is domiciled cannot, we think, operate against the *bona fides* of residence. The existence of a mere purpose to go elsewhere to live is not in our opinion sufficient to defeat a legal residence in the place where a person is actually domiciled."

2. Distinction Between Residence and Domicil.—*United States*.—*Pacific Mut. L. Ins. Co. v. Tompkins*, (C. C. A.) 101 Fed. Rep. 539; *Collins v. Ashland*, 112 Fed. Rep. 175; *Corel v.*

## 9. See note 1.

Domicil and Residence in Different Places. — See note 2.

Two Residences. — See note 3.

Used as Synonymous. — See note 4.

## 10. Domicil Necessary. — See note 1.

Number of Domicils. — See notes 2, 3, 4.

Chicago, etc., R. Co., 123 Fed. Rep. 452; *In re Garneau*, (C. C. A.) 127 Fed. Rep. 677.

California. — *San Diego Sav. Bank v. Goodsell*, 137 Cal. 420.

Georgia. — *Stickney v. Chapman*, 115 Ga. 759.

Illinois. — *Witbeck v. Marshall-Wells Hardware Co.*, 88 Ill. App. 101, *affirmed* 188 Ill. 154.

Oregon. — *McFarlane v. Cornelius*, 43 Oregon 513.

Tennessee. — *Hascall v. Hafford*, 107 Tenn. 355, 89 Am. St. Rep. 952.

Vermont. — *State v. Cunningham*, 75 Vt. 332.

West Virginia. — *State v. Allen*, 48 W. Va. 154, 86 Am. St. Rep. 29; *Atkinson v. Washington, etc.*, College, 54 W. Va. 32.

Canada. — *Denier v. Marks*, 18 Ont. Pr. 465.

9. 1. *Witbeck v. Marshall-Wells Hardware Co.*, 88 Ill. App. 101, *affirmed* 188 Ill. 154; *State v. Allen*, 48 W. Va. 154, 86 Am. St. Rep. 29, quoting 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 8 [9].

Domicil Includes Residence. — *Matter of Henning*, 128 Cal. 214, 79 Am. St. Rep. 43.

"Domicil includes residence with an intention to remain, while no length of residence without intention of remaining constitutes domicil." *Stickney v. Chapman*, 115 Ga. 759.

Residence and Habitation are generally regarded as synonymous. *Atkinson v. Washington, etc.*, College, 54 W. Va. 32. And see HABITATION — HABITANCY.

The Words "Inhabitant," "Citizen," and "Resident" mean substantially the same thing, and one is an inhabitant, resident, or citizen of the place where he has his domicil. *Stevens v. Larwill*, 110 Mo. App. 140. See generally INHABITANT; RESIDENCE, RESIDENT, ETC.. Compare *McFarlane v. Cornelius*, 43 Oregon 513.

The Term "Residence" Is an Elastic One, and difficult of precise definition. The sense in which it should be used is controlled by reference to the object. Its meaning is dependent upon the circumstances then surrounding the person, upon the character of the work to be performed, upon whether he has a family or a home in another place, and largely upon his present intention. *In re Garneau*, (C. C. A.) 127 Fed. Rep. 677.

"Citizenship Depends upon Domicil, and, as domicil and residence are two different things, it follows that citizenship is not determined by residence." *Collins v. Ashland*, 112 Fed. Rep. 175. See also *State v. Kuhn*, 11 Ohio Dec. 321.

In Colorado a person is a citizen within the purview of the divorce act if domiciled in the state. Citizenship of the United States is not necessary. *Cairnes v. Cairnes*, 29 Colo. 260, 93 Am. St. Rep. 55.

"Dwelling House" and "Usual Place of Abode" are synonymous as signifying domicil and are distinguishable from "place of residence." *McFarlane v. Cornelius*, 43 Oregon 513.

Bankruptcy Act of 1898. — The term "domicil,"

used in the Bankruptcy Act of 1898, is a broader term than the term "residence." *In re Grimes*, 94 Fed. Rep. 800.

In Pennsylvania the word "resident," as used in the Act of May 4, 1855, includes both permanent and temporary residence in the commonwealth. *Brown's Adoption*, 25 Pa. Super. Ct. 259.

2. Domicil and Residence in Different Places. — *Collins v. Ashland*, 112 Fed. Rep. 175; *Matter of Henning*, 128 Cal. 214, 79 Am. St. Rep. 43; *San Diego Sav. Bank v. Goodsell*, 137 Cal. 420; *Hascall v. Hafford*, 107 Tenn. 355, 89 Am. St. Rep. 952; *State v. Cunningham*, 75 Vt. 332; *State v. Allen*, 48 W. Va. 154, 86 Am. St. Rep. 29; *Atkinson v. Washington, etc.*, College, 54 W. Va. 32. See also *Eisele v. Oddie*, 128 Fed. Rep. 941.

3. More than One Residence. — *Corel v. Chicago, etc.*, R. Co., 123 Fed. Rep. 452, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 9; *Gardiner v. Brookline*, 181 Mass. 162. See also *Paddack v. Lewis*, 59 N. Y. App. Div. 430, *affirmed* 179 N. Y. 591.

4. "Residence" and "Domicil" Used as Convertible Terms — *United States*. — *In re Garneau*, (C. C. A.) 127 Fed. Rep. 677.

California. — See *Matter of Henning*, 128 Cal. 214, 79 Am. St. Rep. 43.

Illinois. — *People v. Moir*, 207 Ill. 180, 99 Am. St. Rep. 205, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 9.

Kansas. — *Modern Woodmen of America v. Hester*, 66 Kan. 129.

Massachusetts. — *Andrews v. Andrews*, 176 Mass. 92; *Phillips v. Boston*, 183 Mass. 314.

New York. — *Matter of Cruger*, (Surrogate Ct.) 36 Misc. (N. Y.) 477; *Matter of Cleveland*, (Surrogate Ct.) 28 Misc. (N. Y.) 369.

North Dakota. — *Graham v. Graham*, 9 N. Dak. 88; *Smith v. Smith*, 10 N. Dak. 219.

Ohio. — *State v. Kuhn*, 11 Ohio Dec. 321.

Tennessee. — *Hascall v. Hafford*, 107 Tenn. 355, 89 Am. St. Rep. 952.

Texas. — *Texas, etc.*, R. Co. v. *Edmisson*, (Tex. Civ. App. 1899) 52 S. W. Rep. 635; *Hipp v. State*, 45 Tex. Crim. 200; *Pearson v. West*, 97 Tex. 238. See also *Laferiere v. Richards*, 28 Tex. Civ. App. 63.

Not Synonymous in Attachment. — *Stickney v. Chapman*, 115 Ga. 759; *Witbeck v. Marshall-Wells Hardware Co.*, 88 Ill. App. 101, *affirmed* 188 Ill. 154; *Hamill v. Talbott*, 81 Mo. App. 210; *Thomson v. Ogden*, 23 Ohio Cir. Ct. 185; *Southern R. Co. v. McDonald*, (Tenn. Ch. 1900) 59 S. W. Rep. 370. See also the title ATTACHMENT, 198, 3, 4.

10. 1. Every Person Must Have a Domicil. — *Louisville, etc.*, R. Co. v. *Kimbrough*, 115 Ky. 512; *Lebanon v. Biggers*, (Ky. 1904) 78 S. W. Rep. 213; *State v. Kuhn*, 11 Ohio Dec. 321.

2. Only One Domicil. — *Lebanon v. Biggers*, (Ky. 1904) 78 S. W. Rep. 213.

3. Different Domicils for Different Purposes. —

- 10. II. KINDS OF DOMICIL — 1. In General.** — See note 5.  
**2. Domicil of Origin — a. IN WHAT PLACE — (1) In General.** — See note 6.  
**11.** See note 1.  
 (2) *Legitimate Child* — **Born During Father's Lifetime.** — See note 2.  
 (3) *Illegitimate Child.* — See note 4.  
**12. b. PRESUMPTION OF CONTINUANCE OF DOMICIL OF ORIGIN.** — See note 1.  
**c. REVERTER OF DOMICIL OF ORIGIN.** — See notes 2, 4.  
**14. 3. Domicil of Choice — a. IN GENERAL.** — See note 2.  
**b. PRESUMPTION OF CONTINUANCE OF ACQUIRED DOMICIL.** — See note 4.  
**15.** See note 1.  
**c. CONTINUANCE OF ACQUIRED DOMICIL.** — See note 2.

What constitutes a legal residence is, generally speaking, dependent on the facts of each individual case, and consequently it often happens that facts which constitute a legal residence in one locality, for one purpose, do not necessarily establish such residence for another purpose. To illustrate: A person may be a legal voter in one borough and yet be a taxable resident of another borough where he spends most of his time and transacts his principal business. But wherever his residence may be, it is well settled that for the purposes of taxation for personal property it will be deemed to continue until a *bona fide* change is affirmatively and satisfactorily shown to have taken place. *Pad-dack v. Lewis*, 59 N. Y. App. Div. 430, *affirmed* 179 N. Y. 591.

**10. 4. Only One Domicil for One Purpose.** — *Gardiner v. Brookline*, 181 Mass. 162; *Harris v. Harris*, 83 N. Y. App. Div. 123; *State v. Kuhn*, 11 Ohio Dec. 321; *State v. Allen*, 48 W. Va. 154, 86 Am. St. Rep. 29.

**5.** *Louisville, etc., R. Co. v. Kimbrough*, 115 Ky. 512; *Lesh v. Lesh*, 13 Pa. Dist. 537.

**National, Quasi-national, and Municipal.** — Domicil has been divided into national, quasi-national, and municipal domicil. *State v. Kuhn*, 11 Ohio Dec. 321.

**6. Domicil of Origin and of Choice Distinguished.** — "Domicil of origin, or as it is sometimes called, perhaps less accurately, 'domicil of birth,' differs from domicil of choice mainly in this: that its character is more enduring, its hold stronger, and less easily shaken off." *Winans v. Atty.-Gen.*, (1904) A. C. 287, *per Lord Macnaghten*.

**11. 1. May Differ from Birthplace.** — See *Winans v. Atty.-Gen.*, (1904) A. C. 287.

**2. Legitimate Child Has Father's Domicil.** — *Louisville, etc., R. Co. v. Kimbrough*, 115 Ky. 512.

**4. Illegitimate Child Has Mother's Domicil.** — *Louisville, etc., R. Co. v. Kimbrough*, 115 Ky. 512.

**12. 1. Continuance of Domicil.** — *Winans v. Atty.-Gen.*, (1904) A. C. 287; *In re Williams*, 3 Am. Bankr. Rep. 677, *citing* 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 11 (12); *In re Grimes*, 94 Fed. Rep. 800; *People v. Moir*, 207 Ill. 180, 99 Am. St. Rep. 205; *Lebanon v. Biggers*, (Ky. 1904) 78 S. W. Rep. 213; *Simmons's Succession*, 109 La. 1095; *Chew v. Wilson*, 93 Md. 196; *Phillips v. Boston*, 183 Mass. 314; *Matter of*

*Russell*, 64 N. J. Eq. 313; *Matter of Cleveland*, (Surrogate Ct.) 28 Misc. (N. Y.) 369; *Harris v. Harris*, 83 N. Y. App. Div. 123; *In re Williamson*, 8 Ohio Dec. 47, 6 Ohio N. P. 79; *Lesh v. Lesh*, 13 Pa. Dist. 537, *citing* 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 12.

**2. "Reverts Easily."** — *Plant v. Harrison*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 649.

**4. English Doctrine.** — See *Plant v. Harrison*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 649.

**14. 2. Domicil of Choice.** — *In re Williamson*, 8 Ohio Dec. 47, 6 Ohio N. P. 79.

**The General Rule** in respect to the acquisition of a new domicil is that after a person has abandoned his domicil of origin, or his acquired domicil, his domicil will be considered to be in that place in which he has voluntarily fixed his habitation, not for a special or temporary purpose, but with a present intention of making it his home unless or until something which is uncertain or unexpected should happen to induce him to adopt some other permanent home. *Valentine v. Valentine*, 61 N. J. Eq. 400.

**Soldiers and Sailors in Active Service.** — "In order to gain either an actual or legal residence, there is, of necessity, involved at least the exercise of volition in its selection, and this cannot be affirmed of the residence of either a soldier or sailor in active service." *Radford v. Radford*, (Ky. 1904) 82 S. W. Rep. 391.

**4. Presumption Against Change.** — *In re Filer*, 108 Fed. Rep. 209; *Tuttle v. Wood*, 115 Iowa 507; *Pilnik v. Numinzinski*, 16 Quebec Super. Ct. 231.

**15. 1. Burden of Proof.** — *In re Grimes*, 94 Fed. Rep. 800; *In re Filer*, 108 Fed. Rep. 209; *Eisele v. Oddie*, 128 Fed. Rep. 941; *People v. Moir*, 207 Ill. 180, 99 Am. St. Rep. 205, *citing* 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 6 [15]; *Dickinson v. Brookline*, 181 Mass. 195, 92 Am. St. Rep. 407; *Greene v. Burkhardt*, 11 Ohio Dec. 399.

**2. Continuance of Former Domicil.** — *Illinois L. Ins. Co. v. Shenehon*, 109 Fed. Rep. 674; *Jain v. Bossen*, 27 Colo. 423; *People v. Moir*, 207 Ill. 180, 99 Am. St. Rep. 205; *Ballard v. Puleston*, 113 La. 235; *Matter of Brant*, (Surrogate Ct.) 30 Misc. (N. Y.) 14; *Plant v. Harrison*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 649; *Greene v. Burkhardt*, 11 Ohio Dec. 399; *Bonbright v. Bonbright*, 2 Ont. L. Rep. 249. See also *Matter of Golden*, (Surrogate Ct.) 40 Misc. (N. Y.) 544.



**15.** 4. Domicil by Operation of Law. — See note 6.

**16.** III. ELEMENTS OF DOMICIL — 1. In General. — See note 1.

**17.** 2. Residence — *a.* NO DEFINITE PERIOD OF RESIDENCE. — See note 1.

**18.** *b.* TEMPORARY RESIDENCE. — See note 1.

*c.* CHARACTER OF THE RESIDENCE. — See note 2.

**3.** Intention — *a.* IN GENERAL. — See note 3.

**15.** 6. *Lesh v. Lesh*, 13 Pa. Dist. 537.

**Infant's Domicil by Operation of Law.** — Where the child has neither legal father nor living mother, and where neither is shown to have maintained a domicil at any place, then it must follow that the child's domicil must be fixed by operation of law. *Louisville, etc., R. Co. v. Kimbrough*, 115 Ky. 512.

**16.** 1. Residence and Intention Constitute Domicil — *England.* — *Winans v. Atty.-Gen.*, (1904) A. C. 287.

*United States.* — *In re Williams*, 3 Am. Bankr. Rep. 677, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 15 (16); *Sun Printing, etc., Assoc. v. Edwards*, 194 U. S. 377; *Corel v. Chicago, etc., R. Co.*, 123 Fed. Rep. 452; *In re Garneau*, (C. C. A.) 127 Fed. Rep. 677.

*California.* — *Sheehan v. Scott*, 145 Cal. 684.

*Colorado.* — See *Parsons v. People*, 30 Colo. 388.

*Connecticut.* — *Fairfield v. Easton*, 73 Conn. 735.

*Georgia.* — *Peacock v. Collins*, 110 Ga. 281; *Knight v. Bond*, 112 Ga. 828; *Stickney v. Chapman*, 115 Ga. 759.

*Illinois.* — *People v. Moir*, 207 Ill. 180, 99 Am. St. Rep. 205.

*Kansas.* — *Modern Woodmen of America v. Hester*, 66 Kan. 129.

*Kentucky.* — *Lebanon v. Biggers*, (Ky. 1904) 78 S. W. Rep. 213, quoting 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 15 (16).

*Louisiana.* — *Marks v. Germania Sav. Bank*, 110 La. 659.

*Massachusetts.* — *Gardiner v. Brookline*, 181 Mass. 162; *Palmer v. Hampden*, 182 Mass. 511; *Phillips v. Boston*, 183 Mass. 314.

*Michigan.* — See *Loeser v. Jorgensen*, (Mich. 1904) 100 N. W. Rep. 450.

*Missouri.* — *State v. Snyder*, 182 Mo. 462; *Stevens v. Larwill*, 110 Mo. App. 140.

*New Jersey.* — *Valentine v. Valentine*, 61 N. J. Eq. 400; *Matter of Russell*, 64 N. J. Eq. 313; *Wallace v. Wallace*, 65 N. J. Eq. 359, reversing 62 N. J. Eq. 509.

*New York.* — *Matter of Cruger*, (Surrogate Ct.) 36 Misc. (N. Y.) 477; *Plant v. Harrison*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 649; *Matter of Cleveland*, (Surrogate Ct.) 28 Misc. (N. Y.) 369; *Doeme v. Doeme*, 96 N. Y. App. Div. 284.

*North Dakota.* — *Graham v. Graham*, 9 N. Dak. 88.

*Ohio.* — *In re Williamson*, 8 Ohio Dec. 47, 6 Ohio N. P. 79; *Greene v. Burkhardt*, 11 Ohio Dec. 399.

*Pennsylvania.* — *Lesh v. Lesh*, 13 Pa. Dist. 537.

*Tennessee.* — *Hascall v. Hafford*, 107 Tenn. 355, 89 Am. St. Rep. 952.

*Washington.* — *McCord v. Rosene*, (Wash. 1905) 80 Pac. Rep. 793.

*West Virginia.* — *State v. Allen*, 48 W. Va. 154, 86 Am. St. Rep. 29, quoting 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 15 [16].

**17.** 1. Period of Residence Not Definite. — *Palmer v. Hampden*, 182 Mass. 511; *Matter of Cleveland*, (Surrogate Ct.) 28 Misc. (N. Y.) 369; *Plant v. Harrison*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 649.

**18.** 1. Temporary Residence Does Not Constitute Domicil — *United States.* — *Illinois L. Ins. Co. v. Shenehon*, 109 Fed. Rep. 674. See also *Sun Printing, etc., Assoc. v. Edwards*, 194 U. S. 377.

*Colorado.* — *Jain v. Bossen*, 27 Colo. 423; *Newton-Hart Grocer Co. v. Peet*, 18 Colo. App. 147.

*Georgia.* — *Peacock v. Collins*, 110 Ga. 281; *Knight v. Bond*, 112 Ga. 828.

*Illinois.* — *Collier v. Anlicker*, 189 Ill. 34.

*Iowa.* — *Kelso v. Wright*, 110 Iowa 560.

*Kentucky.* — *Jones v. Lay*, (Ky. 1902) 66 S. W. Rep. 720; *Boreing v. Boreing*, 114 Ky. 522; *Lebanon v. Biggers*, (Ky. 1904) 78 S. W. Rep. 213.

*Louisiana.* — *Ballard v. Puleston*, 113 La. 235.

*New York.* — *Matter of Cleveland*, (Surrogate Ct.) 28 Misc. (N. Y.) 369; *Matter of Brant*, (Surrogate Ct.) 30 Misc. (N. Y.) 14; *Matter of Porter*, 34 N. Y. App. Div. 147; *Doeme v. Doeme*, 96 N. Y. App. Div. 284; *Hammond v. Hammond*, 103 N. Y. App. Div. 437.

*North Carolina.* — *Moore v. Moore*, 130 N. Car. 333.

*North Dakota.* — *Graham v. Graham*, 9 N. Dak. 88.

*Ohio.* — *State v. Kuhn*, 11 Ohio Dec. 321, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 18.

*Rhode Island.* — *Finn v. Board of Canvassers*, 24 R. I. 482.

*Tennessee.* — *Hascall v. Hafford*, 107 Tenn. 355, 89 Am. St. Rep. 952.

*West Virginia.* — *State v. Allen*, 48 W. Va. 154, 86 Am. St. Rep. 29; *Atkinson v. Washington, etc., College*, 54 W. Va. 32.

*Canada.* — *Bonbright v. Bonbright*, 2 Ont. L. Rep. 249. See also *McGoun v. Morrison*, 15 Quebec Super. Ct. 32.

**2.** Character of Residence Immaterial. — *Tracy v. Tracy*, 62 N. J. Eq. 807; *McCord v. Rosene*, (Wash. 1905) 80 Pac. Rep. 793.

**3.** Intention — *England.* — *Winans v. Atty.-Gen.*, (1904) A. C. 287.

*Ontario.* — *Bonbright v. Bonbright*, 2 Ont. L. Rep. 249.

*Georgia.* — *Peacock v. Collins*, 110 Ga. 281.

*Kentucky.* — *Montgomery v. Lebanon*, 111 Ky. 646, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 18.

*Massachusetts.* — *Gardiner v. Brookline*, 181

**19.** See notes 1, 2.

b. FLOATING INTENTION. — See note 3.

**20.** d. BONA FIDE INTENTION. — See notes 1, 2.

e. PURPOSE UNIMPORTANT. — See note 3.

**IV. CHANGE OF DOMICIL.** — See note 4.**V. EVIDENCE** — 1. In General. — See note 5.

Mass. 162; *Dickinson v. Brookline*, 181 Mass. 195, 92 Am. St. Rep. 407.

Michigan. — *Spaulding v. Steele*, 129 Mich. 237.

New Jersey. — *Valentine v. Valentine*, 61 N. J. Eq. 400.

New York. — *Bump v. New York*, etc., R. Co., 38 N. Y. App. Div. 60, *affirmed* 165 N. Y. 636.

North Dakota. — *Graham v. Graham*, 9 N. Dak. 88.

Pennsylvania. — *Lesh v. Lesh*, 13 Pa. Dist. 537.

Rhode Island. — *Finn v. Board of Canvassers*, 24 R. I. 482.

West Virginia. — *State v. Allen*, 48 W. Va. 154, 86 Am. St. Rep. 154.

**19. 1. Intention to Make Residence Permanent Not Necessary.** — *Bump v. New York*, etc., R. Co., 38 N. Y. App. Div. 60, *affirmed* 165 N. Y. 636.

2. *Bump v. New York*, etc., R. Co., 38 N. Y. App. Div. 60, *affirmed* 165 N. Y. 636.

3. **Floating Intention.** — *Lebanon v. Biggers*, (Ky. 1904) 78 S. W. Rep. 213, *quoting* 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 15 [19]; *Valentine v. Valentine*, 61 N. J. Eq. 400, *citing* 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 19.

**20. 1. Bona Fide Intention** — *United States*. — *Bell v. Bell*, 181 U. S. 175, *affirming* 157 N. Y. 719; *Streitwolf v. Streitwolf*, 181 U. S. 179, *affirming* 58 N. J. Eq. 563; *Andrews v. Andrews*, 188 U. S. 14, *affirming* 176 Mass. 92; *In re Garneau*, (C. C. A.) 127 Fed. Rep. 677.

Colorado. — *Branch v. Branch*, 30 Colo. 499. Iowa. — *Beeman v. Kitzman*, 124 Iowa 86.

New Jersey. — *Sweeney v. Sweeney*, 62 N. J. Eq. 357; *Grover v. Grover*, 63 N. J. Eq. 771; *Miller v. Miller*, (N. J. 1904) 58 Atl. Rep. 188; *Watkinson v. Watkinson*, (N. J. 1904) 58 Atl. Rep. 384.

North Dakota. — *Graham v. Graham*, 9 N. Dak. 88; *Smith v. Smith*, 10 N. Dak. 219.

Washington. — *Dormitzer v. German Sav.*, etc., Soc., 23 Wash. 132.

2. **Bona Fide Removal to Give Jurisdiction Valid.** — *Wierner v. Louisville Water Co.*, 130 Fed. Rep. 244; *Wallace v. Wallace*, 65 N. J. Eq. 359, *reversing* 62 N. J. Eq. 509; *Graham v. Graham*, 9 N. Dak. 88; *Stevens v. Larwill*, 110 Mo. App. 140.

3. *Stevens v. Larwill*, 110 Mo. App. 140. See *Matter of Hall*, 61 N. Y. App. Div. 266.

**Motive** may be considered in determining the bona fides of an intent to change one's domicile. *Plant v. Harrison*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 649, *citing* 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 20.

4. **Change of Domicil** — *England*. — *Winans v. Atty.-Gen.*, (1904) A. C. 287.

Canada. — *Bonbright v. Bonbright*, 2 Ont. L. Rep. 249.

United States. — *Sun Printing*, etc., Assoc. v. *Edwards*, 194 U. S. 377; *Pacific Mut. L. Ins.*

*Co. v. Tompkins*, (C. C. A.) 101 Fed. Rep. 539; *Collins v. Ashland*, 112 Fed. Rep. 175; *Corel v. Chicago*, etc., R. Co., 123 Fed. Rep. 453; *In re Garneau*, (C. C. A.) 127 Fed. Rep. 677; *Eisele v. Oddie*, 128 Fed. Rep. 941.

Colorado. — *Jain v. Bossen*, 27 Colo. 423.

Georgia. — *Peacock v. Collins*, 110 Ga. 281; *Knight v. Bond*, 112 Ga. 828.

Illinois. — *People v. Moir*, 207 Ill. 180, 99 Am. St. Rep. 205.

Kentucky. — *Lebanon v. Biggers*, (Ky. 1904) 78 S. W. Rep. 213, *quoting* 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 15 [20].

Louisiana. — *Simmons's Succession*, 109 La. 1095; *Marks v. Germania Sav. Bank*, 110 La. 659.

Massachusetts. — *Palmer v. Hampden*, 182 Mass. 511.

Missouri. — *State v. Snyder*, 182 Mo. 462; *Stevens v. Larwill*, 110 Mo. App. 140.

New Jersey. — *Valentine v. Valentine*, 61 N. J. Eq. 400; *Matter of Russell*, 64 N. J. Eq. 313; *Tracy v. Tracy*, 62 N. J. Eq. 807.

New York. — *Matter of Cleveland*, (Surrogate Ct.) 28 Misc. (N. Y.) 369; *Plant v. Harrison*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 649; *Bump v. New York*, etc., R. Co., 38 N. Y. App. Div. 60, *affirmed* 165 N. Y. 636.

North Dakota. — *Graham v. Graham*, 9 N. Dak. 88.

Ohio. — *In re Williamson*, 8 Ohio Dec. 47, 6 Ohio N. P. 79; *Greene v. Burkhardt*, 11 Ohio Dec. 399.

West Virginia. — *State v. Allen*, 48 W. Va. 154, 86 Am. St. Rep. 29.

**Right to Change.** — Every person who is sui juris and capable of controlling his personal movements may change his domicile at pleasure. *State v. Kuhn*, 11 Ohio Dec. 321.

**The Question of Change of Residence** is largely dependent on intention, and, where the intention is not openly expressed, it must be gathered from the facts proved. *Newlon-Hart Grocer Co. v. Peet*, 18 Colo. App. 147.

**Reasonable Doubt.** — So long as a reasonable doubt remains the presumption is that the domicile has not been changed. *Simmons's Succession*, 109 La. 1095.

5. **Proof by Variety of Facts and Circumstances.** — *Winans v. Atty.-Gen.*, (1904) A. C. 287; *Bonbright v. Bonbright*, 2 Ont. L. Rep. 249; *Gardiner v. Brookline*, 181 Mass. 162; *Valentine v. Valentine*, 61 N. J. Eq. 400; *Plant v. Harrison*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 649; *State v. Kuhn*, 11 Ohio Dec. 321; *Lesh v. Lesh*, 13 Pa. Dist. 537.

**Questions of Fact.** — *Harrison v. National Bank*, 207 Ill. 630, *affirming* 108 Ill. App. 493; *Lebanon v. Biggers*, (Ky. 1904) 78 S. W. Rep. 213; *Palmer v. Hampden*, 182 Mass. 511; *Matter of Brant*, (Surrogate Ct.) 30 Misc. (N. Y.) 14. See also *Witbeck v. Marshall-Wells Hardware Co.*, 88 Ill. App. 101, *affirmed* 188 Ill. 154.

- 21.** Illustrations. — See note 1.  
**22.** 2. Place of Residence — *a.* IN GENERAL. — See note 3  
**23.** *c.* MARRIED MEN. — See note 2.  
**24.** 4. Exercise of Right of Suffrage. — See note 4.  
**25.** See note 1.

What constitutes a change of domicile in the abstract is a question of law, but whether it has been effected in a given case must depend on the facts. *Jain v. Bossen*, 27 Colo. 423.

**Mixed Question of Law and Fact.** — See *Stickney v. Chapman*, 115 Ga. 759.

**Precedents Are of Slight Assistance.** — Domicil is so essentially a question depending on the minute facts and circumstances of each particular case that precedents, with necessarily varying facts, are of slight assistance. *Plant v. Harrison*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 649.

**Contemporaneous Acts May Be Shown.** — *Loeser v. Jorgensen*, (Mich. 1904) 100 N. W. Rep. 450.

**Sufficiency of Evidence.** — There was sufficient evidence to sustain a finding that a defendant was subject to the jurisdiction of the Superior Court of Rabun county, Georgia, where it appeared that he was unmarried, had no fixed abode, and had been in Rabun county for eight months. Under the Civil Code, § 425, he could, as to third persons, be treated as a resident of the county in which he was temporarily domiciled. *Ginn v. Cannon*, 119 Ga. 475.

Where a resident sold his property and business and went to another state, purchased land and decided to locate there, these facts were held to be sufficient for the courts of that state to find that the party changed his domicile and that the courts of the former state had no jurisdiction of an action for divorce thereafter brought by the party. *German Sav., etc., Soc. v. Dormitzer*, 192 U. S. 125.

Where evidence was introduced that a party did business at a place for two years, it was held insufficient to establish domicile, in the absence of the ordinary indicia resorted to in order to prove domicile. *Tuttle v. Wood*, 115 Iowa 507.

Where it was shown that the plaintiff made her residence in Seattle, Washington, twelve months prior to the commencement of an action for divorce, that while she was out of the state a part of the time it was for employment, that her baby was left in the state, and that her intention was to make Seattle her home, the plaintiff's residence was held to be sufficiently established. *Summerville v. Summerville*, 31 Wash. 411.

A widow brought an action in *New York* against a corporation for the negligent killing of her husband in *Connecticut*, and she testified that she had removed from Connecticut to New York because she thought she could earn a better living, and also partly for the purpose of bringing suit. As to her intention in respect to her residence, she said that she did not intend to go back to Connecticut when the suit was completed unless she had a better position offered her; that she thought that she would remain in New York although she was uncertain about it; that she probably would remain; that she had not formed a definite intention in

relation to a future residence; that she came to New York with the intention of remaining and living there. The court held that the evidence was sufficient to show residence in New York. *Bump v. New York, etc., R. Co.*, 38 N. Y. App. Div. 60, affirmed 165 N. Y. 636.

**The Mere Removal by a Married Man of His Wife and Children** to a city within the county of his residence, and the occupancy by the family of a rented house in such city, did not effect a change of his domicile, when it affirmatively appeared that his sole purpose in making such removal was to send his children to school for a limited period; that he kept the home from which he had thus temporarily removed his family furnished, and spent much of his own time therein; that he continued to discharge the duties of citizenship incident to residence by him in the county wherein that home was located, and that there was at no time any intention on his part to provide, either for himself or his family, a fixed place of abode in the city referred to, or that he or any of them should permanently reside there. *Peacock v. Collins*, 110 Ga. 281.

**Registering at Hotels.** — While a man's act in registering himself and wife at hotels as of a certain place may be insufficient in itself to fasten on him acknowledgment of domicile there, repeated registrations of that kind through two or three years' time, and never once as of another place (subsequently claimed, from interested motives, to be his domicile), are strong links in the chain of facts and circumstances going to establish intention to make the place of declared residence his domicile. *Marks v. Germania Sav. Bank*, 110 La. 659.

**21. 1. Holding Office.** — *Hammond v. Hammond*, 103 N. Y. App. Div. 437.

**22. 3. Presumption from Residence.** — See *Greene v. Burkhardt*, 11 Ohio Dec. 399.

**23. 2. Presumption as to Married Men.** — *Valentine v. Valentine*, 61 N. J. Eq. 400. But see *McCord v. Rosene*, (Wash. 1905) 80 Pac. Rep. 793.

**Georgia Statute.** — The domicile of a man having a family is, under section 1824 of the Civil Code, the place where his family "shall permanently reside, if in this state," the word "permanently" being here used in contradistinction from the word "temporarily." *Peacock v. Collins*, 110 Ga. 281.

**If a Person Is Moving To and Fro**, the question whether he has his home where he has established his family, or where his strongest domestic ties are fixed, may determine in which of several places is his domicile. *Greene v. Burkhardt*, 11 Ohio Dec. 399.

**24. 4. Voting as Evidence.** — *Hammond v. Hammond*, 103 N. Y. App. Div. 437; *People v. Feitner*, (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 368.

**25. 1. Not Conclusive.** — *State v. Kuhn*, 11 Ohio Dec. 321; *Hascall v. Hafford*, 107 Tenn. 355, 89 Am. St. Rep. 952.



- 25.** 5. **Payment of Taxes.** — See note 2.
- 26.** 6. **Declarations** — *a.* **IN GENERAL.** — See note 1.  
*b.* **STATEMENT IN DEED OR WILL.** — See note 2.
- 27.** *c.* **DECLARATIONS IN A PERSON'S FAVOR.** — See note 2.  
*d.* **WEIGHT** — (1) *In General.* — See note 4.
- 28.** (2) *Conflicting Acts and Declarations.* — See note 1.  
(4) *Written Declarations.* — See note 3.
- 29.** 8. **Right of Person to Testify to His Own Intent.** — See notes 2, 3.
- VI. DOMICIL OF PARTICULAR PERSONS** — 1. **Infants** — *a.* **IN GENERAL.** — See note 5.
- 30.** *b.* **PARENTS SEPARATED.** — See note 1.  
*c.* **AFTER FATHER'S DEATH** — (1) *General Rule.* — See note 2.  
(2) *Power of Surviving Mother to Change.* — See note 3.
- 31.** *d.* **AFTER DEATH OF BOTH PARENTS.** — See note 2.
- 25.** 2. **Payment of Taxes.** — See State v. Kuhn, 11 Ohio Dec. 321.
- 26.** 1. **Declarations Admissible.** — Eisele v. Oddie, 128 Fed. Rep. 941; Marks v. Germania Sav. Bank, 110 La. 659; Loeser v. Jorgensen, (Mich. 1904) 100 N. W. Rep. 450; Matter of Cleveland, (Surrogate Ct.) 28 Misc. (N. Y.) 369; State v. Kuhn, 11 Ohio Dec. 321; Hascall v. Hafford, 107 Tenn. 355, 89 Am. St. Rep. 952. See also People v. Moir, 207 Ill. 180, 99 Am. St. Rep. 205.
2. **Statements in a Person's Own Deed or Will.** — Matter of Golden, (Surrogate Ct.) 40 Misc. (N. Y.) 544; *In re Williamson*, 8 Ohio Dec. 47, 6 Ohio N. P. 79.
- 27.** 2. **Declarations Constituting a Part of the Res Gestæ.** — Gardiner v. Brookline, 181 Mass. 162.
4. **Weight Dependent upon Circumstances.** — Ida County Sav. Bank v. Seidensticker, (Iowa 1902) 92 N. W. Rep. 862; Matter of Brant, (Surrogate Ct.) 30 Misc. (N. Y.) 14.  
In Hascall v. Hafford, 107 Tenn. 355, 89 Am. St. Rep. 952, it was held that declarations outweighed the fact of voting in a primary election or running for office.
- Continuous, Uninterrupted Declarations,** especially at times not suspicious, accompanied by the fact of residence, the removal of personal property, and the exercise of political rights, establish a change of domicile. Marks v. Germania Sav. Bank, 110 La. 659.
- Concerning Declarations Which Merely Looked to the Future,** and which were merely indicative of a purpose, but were not expressions giving character to the performance of an act, the court said in Sheehan v. Scott, 145 Cal. 684: "Declarations of the intention with which an act is done may illustrate the character of the act as a part of the *res gestæ*, \* \* \* but are entitled to but little, if any, consideration when made either as the narration of a past act, or as indicating the purpose with which an act is to be done in the future. The residence of a person will not be affected by such declarations until the intention is carried into effect by the completed act."
- Matters of Form.** — The statements of residence in a holographic will are entitled to great weight, but in one prepared by an attorney where he inserted the place of residence as in part a matter of form such statement is not controlling. Matter of Golden, (Surrogate Ct.) 40 Misc. (N. Y.) 544.
- 28.** 1. **Acts Outweigh Declarations.** — People v. Moir, 207 Ill. 180, 99 Am. St. Rep. 205; Matter of Cleveland, (Surrogate Ct.) 28 Misc. (N. Y.) 369; Plant v. Harrison, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 649; Graham v. Graham, 9 N. Dak. 88, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 29 [28]. See also Corel v. Chicago, etc., R. Co., 123 Fed. Rep. 452; Eisele v. Oddie, 128 Fed. Rep. 941; Smith v. Smith, 10 N. Dak. 219.
3. **Matter of Cleveland, (Surrogate Ct.) 28 Misc. (N. Y.) 369.**
- 29.** 2. **Person May Testify to His Own Intent.** — Collins v. Ashland, 112 Fed. Rep. 175; Matter of Henning, 128 Cal. 214, 79 Am. St. Rep. 43; Modern Woodmen of America v. Hester, 66 Kan. 129; Boyle v. Griffin, 84 Miss. 41; Matter of Russell, 64 N. J. Eq. 313; Graham v. Graham, 9 N. Dak. 88. See also State v. Kuhn, 11 Ohio Dec. 321.
3. **Person's Own Evidence Not Conclusive.** — Corel v. Chicago, etc., R. Co., 123 Fed. Rep. 452; Graham v. Graham, 9 N. Dak. 88, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 29.
- The Party's Own Testimony Will Control** unless negated by his acts or declarations. Collins v. Ashland, 112 Fed. Rep. 175.
5. **Domicil of Infants.** — Tsoi Sim v. U. S., (C. C. A.) 116 Fed. Rep. 920.
- 30.** 1. **When a Divorce Has Been Granted** to the wife, and unrestricted custody of the minor child given to her by the decree, her own domicile establishes that of the child. Fox v. Hicks, 81 Minn. 197.
2. **After Father's Death.** — Garth v. City Sav. Bank, (Ky. 1905) 86 S. W. Rep. 520.  
After the death of the father the domicile of the mother determines the domicile of minor children. Modern Woodmen of America v. Hester, 66 Kan. 129.
3. **View that Domicil of Infant Follows Its Mother's.** — Modern Woodmen of America v. Hester, 66 Kan. 129; Garth v. City Sav. Bank, (Ky. 1905) 86 S. W. Rep. 520, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 30; Matter of Russell, 64 N. J. Eq. 313.
- 31.** 2. **Matter of Kiernan, (Surrogate Ct.) 38 Misc. (N. Y.) 394.**  
Where the parents of minors were at their death domiciled in California, that state was held to be the domicile of the minors until a change by lawful authority was shown. Matter of Henning, 128 Cal. 214, 79 Am. St. Rep. 43.

- 31.** *c.* INFANT CANNOT CHANGE. — See note 3.  
**32.** 2. Married Women — *a.* DURING COVERTURE — (1) *General Rule.* — See note 1.  
**33.** Separate Residence, but Same Domicil. — See note 1.  
 (2) *Separate Domicil* — (b) *Whenever Necessary.* — See note 3.  
**35.** 3. Persons Non Compos Mentis — *b.* AFTER ATTAINING MAJORITY. — See note 1.  
*c.* PARTIALLY NON COMPOS MENTIS. — See note 2.  
**6.** Prisoners. — See note 8.  
**36.** 9. Absconding Debtors. — See note 4.  
 11. Students. — See note 7.

**Domicil of Abandoned Child — Parents' Domicil Unknown.** — A child of thirteen years, abandoned by his mother when about six months old, his father unknown, and whether his mother was living, or, if living, where, not being shown, was injured while stealing a ride on a passenger train, and was taken charge of by the authorities of the county where he was injured. It was held that the court of that county had jurisdiction to appoint a guardian for him under the *Kentucky* statute. *Louisville, etc., R. Co. v. Kimbrough*, 115 Ky. 512.

**31. 3. Infant Cannot Change His Domicil.** — *Matter of Henning*, 128 Cal. 214, 79 Am. St. Rep. 43; *Modern Woodmen of America v. Hester*, 66 Kan. 129; *Louisville, etc., R. Co. v. Kimbrough*, 115 Ky. 512; *Matter of Kiernan*, (Surrogate Ct.) 38 Misc. (N. Y.) 394.

**Settlement of an Emancipated Minor.** — *Russell v. State*, 62 Neb. 512, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 31.

The child will not take the subsequently-acquired settlement of its parent, but will take by derivation that of the parent at the time of the emancipation. *Carthage v. Canton*, 97 Me. 473.

**32. 1. Wife Has the Domicil of Her Husband — United States.** — *Tsoi Sim v. U. S.*, (C. C. A.) 116 Fed. Rep. 920, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 32; *Watertown v. Greaves*, (C. C. A.) 112 Fed. Rep. 183. See also *Atherton v. Atherton*, 181 U. S. 155.

*Iowa.* — *Galvin v. Dailey*, 109 Iowa 332, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 32.

*Kansas.* — *Modern Woodmen of America v. Hester*, 66 Kan. 129.

*Kentucky.* — *Boreing v. Boreing*, 114 Ky. 522.

*Michigan.* — *Spaulding v. Steel*, 129 Mich. 237.

*Nebraska.* — *Isaacs v. Isaacs*, (Neb. 1904) 99 N. W. Rep. 268.

*New Jersey.* — *Tracy v. Tracy*, 62 N. J. Eq. 807.

*New York.* — *Harris v. Harris*, 83 N. Y. App. Div. 123; *Hammond v. Hammond*, 103 N. Y. App. Div. 437.

*North Carolina.* — *Moore v. Moore*, 130 N. Car. 333.

*Rhode Island.* — *Howland v. Granger*, 22 R. I. 1.

*South Carolina.* — *Cone v. Cone*, 61 S. Car. 512.

*Tennessee.* — *Haskell v. Hafford*, 107 Tenn. 355, 89 Am. St. Rep. 952.

*Texas.* — *Schwartz v. West*, (Tex. Civ. App. 1904) 84 S. W. Rep. 282.

**Right of Husband to Select Domicil.** — As a general rule at common law the husband may select the domicil of the family. *Schuman v. Schuman*, 93 Mo. App. 99.

**33. 1. Same Domicil Notwithstanding Separate Residence.** — *Watertown v. Greaves*, (C. C. A.) 112 Fed. Rep. 183; *Hammond v. Hammond*, 103 N. Y. App. Div. 437; *Howland v. Granger*, 22 R. I. 1.

**3. New York Rule.** — See *Marks v. Germania Sav. Bank*, 110 La. 659, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 33.

**Desertion by Husband.** — That a married woman unlawfully deserted by her husband may establish an independent domicil, see *Watertown v. Greaves*, (C. C. A.) 112 Fed. Rep. 183; *Howland v. Granger*, 22 R. I. 1.

In *Missouri* it is said that a husband and wife may have separate domicils. When a man is living separate from his wife, his domicil may be in one state, though his wife may reside in another. *Stevens v. Larwill*, 110 Mo. App. 140.

**The Abandonment of a Wife and Child** by the husband and father prevents the residence of the wife and child from following that of the husband and father. *In re Rogers*, 11 Ohio Dec. 806.

**35. 1. Domicil of Origin.** — In *Phillips v. Boston*, 183 Mass. 314, it was held that a woman who was *non compos mentis* and who was not under guardianship, did not acquire a settlement under Pub. Stat. Mass., c. 8331, c. 6, by living in a city five consecutive years, and that the domicil of origin continued.

**2. Partially Imbecile.** — *Matter of Fidelity Trust Co.*, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 118, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 35.

**8. Prisoners.** — *Ware v. Schintz*, 190 Ill. 189, quoting 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 35.

**36. 4. In re Filer**, 108 Fed. Rep. 209.

**7. Students.** — *State v. Kuhn*, 11 Ohio Dec. 321, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 36.

**New York Constitutional Provision.** — Under the provision of the New York constitution it was held that a person who entered a seminary where it was required that no person could enter or remain as a student unless he intended to become a Roman Catholic priest, and renounce all other residences or homes save that of the seminary, did not change his legal residence for the purpose of voting. *Matter of Barry*, 164 N. Y. 18.

In *Colorado* the constitution provides against the acquisition or loss of residence for the pur-

**39. 14. Persons in Army and Navy — a. SERVICE UNDER OWN GOVERNMENT.** — See note 2.

**40. 15. Sailors.** — See note 5.

pose of voting by a person while at an institution of learning. A defendant came to Colorado for the sole purpose of attending the State School of Mines at Golden. He was without intention, so far as the adoption of any place as a fixed and permanent habitation was concerned, but it was his intention not to stay or reside in the county of Jefferson after his graduation at the School of Mines. Under the constitution, he did not gain a residence in the state for the purpose of voting by reason of his presence within the state while a student at the State School of Mines; and, not having acquired a residence independently of that gained while a student, he was not a legal voter. *Parsons v. People*, 30 Colo. 388.

**39. 2. The New York Constitution** provides that for the purpose of voting, no person shall be deemed to have gained or lost a residence by reason of his presence or absence while employed in the service of the United States. The effect of this constitutional provision "is not to disqualify such persons from gaining or losing a residence, but renders the fact of sojourn or absence impotent as evidence either to create or destroy it; in other words, presence or ab-

sence has primarily no effect upon the political status of such person. The question in each case is still, as it was before the adoption of this provision of the constitution, one of domicile or residence, to be decided upon all the circumstances of the case. \* \* \* The soldier may acquire a residence in the new locality. His calling the place his home, or believing it to be his home, does not legally make it such. It is not his view of the fact that governs. The facts themselves govern the question. Mere intention is not alone sufficient. It must exist, but must concur with and be manifest by resultant acts which are independent of the presence of the soldier in the new locality." *Matter of Cunningham*, (County Ct.) 45 Misc. (N. Y.) 206.

**2. Person in Soldiers' Home.** — Under the *New York* constitution, where a person enters the Soldiers' Home for the sole purpose of receiving the benefits of the institution, his former residence must be considered his domicile for citizenship. *Matter of Smith*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 384.

**40. 5. Not Lost During Absence.** — *Radford v. Radford*, (Ky. 1904) 82 S. W. Rep. 391.

## DOMINION OF CANADA.

BY H. N. ELDRIDGE.

**57. VI. THE CROWN — (5) How Far the Crown Can Be Bound by Dominion and Provincial Statutes — Legislative Power over the Royal Prerogative.** — See note 3.

**60. VII. LEGISLATIVE POWERS GENERALLY IN CANADA — (3) Generality of Language Used in Describing Legislative Powers Conferred — Overlapping Powers.** — See note 3.

**63. (5) Presumption in Favor of Validity of Acts.** — See note 1.

**64. (7) Acts Ultra Vires in Part Only.** — See note 3.

**73. VIII. DOMINION PARLIAMENT — POWERS OF — D. Dominion Power to Encroach upon the Provincial Area of Subjects in Certain Cases, and Vice Versa.** — See note 2.

**76. E. Dominion Power to Impose Duties on Provincial Courts, Officials, and Municipalities; Also as to Dominion Courts.** — See note 3.

**77. F. Dominion Powers as to Incorporation of Companies, and as to Foreign and Provincial Corporations — Dominion Companies.** — See note 3.

**79. H. Dominion General Residuary Legislative Power over Nonprovincial Subjects.** — See note 3.

**57. 3. To What Extent Crown Bound by Dominion and Provincial Legislation.** — See *Quebec v. Atlantic, etc., R. Co.*, 8 Quebec Q. B. 42.

**60. 3. See *Ex p. Green***, 35 N. Bruns. 137.

**63. 1. Presumption as to Validity of Acts.** — *Ex p. Green*, 35 N. Bruns. 137; *Bradburn v. Edinburgh L. Assur. Co.*, 5 Ont. L. Rep. 657.

**64. 3. Legislative Acts Void in Part.** — See also *Union Colliery Co. v. Bryden*, (1899) A. C. 580.

**73. 2. *Bradburn v. Edinburgh L. Assur. Co.***, 5 Ont. L. Rep. 657; *Reg. v. Holland*, 7 British Columbia 281.

**76. 3. As to Dominion Depriving Provincial Courts of Jurisdiction.** — See *In re Vancini*, 34 Can. Sup. Ct. 621.

**77. 3. Incorporation of Companies.** — *Reg. v. Holland*, 7 British Columbia 281.

**79. 3. *O'Dea v. Reg.***, 9 Quebec Q. B. 158; *Reg. v. Holland*, 7 British Columbia 281.



**81. I. The Specifically Enumerated Powers of the Dominion Parliament —**  
**(b) RULE THAT NO MATTER COMING WITHIN THE ENUMERATED DOMINION**  
**SUBJECTS IS TO BE DEEMED WITHIN THE CLASS OF MATTERS OF A LOCAL**  
**OR PRIVATE NATURE ASSIGNED TO THE PROVINCES. — See note 1.**

**82. (2) THE REGULATION OF TRADE AND COMMERCE. — See note 4.**

**83. See note 1.**

**87. (19) INTEREST. — See note 7.**

**90. (24) INDIANS, AND LANDS RESERVED FOR THE INDIANS. — See**  
**note 3.**

**91. (25) NATURALIZATION AND ALIENS. — See note 1.**

**92. See note 1.**

**(27) THE CRIMINAL LAW, EXCEPT THE CONSTITUTION OF COURTS**  
**OF CRIMINAL JURISDICTION, BUT INCLUDING THE PROCEDURE IN CRIMI-**  
**NAL MATTERS. — See note 5.**

**93. See note 1.**

**97 IX. PROVINCIAL LEGISLATURES — POWERS OF — D. Provincial Powers**  
**Not Affected by Nonexercise of Overlapping Dominion Powers. — See note 5.**

**100. I. The Enumerated Powers of Provincial Legislatures — (2) DIRECT**  
**TAXATION WITHIN THE PROVINCE IN ORDER TO THE RAISING OF A**  
**REVENUE FOR PROVINCIAL PURPOSES. — See note 1.**

**102. (5) THE MANAGEMENT AND SALE OF THE PUBLIC LANDS BE-**  
**LONGING TO THE PROVINCE, AND OF THE TIMBER AND WOOD THEREON. —**  
**See note 1.**

**(8) MUNICIPAL INSTITUTIONS IN THE PROVINCE. — See note 3.**

**81. 1. Reg. v. Holland, 7 British Columbia**  
**281.**

**82. 4. See Reg. v. Holland, 7 British Co-**  
**lumbia 281; Smylie v. Reg., 27 Ont. App. 172,**  
**affirming 31 Ont. 202.**

**The Regulation of the Business of Selling Drugs**  
 in a particular province is not the regulation  
 of trade and commerce within the meaning of  
 the British North America Act. *Girard v. Muir*,  
 14 Quebec Sup. Ct. 237.

**83. 1. Power to Make Regulations in the Na-**  
**ture of Police or Municipal Regulations of a**  
 merely local character for the prevention of  
 fires and the destruction of property by fire  
 may be conferred by provincial legislatures.  
*Rex v. McGregor*, 4 Ont. L. Rep. 198.

**87. 7. Rate of Interest. — See Bradburn v.**  
*Edinburgh L. Assur. Co.*, 5 Ont. L. Rep. 657.

**90. 3. Indians and Lands Reserved for Indians.**  
*— Ontario Min. Co. v. Seybold*, (1903) A. C. 73.

**91. 1. Naturalization — Aliens. — Section**  
 91, subs. 25, of the British America Act, 1867,  
 reserves to the exclusive jurisdiction of the  
 Dominion Parliament the subject of naturaliza-  
 tion — that is, the right to determine how it  
 shall be constituted. But the provincial legisla-  
 ture has the right to determine, under section  
 92, subs. 1, what privileges, as distinguished  
 from necessary consequences, shall be attached  
 to it. *Cunningham v. Homma*, (1903) A. C. 151.

**92. 1. The Provincial Act Prohibiting the Em-**  
**ployment of Chinese Below Ground** which was  
 held in *In re Coal Mines Regulation Amendment*  
 Act, 5 B. C. 306, cited in the original article,  
 to be constitutional, was declared by the Privy  
 Council in *Union Colliery Co. v. Bryden*, (1899)  
 A. C. 580, to be unconstitutional.

**5. Criminal Law and Procedure. — See Atty.-**  
*Gen. v. Hamilton St. R. Co.*, (1903) A. C. 524;  
*See Ex p. Green*, 35 N. Bruns. 137.

**Criminal Law Within Exclusive Jurisdiction of**  
**Dominion Parliament. — See Reg. v. Halifax**  
*Electric Tramway Co.*, 1 Can. Crim. Cas. (Nova  
 Scotia) 424.

**Lotteries. — The provincial legislatures have**  
 no jurisdiction to permit the operation of lot-  
 teries forbidden by the criminal statutes of  
 Canada. *L'Association St. Jean Baptiste v.*  
*Brault*, 30 Can. Sup. Ct. 598.

**93. 1. The Fixing of the Number of Grand**  
**Jurors** necessary to find a good bill of indict-  
 ment is a matter of criminal procedure and ex-  
 clusively within the powers of the Dominion  
 legislature. But the fixing of the number of  
 grand jurors who shall compose the panel is  
 a part of the organization or constitution of  
 the court and is within the power of a provin-  
 cial legislature. *Reg. v. Cox*, 31 Nova Scotia 311.

**97. 5. See Reg. v. Holland, 7 British Co-**  
**lumbia 281.**

**100. 1. As to What Is Taxation "Within**  
**the Province."** — A provincial legislature has  
 no power to impose a tax upon the official income  
 of an employee of the Dominion government,  
 nor to confer such a power on the municipali-  
 ties. *Ex p. Burke*, 34 N. Bruns. 200.

**102. 1. A statute which enacts that all**  
 sales of pine timber which shall be thereafter  
 made and every license thereafter granted shall  
 be made or granted subject to the condition  
 set out in the Crown timber regulations, that  
 all pine timber cut under such license shall be  
 manufactured into sawn lumber in Canada, is  
*intra vires* the provincial legislature, being an  
 enactment in relation to "the management and  
 sale of the public lands belonging to the province  
 and of the timber and wood thereon," within the  
 meaning of the British North America Act.  
*Smylie v. Reg.*, 31 Ont. 202.

**3. Municipal Institutions. — The provincial**

**103.** (9) SHOP, SALOON, TAVERN, AUCTIONEER, AND OTHER LICENSES IN ORDER TO THE RAISING OF A REVENUE FOR PROVINCIAL, LOCAL, OR MUNICIPAL PURPOSES — Whether Distinction Between Wholesale and Retail Trade Forms a Line of Division of Legislative Jurisdiction in Respect to Taxation or Otherwise — Provincial Powers of Indirect Taxation. — See note 8.

**104.** (10) LOCAL WORKS AND UNDERTAKINGS, OTHER THAN SUCH AS ARE OF THE FOLLOWING CLASSES. — See note 4.

**105.** (a) *Lines of Steam or Other Ships, Railways, Canals, Telegraphs, and Other Works and Undertakings Connecting the Province with Any Other or Others of the Provinces, or Extending Beyond the Limits of the Province.* — See note 1.

**107.** (11) THE INCORPORATION OF COMPANIES WITH PROVINCIAL OBJECTS. — See notes 1, 3.

**109.** (13) PROPERTY AND CIVIL RIGHTS IN THE PROVINCE. — See note 4.

legislatures have sovereign powers within the range of subjects falling within the scope of provincial jurisdiction, including the governance of municipal institutions, and the courts cannot set aside legislation relating to such matters on the ground that constitutional principles have been violated. *Bell v. Westmount*, 9 Quebec Q. B. 34.

**103.** 8. See *Rex v. Carlisle*, 6 Ont. L. Rep. 718.

**104.** 4. *A Mere Coal Working Regulation* relating to local works is not *ultra vires* of a provincial legislature. *Union Colliery Co. v. Bryden*, (1899) A. C. 580.

*The Right of Building Highways* and of operating them, whether under the direct authority of the government or by means of individuals, companies, or municipalities, is wholly within the purview of the provincial legislatures. *O'Brien v. Allen*, 30 Can. Sup. Ct. 340.

**105.** 1. *As to Ferries.* — The right to create and license a ferry, having been one of the *jura regalia*, or royalties which belonged to the several provinces at the union, continued to belong to them after confederation, as declared by section 109 of the British North America Act, notwithstanding section 91, subs. 13, giving the Dominion legislature power in relation to ferries; and therefore a lease of a ferry between the town of Sault Ste. Marie in the province of Ontario, and the town of Sault Ste. Marie in the state of Michigan, U. S. A., granted by the Dominion government, was declared to be invalid. *Perry v. Clergue*, 5 Ont. L. Rep. 357.

*Authorization of Lines of Electric Light Wire Extending Beyond Limits of Province* is *intra vires* of the Dominion Parliament. *Hewson v. Ontario Power Co.*, 8 Ont. L. Rep. 88.

*Power to Construct and Operate Telephone Lines Connecting Provinces* can be conferred only by the Dominion Parliament. See *Toronto v. Bell Telephone Co.*, 6 Ont. L. Rep. 335.

*The Making of Regulations in Respect to Crossings or the Structural Condition of the Roadbed of Dominion Railways* subject to the provisions of the Railway Act of Canada is beyond the power of provincial legislatures. *Grand Trunk R. Co. v. Therrien*, 30 Can. Sup. Ct. 485.

*The Power to Regulate the Structure of a Ditch* forming part of the authorized works of a railway connecting the provinces does not belong to a provincial legislature, but it is within the power of a provincial legislature to prescribe

the cleaning of the ditch so as to prevent a nuisance. *Canadian Pac. R. Co. v. Notre Dame De Bonsecours*, (1899) A. C. 367.

*A Provision Requiring the Erection of Proper Fences Along the Line of a Dominion Railway Company* is *ultra vires* of a provincial legislature. *Madden v. Nelson, etc.*, R. Co., (1899) A. C. 626.

*Extent to Which Dominion Parliament May Legislate Concerning Dominion Railways.* — In *Macdonald v. Riordan*, 8 Quebec Q. B. 573, the court said: "By the British North America Act, the provincial legislatures are exclusively authorized to make laws in relation to property and civil rights and local works and undertakings; but, on the other hand, the Parliament of Canada is exclusively authorized to legislate respecting railways extending beyond the limits of any province and continuing in territory of another province. While Parliament has the right to legislate for the principal object, which is to create a railway company and to authorize it to construct and operate a railway, it follows that it must also have the power to legislate on all incidents which may be required to carry out the object which it had in view, as otherwise legislation under this constitutive power would often be crude and in many cases ineffective, and sometimes even wholly inoperative. In the exercise of this power the greater includes the lesser, but the lesser elements must be essentially and strictly connected with the principal object and be primarily intended to assist in carrying out such principal object. Therefore, all powers so granted must only concern or apply to the organization of the railway company, its internal economy or management, the care of its track and stations, or the conduct and duties of its directors, officers, and employees, and they cannot apply to or in any way affect the rights of parties who are neither shareholders, officers, nor employees of the railway company under contracts entered into by them with it or under obligations which may arise in their favor from *quasi*-contracts, offenses and *quasi*-offenses, which all fall under the rules of the codes and of the statutory law of the province."

**107.** 1. *Reg. v. Holland*, 7 British Columbia 281.

3. *Reg. v. Holland*, 7 British Columbia 281.

**109.** 4. *Property and Civil Rights Within the Province.* — See *Gower v. Joyner*, 2 N. W. Ter. 387.

**110.** (14) THE ADMINISTRATION OF JUSTICE IN THE PROVINCE, INCLUDING THE CONSTITUTION, MAINTENANCE, AND ORGANIZATION OF PROVINCIAL COURTS, BOTH OF CIVIL AND OF CRIMINAL JURISDICTION, AND INCLUDING PROCEDURE IN CIVIL MATTERS IN THOSE COURTS. — See note 4.

**115.** XI. LEGISLATIVE POWER OVER AGRICULTURE AND IMMIGRATION. — See note 1.

**120.** DORMANT PARTNER. — See note 1.

**121.** [DOWEL PIN. — See note 2a.]

**May Make Regulations in Relation to Coal Mines Within Province.** — Union Colliery Co. v. Bryden, (1899) A. C. 580.

**110. 4. Provincial Power over Administration of Justice in the Province.** — See Deacon v. Chadwick, 1 Ont. L. Rep. 346; *In re Vancini*, 34 Can. Sup. Ct. 621; Gower v. Joyner, 2 N. W. Ter. 387.

**115. 1. Legislation in Relation to Agriculture** is *intra vires* of the provincial legislatures. *Rex v. Horning*, 8 Ont. L. Rep. 215.

**120. 1.** Bouker Contracting Co. v. Scribner, 52 N. Y. App. Div. 505; *Rowland v. Estes*, 190 Pa. St. 111.

**121. 2a. Dowel Pin.** — Webster's Dictionary defines a *dowel pin* as "a pin of wood or metal used for joining two pieces, as of wood, stone, etc., by inserting part of its length in one piece, the rest of it entering a corresponding hole in the other." *Perry v. Revere Rubber Co.*, (C. C. A.) 103 Fed. Rep. 314.

## DOWER.

By A. A. WADSWORTH.

**125. I. DEFINITION.** — See note 1.

**127. III. KINDS OF DOWER — 6. Dower by Common Law — Present Status.** — See note 8.

**128. IV. REQUISITES OF DOWER — 1. In General.** — See note 2.

**129. 2. Marriage — a. IN GENERAL.** — See note 3.

**131. b. EVIDENCE OF MARRIAGE.** — See note 1.

**3. Seizin of the Husband — a. IN GENERAL.** — See note 2.

**125. 1. Dower Defined.** — *Boykin v. Springs*, 66 S. Car. 362, quoting 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 125.

**127. 8. Georgia — Seizin at Time of Husband's Death.** — In Georgia the widow has a right of dower in lands of which the husband was seized at his death and in lands that came to him through her and were aliened by him in his lifetime, but not in other lands aliened by him during coverture. *La Grange Mills v. Kener*, 121 Ga. 429.

**As to the Indiana Statutes** giving an estate in fee to the widow, see *Bateman v. Bennett*, 31 Ind. App. 277. See also *Bell v. Shaffer*, 154 Ind. 413.

**In South Carolina** dower exists as at common law. *Boykin v. Springs*, 66 S. Car. 362.

**Utah — Dower Abolished and Re-established.** — The right of dower was abolished in Utah in 1872, and was not re-established until it became a statutory right under the Edmunds-Tucker Act (March, 1887). *Norton v. Tufts*, 19 Utah 470.

**128. 2. Inchoate Dower.** — *Lucas v. Whitacre*, 121 Iowa 251; *Bartlett v. Tinsley*, 175 Mo. 319; *Brown v. Morisey*, 124 N. Car. 292.

**In Georgia** inchoate dower arises only in lands that came to the husband through his marital rights. *La Grange Mills v. Kener*, 121 Ga. 429.

**129. 3. Void Marriage.** — *McIlvain v. Scheibley*, 109 Ky. 455.

**131. 1. Evidence of Marriage.** — *Yutte v. Yutte*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 272. See generally the title MARRIAGE, 1197. 2 *et seq.*

**2. Seizin Necessary — Georgia.** — *Ferris v. Van Ingen*, 110 Ga. 115; *McDonald v. McDonald*, 120 Ga. 403.

*Indiana.* — *Sarver v. Clarkson*, 156 Ind. 316.

*Iowa.* — *Burgoon v. Whitney*, 121 Iowa 76.

*Kentucky.* — *Nolen v. Rice*, (Ky. 1902) 67 S. W. Rep. 36.

*Michigan.* — *Stephens v. Leonard*, 122 Mich. 125.

*Missouri.* — *Hendrickson v. Grable*, 157 Mo. 42.

*New York.* — *Nichols v. Park*, 78 N. Y. App. Div. 95; *Poillon v. Poillon*, 90 N. Y. App. Div. 71; *Jackson v. Walters*, 86 N. Y. App. Div. 470.

*Rhode Island.* — *Ames, Petitioner*, 22 R. I. 54.

*South Carolina.* — *Boykin v. Springs*, 66 S. Car. 362.

*Virginia.* — *Gardner v. Gardner*, 98 Va. 525.

*Canada.* — *Fitzgerald v. Fitzgerald*, 5 Ont. L. Rep. 279; *In re Zimmerman*, 7 Ont. L. Rep. 480; *Brown v. Brown*, 8 Ont. L. Rep. 332.

**Seizin Subject to a Deed of Trust.** — Where a wife joins the husband in a deed of trust,



**132.** Right of Entry or Action. — See note 3.

*b.* BENEFICIAL SEIZIN. — See note 4.

**133.** See note 1.

**134.** *d.* IMMEDIATE SEIZIN — (1) *Estates in Remainder or Reversion* —

(a) *After an Estate of Freehold.* — See notes 1, 2, 3.

**136.** (2) *Dos de Dote Peti Non Debet* — Rights of Divorced Wife and Second Wife. — See note 4.

**137.** *e.* DURATION OF SEIZIN — (2) *Transitory Seizin* — (a) *In General.* — See note 1.

(b) *Purchase-money Mortgage* — *aa.* UNITED STATES DOCTRINE. — See note 3.

**140.** (c) *Vendor's Lien for Purchase Money.* — See note 2.

*f.* EVIDENCE OF SEIZIN. — See note 3.

**141.** 4. *Death of Husband* — *a.* IN GENERAL. — See note 2.

**V. NATURE AND INCIDENTS** — 1. *In General* — *a.* MORAL AND LEGAL RIGHT — *Favored by the Law.* — See note 9.

**142.** *b.* WHETHER DOWER ARISES BY CONTRACT OR BY POSITIVE LAW. — See note 3.

whereby the trustee is bound to convey the land to such other party as the husband may designate in writing, if, during the lifetime of the husband a conveyance is made by the trustee in execution of his trust, the wife's dower is barred. But if the land is not conveyed pursuant to the provisions of the trust deed during the lifetime of the husband, the husband retains an equitable estate of inheritance in the land as if the deed had never been executed, and the wife's dower attaches. *Goodheart v. Goodheart*, 63 N. J. Eq. 746.

**Cancellation of Tax Deed.** — Inchoate right of dower is terminated by the cancellation of a tax deed to the husband, his seizin being thereby defeated. *Glos v. Gerrity*, 190 Ill. 545.

**No Conveyance to Husband.** — The wife has no inchoate right of dower in lands purchased with moneys of the husband and conveyed to another to prevent her dower right from attaching; and this, too, although the husband may enter into immediate possession and retain it until death. *Nichols v. Park*, 78 N. Y. App. Div. 95, *reversing* (Supm. Ct. Spec. T.) 132 Misc. (N. Y.) 176.

**Where a Corporation Is Seized in Fee** of land, the wife of one who owns all of the corporation's stock has no inchoate dower therein. *Poillon v. Poillon*, 90 N. Y. App. Div. 71.

**132.** 3. *Missouri Statute.* — *Bartlett v. Tinsley*, 175 Mo. 319.

4. *Husband a Mere Trustee.* — *Lazarus v. Lazarus*, 12 Hawaii 369, *citing* 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 132; *Gritten v. Dickerson*, 202 Ill. 372, *affirming* 103 Ill. App. 351; *Rhea v. Rawls*, 131 N. Car. 453; *Kaphan v. Toney*, (Tenn. Ch. 1899) 58 S. W. Rep. 909; *Brown v. Brown*, 8 Ont. L. Rep. 332.

**133.** 1. *Lands Sold Before and Conveyed After Marriage.* — *Hall v. Hall*, 70 N. H. 47; *Burdine v. Burdine*, 98 Va. 515, 81 Am. St. Rep. 741; *Crossett v. Haycock*, 7 Ont. L. Rep. 655, *affirming* 6 Ont. L. Rep. 259; *Brown v. Brown*, 8 Ont. L. Rep. 332.

**134.** 1. *No Dower in Reversion or Remainder After Estate of Freehold.* — *Ward v. Ward*, 131 Fed. Rep. 946; *Kirkpatrick v. Kirkpatrick*, 197 Ill. 144, *citing* 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 134; *Hill v. Pike*, 174 Mass. 582; *Stewart v. Cryslar*, 52 N. Y. App. Div. 597; *Sammis v. Sammis*, 23 R. I. 499.

2. *Intervening Vested Estate.* — *Von Arb v. Thomas*, 163 Mo. 33.

3. *Alienation During Existence of Particular Estate.* — *Jackson v. Walters*, 86 N. Y. App. Div. 470.

**136.** 4. *Dower Rights of Divorced Wife and Second Wife.* — See *Potter v. Clapp*, 203 Ill. 592, 96 Am. St. Rep. 322.

**137.** 1. *Instantaneous Seizin Insufficient.* — *Lohmeyer v. Durbin*, 206 Ill. 574.

3. *Effect of Purchase-money Mortgage.* — *Lohmeyer v. Durbin*, 206 Ill. 574 (by statute); *Helm v. Board*, 114 Ky. 289; *Groce v. Ponder*, 63 S. Car. 162.

**140.** 2. *Subject to Vendor's Lien.* — *Sarver v. Clarkson*, 156 Ind. 316; *Schaefer v. Purviance*, 160 Ind. 63; *Helm v. Board*, 114 Ky. 289; *Whitmore v. Roscoe*, 112 Tenn. 622.

**Where No Lien Has Been Reserved.** — It has been held that where the husband borrowed money to pay for land and no lien was reserved for the purchase price, or any part thereof, in favor of the vendor, or in favor of the lender of the purchase money, the wife was not deprived of her dower where the lands were afterwards sold on execution against the husband under a claim that the sale was to satisfy a lien for the purchase price. *Hogg v. Potter*, (Ky. 1903) 76 S. W. Rep. 35.

3. *Presumption from Sale under Execution.* — Facts disclosed by entries in a sheriff's books showing sale of land under execution against the husband authorize the presumption of seizin in the husband during coverture. *Ex p. Steen*, 59 S. Car. 220.

**When Necessary to Show Title in Grantor.** — Evidence that the husband of the claimant occupied the land for one year under a deed, no title in the grantor being shown, does not establish a right to dower as against one who has occupied under a sheriff's deed for a sufficient time for his color to ripen into title. *Brown v. Morisey*, 128 N. Car. 138.

**141.** 2. *Husband's Death Necessary.* — *Tenbrook v. Jessup*, 60 N. J. Eq. 234.

9. *A Favorite of the Law.* — *Bartlett v. Tinsley*, 175 Mo. 319; *Brown v. Morisey*, 126 N. Car. 772.

**142.** 3. *Dower Generally Held to Arise by*

**142.** *c.* WHAT LAW GOVERNS — *As to Time.* — See note 5.

**2.** Inchoate Dower — *a.* PROPERTY INTEREST IN INCHOATE DOWER — Not an Estate in Land. — See note 6.

A Valuable Right. — See note 7.

**144.** Assignability. — See note 2.

Release or Extinguishment. — See note 3.

Inchoate Dower as an Incumbrance. — See notes 4, 5.

**145.** Not a Lien. — See note 1.

*b.* LEGISLATIVE CONTROL. — See note 2.

**146.** **3.** Consummate Dower — *a.* BEFORE ASSIGNMENT — (1) *In General* — Right of Entry. — See note 1.

**147.** Power of Alienation. — See notes 2, 3.

**148.** In Equity — Assignability. — See note 2.

Liability to Seizure under Execution. — See note 3.

(2) *Right of Quarantine* — (a) *In General.* — See note 6.

Operation of Law. — *Turgeon v. Shannon*, 20 Quebec Super. Ct. 135.

**142.** **5.** Law at Time of Husband's Death Governs. — *Bartlett v. Tinsley*, 175 Mo. 319; *Hanley v. Kubli*, (Oregon 1903) 74 Pac. Rep. 224.

**6.** Inchoate Dower Not an Estate in Land. — *Virgin v. Virgin*, 189 Ill. 144; *Cravens v. Winzenberger*, 97 Ill. App. 335; *Lucas v. Whitacre*, 121 Iowa 251; *Lucas v. White*, 120 Iowa 735, 98 Am. St. Rep. 380; *Beeman v. Kitzman*, 124 Iowa 86; *McCrillis v. Thomas*, 110 Mo. App. 699; *Hoy v. Varner*, 100 Va. 600; *George v. Hess*, 48 W. Va. 534, quoting 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 142.

**7.** Is a Valuable Right. — *Lucas v. Whitacre*, 121 Iowa 251; *Fisher v. Koontz*, 110 Iowa 498; *Helm v. Board*, 114 Ky. 289; *Haugh v. Peirce*, 97 Me. 281; *Southern L. & T. Co. v. Benbow*, 135 N. Car. 304, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 142; *Jewett v. Feldheiser*, 68 Ohio St. 523; *Atwood v. Arnold*, 23 R. I. 609.

**144.** **2.** Is a Mere Chose in Action. — *McCrillis v. Thomas*, 110 Mo. App. 699; *Baer v. Ballingall*, 37 Oregon 416; *Hunt v. Reilly*, 23 R. I. 471; *George v. Hess*, 48 W. Va. 534, quoting 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 144.

**3.** May Be Released. — *Higgins v. Ormsby*, 156 Ind. 82.

Effect as to Third Persons. — A release or relinquishment of inchoate dower does not operate as an extinguishment, except in favor of the person to whom it is given and those who claim under him. *McCrillis v. Thomas*, 110 Mo. App. 699.

**4.** Inchoate Dower as an Incumbrance. — *Reed v. Reed*, (Ky. 1904) 80 S. W. Rep. 520; *Bassell v. Caywood*, 54 W. Va. 241.

**5.** Included in Covenant Against Incumbrances. — *Seldon v. Dudley E. Jones Co.*, (Ark. 1905) 85 S. W. Rep. 778; *George v. Hess*, 48 W. Va. 534, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 144.

**145.** **1.** Not a Lien. — *Jewett v. Feldheiser*, 68 Ohio St. 523.

**2.** Legislative Power over Inchoate Dower. — *Hatch v. Small*, 61 Kan. 242, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 145; *George v. Hess*, 48 W. Va. 534, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 145. See also *Helm v. Board*, 114 Ky. 289.

**146.** **1.** Widow Cannot Enter Before Assignment. — *Tenbrook v. Jessup*, 60 N. J. Eq. 234; *Brown v. Morisey*, 126 N. Car. 772; *Haskell v. Sutton*, 53 W. Va. 206; *Allan v. Rever*, 4 Ont. L. Rep. 309.

Possession Is in Heirs at Law. — Possession of unassigned dower lands, excepting the mansion house and homestead, is in the heirs at law, and not in the widow. *Seldon v. Dudley E. Jones Co.*, (Ark. 1905) 85 S. W. Rep. 778.

Dower Right No Defense to Ejectment by Heir. — *Ricknor v. Clabber*, (Indian Ter. 1903) 76 S. W. Rep. 271.

**147.** **2.** Cannot Be Alienated or Subjected to Payment of Debts. — *Welch v. McKenzie*, 66 Ark. 251; *Morton v. Morton*, 112 Ky. 706; *Tenbrook v. Jessup*, 60 N. J. Eq. 234; *George v. Hess*, 48 W. Va. 534, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 147; *Haskell v. Sutton*, 53 W. Va. 206, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 147.

**3.** *Jackson v. O'Rourke*, (Neb. 1904) 98 N. W. Rep. 1068; *George v. Hess*, 48 W. Va. 534, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 147; *Haskell v. Sutton*, 53 W. Va. 206, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 147. See also *Tenbrook v. Jessup*, 60 N. J. Eq. 234.

In *Missouri*, by express statute (Rev. Stat. Mo. 1899, § 2934), the widow may transfer her unassigned dower interest, and the assignee may maintain an action for its admeasurement. *Phillips v. Presson*, 172 Mo. 24, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 147 (as to the rule in the absence of statutes); *Cassidy v. Pound*, 167 Mo. 605.

**148.** **2.** Assignability in Equity. — *Hanna v. Gay*, (Ky. 1904) 78 S. W. Rep. 915; *Moffett v. Trent*, 66 N. J. Eq. 143; *Weyer v. Sager*, 12 Ohio Cir. Dec. 193; *Baer v. Ballingall*, 37 Oregon 416.

**3.** Seizure under Execution. — *Tenbrook v. Jessup*, 60 N. J. Eq. 234.

**6.** Statutory Provisions as to Quarantine. — *Callahan v. Nelson*, 128 Ala. 671; *Reagan v. Hodges*, 70 Ark. 563; *Palmer v. Palmer*, (Fla. 1904) 35 So. Rep. 983; *Morton v. Morton*, 112 Ky. 706; *In re Graff*, 123 Mich. 456; *Casteel v. Potter*, 176 Mo. 76, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 148; *Smith v. Stephens*, 164 Mo. 415; *De Roche v. Myers*, 69 N. J. L. 14.

**149.** (b) *Nature of Interest — Assignability.* — See notes 1, 3.

(c) *To What Premises Right Attaches — By Statute.* — See notes 6, 7.

**151.** (e) *Termination of Quarantine* — *bb.* REMOVAL FROM PREMISES. — See note 2.

*cc.* SUBSEQUENT MARRIAGE OF WIDOW. — See note 4.

*b.* AFTER ASSIGNMENT — (1) *In General.* — See note 5.

*Right of Use and Occupation.* — See note 7.

*Power of Alienation.* — See note 8.

**152.** (2) *Relation Back of Widow's Seizin.* — See note 1.

(3) *Liabilities and Incidents to Which Interest Is Subject — General Rule.* — See note 4.

**154.** VI. PRIORITY AS BETWEEN DOWER AND OTHER INCUMBRANCES —

1. *In General.* — See note 1.

2. *Superior to Claims of Creditors* — *a.* GENERAL RULE. — See note 2.

**155.** VII. OF WHAT THE WIFE IS DOWABLE — 1. *General Rule.* — See note 2.

**157.** 2. *Unimproved Lands* — *b.* NEW ENGLAND RULE. — See note 7.

**149.** 1. *Assignability — Alabama Doctrine.* — Callahan *v.* Nelson, 128 Ala. 671.

So in *Kentucky* the right is not subject to execution. Morton *v.* Morton, 112 Ky. 706.

3. *Missouri Doctrine.* — Phillips *v.* Presson, 172 Mo. 24, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 149; Graham *v.* Stafford, 171 Mo. 692, distinguishing Quick *v.* Rufe, 164 Mo. 408.

6. *Right to Occupy Dwelling House and Plantation.* — Reagan *v.* Hodges, 70 Ark. 563; Smith *v.* Stephens, 164 Mo. 415.

7. *Right to Occupy Mansion House and Curtilage.* — In *Kentucky* the right of the widow to one-third of the gross rents and profits of her husband's dower real estate from his death until dower is assigned, together with the right to hold the mansion house and curtilage without charge until dower is assigned, is derived from, and is in lieu of, the ancient right of quarantine. Morton *v.* Morton, 112 Ky. 706.

**151.** 2. *Widow's Personal Occupation Unnecessary.* — Callahan *v.* Nelson, 128 Ala. 671; Rowley *v.* Poppenhager, 203 Ill. 434, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 151; King *v.* King, 155 Mo. 406.

4. *In Missouri a Widow Does Not Forfeit Her Rights* to the mansion house and messuage by remarriage. Westmeyer *v.* Gallenkamp, 154 Mo. 28, 77 Am. St. Rep. 747.

5. *Nature of Estate After Assignment.* — Haugh *v.* Peirce, 97 Me. 281.

7. *Liable for Waste.* — Garnett Smelting, etc., Co. *v.* Watts, 140 Ala. 449, holding that the widow may not cut and sell sawed timber, nor use it otherwise than for proper and reasonable purposes in the enjoyment of her life estate. See also Hawpe *v.* Bumgardner, 103 Va. 91.

8. *May Encumber or Convey.* — Rowley *v.* Poppenhager, 203 Ill. 434, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 151. See also Blake *v.* Ashbrook, 91 Ill. App. 45.

*But the Dowress Cannot Be Compelled to Sell Her Dower,* or change its form against her will. Haugh *v.* Peirce, 97 Me. 281.

**152.** 1. *Seizin Relates Back to Time of Husband's Death.* — Bettis *v.* McNider, 137 Ala. 588, citing 10 AM. AND ENG. ENCYC. OF LAW

(2d ed.) 152. See also Lucas *v.* Whitacre, 121 Iowa 251.

4. *Subject to Usual Incidents of Life Estates.* — Tenbrook *v.* Jessup, 60 N. J. Eq. 234.

**154.** 1. *Judgment Subsequent to Marriage.* — Fields *v.* Napier, (Ky. 1904) 80 S. W. Rep. 1110 (holding that a sale under a judgment in favor of the state does not defeat the potential right to dower); Martin *v.* Abbott, (Neb. 1901) 95 N. W. Rep. 356.

2. *Dower Superior to Debts.* — Starr *v.* Newman, 107 Ga. 395; Potter *v.* Skiles, 114 Ky. 132.

*Bankruptcy.* — A federal court sitting as a court of bankruptcy, on the death of the bankrupt pending the proceedings, is authorized to make a reasonable allowance in way of dower to the widow. *In re Newton*, 122 Fed. Rep. 103.

**155.** 2. *To What Dower Is Incident.* — See Casteel *v.* Potter, 176 Mo. 76, defining the term "estate of inheritance."

*Missouri Statutes—Leaseholds.* — In Missouri a widow is entitled to dower as in realty in a leasehold estate for a term of twenty years or more, and in a leasehold for a term less than twenty years it is granted as in personal property. Phillips *v.* Hardenburg, 181 Mo. 463.

*Where the Wife Is the Owner* of a sole and entire interest in land, no question as to dower can arise after her husband's death. McCreary *v.* McCorkle, (Tenn. 1899) 54 S. W. Rep. 53. See also Roulston *v.* Hall, 66 Ark. 305, 74 Am. St. Rep. 97.

**157.** 7. *Rhode Island Statute.* — Under the provisions of Gen. Laws R. I., c. 264, § 2, the widow shall be endowed in a special and certain manner, as of a third part of the growth in woodlands. Brayton *v.* Jordan, 24 R. I. 6.

*In the Province of Ontario.* — Where a lot is not in a state of nature at the death of the husband, but is improved for the purposes of cultivation in part, the widow's dower attaches upon the whole lot, and she is entitled to have one-third of such part of the lot as is not woodland assigned to her, and one-third of such as is woodland, with the right to take firewood for her own use and timber for fencing the other part from the woodland. *Re McIntyre*, 7 Ont. L. Rep. 548.



**158.** 3. Mines and Quarries. — See notes 1, 4.

4. Exchanged Lands. — See note 5.

**159.** 5. Partnership Realty — *c.* UNITED STATES RULE. — See note 3.

**162.** 7. Equitable Estates — *a.* IN GENERAL. — See note 2.

**163.** Possession of Husband at Time of Death Necessary. — See note 1.

**164.** *c.* IMPERFECT EQUITY — Contract of Purchase — Assignment. — See note 3.

8. Mortgaged Lands — *a.* IN GENERAL. — See note 9.

**165.** See note 1.

**166.** *b.* REDEMPTION — (2) *By the Husband or His Personal Representatives.* — See note 2.

*c.* CONTRIBUTION — (1) *By the Widow.* — See note 4.

**167.** (2) *To the Widow.* — See note 2.

**169.** *h.* DOWER IN THE SURPLUS AFTER PAYING MORTGAGE DEBT — (1) *General Rule.* — See note 3.

**170.** (3) *Canada Rule.* — See note 3.

**171.** (4) *Not a Charge upon the Land.* — See note 1.

VIII. ASSIGNMENT — 1. *By Whom Assignment May Be Made* — *a.* GENERAL RULE — OWNER OF FREEHOLD. — See note 3.

**158.** 1. Dower in Mines. — *Hook v. Garfield Coal Co.*, 112 Iowa 210.

**Oil Wells Opened After the Husband's Death** are subject to dower in *Ohio* and *Texas*. *Willford v. Heimhoffer*, 25 Ohio Cir. Dec. 748; *Higgins Oil, etc., Co. v. Snow*, (C. C. A.) 113 Fed. Rep. 433, holding that in *Texas* the wife takes a one-third interest for life in the land itself, as land, including the surface and the underlying minerals, and she is entitled to her proportionate share of the incoming profits from the minerals produced during her life, after deducting all expenses of producing and marketing, whether the mines were opened in the lifetime of the husband, or afterwards by the remaindermen or owners of other undivided interests.

**4. Right to Exhaust.** — *Stewart v. Tennant*, 52 W. Va. 559, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 158.

**5. Exchanged Lands.** — *De Witt v. De Witt*, 202 Pa. St. 255.

**159.** 3. United States Doctrine. — *Welch v. McKenzie*, 66 Ark. 251; *Ferris v. Van Ingen*, 110 Ga. 102; *Davidson v. Richmond*, (Ky. 1902) 69 S. W. Rep. 794; *Hauptmann v. Hauptmann*, 91 N. Y. App. Div. 197. And see the title PARTNERSHIP, 108, 3 *et seq.*

**162.** 2. Present Doctrine. — *Greene v. Huntington*, 73 Conn. 106; *Mowry v. Mowry*, 24 R. I. 565; *Fitzgerald v. Fitzgerald*, 5 Ont. L. Rep. 279; *Re Williams*, 7 Ont. L. Rep. 156.

**163.** 1. No Dower unless Husband Possessed at Time of Death. — *Nichols v. Park*, 78 N. Y. App. Div. 95; *Howell v. Parker*, 136 N. Car. 373; *Re Williams*, 7 Ont. L. Rep. 156.

**Contra Where Conveyance Is Without Consideration.** — In *Ohio* it has been held that a husband cannot during coverture, without the knowledge or consent of the wife, voluntarily and without consideration dispose of his equitable estate so as to deprive her of her right of dower at his death. *Fast v. Umbaugh*, 12 Ohio Cir. Dec. 434.

**164.** 3. Contract of Purchase Assigned. — *Stephens v. Leonard*, 122 Mich. 125.

**9. General Rule as to Mortgaged Lands.** — *McMichael v. Russell*, 68 N. Y. App. Div. 104;

*Morgan v. Wickliffe*, 115 Ky. 226; *Mayfield v. Wright*, 107 Ky. 530; *Needles v. Ford*, 167 Mo. 495; *Smith v. Stephens*, 164 Mo. 415; *Jewett v. Feldheiser*, 68 Ohio St. 523; *Sprague v. Law*, 5 Ohio Dec. 384; *In re Dower*, 5 Ohio Dec. 560.

**165.** 1. Effect of Wife's Nonjoinder. — *Frederick v. Emig*, 186 Ill. 319, 78 Am. St. Rep. 283; *Reade v. Continental Trust Co.*, 49 N. Y. App. Div. 400, modifying (Supm. Ct. Spec. T.) 28 Misc. (N. Y.) 721.

**166.** 2. Redemption by Husband or Personal Representative. — *Casteel v. Potter*, 176 Mo. 76, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 166.

**4. Widow Must Contribute.** — *Salinger v. Black*, 68 Ark. 449; *Frederick v. Emig*, 186 Ill. 319, 78 Am. St. Rep. 283, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 166; *Hoy v. Varner*, 100 Va. 600.

**167.** 2. Widow's Right to Contribution. — *Smith v. Stephens*, 164 Mo. 415.

**169.** 3. Only the Surplus Subject to Dower. — *Virgin v. Virgin*, 189 Ill. 144, quoting 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 169; *Campbell v. Wilson*, 195 Ill. 284; *Hall v. Marshall*, (Mich. 1905) 102 N. W. Rep. 658; *Dahlman v. Dahlman*, 28 Mont. 373; *Lavender v. Daniel*, 58 S. Car. 125; *Geiger v. Geiger*, 57 S. Car. 521; *Hoy v. Varner*, 100 Va. 600, quoting 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 169; *Land v. Shipp*, 100 Va. 337.

**170.** 3. Canada Statute. — *Re Williams*, 7 Ont. L. Rep. 156.

**171.** 1. Land Not Charged with Dower Interest in Surplus. — *Compare Bassell v. Caywood*, 54 W. Va. 241, wherein it was held that if a purchaser buys lands sold to pay liens thereon, and the wife of the owner has a contingent right of dower in the surplus proceeds of sale, such purchaser takes the land subject to such contingent right of dower to the extent that the amount thereof remains charged against the land when the dower right may become consummated, unless such dower right has been otherwise provided for or satisfied.

**3. Assignment by Tenant of Freehold.** — *Baer v. Billigall*, 37 Oregon 416.

- 172.** Acceptance and Entry by Widow. — See note 3.  
 Parol Assignment. — See note 5.  
*b.* MINORS. — See note 6.  
*c.* GUARDIAN — In the United States. — See note 8.
- 173.** *e.* BY PROCESS OF LAW — Courts of Law. — See notes 1, 2.  
 Courts of Equity. — See note 5.
- 174.** 2. Mode of Assignment — *a.* BY METES AND BOUNDS. — See note 6.
- 175.** Where Property Is in Hands of Alienee. — See note 3.
- 176.** Variation of Rule by Reason of Improvements by Alienee. — See note 1.  
*b.* WHERE LANDS ARE HELD IN COMMON — Another Exception to the Rule. — See note 4.  
 Where Partition Is Made During Coverture. — See note 6.
- 177.** *c.* RENTS AND PROFITS — (1) *Property by Nature Indivisible* —  
 (a) In General. — See notes 1, 3.
- 178.** (c) Buildings — Where Mill Is Attached to Lands of Husband. — See note 5.  
 (2) *By Agreement*. — See note 7.
- 179.** (3) *Form of Payment* — Interest on Estimated Value of Premises. — See note 2.
- 183.** *d.* GROSS SUM IN LIEU OF DOWER — (3) *How Computation Is Made* — Computation by Annuity Tables. — See note 1.  
*e.* WHERE LANDS ARE IN SEPARATE TRACTS — At Common Law — General Rule. — See note 3.
- 184.** Qualification of Rule in Equity. — See note 1.  
 Rule under Statute. — See note 2.

**172.** 3. Acceptance of Assignment by Widow. — Pearce v. Pearce, 184 Ill. 289, affirming 83 Ill. App. 77.

5. Assignment by Parol. — Sill v. Sill, 185 Ill. 594, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 172. See also Graham v. Le Sourd, 99 Ill. App. 223.

6. Assignment by Minor. — In Illinois it is a settled doctrine that a minor cannot make an assignment of dower that will be binding on him upon arriving at age. Sill v. Sill, 185 Ill. 594.

8. Assignment by Guardian. — In Illinois, under statute, a guardian has no power to assign dower. Sill v. Sill, 185 Ill. 594.

**173.** 1. Writ of Dower. — Sperry v. Swiger, 54 W. Va. 283; Tenbrook v. Jessup, 60 N. J. Eq. 234; Baer v. Ballingall, 37 Oregon 416.

2. Writ of Right of Dower. — Baer v. Ballingall, 37 Oregon 416.

5. Assignment by Courts of Equity. — Beeman v. Kitzman, 124 Iowa 86; Baer v. Ballingall, 37 Oregon 416, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 173; Land v. Shipp, 98 Va. 284.

**174.** 6. Discretion of Court. — Gen. Laws R. I., c. 264, § 18, confers discretionary power upon the court to elect whether to set out dower under the general rule, *i. e.*, by metes and bounds, or for special reasons to substitute in lieu thereof a fixed rent. Arnold v. Probate Ct., 25 R. I. 506.

**175.** 3. Assignment by Metes and Bounds of Property in Hands of Alienee. — Sill v. Sill, 185 Ill. 594, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 175.

**176.** 1. United States Rule. — Ewell v. Tye, (Ky. 1903) 76 S. W. Rep. 875. As to the time of valuation, see also *infra*, this title, **186.** 1 *et seq.*

4. Assignment Out of Lands Held in Common. — Card v. Pudney, 42 N. Y. App. Div. 405,

quoting 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 176.

6. Where Partition of Lands Held in Common Is Made During Coverture. — Gaffney v. Jefferies, 59 S. Car. 565, 82 Am. St. Rep. 860.

**177.** 1. Assignment of Rents and Profits When Property Indivisible. — Howells v. McGraw, 97 N. Y. App. Div. 460.

3. Statutes. — See Smith v. Stephens, 164 Mo. 415; Carlin v. Mullery, 83 Mo. App. 30.

**178.** 5. See Sill v. Sill, 185 Ill. 594.

7. Assignment of Rents and Profits by Agreement. — Sill v. Sill, 185 Ill. 594, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 178.

**179.** 2. Interest on One-third Value of Premises. — To entitle an alienee to retain possession of the widow's interest in land, he must not only elect to pay the annual interest on its value, but he must pay it, and upon his failure to do so she may have her dower assigned. Dickenson v. Gray, 100 Va. 526.

**183.** 1. Effect of Widow's Death upon Valuation. — In Missouri it is held that the fact that the widow died before the expiration of the period of her expectancy is of no consequence in calculating the value of her dower by means of the American experience table of mortality. Andrews v. Broughton, 84 Mo. App. 640. And in Canada it has been held that notwithstanding the death of the widow after land is sold and the proceeds are paid into court, the amount of her dower must be determined according to tables based on expectancy. *Re Pettit*, 4 Ont. L. Rep. 506.

3. Assigned in Each Tract. — Morey v. Morey, 113 Iowa 152.

**184.** 1. Equitable Qualification of Rule. — Longshore v. Longshore, 200 Ill. 470.

2. Statutes. — See Rowley v. Poppenhager, 203 Ill. 434; Howell v. Parker, 136 N. Car. 373.

**185. 3. Quantum of Interest to Be Assigned — a. IN GENERAL — Assignment of Mansion House.** — See note 3.

*b. BASIS OF DIVISION.* — See note 4.

**187. c. TIME OF VALUATION OF ESTATE — (1) As Against the Heir — In South Carolina.** — See note 1.

*(2) As Against an Alienee — Allowance for Appreciation or Depreciation Caused by Alienee.* — See note 6.

**190. 4. Damages for Detention — a. IN GENERAL.** — See note 2.

**191. c. FROM WHAT TIME DAMAGES ACCRUE.** — See note 8.

**192.** See note 2.

**193. Where Property Is in Hands of Alienee of Husband.** — See note 3.

**194. 5. Rents and Mesne Profits in Lieu of Damages — a. IN GENERAL — As Against the Heir or Devisee.** — See note 6.

**196. b. AMOUNT OF RECOVERY — Deductions for Taxes and Repairs.** — See note 2.

**198. 6. Costs — In Equity.** — See note 4.

**200. IX. BARRING AND DEFEATING DOWER — 1. By Divorce.** — See notes 3, 4.

**2. By Adultery and Elopement.** — See note 5.

**185. 3. Under the North Carolina Statute** (Code N. Car., § 2103) the widow's "one-third in value" of her husband's realty includes the dwelling house in which the husband usually resided, and the rule that it must be included in the assignment of dower is peremptory. *Howell v. Parker*, 136 N. Car. 373.

**4. Quality and Not Quantity to Be Considered.** — *Higgins Oil, etc., Co. v. Snow*, (C. C. A.) 113 Fed. Rep. 433; *Cassity v. Pound*, 167 Mo. 605.

**187. 1. South Carolina Rule.** — *Geiger v. Geiger*, 57 S. Car. 521.

**6. Rule in United States** — *Bartlett v. Ball*, 92 Mo. App. 57, stating the rule in *Missouri* to be that where the land in which the widow is entitled to dower is not susceptible of division in kind, and has no rental value separate and apart from lasting improvements (in the benefits of which she is not entitled to participate), the property will be considered as a whole, and out of its annual rental value as a whole the widow is entitled to receive her just proportion, to be estimated by deducting from the net rent that proportion thereof which the improvements bear to the land, and dividing the remainder by three.

**190. 2. Damages for Detention.** — *Brown v. Morisey*, 126 N. Car. 772.

**191. 8. When Demand for Dower Unnecessary.** — A demand for dower is unnecessary on the part of a second wife who remains in possession and collects the rents under an agreement with the heirs pending an adjustment of the respective rights of the heirs. *Potter v. Clapp*, 203 Ill. 592, 96 Am. St. Rep. 322.

**192. 2. Damages from the Teste of the Original Writ.** — *Fast v. Umbaugh*, 12 Ohio Cir. Dec. 434.

**193. 3. From What Time Damages Accrue as Against Alienee of Husband.** — *Gorden v. Gorden*, 179 N. Y. 549, affirming 80 N. Y. App. Div. 258.

*From Institution of Suit.* — *Dickenson v. Grav*, 100 Va. 526.

**194. 6. Rents and Mesne Profits as Against Heir or Devisee.** — *Bettis v. McNider*, 137 Ala. 588, 97 Am. St. Rep. 59.

**196. 2. Iowa Rule.** — Under Code Iowa, § 3379, where the husband left no issue surviving him, his widow is entitled to one-half of the proceeds from the sale of his estate, but the portion to which she is entitled as widow by reason of her want of issue, so far as it exceeds her one-third dower interest, is subject to the payment of claims against the estate, such as taxes, repairs, and costs of administration and sale. But where the widow is only entitled to one-third of the gross proceeds of her husband's realty, it is not chargeable with taxes, repairs, etc. *Wild v. Toms*, 123 Iowa 747.

**198. 4. Rule in Equity as to Costs.** — *Watson v. Watson*, 11 Ohio Cir. Dec. 463.

**An Attorney's Fee** will not be taxed against an alienee of the husband in favor of the widow in a suit for dower. *Beeman v. Kitzman*, 124 Iowa 86. See also *Watson v. Watson*, 11 Ohio Cir. Dec. 463.

**200. 3. Effect of Divorce a Vinculo.** — *In re Taylor*, (Indian Ter. 1904) 82 S. W. Rep. 727; *Hatch v. Small*, 61 Kan. 242; *Nichols v. Park*, 78 N. Y. App. Div. 95, reversing (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 176; *Norton v. Tufts*, 19 Utah 470. And see the title **DIVORCE**, 856, 3 *et seq.*

**Decree Ordering Release of Dower.** — When, upon granting a divorce, a decree for alimony, rendered by a court having jurisdiction, in pursuance of an agreement between the parties, orders the wife to execute a release of her right of dower in lands of her husband, the decree, if the wife fails to perform it, will operate as such release, and be as effectual a bar to her right of dower as if the deed were duly executed and delivered. *Julier v. Julier*, 62 Ohio St. 90, 78 Am. St. Rep. 697.

**4. Mere Separation** and living apart from the husband by reason of his habitual drunkenness will not bar the wife's dower. *Stuart v. Neely*, 50 W. Va. 508.

**5. Barred by Adultery and Elopement.** — See *Grober v. Clements*, 71 Ark. 565, 100 Am. St. Rep. 91; *Wilson v. Craig*, 175 Mo. 362; *Lyons v. Lyons*, 101 Mo. App. 494; *Phillips v. Wise-*



**201.** See notes 1, 2.

**202.** 9. By Partition Proceedings. — See note 5.

**203.** 11. By Alienation of the Husband — *a.* BEFORE MARRIAGE — Conveyances in Fraud of Wife. — See note 4.

**204.** See note 1.

*c.* AFTER MARRIAGE. — See notes 3, 4.

**205.** 12. By Statute of Limitations or Laches — *a.* IN GENERAL. — See notes 2, 3.

man, 131 N. Car. 402; *Beatty v. Richardson*, 56 S. Car. 173, quoting 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 200.

**201.** 1. Leaving Husband Necessary — *Kentucky Statute.* — Under Stat. Ky. (1894), § 2133, a wife's claim to dower is not barred by her acts of adultery, where she continues to live with the husband. *Sergeant v. North Cumberland Mfg. Co.*, 112 Ky. 888. But it has been held that a wife may "voluntarily leave her husband and live in adultery," so as to forfeit her right of dower, by voluntarily adopting the adulterous relation in the husband's enforced absence from his home, though she continues to reside there. *McQuinn v. McQuinn*, 110 Ky. 321.

"Voluntary Abandonment" — *Missouri Statute.* — Any separation which is demonstrated by the acts and conduct of the wife to be voluntary, and which is not brought about by the acts of the husband, or by any restraint upon her person, fully meets the provision of the *Missouri* statute. *Wilson v. Craig*, 175 Mo. 362.

Where the Husband Deserts the Wife, and after unsuccessful efforts to win him back the wife lives in adultery with another, her dower is not barred under Civ. Code S. Car. (1893), § 1903. *Beatty v. Richardson*, 56 S. Car. 173.

**2.** *Norton v. Tufts*, 19 Utah 470.

Adultery of the Wife Not Followed by Divorce does not bar her dower under the *Indian Territory* statutes. *In re Taylor* (Indian Ter. 1904) 82 S. W. Rep. 727. See also *Grober v. Clements*, 71 Ark. 565, 100 Am. St. Rep. 91.

**202.** 5. Partition Proceedings. — Under Civ. Code Ky., § 495, a wife cannot be divested of her contingent right of dower, ordered to be sold in partition proceedings, except by her consent, if a widow, or if married and of sound mind, with her consent on privy examination. If of unsound mind, the chancellor may consent for her and make reasonable compensation for her dower right either out of the proceeds of sale or by substitution of her right upon the property purchased therewith. *Woman's Club Corp. v. Reed*, 111 Ky. 806. See also *Reed v. Reed*, (Ky. 1904) 80 S. W. Rep. 520.

In a case arising under Comp. State. Neb. (1901), §§ 289, 290, it was held that the wife of a devisee has an inchoate right of dower in the land devised to him, and a decree in partition barring her of any right in the land is erroneous. *Schick v. Whitcomb*, (Neb. 1903) 94 N. W. Rep. 1023.

**203.** 4. Fraudulent Conveyance Void as Against Wife. — *Rice v. Waddill*, 168 Mo. 99; *Hach v. Rollins*, 158 Mo. 182; *Ward v. Ward*, 63 Ohio St. 125, 81 Am. St. Rep. 621. See also the title FRAUDULENT SALES AND CONVEYANCES, 252. 1.

Where Wife Has Knowledge of Fraudulent

Conveyances. — It has been held that where the husband, before marriage, voluntarily conveys his land with intent to defeat his wife's dower right, and the wife marries him with full knowledge of the facts, she cannot complain of the fraudulent conveyance. *Smith v. Erwin*, (Ky. 1904) 82 S. W. Rep. 411.

**204.** 1. *Jones v. Jones*, 213 Ill. 228; *Daniher v. Daniher*, 201 Ill. 489; *Clark v. Clark*, 183 Ill. 448, 75 Am. St. Rep. 115; *Burgoon v. Whitney*, 121 Iowa 76. Compare *Rice v. Waddill*, 168 Mo. 99, holding that gifts by the husband before marriage, to children by a former wife, under a promise to her to provide for them, and in fraud of the dower rights of the second wife, being without consideration, are unenforceable as against the dower right of the second wife.

**3.** *Redmond v. Redmond*, 112 Ky. 760; *Newton v. Newton*, 162 Mo. 173.

A Contract of the Husband to Sell will not affect the wife's dower rights. *Rankin v. Rankin*, 111 Ill. App. 403. See also *Ebert v. Arends*, 190 Ill. 221.

Exception to General Rule. — In *Crow v. Brown*, (Ky. 1900) 56 S. W. Rep. 805, it was held that dower was barred in land conveyed by the husband alone during coverture in exchange for other land, afterwards sold by him, where the proceeds thereof were invested in another state, and out of them the wife, after the husband's death, received an amount in excess of the value of her dower in the land first conveyed.

**4.** *Georgia Statute.* — See *La Grange Mills v. Kener*, 121 Ga. 429.

**205.** 2. Barred by Statute of Limitations. — *La Grange Mills v. Kener*, 121 Ga. 429; *Crawford v. Watkins*, 118 Ga. 631; *Winchester v. Keith*, (Ky. 1902) 70 S. W. Rep. 664; *Harrison v. McReynolds*, 183 Mo. 533; *Beall v. McMenemy*, 63 Neb. 70, 93 Am. St. Rep. 427.

Widow Occupying Land with Heirs. — See *Sperry v. Swiger*, 54 W. Va. 283, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 205, and note. See also *Brown v. Morisey*, 124 N. Car. 292.

**3.** Not Barred by Statute of Limitations. — *Brown v. Morisey*, 126 N. Car. 772.

Land in Possession of Heirs. — *Sill v. Sill*, 185 Ill. 594. See also *Brumback v. Brumback*, 198 Ill. 66; *Grober v. Clements*, 71 Ark. 565, 100 Am. St. Rep. 91.

New York Statute. — Under Code Civ. Pro. N. Y., § 1596, a suit for dower by the widow must be commenced within twenty years from the husband's death, unless the widow is at such time under disability. *Wetyen v. Fick*, 178 N. Y. 223.

Where the Widow Has Been Continuously in Possession of the land since the death of the husband, the *Kentucky* statute of limitations does not run against her right of dower. *O'Bryan v. Langley*, (Ky. 1900) 59 S. W. Rep. 523.

- 206.** *b. WHEN STATUTE BEGINS TO RUN.* — See notes 1, 2.  
*a. LACHES.* — See note 3.  
**13.** *By Estoppel in Pais.* — See note 4.  
**207.** See note 1.  
**14.** *By Jointure* — *a. LEGAL JOINTURE.* — See notes 2, 3.  
**208.** *Requisites of a Jointure.* — See note 1.  
*b. EQUITABLE JOINTURE.* — See note 2.  
**209.** *15. By Antenuptial Agreement.* — See note 1.  
**210.** *Such Agreements Closely Scrutinized.* — See note 1.  
**211.** *16. By Postnuptial Agreement.* — See note 1.  
*Deed of Separation.* — See notes 2, 3.

**206. 1. When Statute Begins to Run.** — *Lucas v. White*, 120 Iowa 735, 98 Am. St. Rep. 380; *Winchester v. Keith*, (Ky. 1902) 70 S. W. Rep. 664; *McCrillis v. Thomas*, 110 Mo. App. 699.

**Whether the Husband's Death Be Actual or Legal, in Michigan**, the statute of limitations in regard to real actions controls. *Moross v. Moross*, 132 Mich. 203.

**A Widow Who Is Insane** at the date of her husband's death is not barred in *Georgia* of her right to apply for dower seven years after the removal of her disability. *La Grange Mills v. Kener*, 121 Ga. 429.

**Dower Barred in Ten Years After Death of Husband.** — *Harrison v. McReynolds*, 183 Mo. 533. See also *Sperry v. Swiger*, 54 W. Va. 283.

**2. Possession Adverse to Husband Does Not Bar.** — *Lucas v. Whitacre*, 121 Iowa 251; *Butcher v. Butcher*, (Mich. 1904) 100 N. W. Rep. 604.

**Where Claim Is Adverse and by Paramount Title.** — In *Brown v. Morisey*, 124 N. Car. 292, it was held that where the defendant does not claim under the husband as heir or assignee, but claims adversely and by paramount title, the rule does not apply.

**3. When Laches Not Imputable.** — Laches in asserting her dower cannot be imputed to a widow in joint possession of the premises with a son so long as she continues in possession. *Brumback v. Brumback*, 198 Ill. 66.

**4. Estoppel in Pais.** — *Foley v. Boulware*, 86 Mo. App. 674; *Norton v. Tufts*, 19 Utah 470.

**207. 1. Wife's Conduct Must Be Relied Upon.** — *Starr v. Newman*, 107 Ga. 395; *Foley v. Boulware*, 86 Mo. App. 674; *Harrison v. McReynolds*, 183 Mo. 533; *Fast v. Umbaugh*, 12 Ohio Cir. Dec. 434; *Hunt v. Reilly*, 24 R. I. 68, 96 Am. St. Rep. 707; *Norton v. Tufts*, 19 Utah 470.

**2. Barred by Jointure.** — *Ward v. Ward*, 63 Ohio St. 125, 81 Am. St. Rep. 621.

**3. Jointure Defined.** — *Moran v. Stewart*, 173 Mo. 207, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 207.

**208. 1. Requisites of Jointure.** — *Land v. Shipp*, 98 Va. 284.

**Must Be Expressed to Be in Lien of Dower.** — *King v. King*, 184 Mo. 99.

**May Be of Personalty under Statute.** — By the statute in *Virginia* (Code Va., §§ 2270, 2271), dower may be of personal as well as real estate, otherwise the common-law requisites prevail. *Land v. Shipp*, 98 Va. 284.

**2. Equitable Jointure.** — *Moran v. Stewart*, 173 Mo. 207, citing 10 AM. AND ENG. ENCYC. OF

LAW (2d ed.) 208. See also *Hieser v. Sutter*, 195 Ill. 378.

**209. 1. Antenuptial Agreement as a Bar.** — *Mannan v. Mannan*, 154 Ind. 9; *Kohl v. Frederick*, 115 Iowa 517; *Fisher v. Koontz*, 110 Iowa 498; *Moran v. Stewart*, 173 Mo. 207, quoting 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 209; *Cummings v. Cummings*, 25 R. I. 528.

**An Antenuptial Agreement Must Show on Its Face** that it is made in lieu of dower or in full discharge thereof. *Rice v. Waddill*, 168 Mo. 99.

**Effect of Existence of Minor Child.** — In *Zachmann v. Zachmann*, 201 Ill. 380, 94 Am. St. Rep. 180, it was held that a widow having a minor child of the deceased husband may repudiate an antenuptial contract by which she agreed to accept a certain sum in lieu of dower. But in the same jurisdiction it has been held that where there were no minor children interested, it was competent for the husband and wife, by agreement, to bar the dower of the wife. *Merki v. Merki*, 212 Ill. 121.

**210. 1. Avoided by Fraud.** — See *Moran v. Stewart*, 173 Mo. 207, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 210; *Turgeon v. Shannon*, 20 Quebec Super. Ct. 135, holding that antenuptial agreements are to be strictly construed in favor of the wife.

**211. 1. Postnuptial Agreement.** — *Mannan v. Mannan*, 154 Ind. 9, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 211.

**In Equity and by Statute.** — In *Fennell's Estate*, 207 Pa. St. 309, it was held that where a postnuptial agreement to release dower is reasonable in terms and free from force, concealment, or overreaching, and for an adequate consideration, it will bind the wife both in equity and by Act Pa. June 8, 1893, P. L. 344, although at the time there is no intention to suspend the marital relation.

**2. Deed of Separation.** — *Bowers v. Hutchinson*, 67 Ark. 15; *In re Taylor*, (Indian Ter. 1904) 82 S. W. Rep. 727; *Sawyer v. Biggart*, 114 Iowa 489; *Land v. Shipp*, 98 Va. 284, wherein it was held that the consideration for such deed need not be refunded by the wife as a condition to the assignment of dower, since such deed and release were absolutely void. See also *Moon v. Bruce*, 63 S. Car. 126, wherein it was held that a contract of separation under seal which provided merely that for a certain consideration the wife forever released and discharged her husband, his heirs, and executors, from all causes of action, claims, executions, and demands at law or in equity, was insufficient to release the wife's dower, since her claim there-

**211. 17. By Wife's Release — a. RIGHT TO RELEASE — (1) During Coverture.** — See note 4.

**213. Power of Attorney.** — See note 1.

**Cannot Release by a Separate Deed.** — See note 4.

**214.** See note 1.

**Joinder in an Inoperative Deed.** — See note 4.

**218. DRAFT.** — See note 1.

for could not arise until after the husband's death.

**211. 3. Dower Barred by Deed of Separation.** — *Harris v. Davis*, 115 Ga. 950; *Higgins v. Ormsby*, 156 Ind. 82; *Fennell's Estate*, 207 Pa. St. 309; *Eves v. Booth*, 27 Ont. App. 420, affirming 30 Ont. 689.

But a contract intended to promote the dissolution of a marriage is void and will not bar dower. *Birch v. Anthony*, 109 Ga. 349, 77 Am. St. Rep. 379.

See further, as to the effect on dower rights of a deed of separation, the title SEPARATION (HUSBAND AND WIFE), **461. 2, 462. 4, 463. 1.**

**Acknowledgment Apart from Husband.** — In *Pennsylvania*, where the deed of separation has been freely made, for a good consideration, upon returns advantageous to the wife, and carried into effect in good faith, it will bar the wife's dower although not acknowledged by the wife separate and apart from the husband, as required by statute. *Kaiser's Estate*, 199 Pa. St. 269, 85 Am. St. Rep. 785, reversing 14 Pa. Super. Ct. 155.

**4. Joinder of the Wife.** — *Hanna v. Gay*, (Ky. 1904) 78 S. W. Rep. 915; *Genoway v. Maize*, 163 Mo. 224; *Bush v. Peirsol*, 183 Mo. 500; *Lavender v. Daniel*, 58 S. Car. 125; *Norton v. Tufts*, 19 Utah 470.

**Need Not Release Dower *Ex Nomine*.** — See *Goodheart v. Goodheart*, 63 N. J. Eq. 746. See also *Campbell v. Wilson*, 195 Ill. 284.

**Wife's Name Must Appear in Body of Deed.** — In *Kentucky* it is held that the wife's signature and acknowledgment of a mortgage will not bar her right of dower where her name does not appear in the body of the instrument. *Beverly v. Waller*, 115 Ky. 596.

And in *Arkansas*, by statute, a married woman can relinquish her dower only by joining with her husband in a deed of conveyance to a third person and by voluntary appearance before a court or officer and acknowledging the relinquishment of dower as set forth in the conveyance. *Bowers v. Hutchinson*, 67 Ark. 15.

**A Deed Not Acknowledged** by the wife will not bar dower. *Maynard v. Davis*, 127 Mich. 571. See also *Harris v. Langford*, (Ky. 1904) 83 S. W. Rep. 566.

**213. 1. Under the New York Statute** a wife can execute a power of attorney by virtue of which the inchoate dower interest of the wife may be transferred, although such interest is not specifically mentioned in the power. *Platt v. Finck*, 60 N. Y. App. Div. 312.

**4. Husband Must Join.** — *Lewis v. Apperson*, 103 Va. 624.

**214. 1. In Kentucky** where the husband has conveyed, the wife may release her potential dower by separate deed and by privy acknowledgment thereof before the proper officer. *Hanna v. Gay*, (Ky. 1904) 78 S. W. Rep. 915.

**4. Deed Avoided for Fraud.** — *Frederick v. Emig*, 186 Ill. 319, 78 Am. St. Rep. 283; *Wells v. Estes*, 154 Mo. 291; *Bealey v. Blake*, 153 Mo. 657; *Bradshaw v. Halpin*, 180 Mo. 666.

**Breach of a Condition to Pay an Annuity** to husband and wife and the survivors of them has been held to entitle the wife to an avoidance of her release of dower in a deed. *Brown v. Tilley*, 25 R. I. 579.

**218. 1. Check, Draft, and Bill of Exchange** **Synonymous.** — See *State v. Warner*, 60 Kan. 94.



# DRAINS AND SEWERS.

By E. G. CHILTON.

**221. I. DEFINITIONS — Drain.** — See note 2.

**Sewer — Sewerage — Sewage.** — See note 4.

**222. II. PUBLIC DRAINS — 1. Power of the Legislature to Establish Drains**

— *a. GENERALLY.* — See note 1.

**223. b. UNDER THE POLICE POWER.** — See note 2.

*c. UNDER THE RIGHT OF EMINENT DOMAIN.* — See note 3.

*d. UNDER THE TAXING POWER.* — See note 4.

**224. e. REQUIREMENT THAT DRAINAGE MUST BE FOR PUBLIC USE —**

(1) *Generally.* — See note 1.

**225.** See note 1.

**Incidental Private Benefit.** — See note 2.

**What Is a Public Use.** — See note 4.

**226. (2) Drainage for Agricultural Purposes.** — See note 3.

**228. 3. Assessments — a. GENERALLY.** — See note 2.

**221. 2. Drain Defined.** — *Royse v. Evansville, etc., R. Co.*, 160 Ind. 594, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 221.

**4. A Sewer, Etc.** — *Aldrich v. Paine*, 106 Iowa 461.

**The Difference Between Drains and Sewers** is that sewers are generally covered to prevent the escape of foul odors and gases, while drains are generally open. *Mound City Land, etc., Co. v. Miller*, 170 Mo. 240, 94 Am. St. Rep. 727.

**222. 1. Drainage Acts Held Constitutional — Arkansas.** — *St. Louis Southwestern R. Co. v. Grayson*, 72 Ark. 119.

*California.* — *Laguna Drainage Dist. v. Charles Martin Co.*, 144 Cal. 209.

*Indiana.* — *Sauntman v. Maxwell*, 154 Ind. 114.

*Iowa.* — *Oliver v. Monona County*, 117 Iowa 43.

*Kansas.* — *Griffith v. Pence*, 9 Kan. App. 253, quoting 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 222.

*Michigan.* — *Auditor Gen. v. Melze*, 124 Mich. 285.

*Minnesota.* — *Lien v. Norman County*, 80 Minn. 58; *State v. Polk County*, 87 Minn. 336; *McMillan v. Freeborn County*, 93 Minn. 16.

*Missouri.* — *Mound City Land, etc., Co. v. Miller*, 170 Mo. 240, 94 Am. St. Rep. 727.

*Nebraska.* — *Dodge County v. Acorn*, 61 Neb. 376; *Neal v. Vansickel*, (Neb. 1904) 100 N. W. Rep. 200.

*New Jersey.* — *Zeliff v. Bog, etc., Meadow Co.*, 68 N. J. L. 200; *Van Cleve v. Passaic Valley Sewerage Com'rs*, 71 N. J. L. 183.

*North Dakota.* — *Erickson v. Cass County*, 11 N. Dak. 494.

*Washington.* — *Lewis County v. Gordon*, 20 Wash. 80; *Skagit County v. McLean*, 20 Wash. 92; *State v. Henry*, 28 Wash. 38.

**223. 2. Drainage under Police Power.** — *Lien v. Norman County*, 80 Minn. 58, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 223;

*Mound City Land, etc., Co. v. Miller*, 170 Mo. 240, 94 Am. St. Rep. 727.

**3. Drainage under Eminent Domain.** — *Lien v. Norman County*, 80 Minn. 58, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 223; *Lile v. Gibson*, 91 Mo. App. 480; *Matter of Tuthill*, 36 N. Y. App. Div. 492, affirmed 163 N. Y. 133.

**4. Drainage under Taxing Power.** — *Lien v. Norman County*, 80 Minn. 58, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 223.

**224. 1. Drain Must Be for Public Use.** — *Oliver v. Monona County*, 117 Iowa 43; *De Gravelle v. Iberia, etc., Drainage Dist.*, 104 La. 703.

**225. 1. Oliver v. Monona County, 117 Iowa 43.**

*2. De Gravelle v. Iberia, etc., Drainage Dist.*, 104 La. 703; *State v. Polk County*, 87 Minn. 336.

**4. Whole Public or State Need Not Be Benefited.** — *Laguna Drainage Dist. v. Charles Martin Co.*, 144 Cal. 209; *Lien v. Norman County*, 80 Minn. 58, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 225; *State v. Polk County*, 87 Minn. 336; *Lewis County v. Gordon*, 20 Wash. 80.

**When Drainage as a Public Use.** — *State v. Polk County*, 87 Minn. 325; *Thomas v. County Com'rs*, 5 Ohio Dec. 503, 5 Ohio N. P. 449.

**Promotion of Public Health.** — *Thomas v. County Com'rs*, 5 Ohio Dec. 503, 5 Ohio N. P. 449.

**226. 3. Reclamation of Large Bodies of Waste Lands Held a Public Purpose.** — *State v. Polk County*, 87 Minn. 336, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 226; *Lien v. Norman County*, 80 Minn. 58; *Lewis County v. Gordon*, 20 Wash. 80.

**228. 2. Assessments — England.** — *Newcastle-upon-Tyne Corp. v. Houseman*, 63 J. P. 85.

*Illinois.* — *People v. McDougal*, 205 Ill. 636.

*Iowa.* — *Oliver v. Monona County*, 117 Iowa 43.

- 230.** **Property Owner Must Be Given Opportunity to Be Heard.** — See notes 1, 2. **Estoppel.** — See note 3.  
**b. ASSESSMENTS MUST BE ACCORDING TO BENEFITS.** — See note 4.
- 231.** **Nature of Benefits — Special Benefits.** — See note 4. **Speculative Benefits.** — See note 5. **Indirect Benefits.** — See note 6.
- 232.** **The Assessment Roll.** — See notes 3, 4. **c. REASSESSMENT.** — See note 5.
- 233.** **4. Compensation and Damages.** — See notes 1, 2. **5. Drainage Districts — a. GENERALLY.** — See note 3.
- 234.** See notes 1, 2, 3, 4.

*Louisiana.* — De Gravelle *v.* Iberia, etc., Drainage Dist., 104 La. 703.

*Nebraska.* — Neal *v.* Vansickel, (Neb. 1904) 100 N. W. Rep. 200.

*North Dakota.* — Erickson *v.* Cass County, 11 N. Dak. 494.

**Assessments in Advance.** — First Nat. Bank *v.* Union Dist. No. 1, 82 Ill. App. 626; Sterling First Nat. Bank *v.* Drew, 93 Ill. App. 630; affirmed 191 Ill. 186.

**Assessment Not Invalidated by Slight Errors.** — Lower Kings River Reclamation Dist. No. 531 *v.* McCullah, 124 Cal. 175; Scholtz *v.* Smith, 119 Mich. 634.

**Assessment for Ditch Not Properly Constructed.** — To the same effect as Racer *v.* State, 131 Ind. 393, stated in the original note, see Studabaker *v.* Studabaker, 152 Ind. 89.

**230. 1.** Oliver *v.* Monona County, 117 Iowa 43; Erickson *v.* Cass County, 11 N. Dak. 494.

**2.** Beebe *v.* Magoun, 122 Iowa 94; Smith *v.* Peterson, 123 Iowa 672; Neal *v.* Vansickel, (Neb. 1904) 100 N. W. Rep. 200.

**3. Estoppel — Acquiescence — Illinois.** — People *v.* Schnepf, 179 Ill. 305.

*Indiana.* — Fletcher *v.* White, 151 Ind. 401; Cochran *v.* White, 151 Ind. 435.

*Iowa.* — Oliver *v.* Monona County, 117 Iowa 43.

*Michigan.* — Auditor Gen. *v.* Melze, 124 Mich. 285; Wilson *v.* Woolman, 133 Mich. 350.

*North Dakota.* — Erickson *v.* Cass County, 11 N. Dak. 494.

**4. Assessment Must Be According to Benefit.** — Culbertson *v.* Knight, 152 Ind. 121; Neal *v.* Vansickel, (Neb. 1904) 100 N. W. Rep. 200; C., etc., R. Co. *v.* Logan County, 9 Ohio Cir. Dec. 803, 17 Ohio Cir. Ct. 436.

**Assessment on Land Not Benefited.** — Beals *v.* James, 173 Mass. 591.

**231. 4. Benefits Must Be Special.** — Dodge County *v.* Acom, 61 Neb. 376.

**What Constitute Special Benefits.** — Benefits afforded for draining lands through connecting or lateral drains are special, and will support assessments. Erickson *v.* Cass County, 11 N. Dak. 494.

**5.** See Erickson *v.* Cass County, 11 N. Dak. 494.

**6. Indirect Benefits.** — Oliver *v.* Monona County, 117 Iowa 43.

**232. 3. Assessment Roll.** — Trigger *v.* Drainage Dist. No. 1, 193 Ill. 230; Pinkstaff *v.* Allison Ditch Dist. No. 2, 213 Ill. 186; Wathen *v.* Allison Ditch Dist. No. 2, 213 Ill. 138.

**The Assessment Roll Is Conclusive Evidence** that the persons named therein as owners are owners. Warwick Tp. *v.* Brooke Tp., 1 Ont. L. Rep. 433.

**4.** Wathen *v.* Allison Ditch Dist. No. 2, 213 Ill. 138.

**5. Reassessment.** — First Nat. Bank *v.* Union Dist. No. 1, 82 Ill. App. 626; McMillan *v.* Freeborn County, 93 Minn. 16.

**233. 1. Compensation and Damages.** — Juvinall *v.* Jamesburg Drainage Dist., 204 Ill. 106.

**2. Benefits May Be Set Off Against Damages.** — Payson *v.* People, 175 Ill. 267.

**3. Drainage Districts — California.** — People *v.* Reclamation Dist. No. 136, 121 Cal. 522; Lower Kings River Reclamation Dist. No. 531 *v.* McCullah, 124 Cal. 175; People *v.* Reclamation Dist. No. 556, 130 Cal. 607.

*Illinois.* — First Nat. Bank *v.* Union Dist. No. 1, 82 Ill. App. 626; Payson *v.* People, 175 Ill. 267; Sanner *v.* Union Drainage Dist., 175 Ill. 575; Craig *v.* People, 188 Ill. 416; Bishop *v.* People, 200 Ill. 33.

*Indiana.* — Conn *v.* Cass County, 151 Ind. 517; Keiser *v.* Mills, 162 Ind. 366.

*Iowa.* — Oliver *v.* Monona County, 117 Iowa 43.

*Louisiana.* — De Gravelle *v.* Iberia, etc., Drainage Dist., 104 La. 703; Richard *v.* Cypressmorton Drainage Dist., 107 La. 657.

*Michigan.* — Hackett *v.* Brown, 128 Mich. 141.

*Missouri.* — Lile *v.* Gibson, 91 Mo. App. 480; Drainage Dist. No. 1 *v.* Daudt, 74 Mo. App. 579; Bungenstock *v.* Nishnabotna Drainage Dist., 163 Mo. 108; Mound City Land, etc., Co. *v.* Miller, 170 Mo. 240, 94 Am. St. Rep. 727.

*Nebraska.* — Dodge County *v.* Acom, 61 Neb. 376.

**Outside Landowner Connecting with District.** — See People *v.* Bug River Special Drainage Dist., 189 Ill. 55.

**234. 1. Drainage District Is a Public Corporation.** — Payson *v.* People, 175 Ill. 267; People *v.* Burns, 212 Ill. 227; Mound City Land, etc., Co. *v.* Miller, 170 Mo. 240, 94 Am. St. Rep. 727.

**2. Quasi-public Corporations.** — Barton *v.* Minnie Creek Drainage Dist., 112 Ill. App. 640.

**3. Organization of District Not Subject to Collateral Attack.** — Payson *v.* People, 175 Ill. 267; People *v.* Dyer, 205 Ill. 575; Cleveland, etc., R. Co. *v.* Polecat Drainage Dist., 213 Ill. 83; State *v.* Polk County, 87 Minn. 336; Stone *v.* Little Yellow Drainage Dist., 118 Wis. 388.

**4.** People *v.* Reclamation Dist. No. 136, 121

**234.** *b.* ALTERATION, EXTENSION, OR DISSOLUTION. — See note 5.

**235.** III. PRIVATE DRAINS — Right to Construct. — See notes 3, 4.

**236.** See note 1.

**237.** Drainage into Natural Stream. — See note 2.

IV. SEWERS — 1. Power of Municipality to Construct Sewers and Drains. — See note 3.

**239.** Acquisition of Private Property for Sewerage Purposes. — See notes 1, 2.

2. Duties and Liabilities of Municipality — *a.* GENERALLY — JUDICIAL AND MINISTERIAL DUTIES. — See note 3.

What Are Judicial and What Ministerial Duties. — See note 4.

*b.* DUTY TO EXERCISE ORDINARY CARE. — See note 5.

**240.** *c.* LIABILITY IN PARTICULAR CASES CONSIDERED — (1) *Failure to Provide Sewers or Drains* — (*a*) Generally. — See notes 2, 3.

Cal. 522; Payson *v.* People, 175 Ill. 267; San-  
ner *v.* Union Drainage Dist., 175 Ill. 575;  
Cleveland, etc., R. Co. *v.* Polecat Drainage Dist.,  
213 Ill. 83.

**234.** 5. Alteration, Extension, or Dissolution  
of Drainage District. — People *v.* Bug River  
Special Drainage Dist., 189 Ill. 55; Cleary *v.*  
Hoobler, 207 Ill. 97.

**235.** 3. Baldwin *v.* Ohio Tp., (Kan. 1904)  
78 Pac. Rep. 424; Gottenetroeter *v.* Kapple-  
mann, 83 Mo. App. 290; Todd *v.* York County,  
(Neb. 1904) 100 N. W. Rep. 299; Johnson *v.*  
White, 26 R. I. 207; Gramann *v.* Eicholtz, 36  
Tex. Civ. App. 309; Barnett *v.* Matagorda Rice,  
etc., Co., (Tex. 1904) 83 S. W. Rep. 801; Con-  
nell *v.* Stark, 108 Wis. 92.

Control by Local Authority in England. — A  
statute providing that all sewers within the dis-  
trict of a local authority, except sewers made  
by any person for his own profit, shall vest in  
and be under the control of the local authority,  
does not except a sewer made merely for the  
purpose of draining premises. Sykes *v.*  
Sowerby Urban Dist. Council, [1899] 1 Q. B.  
979, 80 L. T. N. S. 392, reversed (1900) 1 Q. B.  
584.

4. Landowner May Increase Natural Flow by  
Artificial Drains. — Todd *v.* York County,  
(Neb. 1904) 100 N. W. Rep. 299; Parker *v.*  
Norfolk, etc., R. Co., 123 N. Car. 71; Mizell *v.*  
McGowan, 129 N. Car. 93, 85 Am. St. Rep. 705.

**236.** 1. Landowner Cannot Discharge New  
Currents on Lower Proprietor — *Illinois*. — Cross-  
ville *v.* Stuart, 77 Ill. App. 513.

*Iowa*. — See Mulvihill *v.* Thompson, 114 Iowa  
734.

*Kentucky*. — Robertson *v.* Daviess Gravel  
Road Co., 116 Ky. 913.

*Nebraska*. — Chicago, etc., R. Co. *v.* Shaw, 63  
Neb. 380; Todd *v.* York County, (Neb. 1904)  
100 N. W. Rep. 299.

*North Carolina*. — Mizell *v.* McGowan, 129 N.  
Car. 93, 85 Am. St. Rep. 705.

*South Carolina*. — Brandenburg *v.* Zeigler, 62  
S. Car. 18, 89 Am. St. Rep. 887; Cain *v.* South  
Bound R. Co., 62 S. Car. 25.

*Tennessee*. — Sweetwater *v.* Pate, (Tenn. Ch.  
1900) 59 S. W. Rep. 480.

The owner of land has the right to carry off  
surface water by cutting ditches by which the  
flow of water naturally flowing therein is in-  
creased and accelerated, and discharged on the  
lower land; but he has no right to divert other  
water so as to cause it to flow on the other land,

when it would not have done so in its natural  
course. Parker *v.* Norfolk, etc., R. Co., 123  
N. Car. 71.

But where, by agreement, a person constructs  
a drain on the lands of another, but changes  
the direction of the drain, the fact that the  
lower proprietor is present while the work is  
being performed estops him from complaining.  
Adams *v.* Stadler, 78 Ill. App. 432.

**237.** 2. Drainage into Stream. — Baldwin *v.*  
Ohio Tp., (Kan. 1904) 78 Pac. Rep. 424.

3. Power to Construct Sewers. — Aldrich *v.*  
Paine, 106 Iowa 461; Richmond *v.* Gallego  
Mills Co., 102 Va. 165.

**239.** 1. City May Acquire Land for Sewer  
Purposes. — Aldrich *v.* Paine, 106 Iowa 461.

2. Property Owner Entitled to Compensation. —  
Aldrich *v.* Paine, 106 Iowa 461.

3. Judicial and Ministerial Duties Distinguished.  
— Harrington *v.* Woodbridge, 70 N. J. L. 28;  
King *v.* Granger, 21 R. I. 93, 79 Am. St. Rep.  
779; Knoxville *v.* Klasing, 111 Tenn. 134, cit-  
ing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.)  
239.

4. Judicial and Ministerial Duties Defined —  
*Maine*. — Hamlin *v.* Biddeford, 95 Me. 308.

*Michigan*. — McAskill *v.* Hancock Tp., 129  
Mich. 74.

*New Jersey*. — Harrington *v.* Woodbridge, 70  
N. J. L. 28.

*New York*. — Munn *v.* Hudson, 61 N. Y. App.  
Div. 343.

*Rhode Island*. — King *v.* Granger, 21 R. I.  
93, 79 Am. St. Rep. 779.

5. Corporation Bound to Exercise Ordinary Care  
and Skill. — Langley *v.* Augusta, 118 Ga. 590,  
98 Am. St. Rep. 133; Effingham *v.* Surrells, 77  
Ill. Rep. 460; Murphy *v.* Indianapolis, 158 Ind.  
238; Burnett *v.* New York, 36 N. Y. App. Div.  
458; Munn *v.* Hudson, 61 N. Y. App. Div. 343;  
King *v.* Granger, 21 R. I. 93, 79 Am. St. Rep.  
779; Knoxville *v.* Klasing, 111 Tenn. 134, cit-  
ing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.)  
239.

**240.** 2. Construction of Sewers Within Dis-  
cretion of Municipal Authorities. — King *v.*  
Granger, 21 R. I. 93, 79 Am. St. Rep. 779;  
Chattanooga *v.* Reid, 103 Tenn. 616.

3. Municipal Corporations Not Liable for Failure  
to Construct Sewers or Drains. — Chicago *v.* Rus-  
tin, 99 Ill. App. 47; McAskill *v.* Hancock, 129  
Mich. 74; McAdams *v.* McCook, (Neb. 1904)  
99 N. W. Rep. 656; Cooper *v.* Scranton, 21 Pa.  
Super. Ct. 17; Knoxville *v.* Klasing, 111 Tenn.



- 211.** (b) When Made Necessary by Act of Corporation. — See notes 1, 2.  
**212.** (2) *Inadequate or Defective Sewers* — (a) *Defective Plan* — *aa. GENERALLY.*  
 — Adopting Sewerage Plan — Whether a Judicial or Ministerial Duty. — See notes 1, 2.  
**213.** Municipality Liable for Direct Invasion of Property. — See note 2.  
*bb. PROVISION FOR STORMS — Floods Which May Reasonably Be Foreseen.* — See note 5.  
*Extraordinary Floods.* — See note 6.  
**244.** (b) *Faulty Construction.* — See note 1.  
**245.** (3) *Failure to Clean and Repair Sewers.* — See note 1.  
**246.** See note 1.  
*Notice of Defect or Obstruction.* — See note 4.

134, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 240.

"It is a well-settled principle of law that a municipal corporation is not bound to build sewers, and that it is not responsible to a private citizen for failing to provide sewers for any part of its territory. The building of a public sewer by a municipal corporation is the exercise of a legislative discretion, and it is not responsible in a private action for its failure to exercise this discretion." *Chattanooga v. Reid*, 103 Tenn. 616.

**241.** 1. *Drain Made Necessary by Act of Corporation.* — *Beach v. Scranton*, 5 Lack. Leg. N. (Pa.) 25.

*Providing Outlet.* — *Chicago v. Rustin*, 99 Ill. App. 47.

A municipal corporation, in constructing a system of sewers, must not only provide outlets, but the outlets must be so constructed as not to become public nuisances. *San Antonio v. Pizzini*, (Tex. Civ. App. 1900) 58 S. W. Rep. 635.

**2.** *Corporation Not Bound to Construct Drains Made Necessary by Street Improvements.* — *McAskill v. Hancock Tp.*, 129 Mich. 74.

**242.** 1. *Municipality Not Liable for Defective Plan* — *United States.* — *Carmichael v. Texarkana*, 94 Fed. Rep. 561.

*District of Columbia.* — *District of Columbia v. Croyley*, 23 App. Cas. (D. C.) 232.

*Maine.* — *Hamlin v. Biddeford*, 95 Me. 308.

*Massachusetts.* — *O'Brien v. Worcester*, 172 Mass. 348; *Manning v. Springfield*, 184 Mass. 245.

*New Jersey.* — *Harrington v. Woodbridge*, 70 N. J. L. 28.

*New York.* — *Uppington v. New York*, 41 N. Y. App. Div. 370; *Graves v. Olean*, 64 N. Y. App. Div. 598.

*Texas.* — *Dallas v. Webb*, 22 Tex. Civ. App. 48; *San Antonio v. Pizzini*, (Tex. Civ. App. 1900) 58 S. W. Rep. 635.

**2.** *Contrary Doctrine* — *Kentucky.* — The adoption of a plan palpably bad renders a municipal corporation liable for resulting damages, and such liability is unaffected by the skill displayed in executing the plan. *Louisville v. Norris*, 111 Ky. 903, 98 Am. St. Rep. 437.

**243.** 2. *Beach v. Scranton*, 5 Lack. Leg. N. (Pa.) 25; *New Albany v. Lines*, 21 Ind. App. 380.

**5.** *Duty to Provide for Floods.* — *Arndt v. Cullman*, 132 Ala. 540, 90 Am. St. Rep. 922, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 243; *Kansas City v. King*, 65 Kan. 64; *Louisville v. Gimpel*, (Ky. 1900) 59 S. W. Rep. 1096.

**6.** *Extraordinary Floods.* — *Chicago v. Rustin*, 99 Ill. App. 47; *Brash v. St. Louis*, 161 Mo. 433; *Gulath v. St. Louis*, 179 Mo. 38; *Graves v. Olean*, 64 N. Y. App. Div. 598; *Sundheimer v. New York*, 77 N. Y. App. Div. 53, *reversed* 176 N. Y. 495; *Helbling v. Allegheny Cemetery Co.*, 201 Pa. St. 171.

**244.** 1. *Corporation Liable for Damages Due to Faulty Construction* — *United States.* — *Carmichael v. Texarkana*, 94 Fed. Rep. 561.

*Georgia.* — *Langley v. Augusta*, 118 Ga. 590, 98 Am. St. Rep. 133; *Macon v. Small*, 108 Ga. 309.

*Indiana.* — *Kuriger v. Joest*, 22 Ind. App. 633; *Murphy v. Indianapolis*, 158 Ind. 238; *Valparaiso v. Kyes*, 30 Ind. App. 447.

*Maine.* — *Hamlin v. Biddeford*, 95 Me. 308.

*Massachusetts.* — *O'Brien v. Worcester*, 172 Mass. 348.

*New York.* — *Munn v. Hudson*, 61 N. Y. App. Div. 343.

*Pennsylvania.* — *Rohrer v. Harrisburg*, 20 Pa. Super. Ct. 543; *Cooper v. Scranton*, 21 Pa. Super. Ct. 17.

*Texas.* — *Dallas v. Webb*, 22 Tex. Civ. App. 48; *San Antonio v. Pizzini*, (Tex. Civ. App. 1900) 58 S. W. Rep. 635.

**245.** 1. *Corporation Liable for Failure to Clean and Repair Sewers* — *Connecticut.* — *Judd v. Hartford*, 72 Conn. 350, 77 Am. St. Rep. 312.

*Georgia.* — *Massengale v. Atlanta*, 113 Ga. 966; *Langley v. City Council*, 118 Ga. 590, 98 Am. St. Rep. 133.

*Indiana.* — *Murphy v. Indianapolis*, 158 Ind. 238.

*Kentucky.* — *Louisville v. O'Malley*, (Ky. 1899) 53 S. W. Rep. 287; *Louisville v. Norris*, 111 Ky. 903, 98 Am. St. Rep. 437.

*Maine.* — *Hamlin v. Biddeford*, 95 Me. 308; *Atwood v. Biddeford*, 99 Me. 78.

*Massachusetts.* — *Burnside v. Everett*, 186 Mass. 4; *Manning v. Springfield*, 184 Mass. 245.

*New York.* — *Schumacher v. New York*, 40 N. Y. App. Div. 320, *affirmed* 166 N. Y. 103; *Talcott v. New York*, 58 N. Y. App. Div. 518; *Munn v. Hudson*, 61 N. Y. App. Div. 343.

*North Carolina.* — *Williams v. Greenville*, 130 N. Car. 93, 89 Am. St. Rep. 860.

*Pennsylvania.* — *Betterly v. Scranton*, 208 Pa. St. 370.

**246.** 1. *Negligence in Cleaning and Repairing Sewers.* — *Langley v. Augusta*, 118 Ga. 590, 98 Am. St. Rep. 133; *Hamlin v. Biddeford*, 95 Me. 308.

**4.** *Where Municipality Has Actual or Constructive Notice of Obstruction.* — *Effingham v. Surrells*, 77 Ill. App. 460.

- 246.** The Fact that the Premises Were Not Directly Connected with the Sewer. — See note 5.
- 247.** (4) *Discharging Sewage* — (a) Generally. — See notes 1, 2.
- 248.** (b) Into Natural Stream. — See notes 1, 2.
- (c) Into Navigable Water. — See note 3.
- 249.** See note 1.
- (d) Surface Water — The General Doctrine. — See note 3.
- 250.** Municipality Liable for Damage Due to Direct Invasion of Property by Surface Water. — See note 1.
- 251.** See note 1.
- 252.** (5) *Damages Caused by Construction of Sewers* — (a) To Property. — See note 1.
- 253.** 3. Cost of Construction and Maintenance — *b.* ASSESSMENTS — (1) Generally. — See note 6.
- 255.** (2) *Assessment Must Be According to Benefit* — (a) Generally. — See note 1.
- 246.** 5. *Rome v. Cheney*, 114 Ga. 194, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 246.
- 247.** 1. *Outlet Beyond Corporate Limits.* — *Langley v. Augusta*, 118 Ga. 590, 98 Am. St. Rep. 133, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 247; *Richmond v. Gallego Mills Co.*, 102 Va. 165.
2. *Corporation Liable for Discharge of Sewage on Private Property.* — *Watson v. New Milford*, 72 Conn. 561, 77 Am. St. Rep. 345; *New Albany v. Lines*, 21 Ind. App. 380; *Nevins v. Fitchburg*, 174 Mass. 545; *Munn v. Hudson*, 61 N. Y. App. Div. 343; *Matheny v. Aiken*, 68 S. Car. 163; *Knoxville v. Klasing*, 111 Tenn. 134, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 247.
- 248.** 1. *Right to Use Natural Stream as Outlet for Sewers.* — *Grey v. Paterson*, 58 N. J. Eq. 1.
- Tidal Streams May Be Converted into Sewers* by virtue of their user. *Newcastle-upon-Tyne Corp. v. Houseman*, 63 J. P. 85.
2. *Municipality Liable for Nuisance Caused by Pollution of Stream by Sewage* — *Alabama.* — *Birmingham v. Land*, 137 Ala. 538.
- Connecticut.* — *Platt v. Waterbury*, 72 Conn. 531, 77 Am. St. Rep. 335.
- Illinois.* — *Kewanee v. Otley*, 204 Ill. 402.
- Missouri.* — *Smith v. Sedalia*, 182 Mo. 1.
- Nebraska.* — *Todd v. New York*, (Neb. 1902) 92 N. W. Rep. 1040.
- New York.* — *Moody v. Saratoga Springs*, 17 N. Y. App. Div. 207, affirmed 163 N. Y. 581; *Butler v. White Plains*, 59 N. Y. App. Div. 30; *Sammons v. Gloversville*, 81 N. Y. App. Div. 332.
- Pennsylvania.* — *Tyler Tube, etc., Co. v. Washington*, 31 Pittsb. Leg. J. N. S. (Pa.) 363.
- South Carolina.* — *Matheny v. Aiken*, 68 S. Car. 163.
- Texas.* — *San Antonio v. Pizzini*, (Tex. Civ. App. 1900) 58 S. W. Rep. 635; *Donovan v. Royal*, 26 Tex. Civ. App. 248.
3. *Discharge into Navigable Water Creating Nuisance — Remedies.* — *West Arlington Imp. Co. v. Mt. Hope Retreat*, 97 Md. 191; *Winchell v. Waukesha*, 110 Wis. 101, 84 Am. St. Rep. 902; *Matthews v. Hamilton*, 6 Ont. L. Rep. 198, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 248.
- 249.** 1. *Public Nuisance — Special Damage.* — *Mathews v. Hamilton*, 6 Ont. L. Rep. 198, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 248.
3. *Corporation Not Liable for Consequential Damages from Surface Water Resulting from Street Improvements.* — *Lampe v. San Francisco*, 124 Cal. 546; *Miles v. Brooklyn*, 98 N. Y. App. Div. 195; *Johnson v. White*, 26 R. I. 207; *Harp v. Baraboo*, 101 Wis. 368. *Contra*, *Mt. Sterling v. Jephson*, (Ky. 1899) 53 S. W. Rep. 1046; *Thoman v. Covington*, (Ky. 1901) 62 S. W. Rep. 721.
- 250.** 1. *Municipality Held Liable for Damage by Discharge of Surface Water* — *United States.* — *Carmichael v. Texarkana*, 94 Fed. Rep. 561.
- Alabama.* — *Arndt v. Cullman*, 132 Ala. 540, 90 Am. St. Rep. 922, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 250.
- California.* — *Larrabee v. Cloverdale*, 131 Cal. 96.
- Georgia.* — *Holbrook v. Norcross*, 121 Ga. 319.
- Michigan.* — *McAskill v. Hancock Tp.*, 129 Mich. 74.
- Nebraska.* — *McAdams v. McCook*, (Neb. 1904) 99 N. W. Rep. 656.
- New Hampshire.* — *Flanders v. Franklin*, 70 N. H. 168.
- New York.* — *Hentz v. Mt. Vernon*, 78 N. Y. App. Div. 515; *Miles v. Brooklyn*, 98 N. Y. App. Div. 195.
- North Carolina.* — *Mizell v. McGowan*, 129 N. Car. 93, 85 Am. St. Rep. 705.
- Rhode Island.* — *Johnson v. White*, 26 R. I. 207.
- Texas.* — *Houston v. Hutcheson*, (Tex. Civ. App. 1904) 81 S. W. Rep. 86.
- Canada.* — *Scanlan v. Montreal*, 17 Quebec Super. Ct. 363.
- 251.** 1. *Municipality Liable for Direct Invasion of Private Property.* — *Larrabee v. Cloverdale*, 131 Cal. 96.
- 252.** 1. *Municipal Liability for Damage to Property from Construction of Sewers.* — *Arndt v. Cullman*, 132 Ala. 540, 90 Am. St. Rep. 922, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 252; *Fyfe v. Turtle Creek*, 22 Pa. Super. Ct. 292.
- 253.** 6. *Sewerage Assessments.* — *Pennsylvania Co. v. Cole*, 132 Fed. Rep. 668; *Moody v. Spotorino*, 112 La. 1008; *South Highland Land, etc., Co. v. Kansas City*, 172 Mo. 523.
- 255.** 1. *Assessment Confined to Property Bene-*

**258.** (c) Assessment According to Frontage. — See note 2.

**261.** DRAMSHOP. — See note 1.

DRAW. — See note 5.

**263.** [DRESSMAKER. — See note 3a.]

**264.** DRIVE — DRIVER — DROVE. — See note 1.

ited. — Grant Street, 17 Pa. Super. Ct. 459. See also *Sears v. Street Com'rs*, 173 Mass. 350.

**258.** 2. Assessments According to Frontage Held Valid. — *Moody v. Spotorno*, 112 La. 1008.

**261.** 1. License. — *Hewitt v. People*, 186 Ill. 336; *Strauss v. Galesburg*, 203 Ill. 234.

5. A Drawing is a representation on a plane surface by means of lines and shades. Its synonyms are delineation, picture. *Per Smith, J.*, in *Ampt v. Cincinnati*, 8 Ohio Dec. 475.

**263.** 3a. In construing a contract providing, "In consideration of the above employment, the said Martha E. Miller, party of the second part, is to take charge of the dressmaking department of the party of the first part, as manager and dressmaker, in his business at Birmingham, Alabama," the court said: "The

word *dressmaker*, when taken in connection with the entire context of the contract, cannot be construed as meaning that she was employed as a seamstress. \* \* \* It is entirely clear that the words 'as manager and dressmaker' are merely descriptive of the position or office which the plaintiff was to fill, and imposed no obligation upon her to do the work of a seamstress." *Marx v. Miller*, 134 Ala. 353.

**264.** 1. Driver — Street Car. — A motorman running a street car is not a *driver* within Rev. Stat. Mo., 1899, § 2864, providing a penalty for death caused by the negligence of the *driver* of a stage coach or other public conveyance whilst in charge of the same as *driver*. *Drolshagen v. Union Depot R. Co.*, 186 Mo. 258.

## DRUGGIST.

**267.** II. STATUTORY REGULATIONS. — See note 1.

**270.** III. LIABILITY OF DRUGGIST — 1. Civil Liability. — See notes 2, 3.

**271.** See notes 1, 2.

**267.** 1. One Having an Experience of Five Years Is Entitled to Be Registered as a Pharmacist under the *Kentucky* statute without standing an examination, and it is immaterial in what town the experience is gained. *Kentucky Board of Pharmacy v. Lordier*, 109 Ky. 119.

The Term "Domestic Remedies" Within the Meaning of the *Illinois* Statute requiring the registration of pharmacists, but allowing anybody to sell domestic remedies, is not confined to harmless concoctions of teas and herbs, but includes drugs prepared by skilled chemists and scientific apparatus which have come into common use and are well understood in their effects by people without medical knowledge. *People v. Fisher*, 83 Ill. App. 114.

**Sale of Patent Medicine and Pills by One Not a Registered Pharmacist.** — A statute prohibiting persons who are not qualified pharmacists from compounding prescriptions or retailing medicine has been held not to apply to the selling of patent medicine and pills. *Watson v. State*, 45 Tex. Crim. 509.

In *Kentucky* a statute prohibits any but registered pharmacists from selling or compounding drugs, but excepts sales of patent or proprietary medicine. See *Kentucky Board of Pharmacy v. Cassidy*, 115 Ky. 690.

**Physicians May Sell Drugs to Patients Without Druggist License.** — The *Kentucky* statute requiring persons who sell or compound drugs to be registered pharmacists makes an exception in cases of physicians to the extent of allowing them to sell and compound drugs for their own patients. *Com. v. Hovious*, 112 Ky. 491.

**Construction of Massachusetts Statutes Providing for Revocation of Pharmacist's Certificate of Registration.** — *Munkley v. Hoyt*, 179 Mass. 108.

**A Pharmacist Violating Statutory Regulations Is Liable to a Civil Action for Damages**, though the statute does not provide for such an action. *Sutton v. Wood*, (Ky. 1905) 85 S. W. Rep. 201.

**Druggist's License — Burden of Proof.** — In prosecutions for carrying on the business of druggist without a state license, on the plea of not guilty, the burden of justifying under or proving license is on the defendant. *State v. Horner*, 52 W. Va. 373.

**270.** 2. But in the Sale of Patent or Proprietary Medicine furnished by the compounder of the ingredients which compose them, the druggist is not required to analyze the contents of each bottle or package he receives. If he delivers to the consumer the article called for with the label of the proprietary or patentee upon it, he cannot be justly charged with negligence in so doing. *West v. Emanuel*, 198 Pa. St. 182.

**3. Degree of Care and Skill Required of Druggists.** — *Sutton v. Wood*, (Ky. 1905) 85 S. W. Rep. 201; *Peters v. Johnson*, 50 W. Va. 644, 88 Am. St. Rep. 909.

**271.** 1. Druggist Responsible for Negligence of His Clerk. — *Burgess v. Sims Drug Co.*, 114 Iowa 275, 89 Am. St. Rep. 359.

**2. Druggist Liable for Injury Caused by His Negligence.** — *Peterson v. Westman*, 103 Mo. App. 672; *Kennedy v. Plank*, 120 Wis. 197. See also *Laturen v. Bolton Drug Co.*, (Supm. Ct. Tr. T.) 93 N. Y. Supp. 1035.



- 273.** Contributory Negligence. — See note 1.  
**274.** Druggist Not Liable for Refusing to Fill Prescription. — See note 1.  
**275.** DRUGS. — See note 1.  
**276.** DRUNKENNESS. — See notes 1, 2.  
 [DRY DOCK. — See DOCK, *ante*.]  
**277.** DRY GOODS. — See note 1.  
 [DRY MORTGAGE. — See note 1a.]  
 DUE. — See note 5.  
**278.** See note 1.  
**279.** See note 1.  
**283.** See note 1.  
**285.** DUE CARE. — See note 1.  
 DUE DILIGENCE. — See note 2.

Where the Person Injured Is Not the Immediate Vendee of the Druggist. — *McVeigh v. Gentry*, 72 N. Y. App. Div. 598, following *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455; *Peters v. Johnson*, 50 W. Va. 644, 88 Am. St. Rep. 909.

**273. 1.** Contributory Negligence. — *Sutton v. Wood*, (Ky. 1905) 85 S. W. Rep. 201; *Fowler v. Randall*, 99 Mo. App. 407. See also *Peterson v. Westman*, 103 Mo. App. 672.

**274. 1.** A Refusal by a Druggist to Return a Prescription Which He Would Not Fill, the reason for the refusal being that the person presenting it owed him a bill, will give the latter a right of action against the former for damages resulting. *White v. McComb City Drug Co.*, (Miss. 1905) 38 So. Rep. 739.

**275. 1.** Sunday — Tobacco. — *Penniston v. Newnan*, 117 Ga. 700.

**276. 1.** Intoxication and Drunkenness Synonymous. — See *Sapp v. State*, 116 Ga. 182; *Ring v. Ring*, 112 Ga. 854.

2. See *Sapp v. State*, 116 Ga. 185.

**277. 1.** Contract — Usage of Trade. — It is error to exclude evidence that the term *dry goods*, used in a written contract, bears a meaning according to the usage of the locality and among business men and merchants in the community in which the stock was located, under which notions, clothing, hats, and caps are excluded, since such evidence does not contradict the terms of the contract, but merely applies them to its subject-matter. *Wood v. Allen*, 111 Iowa 97.

1a. In *Frowenfeld v. Hastings*, 134 Cal. 132, the court said: "It is true, as counsel for respondent says, that there may be a lien for the security of money, without any absolute personal liability beyond the value of the property, as in the case of what is sometimes called a *dry mortgage*, and other similar instances."

5. Due. — *Griffith v. Speaks*, 111 Ky. 149; *Feeser v. Feeser*, 93 Md. 725, quoting 10 Am.

AND ENG. ENCYC. OF LAW (2d ed.) 277; *Buehler v. Pierce*, 175 N. Y. 265.

Dues — Tort. — See *Whitman v. Oxford Nat. Bank*, 176 U. S. 559.

Dues Distinguished from Assessments. — *Warwick v. Supreme Conclave, etc.*, 107 Ga. 115.

Garnishment — Contingency — Salary. — *Main v. McInnis*, 4 N. W. Ter. 517.

**278. 1.** Due in the Sense of Payable. — *Feeser v. Feeser*, 93 Md. 716; *Buehler v. Pierce*, 175 N. Y. 267.

Rent. — See *Jones v. Adams*, 37 Oregon 478.

**279. 1.** Not Payable Presently — Owning. — *In re West Norfolk Lumber Co.*, 112 Fed. Rep. 759; *In re B. H. Gladding Co.*, 120 Fed. Rep. 710, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 279; *In re McGuire*, 132 Fed. Rep. 394; *Sather Banking Co. v. Arthur R. Briggs Co.*, 138 Cal. 724; *Buehler v. Pierce*, 175 N. Y. 267.

Tax. — See *People v. Feitner*, 54 N. Y. App. Div. 217.

Insurance. — *Putze v. Saginaw Valley Mut. F. Ins. Co.*, 132 Mich. 670.

Claim Against an Estate. — *Crocker-Woolworth Nat. Bank v. Carle*, 133 Cal. 409.

**283. 1.** Due Publication of Ordinance. — See *Laugel v. Bushnell*, 197 Ill. 20.

Due Service. — *Vail v. Pennsylvania F. Ins. Co.*, 67 N. J. L. 66; *Harmon v. Van Ness*, 56 N. Y. App. Div. 160.

Bonds — Due and Matured Synonymous. — *Teritory v. Hopkins*, 9 Okla. 133.

Due Administration. — See *Matter of Meagley*, 39 N. Y. App. Div. 83.

**285. 1.** *Hilton v. Boston*, 171 Mass. 478; *Riska v. Union Depot R. Co.*, 180 Mo. 189, quoting 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 285.

2. Other Definitions. — *State v. Scott*, 110 La. 369.

Question of Law and Fact. — *Hendricks v. Western Union Tel. Co.*, 126 N. Car. 304.

## DUE PROCESS OF LAW.

By H. W. HOYE.

### 288. II. THE CONSTITUTIONAL GUARANTY — 1. In the Federal Constitution

— *a.* THE FIFTH AMENDMENT. — See note 2.

*b.* THE FOURTEENTH AMENDMENT. — See note 3.

### 290. III. SYNONYMOUS TERMS. — See note 1.

### 291. V. MEANING OF THE TERM — How to Be Ascertained. — See note 3.

### 293. The General Law — Inquiry and Trial — Webster's Definition. — See note 1

Law in Regular Course of Administration. — See note 2.

Legal Proceedings According to Established Rules. — See note 4.

### 294. See note 1.

### 296. Notice and Opportunity to Be Heard. — See notes 3, 4.

**288. 2. Fifth Amendment Not a Restraint on State Power** — *United States*. — St. Louis, etc., R. Co. *v.* Davis, 132 Fed. Rep. 629, Central of Georgia R. Co. *v.* Macon, 110 Fed. Rep. 865.

*Iowa*. — State *v.* Height, 117 Iowa 650, 94 Am. St. Rep. 323.

*Kansas*. — Meffert *v.* State Board of Medical Registration, etc., 66 Kan. 710.

*Massachusetts*. — McDonald *v.* Com., 173 Mass. 322, 73 Am. St. Rep. 293.

*New York*. — Matter of Tuthill, 36 N. Y. App. Div. 492, *affirmed* 163 N. Y. 133; Pratt Institute *v.* New York, 99 N. Y. App. Div. 525.

*North Carolina*. — Phillips *v.* Postal Tel. Cable Co., 130 N. Car. 513, 89 Am. St. Rep. 868.

*Pennsylvania*. — Com. *v.* Gibbons, 9 Pa. Super. Ct. 527, *affirmed* 200 Pa. St. 430.

*Rhode Island*. — Collection of Poll Tax, 21 R. I. 582; Gunn *v.* Union R. Co., 23 R. I. 303.

*Utah*. — Matter of McKee, 19 Utah 231.

See the title CONSTITUTIONAL LAW, **962. 7. 3. Fourteenth Amendment Binding on States**. — Kiernan *v.* Multnomah County, 95 Fed. Rep. 849; Caldwell *v.* Armour, 1 Penn. (Del.) 545; State *v.* Sponaugle, 45 W. Va. 415. See also the title CONSTITUTIONAL LAW, **965. 3 et seq.**

**290. 1. Synonymous Terms.** — French *v.* Barber Asphalt Paving Co., 181 U. S. 324; Booth *v.* People, 186 Ill. 43, 78 Am. St. Rep. 229; Matter of Davies, 168 N. Y. 89; Parish *v.* East Coast Cedar Co., 133 N. Car. 478, 98 Am. St. Rep. 718; Church *v.* South Kingstown, 22 R. I. 381; Harbison *v.* Knoxville Iron Co., 103 Tenn. 421, 76 Am. St. Rep. 682; Salt Lake City Water, etc., Co. *v.* Salt Lake City, 24 Utah 299, *citing* 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 289, 290.

**291. 3. Meaning Ascertained by Gradual Inclusion and Exclusion.** — St. Louis, etc., R. Co. *v.* Davis, 132 Fed. Rep. 633.

**293. 1. The General Law — Webster's Definition.** — Barber Asphalt Paving Co. *v.* Ridge, 169 Mo. 376; Hunt *v.* Searcy, 167 Mo. 158; Clapp *v.* Houg, 12 N. Dak. 600, 102 Am. St. Rep. 589; Harbison *v.* Knoxville Iron Co., 103 Tenn. 421, 76 Am. St. Rep. 682.

**2 Regular Course of Administration.** — St. Louis *v.* Galt, 179 Mo. 8.

**4. Established Rules.** — San Jose Ranch Co. *v.* San Jose Land, etc., Co., 126 Cal. 326, *citing* 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 293; Palace Hardware Co. *v.* Smith, 134 Cal. 381; Caldwell *v.* Armour, 1 Penn. (Del.) 545; White *v.* White, 65 N. J. Eq. 741; Church *v.* South Kingstown, 22 R. I. 381; Matter of Maxwell, 19 Utah 495, *affirmed* 176 U. S. 581.

**294. 1. Court of Competent Jurisdiction.** — See Charles *v.* Marion, 98 Fed. Rep. 166.

**296. 3. Notice — United States.** — Louisville, etc., R. Co. *v.* Schmidt, 177 U. S. 230; Simon *v.* Craft, 182 U. S. 427; Charles *v.* Marion, 98 Fed. Rep. 166; *In re* Rosser, (C. C. A.) 101 Fed. Rep. 562; Louisville, etc., R. Co. *v.* McChord, 103 Fed. Rep. 216, *reversed* 183 U. S. 483; Campbellsville Lumber Co. *v.* Hubbert, 112 Fed. Rep. 718, *affirmed* 191 U. S. 70.

*Alabama*. — Wilmerding *v.* Corbin Banking Co., 126 Ala. 268.

*California*. — Ramish *v.* Hartwell, 126 Cal. 443.

*Indiana*. — Baltimore, etc., R. Co. *v.* State, 159 Ind. 510; Deane *v.* Indiana Macadam, etc., Co., 161 Ind. 371.

*Iowa*. — Hodge *v.* Muscatine County, 121 Iowa 482; Beebe *v.* Magown, 122 Iowa 94; Oliver *v.* Monona County, 117 Iowa 43.

*Maryland*. — Monticello Distilling Co. *v.* Baltimore, 90 Md. 416.

*Minnesota*. — State *v.* Weyerhauser, 72 Minn. 519; Hurst *v.* Martinsburg, 80 Minn. 40; State *v.* Robert P. Lewis Co., 82 Minn. 390.

*Missouri*. — Hunt *v.* Searcy, 167 Mo. 158; Kansas City *v.* Mastin, 169 Mo. 80.

*New York*. — People *v.* St. Saviour's Sanitarium, 34 N. Y. App. Div. 363; People *v.* Wendell, (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 496; Matter of New York, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 719, *modified and affirmed* 95 N. Y. App. Div. 552; Goldie *v.* Goldie, 77 N. Y. App. Div. 12; Matter of Jensen, (Supm. Ct. Spec. T.) 28 Misc. (N. Y.) 378, *affirmed* 44 N. Y. App. Div. 509.

*North Carolina*. — Parish *v.* East Coast Cedar Co., 133 N. Car. 478, 98 Am. St. Rep. 718, *quoting* 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 296.

*North Dakota*. — Erickson *v.* Cass County, 11

**298. VI. EXTENT OF PROTECTION AFFORDED — 2. Meaning of Term "Person" in the Guaranty.** — See note 4.

**299. 3. Extent of Protection to Liberty.** — See note 1.

**4. Extent of Protection to Property.** — See notes 2, 4.

**300. 5. What Notice Is Guaranteed.** — See notes 1, 2, 3.

N. Dak. 494; *Clapp v. Houg*, 12 N. Dak. 600, 102 Am. St. Rep. 589.

*Ohio*. — *Southward v. Jamison*, 66 Ohio St. 313, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 296; *Chicago, etc., R. Co. v. Keith*, 67 Ohio St. 279.

*Pennsylvania*. — *Cunnius v. Reading School Dist.*, 21 Pa. Super. Ct. 340.

*Tennessee*. — *Kemper-Thomas Paper Co. v. Shyer*, 108 Tenn. 444.

*Virginia*. — *Adams v. Roanoke*, 102 Va. 53.

*Wisconsin*. — *In re Meggett*, 105 Wis. 291; *Stone v. Little Yellow Drainage Dist.*, 118 Wis. 388.

**296. 4. Opportunity to Be Heard** — *United States*. — *Louisville, etc., R. Co. v. Schmidt*, 177 U. S. 230; *Simon v. Craft*, 182 U. S. 427; *Voigt v. Detroit*, 184 U. S. 115; *Fay v. Springfield*, 94 Fed. Rep. 409; *Charles v. Marion*, 98 Fed. Rep. 166; *In re Rosser*, (C. C. A.) 101 Fed. Rep. 562; *Parker v. Detroit*, 103 Fed. Rep. 357, reversed 181 U. S. 399; *Ex p. Stricker*, 109 Fed. Rep. 145; *Campbellsville Lumber Co. v. Hubbert*, 112 Fed. Rep. 718, affirmed 191 U. S. 70; *Sing Tuck v. U. S.*, (C. C. A.) 128 Fed. Rep. 592.

*Alabama*. — *Wilmerding v. Corbin Banking Co.*, 126 Ala. 268; *Montgomery v. Birdsong*, 126 Ala. 632.

*Indiana*. — *Indianapolis v. Holt*, 155 Ind. 222; *Adams v. Shelbyville*, 154 Ind. 467, 77 Am. St. Rep. 484; *Baltimore, etc., R. Co. v. State*, 159 Ind. 510; *Deane v. Indiana Macadam, etc., Co.*, 161 Ind. 371.

*Iowa*. — *Hodge v. Muscatine County*, 121 Iowa 482.

*Maryland*. — *Monticello Distilling Co. v. Baltimore*, 90 Md. 416.

*Massachusetts*. — *Sears v. Street Com'rs*, 173 Mass. 350; *Le Donne, Petitioner*, 173 Mass. 550; *Carson v. Sewerage Com'rs*, 175 Mass. 242.

*Minnesota*. — *State v. Weyerhauser*, 72 Minn. 519; *State v. Robert P. Lewis Co.*, 82 Minn. 390.

*Missouri*. — *Barber Asphalt Paving Co. v. Ridge*, 169 Mo. 376; *Weller Mfg. Co. v. Eaton*, 81 Mo. App. 657.

*New York*. — *People v. Pitt*, 169 N. Y. 521; *Matter of Jensen*, (Supm. Ct. Spec. T.) 28 Misc. (N. Y.) 378, affirmed 44 N. Y. App. Div. 509; *Sibley v. Sibley*, 76 N. Y. App. Div. 132; *Goldie v. Goldie*, 77 N. Y. App. Div. 12; *Riglander v. Star Co.*, 98 N. Y. App. Div. 101, affirmed 181 N. Y. 531.

*North Carolina*. — *Parish v. East Coast Cedar Co.*, 133 N. Car. 478, 98 Am. St. Rep. 718, quoting 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 296; *In re Boyett*, 136 N. Car. 415.

*North Dakota*. — *Erickson v. Cass County*, 11 N. Dak. 494; *Clapp v. Houg*, 12 N. Dak. 600, 102 Am. St. Rep. 589.

*Ohio*. — *Southward v. Jamison*, 66 Ohio St. 313, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 296; *Sandusky Second Nat. Bank v.*

*Becker*, 62 Ohio St. 289; *Chicago, etc., R. Co. v. Keith*, 67 Ohio St. 279.

*Tennessee*. — *Knoxville Traction Co. v. McMillan*, 111 Tenn. 521, 77 S. W. Rep. 665.

*Virginia*. — *Heth v. Radford*, 96 Va. 272; *Norfolk v. Young*, 97 Va. 728; *Adams v. Roanoke*, 102 Va. 53.

*Wisconsin*. — *Stone v. Little Yellow Drainage Dist.*, 118 Wis. 388.

**298. 4. Corporations Included in Meaning.** — *Central of Georgia R. Co. v. Macon*, 110 Fed. Rep. 865; *Iowa L. Ins. Co. v. Eastern Mut. L. Ins. Co.*, 64 N. J. L. 340; *Matter of Jensen*, (Supm. Ct. Spec. T.) 28 Misc. (N. Y.) 378, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 298, affirmed 44 N. Y. App. Div. 509; *Rochester, etc., Turnpike Road Co. v. Joel*, 41 N. Y. App. Div. 43; *Harris v. Stearns*, 17 S. Dak. 439; *Harbison v. Knoxville Iron Co.*, 103 Tenn. 421, 76 Am. St. Rep. 682. See also *Atchison, etc., R. Co. v. Campbell*, 61 Kan. 439, 78 Am. St. Rep. 328.

**299. 1. What "Liberty" Includes.** — See *Republic Iron, etc., Co. v. State*, 160 Ind. 379; *Street v. Varney Electrical Supply Co.*, 160 Ind. 338, 98 Am. St. Rep. 325; *State v. Height*, 117 Iowa 650, 94 Am. St. Rep. 323; *Matter of Davies*, 168 N. Y. 89; *People v. Dycker*, 72 N. Y. App. Div. 308.

**The Privilege of Contracting** is both a liberty and a property right. *Mathews v. People*, 202 Ill. 389, 95 Am. St. Rep. 241.

**2. A Public Office** is not "property" within the meaning of the Fourteenth Amendment. *Moore v. Strickling*, 46 W. Va. 515.

**4. Taking Away Essential Attributes.** — *Gray v. Building Trades Council*, 91 Minn. 171; *In re Flukes*, 157 Mo. 125, 80 Am. St. Rep. 619; *Follett Wool Co. v. Albany Terminal Warehouse Co.*, 61 N. Y. App. Div. 296; *Johnson v. Sanger*, 49 W. Va. 405, quoting 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 299.

**300. 1. Personal Notice Not Required.** — *Reetz v. Michigan*, 188 U. S. 505; *Glidden v. Harrington*, 189 U. S. 255; *Smith v. Empire State-Idaho Min., etc., Co.*, 127 Fed. Rep. 462; *Territory v. Jerome*, (Ariz. 1901) 64 Pac. Rep. 417; *Hubbard v. Goss*, 157 Ind. 485; *Sprigg v. Garrett Park*, 89 Md. 406; *Monticello Distilling Co. v. Baltimore*, 90 Md. 416; *Chicago, etc., R. Co. v. Richardson County*, (Neb. 1904) 100 N. W. Rep. 950; *Hacker v. Howe*, (Neb. 1904) 101 N. W. Rep. 255; *State v. Armstrong*, 19 Utah 117.

**2. Notice May Be Actual or Constructive.** — *Oskamp v. Lewis*, 103 Fed. Rep. 906; *People's Nat. Bank v. Cleveland*, 117 Ga. 908; *Baltimore, etc., R. Co. v. State*, 159 Ind. 510; *Corry v. Baltimore*, 96 Md. 310; *Aldredge v. School Dist. No. 16*, 10 Okla. 694.

**Service on Corporation.** — Service of a copy of an order of court upon the president of the company is sufficient notice to a corporation. *Back River Neck Turnpike Co. v. Homberg*, 96 Md. 430.



- 300.** 6. What Hearing Is Guaranteed. — See note 4.
- 301.** One Hearing Sufficient. — See note 2.  
Where Right to Hearing Is Lost. — See note 3.
- 302.** Form of Action. — See note 1.  
7. Protection Against Class Legislation. — See note 4.
- 303.** See note 1.  
8. In Prosecutions for Crime. — See note 3.
- 305.** 9. As to Jury Trial. — See notes 3, 4, 5.
- 306.** 10. Administration of Law by State Courts. — See notes 1, 2.
- 300.** 3. Notice Reasonably Probable to Reach Person Interested. — *Indianapolis v. Holt*, 155 Ind. 222; *State v. District Ct.*, 90 Minn. 462, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 299, and supporting the whole text paragraph; *Leigh v. Green*, 64 Neb. 633; *Hood River Lumbering Co. v. Wasco County*, 35 Oregon 498; *Pinney v. Providence Loan, etc., Co.*, 106 Wis. 396, 80 Am. St. Rep. 41; *Farm Invest. Co. v. Carpenter*, 9 Wyo. 110.
- 4.** Orderly Proceeding and Opportunity to Be Heard. — *Matter of Lambert*, 134 Cal. 626, 86 Am. St. Rep. 296; *Lower Kings River Reclamation Dist. No. 531 v. McCullah*, 124 Cal. 175; *Greig v. Ware*, 25 Colo. 184; *American Refrigerator Transit Co. v. Adams*, 28 Colo. 119; *Miller v. Colonial Forestry Co.*, 73 Conn. 500; *Corry v. Baltimore*, 96 Md. 310; *Carter v. Colby*, 71 N. H. 230; *Gundry v. Gundry*, 11 Okla. 423; *Hood River Lumbering Co. v. Wasco County*, 35 Oregon 498; *King v. Portland*, 38 Oregon 402; *Godfrey v. Bennington Water Co.*, 75 Vt. 350.
- 301.** 2. One Hearing Sufficient. — *August v. Gilmer*, 53 W. Va. 65, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 301.
- Appeals.** — That the right of appeal is not essential to due process of law, see *Reetz v. Michigan*, 188 U. S. 505; *Savannah, etc., R. Co. v. Postal Tel.-Cable Co.*, 112 Ga. 941; *Deane v. Indiana Macadam, etc., Co.*, 161 Ind. 371.
- 3.** Opportunity Lost by Neglect. — *Ashley Co. v. Bradford*, 109 La. 641.
- 302.** 1. Form of Action. — *Gunn v. Union R. Co.*, 23 R. I. 303, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 301.
- 4.** Must Embrace All in Like Situation. — *Condon v. Maloney*, 108 Tenn. 82.
- 303.** 1. Classification Must Be Reasonable. — *State v. Schlitz Brewing Co.*, 104 Tenn. 715, 78 Am. St. Rep. 941.
- Case Holding Classification Reasonable.** — *Condon v. Maloney*, 108 Tenn. 82.
- 3.** Day in Court. — *Jamison v. Wimbish*, 130 Fed. Rep. 358, quoting 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 303.
- 305.** 3. Jury Trial Not Required. — *French v. Barber Asphalt Paving Co.*, 181 U. S. 324; *Kirkland v. State*, 72 Ark. 171, 105 Am. St. Rep. 25; *Palace Hardware Co. v. Smith*, 134 Cal. 381; *State v. Moore*, 2 Penn. (Del.) 299; *Matter of Bradley*, 108 Iowa 476; *In re Cox*, 129 Mich. 635; *St. Joseph v. Geiwitz*, 148 Mo. 210; *Mound City Land, etc., Co. v. Miller*, 170 Mo. 240, 94 St. Rep. 727; *State Board of Health v. Roy*, 22 R. I. 538; *State v. Murphy*, 71 Vt. 127; *Sipes v. Decker*, 102 Wis. 588, quoting 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 305.
- 4.** No Additional Right of Jury Trial Conferred. — *Frost v. People*, 193 Ill. 635, 86 Am. St. Rep. 352.
- 5.** Existing Right Perpetuated. — *Gunn v. Union R. Co.*, 23 R. I. 303, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 305.
- 306.** 1. States May Regulate Procedure. — *Welborne v. Donaldson*, 115 Ga. 563.
- "No objection to a change of remedy can be successfully urged, on account of its being more speedy and effectual. That objection might be urged as to all changes in the form of proceedings, or the organization of the legal tribunals to act thereon. Every statute extending the equity powers of this court would be obnoxious to objections of this character. The objection, to be tenable, must go beyond this, and show that the statute increased the actual liabilities of the stockholders, and was something more than a change in the mode of enforcing a pre-existing liability." *Persons v. Gardiner*, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 663, affirmed 42 N. Y. App. Div. 490.
- "That a state may adopt new remedies for the collection of taxes, and apply those remedies to taxes already delinquent, without any violation of the Federal Constitution, is not a matter of doubt. A delinquent taxpayer has no vested right in an existing mode of collecting taxes. There is no contract between him and the state, that the latter will not vary the mode of collection. Indeed, generally speaking, a party has no vested right in a mere matter of remedy; that is subject to legislative change." *League v. Texas*, 184 U. S. 156.
- A law substituting a stay of execution for a postponement of judgment is nothing more than a reasonable modification of a form of remedy for enforcing right, and does not deprive a person of property without due process of law. *O'Brien v. Flint*, 74 Conn. 502.
- 2.** Regular Administration of Valid Laws. — See *Matter of Maxwell*, 19 Utah 495, affirmed 176 U. S. 581.
- A rule that a return of service of a summons by the sheriff in the record of a court of general jurisdiction is absolutely conclusive between the parties and cannot be disproved by extrinsic evidence is not in conflict with the rule requiring notice to the person affected. *Warren v. Wilner*, 61 Kan. 719.
- A law providing that in criminal trials other than for a capital crime the jury shall consist of eight members does not deprive a person of his liberty without due process of law. *Matter of McKee*, 19 Utah 231.
- Nor does an act providing for a special jury in criminal cases violate the Fourteenth Amendment. *People v. Dunn*, 157 N. Y. 528.

**307.** 11. Administrative Process. — See note 1.

# VII. EFFECT OF THE EXERCISE OF VARIOUS GOVERNMENTAL POWERS

— 1. Police Power. — See note 2.

**308.** 2. Taxation. — See notes 1, 3, 4.

**309.** 3. Eminent Domain. — See note 1.

**DUEBILL.** — See note 2.

**307.** 1. Administrative Process. — State *v.* Sponaugle, 45 W. Va. 415.

2. Not a Restriction on Police Power — United States. — Compagnie Francaise, etc., *v.* Louisiana Board of Health, 186 U. S. 380; Michigan Telephone Co. *v.* Charlotte, 93 Fed. Rep. 11; Humes *v.* Ft. Smith, 93 Fed. Rep. 857.

California. — Parker *v.* Otis, 130 Cal. 322, 92 Am. St. Rep. 56.

Illinois. — Booth *v.* People, 186 Ill. 43, 78 Am. St. Rep. 229; Gundling *v.* Chicago, 176 Ill. 340.

Indiana. — Given *v.* State, 160 Ind. 552.

Iowa. — State *v.* Schlenker, 112 Iowa 642, 84 Am. St. Rep. 360.

Kansas. — Meffert *v.* State Board of Medical Registration, etc., 66 Kan. 710.

Louisiana. — Compagnie Francaise, etc., *v.* State Board of Health, 51 La. Ann. 645, 72 Am. St. Rep. 458.

Maryland. — State *v.* Broadbelt, 89 Md. 565; Sprigg *v.* Garrett Park, 89 Md. 406; State *v.* Knowles, 90 Md. 646; Police Com'rs *v.* Wagner, 93 Md. 182.

Massachusetts. — Com. *v.* Roswell, 173 Mass. 119.

Mississippi. — Illinois Cent. R. Co. *v.* Copian County, 81 Miss. 685.

New York. — Cartwright *v.* Cohoes, 39 N. Y. App. Div. 69, affirmed 165 N. Y. 631; Buffalo *v.* Hill, 79 N. Y. App. Div. 402.

Pennsylvania. — Com. *v.* Charity Hospital, 198 Pa. St. 270; McCann *v.* Com., 198 Pa. St. 509.

Vermont. — Clarendon *v.* Rutland R. Co., 75 Vt. 6.

Washington. — State *v.* Superior Ct., 28 Wash. 677.

**308.** 1. Proper Exercise of Taxing Power Not Restricted. — German Sav., etc., Soc. *v.* Ramish, 138 Cal. 120.

3. Notice of Every Step Not Necessary. — Adams *v.* Roanoke, 102 Va. 53.

4. Opportunity to Be Heard. — St. Louis, etc., R. Co. *v.* Davis, 132 Fed. Rep. 629; Baldwin *v.* State, 89 Md. 587; Heth *v.* Radford, 96 Va. 272.

**309.** 1. Compensation for Property Taken. — Painter *v.* St. Clair, 98 Va. 85, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 309.

2. Duebill. — *In re* McGuire, 132 Fed. Rep. 394; Feeser *v.* Feeser, 93 Md. 716.

## DUELLING.

**311.** I. DEFINITION AND NATURE. — See note 1.

Deadly Weapons. — See note 2.

Common Law. — See note 3.

Statutes. — See note 4.

When Offense Complete. — See note 5.

**313.** II. CHALLENGING TO FIGHT — 2. What Constitutes a Challenge. — See note 4.

**315.** DULY. — See note 4.

**311.** 1. State *v.* Fritz, 133 N. Car. 725. See also Davis *v.* Modern Woodmen of America, 98 Mo. App. 713.

Duelling Is an Aggravated Form of Affray. — State *v.* Fritz, 133 N. Car. 725. And see AFFRAY.

2. State *v.* Fritz, 133 N. Car. 725, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 311. In this case it was held that a challenge to fight a fair fight with fists and not to use any deadly weapon was not duelling.

3. See State *v.* Fritz, 133 N. Car. 725.

4. The Florida Statutes define duelling as killing by fight in a single combat with any deadly weapons. Bassett *v.* State, 44 Fla. 12.

North Carolina Statute. — See State *v.* Fritz, 133 N. Car. 725.

5. State *v.* Fritz, 133 N. Car. 725.

**313.** 4. See State *v.* Fritz, 133 N. Car. 725.

**315.** 4. Duly Filed. — In People *v.* Town Clerk, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 223, the court said: "I am satisfied that the words *duly filed* mean, according to the statute governing the subject of filing petitions, to wit: the Town Law."

Duly Served. — See Kirk *v.* U. S., 124 Fed. Rep. 337.

The Phrase Duly Recorded means actually recorded, not legally. Bresser *v.* Saarman, 112 Iowa 720.

Duly Shown in a city charter forbidding the removal of an officer except for sufficient cause *duly* shown implies that opportunity shall be

**316.** See note 1.

**318. DUPLICATE.**—See note 4.

**319. DURATION.**—See note 1.

given for a hearing as to the sufficiency of the cause. *Thompson v. Troup*, 74 Conn. 123.

**316. 1. According to Law.**—*Citizens' State Bank v. Morse*, 60 Kan. 526, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 315, 316; *Baxter v. Lancaster*, 58 N. Y. App. Div. 380.

**Pleading.**—See *Youngs v. Perry*, 42 N. Y. App. Div. 247; *Bury v. J. E. Mitchell Co.*, (Tex. Civ. App. 1903) 74 S. W. Rep. 341.

**Duly Given or Made.**—*People v. Bacon*, 37 N. Y. App. Div. 414.

**Duly Prosecute an Action.**—*Citizens' State Bank v. Morse*, 60 Kan. 529.

**"The Term Duly Assigned** as thus used by the legislature in connection with a transfer by a husband to his wife, necessarily imports that

such a transfer can be *duly*, that is legally, made." *Colburn's Appeal*, 74 Conn. 466.

**318. 4. Duplicate.**—*Wright v. Michigan Cent. R. Co.*, (C. C. A.) 130 Fed. Rep. 846, quoting 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 318; *Dakota L. & T. Co. v. Codrington County*, 9 S. Dak. 163; *Towner v. Hiawatha Gold Min., etc., Co.*, 30 Ont. 548.

**Duplicate Distinguished from Copy.**—*Wright v. Michigan Cent. R. Co.*, (C. C. A.) 130 Fed. Rep. 846; *Grant v. Griffith*, 39 N. Y. App. Div. 107; *Towner v. Hiawatha Gold Min., etc., Co.*, 30 Ont. 548; *State v. Allen*, 56 S. Car. 505; *Dakota L. & T. Co. v. Codrington County*, 9 S. Dak. 163.

**319. 1. Duration.**—*Roth v. State*, 158 Ind. 242, following *People v. Hill*, 7 Cal. 97.

## DURESS.

By M. G. BEAMAN.

**321. I. DEFINITIONS AND GENERAL NATURE—2. In Avoidance of Non-criminal Act—*a.* IN GENERAL.**—See note 3.

**322. *b.* DURESS OF IMPRISONMENT.**—See notes 1, 2, 3.

**323.** See note 1.

**324.** See note 1.

*c.* DURESS PER MINAS—(1) *In General.*—See note 1*a.*

(2) *Common-Law Definition.*—See note 2.

**325. (4) Effect of Threats on Mind of Actor.**—See note 4.

**326. The Rule Supported by Reason.**—See note 1.

**321. 3. In Avoidance of Noncriminal Act.**—*In re Meyer*, 106 Fed. Rep. 828, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 321; *Christensen v. People*, 114 Ill. App. 69, quoting 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 321.

**322. 1. Where Contract Made under Duress of Imprisonment.**—See *The Fred E. Sander*, 95 Fed. Rep. 829.

**2. Arrest for Improper Purpose Without Just Cause.**—*Houtz v. Uinta County*, 11 Wyo. 152.

**3. Where Arrest Without Lawful Authority.**—*Houtz v. Uinta County*, 11 Wyo. 152.

**323. 1. Arrest for Just Cause but for Improper Purpose.**—*Houtz v. Uinta County*, 11 Wyo. 152.

**324. 1. Act Must Be Done Because of the Restraint.**—*Houtz v. Uinta County*, 11 Wyo. 152. See also *Meredith v. Meredith*, 79 Mo. App. 636.

There is no duress where a promissory note is given to procure a discharge from imprisonment on a bastardy charge. *Jones v. Peterson*, 117 Ga. 58. See also *Petit v. Martin*, 14 Quebec Super. Ct. 128.

**1*a.* Duress per Minas—In General.**—*Christensen v. People*, 114 Ill. App. 69, quoting 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 324.

**2. Old Common-law Rule.**—*Glass v. Haygood*,

133 Ala. 489, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 324.

**325. 4. Bryant v. Levy**, 52 La. Ann. 1649; *Loud v. Hamilton*, (Tenn. Ch. 1898) 51 S. W. Rep. 140; *Fulton v. Kingston Vehicle Co.*, 30 Nova Scotia 455.

**326. 1. Threats Must Be Shown to Have Coerced.**—*Knight v. Brown*, (Mich. 1904) 100 N. W. Rep. 602; *Meredith v. Meredith*, 79 Mo. App. 636; *Nebraska Mut. Bond Assoc. v. Klee*, (Neb. 1903) 97 N. W. Rep. 476; *Jaeger v. Koenig*, (Supm. Ct. App. T.) 30 Misc. (N. Y.) 580; *Palmer v. Bosley*, (Tenn. Ch. 1900) 62 S. W. Rep. 195; *Gorringe v. Reed*, 23 Utah 120, 90 Am. St. Rep. 692, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 326; *Rochester Mach. Tool Works v. Weiss*, 108 Wis. 545; *Batavian Bank v. North*, 114 Wis. 637; *Bennett v. Luby*, 112 Wis. 118. See also *Mack v. Prang*, 404 Wis. 1, 76 Am. St. Rep. 848.

**Statement of Modern Rule.**—In *Galusha v. Sherman*, 105 Wis. 263, *Marshall, J.*, said: "The making of a contract requires the free exercise of the will power of the contracting parties, and the free meeting and blending of their minds. In the absence of that, the essential of a contract is wanting; and if such absence be produced by the wrongful conduct of one party to the transaction, or conduct for



**327.** See note 1.

**329. II. ON WHOM DURESS MUST BE IMPOSED — 1. Party to the Contract — b. EXCEPTIONS TO THE GENERAL RULE — (1) Husband or Wife of Party.** — See note 2.

**330.** (2) *Parent or Child of Party.* — See note 1.

**331.** (3) *Other Near Blood Relations of Party.* — See note 1.

**334. III. EFFECT OF DURESS ON CONTRACT MADE UNDER IT — 1. In General.** — See note 1.

**335. 2. When Voidable — a. RIGHTS OF BONA FIDE PURCHASER OF NOTES AND REAL ESTATE.** — See notes 1, 2.

**337.** See note 1.

*b. RATIFICATION OF VOIDABLE CONTRACT.* — See note 2.

**338. 3. When Void.** — See note 2.

**339. IV. DURESS OF THE PERSON — 1. In General.** — See note 6.

**340. 2. By Actual or Threatened Imprisonment — a. IN GENERAL.** — See note 2.

which he is responsible, whereby the other party, for the time being, through fear, is bereft of his free will power, for the purpose of obtaining the contract, and it is thereby obtained, such contract may be avoided on the ground of duress. There is no legal standard of resistance which a party so circumstanced must exercise at his peril to protect himself. The question in each case is, was the alleged injured person, by being put in fear by the other party to the transaction for the purpose of obtaining an advantage over him, deprived of the free exercise of his will power, and was such advantage thereby obtained?"

**Mere Insistence by Creditor Not Enough.** — Zuccarello v. Randolph, (Tenn. Ch. 1899) 58 S. W. Rep. 453.

**327. 1. Mind and Will of Particular Person Considered.** — David City First Nat. Bank v. Sargeant, 65 Neb. 594; Pride v. Baker, (Tenn. Ch. 1901) 64 S. W. Rep. 329, *citing* 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 327; Galusha v. Sherman, 105 Wis. 263.

**Cooley's Definition Followed.** — Iowa Sav. Bank v. Frink, (Neb. 1901) 92 N. W. Rep. 916.

**329. 2. Husband or Wife of Party.** — Treadwell v. Torbert, 122 Ala. 297; Searle v. Gregg, 67 Kan. 1; Allen v. Leflore County, 78 Miss. 671; Leflore County v. Allen, 80 Miss. 298; Hensinger v. Dyer, 147 Mo. 219; Davis v. Smith, 68 N. H. 253, 73 Am. St. Rep. 584; Jaeger v. Koenig, (Supm. Ct. App. T.) 30 Misc. (N. Y.) 580; Gorringe v. Reed, 23 Utah 120, 90 Am. St. Rep. 692; Mack v. Preng, 104 Wis. 1, 76 Am. St. Rep. 848.

**330. 1. Son-in-law.** — Nebraska Mut. Bond Assoc. v. Klee, (Neb. 1903) 97 N. W. Rep. 476.

**Facts under Which Duress Found Not to Exist.** — Hesitation and long deliberation, and repeated attempt at a compromise are held to show an absence of duress. Loud v. Hamilton, (Tenn. Ch. 1898) 51 S. W. Rep. 140.

**331. 1. Brother and Sister.** — Burris v. Rhind, 29 Can. Sup. Ct. 498, *affirming* 30 Nova Scotia 405.

**334. 1. General Rule — Contract Made under Duress Merely Voidable.** — Bogue v. Franks, 199 Ill. 411, *citing* 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 334.

**335. 1. Bona Fide Purchaser of Negotiable Paper.** — Wilson v. Neu, (Neb. 1901) 95 N. W.

Rep. 502; Mack v. Prang, 104 Wis. 1, 76 Am. St. Rep. 848; Keller v. Schmidt, 104 Wis. 596.

**2. Innocent Purchaser of Real Estate for Value.** — Hughie v. Hammett, 105 Ga. 368; Springfield Engine, etc., Co. v. Donovan, 147 Mo. 622.

**337. 1. So as to Certificates of Stock under Idaho Statutes.** — Bryan v. Montandon, 6 Idaho 352.

**2. Ratification of Voidable Contract — Illinois.** — Bogue v. Franks, 199 Ill. 411.

*Louisiana.* — Crook v. Tensas Basin Levee Dist., 51 La. Ann. 285.

*Mississippi.* — Horn v. Beatty, 85 Miss. 504, *citing* 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 337, 338.

*Missouri.* — Hensinger v. Dyer, 147 Mo. 219. *New York.* — Van Dyke v. Wood, 60 N. Y. App. Div. 208, *citing* 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 337; Martin v. New Rochelle Water Co., 162 N. Y. 599, *affirming* 11 N. Y. App. Div. 177.

*Rhode Island.* — Dispeau v. Pawtucket First Nat. Bank, 24 R. I. 508, *citing* 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 337; Pease v. Francis, 25 R. I. 226.

*Tennessee.* — Loud v. Hamilton, (Tenn. Ch. 1898) 51 S. W. Rep. 140.

*Canada.* — Petit v. Martin, 14 Quebec Super. Ct. 128.

**Ratification Will Not Readily Be Inferred.** — Bryant v. Levy, 52 La. Ann. 1649.

**What Is Not Ratification.** — Where a deed is made by a wife because of the threatened prosecution of her husband, she is not estopped from impeaching such deed on the ground of duress by the fact that she approves of her action during two years, her husband being still subject to prosecution. Leflore County v. Allen, 80 Miss. 298.

**338. 2. Bogue v. Franks,** 199 Ill. 411, *citing* 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 338.

**339. 6. Benn v. Pritchett,** 163 Mo. 560; Western Bank v. McGill, 32 Can. Super. Ct. 581; Migner v. Goulet, 31 Can. Super. Ct. 26.

**340. 2. Threatened Criminal Prosecution.** — Treadwell v. Torbert, 122 Ala. 297; Davis v. Smith, 68 N. H. 253, 73 Am. St. Rep. 584; Wheeler v. Pettyjohn, 14 Okla. 71; Gorringe v. Reed, 23 Utah 120, 90 Am. St. Rep. 692.

**Rule Cannot Be Taken Advantage Of to Avoid**

**341. b. AS RELATING TO THE IMMINENCE OF THE THREATENED PROSECUTION.** — See note 2.

**342.** See note 1.

**c. AS RELATING TO THE GUILT OR INNOCENCE OF THE PERSON THREATENED** — (1) *When Person Is Innocent of Offense.* — See note 3.

**343. (2) When Person Is Guilty of Offense.** — See notes 2, 3.

**345. V. DURESS OF THE GOODS — 2. Modification of Common-law Rule.** — See note 2.

**346.** See note 2.

**347. VI. DURESS AS A CRIMINAL DEFENSE — 2. When Act Done under Mere Command of Superior — a. IN GENERAL.** — See note 3.

**348. c. UNDER ORDER OF MASTER OR PRINCIPAL.** — See note 1.

**349. DURING.** — See note 1.

**351. DUTY.** — See note 3.

**Payment of Honest Debt.** — Fry *v.* Piersol, 166 Mo. 429.

**341. 2. Rule as to Imminence of Threatened Prosecution.** — Duffy *v.* Metropolitan L. Ins. Co., 94 Me. 414; Reichle *v.* Bentele, 97 Mo. App. 52.

**Mere Rumors** that a certain person intends to prosecute another will not constitute ground for avoiding a contract made between them. Boydan *v.* Haberstumpf, 129 Mich. 137.

But it is not necessary that the threats be made directly to the person coerced, if they are communicated to him, and are of a nature to put him in a state of fear. State Bank *v.* Hutchinson, 62 Kan. 9.

**342. 1. Galusha v. Sherman,** 105 Wis. 263, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 341 [342].

**Must Be Some Threats.** — Mere fear of criminal prosecution is not enough. Roth *v.* Holmes, (Tenn. Ch. 1899) 52 S. W. Rep. 699.

**Fear of Imprisonment Not Enough, if Not Induced by Other Party to Contract.** — Bogue *v.* Franks, 199 Ill. 411.

**3. Sargent v. Beard,** (Tex. Civ. App. 1899) 53 S. W. Rep. 90; Galusha *v.* Sherman, 105 Wis. 263; Migner *v.* Goulet, 31 Can. Sup. Ct. 26. See also Burris *v.* Rhind, 29 Can. Sup. Ct. 498, affirming 30 Nova Scotia 405.

**343. 2. Beath v. Chapoton,** 115 Mich. 507, 69 Am. St. Rep. 589; Blankenmiester *v.* Blankenmiester, 106 Mo. App. 390; Sargent *v.* Beard, (Tex. Civ. App. 1899) 53 S. W. Rep. 90; Fulton *v.* Kingston Vehicle Co., 30 Nova Scotia 455. See also Barger *v.* Farnham, 130 Mich. 487.

**3. Hensinger v. Dyer,** 147 Mo. 219; Gorringer *v.* Reed, 23 Utah 120, 90 Am. St. Rep. 692.

**Voidable When Obtained Through Threatened Prosecution of Son.** — Nebraska Mut. Bond Assoc. *v.* Klee, (Neb. 1903) 97 N. W. Rep. 476.

**345. 2. Modification of Common-law Rule.** — Glass *v.* Haygood, 133 Ala. 489, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 345.

**346. 2. Van Dyke v. Wood,** 60 N. Y. App. Div. 208; McAffrey *v.* Richards, (Tenn. Ch. 1900) 59 S. W. Rep. 1064. See also Dustin *v.* Farrelly, 81 Mo. App. 380.

**Mortgage Given to Prevent Seizure of Exempt Property Is Invalid.** — Searle *v.* Gregg, 67 Kan. 1.

**Contract Avoided Where Legal Remedy Inadequate.** — Glass *v.* Haygood, 133 Ala. 489.

**Contract Not Avoided by Threat to Enforce**

**Legal Remedy.** — Manigault *v.* Ward, 123 Fed. Rep. 707; Bestor *v.* Hickey, 71 Conn. 181; Hart *v.* Strong, 183 Ill. 349; Stout *v.* Judd, 10 Kan. App. 579, 63 Pac. Rep. 662; Goos *v.* Goos, 57 Neb. 294; Pottsville Bank *v.* Cake, 12 Pa. Super. Ct. 61; Dispeau *v.* Pawtucket First Nat. Bank, 24 R. I. 508.

**347. 3. Act Done under Command of Superior.** — Thomas *v.* State, 134 Ala. 126, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 347.

**348. 1. Master and Servant.** — Smith *v.* District of Columbia, 12 App. Cas. (D. C.) 33; Douglass *v.* State, 18 Ind. App. 289; People *v.* Dunlap, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 390; Com. *v.* Kolb, 13 Pa. Super. Ct. 347.

**349. 1. During Coverture.** — State *v.* Guinotte, 156 Mo. 513.

**During Widowhood.** — Kratz *v.* Kratz, 189 Ill. 276.

**An Official Tenure During Good Behavior** is for life, unless sooner determined for cause. And removal for cause implies a right to be heard, and a trial in one form of procedure or another. Smith *v.* Bryan, 100 Va. 199.

**During Continuance in Office.** — A bond of the treasurer of a corporation who is elected for one year, which provides for his honesty and faithfulness "*during* his continuance in office," without any provision showing that it is intended as a continuing security, other than the words quoted, is limited to the term for which he is elected, and does not cover defaults made after the expiration of that term and his re-election. Ulster County Sav. Inst. *v.* Ostrander, 163 N. Y. 430.

**351. 3. In construing New York Penal Code, § 288,** providing that "a person who (1) wilfully omits, without lawful excuse, to perform a *duty*, by law imposed upon him, to furnish food, clothing, shelter, or medical attendance to a minor, \* \* \* or (4) neglects, refuses, or omits to comply with any provisions of this section, \* \* \* is guilty of a misdemeanor," it was held that the phrase "a *duty* by law imposed" has reference to persons designated in the statutes and in the common law as parents, guardians, or those who by adoption or otherwise have assumed the relation *in loco parentis*, and the character of the duties is specified in the section, and, therefore, assuming that such persons were not bound at common law to furnish medical at-

**354. DWELLING, DWELLING HOUSE, ETC. — Tenement, Lodging, Part of Building.** — See note 3.

**355. Examples.** — See note 1.

**358. DYE.** — See note 2.

tendance for minors, that *duty* is expressly provided for and is made obligatory upon them by the statute. *People v. Pierson*, 176 N. Y. 201.

**354. 3. Homestead.** — *Matter of Levy*, 141 Cal. 646.

**Lodger.** — A *dwelling house* does not lose its character as such merely because its owner occasionally lets rooms by the week. *Matter of Veeder*, (Supm. Ct. Spec. T.) 31 Misc. (N. Y.) 569.

**Same — Water Companies.** — *Birmingham Water Works Co. v. Truss*, 135 Ala. 530.

**355. 1. Dwelling House — Usual Place of Abode.** — *Mygatt v. Coe*, 63 N. J. L. 510; *McFarlane v. Cornelius*, 43 Oregon 513. See also *Massillon Engine, etc., Co. v. Hubbard*, 11 S. Dak. 325.

**Log House — Larceny.** — A small log house occupied as a *dwelling house* was held to be such within a larceny statute. *State v. Weber*, 156 Mo. 257.

**An Addition to a Parish Building** containing living rooms, kitchen, bedrooms, and studies for the clergy of a parish, and used for their residence, is not a *dwelling house* within a restriction in a deed prohibiting the erection of a *dwelling house*. *Crofton v. St. Clement's Church*, 208 Pa. St. 209.

**An Awning** over a sidewalk is not a *dwelling house* within the restriction in a deed. *Olcott v. Knapp*, 96 N. Y. App. Div. 281.

**Flat House Not Private Dwelling.** — A covenant between vendor and vendee that there shall not be erected upon land sold and purchased "any building other than for the use or purpose of a private *dwelling*," is broken by the erection of a flat house adapted for the separate residences of three several families. *Skillman v. Smatheurst*, 57 N. J. Eq. 1.

**Closing Unfit Dwelling House — English Statute.**

— By section 32, subsection 1, of the Housing of the Working Classes Act, 1890, it is the duty of a local authority to take proceedings against the owner or occupier for the closing of a *dwelling house* which is unfit for human habitation; and by subsection 2, "any such proceedings may be taken for the express purpose of causing the *dwelling house* to be closed whether the same be occupied or not." By section 29, "In this part of the act, unless the context otherwise requires, the expression *dwelling house* means any inhabited building." It was held that the definition of *dwelling house* in section 29 did not operate to curtail the powers of the local authority under section 32; that the mere fact of non-occupancy was not in itself an objection to the making of a closing order, and that the magistrate was wrong. *Robertson v. King*, (1901) 2 K. B. 265.

**358. 2. Dyeing — Patent Law.** — In a patent case the court construed the word *dyeing* as follows: "*Dyeing*, technically speaking, and as contrasted with painting, means a saturation or impregnation of the fibre in order to secure fixation of color. As applied to some animal fibres, such as silk or wool, it means a thorough saturation; as applied to skins, it may signify a thorough or a partial saturation; in other words, skins may be *dyled* on the surface, or a portion of the way through, or all the way through. The *dyeing* of skins is effected either by plunging or dipping in the *dyeing* solution, or by spreading the *dyeing* material on the surface by brushing over it." *Tannage Patent Co. v. Donallan*, 93 Fed. Rep. 817.





**366.** Hope of Recovery Must Have Been Abandoned. — See note 1.

**367.** Mere Belief in or Fear of Death Insufficient. — See note 1.

Existence of Slight Hope of Recovery. — See note 3.

**368.** Declarant's Expectation Must Be of Immediate Death. — See note 1.

Belief of Declarant that He Will Ultimately Die. — See note 2.

**369.** Subsequent Hope of Recovery. — See note 1.

Declarations Made Before but Reaffirmed After Loss of Hope. — See note 3.

4. Materiality of Time of Declarant's Death. — See note 4.

**VIII. FORM OF AND MANNER OF GIVING DECLARATIONS.** — See note 6.

**370.** Writing Unnecessary. — See note 1

*United States.* — *In re Orpen*, 86 Fed. Rep. 760.

*Alabama.* — *Starks v. State*, 137 Ala. 9; *Sims v. State*, 139 Ala. 74, 101 Am. St. Rep. 17; *Pitts v. State*, 140 Ala. 70; *Milton v. State*, 134 Ala. 42; *Stevens v. State*, 138 Ala. 71; *Walker v. State*, 139 Ala. 56; *Gregory v. State*, 140 Ala. 16.

*Arizona.* — *Wagoner v. Territory*, 5 Ariz. 175.

*Arkansas.* — *Newberry v. State*, 68 Ark. 355.

*California.* — *People v. Fuhrig*, 127 Cal. 412.

*Florida.* — *Green v. State*, 43 Fla. 552.

*Georgia.* — *Sutherland v. State*, 121 Ga. 190.

*Illinois.* — *Collins v. People*, 194 Ill. 506.

*Iowa.* — *State v. Phillips*, 118 Iowa 660.

*Kansas.* — *State v. Knoll*, 69 Kan. 727.

*Kentucky.* — *Barnes v. Com.*, 110 Ky. 348; *Fuqua v. Com.*, 73 S. W. Rep. 782, 24 Ky. L. Rep. 2204; *Brown v. Com.*, 83 S. W. Rep. 645, 26 Ky. L. Rep. 1269.

*Mississippi.* — *Brown v. State*, 78 Miss. 637, 84 Am. St. Rep. 641; *Harper v. State*, 79 Miss. 575; *Joslin v. State*, 75 Miss. 838.

*Ohio.* — *State v. Moore*, 8 Ohio Dec. 674; *Martin v. State*, 9 Ohio Cir. Dec. 621, 17 Ohio Cir. Ct. 406; *Wade v. State*, 25 Ohio Cir. Ct. 279.

*Pennsylvania.* — *Com. v. Winkelman*, 12 Pa. Super. Ct. 497.

*South Carolina.* — *State v. Lee*, 58 S. Car. 352, quoting 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 364; *State v. Taylor*, 56 S. Car. 360; *State v. Jagers*, 58 S. Car. 41.

*Texas.* — *Castillo v. State*, (Tex. Crim. 1902) 69 S. W. Rep. 517.

*Virginia.* — *Bowles v. Com.*, 103 Va. 816.

**Declaration Need Not Show Consciousness of Impending Death.** — See *infra*, cases supplementary page 388, note 3.

**366. 1. Declarant Must Have Abandoned Hope.** — *State v. Knoll*, 69 Kan. 767, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 366; *State v. Gianfala*, 113 La. 463.

**367. 1. Insufficient that Declarant Fears that He Will Die.** — *Rex v. Laurin*, 6 Can. Crim. Cas. (Quebec) 104, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 367; *Collins v. People*, 194 Ill. 506; *State v. Phillips*, 118 Iowa 660.

3. *State v. Gianfala*, 113 La. 463, quoting 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 366 [367]; *State v. Lee*, 58 S. Car. 352, quoting 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 364; *Rex v. Laurin*, 6 Can. Crim. Cas. (Quebec) 104.

**Requesting Services of Physician.** — Requests made by the deceased for a physician's aid may, in connection with his other expressions and the circumstances, be regarded as indicating

a hope of cure, but not necessarily so, since a physician may be desired merely to alleviate pain or for other purposes than to prolong life. *Milton v. State*, 134 Ala. 42; *Baker v. Com.*, 106 Ky. 212; *State v. Bordelon*, 113 La. 690; *Reg. v. Davidson*, 1 Can. Crim. Cas. (Nova Scotia) 351.

The fact that the dying declarant requested the attending physician to do something to relieve her pain, did not, it has been held, show that she was not conscious that death was impending. *Hawkins v. State*, 98 Md. 355.

**368. 1. Declarant Must Expect Immediate Death.** — But see *State v. Sadler*, 51 La. Ann. 1397.

**2. Declarant's Belief in Ultimate Death Insufficient.** — *Titus v. State*, 117 Ala. 16; *State v. Knoll*, 69 Kan. 767; *Barnes v. Com.*, 110 Ky. 348; *Brown v. Com.*, 83 S. W. Rep. 645, 26 Ky. L. Rep. 1269.

**369. 1. Revival of Hope After Making Declarations.** — *State v. Sadler*, 51 La. Ann. 1397; *Highsmith v. State*, 41 Tex. Crim. 32; *Rex v. Laurin*, 6 Can. Crim. Cas. (Quebec) 104.

**3. Affirmation, After Loss of Hope, of Prior Declarations.** — *Sims v. State*, 139 Ala. 74, 101 Am. St. Rep. 17; *Wilson v. Com.*, 60 S. W. Rep. 400, 22 Ky. L. Rep. 1251; *Smith v. Com.*, 113 Ky. 19; *State v. Garth*, 164 Mo. 553.

But on the other hand, it has been said that a declaration prepared by a person in full possession of his mental faculties, and in confident hope of recovery, to be signed in the possible event of a subsequent conviction of a fatal termination, is too much tainted to be admissible in evidence. *Harper v. State*, 79 Miss. 575.

**4. Death Need Not Result Immediately.** — *Burton v. Com.*, (Ky. 1902) 70 S. W. Rep. 831 (holding declarations to be admissible although declarant lived about eleven days); *State v. Hendricks*, 172 Mo. 654; *Martin v. State*, 9 Ohio Cir. Dec. 621, 17 Ohio Cir. Ct. 406; *Crockett v. State*, 45 Tex. Crim. 276, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 369; *State v. Power*, 24 Wash. 45, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 369; *Rex v. Laurin*, 6 Can. Crim. Cas. (Quebec) 104.

**6. Declaration in Form of Message to Declarant's Wife.** — *Smith v. Com.*, 113 Ky. 19.

**Declaration in Form of Mere Narrative.** — It is not necessary that the declarant should know at the time that he was making a dying declaration, or that the declaration, if reduced to writing, should show that it was made under a sense of impending death, if it was in fact so made. *People v. Yokum*, 118 Cal. 437.

**370. 1. Oral — Declarations May Be.** — *People v. Yokum*, 118 Cal. 437.

**370.** Communication by Signs. — See note 2.

Manner of Taking Declaration Down in Writing. — See notes 3, 4, 5.

Declarations Brought Out by Questions. — See note 6.

Oath Immaterial. — See note 8.

**372.** IX. RESTRICTIONS ON ADMISSIBILITY OF DYING DECLARATIONS — 1. Admissible Only in Homicide Cases — *b.* APPLICATION OF THE RULE — (1) *In Criminal Prosecutions* — (a) *In General*. — See note 1.

(b) *Abortion Cases* — *At Common Law*. — See note 3.

Dying Declarations of Woman Made Admissible by Statute. — See note 6.

**373.** 2. Admissibility in Homicide Cases — *c.* WHERE TWO PERSONS ARE KILLED BY SAME ACT. — See note 2.

**374.** *d.* ADMISSIBLE FOR OR AGAINST DEFENDANT. — See note 1.

*e.* WHETHER RESTRICTED TO CASES OF NECESSITY. — See note 3.

**375.** 3. Applicability of Usual Evidence Rules — *b.* COMPETENCY OF DECLARANT AS A WITNESS — (1) *General Rule*. — See note 2.

(3) *Infamy of Declarant*. — See note 8.

(4) *Mental Incapacity of Declarant* — *Imbecility, Insanity, or Infancy of Declarant*. — See note 10.

*Partial Unconsciousness of Declarant*. — See note 11.

**376.** *c.* COMPETENCY OF DECLARATIONS AS TESTIMONY — (1) *General Rule*. — See notes 5, 6.

**370.** 2. Signs — Declaration Communicated by. — *Rex v. Louie*, 10 British Columbia 1. See *Smith v. Com.*, 113 Ky. 19.

3. Reduction of Declaration to Writing. — *State v. Morrison*, 64 Kan. 669.

If dying declarations are first taken down in pencil, then typewritten, and the typewritten copy is read over to and signed by the declarant, the typewritten declarations, rather than the pencil memoranda, are admissible in evidence. *Hendrickson v. Com.*, 73 S. W. Rep. 764, 24 Ky. L. Rep. 2173.

Declarations in Foreign Language. — *Rex v. Louie*, 10 British Columbia 1.

4. *Reg. v. Whitmarsh*, 62 J. P. 680.

5. *State v. Gianfala*, 113 La. 463.

6. Questions May Be Asked Declarant. — *State v. Morrison*, 64 Kan. 669; *Richard v. State*, 42 Fla. 528; *Worthington v. State*, 92 Md. 222, 84 Am. St. Rep. 506; *Grubb v. State*, 43 Tex. Crim. 72; *Rex v. Louie*, 10 British Columbia 1.

8. *State v. Carter*, 106 La. 407.

**372.** 1. Exclusion of Dying Declarations in Criminal Cases. — *People v. Schiavi*, 96 N. Y. App. Div. 479, holding that dying declarations are not admissible to prove a charge of assault.

3. Prosecutions for the Common-law Offenses. — See *Com. v. Keene*, 7 Pa. Super. Ct. 293.

6. Statutes Making Woman's Dying Declaration Admissible. — *Com. v. Keene*, 7 Pa. Super. Ct. 293; *Com. v. Winkelman*, 12 Pa. Super. Ct. 497.

**373.** 2. Admissibility of Declarations of One Victim on Trial for Murder of the Other. — *Taylor v. State*, 120 Ga. 857, decided under a Georgia statute.

**374.** 1. Admissible as Evidence for the Accused. — *People v. Southern*, 120 Cal. 645.

3. *Parks v. State*, 105 Ga. 242; *Fuqua v. Com.*, 73 S. W. Rep. 782, 24 Ky. L. Rep. 2204. See *State v. Yee Wee*, 7 Idaho 188.

**375.** 2. *State v. Frazier*, 109 La. 458.

8. As to the admissibility of evidence that the declarant has been convicted of a felony for the

purpose of attacking his credibility, see *infra*, cases supplementing page 386, note 3.

10. Infancy of Declarant. — Before the dying declaration of a child ten years old can be admitted in evidence, proper ground must be laid as to his or her competency. *State v. Frazier*, 109 La. 458.

11. Unconsciousness of Declarant. — See *Sims v. State*, 139 Ala. 74, 101 Am. St. Rep. 17.

Fact of Declarant Being under the Influence of Narcotics. — The fact that the declarant, as testified by a physician, "was under the influence of morphine" but that "it did not make her flighty, but made her sleep some," has been held not to render the declarations inadmissible. *Walker v. State*, 139 Ala. 56.

And it has been held that the fact that the declarant, who was somewhat under the influence of opiates, had to be aroused from time to time in order to continue his statement, did not render inadmissible declarations which appeared to be an intelligent, continuous, and logical statement of how the killing occurred. *Taylor v. State*, 38 Tex. Crim. 552.

Although the declarant seemed to be in a kind of stupor, if she was intelligent when her mind was aroused, her dying declarations were admissible. *Hughes v. State*, 109 Wis. 397.

Mental Condition of Declarant Two Days After Making the Declaration. — Testimony as to the mental condition of the defendant two days after he made the declaration, has been held to have been properly excluded. *State v. Wilmbusse*, 8 Idaho 608.

**376.** 5. Substance of Declarations. — *Williams v. State*, 130 Ala. 107; *Sweat v. State*, 107 Ga. 712, quoting 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 376; *State v. Wright*, 112 Iowa 436; *State v. O'Shea*, 60 Kan. 772, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 376; *Jones v. Com.*, (Ky. 1898) 46 S. W. Rep. 217; *State v. Harris*, 112 La. 937; *Com. v. Birriolo*, 197 Pa. St. 371; *Medina v. State*, 43 Tex. Crim. 52; *Bateson v. State*, 46 Tex. Crim.



**377.** (2) *Opinions and Beliefs of Declarant.* — See notes 1, 2.

**378.** *Declarations of Opinion Favorable to Defendant.* — See note 1.

*Statements Identifying Defendant — Positive Statements.* — See note 2.

**379.** See note 1.

**380.** (3) *Statements Respecting Provocation for Defendant's Act.* — See notes 2, 3.

34; *Connell v. State*, 46 Tex. Crim. 259; *State v. Burnett*, 47 W. Va. 731, quoting 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 376.

**Expressions of Forgiveness Not Admissible.** — *State v. Harris*, 112 La. 937, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 376.

**376.** 6. *Sweat v. State*, 107 Ga. 712, quoting 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 376.

**377.** 1. *Opinion or Belief of Declarant Inadmissible — Alabama.* — See *Pitts v. State*, 140 Ala. 70.

*Georgia.* — *Sweat v. State*, 107 Ga. 712, quoting 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 377.

*Indiana.* — *Shenkenberger v. State*, 154 Ind. 630.

*Iowa.* — *State v. Sale*, 119 Iowa 1; *State v. Wright*, 112 Iowa 436, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 377.

*Kansas.* — *State v. O'Shea*, 60 Kan. 772.

*Kentucky.* — *Jones v. Com.*, (Ky. 1898) 46 S. W. Rep. 217; *Feltner v. Com.*, 64 S. W. Rep. 959, 23 Ky. L. Rep. 1110.

*Louisiana.* — *State v. Sadler*, 51 La. Ann. 1397.

*Mississippi.* — *Lipscomb v. State*, 76 Miss. 223; *Jones v. State*, 79 Miss. 309.

*Missouri.* — *State v. Parker*, 172 Mo. 191.

*North Carolina.* — *State v. Jefferson*, 125 N. Car. 712.

*Pennsylvania.* — *Com. v. Birriolo*, 197 Pa. St. 371.

*Texas.* — *Bateson v. State*, 46 Tex. Crim. 34.

*Utah.* — *State v. Carrington*, 15 Utah 480.

*West Virginia.* — *State v. Burnett*, 47 W. Va. 731, quoting 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 377.

**Declaration by Deceased that Defendant Was Trying to Shoot Him.** — A statement in a dying declaration that the defendant was trying to shoot the deceased was objected to on the ground that it was merely a statement of the opinion or conclusion of the deceased and of his belief, and not of a fact, but the court held that it was the statement of a collective fact, the weight and credibility of which was for the jury. *Smith v. State*, 133 Ala. 73.

**Statement that Operation Was for a Criminal Purpose.** — The declarant stated that the defendant performed an operation upon her "for the purpose of performing an abortion" and "so I would miscarry." It was held that the expressions quoted should have been excluded. *State v. Carrington*, 15 Utah 480.

2. *State v. Burnett*, 47 W. Va. 731, quoting 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 377.

**378.** 1. *Rule Where Declarations Are as Favorable to Defendant as to the State.* — It has been thought that even though a declaration may seem to be the mere expression of an opinion, the rule excluding such declarations should not be strictly applied if they are as favorable to the defendant as to the state. *Henderson v. Com.*, 72 S. W. Rep. 781, 24 Ky. L. Rep. 1985.

**Declaration of Opinion Objected to Though Favorable to Defendant.** — A dying declaration to the effect that the defendant was not to blame in the difficulty between himself and the deceased, and the defendant had to do what he did, was held to have been properly excluded. *State v. Sale*, 119 Iowa 1.

The dying declarations of a person mortally stabbed by the accused that: "He had to do it," "I made him do it," "I made Harry [the accused] cut me," "Angus Smith is the cause of it all," were mere statements of opinion, and not admissible in favor of the accused upon his trial for murder. *Sweat v. State*, 107 Ga. 712.

A statement by the deceased that he did not believe that the defendant intended to shoot him, has been held to be inadmissible on the ground that it was merely an opinion. *State v. Wright*, 112 Iowa 436.

**2. Declarations Identifying the Defendant — Held Admissible.** — *Walker v. State*, 139 Ala. 56; *Worthington v. State*, 92 Md. 222, 84 Am. St. Rep. 506; *State v. Dixon*, 131 N. Car. 808.

A statement by the deceased that the defendant shot him has been held to have been properly received as part of the *res gestæ*. *State v. Wilmbusse*, 8 Idaho 608.

The statement of the declarant that she was poisoned by her mother-in-law has been held to be admissible. *Shenkenberger v. State*, 154 Ind. 630.

A statement by the deceased that he did not know who shot him but indicating the place where the person who shot him stood, has been held to be admissible in evidence. *Taylor v. State*, 41 Tex. Crim. 564.

**379.** 1. *Declarations Identifying Defendant — Held Inadmissible Where Declarant Could Not Have Known Fact Stated.* — *Jones v. State*, 79 Miss. 309; *State v. Jefferson*, 125 N. Car. 712. But see *Henderson v. Com.*, 72 S. W. Rep. 781, 24 Ky. L. Rep. 1985.

**380.** 2. *Declarations as to Cause of Defendant's Act Held Inadmissible.* — *Bateson v. State*, 46 Tex. Crim. 34; *Foley v. State*, 11 Wyo. 464. See *Feltner v. Com.*, 64 S. W. Rep. 959, 23 Ky. L. Rep. 1110; *State v. Parker*, 172 Mo. 191.

A statement by the deceased that the defendant shot him "for nothing" has been held to be inadmissible. *Jones v. Com.*, (Ky. 1898) 46 S. W. Rep. 217.

A statement that the declarant had never in any manner or form attempted to harm the defendant, nor had any reason to do so, has been held to be inadmissible. *State v. O'Shea*, 60 Kan. 772.

A statement by the declarant that he had never made any threats against the defendant has been held to be inadmissible. *State v. Parker*, 172 Mo. 191.

**A Statement as to Who Was Right in the Controversy Resulting in the Homicide** has been held

**381.** (4) *Completeness of Statement.* — See note 2.

(5) *Vague and Indefinite Expressions.* — See note 3.

**382.** *d. RELEVANCY OF THE DECLARATIONS* — (1) *General Rule.* — See note 2.

**383.** (2) *Declarations Identifying Defendant.* — See note 1.

(3) *Declarations Relating to Distinct Transactions* — *Prior or Subsequent Transactions.* — See note 3.

to be inadmissible. *Newberry v. State*, 68 Ark. 355.

**380.** 3. *Same* — *Held Admissible.* — See *Connell v. State*, 46 Tex. Crim. 259.

A statement by the declarant that the defendant killed "for nothing" has been held to have been properly admitted in evidence. *State v. Lee*, 58 S. Car. 335. And it was so held in *State v. Gianfala*, 113 La. 463, but it does not appear that the objection that it was merely the expression of opinion was made.

**Statement that the Declarant Was Doing Nothing.** — A statement in a dying declaration that the declarant, when shot, "was not doing a thing" has been held to be admissible. *Pennington v. Com.*, 68 S. W. Rep. 451, 24 Ky. L. Rep. 321.

**A Statement that the Declarant Made No Attempt to Injure the Defendant** has been said to be clearly admissible. *Lane v. State*, 151 Ind. 511.

**Statements Suggesting the Motive** which the defendant may have had for killing the declarant have been held to be inadmissible. *State v. O'Shea*, 60 Kan. 772.

**381.** 2. *Declaration Admissible Though Not Detailing All the Circumstances.* — *State v. Ashworth*, 50 La. Ann. 94; *State v. Garrison*, 147 Mo. 548.

**3.** *Vague and Indefinite Expressions Inadmissible.* — In view of the known relations of an improper nature between the defendant and the wife of the deceased, it was held that the answer of the deceased to the question, "What did he shoot you for?" "You know why," was an intelligent and pointed answer, readily and easily understood, and was admissible. *Wagoner v. Territory*, 5 Ariz. 175.

**382.** 2. *Declaration Must Relate to Homicide.* — *Newberry v. State*, 68 Ark. 355; *People v. Glover*, 141 Cal. 233; *State v. O'Shea*, 60 Kan. 772; *Stephens v. Com.*, (Ky. 1898) 47 S. W. Rep. 229; *Baker v. Com.*, 106 Ky. 212; *Feltner v. Com.*, 64 S. W. Rep. 959, 23 Ky. L. Rep. 1110; *State v. Parker*, 172 Mo. 191; *State v. Jefferson*, 125 N. Car. 712; *State v. Jagers*, 58 S. Car. 41; *State v. Lee*, 58 S. Car. 335, quoting 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 382.

In *Medina v. State*, 43 Tex. Crim. 52, the court by Henderson, J., said: "We understand the rule to be that dying declarations relate only to the *res gesta* of the homicide; that is, the statements must be confined to what actually transpired at the place of the killing, — *i. e.*, who were the actors, where it occurred, the positions of persons, what was said by the parties, the instrument used, and how the homicide was committed.

But it has been said that a written dying declaration is not inadmissible because some of its statements, of themselves, and if standing alone, would not fall within the rule admitting declarations. *State v. Carter*, 106 La. 407.

**Georgia Statutory Rule.** — Under the provisions of section 1000 of the Georgia Penal Code, dying declarations are admissible only in so far as they relate to the cause of the declarant's death and the person who killed him. *Anderson v. State*, 117 Ga. 255; *Parks v. State*, 105 Ga. 242; *Bush v. State*, 109 Ga. 120.

**Statements as to What Was Said and Done by the Parties to the Encounter.** — Statements in a dying declaration as to what was said by the declarant and the defendant, and what happened between them at the time of the encounter which resulted in the declarant's death, have been held to be admissible. *Clemmons v. State*, 43 Fla. 200.

A statement of the deceased to the effect that the defendant followed him, and the deceased begged the defendant not to shoot him any more, and that he was dying then, has been held to be admissible. *People v. Yokum*, 118 Cal. 437.

**Statement that Declarant Was Unarmed at the Time.** — A statement that the deceased was unarmed when he was attacked by the defendant has been held to be properly admitted in rebuttal. *Redmond v. Com.*, (Ky. 1899) 51 S. W. Rep. 565; *Grubb v. State*, 43 Tex. Crim. 72.

**Statements Identifying the Place of the Homicide** have been held to be admissible. *Medina v. State*, 43 Tex. Crim. 52.

**Statement Denying Suicide.** — A statement by the deceased denying that she had taken poison with suicidal intent was held to be admissible where the defendant had advanced the theory that she had done so. *Boyd v. State*, 84 Miss. 414.

**Admissible and Inadmissible Statements Not Separable.** — It has been held that it was not error to admit a dying declaration as a whole where the objectionable portions were so intimately interwoven with the thread of the narrative that they could not be excluded without marring, if not destroying, the sense. *Bennett v. State*, (Tex. Crim. 1903) 75 S. W. Rep. 314.

**383.** 1. *Identifying Defendant* — *Admissibility of Declarations.* — *Walker v. State*, 139 Ala. 56; *State v. Sadler*, 51 La. Ann. 1397.

**Statement as to Which of Several Defendants Did the Shooting.** — *People v. Moran*, 144 Cal. 48.

**3. Prior Transactions** — *Declarations Inadmissible to Prove.* — *State v. McKnight*, 119 Iowa 79; *State v. O'Shea*, 60 Kan. 772; *People v. Smith*, 172 N. Y. 210; *State v. Jefferson*, 125 N. Car. 712; *Winfrey v. State*, 41 Tex. Crim. 538; *Medina v. State*, 43 Tex. Crim. 52; *Foley v. State*, 11 Wyo. 464.

**Statement Describing Commencement of Difficulty.** — A dying declaration which stated the origin of the difficulty in which the deceased was mortally wounded, and which was connected with the subsequent acts of the parties



**384.** (4) *Declarations Showing State of Feelings Between Declarant and Defendant.* — See note 1.

*e.* IMPEACHMENT AND CORROBORATION OF DYING DECLARATIONS — Impeachment. — See note 2.

Character of Declarant. — See note 3.

Irreligiousness of Declarant. — See note 4.

Contradictory Statements. — See notes 5, 6.

Corroboration. — See note 7.

**X. QUESTIONS OF LAW AND FACT** — Admissibility of Declarations. — See note 9.

**385.** Credibility of Declarations. — See notes 1, 2.

by the testimony of the eye witnesses who took up the difficulty where the dying declaration left off, has been held to be admissible. *Brande v. State*, (Tex. Crim. 1898) 45 S. W. Rep. 17.

**384.** 1. *Declarations as to State of Feelings Between Declarant and Defendant Inadmissible.* — *State v. O'Shea*, 60 Kan. 772; *Foley v. State*, 11 Wyo. 464.

A statement in a dying declaration that the declarant thought that if he died the defendant ought to be hung and that the declarant hoped that he would be, was held to have been properly excluded. *Freeman v. State*, 112 Ga. 48.

**2. Impeachment of Dying Declarations.** — *Nordgren v. People*, 211 Ill. 431, quoting 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 384.

**3. Same — By Showing Bad Character of Declarant.** — *Nordgren v. People*, 211 Ill. 431, quoting 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 384.

**4. Declarant's Irreverent State of Mind.** — It has been held that testimony tending to show that the deceased frequently used profanity to the nurses and attendants just before his death, about the time his dying declarations were made, was improperly excluded from the jury. *State v. O'Shea*, 60 Kan. 772.

**Declarant's Entertaining Spirit of Malice and Revenge Towards Defendant.** — It may be shown that the declarant had for some time entertained a spirit of malice and revenge towards the defendant. *Nordgren v. People*, 211 Ill. 431.

**5. Same — By Proving Contradictory Statements.** — *Gregory v. State*, 140 Ala. 16. See *Morrison v. State*, 42 Fla. 149; *Herd v. State*, 43 Tex. Crim. 575.

It has been held that it is not error to exclude testimony as to facts which tend to disprove statements in dying declarations which are irrelevant to the issue. *State v. Stuckey*, 56 S. Car. 576.

**6.** *Dunn v. People*, 172 Ill. 582; *Nordgren v. People*, 211 Ill. 431; *Green v. State*, 154 Ind. 655, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 384; *State v. Charles*, 111 La. 933, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 384.

It has been held in *South Carolina* that dying declarations cannot be impeached by testimony of contradictory statements made by the deceased when not *in extremis*. *State v. Stuckey*, 56 S. Car. 576; *State v. Taylor*, 56 S. Car. 360.

**7. Corroboration of Dying Declarations.** — *Contra*, *State v. Hendricks*, 172 Mo. 654, holding that consistent statements of the deceased, which were not themselves dying declarations, were

not admissible in corroboration of his dying declarations.

**9. Admissibility of Declarations for the Court** — *Tarver v. State*, 137 Ala. 29; *Sims v. State*, 139 Ala. 74, 101 Am. St. Rep. 17; *Smith v. State*, 118 Ga. 61, 110 Ga. 255; *Bush v. State*, 109 Ga. 120; *State v. Dennis*, 119 Iowa 688; *State v. Sexton*, 147 Mo. 89; *Com. v. Winkelman*, 12 Pa. Super. Ct. 497; *Bateson v. State*, 46 Tex. Crim. 34. But in *Com. v. Lawson*, 80 S. W. Rep. 206, 25 Ky. L. Rep. 2187, it was held that where the evidence was conflicting as to whether the deceased made any declaration, the court erred in excluding an alleged dying declaration; "the question as to whether or not the declarant made the declaration as testified to, or whether it is true in whole or in part, or whether he made a declaration at all, are issues for the determination of the jury, and not for the court."

**Conclusiveness of Trial Court's Decision.** — When dying declarations are admitted in evidence without objection, and the court gives to the jury proper instructions relating thereto, it will be presumed that the foundation for their introduction was properly laid. *Mayes v. State*, 108 Ga. 787.

**385.** 1. *Credibility of Declarations for the Jury.* — *Du Bose v. State*, 120 Ala. 300; *Hagenow v. People*, 188 Ill. 545; *Smith v. Com.*, 113 Ky. 19; *Henderson v. Com.*, 72 S. W. Rep. 781, 24 Ky. L. Rep. 1985; *Com. v. Lawson*, 80 S. W. Rep. 206, 25 Ky. L. Rep. 2187; *State v. Hendricks*, 172 Mo. 654; *State v. Davis*, 134 N. Car. 633; *State v. Stuckey*, 56 S. Car. 576.

**2. Instructions Must Not Invade Province of Jury.** — *Bush v. State*, 109 Ga. 120; *Com. v. Keene*, 7 Pa. Super. Ct. 293.

In *People v. Corey*, 157 N. Y. 332, it was held to be error for the court to charge the jury that "it is the experience of mankind that the premonition of immediate death from which there is no hope of recovery, is always sufficient to influence persons so situated to speak the truth."

But it has been held that the court did not err in charging the jury that a statement read to the jury as a dying declaration "should be received by you as such declaration, but because it is a dying declaration you are not necessarily bound to believe it, but you will give it that weight which you think it ought to have when considered in connection with all the other facts and circumstances in evidence." *State v. Parker*, 172 Mo. 191.

And a charge that dying declarations "should be received with caution and care," for the reason that there is no cross-examination, has



**386. XI. CREDIBILITY OF DYING DECLARATIONS.** — See note 2.

Considerations Determining Credibility — In General. — See note 3.

Consideration by Jury of Circumstances Determining Admissibility. — See note 4.

Declarant's Condition and Sense of Impending Death. — See note 5.

Fact of Declaration Being Merely an Expression of Opinion. — See note 6.

**387. XII. EVIDENCE** — 1. Requisite Preliminary Proof. — See note 1.

2. Presentation of Preliminary Proof — In the Absence of the Jury. — See note 2.

In the Presence of the Jury. — See note 3.

Ultimate Submission of Preliminary Proof to Jury. — See note 7.

3. Sufficiency of the Preliminary Proof. — See note 9.

**388. 4. Mode of Proving Declarant's Consciousness of Impending Death** — In General. — See note 1.

been held to be proper. *State v. Davis*, 134 N. Car. 633.

But it has been held that the trial court may properly refuse to charge that dying declarations are "not entitled to the same credit and force as if deceased was still alive, and testifying in the presence of the jury on oath." *Du Bose v. State*, 120 Ala. 300.

In *Shenkenberger v. State*, 154 Ind. 630, applying the rule that an instruction that contains language which casts suspicion upon, or disparages or discredits, any class of evidence, is erroneous, the court held that it was not error to refuse to instruct the jury that a dying declaration "is not so satisfactory as the evidence of the witnesses upon the stand, and it should, therefore, be carefully scrutinized."

It has been held that a charge that dying declarations are not the highest and best evidence known to the law, but such declarations must be received with great caution, was properly refused for the reason that it was argumentative. *Tarver v. State*, 137 Ala. 29.

It has been said that an instruction asked by the defendant that the jury in determining the weight to be given to a dying declaration might take into consideration the mental condition of the deceased at the time, and the fact that the defendant had no opportunity to cross-examine, might well have been given, but it was held that it was not error to refuse to give the instruction when the court told the jury that it was for them to determine the weight to be given to such statements, and that they could, with other circumstances, consider whether such statements were voluntarily made, and whether they covered all the circumstances of the homicide. *Newberry v. State*, 68 Ark. 355.

**386. 2. Dying Declaration Denied the Same Credibility as Oral Testimony in Court.** — *Nordgren v. People*, 211 Ill. 431, quoting 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 386.

**3. Rules for Determining Credibility of Dying Declarations.** — *Com. v. Lawson*, 80 S. W. Rep. 206, 25 Ky. L. Rep. 2187.

**Character of the Deceased.** — Under a statute which permits a witness to be impeached, but not by evidence of particular wrongful acts, except that it may be shown by the examination of a witness, or record, or judgment, that he has been convicted of a felony, but not of misdemeanors, it has been held that when it was shown that the deceased had been convicted of a felony it was error to permit the prosecution to show that he had been pardoned for the

crime. *Martin v. Com.*, 78 S. W. Rep. 1104, 25 Ky. L. Rep. 1928.

**4. Credibility Affected by Facts on Which Admissibility Depends.** — *Bush v. State*, 109 Ga. 120; *Nordgren v. People*, 211 Ill. 431; *Green v. State*, 154 Ind. 655; *State v. Phillips*, 118 Iowa 660; *Smith v. Com.*, 113 Ky. 19; *Martin v. State*, 9 Ohio Cir. Dec. 621, 17 Ohio Cir. Ct. 406, quoting 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 386; *Com. v. Winkelman*, 12 Pa. Super. Ct. 497.

**Fact of Declaration Having Been Made.** — If the jury should conclude that the statement as claimed to have been made was not the true statement made, it should not be considered. *Smith v. State*, 110 Ga. 255.

**5. Wheeler v. State**, 112 Ga. 43; *Young v. State*, 114 Ga. 849; *Anderson v. State*, 117 Ga. 255; *Smith v. State*, 118 Ga. 61, 110 Ga. 255; *Bush v. State*, 109 Ga. 120; *State v. Phillips*, 118 Iowa 660; *Martin v. State*, 9 Ohio Cir. Dec. 621, 17 Ohio Cir. Ct. 406, quoting 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 386. Compare *Bateson v. State*, 46 Tex. Crim. 34.

**6.** But leaving the question whether a dying declaration is the expression of an opinion to the jury, with instructions to disregard it if it was, has been held not to cure the error of the court in admitting it in evidence. *Jones v. State*, 79 Miss. 309.

**387. 1. Laying Foundation for Dying Declarations.** — *Wilson v. State*, 140 Ala. 43.

**2. Preliminary Evidence in Absence of Jury.** — *Baker v. Com.*, 106 Ky. 212; *Martin v. State*, 9 Ohio Cir. Dec. 621, 17 Ohio Cir. Ct. 406.

**3. Preliminary Evidence in Presence of Jury.** — See *State v. Bordelon*, 113 La. 690, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 387.

**7. Preliminary Evidence Must Go to Jury.** — *Martin v. State*, 9 Ohio Cir. Dec. 621, 17 Ohio Cir. Ct. 406, quoting 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 387; *State v. Crawford*, 31 Wash. 260, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 387. But see *Bateson v. State*, 46 Tex. Crim. 34.

But it has been held that this preliminary evidence need not be submitted to the jury if the evidence presents no issue as to the question of admissibility. *Highsmith v. State*, 41 Tex. Crim. 32.

**9. Preliminary Proof Must Be Clear.** — *Smith v. State*, (Fla. 1904) 37 So. Rep. 573; *Parks v. State*, 105 Ga. 242; *State v. Phillips*, 118 Iowa 660; *State v. Jeswell*, 22 R. I. 136.

**388. 1. Generally as to Proof of Sense of**

- 388.** Statements of Declarant. — See note 2.  
 Other Evidence — In General. — See note 3.
- 389.** Surrounding Circumstances. — See note 1.  
 Declarant's Conduct. — See note 2.  
 Condition of Declarant. — See notes 3, 4.
- 390.** Condition Coupled with Statements of Declarant. — See note 2.  
 Disclosed Opinion of Medical or Other Attendant. — See note 3.

**Impending Death.** — The fact that the deceased knew that he was in a dying condition has been held to have been established by the testimony of a witness that the deceased "realized that he was mortally wounded." *Davis v. State*, 120 Ga. 843.

**388. 2. State of Mind Proved by Declarant's Statements** — *Alabama*. — *Gibson v. State*, 126 Ala. 59; *Smith v. State*, 136 Ala. 1; *Starks v. State*, 137 Ala. 9; *Du Bose v. State*, 120 Ala. 300; *Gregory v. State*, 140 Ala. 16; *Milton v. State*, 134 Ala. 42. See *Gerald v. State*, 128 Ala. 6.

*California*. — *People v. Yokum*, 118 Cal. 437; *People v. Lem Deo*, 132 Cal. 199; *People v. Dobbins*, 138 Cal. 694.

*Delaware*. — *State v. Trusty*, 1 Penn. (Del.) 319.

*Florida*. — *Richard v. State*, 42 Fla. 528; *Clemmons v. State*, 43 Fla. 200.

*Georgia*. — *Wheeler v. State*, 112 Ga. 43; *Anderson v. State*, 117 Ga. 255; *Grant v. State*, 118 Ga. 804.

*Idaho*. — *State v. Wilmbusse*, 8 Idaho 608.

*Illinois*. — *Kirkman v. People*, 170 Ill. 9; *Hagenow v. People*, 188 Ill. 545.

*Indiana*. — *Green v. State*, 154 Ind. 655.

*Iowa*. — *State v. Dennis*, 119 Iowa 688.

*Kentucky*. — *Smith v. Com.*, 113 Ky. 19; *Pennington v. Com.*, 68 S. W. Rep. 451, 24 Ky. L. Rep. 321; *Arnett v. Com.*, 114 Ky. 593; *Com. v. Lawson*, 80 S. W. Rep. 206, 25 Ky. L. Rep. 2187.

*Louisiana*. — *State v. Ashworth*, 50 La. Ann. 94; *State v. Gianfala*, 113 La. 463; *State v. Bordelon*, 113 La. 690.

*Maryland*. — *Worthington v. State*, 92 Md. 222, 84 Am. St. Rep. 506; *Hawkins v. State*, 98 Md. 355.

*Mississippi*. — *Boyd v. State*, 84 Miss. 414.

*Missouri*. — *State v. McMullin*, 170 Mo. 608; *State v. Garrison*, 147 Mo. 548; *State v. Garth*, 164 Mo. 553.

*New York*. — *People v. Conklin*, 175 N. Y. 333; *People v. Burt*, 51 N. Y. App. Div. 106, affirmed without opinion 170 N. Y. 561.

*North Carolina*. — *State v. Dixon*, 131 N. Car. 808; *State v. Boggan*, 133 N. Car. 761.

*Pennsylvania*. — *Com. v. Rhoads*, 23 Pa. Super. Ct. 512.

*Rhode Island*. — *State v. Jeswell*, 22 R. I. 136.

*South Carolina*. — *State v. Head*, 60 S. Car. 516.

*Texas*. — *Highsmith v. State*, 41 Tex. Crim. 32; *Keaton v. State*, 41 Tex. Crim. 621; *Crockett v. State*, 45 Tex. Crim. 276; *Mathews v. State*, (Tex. Crim. 1903) 77 S. W. Rep. 218.

*Virginia*. — *O'Boyle v. Com.*, 100 Va. 785, 3 Va. Supm. Ct. 608.

*Wisconsin*. — *Hughes v. State*, 109 Wis. 397.

*Canada*. — *Rex v. Louie*, 10 British Columbia 1; *Reg. v. Davidson*, 1 Can. Crim. Cas. (Nova

Scotia) 351; *Rex v. Laurin*, 6 Can. Crim. Cas. (Quebec) 104.

**3. State of Mind Provable by Other Evidence than Declarant's Statements** — *Alabama*. — *Gerald v. State*, 128 Ala. 6.

*Arizona*. — *Wagoner v. Territory*, 5 Ariz. 175.

*Arkansas*. — *Newberry v. State*, 68 Ark. 355.

*Georgia*. — *Young v. State*, 114 Ga. 849.

*Indiana*. — *Green v. State*, 154 Ind. 655.

*Iowa*. — *State v. Phillips*, 118 Iowa 660; *State v. Dennis*, 119 Iowa 688.

*Kentucky*. — *Pennington v. Com.*, 68 S. W. Rep. 451, 24 Ky. L. Rep. 321.

*Oregon*. — *State v. Gray*, 43 Oregon 446.

*Pennsylvania*. — *Com. v. Birriolo*, 197 Pa. St. 371; *Com. v. Winkelman*, 12 Pa. Super. Ct. 497.

*Texas*. — *Winfrey v. State*, 41 Tex. Crim. 538.

See *infra*, supplementing page 391, note 2.

**389. 1. State of Mind Inferred from Surrounding Circumstances.** — *Reg. v. Davidson*, 1 Can. Crim. Cas. (Nova Scotia) 361; *In re Orpen*, 86 Fed. Rep. 760; *Fuller v. State*, 117 Ala. 36; *Wagoner v. Territory*, 5 Ariz. 175; *Young v. State*, 114 Ga. 849; *Jones v. Com.*, (Ky. 1898) 46 S. W. Rep. 217; *People v. Lonsdale*, 122 Mich. 388; *State v. Gray*, 43 Oregon 446; *State v. Power*, 24 Wash. 45.

**2. State of Mind Inferred from Declarant's Conduct.** — *State v. Gianfala*, 113 La. 463; *State v. Bordelon*, 113 La. 690; *State v. McMullin*, 170 Mo. 608; *Crockett v. State*, 45 Tex. Crim. 276; *Connell v. State*, (Tex. Crim. 1904) 81 S. W. Rep. 746; *Hughes v. State*, 109 Wis. 397; *Rex v. Laurin*, 6 Can. Crim. Cas. (Quebec) 104.

**3. State of Mind Inferred from Condition of Declarant.** — *Newberry v. State*, 68 Ark. 355; *State v. Phillips*, 118 Iowa 660; *People v. Smith*, 172 N. Y. 210; *Keaton v. State*, 41 Tex. Crim. 621; *Connell v. State*, 46 Tex. Crim. 259.

**4. State of Mind Inferred from Nature of Declarant's Injuries.** — *Newberry v. State*, 68 Ark. 355; *State v. Morrison*, 64 Kan. 669; *Baker v. Com.*, 106 Ky. 212; *Burton v. Com.*, 70 S. W. Rep. 831, 24 Ky. L. Rep. 1162.

**390. 2. State of Mind Inferred from Condition Coupled with Statements of Declarant** — *Alabama*. — *Titus v. State*, 117 Ala. 16.

*Georgia*. — *Parks v. State*, 105 Ga. 242.

*Iowa*. — *State v. McKnight*, 119 Iowa 79.

*Kentucky*. — *Jones v. Com.*, (Ky. 1898) 46 S. W. Rep. 217; *Stephens v. Com.*, (Ky. 1898) 47 S. W. Rep. 229; *Toliver v. Com.*, 104 Ky. 760; *Burton v. Com.*, 70 S. W. Rep. 831, 24 Ky. L. Rep. 1162; *Arnett v. Com.*, 114 Ky. 593; *Fuqua v. Com.*, 73 S. W. Rep. 782, 24 Ky. L. Rep. 2204; *Rowsey v. Com.*, 116 Ky. 617.

*Louisiana*. — *State v. Sadler*, 51 La. Ann. 1397.

*New York*. — *People v. Conklin*, 175 N. Y. 333.

**3. Opinion of Medical and Other Attendant Expressed to Declarant** — *Alabama*. — *Du Bose v.*

**390.** Receiving Extreme Unction. — See note 4.

Statements of Deceased Not Conclusive. — See note 5.

**391.** 5. Mode of Proving the Declaration — In General — Admissibility of Writing. — See note 1.

Writing Which Does Not Show the Declarant's State of Mind. — See note 2.

Writing Constitutes the Best Evidence. — See note 4.

Admissibility of Secondary Evidence. — See note 7.

Memorandum of Declarations Inadmissible. — See notes 8, 9, 10.

State, 120 Ala. 300; *Jarvis v. State*, 138 Ala. 17; *Stevens v. State*, 138 Ala. 71.

*California*. — *People v. Lem Deo*, 132 Cal. 199; *People v. Dobbins*, 138 Cal. 694.

*Illinois*. — *Hagenow v. People*, 188 Ill. 545.

*Iowa*. — *State v. Young*, 104 Iowa 730; *State v. Dennis*, 119 Iowa 688.

*Kansas*. — *State v. Morrison*, 64 Kan. 669.

*Kentucky*. — *Pennington v. Com.*, 68 S. W. Rep. 451, 24 Ky. L. Rep. 321; *Burton v. Com.*, 70 S. W. Rep. 831, 24 Ky. L. Rep. 1162; *Fuqua v. Com.*, 73 S. W. Rep. 782, 24 Ky. L. Rep. 2204.

*Missouri*. — *State v. Parker*, 172 Mo. 191; *State v. Garth*, 164 Mo. 553.

*New York*. — *People v. Burt*, 51 N. Y. App. Div. 106, affirmed without opinion 170 N. Y. 561.

*Oregon*. — *State v. Gray*, 43 Oregon 446.

*Pennsylvania*. — *Com. v. Rhoads*, 23 Pa. Super. Ct. 512.

It has been held that the fact that the attending physician informed the declarant that he would die was not alone sufficient to establish a consciousness on his part that death was impending. *Castillo v. State*, (Tex. Crim. 1902) 69 S. W. Rep. 517.

A statement by an attending physician to the declarant that she "would probably die" has been held to be entitled to very little weight. *People v. Fuhrig*, 127 Cal. 412.

It is not necessary to the admission of a dying declaration that the deceased should have been informed by the attending physician that he would die. *State v. Yee Wee*, 7 Idaho 188.

**Encouragement by Attending Physician.** — Dying declarations may be admissible notwithstanding that the attending physician extended some encouragement to the deceased. *Stephens v. Com.*, (Ky. 1898) 47 S. W. Rep. 229; *Worthington v. State*, 92 Md. 222, 84 Am. St. Rep. 506. See *State v. Gianfala*, 113 La. 463.

Dying declarations may be admissible in evidence notwithstanding that an attending physician informed the deceased both before and after they were made that there was a chance for him to recover if an operation were performed. *Wheeler v. State*, 112 Ga. 43.

The fact that attending physicians tried to encourage the deceased by telling him that his wounds were not serious, has been held not to show that he had any hope of recovery, when his instant reply was that he would die. *Richard v. State*, 42 Fla. 528.

**390. 4. Extreme Unction — Receiving Tends to Show Declarant's State of Mind.** — *Rex v. Laurin*, 6 Can. Crim. Cas. (Quebec) 104. Compare *State v. Knoll*, 69 Kan. 767.

**5. Conclusiveness of Declarant's Statements.** — *Rex v. Abbott*, 67 J. P. 151; *Barnes v. Com.*, 110 Ky. 348.

It has been held that the bare statement by the declarant that he "would die" was not sufficient to show that he believed that he was in extremis. *Titus v. State*, 117 Ala. 16.

A merely formal statement in written dying declarations reading, "knowing that I am about to die," etc., which was prepared by the person who took the statements down, has been held to be entitled to little weight. *People v. Fuhrig*, 127 Cal. 412.

The fact that the declarant said that she was aware that she was seriously ill has been held not to show that she expected immediate death. *Rex v. Smith*, 65 J. P. 426.

**391. 1. Admissibility of Writing to Prove Declarations.** — *Richard v. State*, 42 Fla. 528; *Perry v. State*, 102 Ga. 365; *State v. Wilmbusse*, 8 Idaho 608; *Hendrickson v. Com.*, 73 S. W. Rep. 764, 24 Ky. L. Rep. 2173; *Bennett v. State*, (Tex. Crim. 1904) 81 S. W. Rep. 30.

**Taking Writing into Jury Room.** — The jury should not be permitted to take a writing containing dying declarations into the jury room. *Dunn v. People*, 172 Ill. 582. But compare *State v. Webster*, 21 Wash. 63.

**2. Admissibility of Writing When Silent as to Declarant's State of Mind.** — *People v. Yokum*, 118 Cal. 437. See *supra*, cases supplementing page 388, note 3.

**4. Best Evidence — Writing Constitutes.** — See *Herd v. State*, 43 Tex. Crim. 575.

**7. Secondary Evidence — Admissibility of, to Establish Declarations.** — It has been held that when the defendant has objected to the admission in evidence of a written declaration signed by the deceased, he will not afterwards be heard to object to the admission of parol evidence to establish the declaration. *O'Boyle v. Com.*, 100 Va. 785, 3 Va. Sup. Ct. 608.

**8. Memorandum Not Signed by Declarant Inadmissible.** — *Sims v. State*, 139 Ala. 74, 101 Am. St. Rep. 17; *Green v. State*, 43 Fla. 552. *Contra*, *State v. Carrington*, 15 Utah 480. And see *Freeman v. State*, 112 Ga. 48, wherein a writing which contained a dying declaration was held to have been properly admitted although it had not been signed by the declarant.

**9. Memorandum Neither Signed by Nor Read Over to Deceased Inadmissible.** — *Fuqua v. Com.*, 73 S. W. Rep. 782, 24 Ky. L. Rep. 2204, quoting 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 391, 81 S. W. Rep. 923, 26 Ky. L. Rep. 420; *Foley v. State*, 11 Wyo. 464.

**10. Parol Evidence Competent.** — *Sims v. State*, 139 Ala. 74, 101 Am. St. Rep. 17. See *Fuqua v. Com.*, 73 S. W. Rep. 782, 24 Ky. L. Rep. 2204. Although a dying declaration was reduced to writing by a person other than the deceased, and read over to the latter, it may be proved by parol evidence if it was not signed by him. *Jarvis v. State*, 138 Ala. 17.



**391.** Competency to Refresh Memory of Witness. — See note 11.

Oral Declarations. — See note 12.

**392.** Independent Written and Oral Declarations. — See note 1.

Proof of Substance of Declaration Sufficient. — See note 2.

**6. Witnesses — Competency of Declarant's Wife to Prove Declarations.** — See note 7.

**EACH.** — See note 10.

**395. EARN — EARNINGS.** — See notes 1, 2.

**391. 11. Admissibility of Memorandum to Refresh Memory of Witness.** — *Fuqua v. Com.*, 73 S. W. Rep. 782, 24 Ky. L. Rep. 2204, 81 S. W. Rep. 923, 26 Ky. L. Rep. 420; *Foley v. State*, 11 Wyo. 464.

**12. Shenkenberger v. State**, 154 Ind. 630.

**392. 1. Separate Oral and Written Declarations.** — *Dunn v. People*, 172 Ill. 582; *Lane v. State*, 151 Ind. 511; *Hendrickson v. Com.*, 73 S. W. Rep. 764, 24 Ky. L. Rep. 2173; *State v. Gianfala*, 113 La. 463; *State v. Carrington*, 15 Utah 480. See *Herd v. State*, 43 Tex. Crim. 575.

**Declarations Made at Different Times.** — If several complete declarations have been made at different times any one or all of the declarations are admissible in evidence. *Morrison v. State*, 42 Fla. 149; *Dunn v. People*, 172 Ill. 582; *Lane v. State*, 151 Ind. 511.

**Contemporaneous Written and Oral Statements.** — If all of the declarant's statements are not written down, the omitted portions may be shown by parol evidence. *Herd v. State*, 43 Tex. Crim. 575.

**2. Substance of Declaration — Proof of Sufficient.** — *Worthington v. State*, 92 Md. 222, 84 Am. St. Rep. 506. See *supra*, the cases supplementing page 370, notes 4 and 5.

**7. Declarant's Wife Competent to Prove Declarations.** — *Arnett v. Com.*, 114 Ky. 593.

**10. Malcomson v. Wappoo Mills**, 86 Fed. Rep. 192; *Seiler v. State*, 160 Ind. 625, *citing* 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 392; *Beck, etc., Lithographing Co. v. Evansville Brewing Co.*, 25 Ind. App. 668, *quoting* 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 392.

**395. 1. Dayton v. Ewart**, 28 Mont. 153.

**2. Dayton v. Ewart**, 28 Mont. 153.

**Earnings and Profits Distinguished.** — *Pryor v. Metropolitan St. R. Co.*, 85 Mo. App. 367.

**Exemption.** — *Dayton v. Ewart*, 28 Mont. 153.

**Earned Wages — Bankruptcy Act.** — Wages are *earned*, in the sense in which that term is used in the Bankruptcy Act, so long as a *bona fide* contract of hiring exists, and the clerk or servant continues in the master's employment and does all that he is required to do. *In re B. H. Gladding Co.*, 120 Fed. Rep. 711.

**Earnings — Workmen's Compensation Act.** — A railway guard was paid in addition to his wages a fixed sum whenever his duties required him to lodge away from home. No inquiry was made whether he spent that sum or any sum; it was held that these fixed sums were part of his *earnings* within the meaning of the Workmen's Compensation Act, 1897, first schedule. *Midland R. Co. v. Sharpe*, (1904) A. C. 349, *affirming* (1903) 2 K. B. 26.

# EASEMENTS.

BY H. O'B. COOPER.

- 398. 1. DEFINITIONS, CHARACTERISTICS, AND DISTINCTIONS—1. Definitions**  
*a. EASEMENT, PROPERLY SO CALLED, DEFINED.*—See note 1.
- 399. 2. Essential Qualities and Nature**—The Essential Qualities of Easements.—See note 5.
- 400.** See note 1.
- 401.** See note 1.
- 402.** See notes 1, 2.
- 403.** Nature—Estates in Easements.—See note 1.
- 3. Kinds of Easements—***a. EASEMENT APPURTENANT.*—See note 2.  
*b. EASEMENT IN GROSS.*—See notes 3, 4.
- 404.** See note 1.
- 405.** Determining Whether an Easement Is in Gross or Appurtenant.—See note 1.  
*d. APPARENT, NONAPPARENT, CONTINUOUS, AND DISCONTINUOUS EASEMENTS.*—See notes 4, 5.

**398. 1. Definitions.**—Kennedy Stave, etc., Co. v. Sloss Sheffield Steel, etc., Co., 137 Ala. 401, *citing* 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 398; Stovall v. Coggins Granite Co., 116 Ga. 378, *quoting* 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 398; Wessels v. Colebank, 174 Ill. 618; Cleveland, etc., R. Co. v. Munsell, 94 Ill. App. 10; Dickinson County v. Fouse, 112 Iowa 23, *citing* 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 398; Earhart v. Cowles, 122 Iowa 196, *citing* 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 398; Bonney v. Greenwood, 96 Me. 335; Long Island R. Co. v. Garvey, 159 N. Y. 338, *citing* 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 398.

**399. 5. All Easements Are Things Incorporeal.**—Wessels v. Colebank, 174 Ill. 618; Andrus v. National Sugar Refining Co., 72 N. Y. App. Div. 551.

**400. 1. Imposed on Corporeal Property.**—Boyce v. Missouri Pac. R. Co., 168 Mo. 590, *citing* 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 400; Andrus v. National Sugar Refining Co., 72 N. Y. App. Div. 551.

**Incumbrance.**—An easement of light is an incumbrance. Denman v. Mentz, 63 N. J. Eq. 613.

**401. 1. Must Be Without Profit.**—Mitchell v. D'Olier, 68 N. J. L. 375.

**402. 1. A Dominant Tenement.**—Hudson v. Watson, 5 Pa. Super. Ct. 456.

**2. Two Distinct Tenements Necessary.**—Bonney v. Greenwood, 96 Me. 341, *citing* 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 401, 402; Mitchell v. D'Olier, 68 N. J. L. 379, *citing* 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 402; Hudson v. Watson, 5 Pa. Super. Ct. 456.

**403. 1. Easement Is Assignable.**—Perth Amboy Terra Cotta Co. v. Ryan, 68 N. J. L. 474.

**2.** Kennedy Stave, etc., Co. v. Sloss Sheffield Steel, etc., Co., 137 Ala. 401, *citing* 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 403; Stovall v. Coggins Granite Co., 116 Ga. 378, *citing* 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 403; Lid-

gerding v. Zignego, 77 Minn. 421, 77 Am. St. Rep. 677; Metzger v. Holwick, 6 Ohio Cir. Dec. 794, 17 Ohio Cir. Ct. 605; Houston v. Zahm, 44 Oregon 620, *citing* 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 403.

**3. In Strictness No Easements in Gross.**—Houston v. Zahm, 44 Oregon 620, *citing* 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 403.

**4.** Stovall v. Coggins Granite Co., 116 Ga. 378, *citing* 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 403; Shreve v. Mathis, 63 N. J. Eq. 170; Mitchell v. D'Olier, 68 N. J. L. 379; Houston v. Zahm, 44 Oregon 620, *citing* 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 403. See also Metzger v. Holwick, 6 Ohio Cir. Dec. 794, 17 Ohio Cir. Ct. 605.

**404. 1. Personal Right Not Assignable or Inheritable.**—Stovall v. Coggins Granite Co., 116 Ga. 378, *citing* 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 403; Beach v. Morgan, 67 N. H. 529, 68 Am. St. Rep. 692; Mitchell v. D'Olier, 68 N. J. L. 379; Metzger v. Holwick, 6 Ohio Cir. Dec. 794, 17 Ohio Cir. Ct. 605.

**405. 1. Presumption in Favor of Appurtenant Easement.**—Stovall v. Coggins Granite Co., 116 Ga. 376, *citing* 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 405; Horner v. Keene, 177 Ill. 390; Johns v. Davis, (Ky. 1903) 76 S. W. Rep. 187; Lidgerding v. Zignego, 77 Minn. 421, 77 Am. St. Rep. 677; Callan v. Hause, 91 Minn. 270; Houston v. Zahm, 44 Oregon 620, *citing* 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 405.

**Distinction.**—When the right of *profit à prendre* belongs to an individual, distinct from ownership in other lands, it takes the character of an interest or estate in the land itself rather than that of a proper easement. It is then termed a *profit à prendre* in gross. But when the right is enjoyed by reason of holding a certain other estate, it is regarded in the light of an easement appurtenant to such estate. Hinckel v. Stevens, 35 N. Y. App. Div. 5, *affirmed* 165 N. Y. 171.

**4. Apparent Easements.**—Richardson v. In-

**406.** See note 1.

**407.** 4. Rights in Nature of Easements Distinguished — *b.* LICENSES. — See note 5.

**409.** *d.* PROFITS À PRENDRE. — See notes 1, 2, 3.

**II. ACQUISITION** — 1. Generally. — See notes 4, 5.

2. By Express Grant — *a.* GENERALLY — (1) *Requisites of Grant* — Recording. — See note 7.

**410.** See note 1.

Recording Grants. — See note 2.

**411.** (2) *Who May Grant an Easement.* — See note 1.

(3) *Construction of Deed of Grant.* — See note 2.

ternational Pottery Co., 63 N. J. L. 248, *citing* 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 405.

**405.** 5. Continuous and Discontinuous Easements. — Goodwin *v.* Alexander, 105 La. 658; Richardson *v.* International Pottery Co., 63 N. J. L. 248, *citing* 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 405; Baker *v.* Rice, 56 Ohio St. 463.

*Intention in Establishing.* — Scott *v.* Moore, 98 Va. 668, 81 Am. St. Rep. 749.

*Creation.* — An apparent and continuous easement will pass on the severance of the two tenements, as appurtenant, without the use of the word "appurtenant," but nonapparent and discontinuous easements will not be created unless the grantor uses language sufficient to create the easement *de novo*. Whalen *v.* Manchester Land Co., 65 N. J. L. 206.

**406.** 1. Whalen *v.* Manchester Land Co., 65 N. J. L. 206.

**407.** 5. Hicks *v.* Swift Creek Mill Co., 133 Ala. 411, 91 Am. St. Rep. 38; Fonda, *c.* R. Co. *v.* Olmstead, 84 N. Y. App. Div. 127.

**409.** 1. Kennedy Stave, etc., Co. *v.* Sloss Sheffield Steel, etc., Co., 137 Ala. 401, *citing* 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 409; Mitchell *v.* D'Olier, 68 N. J. L. 379, *citing* 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 409.

2. Mitchell *v.* D'Olier, 68 N. J. L. 379, *citing* 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 409.

3. See Mitchell *v.* D'Olier, 68 N. J. L. 379.

4. Hicks *v.* Swift Creek Mill Co., 133 Ala. 411, 91 Am. St. Rep. 38, *citing* 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 409; Dahlberg *v.* Haeberle, (N. J. 1904) 59 Atl. Rep. 92; Fonda, etc., R. Co. *v.* Olmstead, 84 N. Y. App. Div. 127.

5. Hicks *v.* Swift Creek Mill Co., 133 Ala. 411, 91 Am. St. Rep. 38, *citing* 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 409; Belser *v.* Moore, 73 Ark. 296; Wessels *v.* Colebank, 174 Ill. 618; Jay *v.* Michael, 92 Md. 198; Drew *v.* Wiswall, 183 Mass. 554; Hay *v.* Knauth, 36 N. Y. App. Div. 612; Hinckel *v.* Stevens, 35 N. Y. App. Div. 5, *affirmed* 165 N. Y. 171; Toyaho Creek Irrigation Co. *v.* Hutchins, 21 Tex. Civ. App. 274.

7. Interest in Land under Statute of Frauds. — Hutchins *v.* Munn, 22 App. Cas. (D. C.) 88, *citing* 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 409.

*Freehold Estate in Lands.* — Herbert *v.* Bayonne, 64 N. J. L. 548, 63 N. J. L. 532.

**410.** 1. Hutchins *v.* Munn, 22 App. Cas. (D. C.) 88, *citing* 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 409.

*In Kansas* — Seal or Acknowledgment Unnecessary. — Union Terminal R. Co. *v.* Kansas City Belt R. Co., 9 Kan. App. 281.

*Massachusetts Statute* — Seal Required. — Brady *v.* Blackinton, 174 Mass. 559.

2. Record of Grant. — Dahlberg *v.* Haeberle, (N. J. 1904) 59 Atl. Rep. 92; Parker *v.* Meredith, (Tenn. Ch. 1900) 59 S. W. Rep. 167; *In re* Thomson, 19 Quebec Super. Ct. 329.

*Surrender of Easement.* — Dahlberg *v.* Haeberle, (N. J. 1904) 59 Atl. Rep. 92.

**411.** 1. Interest Necessary in Grantor. — Callan *v.* Hause, 91 Minn. 270.

*Tenant in Common.* — Charleston, etc., R. Co. *v.* Fleming, 118 Ga. 699, *citing* 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 411; Forrest Milling Co. *v.* Cedar Falls Mill Co., 103 Iowa 619; Baker *v.* Willard, 171 Mass. 220.

2. Construction of Express Grant. — Connecticut. — Knowlton *v.* New York, etc., R. Co., 72 Conn. 188.

*Illinois.* — Barber *v.* Allen, 212 Ill. 125; Truax *v.* Gregory, 196 Ill. 83; Horner *v.* Keene, 177 Ill. 390; Wood *v.* Carter, 70 Ill. App. 217. *Indiana.* — Vanatta *v.* Waterhouse, 33 Ind. App. 516.

*Maine.* — Rotch *v.* Livingston, 91 Me. 461. *Massachusetts.* — Baldwin *v.* Boston, etc., R. Co., 181 Mass. 166.

*Mississippi.* — Lott *v.* Payne, 82 Miss. 218, 100 Am. St. Rep. 632.

*New Hampshire.* — Jewell *v.* Clement, 69 N. H. 133.

*New Jersey.* — See Shreve *v.* Mathis, 63 N. J. Eq. 170.

*New York.* — Smith *v.* Sponable, 54 N. Y. App. Div. 615; Weed *v.* Donahue, 26 N. Y. App. Div. 360.

*West Virginia.* — Uhl *v.* Ohio River R. Co., 51 W. Va. 106.

*Indefiniteness.* — The grant of an easement, although the right of way is not described or definitely located, is not void for indefiniteness. Stalts *v.* Tuska, 76 N. Y. App. Div. 137.

*A Grant of a Right of Way* to premises used as a club, extends to all people lawfully going to and from it, although only the grantee, "his executors, administrators, and assigns, under-tenants and servants," were specified in the grant. Baxendale *v.* North Lambeth Liberal, etc., Club, (1902) 2 Ch. 427.

*"Free Ingress and Egress" Reserved.* — Such a reservation, without defining it, ordinarily secures to the grantor only such a right of way as is reasonably necessary and convenient. He cannot pass over the grantee's land at any place he may select, but the reservation only confers the right to a reasonably convenient passage-way; and the exercise of such a right must be as little burdensome to the grantee as possible.



**412.** (4) *Parol Grants and the Statute of Frauds.* — See note 1.

**413.** *Part Performance — Effect in Equity.* — See note 1.

**414.** *b. COVENANT OPERATING AS GRANT — Words of Covenant.* — See note 1.  
Conveyance by Reference to Plat or Map. — See note 2.

**415.** *c. RESERVATION OR EXCEPTION IN DEED.* — See note 4.

See *Smith v. Sponable*, 54 N. Y. App. Div. 615; *Peabody v. Chandler*, 42 N. Y. App. Div. 384.

**"Free and Perfect Egress and Ingress."** — Under such a grant the court will not measure the right by inches, as by measuring the height of the grantee's wagons, or of each particular load he may have occasion to take over the right of way. A convenient passage should be allowed, but the exact limitation is a question of fact, for each particular case. *Weed v. McKeg*, 79 N. Y. App. Div. 218.

**Free and Undisturbed Right to Use of Way.** — Under a grant of a free and undisturbed right to the use of a way, the grantee is not entitled to an open way, but the grantor may maintain gates across it at the termini. *Boyd v. Bloom*, 152 Ind. 152.

**Construction by Parties.** — Where a right of way is expressly granted and its precise location and limits are not fixed or defined by the deed, it is competent for the parties to define the location and determine the limits of the right of way by subsequent agreement, use, and acquiescence. *March-Brownback Stove Co. v. Evans*, 9 Pa. Super. Ct. 597.

**Right Not Specifically Defined.** — Where a right granted does not have its extent or limits specifically pointed out, it carries with it the privilege of the owner to use it as it may be reasonably necessary for the purposes for which it was created. *Weed v. McKeg*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 105, *reversed* 79 N. Y. App. Div. 218.

**Undefined Way — Reasonable Way.** — *Devine v. McRohan*, (Ky. 1901) 65 S. W. Rep. 799; *Davis v. Watson*, 89 Mo. App. 15.

**Way of Undefined Width — Reasonable Width for Convenient Use.** — *Bright v. Allan*, 203 Pa. St. 386.

**Way Not Designated — Occupancy with Consent of Grantor.** — *Gaston v. Gainesville*, etc., *Electric R. Co.*, 120 Ga. 516.

**Use of Alley Not Defined or Limited — Non-interference with Adjoiner.** — *Benner v. Junker*, 190 Pa. St. 423.

**Prescriptive Use Determines Location.** — *Mahon v. Luzerne County*, 9 Kulp (Pa.) 453.

**Qualified Way Reserved.** — *Wells v. Tolman*, 156 N. Y. 636.

**412. 1. Parol Grant of Easement Void — Arkansas.** — *Belser v. Moore*, 73 Ark. 296.

*Illinois.* — *Wessels v. Colebank*, 174 Ill. 618; *Louisville*, etc., *R. Co. v. Illinois Cent. R. Co.*, 174 Ill. 448; *Entwhistle v. Henke*, 211 Ill. 273.  
*Kansas.* — *Phoenix Ins. Co. v. Haskett*, 64 Kan. 93.

*Michigan.* — *Ives v. Edison*, 124 Mich. 402, 83 Am. St. Rep. 329; *Schultz v. Huffman*, 127 Mich. 276.

*Montana.* — *Great Falls Water Works Co. v. Great Northern R. Co.*, 21 Mont. 487.

*New Jersey.* — *Peer v. Wadsworth*, (N. J. 1904) 58 Atl. Rep. 379.

*New York.* — *Hay v. Knauth*, 36 N. Y. App. Div. 612.

*Contra.* — *Croke v. American Nat. Bank*, 18 Colo. App. 3.

**Easement Running with Land — Statute Inapplicable.** — *Noojin v. Cason*, 124 Ala. 458.

**413. 1. Taken Out of Statute by Part Performance.** — *Hutchins v. Munn*, 22 App. Cas. (D. C.) 88; *Ashelford v. Willis*, 194 Ill. 492; *Beinlein v. Johns*, 102 Ky. 570; *Clay v. Cline*, 9 Ohio Cir. Dec. 871, 18 Ohio Cir. Ct. 89.

**414. 1. Easement Created by Covenant.** — *Noojin v. Cason*, 124 Ala. 458; *Whitman v. New York*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 43, *affirmed* 85 N. Y. App. Div. 468; *Kahn v. Hoge*, 61 N. Y. App. Div. 147; *Allen v. Lester*, 81 N. Y. App. Div. 376, *affirmed* 177 N. Y. 592; *U. S. Pipe Line Co. v. Delaware*, etc., *R. Co.*, 62 N. J. L. 254; *Morton v. Thompson*, 69 Vt. 432. See also *Jackson v. Eli*, 23 App. Cas. (D. C.) 122; *Gebhard v. Addison*, 87 N. Y. App. Div. 375.

**Negative Easements.** — *Portsmouth First Nat. Bank v. Portsmouth Sav. Bank*, 71 N. H. 547.

**2. Sale by Reference to Map — Kentucky.** — *Douthitt v. Canaday*, (Ky. 1903) 73 S. W. Rep. 757; *Haskins v. J. B. Wathen Bros. Co.*, (Ky. 1898) 47 S. W. Rep. 595.

*New Jersey.* — *Seibert v. Graff*, (N. J. 1897) 38 Atl. Rep. 970.

*New York.* — *Collins v. Buffalo Furnace Co.*, 73 N. Y. App. Div. 22; *Mott v. Eno*, 97 N. Y. App. Div. 580, *reversed* 181 N. Y. 346; *Lowenberg v. Brown*, 79 N. Y. App. Div. 414. See also *Ranscht v. Wright*, 162 N. Y. 632, *affirming* 9 N. Y. App. Div. 108; *Tremberger v. Owens*, 80 N. Y. App. Div. 594; *Niagara Falls v. New York Cent.*, etc., *R. Co.*, 168 N. Y. 610.

*North Carolina.* — *Milliken v. Denny*, 135 N. Car. 19.

*West Virginia.* — *Cook v. Totten*, 49 W. Va. 177, 87 Am. St. Rep. 792.

**Reference to Street, Road, or Highway.** — *Hay v. Knauth*, 36 N. Y. App. Div. 612.

**Description in Deed — Implied Covenant.** — *Teasley v. Stanton*, 136 Ala. 641, 96 Am. St. Rep. 88.

**415. 4. Easement Created by Exception or Reservation — Alabama.** — *Noojin v. Cason*, 124 Ala. 458.

*Illinois.* — *Horner v. Keene*, 177 Ill. 390.

*Maine.* — *Tabbutt v. Grant*, 94 Me. 371.

*Massachusetts.* — *Simpson v. Boston*, etc., *R. Co.*, 176 Mass. 359.

*New Hampshire.* — *Smith v. Furbish*, 68 N. H. 123.

*New York.* — *Wells v. Talman*, 156 N. Y. 636; *Andrus v. National Sugar Refining Co.*, 72 N. Y. App. Div. 551; *Peabody v. Chandler*, 42 N. Y. App. Div. 384; *Whitman v. New York*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 43, *affirmed* 85 N. Y. App. Div. 468.

*Ohio.* — *Jones Fertilizing Co. v. Cleveland*, etc., *R. Co.*, 2 Ohio Dec. 511, 7 Ohio N. P. 245; *Gibbons v. Ebding*, 70 Ohio St. 298, 101 Am. St. Rep. 900.

**Appurtenant Easements Unseverable.** — "The

**416.** See notes 2, 3.

**418.** No Reservation to Stranger. — See note 2.

**3. By Implied Grant — a. APPURTENANT EASEMENTS PASS WITH LAND.** — See note 3.

easements, being appurtenant to the premises, were unseverable by any reservation by the grantor. \* \* \* But the reservation was effective between the grantor and grantee." *McKenna v. Brooklyn Union El. R. Co.*, 95 N. Y. App. Div. 226.

**Easements of Light and Air** are protected only where they are reserved and remain beneficial to the property in whose favor they exist. *Deeves v. Constable*, 87 N. Y. App. Div. 352.

**Reservation of Way — Acceptance of Deed.** — *Morrison v. Chicago, etc.*, R. Co., 117 Iowa 587.

**Reservation of Half of Spring — Access by Implication.** — *Myton v. Wilson*, 6 Pa. Super. Ct. 293.

**416. 2. Operation of Exception and Reservation Explained and Distinguished.** — *Knowlton v. New York, etc.*, R. Co., 72 Conn. 188; *Simpson v. Boston, etc.*, R. Co., 176 Mass. 359.

**3. Words of Inheritance Necessary for Fee by Reservation, Not by Exception.** — *Simpson v. Boston, etc.*, R. Co., 176 Mass. 359; *U. S. Pipe Line Co. v. Delaware, etc.*, R. Co., 62 N. J. L. 254. See *Smith v. Furbish*, 68 N. H. 123.

**Maryland Statute Makes Words of Inheritance Necessary.** — *Ross v. McGee*, 98 Md. 389.

**Words of Inheritance Unnecessary under Kentucky Statute.** — *Beinlein v. Johns*, 102 Ky. 570.

**418. 2.** *Beinlein v. Johns*, 102 Ky. 570.

**3. Easement Appurtenant Passes with Grant — Alabama.** — *Noojin v. Casin*, 124 Ala. 458.

*California.* — *Jones v. Sanders*, 138 Cal. 405.

*Georgia.* — *Stovall v. Coggins Granite Co.*, 116 Ga. 376, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 418.

*Illinois.* — *Wessels v. Colebank*, 174 Ill. 618.

*Kentucky.* — *Elizabethtown, etc.*, R. Co. v. Killen, (Ky. 1899) 50 S. W. Rep. 1108; *Irvine v. McCreary*, 108 Ky. 495; *Muir v. Cox*, 110 Ky. 560.

*Minnesota.* — *Swedish-American Nat. Bank v. Connecticut Mut. L. Ins. Co.*, 83 Minn. 382, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 418.

*Montana.* — *Smith v. Denniff*, 23 Mont. 65, reserved 24 Mont. 21.

*New Hampshire.* — *Howard v. Britton*, 67 N. H. 484.

*New Jersey.* — *Richardson v. International Pottery Co.*, 63 N. J. L. 251, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 418; *Bloom v. Koch*, 63 N. J. Eq. 10; *Mitchell v. D'Olier*, 68 N. J. L. 375; *Whalen v. Manchester Land Co.*, 65 N. J. L. 206.

*New York.* — *Mattes v. Frankel*, 157 N. Y. 603, 68 Am. St. Rep. 804. See *Whyte v. Builders' League*, 164 N. Y. 429; *Ranscht v. Wright*, 9 N. Y. App. Div. 108, affirmed 162 N. Y. 632; *Hinckel v. Stevens*, 35 N. Y. App. Div. 5, affirmed 165 N. Y. 171; *Wilson v. Wightman*, 36 N. Y. App. Div. 41; *Gould v. Partridge*, 52 N. Y. App. Div. 40; *Stuyvesant v. Early*, 58 N. Y. App. Div. 242; *Lowenberg v. Brown*, 79 N. Y. App. Div. 414; *Whyte v. Builders' League*, (Supm. Ct. Spec. T.) 23 Misc. (N. Y.)

385, affirmed 35 N. Y. App. Div. 480; *New York Cent., etc., R. Co. v. Needham*, (Supm. Ct. Spec. T.) 29 Misc. (N. Y.) 435; *Ladue v. Cooper*, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 544; *Stuyvesant v. Early*, (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 644, affirmed 58 N. Y. App. Div. 242. See also *Farley v. Howard*, 60 N. Y. App. Div. 193, affirmed 172 N. Y. 628.

*Ohio.* — *Baker v. Rice*, 56 Ohio St. 463; *Meredith v. Frank*, 56 Ohio St. 479; *Mosher v. Hibbs*, 24 Ohio Cir. Ct. 375.

*Pennsylvania.* — *Richmond v. Bennett*, 205 Pa. St. 470; *Koons v. McNamee*, 6 Pa. Super. Ct. 445.

*Tennessee.* — See *Boyd v. Hunt*, 102 Tenn. 495; *Murray v. Ealy*, (Tenn. Ch. 1899) 57 S. W. Rep. 412.

*Texas.* — *Toyaho Creek Irrigation Co. v. Hutchins*, 21 Tex. Civ. App. 274.

*Vermont.* — *McElroy v. McLeay*, 71 Vt. 396.

*Virginia.* — *Scott v. Moore*, 98 Va. 668, 81 Am. St. Rep. 749.

*Canada.* — *Hall v. Alexander*, 3 Ont. L. Rep. 482.

**Question Determined by Intent of Parties.** — The question whether an easement, not expressly granted, is passed by implication as an appurtenance to premises, is decided by the intent of the parties to be extracted from the grant, its language, and the circumstances and conditions that existed at the time the grant was made. *Ladue v. Cooper*, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 544; *Matter of Brook Ave.*, 40 N. Y. App. Div. 519, affirmed 161 N. Y. 622; *Ranscht v. Wright*, 9 N. Y. App. Div. 108, affirmed 162 N. Y. 632.

**Qualification of Rule.** — Where the interest of the grantor is a fee, and not an easement, the rule is, on the ground that land cannot be appurtenant to land, that there is no implied creation and grant of an easement in the grantor's adjoining land — as, for instance, a spring. *Howard v. Britton*, 67 N. H. 484.

**Grantee Favored.** — An implied grant of an easement is more readily implied in favor of the grantee than in favor of the grantor. *Marcy v. Reimer*, 47 N. Y. App. Div. 636.

**Nonapparent Easement.** — An easement which is nonapparent, of which the grantor has not made use and of which he has no information, does not pass by implication. *Hyde Park Thomson-Houston Light Co. v. Brown*, 172 Ill. 329, affirming 68 Ill. App. 582.

**An Easement Not an Essential and necessary adjunct to lands conveyed is limited in its scope, and does not run with the lands.** *Foster v. South Glens Falls*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 620, affirmed 72 N. Y. App. Div. 620.

**A Covenant Against Incumbrances negatives an easement by implication of light and air.** *Denman v. Mentz*, 63 N. J. Eq. 613.

**Unlawful Connection with Sewer — Easement Not Implied.** — *Bumstead v. Cook*, 169 Mass. 410, 61 Am. St. Rep. 203.

**Way to Lot Not Abutting Thereon Not Appurte-**



**419.** Division of Dominant Tenement Does Not Destroy Appurtenant Easement. — See note 1.

A Grant of Land with Its Appurtenances. — See note 2.

b. SEVERANCE OF UNITY OF POSSESSION. — See note 3.

**420.** (1) *Implied Grants and Implied Reservations* — (a) Distinction Recognized — Grants More Liberally Construed. — See notes 1, 2.

**421.** See note 1.

**422.** (b) Distinction Not Recognized — Implied Grants and Implied Reservations Not Distinguished. — See note 1.

**424.** (c) Degree of Necessity for Creation by Implication. — See notes 1, 3, 4.

**425.** See note 1.

nance. — *Poole v. Dulaney*, 19 Tex. Civ. App. 117.

**419.** 1. *Durkee v. Jones*, 27 Colo. 159; *Blood v. Millard*, 172 Mass. 65; *Stuyvesant v. Early*, (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 644, affirmed 58 N. Y. App. Div. 242.

Destruction of Servient Tenement. — *Bonney v. Greenwood*, 96 Me. 335.

2. Transfer with Appurtenances. — *Frizzell v. Murphy*, 19 App. Cas. (D. C.) 440; *Murphy v. Harker*, 115 Ga. 77; *Richardson v. International Pottery Co.*, 63 N. J. L. 248; *Kamer v. Bryant*, 103 Ky. 723.

The Term "Appurtenances" conveys only incorporeal easements, or rights or privileges which are necessary to the proper enjoyment of the estate granted. *Whyte v. Builders' League*, (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 385, affirmed 35 N. Y. App. Div. 480.

Easements Not in Existence When Conveyance Made Do Not Pass. — *Peters v. Worth*, 164 Mo. 431.

3. No Easement Before Severance. — *Winne v. Winne*, 95 N. Y. App. Div. 53, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 419.

**420.** 1. Grants More Liberally Construed — Reasonably Necessary. — *Walker v. Clifford*, 128 Ala. 67, 86 Am. St. Rep. 74, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 420; *Trump v. McDonnell*, 120 Ala. 200; *O'Daniel v. Baxter*, 112 Ky. 334; *Irvine v. McCreary*, 108 Ky. 495; *Jay v. Michael*, 92 Md. 198; *Amoskeag Mfg. Co. v. Shurley*, 70 N. H. 577; *Jones Fertilizing Co. v. Cleveland*, etc., R. Co., 2 Ohio Dec. 511, 7 Ohio N. P. 245; *Mosher v. Hibbs*, 24 Ohio Cir. Ct. 375; *McElroy v. McLeay*, 71 Vt. 396; *Hall v. Alexander*, 3 Ont. L. Rep. 482. See *Milliken v. Denny*, 135 N. Car. 19.

2. Implied Grants and Implied Reservations Distinguished. — *Union Lighterage Co. v. London Graving Dock Co.*, (1902) 2 Ch. 557; *Walker v. Clifford*, 128 Ala. 67, 86 Am. St. Rep. 74, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 420; *McSweeney v. Com.*, 185 Mass. 371; *Denman v. Mentz*, 63 N. J. Eq. 613; *Meredith v. Frank*, 56 Ohio St. 479; *Holman v. Patterson*, 34 Tex. Civ. App. 344; *Dee v. King*, 73 Vt. 375.

**421.** 1. One Cannot Derogate from His Own Grant. — *Walker v. Clifford*, 128 Ala. 67, 86 Am. St. Rep. 74, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 420; *Meredith v. Frank*, 56 Ohio St. 479. See also *Pollard v. Gare*, (1901) 1 Ch. 834.

**422.** 1. Implied Grants and Reservations Treated Alike. — *McEwan v. Baker*, 98 Ill. App. 276, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 422.

**424.** 1. Only Strictly Necessary Easements Pass. — *Dudgeon v. Bronson*, 159 Ind. 562, 95 Am. St. Rep. 315; *Feoffees of Grammar School v. Jeffrey's Neck Pasture*, 174 Mass. 572.

3. Necessity — *Alabama*. — *Trump v. McDonnell*, 120 Ala. 200.

*Georgia*. — *Charleston*, etc., R. Co. v. *Fleming*, 118 Ga. 699; *Gaines v. Lunsford*, 120 Ga. 370, 102 Am. St. Rep. 109.

*Missouri*. — *Seidel v. Bloeser*, 77 Mo. App. 172.

*New York*. — *Whyte v. Builders' League*, 164 N. Y. 429; *Matter of Opening East One Hundred and Forty-second St.*, 83 N. Y. App. Div. 430; *Matter of Opening Robbins Ave.*, 83 N. Y. App. Div. 513.

*Ohio*. — *Meredith v. Frank*, 56 Ohio St. 479; *Kinnear Mfg. Co. v. Beatty*, 65 Ohio St. 264, 87 Am. St. Rep. 600; *Jones Fertilizing Co. v. Cleveland*, etc., R. Co., 2 Ohio Dec. 511, 7 Ohio N. P. 245.

*Pennsylvania*. — *March-Brownback Stove Co. v. Evans*, 9 Pa. Super. Ct. 597.

*Texas*. — *Hall v. Austin*, 20 Tex. Civ. App. 59.

"It is not necessary to inquire whether a way through one's own land must be absolutely impossible. It is clear that mere inconvenience, however great, will not be sufficient. It is necessity, and not convenience, that gives the right." *Dee v. King*, 73 Vt. 375.

A Right of Way of Necessity, based on an estoppel, is not an interest or right in land which would entitle the one having it to be compensated. It is a "mere convenience," and "not enough to create a right or easement." *Matter of Opening East One Hundred and Forty-second St.*, 83 N. Y. App. Div. 430.

Strict Necessity. — *Hildreth v. Googins*, 91 Me. 227.

Necessity at Time of Conveyance Governs. — *McElroy v. McLeay*, 71 Vt. 396.

Implied Reservation. — See *Lebus v. Boston*, 107 Ky. 98, 105, 92 Am. St. Rep. 333.

4. Reasonable, Not Absolute, Necessity the Criterion. — *Worthen v. Garno*, 182 Mass. 243; *Pine Tree Lumber Co. v. McKinley*, 83 Minn. 419; *Mosher v. Hibbs*, 24 Ohio Cir. Ct. 375. See *Kinnear Mfg. Co. v. Beatty*, 65 Ohio St. 264, 87 Am. St. Rep. 600.

**425.** 1. Ways. — *Trump v. McDonnell*, 120 Ala. 200; *Charleston*, etc., R. Co. v. *Fleming*, 119 Ga. 995; *Gaines v. Lunsford*, 120 Ga. 370, 102 Am. St. Rep. 109; *Ritchey v. Welsh*, 149 Ind. 214; *Estep v. Hammons*, 104 Ky. 144; *Baldwin v. Erie Shooting Club*, 127 Mich. 659; *Pleas v. Thomas*, 75 Miss. 495; *Meredith v. Frank*, 56 Ohio St. 479; *Bailey v. Gray*, 53 S.



**425.** (2) *Simultaneous Alienation of Two Parts of Same Estate.* — See note 2.

**426.** See note 1.

c. BY PRESCRIPTION. — See note 5.

**427.** See notes 1, 2, 3.

Car. 503; *Wooldridge v. Coughlin*, 46 W. Va. 345; *Uhl v. Ohio River R. Co.*, 47 W. Va. 59.

The grantee of part of a tract, having no outlet, is entitled to an outlet over the grantor's land by necessity, which lasts as long as the necessity exists. *New York Carbonic Acid Gas Co. v. Geysers Natural Carbonic Acid Gas Co.*, 72 N. Y. App. Div. 304.

Where a party by his voluntary act cuts himself off from his land, no right of way from necessity arises. *Jones Fertilizing Co. v. Cleveland, etc.*, R. Co., 2 Ohio Dec. 511, 7 Ohio N. P. 245.

A private way of necessity will not arise unless it is indispensable to the enjoyment of his property by the party claiming it. *Charleston, etc.*, R. Co. v. *Fleming*, 118 Ga. 699.

If one grants a piece of land in the midst of his own he impliedly grants a way to reach it. The way is a necessary incident to the grant, without which it would be useless. *Banks v. School Directors*, 194 Ill. 247; *McEwan v. Baker*, 98 Ill. App. 271.

**425.** 2. *Simultaneous Alienation of Two Parts.* — *Jones v. Sanders*, 138 Cal. 405; *Hart v. McMullen*, 30 Can. Sup. Ct. 245. Compare *Whyte v. Builders' League*, 35 N. Y. App. Div. 480, affirmed 164 N. Y. 429.

**426.** 1. *Winne v. Winne*, 95 N. Y. App. Div. 53, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 426.

5. *Prescription* — *England.* — *Neaverson v. Peterborough Rural Dist. Council*, (1901) 1 Ch. 22, reversed (1902) 1 Ch. 557.

*Delaware.* — *Bubenzer v. Philadelphia, etc.*, R. Co., (Del. 1904) 57 Atl. Rep. 242.

*Illinois.* — *Wessels v. Colebank*, 174 Ill. 618.

*Kentucky.* — *Wright v. Willis*, (Ky. 1901) 63 S. W. Rep. 991; *Magruder v. Potter*, (Ky. 1904) 77 S. W. Rep. 919; *Wathen v. Howard*, (Ky. 1905) 84 S. W. Rep. 303.

*Massachusetts.* — *Baldwin v. Boston, etc.*, R. Co., 181 Mass. 166.

*Missouri.* — *Boyce v. Missouri Pac. R. Co.*, 168 Mo. 593, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 426.

*New Jersey.* — *Clement v. Bettie*, 65 N. J. L. 675.

*New York.* — *Hinckel v. Stevens*, 35 N. Y. App. Div. 5, affirmed 165 N. Y. 171; *Hay v. Knauth*, 36 N. Y. App. Div. 612; *Heiser v. Gaul*, 39 N. Y. App. Div. 162; *Winne v. Winne*, (Supm. Ct. Tr. T.) 40 Misc. (N. Y.) 435; *Pearsall v. Westcott*, 45 N. Y. App. Div. 34; *Bell v. Hayes*, 60 N. Y. App. Div. 382.

*Ohio.* — *Tytus-Gardner Paper Co. v. Middleton Hydraulic Co.*, 8 Ohio Cir. Dec. 248, 15 Ohio Cir. Ct. 118.

*Pennsylvania.* — *Hudson v. Watson*, 11 Pa. Super. Ct. 266.

*Wisconsin.* — *Wilkins v. Nicolai*, 99 Wis. 178, distinguished 108 Wis. 97.

**A Husband Cannot Acquire an Easement in His Wife's Land by Prescription** because disqualifica-

tion of coverture rebuts the presumption of a grant. *Graves v. Broughton*, 185 Mass. 174.

**Presumption May Be Rebutted.** — *Patterson v. Griffith*, (Ky. 1901) 62 S. W. Rep. 884; *Thompson v. Louisville, etc.*, R. Co., 110 Ky. 973.

**Presumption of Grant Denied.** — *Reid v. Garrett*, 101 Va. 47.

**427.** 1. *Wasmund v. Harm*, 36 Wash. 170. See *Benedict v. Johnson*, (Ky. 1897) 42 S. W. Rep. 335.

2. *England.* — *Jordeson v. Sutton, etc.*, Gas Co., (1898) 2 Ch. 614, affirmed (1899) 2 Ch. 217.

*Alabama.* — *Jesse French Piano, etc.*, Co. v. *Forbes*, 129 Ala. 471, 87 Am. St. Rep. 71.

*California.* — See *Franz v. Mendonca*, 131 Cal. 205.

*Iowa.* — *Brown v. Peck*, 125 Iowa 624.

*Kansas.* — *Phoenix Ins. Co. v. Haskett*, 64 Kan. 93.

*Kentucky.* — *Lisle v. Embry*, (Ky. 1897) 42 S. W. Rep. 98.

*Montana.* — *Montana Ore Purchasing Co. v. Butte, etc.*, Consol. Min. Co., 25 Mont. 427.

*Nebraska.* — *Dunn v. Thomas*, (Neb. 1903) 96 N. W. Rep. 142.

*New York.* — *Hinckel v. Stevens*, 35 N. Y. App. Div. 5, affirmed 165 N. Y. 171.

*Utah.* — *Funk v. Anderson*, 22 Utah 238.

See also the title PRESCRIPTION, 1213. 1.

3. **Character of User** — *England.* — *Gardner v. Hodgson's Kingston Breweries Co.*, (1900) 1 Ch. 592, reversed (1901) 2 Ch. 198.

*Canada.* — *Guthrie v. Canadian Pac. R. Co.*, 27 Ont. App. 64, reversed 31 Can. Sup. Ct. 155.

*United States.* — *Louisville, etc.*, R. Co. v. *Smith*, (C. C. A.) 128 Fed. Rep. 1.

*Alabama.* — *Stewart v. White*, 128 Ala. 202.

*California.* — *Franz v. Mendonca*, 131 Cal. 205; *Clarke v. Clarke*, 133 Cal. 667.

*Connecticut.* — *Knowlton v. New York, etc.*, R. Co., 72 Conn. 188.

*Illinois.* — *Lambe v. Manning*, 171 Ill. 612; *Cleveland, etc.*, R. Co. v. *Munsell*, 192 Ill. 430.

*Indiana.* — *Kibbey v. Richards*, 30 Ind. App. 101, 96 Am. St. Rep. 333.

*Iowa.* — *Brown v. Peck*, 125 Iowa 624; *Friday v. Henah*, 113 Iowa 425; *Hagerle v. Beebe*, 123 Iowa 620.

*Kansas.* — *Phoenix Ins. Co. v. Haskett*, 64 Kan. 93.

*Kentucky.* — *Abell v. Payne*, (Ky. 1901) 62 S. W. Rep. 880; *Evans v. Motley*, (Ky. 1904) 78 S. W. Rep. 877; *Benedict v. Johnson*, (Ky. 1897) 42 S. W. Rep. 335.

*Maryland.* — *Waters v. Snouffer*, 88 Md. 391.

*Massachusetts.* — *Prescott v. Prescott*, 175 Mass. 64.

*Missouri.* — *Hurt v. Adams*, 86 Mo. App. 73.

*Nebraska.* — *Dunn v. Thomas*, (Neb. 1903) 96 N. W. Rep. 142.

*New Hampshire.* — *Portsmouth First Nat. Bank v. Portsmouth Sav. Bank*, 71 N. H. 547.

*New Jersey.* — *Clement v. Bettie*, 65 N. J. L. 675.

*New York.* — *Winne v. Winne*, 95 N. Y. App.

**427.** 5. Notice to Purchaser of Existence of Easement. — See note 6.

**428.** See notes 1, 2, 3.

**Estoppel.** — See note 5.

**III. RIGHTS AND LIABILITIES OF PARTIES — 1. In Case of Easements by Express Grant — a. GENERALLY.** — See note 6.

**b. REPAIR — SECONDARY EASEMENT OF ACCESS.** — See note 7.

Div. 48; Lowenberg *v.* Brown, 79 N. Y. App. Div. 414; Pearsall *v.* Westcott, 45 N. Y. App. Div. 34; Heiser *v.* Gaul, 39 N. Y. App. Div. 162; Hinckel *v.* Stevens, 35 N. Y. App. Div. 5, affirmed 165 N. Y. 171; Brady *v.* Smith, 88 N. Y. App. Div. 427; Bell *v.* Hayes, 60 N. Y. App. Div. 382.

*Ohio.* — Bates *v.* Sherwood, 24 Ohio Cir. Ct. 146; Vanduzen *v.* Schraffenberger, 2 Ohio Dec. 470, 7 Ohio N. P. 294.

*Oregon.* — Wallowa County *v.* Wade, 43 Oregon 253.

*Pennsylvania.* — Hudson *v.* Watson, 5 Pa. Super. Ct. 456, 11 Pa. Super. Ct. 266; Covert *v.* Pittsburg, etc., R. Co., 18 Pa. Super. Ct. 541.

*Tennessee.* — Jackson *v.* Cody, (Tenn. Ch. 1901) 63 S. W. Rep. 302.

*Utah.* — Coleman *v.* Hines, 24 Utah 360; Clawson *v.* Wallace, 16 Utah. 300.

*Virginia.* — Reid *v.* Garnett, 101 Va. 47; Gaines *v.* Merryman, 95 Va. 660.

*Wisconsin.* — Roberts *v.* Von Briesen, 107 Wis. 486; Wilkins *v.* Nicolai, 99 Wis. 178, distinguished 108 Wis. 97; Frye *v.* Highland, 109 Wis. 292.

And see the title **PRESCRIPTION**.

**Question for Jury.** — Heiser *v.* Gaul, 39 N. Y. App. Div. 162; Koons *v.* McNamee, 6 Pa. Super. Ct. 445; Stuart *v.* Line, 11 Pa. Super. Ct. 345.

**Adverse User — Question of Fact.** — Franz *v.* Mendonca, 131 Cal. 205; Clarke *v.* Clarke, 133 Cal. 667.

**Presumption that Use Is Adverse.** — Bowen *v.* Cooper, (Ky. 1902) 66 S. W. Rep. 601; Lisle *v.* Embry, (Ky. 1897) 42 S. W. Rep. 98; List *v.* Jacoby, (Ky. 1901) 61 S. W. Rep. 355; Browning *v.* Davis, (Ky. 1899) 53 S. W. Rep. 9; Hey *v.* Collman, 78 N. Y. App. Div. 584, affirmed 180 N. Y. 560.

**Burden of Proving Use Permissive on Owner of Land.** — Hudson *v.* Watson, 11 Pa. Super. Ct. 266.

**Unity of Title — No Adverse User.** — Koons *v.* McNamee, 6 Pa. Super. Ct. 445.

**Undefined Easement Granted — Location Fixed by Adverse User.** — Mahon *v.* Luzerene County, 9 Kulp (Pa.) 453.

**Permissive Occupation.** — No easement by right of prescription can arise out of a possession which was a mere license or permissive enjoyment. Slattery *v.* McCaw, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 426.

**427. 6. Notice — England.** — Hastings *v.* North-Eastern R. Co., (1898) 2 Ch. 674.

*Colorado.* — Grand Valley Irrigation Co. *v.* Leshner, 28 Colo. 273; Croke *v.* American Nat. Bank, 18 Colo. App. 3.

*District of Columbia.* — Frizzell *v.* Murphy, 19 App. Cas. (D. C.) 440.

*Georgia.* — Murphey *v.* Harker, 115 Ga. 77.

*Illinois.* — Horner *v.* Keene, 177 Ill. 390.

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*Iowa.* — Fairchild *v.* Stewart, 117 Iowa 734; Dickinson *v.* Crowell, 120 Iowa 254.

*Kentucky.* — Muir *v.* Cox, 110 Ky. 560.

*Nebraska.* — Znamanacek *v.* Jelinck, (Neb. 1903) 95 N. W. Rep. 28.

*New Jersey.* — Mitchell *v.* D'Olier, 68 N. J. L. 375.

*New York.* — McKenna *v.* Brooklyn Union El. R. Co., 95 N. Y. App. Div. 226; Collins *v.* Buffalo Furnace Co., 73 N. Y. App. Div. 22; Gould *v.* Partridge, 52 N. Y. App. Div. 40.

*Ohio.* — Baker *v.* Rice, 56 Ohio St. 463; Gibbons *v.* Ebbing, 70 Ohio St. 298, 101 Am. St. Rep. 900.

*Pennsylvania.* — Koons *v.* McNamee, 6 Pa. Super. Ct. 445; Stuart *v.* Line, 11 Pa. Super. Ct. 345; Weidner *v.* Dauth, 21 Pa. Co. Ct. 440; Richmond *v.* Bennett, 205 Pa. St. 470; Hunter *v.* Wilcox, 23 Pa. Co. Ct. 191.

*Virginia.* — Scott *v.* Moore, 98 Va. 668, 81 Am. St. Rep. 749.

**Statement of Rule.** — A subsequent purchaser takes an estate subject only to easements created expressly or by implication from the terms of the grant, or such other easements as were apparent from an inspection of the premises. Edwards *v.* Haeger, 180 Ill. 99.

**Purchaser Without Notice.** — Brooks *v.* Massey, 4 Ohio Dec. (Reprint) 136, 1 Cleve. L. Rep. 66.

**Public and Private Ways — Necessity for Notice.** — Shaver *v.* Edgell, 48 W. Va. 502.

**Lessee.** — Stoltz *v.* Tuska, 76 N. Y. App. Div. 137.

**428. 1. Rights of Way.** — Hey *v.* Collman, 78 N. Y. App. Div. 584, affirmed 180 N. Y. 560; McEwan *v.* Baker, 98 Ill. App. 271; Manbeck *v.* Jones, 190 Pa. St. 171; Hunter *v.* Wilcox, 23 Pa. Co. Ct. 191.

**2. Water Right.** — Gould *v.* Partridge, 52 N. Y. App. Div. 40.

**3.** "To affect a subsequent purchaser by implication, the 'apparent sign of servitude must have existed on the premises' or the 'marks of the burden must have been open and visible thereon.'" Edwards *v.* Haeger, 180 Ill. 99.

**5.** See Bonney *v.* Greenwood, 96 Me. 335.

**Estoppel — Right of Way by Necessity.** — Matter of Opening East One Hundred and Forty-second St., 83 N. Y. App. Div. 430; Matter of Opening Robbins Ave., 83 N. Y. App. Div. 513.

**Estoppel to Deny.** — Mattes *v.* Frankel, 157 N. Y. 603, 68 Am. St. Rep. 804.

**6.** Smith *v.* Margerum, 21 Pa. Co. Ct. 209. See Crocker *v.* Cotting, 181 Mass. 146; Mershon *v.* Fidelity Ins., etc., Co., 208 Pa. St. 292.

**7. Maintenance of Easement — Repairs.** — Nichols *v.* Peck, 70 Conn. 439, 66 Am. St. Rep. 122; Wessels *v.* Colebank, 174 Ill. 618; Myers *v.* Baker, 45 N. Y. App. Div. 29, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 428; Weed *v.* McKeg, 70 N. Y. App. Div. 218.

**429.** *c.* CHANGES AND ALTERATIONS — The Owner of the Servient Estate. — See notes 2, 4.

The Owner of the Dominant Estate. — See note 5.

**430.** See notes 1, 2.

Effect of Practical Location of Easement Granted in General Terms. — See note 3.

2. In Case of Easements by Implied Grant. — See notes 4, 5.

3. Remedies — Action for Disturbance. — See note 6.

**431.** Injunction. — See note 2.

**432.** IV. EXTINGUISHMENT — 1. By Release — By Deed. — See note 1.

A Parol Agreement. — See notes 2, 3.

**433.** 2. By Merger — General Rule. — See note 2.

**429.** 2. *St. Joseph Valley R. Co. v. Galligan*, 120 Mich. 468; *Gibbons v. Ebding*, 70 Ohio St. 298, 101 Am. St. Rep. 900.

4. *Weed v. McKeg*, 79 N. Y. App. Div. 218.

5. *Alteration by Dominant Owner.* — *Nichols v. Peck*, 70 Conn. 439, 66 Am. St. Rep. 122; *Ives v. Edison*, 124 Mich. 402, 83 Am. St. Rep. 329, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 429; *Myers v. Bakers*, 45 N. Y. App. Div. 29, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 429.

Increase of Burdens — Easement Extinguished. — *Smith v. Margerum*, 21 Pa. Co. Ct. 209.

**430.** 1. *Patout v. Lewis*, 51 La. Ann. 210; *Myers v. Baker*, 45 N. Y. App. Div. 26; *Smith v. Margerum*, 21 Pa. Co. Ct. 209.

2. *Mershon v. Fidelity Ins., etc., Co.*, 208 Pa. St. 292.

3. *Definite Location.* — *Dudgeon v. Bronson*, 159 Ind. 565, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 430. See also *Winne v. Winne*, 95 N. Y. App. Div. 48.

4. *Allegheny Nat. Bank v. Reighard*, 204 Pa. St. 391.

5. *Heiser v. Gaul*, 39 N. Y. App. Div. 162.

6. *Jordeson v. Sutton, etc., Gas Co.*, (1898) 2 Ch. 614, affirmed (1899) 2 Ch. 217; *Warren v. Brown*, (1902) 1 K. B. 15; *Central Trust Co. v. Hennen*, (C. C. A.) 90 Fed. Rep. 593; *Zook v. Illinois Cent. R. Co.*, (Ky. 1904) 80 S. W. Rep. 211; *Robert Mitchell Furniture Co. v. Cleveland, etc., R. Co.*, 9 Ohio Dec. 674, 7 Ohio N. P. 640; *Neff v. Pennsylvania R. Co.*, 202 Pa. St. 371; *March-Brownback Stove Co. v. Evans*, 9 Pa. Super. Ct. 597.

**431.** 2. *Injunction* — *England.* — *Home, etc., Stores v. Colls*, (1902) 1 Ch. 302.

*United States.* — *Southern R. Co. v. Memphis*, (C. C. A.) 99 Fed. Rep. 170; *Louisville, etc., R. Co. v. Smith*, (C. C. A.) 128 Fed. Rep. 1.

*Alabama.* — *Jackson v. Snodgrass*, 140 Ala. 365.

*Colorado.* — *Croke v. American Nat. Bank*, 18 Colo. App. 3.

*Delaware.* — *Bubenzer v. Philadelphia, etc., R. Co.*, (Del. 1904) 57 Atl. Rep. 242.

*District of Columbia.* — *Preston v. Siebert*, 21 App. Cas. (D. C.) 405.

*Georgia.* — *Murphy v. Harker*, 115 Ga. 77.

*Illinois.* — *Yeager v. Manning*, 183 Ill. 275; *Carpenter v. Capital Electric Co.*, 178 Ill. 29, 69 Am. St. Rep. 286; *Cleveland, etc., R. Co. v. Munsell*, 192 Ill. 430.

*Kentucky.* — *Irvine v. McCreary*, 108 Ky. 495; *Henry v. Louisville*, (Ky. 1897) 42 S. W. Rep. 94; *Bohne v. Blankenship*, (Ky. 1904) 77 S. W. Rep. 919.

*Maryland.* — *Jay v. Michael*, 92 Md. 198.

*Massachusetts.* — *O'Brien v. Goodrich*, 177 Mass. 32; *Whitney v. Fitchburg R. Co.*, 178 Mass. 559.

*Michigan.* — *Ives v. Edison*, 124 Mich. 402, 83 Am. St. Rep. 329.

*Minnesota.* — See *Pine Tree Lumber Co. v. McKinley*, 83 Minn. 419.

*Nebraska.* — *Keplinger v. Woolsey*, (Neb. 1903) 93 N. W. Rep. 1008.

*New Jersey.* — *Bloom v. Koch*, 63 N. J. Eq. 10; *Shreve v. Mathis*, 63 N. J. Eq. 170; *Van Horn v. Clark*, 59 N. J. Eq. 37.

*New York.* — *Allen v. Lester*, 81 N. Y. App. Div. 376, affirmed 177 N. Y. 592; *Stolts v. Tuska*, 76 N. Y. App. Div. 137; *Ackerman v. True*, 71 N. Y. App. Div. 143, reversed 175 N. Y. 353; *Lambert v. Huber*, (Supm. Ct. Spec. T.) 22 Misc. (N. Y.) 462; *Johnson v. Cox*, (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 301; *Stuyvesant v. Early*, (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 644, affirmed 58 N. Y. App. Div. 242.

*Ohio.* — *Gibbons v. Ebding*, 70 Ohio St. 298, 101 Am. St. Rep. 900; *Beatty v. Kinnear*, 12 Ohio Cir. Dec. 68. See *Clay v. Cline*, 9 Ohio Cir. Dec. 871, 18 Ohio Cir. Ct. 89.

*Oregon.* — *Hotchkiss v. Young*, 42 Oregon 446.

*Pennsylvania.* — *Bright v. Allan*, 203 Pa. St. 386; *Manbeck v. Jones*, 190 Pa. St. 171; *Weidner v. Dauth*, 21 Pa. Co. Ct. 440; *Weaver v. Getz*, 16 Pa. Super. Ct. 418; *Bright v. Allan*, 203 Pa. St. 386; *Benner v. Junker*, 190 Pa. St. 423.

*Vermont.* — *Stockwell v. Fitzgerald*, 70 Vt. 468.

Question of Fact for Superior Court. — *Portsmouth First Nat. Bank v. Portsmouth Sav. Bank*, 71 N. H. 547.

When Left to Remedy at Law — Easement in Doubt. — *Gulick v. Fisher*, 92 Md. 353.

When Left to Remedy at Law — Title in Dispute. — *Oppenheim v. Loftus*, (N. J. 1901) 50 Atl. Rep. 795.

**432.** 1. *Release by Mortgagee — Easement Created by Mortgage.* — *Hyde Park, etc., Co. v. Brown*, 172 Ill. 329, affirming 69 Ill. App. 582.

Description of Easement. — *Queens County Sav. Bank v. Hudson*, 83 N. Y. App. Div. 620.

2. *Release by Parol Agreement.* — *Hunt v. Sain*, 181 Ill. 381, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 432; *Lebus v. Boston*, 107 Ky. 98, 105, 92 Am. St. Rep. 333; *Hudson v. Watson*, 5 Pa. Super. Ct. 456.

3. *Hunt v. Sain*, 181 Ill. 381, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 432.

**433.** 2. *Unity of Ownership of Dominant and*



**433.** Nature of the Ownership Required. — See note 3.

**434.** Severance of Estate Revives Easement. — See note 6.

**3. By Abandonment** — *a.* GENERALLY. — See note 7.

**435.** Must Be Evidenced by Decisive Acts. — See note 1.

**436.** A Question of Fact. — See note 1.

*b.* NONUSER WHERE OWNER OF SERVIENT TENEMENT CLAIMS ADVERSELY. — See notes 2, 3.

**Servient Estates.** — *Damper v. Bassett*, (1901) 2 Ch. 350; *Charleston R. Co. v. Fleming*, 118 Ga. 699, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 433; *Riehlman v. Field*, 81 N. Y. App. Div. 526; *Barringer v. Virginia Trust Co.*, 132 N. Car. 409; *Bates v. Sherwood*, 24 Ohio Cir. Ct. Rep. 146. And see *McElroy v. McLeay*, 71 Vt. 396.

**Exception — Another Route Used for Convenience — Way Open.** — When a right of way has been open, visible, necessary, and in continuous use for twenty-four years, except during a brief interval when the owner of both lots took a shorter route for convenience, and during which time the way was not closed, but remained as before, there was no merger. *Fritz v. Tompkins*, 168 N. Y. 524.

**433. 3. Character of Ownership Necessary.** — See *Wettlaufer v. Ames*, 133 Mich. 201.

**Full and Unlimited Power of Disposition.** — *Tuttle v. Kilroa*, 177 Mass. 146.

**434. 6. Easement Revived upon Severance of Estate.** — *Wettlaufer v. Ames*, 133 Mich. 201.

**Way of Necessity Not Revived.** — *Bates v. Sherwood*, 24 Ohio Cir. Ct. 146.

**Right of Way by Necessity.** — Where there is a unity of ownership, a previous right of way, which came into existence by necessity, is in suspension, but the moment a severance takes place by conveyance after servient estate by deed absolute, then the servitudes are revived, in favor of the grantor, that previously existed. *Fritz v. Tompkins*, 168 N. Y. 524.

**Contra.** — *Riehlman v. Field*, 81 N. Y. App. Div. 526.

**7. Extinguishment by Abandonment.** — Matter of Opening North Fifth St., 64 N. Y. App. Div. 611; *Scott v. Moore*, 98 Va. 668, 81 Am. St. Rep. 749; *Weston v. Ralston*, 48 W. Va. 182.

**Abandonment Preventing Prescriptive Right.** — *Davis v. Herbert*, 71 Ill. App. 257.

**Well — Justifiable Destruction.** — *Smith v. Margerum*, 21 Pa. Co. Ct. 209.

**435. 1. Acts Must Be Decisive and Unequivocal** — *England*. — *Young v. Star Omnibus Co.*, 86 L. T. N. S. 41.

*California.* — *Cavanaugh v. Wholey*, 143 Cal. 164.

*Georgia.* — *Gaston v. Gainesville, etc.*, Electric R. Co., 120 Ga. 516.

*Illinois.* — *Wood v. Carter*, 70 Ill. App. 217; *McEwan v. Baker*, 98 Ill. App. 271.

*Louisiana.* — *Swain v. Weber*, 106 La. 161.

*Maine.* — *Bonney v. Greenwood*, 96 Me. 335.

*New Jersey.* — *City Nat. Bank v. Van Meter*, 59 N. J. Eq. 32.

*New York.* — Matter of Board of Education, 24 N. Y. App. Div. 117; *Tremberger v. Owens*, 80 N. Y. App. Div. 594; *Deeves v. Constable*, 87 N. Y. App. Div. 352.

*Ohio.* — *Schaeffer v. Clauda*, 25 Ohio Cir. Ct. 249.

*Rhode Island.* — *Johnson v. Stitt*, 21 R. I. 433, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 435.

*Virginia.* — *Scott v. Moore*, 98 Va. 668, 81 Am. St. Rep. 749.

*West Virginia.* — *Weston v. Ralston*, 48 W. Va. 183, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 435.

*Wisconsin.* — *Stenz v. Mahoney*, 114 Wis. 117.

**License to Use.** — A right of way established by adverse use will not be divested by obtaining a license to use it. *Dee v. King*, 73 Vt. 375.

**Use of Another Way for Convenience.** — The fact that the grantee, for convenience, used a way over the grantor's lands other than the one specifically described in the grant, is not evidence of abandonment of the way in the absence of proof of obstruction of original way. *Weaver v. Getz*, 16 Pa. Super. Ct. 418. See also *Scott v. Moore*, 98 Va. 668, 81 Am. St. Rep. 749.

**Knowingly Permitting Obstruction Without Objection.** — Matter of Opening North Fifth St., 64 N. Y. App. Div. 611.

**Acquiescence in Temporary Changes for Convenience No Abandonment.** — *Johnson v. Clark*, (Ky. 1900) 57 S. W. Rep. 474.

**Fencing In Way.** — *Baker v. Barry*, 22 R. I. 471.

**Right of Free Passage — Payment of Toll under Protest No Waiver.** — *Dupont v. Charleston Bridge Co.*, 65 S. Car. 524.

**436. 1. Question of Intent for Jury.** — *City Nat. Bank v. Van Meter*, 59 N. J. Eq. 32; *Johnson v. Stitt*, 21 R. I. 429.

**Evidence Must Be Decisive and Unequivocal.** — *Gaston v. Gainesville, etc.*, Electric R. Co., 120 Ga. 516.

**Mixed Question of Law and Fact.** — *Gaston v. Gainesville, etc.*, Electric R. Co., 120 Ga. 516.

**2. Easement Created by Grant Not Lost by Non-user Merely** — *Kentucky*. — *Johnson v. Clark*, (Ky. 1900) 57 S. W. Rep. 474.

*Maine.* — *Tabbutt v. Grant*, 94 Me. 371.

*Massachusetts.* — *Gloucester Water Supply Co. v. Gloucester*, 179 Mass. 365; *Blood v. Milard*, 172 Mass. 65.

*New Hampshire.* — *Howard v. Britton*, 67 N. H. 484.

*New Jersey.* — *Perth Amboy Terra Cotta Co. v. Ryan*, 68 N. J. L. 474.

*New York.* — *Andrus v. National Sugar Refining Co.*, 93 N. Y. App. Div. 377; *Weed v. McKeg*, 79 N. Y. App. Div. 218; *Brady v. Smith*, 88 N. Y. App. Div. 427; *Brady v. Brady*, (Supm. Ct. Spec. T.) 31 Misc. (N. Y.) 411. See also *Pape v. New York, etc.*, R. Co., 74 N. Y. App. Div. 175, reversed 175 N. Y. 504.

*Pennsylvania.* — *Richmond v. Bennett*, 205 Pa. St. 470; *Weaver v. Getz*, 16 Pa. Super. Ct. 418.

*Rhode Island.* — *Johnson v. Stitt*, 21 R. I. 433,

**437.** See note 2.

Nonuser Accompanied by Acts Showing Intention to Abandon. — See note 3.

**438.** 4. By Change in Condition of Estates — Cessation of Purpose of Easement — General Rule. — See note 1.

Illustrations. — See notes 4, 6.

Easement Appurtenant to Land. — See note 7.

**439.** An Easement of Necessity. — See notes 1, 2.

Other Illustrations of the General Rule. — See note 3.

**440. EASTERLY.** — See note 1.**441. EDITION.** — See note 4.**442. EDUCATE — EDUCATION, ETC.** — See note 2.**445. EFFECT.** — See note 1.

citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 436.

*Tennessee.* — See *Boyd v. Hunt*, 102 Tenn. 495.

*Virginia.* — See *Scott v. Moore*, 98 Va. 668, 81 Am. St. Rep. 749.

*West Virginia.* — *Weston v. Ralston*, 48 W. Va. 182.

Use of Another Way for Convenience. — *Tabbutt v. Grant*, 94 Me. 371.

Loss by Adverse Possession for Statutory Period. — *Jesse French Piano, etc., Co. v. Forbes*, 129 Ala. 471, 87 Am. St. Rep. 71; *New York, etc., R. Co. v. Benedict*, 169 Mass. 262; *Buffalo v. Delaware, etc., R. Co.*, 68 N. Y. App. Div. 488; *Pape v. New York, etc., R. Co.*, 74 N. Y. App. Div. 175, reversed 175 N. Y. 504; *Matter of New York*, 73 N. Y. App. Div. 394; *Andrus v. National Sugar Refining Co.*, 93 N. Y. App. Div. 377.

Nonuser of Highway for Six Years — *New York Statute.* — *Buffalo v. Delaware, etc., R. Co.*, 68 N. Y. App. Div. 488, affirmed 178 N. Y. 561.

In *Texas* five years' continuous, adverse, and exclusive possession of a street under a deed properly acknowledged and duly recorded, and payment of taxes thereon, will bar the abutting owners of their easement or right of way over it. *Peden v. Crenshaw*, (Tex. Civ. App. 1904) 81 S. W. Rep. 369.

**436.** 3. Loss of Easement by Mere Nonuser. — *Matter of New York*, 73 N. Y. App. Div. 394.

Evidence of Nonuser Must Be Decisive and Unequivocal. — *Gaston v. Gainesville, etc., Electric R. Co.*, 120 Ga. 516.

**437.** 2. All Facts to Be Considered. — *Johnson v. Stitt*, 21 R. I. 429.

3. Nonuser Accompanied by Acts Indicating Abandonment. — *Jesse Franch Piano, etc., Co. v. Forbes*, 129 Ala. 471, 87 Am. St. Rep. 71; *New York, etc., R. Co. v. Benedict*, 169 Mass. 262; *Boyd v. Hunt*, 102 Tenn. 495.

**438.** 1. Where Purpose Ceases. — *Southern R. Co. v. Memphis*, (C. C. A.) 97 Fed. Rep. 819; *Portsmouth First Nat. Bank v. Portsmouth Sav. Bank*, 71 N. H. 547.

4. Restoration of Building. — On the restoration or reconstruction of the thing through and by means of which an easement is enjoyed, the easement itself is restored and revived, even though there was no obligation on the servient owner to restore the servient thing. *Hottell v. Farmers' Protective Assoc.*, 25 Colo. 67, 71 Am. St. Rep. 109.

6. Party Walls. — *Bonney v. Greenwood*, 96 Me. 335.

7. Where Easement Appurtenant to Land. — *Hottell v. Farmers' Protective Assoc.*, 25 Colo. 67, 71 Am. St. Rep. 109.

**439.** 1. Duration of Easement of Necessity. — *Benedict v. Johnson*, (Ky. 1897) 42 S. W. Rep. 335; *Jay v. Michael*, 92 Md. 198; *Feoffees of Grammar School v. Jeffrey's Neck Pasture*, 174 Mass. 572; *Ann Arbor Fruit, etc., Co. v. Ann Arbor R. Co.*, (Mich. 1904) 99 N. W. Rep. 869; *Bates v. Sherwood*, 24 Ohio Cir. Ct. 146; *March-Brownback Stove Co. v. Evans*, 9 Pa. Super. Ct. 597. See also *Southern R. Co. v. Memphis*, (C. C. A.) 97 Fed. Rep. 819.

2. *Mosher v. Hibbs*, 24 Ohio Cir. Ct. 375; *March-Brownback Stove Co. v. Evans*, 9 Pa. Super. Ct. 597.

3. An Easement in Fee cannot be extinguished by an unauthorized use of it. *Deavitt v. Washington County*, 75 Vt. 156.

Easement of Light and Air — Location of Windows Substantially Changed. — *Johnson v. Hahne*, 61 N. J. Eq. 438.

**440.** 1. Mining Law. — "In the sense in which *easterly* is used by the miner and prospector, the term denotes the general course of a vein or location running nearer towards the east than any of the other cardinal points of the compass." *Wiltsee v. King of Arizona Min., etc., Co.*, (Ariz. 1900) 60 Pac. Rep. 896.

**441.** 4. An *edition* is the "total number of copies issued or published at once." *Mooney v. U. S. Industrial Pub. Co.*, 27 Ind. App. 407.

An *Edition de Luxe*, as defined by the lexicographers, means "an elaborate and costly *edition*, often limited; a sumptuous *edition*, as regards paper, illustrations, binding, etc." From these definitions it will be seen that the expression quoted may mean an artist proof *edition*, or it may not. It is a generic expression, meaning simply an elegant *edition* of some kind; and it was competent for the defendant to allege and prove that he was led to believe that the expression meant an artist proof *edition*. *Barrie v. Miller*, 104 Ga. 315.

**442.** 2. Exemption from Taxation. — *People v. Mezger*, 98 N. Y. App. Div. 237.

**445.** 1. Effect of Evidence. — See *Jessen v. Donahue*, (Neb. 1903) 96 N. W. Rep. 639, holding *effect* to be synonymous with weight.

Effected in the Sense of Completed — Change of Grade. — In construing a *New York* statute, providing that "a person claiming damages from such change of grade must present to the board of trustees a verified claim therefor within sixty days after such change of grade is

**449. EFFECTS.** — See note 2.

**454.** See note 1.

**456.** See note 1.

**458.** See note 1.

*effected*," the court said: "While the word *effected* is somewhat inexact, we are of opinion that it is here used in the sense of 'completed,' and that the change of grade for which the injured party may claim damages is not *effected* until it is completed; until the village has taken some action to indicate that it has closed the work in connection with the improvement under way." *Phipps v. North Pelham*, 61 N. Y. App. Div. 445.

**449. 2. Goods and Effects.** — *Meier v. Lee*, 106 Iowa 303.

**Choses in Action.** — *Re Way*, 6 Ont. L. Rep. 617, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 448, 449; *Minor v. Gurley*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 662, affirmed 81 N. Y. App. Div. 586.

**A Bequest of Furniture of an Inn** and other personal *effects* belonging to the yearly tenant of an inn, will pass furniture, linen, plate, glass, and such like, whether used for domestic purposes or for the purpose of the inn, but not tenant's fixtures. *In re Seton-Smith*, (1902) 1 Ch. 717.

**454. 1. Ejusdem Generis.** — *Re Hammersley*, 81 L. T. N. S. 150; *Lippincott's Estate*, 173 Pa. St. 368.

**456. 1. Effects Held to Include Realty.** — *Ruckle v. Graffin*, 86 Md. 627. See also *Kirby-Smith v. Parnell*, (1903) 1 Ch. 483.

**458. 1. Effects Confined to Personalty.** — *Meier v. Lee*, 106 Iowa 303; *Banks v. Walker*, 112 Ga. 542.



## EIGHT-HOUR LAWS.

**462. I. CONSTITUTIONALITY OF STATUTES.** — See notes 1, 2.

**463. II. COMPENSATION FOR EXTRA WORK.** — See note 1.

**464. III. CONSTRUCTION OF STATUTES.** — See note 2.

**466. EITHER.** — See note 1.

**462. 1. Object of Statutes.** — See *Atkin v. Kansas*, 191 U. S. 207; *In re Dalton*, 61 Kan. 257.

**2. Contracts with State or Municipality — Constitutional — Kansas.** — A state statute providing an eight-hour day for all laborers employed by or on behalf of the state and its municipalities, prohibiting a contractor on public work requiring or permitting more than an eight-hour day and requiring such contractor to pay the current rate of wages, is not unconstitutional as violating the due process or equal protection clauses of the Federal Constitution, even though the current rate of wages is based on private work where ten hours constitute a day's work or though work in excess of eight hours would not be injurious to workmen. *Atkin v. Kansas*, 191 U. S. 207; *In re Dalton*, 61 Kan. 257, *followed in State v. Atkin*, 64 Kan. 174, 97 Am. St. Rep. 343.

**And in Washington** an ordinance prescribing a similar law was held constitutional. *Matter of Broad*, 36 Wash. 449.

**But in Ohio** a similar statute was held unconstitutional. *Cleveland v. Clements Bros. Constr. Co.*, 67 Ohio St. 197, 93 Am. St. Rep. 670.

**And Penal Code N. Y.**, § 384*h*, subd. 1, prohibiting any person or corporation contracting with the state or a municipal corporation from requiring more than an eight-hour day, is not a valid exercise of the police power, as it has no relation to public health, morals, or order, and is in violation of the equal protection provision of the Federal Constitution by creating a distinction between persons contracting with the state and other employers of labor, nor can the statute be upheld on the ground that the work is state work, as by its terms it includes independent contractors. *People v. Orange County Road Constr. Co.*, 175 N. Y. 84.

**Constitutionality.** — **The Nebraska Act** limiting the hours of labor of females in manufacturing, etc., establishments and hotels is constitutional. *Wenham v. State*, 65 Neb. 394.

**Same — Nevada.** — A statute forbidding workers in mines, etc., working more than eight hours per day is a valid exercise of the police power of a state, and not in violation of the

state constitution guaranteeing to citizens the right to acquire and hold property, and that all laws shall be general and uniform, nor is it in violation of the due process and equal protection clauses of the Federal Constitution. *Ex p. Boyce*, 27 Nev. 299.

**Same — New York.** — *People v. Lochner*, 177 N. Y. 145, *affirmed* 73 N. Y. App. Div. 120.

**Same — Pennsylvania.** — *Com. v. Beatty*, 15 Pa. Super. Ct. 5, 23 Pa. Co. Ct. 300.

**Same — Rhode Island.** — Opinion to Governor, 24 R. I. 603.

**Same — Utah.** — *Holden v. Hardy*, 169 U. S. 366, *affirming State v. Holden*, 14 Utah 71, 96, *stated in original note*.

**463. 1. Compensation — Illinois.** — *Christian County v. Merrigan*, 191 Ill. 484, *quoting* 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 463.

**Maine.** — *Fitzgerald v. International Paper Co.*, 96 Me. 220.

**464. 2. To Whom Applicable.** — The eight-hour laws of *Illinois* are confined to mechanical trades, arts, and employments, and do not embrace services of an official character such as a sheriff performs. *Christian County v. Merrigan*, 191 Ill. 484, *affirmed* 87 Ill. App. 481.

**466. 1. One or the Other.** — "Originally *either* had much of the meaning of 'both.' For some centuries, however, its normal meaning has been 'one or other.' See Murray's 'Oxford English Dictionary.' Certainly that is its *prima facie* meaning at the present time. I have not been able to find even a single instance of so complete a departure from the original meaning as would make it the contradictory of both." *Per Rigby, L. J.*, in *In re Pickworth*, (1899) 1 Ch. 650.

**In the Sense of Both.** — In *Chicago, etc., R. Co. v. Chicago*, 172 Ill. 68, the court said: "In Webster's definition of the word *either* will be found the following: '2. Each of two; the one and the other.' Under this definition the language of the ordinance, 'said curbstones to be set on *either* side of the roadway,' would require them to be set on both sides." See also *Wilson v. Banner Lumber Co.*, 108 La. 590.

# EJECTMENT.

BY BENJAMIN TRAPNELL.

**472. III. FOR WHAT THINGS THE ACTION WILL LIE — 1. In General. —** See note 3.

**473. 2. Lands Subject to Easement — a. IN GENERAL. —** See note 1.  
Easements of Passage — Highways and Streets. — See note 2.

**474. Recovery Subject to Easement. —** See note 2.

**b. WHERE DEFENDANT HAS EASEMENT IN THE LAND. —** See notes 3, 4.

**3. Easements — a. IN GENERAL. —** See notes 5, 6.

**475. Private Right of Way. —** See note 2.

**b. RECOVERY OF STREETS BY MUNICIPAL CORPORATION. —** See note 4.

**476. c. LANDS CONDEMNED AS ROADBED AND RIGHT OF WAY OF RAILROADS. —** See note 1.

**472. 3. Ejectment Lies for Corporeal Hereditaments Only. —** *Inglis v. Freeman*, 137 Ala. 300, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 472; *Louisville, etc., R. Co. v. Massey*, 136 Ala. 156, 96 Am. St. Rep. 17.

**473. 1. Recovery of Land Subject to Easements. —** *Wilson v. Wightman*, 36 N. Y. App. Div. 41.

**2. Recovery of Lands Subject to Easements of Passage — Minnesota. —** *Sanborn v. Van Duyn*, 90 Minn. 215.

*Mississippi. —* *Lott v. Payne*, 82 Miss. 218, 100 Am. St. Rep. 632, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 473.

*New Jersey. —* *Bork v. United New Jersey R., etc., Co.*, 70 N. J. L. 268, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 473; *French v. Robb*, 67 N. J. L. 260, 91 Am. St. Rep. 433.

*New York. —* *Little v. American Telephone, etc., Co.*, 96 N. Y. App. Div. 559.

*North Dakota. —* *Northern Pac. R. Co. v. Lake*, 10 N. Dak. 546, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 473.

**Occupation of Street by Railroad. —** *Bork v. United New Jersey R., etc., Co.*, 70 N. J. L. 268; *Stevens v. Skaneateles R. Co.*, (Supm. Ct. Tr. T.) 42 Misc. (N. Y.) 145.

In *Pennsylvania* it has been held that ejectment will not lie against a turnpike company which, without legal authority, has laid rails on its road in front of the plaintiff's property; for this, as to him, is a mere excessive user of the easement of passage and his remedy is an action of trespass for damages. *Becker v. Lebanon, etc.*, St. R. Co., 195 Pa. St. 502.

**Possession Must Be Inconsistent with Easement. —** See *Becker v. Lebanon, etc.*, St. R. Co., 195 Pa. St. 502.

**474. 2. Recovery Must Be Subject to Easement. —** *Bork v. United New Jersey R., etc., Co.*, 70 N. J. L. 268; *Wilson v. Wightman*, 36 N. Y. App. Div. 41; *Remson v. Hyams*, (Supm. Ct. Tr. T.) 35 Misc. (N. Y.) 345, affirmed 76 N. Y. App. Div. 611. See also *Woodcock v. Baldwin*, 51 La. Ann. 989.

**3. Effect of Easement in Defendant. —** *Lott v.*

*Payne*, 82 Miss. 218, 100 Am. St. Rep. 632, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 474; *Ocean Grove Camp-Meeting Assoc. v. Berthall*, 63 N. J. L. 312; *Asbury Park v. Hawxhurst*, 67 N. J. L. 582.

**4. French v. Robb**, 67 N. J. L. 260, 91 Am. St. Rep. 433.

**Right of Possession of Street as Defense. —** See *Carter v. Chattanooga*, (Tenn. Ch. 1897) 48 S. W. Rep. 117, wherein the court said: "An action of ejectment cannot be maintained for land appropriated for public use where the right of eminent domain exists."

**5. Ejectment Inappropriate to Try Title to Easement. —** Ejectment will not lie to recover a strip of land of which the defendants are not in possession, but in which they have only an easement of passage as abutting proprietors. *Davis v. Morris*, 132 N. Car. 435.

**6. Cornick v. Arthur**, 31 Tex. Civ. App. 579; *Rutland R. Co. v. Chaffee*, 71 Vt. 84.

**475. 2. Private Right of Way Insufficient to Support Ejectment. —** *Rutland R. Co. v. Chaffee*, 71 Vt. 84.

**4. Recovery of Streets by Municipal Corporation. —** *Cleveland v. Cleveland, etc.*, R. Co., 93 Fed Rep. 113; *Lee v. Harris*, 206 Ill. 428, 99 Am. St. Rep. 176, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 475; *Ocean Grove Camp-Meeting Assoc. v. Berthall*, 63 N. J. L. 312; *Hohokus Tp. v. Erie R. Co.*, 65 N. J. L. 353; *South Amboy v. New York, etc., R. Co.*, 66 N. J. L. 623; *French v. Robb*, 67 N. J. L. 260, 91 Am. St. Rep. 433; *Asbury Park v. Hawxhurst*, 67 N. J. L. 582; *Paige v. Cherry*, 9 Ohio Cir. Dec. 364, 17 Ohio Cir. Ct. 588.

**Where an Individual Has Obstructed a Street** by erecting a part of his building within its limits, the city may maintain ejectment against him even in the absence of a prior ordinance regulating or defining obstructions, the right of action being based solely on the right of the municipality to control its streets and public places. *Hawkshurst v. Asbury Park*, 65 N. J. Eq. 406.

**476. 1. Recovery of Lands Condemned as Road-**

**477.** 7. Mines and Mining Interests — General Rule. — See note 3.

**478.** 9. Herbage, Grass, and Aftermath. — See note 5.

10. Accretions and Relictions. — See notes 7, 8.

11. Water, and Land under Water — Watercourses. — See note 10.

**479.** Land under Water. — See note 2.

12. Licenses and Privileges — *b.* WHARFAGE RIGHTS ON NAVIGABLE WATERS — See note 7.

**481.** 15. Money Chargeable on Land. — See note 1.

IV. TITLE TO SUPPORT EJECTMENT — 1. In General. — See notes

2, 3, 4, 5.

bed and Right of Way of Railway. — *Graham v. St. Louis, etc., R. Co.*, 69 Ark. 562; *Chicago, etc., R. Co. v. Englehart*, 57 Neb. 444; *Rutland R. Co. v. Chaffee*, 71 Vt. 84, 72 Vt. 404.

**Recovery of Lands Seized by Railroad.** — Ejectment will lie for land occupied as the roadbed and right of way of a railroad which has failed to take valid and regular proceedings in condemnation. *Illinois Cent. R. Co. v. Hoskins*, 80 Miss. 730, 92 Am. St. Rep. 612.

The owner may recover land occupied by the railroad company without right where he protested against its occupation unless compensation was given him, even though he delays for several years to bring his action, such delay being less than the period of limitation. *Denver, etc., R. Co. v. Wilson*, 28 Colo. 6.

Ejectment will lie where the railroad company fails to offer compensation, although the owner had notice of the location of its road on his land and allowed it to expend large sums of money in improvements for such purpose; it is the willingness of the company to make just compensation that estops him to maintain the action. *Southern R. Co. v. Hood*, 126 Ala. 312, 85 Am. St. Rep. 32.

Ejectment will not lie where the owner has agreed to waive the prepayment of the award in condemnation proceedings and the railroad company, in reliance on such waiver, has entered and built its road. *Williams v. Hutchinson, etc., R. Co.*, 62 Kan. 412, 84 Am. St. Rep. 408.

**Rule Not Applicable to Street Railway.** — Ejectment will not lie on behalf of a street railway company whose use of a public street, under a franchise from the municipal authorities, is interfered with and obstructed by another railway company. *Fresno St. R. Co. v. Southern Pac. R. Co.*, 135 Cal. 202.

**477.** 3. Recovery of Mining Claims. — *Allen v. Myers*, 1 Alaska 114; *Tyce Consol. Min. Co. v. Langstedt*, 1 Alaska 439; *Deeney v. Mineral Creek Milling Co.*, 11 N. Mex. 279. See also *Lockhart v. Wills*, 9 N. Mex. 344. Compare *Louisville, etc., R. Co. v. Massey*, 136 Ala. 156, 96 Am. St. Rep. 17.

**Who May Set Up Defendant's Alienage.** — In an action of ejectment between individuals to recover a mining claim, the defendant cannot impeach the plaintiff's title on the ground that the original locator was an alien; the government alone can raise that objection. *Wilson v. Triumph Consol. Min. Co.*, 19 Utah 66, 75 Am. St. Rep. 718.

**478.** 5. Right to Take Herbage, etc., as Supporting Ejectment. — *Inglis v. Freeman*, 137 Ala. 300, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 478.

7. Ejectment for Accretions. — *McBaine v. Johnson*, 155 Mo. 191; *West Missouri Land Co. v. Thompson*, 157 Mo. 647.

8. Ejectment for Relictions. — See *Hanson v. Stinehoff*, 139 Cal. 169.

10. Ejectment Not Maintainable for Watercourses. — *Conover v. Atlantic City Sewerage Co.*, 70 N. J. L. 315.

**479.** 2. Ejectment for Land under Water. — It is held in *Wisconsin* that the title to land under the waters of Lake Michigan is in the state, and hence that the title of a riparian owner stops at the water's edge, and he cannot maintain ejectment for the submerged land beyond it. *Illinois Steel Co. v. Bilot*, 109 Wis. 418, 430, 83 Am. St. Rep. 905.

7. Ejectment for Wharfage Rights. — In *New Jersey*, by virtue of local usage, declared in *Gough v. Bell*, 22 N. J. L. 441, and *Stevens v. Paterson, etc., R. Co.*, 34 N. J. L. 532, and confirmed by the Wharf Act of 1851 (3 Gen. St., p. 3753), the shore owner has a license, irrevocable after execution, to build wharves in front of his lands down to low-water mark; and ejectment will lie for a wharf so built, though title to the land on which it stands is in the state. *Palen v. Ocean City*, 64 N. J. L. 669.

**481.** 1. Money Chargeable on Land. — One who has no estate or interest in land cannot maintain ejectment therefor, though the former owner has by his will charged her support on such land, to be provided in the first instance by his executor. *Borum v. Gregory*, 119 Ga. 766.

2. Plaintiff Must Recover on Strength of His Own Title — *United States* — *Smyth v. New Orleans Canal, etc., Co.*, 35 C. C. A. 646, 93 Fed. Rep. 899; *Cleveland v. Bigelow*, 98 Fed. Rep. 242, 39 C. C. A. 47; *West v. East Coast Cedar Co.*, 110 Fed. Rep. 725, affirmed (C. C. A.) 113 Fed. Rep. 737.

*Alabama.* — *Alabama Mineral Land Co. v. Baker*, 119 Ala. 351; *Stiff v. Cobb*, 126 Ala. 381, 85 Am. St. Rep. 38; *Etowah Min. Co. v. Doe*, 127 Ala. 663; *Doe v. Edmondson*, 127 Ala. 445; *Bromberg v. Smee*, 130 Ala. 601; *Jackson Lumber Co. v. McCreary*, 137 Ala. 278.

*Arkansas.* — *Dickinson v. Thornton*, 65 Ark. 610.

*Connecticut.* — *Cahill v. Cahill*, 75 Conn. 522.

*Delaware.* — *Pritchard v. Roe*, 3 Penn. (Del.) 128.

*Florida.* — *Burt v. Florida Southern R. Co.*, 43 Fla. 339.

*Georgia.* — *Dodge v. Williams*, 107 Ga. 410; *Ashley v. Cook*, 109 Ga. 653.

*Illinois.* — *McCauley v. Mahon*, 174 Ill. 384; *Terhune v. Porter*, 212 Ill. 595.

*Indiana.* — *Wilson v. Carrico*, 155 Ind. 570.



**482.** See note 1.

**2. Equitable Interest.** — See note 2.

**483.** In the Federal Courts. — See notes 1, 2.

**By Statute in Several of the States.** — See note 3.

**Land Certificates and Receiver's Receipts.** — See note 4.

**484.** **3. Evidences of Title — a. IN GENERAL.** — See note 2.

*Louisiana.* — *Rowson v. Barbe*, 51 La. Ann. 347; *Willet v. Andrews*, 51 La. Ann. 486; *Wornden v. Fisher*, 52 La. Ann. 576.

*Massachusetts.* — *Frazee v. Nelson*, 179 Mass. 456, 88 Am. St. Rep. 391.

*Michigan.* — *Nowlen v. Hall*, 128 Mich. 274.

*Missouri.* — *Robinson v. Claggett*, 149 Mo. 153; *Becker v. Stroehrer*, 167 Mo. 306; *Creech v. Childers*, 156 Mo. 338.

*Nebraska.* — *Abbott v. Coates*, 62 Neb. 247.

*New Jersey.* — *Meyers v. Conover*, 65 N. J. L. 187; *Palen v. Ocean City*, 64 N. J. L. 669.

*New York.* — *Jarvis v. Lynch*, 157 N. Y. 445. *North Carolina.* — *Beddard v. Harrington*, 124 N. Car. 51.

*North Dakota.* — *Conrad v. Adler*, (N. Dak. 1904) 100 N. W. Rep. 722.

*Ohio.* — *Waite v. First German Evangelical Presb. Church*, 8 Ohio Dec. 158, 6 Ohio N. P. 434.

*Rhode Island.* — *Smith v. Haskins*, 22 R. I. 6. *South Carolina.* — *Hodge v. Hodge*, 56 S. Car. 263.

*Tennessee.* — *Hubbard v. Godfrey*, 100 Tenn. 150; *Lowry v. Whitehead*, 103 Tenn. 396; *Winters v. Hainer*, 107 Tenn. 337.

*Virginia.* — *Reusens v. Cassell*, 100 Va. 143.

*West Virginia.* — *Summerfield v. White*, 54 W. Va. 311, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 481; *Ronk v. Higginbotham*, 54 W. Va. 137.

**481. 3. Burden of Proof on Plaintiff — Alabama.** — *Edmondson v. Anniston City Land Co.*, 128 Ala. 589.

*Delaware.* — *Doe v. Roe*, 2 Marv. (Del.) 221.

*Illinois.* — *North Chillicothe v. Burr*, 185 Ill. 322.

*Indian Territory.* — *Robinson v. Nail*, 2 Indian Ter. 509.

*Iowa.* — *Klinkner v. Schmidt*, 114 Iowa 605.

*Kentucky.* — *Chenault v. Quisenberry*, (Ky. 1900) 56 S. W. Rep. 410.

*Maryland.* — *Richardson v. Baltimore, etc.*, R. Co., 89 Md. 126.

*Michigan.* — *Beecher v. Ferris*, 124 Mich. 9. *New York.* — *Southampton v. Betts*, 163 N. Y. 454, affirming 21 N. Y. App. Div. 435.

*Pennsylvania.* — See *Scott v. Nickum*, 193 Pa. St. 371.

*Texas.* — *Halsell v. McCutcheon*, (Tex. Civ. App. 1901) 64 S. W. Rep. 72.

**On the General Issue in ejectment the plaintiff has the right to rely upon any title that the evidence may disclose.** *Porter v. Gaines*, 151 Mo. 560.

**4. Hockett v. Alston**, 49 C. C. A. 180, 110 Fed. Rep. 910; *Jenkins v. Southern R. Co.*, 109 Ga. 35; *Troth v. Smith*, 68 N. J. L. 36; *Waite v. First German Evangelical Presb. Church*, 8 Ohio Dec. 158, 6 Ohio N. P. 434; *Summerfield v. White*, 54 W. Va. 311, quoting 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 481.

**5. Proof by Defendant of Outstanding Title.** —

*Waters v. Durrence*, 119 Ga. 934; *Rowson v. Barbe*, 51 La. Ann. 347; *Ronk v. Higginbotham*, 54 W. Va. 137. And see *Altschul v. Casey*, 45 Oregon 182, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 481.

**Lease by Plaintiff to Third Person.** — The plaintiff cannot recover where it is shown that he has made a valid lease for ninety-nine years to a third person. *State v. Cincinnati Tin, etc., Co.*, 11 Ohio Cir. Dec. 587, 21 Ohio Cir. Ct. 218.

**482. 1. Thomas v. Rauer**, 62 Kan. 568.

**2. Equitable Interest Insufficient to Support Ejectment at Common Law — Alabama.** — *Sharpe v. Brantley*, 123 Ala. 105; *Harrison v. Alexander*, 135 Ala. 307.

*Michigan.* — *Retan v. Sherwood*, 120 Mich. 496; *Porter v. Osmun*, 135 Mich. 361.

*Missouri.* — *Nalle v. Parks*, 173 Mo. 616; *Nalle v. Thompson*, 173 Mo. 595; *De Lassus v. Winn*, 174 Mo. 636.

*Tennessee.* — *Hubbard v. Godfrey*, 100 Tenn. 150.

*Virginia.* — *Virginia Iron, etc., Co. v. Crane's Nest Coal, etc., Co.*, 102 Va. 405.

*Washington.* — *Johnston v. Gerry*, 34 Wash. 524, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 482.

*West Virginia.* — *Chapman v. Mill Creek Coal, etc., Co.*, 54 W. Va. 201, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 482.

*Wisconsin.* — *Gibson v. Gibson*, 102 Wis. 501.

**Where Equitable Owner Has Immediate Right of Possession.** — *Lewis v. Hamilton*, 26 Colo. 263, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 482.

**Right to Title.** — Title, and not the bare right of title, to be perfected by the correction of an alleged mistake in the deed by which the plaintiff claims, must be shown in order to entitle him to recover in ejectment. *Robinson v. Claggett*, 149 Mo. 153.

**483. 1. Rule as to Equitable Title in Support of Action in Federal Courts.** — *Lockhart v. Johnson*, 181 U. S. 516.

**2. Notwithstanding the statutes of a state making different requirements, ejectment can be maintained in the United States courts only on a strict legal title.** *Cleveland v. Bigelow*, 98 Fed. Rep. 242, 39 C. C. A. 47.

**3. Equitable Title in Support of Ejectment by Statute.** — *Pope v. Nichols*, 61 Kan. 230; *Wright v. Fort*, 126 N. Car. 615; *Westfelt v. Adams*, 131 N. Car. 379; *Skinner v. Terry*, 134 N. Car. 305; *Sengfelder v. Hill*, 21 Wash. 371; *Johnston v. Gerry*, 34 Wash. 524. See also *State v. Johanson*, 26 Wash. 668.

**4. Land Certificates and Receivers' Receipts as Evidence of Legal Title.** — *Ledbetter v. Borland*, 128 Ala. 418; *McClung v. Penny*, 12 Okla. 303. See also *Shy v. Brockhouse*, 7 Okla. 35.

**484. 2. Evidences of Title in General.** — *Swainson v. Scott*, 111 Tenn. 140.

**A Warranty Deed executed and delivered by**

**484.** *b.* PAPER TITLE. — See note 3.

**485.** See notes 1, 3.

**486.** *c.* ADVERSE POSSESSION. — See note 1.

*d.* PRIOR POSSESSION — (1) *In General.* — See note 3.

the defendant to the plaintiff establishes a *prima facie* right to the premises in the plaintiff. *Ashton v. Ashton*, 11 S. Dak. 610.

**484. 3. Proof of Title Back to Government or Grantor in Possession.** — *Jackson Lumber Co. v. McCreary*, 137 Ala. 278; *Rawls v. Johns*, 54 S. Car. 394; *Hodge v. Hodge*, 56 S. Car. 263; *Thomas v. Dempsey*, 53 S. Car. 216.

**Who May Attack Regularity of Patent.** — Where a patent produced by the plaintiff as the source of his title is regular and valid on its face, irregularities therein cannot be taken advantage of by one claiming in hostility to the patent, whose sole claim comes from a hostile entry and a holding adverse to the legal title, but only by one with equities superior to the plaintiff's, or connected with the paramount source. *Phillips v. Carter*, 135 Cal. 604, 87 Am. St. Rep. 152.

**485. 1. Proof of Possession in One Grantor Where Chain Does Not Extend to Government.** — *Terhune v. Porter*, 212 Ill. 595; *Troth v. Smith*, 68 N. J. L. 36; *Baxter v. Brown*, 26 R. I. 381, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 484; *Summerfield v. White*, 54 W. Va. 311, quoting 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 484.

**Title in, and Possession by, Grantor.** — Where the plaintiff produces a deed to himself and proves title in his grantor and possession by him, he thereby establishes a *prima facie* title in himself. *Stowell v. Spencer*, 190 Ill. 453.

**Long Possession by Grantor.** — Proof that the plaintiff's grantors were in possession for nearly fifty years, and executed deeds as owners, is sufficient to establish in the plaintiff a title from the government, in the absence of proof to the contrary. *Dawson v. Falls City Boat Club*, 125 Mich. 433.

**When Plaintiff Cannot Recover.** — Where the plaintiff does not derain his title from the government or from any source of title shown by affidavit or oath to be a common source of title, he cannot recover. *North Chillicothe v. Burr*, 178 Ill. 218.

Where there is no proof of a common source of title, and none that one under whom the plaintiff claims, and whose deed is offered as a link in the chain of title, ever had any title, the plaintiff cannot recover. *Rogers v. Vanderburg*, 168 Mo. 430.

**3. Convey by John L. Roper Lumber Co.**, 126 N. Car. 499; *Baxter v. Brown*, 26 R. I. 381, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 485.

**Prior Unrecorded Deed.** — Where the plaintiff has shown a complete chain of title from the original owner by deeds duly recorded, he has the *prima facie* right of possession, notwithstanding he has shown that the original owner made a deed to a stranger which was executed prior to that under which plaintiff claims, but which was not of record when he took his deed, defendant not claiming under such prior deed. *Barber v. Robinson*, 78 Minn. 193.

**Presumption of Possession.** — In *New York*

the rule is laid down that "in an action to recover real property the person who establishes legal title to the premises is presumed to have been in possession thereof within the time required by law, and the occupation of the premises by another person is deemed to have been under, and in subordination to, the legal title, unless the premises have been held and possessed adversely to the legal title for twenty years before the commencement of the action." *Deering v. Riley*, 38 N. Y. App. Div. 164, affirmed 167 N. Y. 184.

**486. 1. Title by Adverse Possession — Alabama.** — *Barron v. Barron*, 122 Ala. 194; *Tennessee Coal, etc., Co. v. Linn*, 123 Ala. 112, 82 Am. St. Rep. 108.

*Illinois.* — *Kepley v. Scully*, 185 Ill. 52.

*New Mexico.* — *Solomon v. Yrisarri*, 9 N. Mex. 480.

*Pennsylvania.* — *Hart v. Williams*, 189 Pa. St. 31.

*South Carolina.* — *Hodge v. Hodge*, 56 S. Car. 263; *Thomas v. Dempsey*, 53 S. Car. 216; *Kolb v. Jones*, 62 S. Car. 193.

*Utah.* — *Snow v. Rich*, 22 Utah 123.

*West Virginia.* — *Summerfield v. White*, 54 W. Va. 311.

**3. Prior Possession as Evidence Against Intruder — United States.** — *Bradshaw v. Ashley*, 180 U. S. 59, affirming 14 App. Cas. (D. C.) 485.

*Alabama.* — *Chessen v. Harrelson*, 119 Ala. 435; *Price v. Cooper*, 123 Ala. 392; *Barrett v. Kelly*, 131 Ala. 378; *Bowling v. Mobile, etc., R. Co.*, 128 Ala. 550.

*California.* — *Hanson v. Stinehoff*, 139 Cal. 169; *Smith v. Hicks*, 139 Cal. 217.

*District of Columbia.* — *Bradshaw v. Ashley*, 14 App. Cas. (D. C.) 485, affirmed 180 U. S. 59; *Chesapeake Beach R. Co. v. Washington, etc., R. Co.*, 23 App. Cas. (D. C.) 587.

*Georgia.* — *Horton v. Murden*, 117 Ga. 72; *Watkins v. Nugen*, 118 Ga. 372.

*Illinois.* — *Casey v. Kimmel*, 181 Ill. 154; *Harrell v. Enterprise Sav. Bank*, 183 Ill. 538.

*Michigan.* — *Olin v. Henderson*, 120 Mich. 149.

*Mississippi.* — *Wilkinson v. Strickland*, (Miss. 1903) 35 So. Rep. 177; *Anderson v. Moore*, 84 Miss. 400.

*Nebraska.* — *Robinson v. Gantt*, (Neb. 1901) 95 N. W. Rep. 506.

*Pennsylvania.* — *Beam v. Gardner*, 18 Pa. Super. Ct. 245, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 486.

*South Dakota.* — *Pendo v. Beakey*, 15 S. Dak. 344.

*Virginia.* — *Rhule v. Seaboard Air Line R. Co.*, 102 Va. 343.

**Prior Possession of Ancestor.** — *Compare Cahill v. Cahill*, 75 Conn. 522.

**Actual Prior Possession of Vendor.** — In ejectment against a vendee in default the actual prior possession of the vendor at the time when the contract was executed is sufficient to entitle him to recover, whether he be the owner of the fee or not. *Coleman v. Stalnacke*, 15 S. Dak. 242.

- 488.** Proof of Outstanding Title by Defendant Inadmissible. — See note 1.  
 Defendant in Lawful Possession. — See note 3.  
**489.** (2) What Amounts to Possession. — See note 4.  
**490.** Cutting Trees or Taking Herbage. — See note 3.  
**491.** f. TITLE FROM COMMON SOURCE. — See note 5.  
**493.** Superior Title from Common Source in Defendant. — See note 1.

**Tennessee — Must Show Legal Title.** — In *Tennessee*, where ejectment is regarded as a real action, and not as possessory merely, the fact that the defendant is a mere trespasser is of no consequence where the plaintiffs have failed to show that they have the legal title, having been in possession under color of title for less than the statutory period. *Hubbard v. Godfrey*, 100 Tenn. 150; *Stockley v. Cissna*, (C. C. A.) 119 Fed. Rep. 812 (construing the Tennessee statutes).

**488. 1. Proof of Outstanding Title Inadmissible Against Person Claiming under Prior Possession.** — *Bradshaw v. Ashley*, 14 App. Cas. (D. C.) 485, affirmed 180 U. S. 59; *Ashley v. Cook*, 109 Ga. 653; *Casey v. Kimmel*, 181 Ill. 154. Compare *Hammond v. Shepard*, 186 Ill. 235, 78 Am. St. Rep. 274, in which it is said that, where the plaintiff has failed to show a *prima facie* title in himself, he is in no position to urge that the defendants are mere trespassers and insist that they cannot set up an outstanding title to defeat the action.

**Surrender by Tenant to Holder of Conflicting Title.** — Where a tenant takes advantage of his position to turn over the premises to the holder of a conflicting title, such holder will not be regarded otherwise than as an intruder; and when sued in ejectment by the landlord he cannot set up title in himself or in a third person to defeat the action. *Kepley v. Scully*, 185 Ill. 52. See also *Wilson v. Braden*, 48 W. Va. 156.

**3. Prior Possession Insufficient Against Defendant Lawfully in Possession.** — *McVey v. Carr*, 159 Mo. 648.

**489. 4. What Amounts to Possession by Plaintiff in General.** — Where the claimant, upon the face of the county records, has color of title to the land, is regarded in its neighborhood as the owner, pays taxes on it for many years, and disposes of its products, there is such a subjection of the land to his will and dominion, even without proof of actual physical occupancy, as entitles him to possession as against a mere intruder. *Robinson v. Gantt*, (Neb. 1901) 95 N. W. Rep. 506.

**490. 3. Cutting Trees Insufficient to Constitute Possession.** — *Chessen v. Harrelson*, 119 Ala. 435; *Robinson v. Claggett*, 149 Mo. 153.

**491. 5. Proof of Title Back of Common Source Unnecessary.** — *Colorado.* — *Bay State Min., etc., Co. v. Jackson*, 27 Colo. 139.

*District of Columbia.* — *Morris v. Wheat*, 11 App. Cas. (D. C.) 201; *Reid v. Anderson*, 13 App. Cas. (D. C.) 30; *Chesapeake Beach R. Co. v. Washington, etc., R. Co.*, 23 App. Cas. (D. C.) 587.

*Illinois.* — *Stalford v. Goldring*, 197 Ill. 156; *Brown v. Schintz*, 203 Ill. 136.

*Indian Territory.* — *Reynolds v. Clowdus*, (Indian Ter. 1903) 76 S. W. Rep. 277.

*Kentucky.* — *Tarvin v. Walker's Creek Coal, etc., Co.*, (Ky. 1904) 80 S. W. Rep. 504.

*Missouri.* — *Worley v. Hlicks*, 161 Mo. 340; *Stevenson v. Black*, 168 Mo. 549.

*Nebraska.* — *McCarthy v. Birmingham*, (Neb. 1902) 89 N. W. Rep. 1003.

*New Mexico.* — *Solomon v. Yrisarri*, 9 N. Mex. 480.

*North Carolina.* — *Wiseman v. Greene*, 123 N. Car. 395.

*South Carolina.* — *Thomas v. Dempsey*, 53 S. Car. 216; *Garrett v. Weinberg*, 54 S. Car. 127; *Rawls v. Johns*, 54 S. Car. 394; *Hodge v. Hodge*, 56 S. Car. 263; *Kilgore v. Kirkland*, 69 S. Car. 78.

*South Dakota.* — *Horswill v. Farnham*, 16 S. Dak. 414.

*Tennessee.* — *Smith v. Turner*, (Tenn. Ch. 1898) 48 S. W. Rep. 396; *Hyder v. Butler*, 103 Tenn. 289; *Carver v. Maxwell*, 110 Tenn. 75.

*Virginia.* — *Chesterman v. Bolling*, 102 Va. 471.

*West Virginia.* — *Summerfield v. White*, 54 W. Va. 311, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 491.

**Elder Title Prevails.** — *Wilhite v. Coombs*, (Indian Ter. 1904) 82 S. W. Rep. 772; *Simpson v. Kilpatrick*, 148 Mo. 507; *Thummel v. Holden*, 149 Mo. 677. Compare *Page v. Simpson*, 188 Pa. St. 393.

Under the *Illinois* statute providing for a sworn statement at the trial of the common source of title, an affidavit not made by the plaintiff himself must show that the affiant is his agent or attorney. *North Chillicothe v. Burr*, 178 Ill. 218. The object of the *Illinois* statute was to relieve the plaintiff from the burden of proving the defendant's chain of title as well as his own, unless the defendant would deny by counter affidavit that he claimed from the alleged common source of title. *North Chillicothe v. Burr*, 185 Ill. 322, citing *Smith v. Laatsch*, 114 Ill. 271. The effect of the defendant's denial, under the *Illinois* statute, is to leave upon the plaintiff the burden of proving both chains of title back to the common source, and that he himself has the better title. *Bradley v. Lightcap*, 201 Ill. 511. A bargain and sale deed from the common source, which recites no consideration, and for which none is shown by the evidence, is insufficient as a foundation for the plaintiff's claim of title, though it be prior to the deed under which the defendant claims. *Catlin Coal Co. v. Lloyd*, 180 Ill. 398, 72 Am. St. Rep. 216.

**Parol Evidence of Common Source.** — See *Thomas v. Dempsey*, 53 S. Car. 216.

**Burden of Proof.** — Where the defendant denies on oath that it claims title through a common source with the plaintiff, the burden is on the plaintiff to show that they do claim through a common source and that he has the better title, or to show that he has a title derived from a paramount source. *North Chillicothe v. Burr*, 185 Ill. 322.

**493. 1. Superior Title from Common Source**



**493.** Claim Through Title Paramount to the Common Source. — See notes 4, 5.

**494.** 4. When Title Must Exist in Plaintiff. — See note 2.

Title Acquired Subsequent to Suit. — See note 3.

Conveyance Pending Suit. — See note 5.

5. Right of Possession. — See note 6.

Mere Legal Title Insufficient. — See note 7.

**496.** Immediate Right of Possession Necessary. — See note 1.

6. Vendor and Vendee — *a.* ACTION BY VENDOR — (1) *In General.*

— See note 2.

**497.** Default in Payment of Instalment. — See note 1.

Where Vendee Is Not in Default. — See notes 2, 3.

**498.** (3) *Repayment of Purchase Money Already Paid.* — See notes 4, 5.

**500.** (4) *Demand and Notice to Quit* — (b) *Vendee in Default.* — See note 2.

in Defendant. — New England Mortg. Security Co. v. Clayton, 119 Ala. 361.

**493.** 4. Claim by Defendant Through Title Paramount to Common Source. — Reid v. Anderson, 13 App. Cas. (D. C.) 30.

5. Defendant Must Connect Himself with Title Paramount to Common Title. — Greenfield v. McIntyre, 112 Ga. 698, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 493; Donehoo v. Johnson, 120 Ala. 438.

**494.** 2. When Title Must Exist in Plaintiff — *In General.* — Burch v. Daniel, 109 Ga. 256, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 494; Morehead v. Hall, 132 N. Car. 122.

3. Title Acquired Subsequent to Suit. — Dickinson v. Thornton, 65 Ark. 610; Burch v. Daniel, 109 Ga. 259, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 494; Nowlen v. Hall, 128 Mich. 274; Baber v. Henderson, 156 Mo. 566, 79 Am. St. Rep. 540.

5. Conveyance Pending Suit. — Suwannee Turpentine Co. v. Baxter, 109 Ga. 597, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 494.

*In Alabama* the rule is that the plaintiff must not only have title at the commencement of the suit, but also at the time of the trial. Etowah Min. Co. v. Doe, 127 Ala. 663.

6. Necessity of Right of Possession in Plaintiff. — Lewis v. Hamilton, 26 Colo. 269, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 494; Lockhart v. Wills, 9 N. Mex. 344; Sowles v. Carr, 70 Vt. 630.

7. Mere Naked, Legal Title in Plaintiff Insufficient. — To enable a lessee to recover in ejectment against a third person he must show not only a lease but an actual taking of possession under such lease. Watson v. Hue, 9 Pa. Dist. 519.

*In Connecticut* it is held that a bare possessory right will not support ejectment, but there must be proof of legal title in the plaintiff. Cahill v. Cahill, 75 Conn. 522, citing Tracy v. Norwich, etc., R. Co., 39 Conn. 382.

**496.** 1. Immediate Right of Possession Necessary. — Adkins v. Spurlock, 46 W. Va. 139, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 496.

*Land Held in Trust.* — The heir-at-law cannot maintain ejectment for land in the possession of testamentary trustees where some of the purposes of the trust are valid and are not yet satisfied. Simmons v. Hadley, 63 N. J. L. 227.

*Wisconsin* — Right Acquired Pending Action. — Rev. Stat. Wis. 1898, § 3087, provides that if

either party shall acquire title and right of possession pending the action, judgment may, upon certain terms, be entered according to the rights of the parties at the time of the trial. Bell v. Peterson, 105 Wis. 607.

2. Action by Vendor Against Vendee in Default — Haile v. Smith, 128 Cal. 415; Howard v. Hewitt, 139 Cal. 614; Coggsall v. Marine Bank Co., 63 Ohio St. 96, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 498; Walker v. Arnold, 71 Vt. 263.

*Where Purchase-money Notes Transferred.* — The title of the vendee does not become complete so as to defeat an action of ejectment by the transferee of the vendor under the rule, where, as part of the agreement for the transfer of the notes without recourse, he also agreed to transfer the title, and this was actually done later on. Georgia Mills, etc., Co. v. Clarke, 112 Ga. 253.

A Second Vendee. — See Bolton v. Roebuck, 77 Miss. 710.

*Enforcement of Payment of Purchase Money.* — Stevenson v. Scott, 188 Pa. St. 234.

**497.** 1. Default by Vendee of Payment of One Instalment. — Williams v. Long, 139 Cal. 186.

2. Action Not Maintainable Against Vendee Not in Default. — Walker v. David, 68 Ark. 544; Hutchinson v. Coonley, 209 Ill. 437; Titcomb v. Fonda, etc., R. Co., (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 630, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 497.

3. Burden of Proof in Action by Vendor Against Vendee. — Titcomb v. Fonda, etc., R. Co., (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 635, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 497.

**498.** 4. Necessity of Repayment by Vendor of Purchase Money Prior to Action. — Williams v. Long, 139 Cal. 186.

*Vendee's Right to Purchase Money No Defense.* — Whatever cause of action the vendee may have for the purchase money which he has already paid, or for the value of his improvements, it constitutes no defense to ejectment by the vendor. Haile v. Smith, 128 Cal. 415.

5. Brixen v. Jorgensen, 28 Utah 290.

**500.** 2. Jurisdictions Requiring Demand on Vendee in Default. — *In Mississippi* it is held that one who is in possession under a bond for title is legally and rightfully so until his vendor tenders him a proper conveyance and demands payment of unpaid purchase money. Bolton v. Roebuck, 77 Miss. 710.

- 501.** (5) *Estoppel to Deny Title.* — See note 1.  
*b. ACTION BY VENDEE.* — See note 3.
- 502.** 7. *Mortgagor and Mortgagee* — *a. ACTION BY MORTGAGOR* — (1) *Against Mortgagee* — (a) *In General.* — See note 1.  
*Jurisdictions Regarding Mortgage as Lien.* — See note 2.
- 503.** See note 2.  
*Possession of Purchaser at Void Foreclosure Sale.* — See notes 3, 4.
- 504.** (b) *Payment or Tender After Default* — *Receipt of Rents and Profits.* — See note 1.  
(2) *Against Third Person.* — See note 5.  
*b. ACTION BY MORTGAGEE* — (1) *Against Mortgagor* — (a) *In General* — *After Condition Broken.* — See note 6.
- 505.** *Foreclosure Proceedings as Prerequisite.* — See note 4.  
*Before Default.* — See note 5.
- 506.** *Jurisdiction in Which Legal Title Remains in Mortgagor.* — See note 1.  
(c) *Evidence of Outstanding Title Inadmissible* — *Outstanding Prior Mortgage.* — See note 5.
- 507.** 8. *Action by Purchaser at Foreclosure Sale.* — See note 4.

**501.** 1. *Estoppel by Vendee to Deny Vendor's Title.* — *Coleman v. Stalnacke*, 15 S. Dak. 242.

3. *Action Against Intruder.* — A vendee in possession under a contract of sale may maintain ejectment against one who has ousted him. *Olin v. Henderson*, 120 Mich. 149.

**502.** 1. *The Assignee of a Mortgage.* — *Benton Land Co. v. Zeitler*, 182 Mo. 251.

2. *Action Not Maintainable by Mortgagor in Jurisdictions Regarding Mortgage as Lien.* — *Hooper v. Young*, 140 Cal. 274, 98 Am. St. Rep. 56.

**503.** 2. *Rule in Michigan as to Action by Mortgagor.* — *Bowen v. Brogan*, 119 Mich. 218, 75 Am. St. Rep. 387.

The same rule is adopted in *North Dakota*, namely, that the mortgagor has a right to the possession, even after default, as against the mortgagee, and at all times until title has been acquired by a valid foreclosure. *McClory v. Ricks*, 11 N. Dak. 38.

3. *Action Against Purchaser at Void Foreclosure Sale.* — Under the statutes of *North Dakota*, which declare a mortgage a mere security giving no right of possession, either before or after default, the possession under a mortgage, based upon a void foreclosure by advertisement, is unlawful, and the possessor cannot defend against an action of ejectment. *McClory v. Ricks*, 11 N. Dak. 38.

In *Colorado* it is held that the mortgagor or his successor in interest, having the equitable title and the legal right of possession under the mortgage, may recover against a purchaser at a void foreclosure sale. *Lewis v. Hamilton*, 26 Colo. 263; *Ashley v. Cook*, 109 Ga. 653; *Sims v. Steadman*, 62 S. Car. 300.

4. *Entering with Consent of Mortgagor.* — Ejectment will not lie against the purchaser at a void foreclosure sale who enters with the consent of the mortgagor; for such consent is a waiver of the right of the mortgagor, under the laws of *Kansas*, to retain possession until a valid decree of foreclosure is rendered and a valid sale made under it. *Kelso v. Norton*, 65 Kan. 778, 93 Am. St. Rep. 308.

**504.** 1. *Receipt of Rents, etc., as Satisfaction*

*of Mortgage.* — *Compare Gunter v. Smith*, 113 Ga. 18.

5. *Action by Mortgagor Against Third Person.* — Although it is the rule in *Maryland* that the existence of an outstanding mortgage is a bar to ejectment by the mortgagor unless it contains a covenant that he shall retain possession until default, and that even so he cannot maintain the action after default, where by the terms of the mortgage the mortgagee's right of entry for default in payment of interest does not accrue until ninety days after demand of payment, the mortgagor may maintain ejectment even after default where no such demand has been made. *Richardson v. Baltimore, etc., R. Co.*, 89 Md. 126.

6. *Action by Mortgagee Against Mortgagor After Condition Broken.* — *Dean v. Gorton*, 177 Ill. 624; *Kransz v. Nedelhofen*, 193 Ill. 477; *Bradfield v. Hale*, 67 Ohio St. 316.

**505.** 4. *In Michigan Foreclosure Proceedings a Prerequisite.* — *Dawson v. Peter*, 119 Mich. 274.

5. *Action Against Mortgagor Before Default.* — The mortgagee cannot maintain ejectment before default where the mortgage provides that upon breach of condition the mortgagors waive all right to possession of the premises, and that it shall thereupon be lawful for the mortgagee to enter and take possession; for the right of the mortgagors to continue in possession until default is a necessary implication from the language used. *Kransz v. Uedelhofen*, 193 Ill. 477.

**506.** 1. *Jurisdictions Not Allowing Action by Mortgagee.* — *Kelso v. Norton*, 65 Kan. 778, 93 Am. St. Rep. 308; *Faulkner v. Cody*, (Supm. Ct. Spec. T.) 45 Misc. (N. Y.) 64.

5. *Evidence of Outstanding Prior Mortgage Inadmissible.* — *Benton Land Co. v. Zeitler*, 182 Mo. 276, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 506.

**507.** 4. *Action by Purchaser at Foreclosure Sale.* — *Woods v. Soucy*, 184 Ill. 568.

*Failure to Show Valid Foreclosure Sale.* — The purchaser cannot maintain ejectment against a vendee in possession under a contract subsequent to the mortgage, who was not made a



**508.** 11. Landlord and Tenant — *a.* ACTION BY LANDLORD — (1) *Against Tenant* — (a) In General. — See note 1.

(b) Demand and Notice to Quit. — See note 4.

**511.** Waiver of Notice. — See note 1.

(c) Estoppel to Deny Title. — See note 2.

**512.** 12. Joint Tenants and Tenants in Common — *a.* ACTIONS AGAINST THIRD PERSONS — Separate Action by Cotenant. — See notes 5, 6.

**513.** *b.* ACTIONS BY TENANTS INTER SE. — See note 3.

**515.** 14. Tenant for Life, Years, etc. — See note 1.

**516.** 17. Reversioner — *b.* BREACH OF CONDITION SUBSEQUENT IN DEED. — See note 5.

Entry or Demand. — See note 6.

**517.** *c.* ASSIGNEES OF REVERSION. — See note 2.

18. Remaindermen. — See note 4.

**518.** 19. Devisee and Legatee, Heir, and Personal Representative — *a.* ACTION BY DEVISEE OR LEGATEE. — See note 2.

party to the foreclosure suit. *Titcomb v. Fonda*, etc., R. Co., (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 630.

**508.** 1. Action by Landlord Against Tenant After Expiration of Lease. — See *Heman v. Wade*, 74 Mo. App. 339; *Kopper v. Fulton*, 71 Vt. 211.

4. Tenancies at Will. — *Zilch v. Young*, 184 Ill. 333, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 508, 509.

Under the *Kentucky* statute the right to maintain ejectment against a tenant at will does not accrue until notice has been given him requiring him to remove. *Howard v. Blanton*, (Ky. 1899) 49 S. W. Rep. 461. See also *Davis v. Clinton*, (Ky. 1904) 79 S. W. Rep. 529.

**511.** 1. Waiver of Notice. — See *Belinski v. Brand*, 76 Ill. App. 404.

2. Estoppel to Deny Landlord's Title. — *Shy v. Brockhouse*, 7 Okla. 35; *Ayotte v. Johnson*, 25 R. I. 404, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 511; *Golden v. Galveston*, 20 Tex. Civ. App. 584.

**512.** 5. Jurisdictions Permitting Tenant in Common to Recover Aliquot Part Only. — *Baber v. Henderson*, 156 Mo. 566, 79 Am. St. Rep. 540.

Under Code Civ. Pro. N. Y., § 1500, a joint tenant or a tenant in common of land may maintain ejectment for his undivided share where the evidence shows that those in whom the other shares are vested may *prima facie* maintain an action to recover possession of their respective shares. *Deering v. Reilly*, 38 N. Y. App. Div. 164, affirmed 167 N. Y. 184.

6. Jurisdictions Allowing Tenant in Common to Recover Entire Premises. — *Dorlan v. Westervitch*, 140 Ala. 283; *Shelton v. Wilson*, 131 N. Car. 499; *Griswold v. Minneapolis*, etc., R. Co., 12 N. Dak. 435, 102 Am. St. Rep. 572. See also *Binswanger v. Henninger*, 1 Alaska 509.

When the Defendant Is a Mere Trespasser the plaintiffs may recover possession of the whole premises though they own but one-half thereof. *McGuire v. Lynch*, 126 Cal. 576.

**Must Show Who Owns Residue.** — The rule is that a tenant in common may bring ejectment and recover of a stranger the whole property, where he shows that he has title to an undivided share and, by the same evidence, shows that others than the defendant have title to the residue. But if he proves his own title to an undivided interest and fails to show who are the

owners of the residue, he is entitled to recover only his undivided interest. *Morehead v. Hall*, 126 N. Car. 213.

**513.** 3. Actions by Tenants Inter Se. — *Baum v. Bowen*, 53 S. Car. 471.

**515.** 1. Action by Tenant for Life. — *Towns v. Towns*, 121 Ala. 422.

Action Not Maintainable After Expiration of Life Estate. — *Smith v. Haskins*, 22 R. I. 6.

**516.** 5. Action by Grantor Against Grantee After Breach of Condition Subsequent. — *Jones v. Nichols*, 42 N. Y. App. Div. 515; *Griswold v. Minneapolis*, etc., R. Co., 12 N. Dak. 435, 102 Am. St. Rep. 572. See also *Gray v. Chicago*, etc., R. Co., 189 Ill. 400.

**Where Stipulation Does Not Amount to Condition.** — Provisions in a deed to a railroad company that the grantee should have no power to sell the land nor to use the same for other than the strict uses of a railroad, nor to erect thereon dwellings for its servants, without a clause of re-entry, are mere covenants and not conditions subsequent, and ejectment will not lie for the breach of them. *King v. Norfolk*, etc., R. Co., 99 Va. 625.

An agreement that a railroad company, in consideration of the grant of a right of way, shall erect and maintain a station on the land is void, as a condition subsequent, under the laws of *Illinois*, and even if valid, only the grantor and his heirs can take advantage of it, so that his grantee cannot maintain ejectment for its breach. *Waggoner v. Wabash R. Co.*, 185 Ill. 154.

6. Necessity of Entry or Demand Before Action for Breach of Condition Subsequent. — *Brown v. Schintz*, 203 Ill. 136; *Bouvier v. Baltimore*, etc., R. Co., 65 N. J. L. 313; *Bouvier v. Baltimore*, etc., R. Co., 67 N. J. L. 281.

**517.** 2. Beaufort First Presb. Church v. Elliott, 65 S. Car. 251.

Under the *New Jersey* statutes, ejectment for breach of condition subsequent may be maintained by the grantee of the reversion. *Bouvier v. Baltimore*, etc., R. Co., 65 N. J. L. 313.

4. Action Not Maintainable by Remainderman During Continuance of Particular Estate. — *Williams v. Woodruff*, 138 Ala. 125; *Adkins v. Spurlock*, 46 W. Va. 139.

**518.** 2. Legacy of Term for Years. — The legatee of a term of years may maintain eject-



- 518.** *b. ACTION BY HEIR AT LAW — (1) In General.* — See notes 3, 4.  
**519.** *(3) Fraudulent Conveyance by Personal Representative.* — See note 1.  
*c. ACTION BY PERSONAL REPRESENTATIVE — In General.* — See

note 2.

Rule under Statute. — See note 7.

- 520.** *20. Lands Held under Void Conveyance.* — See note 2.

Conveyance by Person Non Compos Mentis. — See note 3.

Conveyance Obtained Through Fraud. — See note 4.

- 521.** *Conveyances in Fraud of Creditors.* — See note 1.

*21. Lands Improperly Taken under Condemnation Proceedings.* — See notes 4, 5, 6.

ment therefor ten years after the testator's death, for the lapse of time raises the presumption, nothing being shown to the contrary, that the estate has been settled and that the property in question is not needed to pay debts. *Fisk v. Brayman*, 21 R. I. 195.

- 518.** *3. Action by Heir for Freehold.* — *Jenkins v. Jenkins*, 92 Minn. 310.

Under the *Georgia* statutes (Code, §§ 3081, 3353, 3357), in order to maintain ejectment the heir must show either that there is no administrator, or that the administrator appointed has consented to the suit. *Greenfield v. McIntyre*, 112 Ga. 691.

**4.** In *Georgia* it is held that in order to make out a *prima facie* case the heir must show that his ancestor was in possession under a *bona fide* claim of right at the date of his death. *Watkins v. Nugen*, 118 Ga. 372.

- 519.** *1. Action by Heir Against Personal Representative Making Fraudulent Sale.* — In *Wisconsin* it is held that a sale by an administrator in which he is himself interested, is not void but is voidable only, and that the purchaser has the legal title until it is set aside in some proper action, and hence the heir at law cannot maintain ejectment until that is done. *Gibson v. Gibson*, 102 Wis. 501.

**2.** Right of Personal Representative to Recover Freehold at Common Law. — *Kohn v. McKinnon*, 90 Fed. Rep. 623.

**7.** Right of Personal Representative to Maintain Action under Statute. — *Croft v. Doe*, 125 Ala. 391; *Cook v. Franklin*, 73 Ark. 23; *Greenfield v. McIntyre*, 112 Ga. 691. Compare *Pabst Brewing Co. v. Small*, 83 Minn. 445.

**Where Personal Representative Cannot Maintain.** — It has been held in *Alaska* that under the laws of *Oregon*, whose provisions are substantially those stated in the text, and which are in force in that territory, an administrator cannot maintain ejectment. *Kohn v. McKinnon*, 90 Fed. Rep. 623.

Under the *Florida* statute (Rev. Stat., § 1917) which provides that land shall descend to the heir or devisee and remain in his possession until the administrator shall take possession and sell the same under an order of court for the payment of debts, the administrator cannot, as formerly, maintain ejectment for land of which he had never been in possession, or directed by the court to take possession. *Finlavson v. Love*, 44 Fla. 551.

**Where Defendant Does Not Claim Title Through Heir or Devisee.** — In ejectment by an executor the defendant cannot raise the question of the right of the plaintiff to intercept or divest

the possession of the heir or devisee where the defendant does not claim any title or interest through such heir or devisee. *Johnson v. Kyser*, 127 Ala. 309.

**520.** *2. Lands Held under Void Conveyance.* — Under Civil Code Ga., § 2488, a conveyance made by a wife of her separate property to a creditor of her husband in extinguishment of his debt is absolutely void, and she may maintain ejectment to recover property so conveyed. *Taylor v. Allen*, 112 Ga. 330.

**3.** Recovery of Land Conveyed by Insane Person. — *Galloway v. Hendon*, 131 Ala. 285.

**A Deed Executed by Virtue of a Power of Attorney** given by one who was *non compos* at the time, is void and is not admissible as evidence of outstanding title in a stranger. *Rigney v. Plaster*, 88 Fed. Rep. 686.

**4.** Conveyance Obtained Through Fraud. — *Babcock v. Clark*, 93 N. Y. App. Div. 119; *Wilcox v. American Telephone, etc., Co.*, 176 N. Y. 115, 98 Am. St. Rep. 650.

**521.** *1. Recovery of Land Conveyed in Fraud of Creditors.* — *Lewis v. Hamilton*, 26 Colo. 269, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 520, 521; *Gunn v. Hardy*, 130 Ala. 642. Compare *Perkins v. Meighan*, 147 Mo. 617, 71 Am. St. Rep. 586.

**Prior Fraudulent Deed from Plaintiff's Grantor.** — Where the defendant, in order to show title in a third person, produces a deed from the plaintiff's grantor prior to that under which the plaintiff claims, the latter may show that such deed was made in fraud of creditors and is therefore void. *Rauer v. Thomas*, 60 Kan. 71.

**Maine — Momentary Seizin of Creditor.** — Under the *Maine* statutes (Rev. Stat., c. 76, § 14; c. 81, § 56) a creditor may attach land alleged to have been fraudulently conveyed by his debtor; and while the tenant in possession may not be ousted under execution on the judgment rendered in the action, it is provided that the sheriff shall deliver to the creditor "a momentary seizin sufficient to enable him to maintain an action for its recovery in his own name." *Stickney, etc., Coal Co. v. Goodwin*, 95 Me. 246, 85 Am. St. Rep. 408.

**4.** Recovery of Lands Taken Without Condemnation Proceedings. — In *Tennessee* it is held that ejectment will not lie for land appropriated for public use where the right of eminent domain exists, as in the case of land appropriated by a city for a public street, even though no condemnation proceedings have actually been taken. *Carter v. Chattanooga*, (Tenn. Ch. 1897) 48 S. W. Rep. 117.

The remedies given to owners by the Ten-

**522.** 23. Lands Purchased at Execution Sale. — See notes 3, 4, 5.

Proof of Title Necessary. — See notes 7, 8.

**523.** See note 1.

**524.** V. AGAINST WHOM AND FOR WHAT ACTS ACTION MAINTAINABLE —

1. Against Whom Action May Be Brought — *a.* IN GENERAL — At Common Law. — See notes 6, 7.

**525.** Under Statute — Where Premises Are Occupied. — See note 1.

nessee statutes are exclusive, and ejectment will not lie where the land is subject to condemnation although the railroad company has seized and occupied such land without having condemned or paid for it. *Saunders v. Memphis, etc., R. Co.*, 101 Tenn. 206.

**521.** 5. Recovery of Lands Taken under Void Condemnation Proceedings. — *Nashville, etc., R. Co. v. Hobbs*, 120 Ala. 600.

6. Since Rev. Stat. Ohio, § 2232 *et seq.*, which provides that compensation shall be made for land taken by a city for a street, does not require that it shall be first made, ejectment will not lie to recover the land, and the owner's remedy is to seek compensation. *Webber v. Toledo*, 23 Ohio Cir. Ct. 237.

**522.** 3. Lands Purchased at Execution Sale. — *Carr v. Georgia L. & T. Co.*, 108 Ga. 757.

The Holder of a Sheriff's Deed executed on confirmation of a sale in a proceeding to foreclose a tax lien may maintain ejectment, and is not confined to an action for forcible entry and detainer under Code Civ. Pro. Neb., § 1020. *Abbott v. Coates*, 62 Neb. 247.

4. Sale Must Not Be Made under Proceeding Void for Irregularity. — *Hockett v. Alston*, 49 C. C. A. 180, 110 Fed. Rep. 910.

The levy and sale are unlawful and void where the proceedings prescribed by the *Missouri* statutes for the protection of the debtor's homestead have been omitted. *Creech v. Childers*, 156 Mo. 338.

5. Where an Equitable Interest Only Passes by Sheriff's Deed, the purchaser cannot maintain ejectment. *Sharpe v. Brantley*, 123 Ala. 105.

7. Proof of Title Necessary. — *Clem v. Meserole*, 44 Fla. 234, following *McGehee v. Wilkins*, 31 Fla. 83, and overruling *Hartley v. Ferrell*, 9 Fla. 374.

Under Rev. Stat. Mo. 1899, § 3210, the sheriff's deed itself is evidence of the truth of its recitals and makes a *prima facie* showing of the plaintiff's right to recover. *Cummings v. Brown*, 181 Mo. 711.

Deed Accompanied by Exemplification of Judgment. — Where the sheriff's deed is accompanied by the exemplification of a valid judgment and by proof of the loss of the execution, the deed is admissible as evidence of title and not merely as color of title. *Sweeney v. Sweeney*, 119 Ga. 76, 100 Am. St. Rep. 159.

Where the Defendant Is a Stranger to the Execution on which the sheriff's deed is based, the recital of the judgment in such deed is not evidence against him and the plaintiff must produce independent proof of a valid judgment. *Frazer v. Nelson*, 179 Mass. 456, 88 Am. St. Rep. 391.

Recitals in Deed *Prima Facie* Evidence. — Under the *New Jersey* statutes the recitals in a sheriff's deed which is duly acknowledged and proved, are *prima facie* evidence of the truth

thereof, but they may be rebutted by the defendant. *Meyers v. Conover*, 65 N. J. L. 187.

In *North Carolina*, as the doctrine is now settled, the recitals in a sheriff's deed are *prima facie* evidence of the facts therein stated, and will be sufficient evidence upon which the plaintiff can recover unless it is rebutted by proof to the contrary. *Wainwright v. Bobbitt*, 127 N. Car. 274.

8. *Woods v. Soucy*, 184 Ill. 568.

**523.** 1. Both Claiming under Execution Sales. — Where both parties claim title under sales by virtue of executions upon successive judgments against the same person, but the judgment under which the plaintiff claims was rendered after the sale under which the defendant claims, the plaintiff cannot maintain his action unless he can show that no title passed by such prior sale. *Page v. Simpson*, 188 Pa. St. 393.

Transfer to Defendant Between Levy and Sale. — It is not defense to ejectment brought by a purchaser at sheriff's sale that between the date of the levy and that of the sale the execution debtor transferred the property to the defendant; but the latter, although the real owner, must pursue his title by ejectment against the purchaser. *Feigenspan v. Driesgacker*, 195 Pa. St. 17, 78 Am. St. Rep. 799.

**524.** 6. Against Whom Ejectment May Be Brought in General. — *Chicago, etc., R. Co. v. Clapp*, 201 Ill. 431, quoting 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 524; *Doggett v. Hardin*, 132 N. Car. 690.

7. Admission of Possession by Defendant. — *Carpenter v. Carpenter*, 119 Mich. 167; *Yorks v. Mooberg*, 84 Minn. 502.

Where the answer alleges that the defendant has been in undisputed and continuous possession of the premises since the recording of the tax deed under which he claims, evidence on his part to show that the premises are vacant is not admissible. *Dunbar v. Lindsay*, 119 Wis. 230.

**525.** 1. Action Against Occupant under Statute. — *Dawson v. Peter*, 119 Mich. 274; *Steinman v. Vicars*, 99 Va. 595; *Johnston v. Gerry*, 34 Wash. 524.

The *Michigan* statute (Comp. Laws, § 10,950) permits the use of ejectment to try the question of title set up by one not in possession, but the person in possession, if there be such, is a necessary party to the action. *Farrand v. Kavanaugh*, 132 Mich. 435.

Under the *Illinois* statute (*Hurd's Rev. Stat.* 1901, p. 757, §§ 6, 7), which provides that all persons claiming title may be joined as defendants with the actual occupant, one may maintain ejectment to try and settle the title to premises claimed by him as against other persons claiming title to, or any interest in, the same, though they are not in possession. *Gloss v. Patterson*, 204 Ill. 540.

**525.** Where Premises Are Unoccupied. — See note 2.

*c.* AT WHAT TIME DEFENDANT MUST BE IN POSSESSION. — See note 5.

Abandonment by Defendant. — See note 6.

**526.** *d.* PROOF OF POSSESSION IN PLAINTIFF. — See notes 2, 3.

*e.* LANDLORD AND TENANT. — See notes 5, 6.

*f.* TENANTS IN COMMON AND JOINT TENANTS. — See note 7.

**527.** Proof of Ouster. — See note 3.

**529.** 2. For What Acts Action Maintainable — *a.* IN GENERAL. — See note 7.

**531.** *c.* TRESPASS — (2) *Overflowing Lands by Erection of Dam.* — See note 1.

(3) *Overhanging Roofs or Walls.* — See notes 2, 4.

**532.** VI. DEFENSES — In General. — See notes 3, 4, 5.

**525.** 2. Action under Statute Against Person Exercising Acts of Ownership. — *Glos v. Patterson*, 195 Ill. 530; *Dawson v. Peter*, 119 Mich. 274; *Steinman v. Vicars*, 99 Va. 595.

Ejectment will not lie, under the *Wisconsin* statute, against one claiming title to unoccupied lands under a recorded tax deed, after he has conveyed his interest to a third person, whether the latter has recorded his deed or not. *Webster v. Pierce*, 108 Wis. 407.

**5.** Defendant Must Be in Possession at Commencement of Action. — *Sowles v. Carr*, 70 Vt. 630. See also *Connor v. Connor*, 134 Mich. 355.

When Defendant's Possession Need Not Be Shown. — It has been held in *Illinois* that when it is shown that the titles of both parties are derived from a common source, and the plaintiff's title from that source is established, he is entitled to recover without showing possession by the defendant. *Dean v. Gorton*, 177 Ill. 624.

Effect of Transfer Pending Suit. — The defendant in ejectment cannot defeat the action by transferring the title either with or without consideration; whoever succeeds to the possession succeeds also to the perils of the suit. *Walker v. Arnold*, 71 Vt. 263.

**6.** Abandonment of Possession by Defendant. — *Webster v. Pierce*, 108 Wis. 407.

In *Vermont* it has been held that while one who has entered into possession under a written lease cannot abandon such possession without the consent and acceptance of the landlord, yet the landlord's acceptance of a surrender verbally agreed to and acted upon will estop him from claiming thereafter that the tenant is still in possession under the lease, and will defeat his right to maintain ejectment. *Sowles v. Carr*, 70 Vt. 630.

**526.** 2. Action Not Maintainable by Plaintiff in Possession. — *Burke v. Carlinville Water Co.*, 176 Ill. 555; *Peters v. Reichenbach*, 114 Wis. 209.

**3.** Ejectment for Residue by Plaintiff in Possession of Portion. — *Steinman v. Vicars*, 99 Va. 595.

**5.** *Baxter v. Carrol*, (N. J. 1898) 41 Atl. Rep. 407.

**6.** *Baxter v. Carrol*, (N. J. 1898) 41 Atl. Rep. 407.

Under the *Alabama* Statute (Code 1896, § 1534) the tenant when sued in ejectment has the right to compel his landlord to appear and defend his title, and thus to relieve himself of

the burden of litigating a matter in which he has no interest other than to pay rent to the person who can give him a legal acquittance. *McClendon v. Equitable Mortg. Co.*, 122 Ala. 384.

In an Action by a Landlord Against a Lessee to recover possession of premises, a sublessee need not be joined as a defendant. *Incorporated Synod v. Fiske*, 29 Ont. 738.

**7.** Action by Cotenant Against Another on Proof of Ouster. — *Moyer v. Moyer*, 13 Pa. Dist. 739, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 526; *Baum v. Bowen*, 53 S. Car. 471.

**527.** 3. Proof of Ouster. — Evidence that the defendant was in exclusive possession of the land, that he refused to treat with the plaintiff in reference to the land, and repudiated any rights therein on the part of the plaintiff, is sufficient to support a finding of ouster. *Baum v. Bowen*, 53 S. Car. 471.

**529.** 7. Possession a Question for Jury. — *Cowles v. McNeill*, 125 N. Car. 385.

**531.** 1. Ejectment Not Maintainable for Overflowing Lands. — *Burke v. Carlinville Water Co.*, 176 Ill. 555.

**2.** Ejectment for Overhanging Roofs. — *Johnson v. Minnesota Tribune Co.*, 91 Minn. 476.

**4.** Extension of Wall Not Amounting to Disseizin. — Where the intrusion, by one lot owner, of his foundation wall upon the land of the adjoining owner, leaves the latter in the full and undisturbed possession of the surface of his land to the true line, he cannot maintain ejectment. *Rahn v. Milwaukee Electric R., etc., Co.*, 103 Wis. 467.

**532.** 3. Defenses to Ejectment in General. — *Edmondson v. Anniston City Land Co.*, 128 Ala. 589; *Goforth v. Stingley*, 79 Miss. 398; *Altschul v. Casey*, 45 Oregon 182.

Where the Plaintiff Fails to Establish His Title the action fails, and it is not necessary for the defendants to establish the title under which they claim. *Sinclair v. Huntley*, 131 N. Car. 243.

**4.** Estoppel to Deny Plaintiff's Title. — Compare *Graham v. Warren*, 81 Miss. 330.

In Ejectment for Land Sold under Execution or at Foreclosure Sale, brought by the purchaser at such sale, the defendant in the execution, or the mortgagor in such foreclosure proceedings, cannot dispute the plaintiff's title thereunder. *Woods v. Soucy*, 184 Ill. 568.

**5.** Defendant Setting Up Title in Himself or



**533. Impeachment of Plaintiff's Title for Fraud. — See note 1.**

Equitable Defense. — See notes 2, 3.

By Statute. — See note 4.

**Stranger** — *United States*. — *Smyth v. New Orleans Canal, etc., Co.*, 35 C. C. A. 646, 93 Fed. Rep. 899; *West v. East Coast Cedar Co.*, 51 C. C. A. 411, 113 Fed. Rep. 737.

*Alabama*. — *Bromberg v. Smee*, 130 Ala. 601.

*Arkansas*. — *Dickinson v. Thornton*, 65 Ark. 610.

*Delaware*. — *Doe v. Roe*, 2 Marv. (Del.) 221.

*District of Columbia*. — *Reid v. Anderson*, 13 App. Cas. (D. C.) 30.

*Georgia*. — *Jenkins v. Southern R. Co.*, 109 Ga. 35; *Briscoe v. Holder*, 111 Ga. 877.

*Kansas*. — *Rauer v. Thomas*, 60 Kan. 71.

*Kentucky*. — *Shaw v. Revel*, (Ky. 1899) 51 S. W. Rep. 566.

*Louisiana*. — *Worden v. Fisher*, 52 La. Ann. 576.

**Stranger Setting Up Outstanding Mortgage.** — *Benton Land Co. v. Zeitler*, 182 Mo. 251. See also *Smith v. Sullivan*, 20 App. Cas. (D. C.) 553.

Where the defendant sets up an outstanding mortgage executed by the plaintiff to a third person, in order to defeat the action, the plaintiff is entitled, if he can do so, to show that such mortgage is void as against public policy. *Price v. Cooper*, 123 Ala. 392.

In *Georgia* it is held that a defendant in ejectment who connects his possession with an outstanding title represented by a "security deed," an instrument peculiar to that jurisdiction but in its nature similar to a mortgage, may set up the same to defeat the action. *Ashley v. Cook*, 109 Ga. 653.

In *Maryland* it is held that as a mortgage vests the legal title in the mortgagee, the right of possession follows as a consequence unless there is a provision to the contrary, and hence such a mortgage outstanding prevents recovery in ejectment by the mortgagor. *Richardson v. Baltimore, etc., R. Co.*, 89 Md. 126.

Where the defendant puts in evidence a conveyance to a third person in order to defeat the action, it is competent for the plaintiff to show that it was made only as security for a debt. *Rauer v. Thomas*, 60 Kan. 71.

**Requisites of Outstanding Title.** — The outstanding title must be one which might be successfully asserted against both the plaintiff and the defendant. *Chicago, etc., R. Co. v. Clapp*, 201 Ill. 433, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 532. See also *Rigney v. Plaster*, 88 Fed. Rep. 686; *Plaster v. Rigney*, 97 Fed. Rep. 12, 38 C. C. A. 25; *West v. Negrotto*, 52 La. Ann. 381; *Richardson v. Baltimore, etc., R. Co.*, 89 Md. 126, *Wilson v. Braden*, 48 W. Va. 196; *Maxwell v. Cunningham*, 50 W. Va. 298.

**Plaintiff Must Show Abandonment of Outstanding Title.** — Where it is shown that there is an outstanding title older and better than that of the plaintiff, the burden is upon the plaintiff to show that it has been abandoned, even though the defendant does not connect himself with it. *Buttery v. Brown*, (Tenn. Ch. 1899) 52 S. W. Rep. 713.

**Lease to Third Person.** — In *Illinois* it has been held that a lease of land for ninety-nine

years under seal and acknowledged and recorded in the same manner as deeds are required to be, may be shown in evidence by the defendant in ejectment brought by the lessor, and the action may be thus defeated, though the defendant does not connect himself with the lease. *Woods v. Soucy*, 184 Ill. 568. See also *State v. Cincinnati Tin, etc., Co.*, 11 Ohio Cir. Dec. 587, 21 Ohio Cir. Ct. 218.

**Vendee Cannot Set Up Possession of Trespasser.** — A vendee sued in ejectment for default of payments cannot defend on the ground that a mere trespasser has taken possession since the contract of sale was made. *Walker v. Arnold*, 71 Vt. 263.

**Inoperative Deed to Stranger.** — Defendant cannot avail himself of a deed to a stranger, as showing an outstanding title, where the evidence shows that the consideration for such deed has been refunded to, and accepted by, the grantee therein in satisfaction of all interest conveyed, and that possession was never taken thereunder. *Clayton v. Feig*, 179 Ill. 534.

**The Appointment of a Receiver** to take possession of the premises in a suit to foreclose a mortgage made by the plaintiff's grantor cannot be set up by a defendant in ejectment who is a stranger to the foreclosure suit. *Glos v. Patterson*, 195 Ill. 530.

**Title Acquired Pending Suit.** — The defendant may set up a title acquired by him since the action was commenced. *Duggan v. McCullough*, 27 Colo. 43.

It is a complete defense that, pending the action, title to the land and the right of possession have become vested in the defendant by operation of law without the concurrence of the plaintiff. *Hilliker v. Simpson*, 92 Me. 590.

**The Burden is on the Defendant to prove a title in himself or another by adverse possession.** "It is not incumbent upon plaintiff negatively to establish the nonexistence thereof, but he may stand upon his *prima facie* case, if he so desires, and, if it proves to be the better title, he will prevail." *Altschul v. Casey*, 45 Oregon 182.

**533. 1. Impeachment of Plaintiff's Title for Fraud.** — *Willcox v. Priest*, 68 S. Car. 106.

**2. Equitable Defense Not Allowed at Common Law** — *United States*. — *Highland Boy Gold Min. Co. v. Strickley*, (C. C. A.) 116 Fed. Rep. 852.

*Alabama*. — *Nunnally v. Barnes*, 139 Ala. 657.  
*Arkansas*. — *Rowland v. McGuire*, 67 Ark. 320.

*Illinois*. — *Grubbs v. Boon*, 201 Ill. 98, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 533.

*Michigan*. — *Rausch v. Briefer*, (Mich. 1904) 101 N. W. Rep. 523.

**3. New England Mortg. Security Co. v. Clayton**, 119 Ala. 361. See also *McNear v. Williamson*, 166 Mo. 358.

**4. Equitable Defense Allowed by Statute** — *Colorado*. — *Davis v. Holbrook*, 25 Colo. 493; *Cheney v. Crandell*, 28 Colo. 383.

*Indiana*. — *Wieneke v. Deputy*, 31 Ind. App. 621.

**534.** And in Pennsylvania. — See note 1.

**535.** Estoppel in Pais. — See notes 2, 3, 4.

**VII. DAMAGES, MESNE PROFITS, AND IMPROVEMENTS — 1. Mode of Recovery — a. AT COMMON LAW —** Origin of the Action for Mesne Profits. — See note 6.

**537.** Exception to the Rule. — See note 2.

Actual Damages Recovered in Ejectment. — See note 3.

**538.** b. BY STATUTE. — See notes 1, 2.

**539.** 2. What May Be Recovered as Damages — a. RENTS AND PROFITS — (1) *In General.* — See notes 3, 4.

**540.** Measure of Damages. — See notes 1, 2, 3.

*Kansas.* — *Frazier v. Jeakins*, 9 Kan. App. 850, reversed 64 Kan. 267.

*Minnesota.* — *Travelers' Ins. Co. v. Walker*, 77 Minn. 438.

*Missouri.* — *Johnson v. Bowlware*, 149 Mo. 451; *Butler v. Carpenter*, 163 Mo. 597; *Martin v. Turnbaugh*, 153 Mo. 172.

*Nebraska.* — *Pinkham v. Pinkham*, 61 Neb. 336, affirming 60 Neb. 600.

**Becomes Equitable Proceeding.** — Where the answer admits facts constituting the plaintiff's legal cause of action and sets up facts of an equitable character in avoidance, the case is converted into a suit in equity, triable by the court. *Lewis v. Rhodes*, 150 Mo. 498; *Dunn v. McCoy*, 150 Mo. 548.

**Clear Equitable Title to Be Established.** — *Davis v. Holbrook*, 25 Colo. 493.

**534. 1. Equitable Defense Allowed in Pennsylvania Apart from Statute.** — *Dutton's Estate*, 208 Pa. St. 350.

**535. 2. Jurisdctions Not Allowing Defendant to Set Up Equitable Estoppel.** — *Donehoo v. Johnson*, 120 Ala. 438; *Williams v. Armstrong*, 130 Ala. 389; *Vankirk Land, etc., Co. v. Green*, 132 Ala. 348; *Linnertz v. Dorway*, 175 Ill. 508, 67 Am. St. Rep. 232; *Grubbs v. Boon*, 201 Ill. 98; *Wakefield v. Van Tassel*, 202 Ill. 41, 95 Am. St. Rep. 207; *Petit v. Flint, etc., R. Co.*, 119 Mich. 492, 75 Am. St. Rep. 417; *Haney v. Breeden*, 100 Va. 781.

A defendant in ejectment who fails to show either title to or right of possession of the premises in himself, cannot invoke the doctrine of estoppel or of laches against the plaintiff. *Cooper v. Newton*, 68 Ark. 150.

**The Doctrine of Laches** does not apply to an action of ejectment, based on a plain legal title, and not barred by the statute of limitations. *McFarlane v. Grober*, 70 Ark. 371, 91 Am. St. Rep. 84.

**3. Equitable Estoppel Allowed as Defense by Federal Courts.** — *National Nickel Co. v. Nevada Nickel Syndicate*, 50 C. C. A. 113, 112 Fed. Rep. 44; *Morgan v. Johnson*, 45 C. C. A. 421, 106 Fed. Rep. 452.

4. *Shea v. Shea*, 154 Mo. 599, 77 Am. St. Rep. 779; *Tarpey v. Madsen*, 26 Utah 294.

**6. Right of Action Arises from Recovery in Ejectment.** — *Huncheon v. Long*, 25 Ind. App. 530.

**537. 2. When Plaintiff's Term Expired Before Trial.** — Under the *Maine* statute it is held that the right to recover damages for rents and profits is a mere incident to the recovery of the land itself, and hence where plaintiff is divested of title by operation of law pending the action,

the right to recover rents and profits therein is defeated. *Hilliker v. Simpson*, 92 Me. 590.

**3. Actual Damages May Be Recovered in Ejectment.** — *Credle v. Ayers*, 126 N. Car. 11, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 537.

**538. 1. Statutes — Damages Recoverable in Ejectment.** — *Huncheon v. Long*, 25 Ind. App. 530; *Hilliker v. Simpson*, 92 Me. 590; *Phillips v. Stewart*, 87 Mo. App. 486; *Fanning v. Doan*, 146 Mo. 98.

**Claim for Damages Must Be Separately Stated.** — *Deering v. Riley*, 38 N. Y. App. Div. 164, affirmed 167 N. Y. 184; *Pfeffer v. Kling*, 58 N. Y. App. Div. 179, affirmed 171 N. Y. 668.

Under the Ejectment Act of *New Jersey* (Gen. Stat., p. 1289, § 45) and Supreme Court Rule 85, where the plaintiff in ejectment desires to hold the defendant, his tenant, for the use and occupation of the premises after forfeiture of the term, he must make claim therefor in his declaration. *Kline v. Williams*, 69 N. J. L. 17.

**2. Mode of Procedure Optional.** — See *Huncheon v. Long*, 25 Ind. App. 530; *O'Reilly v. Long*, 25 Ind. App. 529.

**539. 3. In Alabama** it is held that the right of the plaintiff in ejectment to recover the value of the hire or use of the property results from the wrongful act of the defendant in withholding it, and in no sense from a contract, express or implied, on his part to pay for it. *Hardy v. Gunn*, 122 Ala. 666, 25 So. Rep. 621.

**4. Compensation the Foundation of the Action.** — *Horkan v. Benning*, 111 Ga. 126.

**540. 1. Damages to Be Given as for Use and Occupation.** — *Willis v. McKinnon*, 79 N. Y. App. Div. 249, affirmed 178 N. Y. 451.

**2. Value of Rents and Profits the Measure of Damage.** — *Doe v. Adams*, 121 Ala. 664; *Kimball v. Miller*, 1 Alaska 347; *Phillips v. Stewart*, 87 Mo. App. 486.

**From What Time Chargeable with Rents and Profits.** — The defendants are chargeable with rents and profits by way of damages only from the date when the action was brought, where it is not shown that they had notice of plaintiff's title before that time, he being the purchaser at foreclosure of a deed of trust. *Cowan v. Mueller*, 176 Mo. 192.

**Where the Evidence Does Not Point to Any Fixed or Specific Amount,** it is error for the court to direct a verdict for a sum stated. *Horkan v. Benning*, 111 Ga. 126.

**3. Allowance for Taxes and Other Charges.** — See *Muthersbaugh v. McCabe*, 22 Pa. Super. Ct. 587.



**541.** (2) *Value—How Determined*—(a) *By the Character of the Property—Improved City Lots.*—See note 3.

**542.** (b) *By the Nature and Extent of the Tenant's Possession.*—See note 1.

(c) *Value Not Determined by Amount Actually Received.*—See note 2.

(3) *Allowance for Improvements*—(a) *In General—By the Ancient Common Law.*—See note 4.

*Civil-law Doctrine—In Equity.*—See note 6.

**543.** *Doctrine of the Modern Law.*—See notes 1, 2.

*Statutes Granting Affirmative Relief.*—See note 3.

**544.** See note 1.

**545.** (b) *Must Be Made by Bona Fide Occupant.*—See notes 1, 2.

**541.** 3. *Improved City Lots.*—In ejectment against a city for lots occupied by it as a public market, the revenues resulting from its use as such market should not be taken as the basis of the amount to be allowed as mesne profits, for the plaintiff is entitled to recover no more than he could have derived from the property itself apart from the enjoyment of the market franchise. *Ball v. New Orleans*, 52 La. Ann. 1550.

**542.** 1. *Moiety of Land.*—Though the owners of an undivided half may recover possession of the whole premises from a mere trespasser, their damages are limited to one-half of the rents and profits. *McGuire v. Lynch*, 126 Cal. 576.

2. *Value Not Determined by Amount Actually Received.*—*Credle v. Ayers*, 126 N. Car. 11, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 542. See also *Curry v. Sandusky Fish Co.*, 88 Minn. 485.

4. See *Anderson v. Reid*, 14 App. Cas. (D. C.) 54; *Sengfelder v. Hill*, 21 Wash. 371.

6. *Mills v. Geer*, 111 Ga. 275.

**543.** 1. *Occupant Allowed to Offset Value of Improvements.*—*Anderson v. Reid*, 14 App. Cas. (D. C.) 54; *Bond v. Wilson*, 129 N. Car. 325. See also *Sengfelder v. Hill*, 21 Wash. 371.

2. See *Lewis v. Lewis*, 76 Conn. 586.

3. *Improvements Not Allowed Except as Offset.*—*Sengfelder v. Hill*, 21 Wash. 371.

**544.** 1. *Statutes Granting Affirmative Relief.*—*Hardeman v. Turner*, 3 Indian Ter. 338, affirmed (C. C. A.) 112 Fed. Rep. 41; *Allen v. Fitzgerald*, 23 Utah 597.

Under the *Vermont* statute a vendee in possession under an executory contract who is in default cannot recover the value of improvements made by him, for it enures only to the benefit of defendants whose titles are supposed by them to be good in fee, but prove to be defective. *Walker v. Arnold*, 71 Vt. 263.

**Judgment Not Personal.**—Under the *Vermont* statutes (Stat. Vt., §§ 1500, 1502, 1505) the court is authorized to stay proceedings in the action of ejectment after final judgment for the plaintiff while the defendant brings an action for betterments; and it is provided that the land shall be held to respond to the judgment in the latter action, and that execution shall only issue against the land recovered in ejectment. *Rutland R. Co. v. Chaffee*, 72 Vt. 404. See also *Marlow v. Liter*, 87 Mo. App. 584.

**Contra.**—Under the *Georgia* statute (Acts Ga. 1897, pp. 79-81), where the value of the defendant's improvements exceeds the amount of

the mesne profits, he is entitled to a verdict for the excess. *Mills v. Geer*, 111 Ga. 275.

**545.** 1. *Must Be Made by Bona Fide Occupant.*—*Doe v. Adams*, 121 Ala. 664; *Anderson v. Reid*, 14 App. Cas. (D. C.) 54; *Cleland v. Clark*, 123 Mich. 179, 81 Am. St. Rep. 161; *Hallyburton v. Slagle*, 132 N. Car. 957; *Vilas v. Prince*, 88 Fed. Rep. 682.

The occupancy contemplated by the *Michigan* statute (Comp. Laws 1897, § 10,995) is such a one as under the rules of the common law would entitle one to a title by adverse possession. *Sleight v. Roe*, 125 Mich. 585.

It has been held, construing the *Michigan* statute (Comp. Laws Mich. 1897, § 10,995), that where the defendants entered under a tax deed which counsel had advised them was good, though it was afterwards held void, believing that they had title, and made improvements in good faith, they are entitled to recover for their improvements though they knew that the plaintiff claimed an interest in the premises. *Thomas v. Wagner*, 131 Mich. 601.

Where the tax deed under which the defendant claims is fair on its face, though it is actually void as matter of law by reason of defective proceedings, it will be presumed that the tax title was acquired and the improvements made in good faith, in the absence of anything to the contrary. *Meadows v. Osterkamp*, 13 S. Dak. 571.

The mere pendency of an action of ejectment is not inconsistent with good faith on the part of the occupant, and he may therefore recover, in a proper case, for improvements made after the action was commenced. *Dorer v. Hood*, 113 Wis. 607.

2. **Notice.**—*Kugel v. Knuckles*, 95 Mo. App. 670; *Marlow v. Liter*, 87 Mo. App. 584.

One cannot be regarded as a purchaser in good faith who, with the records open to him from which he can ascertain the infirmity of the title which he proposes to buy and the superiority of the title of another person, fails to examine those records and purchases the defective title without examination. *Anderson v. Reid*, 14 App. Cas. (D. C.) 54.

It is held in *Vermont* that constructive notice, which the law implies from the registry of a deed, is not sufficient to preclude one from recovering for betterments who in fact purchased in good faith and under the supposition that he was obtaining a perfect title in fee. *Rutland R. Co. v. Chaffee*, 72 Vt. 404, citing *Whitney v. Richardson*, 31 Vt. 300.

It has been held in *Michigan* that where there is evidence tending to show that the defendant



**545. Color of Title.**—See note 3.(c) **Improvements Must Be Beneficial.**—See note 4.(d) **Measure of Value.**—See note 5.**546. (4) Rents and Profits from Land Improved by Occupant.**—See notes 1, 2.**548. b. WASTE AND SPECIAL DAMAGES.**—See note 1.**549. EJIDOS.**—See note 2.[**ELASTIC.**—See note 2a.]**ELDEST.**—See note 5.**550. ELECT—ELECTION.**—See note 1.

entered in good faith, the fact that diligence might have shown him that he had no title does not necessarily negative good faith, an honest filing of the occupant in his right or title being all that is intended by the statute. *Petit v. Flint, etc., R. Co., 119 Mich. 492, 75 Am. St. Rep. 417.*

**545. 3. Improvements under Color of Title**—*Arkansas.*—*Bloom v. Strauss, 70 Ark. 483; Beasley v. Equitable Securities Co., (Ark. 1904) 84 S. W. Rep. 224.*

*Michigan.*—*Petit v. Flint, etc., R. Co., 119 Mich. 492, 75 Am. St. Rep. 417; Cleland v. Clark, 123 Mich. 179, 81 Am. St. Rep. 161; Sleight v. Roe, 125 Mich. 585.*

*South Dakota.*—*Parker v. Vinson, 11 S. Dak. 381; Meadows v. Osterkamp, 13 S. Dak. 571; Pendo v. Beakey, 15 S. Dak. 344; Skelly v. Warren, 17 S. Dak. 25.*

*Wisconsin.*—*Whitcomb v. Provost, 102 Wis. 278; Dorer v. Hood, 113 Wis. 607; Vilas v. Prince, 88 Fed. Rep. 682 (under Wisconsin statute).*

**4. Improvements Must Be Beneficial.**—*Bartlett v. Kelly, 131 Ala. 378; Haymond v. Camden, 48 W. Va. 467, quoting 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 545.*

In ejectment to recover part of the right of way of a railroad on which the defendant has erected buildings, his right to recover for betterments under the *Vermont* statute cannot be defeated by the contention that structures erected upon a railroad's right of way are nuisances and cannot be regarded in law as improvements. *Rutland R. Co. v. Chaffee, 72 Vt. 404.*

Under the *Georgia* "Improvement Act of 1897" the defendant is not entitled to compensation for a church which was built on the premises by popular subscription during his occupancy thereof. *Crummey v. Bentley, 114 Ga. 746.*

**5. Measure of Value.**—*Greer v. Fontaine, 71 Ark. 605; Harman v. Harman, 54 S. Car. 100.*

**The True Test** is the relative market values of the land with or without the improvements, and the defendant cannot be denied relief on the ground that the improvements are not adapted to the use to which the plaintiff intends to devote the property when it is recovered. *Petit v. Flint, etc., R. Co., 119 Mich. 492, 75 Am. St. Rep. 417.*

**546. 1. Occupant Ought Not to Be Charged Profits on His Own Improvements.**—The rents must be computed upon the basis of the con-

dition of the land when the defendant took possession of it, and not upon the value of the land as enhanced by the improvements. *McCarver v. Doe, 135 Ala. 542.*

**2. Rule When Prime Cost of Improvements Is Allowed.**—*Hardemann v. Turner, 50 C. C. A. 110, 112 Fed. Rep. 41; Bodkin v. Arnold, 48 W. Va. 108, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 546.*

**548. 1. Extra Damages May Be Recovered in Ejectment.**—*Trotter v. Stayton, 45 Oregon 301, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 547.*

Where the plaintiff in ejectment claims damages for waste committed by the defendant in cutting timber from the premises, which were only valuable for the timber thereon, the measure of his damages is the diminution in the value of the land. *Nelson v. Churchill, 117 Wis. 10.*

**549. 2. School Trustees v. Galveston, etc., R. Co., (Tex. Civ. App. 1902) 67 S. W. Rep. 147.**

**2a.** In *Globe-Wernicke Co. v. Brown, 121 Fed. Rep. 186*, the court said: "The primary meaning of this word (as defined by Webster) is, 'having a power or inherent property of returning to the form from which a substance is bent, drawn, pressed, or twisted.' This is the common acceptance of the word *elastic*. Certainly a sectional bookcase or other like article of furniture does not have the capability of spontaneously returning to a former size or shape. In no true sense is such an article *elastic*. \* \* \* The most that can be said correctly is that the term *elastic* as applied to sectional bookcases and similar furniture is somewhat suggestive of one of their characteristics. This, however, I think, was not enough to take the word out of the range of lawful appropriation as a trademark for sectional furniture such as the plaintiff manufactures, and which its predecessor in business first introduced to the public."

**5. A gift "to the eldest son of my sister and his heirs forever" operates in favor of the elder of her two sons living at the date of the will, though he predeceased the testator, in the absence of any contrary intention appearing in the context.** *Amyot v. Dwarrris, (1904) A. C. 268.*

**550. 1. Equivalent to Appointment.**—*People v. Sturges, 27 N. Y. App. Div. 387, affirmed 156 N. Y. 580.*

**Appointing Distinguished.**—*Reid v. Gorsuch, 67 N. J. L. 396.*

# ELECTIONS.

By O. D. ESTEE.

**563. II. AUTHORITY TO HOLD ELECTIONS — 1. Necessity for Authority —**  
*a. IN GENERAL.* — See note 1.

*c. REPEAL OF ELECTION LAWS.* — See note 5.

**568. III. THE RIGHT OF SUFFRAGE AND REGULATIONS IN GENERAL —**  
**1. General Power to Withhold or Regulate the Right.** — See note 3.

**572. 2. How the Right May Be Extended or Restricted —**  
*b. IN THE UNITED STATES — (3) Effect of the Federal Constitution — (b) Fourteenth Amendment —*  
**Effect of This Amendment.** — See note 1.

**573. (c) Fifteenth Amendment — Effect of This Amendment.** — See note 1.

*(4) Power of the State Legislatures — (a) Cannot Restrict or Extend the*  
**Constitutional Right —**  
*aa. IN GENERAL.* — See note 4.

**574. bb. LIMITING THE RIGHT TO A CERTAIN NUMBER OF CANDIDATES.** — See note 3.

**576. (c) Provisions as to Nominations.** — See note 2.

**579. (e) Provisions for Registration and for Proof of Qualification — Express Constitu-**  
**tional Provision.** — See note 3.

**585. 3. Australian Ballot System —**  
*a. IN GENERAL — The Main Features.* —  
See note 4.

**586. c. CONSTITUTIONALITY OF LAWS — (1) In General.** — See note 4.

**587. (2) Provisions as to Nominations.** — See notes 1, 2.

**590. V. QUALIFICATIONS OF ELECTORS — 1. Citizenship.** — See note 1.

**563. 1. Authority to Hold Elections —**  
**Constitutional or Statutory Authority Necessary.** —  
*O'Bryan v. Owensboro, 113 Ky. 680, citing 10*  
*AM. AND ENG. ENCYC. OF LAW (2d ed.) 562-3.*

**5. Effect of Repeal of Law.** — *Mullins v. Mc-*  
*Keel, 109 Ky. 539, citing 10 AM. AND ENG.*  
*ENCYC. OF LAW (2d ed.) 563.*

**568. 3. Suffrage Not a Natural Right.** —  
*Chamberlain v. Wood, 15 S. Dak. 216, 91 Am.*  
*St. Rep. 674, citing 10 AM. AND ENG. ENCYC.*  
*OF LAW (2d ed.) 568.*

**572. 1. Effect of Fourteenth Amendment.** —  
See *Pope v. Williams, 98 Md. 59; State v.*  
*Mason, 155 Mo. 486.*

**573. 1. Effect of Fifteenth Amendment.** —  
*Howell v. Pate, 119 Ga. 537, citing 10 AM. AND*  
*ENG. ENCYC. OF LAW (2d ed.) 573.*

**4. The Legislature Cannot Restrict the Con-**  
**stitutional Right of Suffrage.** — *Britton v. Elec-*  
*tion Com'rs, 129 Cal. 337. See also Gentsch v.*  
*State, 71 Ohio St. 151.*

**574. 3. Limiting Right to Vote to a Certain**  
**Number of Candidates.** — *In Connecticut* such  
a statute seems to be constitutional. *Buck v.*  
*Barnes, 75 Conn. 460.*

*In McArdle v. Jersey City, 66 N. J. L. 590,*  
*88 Am. St. Rep. 496,* such a statute was held  
to be unconstitutional. To same effect see  
*Bowden v. Bedell, 68 N. J. L. 451; Smith v.*  
*Perth Amboy, 70 N. J. L. 194.*

*In Rhode Island* such a provision is uncon-

stitutional. *Opinion of Justices, 21 R. I. 579.*  
**576. 2. Regulations as to Nominations.** —  
The legislature may under its police power  
regulate primary elections in a reasonable man-

**579. 3. Registration Laws, etc. — Express**  
**Constitutional Requirements or Authority.** —  
*Cole v. McClendon, 109 Ga. 183.*

The constitution of *Mississippi, § 241,* re-  
quires registration as a condition precedent to  
voting. *State v. Kelly, 81 Miss. 1.*

*In Missouri* the state constitution authorizes  
the legislature to pass registration laws for  
cities of certain population. *State v. Mason,*  
*155 Mo. 486.*

**585. 4. The Object and Effect of the Secret Bal-**  
**lot.** — See *Jones v. State, 153 Ind. 440; State v.*  
*Hogan, 24 Mont. 383; Orr v. Bailey, 59 Neb.*  
*128, quoting 10 AM. AND ENG. ENCYC. OF LAW*  
*(2d ed.) 585; State v. Sadler, 25 Nev. 131, 83*  
*Am. St. Rep. 573.*

**586. 4. Constitutionality of Australian Ballot**  
**Laws.** — See *State v. Poston, 59 Ohio St. 122.*

**587. 1. Provisions for Legal Nominations.** —  
See dissenting opinion of *Fuller, J., in*  
*Chamberlain v. Wood, 15 S. Dak. 216, 91 Am.*  
*St. Rep. 674, quoting 10 AM. AND ENG. ENCYC.*  
*OF LAW (2d ed.) 587; Ladd v. Holmes, 40 Ore-*  
*gon 167, 91 Am. St. Rep. 457.*

**2. Restriction to Candidate on Official Ballot.** —  
— See dissenting opinion of *Fuller, J., in*  
*Chamberlain v. Wood, 15 S. Dak. 216, 91 Am.*  
*St. Rep. 674, quoting 10 AM. AND ENG. ENCYC.*  
*OF LAW (2d ed.) 587.*

*In South Dakota* a law restricting a voter to  
candidates whose names appear on the official  
ballot is constitutional. *Chamberlain v. Wood,*  
*15 S. Dak. 216, 91 Am. St. Rep. 674.*

**590. 1. See Cronly v. Tucson, 6 Ariz. 235;**  
*Wilson v. Bartlett, 7 Idaho 271; Orr v. Bailey,*  
*59 Neb. 128; State v. Poston, 59 Ohio St. 122.*

- 591.** 3. Race. — See note 1.  
**592.** 4. Sex — School Elections. — See note 3.  
**593.** 6. Payment of Taxes — *a.* IN GENERAL. — See note 1.  
**595.** 7. Property Qualification — General Elections. — See note 2.  
 Local Elections. — See note 4.  
**596.** 8. Residence — *a.* IN GENERAL. — See note 2.  
**598.** *b.* RESIDENCE DEFINED AND CONSIDERED — The Term "Residence."  
 — See note 1.  
**599.** *c.* HOW RESIDENCE MAY BE LOST OR ACQUIRED — (1) *Act and Intent Must Concur.* — See note 2.  
 (2) *Change of Residence Must Be Actual.* — See note 3.  
 (4) *Change Must Be Permanent* — (a) Temporary Absence or Presence —  
 Personal Presence Not Sufficient. — See note 6.  
**602.** Leaving Former Residence. — See note 1.  
**603.** (b) Finality Not Essential — Itinerant Laborers. — See note 1.  
**604.** (5) *Residence for Particular Purposes.* — See notes 1, 3.

In *People v. Board of Inspectors*, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 584, it was held that a person born in Porto Rico was not entitled to vote in New York, because he was not a citizen of the United States.

**591.** 1. Naturalized Japanese may be prohibited by a provincial electoral law from the right to vote. *Cunningham v. Homma*, (1903) A. C. 151, reversing 8 British Columbia 76.

**592.** 3. Women May Vote at School Elections. — *Dorsey v. Brigham*, 177 Ill. 250, 69 Am. St. Rep. 228.

**593.** 1. Payment of Poll Tax. — By the constitution of Arkansas payment of a poll tax is made a condition precedent to voting. *Whittaker v. Watson*, 68 Ark. 555; *Rhodes v. Driver*, 69 Ark. 501.

The Texas constitution, art. 6, § 2, as amended in the year 1901 (Laws 1901, p. 322) prohibits a party from voting who is required to pay a poll tax and fails to pay it. *Stinson v. Gardner*, 97 Tex. 287.

Payment of Poor Rates is an essential qualification for voting under the English law, and a tender of such rates is not sufficient. *Kennedy v. Buchanan*, (1903) 2 Ir. R. 484.

**595.** 2. Property Qualifications in England and Canada. — See *Kitchen v. Johnson*, (1899) 1 Q. B. 95, 79 L. T. N. S. 422; *Jenkins v. Grocott*, (1904) 1 K. B. 374, 90 L. T. N. S. 90; *Dover v. Prosser*, (1904) 1 K. B. 84, 89 L. T. N. S. 724; *Reade v. Richards*, 1 Smith 236; *James v. Iveney*, 64 J. P. 791; *Williams v. Blakeway*, 67 J. P. 11; *Vickers v. Selwyn*, 89 L. T. N. S. 747; *Rex v. Nepean*, 52 W. R. 264; *M'Quade v. Charlton*, (1904) 2 Ir. R. 383 discussing *Stribling v. Halse*, 16 Q. B. D. 246; *Ladd v. O'Toole*, (1904) 2 Ir. R. 389; *Anderson v. Hicks*, 35 Nova Scotia 161; *Re Voters' Lists*, 2 Election Cas. 154; *Drouin v. Sainte Monique*, 5 Rev. de Jur. 243.

Occupation as Owner or Tenant. — *Loveridge v. Gardom*, 1 Smith 186; *Pearce v. Merriman*, (1904) 1 K. B. 80, 89 L. T. N. S. 745, distinguishing *Hall v. Michelmores*, 86 L. T. N. S. 17.

4. Local Elections. — *Spitzer v. Fulton*, 172 N. Y. 285, 92 Am. St. Rep. 736.

In Municipal Elections. — In Idaho a city may require a property qualification of voters at an election to create an indebtedness against the city. *Wiggin v. Lewiston*, 8 Idaho 527.

**596.** 2. In England a militiaman who is sentenced to be a prisoner at large for forty-eight hours during the qualifying period does not become disqualified as an inhabitant occupier of the place wherein the regiment is ordinarily resident if under the sentence he could not go beyond the camp lines during such forty-eight hours. *O'Connell v. Holland*, (1900) 2 Ir. R. 448.

**598.** 1. Habitual Physical Presence. — *In re Banff Election*, 4 N. W. Ter. 140.

**599.** 2. See *Re Voters' Lists*, 2 Election Cas. 69.

3. *Spurrier v. McLennan*, 115 Iowa 461.

6. Intention Must Control. — *Jain v. Bossen*, 27 Colo. 423, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 600.

**602.** 1. Temporary Absence Will Not Constitute Abandonment. — *Huston v. Anderson*, 145 Cal. 320; *Jain v. Bossen*, 27 Colo. 423; *Kelso v. Wright*, 110 Iowa 560; *Edwards v. Logan*, 114 Ky. 312; *Chew v. Wilson*, 93 Md. 196; *Fairchance Borough's Election Contest*, 8 Pa. Dist. 595; *Finn v. Board of Canvassers*, 24 R. I. 482; *Re Voters' Lists*, 2 Election Cas. 69. See also *In re Banff Election*, 4 N. W. Ter. 140.

Illustrations. — Voters in the employ of the state have a right to vote at the place where they resided when appointed, though their duties may require them to live elsewhere, but such voters may acquire a residence elsewhere if such be their intention. *Uhls v. Allard*, 69 Kan. 825.

**603.** 1. The Right to Be Entered on the Rolls as a Lodger cannot successfully be claimed by a person who under contract with his father has the sole right of occupying a certain room, where it appears that such person is employed in another place and occupies the room during only a portion of each week. *Miller v. Bruce*, Sc. Ct. of Sess. Cas. 2 F. 265.

**604.** 1. In England during the continuance of the South African war, the qualifications of a parliamentary or local government elector, absent during the whole qualifying period as a volunteer, was preserved and this preservation extended through a subsequent period of military service consequent on the war. *Marsh v. Bantoft*, 88 L. T. N. S. 230.

3. Students. — The New York constitution



**606.** A Soldier Can Establish His Domicil. — See note 1.

**608.** VI. DISQUALIFICATION AND DISFRANCHISEMENT — 1. Pauperage — At the Common Law. — See note 1.

2. Want of Mental Capacity. — See note 6.

**609.** 4. Crime. — See note 8.

**611.** VII. REGISTRATION — 1. Registration in the United States — *a.* POWER TO ENACT REGISTRY LAWS. — See note 2.

*c.* APPLICABILITY OF GENERAL REGISTRATION LAWS TO PARTICULAR ELECTIONS AND PLACES. — See note 4.

**613.** *e.* APPOINTMENT, QUALIFICATIONS, AND TENURE OF REGISTRARS. — See note 2.

**616.** *j.* OATH ADMINISTERED TO APPLICANTS FOR REGISTRATION. — See note 2.

**617.** *l.* CONCLUSIVENESS OF REGISTER AS TO RIGHT TO VOTE — In the United States. — See note 1.

*m.* EFFECT OF FAILURE TO REGISTER AND IRREGULARITIES UPON RIGHT TO VOTE. — See notes 2, 3, 4.

Erroneous Spelling of Names. — See note 5.

**618.** *n.* EFFECT OF NONCOMPLIANCE WITH REGISTRATION LAWS AND IRREGULARITIES ON VOTE OR ELECTION. — See note 2.

**620.** 2. Registration in England — *a.* LIST OF VOTERS. — See note 4.

provides that a person shall neither gain nor lose his residence by reason of being a student at a seminary. *In re Barry*, (Supm. Ct. App. Div.) 61 N. Y. Supp. 124. See also *Parsons v. People*, 30 Colo. 388; *Matter of McCormack*, 86 N. Y. App. Div. 362.

However, there may be particular facts independent of his status as a student which show that he has become a resident of the place in which the seminary is located. *Matter of Barry*, 164 N. Y. 18.

**606.** 1. *Soldiers' Home.* — A disabled soldier in a soldiers' home may acquire a residence for voting purposes. *Cory v. Spencer*, 67 Kan. 648.

The *New York* statute provides that a party neither gains nor loses a residence by living in a state home for soldiers. *Matter of Smith*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 384.

**608.** 1. Where an Insane Person, Dependent upon a Voter for Support, remains permanently in an asylum at the expense of the parish, the voter will be deemed to be in receipt of relief other than medical, and accordingly will be excluded from the occupiers' list. *Kirkhouse v. Blakeway*, (1902) 1 K. B. 306, 86 L. T. N. S. 19.

**6.** Want of Mental Capacity. — See *Mew v. Charleston*, etc., R. Co., 55 S. Car. 90.

**609.** 8. Disfranchisement for Crime. — See *Mew v. Charleston*, etc., R. Co., 55 S. Car. 90.

In *Indiana* a party who is convicted of selling his vote may be disfranchised. *Baum v. State*, 157 Ind. 282.

**611.** 2. Legislative Power to Enact Registry Laws. — *Earl v. Lewis*, 28 Utah 116.

**4.** Petition for Removal of County Seat. — It is not necessary for the voters who sign such a petition to be registered. *Wilson v. Bartlett*, 7 Idaho 271.

**613.** 2. Appointment. — In *Nevada* the statutes do not provide a means of filling a vacancy in a registration office unless the registration officer resigns or dies. There is no means provided for filling such office in case of sick-

ness. *State v. Sadler*, 25 Nev. 131, 83 Am. St. Rep. 573.

**616.** 2. Failure to Administer Oath. — *Lane v. Bailey*, 29 Mont. 548, 75 Pac. Rep. 191.

**617.** 1. Registration Not Conclusive. — In *Colorado* the fact that a voter is registered is only *prima facie* evidence of his right to vote, and he may still be challenged. *People v. District Ct.*, 33 Colo. 22.

*Idaho.* — The fact that a voter is registered is *prima facie* evidence of his right to vote. *Wilson v. Bartlett*, 7 Idaho 271.

In *Montana* a party whose name appears on the register has a *prima facie* right to vote. *Lane v. Bailey*, 29 Mont. 548.

In *Nevada* a voter who is on the registry list has a *prima facie* right to vote and the election inspectors are compelled to permit him to do so. *State v. Sadler*, 25 Nev. 131, 83 Am. St. Rep. 573.

**2.** Failure to Register. — *Brant's Case*, 13 York Leg. Rec. (Pa.) 145.

**3.** *Cole v. McClendon*, 109 Ga. 183; *Kelly v. State*, 79 Miss. 168; *Mew v. Charleston*, etc., R. Co., 55 S. Car. 90; *State v. Peter*, 21 Wash. 243.

**4.** Wrongful Refusal to Permit Registration. — Where a registration officer wrongfully refused to permit a voter to register, the voter is still entitled to vote. *Earl v. Lewis*, 28 Utah 116.

**5.** Names Erroneously Spelled. — *Brant's Case*, 13 York Leg. Rec. (Pa.) 145.

**618.** 2. Immaterial Irregularities Do Not Vitiolate Vote. — *Cole v. McClendon*, 109 Ga. 183.

**620.** 4. Amendment of Statement of Qualification. — *Goodrich v. Town Clerk*, (1902) 1 K. B. 301, 85 L. T. N. S. 583, following dicta in *Foskett v. Kaufman*, 16 Q. B. D. 279, and distinguishing *Lord v. Fox*, (1892) 1 Q. B. 199.

The Owner of Only Part of the Tithe Rentcharge of a rectory, vicarage, chapelry, or benefice to which an apportionment of tithe rentcharge has been made is not qualified to have his name placed upon the parliamentary list of ownership

- 621.** *c.* CORRECTION OF VOTERS' LIST. — See note 1.  
**622.** *d.* THE REVISING BARRISTER. — See note 1.  
**623.** *e.* REVIEW OF BARRISTER'S DECISIONS. — See note 1.  
**624.** 3. Registration in Canada. — See note 1.  
**625.** VIII. CALLING ELECTIONS, NOTICE, AND OTHER PRELIMINARY PROCEEDINGS—2. Calling Elections—*c.* PETITION FOR HOLDING ELECTION. — See note 4.  
*d.* WRITS OF ELECTION. — See note 5.  
 3. Notice or Proclamation — *a.* IN GENERAL. — See note 6.  
**626.** Special Elections. — See notes 1, 2.  
**627.** *b.* ELECTIONS TO FILL VACANCIES. — See note 3.

voters as the owner of "freehold tithes" or "tithe rentcharge." *Reade v. Richards*, 63 J. P. 759.

**621.** 1. Notice of Objection — Form and Sufficiency — Description of Voter Objected to. — The object of the notice is that the person objected to may be clearly ascertained, and that he may clearly understand that he is objected to. If the notice gives the full and accurate address of such person it is immaterial that such objection is not precisely in the proper place. *Linforth v. Butler*, (1899) 1 Q. B. 116, 79 L. T. N. S. 498.

The ward of the person objected to need not be specified where both the division and ward of such person appear on the list. *Sagar v. Clare*, 1 Smith 243, 82 L. T. N. S. 599.

**Description of Objector — Stating Place of Objector's Abode.** — Intentionally inserting the objector's business address instead of his place of abode is a mistake which may be corrected by the revising barrister. *Prescott v. Lee*, (1899) 2 Q. B. 273, 81 L. T. N. S. 43.

**Service of Notice — Personally.** — *Linforth v. Butler*, (1899) 1 Q. B. 116, 79 L. T. N. S. 498.

**Any Proper Evidence** in support of the objection may be considered by the revising barrister. *Jenkins v. Grocott*, (1904) 1 K. B. 374, 90 L. T. N. S. 90.

**622.** 1. Powers of Revising Barrister. — When a wife is rated as the owner of a house and the husband as occupier thereof, and it appears that the latter is the breadwinner, owns the furniture and pays rates and expenses, but has no agreement of tenancy with his wife nor pays rent to her, the revising barrister may hold that the husband is not entitled to remain on the register as an inhabitant occupier. *Hall v. Michelmores*, 65 J. P. 759.

The revising barrister may correct a mistake of a clerk in entering a description of qualifying property in the claimants' list. *Kitchen v. Johnson*, (1899) 1 Q. B. 95, 79 L. T. N. S. 422.

**The Duty of the Revising Barrister** includes the revising of the list of parochial electors and the revising of the list of ownership claimants to be entered on the list of such electors. *Reg. v. Nash*, (1900) 1 Q. B. 103, 81 L. T. N. S. 489.

**623.** 1. Review of Barrister's Decision. — Compare *Jones v. Munro*, (1899) 1 Q. B. 109, 79 L. T. N. S. 500.

**Evidence Not Before the Revising Barrister** cannot be considered by the court on appeal, and his decision will be affirmed where it appears that it was justified by the evidence submitted to him. *Williams v. Blakeway*, 67 J. P. 11, explaining *Foster v. Mulhall*, 10 Ir. C. L. 532.

**624.** 1. Objection to Name Listed. — *Re Voters' List*, 40 Can. L. Jur. 31.

In British Columbia where a collector has entered objected names in the list of voters it is too late to institute proceedings to prevent such entry. *In re Provincial Elections Act*, 8 British Columbia 424.

**Correction of Lists.** — *Re Voters' Lists*, 2 Election Cas. 162; *Re Voters' Lists*, 2 Election Cas. 165; *Rex v. Bonnar*, 14 Manitoba 467.

**Preparation of Lists.** — *Re West Algoma Voters' Lists*, 8 Ont. L. Rep. 533.

**Application for Registration.** — *In re Provincial Elections Act*, 40 Can. L. Jur. 45.

**Right to Have Name on Voters' List.** — *Barker v. Cowansville*, 24 Quebec Super. Ct. 333.

**Revision of Lists.** — *In re Huron Voters' Lists*, 7 Ont. L. Rep. 44.

**Voters' Lists Final and Conclusive as to Age of Voter.** — *Re South Perth*, 2 Election Cas. 144.

**625.** 4. Petition for Election Required by Statute. — See *People v. Lodi High School Dist.*, 124 Cal. 694; *People v. Los Angeles*, 133 Cal. 338; *Tax Payers v. Police Jury*, 52 La. Ann. 465; *Graves v. Rudd*, 26 Tex. Civ. App. 554.

**5. Failure to Issue Writs of Election.** — In *Buchanan v. Graham*, 36 Tex. Civ. App. 468, a county judge failed to make an order for a school election, but the election took place at the regular place and time and all had an opportunity of voting. It was held that the election was valid.

**6. Necessity for Notice of Election — Time and Place Fixed by Law.** — *Wilson v. Brown*, 109 Ky. 229, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) [627] 625; *Brown v. Street Lighting Dist. No. 1*, 70 N. J. L. 762, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 625.

**626.** 1. Time and Place Not Fixed by Law. — *Fike v. State*, 25 Ohio Cir. Ct. 554, quoting 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 626; *Norman v. Thompson*, 30 Tex. Civ. App. 537, quoting 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 626.

**2. Result Not Affected — Actual Notice.** — *Norman v. Thompson*, 30 Tex. Civ. App. 537, quoting 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 626.

**Qualifications of Rule.** — Where the law specifically requires notice of an election to be published in a certain manner, such requirement is mandatory. *State v. Martin*, 83 Mo. App. 55.

**627.** 3. Elections to Fill Vacancies — Elections Upheld When There Was Knowledge of Vacancy. — *Wilson v. Brown*, 109 Ky. 229, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 627.

**630.** 4. Form and Sufficiency of Notice — *c.* SUFFICIENCY AS TO TIME. — See notes 5, 6.

**632.** *d.* STATEMENT OF PURPOSE OF ELECTION AND OTHER MATTERS. — See note 1.

*e.* PUBLICATION AND POSTING. — See note 3.

Defects in Posting or Publishing. — See note 5.

**633.** IX. NOMINATIONS — 1. Object of Nominations — England. — See note 2.

**634.** 3. Direct Nomination by Electors — *a.* NUMBER NECESSARY TO NOMINATE. — See note 1.

**635.** *c.* EFFECT OF PARTICIPATING IN ANOTHER NOMINATION. — See note 5.

**637.** *d.* NOMINATION PAPERS — (2) *Signing, Acknowledgment, and Proof.* — See note 5.

**638.** See note 2.

**639.** (3) *Filing.* — See note 1.

*e.* ELECTORS' NOMINEE CANNOT USE PARTY NAME. — See note 3.

**640.** See note 1.

**641.** 4. Party Nominations — *a.* PRINCIPLES GOVERNING — IN GENERAL — (1) *What Parties May Nominate.* — See notes 2, 3.

**642.** (3) *Party Rules.* — See note 4.

**630.** 5. Length of Time of Notice — When Fixed by Statute. — *Nelson v. State*, (Tex. Crim. 1902) 75 S. W. Rep. 502; *Ex p. Conley*, (Tex. Crim. 1903) 75 S. W. Rep. 301.

A law may be subsequently enacted legalizing an election that was void because the election notice was insufficient. *Eastman v. McCarten*, 70 N. H. 23.

6. Matter of O'Hara, (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 355; *Fike v. State*, 25 Ohio Cir. Ct. 554.

**632.** 1. Notice Need Not State Matters Implied. — *People v. Prewett*, 124 Cal. 7.

3. Places of Posting. — *Pritchard v. Magoun*, 109 Iowa 364.

5. Defects in Posting Notices. — *Hoxsie v. Edwards*, 24 R. I. 338, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 632.

In the case of *Matter of Smith*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 384, a local option election was held to be void because the notice of the election was not posted in four public places in the town.

**633.** 2. In Ontario it is provided by statute that where only one candidate for any particular office is proposed, the clerk, or other returning officer or chairman, is obliged to allow one hour to elapse before he can declare the candidate duly elected for the office. *Re Parke*, 30 Ont. 498.

**634.** 1. Number Necessary to Nominate. — In *Minnesota* a petition containing two thousand voters is sufficient to make nominations for state officers. *Davidson v. Hanson*, 87 Minn. 211. *New York.* — See also *Matter of McDonald*, (Supm. Ct.) 25 Misc. (N. Y.) 80.

**635.** 5. Effect of Previous Participation in Primary. — The signature of a party to a certificate of nomination is invalid if that party has previously participated in nominating another candidate for the same office. *Matter of Smith*, (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 501.

**637.** 5. Must Be Signed in Person. — *Matter of McDonald*, (Supm. Ct.) 25 Misc. (N. Y.) 80.

It is not only necessary for the elector's certificate of nomination to be signed by the voters but it must also give their residences and post office addresses. *Skidmore v. Hurst*, 113 Ky. 694.

In *Ohio* the party signing must also pledge himself to vote for the candidate nominated. *State v. Poston*, 59 Ohio St. 122.

**638.** 2. Oath of Qualification and Residence — *New York.* — *Matter of McDonald*, (Supm. Ct.) 25 Misc. (N. Y.) 80.

**639.** 1. Provisions as to Time of Filing. — *Whipple v. Kleckner*, 25 Colo. 423; *Matter of McDonald*, (Supm. Ct.) 25 Misc. (N. Y.) 80.

3. Designation as Nominee of Party. — In *Minnesota* a candidate nominated by petition for a state office is entitled to have his name placed on the official ballot under a suitable party name, which may be designated in the petition. *Davidson v. Hanson*, 87 Minn. 211.

**640.** 1. Modification of Rule in Kentucky. — *Skidmore v. Hurst*, 113 Ky. 694.

**641.** 2. What Constitutes a Political Party. — *Weaver v. Toney*, 107 Ky. 419, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 641.

3. What Parties May Nominate. — See also *People v. Williamson*, 185 Ill. 106; *Citizens' Party*, 7 Pa. Dist. 641; *Citizens' Party*, 1 Dauphin Co. Rep. (Pa.) 328.

In *Pennsylvania* it is provided by Act June 22, 1897, (P. L. 179) that a party which polled two per cent. of the highest vote cast at the last election is entitled to nominate by certificate. *Independence Party Nomination*, 208 Pa. St. 108.

In *North Dakota* it is necessary for a party to have cast five per cent. of the vote cast for member of Congress at the last election in order to entitle it to make nominations. *State v. Falley*, 8 N. Dak. 90.

**642.** 4. Party Rules Govern. — *Falkenstein's Case*, 30 Pittsb. Leg. J. N. S. (Pa.) 255, *Douglass's Nomination*, 9 Pa. Dist. 187.

In *South Carolina* it is provided by statute that the rules adopted by a party for regulating



**643.** *b. NOMINATING AGENCIES* — (1) *Explanatory* — Nominating Convention. — See note 1.

(2) *Nominating Convention* — (a) *Call for Convention* — Composition. — See note 4.

**647.** (e) *Qualifications and Credentials of Delegates.* — See note 5.

**648.** (g) *Minority Cannot Nominate.* — See note 6.

**649.** (i) *Revocation of Nomination.* — See note 3.

(3) *Conference.* — See notes 4, 5, 6.

**650.** See notes 1, 2.

(4) *Committee.* — See notes 4, 6.

**651.** (6) *Primary Election.* — See note 8.

**652.** *c. CERTIFICATES OF NOMINATION* — (1) *Form.* — See note 3.

**653.** See notes 1, 2.

**654.** (2) *Signing and Execution.* — See notes 1, 2, 3.

primary elections to nominate candidates must be observed. *Ex p. Sanders*, 53 S. Car. 478.

**643. 1. Definition of Convention.** — Political Code Mont., § 1310, defines a convention as follows: "A convention or primary meeting within the meaning of this chapter is an organized assemblage of electors or delegates representing a political party or principle." *State v. Hogan*, 24 Mont. 383.

**4. Convention Must Be Regularly Called and Delegates Regularly Chosen.** — *Whipple v. Wheeler*, 25 Colo. 421; *State v. Young*, 160 Mo. 320; *State v. Hays*, (Mont. 1904) 78 Pac. Rep. 486; *State v. Hogan*, 24 Mont. 383; *Citizens' Party Nominations*, 21 Pa. Co. Ct. 417.

In *North Dakota* public notice of the nominating convention must be given at least six days before it is held. *State v. Falley*, 8 N. Dak. 90.

**Who May Call Convention.** — A chairman of the district central committee of a congressional district may call a convention to nominate a candidate for Congress. *Whipple v. Hartzell*, 25 Colo. 481.

The regular state central committee of the party may call the convention. *Williams v. Lewis*, 6 Idaho 184.

**647. 5. Decision of Convention.** — A political convention is the sole judge of the qualifications of its members. *In re Grear*, 9 Ohio Dec. 299, 6 Ohio N. P. 312.

**648. 6. Minority Cannot Nominate.** — *Beckwith v. Rucker*, 28 Colo. 31; *State v. Lavik*, 9 N. Dak. 461; *State v. Porter*, 11 N. Dak. 309.

**649. 3. Convention Cannot Revoke Nominations.** — See *Palmer v. Ruland*, 28 Colo. 65.

See also *Phillips v. Smith*, 25 Colo. 398, holding that, where a convention makes a nomination and adjourns to a certain day, it may revoke the nomination at such subsequent meeting.

But a convention may revoke a nomination, provided the revocation takes place before the convention adjourns. *Phillips v. Gallagher*, 73 Minn. 528. See also *Matter of Nash*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 113.

**4. Majority of Conferees Constitute a Quorum for the Transaction of Business.** — *Doyle's Nomination*, 7 Pa. Dist. 635.

**Delegates Must Be Elected According to Party Rules.** — *Robb's Second Nomination*, 7 Pa. Dist. 620.

**5. Candidate Must Receive Vote of Majority of Conferees.** — *Heberling's Nomination*, 7 Pa. Dist. 648; *Lauer's Nomination*, 7 Pa. Dist. 646.

But it is sufficient if a candidate receive the vote of the majority of the conferees who are actually present at the convention. *Woodruff's Nomination*, 7 Pa. Dist. 623.

**6. Courts May Review Determination of Conference as to Qualifications.** — *Robb's Second Nomination*, 7 Pa. Dist. 620.

**650. 1. Resignation of Conferee.** — *Butler's Nomination*, 1 Dauphin Co. Rep. (Pa.) 325.

**Actual Appointment Is Necessary.** — *Little's Nomination*, 7 Pa. Dist. 580.

**2. Substituted Nomination.** — *Berlin's Nomination*, 7 Pa. Dist. 663.

**4. Authority to Fill Vacancy — Must Be Express.** — In *Kansas* express authority is conferred by statute upon the executive committee of the party holding the nominating convention to fill a vacancy among the nominees, unless the party rules provide a different method. *Bower v. Clemans*, 61 Kan. 129.

**6. Power of Committee to Make Original Nominations.** — *White v. Sanderson*, 74 Minn. 118, 73 Am. St. Rep. 334; *State v. Clark*, 56 Neb. 584. See also *Gillespie v. McDonough*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 147.

**651. 8. Primary Cannot Be Dispensed With.** — Likewise a party committee cannot dispense with a primary election in making nominations for office. *State v. Scott*, 87 Minn. 313.

**652. 3. Certificate Should Show Office for Which Nomination Is Made.** — *State v. Clark*, 56 Neb. 584; *State v. Falley*, 8 N. Dak. 90.

**653. 1. Name, Address, and Business of Candidate.** — *State v. Hays*, (Mont. 1904) 78 Pac. Rep. 301; *State v. Clark*, 56 Neb. 584; *State v. Falley*, 8 N. Dak. 90.

The name of the candidate must be inserted before the officers sign the certificate. *Kreimer's Nomination Papers*, 22 Pa. Co. Ct. 618.

**2. Party or Principle Represented.** — *State v. Martin*, 24 Mont. 403; *State v. Falley*, 8 N. Dak. 90.

**654. 1. Presiding Officer and Secretary Must Sign Certificate of Nomination.** — *State v. Hays*, (Mont. 1904) 78 Pac. Rep. 301; *State v. Falley*, 8 N. Dak. 90.

**2. Residence, Business, etc., of Officers Signing Certificate.** — *State v. Falley*, 8 N. Dak. 90; *Robinson's Nomination*, 7 Pa. Dist. 639; *Butler's Nomination*, 7 Pa. Dist. 639; *Com. v. Martin*, 7 Pa. Dist. 640.

**3. Bower v. Clemans**, 61 Kan. 129; *State v. Falley*, 8 N. Dak. 90; *Com. v. Martin*, 7 Pa.

**654.** (3) *Filing*. — See note 5.

**655.** See notes 1, 2.

**656.** 5. Powers and Duties of Various Officers. — See note 3.

**658.** 6. Objections to Nominations — Contests — *a.* JURISDICTION TO PASS ON VALIDITY OF NOMINATIONS — (1) *Public Officers*. — See note 2.

**659.** See notes 1, 2.

**660.** Conclusiveness of Decision. — See note 3.

(2) *Courts*. — See notes 5, 6.

**661.** See note 1.

Dist. 659; *In re Twenty-Eighth Ward School Directors*, 22 Pa. Co. Ct. 308.

A failure to verify the certificate is waived where the certificate is received by the proper officer without objection. *Jones v. State*, 153 Ind. 440.

**654.** 5. Time and Place of Filing. — Civ. Code Iowa, § 1104, requires certificates of nomination to be filed with the county auditor not more than sixty and not less than twenty days before the election. *Reese v. Hogan*, 117 Iowa 603.

*Montana*. — Certificates of nomination of county officers must be filed with the county clerk, but in the case of state officers and in the case of officers elected by a larger district of the state than the county, the certificate of nomination must be filed with the secretary of state. *State v. Hays*, 27 Mont. 174.

Certificates of nomination must also be filed at least thirty days before the election with the secretary of state in accordance with Political Code Mont., § 1316. *State v. Hays*, (Mont. 1904) 78 Pac. Rep. 301.

In *New York* the certificate of nomination for state senator must be filed with the county clerk twenty-five days before the election. *Matter of Norton*, 34 N. Y. App. Div. 79, *appeal dismissed* 158 N. Y. 130.

In *North Dakota* the certificate of nomination for state and legislative officers must be filed with the secretary of state. *State v. Falley*, 8 N. Dak. 90.

In *Ohio* the certificates of nomination for county officers must be filed with the deputy state supervisor at least twenty days before election. *Randall v. State*, 64 Ohio St. 57.

*Pennsylvania*. — Candidates for township and borough officers must have their certificates for nomination filed at least eighteen days before the election. *Rosenstock's Case*, 9 Kulp (Pa.) 538. See also *Ringler's Nomination*, 8 Pa. Dist. 620.

The certificate of nomination of a justice of the peace must be filed with the county commissioners twenty-eight days before the election. *Donahoe v. Johnson*, 8 Pa. Dist. 316.

**655.** 1. Provisions as to Filing Certificates of Nomination Mandatory. — *Bower v. Clemans*, 61 Kan. 129; *State v. Hays*, (Mont. 1904) 78 Pac. Rep. 301.

**2.** When Certificate Filed After Time Prescribed Should Be Accepted. — *State v. Deputy State Supervisors*, 9 Ohio Cir. Dec. 427.

Where a certificate of nomination was presented at the office of the town clerk within the prescribed time, but the office was closed, it was permissible to file the certificate at the earliest opportunity. *Earl v. Lewis*, 28 Utah 116.

**656.** 3. Certifying Nominations to Be Placed

on Ballot — *North Dakota*. — Rev. Codes N. Dak., § 504, requires the secretary of state to certify to the county auditors the names and addresses of candidates whose certificates of nomination have been filed with him. *State v. Falley*, 8 N. Dak. 90.

**658.** 2. What Officer May Pass on Nominations. — In *Kansas* the secretary of state, attorney-general, and state auditor constitute a board that is authorized by statute to pass upon the validity of nominations. *Miller v. Clark*, 62 Kan. 278.

**659.** 1. Officer May Pass upon Matters Both of Form and of Substance. — *Spencer v. Maloney*, 28 Colo. 38; *Miller v. Clark*, 62 Kan. 278.

**2.** Officer May Pass upon Matters of Form Only — *North Dakota*. — The secretary of state cannot question the validity of certificates of nomination that are filed with him provided that they are fair on their face. *State v. Falley*, 8 N. Dak. 90.

Under the *Pennsylvania* Act of July 9, 1897, § 6 (P. L. 419), the officers with whom certificates of nomination are filed may pass upon matters of form but not upon matters of substance. *Jefferis v. Griest*, 24 Pa. Co. Ct. 412.

In *Rhode Island* the duties of the secretary of state as regards certificates of nomination are ministerial only, and he has no authority to investigate irregularities and fraud in the nomination. *Rose v. Bennett*, 25 R. I. 405.

**660.** 3. Decision upon Matters of Substance Reviewable. — *Whipple v. Broad*, 25 Colo. 407; *Spencer v. Maloney*, 28 Colo. 38; *McKnight v. Whipple*, 25 Colo. 469.

**5.** What Courts Have Jurisdiction. — *State v. Foster*, 111 La. 939, *quoting* 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 660.

**6.** Jurisdiction Must Be Invoked in Manner Prescribed by Statute. — *State v. Foster*, 111 La. 939, *quoting* 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 660.

**661.** 1. Courts Cannot Pass upon Matters as to Which They Have No Grant of Jurisdiction. — *State v. Foster*, 111 La. 939, *quoting* 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 661.

**What Matters Will Be Inquired Into.** — In *North Dakota* the courts will merely decide which of two rival nominating conventions is the regular one, but will not investigate the political methods by which a nomination was secured. *State v. Porter*, 11 N. Dak. 309.

In *South Carolina* it is possible to test by certiorari the validity of a decision by the state executive committee of a party as to the regularity of a primary election. *Ex p. Sanders*, 53 S. Car. 478.

**Complainant Must First Resort to Party Tribunals.** — *Hutchins' Nominations*, 8 Pa. Dist. 109.

- 661.** (3) *Party Tribunals*. — See notes 3, 4.  
**663.** *g. TRIAL OF OBJECTIONS* — (2) *Evidence*. — See note 5.  
**664.** *j. RIVAL NOMINATIONS BY CONTENDING FACTIONS OF A PARTY*. — See note 4.  
**668.** **X. ELECTION OFFICERS** — **4. Powers and Duties** — *b. DUTIES ARE MINISTERIAL AND NOT JUDICIAL* — *Inspectors, Judges, and Supervisors*. — See note 3.  
**670.** **5. Effect of Ineligibility, Disqualification, Irregularities, and Misconduct** — *a. INELIGIBILITY AND DISQUALIFICATION*. — See note 1.  
*b. MISCONDUCT AND IRREGULARITIES* — (1) *In General*. — See note 2.  
**671.** (2) *Appointment* — *Officers De Facto*. — See note 2.  
**672.** (3) *Omission to Be Sworn*. — See note 2.  
**673.** (5) *Less than Proper Number Acting*. — See note 1.  
**6.** *Civil Liabilities* — *a. ACTION FOR DAMAGES* — (1) *Rejection of Votes*. — See note 3.  
**674.** (2) *Refusal to Allow Registration*. — See note 2.  
**676.** *b. ACTION FOR PENALTY*. — See note 9.  
**677.** **8. Compensation**. — See note 3.

**661. 3. Who Are Party Authorities.** — In *Wisconsin* the decision of the state central committee of a party is final in matters relating to the regularity of party nominations. *State v. Houser*, 122 Wis. 534.

**Decision as to Nominations Rests with Party Tribunals.** — *State v. Larson*, (N. Dak. 1904) 101 N. W. Rep. 315. See also *Rose v. Bennett*, 25 R. I. 405.

Courts cannot review the decision of party tribunals as to the validity of congressional nominations. *Moody v. Trimble*, 109 Ky. 139.

**4. Decision of Party Tribunals Final** — *Pennsylvania*. — *Douglass's Nomination*, 9 Pa. Dist. 187; *Gerberich's Nomination*, 24 Pa. Co. Ct. 250.

**663. 5. Certificate or Nomination Paper Prima Facie Evidence of Nomination.** — But the certificate is only *prima facie* evidence, and its validity may be attacked where it appears that the nominating convention did not indicate its choice by a majority vote. *Robb's Nomination*, 7 Pa. Dist. 577.

Objections to the certificate on the ground that it is not signed by members of a party will not be considered unless they are supported by proof. *Luden's Nomination*, 7 Pa. Dist. 662.

**664. 4. No Decision Should Be Made Between Rival Factional Nominations.** — *Stephenson v. Election Com'rs*, 118 Mich. 396, 74 Am. St. Rep. 402.

**Contrary Doctrine.** — *Hutchinson v. Brown*, 122 Cal. 189. See also *Spelling v. Brown*, 122 Cal. 277, holding that the secretary of state may determine the regularity of nominations of rival party factions, and that his decision is subject to review by the courts.

In *Idaho* the official ballot can have but one ticket under a party name. *Williams v. Lewis*, 6 Idaho 184.

**668. 3. A Deputy Returning Officer** acts merely as a ministerial officer in determining the right of a person to vote. *Anderson v. Hicks*, 35 Nova Scotia 161.

**670. 1. Officers Not Apportioned Between Political Parties.** — In *Nevada* there is a similar decision in respect to clerks and inspectors of

election. *State v. Sadler*, 25 Nev. 131, 83 Am. St. Rep. 573.

**2. Effect of Misconduct.** — *Wilkins v. Duffy*, 114 Ky. 111, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 670; *Rexroth v. Schein*, 206 Ill. 80, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 670; *Patton v. Watkins*, 131 Ala. 387, 90 Am. St. Rep. 43; *Jones v. State*, 153 Ind. 440.

**671. 2. The Courts in the United States.** — *Hankey v. Bowman*, 82 Minn. 328.

In *Choisser v. York*, 211 Ill. 56, the judges of election who were appointed failed to appear and others were irregularly appointed and sworn. It was held that these judges were *de facto* officers, and that the election should not be declared void on account of the irregularity in their appointment.

**672. 2. The Current of Judicial Decision.** — *People v. Prewett*, 124 Cal. 7.

**673. 1. Judicial Decisions.** — *People v. Lodi High School Dist.*, 124 Cal. 694; *Roper v. Scurlock*, 29 Tex. Civ. App. 464.

In *California* a failure to appoint as many election officers as the law authorizes does not invalidate the election. *Fragley v. Phelan*, 126 Cal. 383.

**3. Officer Civilly Liable for Wrongful or Malicious Rejection of Vote.** — *Anderson v. Hicks*, 35 Nova Scotia 161.

**674. 2. Liability of Registration Officers.** — *Hanlon v. Partridge*, 69 N. H. 88.

**676. 9. Liability for Statutory Penalties.** — See *Anderson v. Hicks*, 37 Can. L. Jur. 857.

Where an elector inadvertently marks a ballot for the wrong candidate he is entitled to recover, under the *Ontario Election Act*, from an election officer who discloses the manner in which the ballot is marked, who does not cancel the ballot, and who, after he ought to be satisfied of the fact of the inadvertence, refuses to deliver another ballot to the elector. *Hastings v. Summerfeldt*, 30 Ont. 577.

**677. 3. Compensation** — *Right Thereto Dependent upon Statutory Provision.* — *Bellis v. Chosen Freeholders*, 67 N. J. L. 528; *People v. West Turin*, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 470.



**684. XII. PLACE OF HOLDING ELECTIONS—1. In General.**—See note 2.

**685.** And Where There Has Been a Custom.—See note 3.

2. Effect of Votes in Wrong Place.—See note 5.

**686.** 3. Power to Fix Place.—See note 2.

**687.** 4. Establishing and Changing Precincts and Voting Places—*b. MODE OF ESTABLISHING OR CHANGING.*—See note 3.

**688.** *d. WHERE VOTING PLACES MAY BE ESTABLISHED—Constitutional Restrictions.*—See note 2.

**689.** *e. DISFRANCHISEMENT OF VOTERS—(2) Number and Location of Voting Places.*—See note 4.

**690. XIII. CONDUCT OF ELECTIONS—1. Compliance with Statutory Requirements—Effect of Errors and Irregularities.**—See notes 3, 4.

**691.** 4. Opening and Closing Polls.—See note 4.

**692.** Delay in Opening Polls.—See note 1.

**693.** Closing Polls Too Soon.—See notes 1, 2.

Adjournment or Recess.—See note 4.

Holding Open Too Long.—See note 5.

**694.** 5. Voting Rooms and Booths.—See note 2.

6. Presence of Officers.—See note 4.

**696.** 8. Registration Books or Lists, Check Lists, Etc.—See note 5.

**698.** 10. Voting Machines.—See note 2.

**699.** 11. Voting—*b. SECRECY IN VOTING.*—See note 1.

**701.** *c. ASSISTING VOTERS—(3) Oath or Declaration of Disability.*—See notes 1, 2.

**684. 2. Election at Unauthorized Place.**—*Johnstone v. Robertson*, (Ariz. 1904) 76 Pac. Rep. 465.

**685. 3. Custom to Hold Election at Unauthorized Place.**—In *People v. Brown*, 189 Ill. 619, the authorities failed to designate a place for holding an election, but the election took place where formerly held, and it was decided that the election was legal, it not appearing that the location of the polls prevented any one from voting.

**5. Voting in Wrong Place.**—*Lane v. Otis*, 68 N. J. L. 64, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 685.

**686. 2. Right of Voters to Fix Place—Illinois.**—*Hurd's Rev. Stat. Ill.*, c. 139, art. 6, provides that electors shall designate the place of holding elections, at their annual town meeting. *People v. Brown*, 189 Ill. 619.

**687. 3. Change of Polling Place by Court on Petition—Pennsylvania.**—Polling Place, 9 Kulp (Pa.) 533; Polling Place, etc., 8 Pa. Dist. 208.

**688. 2. Vote Held Valid, Though an Irregularity.**—In *New Jersey* such votes are held to be valid in the absence of fraud. *Lane v. Otis*, 68 N. J. L. 656.

**689. 4. Where a failure to redistrict a town results in the disfranchisement of voters through crowding the polls, the election will be set aside.** *Matter of Griffin*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 532.

**690. 3. Unprejudicial Irregularities.**—*Tanner v. Deen*, 108 Ga. 95.

**4. Mistake or Fraud of Election Officers.**—*Graham v. Graham*, (Ky. 1902) 68 S. W. Rep. 1093; *Pettit v. Yewell*, 113 Ky. 777.

**691. 4. Opening and Closing Polls—Fixing Time.**—In *New Hampshire* the voters themselves decide when the polls shall be closed, at a town meeting. *Atty.-Gen. v. Folsom*, 69 N. H. 556.

**692. 1. Delay in Opening Polls—In Absence of Prejudice.**—*Kenworthy v. Mast*, 141 Cal. 268; *Graham v. Graham*, (Ky. 1902) 68 S. W. Rep. 1093; *Edom v. Monroe*, 112 La. 779.

**693. 1. Closing Polls Too Soon.**—*Graham v. Graham*, (Ky. 1902) 68 S. W. Rep. 1093.

2. See also *People v. Hill*, 125 Cal. 16.

**4. Adjournment or Recess.**—*Patton v. Watkins*, 131 Ala. 387, 90 Am. St. Rep. 43; *Hoover v. Thomas*, 35 Tex. Civ. App. 535.

**5. Holding Polls Open Too Long.**—*Banks v. Sergeant*, 104 Ky. 843; *Atty.-Gen. v. Folsom*, 69 N. H. 556.

**694. 2. Voting Rooms and Booths—Irregularities in Arrangement.**—*Conaty v. Gardner*, 75 Conn. 48.

A failure to comply with the law in regard to voting booths does not render the election invalid. *Patton v. Watkins*, 131 Ala. 387, 98 Am. St. Rep. 43.

The statute as to voting booths must be so far complied with as to preserve the secrecy of the ballot or the election will be declared void. *Choisser v. York*, 211 Ill. 56.

4. *Anderson v. Likens*, 104 Ky. 699.

In *California* a brief absence of part of the election board does not render the election invalid. *Hayes v. Kirkwood*, 136 Cal. 396.

**696. 5. Failure to Use Registry or Check List—Absence of Prejudice.**—*Choisser v. York*, 211 Ill. 56.

**698. 2. Voting Machines.**—*McTammany Voting-Mach.*, 23 R. I. 630.

In *Massachusetts* such a statute is constitutional. *Opinion of Justices*, 178 Mass. 605.

**699. 1. Provisions Are Mandatory—In Michigan.**—*Atty.-Gen. v. Kirby*, 120 Mich. 502.

In *Kentucky*.—See also *Banks v. Sergeant*, 104 Ky. 843.

**701. 1. Provisions as to Oath or Declaration Mandatory.**—*Patterson v. Hanley*, 136 Cal.

- 702.** (4) *Who May Render Assistance.* — See note 2.  
**703.** (5) *Manner of Rendering Assistance.* — See note 2.  
**705.** *f. CHALLENGE AND PROOF OF QUALIFICATION.* — See note 2.  
**706.** *g. WITHDRAWAL OR CHANGE OF VOTES.* — See note 2.  
**708.** 12. *Ballots* — *b. FORM AND CONTENTS* — (1) *In General.* — See note 3.  
**709.** See note 1.  
 (2) *Name of Political Party.* — See note 2.  
*c. OFFICIAL BALLOTS* — (1) *In General.* — See note 3.  
**713.** (3) *Number of Times Name May Appear upon Ballot.* — See note 2.  
 (4) *Arrangement of Party Tickets and Names.* — See note 3.  
 (5) *Withdrawal of Candidate's Name.* — See note 6.  
**714.** (7) *Indorsement of Ballots.* — See note 3.  
**715.** See note 1.

265; *Gill v. Shurtleff*, 183 Ill. 440; *Patrick v. Runyon*, (Ky. 1899) 50 S. W. Rep. 538; *Napier v. Cornett*, (Ky. 1902) 68 S. W. Rep. 1076. See also *Banks v. Sergeant*, 104 Ky. 843.

Political Code *California*, § 1208, requires that the voter make an oath of disability at the time of registering, in order to be entitled to assistance in marking his ballot. *Huston v. Anderson*, 145 Cal. 320.

**701. 2. Provision as to Declaration Directory.** — In *Alabama* the provision as to the oath is also considered directory. *Patton v. Watkins*, 131 Ala. 387, 90 Am. St. Rep. 43.

**702. 2. Who May Assist Voter.** — Under the *California* statute an illiterate voter has a right to be assisted by two officers of election, but these officers must not belong to the same political party. *Patterson v. Hanley*, 136 Cal. 265.

Political Code *Montana*, § 1364, provides that the voter may be assisted by two election judges, but that these judges must belong to different political parties. *Lane v. Bailey*, 29 Mont. 548.

**703. 2. Secrecy Must Be Preserved as Far as Possible.** — *King v. State*, 30 Tex. Civ. App. 320.

**705. 2. Rejection of Votes in Absence of Oath or Affidavit.** — In *Oregon* in a school election a voter who is challenged must prove that he is qualified to vote. *Breding v. Williams*, 37 Oregon 433.

**706. 2. Withdrawal or Change of Vote — Ballots.** — *Roach v. Malotte*, 23 Tex. Civ. App. 400.

**708. 3. Illustrations.** — Where officers of a school are to be elected for terms of different lengths, the official ballot must show the term for which each candidate is nominated. *North Union Tp. School Directors' Case*, 23 Pa. Co. Ct. 593.

The candidate's number, provided for in the *Ontario* Election Act, is not regarded as an essential part of the ballot, and the error of an election officer in tearing off such number does not work the destruction of the ballot. *Re Prince Edward Provincial Election*, 4 Ont. L. Rep. 255.

**709. 1. Technical Inaccuracies Immaterial.** — *Re West Elgin*, 2 Election Cas. 38.

**2. Caption Designating Political Character.** — *State v. Frye*, 62 Neb. 817.

**3. Use of Official Ballot.** — *State v. Martin*, 24 Mont. 403.

**713. 2. Validity of Statutes.** — *Com. v. McCormick*, 2 Dauphin Co. Rep. (Pa.) 46.

In *Wisconsin* such a statute was held to be constitutional. *State v. Anderson*, 100 Wis. 523.

**3. Arrangement.** — *Higgins v. Berg*, 74 Minn. 11.

In *Montana* the matter lies in the discretion of the party printing the official ballot. *State v. Martin*, 24 Mont. 403.

**6.** In *Montana* the law provides that a name cannot be removed from the official ballot "except by death or resignation, or by conviction of a felony, judicially declared insanity, or removal from the state or county." *State v. Martin*, 24 Mont. 403.

**714. 3. Official Stamp.** — *Kirkpatrick v. Deegans*, 53 W. Va. 275, quoting 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 714.

**715. 1. Indorsement by Election Officers.** — *Caldwell v. McElvain*, 184 Ill. 552; *Tombaugh v. Grogg*, 156 Ind. 355; *Duvall v. Miller*, 94 Md. 697; *O'Connell v. Mathews*, 177 Mass. 518; *Truelsen v. Hugo*, 81 Minn. 73; *Truelsen v. Hugo*, 87 Minn. 139; *Donnell v. Lee*, 101 Mo. App. 191; *Hehl v. Guign*, 155 Mo. 76; *Miller v. Schallern*, 8 N. Dak. 395; *Kirkpatrick v. Deegans*, 53 W. Va. 275, quoting 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 715; *Daniel v. Simms*, 49 W. Va. 554.

Ballots are not invalidated because indorsed with but one initial or with the name of the judge in full. *Perkins v. Bertrand*, 192 Ill. 58, 85 Am. St. Rep. 315.

The statute requiring ballots to be indorsed by an election officer is mandatory, and ballots not so indorsed are void. *Frazer v. Fitzsimmons*, 124 Mich. 511; *Rhodes v. Driver*, 69 Ark. 501; *Kelly v. Adams*, 183 Ill. 193; *Kelso v. Wright*, 110 Iowa 560.

Ballots that are not initialed are void. *McKay v. Minner*, 154 Mo. 608; *Mauck v. Brown*, 59 Neb. 382. See also *Kirkpatrick v. Deegans*, 53 W. Va. 275.

The statute requiring indorsement is merely directory and not mandatory. *Bates v. Crumbaugh*, 114 Ky. 447. See also *Anderson v. Likens*, 104 Ky. 699; *King v. State*, 30 Tex. Civ. App. 320.

**Requirement of Indorsement in a Certain Place Directory.** — *Coulehan v. White*, 95 Md. 703; *Horning v. Board of Canvassers*, 119 Mich. 51.

**Failure to Initial Does Not Invalidate Election.** — But see *Orr v. Bailey*, 59 Neb. 128, holding that the indorsement of ballots is mandatory; *Howser v. Pepper*, 8 N. Dak. 484, holding that

**716.** (8) *Numbering Ballots.* — See note 1.

*Whether Directory or Mandatory.* — See notes 2, 3.

**717.** (10) *Blank Spaces for Persons Not Nominated.* — See notes 3, 4.

(11) *Indicating Choice upon the Ballots* — (a) *In General.* — See note 7.

**720.** (b) *What Constitutes a Proper Mark.* — See note 1.

ballots cannot be counted unless they are initialed by the election inspector.

**Illegal Indorsement.** — An election official indorsed a ballot in such a way as to make a distinguishing mark, but it was held that the ballot was not void, as the voter was in no wise to blame. *Gill v. Shurtleff*, 183 Ill. 440.

**The Initials of a Deputy Returning Officer** need not designate the full name of such officer. *Muskoka Provincial Election*, 4 Ont. L. Rep. 253.

**716. 1. Statutes Enforced.** — *Brant's Case*, 13 York Leg. Rec. (Pa.) 145.

In *Pennsylvania* the statute as to numbering ballots does not apply to a special election to decide upon the erection of a school building. *Rebman v. School Dist.*, 201 Pa. St. 437.

**2. Statute Directory.** — *Rebman v. School Dist.*, 25 Pa. Co. St. 132, *affirmed* 201 Pa. St. 437.

**3. Statute Mandatory.** — *Donnell v. Lee*, 101 Mo. App. 191; *Gray v. State*, 19 Tex. Civ. App. 521.

**717. 3. Blanks for Persons Not Nominated.** — *Salcido v. Roberts*, (Cal. 1902) 67 Pac. Rep. 1077; *Patterson v. Hanley*, 136 Cal. 265; *McSorley v. Schroeder*, 196 Ill. 99; *Edwards v. Loy*, 113 Ky. 746; *Freemansburg Case*, 7 Northam. Co. Rep. (Pa.) 387; *Foreman's Case*, 30 Pittsb. Leg. J. N. S. (Pa.) 318.

A voter must write nothing but the candidate's name in the blank space. *In re Elizabethville*, 2 Dauphin Co. Rep. (Pa.) 380.

**4. Right to Vote for Person Not Nominated.** — *State v. Conser*, 24 Ohio Cir. Ct. 270.

**7. How to Mark Ballots.** — *Van Winkle v. Crabtree*, 34 Oregon 462.

**Double Marking.** — *Herndon v. Farmer*, 114 Ky. 200.

A ballot marked with a cross for each of two opposing candidates will be rejected where it does not appear that either of the crosses has been inserted by the deputy returning officer. But where one of the crosses has been obliterated the ballot will be allowed. *Re North Grey Provincial Election*, 4 Ont. L. Rep. 286; *In re Halton Provincial Election*, 4 Ont. L. Rep. 345; *In re Lennox Provincial Election*, 4 Ont. L. Rep. 378.

A ballot containing a cross in one candidate's compartment and a line in the opposing candidate's will be counted for the candidate designated by the cross. *In re Halton Provincial Election*, 4 Ont. L. Rep. 345; *In re Lennox Provincial Election*, 4 Ont. L. Rep. 378.

A ballot marked for both candidates is properly rejected. *Re West Elgin*, 2 Election Cas. 38.

**Effect of Crosses at Head of Two Tickets.** — *Bates v. Crumbaugh*, 114 Ky. 447; *Moody v. Davis*, 13 S. Dak. 86. But in such a case crosses opposite the names of candidates show the voter's intention and should be counted. *Perkins v. Bertrand*, 192 Ill. 58, 85 Am. St. Rep. 315.

**Names of Candidates Not Voted for Erased.** — *Daniel v. Simms*, 49 W. Va. 554.

**Additional Marks.** — *Farnham v. Boland*, 134 Cal. 151; *Patterson v. Hanley*, 136 Cal. 265; *People v. Campbell*, 138 Cal. 11; *Tombaugh v. Grogg*, 156 Ind. 355; *Spurrier v. McLennan*, 115 Iowa 461; *Duvall v. Miller*, 94 Md. 697; *Thacher v. Lent*, 71 N. Y. App. Div. 483; *Matter of Holmes*, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 127; *People v. Bourke*, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 461. See also *Re West Elgin*, 2 Election Cas. 38.

A small, obscure pencil marking, which might be taken for the letter C, following a cross, is not sufficient to cause the ballot to be disallowed. *Muskoka Provincial Election*, 4 Ont. L. Rep. 253.

A ballot containing a distinct cross and in the same division a series of slight, cloudy, formless pencil markings is rightly allowed. *Re North Grey Provincial Election*, 4 Ont. L. Rep. 286.

A ballot marked with three clear crosses in a line for one candidate will be allowed. *In re Halton Provincial Election*, 4 Ont. L. Rep. 345.

A ballot properly marked with a cross is invalidated if there are legible letters written in the same division. *In re Lennox Provincial Election*, 4 Ont. L. Rep. 378.

Writing the word "vote" after the name of the candidate for whom the ballot has been marked will invalidate such ballot. And so also where the abbreviation of the candidate's Christian name is written before his name. *Re West Huron*, 2 Election Cas. 58.

Writing the candidate's surname on the back of the ballot will invalidate it. *Re West Huron*, 2 Election Cas. 58.

Ballots are void in which a cross is placed opposite the words "no nomination." *Maddux v. Walthall*, 141 Cal. 412; *McMenomy v. Ruch*, 142 Cal. 77; *McCardle v. Barstow*, 145 Cal. 135; *Merkley v. Trainor*, 142 Cal. 265; *Kincaid v. Reid*, 142 Cal. 88; *Treanor v. Williams*, 145 Cal. 315; *Tandy v. Lavery*, 194 Ill. 372; *Kelso v. Wright*, 110 Iowa 560.

**Name of Candidate Written on Ballot.** — A ballot marked for a candidate and which also contains the name of such candidate written upon it is not a good ballot. *In re Halton Provincial Election*, 4 Ont. L. Rep. 345; *Re North Grey Election*, 4 Ont. L. Rep. 286.

**720. 1. Rule as to Style of Mark.** — *People v. Kamps*, 129 Mich. 217; *Kelly v. State*, 79 Miss. 168; *People v. Burke*, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 461; *Van Winkle v. Crabtree*, 34 Oregon 462; *Muskoka Provincial Election*, 4 Ont. L. Rep. 253; *Re North Grey Provincial Election*, 4 Ont. L. Rep. 286; *In re Halton Provincial Election*, 4 Ont. L. Rep. 345; *In re Lennox Provincial Election*, 4 Ont. L. Rep. 378. *Compare Re West Huron*, 2 Election Cas. 58.



- 721.** (c) **Marking with Pencil, Ink, etc.** — See notes 1, 2.  
 (d) **Position of the Mark.** — See note 3.  
**722.** (12) **Spoiled Ballots.** — See note 1.  
 (13) **Effect of Official Irregularities.** — See note 2.  
**723.** d. **IMPERFECTIONS IN NAME OF CANDIDATE.** — See note 2.  
**726.** f. **ILLEGALITY IN BALLOTS** — (1) *In General.* — See note 2.  
**728.** (2) **Accidental Marks.** — See note 2.  
**729.** See note 1.  
 (3) **Voter's Name upon the Ballot.** — See note 2.  
 g. **PASTERS.** — See notes 4, 5.

**Illustrations — Proper Marks.** — See also *Bates v. Crumbaugh*, 114 Ky. 447.

A ballot is not void because the crosses have curls at the end. *Coulehan v. White*, 95 Md. 703.

A ballot is not invalid because one leg of the cross is shorter than the other. *Coulehan v. White*, 95 Md. 703. See also *Wheeler v. Caldwell*, 68 Kan. 776.

A cross made with three or four strokes of the pencil is sufficient. *Muskoka Provincial Election*, 4 Ont. L. Rep. 253.

Several tremulous connected marks after one name may be construed as a cross and the ballot allowed. And so also where the lines are close to each other but partly coincident and then divergent. *Re North Grey Provincial Election*, 4 Ont. L. Rep. 286.

Two plain strokes united at the top or bottom, though not very widely apart at the other end, may be construed as a cross and not as a single straight stroke. *In re Halton Provincial Election*, 4 Ont. L. Rep. 395; *Re West Huron*, 2 Election Cas. 58.

**Invalid Marks.** — A ballot is invalid where the cross is made by several perpendicular lines crossing several horizontal lines. *Thacker v. Lent*, 71 N. Y. App. Div. 483. See also *Wheeler v. Caldwell*, 68 Kan. 776.

A mark made by the intersection of three straight lines is invalid. *Coulehan v. White*, 95 Md. 703.

**721.** 1. Ballots are not void because they were marked with a pencil instead of a stencil. *Graham v. Graham*, (Ky. 1902) 68 S. W. Rep. 1093.

Marking with a blue or indelible pencil does not invalidate a ballot. *In re Halton Provincial Election*, 4 Ont. L. Rep. 345.

2. The *New York* statute requires the ballots to be marked with a black lead pencil, and consequently a ballot marked with a pencil with purple lead is void. *People v. Bourke*, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 461.

3. **Where Mark Should Be Made — Illustrations.** — A cross in the same compartment as the candidate's name and to the left of the name has been held valid. *Mauck v. Brown*, 59 Neb. 382.

**Cross on Back of Ballot.** — A ballot marked by placing a cross on the back is rightly disallowed. *Re North Grey Provincial Election*, 4 Ont. L. Rep. 286; *Re West Elgin*, 2 Election Cas. 38.

**Cross Should Be in Voting Space.** — *Duvall v. Miller*, 94 Md. 697; *Houser v. Pepper*, 8 N. Dak. 484. Compare *State v. Sadler*, 25 Nev. 131, 83 Am. St. Rep. 573.

**Uncertainty as to Place of Cross.** — A cross upon or above the upper division line may be suffi-

cient. *Muskoka Provincial Election*, 4 Ont. L. Rep. 253; *In re Lennox Provincial Election*, 4 Ont. L. Rep. 378.

**722.** 1. *People v. Campbell*, 138 Cal. 11; *Duvall v. Miller*, 94 Md. 697; *King v. State*, 30 Tex. Civ. App. 320.

2. **Ballots Not Invalidated by Official Irregularities.** — *Rexroth v. Schein*, 206 Ill. 80, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 722; *State v. Bernholtz*, 106 Iowa 157; *Creech v. Davis*, (Ky. 1899) 51 S. W. Rep. 428; *Matter of Arnold*, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 439; *People v. Edwards*, (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 567; *Earl v. Lewis*, 28 Utah 116.

The fact that the nomination papers of a candidate were defective and his name was wrongfully placed on the official ballot does not invalidate the election. *Blackmer v. Hildreth*, 181 Mass. 29.

A candidate resigned and the county clerk was unable to get sufficient paper to print new ballots for all the voters. Consequently he made up the deficiency in ballots by crossing off the candidate's name on the original ballots, with red ink, and distributing them to part of the voters. These ballots were held to be invalid. *State v. Sadler*, 25 Nev. 131, 83 Am. St. Rep. 573.

**An Error in Printing Official Ballots**, which has caused the name of one candidate to be in the same division as that of another candidate so that it is uncertain for whom a vote marked opposite such unplaced name is intended, requires the election to be declared invalid. *Re South Perth*, 2 Election Cas. 47, 52.

**723.** 2. **Mistake in Name of Candidate.** — See *Weeks v. Kip*, 64 N. J. L. 61.

**Only Surname Given.** — *State v. Eagan*, 115 Wis. 417.

**726.** 2. **Illegal Ballots.** — *Kirkpatrick v. Deegans*, 53 W. Va. 275, quoting 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 726; *Rollins v. McKinney*, 157 Mo. 656.

**728.** 2. **Not Invalidated by Accidental Marks.** — *Tombaugh v. Grogg*, 156 Ind. 355; *Voorhees v. Arnold*, 108 Iowa 77; *State v. Sadler*, 25 Nev. 131, 83 Am. St. Rep. 573.

**729.** 1. **Presumption as to Mark.** — *Coughlin v. McElroy*, 72 Conn. 99, 77 Am. St. Rep. 301; *Howser v. Pepper*, 8 N. Dak. 484.

2. **Name Written upon Ballot.** — *Tandy v. Lavery*, 194 Ill. 372; *Caldwell v. McElvain*, 184 Ill. 552; *State v. Peter*, 21 Wash. 243.

4. **Pasters Permitted.** — *Coughlin v. McElroy*, 72 Conn. 99, 77 Am. St. Rep. 301; *State v. Roundtree*, 28 Wash. 669.

**Pennsylvania Statute.** — A voter may use a

- 730.** *h.* ERASURES. — See note 1.  
**731.** *j.* MUTILATED BALLOTS. — See note 3.  
*k.* DOUBLE VOTING. — See notes 5, 6.  
**732.** 13. Custody and Disposition of Ballot Boxes and Ballots — *a.* IN GENERAL. — See notes 3, 4.  
**733.** *c.* POWER OF COURT TO COMPEL PRODUCTION OF BALLOTS AS EVIDENCE. — See notes 2, 3.  
**736.** XIV. COUNT, RETURN, CANVASS, AND RECOUNT OR RECANVASS —  
 2. Count of Votes — *c.* RECOUNT BY ELECTION OFFICERS. — See note 2.  
**739.** 3. Returns — *c.* EXECUTION AND FORM OF RETURNS — (3) *Uncertainty in the Returns.* — See note 2.  
     (*a.*) *Returns Made from Improper Data.* — See note 3.  
     (*b.*) *Signature and Certificate* — (*a.*) *Necessity.* — See notes 6, 7.  
**740.** (*b.*) *Sufficiency* — *bb.* PERSONS SIGNING. — See note 4.  
**741.** (*b.*) *Correction of Returns.* — See note 3.  
**746.** 4. Canvass of Returns — *b.* CANVASSERS MINISTERIAL OFFICERS. — See note 3.

paster, but the paster must not be so large as to disfigure the rest of the ballot. Foreman's Case, 30 Pittsb. Leg. J. N. S. (Pa.) 318.

**729.** 5. Pastors Prohibited. — A voter cannot use a paster in preparing his ballot, but an election officer may use a paster to place upon the official ballot the name of a party who is supplied to fill a vacancy. *McSorley v. Schroeder*, 196 Ill. 99.

**730.** 1. Effect of Erasure — Whether Erasure Is a Distinguishing Mark — Illinois Statute. — See *Kelly v. Adams*, 183 Ill. 193.

**731.** 3. Torn Ballot Counted. — *Thacher v. Lent*, 71 N. Y. App. Div. 483.

**5.** Double Voting. — *Salcido v. Roberts*, (Cal. 1902) 67 Pac. Rep. 1077; *Patterson v. Hanley*, 136 Cal. 265; *Day v. Dunning*, 127 Cal. 55; *Caldwell v. McElvain*, 184 Ill. 552; *Borders v. Williams*, 155 Ind. 36; *Hughes v. Upson*, 84 Minn. 85; *Mitchell v. Alley*, 126 N. Car. 84; *Daniel v. Simms*, 49 W. Va. 554.

**6.** *Salcido v. Roberts*, (Cal. 1902) 67 Pac. Rep. 1077; *Day v. Dunning*, 127 Cal. 55; *Caldwell v. McElvain*, 184 Ill. 552; *Borders v. Williams*, 155 Ind. 36; *Spurrier v. McLennan*, 115 Iowa 461.

Under the Maryland statute the entire ballot is void. *Duvall v. Miller*, 94 Md. 697.

**732.** 3. Custody of Ballot Boxes and Ballots. — *De Long v. Brown*, 113 Iowa 370, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 732; *Collier v. Anlicker*, 189 Ill. 34; *Jeter v. Headley*, 186 Ill. 34; *Gray v. State*, 19 Tex. Civ. App. 521.

**4.** Ballots Tampered With, or Probably Tampered With. — *De Long v. Brown*, 113 Iowa 370, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 732; *Jeter v. Headley*, 186 Ill. 34.

**733.** 2. Power of Federal Courts. — In a congressional contest the court may order the ballots to be removed from the boxes and preserved even before the time when they are to be used as evidence. *In re Howell*, 119 Fed. Rep. 465.

**3.** Compelling Production in Contested Elections. — *Conaty v. Gardner*, 75 Conn. 48; *Edwards v. Logan*, 114 Ky. 312.

**Inspection of Ballots.** — In *New York* the Supreme Court may order an inspection of the bal-

lots on the application of the defeated candidate though no election contest has actually been commenced. *Matter of Van Cott*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 411.

**736.** 2. Election Officers Cannot Recount Votes. — *People v. Way*, 179 N. Y. 174.

**739.** 2. Failure to Give Names of Candidates. — *Tunks v. Vincent*, 106 Ky. 829.

**3.** Returns Made from Improper Data. — In *People v. Stewart*, 132 Cal. 283, the returns from one precinct were lost, and the board of supervisors used the duplicate list from this precinct in their canvass. This was held to render the canvass invalid, as the law required them to wait for a certain length of time for the original returns to be found.

**6.** Want of Signatures on Certificate — View that Returns Should Be Received. — The vote of an election district is not to be rejected merely because the election officers refuse to sign the returns. *O'Laughlin v. Kirkwood*, 107 Mo. App. 302.

**7.** Weight of Authority that Returns Should Be Rejected. — In *Choisser v. York*, 211 Ill. 56, it was held that the returns should have been rejected by the canvassing board until the certificate was corrected, but that where the returns had been received without objection by the canvassing board, they would not be thrown out in a proceeding to contest the election, because this would result in disfranchising voters for the neglect of election officers.

**740.** 4. *Tanner v. Deen*, 108 Ga. 95, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 740.

**741.** 3. After Leaving Hands of Returning Officer. — *Keeler v. Shaw*, 24 Pa. Co. Ct. 337.

**746.** 3. Canvass of Returns — Canvassers Ministerial Officers. — *Matter of Atkinson*, (Supm. Ct. Spec. T.) 28 Misc. (N. Y.) 694, affirmed 43 N. Y. App. Div. 628; *State v. McKenzie*, 10 N. Dak. 132, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 746; *People v. Stewart*, 132 Cal. 283; *Board of Trustees v. Sumner County*, 61 Kan. 796; *Matter of Hart*, 161 N. Y. 507; *State v. McKenzie*, 10 N. Dak. 132; *Dunlevy v. Marshall County Ct.*, 47 W. Va. 513.

A canvassing board cannot decide the eligibility of a candidate for a certain office. *State v. Finley*, 74 Mo. App. 213.



- 751.** 5. Recount and Recanvass — Power of Courts. — See note 1.  
*b.* EXPRESS STATUTORY PROVISIONS. — See note 2.
- 751.** XV. VOTE NECESSARY TO A CHOICE — 3. Construction of Provisions as to Vote Required. — See note 2.
- 756.** See notes 1, 2.
- 758.** 4. Effect of Votes for Ineligible Person. — See note 1.
- 760.** 6. Effect of Blank Ballots. — See note 5.
- XVI. TIE VOTE. — See note 6.
- Statutory Provisions for Determining Tie Vote. — See note 7.
- 761.** XVII. THE COMMISSION AND THE CERTIFICATE OF ELECTION —
1. Prima Facie Right to Office in General. — See note 3.
- 766.** XVIII. ILLEGALITY AND IRREGULARITIES — 2. General Principles. — See note 4.
- 770.** 6. Illegal Voting — *b.* EFFECT OF ILLEGAL VOTES. — See notes 7, 8.
- 773.** *f.* PURGING THE POLLS. — See note 3.
7. Improper Rejection of Votes. — See note 4.
- 774.** XIX. FRAUD — 1. Effect in General. — See note 2.
- 776.** XX. VIOLENCE AND INTIMIDATION — 1. Effect in General. — See note 2.
- 780.** XXI. BRIBERY, UNDUE INFLUENCE, AND OTHER CORRUPT PRACTICES —
1. Bribery — *a.* EFFECT OF BRIBERY — (1) *On Election.* — See note 3.
- 781.** United States. — See note 2.
- 786.** *b.* WHAT CONSTITUTES BRIBERY — (7) *Furnishing or Promising Employment.* — See note 5.
- 751.** 1. Power of Court to Compel Recount. — *Re Fernie Election*, 10 British Columbia 151.
2. Whether Duties of the Justice Are Judicial or Ministerial. — See *Meigs v. Comeau*, 3 Quebec Pr. 307, 10 Quebec K. B. 56.
- 754.** 2. Consent Given by Required Proportion of Votes Cast. — *Davis v. Brown*, 46 W. Va. 716, quoting 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 754; *Pickett v. Russell*, 42 Fla. 116, 634, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 754; *Cronly v. Tucson*, 6 Ariz. 235.
- 756.** 1. View that a Proposition May Be Decided by Votes Actually Cast Thereon. — But see *Davis v. Brown*, 46 W. Va. 716, quoting 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) [754] 756.
2. Required Proportion of All Votes Cast at Election Necessary. — *Davis v. Brown*, 46 W. Va. 716, quoting 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 756; *In re Davis*, 62 Kan. 231; *State v. Clark*, 59 Neb. 702. But see *Rush v. Com.*, (Ky. 1898) 47 S. W. Rep. 586; *Jones v. Com.*, 104 Ky. 468; *Montgomery County Fiscal Ct. v. Trimble*, 104 Ky. 629.
- 758.** 1. General Rule — Minority Candidate Not Elected. — *Sheridan v. St. Louis*, 183 Mo. 25; *Gardner v. Burke*, 61 Neb. 534.
- 760.** 5. Effect of Blank Votes. — In *Murdoch v. Strange*, 99 Md. 89, it was held that blank ballots should be disregarded in estimating whether a candidate received a majority of the votes cast.
6. Tie Vote — No Election. — *State v. Kramer*, 150 Mo. 89.
- In case of a tie vote a new election must be ordered. *Bailey v. Fly*, (Tex. Civ. App. 1904) 80 S. W. Rep. 675.
7. Statutory Provisions for Determination. — *Allen v. Patterson*, 85 Ill. App. 256; *Howser v. Pepper*, 8 N. Dak. 484; *In re Clarion Borough*, 189 Pa. St. 79.
- In *Pennsylvania* the court has power to make a choice in case of a tie vote for supervisors. *Washington Tp.*, 13 York Leg. Rec. (Pa.) 176.
- 761.** 3. Certificate Gives Prima Facie Right to Office. — *Com. v. McAllister*, 24 Pa. Co. Ct. 96; *State v. Kersten*, 118 Wis. 287.
- 766.** 4. Irregularities Not Affecting Result. — *Rexroth v. Schein*, 206 Ill. 80, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 766; *Hayes v. Kirkwood*, 136 Cal. 396; *Choisser v. York*, 211 Ill. 56; *Napier v. Cornett*, (Ky. 1902) 68 S. W. Rep. 1076; *Bailey v. Hurst*, 113 Ky. 699; *Horning v. Board of Canvassers*, 119 Mich. 51.
- 770.** 7. Effect of Illegal Voting — Result Not Affected. — *Hoover v. Thomas*, 35 Tex. Civ. App. 535.
8. Where the Result Is Affected. — *Lewis v. Boynton*, 25 Colo. 486; *Atty.-Gen. v. Folsom*, 69 N. H. 556.
- 773.** 3. Purging the Polls — Excessive Number of Votes. — Such a course is followed in *Minnesota*, but ballots that are invalid and those that are not initialed by the election officers are to be first deducted. *Truelsen v. Hugo*, 87 Minn. 139.
4. Votes Improperly Rejected. — In *Colorado* it is permissible to contest the election if enough legal votes were rejected to affect the result. *Lewis v. Boynton*, 25 Colo. 486. See also *Rathgen v. French*, 22 Tex. Civ. App. 439.
- 774.** 2. Effect of Fraud. — See also *Stewart v. Rose*, (Ky. 1903) 72 S. W. Rep. 271.
- 776.** 2. Violence and Intimidation. — See also *Stewart v. Rose*, (Ky. 1903) 72 S. W. Rep. 271.
- 780.** 3. Election Materially Influenced by Bribery Void. — *Stewart v. Rose*, (Ky. 1903) 72 S. W. Rep. 271; *State v. Conness*, 106 Wis. 425.
- 781.** 2. Disqualification for Office. — In *Missouri* the successful candidate may be ousted from office for bribery. *State v. Towns*, 153 Mo. 91.
- 786.** 5. Furnishing Employment in Consider-



- 787.** (8) *Excessive Price for Work or Articles Purchased.*—See note 3.  
 (10) *Payment of Traveling Expenses and for Loss of Time.*—See note 6.
- 788.** (11) *Treating.*—See note 2.  
 Intent.—See note 3.
- 789.** *Receiving Treat.*—See note 1.  
 (12) *Betting on Result.*—See note 4.
- 790.** (17) *Evidence.*—See note 4.
- 791.** 2. *Undue Influence*—*b.* WHAT CONSTITUTES UNDUE INFLUENCE—(5) *Spiritual Influence.*—See note 6.
- 792.** 3. *Other Corrupt Practices*—*b.* WHAT CONSTITUTE CORRUPT PRACTICES—(1) *In General.*—See note 4.
- 794.** 4. *Corrupt Practices by Agent of Candidate*—*a.* RESPONSIBILITY OF CANDIDATE FOR ACTS OF AGENTS.—See notes 6, 7.
- 795.** *c.* WHAT WILL CONSTITUTE AN AGENCY.—See notes 2, 3.
- 799.** XXII. *REMEDIES IN ELECTION CASES*—1. *Quo Warranto*—*d.* WHAT MAY BE TESTED IN QUO WARRANTO—*Canvassers' Returns.*—See note 1.  
*Legality of Election Tested.*—See note 3.
- 800.** *e.* EFFECT OF STATUTORY PROVISION FOR CONTEST.—See note 1.
- 803.** 2. *Mandamus*—*a.* IN GENERAL.—See note 3.
- 804.** *b.* TO WHOM THE WRIT MAY ISSUE.—See note 1.

ation of Vote Bribery.—A promise to appoint a man deputy clerk in consideration of his political support is bribery. *State v. Towns*, 153 Mo. 91.

**787.** 3. *Colorable Purchases or Excessive Payments.*—*Re East Elgin*, 2 Election Cas. 100.

6. *Present Doctrine*—*Payment Illegal.*—See *State v. Conness*, 106 Wis. 425.

**788.** 2. *Treating May Invalidate Election.*—*West Wellington Case*, 2 Election Cas. 16; *Re North Waterloo*, 2 Election Cas. 76; *Leblanc v. Maloney*, 4 N. W. Ter. 402.

*Extensive and General or Miscellaneous Treating* is only *prima facie* corrupt, and may in fact be perfectly innocent. *Re East Middlesex*, 5 Ont. L. Rep. 644. See also *Re North Waterloo*, 2 Election Cas. 76.

*Where a Meeting Has Come to an End and Dispersed*, before anything has been said about treating, there is not a treating in contravention of section 161 of the *Ontario Election Act*. *Re East Middlesex*, 5 Ont. L. Rep. 644.

*Only the Person at Whose Expense Drink Is Supplied*, or who pays or engages to pay for it, is guilty of the offense of corrupt treating. *Re East Middlesex*, 5 Ont. L. Rep. 644.

3. *Corrupt Intent Must Be Shown.*—*Re East Middlesex*, 5 Ont. L. Rep. 644.

*Intoxicating Liquor Paid for by Subscription.*—*Re South Perth Provincial Election*, 2 Election Cas. 144.

*Treating by a Candidate May Be Deemed Corrupt* when it is not the usual custom of such candidate to treat or to frequent bar-rooms. *Re West Wellington Case*, 2 Election Cas. 16.

**789.** 1. *Receiving Treat a Corrupt Practice.*—*Compare Re North Waterloo*, 2 Election Cas. 76.

4. *Loaning Money to Be Used in Betting* is a corrupt practice. *Re East Elgin*, 2 Election Cas. 100.

**790.** 4. *Evidence Must Be Clear and Satisfying.*—*In re Lisgar Election*, 14 Manitoba 310.

**791.** 6. *Spiritual Influence Not Necessarily Undue.*—See *State v. Rogers*, 128 N. Car. 576.

**792.** 4. *A Corrupt Act—Actual Knowledge of Wrong Essential.*—*Re South Perth*, 2 Election Cas. 30; *Re East Elgin*, 2 Election Cas. 100.

*Payment of Agent's Legitimate Expenses Not Corrupt Practice.*—*In re Lisgar Election*, 13 Manitoba 478.

**794.** 6. *Candidate May Lose Election Through Corrupt Practices of Agent.*—*In re Lisgar Election*, 13 Manitoba 478.

7. *Burden of Proof on Petitioner.*—*In re Lisgar Election*, 13 Manitoba 478.

**795.** 2. *Agency May Be Shown or Implied* from circumstances which show knowledge on the part of the candidate or on the part of some authorized agent of his—knowledge which he has, or would have unless he closed his eyes on it—of the part which the alleged agent is taking in the election. See *Lablanc v. Maloney*, 5 N. W. Ter. 402.

3. *Circumstances Held to Constitute Agency.*—*Re East Middlesex*, 5 Ont. L. Rep. 644; *Re East Elgin*, 2 Election Cas. 100.

*Circumstances Held Not to Constitute Agency.*—*Re East Middlesex*, 5 Ont. L. Rep. 644; *Re*

**799.** 1. *Going Behind Returns.*—*Lane v. Otis*, 68 N. J. L. 64.

3. *Legality of Election.*—*Matter of Hart*, 161 N. Y. 507.

**800.** 1. *Statutory Remedy Cumulative.*—*Gray v. State*, 19 Tex. Civ. App. 521; *State v. Peter*, 21 Wash. 243.

**803.** 3. *Performance of Ministerial Duties.*—*Rummel v. Dealy*, 112 Iowa 503.

**804.** 1. *Boards of Canvassers.*—*Dunlevy v. Marshall County Ct.*, 47 W. Va. 513.

*Secretary of State.*—*Williams v. Lewis*, 6 Idaho 184; *State v. Falley*, 9 N. Dak. 450; *Rose v. Bennett*, 25 R. I. 405.

*County Court.*—*Morgan v. Wetzel County Ct.*, 53 W. Va. 372.

- 805.** *c.* TO COMPEL CALL OF ELECTION. — See note 1.  
*d.* TO COMPEL APPOINTMENT OF OFFICERS. — See note 2.  
*e.* TO COMPEL REGISTRATION OF QUALIFIED VOTERS. — See note 3.  
**806.** *g.* TO COMPEL CANVASS — (1) *In General*. — See note 4.  
**807.** (2) *Recanvass*. — See note 3.  
**808.** (4) *Effect of Adjournment of Board*. — See note 3.  
**810.** *h.* TO COMPEL GIVING CERTIFICATE OF ELECTION — (1) *In General*. — See note 5.  
**813.** *j.* TO OBTAIN POSSESSION OF OFFICE, ETC. — See note 3.  
**814.** *l.* THE RELATOR. — See note 6.  
**815.** 3. Prohibition — Prohibition Against Injunction. — See note 10.  
**817.** 5. Equitable Remedies — *b.* TO ENJOIN HOLDING AN ELECTION. — See notes 2, 3.  
**818.** 6. Contests Before Legislative Bodies — *a.* IN GENERAL — United States. — See note 7.  
**828.** XXIII. EVIDENCE IN ELECTION CASES — 2. Who May and Must Testify. — See note 2.  
 Secrecy of the Ballot. — See note 3.  
 3. The Returns — *a.* THE EFFECT OF RETURN OR CERTIFICATE. — See note 4.  
**829.** Improper Returns. — See note 6.

Clerk and Registrar. — *Keller v. Stone*, 96 Va. 667.

County Auditor. — *State v. Lavik*, 9 N. Dak. 461.

Mandamus will lie to compel the county auditor to file the nominations of a political party. *Addle v. Davenport*, 7 Idaho 282.

**805.** 1. To Compel Call of Election. — *People v. Knopf*, 198 Ill. 340, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 805.

Lack of Funds for Election. — See also *Rizer v. People*, 18 Colo. App. 40.

2. Mandamus to Compel Appointment of Officers. — *State v. Kinney*, 63 Ohio St. 304.

3. Registration of Voters. — *People v. District Ct.*, 33 Colo. 22.

**806.** 4. Mandamus to Canvassing Board. — *Board of Trustees v. Sumner County*, 61 Kan. 796; *Chamberlain v. Hedger*, 12 S. Dak. 135.

**807.** 3. Mandamus to Compel Recanvass. — *State v. McCoy*, 2 Marv. (Del.) 576; *People v. Way*, 92 N. Y. App. Div. 82, reversed 179 N. Y. 174; *People v. County Board of Canvassers*, 75 N. Y. App. Div. 110; *Matter of Stiles*, 69 N. Y. App. Div. 589; *Hebb v. Cayton*, 45 W. Va. 578.

In *Georgia* a court may compel the board of election superintendents to include the vote of a certain district in their return, thus leaving the question of the legality of this vote to the decision of the proper authorities. *Tanner v. Deen*, 108 Ga. 95.

Mandatory Injunction. — In *Kentucky* election officers can be compelled to recount the ballots by a mandatory injunction. *Bennett v. Richards*, (Ky. 1904) 83 S. W. Rep. 154.

**808.** 3. Adjournment of Board. — *Daniel v. Simms*, 49 W. Va. 554. But in *People v. Mottinger*, 212 Ill. 530, it was held that mandamus would not lie to compel a temporary canvassing board to reassemble after it had adjourned, especially where the petitioner had another remedy that was sufficient.

**810.** 5. To Compel Giving Certificate of Election. — Mandamus lies to compel the County Court to declare the result of an election changing the county seat. *Morgan v. Wetzel County Ct.*, 53 W. Va. 372.

**813.** 3. To Obtain Possession of Office, Books, Etc. — *State v. Kersten*, 118 Wis. 287.

**814.** 6. The Relator. — *Rizer v. People*, 18 Colo. App. 40.

**815.** 10. A writ of prohibition will be granted where the lower court exceeded its jurisdiction in granting an injunction and the remedy by appeal is inadequate. *Weaver v. Toney*, 107 Ky. 419.

**817.** 2. Injunction Against Holding Election. — *Morgan v. Wetzel County Ct.*, 53 W. Va. 372, quoting 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 817.

3. *Morgan v. Wetzel County Ct.*, 53 W. Va. 372, quoting 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 817.

**818.** 7. In *Kentucky* the constitution provides that a contest for governor shall be decided by the general assembly. *Taylor v. Beckham*, 108 Ky. 278, 94 Am. St. Rep. 357.

**828.** 2. Self-incriminating Testimony. — *Sorenson v. Sorenson*, 189 Ill. 179; *Eggers v. Fox*, 177 Ill. 185; *Tunks v. Vincent*, 106 Ky. 829.

3. Secrecy of the Ballot — Congressional Election Cases. — *Sorenson v. Sorenson*, 189 Ill. 179, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) [1828] 828.

4. Returns and Certificate Prima Facie Correct. — *Bailey v. Hurst*, 113 Ky. 699; *Hamilton v. Young*, (Ky. 1904) 81 S. W. Rep. 682; *Galloway v. Bradburn*, (Ky. 1904) 82 S. W. Rep. 1013; *Farrell v. Larsen*, 26 Utah 283; *Dent v. Taylor County*, 45 W. Va. 750.

**829.** 6. Returns of Improper Officers or Not Duly Certified or Signed. — *State v. Conness*, 106 Wis. 425.

**829.** *d. IMPEACHING THE RETURNS — (1) In General.* — See note 12.

**830.** See note 1.

(2) *Recount of Ballots — In General.* — See note 2.

Preservation of the Ballots. — See note 7.

**831.** Statutory Provisions as to Preservation of Ballots. — See note 2.

Admissibility of Ballots Not Kept According to Law. — See notes 3, 4, 5.

**832.** (3) *Returns Impeached by Fraud.* — See notes 1, 2, 3.

**833.** Presumption Where Fraud Is Proved. — See note 2.

**835.** (5) *Reception of Illegal Votes — (c) Proof of Illegality of the Vote — Presumption of Legality.* — See note 6.

**838.** (d) *Proof of How Voter Voted.* — See note 1.

Declaration of Voters. — See notes 3, 4.

(6) *Burden of Proof.* — See note 6.

**844.** 17. Presumptions. — See note 4.

**847.** XXIV. OFFENSES AGAINST ELECTION LAWS — 3. Fraud in Registration — *b. PERSON REGISTERING.* — See note 5.

**829.** 12. *Windes v. Nelson*, 159 Mo. 51, quoting 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 829.

Proving Mistake or Carelessness in Discharge of Duty. — *Perkins v. Bertrand*, 192 Ill. 58, 85 Am. St. Rep. 315.

**830.** 1. *Windes v. Nelson*, 159 Mo. 51, quoting 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 830.

2. *Return Controlled by Ballots.* — *Averyt v. Williams*, (Ariz. 1904) 76 Pac. Rep. 463; *Kreider v. McFerson*, 189 Ill. 605; *Perkins v. Bertrand*, 192 Ill. 58, 85 Am. St. Rep. 315; *Bonney v. Finch*, 180 Ill. 133; *Caldwell v. McElvain*, 184 Ill. 552; *De Long v. Brown*, 113 Iowa 370, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 830; *Edwards v. Logan*, 114 Ky. 312; *Leonard v. Woolford*, 91 Md. 626; *Windes v. Nelson*, 159 Mo. 51, quoting 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 830; *Howser v. Pepper*, 8 N. Dak. 484; *McMahon v. Crockett*, 12 S. Dak. 11; *Farrell v. Larsen*, 26 Utah 283.

7. *Preservation of Ballots.* — *Conaty v. Gardner*, 75 Conn. 48; *Choisser v. York*, 211 Ill. 56; *Collier v. Anlicker*, 189 Ill. 34; *Bonney v. Finch*, 180 Ill. 133; *Jeter v. Headley*, 186 Ill. 34; *De Long v. Brown*, 113 Iowa 370, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 830; *Mentzer v. Davis*, 109 Iowa 528; *Bailey v. Hurst*, 113 Ky. 699; *Edwards v. Logan*, 114 Ky. 312; *Hamilton v. Young*, (Ky. 1904) 81 S. W. Rep. 682; *Windes v. Nelson*, 159 Mo. 51, quoting 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 830; *McMahon v. Crockett*, 12 S. Dak. 11; *Farrell v. Larsen*, 26 Utah 283; *Dent v. Taylor County*, 45 W. Va. 750.

**831.** 2. *Ballots in Proper Hands Presumed to Have Been Properly Kept.* — *Windes v. Nelson*, 159 Mo. 51, quoting 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 831; *Howser v. Pepper*, 8 N. Dak. 484, quoting 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 831; *Huston v. Anderson*, 145 Cal. 320; *Edwards v. Logan*, 114 Ky. 312.

3. *Windes v. Nelson*, 159 Mo. 51, quoting 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 831; *Howser v. Pepper*, 8 N. Dak. 484, quoting 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 831; *Averyt v. Williams*, (Ariz. 1904) 76 Pac. Rep. 463; *Caldwell v. McElvain*, 184 Ill. 552.

4. *Windes v. Nelson*, 159 Mo. 51, quoting 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 831; *Howser v. Pepper*, 8 N. Dak. 484, quoting 10

AM. AND ENG. ENCYC. OF LAW (2d ed.) 831; *Averyt v. Williams*, (Ariz. 1904) 76 Pac. Rep. 463; *Eggers v. Fox*, 177 Ill. 185; *Edwards v. Logan*, 114 Ky. 312; *Gray v. State*, 19 Tex. Civ. App. 521.

5. *Question of Fact.* — *Windes v. Nelson*, 159 Mo. 51, quoting 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 831; *Howser v. Pepper*, 8 N. Dak. 484, quoting 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 831; *Averyt v. Williams*, (Ariz. 1904) 76 Pac. Rep. 463; *Caldwell v. McElvain*, 184 Ill. 552.

Where there is evidence that the ballots may have been tampered with and also evidence that the returns are erroneous, the ballots should be introduced in evidence, their credibility being a question of fact to be determined by the jury or court trying the case. *Collier v. Anlicker*, 180 Ill. 34.

**832.** 1. *Returns Impeached by Fraud.* — *Windes v. Nelson*, 159 Mo. 51, quoting 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 832.

2. *Windes v. Nelson*, 159 Mo. 51, quoting 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 832.

3. *Windes v. Nelson*, 159 Mo. 51, quoting 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 832.

**833.** 2. *Presumption Where Fraud Is Proved.* — *Windes v. Nelson*, 159 Mo. 51, quoting 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 833.

**835.** 6. *Presumption of Legality of Vote Cast.* — *Carr v. Stafford*, 62 Kan. 868, 63 Pac. Rep. 737.

**838.** 1. *Circumstantial Evidence as to How Voter Voted.* — *Sorenson v. Sorenson*, 189 Ill. 179, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 838; *Black v. Pate*, 130 Ala. 514; *Rexroth v. Schein*, 206 Ill. 80. See also *Choisser v. York*, 211 Ill. 56; *Tunks v. Vincent*, 106 Ky. 829; *Lane v. Bailey*, 29 Mont. 548.

3. In *Kentucky* such testimony is inadmissible. *Tunks v. Vincent*, 106 Ky. 829.

In *Nebraska* testimony in regard to declarations made by voters as to the way in which they voted is not admissible. *Dean v. Miller*, 56 Neb. 301.

4. *Black v. Pate*, 130 Ala. 514. See also *Dean v. Miller*, 56 Neb. 301.

6. *Rhodes v. Driver*, 69 Ark. 501.

**844.** 4. *Performance of Duty Presumed.* — *McMenomy v. Ruch*, 142 Cal. 77; *Caldwell v. McElvain*, 184 Ill. 552.

**847.** 5. *Registering in Two Districts — Crimi-*



**848.** *c.* OTHER PERSONS. — See note 1.

**4.** Illegal Voting — *a.* VOTING MORE THAN ONCE. — See note 5.

*b.* VOTING BY PERSON NOT QUALIFIED. — See notes 7, 8.

**849.** *c.* FALSE PERSONATION OF VOTERS. — See note 7.

**852.** **5.** Misconduct of Election Officer — *c.* MAKING FALSE RETURNS. —

See note 1.

**853.** **6.** Other Offenses — *a.* BRIBERY. — See note 6.

**854.** *b.* BETTING ON ELECTIONS. — See note 2.

*c.* SALES OR GIFTS OF LIQUOR — KEEPING SALOONS OPEN. — See

note 3.

*d.* INTIMIDATING VOTERS. — See note 5.

**857.** **XXV. ELECTION EXPENSES** — **2.** Who Liable for Expenses — Express Statutory Provisions. — See note 5.

**858.** When Statutes Fail Expressly to Provide for Payment. — See note 1.

nal Intent Not Essential. — *State v. Caldwell*, 1 Marv. (Del.) 555; *State v. Lally*, 2 Marv. (Del.) 424.

**848.** **1.** Any Person Procuring False Registration May Be Punished. — In *New Jersey* a person who knowingly procures the registration of a person who is not qualified may be punished. *State v. McBarron*, 66 N. J. L. 680.

**5.** Voting More than Once. — *State v. Gilman*, 96 Me. 431.

**7.** Voting by Unqualified Person Misdemeanor. — See also *Banyon v. State*, 108 Ga. 49.

Inducing or Procuring a Person to Vote at an election, knowing that such person has no right to vote, constitutes a corrupt practice. *Rex v. Coulter*, 6 Ont. L. Rep. 114.

**8.** Knowledge of Facts Must Be Shown. — *Smith v. Carey*, 5 Ont. L. Rep. 203.

**849.** **7.** False Personation. — In *Illinois* a similar doctrine prevails. *Lionetti v. People*, 183 Ill. 253.

In *Missouri* a similar statute exists. *State v. O'Brien*, 168 Mo. 404; *State v. Nolan*, 168 Mo. 446, 90 Am. St. Rep. 466; *State v. Timothy*, 147 Mo. 532.

**852.** **1.** False Returns. — *State v. Conway*, 2 Marv. (Del.) 453; *Com. v. Hafer*, 22 Pa. Super. Ct. 107; *Banner v. State*, 44 Tex. Crim. 42.

**853.** **6.** Reception of Compensation by Voter Bribery. — *Christie v. People*, 206 Ill. 337; *Com. v. Headley*, 111 Ky. 815.

**854.** **2.** Bet Made After Election. — A bet made after the election has been held and the result announced does not violate Stat. Ky. 1899, § 1975. *Com. v. Leak*, 116 Ky. 540.

**3.** Keeping Open Saloon on Election Day. — *Knox v. State*, (Tex. Crim. 1903) 77 S. W. Rep. 13.

**5.** Sale of Intoxicating Liquor on Election Day Prohibited. — See *Timmis v. Hillman*, 15 Quebec Super. Ct. 365.

**5.** Threatening Arrest. — It is unlawful to threaten arrest for the purpose of preventing voters from voting. *In re Spooner*, 104 Fed. Rep. 334.

**857.** **5.** Statutes Imposing upon Counties Expenses of Elections. — But an exception is made in municipal elections. In such a case Stat. Ky., § 1452, provides that the city shall pay the cost of the ballots and cards of instruction to voters. *Fayette County v. Board of Education*, (Ky. 1901) 63 S. W. Rep. 477.

**858.** **1.** Statute Silent as to Payment of Expenses Directed to Be Incurred. — *San Juan County v. Tulley*, 17 Colo. App. 113, quoting 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 858.

# ELECTRIC-LIGHT COMPANIES.

By L. C. BOEHM.

**862. II. INCORPORATION — 2. Under General Laws.** — See note 2.

**III. NATURE OF COMPANY AND ITS PROPERTY — 1. Whether a Manufacturing Corporation.** — See note 3.

**863. 2. Whether Its Apparatus and Appliances Are Personalty.** — See note 5.

**IV. MUNICIPAL POWERS — 1. To Regulate and Control Electric-light Companies — In General.** — See note 6.

**864. New York Board of Electrical Control.** — See note 3.

**2. To Contract with Electric-light Companies.** — See note 4.

**865. 3. To Own an Electric-light Plant — Express Statutory Authority.** — See note 1.

**866. V. RIGHTS, DUTIES, AND LIABILITIES — 1. Right to Use Streets — a. IN GENERAL.** — See note 5.

**862. 2. Incorporation under General Laws.** — Metropolitan Trust Co. *v.* Dolgeville Electric Light, etc., Co., (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 467; Brown *v.* Radnor Tp. Electric Light Co., 208 Pa. St. 453.

**3. The Generating of Electricity Is Manufacturing.** — Burke *v.* Mead, 159 Ind. 260, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 862.

**863. 5. Franchise Taxable as Personalty.** — Commercial Electric Light, etc., Co. *v.* Judson, 21 Wash. 49.

**6. Municipal Regulation — United States.** — Denver *v.* Sherret, (C. C. A.) 88 Fed. Rep. 226. *Illinois.* — Commonwealth Electric Co. *v.* Rose, 214 Ill. 560, quoting 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 863; McWethy *v.* Aurora Electric Light, etc., Co., 202 Ill. 218, affirming 104 Ill. App. 479.

*Indiana.* — Coverdale *v.* Edwards, 155 Ind. 374.

*Kentucky.* — Henderson *v.* Young, 83 S. W. Rep. 583, 26 Ky. L. Rep. 1152.

*Maine.* — Twin Village Water Co. *v.* Damariscotta Gas Light Co., 98 Me. 325.

*Maryland.* — Mealey *v.* Hagerstown, 92 Md. 741; Purnell *v.* McLane, 98 Md. 589.

*Massachusetts.* — Crocker *v.* Boston Electric Light Co., 180 Mass. 516; Boston Electric Light Co. *v.* Boston Terminal Co., 184 Mass. 566.

*Michigan.* — Wyandotte Electric Light Co. *v.* Wyandotte, 124 Mich. 43.

*Missouri.* — State *v.* St. Louis, 145 Mo. 551.

*New Jersey.* — Point Pleasant Electric Light, etc., Co. *v.* Bay Head, 62 N. J. Eq. 296.

*Pennsylvania.* — Ridley Park *v.* Citizen's Electric Light, etc., Co., 9 Pa. Super. Ct. 615.

*Wisconsin.* — Malone *v.* Waukesha Electric Light Co., 120 Wis. 485.

**Act Granting Rights to Gas Company No Authority to Erect Electric Lights.** — Missouri *v.* Murphy, 170 U. S. 78.

**864. 3. Electric Power Co. *v.* New York,** (Supm. Ct. Spec. T.) 29 Misc. (N. Y.) 48.

**4. Contracts with Electric-light Companies —** Denver *v.* Hubbard, 17 Colo. App. 346; Mealey *v.* Hagerstown, 92 Md. 741; Reid *v.* Trowbridge, 78 Miss. 542; State *v.* St. Louis, 145 Mo. 551;

State *v.* Allen, 178 Mo. 555; Andreas *v.* Gas, etc., Co., 61 N. J. Eq. 69; Smith *v.* Avon-by-the-Sea, 68 N. J. L. 243; Central Electric Co. *v.* Street Lighting Dist. No. 1, 71 N. J. L. 403; Wadsworth *v.* Concord, 133 N. Car. 587; Salem *v.* Anson, 40 Oregon 339, 91 Am. St. Rep. 485. See also the title MUNICIPAL CORPORATIONS, 1147. 6.

Where an ordinance allowed an electric-light company to use certain streets on condition that it furnish lights for the police and fire stations of the town, the provision applied to all police or fire stations, whether erected before or after the date of the ordinance. Kensington Electric Co. *v.* Philadelphia, 187 Pa. St. 446.

Where a town contracts with a company giving it the right to erect a dam and supply water and electric lights to the town in consideration of one-half the profits resulting from the motive power generated by the dam, the town is entitled to profits although the power is used some distance from the dam. Caribou *v.* Caribou Water Co., 96 Me. 17.

A contract with a municipality whereby an electric-light company is required to place poles in certain places, supersedes an ordinance forbidding the erection of poles in front of property without the owner's consent. Montclair Light, etc., Co. *v.* Montclair, 67 N. J. L. 151.

**Municipal Contracts Limited by State Authority.** — "Municipalities have only such control over the streets and highways as is conferred on them by the legislature, either by express enactment or by necessary implication." Horner *v.* Eaton Rapids, 122 Mich. 117.

**865. 1. Ownership Authorized by Statute.** — Mealey *v.* Hagerstown, 92 Md. 754, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 865. See also Metropolitan Electric Supply Co. *v.* St. Marylebone Borough Council, 2 Local Gov. Rep. 410.

**866. 5. Municipal Consent to Use of Streets Necessary.** — Purnell *v.* McLane, 98 Md. 589; State *v.* St. Louis, 145 Mo. 551; Suburban Electric Light, etc., Co. *v.* East Orange Tp. (N. J., 1898) 41 Atl. Rep. 865; Palmer *v.* Larchmont Electric Co., 158 N. Y. 231, reversing 6 N. Y.

- 867.** *b.* VESTED RIGHT. — See note 1.  
*c.* EXCLUSIVE RIGHT. — See note 2.  
*d.* CONFLICTING RIGHTS OF ELECTRIC COMPANIES. — See notes 3, 4.  
**868.** See note 1.  
*e.* RIGHTS OF ABUTTING OWNERS — (1) *Streets.* — See notes 2, 3.  
**869.** *2.* Recovery for Breach of Contract. — See note 1.  
*3.* Duty as to Furnishing Light. — See note 3.  
*5.* Liability for Nuisance. — See note 4.  
*6.* Liability for Injury to Real Property. — See note 5.  
*7.* Liability for Personal Injuries — *a.* IN GENERAL — (1) *Injury to Employees.* — See note 7.

App. Div. 12; *Malone v. Waukesha Electric Light Co.*, 120 Wis. 485.

Consent of City Council Necessary to Use of Streets and Alleys. — *Morrow County Illuminating Co. v. Mt. Gilead*, 10 Ohio Dec. 235.

**867.** 1. *Phillipsburg Electric Lighting, etc., Co. v. Phillipsburg*, 66 N. J. L. 505.

2. Cannot Grant Exclusive Rights. — *Capital City Light, etc., Co. v. Tallahassee*, 42 Fla. 462; *Clarksburg Electric Light Co. v. Clarksburg*, 47 W. Va. 739.

Grant of Exclusive Privilege Held Subject to Rights of Existing Company. — *Hull Electric Co. v. Ottawa Electric Co.*, (1902) A. C. 237, 86 L. T. N. S. 208, *affirming* 10 Quebec K. B. 34.

Contract for Ten Years Not Unreasonably Long. — *Reid v. Trowbridge*, 78 Miss. 542.

3. Priority of Occupation Determines the Right. — *Edison Electric Light, etc., Co. v. Merchants, etc., Electric Light, etc., Co.*, 200 Pa. St. 209, 86 Am. St. Rep. 712.

In *Maine*, where an electric-light company has a franchise to light a town, a gas company cannot rightfully put up gas lights unless expressly authorized by the legislature. *Twin Village Water Co. v. Damariscotta Gas Light Co.*, 98 Me. 325.

Where Two or More Companies Are Granted Concurrent Powers which are exercised in the same territory, the courts will not interfere unless one company trespasses upon the rights of another. *Jacques Cartier Water, etc., Co. v. Quebec R., etc., Co.*, 11 Quebec K. B. 511.

4. Injunction. — *Edison Electric Light, etc., Co. v. Merchants', etc., Electric Light, etc., Co.*, 200 Pa. St. 209, 86 Am. St. Rep. 712.

**868.** 1. Company Furnishing Public Lights. — See *Jacques Cartier Water, etc., Co. v. Quebec R., etc., Co.*, 11 Quebec K. B. 511.

2. No Compensation for Public Use. — *Andreas v. Gas, etc., Co.*, 61 N. J. Eq. 69; *Palmer v. Larchmont Electric Co.*, 158 N. Y. 231, *reversing* 6 N. Y. App. Div. 12.

3. Compensation for Private Use. — *Andreas v. Gas, etc., Co.*, 61 N. J. Eq. 69.

When Consent of Abutting Owner Necessary. — *Point Pleasant Electric Light, etc., Co. v. Bay Head*, 62 N. J. Eq. 296.

No Right to Cut Trees on Abutting Property. — *Van Siclen v. Jamaica Electric Light Co.*, 45 N. Y. App. Div. 1, *affirmed* 168 N. Y. 650.

An Injunction Against Private Electric-light Company Will Lie. — *Callen v. Columbus Edison Electric Light Co.*, 66 Ohio St. 166.

**869.** 1. Injunction to Restrain Consumer from

Taking Electricity from Other Companies. — *Metropolitan Electric Supply Co. v. Ginder*, (1901) 2 Ch. 799, 84 L. T. N. S. 818, 65 J. P. 519.

3. Must Not Discriminate in Their Rates. — *Snell v. Clinton Electric Light, etc., Co.*, 196 Ill. 626, 89 Am. St. Rep. 341; *Gould v. Edison Electric Illuminating Co.*, (Supm. Ct. Spec. T.) 29 Misc. (N. Y.) 241 *Cincinnati, etc., R. Co. v. Bowling Green*, 57 Ohio St. 336; *Mercur v. Media Electric Light, etc., Co.*, 19 Pa. Super. Ct. 519. See also *Husey v. London Electric Supply Corp.*, (1902) 1 Ch. 411, 86 L. T. N. S. 166.

Laws N. Y. 1890, c. 566, § 65, giving to an occupant of premises within one hundred feet of the wires of any electric-lighting company the right to have lights supplied, and providing a penalty on refusal after ten days' notice was held not to apply in a case where the wire was only for street lighting purposes, was not adapted to house lighting and compliance with the householder's demand would necessitate the running of one thousand seven hundred feet of wire. *Moore v. Champlain Electric Co.*, 88 N. Y. App. Div. 289.

Rules and Regulations. — Where the plaintiff demanded that electric lights be put in, but when requested did not state the number of lights, the company was under no obligation. See Laws N. Y., 1890, c. 566, §§ 65, 66; *Andrews v. North River Electric Light, etc., Co.*, (N. Y. City Ct. Gen. T.) 23 Misc. (N. Y.) 512, *affirmed* (Supm. Ct. App. T.) 24 Misc. (N. Y.) 671.

Injunction Against Cutting Off Light. — Where an electric-light company had been furnishing light under a contract, but cuts it off on the ground that the contract is illegal, an order continuing the lights until final hearing is proper. *U. S. Electric Lighting Co. v. Metropolitan Club*, 6 App. Cas. (D. C.) 536.

4. Nuisance. — *Wittleder v. Citizens' Electric Illuminating Co.*, 47 N. Y. App. Div. 410.

Injunction Against Nuisance Denied When Injury Slight. — *Riedeman v. Mt. Morris Electric Light Co.*, 56 N. Y. App. Div. 23.

5. Damages for Injury to Real Property. — *Chicago North Shore St. R. Co. v. Payne*, 192 Ill. 239, *affirming* 94 Ill. App. 466; *Miller v. Edison Electric Illuminating Co.*, (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 664, *reversed* 66 N. Y. App. Div. 470; *Pritchard v. Edison Electric Illuminating Co.*, 92 N. Y. App. Div. 178, *affirmed* 179 N. Y. 364.

7. Injuries to Employees. — *Dallas Electric Co. v. Mitchell*, 33 Tex. Civ. App. 424.



**870.** (2) *Injury to Persons on the Street.* — See note 1.

**871.** (3) *Injury to Persons Rightfully on the Premises Where Injured.* — See note 1.

**872.** (4) *Injury to Trespassers.* — See note 1.

(5) *Construction and Repair of Appliances.* — See notes 2, 3.

**Injury to Person Engaged to Remedy Defects.** — Davidson *v.* Stuart, 34 Can. Sup. Ct. 215.

**870. 1. Injury to Persons on the Street.** — Schultz *v.* Faribault Consol. Gas, etc., Co., 82 Minn. 100; Newark Electric Light, etc., Co. *v.* McGilvery, 62 N. J. L. 451; Hamilton *v.* Bordentown Electric Light, etc., Co., 68 N. J. L. 85; O'Flaherty *v.* Nassau Electric R. Co., 34 N. Y. App. Div. 74, affirmed 165 N. Y. 624; Wittleder *v.* Citizens' Electric Illuminating Co., 47 N. Y. App. Div. 410; Wehner *v.* Lagerfelt, 27 Tex. Civ. App. 520.

**Joint Liability.** — Where a child was injured by a wire that had been broken and down for three weeks, the city and the electric company were held to be liable jointly or separately. Kansas City *v.* File, 60 Kan. 157.

**Contributory Negligence — What Constitutes.** — South Omaha Water-Works Co. *v.* Vocasek, 62 Neb. 710.

**871. 1. Injury to Persons Rightfully on the Premises.** — Consolidated Electric Light, etc., Co. *v.* Healy, 65 Kan. 798; Baries *v.* Louisville Electric Light Co., 80 S. W. Rep. 814, 25 Ky. L. Rep. 2303; Wittleder *v.* Citizens' Electric Illuminating Co., 50 N. Y. App. Div. 478; Fitzgerald *v.* Edison Electric Illuminating Co., 200 Pa. St. 540, 86 Am. St. Rep. 732; Daltry *v.* Media Electric Light, etc., Co., 208 Pa. St. 403; Fitzgerald *v.* Edison Electric Illuminating Co., 207 Pa. St. 118; Rucker *v.* Sherman Oil, etc., Co., 29 Tex. Civ. App. 418; Fish *v.* Kirlin-Gray Electric Co., (S. Dak. 1904) 99 N. W. Rep. 1092; Thomas *v.* Wheeling Electrical Co., 54 W. Va. 395.

**Person Repairing Roof.** — See Smith *v.* East End Electric Light Co., 198 Pa. St. 19.

**Person Repairing Bridge.** — Where a workman was employed by the owner of a bridge to make repairs, and was killed by two dangerous electric wires, the electric company was liable, it not having informed the workman of the danger, of which he knew nothing, and he being reasonably careful. Perham *v.* Portland Gen. Electric Co., 33 Oregon 451, 72 Am. St. Rep. 730.

**Employees of Other Electrical Companies.** — Overall *v.* Louisville Electric Light Co., (Ky. 1898) 47 S. W. Rep. 442.

Where a gang of workmen for a traction company broke a wire of an electric-light company and one of the gang was killed in handling the broken end, no damages were recoverable, and there was no question for the jury. Newark Electric Light, etc., Co. *v.* McGilvery, 62 N. J. L. 451.

Where an electric-light company ran its wires over a roof and so badly insulated them that the lineman of a telephone company was injured, the lineman must show that he was on the roof by invitation or license, and a mere showing that the electric company should have known that linemen went upon the roof would not suffice to establish their liability for damages. Hector *v.* Boston Electric Light Co., 174 Mass. 212, 75 Am. St. Rep. 300.

The utmost degree of care is not necessary to free an electric company from responsibility for injuries sustained by an employee of another company. Calumet Electric St. R. Co. *v.* Grosse, 70 Ill. App. 381.

**Boy Diving from Bridge — Damages for Death.** — Nelson *v.* Branford Lighting, etc., Co., 75 Conn. 548.

**872. 1. Injury to Trespasser.** — McCaughna *v.* Owasso, etc., Electric Co., 129 Mich. 407, 8 Detroit Leg. N. 1000. See also Randall *v.* Ottawa, Electric Co., 6 Ont. L. Rep. 619, reversed 34 Can. Sup. Ct. 698.

Where a boy trespassing on a railway platform was injured by the wire of an electric-light company, the fact that he was a trespasser is no defense, especially when the electric-light company did not show that it was not itself a trespasser. Wittleder *v.* Citizens' Electric Illuminating Co., 47 N. Y. App. Div. 410. But see Daltry *v.* Media Electric Light, etc., Co., 208 Pa. St. 403, where it was held that as the owner of a house had ordered the lights removed from his house the electric-light company was a trespasser itself in leaving an exposed wire in the yard, and the fact that the plaintiff was a trespasser could not be raised by the defendant.

**2. Negligent Construction of Appliances.** — Knowlton *v.* Des Moines Edison Light Co., 117 Iowa 451; General Electric Co. *v.* Murray, 32 Tex. Civ. App. 226.

**Wires Run by Independent Contractor.** — An electric-light company is not liable for fire caused by the defective wiring of a building, where such wiring was the work of an independent contractor employed by the owner of the building, and the electric-light company merely connected the building with its electric system and supplied the current for the lights, without any knowledge or notice of the defective character of the wiring. National F. Ins. Co. *v.* Denver Consol. Electric Co., 16 Colo. App. 86.

**3. Failure to Keep Appliances in Proper Condition.** — Hebert *v.* Lake Charles Ice, etc., Co., 111 La. 522, 100 Am. St. Rep. 505; Fitzgerald *v.* Edison Electric Illuminating Co., 200 Pa. St. 540, 86 Am. St. Rep. 732.

**Insulation Destroyed.** — When a statute required wires to be insulated, lack of insulation was held *prima facie* evidence of negligence. Mitchell *v.* Raleigh Electric Co., 129 N. Car. 166, 85 Am. St. Rep. 735.

Where a person was killed while painting a roof, and defective insulation was the cause, the electric company was held not chargeable with negligence where there was no evidence as to the cause of the defect or that the company had notice of the defect. Smith *v.* East End Electric Light Co., 198 Pa. St. 19.

Where a person is injured by contact with a wire that should be insulated, the electric-light company is *prima facie* negligent and liable. Thomas *v.* Wheeling Electrical Co., 54 W. Va. 395.

**873.** (6) *Care Required.* — See notes 1, 2.

*b. CONTRIBUTORY NEGLIGENCE — (1) General Doctrine.* — See note 3.

(2) *Illustrations.* — See note 8.

**874.** (3) *When a Question of Fact.* — See note 4.

**873. 1. Utmost Care — Arizona.** — Phoenix Light, etc., Co. v. Bennett, (Ariz. 1903) 74 Pac. Rep. 48, 63 L. R. A. 219.

*Colorado.* — Denver Consol. Electric Co. v. Lawrence, 31 Colo. 301.

*Connecticut.* — Nelson v. Branford Lighting, etc., Co., 75 Conn. 548.

*Illinois.* — Alton R., etc., Co. v. Foulds, 81 Ill. App. 322, *affirmed* 190 Ill. 367.

*Iowa.* — Knowlton v. Des Moines Edison Light Co., 117 Iowa 451; Barto v. Iowa Telephone Co., 126 Iowa 241.

*Kentucky.* — Overall v. Louisville Electric Light Co., (Ky. 1808) 47 S. W. Rep. 442; Schweitzer v. Citizen's Gen. Electric Co., (Ky. 1899) 52 S. W. Rep. 830.

*Louisiana.* — Hebert v. Lake Charles Ice, etc., Co., 111 La. 522, 100 Am. St. Rep. 505.

*Maryland.* — Brown v. Edison Electric Illuminating Co., 90 Md. 400, 78 Am. St. Rep. 442.

*Missouri.* — Geismann v. Missouri Edison Electric Co., 173 Mo. 654.

*New Jersey.* — Newark Electric Light, etc., Co. v. Ruddy, 62 N. J. L. 505; Newark Electric Light, etc., Co. v. McGilvery, 62 N. J. L. 451; Anderson v. Jersey City Electric Light Co., 63 N. J. L. 387; Brooks v. Consolidated Gas Co., 70 N. J. L. 211; Spires v. Middlesex, etc., Electric Light, etc., Co., 70 N. J. L. 355; Hoboken Land, etc., Co. v. United Electric Co., 71 N. J. L. 430.

*North Carolina.* — Mitchell v. Raleigh Electric Co., 129 N. Car. 166, 85 Am. St. Rep. 735.

*Ohio.* — Katafiasz v. Toledo Consol. Electric Co., 24 Ohio Cir. Ct. 127.

*Oregon.* — Perham v. Portland Gen. Electric Co., 33 Oregon 451, 72 Am. St. Rep. 730; Boyd v. Portland Electric Co., 40 Oregon 126, *affirmed* 41 Oregon 336.

*Pennsylvania.* — Fitzgerald v. Edison Electric Illuminating Co., 200 Pa. St. 540, 86 Am. St. Rep. 732; Daltry v. Media Electric Light, etc., Co., 208 Pa. St. 403.

*Virginia.* — Norfolk R., etc., Co. v. Spratley, 103 Va. 379.

*West Virginia.* — Thomas v. Wheeling Electrical Co., 54 W. Va. 395.

An electric-light company, in furnishing light, is under an implied contract to safeguard one who turns on the light in the ordinary way. Royal Electric Co. v. Hevé, 11 Quebec K. B. 436.

**2. Care Proportionate to the Danger — United States.** — Denver v. Sherret, (C. C. A.) 88 Fed. Rep. 226.

*Colorado.* — Walters v. Denver Consol. Electric Light Co., 17 Colo. App. 192.

*Illinois.* — Commonwealth Electric Co. v. Melville, 210 Ill. 70, *affirming* 110 Ill. App. 242, and *citing* 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 873; Economy Light, etc., Co. v. Hiller, 203 Ill. 518, *affirming* 106 Ill. App. 306; Rowe v. Taylorville Electric Co., 213 Ill. 318.

*Kansas.* — Consolidated Electric Light, etc., Co. v. Koepp, 64 Kan. 735.

*New York.* — Wittleder v. Citizens' Electric Illuminating Co., 47 N. Y. App. Div. 410; Gaglione v. Mt. Morris Electric Light Co., 56 N. Y. App. Div. 191.

*Oregon.* — Boyd v. Portland Gen. Electric Co., 37 Oregon 567, *affirmed* 40 Oregon 126.

*Texas.* — Rucker v. Sherman Oil, etc., Co., 29 Tex. Civ. App. 418.

*Vermont.* — Griffith v. New England Telephone, etc., Co., 72 Vt. 444, *citing* 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 873.

When one electric-light company purchased another company and continued its business, it impliedly contracted with its customers and the public that it would use such appliances and care as are known to the business, to protect them from harm, and it is liable to any one who suffers damage by its failure to do so. Waller v. Leavenworth Light, etc., Co., 9 Kan. App. 301.

**Reasonable Care.** — Owensboro v. Knox, 116 Ky. 451; Hamilton v. Bordentown Electric Light, etc., Co., 68 N. J. L. 85; Paine v. Electric Illuminating, etc., Co., 64 N. Y. App. Div. 477; Herzog v. Municipal Electric Light Co., 89 N. Y. App. Div. 569, *affirmed* 180 N. Y. 518; International Light, etc., Co. v. Maxwell, 27 Tex. Civ. App. 204; Nagle v. Hake, 123 Wis. 256; Royal Electric Co. v. Hevé, 11 Quebec K. B. 436.

**3. Contributory Negligence Is a Defense.** — Columbus R. Co. v. Dorsey, 119 Ga. 363; Cosgrove v. Kennebec Light, etc., Co., 98 Me. 473, 57 Atl. Rep. 841; Cumberland v. Lottig, 95 Md. 42; Carr v. Manchester Electric Co., 70 N. H. 308; Anderson v. Jersey City Electric Light Co., 64 N. J. L. 664; Randall v. Ottawa Electric Co., 6 Ont. L. Rep. 619, *reversed* 34 Can. Sup. Ct. 698.

**Rescuing Child from Contact with a Live Wire Not Negligence.** — Walters v. Denver Consol. Electric Light Co., 12 Colo. App. 145.

**8. Carr v. Manchester Electric Co.,** 70 N. H. 308.

**874. 4. When a Question for the Jury — Colorado.** — Walters v. Denver Consol. Electric Light Co., 12 Colo. App. 145; Walters v. Denver Consol. Electric Light Co., 17 Colo. App. 192.

*Illinois.* — Commonwealth Electric Co. v. Melville, 210 Ill. 70, *affirming* 110 Ill. App. 242; Economy Light, etc., Co. v. Hiller, 203 Ill. 518, *affirming* 106 Ill. App. 306.

*Iowa.* — Barto v. Iowa Telephone Co., 126 Iowa 241.

*Minnesota.* — Bernier v. St. Paul Gaslight Co., 92 Minn. 214; Steindorff v. St. Paul Gaslight Co., 92 Minn. 496.

*Missouri.* — Geismann v. Missouri-Edison Electric Co., 173 Mo. 654.

*New Jersey.* — Spires v. Middlesex, etc., Electric Light, etc., Co., 70 N. J. L. 355.

*New York.* — Paine v. Electric Illuminating, etc., Co., 64 N. Y. App. Div. 477; Wittleder v. Citizens' Electric Illuminating Co., 47 N. Y. App. Div. 410.

**874.** *c.* EVIDENCE — (2) *Presumption of Negligence.* — See note 6.

**875.** (4) *Condition of Wires at Other Times.* — See note 2.

(5) *Expert Testimony.* — See note 4.

**876.** VI. TAXATION — In Maryland and Pennsylvania. — See note 3.

*Pennsylvania.* — *Devlin v. Beacon Light Co.*, 192 Pa. St. 188; *Fitzgerald v. Edison Electric Illuminating Co.*, 207 Pa. St. 118.

**874.** 6. *Negligence May Be Sometimes Presumed* — *Colorado.* — *Walters v. Denver Consol. Electric Light Co.*, 17 Colo. App. 192.

*Kansas.* — *Kansas City v. File*, 60 Kan. 157.

*Kentucky.* — *Owensboro v. Knox*, 116 Ky. 451.

*Missouri.* — *Gannon v. Laclede Gaslight Co.*, 145 Mo. 502; *Geismann v. Missouri-Edison Electric Co.*, 173 Mo. 654.

*New Jersey.* — *Newark Electric Light, etc., Co. v. Ruddy*, 62 N. J. L. 505.

*New York.* — *O'Flaherty v. Nassau Electric R. Co.*, 34 N. Y. App. Div. 74, *affirmed* 165 N. Y. 624; *Wolpers v. New York, etc., Electric Light, etc., Co.*, 91 N. Y. App. Div. 424.

*Oregon.* — *Boyd v. Portland Gen. Electric Co.*, 40 Oregon 126, *affirmed* 41 Oregon 336; *Chaparon v. Portland Electric Co.*, 41 Oregon 39.

*Pennsylvania.* — *Alexander v. Nanticoke Light Co.*, 209 Pa. St. 571; *Crowe v. Nanticoke Light Co.*, 209 Pa. St. 580.

*Rhode Island.* — *Reynolds v. Narragansett Electric Lighting Co.*, 26 R. I. 457.

*Virginia.* — *Norfolk R., etc., Co. v. Spratley*, 103 Va. 379.

Where a customer in her own house was killed by an electric shock received while turning on the light, negligence was presumed. *Alton R., etc., Co. v. Foulds*, 81 Ill. App. 322, *affirmed* 190 Ill. 367.

**875.** 2. *Subsequent Condition of Wires.* — Testimony as to the location of electric-light wires ten minutes after the injury, was admissible. *Gloucester Electric Co. v. Kansas*, (C. C. A.) 120 Fed. Rep. 490.

*Previous Condition of Wires.* — *Fitzgerald v. Edison Electric Illuminating Co.*, 200 Pa. St. 540, 86 Am. St. Rep. 732.

**4.** *Expert Testimony Admissible.* — *Bernier v. St. Paul Gaslight Co.*, 92 Minn. 214.

No witness should be allowed to give an opinion as to the cause of an injury or the condition of an electrical apparatus, unless he had first shown himself as an expert. *Schweitzer v. Citizens' Gen. Electric Co.*, (Ky. 1899) 52 S. W. Rep. 830.

An electrical engineer was allowed to testify as to the voltage of the wires of an electric-light company. *Nagle v. Hake*, 123 Wis. 256.

**876.** 3. *Electric-light Companies Exempt from Local Taxation.* — *Bush Electric Light Co. v. Philadelphia*, 8 Pa. Dist. 231.

## ELECTRIC RAILROADS.

By L. C. BOEHM.

**879.** III. RIGHT TO CONSTRUCT AND OPERATE — SOME LEGISLATIVE ACT NECESSARY — 2. Under Municipal Grant or Consent — *a.* IN GENERAL. — See note 3.

**880.** *b.* WHAT ACT SUFFICIENT DELEGATION OF POWER — (1) *In General* — *Where Act Contains No Limitation.* — See note 1.

**881.** (3) *Right to Change to Electric Motive Power.* — See note 1.

**882.** 3. Failure to Obtain Necessary Municipal Grant or Consent. — See note 2.

**884.** IV. RELATION OF OPERATORS TO ABUTTING OWNERS — 2. No Additional Servitude Imposed — *a.* IN GENERAL. — See note 1.

*b.* BY THE ERECTION OF POLES AND STRINGING OF WIRES. — See note 2.

**879.** 3. *Municipality Must Have Legislative Authority to Authorize.* — *Milbridge, etc., Electric R. Co.*, Appellant, 96 Me. 110.

**880.** 1. *The Use of Electric Sweepers* is authorized by a grant of all privileges necessary to the proper and efficient use of electric power to operate cars in the streets "in the manner successfully in use elsewhere." *Montreal v. Montreal St. R. Co.*, (1903) A. C. 482.

**881.** 1. *Right to Change to Electric Motive Power.* — *People v. Railroad Com'rs*, 30 N. Y. App. Div. 69, *affirmed* 156 N. Y. 693.

**882.** 2. The *Maine* statute makes a finding by the railroad commissioners that public convenience requires the railroad a prerequisite. *Milbridge, etc., Electric R. Co.*, Appellant, 96 Me. 110.

**884.** 1. *No Additional Servitude.* — *Milbridge, etc., Electric R. Co.*, Appellant, 96 Me. 110; *Ehret v. Camden, etc., R. Co.*, 61 N. J. Eq. 171.

**2.** *New York Rule.* — The use of a city street for the purposes of a street surface railroad operated by electric power imposes an added



**886. V. RESPECTIVE RIGHTS OF ELECTRIC RAILROADS AND TELEPHONE COMPANIES — 2. Where Use of Streets by Both Operators Impossible. —** See note 1.

**887. VI. LIABILITY FOR INJURIES — 2. Degree of Care Required. —** See note 2.

**888. 4. Injuries to Employees. —** See note 6.

**889. 5. Injuries to Persons in the Street — a. IN GENERAL. —** See notes 1, 2, 3, 4.

*b. INJURY FROM CONTACT WITH WIRES OF ANOTHER COMPANY CHARGED FROM TROLLEY — (1) In General — Duty of Railway Company. —* See note 6.

**890. See notes 1, 2.**

**891. (2) Injuries to Employees of Other Electrical Companies. —** See notes 2, 3.

burden on the property rights of the owners of the fee, subject to the public easement for street purposes. *Peck v. Schenectady R. Co.*, 170 N. Y. 298.

**886. 1. An Electric Railway Company will Be Enjoined from Short-circuiting Telephone Wires** in a case where the trouble could be avoided by proper construction. *Birmingham Traction Co. v. Southern Bell Telephone, etc., Co.*, 119 Ala. 144.

**887. 2. Injury from Contact with Conductor Charged from Trolley Wire. —** *Potts v. Shreveport Belt R. Co.*, 110 La. 1, 98 Am. St. Rep. 452.

**888. 6. Injury to Employee by Contact with Span Wire Charged from Trolley. —** *Potts v. Shreveport Belt R. Co.*, 110 La. 1, 98 Am. St. Rep. 452.

**Injury to Employee of Contractor. —** An electric railroad company owes reasonable care to a painter while at work on its poles, and injury caused by contact with a wire is evidence of defective insulation. *Kennealy v. Westchester Electric R. Co.*, 86 N. Y. App. Div. 293, *affirmed* 181 N. Y. 582.

**889. 1. For Injuries to Persons Other than Passengers and Employees. —** *Macon v. Paducah St. R. Co.*, 110 Ky. 680; *Lexington R. Co. v. Fain*, 71 S. W. Rep. 628, 24 Ky. L. Rep. 1443; *Clancy v. New York, etc., R. Co.*, 82 N. Y. App. Div. 563; *Anderson v. Seattle-Tacoma Interurban R. Co.*, 36 Wash. 387, 104 Am. St. Rep. 962.

Where a boy, while walking across the girder of a bridge instead of the bridge proper, was injured by an electric shock from a guard wire which had in some way become charged with electricity, and it was shown that the railway company was rightfully using the bridge and took care that would ordinarily be sufficient, there was no liability. *Freeman v. Brooklyn Heights R. Co.*, 54 N. Y. App. Div. 596.

An elevated railway company is required to exercise only ordinary care to prevent children from getting on the live rail. *McAllister v. Jung*, 112 Ill. App. 138.

**Negligence Presumed. —** When the trolley wire of a railroad company fell, when struck by the trolley pole of a car, it was held that the doctrine of *res ipsa loquitur* applied, and negligence was presumed. *Memphis St. R. Co. v. Kartwright*, 110 Tenn. 277, 100 Am. St. Rep. 807.

**A Railway Company Need Not Insure, but must use ordinary care. —** *Citizens R. Co. v. Gifford*, 19 Tex. Civ. App. 631.

**2. Prima Facie Proof of Defective Insulation. —** *Cleary v. St. Louis Transit Co.*, 108 Mo. App. 433; *Braham v. Nassau Electric R. Co.*, 72 N. Y. App. Div. 456; *Smith v. Brooklyn Heights R. Co.*, 82 N. Y. App. Div. 531; *Smith v. Brooklyn Heights R. Co.*, 82 N. Y. App. Div. 531.

Where a person on the street was injured by receiving a shock from the slot-rail of an electric railroad, the maxim *res ipsa loquitur* applies, and puts it upon the defendant railroad to disprove the presumption of negligence. *Ludwig v. Metropolitan St. R. Co.*, 71 N. Y. App. Div. 210, *reversed* 174 N. Y. 546.

**A Company Furnishing Electricity to Another Company** is under a duty to see that the latter company has its wires properly insulated, and is liable for injuries received by reason of defective insulation. *Thomas v. Maysville Gas Co.*, 108 Ky. 204.

**3. Thompson v. New Orleans, etc., R. Co.**, 108 La. 56, *quoting* 10 AM. AND ENG. ENCYC. OF LAW\* (2d ed.) 889.

**4. Breaking of Guy Wire. —** *Neal v. Wilmington, etc., Electric R. Co.*, 3 Penn. (Del.) 467.

**Criminal Liability for Failure to Provide Proper Fenders. —** *Reg. v. Toronto R. Co.*, 4 Can. Crim. Cas. (Ont.) 4.

**6. Suffering Telephone Wire to Become Charged from Trolley Wire. —** *Richmond, etc., Electric R. Co. v. Rubin*, 102 Va. 809.

**890. 1. Duty of Railway Company to Provide Safeguards to Prevent Contact of Wires. —** *New York, etc., Telephone Co. v. Bennett*, 62 N. J. L. 742; *Wagner v. Brooklyn Heights R. Co.*, 69 N. Y. App. Div. 349, *affirmed* 174 N. Y. 520.

**2. Duty of Railway Company to Maintain Guard Wires Question of Fact. —** *Richmond, etc., Electric R. Co. v. Rubin*, 102 Va. 809.

**891. 2. Injuries to Employees of Other Electrical Corporations. —** Where an elevated railroad company allowed the city to string telegraph wires on its structure, and collected rent for the privilege, an employee of the city while repairing such wires was in no sense a trespasser, and the railroad company was liable for an injury that might have been averted by ordinary care on its part. *Wagner v. Brooklyn Heights R. Co.*, 69 N. Y. App. Div. 349, *affirmed* 174 N. Y. 520.

**3. Trespasser upon Pole Supporting Electric Wires Cannot Recover. —** See also *Sias v. Lowell, etc., St. R. Co.*, 179 Mass. 343.

**892.** [4. Injuries Caused by Vibration of Machinery in Power House. — See note 1a.]

[VII. NATURE OF EQUIPMENT AS PROPERTY — Personalty. — See note 1b.]

**892.** 1a. Liability for Structural Injuries Caused by Vibrations of Machinery in Power House. — *Gareau v. Montreal St. R. Co.*, 31 Can. Sup. Ct. 463.

1b. The Rolling Stock of an Electric Railway Is Personal Property. — *Toronto R. Co. v. Toronto*, (1904) A. C. 809. Compare *Kirkpatrick v. Cornwall Electric St. R. Co.*, 2 Ont. L. Rep. 113.

## ELECTRIC SUBWAYS.

**893.** I. CONSTITUTIONALITY OF STATUTES. — See note 1.

II. CONSTRUCTION OF STATUTES. — See note 3.

**893.** 1. New York Statutes. — *Geneva v. Geneva Telephone Co.*, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 236, reversed 54 N. Y. App. Div. 617.

**Validity of Ordinance.** — See *Missouri-Edison Electric Co. v. Weber*, 102 Mo. App. 95; *Geneva v. Geneva Telephone Co.*, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 236, reversed 54 N. Y. App. Div. 617.

**Power of Municipality to Grant Company Right to Lay Conduits.** — *Missouri-Edison Electric Co. v. Weber*, 102 Mo. App. 95.

**3. Power of Board.** — In *Geneva v. Geneva Telephone Co.*, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 236, reversed 54 N. Y. App. Div. 617, the court said: "The fact that the board of public works has refused to grant permission to the defendant to construct its own conduits is wholly immaterial. It will be seen from the plain and unambiguous language of the Act that the board is clothed with a discretionary power to either construct the conduits or compel the

companies to construct their own conduits; and having exercised that discretion in good faith, the defendant must acquiesce in its decision and place its wires in the conduits prepared by said board."

**Injunction.** — A lessee of premises upon a way over private land dedicated to the public for purposes of access does not, by requesting a lighting corporation to furnish light for his premises, thereby give the corporation a right to enter and permanently occupy the way by its conduits to such an extent as is necessary to furnish electric light for such purposes. *Lent v. Tilyou*, 106 N. Y. App. Div. 189.

**Property of Installing Company.** — Conduits placed under a street are not the property of the city, but remain the property of the companies installing them, subject to the public easement in the use of the street, and the regulation by the city. *Missouri-Edison Electric Co. v. Weber*, 102 Mo. App. 95.

# ELEVATED RAILROADS.

BY M. G. BEAMAN.

- 896. I. UNDER GENERAL RAILROAD LAW.** — See note 1.  
**898.** See note 1.  
**900. II. UNDER RAPID-TRANSIT ACTS** — 3. Consent of Property Owners and Local Authorities — Nature of Right Acquired. — See note 2.  
**902. III. RECOVERY OF DAMAGES BY OWNERS OF ABUTTING PROPERTY** —  
1. Right to Recover. — See note 7.  
**905. 2. Form of Action** — Permanent or Temporary Damages — *a.* IN GENERAL. — See note 1.  
**909. c. COMMON-LAW ACTION** — In Illinois. — See note 1.  
**910. d. PROCEEDING FOR AN INJUNCTION.** — See note 2.  
**911.** See note 1.  
**913. 3. Who May Recover** — *a.* PERSONAL REPRESENTATIVES. — See note 3.  
**914. b. SUBSEQUENT PURCHASERS.** — See note 1.  
Rental Value. — See note 2.  
**915. A Conveyance Pendente Lite.** — See note 2.

**896. 1. Definition.** — An elevated railroad is one which is placed above the surface of the street which is used by the general public. *State v. Superior Ct.*, 30 Wash. 219.

**898. 1. Auchincloss v. Metropolitan El. R. Co.**, 69 N. Y. App. Div. 63.

**900. 2. Heimbarg v. Manhattan R. Co.**, 162 N. Y. 352; *Shaw v. Manhattan Ave. R. Co.*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 47, reversed 78 N. Y. App. Div. 290.

**Right of Action May Be Reserved in Consent.** — *Kornder v. Kings County El. R. Co.*, 41 N. Y. App. Div. 357.

**Petition to Commissioners as to Route Not Consent.** — *Koehler v. New York El. R. Co.*, 159 N. Y. 218, affirming 9 N. Y. App. Div. 449.

**902. 7. Illinois.** — *Aldis v. Union El. R. Co.*, 203 Ill. 567; *Metropolitan West Side El. R. Co. v. Goll*, 100 Ill. App. 323; *Chicago Office Bldg. v. Lake St. El. R. Co.*, 87 Ill. App. 594. But there can be no recovery for damage to the plaintiff's property caused by the construction and operation of the defendant's elevated railroad, where such structure was not erected in the street on which the plaintiff's property abutted, and did not interfere with the access to the plaintiff's property. *Aldrich v. Metropolitan West Side El. R. Co.*, 105 Ill. 456.

*Massachusetts.* — *Baker v. Boston El. R. Co.*, 183 Mass. 178.

*Missouri.* — *De Geofroy v. Merchants Bridge Terminal R. Co.*, 179 Mo. 698, 101 Am. St. Rep. 524.

*New York.* — See *Mattlage v. New York El. R. Co.*, 157 N. Y. 708, affirming (C. Pl. Gen. T.) 14 Misc. (N. Y.) 291.

**Additional Track.** — The abutting owner is entitled to enjoin the construction of an additional track until he has been compensated for the additional servitude. *Auchincloss v. Metropolitan El. R. Co.*, 69 N. Y. App. Div. 63.

**905. 1. Practice in Massachusetts.** — Under Stat. Mass. 1894, c. 548, the method of assessing damages in Boston is by proceedings before the board of aldermen. *Boston El. R. Co. v. Prescho*, 174 Mass. 99.

**909. 1. Illinois.** — *Aldis v. Union El. R. Co.*, 203 Ill. 567; *Chicago, etc., R. Co. v. General Electric R. Co.*, 79 Ill. App. 569.

**910. 2. Whole Structure Illegal.** — Where authority to use a certain part of the street is given, and much more is taken, and it is impossible to separate the lawful part from the unlawful, the abutter may recover for the damage occasioned by the whole structure. *Siegel v. New York, etc., R. Co.*, 62 N. Y. App. Div. 290, reversed 173 N. Y. 644.

**911. 1.** See *Hernan v. Manhattan R. Co.*, 58 N. Y. App. Div. 369.

**913. 3. Assignment of Past Damages.** — If the personal representatives assign to the devisee their claim for past damages, the devisee may recover such past damages in the equitable action. *Hirsh v. Manhattan R. Co.*, 84 N. Y. App. Div. 374.

**914. 1. One Who Purchased After Road Constructed.** — *Stokes v. Manhattan R. Co.*, 47 N. Y. App. Div. 58. See also *Skelly v. Metropolitan El. R. Co.*, 1 N. Y. App. Div. 51, affirmed 158 N. Y. 677.

**2. Original Owner Regaining Title May Recover All in Equitable Proceeding.** — *Chanler v. New York El. R. Co.*, 34 N. Y. App. Div. 305.

**Right May Be Waived** even if the grantee is entitled to recover by reason of having been in possession as lessee. *Farrell v. Manhattan R. Co.*, 43 N. Y. App. Div. 143.

**915. 2. Pope v. Manhattan R. Co.**, 79 N. Y. App. Div. 583; *Stokes v. Manhattan R. Co.*, 47 N. Y. App. Div. 58.

Though the grantee cannot be brought into the suit involuntarily, it is in the discretion of



**915.** Vendor's Right to Past Damages. — See note 3.

Reservation of Cause of Action. — See note 5.

**917.** *c.* LANDLORD AND TENANT — Where the Lease Is Executed After the Construction of the Road. — See note 1.

Where, However, the Lease Is Executed Before the Construction of the Road. — See note 2.

**918.** *d.* OTHER PARTIES. — See note 3.

**923.** 4. Evidence — *b.* OTHER EVIDENCE — Evidence in Regard to Adjacent Property. — See note 3.

Evidence as to Other Property Not on Line of Road. — See note 5.

**924.** Inquiry as to Specific Instances — Collateral Issues. — See note 1.

**926.** 5. Damages — *a.* GENERALLY — Province of Jury. — See note 2.

**929.** Difference in Value Before and After Road Construction. — See notes 1, 2.

**930.** *b.* DAMAGES FROM SMOKE, CINDERS, ETC. — See notes 2, 4.

**931.** *c.* CONSEQUENTIAL DAMAGES — NOISE, VIBRATION, ETC. — See note 1.

**932.** See note 1.

**936.** *f.* DEDUCTION ON ACCOUNT OF BENEFITS DERIVED FROM THE EXISTENCE OF THE ROAD — Increase Must Be Shown to Be Due to Road. — See note 2.

the Supreme Court to permit him to be brought in, if he so desires, and the Court of Appeals will not review the exercise of this discretion. *Koehler v. New York El. R. Co.*, 159 N. Y. 218; *Mooney v. New York El. R. Co.*, 163 N. Y. 242; *Pope v. Manhattan R. Co.*, 79 N. Y. App. Div. 583.

And when the grantee has been so joined as a party to the suit, its equitable features are preserved and it may thereafter be continued as a suit in equity and a complete decree rendered adjusting the equities and rights of all the parties. *Koehler v. New York El. R. Co.*, 159 N. Y. 218.

**915.** 3. Conveyance Pendente Lite. — *Pope v. Manhattan R. Co.*, 79 N. Y. App. Div. 583.

Waiver of Jury Trial. — *Koehler v. New York El. R. Co.*, 159 N. Y. 218.

5. *Shepard v. Manhattan R. Co.*, 169 N. Y. 160.

Grantee Holds Amount Recovered as Trustee for Grantor. — *Western Union Tel. Co. v. Shepard*, 169 N. Y. 170; *Stilwell v. Kenedy*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 359. See also *Shepard v. Manhattan R. Co.*, 72 N. Y. App. Div. 132.

**917.** 1. Lease Executed After Road Constructed. — *Child v. New York El. R. Co.*, 89 N. Y. App. Div. 598.

2. Renewals. — *Storms v. Manhattan R. Co.*, 178 N. Y. 493.

Lessor May Recover Where Provision for Renewal. — Where the lease contains a provision for fixing the rent by arbitrators after a certain number of years, the lessor may recover rental damages from the time of readjustment to the time of trial. *Kernochan v. Manhattan R. Co.*, 161 N. Y. 339.

**918.** 3. An Infant may maintain an action by a guardian *ad litem*. *Walsh v. Brooklyn Union El. R. Co.*, 69 N. Y. App. Div. 389.

**923.** 3. Evidence as to Adjacent Property. — *Steigerwald v. Manhattan R. Co.*, 50 N. Y. App. Div. 487.

5. Plaintiff May Ask Expert as to Comparative Values on adjoining streets, though such streets are of a better character of property. *Shepard v. Manhattan R. Co.*, 169 N. Y. 160.

**924.** 1. *Douglas v. New York El. R. Co.*, 45 N. Y. App. Div. 596.

General Course and Current of Values. — *Levin v. New York El. R. Co.*, 165 N. Y. 572.

**926.** 2. Under the *Massachusetts* statute it is immaterial whether the abutter owns to the middle of the street, or merely up to the edge of the street. *Baker v. Boston El. R. Co.*, 183 Mass. 178.

**929.** 1. Difference in Values. — *Laue v. Metropolitan El. R. Co.*, 69 N. Y. App. Div. 231.

2. Decrease in Value Not Due to Road. — *Metropolitan West Side El. R. Co. v. Goll*, 100 Ill. App. 323.

**930.** 2. Change from Steam to Electricity. — Unless the railroad has the electric system in operation by the time of the trial, or there is reason to believe that it will shortly be installed, the plaintiff is entitled to recover for the ordinary adjuncts of the operation of steam engines. *Laue v. Metropolitan El. R. Co.*, 69 N. Y. App. Div. 231.

4. Injury from Dumping Ground Not Element of Fee Damages. — *Emigrant Mission Committee v. Brooklyn El. R. Co.*, 165 N. Y. 604, *affirming* 20 N. Y. App. Div. 596.

**931.** 1. Noise and Vibration as Elements of Damage. — *Metropolitan West Side El. R. Co. v. Goll*, 100 Ill. App. 323.

Under *Mass. Stat.* 1894, c. 548, § 8, authorizing the erection of an elevated railroad in the city of Boston, and providing for compensation to abutting owners, noise is special and peculiar damage for which compensation may be recovered. *Baker v. Boston El. R. Co.*, 183 Mass. 178.

**932.** 1. Where Occupation of Street Unlawful. — *Church of the Holy Apostles v. New York El. R. Co.*, 21 N. Y. App. Div. 47.

**936.** 2. Increased Benefits Must Be Shown to Be Due to Road. — The mere fact that the premises have increased in value since the construction of the defendant's road is not sufficient to authorize a deduction from the damages. It must affirmatively appear that the increase in value was due to the defendant's road and not to normal causes or to the presence and

**937.** General Rise in Values — Particular Property Damaged. — See note 2.  
Unimproved Locality — Substantial Increase in Values. — See note 3.

**938.** Proximity of Station. — See note 1.

*g.* WHERE PLAINTIFF'S PROPERTY FRONTS ON TWO STREETS. —

See note 2.

**6.** Statute of Limitations — Adverse Possession — Implied Acquiescence  
— In Common-law Actions to Recover Past Damages. — See note 3.

**940.** **7.** Right to Trial by Jury in Injunction Proceedings. — See note 1.

**IV. LIABILITY FOR PERSONAL INJURIES AND OTHER TORTS** — Injuries  
from Sparks — Negligence. — See note 3.

**941.** See note 1.

operation of an elevated road in another street  
near by. *Wetterau v. Metropolitan El. R. Co.*,  
39 N. Y. App. Div. 662.

**937. 2. General Increase in Values, but Particular Property Damaged.** — *Israel v. Manhattan R. Co.*, 158 N. Y. 624; *Powers v. Brooklyn El. R. Co.*, 157 N. Y. 105.

**3.** The value is to be ascertained by the conditions at the time of the trial, and if at that time the operation of the road is an injury rather than a benefit, this must be controlling, no matter what may have been the past benefit to the land. *Hynes v. Manhattan R. Co.*, 54 N. Y. App. Div. 256.

**938. 1. Benefit Must Be Proved, Not Presumed.** — *Israel v. Manhattan R. Co.*, 158 N. Y. 624.

**2. Property Fronting on Two Streets.** — *Shaw v. Manhattan Ave. R. Co.*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 47, *reversed* 78 N. Y. App. Div. 290; *Reilly v. Manhattan R. Co.*, 43 N. Y. App. Div. 80.

**3. Five-year Statute Applies.** — *DeGeofroy v. Merchants' Bridge Terminal R. Co.*, 179 Mo. 698, 101 Am. St. Rep. 524.

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**940. 1. Jury Trial.** — *Pope v. Manhattan R. Co.*, 79 N. Y. App. Div. 583.

**3. Falling Cinders Prima Facie Negligence.** — *Kister v. Manhattan R. Co.*, 40 N. Y. App. Div. 441.

**941. 1.** An elevated railroad, like a surface railroad, owes to the servant of a contractor with the railroad a duty to exercise reasonable care in the operation of its trains. *Wells v. Brooklyn Heights R. Co.*, 67 N. Y. App. Div. 212, *affirming* (Supm. Ct. Tr. T.) 34 Misc. (N. Y.) 44.

**Injury from Live Rail.** — An elevated railroad company is under no duty to protect its live rail at points distant from stations, in the absence of anything peculiarly attractive to children. *McAllister v. Jung*, 112 Ill. App. 138.

**Plank Left in Street.** — An elevated railroad company is not liable to a traveler for injuries resulting from stepping on a nail in a plank left in the street by the company's servants, unless it appears that such plank was permitted to remain on the street beyond a reasonable time. *Hedenberg v. Manhattan R. Co.*, (Supm. Ct. App. T.) 91 N. Y. Supp. 68.

# ELEVATORS.

BY RUFFIN T. COOPER.

**945. II. OPERATORS AS CARRIERS — 1. In General.** — See note 2.

**946. 2. As Carriers of Passengers — a. IN GENERAL — A Carrier by Elevator Is Not an Insurer.** — See note 2.

Carrier for Hire. — See note 3.

**b. DUTIES OWING AS CARRIERS OF PASSENGERS — (1) In General.** — See note 5.

**947. (2) To Provide and Maintain Safe and Suitable Machinery — (a) In General.** — See note 1.

**948.** See note 1.

(b) Presumption of Negligence from Unexplained Breaking of Machinery. — Burden of Proof. — See notes 2, 3.

**949. (3) To Provide and Maintain Skilful and Competent Operatives — (a) In General.** — See note 3.

(b) Injuries Sustained Through Negligent Operation — aa. STARTING CAR BEFORE PASSENGER HAS OPPORTUNITY TO OBTAIN BALANCE. — See note 4.

**950. bb. OTHER ACTS OF NEGLIGENCE.** — See note 2.

**945. 2. Proprietor or Operator Held to Be Carrier.** — *Masonic Fraternity Temple Assoc. v. Collins*, 210 Ill. 482; *Western Union Tel. Co. v. Woods*, 88 Ill. App. 375; *Field v. French*, 80 Ill. App. 78; *Goldsmith v. Holland Bldg. Co.*, 182 Mo. 597, *quoting* 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 945; *Luckel v. Century Bldg. Co.*, 177 Mo. 628; *Becker v. Lincoln Real Estate, etc., Co.*, 174 Mo. 246.

**946. 2. Western Union Tel. Co. v. Woods**, 88 Ill. App. 375; *Goldsmith v. Holland Bldg. Co.*, 182 Mo. 597, *quoting* 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 946; *Becker v. Lincoln Real Estate, etc., Co.*, 174 Mo. 250, *quoting* 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 946; *Luckel v. Century Bldg. Co.*, 177 Mo. 628, *quoting* 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 946; *Lee v. Knapp*, 155 Mo. 610, *quoting* 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 946.

**3. General Invitation.** — *Springer v. Ford*, 189 Ill. 430, 82 Am. St. Rep. 464, *quoting* 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 946; *Goldsmith v. Holland Bldg. Co.*, 182 Mo. 597, *quoting* 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 946. But see otherwise in *Seaver v. Bradley*, 179 Mass. 329, 88 Am. St. Rep. 384; *Griffen v. Manice*, 166 N. Y. 188, as to passengers by invitation.

**5. Duty of Carrier of Passengers by Elevator.** — *Beidler v. Branshaw*, 200 Ill. 425; *Chicago Exch. Bldg. Co. v. Nelson*, 197 Ill. 334; *Springer v. Ford*, 189 Ill. 430, 82 Am. St. Rep. 464; *Western Union Tel. Co. v. Woods*, 88 Ill. App. 375; *H. B. Phillips Co. v. Pruitt*, (Ky. 1904) 82 S. W. Rep. 628; *Russo v. Morris Bldg., etc., Assoc.*, 104 La. 426; *Goldsmith v. Holland Bldg. Co.*, 182 Mo. 597, *quoting* 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1046; *Oberndorfer v. Pabst*, 100 Wis. 505. But see *Seaver v. Bradley*, 179 Mass. 329, 88 Am. St. Rep. 384; *Burgess v. Stowe*, 134 Mich. 204; *Griffen v.*

*Manice*, 166 N. Y. 188; *Young v. Mason Stable Co.*, 96 N. Y. App. Div. 305, in which cases the degree of care required of a carrier of passengers is not demanded.

**947. 1. Negligent Failure to Maintain Safe Machinery.** — *Russo v. Morris Bldg., etc., Assoc.*, 104 La. 426; *Kleibaz v. Middleton Paper Co.*, 180 Mass. 363. See also *Goldsmith v. Holland Bldg. Co.*, 182 Mo. 597.

**948. 1. Duty to Maintain Safe Appliances.** — *Goldsmith v. Holland Bldg. Co.*, 182 Mo. 597, *quoting* the whole of this section of the original text in 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 946.

**2. Goldsmith v. Holland Bldg. Co.**, 182 Mo. 597.

**3. Rule Applied to Operators of Elevators.** — *Springer v. Ford*, 189 Ill. 430, 82 Am. St. Rep. 464; *Baltimore Boot, etc., Mfg. Co. v. Jamar*, 93 Md. 404, 86 Am. St. Rep. 428; *Griffen v. Manice*, 166 N. Y. 188; *Borgendoerfer v. Jacobs*, 97 N. Y. App. Div. 355.

**949. 3. Becker v. Lincoln Real Estate, etc., Co.**, 174 Mo. 246; *Oberndorfer v. Pabst*, 100 Wis. 505.

**Where There Is No Negligence** there can be no recovery. *Russo v. Morris Bldg., etc., Assoc.*, 104 La. 426. See also *Gibson v. International Trust Co.*, 177 Mass. 100, for facts which were held to show no negligence.

**4. Starting Car Before Passenger Obtains Balance.** — *Russo v. Morris Bldg., etc., Assoc.*, 104 La. 426.

**950. 2. Time to Enter and Leave.** — It is the duty of carriers, elevators as well as railroads, to allow a reasonable time for passengers to enter and leave their cars with safety in the exercise of ordinary care. *Luckel v. Century Bldg. Co.*, 177 Mo. 628; *Becker v. Lincoln Real Estate, etc., Co.*, 174 Mo. 246.

When the car stops to permit a passenger to



**951. c. WHEN AND WHETHER PASSENGER GUILTY OF CONTRIBUTORY NEGLIGENCE** — (1) *In General*. — See notes 1, 2.

**952. III. LIABILITY OF MASTER FOR INJURY TO SERVANT** — 1. *In General*. — See notes 2, 3.

2. *Duty of Master to Warn Ignorant Servant and Instruct Him as to His Duties* — *a. IN GENERAL*. — See note 5.

**953. b. WHERE DANGER OBVIOUS, WARNING UNNECESSARY.** — See note 1.

3. *Master's Duty to Servant to Use Safe Machinery and Appliances* — *a. IN GENERAL*. — See note 2.

**954.** See notes 1, 2.

**955. b. CONDITIONS OF MASTER'S LIABILITY FOR INJURY RESULTING FROM USE OF WORN AND DEFECTIVE MACHINERY.** — See note 1.

leave, the operator must, before starting, use reasonable care to ascertain if others are about to leave, and it is not necessary that every passenger aboard who wishes to leave at that place should repeat the direction to the operator to stop there. *Luckel v. Century Bldg., etc., Co.*, 177 Mo. 625; *Becker v. Lincoln Real Estate, etc., Co.*, 174 Mo. 246.

**Leaving the Elevator Door Open**, so that a child who has left the elevator and returns may catch hold of the elevator and hang on to it until it falls into the elevator well and is killed, is sufficient to support a finding of negligence. *Hayes v. Pitts-Kimball Co.*, 183 Mass. 262.

**Elevator Caught Between Floors.** — Where by reason of some foreign obstruction an elevator is held fast between two floors and cannot be moved by the use of the levers, the machinery being in good order, the operator is bound to use the highest degree of care to release the passengers in safety; and to try any experiment to lower the car without taking every precaution possible to insure their safety is negligence. *Savage v. Joseph H. Bauland Co.*, 42 N. Y. App. Div. 285.

**951. 1. Where Question of Fact.** — *Hilebrand v. Standard Biscuit Co.*, 139 Cal. 233; *Wilsey v. Jewett*, 122 Iowa 315; *H. B. Phillips Co. v. Pruitt*, (Ky. 1904) 82 S. W. Rep. 628; *Harmer v. Reed Apartment, etc., Co.*, 68 N. J. L. 332; *Weiss v. Jenkins*, 39 N. Y. App. Div. 567.

2. *Where Question of Law* — *California*. — *Sheyer v. Lowell*, 134 Cal. 357.

*Illinois*. — *Beidler v. Branshaw*, 200 Ill. 425.

*Maryland*. — *State v. Green*, 95 Md. 217; *Baltimore Boot, etc., Mfg. Co. v. Jamar*, 93 Md. 404, 86 Am. St. Rep. 428.

*Massachusetts*. — *Sullivan v. Marin*, 175 Mass. 422; *McCarvell v. Sawyer*, 173 Mass. 540, 73 Am. St. Rep. 318; *Cowen v. Kirby*, 180 Mass. 504.

*Minnesota*. — *Nutzmann v. Germania L. Ins. Co.*, 78 Minn. 504.

*New Hampshire*. — *Leavitt v. Mudge Shoe Co.*, 69 N. H. 597.

*New York*. — *Watson v. Duncan*, 47 N. Y. App. Div. 640.

*Oregon*. — *Massey v. Seller*, 45 Oregon 267.

*Rhode Island*. — *Bullack v. Butler Exch. Co.*, 22 R. I. 105; *Blackwell v. O'Gorman Co.*, 22 R. I. 638; *Gallowshaw v. Lonsdale Co.*, 25 R. I. 383.

*Wisconsin*. — *Bremer v. Pleiss*, 121 Wis. 61.

**952. 2. Risks Assumed by Servants** — *Delaware*. — *Boyd v. Blumenthal*, 3 Penn. (Del.) 564.

*Illinois*. — *Slack v. Harris*, 200 Ill. 96 (applying the rule that the servant does not assume unreasonable or extraordinary risks or risks of master's negligence); *Middendorf v. Schulze*, 105 Ill. App. 221.

*Iowa*. — *Russ v. American Cereal Co.*, 110 Iowa 743.

*Massachusetts*. — *Sullivan v. Thorndike Co.*, 175 Mass. 41.

*New York*. — *Karch v. Kipp*, (Supm. Ct. App. T.) 90 N. Y. App. 404; *Wolf v. Devitt*, 83 N. Y. App. Div. 42, affirmed 179 N. Y. 569; *Larkin v. Washington Mills Co.*, 45 N. Y. App. Div. 6; *Watson v. Duncan*, 47 N. Y. App. Div. 640.

3. *Boyd v. Blumenthal*, 3 Penn. (Del.) 564.

5. *Liability of Master When Servant Ignorant of Peril and Unwarned*. — *Sullivan v. Thorndike Co.*, 175 Mass. 41; *Harmer v. Reed Apartment, etc., Co.*, 68 N. J. L. 332.

**953. 1. Where Servant's Duties Do Not Require His Presence in Place Where Injury Received.** — See for a case of no liability on master, *Hyde v. Mendel*, 75 Conn. 140; *Karch v. Kipp*, (Supm. Ct. App. T.) 90 N. Y. Supp. 404.

**Servant Acting Beyond Scope of Employment.** — The master is not liable if the servant is acting outside of his employment. *Boyd v. Blumenthal*, 3 Penn. (Del.) 564.

2. *Duty to Maintain Safe Machinery.* — *Boyd v. Blumenthal*, 3 Penn. (Del.) 564; *Springer v. Schultz*, 205 Ill. 144; *McGregor v. Reid*, 178 Ill. 464, 69 Am. St. Rep. 332; *Continental Tobacco Co. v. Knoop*, 71 S. W. Rep. 3, 24 Ky. L. Rep. 1268; *Baltimore Boot, etc., Mfg. Co. v. Jamar*, 93 Md. 404, 86 Am. St. Rep. 428; *Montgomery v. Bloomingdale*, 34 N. Y. App. Div. 375; *Larkin v. Washington Mills Co.*, 45 N. Y. App. Div. 6.

**Duty to Provide Safe Place in Which to Do Work.** — *Wolf v. Devitt*, 83 N. Y. App. Div. 42, affirmed 179 N. Y. 569.

**Where Question One of Fact.** — *Larkin v. Washington Mills Co.*, 45 N. Y. App. Div. 6.

**954. 1. Test of Master's Negligence in This Regard.** — *Boyd v. Blumenthal*, 3 Penn. (Del.) 564; *Montgomery v. Bloomingdale*, 34 N. Y. App. Div. 375.

2. *Question of Fact.* — *Continental Tobacco Co. v. Knoop*, 71 S. W. Rep. 3, 24 Ky. L. Rep. 1268; *Auld v. Manhattan L. Ins. Co.*, 34 N. Y. App. Div. 491, affirmed 165 N. Y. 610.

**955. 1. Conditions of Master's Liability.** —

**957.** *c.* EVIDENCE OF MASTER'S NEGLIGENCE IN THIS REGARD. — See note 1.

**4. Fellow Servants — b.** INJURY TO SERVANT RESULTING FROM NEGLIGENCE OF FELLOW SERVANT. — See note 4.

*c.* WHO ARE FELLOW SERVANTS. — See note 6.

**958.** Agent Intrusted with Maintaining Safe Machinery Not Fellow Servant of Other Employees. — See note 1.

**5. Contributory Negligence of Servant — a.** IN GENERAL. — See note 2.

Proximate Cause of Injury — Use of Defective Machinery. — See note 3.

**959.** IV. DUTY OF OPERATOR OF ELEVATOR TO BAR SHAFTS — 1. IN GENERAL. — See note 4.

**960.** 2. Proprietors of Hotels, Office Buildings, and Apartment Houses. — See note 1.

**961.** 3. Proprietors of Stores, Manufactories, Etc. — See note 1.

**962.** 6. In Case of Trespassers and Licensees — *a.* IN GENERAL. — See note 2.

**964.** 7. Contributory Negligence in This Regard — *a.* IN GENERAL. — See note 1.

**965.** See note 1.

See *Skelley v. Crutchfield*, 17 Pa. Super. Ct. 198, where defendant was held liable for an injury to an employee while using the elevator for freight under defendant's direction, though the defendant's employees had previously been forbidden to use the elevator on account of its dangerous condition.

**Notice to Employer's Foreman Is Notice to Employer.** — *Boyd v. Blumenthal*, 3 Penn. (Del.) 564.

**Notice to Shipping Clerk Is Notice to Employer.** — *Larkin v. Washington Mills Co.*, 45 N. Y. App. Div. 6.

**Evidence Tending to Show Notice to Employer of Defective Machinery.** — See *Auld v. Manhattan L. Ins. Co.*, 34 N. Y. App. Div. 491, *affirmed* 165 N. Y. 610.

**957.** 1. See *Kleibaz v. Middleton Paper Co.*, 180 Mass. 363, where the evidence was held sufficient to justify the finding of negligence.

**4. Master Not Liable for Negligence of Fellow Servant.** — *Mann v. O'Sullivan*, 126 Cal. 61, 77 Am. St. Rep. 149; *Baltimore Boot, etc., Mfg. Co. v. Jamar*, 93 Md. 404, 86 Am. St. Rep. 428; *Nutzmann v. Germania L. Ins. Co.*, 78 Minn. 504; *Karch v. Kipp*, (Supm. Ct. App. T.) 90 N. Y. Supp. 404.

**Co-operating Negligence of Master and Fellow Servant** will render the master liable. *Auld v. Manhattan L. Ins. Co.*, 34 N. Y. App. Div. 491, *affirmed* 165 N. Y. 610.

**6. Conductor of Elevator and Engineer.** — See *Slack v. Harris*, 200 Ill. 96, where the operator was obeying the instructions of the engineer who was repairing the machinery.

**An Assistant Engineer and the Elevator Man** are fellow servants, and the general rule exempting the master from liability for injury to one for the negligence of the other applies unless the master's liability can be predicated on his negligence in selecting the servant who caused the injury, which is a question of fact for the jury. *Nutzmann v. Germania L. Ins. Co.*, 78 Minn. 504.

**Elevator Operator and Carpenter Working About Elevator** are fellow servants. *Mann v. O'Sullivan*, 126 Cal. 61, 77 Am. St. Rep. 149.

**958.** 1. **Duty Cannot Be Delegated So as to Excuse Master.** — *Larkin v. Washington Mills Co.*, 45 N. Y. App. Div. 6.

**2. Contributory Negligence of Servants.** — *Springer v. Ford*, 189 Ill. 430, 82 Am. St. Rep. 464; *Kennedy v. Friederich*, 168 N. Y. 379; *Wendler v. People's House Furnishing Co.*, 165 Mo. 527 (where the question was one of fact); *Hoes v. Edison Gen. Electric Co.*, 161 N. Y. 35, where the question was one of fact.

**3. Where Contributory Negligence of Employee the Proximate Cause.** — *Boyd v. Blumenthal*, 3 Penn. (Del.) 564.

**959.** 4. **Duty of Operator to Persons Rightfully on Premises to Guard Shaft.** — *Sheyer v. Lowell*, 134 Cal. 357; *Hillebrand v. Standard Biscuit Co.*, 139 Cal. 233; *Massey v. Seller*, 45 Oregon 267.

**960.** 1. **Duty of Proprietors of Hotels, Office Buildings, and Apartment Houses to Bar Shafts.** — *Haymarket Theater Co. v. Rosenberg*, 77 Ill. App. 183; *McCarvell v. Sawyer*, 173 Mass. 540, 73 Am. St. Rep. 318; *Bremer v. Pleiss*, 121 Wis. 61.

**961.** 1. **Duty of Operator of Elevator to Guests Impliedly Invited.** — *Ford v. Crigler*, 74 S. W. Rep. 661, 25 Ky. L. Rep. 56; *H. B. Phillips Co. v. Pruitt*, (Ky. 1904) 82 S. W. Rep. 628.

**962.** 2. **Duty to Bar Shafts Owning Neither to Trespassers Nor to Naked Licensees.** — *Massey v. Seller*, 45 Oregon 267. See also *Bigby v. U. S.*, 103 Fed. Rep. 597, *affirmed* 188 U. S. 400.

**964.** 1. **Where Question for Jury.** — *Wolf v. Devitt*, 83 N. Y. App. Div. 42, *affirmed* 179 N. Y. 569.

**Where a Question of Law.** — *Kennedy v. Friederich*, 168 N. Y. 379.

**965.** 1. **Where Person Guilty of Contributory Negligence Per Se.** — *State v. Green*, 95 Md. 217; *Cowen v. Kirby*, 180 Mass. 504; *Massey v. Seller*, 45 Oregon 267.

**966. V. STATUTES REGULATING CONSTRUCTION — 1. In General.** — See notes 1, 2.

2. Effect of Failure to Comply with Statute. — See note 3.

**968. VI. WHO LIABLE TO PERSON INJURED BY NEGLIGENT OPERATION OR CONSTRUCTION OF ELEVATOR — 1. In General** — Where Landlord Operator — Where Tenant Operator. — See note 1.

3. Injury Through Negligence of One of Several Tenants — No Joint Liability. — See note 4.

**969. VII. RELATION OF OPERATOR TO PERSON INJURED — 2. Where Not Liable for Negligence in Either Operation or Maintenance — To Trespassers and Licensees — a. IN GENERAL.** — See note 2.

b. RIDING ON FREIGHT ELEVATOR NOT MEANT FOR CARRIAGE OF PASSENGERS. — See note 4.

**970.** See note 1.

**966. 1.** See *Weinberger v. Kratzenstein*, (Supm. Ct. Tr. T.) 35 Misc. (N. Y.) 74, *affirmed* 71 N. Y. App. Div. 155 (where there was held to be a sufficient compliance with the statute); *Gallowshaw v. Lonsdale Co.*, 25 R. I. 383, holding the statute requiring certain signal attachments not applicable in the particular case.

2. **Power of Regulation.** — Under an act providing that cities of a certain class might, by general ordinance, regulate the management and inspection of elevator hoistways and elevator shafts in said cities, such cities are only invested with power to regulate management and inspection. They were not and could not be authorized to prescribe by general rescript, and without inspection, that no full automatic gates whatever should be erected or maintained. The regulations imposed under the power must be reasonable, and be reasonably applied. *Richmond Safety Gate Co. v. Ashbridge*, 116 Fed. Rep. 220.

3. **Failure to Comply with Statute.** — *Wendler v. People's House Furnishing Co.*, 165 Mo. 527; *Weiss v. Jenkins*, 39 N. Y. App. Div. 567.

**Not Conclusive of Negligence.** — *Ubelmann v. American Ice Co.*, 209 Pa. St. 398.

**968. 1. Liability of Landlord Where He Undertakes Maintenance and Operation.** — *Grifhahn v. Kreiger*, 171 N. Y. 661; *Bogendoerfer v. Jacobs*, 97 N. Y. App. Div. 355.

4. **Liability of Landlord.** — In *Cleary v. Brooklyn Factory, etc., Co.*, 79 N. Y. App. Div. 35, the landlord was held not liable under these facts: the building, the several floors of which were rented to different tenants, was furnished with a freight elevator which was operated by a rope, the power being furnished by an engine in another building; the elevator could not be

started except by pulling the rope in the elevator shaft; some one in the building, above or below the elevator, pulled the rope in the shaft without warning the plaintiff, and thereby caused the elevator to move, which inflicted injury on the plaintiff who was placing goods on the elevator at the time.

**969. 2. Where Liable for Negligence in Neither Operation Nor Maintenance.** — *Wilsey v. Jewett*, 122 Iowa 315; *Kentucky Distilleries, etc., Co. v. Leonard*, 79 S. W. Rep. 281, 25 Ky. L. Rep. 2046; *Cowen v. Kirby*, 180 Mass. 504; *McCarvell v. Sawyer*, 173 Mass. 540, 73 Am. St. Rep. 318; *Ball v. Hauser*, 129 Mich. 397; *Chesley v. Rocheford*, (Neb. 1903) 96 N. W. Rep. 241; *Leavitt v. Mudge Shoe Co.*, 69 N. H. 597.

**Using in Violation of Rule.** — *Hyde v. Mendel*, 75 Conn. 140; *Ball v. Hauser*, 129 Mich. 397.

4. **Employees Using Freight Elevator.** — *Kentucky Distilleries, etc., Co. v. Leonard*, 79 S. W. Rep. 281, 25 Ky. L. Rep. 2046; *Ball v. Hauser*, 129 Mich. 397.

**Liability for Injury to Persons Rightfully on Freight Elevator.** — There is liability for negligence in case of freight elevators as well as in case of passenger elevators. *Beidler v. Branchaw*, 200 Ill. 425; *Kentucky Distilleries, etc., Co. v. Leonard*, (Ky. 1904) 79 S. W. Rep. 281; *Frolich v. Cranker*, 11 Ohio Cir. Dec. 592, 21 Ohio Cir. Ct. 615.

**970. 1. Where Person Not Trespasser in Using Freight Elevator.** — See *Kentucky Distilleries, etc., Co. v. Leonard*, (Ky. 1904) 79 S. W. Rep. 281, where it was held that the defendant could not escape liability because of a warning printed on the elevator, because defendant may waive such restriction.



# EMBEZZLEMENT.

BY H. O'B. COOPER.

**978. I. DEFINITION, ORIGIN, AND NATURE OF THE OFFENSE — 1. Definition.** — See note 2.

2. Origin of the Offense. — See note 3.

**979. 3. Particular Statutes — In Canada.** — See note 1.

**980. Embezzlement and Larceny.** — See note 1.

4. Object of the Statutes. — See note 4.

5. Distinction Between Embezzlement and Larceny. — See note 5.

**981. Embezzlement a Distinct Offense.** — See notes 2, 3.

Statutes Using the Term "Larceny." — See note 5.

**984. II. ELEMENTS OF THE OFFENSE — 1. In General.** — See note 1.

2. Persons Who May Commit Embezzlement. — See note 2.

**978. 2. Definitions of Embezzlement.** — *In re Grin*, 112 Fed. Rep. 790, *affirmed* 187 U. S. 181; U. S. v. Breese, 131 Fed. Rep. 915; State v. Foster, 1 Penn. (Del.) 289; State v. Davis, 3 Penn. (Del.) 220; State v. Seoney, (Del. 1904) 59 Atl. Rep. 48; State v. Winstanley, 155 Ind. 290; Metropolitan L. Ins. Co. v. Miller, 114 Ky. 760, *citing* 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 978; State v. Nicholls, 50 La. Ann. 699; People v. Butts, 128 Mich. 208; State v. McDonald, 133 N. Car. 680.

**Statutory Definition in California.** — People v. Westlake, 124 Cal. 452; People v. McMahan, 133 Cal. 278; People v. McLean, 135 Cal. 306; People v. Dougherty, 143 Cal. 593. See also *In re Grin*, 112 Fed. Rep. 790, *affirmed* 187 U. S. 181.

**Statutory Definition in Ohio.** — State v. Pohlmeier, 59 Ohio St. 491.

**Embezzle Defined.** — Mitchell v. State, 11 Ohio Cir. Dec. 446, 21 Ohio Cir. Ct. 24.

**3. Embezzlement Not an Offense at Common Law.** — *In re Richter*, 100 Fed. Rep. 295; Hinds v. Territory, (Ariz.) 76 Pac. Rep. 469; People v. Shearer, 143 Cal. 66; Foster v. State, 2 Penn. (Del.) 111; City Trust, etc., Co. v. Lee, 107 Ill. App. 263, *affirmed* 204 Ill. 69; Com. v. Barney, 115 Ky. 475; State v. Gillis, 75 Miss. 331; State v. Keith, 126 N. Car. 1114; State v. McDonald, 133 N. Car. 680; Mitchell v. State, 11 Ohio Cir. Dec. 446, 21 Ohio Cir. Ct. 24.

**979. 1. Canadian Statutes.** — See Major v. McCraney, 2 Can. Crim. Cas. (Can.) 547.

**980. 1. Embezzlement and Larceny.** — Foster v. State, 2 Penn. (Del.) 111, *citing* 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 980.

**4. Object of the Statutes.** — Hinds v. Territory, (Ariz.) 76 Pac. Rep. 469; Com. v. Barney, 115 Ky. 475.

**5. Distinction Between Larceny and Embezzlement — United States.** — *In re Grin*, 112 Fed. Rep. 790, *affirmed* 187 U. S. 181; U. S. v. Breese, 131 Fed. Rep. 915.

*Alabama.* — See Eggleston v. State, 129 Ala. 80, 87 Am. St. Rep. 17.

*Arkansas.* — Hunt v. State, 72 Ark. 241, 105 Am. St. Rep. 34.

*California.* — People v. Dougherty, 143 Cal. 593.

*Georgia.* — Mobley v. State, 114 Ga. 544.

*Indiana.* — Wynegar v. State, 157 Ind. 577.

*Kentucky.* — Com. v. Barney, 115 Ky. 475.

*Nebraska.* — State v. Culver, (Neb. 1904) 97 N. W. Rep. 1015.

*North Carolina.* — State v. McDonald, 133 N. Car. 680.

*Pennsylvania.* — Young v. Glendenning, 8 Pa. Dist. 57.

*Texas.* — Johnson v. State, 46 Tex. Crim. 415; Leach v. State, 46 Tex. Crim. 507.

**Time When Intent Occurs.** — The distinction between larceny where the taking is fraudulent and embezzlement is determined with reference to the time when the intent to wrongfully convert the property to the taker's use occurs. Flohr v. Territory, 14 Okla. 477.

**981. 2. Embezzlement as a Distinct Offense — Called Statutory Larceny.** — Foster v. State, 2 Penn. (Del.) 111; Com. v. Barney, 115 Ky. 475.

**3. Decisions that Embezzlement Is a Distinct Offense.** — *In re Grin*, 112 Fed. Rep. 790, *affirmed* 187 U. S. 181; Foster v. State, 2 Penn. (Del.) 111.

**5. Immaterial that Statute Uses the Term "Larceny."** — See State v. Cates, 99 Me. 68.

**984. 1. Elements of the Offense — In General.** — U. S. v. Breese, 131 Fed. Rep. 915; Eggleston v. State, 129 Ala. 80, 87 Am. St. Rep. 17; Grider v. State, 133 Ala. 188; Hinds v. Territory, (Ariz.) 76 Pac. Rep. 469; Robinson v. State, 109 Ga. 564, 77 Am. St. Rep. 392.

**Essential Elements — Fiduciary Relation and Fraudulent Appropriation.** — People v. Gordon, 133 Cal. 328, 85 Am. St. Rep. 174; People v. Goodrich, 142 Cal. 216.

**The Gravamen of the Offense** is the wilful and wrongful appropriation of money for one's own use, with the intent to deprive the owner of it. Com. v. Fisher, 113 Ky. 491.

**2. Persons Who May Be Guilty of Embezzlement.** — State v. Obuchon, 159 Mo. 256; State v. Barton, 125 N. Car. 702.

**985. 3. What May Be the Subject of Embezzlement — *b. VALUE.*** — See note 4.

*Degrees of Offense.* — See note 5.

*c. OWNERSHIP.* — See note 6.

*Joint Ownership.* — See note 7.

**986. *d. PROPERTY OBTAINED OR HELD ILLEGALLY.*** — See notes 2, 3.

**989. 5. Character in Which Property Is Received or Held — *a. IN GENERAL.*** — See note 5.

**990. *b. RELATION OF TRUST AND CONFIDENCE.*** — See note 1.

*Property Held under a Trust.* — See note 3.

**994. 6. The Act by Which Embezzlement Is Effected — *b. WHAT CONSTITUTES A CONVERSION.*** — See notes 2, 3.

**995.** See note 1.

*c. NONPAYMENT OF DEBT.* — See note 2.

*e. NECESSITY FOR DEMAND.* — See notes 4, 5.

**985. 4. Value of Property.** — *Com. v. Smith*, (Ky. 1904) 82 S. W. Rep. 236; *State v. Fourchy*, 51 La. Ann. 228. See *State v. Bartholomew*, 69 N. J. L. 160.

**5. Degrees of Offense — Felony or Misdemeanor.** — *Loving v. State*, 44 Tex. Crim. 373. See *Spurlock v. State*, 45 Tex. Crim. 282.

**6. Ownership of Property.** — *People v. Goodrich*, 138 Cal. 472; *McElroy v. People*, 202 Ill. 473; *State v. Barton*, 125 N. Car. 702; *Dancy v. State*, 41 Tex. Crim. 293; *Manuel v. State*, 44 Tex. Crim. 433.

**7. Joint Ownership.** — *McElroy v. People*, 202 Ill. 476, *citing* 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 985; *State v. Knowles*, 185 Mo. 164, *quoting* 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 985; *State v. Wise*, 186 Mo. 42, *citing* 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 985; *State v. Keith*, 126 N. Car. 1114.

**986. 2. Property Obtained or Held Illegally.** — *State v. Hoshor*, 26 Wash. 653. See *People v. Ward*, 134 Cal. 301.

**3. Money Intrusted for Immoral Purposes.** — *State v. Cunningham*, 154 Mo. 177, *citing* 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 986.

**989. 5. Character in Which Property Is Received or Held.** — *People v. Dougherty*, 143 Cal. 593; *State v. Davis*, 3 Penn. (Del.) 220; *State v. Sienkiewicz*, 4 Penn. (Del.) 59. See also *State v. Barton*, 125 N. Car. 702.

**Retention under Claim of Right.** — *State v. Collins*, 1 Marv. (Del.) 536.

**Property Appropriated under Claim of Title.** — By Pen. Code Cal., § 511, it is a good defense to an indictment for embezzlement that the property was appropriated openly and avowedly, and under a claim of title preferred in good faith, even though the claim is untenable. *People v. Lapique*, 120 Cal. 25.

**990. 1. Relation of Trust and Confidence — California.** — *People v. Shearer*, 143 Cal. 66; *People v. Dougherty*, 143 Cal. 593.

*Indiana.* — *Colip v. State*, 153 Ind. 584, 74 Am. St. Rep. 322; *Wynegar v. State*, 157 Ind. 577.

*Kentucky.* — *Com. v. Barney*, 115 Ky. 475.

*Missouri.* — *State v. Laughlin*, 180 Mo. 342.

*Nebraska.* — *State v. Culver*, (Neb. 1904) 97 N. W. Rep. 1015.

*North Carolina.* — *State v. McDonald*, 133 N. Car. 680.

*Texas.* — *Loving v. State*, 44 Tex. Crim. 373; *Johnson v. State*, 46 Tex. Crim. 415; *O'Morrow v. State*, 44 Tex. Crim. 221; *Jackson v. State*, 44 Tex. Crim. 259.

**3. "Property Held under a Trust."** — *Hinds v. Territory*, (Ariz.) 76 Pac. Rep. 469.

**994. 2. What Constitutes a Conversion.** — *Wilson v. State*, (Tex. Crim. 1904) 82 S. W. Rep. 651.

**A Demand and a Refusal** does not of itself in any case establish fraudulent conversion, or conversion by a defendant to his own use, but it is only evidence to go to the jury upon the question of the defendant's fraudulent conversion. *State v. Reynolds*, 65 N. J. L. 424.

**3. A Mere Failure to Return Money** intrusted to an agent, without evidence of a fraudulent appropriation or disposition, is not sufficient to constitute embezzlement. *Henderson v. State*, 129 Ala. 104.

**995. 1. Continuous Series of Acts.** — *Willis v. State*, 134 Ala. 429.

**2. Failure or Refusal to Pay Debt.** — *Rauguth v. People*, 186 Ill. 93; *State v. Culver*, (Neb. 1904) 97 N. W. Rep. 1015.

**4. Necessity for Demand.** — *State v. Eastman*, 62 Kan. 353.

**Demand Unnecessary When Impossible.** — *Kosakowski v. People*, 177 Ill. 563.

**After Verdict.** — A verdict of guilty is, in effect, a finding of the fact of embezzlement, and will not be set aside because of the absence of formal demand on the embezzler for the return of the funds prior to prosecution. *State v. Mathis*, 106 La. 263.

**5. Not Necessary in Absence of Statute.** — *People v. Gordon*, 133 Cal. 328, 85 Am. St. Rep. 174; *People v. Ward*, 134 Cal. 301; *People v. Goodrich*, 142 Cal. 216; *State v. Blackley*, 138 N. Car. 620, *quoting* 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 995.

**Defendant Absconded — No Demand Necessary.** — *State v. Knowles*, 185 Mo. 141; *People v. Carter*, 122 Mich. 668.

**When Demand Material to Establish Fraudulent Conversion.** — See *State v. Reynolds*, 65 N. J. L. 424.

**Deposit "When Required" — Words Not Equivalent to "Upon Demand."** — *U. S. v. Dimmick*, 112 Fed. Rep. 350, *affirmed* (C. C. A.) 116 Fed. Rep. 825.

**996.** 7. The Intent — Criminal Intent Is Essential. — See note 2.

**997.** Appropriation under Claim of Right. — See note 1.

Fraudulent Intent May Be Inferred from Circumstances. — See note 2.

8. Return of Property or Settlement. — See note 3.

III. PARTICULAR CLASSES OF PERSONS — 1. In General. — See note 4.

Strict Construction of Statutes. — See note 5.

**1003.** 3. Agents — *a.* WHO ARE — IN GENERAL. — See note 2.

**1004.** *b.* PAYMENT OF COMPENSATION — (2) *Agents on Commission.* —

See note 7.

**1005.** *c.* CASUAL EMPLOYMENT. — See note 1.

*e.* COLLECTING AGENTS. — See note 3.

**1006.** See note 1.

**1007.** 4. Partners. — See note 1.

5. Bailees, Including Common Carriers. — See note 5.

**996.** 2. Criminal Intent Essential — *United States.* — *U. S. v. Breese*, 131 Fed. Rep. 915.

*Delaware.* — *State v. Foster*, 1 Penn. (Del.) 289; *State v. Seeney*, (Del. 1904) 59 Atl. Rep. 48; *State v. Davis*, 3 Penn. (Del.) 220; *State v. Sienkiewicz*, 4 Penn. (Del.) 59.

*Iowa.* — *State v. Ames*, 119 Iowa 680.

*Kansas.* — *State v. Eastman*, 60 Kan. 557.

*Kentucky.* — *Metropolitan L. Ins. Co. v. Miller*, 114 Ky. 760, *citing* 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 996.

*Minnesota.* — *State v. Cowdery*, 79 Minn. 94.

*Missouri.* — *State v. Cunningham*, 154 Mo. 178, *citing* 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 996; *State v. Schilb*, 159 Mo. 130.

*Nebraska.* — *State v. Culver*, (Neb. 1904) 97 N. W. Rep. 1015.

*New Jersey.* — *State v. Temple*, 63 N. J. L. 375, *citing* 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 996.

*North Carolina.* — *State v. McDonald*, 133 N. Car. 680.

*Rhode Island.* — *State v. Hunt*, 25 R. I. 75.

*Texas.* — *Leach v. State*, 46 Tex. Crim. 507; *Ximenez v. State*, (Tex. Crim. 1899) 54 S. W. Rep. 588.

*Virginia.* — *Wadley v. Com.*, 98 Va. 803.

**Intention to Restore.** — *People v. McLean*, 135 Cal. 306; *Metropolitan L. Ins. Co. v. Miller*, 114 Ky. 760, *citing* 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 997; *People v. Butts*, 128 Mich. 208; *State v. Lentz*, 184 Mo. 223.

**Intent Omitted from Statute.** — "Whatever one voluntarily does, he of course intends; and, whenever the statute has made that act criminal, the party voluntarily doing the prohibited act is chargeable with the criminal intent, and the section of the statute defining embezzlement (§ 6842) does not make intent an element of the crime of embezzlement, and not being an element of the crime, it is not necessary to allege that the act was intentionally done as a constituent part of the crime." *Mitchell v. State*, 11 Ohio Cir. Dec. 446, 21 Ohio Cir. Ct. 24.

**997.** 1. Appropriation under Claim of Right. — *Eastman v. State*, (Fla. 1904) 37 So. Rep. 576; *State v. Culver*, (Neb. 1904) 97 N. W. Rep. 1015; *Wadley v. Com.*, 98 Va. 803.

**2. Intent Inferred from Circumstances.** — *U. S. v. Breese*, 131 Fed. Rep. 915; *Willis v. State*, 134 Ala. 429; *State v. Seeney*, (Del. 1904) 59 Atl. Rep. 48; *State v. Sienkiewicz*, 4 Penn. (Del.) 59; *State v. Davis*, 3 Penn. (Del.) 220;

*State v. McGregor*, 88 Minn. 77; *State v. Lentz*, 184 Mo. 223; *Com. v. Beale*, 19 Pa. Super. Ct. 434.

**Inferred from Felonious or Fraudulent Conversion.** — *State v. Cunningham*, 154 Mo. 161; *State v. Schilb*, 159 Mo. 130; *State v. Rigall*, 169 Mo. 659.

**Failure to Enter Collection in Book — No False Accounts — No Evidence of Criminal Intent.** — *State v. Collins*, 1 Marv. (Del.) 536.

**Failure of Employee to Account.** — "There is no rule of law that an employee who takes his employer's money, and keeps it without accounting for it, is to be presumed innocent of the intent implied by his act or to have no intent to defraud his employer." *Zuckerman v. People*, 213 Ill. 114.

**3. Return of Property or Settlement No Defense.** — *State v. Eastman*, 62 Kan. 353; *State v. Lentz*, 184 Mo. 223.

**4. Persons Must Be Within the Statute.** — *People v. Shearer*, 143 Cal. 66; *State v. Brown*, 171 Mo. 477; *State v. Keith*, 126 N. Car. 1114.

**5. People v. Shearer, 143 Cal. 66; *State v. Collins*, 1 Marv. (Del.) 536; *State v. Brown*, 171 Mo. 477.**

**1003.** 2. Who Are Agents — In General. — *State v. Foster*, 1 Penn. (Del.) 289.

**1004.** 7. Agents on Commission. — *State v. Collins*, 1 Marv. (Del.) 536; *Com. v. Fisher*, 113 Ky. 491.

**1005.** 1. Casual Employment. — *Foster v. State*, 2 Penn. (Del.) 111, *citing* 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1005; *State v. Foster*, 1 Penn. (Del.) 289.

**Agent to Do Single Act — Delaware Statute.** — *State v. Foster*, 1 Penn. (Del.) 289.

**3. Collecting Agents — Independent Business.** — *City Trust, etc., Co. v. Lee*, 107 Ill. App. 263, *citing* 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1005, *affirmed* 204 Ill. 69.

**1006.** 1. Collectors Not Engaged in Independent Business. — *City Trust, etc., Co. v. Lee*, 107 Ill. App. 263, *citing* 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1005, *affirmed* 204 Ill. 69.

**1007.** 1. Partners — In General. — *State v. Knowles*, 185 Mo. 164, *quoting* 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 985; *State v. Wise*, 186 Mo. 42, *citing* 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1007.

**5. Indiana Statute — Bailee as Agent.** — *Wynegar v. State*, 157 Ind. 577.



- 1008.** See note 1.  
**1010.** 6. Attorneys. — See note 1.  
**1012.** 10. Banks and Their Officers and Employees — *a.* PRIVATE BANKERS AND MANAGERS. — See note 5.  
**1013.** *b.* OFFICERS OF BANKS GENERALLY. — See note 1.  
**1014.** *d.* NATIONAL BANKS — (1) *In General.* — See note 1.  
**1017.** 11. Public Officers and Employees — *a.* UNITED STATES OFFICERS — Failure to Deposit or Safely Keep Moneys. — See note 3.  
**1018.** Persons Within the Statutes. — See note 1.  
**1020.** *c.* COUNTY OFFICERS — Failure to Pay Over to Successor. — See note 1.  
**1021.** Other Cases. — See note 2.  
*d.* MUNICIPAL AND TOWNSHIP OFFICERS. — See note 3.  
Town and City Treasurer. — See note 5.  
Township Trustees, Agents, Selectmen, Etc. — See note 9.  
A Tax Collector. — See note 11.  
**1024.** IV. EMBEZZLEMENT FROM THE MAILS — 1. In General — Section 5467 of the Revised Statutes. — See note 1.  
2. By Postmasters, Postal Clerks, Etc. — See note 5.  
**1025.** 4. By Private Individuals. — See note 4.  
5. Decoy Letters. — See note 5.  
V. LOCALITY OF THE OFFENSE — 1. In General. — See note 6.

**1008.** 1. Embezzlement by Carriers and Other Bailees. — State *v.* Davis, 3 Penn. (Del.) 220; State *v.* Sienkiewicz, 4 Penn. (Del.) 59; State *v.* Seeney, (Del. 1904) 59 Atl. Rep. 48.

**1010.** 1. Attorneys. — Com. *v.* Barton, 20 Pa. Super. Ct. 447.

**1012.** 5. What Constitutes Embezzlement — Bank Insolvent — Deposits Received. — State *v.* Cadwallader, 154 Ind. 607; State *v.* Easton, 113 Iowa 516, 86 Am. St. Rep. 389. See Paulsen *v.* People, 195 Ill. 507.

**1013.** 1. Officers of Banks Generally. — State *v.* Nicholls, 50 La. Ann. 699.

**1014.** 1. National Banks. — See generally for the construction of section 5209 Rev. Stat., U. S. *v.* Breese, 131 Fed. Rep. 915.

**1017.** 3. Failure to Deposit or to Safely Keep. — U. S. *v.* Dimmick, 112 Fed. Rep. 350, (C. C. A.) 121 Fed. Rep. 638.

**1018.** 1. Disbursing Officer of United States Army. — Carter *v.* McClaughry, 105 Fed. Rep. 614, affirmed 183 U. S. 365.

**1020.** 1. Failure to Pay Over. — The omission to pay over money by a public officer is not necessarily embezzlement, as it might be claimed to be due him for commissions or under some other *bona fide* claim. People *v.* Westlake, 124 Cal. 452.

A Mere Failure to Pay Over an amount with which a public officer is chargeable is not of itself, alone, sufficient to establish a fraudulent appropriation to his own use. Robinson *v.* State, 109 Ga. 564, 77 Am. St. Rep. 392.

**1021.** 2. County Clerk. — Com. *v.* Shoener, 25 Pa. Super. Ct. 526.

3. Municipal and Township Officers. — State *v.* Carter, 67 Ohio St. 422.

5. Town Treasurer. — Com. *v.* Carson, 21 Pa. Super. Ct. 48.

9. Township Trustee. — Com. *v.* Carson, 21 Pa. Super. Ct. 48.

11. Tax Collectors. — State *v.* Griswold, 73 Conn. 95, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1021.

**1024.** 1. Rev. Stat. U. S., § 5468, provides that the fact that any letter has been deposited in any post office or in any other authorized depository for mail matter shall be evidence that the same was "intended to be conveyed by mail" within the meaning of section 5467. Bromberger *v.* U. S., (C. C. A.) 128 Fed. Rep. 346.

Intended to Be Conveyed — Decoy Letter. — Section 5458 of the Revised Statutes provides that the depositing of a letter shall be evidence that it was intended to be conveyed by mail. Such *prima facie* evidence is not contradicted or modified by proof that a letter was a decoy and was addressed to a fictitious person. Scott *v.* U. S., 172 U. S. 343.

5. Money-order Funds — Post-office Clerk. — U. S. *v.* Royer, 122 Fed. Rep. 844.

Issuance of Money Orders Without Receiving Money — Intent Not to Defraud No Defense. — Vives *v.* U. S., (C. C. A.) 92 Fed. Rep. 355.

**1025.** 3. By Individuals — Letter Not in Custody of Postal Authorities. — After a letter had been properly delivered, and had been re-addressed for being forwarded, a messenger boy, to whom it was delivered with instructions to put it in a letter box, who opened it and took money therefrom, is not guilty of an offense against the United States law. U. S. *v.* Huilsmann, 94 Fed. Rep. 486.

5. Decoy Letters. — Scott *v.* U. S., 172 U. S. 343.

6. Locality of Offense. — Keys *v.* State, 112 Ga. 399, 81 Am. St. Rep. 70, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1025; State *v.* Hoshor, 26 Wash. 653, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1025.

Continuing Offense. — *In re* Richter, 100 Fed. Rep. 295.

Obligation to Account in One County. — State *v.* Maxwell, 113 Iowa 369.

Venue — Place Where Accused Was under Obligation to Account. — Kossakowski *v.* People, 177 Ill. 563.

**1026.** See note 1.

**1029.** VI. EVIDENCE — 3. Competency, Relevancy, and Materiality — *a.* IN GENERAL. — See note 4.

**1030.** Financial Condition of Defendant. — See note 4.

Harmless Error in Admission of Evidence. — See note 5.

**1032.** *e.* INTENT. — See note 3.

**1033.** [Burden of Proof. — See note 1*a.*]

*f.* OTHER OFFENSES AND SIMILAR ACTS. — See note 2.

**1034.** *h.* EXPERT TESTIMONY. — See note 2.

**1035.** *i.* DOCUMENTARY EVIDENCE — (2) *Books of Account, Statements, Receipts, Checks, Etc.* — See note 3.

**1036.** (3) *Letters.* — See note 5.

*j.* CONFESSIONS, ADMISSIONS, AND STATEMENTS OF ACCUSED. — See note 7.

**1037.** 4. Sufficiency of Evidence. — See note 1.

**1026.** 1. Money or Property Need Not Be Expended or Disposed of in the County. — *Keys v. State*, 112 Ga. 399, 81 Am. St. Rep. 70, *citing* 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1025 [1026]; *State v. Hoshor*, 26 Wash. 653, *citing* 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1025 [1026].

**1029.** 4. Competency, Relevancy, and Materiality — In General. — *Schintz v. People*, 178 Ill. 320; *Burnett v. State*, 62 N. J. L. 510.

**1030.** 4. Evidence of Financial Condition of Defendant Admissible. — The tendency of the courts is to admit testimony that the defendant was in debt, because, in a greater or less degree under the facts of each case, it tends to show temptation or motive on the part of the defendant. *Dimmick v. U. S.*, (C. C. A.) 135 Fed. Rep. 257, *citing* 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1030.

5. Harmless Error. — *Haupt v. State*, 108 Ga. 60.

**1032.** 3. Misappropriation by Another. — An agent on trial for embezzlement may prove that the fund was drawn and appropriated by another, to whose control he had subjected it, without the knowledge or consent of the agent. *Burnett v. State*, 62 N. J. L. 510.

**1033.** 1*a.* The Burden of Proving a Criminal Intent in an embezzlement case is on the state, and though such intent may be found by the jury from the facts and circumstances surrounding the act of conversion, it is not to be presumed from that act. *State v. McDonald*, 133 N. Car. 680.

And see INTENT — INTENTION.

2. Evidence of Other Offenses and Similar Acts. — *U. S. v. Breese*, 131 Fed. Rep. 915; *Goodwyn v. State*, (Tex. Crim. 1901) 64 S. W. Rep. 251; *State v. Pittam*, 32 Wash. 137. See also *Zuckerman v. People*, 213 Ill. 114.

**1034.** 2. Expert Evidence. — *State v. Mathis*, 106 La. 263, *citing* 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1034; *Ritter v. State*, 70 Ark. 472.

**1035.** 3. Books of Account, Receipts, Etc. — *Willis v. State*, 134 Ala. 429.

Entries by Others — Not Binding on Accused. — *State v. Collins*, 1 Marv. (Del.) 536; *State v. Ames*, 119 Iowa 680.

Entry in Minute Book of Bank. — See *McKnight v. U. S.*, (C. C. A.) 122 Fed. Rep. 926.

Bookkeeper Responsible for Books — Admissible Against Him Though Not in His Handwriting. — *Secor v. State*, 118 Wis. 621.

Receipts — Source or Authority. — The mere reception of a receipt through the mail, without some knowledge of the source or the authority from which it came, would not authorize its introduction in evidence. *Templeton v. State*, (Tex. Crim. 1900) 57 S. W. Rep. 831.

Secretary of Corporation. — Upon the trial of the secretary of a corporation for embezzlement, the books of the corporation, which were kept by a bookkeeper, are inadmissible to show a shortness unless it is proved that the defendant knew their contents, and was responsible for their condition. *People v. Blackman*, 127 Cal. 248.

**1036.** 5. *Eastman v. State*, (Fla. 1904) 37 So. Rep. 576.

7. Admission Before Commission of Offense. — *Jackson v. State*, 44 Tex. Crim. 259.

**1037.** 1. Offense Must Be Proved Beyond Reasonable Doubt. — *U. S. v. Breese*, 131 Fed. Rep. 915; *State v. Seeney*, (Del. 1904) 59 Atl. Rep. 48; *State v. Sienkiewicz*, 4 Penn. (Del.) 59; *State v. Foster*, 1 Penn. (Del.) 289; *Kossakowski v. People*, 177 Ill. 563; *State v. Cowdery*, 79 Minn. 94; *State v. Culver*, (Neb. 1904) 97 N. W. Rep. 1015; *State v. Temple*, 63 N. J. L. 375; *State v. McDonald*, 133 N. Car. 680; *Secor v. State*, 118 Wis. 621.

A Reasonable Doubt is not a vague, fanciful, whimsical doubt, but a doubt naturally arising out of all the evidence in the case; and such a doubt as intelligent, impartial, fairminded jurors may reasonably entertain after a careful consideration of all the relevant evidence before them. *State v. Davis*, 3 Penn. (Del.) 220; *State v. Seeney*, (Del. 1904) 59 Atl. Rep. 48.

Evidence Held Sufficient. — Where the proof is that part of the fund described in the information was received and converted, it is sufficient to sustain a conviction. *State v. Lewis*, 31 Wash. 75.

Well Founded Doubt Not Reasonable Doubt. — *Willis v. State*, 134 Ala. 429.

Proof of Embezzlement of Part of Amount Alleged Is Sufficient. — *State v. Foster*, 1 Penn. (Del.) 289; *State v. Davis*, 3 Penn. (Del.) 220.

**1038. EMBLEMENTS.** — See note 3.

**1039. EMBRACE.** — See note 1.

**1038. 3. Grass.** — See *State v. Crook*, 132 N. Car. 1053.

**1039. 1. In the Sense of Inclose.** — The word *embrace* in an act providing that a state shall select a section of land so as to

*embrace* the buildings and improvements thereon means to enclose as by surrounding or encircling. *Story v. Woolverton*, (Mont. 1904) 78 Pac. Rep. 589.

## EMBRACERY.

**1040. I. DEFINITION AND NATURE.** — See notes 3, 4, 5.

**1041. An Attempt to Commit Embracery.** — See note 3.

**III. PUNISHMENT.** — See note 8.

**EMERGENCY.** — See note 9.

**1042. EMIGRANT — EMIGRATION.** — See note 1.

**1040. 3. Embracery Defined.** — *State v. Davis*, 112 Mo. App. 346. See also *People v. Glen*, 64 N. Y. App. Div. 167, *affirmed* 173 N. Y. 395.

4. *State v. Davis*, 112 Mo. App. 346.

5. See *State v. Nunley*, 185 Mo. 103.

**Missouri Statutes.** — Rev. Stat. Mo., § 2045, reasserts the common-law rule (laid down in the original text) and makes it an offense by substituting "improperly" for "corruptly" to attempt to influence the jury or one summoned as a juror, and extends the law so as to cover the case of referees and arbitrators as well. *State v. Davis*, 112 Mo. App. 346.

Under Mo. Stat., § 2045, a conviction will not lie where the evidence fails to show that the juror alleged to have been improperly influenced was sworn or impaneled as such. *State v. Williford*, 111 Mo. App. 668.

**Insufficient Evidence.** — *State v. Davis*, 112 Mo. App. 346.

**New York Statute.** — The New York Penal Code, § 75, defines embracery as follows: "A person who influences or attempts to influence improperly a juror in a civil or criminal action or proceeding, or one drawn or summoned to attend as such a juror \* \* \* in respect to his verdict \* \* \* or decision in any cause or matter pending, or about to be brought before him in any case \* \* \* is guilty of a mis-

demeanor. Under this section it is not necessary that a proffer of money or other consideration be tendered to the juror improperly approached to influence his decision. The unlawful attempt is the gist of the action, and it is for the jury to construe the intent of the defendant in endeavoring to persuade the juror." *People v. Glen*, 64 N. Y. App. Div. 167, *affirmed* 173 N. Y. 395.

**1041. 3. Attempts.** — *State v. Davis*, 112 Mo. App. 346.

8. See *State v. Munley*, 185 Mo. 103.

9. An *emergency* is "a sudden or unexpected happening, an unforeseen occurrence or condition." *Sheehan v. New York*, (Supm. Ct. Tr. T.) 37 Misc. (N. Y.) 433.

**1042. 1. Emigrant.** — *Varner v. State*, 110 Ga. 595, *quoting* 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1042; *Williams v. Fears*, 110 Ga. 586, *quoting* 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1042.

**Emigrant Agent.** — The term "*emigrant agent*," in the *Georgia General Tax Act* of 1898, means a person engaged in hiring laborers in this state to be employed beyond the limits of the same. *Williams v. Fears*, 110 Ga. 584, *affirmed* 179 U. S. 270. And see *Varner v. State*, 110 Ga. 595; *Theus v. State*, 114 Ga. 53; *State v. Hunt*, 129 N. Car. 686; *State v. Napier*, 63 S. Car. 60.



# EMINENT DOMAIN.

By E. C. ELLSBREE.

**1047. I. DEFINITION.** — See note 1.

**1048. II. NATURE OF THE POWER** — 1. An Attribute of Sovereignty — Founded Originally on State Necessity. — See note 4.

**1049.** Founded upon Sovereignty. — See note 1.

It Exists Independent of Constitutions. — See notes 2, 3.

State May Not Be Divested of the Power. — See note 4.

**1051. 3. Conditions Imposed upon Its Exercise.** — See notes 1, 2.

**III. WHO MAY EXERCISE THE POWER — MANNER OF EXERCISE —**

**1. In General** — Confined Within Territorial Limits. — See note 6.

**1052. 3. The States.** — See note 3.

**4. Manner of Exercising the Power** — *a. IN GENERAL.* — See notes 5, 6.

**1053. b. DELEGATION TO AGENTS** — (1) *Method of Delegation.* — See note 2.

**1047. 1. Definition.** — *Tuttle v. Moore*, 3 Indian Ter. 712; *People v. Adirondack R. Co.*, 160 N. Y. 225; *Spencer v. Seaboard Air Line R. Co.*, 137 N. Car. 107; *Trenton Cut-off R. Co. v. Newtown Electric St. R. Co.*, 8 Pa. Dist. 549.

**1048. 4. Spencer v. Seaboard Air Line R. Co.**, 137 N. Car. 107, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1048.

**1049. 1. Eminent Domain an Attribute of Sovereignty** — *Georgia.* — *Chestatee Pyrites Co. v. Cavenders Creek Gold Min. Co.*, 119 Ga. 354, 100 Am. St. Rep. 174.

*Idaho.* — *Hollister v. State*, (Idaho 1903) 71 Pac. Rep. 541.

*Illinois.* — *Illinois State Trust Co. v. St. Louis, etc., R. Co.*, 208 Ill. 419; *People v. Sanitary Dist.*, 210 Ill. 171.

*Maine.* — *Kennebec Water Dist. v. Waterville*, 96 Me. 234.

*New York.* — *People v. Adirondack R. Co.*, 160 N. Y. 225.

*North Carolina.* — *Spencer v. Seaboard Air Line R. Co.*, 137 N. Car. 107.

*Ohio.* — *Covington, etc., Bridge Co. v. Magruder*, 63 Ohio St. 455.

*Virginia.* — *Painter v. St. Clair*, 98 Va. 85.

*Washington.* — *Samish River Boom Co. v. Union Boom Co.*, 32 Wash. 586.

**2. Not Dependent upon Constitution.** — *Chestatee Pyrites Co. v. Cavenders Creek Gold Min. Co.*, 119 Ga. 354, 100 Am. St. Rep. 174; *Kennebec Water Dist. v. Waterville*, 96 Me. 234; *People v. Adirondack R. Co.*, 160 N. Y. 225.

Eminent domain is a power recognized, but not granted, by the Constitution. *Samish River Boom Co. v. Union Boom Co.*, 32 Wash. 586.

**3. Chestatee Pyrites Co. v. Cavenders Creek Gold Min. Co.**, 119 Ga. 354, 100 Am. St. Rep. 174.

**4. State's Power May Not Be Divested by Legislature.** — *Kennebec Water Dist. v. Waterville*, 96 Me. 234; *People v. Adirondack R. Co.*, 160 N. Y. 225; *Spencer v. Seaboard Air Line R. Co.*, 137 N. Car. 107.

A Municipality cannot surrender, abridge, or barter away its right of eminent domain relative to the establishment and maintenance of public roads. *Watkins v. Hopkins County*, (Tex. Civ. App. 1903) 72 S. W. Rep. 872.

**1051. 1. Must Be for Public Use.** — *Fontaine v. De Sherrington*, 23 Quebec Sup. Ct. 532; *Matter of Tuthill*, 163 N. Y. 133; *Brewster v. J. & J. Rogers Co.*, 169 N. Y. 73.

A statute authorizing the taking of private property for private purposes is unconstitutional. *Berrien Springs Water-Power Co. v. Berrien Circuit Judge*, 133 Mich. 48; *Sanborn v. Van Dwyne*, 90 Minn. 215.

**2. Particular Property Must Be Necessary.** — *Highland Boy Gold Min. Co. v. Strickley*, (C. C. A.) 116 Fed. Rep. 852.

**6. Eminent Domain Confined to Limits of State.** — *St. Louis, etc., R. Co. v. Southwestern Telephone, etc., Co.*, 121 Fed. Rep. 276, 58 C. C. A. 198; *Illinois State Trust Co. v. St. Louis, etc., R. Co.*, 208 Ill. 419.

**1052. 3. Territories.** — The territory of *Arizona*, though not possessing sovereignty, is clothed with authority to provide for the exercise of the power of eminent domain. *Sanford v. Tucson*, (Ariz. 1903) 71 Pac. Rep. 903.

**5. Covington, etc., Bridge Co. v. Magruder**, 63 Ohio St. 455.

**6. Painter v. St. Clair**, 98 Va. 85; *Illinois State Trust Co. v. St. Louis, etc., R. Co.*, 208 Ill. 419; *People v. Adirondack R. Co.*, 160 N. Y. 225.

**1053. 2. Delegation of the Power.** — *Chestatee Pyrites Co. v. Cavenders Creek Gold Min. Co.*, 119 Ga. 354, 100 Am. St. Rep. 174.

The general assembly may, by special act, charter a railroad corporation and confer on it in express terms every power and right incident to the exercise of the authority to build its road, leaving no necessity for invoking the provisions of the general law. *Tennessee Coal, etc., R. Co. v. Birmingham Southern R. Co.*, 128 Ala. 526.

**1053.** Companies with Special Charters — Condemnation under General Laws. — See note 3.

(2) *Statutory Requirements* — (a) *Conditions Precedent*. — See notes

6, 7.

**1054.** Attempt to Agree as to Price of Land. — See note 1.

(b) *Statutory Authority* — *Necessity of*. — See notes 2, 3.

**1055.** Presumption. — See note 1.

*Effect of Necessity of the Power in a Given Case*. — See note 2.

*Authority by Implication*. — See note 3.

**1053. 3.** Where a railroad whose charter gave it no power to condemn a right of way over the tracks of another road was granted leave to change its name and adopt the provisions of the general railroad law, it thereby became vested with the power to acquire such right by condemnation. *Atlantic, etc., R. Co. v. Seaboard Air Line R. Co.*, 116 Ga. 412. See also *Tennessee Coal, etc., R. Co. v. Birmingham Southern R. Co.*, 128 Ala. 526.

**6. Conditions Precedent — Consent of Authorities to Formation of Company.** — Under Gen. Stat. N. J., p. 2199, there can be no condemnation of property for the construction of water-works unless there has been first filed with the secretary of state a consent in writing of the corporate authorities of the town proposed to be supplied with water, to the formation of a company under such act. *Hampton v. Clinton Water, etc., Co.*, 65 N. J. L. 158.

**7. Filing of Survey.** — *Seeley v. Amsterdam*, (Supm. Ct. Spec. T.) 31 Misc. (N. Y.) 123, modified 54 N. Y. App. Div. 9.

**1054. 1. Failure to Agree as to Price.** — *Minneapolis, etc., R. Co. v. Chicago, etc., R. Co.*, 116 Iowa 681; *Marquette, etc., R. Co. v. Longyear*, 133 Mich. 94; *Hickory v. Southern R. Co.*, 137 N. Car. 189; *McCotter v. New Shoreham*, 21 R. I. 43; *Core v. Norfolk*, 99 Va. 190.

The words "if no such agreement is reached" imply only the absence of agreement, not failure or inability to agree. Matter of *New York, etc., Bridge*, (Supm. Ct. Spec. T.) 45 Misc. (N. Y.) 184.

**Effort to Agree Must Appear.** — A railroad company cannot claim that it was unable to agree on the price, unless it appears that it made some effort to reach an agreement. *Schenectady R. Co. v. Lyon*, (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 506, affirmed 88 N. Y. App. Div. 201.

**Series of Efforts Not Necessary.** — It is not necessary that there should be a series of efforts, or a prolonged negotiation, in order to agree upon compensation; an effort to agree is all that is required. *St. Louis, etc., R. Co. v. Postal Tel. Co.*, 173 Ill. 508.

**2. Necessity of Statutory Authority.** — *Western Union Tel. Co. v. Pennsylvania R. Co.*, 120 Fed. Rep. 362, quoting 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1054, affirmed (C. C. A.) 123 Fed. Rep. 33; *Oconee Electric Light, etc., Co. v. Carter*, 111 Ga. 106; *Chestatee Pyrites Co. v. Cavenders Creek Gold Min. Co.*, 119 Ga. 354, 100 Am. St. Rep. 174; *Erie R. Co. v. Steward*, 61 N. Y. App. Div. 480, affirmed 170 N. Y. 172.

The right to exercise the power of eminent domain for the purpose of laying out and opening a new street cannot be implied from the grant, in a municipal charter, of authority "to

establish and lay out new streets as public necessity requires." *Georgia, R., etc., Co. v. Union Point*, 119 Ga. 809.

**Necessity of Statutory Authority.** — *Toronto v. Metropolitan R. Co.*, 31 Ont. 367.

**3. Strict Construction of Statutes** — *United States*. — *Western Union Tel. Co. v. Pennsylvania R. Co.*, 120 Fed. Rep. 362, quoting 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1054, affirmed (C. C. A.) 123 Fed. Rep. 33.

*Colorado*. — *Colorado Fuel, etc., Co. v. Four-Mile R. Co.*, 29 Colo. 96.

*Connecticut*. — *Waterbury v. Platt*, 75 Conn. 387, 96 Am. St. Rep. 229.

*Florida*. — *Florida State, etc., R. Co. v. Bear*, 43 Fla. 319.

*Georgia*. — *Chestatee Pyrites Co. v. Cavenders Creek Gold Min. Co.*, 119 Ga. 354, 100 Am. St. Rep. 174; *Oconee Electric Light, etc., Co. v. Carter*, 111 Ga. 106.

*Illinois*. — *Harvey v. Aurora, etc., R. Co.*, 174 Ill. 295; *Dewey v. Chicago, etc., Electric R. Co.*, 184 Ill. 426; *Phillips v. Scales Mound*, 195 Ill. 353; *Goddard v. Chicago, etc., R. Co.*, 202 Ill. 362; *Illinois State Trust Co. v. St. Louis, etc., R. Co.*, 208 Ill. 419.

*Kansas*. — *Atchison, etc., R. Co. v. Kansas City, etc., R. Co.*, 67 Kan. 569.

*Louisiana*. — *Breaux v. Bienvenu*, 51 La. Ann. 687.

*Mississippi*. — *Levee Com'rs v. Brooks*, 76 Miss. 635, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1054.

*New York*. — *Erie R. Co. v. Steward*, 61 N. Y. App. Div. 480, affirmed 170 N. Y. 172.

*Ohio*. — *Grant v. Hyde Park*, 67 Ohio St. 166.

*Oregon*. — *Grande Ronde Electrical Co. v. Drake*, (Oregon 1905) 78 Pac. Rep. 1031.

*Tennessee*. — *Woolard v. Nashville*, 108 Tenn. 353.

*Virginia*. — *Charlottesville v. Maury*, 96 Va. 383; *Painter v. St. Clair*, 98 Va. 85.

*Washington*. — *State v. Superior Ct.*, 36 Wash. 381.

**1055. 1. Presumption.** — See *Georgia R., etc., Co. v. Union Point*, 119 Ga. 809.

**2. Authority to Expropriate Not Implied.** — The authority to make a junction with another railway granted to a railway by the railway committee of the Canadian Privy Council, deals only with the mode of making such junction and does not authorize the grantee of the power to expropriate part of the highway, whether the soil thereof is vested in the Crown or in a municipal corporation. *Toronto v. Metropolitan R. Co.*, 31 Ont. 367.

**3. Implied Authority.** — *Western Union Tel. Co. v. Pennsylvania R. Co.*, 120 Fed. Rep. 362, quoting 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1055, affirmed (C. C. A.) 123 Fed. Rep. 33.

**1055.** (c) *Must Be Used By Party to Whom Delegated.* — See notes 4, 5.

(d) *Must Be Used for Purpose for Which Granted.* — See note 6.

**1057.** (3) *Discretion Allowed to Grantee in Location, Etc.* — See note 1. Quantity of Land — Amount Necessary. — See note 2.

**1058.** *Other Land More Convenient.* — See note 1.

**1060.** (4) *Who May Be Agents or Grantees of the Power* — (d) *Transferees of Property and Franchises — Purchasers.* — See note 1.

*Lessees.* — See note 5.

(5) *Exhaustion of the Power.* — See note 8.

See also South, etc., *Alabama R. Co. v. Highland Ave., etc.*, R. Co., 119 Ala. 105.

**1055.** 4. *Redelegation Not Permissible.* — *Delabole Slate Co. v. Bangor, etc.*, R. Co., 6 Northern Co. Rep. (Pa.) 337.

Where a corporation is the grantee, the power must be exercised by the corporation itself, and not by the president alone. *Schaadt v. Ironton R. Co.*, 22 Pa. Co. Ct. 101.

**5. Ministerial Duties.** — *Moseley v. York Shore Water Co.*, 94 Me. 83.

**6. Use Must Be Confined to Purposes for Which Power Granted.** — *Hampson v. Chateauguay, etc.*, R. Co., 6 Quebec Pr. 283. See also *Ragsdale v. Southern R. Co.*, 60 S. Car. 381.

**Land Acquired for Ultra Vires Purpose.** — A school board cannot condemn land for use for an *ultra vires* purpose — as for the erection, out of the school fund, of a building which is to be used for a purpose for which the board has no power to expend such fund. *Batson v. London School Board*, 20 Times L. Rep. 22.

**1057.** 1. *Discretion Allowed Grantee in Location* — *Arkansas.* — *McKennon v. St. Louis, etc.*, R. Co., 69 Ark. 104.

*California.* — See *San Francisco, etc.*, R. Co. *v. Leviston*, 134 Cal. 412.

*Georgia.* — *Atlantic, etc.*, R. Co. *v. Penny*, 119 Ga. 479, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1057; *Savannah, etc.*, R. Co. *v. Postal Tel.-Cable Co.*, 112 Ga. 941, quoting 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1057. See also *Gardner v. Georgia R., etc.*, Co., 117 Ga. 522, 97 Am. St. Rep. 175.

*Illinois.* — *Chicago, etc.*, R. Co. *v. Morrison*, 195 Ill. 271.

*Iowa.* — *Bennett v. Marion*, 106 Iowa 628.

*Massachusetts.* — *Burnett v. Boston*, 173 Mass. 173.

*Missouri.* — *Kansas, etc.*, Coal R. Co. *v. Northwestern Coal, etc.*, Co., 161 Mo. 288, 84 Am. St. Rep. 717.

*Oregon.* — *Dallas v. Hallock*, 44 Oregon 246.

*Texas.* — *Palmer v. Harris County*, 29 Tex. Civ. App. 340, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1057; *Cane Belt R. Co. v. Hughes*, 31 Tex. Civ. App. 565.

*Utah.* — *Short-Line Postal Tel. Cable Co. v. Oregon, etc.*, R. Co., 23 Utah 474, 90 Am. St. Rep. 705.

*Virginia.* — *Zircle v. Southern R. Co.*, 102 Va. 17, 102 Am. St. Rep. 805.

*Washington.* — *Samish River Boom Co. v. Union Boom Co.*, 32 Wash. 586, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1057.

**Replacement of Trestle by Embankment.** — Where a railway company constructed a trestle over a lake and thereafter replaced such trestle by a solid embankment, it was held that persons who became owners of the adjoining lands after

the first construction were not entitled to maintain an action for damages on account of the construction of the embankment and the consequent deprivation of access to the waters of the lake. *Ross v. Canadian Pac. R. Co.*, 1 Can. R. 461.

**2. Degree of Necessity Requisite.** — *Savannah, etc.*, R. Co. *v. Postal Tel.-Cable Co.*, 112 Ga. 941, quoting 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1057; *Atlantic, etc.*, R. Co. *v. Penny*, 119 Ga. 479, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1057.

In the construction of statutes relating to the taking of private property, the word "necessary" should be construed to mean "expedient," "reasonably convenient," or "useful to the public," and cannot be limited to an absolute physical necessity. *Aurora, etc.*, R. Co. *v. Harvey*, 178 Ill. 477.

**Discretion Allowed Grantee as to Amount.** — The grantee must be permitted to judge for itself what amount of land is necessary for its purpose, subject to the authority resting in the courts to restrain any abuse of the power in that respect. *Schuster v. Sanitary Dist.*, 177 Ill. 626.

A municipality condemning land for street purposes may take, in addition to what is necessary to furnish a passage for traffic, land for the purpose of furnishing ample space for the access of light and air, and also to beautify and adorn. *Curran v. Guilfoyle*, 38 N. Y. App. Div. 82.

No more land should be taken than is necessary for the public use. *Matter of Harlem River Bridge*, 74 N. Y. App. Div. 197, affirmed 174 N. Y. 26.

**1058.** 1. *Where There Is Other Land More Convenient.* — *Savannah, etc.*, R. Co. *v. Postal Tel.-Cable Co.*, 112 Ga. 941, quoting 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1057; *Samish River Boom Co. v. Union Boom Co.*, 32 Wash. 586, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1057, 1058. See also *Ft. Worth, etc.*, R. Co. *v. Southwestern Tel., etc.*, Co., 96 Tex. 160.

**1060.** 1. *Transfer of Right.* — An individual will not be permitted to condemn a right of way solely for the purpose of transferring the same to a railroad corporation. *Beveridge v. Lewis*, 137 Cal. 619, 92 Am. St. Rep. 188.

**5. Leases.** — *Western Union Tel. Co. v. Pennsylvania R. Co.*, 195 U. S. 594.

The leasing of a line of a railway corporation to another corporation does not deprive the former of the power to exercise the right of eminent domain. *State v. Superior Ct.*, 31 Wash. 445.

**8. Power of Eminent Domain Not Exhausted by Use.** — *Gardner v. Georgia R., etc.*, Co., 117



**1061. Unsuccessful Attempt.** — See note 1.

Where Time Limited or Second Taking Unnecessary. — See note 2.

Statutes. — See note 3.

**1062. IV. THE PUBLIC USE — 1. What Is a Public Use.** — *a. IN GENERAL.*

— See notes 1, 2.

**1063.** See notes 2, 3.*b. EXTENT OF THE USE — (1) The Use or Benefit May Be Local or Limited.* — See note 4.**1064.** (2) *The Public Need Not Own or Operate.* — See note 2.(3) *Magnitude of the Interests Involved.* — See note 3.**1066.** C. PUBLIC AND PRIVATE USES COMBINED. — See note 1.**2. Province of the Legislature and the Judiciary** — *a. PROVINCE OF THE LEGISLATURE — (1) The Question of Necessity, Propriety, or Expediency.* — See note 2.

Ga. 522, 97 Am. St. Rep. 175, quoting 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1060; Chicago, etc., Electric R. Co. v. Chicago, etc., R. Co., 211 Ill. 352; Hopkins v. Philadelphia, etc., R. Co., 94 Md. 257. See also Jamaica v. Denton, (Supm. Ct. Spec. T.) 70 N. Y. Supp. 837; Miller v. Weber, 1 Ohio Cir. Dec. 77; Commonwealth Title Ins., etc., Co. v. Willow Grove, etc., Farm Road Co., 17 Montg. Co. Rep. (Pa.) 76.

**1061. 1. Unsuccessful Attempt to Condemn.** — Ashton Vale Iron Co. v. Bristol, (1901) 1 Ch. 591.

**2. Power Exhausted After First Use.** — Hartford, etc., Co. R. Co. v. Wagner, 73 Conn. 506; Erie R. Co. v. Steward, 170 N. Y. 172.

Where a railroad company has lost by its procrastination the right to take certain land by condemnation proceedings, it cannot regain the power by making a new location over the same route. *In re Hartford, etc., R. Co.*, 74 Conn. 662.

**3. Dryden v. Pittsburg, etc., R. Co.**, 208 Pa. St. 316.

**1062. 1. Use by the Public.** — Borden v. Trespalacios Rice, etc., Co., (Tex. Civ. App. 1904) 82 S. W. Rep. 461.

The use must be either a use by the public or by some agency which is quasi-public, and not simply a use which may incidentally or indirectly promote the public interest or general prosperity of the state. *Healy Lumber Co. v. Morris*, 33 Wash. 490, 99 Am. St. Rep. 964.

Land cannot be taken under the exercise of the power of eminent domain unless, after it is taken, it will be devoted to the use of the public, independent of the will of the corporation taking it. *Berrien Springs Water-Power Co. v. Berrien Circuit Judge*, 133 Mich. 48.

**2. Public Use and Public Benefit.** — Cleveland, etc., R. Co. v. Polecat Drainage Dist., 213 Ill. 83; Boyd v. Winnsboro Granite Co., 66 S. Car. 433, quoting from Talbot v. Hudson, 16 Gray (Mass.) 417, as stated in 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1062; Nash v. Clark, 27 Utah 158, 101 Am. St. Rep. 953.

**Utility.** — The chief object in the acquisition of the property must be utility, and not mere sport or pastime. *Albright v. Sussex County Lake, etc., Commission*, (N. J. 1904) 57 Atl. Rep. 398.

In Illinois something more than a mere benefit to the public must flow from the contemplated

improvement. The public must be to some extent entitled to use or enjoy the property, not as a mere favor or by permission of the owner, but by right. *Gaylord v. Sanitary Dist.*, 204 Ill. 576, 98 St. Rep. 235.

**1063. 2. No Arbitrary Definition Attempted.** — *Ryan v. Louisville, etc., Terminal Co.*, 102 Tenn. 111; *Fallsburg Power, etc., Co. v. Alexander*, 101 Va. 98, 99 Am. St. Rep. 855; *Charleston Natural Gas Co. v. Lowe*, 52 W. Va. 662. See also *Highland Boy Gold Min. Co. v. Strickley*, 28 Utah 215.

**3. Ryan v. Louisville, etc., Terminal Co.**, 102 Tenn. 111.

**The True Test** is whether the taking is essential to the service of the public franchise or whether it pertains only to the private interest of the company in the details of its business. The former constitutes a public use, and the latter does not. *In re Rhode Island Suburban R. Co.*, 22 R. I. 457.

**4. Use May Be Local.** — *Laguna Drainage Dist. v. Charles Martin Co.*, 144 Cal. 209; *Cleveland, etc., R. Co. v. Polecat Drainage Dist.*, 213 Ill. 83, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1063; *Lake Koen Nav., etc., Co. v. Klein*, 63 Kan. 484; *Ulmer v. Lime Rock R. Co.*, 98 Me. 579; *State v. Polk County*, 87 Minn. 325, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1063; *Matter of Whitestown*, (County Ct.) 24 Misc. (N. Y.) 150; *Lewis County v. Gordon*, 20 Wash. 80; *Charleston Natural Gas Co. v. Lowe*, 52 W. Va. 662.

**1064. 2. Private Gain.** — *New York Min. Co. v. Midland Min. Co.*, 99 Md. 506; *State v. Polk County*, 87 Minn. 325; *Ryan v. Louisville, etc., Terminal Co.*, 102 Tenn. 111; *Zircle v. Southern R. Co.*, 102 Va. 17, 102 Am. St. Rep. 805.

**3. Nash v. Clark**, 27 Utah 158, 101 Am. St. Rep. 953, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1064.

**1066. 1. Public and Private Use Combined.** — *Gaylord v. Sanitary Dist.*, 204 Ill. 576, 98 Am. St. Rep. 235; *Berrien Springs Water-Power Co. v. Berrien Circuit Judge*, 133 Mich. 48; *Fallsburg Power, etc., Co. v. Alexander*, 101 Va. 98, 99 Am. St. Rep. 855.

Where the private benefit is substantial, and the public benefit only incidental and purely prospective, the use is not public. *Stratford v. Greensboro*, 124 N. Car. 127.

**2. Province of the Legislature — Question of Necessity, Propriety, or Expediency** — *United States*,

**1067.** See note 1.

**1068.** (2) *Mode or Manner of Exercising the Right.*—See note 1.

(3) *Extent of the Estate or Interest to Be Taken.*—See notes

2, 3, 4.

**1069.** (4) *The Particular Property to Be Taken.*—See note 1.

*b. PROVINCE OF THE JUDICIARY*—(1) *The Question of Public Use.*—See note 2.

—Adirondack R. Co. v. New York, 176 U. S. 335.

*California.*—San Mateo County v. Coburn, 130 Cal. 631; Pool v. Simmons, 134 Cal. 621.

*Connecticut.*—New York, etc., R. Co. v. Long, 69 Conn. 424; *In re* Hartford, etc., R. Co., 74 Conn. 662.

*Georgia.*—Savannah, etc., R. Co. v. Postal Tel.-Cable Co., 115 Ga. 554.

*Illinois.*—Illinois State Trust Co. v. St. Louis, etc., R. Co., 208 Ill. 419.

*Indian Territory.*—Tuttle v. Moore, 3 Indian Ter. 712.

*Iowa.*—Bennett v. Marion, 106 Iowa 628.

*Kansas.*—Lake Koen Nav., etc., Co. v. Klein, 63 Kan. 484.

*Maine.*—Moseley v. York Shore Water Co., 94 Me. 83; Kennebec Water Dist. v. Waterville, 96 Me. 234.

*Minnesota.*—Minneapolis, etc., R. Co. v. Hartland, 85 Minn. 76; State v. Polk County, 87 Minn. 325.

*Missouri.*—St. Louis v. Brown, 155 Mo. 545.

*New Jersey.*—Albright v. Sussex County Lake, etc., Commission, 68 N. J. L. 523.

*New York.*—People v. Adirondack R. Co., 160 N. Y. 225.

*North Carolina.*—Stratford v. Greensboro, 124 N. Car. 127.

*Ohio.*—Covington, etc., Bridge Co. v. Ma-gruder, 63 Ohio St. 455.

*Oregon.*—Dallas v. Hallock, 44 Oregon 246.

*Pennsylvania.*—Philadelphia, etc., R. Co.'s Petition, 203 Pa. St. 354.

*Tennessee.*—Ryan v. Louisville, etc., Terminal Co., 102 Tenn. 111.

*Texas.*—Croley v. St. Louis Southwestern R. Co., (Tex. Civ. App. 1900) 56 S. W. Rep. 615.

*Utah.*—Postal Tel., etc., Co. v. Oregon Short Line R. Co., 23 Utah 474, 90 Am. St. Rep. 705.

*Virginia.*—Zircle v. Southern R. Co., 102 Va. 17, 102 Am. St. Rep. 805.

*Washington.*—Samish River Boom Co. v. Union Boom Co., 32 Wash. 586.

*Wisconsin.*—Lange v. La Crosse, etc., R. Co., 118 Wis. 558.

But see St. Louis, etc., R. Co. v. Southwestern Telephone, etc., R. Co., 121 Fed. Rep. 276, 58 C. C. A. 198; Stearns v. Barre, 73 Vt. 281, 87 Am. St. Rep. 721.

**1067. 1. Michigan.**—Berrien Springs Water Power Co. v. Berrien Circuit Judge, 133 Mich. 48.

**1068. 1. Mode or Manner of Exercising the Right—Province of the Legislature.**—People v. Adirondack R. Co., 160 N. Y. 225; Samish River Boom Co. v. Union Boom Co., 32 Wash. 586.

Though the constitution recognizes the right of eminent domain, it is proper for the legislature to impose just limitations which do not

prevent the exercise of the right. Gibson v. Cann, 28 Colo. 499.

*In Ohio* a statute conferring on the probate court the power to direct in what mode telephone companies shall construct their lines, was held constitutional and valid. Zanesville v. Zanesville Tel., etc., Co., 64 Ohio St. 67, 83 Am. St. Rep. 725.

**2. Quantity or Interest to Be Taken.**—Driscoll v. New Haven, 75 Conn. 92; Matter of Harlem River Bridge, 74 N. Y. App. Div. 197, affirmed 174 N. Y. 26.

**3. Where Interest to Be Taken Is Specified.**—Charlottesville v. Maury, 96 Va. 383.

**4. Only Such Estate or Quantity as Necessary—Strict Construction.**—Shreveport, etc., R. Co. v. Hinds, 50 La. Ann. 781; Devine v. Lord, 175 Mass. 384; Framingham Water Co. v. Old Colony R. Co., 176 Mass. 404; Long Island R. Co. v. Garvey, 159 N. Y. 334; Matter of Harlem River Bridge, 74 N. Y. App. Div. 197, affirmed 174 N. Y. 26.

**1069. 1. The Particular Property to Be Condemned May Be Pointed Out.**—Starr Burying Ground Assoc. v. North Lane Cemetery Assoc., 77 Conn. 83; Kennebec Water Dist. v. Waterville, 96 Me. 234. Compare Atlantic, etc., R. Co. v. Penny, 119 Ga. 479.

**2. Province of Judiciary—Question of Public Use.**—*Illinois.*—Illinois State Trust Co. v. St. Louis, etc., R. Co., 208 Ill. 419.

*Kansas.*—Lake Koen Nav., etc., Co. v. Klein, 63 Kan. 484.

*Maine.*—Moseley v. York Shore Water Co., 94 Me. 83; Kennebec Water Dist. v. Waterville, 96 Me. 234.

*Minnesota.*—State v. Polk County, 87 Minn. 325.

*Missouri.*—St. Louis v. Brown, 155 Mo. 545.

*New Hampshire.*—Rockingham County Light, etc., Co. v. Hobbs, 72 N. H. 531.

*New Jersey.*—Albright v. Sussex County Lake, etc., Commission, (N. J. 1904) 57 Atl. Rep. 398.

*New York.*—Matter of Tuthill, 36 N. Y. App. Div. 492, affirmed 163 N. Y. 133.

*North Carolina.*—Stratford v. Greensboro, 124 N. Car. 127.

*Oregon.*—Fanning v. Gilliland, 37 Oregon 369, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1069; Dallas v. Hallock, 44 Oregon 246; Grande Ronde Electrical Co. v. Drake, (Oregon 1905) 78 Pac. Rep. 1031.

*Pennsylvania.*—Philadelphia, etc., R. Co.'s Petition, 203 Pa. St. 354.

*Tennessee.*—Ryan v. Louisville, etc., Terminal Co., 102 Tenn. 111.

*Utah.*—Highland Boy Gold Min. Co. v. Strickley, 28 Utah 215.

*Virginia.*—Fallsburg Power, etc., Co. v. Alexander, 101 Va. 98, 99 Am. St. Rep. 855.



**1070.** (2) *Use Declared Public by the Legislature.* — See notes 1, 2.

**1072.** 4. *Application to Particular Cases* — *a. USES CONSIDERED PUBLIC* — (1) *Highways.* — See note 13.

**1074.** *Number of Persons Who Will Use Road.* — See note 1.

*Primarily for Advantage of One Family.* — See note 2.

(2) *Railways* — (a) *Ordinary Railways* — *aa. IN GENERAL* — *Right of Way* — *Depots* — *Stock Yards* — *Repair Shops, Etc.* — See notes 3, 4.

**1075.** See note 3.

**1076.** *Removal of Gravel* — *Temporary Right of Way.* — See notes 1, 2.

*bb. BRANCHES OR LATERAL LINES.* — See note 3.

**1077.** See note 1.

*cc. SPURS TO PRIVATE ESTABLISHMENTS* — *The Decisions Are Conflicting.* — See note 2.

**1070.** 1. *Use Declared Public by Legislature.* — *San Mateo County v. Coburn*, 130 Cal. 631; *New York, etc., R. Co. v. Offield*, 77 Conn. 417; *Ulmer v. Lime Rock R. Co.*, 98 Me. 579; *State v. Polk County*, 87 Minn. 325; *Highland Boy Gold Min. Co. v. Strickley*, 28 Utah 215, *citing* 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1070; *Chicago, etc., R. Co. v. Morehouse*, 112 Wis. 1, 88 Am. St. Rep. 918. See also *Tuttle v. Moore*, 3 Indian Ter. 712; *Atty.-Gen. v. Williams*, 174 Mass. 476.

2. *Healy Lumber Co. v. Morris*, 33 Wash. 490, 99 Am. St. Rep. 964.

**1072.** 13. *Highways.* — *San Mateo County v. Coburn*, 130 Cal. 631; *Matter of Widening Clinton Ave.*, 57 N. Y. App. Div. 166, *affirmed* 167 N. Y. 624.

*The Closing of Streets in consequence of the adoption of a uniform plan is for a public purpose. Matter of Acquiring Title to East One Hundred and Sixth-Eighth St.*, 28 N. Y. App. Div. 143, *affirmed* 157 N. Y. 409.

**1074.** 1. *Right of the Public to Use, the Controlling Factor.* — *Madera County v. Raymond Granite Co.*, 139 Cal. 128; *Towns v. Klamath County*, 33 Oregon 225; *Pochila v. Calvert, etc., R. Co.*, 31 Tex. Civ. App. 398; *Heninger v. Peery*, 102 Va. 896. See also *Stockdale v. Rio Grande Western R. Co.*, 28 Utah 201.

2. *Road for Accommodation of One Family.* — *Towns v. Klamath County*, 33 Oregon 225; *Fanning v. Gilliland*, 37 Oregon 369; *Heninger v. Peery*, 102 Va. 896. But see *Clark v. Mitchell County*, 69 Kan. 542.

3. *Railways* — *Right of Way.* — *New York, etc., R. Co. v. Offield*, 77 Conn. 417; *Com. v. Boston Terminal Co.*, 185 Mass. 281; *Hannibal, etc., R. Co. v. Totman*, 149 Mo. 657; *Kansas, etc., Coal R. Co. v. Northwestern Coal, etc., Co.*, 161 Mo. 288, 84 Am. St. Rep. 717; *Erie R. Co. v. Steward*, 170 N. Y. 172.

*Railroad for Carrying Persons On* — Under *Rev. Stat. Wis.* (1898), § 1820, a railroad corporation formed for the purpose of carrying persons only, cannot maintain condemnation proceedings. *Chicago, etc., R. Co. v. Oshkosh, etc., R. Co.*, 107 Wis. 192.

*Private Railroad* — *Way of Necessity.* — A person or corporation engaged in the business of quarrying stone, who, for the successful prosecution of such business, needs a right of way for a private railroad across the lands of others, may, under the Constitution and laws of *Georgia*, in a case of necessity, obtain the same

under condemnation proceedings. *Jones v. Venable*, 120 Ga. 1.

4. *Passenger Depots.* — *Hannibal, etc., R. Co. v. Totman*, 149 Mo. 657.

**1075.** 3. *Water Stations.* — Railway companies may condemn lands for water stations, separate and apart from the right of way. *Dillon v. Kansas City, etc., R. Co.*, 67 Kan. 687.

*Terminal Facilities.* — *Ryan v. Louisville, etc., Terminal Co.*, 102 Tenn. 111; *Collier v. Union R. Co.*, 113 Tenn. 96.

**1076.** 1. *Spur to Gravel Pit.* — A railroad company may condemn land for a right of way from its main line to a gravel pit for the purpose of obtaining necessary gravel for the maintenance of its railroad. *Minneapolis, etc., R. Co. v. Nicolin*, 76 Minn. 302.

2. *Tramway for Transportation of Construction Materials.* — The provisions of the "Railway Act," 51 Vict., c. 29, § 114, confer on railway companies a servitude consisting merely of the right of passage, and do not confer any right to expropriate lands required for laying the tracks of a tramway for the transportation of materials to be used for purposes of construction. *Quebec Bridge Co. v. Roy*, 32 Can. Sup. Ct. 572.

3. *Branch Roads* — *By Express Terms or Necessary Implication.* — See *Erie R. Co. v. Steward*, 61 N. Y. App. Div. 480, *affirmed* 170 N. Y. 172.

**1077.** 1. *Extension.* — A railroad authorized by statute to extend its lines has power to condemn property along the line of such extension. *Florida Cent., etc., R. Co. v. Bell*, 43 Fla. 359.

2. *Spurs.* — *Atlanta, etc., R. Co. v. Southern R. Co.*, (C. C. A.) 131 Fed. Rep. 657, *citing* 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1078.

A spur track running to a single industry is for a public use, provided the general public has the right to use it. *Chicago, etc., R. Co. v. Morehouse*, 112 Wis. 1, 88 Am. St. Rep. 918; *Stockdale v. Rio Grande, Western R. Co.*, 28 Utah 201; *Circle v. Southern R. Co.*, 102 Va. 17, 102 Am. St. Rep. 805; *Robbins v. Western Washington R. Co.*, 31 Pittsb. Leg. J. N. S. (Pa.) 181.

But the establishment of a spur as a purely private enterprise cannot be aided by the power of eminent domain. *Maginnis v. Knickerbocker Ice Co.*, 112 Wis. 385.

*Maine.* — The decisive tests as to whether a branch railroad track is for public purposes are these: Is the track to be open to the public on



- 1078.** Spur to Iron Works. — See note 1.  
**1079.** *dd.* SWITCHES AND SIDE-TRACKS. — See note 1.  
 (6) Street Railways. — See note 3.  
 (3) Telegraphs and Telephones. — See note 4.  
**1080.** Telephones. — See note 1.  
 (4) Electric-light Plants. — See note 2.  
**1081.** (10) Booms. — See note 4.  
 (11) Dikes and Levees. — See note 6.  
**1082.** (12) Works for the Drainage of Land — Marshes. — See note 1.  
 Preservation and Promotion of Public Health. — See note 2.  
 Public Health, Convenience, or Welfare. — See note 3.  
**1083.** Ditches and Drains for Reclaiming Land. — See note 2.  
 Constitutional Provisions — Agricultural and Sanitary Purposes. — See note 3.  
 (13) Drains and Sewers in Cities. — See note 4.  
**1084.** (14) Irrigation. — See note 1.

equal terms to all having occasion to use it, so that all can demand that they be served without discrimination, as of right? If so, and the track is subject to governmental control, under general laws, as are the main lines of a railroad, then the use is public, and a proper one for the exercise of the right of eminent domain. *Ulmer v. Lime Rock R. Co.*, 98 Me. 579.

**1078. 1. Pennsylvania Doctrine.** — *Rochester, etc., Coal, etc., Co. v. Berwind-White Coal Min. Co.*, 24 Pa. Co. Ct. 104.

**1079. 1. Switches and Sidings.** — See *Gardner v. Georgia R., etc., Co.*, 117 Ga. 522, 97 Am. St. Rep. 175; *State v. Toledo R., etc., Co.*, 24 Ohio Cir. Ct. 321.

**3. Street Railways.** — A street railway is supposed to follow the highway, making all the stops necessary for the accommodation of the people living along the highways. If the traffic will not support the road, then its construction is not a public necessity, so as to justify the exercise of the power of eminent domain. *Hartshorn v. Illinois Valley Traction Co.*, 210 Ill. 609.

Under section 2 of the Horse and Dummy Railroad Act of 1874, a street railroad has no power to condemn private property except where a necessity is shown to exist. *Harvey v. Aurora, etc., R. Co.*, 174 Ill. 295.

**4. Telegraph Companies.** — Mobile, etc., R. Co. *v. Postal Tel.-Cable Co.*, 120 Ala. 21; *Postal Tel.-Cable Co. v. Oregon Short Line R. Co.*, 23 Utah 474, 90 Am. St. Rep. 705.

**1080. 1. Telephone Companies.** — Northwestern Telephone Exch. Co. *v. Chicago, etc., R. Co.*, 76 Minn. 334; *Zanesville v. Zanesville Tel., etc., Co.*, 64 Ohio St. 67, 83 Am. St. Rep. 725; *Southwestern Tel., etc., Co. v. Gulf, etc., R. Co.*, (Tex. Civ. App. 1899) 52 S. W. Rep. 106; *San Antonio, etc., R. Co. v. Southwestern Tel., etc., Co.*, 93 Tex. 313; *San Antonio, etc., R. Co. v. Southwestern Tel., etc., Co.*, (Tex. Civ. App. 1900) 56 S. W. Rep. 201. But see *Pennsylvania Telephone Co. v. Hoover*, 209 Pa. St. 555.

**2. Electric-light Companies.** — The use of land for collecting, storing, and distributing electricity, for the purposes of supplying power and heat to all who may desire it, is a public use. *Rockingham County Light, etc., Co. v. Hobbs*, 72 N. H. 531. See also *State v. Allen*, 178 Mo. 555, and the title ELECTRIC LIGHT COMPANIES.

But private property cannot be appropriated for a plant for the generation of electricity to operate a railroad, where the company is not bound to serve the railroad or the public. *Avery v. Vermont Electric Co.*, 75 Vt. 235, 98 Am. St. Rep. 818.

**1081. 4. Booms.** — *Maffet v. Quine*, 93 Fed. Rep. 347.

**Logging Way for Private Use.** — A corporation has no right to condemn a right of way along a stream over another's land for a logging way for its own private benefit, to the exclusion of every one else. *Matthews v. Belfast Mfg. Co.*, 35 Wash. 662; *Healy Lumber Co. v. Morris*, 33 Wash. 490, 99 Am. St. Rep. 964.

**6. Missouri, etc., R. Co. v. Cambern**, 10 Kan. App. 581, 63 Pac. Rep. 605, 66 Kan. 365.

**1082. 1. Drainage of Marshes.** — *Matter of Tuthill*, 36 N. Y. App. Div. 492, affirmed 163 N. Y. 133; *Lewis County v. Gordon*, 20 Wash. 80.

**2. Must Be to Promote Public Health — New York Rule.** — Under the present Constitution this rule no longer exists. *Matter of Tuthill*, 36 N. Y. App. Div. 492, affirmed 163 N. Y. 133.

**3. Public Health, Convenience, or Welfare.** — *Lake Erie, etc., R. Co. v. Hancock County*, 63 Ohio St. 23.

**1083. 2. Reclaiming Lands.** — *Laguna Drainage Dist. v. Charles Martin Co.*, 144 Cal. 209; *Nickey v. Stearns Ranchos Co.*, 126 Cal. 150; *State v. Polk County*, 87 Minn. 325; *Thomas v. County Com'rs*, 5 Ohio Dec. 503, 5 Ohio N. P. 449.

**3. Illinois.** — *Heffner v. Cass County*, 193 Ill. 439; *Wabash R. Co. v. Coon Run Drainage, etc., Dist.*, 194 Ill. 310; *Cleveland, etc., R. Co. v. Polecat Drainage Dist.*, 213 Ill. 83.

**New York.** — The amendment to Const. N. Y., 1894, art. 1, § 7, providing that general laws may be passed permitting the owners or occupants of agricultural lands to construct and maintain for the drainage thereof, necessary drains upon the lands of others, etc., is violative of the Federal Constitution, as authorizing the taking of private property for private use. *Matter of Tuthill*, 163 N. Y. 133.

**4. A City Cannot Take Land for Sewers Without Compensating the Owner.** — *Arnold v. Vancouver*, 10 British Columbia 198.

**1084. 1. Irrigation.** — *Lake Koen Nav., etc., Co. v. Klein*, 63 Kan. 484; *State v. Polk County*, 87 Minn. 325, citing 10 AM. AND ENG. ENCYC.

**1084.** (15) *Water Works for Cities and Towns.* — See note 2.

(17) *Public Parks.* — See notes 4, 5.

**1085.** See note 1.

(18) *Pipe Lines — Gas Companies.* — See note 2.

(19) *Cemeteries.* — See note 4.

**1086.** (20) *Mills.* — See notes 1, 2, 3.

(21) *Development of Mines.* — See note 7.

**1088.** 5. *Right to Change the Use.* — See note 2.

**V. THE PROPERTY THAT MAY BE TAKEN — 1. General Rule.** — See

note 3.

**1089.** 2. *Private Property.* — See note 1.

of Law (2d ed.) 1084; *Helena v. Rogan*, 26 Mont. 452; *Albuquerque Land, etc., Co. v. Gutierrez*, 10 N. Mex. 177; *Borden v. Trespalacios Rice, etc., Co.*, (Tex. Civ. App. 1904) 82 S. W. Rep. 461; *Nash v. Clark*, 27 Utah 158, 101 Am. St. Rep. 953; *Prescott Irrigation Co. v. Flathers*, 20 Wash. 454. See also *Missouri, etc., R. Co. v. Cambern*, 66 Kan. 365.

**1084.** 2. *Water Supply for Cities and Towns.* — *Kennebec Water Dist. v. Waterville*, 96 Me. 234.

**4. Public Parks.** — *Kansas City v. Bacon*, 147 Mo. 259; *Memphis v. Hastings*, 113 Tenn. 142, quoting 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1084.

Land taken for the enlargement of a free library building situated in a public park is for a use within what is legitimately implied in the authority to take for a public park. *Laird v. Pittsburg*, 205 Pa. St. 1.

**5. Atty.-Gen. v. Williams, 174 Mass. 476; *People v. Adirondack R. Co.*, 160 N. Y. 225, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1084; *Memphis v. Hastings*, 113 Tenn. 142, quoting 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1084.**

**1085.** 1. *Memphis v. Hastings*, 113 Tenn. 142, quoting 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1085.

**2. Pipe Lines.** — *La Harpe v. Elm Tp. Gas, etc., Co.*, 69 Kan. 97, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1085; *Charleston Natural Gas Co. v. Lowe*, 52 W. Va. 662.

**4. Cemeteries.** — *Starr Burying Ground Assoc. v. North Lane Cemetery Assoc.*, 77 Conn. 83; *Matter of Lyons Cemetery Assoc.*, 93 N. Y. App. Div. 19.

**1086.** 1. *Mills.* — The mill acts relate to flowing, and not to excavating, land. *Cobb v. Massachusetts Chemical Co.*, 179 Mass. 423.

**2. Ingram v. Maine Water Co.**, 98 Me. 566.

**3. Gaylord v. Sanitary Dist.**, 204 Ill. 576, 98 Am. St. Rep. 235.

**7. New York Min. Co. v. Midland Min. Co.**, 99 Md. 506; *Highland Boy Gold Min. Co. v. Strickley*, 28 Utah 215.

**Court Houses — Clerk's Office.** — Land within the limits of a city may be condemned for the purpose of enlarging the clerk's office of the county, which is kept at the court house. *Norfolk County v. Cox*, 98 Va. 270.

**1088.** 2. *Change of Use.* — *U. S. v. Certain Lands*, 112 Fed. Rep. 622, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1088.

Nor can property acquired for a public use be diverted to an inconsistent private use. *Sanborn v. Van Dyne*, 90 Minn. 215.

**3. Every Species of Property Subject to Right.** — *Matter of Widening Clinton Ave.*, 57 N. Y. App. Div. 166, affirmed 167 N. Y. 624, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1088; *Covington, etc., Bridge Co. v. Magruder*, 63 Ohio St. 455, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1088; *Southern Kansas R. Co. v. Oklahoma City*, 12 Okla. 82.

**Interest in Tide Lands.** — The interest of private parties in tide lands, held under agreement with the state, may be taken by condemnation proceedings. *State v. Superior Ct.*, 31 Wash. 445.

**The Right to Fish** in an inland lake is not such a right as can be taken under the power of eminent domain. *Albright v. Sussex County Lake, etc., Co.*, (N. J. 1904) 57 Atl. Rep. 398, reversing 68 N. J. L. 523.

**Consents of Property Owners.** — The consents of owners of lots abutting on a street to the construction and operation of a street railroad on such street are not property rights that can be appropriated under the power of eminent domain. *Hamilton, etc., Traction Co. v. Parish*, 67 Ohio St. 181.

**1089.** 1. *Private Property of Every Species Subject to the Right.* — *Kennebec Water Dist. v. Waterville*, 96 Me. 234; *People v. Adirondack R. Co.*, 160 N. Y. 225.

**Right of Abutting Lot Owner in Street.** — *Cal- len v. Columbus Edison Electric Light Co.*, 66 Ohio St. 166.

**A Calling, Business, or Profession** is property, and the legislature cannot destroy it without providing for compensation. *State v. Chapman*, 69 N. J. L. 464.

**Riparian Rights** are property rights and therefore property, in the legal signification of the term, and within the meaning of the constitution. *Mansfield v. Balliett*, 65 Ohio St. 451.

**Easement.** — An easement is a property right and therefore subject to condemnation. *Ray v. New York Bay Extension R. Co.*, 34 N. Y. App. Div. 3, appeal dismissed 158 N. Y. 702; *Long Island R. Co. v. Garvey*, 159 N. Y. 334; *Deavitt v. Washington County*, 75 Vt. 156.

**Homestead Rights.** — Where one enters on public lands which are open to settlement, and makes settlement thereon, for homestead purposes, and has legal vested rights therein, such rights cannot be taken for public use without compensation. *Oklahoma City v. McMaster*, 12 Okla. 570.

**Private Drains or Sewers** are property which cannot be taken or destroyed without compensation to the owner. *Wright v. Mt. Vernon*, 44 N. Y. App. Div. 574, affirmed 167 N. Y. 541.

**1089.** Private Contracts. — See note 2.

**1090.** Corporate Stock. — See note 6.

Money. — See note 7.

**3.** Property of Private Corporations — *a.* IN GENERAL. — See note 9.

**1091.** *b.* FRANCHISES. — See note 2.

**1093.** **6.** Property Already Devoted to a Public Use — *a.* GENERAL RULE.

— See note 3.

**1094.** *b.* APPLICATION OF THE RULE. — See notes 2, 3.

*c.* MODE OF EXPRESSING LEGISLATIVE AUTHORITY — (1) *General Rule.* — See notes 6, 7.

**Condemnation of Right Reserved.** — Where a landowner conveys certain real estate to a railroad company, reserving a ferry landing and a private right of way over the land conveyed, the company may subsequently condemn the property reserved. *Kenny v. Pittsburg, etc., R. Co.*, 208 Pa. St. 30.

**A Right of Way of Necessity**, based on an estoppel, is not an interest or right in land, which entitles the one having it to compensation. Matter of Opening East One Hundred and Forty-second St., 83 N. Y. App. Div. 430.

**1089.** **2.** Private Contracts. — *Kennebec Water Dist. v. Waterville*, 96 Me. 234.

**1090.** **6.** New York, etc., *R. Co. v. Offield*, 77 Conn. 417; *Spencer v. Seaboard Air Line R. Co.*, 137 N. Car. 107.

**7.** Money — Whether Subject to Right of Eminent Domain, *Quare.* — *Woodward v. Central Vermont R. Co.*, 180 Mass. 599.

**9.** Private Corporations. — *Suburban R. Co. v. Metropolitan West Side El. R. Co.*, 193 Ill. 217; *Kennebec Water Dist. v. Waterville*, 96 Me. 234; *Herbert v. Bayonne*, 64 N. J. L. 548.

**1091.** **2.** Franchises Subject to Right of Eminent Domain. — New York, etc., *R. Co. v. Offield*, 77 Conn. 417; *Kennebec Water Dist. v. Waterville*, 96 Me. 234; *Philadelphia, etc., R. Cos. Petition*, 203 Pa. St. 354. See also *Kansas, etc., Coal R. Co. v. Northwestern Coal, etc., Co.*, 161 Mo. 288, 84 Am. St. Rep. 717.

**Authorizing Cars of One Company to Run on Tracks of Another.** — The legislature cannot grant the right to one corporation to run its cars over the tracks of another merely for the convenience and profit of the younger corporation. *Philadelphia, etc., R. Cos. Petition*, 203 Pa. St. 354; *Com. v. Uwchlan St. R. Co.*, 203 Pa. St. 608.

**1093.** **3.** Right to Condemn Property Already Devoted to a Public Use. — *Starr Burying Ground Assoc. v. North Lane Cemetery Assoc.*, 77 Conn. 83; *Chicago, etc., R. Co. v. Morrison*, 195 Ill. 271; *Indianapolis, etc., R. Co. v. Indianapolis, etc., Rapid Transit R. Co.*, 33 Ind. App. 337; Matter of *Gloversville*, (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 559; *People v. Adirondack R. Co.*, 160 N. Y. 225; *Colby v. Toledo*, 12 Ohio Cir. Dec. 347, 22 Ohio Cir. Ct. 732; *Road in Herrick, etc., Tps.*, 16 Pa. Super. Ct. 579; *Salt Lake City v. Salt Lake City Water, etc., Co.*, 24 Utah 249; *Ottawa v. Canada Atlantic R. Co.*, 33 Can. Sup. Ct. 376, *affirming* 4 Ont. L. Rep. 56, 2 Ont. L. Rep. 336.

**No Right to Condemn for Same Use.** — But one corporation cannot take the property of another already devoted to a particular use for the purpose of applying it to the same use. *Suburban*

*R. Co. v. Metropolitan West Side El. R. Co.*, 193 Ill. 217; *Samish River Boom Co. v. Union Boom Co.*, 32 Wash. 586.

Land acquired for a public use, when, on account of its particular ownership, it does not at all or effectually serve that use, may be condemned for the same public use; *a fortiori* is this true when the original acquirement for public use is one in form only, intended to prevent the actual appropriation to that public use. *Starr Burying Ground Assoc. v. North Lane Cemetery Assoc.*, 77 Conn. 83.

**Montana.** — Under Code Civ. Pro. Mont., § 2214, property already appropriated to a public use may be devoted to another public use, if it appears that the latter use is a more necessary one. *Helena v. Rogan*, 26 Mont. 452.

**1094.** **2.** Drain Across Railroad. — The state has the undoubted right to authorize the improving of a drain across the right of way of a railroad company by deepening and widening a natural channel. *Pittsburgh, etc., R. Co. v. Machler*, 158 Ind. 159; *Baltimore, etc., R. Co. v. Jackson County*, 156 Ind. 260.

**3.** Same — Where Railroad Seeks to Locate Road over Street or Highway. — *Ottawa v. Canada Atlantic R. Co.*, 33 Can. Sup. Ct. 376, *affirming* 4 Ont. L. Rep. 56, 2 Ont. L. Rep. 336.

**6.** Legislative Intent Must Appear by Express Terms or Necessary Implication — *United States.* — *Adirondack R. Co. v. New York*, 176 U. S. 335; *Oregon Short Line R. Co. v. Postal Tel. Cable Co.*, 111 Fed. Rep. 842, 49 C. C. A. 663; *St. Louis, etc., R. Co. v. Southwestern Telephone, etc., Co.*, 121 Fed. Rep. 276, 58 C. C. A. 198; *Western Union Tel. Co. v. Pennsylvania R. Co.*, (C. C. A.) 123 Fed. Rep. 33.

**Colorado.** — *Denver Power, etc., Co. v. Denver, etc., R. Co.*, 30 Colo. 204.

**Connecticut.** — *New Haven Water Co. v. Wallingford*, 72 Conn. 293; *Starr Burying Ground Assoc. v. North Lane Cemetery Assoc.*, 77 Conn. 83.

**Illinois.** — See *St. Louis, etc., R. Co. v. Postal Tel. Co.*, 173 Ill. 508.

**Indiana.** — *Gold v. Pittsburgh, etc., R. Co.*, 153 Ind. 232; *Baltimore, etc., R. Co. v. Jackson County*, 156 Ind. 260; *Postal Tel.-Cable, etc., Co. v. Chicago, etc., R. Co.*, 30 Ind. App. 654; *Indianapolis, etc., R. Co. v. Indianapolis, etc., Rapid Transit R. Co.*, 33 Ind. App. 337.

**Iowa.** — *Diamond Jo Line Steamers v. Davenport*, 114 Iowa 432.

**Louisiana.** — *Louisiana, etc., R. Co. v. Vicksburg, etc., R. Co.*, 112 La. 915.

**Massachusetts.** — *Eldredge v. Norfolk County*, 185 Mass. 186.



**1095.** (2) *By Express Words.* — See note 1.

(3) *By Necessary Implication.* — See notes 3, 4.

Where the Two Uses Do Not Conflict — In General. — See note 5.

Streets or Highways Across Railways. — See notes 6, 8.

**1096.** Railway Across a Highway. — See note 1.

Railway Across Railway. — See note 4.

**1097.** Longitudinal or Parallel Lines. — See note 1.

**1099.** 9. Statutory Exemption of Certain Property — In General. — See notes 2, 3.

*Minnesota.* — Northwestern Telephone Exch. Co. v. Chicago, etc., R. Co., 76 Minn. 334.

*Vermont.* — Rutland-Canadian R. Co. v. Central Vermont R. Co., 72 Vt. 128.

*Washington.* — Samish River Boom Co. v. Union Boom Co., 32 Wash. 586.

**Land Not Actually in Use.** — Land which is not employed in or needed for the former use is not within the reason or operation of this rule. Denver Power, etc., Co. v. Denver, etc., R. Co., 30 Colo. 204; Atchison, etc., R. Co. v. Kansas City, etc., R. Co., 67 Kan. 569; Samish River Boom Co. v. Union Boom Co., 32 Wash. 586; Kansas City, etc., R. Co. v. Vicksburg, etc., R. Co., 49 La. Ann. 29; Shreveport, etc., R. Co. v. St. Louis, etc., R. Co., 51 La. Ann. 814; Orleans, etc., R. Co. v. Jefferson, etc., R. Co., 51 La. Ann. 1605.

**1094.** 7. Property Devoted to a Public Use Excepted from a General Grant. — Diamond Jo Line Steamers v. Davenport, 114 Ga. 432.

**1095.** 1. Express Authority. — In *Illinois* a telegraph company is empowered by statute to construct lines of telegraph "along and upon any railroad." St. Louis, etc., R. Co. v. Postal Tel. Co., 173 Ill. 508.

3. Rutland-Canadian R. Co. v. Central Vermont R. Co., 72 Vt. 128, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1095; Seattle, etc., R. Co. v. Bellingham Bay, etc., R. Co., 29 Wash. 491, 92 Am. St. Rep. 907.

4. St. Louis, etc., R. Co. v. Southwestern Telephone, etc., Co., 121 Fed. Rep. 276, 58 C. C. A. 198; Western Union Tel. Co. v. Pennsylvania R. Co., (C. C. A.) 123 Fed. Rep. 33, reversing 120 Fed. Rep. 362; Northwestern Telephone Exch. Co. v. Chicago, etc., R. Co., 76 Minn. 334; Scranton Gas, etc., Co. v. Northern Coal, etc., Co., 192 Pa. St. 80, 73 Am. St. Rep. 798; Rutland-Canadian R. Co. v. Central Vermont R. Co., 72 Vt. 128, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1095. But see Seattle, etc., R. Co. v. Bellingham Bay, etc., R. Co., 29 Wash. 491, 92 Am. St. Rep. 907; Samish River Boom Co. v. Union Boom Co., 32 Wash. 586.

**5. Implied Right to Subject Property to New Use — United States.** — Oregon Short Line R. Co. v. Postal Tel. Cable Co., 111 Fed. Rep. 842, 49 C. C. A. 663.

*Colorado.* — Union Pac. R. Co. v. Colorado Postal Tel. Cable Co., 30 Colo. 133, 97 Am. St. Rep. 106.

*Indiana.* — Baltimore, etc., R. Co. v. Jackson County, 156 Ind. 260; Indianapolis, etc., R. Co. v. Indianapolis, etc., Rapid Transit R. Co., 33 Ind. App. 337; Postal Tel.-Cable Co. v. Chicago, etc., R. Co., 30 Ind. App. 654.

*Massachusetts.* — Eldredge v. Norfolk County, 185 Mass. 186.

*Minnesota.* — Northwestern Telephone Exch. Co. v. Chicago, etc., R. Co., 76 Minn. 334.

*Texas.* — Southwestern Tel., etc., Co. v. Gulf, etc., R. Co., (Tex. Civ. App. 1899) 52 S. W. Rep. 106; Ft. Worth, etc., R. Co. v. Southwestern Tel., etc., Co., 96 Tex. 160.

*Utah.* — Postal Tel. Cable Co. v. Oregon Short Line R. Co., 23 Utah 474, 90 Am. St. Rep. 705.

**6. General Authority to Lay Out Streets or Highways.** — Gold v. Pittsburgh, etc., R. Co., 153 Ind. 232. See also Eldredge v. Norfolk County, 185 Mass. 186.

Such authority is not implied, however, where the use of the right of way for railway purposes will be thereby essentially impaired or destroyed. Minneapolis, etc., R. Co. v. Hartland, 85 Minn. 76.

A city council or board of trustees cannot establish and open a street across the right of way of a railroad without condemnation proceedings. St. Louis, etc., R. Co. v. Gordon, 157 Mo. 71; Georgia R., etc., Co. v. Union Point, 119 Ga. 809.

8. Richmond, etc., R. Co. v. Johnston, 103 Va. 456.

**1096.** 1. Power to cross any "public road or way" refers to municipal streets as well as county highways. Canton v. Canton Cotton Warehouse Co., 84 Miss. 268, 105 Am. St. Rep. 428.

**Right to Cross Highways Between Termini.** — Authority to a company to build a railway empowers it to cross every highway between the authorized termini of such railway without the necessity of obtaining the permission of the municipal authorities and without liability to compensate the municipalities for the portions of the highways thus taken. Ottawa v. Canada Atlantic R. Co., 33 Can. Sup. Ct. 376, affirming 4 Ont. L. Rep. 56, and 2 Ont. L. Rep. 336.

**4. Implied Right of One Railroad to Cross Another.** — Minneapolis, etc., R. Co. v. Chicago, etc., R. Co., 116 Iowa 681; Houston, etc., R. Co. v. Kansas City, etc., R. Co., 109 La. 581.

**1097.** 1. Longitudinal or Parallel Lines. — Union Terminal R. Co. v. Kansas City Belt R. Co., 9 Kan. App. 281; Indianapolis, etc., R. Co. v. Indianapolis, etc., Rapid Transit R. Co., 33 Ind. App. 337; Atchison, etc., R. Co. v. Kansas City, etc., R. Co., 67 Kan. 569.

This rule applies only to the right of way of the width which the railroad company is authorized by statute to condemn. A strip of land outside the statutory right of way is not exempt unless actually needed by the owner for its present or immediate future uses and purposes. Chicago, etc., Electric R. Co. v. Chicago, etc., R. Co., 211 Ill. 352. See also Shreveport, etc., R. Co. v. St. Louis, etc., R. Co., 51 La. Ann. 814.

**1099.** 2. Right of Legislature to Exempt Cer.

**1100.** Construction of the Term "House." — See note 3.

**1101.** 10. Construction of Legislative Acts Granting Powers of Condemnation — *b.* CONSTRUCTION OF PARTICULAR TERMS — Structures. — See note 2.

**1102.** VI. WHAT AMOUNTS TO A TAKING — 1. Entry for Permanent Occupation — Intention Permanently to Occupy Necessary. — See note 2.

Taking Completed by Confirmation of Award. — See note 3.

Payment or Possession. — See note 4.

**1103.** 3. Interference with Use. — See note 2.

**1105.** 4. Injurious Affecting Property — *b.* RULE IN ENGLAND. — See note 1.

*c.* IN THE UNITED STATES UNDER VARIOUS STATE CONSTITUTIONS. — See note 2.

tain Property. — Matter of New York, etc., Bridge, (Supm. Ct. Spec. T.) 45 Misc. (N. Y.) 184, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1099.

**1099.** 3. Pennsylvania. — Under Act of March 17, 1869 (P. L. 12), authorizing railroad companies to widen, deepen, enlarge, or otherwise improve their lines of road, dwelling houses may be condemned. Dryden v. Pittsburgh, etc., R. Co., 208 Pa. St. 316; Glaser v. Glenwood R. Co., 208 Pa. St. 328.

**1100.** 3. Where land was not at the time of the construction of a railroad used as a garden, the fact that it was so used when actual possession was taken, is immaterial. Dargan v. Carolina Cent. R. Co., 131 N. Car. 623.

**1101.** 2. Term Includes Structures. — Stauffer v. Cincinnati, etc., R. Co., 33 Ind. App. 356; White v. Cincinnati, etc., R. Co., 34 Ind. App. 287.

**1102.** 2. The Temporary Use of Water for less than a year, which was then abandoned, and has never since then been resumed, is not a legal taking of that water under Stat. Mass. (1895), c. 167, § 2, as against a person who has rights in the water in question. Gloucester Water-Supply Co. v. Gloucester, 179 Mass. 365.

**3.** Confirmation of Award Completes Taking. — Sprague v. Northern Pac. R. Co., 122 Wis. 509; Brown v. Chicago, etc., R. Co., 64 Neb. 62.

**4.** Possession or Compensation Completes Taking. — Pool v. Butler, 141 Cal. 46; Chandler v. Morey, 195 Ill. 596; Meeker v. Chicago, 96 Ill. App. 23; Atchison, etc., R. Co. v. Wilson, 66 Kan. 233; Silvester v. St. Louis, 164 Mo. 601; Woolard v. Nashville, 108 Tenn. 353; Fairman v. Montreal, 31 Can. Sup. Ct. 210, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1102; Montreal v. Hogan, 8 Quebec Q. B. 534, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1103. See also Benedict v. New York, 98 Fed. Rep. 789, 39 C. C. A. 290; Atlanta, etc., R. Co. v. Southern R. Co., (C. C. A.) 131 Fed. Rep. 657; Florida Cent., etc., R. Co. v. Bear, 43 Fla. 319.

Where a city takes possession of the land condemned and proceeds to construct its improvement, failure to prepay the award does not amount to an abandonment of the proceedings. Woolard v. Nashville, 108 Tenn. 353.

**1103.** 2. U. S. v. Williams, 188 U. S. 485; U. S. v. Lynch, 188 U. S. 445; Clinton v. Franklin, 83 S. W. Rep. 142, 26 Ky. L. Rep. 1053; De Lauder v. Baltimore County, 94 Md. 1; Mansfield v. Balliett, 65 Ohio St. 451; Callen

v. Columbus Edison Electric Light Co., 66 Ohio St. 166; Barion v. Memphis, (Tenn. 1904) 80 S. W. Rep. 832; Stockdale v. Rio Grande Western R. Co., 28 Utah 201.

**Interference with an Easement** — *United States.* — Lowndes v. U. S., 105 Fed. Rep. 838; U. S. v. Certain Lands, 112 Fed. Rep. 622.

*New York.* — Syracuse Solar-Salt Co. v. Rome, etc., R. Co., 43 N. Y. App. Div. 203; Sauer v. New York, 44 N. Y. App. Div. 305; Egerer v. New York Cent., etc., R. Co., 70 N. Y. App. Div. 421; Dolan v. New York, etc., R. Co., 74 N. Y. App. Div. 434, reversed 175 N. Y. 367; People v. Calder, 89 N. Y. App. Div. 503.

*Ohio.* — Mansfield v. Balliett, 65 Ohio St. 451; Madden v. Pennsylvania R. Co., 11 Ohio Cir. Dec. 571, 21 Ohio Cir. Ct. 73; Butler v. Cincinnati, 25 Ohio Cir. Ct. 772.

*Washington.* — Seattle Transfer Co. v. Seattle, 27 Wash. 520; State v. Superior Ct., 30 Wash. 219, 232; State v. Superior Ct., 26 Wash. 278.

**The Closing of a Street** is the taking of an easement for public use. Laurel v. Rowell, 84 Miss. 435.

**Any Direct Encroachment on Land** which subjects it to a public use that excludes or restricts the dominion and control of the owner over it, constitutes a taking. Lake Erie, etc., R. Co. v. Hancock County, 63 Ohio St. 23.

**Discharging Sewage on Private Property.** — The discharge of sewage on the private property of an individual is the invasion of a private right, and the taking of private property, within the meaning of the constitution. Sammons v. Gloversville, (Supm. Ct. Tr. T.) 34 Misc. (N. Y.) 459, affirmed 67 N. Y. App. Div. 628, 175 N. Y. 346; Huffmire v. Brooklyn, 162 N. Y. 584; Grey v. Paterson, 60 N. J. Eq. 385, 83 Am. St. Rep. 642; Platt v. Waterbury, 72 Conn. 531, 77 Am. St. Rep. 335.

**The Legislature** cannot interfere with the use of property without giving compensation to the owner. Edwards v. Bruerton, 184 Mass. 529.

**1105.** 1. **The English Rule Obtains in Canada.** — McQuade v. Rex, 7 Can. Exch. 321, following Reg. v. Barry, 2 Can. Exch. 333.

**2. Georgia.** — The constitution reads "taken or damaged." The word "damaged" is used in its usual sense as a law term, and does not change the substantive law of damages, or create a cause of action where none previously existed; nor does it abrogate the principle expressed in the phrase *damnum absque injuria*. The word "damaged" "refers to actionable

**1109.** *d.* WHAT AMOUNTS TO INJURIOUSLY AFFECTING — (1) *In General*. — See note 2.

**1110.** *Special Injuries*. — See note 2.

(2) *Injuries from Proper Construction and Operation*. — See note 3.

**1111.** See note 1.

**1113.** (3) *Where No Part of the Premises Is Taken*. — See note 1.

*Statutes Providing Compensation for Injury to Property Not Taken*. — See note 2.

wrongs, and does not require compensation for depreciation in the value of private property caused by the lawful operation of a public work unless a private corporation or individual would be liable under like circumstances." To "damage" property there must be some physical interference with property or with a right or use appurtenant to property. Lumpkin, P. J., and Lewis, J., *dissenting*. Austin v. Augusta Terminal R. Co., 108 Ga. 671.

*Illinois*. — Metropolitan West Side El. R. Co. v. Goll, 100 Ill. App. 323; Chicago v. McShane, 102 Ill. App. 239.

*Maine*. — "Property taken" includes permanent damage to property. Ingram v. Maine Water Co., 98 Me. 566.

*Maryland*. — It is the established law in Maryland that, where the construction of a railroad is authorized by competent authority, and there is no invasion of, or physical interference with, the property of an abutting owner, there is no "taking" within the meaning of the constitution. Poole v. Falls Road Electric R. Co., 88 Md. 533.

*South Carolina*. — The constitution reads "taking." An abutting landowner has a special property in the benefits derived from the street on which his land is situated, and the destruction or impairment of these benefits for other than street purposes, which materially lessen its value, is taking private property. South Bound R. Co. v. Burton, 67 S. Car. 515.

*Vermont*. — "Acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a 'taking' within the meaning of the constitutional provision." East Montpelier v. Wheelock, 70 Vt. 391.

**1109.** 2. *Act Must Be Such as to Give Right of Action if Done Without Authority*. — Austin v. Augusta Terminal R. Co., 108 Ga. 671; Metropolitan West Side El. R. Co. v. Goll, 100 Ill. App. 323.

**1110.** 2. *Injuries Must Be Special* — Arkansas. — Little Rock, etc., R. Co. v. Newman, 73 Ark. 1.

*Illinois*. — Illinois Cent. R. Co. v. School Trustees, 212 Ill. 406; Metropolitan West Side El. R. Co. v. Goll, 100 Ill. App. 323; Chicago v. Webb, 102 Ill. App. 232.

*Kentucky*. — Louisville R. Co. v. Foster, 108 Ky. 743.

*Massachusetts*. — Davenport v. Dedham, 178 Mass. 382; Davenport v. Hyde Park, 178 Mass. 385; Putnam v. Boston, etc., R. Corp., 182 Mass. 351.

*Missouri*. — Ruckert v. Grand Ave. R. Co., 163 Mo. 260; Nagel v. Lindell R. Co., 167 Mo. 89; Thompson v. Macon, 106 Mo. App. 84.

*New Hampshire*. — Cram v. Laconia, 71 N. H. 41.

*Ohio*. — Robert Mitchell Furniture Co. v. Cleveland, etc., R. Co., 10 Ohio Dec. 218, 7 Ohio N. P. 639.

*Utah*. — Stockdale v. Rio Grande Western R. Co., 28 Utah 201.

*Canada*. — Rex v. MacArthur, 34 Can. Sup. Ct. 570, reversing 8 Can. Exch. 245.

"If the construction and operation of defendant's railroad casts cinders, ashes, and sparks of fire upon and into plaintiff's houses previously erected on his contiguous land, and dams water back upon it, and thereby depreciates the value of his property, it cannot be said such damages are suffered by the public generally, merely because some other land owner similarly situated in an adjoining block, may suffer similar injuries from cinders, ashes, fire, and water." Davenport, etc., R. Co. v. Sinnet, 111 Ill. App. 75. See also Texarkana, etc., R. Co. v. Bulgier, (Tex. Civ. App. 1898) 47 S. W. Rep. 1047.

**3. Injuries from Proper Construction and Operation**. — Kishlar v. Southern Pac. R. Co., 134 Cal. 636; Metropolitan West Side El. R. Co. v. Goll, 100 Ill. App. 323; Aldrich v. Metropolitan West Side El. R. Co., 195 Ill. 456; Thompson v. Macon, 106 Mo. App. 84.

**1111.** 1. *Injury from Negligence or Improper Construction Gives Right of Action*. — Langley v. Augusta, 118 Ga. 590, 98 Am. St. Rep. 133; Illinois Cent. R. Co. v. School Trustees, 212 Ill. 406.

**1113.** 1. *Where No Part of Property Is Actually Taken* — England. — Escott v. Newport, (1904) 2 K. B. 369.

*United States*. — Meyer v. Richmond, 172 U. S. 82; U. S. v. Certain Lands, 112 Fed. Rep. 622.

*Alabama*. — Dennis v. Mobile, etc., R. Co., 137 Ala. 649.

*California*. — Brown v. San Francisco, 124 Cal. 274.

*Illinois*. — Frazer v. Chicago, 186 Ill. 480, 78 Am. St. Rep. 296; Metropolitan West Side El. R. Co. v. Goll, 100 Ill. App. 323.

*Indiana*. — Valparaiso v. Hagen, 153 Ind. 337, 74 Am. St. Rep. 305.

*Maine*. — Frost v. Washington County R. Co., 96 Me. 76.

*Maryland*. — De Lauder v. Baltimore County, 94 Md. 1.

*Massachusetts*. — McSweeney v. Com., 185 Mass. 371.

*New York*. — Fries v. New York, etc., R. Co., 169 N. Y. 270; Sauer v. New York, 180 N. Y. 27.

*Wisconsin*. — Kuhl v. Chicago, etc., R. Co., 101 Wis. 42.

**2. Injury to Property Not Taken Provided For**



**1114.** (4) *Injuries to Remainder of Tract Part of Which Has Been Taken.*—See note 1.

(5) *Injuries Must Be Certain, Not Merely Speculative.*—See note 2.

*e. DAMAGES TO TRADE OR BUSINESS.*—See note 3.

**1115.** *Good Will.*—See note 2.

*Prospective Profits.*—See note 3.

**1116.** *But Damages Have Been Allowed.*—See note 2.

**1118.** *g. DANGER FROM FIRE.*—See note 1.

—*Alabama.*—*Niehaus v. Cooke*, 134 Ala. 223.

*Illinois.*—*Aldis v. Union El. R. Co.*, 203 Ill. 567.

*Kentucky.*—*Thoman v. Covington*, 62 S. W. Rep. 721, 23 Ky. L. Rep. 117; *Bramlette v. Louisville, etc.*, R. Co., 113 Ky. 300; *Louisville, etc.*, R. Co. v. *Cumnock*, 77 S. W. Rep. 933, 25 Ky. L. Rep. 1330; *Councilmen v. Edelen*, 82 S. W. Rep. 279, 26 Ky. L. Rep. 601.

*Massachusetts.*—*Bickford v. Hyde Park*, 173 Mass. 552, 73 Am. St. Rep. 320.

*Montana.*—*Less v. Butte*, 28 Mont. 27, 98 Am. St. Rep. 545.

*Nebraska.*—*Chicago, etc.*, R. Co. v. *O'Neill*, 58 Neb. 239; *Scace v. Wayne County*, (Neb. 1904) 100 N. W. Rep. 149.

*Pennsylvania.*—*In re Walnut St. Bridge*, 191 Pa. St. 153.

*Texas.*—*New Odorless Sewerage Co. v. Wisdom*, 30 Tex. Civ. App. 224.

**Property Embraced in Such Provisions.**—The constitutional provision granting compensation for injuries to private property is not limited to property abutting or fronting on the particular highway or improvement by the construction or enlargement of which the property is injured. It applies to any works, etc., that are sufficiently near to the property to make the injury proximate, immediate, and substantial. *In re Chatham Street*, 191 Pa. St. 604.

**Whole Improvement Must Be Considered.**—In estimating such damages the whole improvement should be considered and not merely a part thereof. *Chicago v. Anglum*, 104 Ill. App. 188; *Chicago v. Webb*, 102 Ill. App. 232; *Cooper v. Scranton*, 21 Pa. Super. Ct. 17.

**1114. 1. Part Taken and Part Injured Must Constitute One Tract.**—*Sharp v. U. S.*, 191 U. S. 341, affirming 112 Fed. Rep. 893, 50 C. C. A. 597.

**2. Actual, Not Speculative, Damages.**—*East, etc.*, Illinois R. Co. v. *Miller*, 201 Ill. 413; *Spohr v. Chicago*, 206 Ill. 441; *Illinois Cent. R. Co. v. School Trustees*, 212 Ill. 406; *Chicago, etc.*, R. Co. v. *Mason*, 26 Ind. App. 395; *Crary v. Port Arthur Channel, etc., Co.*, (Tex. Civ. App. 1899) 49 S. W. Rep. 703.

**Diversion of Traffic as a result of a public improvement is an element of damage which is considered in law too remote and speculative to become the basis of recovery in a suit wherein a person seeks damages or loss of profits to his business from the author of such improvement.** *Chicago v. Spoor*, 190 Ill. 340; *Chicago v. Le Moyne*, (C. C. A.) 119 Fed. Rep. 662; *Cram v. Laconia*, 71 N. H. 41. But see *Schuler v. Lincoln Tp.*, 12 S. Dak. 460; *Dairy v. Iowa Cent. R. Co.*, 113 Iowa 716.

**Possibilities or Probabilities of damage from**

the use to which the land in question may be put cannot be considered, since it must be assumed that the property will be used for the purpose for which it is condemned. *U. S. v. Certain Lands*, 112 Fed. Rep. 622.

**3. Injuries to Trade or Business—Illinois.**—*Cook, etc.*, Co. v. *Sanitary Dist.*, 177 Ill. 599; *Chicago v. McShane*, 102 Ill. App. 239. See also *Illinois Cent. R. Co. v. School Trustees*, 212 Ill. 406.

*Massachusetts.*—*Sawyer v. Com.*, 182 Mass. 245; *Bailey v. Boston, etc.*, R. Corp., 182 Mass. 537; *Boston Belting Co. v. Boston*, 183 Mass. 254.

*Missouri.*—*St. Louis, etc.*, R. Co. v. *Knapp-Stout, etc.*, Co., 160 Mo. 396.

*New Jersey.*—*Chosen Freeholders v. Emmerich*, 57 N. J. Eq. 535.

*Virginia.*—*Richmond, etc.*, R. Co. v. *Chamblin*, 100 Va. 401.

The case stands no differently when the business is destroyed by taking the land on which it is carried on, except so far as it may have enhanced the value of the land. *New York, etc.*, R. Co. v. *Blacker*, 178 Mass. 386.

Where a wharf is taken, the loss of earnings and profits, for the period that the business is temporarily suspended or interrupted while being removed to another location, cannot be considered. *Emery v. Boston Terminal Co.*, 178 Mass. 172, 86 Am. St. Rep. 473.

*Stat. Mass.* 1895, c. 488, § 14 (the Metropolitan Water Supply Act), provides for compensation for damage to an established business occasioned by the carrying out of that act. *Earle v. Com.*, 180 Mass. 579, 91 Am. St. Rep. 326.

**1115. 2. Good Will.**—*In re Race St.*, 9 Pa. Dist. 615, 24 Pa. Co. Ct. 433.

**3. Future Profits.**—*Gage v. Judson*, 111 Fed. Rep. 350; *St. Louis, etc.*, R. Co. v. *Knapp-Stout, etc.*, Co., 160 Mo. 396; *Port Henry v. Kidder*, 39 N. Y. App. Div. 640; *Hamilton v. Pittsburg, etc.*, R. Co., 190 Pa. St. 51.

**1116. 2. Effect of Construction on Business Considered.**—*Vincent v. New York, etc.*, R. Co., 77 Conn. 431; *St. Louis v. Abeln*, 170 Mo. 318.

Where a business street is changed to a pleasure drive, compensation should be made for injury to the business of property owners. *Matter of Euclid Ave.*, 8 Ohio Dec. 86, 6 Ohio N. P. 160.

**1118. 1. Danger of Fire.**—*Rock Island, etc.*, R. Co. v. *Gordon*, 184 Ill. 456; *Davenport, etc.*, R. Co. v. *Sinnet*, 111 Ill. App. 75; *Chicago, etc.*, R. Co. v. *Patterson*, 26 Ind. App. 295; *South Bound R. Co. v. Burton*, 67 S. Car. 515; *Kay v. Glade Creek, etc.*, R. Co., 47 W. Va. 467.

**1118.** Where Railroad Responsible for Losses. — See note 2.

**1119.** Degree of Danger — Imminent Danger. — See notes 1, 2.

**1120.** Increased Insurance Rate. — See note 2.

**1121.** *h.* DANGER TO PERSONS AND LIVE STOCK — (1) *To Lives of Persons.* — See note 1.

**1122.** (2) *To Live Stock* — Contrary Holding. — See note 1.

(i) INJURIES FROM SMOKE, NOISE, VIBRATION, ETC. — See note 2.

**1123.** *j.* OBSTRUCTION OF LIGHT. — See note 1.

**1125.** *m.* CHANGE OF GRADE IN STREETS BY MUNICIPALITY. — See note 1.

**1118.** 2. See Illinois, etc., R. Co. v. Freeman, 210 Ill. 270.

**1119.** 1. Risk Must Be Imminent. — Conness v. Indiana, etc., R. Co., 193 Ill. 464; Kay v. Glade Creek, etc., R. Co., 47 W. Va. 467.

**Danger So Great as to Necessitate Removal.** — In such a case the owner is entitled to the cost of removal of his building and its reconstruction in a safe place. Hamilton v. Pittsburg, etc., R. Co., 190 Pa. St. 51.

**2. Test Is Depreciation of Value.** — Hamilton v. Pittsburg, etc., R. Co., 190 Pa. St. 51.

The question is, is the residue depreciated in value by the danger of fire, and how much? But the danger must be real and imminent, not merely remote or possible. Kay v. Glade Creek, etc., R. Co., 47 W. Va. 467.

**1120.** 2. Increased Cost of Insurance. — Indiana, etc., R. Co. v. Stauber, 185 Ill. 9. Compare Cook, etc., Co. v. Sanitary Dist., 177 Ill. 599.

On the other hand the company may show that the exposure is not sufficient to cause any increase in the rate of insurance. North Arkansas, etc., R. Co. v. Cole, 71 Ark. 38.

**1121.** 1. Contrary Holding. — Chicago, etc., Electric R. Co. v. Mawman, 206 Ill. 182; Illinois, etc., R. Co. v. Freeman, 210 Ill. 270; Illinois Cent. R. Co. v. School Trustees, 212 Ill. 406; Davenport, etc., R. Co. v. Sinnet, 111 Ill. App. 75.

Compensation for damages incident to the construction of pipe lines cannot be made to embrace damages on account of injuries, either to persons or property, that subsequently might occur from leakage of gas, causing explosions and loss of crops. Manufacturers' Natural Gas Co. v. Leslie, 22 Ind. App. 677.

**1122.** 1. Danger to Live Stock and Teams Not to Be Considered. — Conness v. Indiana, etc., R. Co., 193 Ill. 464; Chicago, etc., R. Co. v. Mason, 26 Ind. App. 395; Southwestern Mineral R. Co. v. Harvey, 8 Kan. App. 489; St. Louis, etc., R. Co. v. Hammers, 8 Kan. App. 860, 57 Pac. Rep. 350.

**2. Smoke — Gases — Ashes.** — Illinois Cent. R. Co. v. Schmidgall, 91 Ill. App. 23; Davenport, etc., R. Co. v. Sinnet, 111 Ill. App. 75; Calumet, etc., Canal, etc., Co. v. Morawetz, 195 Ill. 398; Illinois Cent. R. Co. v. Turner, 194 Ill. 575; Chesapeake, etc., R. Co. v. Smith, (Ky. 1899) 51 S. W. Rep. 12; Syracuse Solar-Salt Co. v. Rome, etc., R. Co., 43 N. Y. App. Div. 203, affirmed 168 N. Y. 650; South Buffalo R. Co. v. Kirkover, 86 N. Y. App. Div. 55, affirmed 176 N. Y. 301; South Bound R. Co. v. Burton, 67 S. Car. 515; Missouri, etc., R. Co. v. Calkins, (Tex. Civ. App. 1904) 79 S. W. Rep. 852. See also Long Island R. Co. v. Garvey, 159 N. Y. 334.

Injuries from smoke and cinders which would not fall on the property except for the force of the wind should be excluded in awarding compensation. Covington, etc., El. R., etc., Co. v. Kleymeier, 105 Ky. 609.

**Cases Holding that Such Injuries Cannot Be Included in the Estimate of Compensation.** — Austin v. Augusta Terminal R. Co., 108 Ga. 671, Lewis, J., dissenting and quoting the statement of the majority rule in 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1122.

**Injury from Noise and Confusion.** — Illinois Cent. R. Co. v. Turner, 194 Ill. 575; Calumet, etc., Canal, etc., Co. v. Morawetz, 195 Ill. 398; Davenport, etc., R. Co. v. Sinnet, 111 Ill. App. 75; Louisville R. Co. v. Foster, 108 Ky. 743; South Buffalo R. Co. v. Kirkover, 86 N. Y. App. Div. 55, affirmed 176 N. Y. 301; Shano v. Fifth Ave., etc., Bridge Co., 189 Pa. St. 245, 69 Am. St. Rep. 808; South Bound R. Co. v. Burton, 67 S. Car. 515; Missouri, etc., R. Co. v. Calkins, (Tex. Civ. App. 1904) 79 S. W. Rep. 852. See also Baker v. Boston El. R. Co., 183 Mass. 178.

Noise, such as would constitute a private nuisance to abutting property if it were not authorized, should be treated as causing special and peculiar damages, which entitle the landowner to compensation. Baker v. Boston El. R. Co., 183 Mass. 178.

Injuries from such causes may be considered so far as they affect the value of the property, but the personal inconvenience of the owner, or his loss of business cannot be recovered for. Covington, etc., El. R., etc., Co. v. Kleymeier, 105 Ky. 609.

**Contrary Opinion.** — Metropolitan West Side El. R. Co. v. Goll, 100 Ill. App. 323.

**Vibration and Jarring.** — Lake St. El. R. Co. v. Brooks, 90 Ill. App. 173; Davenport, etc., R. Co. v. Sinnet, 111 Ill. App. 75; Chesapeake, etc., R. Co. v. Smith, (Ky. 1899) 51 S. W. Rep. 12; South Bound R. Co. v. Burton, 67 S. Car. 515.

An instruction authorizing a recovery for the vibration of the ground caused by passing trains, is improper in the absence of evidence that the property was damaged thereby. Illinois Cent. R. Co. v. School Trustees, 212 Ill. 406.

**1123.** 1. Injury from Obstruction of Light. — Lewis v. New York, etc., R. Co., (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 13, affirmed 40 N. Y. App. Div. 343; Lafean v. York County, 20 Pa. Super. Ct. 573; South Bound R. Co. v. Burton, 67 S. Car. 515.

**Obstruction of the View** is not an element of damage. Illinois Cent. R. Co. v. School Trustees, 212 Ill. 406.

**1125.** 1. Injuries from Change of Grade in



**1126.** Ohio Rule. — See note 2.

**1127.** Liability Under Special Statutes. — See note 1.

**1128.** *n.* INJURY TO ACCESS. — See note 1.

**Street** — *England*. — *East Fremantle v. Annois*, (1902) A. C. 213, 71 L. J. P. C. 39.

*Iowa*. — *Farmer v. Cedar Rapids*, 116 Iowa 322; *Reilly v. Ft. Dodge*, 118 Iowa 633.

*Michigan*. — *Austin v. Detroit, etc., R. Co.*, 134 Mich. 149, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1125.

*Montana*. — *Less v. Butte*, 28 Mont. 27, 98 Am. St. Rep. 545.

*New York*. — *Sauer v. New York*, 90 N. Y. App. Div. 36, affirming (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 585; *Smith v. Boston, etc., R. Co.*, 99 N. Y. App. Div. 94, affirmed 181 N. Y. 132; *Matter of Andersen*, 178 N. Y. 416; *Ehrsam v. Utica*, 37 N. Y. App. Div. 272.

*Oregon*. — *Brand v. Multnomah County*, 38 Oregon 79.

*South Carolina*. — *Garraux v. Greenville*, 53 S. Car. 575.

*Wisconsin*. — *McCullough v. Campbellsport*, 123 Wis. 334.

**Where Property Physically Invaded.** — If, however, the municipality, in making such improvements, is guilty of an actual physical invasion of the adjoining premises, by causing them to subside and fall by excavations, then liability attaches. *Damkoehler v. Milwaukee*, (Wis. 1904) 101 N. W. Rep. 706; *Mosier v. Oregon R., etc., Co.*, 39 Oregon 256, 87 Am. St. Rep. 652.

*Kentucky*. — Section 242 of the present constitution of Kentucky made a change in the organic law of the state, and abolished the requirement of direct physical injury to the property in order to establish a claim for consequential damages, so that damages may now be recovered for injury to property caused by a change in the grade of a street. *Ludlow v. Detweller*, (Ky. 1898) 47 S. W. Rep. 881; *Louisville v. Hegan*, (Ky. 1899) 49 S. W. Rep. 532.

*West Virginia*. — A municipal corporation is not liable for damages to a lot by reason of change of a street's grade operating on surface water, though it may increase it; but if the work operates, as its direct effect, to collect and cast water in a mass on a lot, the corporation is liable. *McCray v. Fairmont*, 46 W. Va. 442.

**1126. 2. Rule in Ohio — Compensation for Change of Grade.** — *Grant v. Hyde Park*, 67 Ohio St. 166; *Ross v. Cincinnati*, 24 Ohio Cir. Ct. 41.

Where a change of grade does not interfere with the right of access, or otherwise diminish the market value of the property, no right of compensation exists. *Lotze v. Cincinnati*, 61 Ohio St. 272.

**1127. 1. Statutes Requiring Compensation — California.** — *Eachus v. Los Angeles*, 130 Cal. 492, 80 Am. St. Rep. 147.

*Colorado*. — *Denver v. Bonesteel*, 30 Colo. 107.

*Georgia*. — *Roughton v. Atlanta*, 113 Ga. 948.

*Illinois*. — *Whaples v. Waukegan*, 95 Ill. App. 29; *Barrington v. Meyer*, 103 Ill. App. 124; *Chicago v. Jackson*, 196 Ill. 496.

*Iowa*. — *Millard v. Webster City*, 113 Iowa 220; *Farmer v. Cedar Rapids*, 116 Iowa 322. See also *Reilly v. Ft. Dodge*, 118 Iowa 633; *Wilber v. Ft. Dodge*, 120 Iowa 555.

*Kansas*. — *Leavenworth v. Duffy*, 10 Kan. App. 124.

*Kentucky*. — *Henderson v. McClain*, 102 Ky. 402; *Mt. Sterling v. Jephson*, (Ky. 1899) 53 S. W. Rep. 1046; *Layman v. Beeler*, 113 Ky. 221; *Councilman v. Edelen*, 82 S. W. Rep. 279, 26 Ky. L. Rep. 601.

*Minnesota*. — *Dickerman v. Duluth*, 88 Minn. 288.

*Montana*. — *Less v. Butte*, 28 Mont. 27, 98 Am. St. Rep. 545.

*New Hampshire*. — *Hinckley v. Franklin*, 69 N. H. 614.

*New York*. — *Matter of Greer*, 39 N. Y. App. Div. 22; *Matter of Comesky*, 83 N. Y. App. Div. 137, reversed 179 N. Y. 393.

*Pennsylvania*. — *Whitehead v. Manor*, 23 Pa. Super. Ct. 314.

*South Carolina*. — *Garraux v. Greenville*, 53 S. Car. 575.

*South Dakota*. — *Whittaker v. Deadwood*, 12 S. Dak. 608.

**When Drainage Affected.** — Where the drainage of property is materially affected by a change of grade in the street, the owner of such property is entitled to compensation. *In re Chatham Street*, 191 Pa. St. 604.

*New York*. — Under an act giving the right to compensation for the change of grade in a street to "the owner of any house or lot fronting thereon," owners of nonabutting property are not entitled to compensation. *Matter of Grade Crossing Com'rs*, 166 N. Y. 69, affirming 46 N. Y. App. Div. 473.

*Laws N. Y.* 1903, p. 1396, c. 610, providing for compensation for injuries to land resulting from a change of grade in the street, is retroactive. *Matter of Andersen*, 178 N. Y. 416.

Under the Buffalo grade-crossing act damages may be recovered for injuries resulting from the doing of the work as well as for those which result permanently to the fee on account of the completion of the improvements. *Matter of Grade Crossing Com'rs*, 52 N. Y. App. Div. 27, affirmed 165 N. Y. 605.

*Vermont*. — Under Stat. Vt., § 3358, an abutting owner is entitled to compensation for injury caused by a change of grade in excess of three feet. *Fairbanks v. Rockingham*, 75 Vt. 221.

**1128. 1. Injury to Access — United States.** — *Central Trust Co. v. Hennen*, (C. C. A.) 90 Fed. Rep. 593; *Chicago v. Baker*, 98 Fed. Rep. 830, 39 C. C. A. 318.

*California*. — *Brown v. San Francisco*, 124 Cal. 274.

*Connecticut*. — *McKeon v. New York, etc., R. Co.*, 75 Conn. 343. See also *Vincent v. New York, etc., R. Co.*, 77 Conn. 431.

*Georgia*. — *Macon v. Wing*, 113 Ga. 90.

*Illinois*. — *Chicago v. Spoor*, 190 Ill. 340; *Chicago v. Lonergan*, 196 Ill. 518; *Winnetka v. Clifford*, 201 Ill. 475; *Chicago v. Webb*, 102 Ill. App. 232; *Illinois Cent. R. Co. v. Wolf*, 95 Ill. App. 74; *Beidler v. Sanitary Dist.*, 211 Ill. 628.

*Indiana*. — *Cincinnati, etc., R. Co. v. Miller*, (Ind. App. 1905) 72 N. E. Rep. 1001.



**1128.** Private Injury. — See note 2.

**1129.** *p.* INJURIES TO FENCES. — See note 1.

*q.* INJURIES FROM NEGLIGENCE AND WANT OF SKILL IN CONSTRUCTION. — See notes 2, 3.

**1130.** 5. Injuries to Water Rights — *b.* ACCESS TO PUBLIC WATERS — Injury to Access a "Taking." — See note 1.

6. Imposition of Additional Servitudes — Change of Use. — See note 2.

**1131.** 7. Temporary User — *b.* IN AID OF CONSTRUCTION. — See note 5.

**1132.** VII. COMPENSATION — 1. Meaning of the Term. — See note 1.

2. Necessity of Provision For — *a.* IN STATUTES. — See note 2.

*Iowa.* — *Richardson v. Webster City*, 111 Iowa 427.

*Kentucky.* — *Chesapeake, etc., R. Co. v. Smith*, (Ky. 1899) 51 S. W. Rep. 12; *Elizabethtown, etc., R. Co. v. Catlettsburg Water Co.*, 110 Ky. 175.

*Massachusetts.* — *Bailey v. Boston, etc., R. Corp.*, 182 Mass. 537.

*Missouri.* — *Farrar v. Midland Electric R. Co.*, 101 Mo. App. 140.

*New York.* — *Egerer v. New York Cent., etc., R. Co.*, 39 N. Y. App. Div. 652, 57 N. Y. Supp. 133; *Egerer v. New York Cent., etc., R. Co.*, 70 N. Y. App. Div. 421.

*Ohio.* — *Lotze v. Cincinnati*, 61 Ohio St. 272; *Cleveland Burial Case Co. v. Erie R. Co.*, 24 Ohio Cir. Ct. 107.

*Pennsylvania.* — *Lafean v. York County*, 20 Pa. Super. Ct. 573; *Walsh v. Scranton*, 23 Pa. Super. Ct. 276; *Matter of Chatham Street*, 16 Pa. Super. Ct. 103.

*South Carolina.* — *South Bound R. Co. v. Burton*, 67 S. Car. 515.

*Tennessee.* — *Hamilton County v. Rape*, 101 Tenn. 222; *Brumit v. Virginia, etc., R. Co.*, 106 Tenn. 124.

*Canada.* — *McQuade v. Rex*, 7 Can. Exch. 318.

**Vacant Lot.** — The rule applies although the lot obstructed is vacant. *Chesapeake, etc., R. Co. v. Rice*, (Ky. 1899) 50 S. W. Rep. 541.

**Temporary Injury.** — The fact that the damage is only temporary makes no difference in the principle. *Putnam v. Boston, etc., R. Corp.*, 182 Mass. 351; *Bailey v. Boston, etc., R. Corp.*, 182 Mass. 537; *Munn v. Boston*, 183 Mass. 421.

**Property Having Access to Two Streets.** — The fact that property has access to two streets will not prevent recovery for injury to the access to one. *Hulett v. Missouri, etc., R. Co.*, 80 Mo. App. 87.

**1128.** 2. Injury Must Be Distinct from That Suffered by Public. — *Winnetka v. Clifford*, 201 Ill. 475; *Bailey v. Boston, etc., R. Corp.*, 182 Mass. 537.

**1129.** 1. Cost of Fences. — *Barrall v. Quick*, 111 Ky. 22; *Schuler v. Lincoln Tp.*, 12 S. Dak. 460; *Bockoven v. Lincoln Tp.*, 13 S. Dak. 317; *Sullivan v. San Antonio*, (Tex. Civ. App. 1901) 62 S. W. Rep. 556.

In the absence of proof that land is enhanced in value by the laying out of a public road, the owner is entitled to the cost of fences made necessary by it. *Anderson v. Wharton County*, 27 Tex. Civ. App. 115.

2. Injuries from Improper Construction. — *Mordhurst v. Ft. Wayne, etc., Traction Co.*, 163 Ind. 268.

But where certain acts are beyond the author-

ity of a city to do, it cannot be held liable for negligence in doing them. *Betham v. Philadelphia*, 196 Pa. St. 302.

3. Compensation Recoverable in Action at Law. — *Montana R. Co. v. Freeser*, 29 Mont. 210; *Gregory v. Gulf, etc., R. Co.*, 21 Tex. Civ. App. 598.

**1130.** 1. Compensation for Injuring Access of Riparian Owner to Public Waters. — *Gawn v. Wilson*, 9 Ohio Dec. 683, 7 Ohio N. P. 33. Compare *Scranton v. Wheeler*, 179 U. S. 141.

2. Change of Use. — *U. S. v. Certain Lands*, 112 Fed. Rep. 622, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1130; *Newton v. Manufacturers' R. Co.*, (C. C. A.) 115 Fed. Rep. 781. See also *Matter of New York*, 168 N. Y. 134.

**1131.** 5. *Hepburn v. Jersey City*, 67 N. J. L. 114, quoting 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1131.

**Blockading Street.** — See *McKeon v. New York, etc., R. Co.*, 75 Conn. 343; *Knapp, etc., Mfg. Co. v. New York, etc., R. Co.*, 76 Conn. 311, 100 Am. St. Rep. 994.

**1132.** 1. Meaning of Terms Compensation, Just Compensation, Etc. — *Spring Valley Waterworks v. San Francisco*, 124 Fed. Rep. 574; *Phillips v. Scales Mound*, 195 Ill. 353.

Just compensation means a fair equivalent in money, which must be paid within a reasonable time after the taking, and it is not within the power of the legislature to substitute future obligations, bonds, or other valuable advantage. *Waterbury v. Platt*, 76 Conn. 435.

Nothing short of actual payment, or its equivalent, to the owner, of the damages assessed, constitutes compensation for property wrested from him under the power of eminent domain. *Brown v. Chicago, etc., R. Co.*, 66 Neb. 106.

**Compensation — Damages.** — In expropriation proceedings the question of the value of the land is distinct and separate from the question of damages. *Shreveport, etc., R. Co. v. Hinds*, 50 La. Ann. 781.

**Compensation Includes Costs.** — Just compensation includes all necessary costs and expenses incurred by the property owner in the enforcement of his rights, which are taxable according to law. *Stolze v. Milwaukee, etc., R. Co.*, 113 Wis. 44, 90 Am. St. Rep. 833.

2. **Condemnation Does Not Give Title.** — Compare *Shields v. Pittsburg*, 201 Pa. St. 328; *In re Delafield*, 109 Fed. Rep. 577.

**Manner of Payment Governed by Statute.** — The manner in which money must be paid or tendered in condemnation proceedings is governed by statute, not by common-law rules. *Stolze v. Milwaukee, etc., R. Co.*, 113 Wis. 44, 90 Am. St. Rep. 833.

**1133.** See note 1.

**3. Taking Property of State or Public Corporation — State Property. —**

See note 3.

**1135.** Property of Public Corporations. — See notes 2, 3, 4.

**1136.** 4. Time of Paying Compensation — *a.* BEFORE ENTRY — (1) *Constitutional Provisions.* — See note 1.

**1137.** (2) *General Rule — Prepayment or Tender.* — See note 1.

**1138.** (3) *"Prepayment" Refers to Time of Entry.* — See note 1.

**1139.** (5) *Payment into Court — Possession Pending Appeal.* — See note 1.

*b.* ENTRY BEFORE PAYMENT — (1) *In General.* — See note 2.

**1140.** Payment Within Reasonable Time. — See note 1.

**1133.** 1. *New York.* — Matter of Tuthill, 36 N. Y. App. Div. 492, affirmed 163 N. Y. 133; De Camp v. Dix, 159 N. Y. 436; People v. Calder, 89 N. Y. App. Div. 503.

*South Carolina.* — Goodale v. Sowell, 62 S. Car. 516.

*Tennessee.* — Watauga Water Co. v. Scott, 111 Tenn. 321, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1133; Barron v. Memphis, (Tenn. 1904) 80 S. W. Rep. 832.

*Texas.* — Houston v. Bartels, 36 Tex. Civ. App. 498.

*Utah.* — Fisher v. Bountiful City, 21 Utah 29. See also Chicago, etc., R. Co. v. Chappell, 124 Mich. 72.

**Owner Entitled to Compensation Though Taking Was Authorized by Government.** — The permission granted by the railway committee of the privy council for the crossing of a highway by a railway at a place where there are approaches to a bridge belonging to a private person does not deprive such person of his recourse for indemnity; and in default of a previous tender of such indemnity he may enjoin the railway company from constructing its crossing over the approaches to his bridge. Jones v. Atlantic, etc., R. Co., 12 Quebec Pr. 392.

**Rule in England.** — The intention of authorizing the taking of private property without compensation cannot be attributed to the legislature, unless it be expressed in unequivocal terms, and if an enactment is susceptible of two constructions, that will be adopted which contemplates compensation for the property taken. Public Works v. Logan, (1903) A. C. 355.

**3.** Such a grant must be made by legislative act. Com. v. Boston Terminal Co., 185 Mass. 281.

Where the fee of streets and alleys is in the public the legislature has unlimited control of the streets and alleys, and may grant a privilege of franchise in them (*e. g.*, to lay a pipe line) without providing for the payment of compensation. La Harpe v. Elm Tp. Gas, etc., Co., 69 Kan. 97, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1133.

**1135.** 2. Property Held by Municipality for Public — Compensation Not Required. — *In re* Certain Land, 119 Fed. Rep. 453; Heffner v. Cass County, 193 Ill. 439; Canton v. Canton Cotton Warehouse Co., 84 Miss. 268, 105 Am. St. Rep. 428; Zanesville v. Zanesville Tel., etc., Co., 64 Ohio St. 67, 83 Am. St. Rep. 725. See also Sydney Municipal Council v. Young, (1898) A. C. 457, 67 L. J. P. C. 40.

**3. Private Property of Public Corporations. —**

*In re* Condemnation Land, 128 Fed. Rep. 185; State v. District Ct., 77 Minn. 248.

**4.** Under Laws N. Y., 1882, c. 410, and Laws N. Y., 1897, c. 378, an award to the city of New York for property owned by it and taken under condemnation proceedings is sanctioned. Matter of Opening Edgcombe Road, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 119.

**1136.** 1. *Louisiana.* — The right to require payment before possession is taken cannot be defeated by mere consideration of public convenience. State v. Somerville, 104 La. 74.

**1137.** 1. *Prepayment or Tender.* — Birmingham Traction Co. v. Birmingham R., etc., Co., 119 Ala. 129; Meeker v. Chicago, 96 Ill. App. 23; *In re* Paseo, 78 Mo. App. 518; Chicago, etc., R. Co. v. Douglas County, (Neb. 1901) 95 N. W. Rep. 339; Hogsett v. Harlan County, (Neb. 1903) 97 N. W. Rep. 316; Kime v. Cass County, (Neb. 1904) 99 N. W. Rep. 546; Stolze v. Milwaukee, etc., R. Co., 104 Wis. 47.

Where on appeal the damages are increased over the amount awarded by the commissioners and paid into court, payment or tender of the difference between the two awards is necessary before the land can be finally appropriated. Heintz v. Terre Haute, 161 Ind. 44.

**1138.** 1. *Vesting of Title.* — Southern R. Co. v. Gregg, 101 Va. 308; Virginia-Carolina R. Co. v. Booker, 99 Va. 633.

**1139.** 1. *Payment into Court — Appeal.* — Postal Tel.-Cable Co. v. Southern R. Co., 89 Fed. Rep. 190, construing the law of North Carolina; Davidson v. Texas, etc., R. Co., 29 Tex. Civ. App. 54. But see Steinhart v. Superior Ct., 137 Cal. 575, 92 Am. St. Rep. 183.

**2. Entry Before Payment.** — Adirondack R. Co. v. New York, 176 U. S. 335 (declaring the rule as it exists in New York); Buckwalter v. School Dist. No. 42, 65 Kan. 603; Matter of Gilroy, 32 N. Y. App. Div. 216; People v. Adirondack R. Co., 160 N. Y. 225; Saunders v. Memphis, etc., R. Co., 101 Tenn. 206; Salt Lake City Water, etc., Co. v. Salt Lake City, 24 Utah 282.

**Provision for Payment Must Be Sure and Certain.** — The property owner cannot be relegated to the doubtful responsibility or solvency of a private corporation or individual. Brewster v. J. & J. Rogers Co., 169 N. Y. 73; Brown v. Chicago, etc., R. Co., 64 Neb. 62.

**1140.** 1. Where by statute compensation is required to be paid within six months of the date of the judgment, it need not be accepted after that time, but if accepted, the statutory provision will be considered waived, and the

- 1141.** (3) *Entry for Survey.* — See note 1.  
 (4) *In Case of Damaging Property.* — See note 2.  
**1142.** (5) *In Case of State or Municipality.* — See note 2.  
**1144.** (6) *Where Impossible to Estimate Damages in Advance.* — See note 1.  
*c.* **WAIVER OF PREPAYMENT.** — See note 2.  
**1145.** 5. **How Compensation Made** — *a.* **IN MONEY.** — See note 1.  
*b.* **SECURITY FOR PAYMENT** — **Right to Enter Under.** — See note 8.  
**1146.** **Bond Approved by the Court.** — See note 1.  
**Pending Appeal.** — See note 2.  
*c.* **JUDGMENT.** — See note 3.  
**1147.** 6. **Time with Reference to Which Compensation Is to Be Estimated** —  
*a.* **TIME OF TAKING OR ENTRY.** — See note 1.

proceedings ratified. *Cincinnati v. Hosea*, 10 Ohio Cir. Dec. 618, 19 Ohio Cir. Ct. 744.

**1141.** 1. **Entry for Survey.** — Under a statute permitting entry upon land for such a purpose, a railroad corporation cannot proceed to construct its road before commencing condemnation proceedings. *Robinson v. Southern California R. Co.*, 129 Cal. 8.

**2. Property Damaged or Injured.** — *Aldis v. Union El. R. Co.*, 203 Ill. 567; *Barfield v. Gleason*, 111 Ky. 491; *Riscie v. Texas Transp. Co.*, 27 Tex. Civ. App. 33.

**1142.** 2. **Condemnation by State or Public Corporation.** — *Fogarty v. Cincinnati*, 9 Ohio Dec. 753, 7 Ohio N. P. 33. See also *New Odorless Sewerage Co. v. Wisdom*, 30 Tex. Civ. App. 224.

**1144.** 1. **Where Damages Cannot Be Estimated in Advance.** — See *Vincent v. New York*, etc., R. Co., 77 Conn. 431.

**2. Waiver of Prepayment.** — *Williams v. Hutchinson*, etc., R. Co., 62 Kan. 412, 84 Am. St. Rep. 408, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1144; *Woolard v. Nashville*, 108 Tenn. 353; *Fairman v. Montreal*, 31 Can. Sup. Ct. 210, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1144; *Montreal v. Hogan*, 8 Quebec Q. B. 534, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1144.

**1145.** 1. **Payment in Money.** — *Oregon Short Line R. Co. v. Fox*, 28 Utah 311, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1145.

An agreement, duly carried out, that the county shall expend a stipulated sum in improving a road at the claimant's request and for his benefit, in lieu of damages, constitutes due compensation for land taken in laying out the road. *Welch v. Tippery*, 66 Neb. 604.

**8.** *State v. Sommerville*, 104 La. 74; *State v. Superior Ct.*, 26 Wash. 278.

**1146.** 1. **Bond to Secure Payment.** — *Ex p. Midland R. Co.*, (1904) 1 Ch. 61; *Salt Lake City Water*, etc., Co. v. *Salt Lake City*, 24 Utah 282.

A statute arbitrarily fixing the amount of the bond at five thousand dollars, in all cases, regardless of what may be the value of the rights appropriated, is not a sufficient compliance with the constitutional requirement. *Brewster v. J. & J. Rogers Co.*, 169 N. Y. 73.

**2. Possession Pending Appeal.** — *Savannah*, etc., R. Co. v. *Postal Tel. Cable Co.*, 115 Ga. 554; *Gulf*, etc., R. Co. v. *Southwestern Tel.*, etc., Co.,

25 Tex. Civ. App. 488; *Virginia-Carolina R. Co. v. Booker*, 99 Va. 633.

**Under a Constitutional Provision Requiring Prepayment** and designating a jury as the only legal agency for assessing compensation, no right to possession pending appeal exists. *Southern R. Co. v. Birmingham*, etc., R. Co., 130 Ala. 660.

**3. Judgment Not Compensation.** — See *Chandler v. Morey*, 195 Ill. 596.

**1147.** 1. **Valuation as of the Time of Taking** — *United States*. — *Benedict v. New York*, 98 Fed. Rep. 789, 39 C. C. A. 290, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1147.

*Alabama*. — *Southern R. Co. v. Cowan*, 129 Ala. 577.

*Iowa*. — *Van Husen v. Omaha Bridge*, etc., R. Co., 118 Iowa 366.

*Kentucky*. — *Richmond*, etc., Turnpike Co. v. *Madison County Fiscal Ct.*, 114 Ky. 351.

*Missouri*. — *St. Louis*, etc., R. Co. v. *Knapp-Stout*, etc., Co., 160 Mo. 396; *Miller v. St. Louis*, etc., R. Co., 162 Mo. 424.

*Nebraska*. — *Hogsett v. Harlan County*, (Neb. 1903) 93 N. W. Rep. 1001.

*New York*. — *Matter of New York*, 40 N. Y. App. Div. 281.

*Ohio*. — *Cincinnati*, etc., Turnpike Co. v. *Cincinnati*, 9 Ohio Dec. 259.

*Texas*. — *Gulf*, etc., R. Co. v. *Brugger*, 24 Tex. Civ. App. 367.

*Canada*. — *Rex v. Sedger*, 7 Can. Exch. 274; *McQuade v. Rex*, 7 Can. Exch. 318.

**When Taking Is Complete.** — The taking is complete when the commissioners decide that the land in question shall be taken. *Matter of New York*, 40 N. Y. App. Div. 281, 24 N. Y. App. Div. 7.

The date of the filing of the oath of the commissioners of appraisal is the date of the appropriation of the land. *Benedict v. New York*, 98 Fed. Rep. 789, 39 C. C. A. 290.

Damages for lands appropriated for a highway accrue at the date of the condemnation proceedings, without regard to the time when the road is actually opened. *Harlan County v. Hogsett*, 60 Neb. 362.

**Appropriation by City Ordinance.** — Compensation of property appropriated by a city ordinance for the use of the city should be made as of the date of the passage of the ordinance. *Toledo v. Bayer*, 5 Ohio Dec. 87, 7 Ohio N. P. 324.

**Land Expropriated by Lessee.** — Where the owner of the fee demised certain lands to the



**1148. b. TIME OF ASSESSMENT, APPRAISEMENT, OR TRIAL.** — See note 1.

*c. DATE OF FILING PETITION.* — See note 2.

*d. TIME OF PROJECTION OF THE WORK.* — See note 3.

**1149. g. WRONGFUL OCCUPANCY.** — See note 3.

**1150. 7. Measure and Elements of Compensation — a. ACCORDING TO THE INTEREST ACQUIRED — (1) Nature of the Estate Taken.** — See note 2.

**1151. Taking Perpetual Easement.** — See note 1.

(2) *Nature of Owner's Title — Easement upon the Land.* — See note 3.

*b. WHERE WHOLE TRACT IS TAKEN — (1) Market Value — (a) Generally.* — See note 4.

secretary of state for war, for twenty-one years at a stipulated rental, with a clause permitting surrender at the expiration of seven or fourteen years, and after the expiration of eleven years the secretary served notice to treat, it was held that the compensation payable to the owner in respect of the reserved rent should be assessed on the basis of a purchase at a point of time immediately before the notice to treat, and should be valued at the rent reserved on a lease for the unexpired term, taking into account the likelihood of the lease being determined sooner; and that all the circumstances of the case should be taken into consideration and that the arbitrator should find the reasonable value of the land to be purchased on the basis of what a purchaser would have given for it immediately before the notice to treat. *In re Athlone Rifle Range*, (1902) 1 Ir. R. 433.

**1148. 1. Time of Assessment.** — *Manhattan R. Co. v. Comstock*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 326, *affirmed* 74 N. Y. App. Div. 341.

**Enlargement of Street.** — In assessing the costs of expropriating land taken for the enlargement of a street, it is the value of the property at the time the assessment-roll was made up that is to be considered and not the value the property had at the time of the expropriation. *Bélanger v. Montreal*, 15 Quebec Super. Ct. 43.

**2. Date of Filing Petition.** — *Muncie Natural Gas Co. v. Allison*, 31 Ind. App. 50.

**3. Time of Projection of Work.** — *Mowry v. Boston*, 173 Mass. 425.

**1149. 3. Time of Lawful Taking.** — *Shevaller v. Postal Tel. Co.*, 22 Pa. Super. Ct. 506.

**1150. 2. Nature of Estate Taken to Be Considered.** — *Sexton v. Union Stock Yard, etc.*, Co., 200 Ill. 244, *citing* 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1150.

The owners of the fee are entitled to a substantial award, notwithstanding any easements which may exist in the land in favor of other parties. *Matter of Opening Trinity Ave.*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 56, *reversed* 81 N. Y. App. Div. 215; *Matter of Acquiring Title to Summit Ave.*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 59, *reversed* 84 N. Y. App. Div. 455.

**Arrears of Rent Due.** — In fixing the compensation for lands compulsorily taken for the defense of the realm, the arbitrators cannot take into account the existence of arrears of rent due to the owner by lessees or tenants of the lands taken and which are rendered irrecoverable by the taking. *In re Kilworth Rifle Range*, (1899) 2 Ir. R. 305.

**1151. 1. Taking Perpetual Easement.** — *Sexton v. Union Stock Yard, etc.*, Co., 200 Ill. 244; *Missouri, etc.*, R. Co. *v. Schmuck*, 69 Kan. 272, *quoting* 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1150; *Barrall v. Quick*, 111 Ky. 22; *Guthrie, etc.*, R. Co. *v. Faulkner*, 12 Okla. 532.

**3. Title Burdened by Easement.** — *Matter of Opening North Fifth St.*, 64 N. Y. App. Div. 611.

**Where There Is a Restrictive Covenant Running with the Land**, that fact should be taken into consideration in fixing the compensation. *Chandler's Wiltshire Brewery Co. v. London County Council*, (1903) 1 K. B. 569.

**The Owner of a Right of Way Is Entitled to Compensation** for interference with his use and enjoyment of the easement. Thus, one who has the right to use an occupation road over land which has been taken by a railway, has a sufficient interest in such land to be entitled to compensation for interference with his use of such occupation road by reason of the running of trains thereon by the railway company. He is not entitled, however, to an injunction restraining the railway from using the road. *Barnard v. Great Western R. Co.*, 86 L. T. N. S. 798.

**4. Market Value — United States.** — *Sharpe v. U. S.*, 112 Fed. Rep. 893, 50 C. C. A. 597; *U. S. v. Honolulu Plantation Co.*, 122 Fed. Rep. 581, 58 C. C. A. 279.

*California.* — *Kishlar v. Southern Pac. R. Co.*, 134 Cal. 636; *Santa Ana v. Brunner*, 132 Cal. 234.

*Illinois.* — *Lanquist v. Chicago*, 200 Ill. 69.

*Louisiana.* — *Louisiana R., etc., Co. v. Jones*, 113 La. 29.

*Massachusetts.* — *Conness v. Com.*, 184 Mass. 541.

*New York.* — *In re New York*, (Supm. Ct. App. Div.) 54 N. Y. Supp. 1066.

*Texas.* — *Sullivan v. Missouri, etc.*, R. Co., 29 Tex. Civ. App. 429.

*Canada.* — *Eldon v. North-Eastern R. Co.*, 80 L. T. N. S. 723; *In re Athlone Rifle Range*, (1902) 1 Ir. Rep. 433; *Reg. v. Harwood*, 6 Can. Exch. 420.

When it is attempted to prove value the evidence in that respect should be limited to market value. *Dallis v. Taylor*, (Tex. Civ. App. 1902) 69 S. W. Rep. 1005.

**Appropriation of Timber.** — Where timber is appropriated by the state the measure of damages is the value of the timber as it was upon the stump, with interest on the amount from the time of the appropriation. *Turner v. State*, 67 N. Y. App. Div. 393.

**1152.** (b) **What Is Market Value.** — See notes 1, 2.

**1153.** (c) **Means of Estimating** — *aa.* IN GENERAL — Value of the Property to the Present Owner. — See note 1.

The Value Which the Owner Places upon It. — See note 3.

The Owner's Willingness or Unwillingness to Sell. — See notes 4, 6.

**1154.** *bb.* ADMISSIONS BY OWNER. — See note 1.

*cc.* OFFERS TO PURCHASE — By Third Parties. — See note 3.

*dd.* VALUATION FOR TAXATION. — See note 4.

**1155.** Valuation by Commissioners. — See note 1.

**Sentimental Value.** — Where land is shown to have a market value capable of ascertainment, its sentimental value as an old homestead is not an element proper for the consideration of the jury. *Cane Belt R. Co. v. Hughes*, 31 Tex. Civ. App. 565.

**Historic Association** may be considered in determining the market value of the land. *Five Tracts Land v. U. S.*, 101 Fed. Rep. 661, 41 C. C. A. 580.

**The Yearly Rental May Be Used as a Basis for Calculating the Value of the Land.** — *Eldon v. North-Eastern R. Co.*, 80 L. T. N. S. 723.

**1152. 1. Meaning of "Market Value."** — *Five Tracts Land v. U. S.*, 101 Fed. Rep. 661, 41 C. C. A. 580; *Sharpe v. U. S.*, 112 Fed. Rep. 893, 50 C. C. A. 597; *Phillips v. Scales Mound*, 195 Ill. 353; *Kennebec Water Dist. v. Waterville*, 97 Me. 185 citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1152; *Kansas City v. Bacon*, 157 Mo. 450; *Wray v. Knoxville*, etc., R. Co., 113 Tenn. 544.

**2. What the Property Would Bring at a Fair Public Sale.** — *Conness v. Indiana*, etc., R. Co., 193 Ill. 464.

**The Market Value of Personal Property** is what could be realized on it in the market, less the cost of getting it there. *Lehigh Coal Co. v. Wilkes Barre*, etc., R. Co., 187 Pa. St. 145.

**Average of Witnesses' Estimates.** — The assessment of damages by taking the average of the estimates made by the witnesses examined is wrong in principle. *Fairman v. Montreal*, 31 Can. Sup. Ct. 210.

**1153. 1. Not Value to Future Owner.** — *Five Tracts Land v. U. S.*, 101 Fed. Rep. 661, 41 C. C. A. 580; *St. Louis*, etc., R. Co. *v. Knapp-Stout*, etc., Co., 160 Mo. 396; *Matter of Daly*, 72 N. Y. App. Div. 394; *Chambersburg*, etc., Turnpike Road, 20 Pa. Super. Ct. 173; *Texas*, etc., R. Co. *v. Postal Tel. Cable Co.*, (Tex. Civ. App. 1899) 52 S. W. Rep. 108; *San Antonio*, etc., R. Co. *v. Southwestern Tel.*, etc., Co., (Tex. Civ. App. 1900) 56 S. W. Rep. 201; *Reg. v. Harwood*, 6 Can. Exch. 420.

The compensation to be paid is not the value of the land to any particular company or individual, whether plaintiff, defendant, or anybody else, but the market value. *U. S. v. Honolulu Plantation Co.*, 122 Fed. Rep. 581, 58 C. C. A. 279.

Evidence as to the cost of filling up and improving the land to make it suitable for the purposes for which the expropriator desires the same is incompetent. *Brown v. Illinois*, etc., R. Co., 209 Ill. 402.

**3. Owner's Valuation.** — *Louisiana R.*, etc., Co. *v. Jones*, 113 La. 20.

What the owner will take for his property

does not tend to establish its market value. *Eastern Texas R. Co. v. Scurlock*, (Tex. Civ. App. 1903) 75 S. W. Rep. 366.

The owner cannot be asked if he would take a certain sum for the land. *Rice v. Norfolk*, etc., R. Co., 130 N. Car. 375.

**4. Willingness or Unwillingness to Sell.** — *Illinois*, etc., R. Co. *v. Easterbrook*, 211 Ill. 624. But see *Rex v. Sedger*, 7 Can. Exch. 274.

**6. Compromise Offers.** — *St. Louis*, etc., R. Co. *v. Eby*, 152 Mo. 606.

**1154. 1. Admissions of Owner as to Value.** — *Houston v. Western Washington R. Co.*, 204 Pa. St. 324, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1154.

**3. Offers to Purchase.** — *Sharpe v. U. S.*, 191 U. S. 341, affirming 112 Fed. Rep. 893, 50 C. C. A. 597; *Loloff v. Sterling*, 31 Colo. 102; *Sullivan v. Missouri*, etc., R. Co., 29 Tex. Civ. App. 429.

**Bona Fide Offers Made Near Time of Assessment.** — Testimony as to what the owner was offered for the property five years before the time at which the value is to be ascertained is not competent. *Eastern Texas R. Co. v. Eddings*, 30 Tex. Civ. App. 170.

**4. A Valuation Made Without the Owner.** — *Haggard v. Independent School Dist.*, 113 Iowa 486; *Suffolk*, etc., R. Co. *v. West End Land*, etc., Co., 137 N. Car. 330; *Wray v. Knoxville*, etc., R. Co., 113 Tenn. 544. But see *King v. Turnbull Real Estate Co.*, 8 Can. Exch. 163; *Levee Comrs v. Jackson*, 113 La. 124.

**A Valuation Made by Owner Himself Returned to Assessor.** — *Chambersburg*, etc., Turnpike Road, 20 Pa. Super. Ct. 173. See also *Haggard v. Independent School Dist.*, 113 Iowa 486.

While the renditions made by the landowner of the property for taxes are admissible in evidence, he should be allowed to show in rebuttal that not he, but the assessor, put the valuation on the property. *Boyer v. St. Louis*, etc., R. Co., 97 Tex. 107.

**Extent to Which Assessed Value May Be Considered.** — In fixing the compensation for land expropriated, the court may look at the assessed value of the land, not as a determining consideration, but as affording some assistance in arriving at a fair valuation of it. *Rex v. Turnbull Real Estate Co.*, 8 Can. Exch. 163.

**1155. 1. Valuation by Commissioners.** — *Sharp v. U. S.*, 191 U. S. 341, affirming 112 Fed. Rep. 893, 50 C. C. A. 597. See also *Kansas City Suburban Belt R. Co. v. McElroy*, 161 Mo. 584.

**The Award of Commissioners in condemnation proceedings** cannot be considered on appeal on the question of damages. *Northern Pac. R. Co. v. Duncan*, 87 Minn. 91.

**1155.** *cc.* PRICE PAID FOR THE LAND BY OWNER — Consideration Provable. — See note 2.

*ff.* PRICE PAID FOR SIMILAR LANDS IN VICINITY. — See note 4.

**1156.** Must Be in Same Vicinity. — See note 1.

Price Paid for Similar Land Not to Be Considered. — See note 2.

Consideration of Such Facts Discretionary. — See note 3.

Evidence of Other Purchases by Condemning Company. — See note 4.

**1157.** Offers to Sell. — See note 2.

*gg.* OPINION EVIDENCE. — See notes 3, 4, 5.

**1155.** 2. Price Paid by Owner. — See *Kennebec Water Dist. v. Waterville*, 97 Me. 185.

Evidence of the price paid for the property seven years before the condemnation proceedings is inadmissible. *Lanquist v. Chicago*, 200 Ill. 69; *Sullivan v. Missouri*, etc., R. Co., 29 Tex. Civ. App. 429.

4. Price Paid for Similar Property. — *Loloff v. Sterling*, 31 Colo. 102; *Paducah v. Allen*, 111 Ky. 361, 98 Am. St. Rep. 422; *Chicago*, etc., R. Co. v. *Rottgering*, 83 S. W. Rep. 584, 26 Ky. L. Rep. 1167; *Sullivan v. Missouri*, etc., R. Co., 29 Tex. Civ. App. 429, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1155; *Newbold v. International*, etc., R. Co., 34 Tex. Civ. App. 525, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1155; *St. Louis Southwestern R. Co. v. Hughes*, (Tex. Civ. App. 1903) 73 S. W. Rep. 976. Compare *Lorain St. R. Co. v. Sinning*, 6 Ohio Cir. Dec. 753.

Cross-examination as to Sales of Similar Property. — In weakening opinion values, it is competent to show by witnesses the fact of sales of neighboring land of like quality, and the actual purchase price. *Levee Com'rs v. Nelms*, 82 Miss. 416.

Must Be Voluntary Sales. — In order to justify proof of such other sales as a basis of determining value it must appear that they were not compulsory, but voluntary. *Lanquist v. Chicago*, 200 Ill. 69.

The Introduction of Deeds to show value, by their recitals of consideration paid for neighborhood land, is obviously incompetent. *Levee Com'rs v. Nelms*, 82 Miss. 416; *New Orleans v. Manfre*, 111 La. 927.

**1156.** 1. Sale Must Have Been Near in Time and Place. — Evidence of sales of other property is not admissible unless it first be shown that such other property is substantially similar to the property condemned in those particulars which affect its value. *Newbold v. International*, etc., R. Co., 34 Tex. Civ. App. 525.

2. Price of Similar Land Not Considered. — *Union Pac. R. Co. v. Stanwood*, (Neb. 1904) 98 N. W. Rep. 656, vacating judgment (Neb. 1902) 91 N. W. Rep. 191; *Robinson v. New York El. R. Co.*, 175 N. Y. 219; *Hewitt v. Pittsburg*, etc., R. Co., 19 Pa. Super. Ct. 304.

3. Discretion of Tribunal. — The court may in its discretion require the differences and similarities to be shown before receiving proof of the amount paid for other lots. *Millard v. Webster City*, 113 Iowa 220.

4. Other Purchases by Condemning Party. — *U. S. v. Freeman*, 113 Fed. Rep. 370; *Schuster v. Sanitary Dist.*, 177 Ill. 626; *Illinois*, etc., R. Co. v. *Humiston*, 208 Ill. 100.

**1157.** 2. Offers to Sell Excluded. — *Sullivan v. Missouri*, etc., R. Co., 29 Tex. Civ. App. 429.

3. *Lorain St. R. Co. v. Sinning*, 6 Ohio Cir. Dec. 753; *Foot v. Lorain*, etc., R. Co., 11 Ohio Cir. Dec. 685; *Crary v. Port Arthur Channel*, etc., Co., (Tex. Civ. App. 1899) 49 S. W. Rep. 703; *Texas*, etc., R. Co. v. *Maddox*, 26 Tex. Civ. App. 297; *Eastern Texas R. Co. v. Eddings*, 30 Tex. Civ. App. 170.

It is immaterial whether such testimony is given in the form of damages sustained or the value of the land before and after condemnation. *Schuler v. Lincoln Tp.*, 12 S. Dak. 460; *Wray v. Knoxville*, etc., R. Co., 113 Tenn. 544. But see *Richardson v. Webster City*, 111 Iowa 427; *Millard v. Webster City*, 113 Iowa 220; *Illinois Cent. R. Co. v. Smith*, 110 Ky. 203.

Land Should Be Valued as a Whole. — The property owner is entitled to have his land valued as a whole, and it is error for the witnesses to value it in detached parcels. *Lough v. Minneapolis*, etc., R. Co., 116 Iowa 31.

Different Classes of Property May Be Valued Separately. — But where different classes of property are taken, witnesses may be allowed to fix a value upon each different class. *Seattle*, etc., R. Co. v. *Roeder*, 30 Wash. 244, 94 Am. St. Rep. 864.

Must Be Based on Existing Facts. — Such opinion evidence must be based upon existing facts, and not merely speculative, based upon an assumption and theory as to facts that may or may not exist in the future. *St. Louis*, etc., R. Co. v. *Vaughan*, (Ark. 1903) 72 S. W. Rep. 575.

Opinion Evidence Does Not Depend on Sales of Similar Property. — If no sales of similar property in the vicinity have been made, opinion evidence of real value is none the less admissible. *Levee Com'rs v. Nelms*, 82 Miss. 416.

Opinion Should Be as to Cash Value. — It is the cash value on a sale made on reasonable notice that should be inquired of. *Levee Com'rs v. Hendricks*, 77 Miss. 483.

A witness should not be permitted to give his opinion as to what would be the yield of the land in corn or cotton or other crops. *Levee Com'rs v. Hendricks*, 77 Miss. 483.

4. Value of Land Not a Question for Experts Only. — *Wickstrum v. Carter*, 9 Kan. App. 439.

Testimony as to the Purposes for Which the Land May Be Used and as to its value for such purposes may be given by one who properly qualifies as an expert. *Foot v. Lorain*, etc., R. Co., 11 Ohio Cir. Dec. 685.

5. *Colorado*. — *Loloff v. Sterling*, 31 Colo. 102.

*District of Columbia*. — *Eckington*, etc., R. Co. v. *McDevitt*, 18 App. Cas. (D. C.) 497.

*Kansas*. — *Wickstrum v. Carter*, 9 Kan. App. 439.

*Kentucky*. — *Paducah v. Allen*, 111 Ky. 361, 98 Am. St. Rep. 422.



**1158.** See note 1.(a) **Condition and Quality of the Land** — *aa.* MINERAL LAND. — See note 2.*bb.* IMPROVEMENTS. — See note 4.**Cost of Removal.** — See note 5.**1159.** If He Prefers to Leave the Improvements. — See note 1.*cc.* GROWING CROPS AND TREES. — See notes 2, 3, 4.*dd.* IMPROVEMENTS MADE BY COMPANY — **Where Company Acts under License or****Authority of Owner.** — See note 5.*Massachusetts.* — *Muskeget Island Club v. Nantucket*, 185 Mass. 303.*Mississippi.* — *Levee Com'rs v. Dillard*, 76 Miss. 641, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1157; *Levee Com'rs v. Nelms*, 82 Miss. 416, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1157.*Missouri.* — *Robinson v. St. Joseph*, 97 Mo. App. 503; *Schrodt v. St. Joseph*, 109 Mo. App. 627. See also *Taylor v. Jackson*, 83 Mo. App. 641.*Montana.* — *Sweeney v. Montana Cent. R. Co.*, 25 Mont. 543.*Nebraska.* — *South Omaha v. Rutljen*, (Neb. 1904) 99 N. W. Rep. 240.*Pennsylvania.* — *Gearhart v. Clear Spring Water Co.*, 202 Pa. St. 292; *Friday v. Pennsylvania R. Co.*, 204 Pa. St. 405; *Smith v. Pennsylvania R. Co.*, 205 Pa. St. 645; *Leiby v. Clear Spring Water Co.*, 205 Pa. St. 634.*Texas.* — *Calvert, etc., R. Co. v. Smith*, (Tex. Civ. App. 1902) 68 S. W. Rep. 68. See also *Cluck v. Houston, etc., R. Co.*, 34 Tex. Civ. App. 452.*Washington.* — *Seattle, etc., R. Co. v. Roeder*, 30 Wash. 244, 94 Am. St. Rep. 864.**Farmers Who Reside in the Vicinity.** — *Kay v. Glade Creek, etc., R. Co.*, 47 W. Va. 467.**Any Person Who Is Shown to Be Familiar with the Value of Any Particular Piece of Land.** — *Chicago, etc., R. Co. v. Buel*, 56 Neb. 205.Unless the witness is in possession of information as to the market value of the land prior as well as subsequent to the construction of the road, he is incompetent. *Shimer v. Easton R. Co.*, 205 Pa. St. 648.But if the witnesses are ignorant of the market value of the property in question, their testimony is inadmissible, although they are acquainted with the property and how the railroad crosses it. *Chicago, etc., R. Co. v. Douglass*, 33 Tex. Civ. App. 262.**Elements of Opinion Evidence.** — The fact of sales is not always the only factor in determining the weight of the testimony of a witness as to value. A witness may, in forming his opinion, consider the uses and capabilities of the property, as well as the prices at which like property in the neighborhood has been sold. He may also base his opinion of value upon his knowledge or observation of the growth and development of towns and cities, a general knowledge of trade and business, rental value, the interest which the land would pay upon an investment, its productiveness, ease of cultivation, its situation in a particular community, and other elements. *Illinois, etc., R. Co. v. Humiston*, 208 Ill. 100. See also *Cochrane v. Com.*, 175 Mass. 299, 78 Am. St. Rep. 491.**1158.** 1. *Connex v. Com.*, 184 Mass. 541; *Lakeside Mfg. Co. v. Worcester*, 186 Mass. 552.**Necessary Qualification.** — Ordinarily the proper way to qualify a witness to testify as to the value of property is to show that he is familiar with sales of similar property and the prices paid therefor. *Cochrane v. Com.*, 175 Mass. 299, 78 Am. St. Rep. 491.The opinions of witnesses as to the value of land should be admitted only when given by persons acquainted with the particular land, and who have knowledge of the value thereof. *Levee Com'rs v. Dillard*, 76 Miss. 641.**2. Mining Land.** — *Seattle, etc., R. Co. v. Roeder*, 30 Wash. 244, 94 Am. St. Rep. 864, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1158.**4. Value Not Cost of Improvements.** — *Orleans, etc., R. Co. v. Jefferson, etc., R. Co.*, 51 La. Ann. 1605.**For the Purpose of Showing the Value of the Land with the Improvements** and the value of the improvements to the land, the cost of the improvements and their utility may be proved. *Foote v. Lorain, etc., R. Co.*, 11 Ohio Cir. Dec. 685, 21 Ohio Cir. Ct. 319.**5.** *St. Louis v. Brown*, 155 Mo. 545. *Contra*, *White v. Cincinnati, etc., R. Co.*, 34 Ind. App. 287.**1159.** 1. *Matter of New York*, 39 N. Y. App. Div. 589.An owner of land cannot recover for improvements placed thereon after the passage of an ordinance appropriating such land for a street. *Toledo v. Bayer*, 5 Ohio Dec. 87, 7 Ohio N. P. 324; *In re New York*, (Supm. Ct. App. Div.) 54 N. Y. Supp. 1066; *New York Cent., etc., R. Co. v. State*, 37 N. Y. App. Div. 57.Where land belonging to a railroad is taken for the purpose of widening a street, the company is entitled to the value of the abutments on the land, as well as to the value of the land. *New York, etc., R. Co. v. Blackstone*, 184 Mass. 491.**2. Spring.** — The jury may take into account a spring on the land, for the uses it may have, in estimating the value of the land. *Kansas City v. Bacon*, 157 Mo. 450; *Leiby v. Clear Spring Water Co.*, 205 Pa. St. 634.**Well.** — The cost of a well on land appropriated may be shown in determining the amount of damages. *Foote v. Lorain, etc., R. Co.*, 11 Ohio Cir. Dec. 685, 21 Ohio Cir. Ct. 319.**3.** *Foote v. Lorain, etc., R. Co.*, 11 Ohio Cir. Dec. 685, 21 Ohio Cir. Ct. 319.**4. Fences and Trees Not Considered.** — It has been held that in expropriation of vacant land indemnity cannot be granted for the fences surrounding it, nor for the trees standing on it, since though they add to the value of the land they cannot be considered in the estimated damages. *Montreal v. Baxter*, 15 Quebec Super. Ct. 149.**5.** *Chicago, etc., R. Co. v. Vaughn*, 206 Ill.

**1159.** Without Consent of Owner. — See note 6.

**1161.** *ee.* USES TO WHICH LAND IS ADAPTED — Location. — See note 1.

Special Adaptation from Improvements. — See note 2.

Adaptation from Quality of Land. — See note 3.

234; Omaha Bridge, etc., *Co. v. Whitney*, (Neb. 1903) 94 N. W. Rep. 513; (Neb. 1904) 99 N. W. Rep. 525.

License from Life Tenant. — *U. S. v. Smith*, 110 Fed. Rep. 338. See also *Charleston*, etc., R. Co. *v. Hughes*, 105 Ga. 1, 70 Am. St. Rep. 17.

**1159.** 6. Improvements Made Before Condemnation Without Owner's Consent. — *St. Louis*, etc., R. Co. *v. Nyce*, 61 Kan. 394; *Cochran v. Missouri*, etc., R. Co., 94 Mo. App. 469; *Burns v. School Dist. No. 18*, 61 Neb. 351; *Seattle*, etc., R. Co. *v. Corbett*, 22 Wash. 189; *Lake Whatcom Logging Co. v. Callvert*, 33 Wash. 126. See also *Illinois Cent. R. Co. v. Hoskins*, 80 Miss. 730, 92 Am. St. Rep. 612.

**1161.** 1. Property Suitable for Special Uses. — *Chicago*, etc., R. Co. *v. Rottering*, 83 S. W. Rep. 584, 26 Ky. L. Rep. 1167; *New York*, etc., R. Co. *v. Blacker*, 178 Mass. 386; *Eastern Texas R. Co. v. Eddings*, 30 Tex. Civ. App. 170; *Eastern Texas R. Co. v. Scurlock*, (Tex. Civ. App. 1903) 75 S. W. Rep. 366; *Richmond*, etc., R. Co. *v. Chamblin*, 100 Va. 401.

It is proper to consider the present condition of the locality as to business and demand for property, and also any increase or development thereof that may be expected in the immediate future. *Sullivan v. Missouri*, etc., R. Co., 29 Tex. Civ. App. 429; *St. Louis Southwestern R. Co. v. Hughes*, (Tex. Civ. App. 1903) 73 S. W. Rep. 976.

Evidence that property was within two squares of a paved street, and close to good houses, is admissible as tending to increase the value of such property. *Suffolk*, etc., R. Co. *v. West End Land*, etc., Co., 137 N. Car. 330.

**Plottage Value.** — Where several contiguous lots are condemned, the owner may present his claim for the value of the lots considered as one parcel, and thus entitle himself to the plottage value; or he may claim the value of each lot and each building thereon, in which case he is not entitled to the plottage value. *Matter of Armory Board*, 73 N. Y. App. Div. 152.

**2. Adapted to Greenhouses.** — Where property used for greenhouses is taken, evidence of the value of the plants, flowers, and potted soil on the premises, and of the amount of business done, is admissible as bearing upon the question of the capacity of the real estate for use. *Pegler v. Hyde Park*, 176 Mass. 101.

**3. Adaptation from Quality of Land** — *United States*. — *Five Tracts Land v. U. S.*, 101 Fed. Rep. 661, 41 C. C. A. 580.

*Illinois*. — *Rock Island*, etc., R. Co. *v. Leisy Brewing Co.*, 174 Ill. 547; *Galesburg*, etc., R. Co. *v. Milroy*, 181 Ill. 243; *Phillips v. Scales Mound*, 195 Ill. 353.

*Indiana*. — *Chicago*, etc., R. Co. *v. Curless*, 27 Ind. App. 306.

*Iowa*. — *Lough v. Minneapolis*, etc., R. Co., 116 Iowa 31.

*Kansas*. — *Lake Koen Nav.*, etc., Co. *v. McLain Land*, etc., Co., 69 Kan. 334.

*Massachusetts*. — *Cochrane v. Com.*, 175 Mass. 299, 78 Am. St. Rep. 491; *Fosgate v.*

*Hudson*, 178 Mass. 225; *Conness v. Com.*, 184 Mass. 541; *Muskeget Island Club v. Nantucket*, 185 Mass. 303.

*Minnesota*. — *Conan v. Ely*, 91 Minn. 127.

*Missouri*. — *Cochran v. Missouri*, etc., R. Co., 94 Mo. App. 469.

*Montana*. — *Sweeney v. Montana Cent. R. Co.*, 25 Mont. 543.

*New York*. — *Syracuse v. Stacey*, 45 N. Y. App. Div. 249, affirmed 169 N. Y. 231.

*Ohio*. — *Foot v. Lorain*, etc., R. Co., 11 Ohio Cir. Dec. 685.

*Pennsylvania*. — *Reiber v. Butler*, etc., R. Co., 201 Pa. St. 49; *Gearhart v. Clear Spring Water Co.*, 202 Pa. St. 292.

*Tennessee*. — *McKinney v. Nashville*, 102 Tenn. 131, 73 Am. St. Rep. 859; *Wray v. Knoxville*, etc., R. Co., 113 Tenn. 544.

*Texas*. — *Sullivan v. Missouri*, etc., R. Co., 29 Tex. Civ. App. 429; *Boyer v. St. Louis*, etc., R. Co., 97 Tex. 107.

*Canada*. — *Rex v. Turnbull Real Estate Co.*, 8 Can. Exch. 163.

The purposes for which the land is adapted or may be used are immaterial, unless such purposes actually affect the present cash value of the property. *Illinois*, etc., R. Co. *v. Freeman*, 210 Ill. 270.

Where a water power is appropriated the value thereof for any purpose for which it may be applied should be considered, and not merely the chance of selling it. *Hall v. State*, 72 N. Y. App. Div. 360.

**The Intention of the Owner to Use the Land for a Particular Purpose** may be taken into consideration in fixing the compensation to which he is entitled, though he has done nothing toward carrying such intention into execution. *Bailey v. Isle of Thanet Light R. Co.*, (1900) 1 Q. B. 722.

**Adaptability of Land to Purpose for Which It Is Taken.** — Where land is compulsorily taken for the purpose of making a reservoir, the fact that the land has peculiar natural advantages for reservoir purposes, apart from any value created or enhanced by the scheme or act under which the expropriators are proceeding may be taken into consideration in the assessment of compensation; and it is not necessary to prove that the land could be used similarly by other specified corporations having a similar object. In order to exclude such an element of value from consideration, it must be shown that there is no reasonable possibility of a market for the land for reservoir purposes apart from the particular scheme under which it is taken. *Gough v. Aspatia*, etc., Water Board, (1904) 1 K. B. 417, affirming (1903) 1 K. B. 574.

Where a corporation takes several parcels of land for reservoir purposes, and one of the parcels is not of itself, standing alone, adapted to such purposes, but is so adapted when taken in connection with the other parcels, in fixing the compensation for such parcel it is proper to take into consideration the fact it has a special value for reservoir purposes when taken in connec-

**1162.** Illustrations. — See notes 4, 7, 8.

**1163.** Value as Shown from Profits. — See note 1.

But in Some Cases Evidence of Profits Has Been Allowed. — See note 2.

Condition of the Business. — See notes 4, 5.

Evidence of the Intended Use. — See note 6.

Prospective or Speculative Value. — See note 7.

*ff.* DISADVANTAGE RENDERING THE LAND LESS VALUABLE. — See note 8.

**1164.** (2) *Temporary Use*. — See note 3.

*c.* WHERE PART OF TRACT IS TAKEN — (1) *Depreciation in Market Value*. — See note 4.

tion with the adjoining lands. It would not be right to disregard such reservoir value merely because the land would have no such value apart from the other lands. *Tynemouth v. Northumberland*, 89 L. T. N. S. 557.

**1162. 4. The Possibility that the Land May Cease to Be Used for Church Purposes** may be considered. *City, etc., R. Co. v. St. Mary Woolnoth*, (1903) 2 K. B. 728.

**7. Railroad Purposes.** — *Orleans, etc., R. Co. v. Jefferson, etc., R. Co.*, 51 La. Ann. 1605.

**8. Residence Purposes.** — *Rex v. Turnbull Real Estate Co.*, 8 Can. Exch. 163.

**1163. 1. Profits Not Proper Evidence of Value.** — *Sauer v. New York*, 44 N. Y. App. Div. 305; *Syracuse v. Stacey*, 45 N. Y. App. Div. 249, *affirmed* 169 N. Y. 231; *Kossler v. Pittsburg, etc., R. Co.*, 208 Pa. St. 50.

**2. Franchise Taken — Evidence of Profits Allowed.** — The value of a franchise depends upon its net earning power, present and prospective, developed and capable of development at reasonable rates. *Kennebec Water Dist. v. Waterville*, 97 Me. 185.

**Exclusive Franchise — Evidence of Profits Not Allowed.** — The earnings of a company which is in the enjoyment of what is practically an exclusive franchise are not a fair criterion of the "fair value" of the property, apart from an exclusive franchise. *Gloucester Water-Supply Co. v. Gloucester*, 179 Mass. 365.

**4.** In estimating the value of a water plant allowance should be made for the fact that the system is a going concern with a profitable business established, and with a present income assured and now being earned. *Kennebec Water Dist. v. Waterville*, 97 Me. 185.

**5. Good Will.** — So far as a water system is practically exclusive, the element of good will should not be considered. *Kennebec Water Dist. v. Waterville*, 97 Me. 185.

**6. Intended Use.** — See *Dallas Terminal R., etc., Co. v. Mosher Mfg. Co.*, (Tex. Civ. App. 1901) 60 S. W. Rep. 893.

**7. Speculative Value.** — *Five Tracts Land v. U. S.*, 101 Fed. Rep. 661, 41 C. C. A. 580; *Mobile, etc., R. Co. v. Postal Tel. Cable Co.*, 120 Ala. 21; *St. Louis, etc., R. Co. v. Knapp-Stout, etc., Co.*, 160 Mo. 396; *Hamilton v. Pittsburg, etc., R. Co.*, 190 Pa. St. 51; *Richmond, etc., Electric R. Co. v. Seaboard Air Line R. Co.*, 103 Va. 399.

A plan of a possible, but largely imaginary, development of a tract of land is inadmissible. *Sexton v. Union Stock Yard, etc., Co.*, 200 Ill. 244.

It is improper to arrive at the amount of damages by estimating the number of lots into which the whole tract or any part thereof might

be divided, and then estimating what such lots might in the future be sold for. *Reiber v. Butler, etc., R. Co.*, 201 Pa. St. 49.

**8. That Premises Are Subject to Inundation** is an element proper for consideration on the question of value. *Schuster v. Sanitary Dist.*, 177 Ill. 626.

**1164. 3. Measure of Compensation for Temporary Use.** — The reasonable value of the use of the premises to the owner for the purposes of the business for which he was using them is the value for the diminution of which, caused by temporary interruption of access, compensation should be made. *Vincent v. New York, etc., R. Co.*, 77 Conn. 431.

The rule of damage for the temporary occupation of land is the rental value of the land actually occupied and the reduction in the rental value of the remaining land. *Leigh v. Garysburg Mfg. Co.*, 132 N. Car. 167.

**4. Depreciation in Market Value — Illinois.** — *Chicago, etc., Electric R. Co. v. Mawman*, 206 Ill. 182; *Illinois, etc., R. Co. v. Easterbrook*, 211 Ill. 624.

*Iowa.* — *Bennett v. Marion*, 106 Iowa 628.

*Kentucky.* — *Chicago, etc., R. Co. v. Rottgering*, 83 S. W. Rep. 584, 26 Ky. L. Rep. 1167.

*Massachusetts.* — *Cochrane v. Com.*, 175 Mass. 299, 78 Am. St. Rep. 491.

*Missouri.* — *St. Louis, etc., R. Co. v. Knapp-Stout, etc., Co.*, 160 Mo. 396.

*Nebraska.* — *Chicago, etc., R. Co. v. Buel*, 56 Neb. 205.

*New York.* — *Matter of New York*, 39 N. Y. App. Div. 589, *citing* 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1164; *Syracuse v. Stacey*, 45 N. Y. App. Div. 249, *citing* 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1164, *affirmed* 169 N. Y. 231; *Lenhart v. State*, 75 N. Y. App. Div. 162.

*Ohio.* — *Lorain St. R. Co. v. Sinning*, 6 Ohio Cir. Dec. 753, 17 Ohio Cir. Ct. 649.

*Pennsylvania.* — *Reiber v. Butler, etc., R. Co.*, 201 Pa. St. 49.

*Texas.* — *Crary v. Port Arthur Channel, etc., Co.*, (Tex. Civ. App. 1899) 49 S. W. Rep. 703.

Where but a part is taken, and the part taken is of greater value as a part of the whole than as a separate parcel, the measure of damages will be the fair cash value of the part taken as a part of the whole with the improvements on it. *Illinois, etc., R. Co. v. Humiston*, 208 Ill. 100; *Conness v. Indiana, etc., R. Co.*, 193 Ill. 464.

Where only part of the tract is taken, evidence of the value of the entire tract is not admissible. *Perkiomen, etc., Turnpike Road v. Berks County*, 196 Pa. St. 21.



**1165.** (2) *Injuries Affecting Whole Tract.* — See note 1.

(3) *Reduction of Rent.* — See note 2.

**1166.** (4) *What Is Considered a Single Tract* — (a) General Rule. — See note 1.

(b) Farm Land — Parts Separated by Public Road, etc. — See note 3.

**1167.** Single Tract Though Divided by a Railroad. — See note 3.

**1169.** (5) *Injuries to Remainder* — (a) Injuries from Construction — Damages from Proper Construction of Work. — See note 2.

How a Railroad Crosses a Farm. — See note 4.

Difficulty of Access and Communication Between Different Parts. — See note 5.

**1170.** Diversion of a Stream. — See note 2.

The Flooding of Lands by Interference with the Flow of Surface Water. — See note 3.

Impairment of Drainage and Irrigation. — See notes 4, 5.

**1165. 1. Injuries to Tract as a Whole** — England. — City, etc., R. Co. v. St. May Woolnoth, (1903) 2 K. B. 728.

Alabama. — Mobile, etc., R. Co. v. Riley, 119 Ala. 260.

Indiana. — White v. Cincinnati, etc., R. Co., 34 Ind. App. 287.

Iowa. — Haggard v. Independent School Dist., 113 Iowa 486.

Kentucky. — Elizabethtown, etc., R. Co. v. Catlettsburg Water Co., 110 Ky. 175; Layman v. Beeler, 113 Ky. 221.

Massachusetts. — Penney v. Com., 173 Mass. 507, 73 Am. St. Rep. 312.

Montana. — Montana R. Co. v. Freeser, 29 Mont. 210.

Nebraska. — Burns v. School Dist. No. 18, 61 Neb. 351; Scaev v. Wayne County, (Neb. 1904) 100 N. W. Rep. 149.

New York. — Rome, etc., R. Co. v. Gleason, 42 N. Y. App. Div. 530; South Buffalo R. Co. v. Kirkover, 86 N. Y. App. Div. 55, affirmed 176 N. Y. 301; Matter of Board of Public Imp., 99 N. Y. App. Div. 576; South Buffalo R. Co. v. Kirkover, 176 N. Y. 301, affirming 86 N. Y. App. Div. 55.

Ohio. — Lorain St. R. Co. v. Sinning, 6 Ohio Cir. Dec. 753, 17 Ohio Cir. Ct. 649.

Texas. — Galveston, etc., R. Co. v. Kinkead, (Tex. Civ. App. 1900) 60 S. W. Rep. 468; Sullivan v. Missouri, etc., R. Co., 29 Tex. Civ. App. 429; Watkins v. Hopkins County, (Tex. Civ. App. 1903) 72 S. W. Rep. 872.

Washington. — Seattle, etc., R. Co. v. Roeder, 30 Wash. 244, 92 Am. St. Rep. 907; Sultan Water, etc., Co. v. Weyerhauser Timber Co., 31 Wash. 558; Weed v. Goodwin, 36 Wash. 31.

**Temporary Damages.** — The fact that the damage is merely temporary is not material. Penney v. Com., 173 Mass. 507, 73 Am. St. Rep. 312.

**2. Decrease in Rental Value.** — Rock Island, etc., R. Co. v. Gordon, 184 Ill. 456; Chicago v. Lonergan, 196 Ill. 518; Bailey v. Boston, etc., R. Corp., 182 Mass. 537; Ragsdale v. Southern R. Co., 60 S. Car. 381; Mauldin v. Greenville, 64 S. Car. 444. See also Langley v. Augusta, 118 Ga. 590, 98 Am. St. Rep. 133.

Where a dwelling is temporarily taken for a pest house, the measure of damages is the fair and reasonable rental value of the property for the purpose for which it was taken and used. Brown v. Pierce County, 28 Wash. 345.

**1166. 1. Single Tract — Actual Use as a Unit.** — Sharp v. U. S., 191 U. S. 341, affirming 112 Fed. Rep. 893, 50 C. C. A. 597; Kennebec Water Dist. v. Waterville, 97 Me. 185, quoting 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1166; Gibson v. Fifth Ave., etc., Bridge Co., 192 Pa. St. 55, 73 Am. St. Rep. 795; Kossler v. Pittsburgh, etc., R. Co., 208 Pa. St. 50; Sultan Water, etc., Co. v. Weyerhauser Timber Co., 31 Wash. 558. See also Westbrook v. Muscatine North, etc., R. Co., 115 Iowa 106.

**3. Separated by Public Road.** — Peck v. Bristol, 74 Conn. 483; Matter of Lyons Cemetery Assoc., 93 N. Y. App. Div. 19. See also Haggard v. Independent School Dist., 113 Iowa 486.

**1167. 3. Rudolph v. Pennsylvania Schuylkill Valley R. Co., 186 Pa. St. 541; Cook v. Boone Suburban Electric R. Co., 122 Iowa 437.**

**1169. 2. Damages Arising from Proper Construction of Work.** — Indiana Stone R. Co. v. Strain, 27 Ind. App. 694; Guinn v. Iowa, etc., R. Co., 125 Iowa 301; Mullen v. Lake Drummond Canal, etc., Co., 130 N. Car. 496; Fyfe v. Turtle Creek, 22 Pa. Super. Ct. 292.

**4. How a Railroad Crosses a Farm.** — Chicago Terminal Transfer R. Co. v. Bugbee, 184 Ill. 353, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1169.

**5. Interference with Access and Communication.** — Rock Island, etc., R. Co. v. Gordon, 184 Ill. 456, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1169; Chicago Terminal Transfer R. Co. v. Bugbee, 184 Ill. 353, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1169.

**1170. 2. Mullen v. Lake Drummond Canal, etc., Co., 130 N. Car. 496; Barron v. Memphis, (Tenn. 1904) 80 S. W. Rep. 832. See also Fosgate v. Hudson, 178 Mass. 225.**

**Measure of Damages for Loss of Water.** — The amount to be determined in such a case is the diminution of the property in value by reason of the loss of the water. This effect upon the value is to be determined in reference to the uses to which the property is adapted, including the use to which it is being put. Boston Belting Co. v. Boston, 183 Mass. 254.

**3. Flooding of Lands.** — Rainey v. Hinds County, 78 Miss. 308; Rice v. Norfolk, etc., R. Co., 130 N. Car. 375. See also Stith v. Louisville, etc., R. Co., 109 Ky. 168; Louisville, etc., R. Co. v. Brinton, 109 Ky. 180.

**4. Impairment of Drainage.** — In re Chatham Street, 191 Pa. St. 604.

- 1171.** (b) *Injuries from Operation* — *aa. IN GENERAL.* — See note 1.  
*bb. COST OF FENCING.* — See note 2.
- 1172.** *Fencing as a Distinct Item of Damages.* — See note 2.
- 1173.** *cc. FARM OR PRIVATE CROSSINGS.* — See note 2.  
*d. COMPENSATION FOR INJURIOUSLY AFFECTING PROPERTY — Consequential Damages* — (1) *Assessed Once for All.* — See note 3.  
 (2) *Certain, Not Speculative.* — See note 4.  
 (4) *Only from Proper Use.* — See note 6.
- 1174.** (5) *Measure.* — See note 1.

**1170.** 5. *Irrigation.* — *Montana R. Co. v. Freeser*, 29 Mont. 210.

**1171.** 1. *Illinois Cent. R. Co. v. School Trustees*, 212 Ill. 406; *South Buffalo R. Co. v. Kirkover*, 176 N. Y. 301, *affirming* 86 N. Y. App. Div. 55.

2. *Where Company Not Required to Fence Immediately.* — *Chicago, etc., Electric R. Co. v. Diver*, 213 Ill. 26.

**1172.** 2. *Board of Trade Tel. Co. v. Darst*, 192 Ill. 47, 85 Am. St. Rep. 288.

**1173.** 2. *Where Company Builds Crossing.* — *Missouri, etc., R. Co. v. Chenault*, 24 Tex. Civ. App. 481.

It is proper to allow the jury to consider the fact that the railroad company is required to provide an adequate crossing. *Lough v. Minneapolis, etc., R. Co.*, 116 Iowa 31.

*Pecuniary Compensation in Lieu of Crossing.* — It is within the discretion of the court to grant a pecuniary compensation instead of requiring the construction of a farm crossing where the value of the portion of the farm on one side of the railroad is less than the cost of a crossing. *Martin v. Maine Cent. R. Co.*, 19 Quebec Super. Ct. 561. See also the title *CROSSINGS*.

3. *Metropolitan West Side El. R. Co. v. Goll*, 100 Ill. App. 323; *Illinois Cent. R. Co. v. Ferrell*, 108 Ill. App. 659; *Illinois Cent. R. Co. v. Lockard*, 112 Ill. App. 423; *Rice v. Norfolk, etc., R. Co.*, 130 N. Car. 375; *Grant v. Hyde Park*, 67 Ohio St. 166; *McQuade v. Rex*, 7 Can. Exch. 318.

*A Second Action for Damages Cannot Be Maintained*, though in the first action the plaintiff specially reserved the right to bring future actions for damages resulting to him from the expropriation. *Ancil v. Quebec*, 33 Can. Sup. Ct. 347. Compare *Reg. v. Harwood*, 6 Can. Exch. 420, where, the parties having agreed that the question of damages should be reserved, the court took cognizance of such agreement, and assessed damages for past injury only.

4. *Damages Must Be Certain.* — *Davenport, etc., R. Co. v. Sinnet*, 111 Ill. App. 75; *Manufacturers' Natural Gas Co. v. Leslie*, 22 Ind. App. 677.

*Remote and Uncertain Damages Are Not Recoverable.* — *Tynenworth v. Northumberland*, 89 L. T. N. S. 557.

6. *Injuries from Proper Construction.* — *Chicago, etc., R. Co. v. Mason*, 26 Ind. App. 395; *Muncie Electric Natural Gas Co. v. Allison*, 31 Ind. App. 50.

**1174.** 1. *Depreciation of Market Value Is Measure* — *Alabama.* — *Dennis v. Mobile, etc., R. Co.*, 137 Ala. 649.

*Colorado.* — *Denver v. Bonesteel*, 30 Colo. 107.

*Connecticut.* — *New Haven Steam Saw Mill Co. v. New Haven*, 72 Conn. 288.

*Georgia.* — *Roughton v. Atlanta*, 113 Ga. 948; *Laugley v. Augusta*, 118 Ga. 590, 98 Am. St. Rep. 133.

*Illinois.* — *Galesburg, etc., R. Co. v. Milroy*, 181 Ill. 243; *Schroeder v. Joliet*, 189 Ill. 48; *Illinois Cent. R. Co. v. Turner*, 194 Ill. 575; *Winnetka v. Clifford*, 201 Ill. 475; *Beidler v. Sanitary Dist.*, 211 Ill. 628; *Ross v. Chicago*, 91 Ill. App. 416; *Illinois Cent. R. Co. v. Schmidgall*, 91 Ill. App. 23; *Joliet v. Schroeder*, 92 Ill. App. 68, *affirmed* 189 Ill. 48; *Chicago v. McShane*, 102 Ill. App. 239; *Rockford v. Doughty*, 103 Ill. App. 48; *Barrington v. Meyer*, 103 Ill. App. 124; *Chicago v. Anglum*, 104 Ill. App. 188; *Wheeler v. Bloomington*, 105 Ill. App. 97; *Illinois Cent. R. Co. v. Ferrell*, 108 Ill. App. 659; *Davenport, etc., R. Co. v. Sinnet*, 111 Ill. App. 75; *Illinois Cent. R. Co. v. Lockard*, 112 Ill. App. 423.

*Iowa.* — *Richardson v. Webster City*, 111 Iowa 427.

*Kentucky.* — *Louisville v. Hegan*, (Ky. 1899) 49 S. W. Rep. 532; *Chesapeake, etc., R. Co. v. Smith*, (Ky. 1899) 51 S. W. Rep. 12; *Henderson v. Winstead*, 109 Ky. 328; *Illinois Cent. R. Co. v. Smith*, 110 Ky. 203; *Louisville v. Harbin*, 61 S. W. Rep. 1011, 22 Ky. L. Rep. 1865; *Louisville v. Bohlson*, 61 S. W. Rep. 1014, 22 Ky. L. Rep. 1864; *Paducah v. Allen*, 111 Ky. 361, 98 Am. St. Rep. 422; *Covington v. Taffee*, (Ky. 1902) 68 S. W. Rep. 629; *Louisville, etc., R. Co. v. Cumnock*, 77 S. W. Rep. 933, 25 Ky. L. Rep. 1330.

*Mississippi.* — *Meridian v. Higgins*, 81 Miss. 376.

*Missouri.* — *Robinson v. St. Joseph*, 97 Mo. App. 503; *Farrar v. Midland Electric R. Co.*, 101 Mo. App. 140.

*Nebraska.* — *Chicago, etc., R. Co. v. O'Neill*, 58 Neb. 239.

*New York.* — *Matter of Grade Crossing Com'rs*, 64 N. Y. App. Div. 71, *affirmed* 169 N. Y. 605.

*Pennsylvania.* — *Shano v. Fifth Ave., etc., Bridge Co.*, 189 Pa. St. 245, 69 Am. St. Rep. 808; *In re Chatham Street*, 16 Pa. Super. Ct. 103; *Lafean v. York County*, 20 Pa. Super. Ct. 573.

*South Carolina.* — *Mauldin v. Greenville*, 64 S. Car. 444; *South Bound R. Co. v. Burton*, 67 S. Car. 515.

*Texas.* — *Denison, etc., Suburban R. Co. v. Evans*, (Tex. Civ. App. 1898) 47 S. W. Rep. 280; *Eastern Texas R. Co. v. Eddings*, 30 Tex. Civ. App. 170; *St. Louis Southwestern R. Co. v. Hughes*, (Tex. Civ. App. 1903) 73 S. W. Rep. 976; *Boyer v. St. Louis, etc., R. Co.*, 97

**1174.** (6) *Interference with the Use of Property.* — See notes 3, 4.

*f. CROSSINGS* — (1) *In General.* — See note 6.

**1175.** (2) *Railroad Crossings.* — See note 1.

(3) *Street Crossing Over Railroad.* — See note 5.

**1176.** *g. BENEFITS* — (2) *Classes of Benefits* — (b) *Special Benefits.* — See note 2.

(c) *General Benefits.* — See note 3.

**1177.** (3) *Right to Deduct Benefits in Making Compensation* — (b) *General Benefits.* — See note 1.

Tex. 107; Red River, etc., R. Co. v. Hughes, 36 Tex. Civ. App. 472.

*West Virginia.* — Guinn v. Ohio River R. Co., 46 W. Va. 151, 76 Am. St. Rep. 806; McCray v. Fairmont, 46 W. Va. 442.

All the elements of depreciation are to be taken into consideration, but the separate items are to be considered not as distinct items, but as they affect the market value. Hewitt v. Pittsburg, etc., R. Co., 19 Pa. Super. Ct. 304.

The damages are measured by the depreciation actually caused by the construction and operation of the railroad, and not that caused by other matters. It is, therefore, not necessarily the difference in the value of the property before and after the construction of the railroad, since the difference in value might have resulted in part, at least, from the general depreciation of market values, the shifting of centres of population, or other causes not attributable to the construction and operation of the railroad. Metropolitan West Side El. R. Co. v. Goll, 100 Ill. App. 323; Davenport, etc., R. Co. v. Sinnet, 111 Ill. App. 75.

**Damages for Annoyance Caused by Railroad.** — Where the construction of a new railway and other works on glebe land seriously interfered with the comfort of the rectory house, the court ordered that part of the purchase money in its hands should be paid to the rector by way of compensation for the injury, inconvenience, and annoyance sustained by him personally. *In re Saunderton Glebe Lands*, (1903) 1 Ch. 480.

**1174.** 3. *Embankments and Cuts.* — Dairy v. Iowa Cent. R. Co., 113 Iowa 716.

4. *Difficulty of Passing Between Parts.* — Bockoven v. Lincoln Tp., 13 S. Dak. 317.

6. *Railroad Crossing Another.* — Birmingham Traction Co. v. Birmingham R., etc., Co., 119 Ala. 129; Wellsburg, etc., R. Co. v. Pan Handle Traction Co., 56 W. Va. 18. See also Townsend v. Michigan Cent. R. Co., (C. C. A.) 101 Fed. Rep. 757.

**Street Railway Across Steam Road.** — A company owning and operating a street railway may, under the permission of the proper authorities, construct its lines across the track of a steam railroad company, and use the same, without instituting condemnation proceedings, or being required to pay damages. Southern R. Co. v. Atlanta R., etc., Co., 111 Ga. 679.

Where a street railway crosses a railroad in the bed of a city street, the latter is not entitled to compensation for injury to its easement. Central Pass. R. Co. v. Philadelphia, etc., R. Co., 95 Md. 428; Cincinnati, etc., Electric St. R. Co. v. Cincinnati, etc., R. Co., 12 Ohio Cir. Dec. 113.

**1175.** 1. A street railway crossing a steam road in the bed of a city street cannot be compelled to pay one-half the cost of safety gates or similar appliances. Such appliances it is the duty of the steam road to supply. Central Pass. R. Co. v. Philadelphia, etc., R. Co., 95 Md. 428.

5. See Southern Kansas R. Co. v. Oklahoma City, 12 Okla. 82.

**Street Crossing Over Railroad.** — A railroad company, on the laying of a highway over its tracks, is entitled to compensation for the use of the *locus in quo* for a highway crossing. For an injury occasioned by necessary structural changes, such as the removal of buildings, or changes in the tracks, compensation should be made which will be adequate. For expenses incident to the erection and maintenance of gates, signboards, cattle guards, etc., the company is not entitled to an allowance. Morris, etc., R. Co. v. Orange, 63 N. J. L. 252.

In the condemnation of a railroad right of way for a street crossing, the market value of the land as land cannot enter into the estimate of compensation, for the reason that such property cannot be sold for general purposes, and by the condemnation the public acquires only the right to use it jointly with the railroad, and only as a crossing. Illinois Cent. R. Co. v. Normal, 175 Ill. 562.

**Street Crossing Under Railroad.** — Where a street is extended under the tracks of a railroad, the company is entitled to compensation for the cost of a bridge or viaduct to carry its trains over the street. Cincinnati, etc., R. Co. v. Troy, 68 Ohio St. 510.

**1176.** 2. *Special Benefits Defined.* — Pickles v. Ansonia, 76 Conn. 278. See also Pochila v. Calvert, etc., R. Co., 31 Tex. Civ. App. 398.

**Instances of Special Benefits — Switch Facilities.** — Kansas City Suburban Belt R. Co. v. McElroy, 161 Mo. 584.

3. *General Benefits Defined.* — Beveridge v. Lewis, 137 Cal. 619, 92 Am. St. Rep. 188.

**1177.** 1. *Right to Deduct General Benefits — United States.* — Levee Inspectors v. Crittenden, 94 Fed. Rep. 613, 36 C. C. A. 418; Chicago v. Le Moyne, (C. C. A.) 119 Fed. Rep. 662.

*Arkansas.* — Little Rock, etc., R. Co. v. Alister, 68 Ark. 600.

*California.* — Beveridge v. Lewis, 137 Cal. 619, 92 Am. St. Rep. 188.

*Illinois.* — Chicago v. Lonergan, 196 Ill. 518. *Missouri.* — Farrar v. Midland Electric R. Co., 101 Mo. App. 140.

*New Hampshire.* — Cram v. Laconia, 71 N. H. 41.

*North Carolina.* — Southport, etc., R. Co. v. Platt Land, 133 N. Car. 266.



**1177.** (c) *Special Benefits* — *bb. UNDER CONSTITUTIONS WHICH MERELY PROVIDE FOR COMPENSATION* — (*bb*) *In Estimating Damages to the Remainder.* — See note 2.

**1178.** See notes 1, 2.

**1179.** (*cc*) *In Estimating the Value of the Land Taken.* — See note 1.

**1180.** See note 1.

**1181.** (*dd*) *Extent and Limitations of the Right* — *Benefits Not Confined to Present Use.* — See note 1.

*Benefits Confined to Tract Part of Which Is Taken.* — See note 3.

**1182.** *Benefits in Excess of Damages and Value of Land.* — See note 1.

*Ohio.* — *Lorain St. R. Co. v. Sinning*, 6 Ohio Cir. Dec. 753.

*Pennsylvania.* — *Shimer v. Easton R. Co.*, 205 Pa. St. 648.

*Texas.* — *Eastern Texas R. Co. v. Eddings*, 30 Tex. Civ. App. 170; *Pochila v. Calvert*, etc., R. Co., 31 Tex. Civ. App. 398; *Houston v. Bartels*, 36 Tex. Civ. App. 498.

*Virginia.* — *Heninger v. Peery*, 102 Va. 896.

*Canada.* — *Dickson v. La Compagnie*, etc., 17 Quebec Super. Ct. 170.

"The reason for the exclusion of such benefits is that it would be unjust to charge the owner of land, a part of which is taken by the company, with those benefits which he receives from the construction of the railroad in common with the community in general when other landowners, whose lands do not happen to be taken, receive and enjoy such benefits equally with himself, and pay nothing for them." *Little Rock*, etc., R. Co. v. *Allister*, 68 Ark. 600.

**1177. 2. Right to Deduct Benefits from Damages to the Remainder.** — See *Little Rock*, etc., R. Co. v. *Allister*, 68 Ark. 600.

In *Iowa* the principle that benefits shall not be taken into account has been applied to all cases where compensation is to be made for taking private property for public use. *Haggard v. Independent School Dist.*, 113 Iowa 486; *Bennett v. Marion*, 106 Iowa 628; *Lough v. Minneapolis*, etc., R. Co., 116 Iowa 31.

In *Washington*, where land is appropriated for a railroad, benefits cannot be considered. *Seattle*, etc., R. Co. v. *Roeder*, 30 Wash. 244, 94 Am. St. Rep. 864.

**1178. 1. Same — Prevailing Rule.** — *Schroeder v. Joliet*, 189 Ill. 48. Compare *Lorain St. R. Co. v. Sinning*, 6 Ohio Cir. Dec. 753, 17 Ohio Cir. Ct. 659.

2. *Chicago*, etc., Electric R. Co. v. *Diver*, 213 Ill. 26; *Joliet v. Schroeder*, 92 Ill. App. 68, affirmed 189 Ill. 48; *Pittsburgh*, etc., R. Co. v. *Wolcott*, 162 Ind. 399; *Chicago*, etc., R. Co. v. *Rottgering*, 83 S. W. Rep. 584, 26 Ky. L. Rep. 1167; *Kansas City v. Bacon*, 157 Mo. 450; *Lotze v. Cincinnati*, 61 Ohio St. 272; *Harrison v. Sulphur Springs*, (Tex. Civ. App. 1902) 67 S. W. Rep. 515; *Dickson v. La Compagnie*, etc., 17 Quebec Super. Ct. 170. But see *Lorain St. R. Co. v. Sinning*, 6 Ohio Cir. Dec. 753, 17 Ohio Cir. Ct. 659.

In *Quebec* it has been held that if by reason of benefit, however questionable and uncertain it may be, the value of lands (part of which has been expropriated for the construction of a railway) has been enhanced on the market, the arbitrators may take this increased value into account in estimating the damages caused by

the expropriation. *Chateauguay*, etc., R. Co. v. *Trenholme*, 11 Quebec K. B. 45. Compare *Dickson v. La Compagnie*, etc., 17 Quebec Super. Ct. 170.

**1179. 1. Right to Deduct Benefits from Value of Land Taken, Denied.** — *Ginn v. Moultrie*, etc., Drainage Dist., 188 Ill. 305; *Schroeder v. Joliet*, 189 Ill. 48; *Chicago*, etc., Electric R. Co. v. *Diver*, 213 Ill. 26; *Chicago*, etc., R. Co. v. *Rottgering*, 83 S. W. Rep. 584, 26 Ky. L. Rep. 1167; *Harrison v. Sulphur Springs*, (Tex. Civ. App. 1902) 67 S. W. Rep. 515.

But Where the Landowner Consents to such deduction of benefits, and pays the balance or excess of benefits over the amount allowed him, he cannot complain that he was not paid in cash for the land taken. *Elgin*, etc., R. Co. v. *Hohenshell*, 193 Ill. 159.

**1180. 1. Right to Deduct Benefits from Value of Land Taken, Affirmed.** — *Fifer v. Ritter*, 159 Ind. 8; *Terre Haute*, etc., R. Co. v. *Flora*, 29 Ind. App. 442; *Cole v. Boston*, 181 Mass. 374; *St. Joseph v. Geiwitz*, 148 Mo. 210; *Kansas City Suburban Belt R. Co. v. McElroy*, 161 Mo. 584; *Randolph v. Chosen Freeholders*, 63 N. J. L. 155.

**1181. 1. Opportunity for Future Enhancement Through Benefits.** — The jury may be allowed to consider the opportunity which the construction of the improvement gives to the land for future growth and enhancement in value. *Fifer v. Ritter*, 159 Ind. 8.

Future increase in the value of the property, in common with the public, cannot be considered. *Meridian v. Higgins*, 81 Miss. 376.

**3. Benefits to Tracts Other than That of Which Part Is Taken.** — *Chicago v. Spoor*, 190 Ill. 340.

On the condemnation of a right of way for a railroad the benefits which may be set off are only such as inure to or directly affect the land adjacent to the right of way sought to be condemned. *Oregon Short Line R. Co. v. Fox*, 28 Utah 311.

**1182. 1. Benefits Equal to Damages — Doctrine Affirmed.** — If it be found that the landowner is benefited instead of damaged by the appropriation, his damages should be allowed. *Pittsburgh*, etc., R. Co. v. *Wolcott*, 162 Ind. 399; *Bigelow v. Pittsburg*, 189 Pa. St. 455. See also *Clapp v. McFarland*, 20 App. Cas. (D. C.) 224.

**Assessment in Excess of Benefits.** — The exaction from the owner of private property of the cost of a public improvement in substantial excess of the benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation. *Norwood v. Baker*, 172 U. S. 269.

**1183.** *cc.* UNDER SPECIAL CONSTITUTIONAL OR STATUTORY PROVISIONS. — See note 1.

**1184.** (4) *Right to Deduct Special Assessments.* — See note 1.

*h.* LIMITED ESTATES — (2) *Lessee.* — See note 4.

A Covenant for Renewal. — See note 6.

Improvements. — See note 8.

**1185.** 8. Allowance of Interest — *a.* IN GENERAL — Where Taking Precedes Assessment — Interest Allowed. — See note 3.

**1186.** Where Owner Has Use of the Land. — See note 1.

Owner's Delay in Instituting Proceedings. — See note 2.

Interest Not Allowed — Detention Considered. — See note 3.

Interest on the Award. — See note 5.

**1187.** *b.* ON APPEAL — Appeal by Owner. — See note 1.

Interest Only on Amount of Increase. — See note 2.

**1188.** Appeal by Expropriator. — See note 2.

**1183.** 1. The *Arkansas* statute excludes special benefits as well as general benefits. *Little Rock, etc., R. Co. v. Allister*, 68 Ark. 600.

**1184.** 1. *Right to Deduct Special Assessments in Making Compensation.* — It is held in *Ohio* that compensation paid to a landowner for land taken in a proceeding to open a street cannot be assessed back on the lands of the owner remaining after such taking. Nor can the costs and expenses of such proceeding be so assessed. *Cincinnati, etc., R. Co. v. Cincinnati*, 62 Ohio St. 465, *overruling Cleveland v. Wick*, 18 Ohio St. 303, cited 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1184, note 1.

While money cannot be raised by assessment to pay for private property taken for public use, money may be thus raised to pay for surface improvements, sewers, etc., so long as the assessment does not exceed the special benefits conferred. *Dayton v. Bauman*, 66 Ohio St. 379.

4. *Lynch v. Glasgow*, Sc. Ct. of Sess., 5 F. 1174.

*Measure of Damages to Lessee.* — The fact that a lessee is released from a covenant to build by the taking of part of the premises, and that his rent is reduced, must be taken into consideration in determining the compensation to which he is entitled. *Rex v. Young*, 7 Can. Exch. 282.

6. *Emery v. Boston Terminal Co.*, 178 Mass. 172, 86 Am. St. Rep. 473.

8. *Improvements by Lessee.* — *McGoldrick v. Rex*, 8 Can. Exch. 169.

**1185.** 3. *Interest from Date of Taking.* — *Lough v. Minneapolis, etc., R. Co.*, 116 Iowa 31; *Imbescheid v. Old Colony R. Co.*, 171 Mass. 209; *Pegler v. Hyde Park*, 176 Mass. 101; *Hay v. Com.*, 183 Mass. 294; *Miller v. St. Louis, etc., R. Co.*, 162 Mo. 424; *Matter of New York*, 40 N. Y. App. Div. 281; *Drury v. Reg.*, 6 Can. Exch. 204.

*Rule Applicable Only to Land Actually Taken.* — *People v. Coler*, 60 N. Y. App. Div. 77, affirmed 168 N. Y. 644.

*Date of Confirmation.* — *Ziegler's Case*, 12 York Leg. Rec. (Pa.) 158. But see *Lemke's Case*, 23 Pa. Co. Ct. 93.

*No Right to Assess Back Interest Allowed.* — No part of the interest allowed a property owner on the taking of his property before payment can be assessed back on such owner. *Matter of Acquiring Title to Eighth Street*, (Supm. Ct. Spec. T.) 44 Mise. (N. Y.) 126.

*Compensation for Lands Injurious Affected* in the exercise of municipal powers is in the nature of damages, and interest should not be allowed thereon before the time of the liquidation of the damage by the making of the award. There is a distinction in this respect between such compensation and compensation for lands taken, or taken and injuriously affected. *Leak v. Toronto*, 26 Ont. App. 351, affirmed 30 Can. Sup. Ct. 321.

**1186.** 1. *Lake Koen Nav., etc., Co. v. McLain Land, etc., Co.*, 69 Kan. 334; *Matter of New York*, 40 N. Y. App. Div. 281. See also *State v. Humes*, 34 Wash. 347.

2. See *New York, etc., R. Co. v. Ansonia Land, etc., Co.*, 72 Conn. 703.

3. *Interest on Damages Not Allowed.* — Interest may be allowed, not as interest, but as damages. *Hewitt v. Pittsburg, etc., R. Co.*, 19 Pa. Super. Ct. 304.

A sum not to exceed legal interest may be awarded as compensation for the delay in paying the damages. *Shevalier v. Postal Tel. Co.*, 22 Pa. Super. Ct. 506.

5. *Interest on Amount of Award Wrongfully Withheld.* — *Matter of Acquiring Title to Nelson Ave.*, 35 N. Y. App. Div. 406; *Leak v. Toronto*, 26 Ont. App. 351, affirmed 30 Can. Sup. Ct. 321; *Cornwall v. Cornwall Water Works Co.*, 27 Ont. App. 48. See also *Matter of New York*, 92 N. Y. App. Div. 523.

Where compensation is delayed, the owner should receive some interest upon the amount of the actual injury to the fee, or some allowance for part damages in addition to the damages to the fee. *Port Henry v. Kidder*, 39 N. Y. App. Div. 640.

An allowance in the nature of interest should be made from the period when the damages are liquidated to that when they are put into formal judgment. *New Haven Steam Saw Mill Co. v. New Haven*, 72 Conn. 276.

**1187.** 1. *Appeal by Owner.* — *Chicago, etc., R. Co. v. Buel*, 56 Neb. 205.

On appeal from the award by the owner he is entitled to interest on the amount found due only from the time of filing the report of the referee until the date of the judgment thereon. *Wentworth v. Portsmouth*, 68 N. H. 302.

2. See *Kansas City Suburban Belt R. Co. v. McElroy*, 161 Mo. 584; *La Compagnie, etc.*, 18 Quebec Super. Ct. 534.

**1188.** 2. *Appeal by Expropriator.* — See St.

**1188. 9. Who Entitled to Compensation — a. OWNER IN FEE.** — See note 4.

**1189. Actual Possession and Use of the Land.** — See note 1.

*b. VENDOR AND VENDEE.* — See note 2.

*Assignment.* — See note 3.

*Where Land Has Been Wrongfully Taken.* — See note 4.

**1190. Transfer Pending Proceedings.** — See note 1.

**1192. c. MORTGAGOR AND MORTGAGEE — (1) Mortgagee.** — General Rules. — See note 1.

*Mortgagee an Owner of Real Estate.* — See note 2.

**1194. f. TENANTS AND LESSEES.** — See note 2.

Louis, etc., *R. Co. v. Knapp-Stout, etc., Co.*, 160 Mo. 396.

**1188. 4. Payment to Owner.** — *Northern Pac. R. Co. v. Murray*, (C. C. A.) 87 Fed. Rep. 648; *Maffet v. Quine*, 93 Fed. Rep. 347; *Illinois Cent. R. Co. v. Lockard*, 112 Ill. App. 423; *Chandler v. Morey*, 195 Ill. 596; *Obst v. Covell*, 93 Minn. 30; *Howley v. Pittsburg*, 204 Pa. St. 428.

Where land is taken for a public road, the owner of the land at the time the road is actually opened is entitled to compensation. *Hogsett v. Harlan County*, (Neb. 1903) 97 N. W. Rep. 316.

The Breach of a Restrictive Covenant may be the ground for a claim for compensation by the owner of the land for the benefit of which the restriction was imposed. This rule was applied where a railway company purchased land on which restrictive covenants were imposed for the benefit of adjoining land, and the railway company, though it had notice of the covenants, broke them and thereby lessened the market value of the adjoining land. *Long Eaton Recreation Grounds Co. v. Midland R. Co.*, (1902) 2 K. B. 574.

**1189. 1.** See *Stewart v. Ottawa, etc., R. Co.*, 30 Ont. 599.

One holding real property under a contract of purchase, and having paid a substantial portion of the purchase price, has such an interest therein as will entitle him to compensation before the property can be taken or damaged for a public use. *Olson v. Seattle*, 30 Wash. 687.

**2. Vendee Not Entitled to Compensation — United States.** — *Northern Pac. R. Co. v. Murray*, (C. C. A.) 87 Fed. Rep. 648.

*Alabama.* — *Hood v. Southern R. Co.*, 133 Ala. 374.

*Georgia.* — *Green v. South Bound R. Co.*, 112 Ga. 849.

*Illinois.* — *Illinois Cent. R. Co. v. Lockard*, 112 Ill. App. 423.

*Kansas.* — *T. Louis, etc., R. Co. v. Nyce*, 61 Kan. 394.

*Mississippi.* — *Miller v. Mississippi Levee Com'rs*, 78 Miss. 201.

*Nebraska.* — *Chicago, etc., R. Co. v. Englehart*, 57 Neb. 444.

*New York.* — *Matter of Opening Seventh Ave.*, 59 N. Y. App. Div. 175; *Matter of Grade Crossing Com'rs*, 64 N. Y. App. Div. 71, affirmed 169 N. Y. 605.

*Ohio.* — *Hatry v. Painesville, etc., R. Co.*, 1 Ohio Cir. Dec. 238.

*Pennsylvania.* — *Fifth Street*, 22 Pa. Super. Ct. 214.

*Washington.* — *Matter of Seattle*, 26 Wash. 602.

**Purchaser at Foreclosure Sale.** — A purchaser at a foreclosure sale of property the title to which has vested in the city prior to the foreclosure sale obtains neither the property nor any right to the award which was made for it. *Matter of Acquiring Title to Washington Ave.*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 655.

**3. Assignment of Right to Compensation to Vendee.** — But the vendee is not entitled to damages to lots not included in the assignment. *Pueblo v. Shutt Invest. Co.*, 28 Colo. 524.

**4. Wrongful Entry.** — *Northern Pac. R. Co. v. Murray*, (C. C. A.) 87 Fed. Rep. 648; *Maffet v. Quine*, 93 Fed. Rep. 347. But see *Phillips v. Postal Tel. Cable Co.*, 130 N. Car. 513, 89 Am. St. Rep. 868; *Beal v. Durham, etc., R. Co.*, 136 N. Car. 298.

**1190. 1. Right of Vendee Pending Proceedings to Damages.** — *Chandler v. Morey*, 195 Ill. 596; *Obst v. Covell*, 93 Minn. 30; *Webber v. Toledo*, 23 Ohio Cir. Ct. 237; *Liberty Tp. Road*, 23 Pa. Co. Ct. 287; *Virginia-Carolina R. Co. v. Booker*, 99 Va. 633. See also *Brooklyn v. Seaman*, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 507.

**1192. 1. View that Compensation Should Be Made to the Mortgagee.** — *Bolton v. Seamen's Sav. Bank*, 99 N. Y. App. Div. 581.

A mortgagee of land condemned for highway purposes by proceedings begun anterior to the mortgage and who is not made a party to the condemnation proceedings, can hold the damages awarded against a creditor of the landowner, who attaches the fund by trustee process. *Brooks v. Hubbard*, 73 Vt. 122.

**2. Fernie v. Chicago, etc., R. Co.**, 9 Kan. App. 614, reversed 62 Kan. 865, 61 Pac. Rep. 1131; *Omaha Bridge, etc., Co. v. Reed*, (Neb. 1902) 92 N. W. Rep. 1021, (Neb. 1903) 96 N. W. Rep. 276.

**1194. 2. Right of Tenants and Lessees Respectively to Compensation.** — *Masters v. Great Western R. Co.*, (1901) 2 K. B. 84; *Gibbon v. Reg.*, 6 Can. Exch. 430; *McGoldrick v. Rex*, 8 Can. Exch. 169; *Pegler v. Hyde Park*, 176 Mass. 101; *Matter of Armory Board*, (Supm. Ct. Spec. T.) 29 Misc. (N. Y.) 174.

Where tenants lease property expressly subject to the contingency that the landlord may be deprived of his title by condemnation proceedings, such tenants are not entitled to share the award with the landlord. *Matter of New York*, 168 N. Y. 254.

**Increased Expenses of Lessee for Balance of Unexpired Term.** — Where the land expropriated



- 1194.** *Tenant Taking Lease Pending the Proceedings.* — See note 4.  
*g. TENANTS FOR LIFE AND REMAINDERMEN.* — See note 5.  
*h. HEIRS AND ADMINISTRATORS.* — See note 7.  
**1195.** *i. OWNER OF A JUDGMENT LIEN.* — See note 1.  
*j. PAYMENT INTO COURT.* — See note 2.

**10. Who Liable for Damages** — Where a Railroad Company Purchases Railroad Property. — See note 4.

**Joint Improvement by Railroad and Municipal Corporation.** — See note 5.

- 1196.** **11. Effect of Payment.** — See note 1.

was under lease and the lease provided that the term might be determined by the lessors on six months' written notice, it was held that the lessees were entitled to compensation for the loss which they had incurred in procuring other premises in which to carry on their business, and, in addition thereto, the increased cost of carrying on such business at the new location during the six months succeeding the institution of expropriation proceedings. But the court declined to allow the lessees anything in respect of their claim that if they had not been disturbed in their possession they would have increased their business and so have made additional profits. *Gibbon v. Reg.*, 6 Can. Exch. 430.

**A Mere License or Privilege Which Creates No Estate or Interest in the Land Taken** confers no right on the licensee which will entitle him to compensation for land taken under the English Lands Clauses Consolidation Act of 1845. This rule was applied in an action to obtain compensation for land taken for public purposes where it appeared that by a contract made between the lessees of a theatre (which was the property taken) and the plaintiff, it had been agreed that the plaintiff should have the exclusive right for a term of years to supply refreshments in the theatre and for that purpose should have the necessary use of the refreshment rooms, bars, and wine cellars of the theatre, and that he should also have the exclusive right to advertise and to let space for advertisements in certain parts of the theatre. *Warr v. London County Council*, (1904) 1 K. B. 713.

**Under the English Lands Clauses Consolidation Act of 1845** it is a condition precedent to the right of compensation of a person who has no greater interest than as a tenant for a year or from year to year in the land taken, that he has been compelled to give up possession of the property before the expiration of his term of interest. *Great Northern, etc., R. Co. v. Tillet*, (1902) 1 K. B. 874.

**1194. 4. Where the Lease Is Taken Pending the Proceedings.** — *Mercer v. Liverpool, etc., R. Co.*, (1904) A. C. 461, *affirming* (1903) 1 K. B. 652.

It is only in those cases where the leasing takes place after the interference with the easement that the landlord is permitted to recover. *Fries v. New York, etc., R. Co.*, 169 N. Y. 270.

**5. Right of Tenant and Remainderman to Apportionment of Damages.** — *Cogan v. McCabe*, (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 739.

Remaindermen are such "owners" as fall within the protection afforded by the constitution, and the life tenant cannot deprive them of

their right to compensation. *Cureton v. South-Bound R. Co.*, 59 S. Car. 371. See also *Charleston, etc., R. Co. v. Reynolds*, 69 S. Car. 481.

The broadest and most extensive signification should be given to the term "owner" as used in the condemnation statutes, and it should be held to embrace all who have any interest in the land, present or future, vested or contingent, that is, any interest or estate which the law regards as of sufficient value for judicial recognition, and therefore a contingent remainderman is entitled to compensation for the value of his contingent interest at the time of the taking. *Charleston, etc., R. Co. v. Reynolds*, 69 S. Car. 481, *citing* 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1194.

Where the life tenant receives compensation for damages to the life estate only, the remaindermen have no right to any part of such sum. *Trimmier v. Darden*, 61 S. Car. 220.

**Measure of Compensation.** — The remainderman is entitled to the value of his contingent remainder at the time of taking with interest. *Charleston, etc., R. Co. v. Reynolds*, 69 S. Car. 481.

**7. Right of Owner's Administrator to the Compensation.** — See *Webber v. Toledo*, 23 Ohio Cir. Ct. 237.

**1195. 1. Right of Owner of a Judgment Lien to Compensation Denied.** — *Williams v. Hutchinson, etc., R. Co.*, 62 Kan. 412, 84 Am. St. Rep. 408. But see *Mack v. Eastern, etc., R. Co.*, 10 Pa. Dist. 102, 7 Northam. Co. Rep. (Pa.) 318; *Ross v. Gates*, 183 Mo. 338.

**2. Award to Unknown Owners.** — Where there is a doubt as to the owner of the land, the award may be made to unknown owners. *Matter of Armory Board*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 548, *reversed* 73 N. Y. App. Div. 152; *Matter of Opening Fordham Road*, 74 N. Y. App. Div. 343.

**4. Liability of Railroad Company for Wrongful Appropriation by Predecessor.** — *Cowan v. Southern R. Co.*, 118 Ala. 554; *Southern R. Co. v. Hood*, 126 Ala. 312, 85 Am. St. Rep. 32.

The liability in such a case is confined to the value of the land at the time it was appropriated by the first company. *Memphis, etc., R. Co. v. Organ*, 67 Ark. 84.

**5. Railroad Not Liable When Work Not for Its Benefit.** — Where the improvement is made by a governmental agency, and is wholly in the interest of the public, and not for the benefit of the railroad, who had no power to prevent it, the railroad is not liable for damages. *Lewis v. New York, etc., R. Co.*, 162 N. Y. 202; *Welde v. New York, etc., R. Co.*, (Supm. Ct. Spec. T.) 29 Misc. (N. Y.) 13, *affirmed* 53 N. Y. App. Div. 637.

**1196. 1. Title Acquired on Payment of Com-**

**1196.** Payment Estops the Owner. — See note 2.

12. Owner's Lien for Unpaid Compensation. — See note 4.

**1197.** 13. Waiver of Compensation. — See notes 3, 5.

**VIII. RIGHTS OF THE PARTIES — AFTER CONDEMNATION — 1. Rights of the Landowner — a. TITLE TO THE LAND AND USE THEREOF.** — See note 6.

**1198.** b. REVERSION WHEN PUBLIC USE CEASES. — See notes 3, 4. Where Fee Taken. — See note 5.

**1199.** c. OWNERSHIP OF MINERALS. — See note 2.

2. Rights of the Corporation — a. ESTATE ACQUIRED. — See notes 3, 4.

**1200.** See notes 1, 2.

Construction of Authority to Take Land. — See notes 3, 4.

compensation. — The title of the company in condemnation proceedings does not become vested until the completion thereof, payment of damages, and entry into possession by the company. *Obst v. Covell*, 93 Minn. 30.

**1196.** 2. Payment Estops Owner from Recovering Further Damages. — *Stauffer v. Cincinnati*, etc., R. Co., 33 Ind. App. 356.

4. Lien of Owner for Unpaid Damages. — *Southern R. Co. v. Gregg*, 101 Va. 308.

**1197.** 3. Waiver by Verbal Agreement. — *Uncanoonuck Road Co. v. Orr*, 67 N. H. 541.

5. Waiver of Compensation by Owner's Conduct. — Mere passive acquiescence by an individual in the appropriation of property, unaccompanied by any conduct indicative of affirmative assent thereto, will not, unless continued for the statutory period of limitations, be regarded as a waiver of his right to compensation. *Kime v. Cass County*, (Neb. 1904) 101 N. W. Rep. 2.

Nothing short of an acquiescence in an adverse hostile possession of sufficient duration to toll the entry, will bar a claim for compensation. *Cowan v. Southern R. Co.*, 118 Ala. 554; *Southern R. Co. v. Hood*, 126 Ala. 312, 85 Am. St. Rep. 32.

6. Fee Usually Remains in Owner. — *Chicago*, etc., R. Co. v. Clapp, 201 Ill. 418, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1197.

**1198.** 3. Reverter When Only Easement Taken. — *Newton v. Manufacturers' R. Co.*, (C. C. A.) 115 Fed. Rep. 781; *Waterbury v. Platt*, 76 Conn. 435; *Chicago*, etc., R. Co. v. Clapp, 201 Ill. 418, quoting 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1198; *Canton Co. v. Baltimore*, etc., R. Co., 99 Md. 202, quoting 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1198; *Sholl v. Stump*, 24 Pa. Super. Ct. 48. See also *Matter of Gloversville*, (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 559.

4. *Charleston*, etc., R. Co. v. Hughes, 105 Ga. 1, 70 Am. St. Rep. 17.

5. Where Fee Is Taken — No Reversion. — *Wood v. Mobile*, 107 Fed. Rep. 846, 47 C. C. A. 9; *State v. Griftnr*, 61 Ohio St. 201.

Land Acquired in Fee May Be Alienated. — The legislature possesses the power to give a city authority to alienate land, the fee of which had been acquired by eminent domain. *Driscoll v. New Haven*, 75 Conn. 92.

**1199.** 2. Minerals in Land. — *Missouri*, etc., R. Co. v. Schmuck, 69 Kan. 272, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1199.

3. *Covington*, etc., Bridge Co. v. Magruder, 63 Ohio St. 455.

No Greater Estate than Owner Possesses. — The interest acquired by the corporation in the land condemned is such as the person against whom the proceeding is had possesses, and no more. *Charleston*, etc., R. Co. v. Hughes, 105 Ga. 1, 70 Am. St. Rep. 17.

Condemnation for Highway. — The estate acquired in land taken for highways, streets, etc., is a perpetual easement. *Aden v. Road Dist.* No. 3, 97 Ill. App. 347.

Condemnation for Canal. — The title acquired by the state to lands appropriated and used in the construction and operation of canals, is a fee simple. *State v. Griftnr*, 61 Ohio St. 201. But see *Sholl v. Stump*, 24 Pa. Super. Ct. 48.

Condemnation for Park. — The estate acquired by a city in land condemned for park purposes is an easement only. *Newton v. Manufacturers' R. Co.*, (C. C. A.) 115 Fed. Rep. 781. But see *Driscoll v. New Haven*, 75 Conn. 92.

4. Legislature May Determine Estate Acquired. — *U. S. Pipe-Line Co. v. Delaware*, etc., R. Co., 62 N. J. L. 254; *Currie v. New York Transit Co.*, 66 N. J. Eq. 313, 105 Am. St. Rep. 647.

**1200.** 1. In General, Railroads Acquire Only Right of Way. — *Obst v. Covell*, 93 Minn. 30; *Matter of Gloversville*, (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 559.

Therefore a house on the right of way does not become the property of the railroad. *Shields v. Norfolk*, etc., R. Co., 129 N. Car. 1.

2. Legislature May Empower Taking of Fee. — *Driscoll v. New Haven*, 75 Conn. 92; *U. S. Pipe-Line Co. v. Delaware*, etc., R. Co., 62 N. J. L. 254; *Currie v. New York Transit Co.*, 66 N. J. Eq. 313, 105 Am. St. Rep. 647.

Where a railroad company acquires the fee title to property, it is entitled to the exclusive possession thereof. *Struve v. Republican Valley R. Co.*, (Neb. 1902) 89 N. W. Rep. 604.

3. Presumption Against Fee. — *Shreveport*, etc., R. Co. v. Hinds, 50 La. Ann. 781; *Mullen v. Lake Drummond Canal*, etc., Co., 130 N. Car. 496. See also *Framingham Water Co. v. Old Colony R. Co.*, 176 Mass. 404.

4. Fee Granted by Implication. — *Driscoll v. New Haven*, 75 Conn. 92.

Statute Using Term "Fee" or "Fee Simple." — To same effect as *Kellogg v. Malin*, 50 Mo. 496, stated in the original note. *Matter of Harlem River Bridge*, 174 N. Y. 26.

Expropriator of Fee Has No Easement over Adjoining Property. — When a school board authorized only to acquire land for school pur-

**1201.** *b.* WHEN EASEMENT ACQUIRED — Duration of Easement. — See note 1.

Right of Corporation Paramount. — See note 3.

Rights of Railroad Corporations. — See notes 5, 6, 7, 8.

Diversion to New Use. — See note 10.

**1202.** Material, Timber, etc., on Land Appropriated. — See note 1.

Cannot Use or Sell Material for Profit. — See note 2.

Transfer of the Rights of a Corporation. — See note 3.

**1203.** IX. ABANDONMENT OF PUBLIC USE — 2. What Amounts to an Abandonment. — See note 3.

A Change of Line. — See note 4.

Mere Delay Where Time Not Limited. — See note 7.

**1204.** Nonuser. — See note 3.

[EMIT. — See note 4*a*.]

EMOLUMENTS. — See note 5.

poses, acquires land for such purposes under its compulsory powers, it can neither claim an easement over adjacent land nor acquire such an easement under its compulsory powers. To acquire an easement over adjacent land, it must either purchase the right or acquire the land. *School Board v. Foster*, 87 L. T. N. S. 700.

**1201.** 1. Duration. — *Shreveport, etc., R. Co. v. Hinds*, 50 La. Ann. 781; *Boyce v. Missouri Pac. R. Co.*, 168 Mo. 583.

3. Corporation Paramount Though Only Easement Acquired. — *Sanborn v. Van Dyne*, 90 Minn. 215. See also *Chicago, etc., R. Co. v. Snyder*, 120 Iowa 532.

There can be no concurrent occupancy of railroad property in actual use by it in the operation of its business without its consent. *Dillon v. Kansas City, etc., R. Co.*, 67 Kan. 687.

Title to a part of a railroad's right of way, while such road is being operated as a common carrier, cannot be divested by adverse possession. *McLucas v. St. Joseph, etc., R. Co.*, 67 Neb. 603.

5. Telegraph Line. — But it cannot establish an extensive line of telegraph and telephone communication for general purposes. *Hodges v. Western Union Tel. Co.*, 133 N. Car. 225.

6. Changing Location of Track on Right of Way. — *Brinkley v. Southern R. Co.*, 135 N. Car. 654.

7. Construction of Roadbed. — *Brinkley v. Southern R. Co.*, 135 N. Car. 654.

8. *Hodges v. Western Union Tel. Co.*, 133 N. Car. 225.

10. *Croley v. St. Louis Southwestern R. Co.*, (Tex. Civ. App. 1900) 56 S. W. Rep. 615.

**1202.** 1. Use of Materials on Land Appropriated. — *Rock Island, etc., R. Co. v. Leisy Brewing Co.*, 174 Ill. 547.

2. Use or Sale for Profit Unauthorized. — *Rock Island, etc., R. Co. v. Leisy Brewing Co.*, 174 Ill. 547.

3. Transfer of Rights in Lands Condemned. — *Pittsburgh, etc., R. Co. v. Garlick*, 11 Ohio Cir. Dec. 337, 20 Ohio Cir. Ct. 561.

**1203.** 3. Where a railroad company condemned a tract of land for a water station, and flooded it for its use, the leasing thereof to a club for fishing and bathing, reserving to itself the actual possession for all purposes for which the land was condemned, is not an abandonment of the land as a water station. *Dillon v. Kansas City, etc., R. Co.*, 67 Kan. 687.

Intention to Abandon Necessary. — To constitute an abandonment there must be not only an actual relinquishment of the property, but an intention to abandon it. *Chicago, etc., R. Co. v. Clapp*, 201 Ill. 418. See also *Townsend v. Michigan Cent. R. Co.*, (C. C. A.) 101 Fed. Rep. 757; *Scarritt v. Kansas City, etc., R. Co.*, 148 Mo. 676.

4. See *Canton Co. v. Baltimore, etc., R. Co.*, 99 Md. 202.

7. Delay in Completing No Abandonment. — Where work on a railroad was suspended for a number of years, but the project was never abandoned, and, so soon as funds were procured, the contemplated road was extended and built, there was no forfeiture of its charter rights. *Collier v. Union R. Co.*, 113 Tenn. 96.

**1204.** 3. Nonuser. — *Townsend v. Michigan Cent. R. Co.*, (C. C. A.) 101 Fed. Rep. 757; *Struve v. Republican Valley R. Co.*, (Neb. 1902) 89 N. W. Rep. 604. See also *Canton Co. v. Baltimore, etc., R. Co.*, 99 Md. 202; *Scarritt v. Kansas City, etc., R. Co.*, 148 Mo. 676.

But when the nonuser is accompanied by acts manifesting an intention to abandon, and which either destroy the object for which the easement was created, or the means of its enjoyment, an abandonment will take place. *Chicago, etc., R. Co. v. Clapp*, 201 Ill. 418.

4*a*. In *Craig v. Missouri*, 4 Pet. (U. S.) 410, Chief Justice Marshall, in referring to the meaning of the clause in the Constitution prohibiting a state from emitting bills of credit, said (page 432): "The word *emit* is never employed in describing those contracts by which a state binds itself to pay money at a future day for services actually received, or for money borrowed for present use; nor are instruments executed for such purposes, in common language, denominated 'bills of credit.' To '*emit* bills of credit' conveys to the mind the idea of issuing paper intended to circulate through the community for its ordinary purposes, as money, which paper is redeemable at a future day. This is the sense in which the terms have been always understood." *Per* Peckham, J., in *Houston, etc., R. Co. v. Texas*, 177 U. S. 66.

5. Emoluments. — *Reals v. Smith*, 8 Wyo. 168, quoting 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1204; *Vansant v. State*, 96 Md. 110.



**1. [EMPIRICISM. — See note a.]****EMPLOY — EMPLOYEE — EMPLOYMENT —** *Employ.* — See note 1.**2. See note 1.****4. Employment. — See note 1.****5. Employee. — See notes 2, 3.****8. Relationship of Master and Servant. — See note 1.**

*a. Empiricism* is defined as "a practice of medicine founded on mere experience without the aid of science or the knowledge of principles." *Per* Hobson, J., in *Nelson v. State Board of Health*, 108 Ky. 769.

1. *Bingham v. Scott*, 177 Mass. 212, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1.

**Obligation to Pay Not Implied.** — Code Iowa, § 1126, authorizing the city to *employ* special policemen at elections to prevent violation of the election law, does not make the city liable for the services of such policemen, since the word *employ* does not imply an obligation to pay for services rendered, except when applied to a servant or hired laborer. *Mousseau v. Sioux City*, 113 Iowa 246.

2. 1. See *McCunney v. New York*, 40 N. Y. App. Div. 482.

**Eight-hour Law.** — *Short v. Bullion-Beck, etc.*, Min. Co., 20 Utah 20.

4. 1. **Employment Distinguished from Office.** — *Mousseau v. Sioux City*, 113 Iowa 246.

5. 2. *Farmer v. St. Croix Power Co.*, 117 Wis. 76.

3. **Employee and Servant.** — *Cocking v. Ward*, (Tenn. Ch. 1898) 48 S. W. Rep. 287.

**Attorney.** — *Latta v. Lonsdale*, (C. C. A.) 107 Fed. Rep. 585; *Bristol v. Smith*, 158 N. Y. 157, affirming *Bristol v. Kretz*, (Supm. Ct. Spec. T.) 22 Misc. (N. Y.) 55, stated in original note.

**Employee and Contractor Distinguished.** — *Frick Co. v. Norfolk, etc.*, R. Co., (C. C. A.) 86 Fed.

Rep. 738; *Clark v. Renninger*, 89 Md. 66; *Fidelity, etc., Co. v. Parkinson*, (Neb. 1903) 94 N. W. Rep. 120; *Farmer v. St. Croix Power Co.*, 117 Wis. 76.

**Bookkeeper** not entitled to preference. *Matter of Stryker*, 158 N. Y. 526, affirming 73 Hun (N. Y.) 327; *Cochran v. A. S. Baker Co.*, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 48.

**The Manager of a Company is not an employee** within a statute giving *employees*, operatives, and laborers preference in their claims against corporations. *Matter of American Lace, etc., Paper Works*, 30 N. Y. App. Div. 321.

**A Salesman on Commission is an employee**, and as such is entitled to a preference in payment, even though his compensation is measured in part by the profits. *Matter of Ginsburg*, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 745. And see *Matter of Luxton, etc., Co.*, 35 N. Y. App. Div. 243.

8. 1. In *Bingham v. Scott*, 177 Mass. 211, the court said: "There are various senses in which the verb *employ* and its derivatives are used. But when used in connection with matters of ordinary business, as in this statute [prohibiting the employing of another to buy stock on margin], it means, we think, service rendered or to be rendered for compensation, and is nearly or quite synonymous with 'hire,' though, as said by the authors of the Standard Dictionary, a word of more dignity than that."

## EMPLOYERS' LIABILITY INSURANCE.

By P. B. MCKENZIE.

**10. I. INTRODUCTORY — 1. Definition and Nature. — See notes 2, 6.****11. II. THE RISK — 2. Scope of Contract — In General. — See note 9.****12. Insurance Covers Liability for Injuries to What Persons. — See note 1.**

**10. 2. Nature of Employer's Liability Insurance.** — *Rumford Falls Paper Co. v. Fidelity, etc., Co.*, 92 Me. 574; *Frye v. Bath Gas, etc., Co.*, 97 Me. 241; *Sanders v. Frankfort Marine, etc., Ins. Co.*, 72 N. H. 485, 101 Am. St. Rep. 688; *Fenton v. Fidelity, etc., Co.*, 36 Oregon 283.

It operates to make the insurer the principal debtor and the insured his surety. *Beacon Lamp Co. v. Travellers' Ins. Co.*, 61 N. J. Eq. 59.

**6. Right of Injured Employee to Collect Insurance.** — *Beacon Lamp Co. v. Travellers' Ins. Co.*, 61 N. J. Eq. 59, affirmed in *Travellers' Ins. Co. v. Moses*, 63 N. J. Eq. 260, 92 Am. St. Rep. 663. And see *infra*, this title, **14. 1**; **16. 7**; **17. 5**.

**11. 9. Insurance Limited to Legal Liability of the Insured.** — *Wollman v. Fidelity, etc., Co.*,

87 Mo. App. 677; *Tolmie v. Fidelity, etc., Co.*, 95 N. Y. App. Div. 352; *Goodwillie v. London Guarantee, etc., Co.*, 108 Wis. 207.

It does not cover the expenses incurred in successfully defending damage suits. *Cornell v. Travelers' Ins. Co.*, 175 N. Y. 239.

**Unauthorized Alteration by Agent.** — The insurer is not bound by an alteration in the policy, enlarging its liability, made without its knowledge or consent by one of its agents who was not authorized to make such an alteration. *Pigott v. Employers' Liability Assur. Corp.*, 31 Ont. 666.

**12. 1. Injuries to Employees Covered.** — *Travelers Ins. Co. v. Bright*, 24 Ohio Cir. Ct. 441; *Fidelity, etc., Co. v. Lone Oak Cotton Oil, etc., Co.*, 35 Tex. Civ. App. 260.

Disease acquired in the discharge of ordinary

**12.** Insurance Covers Liability for What Injuries. — See note 4.

**13.** Waiver. — See notes 1, 2.

**14.** 3. Amount of Liability. — See note 1.

III. PARTIES — 1. The Insurer — *a.* WHO MAY INSURE. — See note 3.

**16.** IV. WHO MAY ENFORCE LIABILITY — Insurance Payable to the Employer. — See note 7.

**17.** Garnishment of Proceeds of Policy by Employee. — See note 1.

V. ACCRUAL OF LIABILITY. — See notes 2, 4.

Insured Need Not Have Discharged Liability. — See note 5.

duties by an employee is covered by such a policy. *Columbia Paper Stock Co. v. Fidelity, etc., Co.*, 104 Mo. App. 157.

**Construction of Application.** — As to inclusion of subcontractors, *Dives v. Fidelity, etc., Co.*, 206 Pa. St. 199.

The application made out by the agent of the insurer, acquainted with all the circumstances, failed to give the number and character of elevators in use, and the policy exempted the insurer unless such information was given; compliance with the requirement was held to have been waived. *Fuller Bros. Toll Lumber, etc., Co. v. Fidelity, etc., Co.*, 94 Mo. App. 490.

**12. 4. For Exceptions to General Liability** see the following cases: *Tolmie v. Fidelity, etc., Co.*, 95 N. Y. App. Div. 352 (negligence of subcontractor or his servants); *Chicago-Coulterville Coal Co. v. Fidelity, etc., Co.*, 130 Fed. Rep. 957 (failure of insured to comply with statutory requirement).

**Injuries Resulting in Instant Death.** — Where the policy protected the insured against loss for accidental injury to persons traveling on its railroad, it was held not to cover claims or losses for liability for injuries resulting in instant death. *Worcester, etc., St. R. Co. v. Travelers' Ins. Co.*, 180 Mass. 263.

**13. 1. Waiver of Objection that Liability Is Not Within Terms of Policy.** — Where the parties had treated a similar claim as covered by the policy the insurer was held to be estopped from denying liability. *Fuller Bros. Toll Lumber, etc., Co. v. Fidelity, etc., Co.*, 94 Mo. App. 490.

**Waiver of Forfeiture.** — Where the insurer undertook the defense of an action under an agreement that such act should not constitute a waiver of its objection based on the insured's failure to give notice of the claim as required by the policy, it was held that there was no waiver of the forfeiture. *London Guarantee, etc., Co. v. Siwy*, (Ind. App. 1903) 66 N. E. Rep. 481.

**2.** Where waiver was relied on, but it appeared that the insured did not inform the insurer that he was operating a mine in disregard of duties imposed by statute, the failure to observe such duties being the direct cause of the injury, it was held that there was no waiver. *Chicago-Coulterville Coal Co. v. Fidelity, etc., Co.*, 130 Fed. Rep. 957.

**14. 1. Limitation of Insurer's Liability to Specified Amount.** — The limitation is binding, even though the insurer refused to accede to the settlement of a claim, and forced litigation in which a judgment largely in excess of the limitation was obtained against the insured. *Rumford Falls Paper Co. v. Fidelity, etc., Co.*, 92 Me. 574.

Where the insured was insolvent and nothing was collected on execution issued against it, the insurer was held liable for the full limit of the policy in a suit in equity by the employee, who had secured judgment for an amount exceeding the limit. *Sanders v. Frankfort Marine, etc., Ins. Co.*, 72 N. H. 485, 101 Am. St. Rep. 688.

Where the liability of the insurer was limited to five thousand dollars in any one case, and judgment was rendered against the insured for six thousand dollars, before paying which the insured was adjudged a bankrupt, the trustee was limited in his recovery to the same percentage of the judgment of six thousand dollars, which the general assets of the bankrupt paid on all its debts, exclusive of the judgment. *Travelers' Ins. Co. v. Moses*, 63 N. J. Eq. 260, 92 Am. St. Rep. 663, *disapproving* *Beacon Lamp Co. v. Travellers' Ins. Co.*, 61 N. J. Eq. 59.

**3.** See *State v. Aetna L. Ins. Co.*, 69 Ohio St. 317.

**16. 7. Insurance Money Not Assets of Injured Servant.** — An injured employee cannot maintain an action against the insurer of his employer. *Kinnan v. Fidelity, etc., Co.*, 107 Ill. App. 406.

It is not a trust fund to which he may resort after failure to collect his judgment from the insured. *Bain v. Atkins*, 181 Mass. 240.

Where the servant died of his injuries and his administratrix recovered a judgment against the insured which was paid, an assignee of the claim thereafter could not recover of the insurer. *Embler v. Hartford Steam Boiler Inspection, etc., Co.*, 158 N. Y. 431.

**Insurance Money Recoverable Only by Insured.** — Where the policy was issued to a partnership and the injured employee obtained judgment against only one of the partners individually, the insurer was not liable under the policy. *Kelley v. London Guarantee, etc., Co.*, 97 Mo. App. 623.

**17. 1. Garnishment of Insurance Money.** — Or by a bill in chancery. *Sanders v. Frankfort Marine, etc., Ins. Co.*, 72 N. H. 485, 101 Am. St. Rep. 688; *Beacon Lamp Co. v. Travellers' Ins. Co.*, 61 N. J. Eq. 59, *affirmed* in *Travellers' Ins. Co. v. Moses*, 63 N. J. Eq. 260, 92 Am. St. Rep. 663. But in *Cushman v. Carbondale Fuel Co.*, 122 Iowa 656, it was held that the employee, failing to collect a judgment against the insured, could not maintain a suit in equity against the insurer.

**2.** *Fenton v. Fidelity, etc., Co.*, 36 Oregon 283.

**4.** *Fenton v. Fidelity, etc., Co.*, 36 Oregon 283.

**5. Right of Insured to Recover Without Discharging Liability.** — *Stephens v. Pennsylvania Casualty Co.*, 135 Mich. 189, 10 Detroit Leg. N. 744; *Sanders v. Frankfort Marine, etc., Ins. Co.*, 72 N. H. 485, 101 Am. St. Rep. 688.

**17. VI. NOTICE OF INJURY** — Effect of Failure to Give Required Notice. — See note 7.

**18. Time of Notice.** — See notes 2, 4.

**19. VII. EXPIRATION OF LIABILITY.** — See note 1.

**VIII. DEFENSE AND SETTLEMENT.** — See notes 3, 4, 5, 6.

**EMPOWER.** — See note 7.

**20. ENACT.** — See note 2.

**21. END.** — See note 1.

*Pickett v. Fidelity, etc., Co.*, 60 S. Car. 477, 38 S. E. Rep. 629, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 17.

Modern employers' liability policies have been so altered that the text and earlier decisions are not applicable. It is now generally provided that the indemnity only protects against "a loss actually sustained and paid in satisfaction of a judgment." *Cushman v. Carbondale Fuel Co.*, 122 Iowa 656.

Where the policy stipulated that the insured could recover only a loss actually paid in satisfaction of a judgment, it was held that the condition was met by the transfer of its property to a trustee in bankruptcy by an insured corporation against which judgment had been obtained, and the trustee could maintain the suit to recover. *Travellers' Ins. Co. v. Moses*, 63 N. J. Eq. 260, 92 Am. St. Rep. 663.

But where the insured made an assignment for the benefit of such creditors as might assent thereto and the employee holding the judgment did not assent, it was held that he could not recover against the insurer. *Frye v. Bath Gas, etc., Co.*, 97 Me. 241.

**17. 7. Failure to Give Required Notice Bars Recovery.** — *In re Williams, etc.*, Acc. Ins. Co., 51 W. R. 222.

**18. 2. Policy Requiring Immediate Notice of Accident or Claim.** — *Ward v. Maryland Casualty Co.*, 71 N. H. 262, 93 Am. St. Rep. 514.

Such requirement is of the essence of the contract. *Employers Liability Assur. Corp. v. Light, etc., Co.*, 28 Ind. App. 437.

Failure to comply with such requirement forfeits the insurance. *London Guarantee, etc., Co. v. Siwy*, (Ind. App. 1903) 66 N. E. Rep. 481. See also *In re Williams, etc.*, Acc. Ins. Co., 51 W. R. 222.

Such requirement is reasonable and means within a reasonable time under the particular circumstances. *Columbia Paper Stock Co. v. Fidelity, etc., Co.*, 104 Mo. App. 157.

**4. Two Notices Required.** — See *Northwestern Telephone Exch. Co. v. Maryland Casualty Co.*, 86 Minn. 467.

**19. 1. Provisions Requiring Suit to Be Brought Within a Time Specified.** — See *Tolmie v. Fidelity, etc., Co.*, 95 N. Y. App. Div. 352.

**3. Stipulation that Insurer May Settle or Defend Action Against Insured.** — *Walker v. Gurney-Tilden Co.*, 19 Ont. Pr. 12.

Under such clause the insurer has no right to demand the discharge of an employee because he refuses to settle his claim on its terms. *London Guarantee, etc., Co. v. Horn*, 101 Ill. App. 355, affirmed 206 Ill. 493, 99 Am. St. Rep. 185.

Where the insurer undertook the defense of

an action against the insured, but the day before the case was to be tried abandoned it on the ground that the insured had violated its statutory duty in the matter of protecting its machinery, and judgment by default was entered against the insured, the insurer could not defend by saying such judgment established its charge. *Glens Falls Portland Cement Co. v. Travelers' Ins. Co.*, 162 N. Y. 399.

**4.** But such stipulation does not apply to a settlement of a judgment against the insured; nor is it any defense to the insurer that the insured, pending the suit against him, agreed with the injured employee that any excess of his judgment over the amount insured would be settled for a specific sum. *Pickett v. Fidelity, etc., Co.*, 60 S. Car. 477, 38 S. E. Rep. 629.

**5.** Where the insurer appeals from a judgment against the insured it is liable for the costs of the appeal. *Stephens v. Pennsylvania Casualty Co.*, 135 Mich. 189, 10 Detroit Leg. N. 744.

**6.** Where the policy permitted the insured to furnish immediately necessary surgical attention the insurer was liable therefor, but not for the expenses of living furnished the employee while laid up from his injuries. *Employers Liability Assur. Corp. v. Light, etc., Co.*, 28 Ind. App. 437.

The provisions in a policy that the insurer shall have the right to defend any action in the name of the assured, and that the assured shall not assign its rights under the policy, were held not to apply to a claim for surgical services furnished the injured employee. *Fenton v. Fidelity, etc., Co.*, 36 Oregon 283.

And the surgeon was permitted to maintain suit against the insurance company in *Kelly v. Maryland Casualty Co.*, 89 Minn. 337.

**7. Authorize and Empower.** — *Armstrong v. Murphy*, 65 N. Y. App. Div. 123.

**20. 2. The Enacting Clause** of a statute is no more a part of the first section than of the others, and hence the repeal, without a saving clause, of part of the sections of an act, including the first section, does not leave the remaining sections without an *enacting clause*, so as to render them invalid. *Pearce v. Vitum*, 193 Ill. 192. And see *State v. Bevins*, 70 Vt. 574.

**21. 1.** In construing a restriction in a deed providing that on the rear *end* of the lot no building, or part of a building, used or occupied as a dwelling house shall be built or erected, the court said: "In strictly construing the restriction and not extending it by implication, as we dare not, the meaning to be given to *end* is the generally accepted one of 'extremity,' 'termination,' 'limit.'" *Crofton v. St. Clement's Church*, 208 Pa. St. 213.



**21. ENDEAVOR.** — See note 2.

**21. 2. In Construing the Word Endeavor in a Deed for Maintenance,** the court said: "It is said to mean 'to use efforts,' 'to attempt,' 'to try,' 'to strive,' and so on. Generally it means that, but that depends on the place, context, and circumstances under which it is found."  
\* \* \* If necessary to give meaning to the

word *endeavor*, as used in this deed, I should say it was used to emphasize the duty already put on the defendant—to call upon him to fulfill, and demand full compliance, and not to destroy, lessen, and fritter away the main purpose of the deed on the grantor's part."  
*Goldsmith v. Goldsmith*, 46 W. Va. 426.

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## ENDOWMENT INSURANCE.

BY P. B. MCKENZIE.

**26. II. PARTIES — 1. The Insurer — Right of Corporation to Issue Endowment Insurance Dependent on Charter.** — See note 4.

**27. 2. The Insured — b. RIGHT OF RECOVERY — (1) In General.** — See note 3.

**28. (2) Forfeiture.** — See note 1.

**c. RIGHT OF RESCISSION — On Account of Representations as to Profits of Insurer.** — See note 2.

**d. RIGHT OF ASSIGNMENT AND TRANSFER.** — See note 9.

**Limitation on Right of Insured to Surrender Policy.** — See note 1.

**30. f. MISCELLANEOUS RIGHTS.** — See note 7.

**31. 3. Beneficiaries — Payee Dying Before Insured.** — See note 6.

**32. Wife Suing for Divorce.** — See note 1.

### ENEMY. — See note 3.

**26. 4. Power of Corporation to Issue Endowment Insurance.** — An insurance company having issued an endowment policy and accepted premiums thereon cannot raise the question of *ultra vires*. *Wagner v. Keystone Mut. Ben. Assoc.*, 8 Pa. Dist. 231.

**27. 3. Invalid Contract of Endowment Insurance.** — The fact that the promise of an insurance company to issue an endowment policy at some future time is *ultra vires*, it having no authority to issue such policy, will not avoid an ordinary life policy issued by it to the promisee to be carried until the endowment policy was issued, though the premiums paid were for the endowment policy. *Calandra v. Life Assoc. of America*, (Supm. Ct. App. T.) 84 N. Y. Supp. 498.

**28. 1. Where the insured and the beneficiary obtained a loan on an endowment policy and gave their note stipulating that the lapsing of the policy for nonpayment of premiums would annul all provisions for paid-up and term policies, and the policy lapsed, it was held that the beneficiary could not recover a term policy.** *Rife v. Union Cent. L. Ins. Co.*, 129 Cal. 455.

**2. Representations as to Future Profits.** — See *McKay v. New York L. Ins. Co.*, 124 Cal. 270.

**9. Assignment Permitted.** — *McDonough v. Aetna L. Ins. Co.*, (Supm. Ct. Tr. T.) 38 Misc. (N. Y.) 625.

An ordinary life policy payable to the wife and children of the insured, but containing a provision that after fifteen years the insured should have the option of converting it into an endowment policy, was held assignable by the

insured. *Travelers' Ins. Co. v. Healey*, 25 N. Y. App. Div. 53, affirmed 164 N. Y. 607.

**29. 1. Limitations upon Right of Surrender.** — See *Union Cent. L. Ins. Co. v. Buxer*, 62 Ohio St. 385.

**30. 7. Right of Insured to Demand Loan.** — A divorced husband cannot demand a loan on an endowment policy on his life while the same is held by the wife subject to her lien for premiums paid by her. *Hatch v. Hatch*, 35 Tex. Civ. App. 373.

**31. 6. Right of Payee in Case of Death of Insured where the Latter Survives.** — *Burton v. Burton*, 56 N. Y. App. Div. 1.

**32. 1. Effect of Divorce.** — A divorce ends the wife's interest in an endowment policy on the husband's life, and she can only recover the premiums paid by her, for which she has a lien on the policy in her hands. *Hatch v. Hatch*, 35 Tex. Civ. App. 373.

**3. "Enemy Property" Is a Technical Phrase Peculiar to Prize Courts,** and depends upon principles of public policy as distinguished from the common law. The general rule is that in war the citizens or subjects of the belligerents are *enemies* to each other without regard to individual sentiments or dispositions, and that political status determines the question of *enemy* ownership. And by the law of prize, property engaged in any illegal intercourse with the *enemy* is deemed *enemy* property, whether belonging to an ally or a citizen, as the illegal traffic stamps it with the hostile character and attaches to it all the penal consequences. *The Benito Estenger*, 176 U. S. 568.

- 32.** [ENERET. — See note 3a.]  
**33.** ENGAGE. — See note 3.  
**36.** ENGINEER. — See note 1.  
 [ENGINEERING WORK. — See note 2a.]  
**37.** ENJOIN. — See note 4.  
**42.** ENTER — ENTRY. — See notes 4, 5.  
**45.** See note 1.  
**47.** ENTERTAINMENT. — See note 2.  
**48.** ENTICE. — See note 1.  
**49.** ENTIRETIES. — See note 1.  
**50.** ENTITLE. — See note 1.  
 [ENTRANCE. — See note 1a.]  
**51.** [ENVELOPES. — See note 2a.]  
**52.** EQUAL — EQUALLY. — See note 3.

**32. 3a.** In *Atlas Glass Co. v. Simonds Mfg. Co.*, (C. C. A.) 10 Fed. Rep. 643, the court said: "The Danish word *eneret*, according to the Danish expert and patent solicitor produced as a witness by complainant, means 'monopoly.'"

**33. 3.** State *v. Roberson*, 136 N. Car. 589, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 33.

**Engaged Chiefly in Farming.** — As to who are persons *engaged* chiefly in farming within the exception of such from involuntary bankruptcy under the Federal Bankrupt Act, see *In re Thompson*, 102 Fed. Rep. 287; *In re Drake*, 114 Fed. Rep. 229, *affirmed* (C. C. A.) 120 Fed. Rep. 493; *In re Matson*, 123 Fed. Rep. 743; *Dearborn Bank v. Matney*, 132 Fed. Rep. 75; *In re Brown*, 132 Fed. Rep. 706.

**The Term Engaged in Business** signifies an employment for the purpose of a livelihood or profit, and hence evidence that a minor was *engaged* in farming at a stipulated price per year, and that he purchased certain lots while so *engaged*, while competent, is not sufficient to show that he was "*engaged* in business," as contemplated by the statute, so as to preclude him from rescinding such purchase. *Beickler v. Guenther*, 121 Iowa 419.

**36. 1. Civil Engineer.** — The term *engineer*, as applied to civil matters, refers "to the construction of fixed public works, such as \* \* \* aqueducts, bridges, \* \* \* sewers, etc." *Webst. Dict.* "To the designing and construction of public works, such as roads, bridges, etc." *Stand. Dict.* *Kollock v. Dodge*, 105 Wis. 187.

**2a. Workmen's Compensation Act** — What constitutes Employment in or About Engineering Work. — See *Chambers v. Whitehaven Harbour Com'rs*, (1899) 2 Q. B. 132.

**37. 4. The Use of the Word "Enjoin" in a Will Does Not Necessarily Create a Precatory Trust.** — Compare *Clifford v. Stewart*, 95 Me. 38.

**42. 4. Public Lands.** — U. S. *v. Four Bottles Sour-Mash Whisky*, 90 Fed. Rep. 720; *Northern Pac. R. Co. v. Nelson*, 22 Wash. 521.

**Same — Entryman.** — See *McCord v. Hill*, 111 Wis. 499.

**5. Recording, Filing, Etc.** — *Knox v. State*, 113 Ga. 929.

**Rendering Distinguished from Entering a Judgment.** — *Coe v. Erb*, 59 Ohio St. 259; *Barthrop v. Tucker*, 29 Wash. 666.

**45. 1. Revenue Laws.** — U. S. *v. Legg*, (C. C. A.) 105 Fed. Rep. 933.

**Entry — Burglary.** — State *v. Crawford*, 8 N. Dak. 539.

**Entered into Equivalent to Executed as Used in a Bond.** — *Fire Assoc. v. Ruby*, 60 Neb. 216.

**47. 2. The word entertainment** in a subscription paper for the *entertainment* of visiting delegates to a benevolent association is not limited to board and necessities, but includes a ball and banquet. *Lasar v. Johnson*, 125 Cal. 549.

**48. 1. Gould v. State, (Neb. 1904) 99 N. W. Rep. 541.**

**49. 1. Laird v. Perry, 74 Vt. 459; *McNeeley v. South Penn. Oil Co.*, 52 W. Va. 621, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 49.**

**50. 1. Entitled in Possession.** — *In re Maunder*, (1902) 2 Ch. 875, *affirmed* (1903) 1 Ch. 451, *following In re Noyce*, 31 Ch. D. 75. See also *Thall v. Dreyfus*, 84 N. Y. App. Div. 569.

**1a. Entrance to Dwelling — Liquor Tax Law.** — In *Matter of Purdy*, 40 N. Y. App. Div. 134, the court said: "The statute (Liquor Tax Law, § 17, subd. 8, as amended by c. 312, Laws of 1897), provides that when the 'nearest entrance to the premises described' is less than two hundred feet from the nearest entrance of a building occupied exclusively as a dwelling, measured in a straight line, it shall be necessary to have the written consent of two-thirds of the owners of premises so situated; but it can hardly be contended that a doorway which has been permanently closed is an entrance within the meaning of the statute."

Rear doors of dwelling houses communicating by rear yards with the street are *entrances* of the dwelling house, within the meaning of the Liquor Tax Law, and, therefore, where they are within two hundred feet of the nearest entrance of a place where traffic in liquors is to be carried on consents of the owners of the dwelling houses are necessary to the granting of a certificate. *Matter of Saunderson*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 375.

**51. 2a. Customs Duties Act.** — As to what constitutes an *envelope* under this act, see *Hunter v. U. S.*, (C. C. A.) 134 Fed. Rep. 361.

**52. 3. Equal Proportions — Joint Tenancy**

**53.** A Direction in a Will. — See notes 1, 2.

**54.** EQUIPMENT. — See note 1.

**55.** EQUITABLE. — See note 1.

and Tenancy in Common. — *Loomis v. Gorham*, 186 Mass. 444; *Shattuck v. Wall*, 174 Mass. 167.

**53. 1.** *Per Capita*. — *Hughes v. Hughes*, (Ky. 1904) 82 S. W. Rep. 408; *Mooney v. Purpus*, 70 Ohio St. 57; *Ramsey v. Stephenson*, 34 Oregon 408.

**2.** *Per Stirpes*. — *Maclean v. Williams*, 116 Ga. 257. See also *Matter of Walker*, (Surrogate Ct.) 39 Misc. (N. Y.) 680.

**54. 1.** "Under the act creating the [New York rapid transit] commission, the word *equipment* is given a much broader significance than it usually receives. It includes not only motors and cars, but also, among other things, all power houses, real estate upon which power houses shall rest, wires, ways, conduits, mechanisms, implements, and devices of every nature whatsoever used for the transmission of motive power, whether such *equipment* be situate on or near or separate from the railway." In this case it was held to be the duty of a subway contractor to supply at his own cost ducts for transmitting electricity, and that such were properly *equipment* notwithstanding the fact that the commission allowed the same as extra construction work. *McDonald v. Grout*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 18, *affirmed* 175 N. Y. 470.

**Mechanics' Liens.** — In construing a statute

giving mechanics a lien on a railroad and its *equipment*, the court said: "The word *equipment* is used in the same article in association with other words, thus: 'locomotive, car, or other *equipment* of a railroad.' From its association with the words indicating the movable *equipments* of the railroad, the legislature intended, by 'other *equipments*,' to include all other things used in like manner in connection with the operation of the railroad; but it cannot be construed to include everything that is necessary to the operation of the railroad, and therefore it is not broad enough to include structures like machine shops, round houses, and the like." *National Bank v. Gulf, etc.*, R. Co., 95 Tex. 176.

**55. 1.** *Equitably in the Sense of Fairly.* — *Hackett v. Equitable Life Assur. Soc.*, 50 N. Y. App. Div. 271.

The *Equitable Plaintiff* is he who, not having the legal title to the right of action, is in equity entitled to the thing sued for. *U. S. v. Henderlong*, 102 Fed. Rep. 2.

The *Equitable and Bona Fide Owner* of a chose in action is the genuine, honest, real, and beneficial owner, the one to whom the equities belong, and not a make-believe owner. *Gaffney v. Tammany*, 72 Conn. 701.

## EQUITABLE ELECTION.

By F. G. BAMMAN.

**59. I. DEFINITION, FOUNDATION, AND RELATIONS OF DOCTRINE — 1.** Definition. — See note 1.

**60. 2.** Rational Foundation of Doctrine. — See note 1.

**61.** See notes 1, 2.

**59. 1.** Definition of Election. — *Price v. Price*, 133 N. Car. 494.

In *Stone v. Cook*, 179 Mo. 545, the court said: "The general doctrine of election is well stated in 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 59."

**Other Definitions.** — Story's definition, given in the original note, was adopted in *Gilroy v. Richards*, 26 Tex. Civ. App. 355; *Graham v. Whitridge*, 99 Md. 248.

**60. 1.** Person Cannot Accept and Reject under Same Instrument — *Illinois*. — *Kidder v. Douglas*, 194 Ill. 388; *Friederick v. Wombacher*, 204 Ill. 72.

*Indiana*. — *Mannan v. Mannan*, 154 Ind. 14, *citing* 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 60. See also *Whisnand v. Fee*, 21 Ind. App. 270; *Cameron v. Parish*, 155 Ind. 329.

*Kentucky*. — *Bennett v. Bennett*, (Ky. 1901) 65 S. W. Rep. 12. See also *Green v. Ponder*, (Ky. 1900) 58 S. W. Rep. 605.

*Missouri*. — *Stone v. Cook*, 179 Mo. 544, cit-

*ing* 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 60.

*New Jersey*. — See *Bird v. Hawkins*, 58 N. J. Eq. 229.

*North Carolina*. — *Allen v. Allen*, 121 N. Car. 328; *Tripp v. Nobles*, 136 N. Car. 99.

*Tennessee*. — See *Cooper v. Pearce*, (Tenn. Ch. 1901) 62 S. W. Rep. 223.

*Texas*. — *Gilroy v. Richards*, 26 Tex. Civ. App. 355.

*West Virginia*. — See *Mathews v. Tyree*, 53 W. Va. 301, *citing* 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 60.

**No Partial Election.** — *In re Bloss*, 114 Mich. 204.

**61. 1.** Founded on Intent. — *Tripp v. Nobles*, 136 N. Car. 99.

"The foundation of the doctrine of election rests upon a presumptive intention upon the part of the testator that the donee was not to take a double benefit." *Gilroy v. Richards*, 26 Tex. Civ. App. 355.



**62. 4. Kindred Equities and Distinctions — b. GIFTS UPON EXPRESS CONDITION.** — See note 2.

*c. GIFTS ACCOMPANIED WITH A BURDEN.* — See note 4.

**63.** Plural Gifts, Some Burdensome. — See notes 2, 3.

**65. II. SCOPE AND APPLICATION OF DOCTRINE — 2. Under What Instruments Election May Arise.** — See notes 2, 5.

**3. Essentials to Raise Election — a. GENERALLY.** — See note 6.

**66. b. DONOR MUST GIVE PROPERTY OF HIS OWN.** — See note 2.

*Property Must Be Given Out of Which Compensation Can Be Made.* — See note 4.

**67. c. DONOR'S ATTEMPT TO DISPOSE OF DONEE'S PROPERTY — (1) An Essential with Respect to Wills.** — See notes 1, 2.

*Precatory Words.* — See note 4.

**68. (4) Proof of Donor's Intent to Dispose of Donee's Property.** — See note 3.

**70. d. ATTEMPTED DISPOSITIONS VOID — (2) Disposition Invalid for Want of Formality in Execution — (a) Execution Sufficient as to Personalty, Insufficient as to Realty.** — See note 3.

**71. (b) Will Insufficiently Executed as to Foreign Property.** — See note 6.

**61. 2.** See *In re Hancock*, (1905) 1 Ch. 16.

**62. 2. Forfeiture Not Compensation.** — See *Mannan v. Mannan*, 154 Ind. 14, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 62.

Property was given by a testator's will to his widow on condition that she pay, within five years, all mortgages thereon. The widow accepted the provisions of the will, but did not perform the condition subsequent. It was held that equity would not work a forfeiture but would enforce the performance of the condition. *Bird v. Hawkins*, 58 N. J. Eq. 229.

**4. Refusal to Accept.** — A will provided that two daughters who were devisees thereunder should pay a certain sum to a third daughter, and also provided that on default of payment the third should have a portion of the land devised to the two. This was held to give the two daughters a right of election, and they having refused to pay the sum named the third daughter was confined to her rights in the land. *Damuth v. Lee*, 163 N. Y. 478.

**63. 2. M'Kibbin's Estate**, 21 Pa. Super. Ct. 578, quoting 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 62, 63.

**3.** *Bird v. Hawkins*, 58 N. J. Eq. 229; *M'Kibbin's Estate*, 21 Pa. Super. Ct. 578, quoting 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 62, 63.

**65. 2. Election Applies to Deeds.** — One proving a superior title to land must elect either to pay the appraised value of the improvements to the occupant, or demand the value of the land without the improvements. *Troxell v. Stevens*, 57 Neb. 329.

**5. Claim under Contract.** — See *Mills v. McCaustland*, 105 Iowa 187; *Price v. Price*, 133 N. Car. 494.

**Contract to Devise Property.** — *Cheney v. Ricks*, 168 Ill. 533.

**6. Earnhardt v. Clement**, 137 N. Car. 94, quoting 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 65.

**In Order to Raise Case of Election under Will.** — *Lamar v. McLaren*, 107 Ga. 591, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 65; *Cameron v. Parish*, 155 Ind. 329; *Parkey v. Ramsey*, 111 Tenn. 302; *Gilroy v. Richards*, 26

Tex. Civ. App. 355. See also *Drake v. Wild*, 70 Vt. 52.

"The rule requiring election is generally based upon the fact that the testator intended to dispose of property not his own and to give its owner something else." *Bible v. Marshall*, 103 Tenn. 324, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 65-67.

**66. 2. Election Applicable Only Where Benefit Is Conferred under Instrument.** — *Ball v. Ball*, 165 Mo. 312; *Kerrigan v. Conelly*, (N. J. 1900) 46 Atl. Rep. 227; *Hutchings v. Davis*, 68 Ohio St. 160; *Sperry v. Swiger*, 54 W. Va. 283; *Jochem v. Dutcher*, 104 Wis. 611. See also *Traudt v. Hagerman*, 27 Ind. App. 150; *Staples v. Hawes*, (Supm. Ct. Spec. T.) 24 Misc. (N. Y.) 475, affirmed 39 N. Y. App. Div. 548. But compare *Tripp v. Nobles*, 136 N. Car. 99.

**4. Property Out of Which Compensation Can Be Made Essential.** — *Graham v. Whitridge*, 99 Md. 288, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 66.

**Settlement Making Property Inalienable in the Donee.** — *Haynes v. Foster*, (1901) 1 Ch. 361, 84 L. T. N. S. 139.

**67. 1. Must Be a Claim Dehors the Will.** — *Cameron v. Parish*, 155 Ind. 329.

**2. Where Property of Donee Is Not Disposed of.** — *Bible v. Marshall*, 103 Tenn. 324, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 65-67.

**4. Precatory Words.** — *Miller v. Miller*, (Supm. Ct. Spec. T.) 22 Misc. (N. Y.) 582.

**68. 3. Parol Evidence Inadmissible to Show Testator's Intention.** — *Charch v. Charch*, 57 Ohio St. 561. See also *Cameron v. Parish*, 155 Ind. 329.

**Description Must Be Specific.** — The description of a donee's property attempted to be disposed of by the testator must be so specific that the donee will recognize it as his own, and the identification cannot be established by parol. *Gray v. Williams*, 130 N. Car. 53.

**70. 3. Devise by Will Defectively Executed.** — See *Hand v. Hand*, 60 N. J. Eq. 518.

**71. 6. Devise of Lands in Foreign Country by Will Imperfectly Executed.** — See *Hand v. Hand*, 60 N. J. Eq. 518.

**72. 4. To What Interests Election Applicable**—*a. FUTURE AND CONTINGENT INTERESTS.*—See note 3.

**75. *d. DONOR AND DONEE BOTH INTERESTED IN PROPERTY BESTOWED***—(3) *Devise in General Words.*—See note 3.

**76.** See note 1.

(4) *Specific Devise.*—See notes 2, 3.

**78. 5. Competency of Persons to Elect**—*a. INFANTS*—Postponing Election until Majority.—See note 1.

*b. MARRIED WOMEN*—Ability to Elect.—See note 5.

**79. *c. INSANE PERSONS***—Insane Widow.—See notes 5, 6.

**80. 7. Against Whom Election Enforceable**—The Claim of a Creditor.—See note 6.

**81. III. ELECTION AS TO DOWER AND OTHER RIGHTS ARISING ON MARRIAGE**—1. Married Women—*a. ELECTION BETWEEN DOWER AND PROVISION IN WILL*—(2) *Notice to Widow.*—See note 7.

**82. (3) Whether Testamentary Provision Raises Election**—(a) General Principles—*aa. PROVISION PRESUMED CUMULATIVE.*—See note 2.

**83. *bb. BY STATUTE PROVISION PRESUMED EXCLUSIVE.***—See note 1.

Application of Statutes Illustrated.—See note 2.

**84.** See note 1.

A Bequest of Personalty.—See notes 3, 4.

**85. (b) Provision Expressed to Be in Lieu of Dower**—*aa GENERALLY.*—See note 3.

*bb. AFTER-ACQUIRED PROPERTY.*—See note 6.

**72. 3. Reversionary Interest of Married Woman Falling in After Dissolution of Marriage.**—A widow is not entitled to dower in a reversion expectant upon an intermediate freehold estate which does not end during coverture, and she may not therefore elect to take a statutory share in lieu of dower. *Von Arb v. Thomas*, 163 Mo. 33.

**75. 3. Devise in General Words.**—*Charch v. Charch*, 57 Ohio St. 561; *Gibony v. Hutcheson*, 20 Tex. Civ. App. 581. See also *Lamar v. McLaren*, 107 Ga. 602, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 75.

**76. 1. Devise in General Words Showing Intent to Dispose of Entirety.**—*Shaggs v. Deskin*, (Tex. Civ. App. 1902) 66 S. W. Rep. 793.

2. *Lamar v. McLaren*, 107 Ga. 591, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 75, 76.

3. See *Charch v. Charch*, 57 Ohio St. 561.

**78. 1. Postponement of Election until Infant's Majority.**—See *In re Hancock*, (1905) 1 Ch. 16.

5. Capacity of Females Covert to Elect.—*Stone v. Cook*, 179 Mo. 544, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 78.

**79. 5. Election by Guardian or Committee.**—See *Williamson v. Nelson*, (Tenn. Ch. 1901) 62 S. W. Rep. 53.

6. Court May Exercise Discretion.—*State v. Hunt*, 88 Minn. 404.

**80. 6. Creditor.**—See *Matter of Thayer*, 142 Cal. 453.

**81. 7. Statutory Provisions for Giving Notice to Widow.**—*Newberry v. Newberry*, 114 Iowa 704; *Bailey v. Hughes*, 115 Iowa 304.

**82. 2. Intention to Exclude Widow from Dower Must Be Expressed or Implied**—*Connecticut.*—*Bennett v. Packer*, 70 Conn. 357, 66 Am. St. Rep. 112; *Thompson v. Betts*, 74 Conn. 576, 92 Am. St. Rep. 235.

*Iowa.*—*Bentley v. Bentley*, 112 Iowa 625; *Matter of Proctor*, 103 Iowa 232; *Kiefer v. Gil-*

*lett*, 120 Iowa 107; *Percifield v. Aumick*, 116 Iowa 383.

*Missouri.*—*Ball v. Ball*, 165 Mo. 312.

*New York.*—*Closs v. Eldert*, 30 N. Y. App. Div. 338; *Dunklee v. Butler*, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 680, modified and affirmed 38 N. Y. App. Div. 99; *Matter of Grotian*, (Surrogate Ct.) 30 Misc. (N. Y.) 23, affirmed (Surrogate Ct.) 35 Misc. (N. Y.) 257; *Fenton v. Fenton*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 479; *Glaser v. Glaser*, 67 N. Y. App. Div. 132; *Lanby v. Gill*, (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 334; *Horstmann v. Flege*, 172 N. Y. 381.

*Rhode Island.*—*Purcell*, for an Opinion, 25 R. I. 553.

*South Carolina.*—*Garrett v. Vaughn*, 59 S. Car. 516.

*West Virginia.*—*Sperry v. Swiger*, 54 W. Va. 283.

**83. 1. Devise Presumed to Be in Lieu of Dower.**—*Sanders v. Wallace*, 118 Ala. 418; *Stearns v. Perrin*, 130 Mich. 456, 9 Detroit Leg. N. 114; *Bayes v. Howes*, 113 Ky. 465. See also *McKee v. Stuckey*, 181 Mo. 719.

A Will under Which No Benefit Is Conferred on Wife.—See *Smoot v. Heyser*, 113 Ky. 81.

2. Direct Devise to Widow Required.—See *Hill v. Hill*, 62 N. J. L. 442; *Cooper v. Cooper*, 56 N. J. Eq. 48.

**84. 1. Bennett v. Packer**, 70 Conn. 357, 66 Am. St. Rep. 112.

A Life Estate.—*Cooper v. Cooper*, 56 N. J. Eq. 48.

3. Bequest of Personalty.—See *Rucker v. Maddox*, 114 Ga. 899.

4. Devise or Bequest Presumed to Be in Lieu of Dower.—*Sanders v. Wallace*, 118 Ala. 418; *Willey v. Lewis*, 113 Wis. 618.

**85. 3. Express Declaration that Provision Is in Lieu of Dower.**—*Hill v. Hill*, 62 N. J. L. 442.

6. Contrary Doctrine.—A widow is put to her

**86. (c) Provision Implying Intent to Exclude Dower.** — See note 1.

*aa. NATURE AND EXTENT OF BENEFICIAL INTEREST PROVIDED FOR WIFE* — (*aa*) *Generally* — The Amount of the Provision. — See note 2.

**87. Annuity or Rent Charge During Life or Widowhood.** — See note 3.

**89. (bb) Effect of Devise During Life or Widowhood** — Whether Widow Takes Dower in Residue. — See note 1.

Dower in the Property Devised. — See note 3.

**90.** See note 2.

*bb. WHERE THE ASSERTION OF DOWER WOULD DEFEAT USES OF PROPERTY MARKED OUT* — Devise for Purpose of Sale. — See note 3.

**91.** See note 1.

Where Property Is to Be Leased, Managed, Enjoyed, etc., as Directed. — See note 3.

**92. Gift to Provide for Dependant After Provision for Wife.** — See note 1.

Devise to Widow and Others in Equal Shares. — See note 2.

*b. ELECTION BETWEEN DOWER AND JOINTURE.* — See notes 3, 4.

**93. c. ELECTION BETWEEN DOWER AND CERTAIN STATUTORY RIGHTS.** — See note 2.

election between dower in after-acquired property and a post-nuptial settlement which was intended to be in lieu of dower in all lands belonging to her husband at his death. *Heiser v. Sutter*, 195 Ill. 378.

**86. 1. When Intent to Exclude Dower Implied.** — *Cooper v. Cooper*, 56 N. J. Eq. 48; *Matter of Gorden*, 172 N. Y. 25, 92 Am. St. Rep. 689; *Garrett v. Vaughn*, 59 S. Car. 516. See also *Purcell*, for an Opinion, 25 R. I. 553, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 86.

The same rule has been applied with regard to the husband's curtesy. *Weller v. Noffsinger*, 57 Neb. 455.

**2. Amount of Provision a Material Circumstance.** — See *Cooper v. Cooper*, 56 N. J. Eq. 48.

**87. 3. Annuity or Rent Charge Not Inconsistent with Dower.** — *Horstmann v. Flege*, 172 N. Y. 381. See also *Matter of Grotrian*, (Surrogate Ct.) 35 Misc. (N. Y.) 257, affirming (Surrogate Ct.) 30 Misc. (N. Y.) 23.

**89. 1. A Devise of the Income of a Third of testator's realty for life, being the same as her dower, will not put the widow to her election, as it will not be presumed the testator intended his widow to elect between two things which are precisely the same.** *Duncklee v. Butler*, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 680, modified and affirmed 38 N. Y. App. Div. 99.

**Wife Provided For** — Entire Residue Disposed of. — *Carscallen v. Wallbridge*, 32 Ont. 114.

**3. Devise of Lands to Wife for Life Not Inconsistent with Claim of Dower Therein.** — See *Hopkins v. Cameron*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 688.

**90. 2. Dependent on Circumstances.** — See *Bennett v. Packer*, 70 Conn. 357, 66 Am. St. Rep. 112.

**3. Devise for Sale After Provision for Wife.** — *Re Shunk*, 31 Ont. 175.

**91. 1. Re Shunk, 31 Ont. 175.**

**3. Power to Lease, Manage, or Control Lands.** — *Campbell v. Sankey*, 114 Iowa 69; *Matter of Gorden*, 172 N. Y. 25, 92 Am. St. Rep. 689.

A trust for the benefit of a husband and son created by a wife's will is repugnant to a right to the curtesy, and this right is barred when the

husband elects to take under the will. *Weller v. Noffsinger*, 57 Neb. 455.

A will devised in trust all the residue of the testator's property and empowered the trustees to collect the rents and profits of the real estate. This was held not inconsistent with a claim to dower and the widow was not put to her election. *Fenton v. Fenton*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 479.

**92. 1. Specific Devise for Support or Maintenance of Devisee.** — *Matter of Gorden*, 172 N. Y. 25, 92 Am. St. Rep. 689. See also *Whetsell v. Loudon*, 25 Ind. App. 257.

**2. Devise to Widow and Others in Equal Shares.** — *Contra*, *Closs v. Eldert*, 30 N. Y. App. Div. 338, reversing (Supm. Ct. Spec. T.) 16 Misc. (N. Y.) 104.

**3. Heiser v. Sutter, 195 Ill. 382, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 92; *Mannan v. Mannan*, 154 Ind. 14, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 92. See also *Krigbaum v. Irvine*, 10 Ohio Dec. 226, 8 Ohio N. P. 174.**

An ante-nuptial jointure which provides for the wife only during widowhood is void as not being a legal or equitable jointure and not supported by sufficient consideration. *Moran v. Stewart*, 173 Mo. 207.

**4. Heiser v. Sutter, 195 Ill. 378, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 92; *Mannan v. Mannan*, 154 Ind. 14, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 92.**

**93. 2. Distributive Share in Place of Dower.** — *Dahlman v. Dahlman*, 28 Mont. 373.

The widow takes this estate in lieu of dower, subject to legal and equitable claims existing against it. *Benedict v. Wilmarth*, (Fla. 1903) 35 So. Rep. 84.

A widow who dissents to take under her husband's will becomes entitled to dower, but not to a share provided by a statute of descent in case of intestacy. *Stearns v. Perrine*, 130 Mich. 456, 9 Detroit Leg. N. 114.

A widow's election to take under her husband's will is a waiver of her claim to the five hundred dollars allowed to her as surviving widow, by *Burns' Annot. Stat. Ind.* 1901, § 2424. *Boord v. Boord*, 163 Ind. 307.

**Widow's Statutory Right of Election in Iowa**



**94.** *d.* ELECTION BETWEEN BENEFIT UNDER WILL AND SHARE OF PERSONALTY. — See note 1.

**95.** See note 1.

*e.* ELECTION BETWEEN BENEFIT UNDER WILL AND HOMESTEAD. — See notes 2, 3.

**96.** *f.* ELECTION UNDER WILL CONVEYING WIFE'S SHARE OF COMMUNITY PROPERTY. — See notes 1, 2.

2. Husband's Election as to Rights in Wife's Property. — See notes 3, 4.

**IV. MANNER AND TIME OF ELECTION** — 1. What Acts Amount to an Election — *a.* ELECTION EXPRESS OR IMPLIED — Express Election. — See note 6. Implied Election. — See note 7.

**97.** The Burden of Showing Acts of Election. — See note 1.

*b.* REQUISITES FOR ACT OF ELECTION — (1) *Generally.* — See note 2.

(2) *Knowledge of Rights.* — See note 3.

**Between Homestead and Dower.** — *Edinger v. Bain*, 125 Iowa 391.

**Presumption from Occupancy under the Iowa Statute.** — *Matter of Lund*, 107 Iowa 264; *Wold v. Berkholtz*, 105 Iowa 370.

**94. 1.** A widow unprovided for in her husband's will, by which an equitable conversion of his realty was effected, is put to her election between dower and a distributive share in the personalty as she cannot treat the property as realty as to dower and personalty as to a distributive share. *In re Davis*, 12 Ohio Cir. Dec. 29, 21 Ohio Cir. Ct. 720.

**95. 1.** See *McDonald v. Moak*, 24 Ind. App. 528; *Whisnand v. Fee*, 21 Ind. App. 270; *Pierce v. Pierce*, 21 Ind. App. 184.

If the widow elects to take against her husband's will by which he has disposed of all his personalty, she is not entitled to a distributive share of his personalty in addition to her dower right. *Matter of Little*, 22 Utah 204.

**Right to Distributive Share Created by Testament.** — See *Matter of Spear*, 90 N. Y. App. Div. 564, *distinguishing* *Matter of Vowers*, 113 N. Y. 569.

**2. Election Applicable to Homestead.** — *Helm v. Leggett*, 66 Ark. 23; *Friederich v. Wombacher*, 204 Ill. 72; *Schacht v. Schacht*, 86 Minn. 91; *Jones v. Jones*, 75 Minn. 53; *Radl v. Radl*, 72 Minn. 81. See also *Rice v. Bamberg*, 68 S. Car. 184.

**Dower and Homestead.** — A widow is put to her election between dower and homestead. *Redmond v. Redmond*, 112 Ky. 760; *Deboe v. Rushing*, (Ky. 1899) 51 S. W. Rep. 613.

**Business Homestead.** — A widow may not claim both of two separate businesses as business homestead, and having taken possession of one is bound by her election. *Wingfield v. Hackney*, 30 Tex. Civ. App. 39.

**A Husband Is Put to His Election** between homestead and his statutory right to a life interest in one-third of the wife's property. *Carpenter v. Hazelrigg*, 103 Ky. 538.

3. *Helm v. Leggett*, 66 Ark. 23; *Palmer v. Palmer*, (Fla. 1904) 35 So. Rep. 983; *Ball v. Ball*, 165 Mo. 312; See also *Koster v. Gellen*, 124 Mich. 149.

**Presumption from Widow's Occupancy of Homestead.** — By ante-nuptial jointure a mansion house was to be given to the wife in lieu of dower. The court held that mere occupancy

of the house until dower was assigned is not an acceptance of the jointure. *Moran v. Stewart*, 173 Mo. 207.

An election to take homestead in lieu of dower is presumed from the fact that the widow used and occupied the land for several years as a homestead. *Deboe v. Rushing*, (Ky. 1899) 51 S. W. Rep. 613.

**96. 1.** See *Gibony v. Hutcheson*, 20 Tex. Civ. App. 581.

**2. General Words.** — But where the intent to include the entire property is clear, general words will be so construed. *Skaggs v. Deskin*, (Tex. Civ. App. 1902) 66 S. W. Rep. 793.

3. See *Milner v. Davis*, 120 Iowa 231; *Seltzer's Estate*, 7 Pa. Dist. 196, *reserved* 189 Pa. St. 574.

**4. Husband's Election.** — *Brand v. Brand*, 109 Ky. 721; *Weller v. Noffsinger*, 57 Neb. 455. See also *Stewart v. Skolfield*, 99 Me. 65; *Kerrigan v. Conelly*, (N. J. 1900) 46 Atl. Rep. 227.

**6. Express Election.** — *Brightman v. Morgan*, 111 Iowa 481; *Pryor v. Pendleton*, (Tex. Civ. App. 1898) 49 S. W. Rep. 403.

The waiver of the provisions of a will must be absolute, and not conditional. *Stearns v. Bemis*, 185 Mass. 106.

**7. Implied Election.** — *Reville v. Dubach*, 60 Kan. 572; *Cook v. Lawson*, 63 Kan. 854; *Moore's Estate*, 23 Pa. Co. Ct. 340. See also *Williams v. Emberson*, 22 Tex. Civ. App. 522.

**97. 1. Burden of Proof.** — *Kerrigan v. Conelly*, (N. J. 1900) 46 Atl. Rep. 227.

2. *Kerrigan v. Conelly*, (N. J. 1900) 46 Atl. Rep. 227.

**Unequivocal Acts Clearly Proven.** — *Reville v. Dubach*, 60 Kan. 572; *White's Estate*, 23 Pa. Super. Ct. 552.

**3. Knowledge of Rights Essential.** — *Matter of Thayer*, 142 Cal. 453; *Stone v. Cook*, 179 Mo. 544; *Richardson v. Justice*, 125 N. Car. 409. See also *Cook v. Lawson*, 63 Kan. 854; *Young's Estate*, 202 Pa. St. 431.

Where a widow pleaded ignorance of her rights and of the statute whereby she was presumed to have elected to take under the will by failure to renounce, the doctrine "ignorance of the law excuses no one" was applied and she was precluded from renouncing the will. *Logsdon v. Haney*, (Ky. 1903) 74 S. W. Rep. 1073, 25 Ky. L. Rep. 245.

**98.** Ignorance of Dower Right. — See note 2.

Revocation of Election Made in Ignorance. — See note 5.

**99.** See notes 1, 2.

c. PARTICULAR ACTS FROM WHICH ELECTION MAY BE IMPLIED —

(1) *Performing Acts of Ownership* — (a) Illustrations of Principle — Possession or Receipt of Property or Proceeds. — See note 6.

**100.** Receiving Property or Rents, Dividends, and Profits — See notes 1, 2.

Sale of Property Devised, or Execution of Deeds. — See note 5.

**101.** (b) Acts of Ownership over Both Property Taken under Will and Given by It. — See note 1.

(2) *Accepting Devise or Bequest*. — See note 2.

Acceptance by Widow of Provision in Lieu of Dower. — See note 3.

**102.** Acceptance of Provision in Lieu of Share of Community Property. — See note 1.

Agreement to Abide by the Will. — See note 4.

**103.** (3) *Instituting Legal Proceedings*. — See notes 1, 2.

(4) *Qualifying and Acting as Executrix*. — See notes 3, 4.

**Express Election.** — *Spratt v. Lawson*, 176 Mo. 175.

**98.** 2. See *Boileau's Estate*, 201 Pa. St. 493; *Reynolds v. Palmer*, 32 Ont. 431.

**5.** *Revocation for Fraud*. — *Stone v. Cook*, 179 Mo. 544, *quoting* 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 98. See also *Young's Estate*, 202 Pa. St. 431.

**99.** 1. *Revocation of Election Made in Ignorance or Mistake*. — *Medill v. Snyder*, 61 Kan. 15, 78 Am. St. Rep. 307; *Stone v. Cook*, 179 Mo. 544, *quoting* 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 98; *Richardson v. Justice*, 125 N. Car. 409. See also *Dudley v. Pigg*, 149 Ind. 363; *Hill v. Hill*, 62 N. J. L. 442; *Drake v. Wild*, 70 Vt. 52; *Pryor v. Pendleton*, (Tex. Civ. App. 1898) 49 S. W. Rep. 403.

Where a widow accepted in writing the provisions of a will by which she received less than one-half the amount which the law gave her, it was held that, although she had also received part of a bequest, she might renounce and elect over during the statutory period if the rights of third parties did not intervene. *Spratt v. Lawson*, 176 Mo. 175.

**2.** *Restoration of Property*. — *Medill v. Snyder*, 61 Kan. 15, 78 Am. St. Rep. 307; *Stone v. Cook*, 179 Mo. 544, *quoting* 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 98.

**6.** *Taking Possession of Property and Exercising Acts of Ownership*. — *Whetsell v. Loudon*, 25 Ind. App. 257; *Keys v. Wright*, 156 Ind. 521; *Cook v. Lawson*, 63 Kan. 854; *Lee v. McFarland*, 19 Tex. Civ. App. 292. See also *Reville v. Dubach*, 60 Kan. 572.

Occupation for ten months of property devised is not an election by the widow to take under her husband's will. *Bailey v. Hughes*, 115 Iowa 304.

**100.** 1. *Receiving Property*. — See *Brown v. Brown*, (Ky. 1900) 58 S. W. Rep. 993.

A *prima facie* case of election is established by proof that, after probate of the will, the widow took possession of personal property with the assent of the executor, and also accepted rent collected by him. *Hill v. Hill*, 62 N. J. L. 442.

**2.** *Receiving Rents and Profits*. — See *Hill v. Hill*, 62 N. J. L. 442.

**5.** *Sale of Devised Property*. — See *Drake v. Wild*, 70 Vt. 52.

**Execution of Mortgage.** — See *Williams v. Emberson*, 22 Tex. Civ. App. 522.

**101.** 1. *Holding Both Properties Is Not an Election*. — *Shanley v. Shanley*, 34 N. Y. App. Div. 172.

**2.** *Acceptance of Devise or Bequest by Devisee or Legatee*. — *Green v. Ponder*, (Ky. 1900) 58 S. W. Rep. 605. See also *Gilroy v. Richards*, 26 Tex. Civ. App. 355.

**3.** *Acceptance by Widow of Provision Made for Her by Her Husband*. — *Richie v. Cox*, 99 Ill. App. 369; *Cooke v. Fidelity Trust, etc., Co.*, 104 Ky. 473; *Logsdon v. Haney*, 74 S. W. Rep. 1073, 25 Ky. L. Rep. 245; *McKee v. Stuckey*, 181 Mo. 719; *Matter of Mersereau*, (Surrogate Ct.) 38 Misc. (N. Y.) 208. See also *Cooper v. Cooper*, 56 N. J. Eq. 48. But see *Spratt v. Lawson*, 176 Mo. 175.

**102.** 1. *Community Property*. — *Lee v. McFarland*, 19 Tex. Civ. App. 292. See also *Gilroy v. Richards*, 26 Tex. Civ. App. 355.

**4.** *Young's Estate*, 202 Pa. St. 431.

**103.** 1. *Legal Proceedings Respecting the Property Given*. — *Edinger v. Bain*, 125 Iowa 391.

*Proceedings for the Recovery or Assignment of Dower*. — *Hogg v. Potter*, 76 S. W. Rep. 35, 25 Ky. L. Rep. 492. See also *Hutchings v. Davis*, 68 Ohio St. 160.

"The assertion by the widow of her ownership of a distributive share in the suit for contribution was a clear and unequivocal election on her part to take that instead of the homestead." *Wold v. Berkholtz*, 105 Iowa 370.

*Proceedings for an Allotment of Homestead* is an election to take homestead in lieu of dower. *Kimberlin v. Isaacs*, 62 S. W. Rep. 494, 23 Ky. L. Rep. 42.

**2.** *Proceeding to Set Aside Will*. — See *Scheibler v. Rinck*, 195 Ill. 636; *Flynn v. McDermott*, (Supm. Ct. Tr. T.) 43 Misc. (N. Y.) 513, *affirmed* 102 N. Y. App. Div. 56.

**3.** *Allen v. Allen*, 121 N. Car. 328; *Treadaway v. Payne*, 127 N. Car. 436; *Tripp v. Nobles*, 136 N. Car. 99.

**4.** *Qualifying and Acting*. — *Moore's Estate*, 23 Pa. Co. Ct. 340 (to the same effect as *Scholl's Appeal*, (Pa. 1889) 17 Atl. Rep. 206, set out in the original note).

A husband does not elect to take under his

**104.** See notes 1, 2.

**105.** *f.* STATUTES AS TO WIDOW'S ELECTION — (1) *Forms Required in Electing Against Will* — Election by Instrument in Writing. — See note 1.

(2) *Failure to Dissent Is an Election to Take under Will.* — See notes 2, 3.

When Prevented by Fraud from Dissenting — See note 4.

**106.** 2. Time Within Which Election Must Be Made — *a.* AT COMMON LAW — Lapse of Time Where Equities Supervene. — See notes 3, 4.

**107.** *b.* BY STATUTE. — See note 1.

**108.** V. EFFECT OF DEATH BEFORE ELECTION — Widow's Election Between Dower and Will. — See note 2.

**109.** VI. EFFECT OF ELECTION — 1. Persons Bound by Election. — See note 2.

wife's will by acting as executor, and as such completing a sale of homestead land, but may elect to take the proceeds of the sale. *Milner v. Davis*, 120 Iowa 231.

**Statements in Accounts Rendered as Personal Representative.** — Where a widow had the will probated, and filed a sworn inventory referring to certain community property as belonging to testator's estate, it was held she had not elected to take under the will. *McClary v. Ducksworth*, (Tex. Civ. App. 1900) 57 S. W. Rep. 317.

**104.** 1. Qualifying as Administrator De Bonis Non. — The husband's mere acceptance of letters testamentary is not an election to take under his wife's will and waive his estate by the curtesy, especially where the estate given him by will was merely part of his estate by curtesy. *Kerrigan v. Conelly*, (N. J. 1900) 46 Atl. Rep. 227.

**2. Wife Acting as Executrix Held Not to Have Elected.** — *Benedict v. Wilmarth*, (Fla. 1903) 35 So. Rep. 84; *Matter of Proctor*, 103 Iowa 232.

**105.** 1. Acknowledgment, Filing, Record. — See *Gillespie v. Boisseau*, 64 S. W. Rep. 730, 23 Ky. L. Rep. 1046; *Castleman v. Castleman*, 184 Mo. 432.

An unacknowledged statement of election by a widow is not sufficient in *Indiana*. *Miller v. Stephens*, 158 Ind. 438.

In *Iowa* the widow's acceptance must be entered of record, and no other evidence thereof is sufficient or competent; but the widow need not file a written election. *Milner v. Davis*, 120 Iowa 231; *Bailey v. Hughes*, 115 Iowa 304.

**2. Election by Failure to Dissent from Will** — *Alabama*. — *Sanders v. Wallace*, 118 Ala. 418.

*Illinois*. — *Scheible v. Binck*, 195 Ill. 636.

*Indiana*. — *Cameron v. Parish*, 155 Ind. 329; *Miller v. Stephens*, 158 Ind. 438.

*Kentucky*. — *Gillespie v. Boisseau*, 64 S. W. Rep. 730, 23 Ky. L. Rep. 1046; *Chenault v. Scott*, 66 S. W. Rep. 759, 23 Ky. L. Rep. 1974; *Bayes v. Howes*, 113 Ky. 465; *Kiesewetter v. Kress*, 70 S. W. Rep. 1065, 24 Ky. L. Rep. 1239; *Logsdon v. Haney*, 74 S. W. Rep. 1073, 25 Ky. L. Rep. 245.

*Minnesota*. — *Jones v. Jones*, 75 Minn. 53; *Schacht v. Schacht*, 86 Minn. 91.

If notice has not been served on the widow of the necessity of election, her failure to make an election within the statutory limitation will not be presumed to be an election to take under

the will. *Bailey v. Hughes*, 115 Iowa 304; *Newberry v. Newberry*, 114 Iowa 704.

In *Indiana* a widower takes under the law unless he elects to take under the will, while a widow takes under the will unless she elects to take under the law. *Lahr v. Ulmer*, 27 Ind. App. 107.

**3.** *Koster v. Gellen*, 124 Mich. 149; *Flynn v. McDermott*, (Supm. Ct. Tr. T.) 43 Misc. (N. Y.) 513, affirmed 102 N. Y. App. Div. 56.

**4. Fraud on Widow.** — *Ludington v. Patton*, 111 Wis. 208.

**106.** 3. Reasonable Time to Elect. — *Crumppler v. Barfield, etc., Co.*, 114 Ga. 570. See also *Tracy v. Tracy*, 79 Minn. 267.

**Illustrations.** — "But we can find no case in *Pennsylvania* where, with the confessed knowledge of the value of the estate of the husband and the regular receipt of income under his will for sixteen years, and without a suggestion that fraud or misrepresentation was practiced against her, the widow, on a plea that she was not advised as to the law, has been permitted to make her election." *Boileau's Estate*, 201 Pa. St. 493.

**4. Infant Allowed Six Months After Attaining Majority.** — See *in re Hancock*, (1905) 1 Ch. 16.

**107.** 1. In *New York*. — See *Flynn v. McDermott*, (Supm. Ct. Tr. T.) 43 Misc. (N. Y.) 513, affirmed 102 N. Y. App. Div. 56.

**108.** 2. Widow's Right to Elect Does Not Devolve. — *Anderson's Estate*, 185 Pa. St. 174; *Williamson v. Nelson*, (Tenn. Ch. 1901) 62 S. W. Rep. 53.

A widow's right to elect between taking the whole estate subject to debts or certain securities is a personal right and upon her death will not descend to her heirs at law. Page v. Eldredge Public Library, 69 N. H. 575.

The personal representatives of the widow may question the validity of an election if she has attempted to make one. *Miller v. Stephens*, 158 Ind. 438.

**109.** 2. What Persons Bound by Election. — *Hawkins v. Bohling*, 168 Ill. 214; *Keys v. Wright*, 156 Ind. 521; *Tripp v. Nobles*, 136 N. Car. 99. See also *Allen v. Allen*, 121 N. Car. 328.

**The Right of Unmarried Minors to Occupancy** of the homestead is not affected by an election of the widow to take under the will whereby the homestead becomes subject to debt. *Kiesewetter v. Kress*, 70 S. W. Rep. 1065, 24 Ky. L. Rep. 1239.



**110. 2. When Donee Elects to Take under Instrument — a. IN GENERAL. —** See note 3.

*b. WIDOW'S RIGHTS — (1) As Heir. —* See note 4.

**111. (2) As Dowress — (b) In Land Sold under Judicial Sale. —** See note 4.

**112. (3) As to Intestate Property. —** See note 3.

**113. A Gift in Satisfaction of All Claims Against the Testator's Estate. —** See note 2.

*(4) As to Lands Situated in Several Jurisdictions. —* See note 5.

**114. (5) As Against Creditors, Legatees, and Devisees — (a) Subject to Debt. —** See note 1.

*(b) Superior to Legacies and Devisees. —* See note 2.

**115. See notes 2, 3.**

**116. 3. When Donee Elects to Take Against Instrument — a. COMPENSATION TO DISAPPOINTED DONEE. —** See note 1.

**117. b. LIABILITY OF DONEE FOR BENEFITS. —** See note 2.

*c. EFFECT OF WIDOW'S RENUNCIATION — (2) Upon the Rights of Others — (a) In General. —* See note 5.

*(b) Compensation. —* See note 6.

**110. 3. General Effect of Election. —** Walker *v. Upson*, 74 Conn. 128; Jackson *v. Bevins*, 74 Conn. 96; Chenault *v. Scott*, 66 S. W. Rep. 759, 23 Ky. L. Rep. 1974. See also Farmington Sav. Bank *v. Curran*, 72 Conn. 342.

An election to take under the will precludes those making it from contesting the validity of the will. Keys *v. Wright*, 156 Ind. 521; Robson *v. Lambertson*, 115 Iowa 366.

**Will Void in Part. —** A sole heir may attack the validity of a trust provision which is contrary to the statute, although such heir has accepted benefits under the will, the testator's presumed intention being that void gifts should descend according to law. Staples *v. Hawes*, (Supm. Ct. Spec. T.) 24 Misc. (N. Y.) 475, affirmed 39 N. Y. App. Div. 548. See also Griffith *v. Howes*, 5 Ont. L. Rep. 439.

**4. Right of Widow as Heir Not Affected by Election to Take under Will. —** See Mannan *v. Mannan*, 154 Ind. 14, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 110, note 4.

**111. 4. Land Sold under Judicial Sale. —** See Sanders *v. Wallace*, 118 Ala. 418.

**112. 3. Devise in Lieu of Dower Does Not Bar Share of Personality. —** See State *v. Holmes*, 115 Mich. 456. But see Walker *v. Upson*, 74 Conn. 128.

**Where Partial Intestacy Caused by Election. —** Where a widow rejected provisions in lieu of dower, and a partial intestacy was thereby effected, she was held entitled to a share in the intestate personality but not in the intestate realty. Bennett *v. Packer*, 70 Conn. 357, 66 Am. St. Rep. 112.

**113. 2. Even Though All the Personality Be Disposed of, a widow will not be deprived of a share in the personality by accepting real estate given in lieu of dower "and also of all statutory allowances." Matter of Mersereau, (Surrogate Ct.) 38 Misc. (N. Y.) 208.**

**5. Election in One Jurisdiction Binds in All. —** Cooke *v. Fidelity Trust, etc., Co.*, 104 Ky. 473.

**114. 1. Provision for Widow Subject to Debt. —** Kiesewetter *v. Kress*, 70 S. W. Rep. 1065, 24 Ky. L. Rep. 1239; Harrison *v. Taylor*, (Ky. 1899) 51 S. W. Rep. 193. See also Wiggins *v. Wiggins*, 65 N. J. Eq. 417. But see Richie *v. Cox*, 99 Ill. App. 369.

**2. Superior to General Legacies. —** See Wiggins *v. Wiggins*, 65 N. J. Eq. 417.

**115. 2. Superior to All Legacies. —** Overton *v. Lea*, 108 Tenn. 505.

**If the Widow Elects to Take a Child's Part in lieu of dower such portion is not subject to the legacies of the will.** Benedict *v. Wilmarth*, (Fla. 1903) 35 So. Rep. 84.

**3. Not a Charge upon Realty. —** A widow by accepting a provision in lieu of dower becomes a creditor and her debt is payable out of the realty if the personalty is insufficient. Wilmoth *v. Robinson*, (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 244.

"A portion of the pecuniary provision made in lieu of the widow's dower having been used in payment of the debts of her husband's estate by the executor, she is subrogated to the rights of the creditors against the real estate, and entitled to compensation." Overton *v. Lea*, 108 Tenn. 505.

**116. 1. Effect of Election to Take Against Instrument — Compensation. —** See Farmington Sav. Bank *v. Curran*, 72 Conn. 342; Shanley *v. Shanley*, 34 N. Y. App. Div. 172; Haynes *v. Foster*, (1901) 1 Ch. 361, 84 L. T. N. S. 139; *In re Hancock*, (1905) 1 Ch. 16.

**Statement of Rule. —** "Election does not require in all cases a surrender, nor does it work a forfeiture. \* \* \* It is a rule that springs from manifest principles of equity, intended to do justice to all parties concerned." Farmington Sav. Bank *v. Curran*, 72 Conn. 342.

**The Amount of Compensation Is to Be Ascertained at the date of the death of the testator, and not as on the date when election is made.** *In re Hancock*, (1905) 1 Ch. 16.

**117. 2. Liable for All Benefits Taken under the Will. —** See Baptist Female University *v. Borden*, 132 N. Car. 476.

**5. Provisions as to Others Still Operative. —** Noecker *v. Noecker*, 66 Kan. 347; Lilly *v. Menke*, 143 Mo. 137; Baptist Female University *v. Borden*, 132 N. Car. 476; Matter of Little, 22 Utah 204. See also Benedict *v. Wilmarth*, (Fla. 1903) 35 So. Rep. 84.

**6. Compensation from Provisions Rejected by the Widow. —** Shreve *v. Shreve*, 176 Mass. 456; Collins's Estate, 10 Pa. Dist. 249; Johnston *v.*

**118.** See note 1.

**119.** (c) **Acceleration.** — See notes 1, 2, 3.

**120.** See note 2.

Osmont, (Tenn. Ch. 1900) 59 S. W. Rep. 644.

**Maryland Doctrine.** — The residuary legatee is not liable to compensate a specific legatee for loss occurring to the latter by reason of the testator's widow electing to take against the will. *Devecmon v. Kuykendall*, 89 Md. 25.

**118. 1. Contribution.** — See *Chamberlain v. Berry*, (Ky. 1900) 56 S. W. Rep. 659; *Baptist Female University v. Borden*, 132 N. Car. 476.

**119. 1. Acceleration.** — *Slocum v. Hagaman*, 176 Ill. 533; *Shreve v. Shreve*, 176 Mass. 456; *Beideman v. Sparks*, 61 N. J. Eq. 226, *affirmed*

without opinion 64 N. J. Eq. 374; *Baptist Female University v. Borden*, 132 N. Car. 476;

**2. Limitation of the Rule.** — *Matter of Lawrence*, (Surrogate Ct.) 37 Misc. (N. Y.) 702, *modifying* (Surrogate Ct.) 36 Misc. (N. Y.) 275.

**3. Life Estate Used to Compensate Residuary Legatees.** — *Matter of Lawrence*, (Surrogate Ct.) 37 Misc. (N. Y.) 702.

**120. 2. Acceleration Expressly Prohibited by Will.** — *Baptist Female University v. Borden*, 132 N. Car. 476. See also *Moore's Estate*, 9 Pa. Dist. 58.

## EQUITABLE MORTGAGES.

BY BRISCOE BALDWIN CLARK.

**123. I. DEFINITION.** — See note 1.

**III. PARTICULAR EQUITABLE MORTGAGES — 1. In General.** — See note 4.

**124.** See note 1.

**125.** See note 1.

**2. Agreement to Execute Mortgage — a. IN GENERAL.** — See note 8.

**126. Merger.** — See note 2.

**123. 1. Definition.** — *Davidson v. Fox*, 65 N. Y. App. Div. 264, *quoting* 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 123.

**4. Informal Mortgages.** — *Loyd v. Guthrie*, 131 Ala. 65, *per* Tyson, J.; *Woodruff v. Adair*, 131 Ala. 530; *Higgins v. Manson*, 126 Cal. 467, 77 Am. St. Rep. 192; *Vaniman v. Gardner*, 99 Ill. App. 345; *Industrial Lumber Co. v. Texas Pine Land Assoc.*, 31 Tex. Civ. App. 380, *citing* 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 123.

**The Intention to Create a Lien on Specific Property** must exist in order that the transaction may create an equitable mortgage. *Industrial Lumber Co. v. Texas Pine Land Assoc.*, 31 Tex. Civ. App. 375.

**Note Reciting Extension of Mechanic's Lien.** — Where a creditor holding a mechanic's lien took a note, payable after the statutory time limited for the enforcement of the lien, reciting that the note is secured by a mechanic's lien, this does not create an equitable mortgage, as such recital is a mere recognition of a then status, that is, the existence at that time of a mechanic's lien in favor of the payee, and does not show an intention to give or create any lien. *Loyd v. Guthrie*, 131 Ala. 65.

**124. 1. Conveyances as Security.** — *McCrillis v. Cole*, 25 K. I. 156, 105 Am. St. Rep. 875.

**A Purchase by a Third Person at a Foreclosure Sale** under an agreement with the mortgagor to hold the land as security for the amount paid, and to convey to the mortgagor on payment, creates an equitable mortgage. *English v. Rainear*, (N. J. 1903) 55 Atl. Rep. 41. See also *Wilson v. McWilliams*, 16 S. Dak. 96 (redemption from foreclosure sale under agreement with the mortgagor to reconvey).

**An Assignment of a Lease as security** creates an equitable mortgage. *Commercial Bank v. Pritchard*, 126 Cal. 600.

**125. 1. Absolute Deeds Construed as Mortgages.** — *Higgins v. Manson*, 126 Cal. 467, 77 Am. St. Rep. 192.

**8. Agreement to Mortgage Creates Equitable Mortgage.** — *Wickes v. Hynson*, 95 Md. 511; *Atlantic Trust Co. v. Holdsworth*, 167 N. Y. 532, *affirming* 50 N. Y. App. Div. 623. See also *People v. Woodruff*, 75 N. Y. App. Div. 90.

**Option to Give Mortgage.** — An agreement whereby a debtor is given an option to require his creditor to accept a mortgage in payment of the indebtedness does not create an equitable mortgage. *Davidson v. Fox*, 65 N. Y. App. Div. 262.

**Release of Mortgage under Oral Agreement to Execute New Mortgage.** — Where a mortgagee releases an existing mortgage in consideration of a partial payment and an agreement for the execution of a new mortgage to secure the balance, a court of equity will enforce such agreement as an equitable mortgage. *King v. Williams*, 66 Ark. 333.

**Land Subsequently to Be Acquired.** — An oral agreement to execute a mortgage on land to secure a loan with which the land was to be purchased creates an equitable mortgage on the land when purchased. *Foster Lumber Co. v. Harlan County Bank*, (Kan. 1905) 80 Pac. Rep. 49, *citing* 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 125.

**126. 2. Merger in Equitable Mortgage.** — In *Chetwynd v. Allen*, (1899) 1 Ch. 353, where money was lent to a mortgagor on his promise to pay off the mortgage and transfer it to the

- 127.** *b.* REQUISITES OF AGREEMENT — *Certainty.* — See note 2.  
*Statute of Frauds.* — See note 3.  
**3.** *Defectively Executed Mortgages.* — See note 5.  
**129.** *4.* Assignments of Rents and Profits. — See note 6.  
**130.** *6.* Assignments of Contracts for the Purchase of Land. — See note 3.  
*Deed Acquired by Assignee.* — See note 5.  
**131.** *8.* Reservation of Lien by Vendor. — See note 3.  
*10. Mortgage by Deposit of Title Deeds* — *a.* GENERAL ENGLISH  
 RULE. — See note 8.  
**132.** *b.* RULE IN UNITED STATES. — See note 1.  
**134.** See note 1.

lender, and the mortgagor suppressed the fact that he was trustee for his wife of the property mortgaged and only applied a part of the money borrowed in payment of the mortgage debt, and gave to the lender an equitable mortgage of the property to secure repayment of the loan, it was held, in a suit by the wife to redeem the charges on her property, that a charge thereon subsisted in favor of the lender to the extent that the loan had been applied in paying off the mortgage, the equitable mortgage to the lender not operating as a release or extinguishment of the charge nor causing it to become merged therein.

**127. 2. Property Must Be Specified.** — *Industrial Lumber Co. v. Texas Pine Land Assoc.*, 31 Tex. Civ. App. 375.

Where a patent describing land is deposited with an agreement to execute a mortgage, and the agreement refers to the patent, there is a sufficient description of the property to be mortgaged so that the transaction may be sustained as an equitable mortgage. *Higgins v. Manson*, 126 Cal. 467, 77 Am. St. Rep. 192.

**3.** In *Foster Lumber Co. v. Harlan County Bank*, (Kan. 1905) 80 Pac. Rep. 49, wherein a bank agreement to execute a mortgage was upheld as creating an equitable mortgage, the court quoted with approval the following extract from *Sprague v. Cochran*, 144 N. Y. 104: "The doctrine of equitable mortgages is not limited to written instruments intended as mortgages, but which by reason of formal defects cannot have such operation without the aid of the court, but also to a very great variety of transactions to which equity attaches that character. It is not necessary that such transactions or agreements as to lands should be in writing, in order to take them out of the operation of the statute of frauds, for two reasons: first, because they are completely executed by at least one of the parties, and are no longer executory; and, secondly, because the statute, by its own terms, does not affect the power which courts of equity have always exercised to compel specific performance of such agreements."

**5. Defective Mortgages.** — *Hayden v. Lauffenburger*, 157 Mo. 88.

**Defect in Regard to Seal.** — See *Holley v. Curry*, (W. Va. 1905) 51 S. E. Rep. 135.

**129. 6. Agreement to Pay Debts From Proceeds of Land.** — A mere promise to pay an indebtedness out of the proceeds of the sale of land is not sufficient to create an equitable mortgage on the land itself. There must be an intention to create a lien on the property as distinguished from an agreement to apply the

proceeds of it to the payment of a debt. *Vaniman v. Gardner*, 99 Ill. App. 345.

**130. 3. Deposit of Certificate of Purchase.** — Where the assignee of a mortgage purchases at the foreclosure sale and receives a certificate of purchase, a deposit of such certificate together with the mortgage and note secured thereby creates an equitable mortgage. *Woodruff v. Adair*, 131 Ala. 530.

**5.** An agreement by the vendee in case he purchases the land under his contract of purchase that he will sell to a third person at an advanced price, which the latter agreed to pay, does not on the completion of the purchase by the vendee create between himself and such third person the relation of equitable mortgagor and mortgagee. *Spaulding v. Jennings*, 173 Mass. 65.

**131. 3. Equitable Mortgage Arising Out of Reservation of Vendor's Lien.** — *West End Town Co. v. Grigg*, 93 Tex. 451, rehearing granted 93 Tex. 458.

**8.** *In re Castell*, (1898) 1 Ch. 315; *Oliver v. Hinton*, (1899) 2 Ch. 264; *Jared v. Clements*, (1903) 1 Ch. 428; *Bank of Ireland v. Cogry Spinning Co.*, (1900) 1 Ir. R. 219; *Bourke v. Lee*, (1904) 1 Ir. R. 280.

**Injury to Deeds Deposited — Liability Therefor.** — There is no implied covenant on the part of the mortgagee to take reasonable care of the title deeds during the continuance of the security. *Gilligan v. National Bank*, (1901) 2 Ir. R. 513.

**132. 1. California.** — *Higgins v. Manson*, 126 Cal. 467, 77 Am. St. Rep. 192 (deposit of title deeds does not of itself create equitable mortgage).

*Georgia.* — *Pierce v. Parrish*, 111 Ga. 725.

*New Jersey.* — In *Bullowa v. Orgo*, 57 N. J. Eq. 428, the doctrine of equitable mortgage by deposit of title deeds was again upheld.

*South Carolina.* — In *Parker v. Carolina Sav. Bank*, 53 S. Car. 583, however, it was expressly held that the mere deposit of title deeds under oral agreement as security would not create an equitable mortgage. In this case the court expressly acknowledged that in *Harper v. Barsh*, 10 Rich. Eq. (S. Car.) 154, *Boyce v. Shiver*, 3 S. Car. 528, and *Hutzler v. Phillips*, 26 S. Car. 146, there were dicta to the contrary, but refused to follow such dicta.

**134. 1. Deposit of Deeds Accompanied by Written Agreement.** — *Higgins v. Manson*, 126 Cal. 467, 77 Am. St. Rep. 192.

In *Mallory v. Mallory*, 86 Ill. App. 193, where a grantee delivered his deed to his creditor accompanied with a writing under seal stating an indebtedness to the creditor and that the



- 136.** *g.* THE SUFFICIENCY AND CHARACTER OF THE DEPOSIT —  
 (3) *Deposit Must Be Intended as a Present Security* — A Distinction. — See note 5.  
**139.** *j.* EXTENT OF CHARGE — (1) *In General*. — See note 6.  
**141.** *k.* ASSIGNMENT OF MORTGAGE. — See note 1.

IV. AGAINST WHOM EQUITABLE MORTGAGES WILL BE ENFORCED. —

See note 5.

- 142.** *Bona Fide Purchasers*. — See note 7.

Priority Between Equitable Mortgages. — See note 9.

- 143.** VI. REMEDY OF EQUITABLE MORTGAGEE. — See note 3.

deed was delivered to him to be held in escrow and not to be recorded until the indebtedness was paid, the transaction was held to constitute an equitable mortgage.

The deposit of title deeds with an agreement to execute a mortgage creates an equitable mortgage. *Foster Lumber Co. v. Harlan County Bank*, (Kan. 1905) 80 Pac. Rep. 49.

- 136.** 5. Deposit as Security until Mortgage Can Be Prepared. — See *Farmer v. Pitt*, (1902) 1 Ch. 954.

**Deposit Accompanied with Agreement to Execute Mortgage.** — Where the title deeds are deposited as security for a debt the fact that such deposit is accompanied with an agreement to execute a legal mortgage does not prevent the deposit from creating an equitable mortgage. *Bullowa v. Orgo*, 57 N. J. Eq. 428.

- 139.** 6. Indebtedness of Third Person. — An equitable mortgage by the deposit of title deeds may be created as security for the debt of a third person. *Bullowa v. Orgo*, 57 N. J. Eq. 428.

- 141.** 1. Assignment of Mortgage. — *Mallory v. Mallory*, 86 Ill. App. 193.

5. Deposit of Title Deeds. — *Jared v. Clements*, (1903) 1 Ch. 428.

A mortgage by deposit of title deeds will be enforced as against a subsequent grantee for value where the latter was guilty of such gross

negligence as would make it unjust for him to be allowed to take up the position of a *bona fide* purchaser for value, as where the purchaser made no inquiry as to the vendor's title and did not ask for the production of the title deeds, but rested satisfied with the statement by the vendor that he had the deeds and would retain them as they related to other property. *Oliver v. Hinton*, (1899) 2 Ch. 264.

**A Subsequent Mortgagee** with notice takes subject to a prior equitable mortgage. *Foster Lumber Co. v. Harlan County Bank*, (Kan. 1905) 80 Pac. Rep. 49.

- 142.** 7. Purchasers Without Notice. — *Cottee v. National Provincial Bank*, 20 Times L. Rep. 607; *In re Bobbett*, (1904) 1 Ir. R. 461.

8. Mortgage by Deposit of Title Deeds. — *In re Castell*, (1898) 1 Ch. 315; *Bank of Ireland v. Cogry Spinning Co.*, (1900) 1 Ir. R. 219; *Manley v. O'Brien*, 8 British Columbia 280; *Fullerton v. Provincial Bank*, (1903) A. C. 309 (effect of failure to register charge).

**143.** 3. Statute of Limitations — Deposit of Title Deed. — The time at which a bar to a suit for foreclosure arises under or by analogy to the statute of limitations is not that at which the personal remedy ceases, but it is that at which the remedy against the property which is the subject of the charge is taken away. *London, etc., Bank v. Mitchell*, (1899) 2 Ch. 161.

## EQUITY.

BY JAMES L. McREE.

- 154.** III. HISTORY OF EQUITY — 5. Amalgamation — *b.* IN THE UNITED STATES — (3) *Present Status of Chancery in America* — (a) *The First Group*. — See note 6.

- 155.** See note 1. \*

- (b) *The Second Group*. — See note 5.

**The Most Important Member of This Group.** — See notes 6, 7.

- (c) *The Code States*. — See note 13.

- 157.** IV. EQUITABLE MAXIMS — 3. *Equitable Maxims Discussed in Detail* —  
*a.* PREREQUISITE MAXIMS — (1) *He Who Seeks Equity Must Do Equity* —  
 (a) *Generally*. — See note 7.

- 154.** 6. *Eggers v. Anderson*, 63 N. J. Eq. 264.

- 155.** 1. *Eggers v. Anderson*, 63 N. J. Eq. 264.

5. *Roberts v. Central Lead Co.*, 95 Mo. App. 581; *Cranford Tp. v. Watters*, 61 N. J. Eq. 284; *Bryan v. Bryan*, 61 N. J. Eq. 45.

6. *Federal Courts*. — *Smith v. American Nat.*

- Bank*, (C. C. A.) 89 Fed. Rep. 832; *Alger v. Anderson*, 92 Fed. Rep. 696.

7. *Alger v. Anderson*, 92 Fed. Rep. 696.

13. *Law and Equity Not Blended by the Code*. — *Miller v. St. Louis, etc., R. Co.*, 162 Mo. 424; *Stockham Bank v. Alter*, 61 Neb. 359; *Willis v. Crawford*, 38 Oregon 522.

- 157.** 7. *Judicial Application of the Maxim* —

**158.** See note 4.

**159.** (b) *Injunctions — Taxes.* — See note 3.

**160.** (c) *Rescission of Contracts.* — See note 3.

(e) *Quieting Title.* — See note 10.

**161.** (g) *Usury.* — See note 6.

**162.** (i) *Set-off.* — See note 2.

(k) *Qualifications of the Maxim.* — See note 8.

(2) *He Who Comes into Equity Must Come with Clean Hands.* —

See note 12.

**163.** (a) *Generally.* — See note 2.

*Alabama.* — *Worthington v. Miller*, 134 Ala. 420.

*California.* — *Dranga v. Rowe*, 127 Cal. 506.  
*District of Columbia.* — *Ohio Nat. Bank v. Central Constr. Co.*, 17 App. Cas. (D. C.) 524; *Mercantile Trust Co. v. Hensey*, 21 App. Cas. (D. C.) 38.

*Georgia.* — *Charleston, etc., R. Co. v. Hughes*, 105 Ga. 1.

*Idaho.* — *Stowell v. Tucker*, 7 Idaho 312.

*Kentucky.* — *Bunnell v. Bunnell*, 111 Ky. 566; *Deppen v. German-American Title Co.*, 70 S. W. Rep. 868, 24 Ky. L. Rep. 1110; *Louisville, etc., R. Co. v. Smith*, 78 S. W. Rep. 160, 25 Ky. L. Rep. 1459.

*Massachusetts.* — *Snow v. Blount*, 182 Mass. 489.

*Missouri.* — *Ruppel v. Missouri Guarantee, etc., Assoc.*, 158 Mo. 613.

*Nebraska.* — *Lewis v. Holdrege*, 57 Neb. 379; *Walsh v. Walsh*, (Neb. 1901) 95 N. W. Rep. 1024.

*New Jersey.* — *Camden Iron Works v. Camden*, 64 N. J. Eq. 723.

*Ohio.* — *Kinner v. Lake Shore, etc., R. Co.*, 69 Ohio St. 339, *affirming* 23 Ohio Cir. Ct. 294.

*Oklahoma.* — *Collins v. Green*, 10 Okla. 244; *Half v. Green*, 10 Okla. 338.

*South Dakota.* — *Ft. Pierre v. Hall*, (S. Dak. 1905) 104 N. W. Rep. 479.

*Tennessee.* — *Bible v. Wisecarver*, (Tenn. Ch. 1898) 50 S. W. Rep. 670.

*Texas.* — *San Antonio, etc., R. Co. v. San Antonio, etc., R. Co.*, 25 Tex. Civ. App. 167; *Swope v. Missouri Trust Co.*, 26 Tex. Civ. App. 133.

*Virginia.* — *Flanary v. Kane*, 102 Va. 547.

*Wisconsin.* — *Raasch v. Raasch*, 100 Wis. 400; *Post v. Campbell*, 110 Wis. 378.

**158.** 4. *Flanary v. Kane*, 102 Va. 547.

**Rule Applicable to Infants as Well as to Adults.** — *Bunnell v. Bunnell*, 111 Ky. 566.

**159.** 3. *Injunction Against Taxes.* — *Collins v. Green*, 10 Okla. 244; *Lasater v. Green*, 10 Okla. 335; *Half v. Green*, 10 Okla. 338; *Russell v. Green*, 10 Okla. 340. See *Dranga v. Rowe*, 127 Cal. 506.

**160.** 3. *Doing Equity by Restoring Status Quo.* — *Taylor v. Dwyer*, 131 Ala. 91; *Rubie Combination Gold Min. Co. v. Princess Alice Gold Min. Co.*, 31 Colo. 162, *citing* 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 160; *Deppen v. German-American Title Co.*, 70 S. W. Rep. 868, 24 Ky. L. Rep. 1110; *Walsh v. Walsh*, (Neb. 1901) 95 N. W. Rep. 1024; *Cincinnati v. Covington, etc., Bridge Co.*, 10 Ohio Cir. Dec. 792, 20 Ohio Cir. Ct. 396.

10. *Quieting Title.* — *Snow v. Blount*, 182

Mass. 489, *citing* 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 160.

**161.** 6. *Usury.* — *Ruppel v. Missouri Guarantee, etc., Assoc.*, 158 Mo. 613.

**162.** 2. *Kinner v. Lake Shore, etc., R. Co.*, 69 Ohio St. 339.

8. *Equity Must Spring from Same Transaction.* — *Mercantile Trust Co. v. Hensey*, 21 App. Cas. (D. C.) 38; *Kinner v. Lake Shore, etc., R. Co.*, 69 Ohio St. 339, *affirming* 23 Ohio Cir. Ct. 294; *Post v. Campbell*, 110 Wis. 378.

12. *He Who Comes into Equity Must Come with Clean Hands.* — *Michigan Pipe Co. v. Fremont Ditch, etc., Co.*, (C. C. A.) 111 Fed. Rep. 284; *Stowell v. Tucker*, 7 Idaho 312; *Pittsburgh, etc., R. Co. v. Crothersville*, 159 Ind. 330, *citing* 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 162, 163; *Abraham v. Cincinnati*, 13 Ohio Dec. 627, *citing* 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 162.

**163.** 2. *Employment of the Maxim — Cases Collected.* — *United States.* — *Liverpool, etc., Ins. Co. v. Clunie*, 88 Fed. Rep. 160; *Shaver v. Heller, etc., Co.*, (C. C. A.) 108 Fed. Rep. 821; *Michigan Pipe Co. v. Fremont Ditch, etc., Co.*, (C. C. A.) 111 Fed. Rep. 284; *Trice v. Comstock*, (C. C. A.) 121 Fed. Rep. 620; *Edward Thompson Co. v. American Law Book Co.*, (C. C. A.) 122 Fed. Rep. 922; *Knapp v. S. Jarvis Adams Co.*, (C. C. A.) 135 Fed. Rep. 1008.

*Delaware.* — *Delaware Surety Co. v. Layton*, (Del. Ch. 1901) 50 Atl. Rep. 378.

*Georgia.* — *Bagwell v. Johnson*, 116 Ga. 464.

*Illinois.* — *John Anisfield Co. v. Grossman*, 98 Ill. App. 180.

*Indiana.* — *Pittsburgh, etc., R. Co. v. Crothersville*, 159 Ind. 330.

*Kentucky.* — *Pineville Land, etc., Co. v. Hollingsworth*, (Ky. 1899) 53 S. W. Rep. 279; *American Assoc. v. Innis*, 109 Ky. 595; *Louisville, etc., R. Co. v. Smith*, 78 S. W. Rep. 160, 25 Ky. L. Rep. 1459.

*Louisiana.* — *Pitre v. Haas*, 110 La. 163.

*Massachusetts.* — *Snow v. Blount*, 182 Mass. 489, *citing* 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 162-164.

*Michigan.* — *Massi v. Lavine*, (Mich. 1905) 102 N. W. Rep. 665.

*Nebraska.* — *Lewis v. Holdrege*, 56 Neb. 379.

*New Jersey.* — *Camden Iron Works v. Camden*, 64 N. J. Eq. 723.

*Pennsylvania.* — *Houston v. Graff*, 24 Pa. Co. Ct. 477.

*Tennessee.* — *Bearden v. Jones*, (Tenn. Ch. 1897) 48 S. W. Rep. 88; *Longinette v. Shelton*, (Tenn. Ch. 1898) 52 S. W. Rep. 1078.

*Texas.* — *Cobb v. Gooch*, (Tex. Civ. App. 1905) 88 S. W. Rep. 401.

**163.** Illustrations. — See notes 6, 7.

**164.** (b) Specific Performance. — See note 1.

(c) Limitations of the Maxim. — See note 4.

**165.** (3) *Equity Aids the Vigilant, Not the Slothful* — (a) Generally. — See note 2.

**166.** Injunctions. — See note 1.

Other Applications. — See note 4.

**167.** b. DESCRIPTIVE MAXIMS — (2) *Equity Acts in Personam and Not in Rem* — (b) Specific Performance. — See notes 4, 5.

**168.** Conveyance of Foreign Lands Decreed. — See note 6.

**169.** (c) Foreclosure — aa. EARLY CHANCERY RULE — FORECLOSURE SUIT PERSONAL AND TRANSITORY. — See notes 2, 7.

bb. STATUTORY CHANGES MAKING FORECLOSURE SUIT EITHER TRANSITORY OR LOCAL — Venue Determined at Option of Complainant. — See note 8.

**175.** (3) *Equity Follows the Law* — (b) In Determining Legal Rights. — See notes 7, 9.

**179.** c. SUBSTANTIVE MAXIMS — (1) *Equity Suffers No Wrong Without a Remedy* — (a) In General. — See note 5.

**180.** (b) Qualifications. — See notes 3, 5.

**181.** (2) *Equity Regards That as Done Which Ought to Have Been Done* — (c) Contracts to Convey. — See note 12.

**182.** (d) Miscellaneous Applications. — See note 7.

**183.** (e) Equitable Mortgages — Agreements to Mortgage. — See note 1.

*West Virginia.* — Craig v. Craig, 54 W. Va. 183.

*Wisconsin.* — Post v. Campbell, 110 Wis. 378.

**163.** 6. Pineville Land, etc., Co. v. Hollingsworth, (Ky. 1899) 53 S. W. Rep. 279; Bearden v. Jones, (Tenn. Ch. 1897) 48 S. W. Rep. 88.

**7.** Nuisances. — Olcott v. Knapp, 96 N. Y. App. Div. 281, quoting 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 163.

**164.** 1. Specific Performance. — American Assoc. v. Innis, 109 Ky. 595; Lewis v. Holdrege, 56 Neb. 379; Houston v. Graff, 24 Pa. Co. Ct. 477.

Specific performance will not lie to enforce the issuance of certificates of stock to a corporation which has been carrying on the transaction in the name of another party in order to evade the law. Martin v. Ohio Stove Co., 78 Ill. App. 105.

**4.** Iniquity Must Relate to Subject of Litigation — *United States.* — Liverpool, etc., Ins. Co. v. Clunie, 88 Fed. Rep. 160; Shaver v. Heller, etc., Co., (C. C. A.) 108 Fed. Rep. 821; Trice v. Comstock, (C. C. A.) 121 Fed. Rep. 620; Knapp v. S. Jarvis Adams Co., (C. C. A.) 135 Fed. Rep. 1008.

*Delaware.* — Delaware Surety Co. v. Layton, (Del. Ch. 1901) 50 Atl. Rep. 378.

*Kentucky.* — American Assoc. v. Innis, 109 Ky. 595.

*Pennsylvania.* — Paterson v. Building Trades Council, 11 Pa. Dist. 508, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 164.

*Tennessee.* — When the iniquity is entirely collateral to the relief sought, courts of equity will entertain the suit. Upchurch v. Anderson, (Tenn. Ch. 1898) 52 S. W. Rep. 917.

*Wisconsin.* — Post v. Campbell, 110 Wis. 378.

**165.** 2. Raht v. Sevier Min., etc., Co., 18 Utah 290.

**166.** 1. Laches a Bar to Injunction. — Louis-

ville, etc., R. Co. v. Smith, 78 S. W. Rep. 160, 25 Ky. L. Rep. 1459.

**4.** Vacation of Judgments. — Koehler v. Reed, (Neb. 1901) 96 N. W. Rep. 380; Hess v. Lell, (Neb. 1903) 94 N. W. Rep. 975.

**167.** 4. Equity Acts in Personam and Not in Rem. — Wood v. Fisk, 45 Oregon 276; Schmaltz v. York Mfg. Co., 204 Pa. St. 1, 93 Am. St. Rep. 782.

**5.** Specific Performance of Contracts Relating to Foreign Lands Decreed. — Deck v. Whitman, 96 Fed. Rep. 873; Schmaltz v. York Mfg. Co., 204 Pa. St. 1, 93 Am. St. Rep. 782.

**168.** 6. Other Cases than Specific Performance. — Schmaltz v. York Mfg. Co., 204 Pa. St. 1, 93 Am. St. Rep. 782.

**169.** 2. Foreclosure Suits. — Deck v. Whitman, 96 Fed. Rep. 873.

**7.** In Tennessee. — Deck v. Whitman, 96 Fed. Rep. 873, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 169.

**8.** Venue Determined at Option of Plaintiff — *Tennessee.* — Deck v. Whitman, 96 Fed. Rep. 873.

**175.** 7. Swope v. Missouri Trust Co., 26 Tex. Civ. App. 133.

**9.** Interest. — Latrobe v. Winans, 89 Md. 636.

**179.** 5. Balch v. Beach, 119 Wis. 77.

**180.** 3. Pietsch v. Milbrath, 123 Wis. 661.

**5.** Election Contests. — Riggins v. Thompson, 30 Tex. Civ. App. 242.

Equity, having acquired jurisdiction, will inquire into the legality of an election coming in question collaterally and incidentally. Schwab v. Frisco Min., etc., Co., 21 Utah 258.

**181.** 12. Contract to Convey Carries Equitable Title. — Camden v. Dewing, 47 W. Va. 314, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 181.

**182.** 7. For Other Instances. — National Bank v. Rogers, 166 N. Y. 380.

**183.** 1. Agreements to Mortgage Considered



- 184.** (3) *Equity Regards the Substance and Intent, Not the Form* —  
 (a) **Generally.** — See note 6.  
**185.** (b) *Equitable Mortgages.* — See note 2.  
**186.** (5) *Equality Is Equity* — (a) **In General.** — See note 3.  
 (c) **Insolvency** — *aa.* PREFERENCE OF CREDITORS. — See notes 6, 7.  
**189.** (6) *Where the Equities Are Equal the Law Will Prevail* — *So, as*  
*Between Claimants to Land.* — See note 4.  
**190.** (7) *Where the Equities Are Equal He Who Is First in Time Will*  
*Prevail.* — See note 1.  
**191.** **V. EQUITY JURISDICTION** — 1. **Scope and Subjects** — *a.* **INTRODUC-**  
**TORY.** — See note 5.  
**196.** *b.* **OUTLINE** — (5) *Crimes* — (a) **Prevention of Crimes** — *aa.* **GENERAL RULE.**  
 — See note 1.  
**197.** *cc.* **EXCEPTION WHERE PROPERTY RIGHTS ARE INVOLVED.** — See note 5.  
**200.** **2. Prerequisites** — **Inadequacy of Legal Remedy** — *a.* **IN GENERAL.**  
 — See note 1.

**as Mortgages.** — *Shipman v. Lord*, 58 N. J. Eq. 380.

**184. 6. General Application.** — *Monteith v. Parker*, 36 Oregon 177, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 184; *Crowell v. Young*, (Indian Ter. 1901) 64 S. W. Rep. 607.

**185. 2.** *Crowell v. Young*, (Indian Ter. 1901) 64 S. W. Rep. 607.

**186. 3. Equality Is Equity.** — *In re Fixen*, (C. C. A.) 102 Fed. Rep. 295, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 186.

**6. In the Distribution of Property Among Creditors.** — *Perth Amboy Gas Light Co. v. Middlesex County Bank*, 60 N. J. Eq. 84.

**7. Changes Common Law.** — *In re Fixen*, (C. C. A.) 102 Fed. Rep. 295, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 186; *U. S. v. Detroit Timber, etc., Co.*, (C. C. A.) 131 Fed. Rep. 668; *Forman v. Brewer*, 62 N. J. Eq. 748, 90 Am. St. Rep. 475.

**189. 4.** *Forman v. Brewer*, 62 N. J. Eq. 748, 90 Am. St. Rep. 475.

**190. 1.** *State v. Hickman*, 150 Mo. 626; *Johnson v. Hayward*, (Neb. 1905) 103 N. W. Rep. 1058; *Duebner Watch Case Mfg. Co. v. Daugherty*, 62 Ohio St. 589.

**191. 5. No Political Jurisdiction.** — *Anthony v. Burrow*, 129 Fed. Rep. 783; *Ogburn v. Elmore*, 121 Ga. 72; *Landes v. Walls*, 160 Ind. 216; *State v. Aloe*, 152 Mo. 466; *Arnold v. Henry*, 155 Mo. 48, 78 Am. St. Rep. 556; *Winnett v. Adams*, (Neb. 1904) 99 N. W. Rep. 681.

**196. 1. No Inherent Power to Enjoin Crimes.** — *People v. Condon*, 102 Ill. App. 449; *Marshall v. Illinois State Reformatory*, 103 Ill. App. 65, affirmed 201 Ill. 9; *Hubbard v. State*, (Neb. 1904) 100 N. W. Rep. 153.

**197. 5. Where Property Rights Involved.** — *John Anisfield Co. v. Grossman*, 98 Ill. App. 180; *J. K. & W. H. Gilcrest Co. v. Des Moines*, (Iowa 1905) 102 N. W. Rep. 831.

**200. 1. Legal Remedy Must Be Inadequate** — *United States.* — *Smith v. American Nat. Bank*, (C. C. A.) 89 Fed. Rep. 832; *Thomas v. Council Bluffs Canning Co.*, (C. C. A.) 92 Fed. Rep. 422; *Alger v. Anderson*, 92 Fed. Rep. 696; *Morrison v. Marker*, 93 Fed. Rep. 692; *Proctor, etc., Co. v. Mahin*, 93 Fed. Rep. 875; *Bedford Quarries Co. v. Thomlinson*, (C. C. A.) 95 Fed. Rep. 208; *Iowa, etc., Land Co. v. Temescal Water Co.*, 95 Fed. Rep. 320; *Safe-Deposit, etc.,*

*Co. v. Anniston*, 96 Fed. Rep. 661; *Corbus v. Alaska Treadwell Gold-Min. Co.*, 99 Fed. Rep. 334; *Forest Oil Co. v. Crawford*, (C. C. A.) 101 Fed. Rep. 849; *Union Cent. L. Ins. Co. v. Phillips*, (C. C. A.) 102 Fed. Rep. 19; *Hale v. Allinson*, 102 Fed. Rep. 790, affirmed (C. C. A.) 106 Fed. Rep. 258; *McGuire v. Pensacola City Co.*, (C. C. A.) 105 Fed. Rep. 677; *Eau Claire v. Payson*, (C. C. A.) 109 Fed. Rep. 676; *Hanley v. Kansas, etc., Coal Co.*, 110 Fed. Rep. 62; *Washington County v. Williams*, (C. C. A.) 111 Fed. Rep. 801; *Sawyer v. Atchison, etc., Co.*, 119 Fed. Rep. 252, affirmed (C. C. A.) 129 Fed. Rep. 100; *Jones v. Mutual Fidelity Co.*, 123 Fed. Rep. 506; *Brown v. Arnold*, 127 Fed. Rep. 387, reversed (C. C. A.) 131 Fed. Rep. 723; *McCabe v. Rapid Transit Subway Constr. Co.*, 127 Fed. Rep. 465; *Holst v. Savannah Electric Co.*, 131 Fed. Rep. 931, reversed (C. C. A.) 132 Fed. Rep. 901; *Indian Land, etc., Co. v. Shoenfelt*, (C. C. A.) 135 Fed. Rep. 484.

*Alabama.* — *Farmers, etc., Bank v. Hall*, 120 Ala. 14; *Birmingham R., etc., Co. v. Birmingham Traction Co.*, 121 Ala. 475; *Seals v. Weldon*, 121 Ala. 319; *Belcher v. Scruggs*, 125 Ala. 336; *Jordan v. Phillips, etc., Co.*, 126 Ala. 561; *Wilkinson v. Wilkinson*, 129 Ala. 279; *Galloway v. Hendon*, 131 Ala. 280; *Letohatchie Baptist Church v. Bullock*, 133 Ala. 549; *Boddie v. Bush*, 136 Ala. 560; *Inglis v. Freeman*, 137 Ala. 298; *Norwood v. Tyson*, 138 Ala. 269; *Yellow Pine Export Co. v. Sutherland-Innes Co.*, (Ala. 1904) 37 So. Rep. 922.

*Alaska.* — *U. S. v. North-West Trading Co.*, 1 Alaska 5; *Allen v. Meyers*, 1 Alaska 114.

*Arkansas.* — *Polk v. Gardner*, 67 Ark. 441.

*Connecticut.* — *Botsford v. Wallace*, 72 Conn. 195.

*District of Columbia.* — *Pechstein v. Smith*, 14 App. Cas. (D. C.) 27; *Giesy v. Gregory*, 15 App. Cas. (D. C.) 49; *Peck v. Haley*, 21 App. Cas. (D. C.) 224.

*Georgia.* — *Beysiegel v. Rome Mut. Loan Assoc.*, 113 Ga. 1071; *Sharpe v. Hodges*, 116 Ga. 795; *Armour Packing Co. v. Lovell*, 118 Ga. 164.

*Idaho.* — *School Dist. No. 25 v. Rice*, (Idaho 1905) 81 Pac. Rep. 155.

*Illinois.* — *Field v. Western Springs*, 181 Ill. 186; *Fuller v. Davis*, 184 Ill. 505; *Williams v. Dutton*, 184 Ill. 608; *Olsen v. Anderson*, 90 Ill. App. 189, affirmed 188 Ill. 502; *Cleland v. Camp-*

**200. Meaning and Test of "Adequate Remedy." — See note 3.**

bell, 78 Ill. App. 624; *Tanton v. Boomgarden*, 79 Ill. App. 551; *Chicago, etc., R. Co. v. General Electric R. Co.*, 79 Ill. App. 569; *Field v. Golconda*, 81 Ill. App. 165; *Mead v. Davies*, 84 Ill. App. 558; *Huening v. Buckley*, 87 Ill. App. 648; *Schack v. McKey*, 97 Ill. App. 460; *Shencho v. Illinois L. Ins. Co.*, 100 Ill. App. 281; *Klinesmith v. Van Bramer*, 104 Ill. App. 384; *Des Moines L. Ins. Co. v. Seifert*, 112 Ill. App. 277, *affirmed* 210 Ill. 157; *Henion v. Pohl*, 113 Ill. App. 100.

*Indiana*. — *Wayne County v. Dickinson*, 153 Ind. 682; *Seymour Water Co. v. Seymour*, 163 Ind. 120; *Stauffer v. Cincinnati, etc., R. Co.*, 33 Ind. App. 356.

*Iowa*. — *Hull v. Hull*, 117 Iowa 63.

*Kentucky*. — *Louisville, etc., R. Co. v. Pittsburg, etc., Coal Co.*, 64 S. W. Rep. 969, 23 Ky. L. Rep. 1318; *Louisville, etc., R. Co. v. Smith*, 78 S. W. Rep. 160, 25 Ky. L. Rep. 1459.

*Maine*. — *Goding v. Bangor, etc., R. Co.*, 94 Me. 542.

*Maryland*. — *Armiger v. Reitz*, 91 Md. 334.

*Massachusetts*. — *Boston, etc., R. Co. v. Sullivan*, 177 Mass. 230.

*Michigan*. — *Mack v. Frankfort*, 123 Mich. 421; *Clarke v. Hill*, 132 Mich. 434.

*Missouri*. — *Schuster v. Myers*, 148 Mo. 422; *Arnold v. Henry*, 155 Mo. 48, 78 Am. St. Rep. 556; *Thorn, etc., Lime, etc., Co. v. Citizens Bank*, 158 Mo. 272; *Benton County v. Morgan*, 163 Mo. 661; *Reed v. Reed*, 94 Mo. App. 590.

*Nebraska*. — *Hess v. Lell*, (Neb. 1903) 94 N. W. Rep. 975; *Brown v. Reed*, (Neb. 1904) 100 N. W. Rep. 143.

*New Hampshire*. — *Williams v. Mathewson*, (N. H. 1905) 60 Atl. Rep. 687.

*New Jersey*. — *Krueger v. Armitage*, 58 N. J. Eq. 357; *Keen v. Maple Shade Land, etc., Co.*, 61 N. J. Eq. 497; *Bennett v. Bennett*, 63 N. J. Eq. 306; *Headley v. Leavitt*, 66 N. J. Eq. 94; *Sperry, etc., Co. v. Vine*, 66 N. J. Eq. 339.

*New Mexico*. — *Lasswell v. Kitt*, 11 N. Mex. 459.

*New York*. — *Marsh v. Kaye*, 168 N. Y. 196; *Schulz v. Albany*, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 51, *affirmed* 42 N. Y. App. Div. 437; *Getman v. Dorr*, (Supm. Ct. Spec. T.) 28 Misc. (N. Y.) 654; *Erste Sokolower Congregation, etc., v. First United Royatiner, etc.*, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 269; *Black v. Vanderbilt*, 67 N. Y. App. Div. 617; *Everett v. De Fontaine*, 78 N. Y. App. Div. 219; *Jones v. Fonda*, 85 N. Y. App. Div. 265.

*North Carolina*. — *Puryear v. Sanford*, 124 N. Car. 276.

*North Dakota*. — *Kitzman v. Minnesota Thresher Mfg. Co.*, 10 N. Dak. 26.

*Ohio*. — *Rosenstiel v. Jones Bros. Electric Co.*, 6 Ohio Cir. Dec. 27; *Robert Mitchell Furniture Co. v. Cleveland, etc., R. Co.*, 9 Ohio Dec. 674, 7 Ohio N. P. 640; *Sipe v. Bartlett*, 12 Ohio Cir. Dec. 226; *Ireland v. Loomis*, 9 Ohio Cir. Dec. 393, 17 Ohio Cir. Ct. 37; *Allison v. Luhrig Coal Co.*, 12 Ohio Cir. Dec. 504, 22 Ohio Cir. Ct. 489.

*Oklahoma*. — *Trimble v. Minnesota Thresher Mfg. Co.*, 10 Okla. 578; *Racey v. Racey*, 12 Okla. 650.

*Oregon*. — *Hughes v. Pratt*, 37 Oregon 45;

*Benson v. Keller*, 37 Oregon 120; *Willis v. Crawford*, 38 Oregon 522; *Union Light, etc., Co. v. Lichty*, 42 Oregon 563.

*Pennsylvania*. — *Steinmeyer v. Siebert*, 190 Pa. St. 471, 70 Am. St. Rep. 641; *Meehan v. Owens*, 196 Pa. St. 69; *Suplee v. Callaghan*, 200 Pa. St. 146; *Price v. Hurley*, 201 Pa. St. 606; *North Braddock v. Corey*, 205 Pa. St. 35; *Leahy v. Tompkins*, 31 Pittsb. Leg. J. N. S. (Pa.) 218; *Graver v. Otto*, 23 Pa. Ct. 227.

*Rhode Island*. — *Gavitt v. Berry*, 23 R. I. 14; *McCudden v. Wheeler, etc., Mfg. Co.*, 23 R. I. 528.

*Texas*. — *Modisett v. National Bank*, 23 Tex. Civ. App. 589; *Givens v. Delprat*, 28 Tex. Civ. App. 363; *Hahn v. Willis*, 31 Tex. Civ. App. 643; *Rucker v. Campbell*, 35 Tex. Civ. App. 178.

*Vermont*. — *School Dist. No. 3 v. Sheldon*, 71 Vt. 95.

*Virginia*. — *Southern R. Co. v. Franklin, etc., R. Co.*, 96 Va. 693; *Buck v. Ward*, 97 Va. 209; *Kane v. Virginia Coal, etc., Co.*, 97 Va. 329; *Langford v. Taylor*, 99 Va. 577; *Lowman v. Crawford*, 99 Va. 688; *Neff v. Ryman*, 100 Va. 521; *Henley v. Cottrell Real Estate, etc., Co.*, 101 Va. 70.

*West Virginia*. — *Shay v. Nolan*, 46 W. Va. 299.

*Wisconsin*. — *Hoff v. Olson*, 101 Wis. 118; *Ellis v. Southwestern Land Co.*, 102 Wis. 409; *Roberts v. Moody*, 107 Wis. 245.

**200. 3. Legal Remedy Must Be as Practical and Efficient as the Equitable Remedy** — *United States*. — *Smith v. American Nat. Bank*, (C. C. A.) 89 Fed. Rep. 832; *Pokegama Sugar Pine Lumber Co. v. Klamath River Lumber, etc., Co.*, 96 Fed. Rep. 34; *Hale v. Allinson*, 102 Fed. Rep. 790, *affirmed* (C. C. A.) 106 Fed. Rep. 258; *New Orleans v. Fisher*, (C. C. A.) 91 Fed. Rep. 574, *modified* 180 U. S. 185; *Washington County v. Williams*, (C. C. A.) 111 Fed. Rep. 801; *Mutual L. Ins. Co. v. Pearson*, 114 Fed. Rep. 395; *Tift v. Southern R. Co.*, 123 Fed. Rep. 789; *Wyman v. Bowman*, (C. C. A.) 127 Fed. Rep. 257; *Wierner v. Louisville Water Co.*, 130 Fed. Rep. 246; *Williams v. Neely*, (C. C. A.) 134 Fed. Rep. 1; *McMullen Lumber Co. v. Strother*, (C. C. A.) 136 Fed. Rep. 295.

*California*. — *Fleishman v. Woods*, 135 Cal. 256.

*Georgia*. — *Milner v. Neel*, 114 Ga. 118; *Fleming v. Blosser Printing Co.*, 118 Ga. 86; *Bailey v. McAlpin*, 122 Ga. 616.

*Illinois*. — *Bank of Montreal v. Waite*, 105 Ill. App. 379, *citing* 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 200; *Smith v. Bates Mach. Co.*, 79 Ill. App. 519, *affirmed* 182 Ill. 166; *Lyman v. Suburban R. Co.*, 190 Ill. 320.

*Indiana*. — *Martin v. Marks*, 154 Ind. 549; *Meyer v. Boonville*, 162 Ind. 165; *Stauffer v. Cincinnati, etc., R. Co.*, 33 Ind. App. 356.

*Kentucky*. — *Jenkins v. Berry*, 83 S. W. Rep. 594, 26 Ky. L. Rep. 1141.

*Maryland*. — *Safe Deposit, etc., Co. v. Baker*, 91 Md. 297.

*Minnesota*. — *Fryberger v. Berven*, 88 Minn. 311.

*Missouri*. — *Barrington v. Ryan*, 88 Mo. App. 85.

*Nebraska*. — *Carter v. Warner*, (Neb. 1902) 89 N. W. Rep. 747; *Kepfinger v. Woolsey*, (Neb. 1903) 93 N. W. Rep. 1008.

**201.** See notes 2, 3, 4.

**b. RETAINING JURISDICTION AFTER DENIAL OF RELIEF IN EQUITY.** — See notes 5, 6, 7.

**202.** **c. OTHER EXCEPTIONS.** — See notes 2, 3, 4.

[Discovery. — See note 4a.]

**203. VI. EQUITABLE REMEDIES** — The Second Class of Equitable Remedies. — See notes 18, 21a.

*New Hampshire.* — Gregg v. Thurber, 69 N. H. 480.

*New Jersey.* — North Jersey St. R. Co. v. South Orange Tp., 58 N. J. Eq. 83; Hoboken Ferry Co. v. Baldwin, 58 N. J. Eq. 36; American Cent. Ins. Co. v. Landau, 62 N. J. Eq. 73; Slater v. Schwegler, (N. J. 1903) 54 Atl. Rep. 937; Davis v. Wilson, (N. J. 1903) 56 Atl. Rep. 704.

*Oregon.* — Benson v. Keller, 37 Oregon 120; Wood v. Fisk, 45 Oregon 276.

*Pennsylvania.* — Schmaltz v. York Mfg. Co., 204 Pa. St. 1, 93 Am. St. Rep. 782; Gray v. Citizens' Gas Co., 206 Pa. St. 303; Pennsylvania R. Co. v. Bogert, 209 Pa. St. 589.

*Rhode Island.* — Dowell v. Goodwin, 22 R. I. 287, 84 Am. St. Rep. 842.

*South Dakota.* — Halley v. Ingersoll, 14 S. Dak. 7.

*Vermont.* — Barton Nat. Bank v. Atkins, 72 Vt. 33.

*Virginia.* — Southern R. Co. v. Franklin, etc., R. Co., 96 Va. 693; Buck v. Ward, 97 Va. 209; Lowman v. Crawford, 99 Va. 688.

*West Virginia.* — Cleavenger v. Franklin F. Ins. Co., 47 W. Va. 595; Carney v. Barnes, 56 W. Va. 581.

**201. 2. Legal Remedy Inadequate if It Permits Multiplicity of Suits** — *United States.* — McGuire v. Pensacola City Co., (C. C. A.) 105 Fed. Rep. 677; Eureka, etc., R. Co. v. California, etc., R. Co., (C. C. A.) 109 Fed. Rep. 509; Washington County v. Williams, (C. C. A.) 111 Fed. Rep. 801; Tift v. Southern R. Co., 123 Fed. Rep. 789; Wyman v. Bowman, (C. C. A.) 127 Fed. Rep. 257; Mutual L. Ins. Co. v. Blair, 130 Fed. Rep. 971; Holst v. Savannah Electric Co., 131 Fed. Rep. 931, reversed (C. C. A.) 132 Fed. Rep. 901.

*Colorado.* — Dumars v. Denver, 16 Colo. App. 375.

*Georgia.* — Fleming v. Blosser Printing Co., 118 Ga. 86.

*Illinois.* — Lloyd v. Catlin Coal Co., 210 Ill. 460; German Alliance Ins. Co. v. Van Cleave, 191 Ill. 410; Chicago Telephone Co. v. Illinois Manufacturers' Assoc., 106 Ill. App. 54.

*Nebraska.* — Leach v. Harbough, (Neb. 1902) 91 N. W. Rep. 521.

*New Hampshire.* — Smith v. New England Bank, 69 N. H. 254.

*New Jersey.* — American Cent. Ins. Co. v. Landau, 62 N. J. Eq. 73.

*Pennsylvania.* — Mengel v. Lehigh Coal, etc., Co., 24 Pa. Co. Ct. 152.

*Vermont.* — Barton Nat. Bank v. Atkins, 72 Vt. 33.

**3.** The complainant cannot come into equity on the ground that a suit in equity will avoid a multiplicity of suits against the defendant. Thomas v. Council Bluffs Canning Co., (C. C. A.) 92 Fed. Rep. 422.

The fact that there is a possibility of a multiplicity of suits does not show that the legal remedy is inadequate. Pechstein v. Smith, 14 App. Cas. (D. C.) 27.

**4.** Hale v. Allinson, 102 Fed. Rep. 790, (C. C. A.) 106 Fed. Rep. 258.

**5.** *United States.* — Williamson v. Monroe, 101 Fed. Rep. 322; Michigan Pipe Co. v. Fremont Ditch, etc., Co., (C. C. A.) 111 Fed. Rep. 284.

*Hawaii.* — Kawanakoa v. Puahi, 14 Hawaii 77, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 201.

*Kansas.* — Kansas City Northwestern R. Co. v. Caton, 9 Kan. App. 272.

*Maryland.* — Safe Deposit, etc., Co. v. Baker, 91 Md. 297.

*Mississippi.* — Atkinson v. Felder, 78 Miss. 83.

*Missouri.* — Hagan v. Continental Nat. Bank, 182 Mo. 319.

*Nebraska.* — Stockham Bank v. Alter, 61 Neb. 359.

*New York.* — Goddard v. American Queen, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 482, reversed 44 N. Y. App. Div. 454.

*Tennessee.* — Gordonsville Milling Co. v. Jones, (Tenn. Ch. 1900) 57 S. W. Rep. 630.

*West Virginia.* — Evans v. Kelley, 49 W. Va. 181, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 201.

**Contra.** — Crowell v. Young, (Indian Ter. 1901) 64 S. W. Rep. 607.

There must be some equity upon which to base the jurisdiction of the court. Miller v. St. Louis, etc., R. Co., 162 Mo. 424.

Where only an incidental matter is cognizable in equity the whole question will not be brought into the equity court for disposal. Graeff v. Felix, 200 Pa. St. 137.

**6. Injunctions.** — Moon v. National Wall-Plaster Co., (Supm. Ct. Spec. T.) 31 Misc. (N. Y.) 631, affirmed 57 N. Y. App. Div. 621.

**7. Specific Performance.** — Ewins v. Cawthon, 132 Ala. 184; Snow v. Monk, 81 N. Y. App. Div. 206.

**202. 2. Fraud.** — Wilkinson v. Kneeland, 125 Mich. 261; Krueger v. Armitage, 58 N. J. Eq. 357; Eggers v. Anderson, 63 N. J. Eq. 264.

**3. Trusts.** — Smith v. Bates Mach. Co., 182 Ill. 166.

**4. Specific Performance.** — Madison Athletic Assoc. v. Brittin, 60 N. J. Eq. 160.

**4a. Discovery.** — Miller v. U. S. Casualty Co., 61 N. J. Eq. 110.

**203. 18.** Central Stock, etc., Exch. v. Bendinger, (C. C. A.) 109 Fed. Rep. 926, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 203.

**21a.** Equitable remedies are denominated contractual because they are available (only) between parties occupying the contract relation. Hannibal, etc., R. Co. v. Nortoni, 154 Mo. 148, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 203.



# EQUITY OF REDEMPTION.

BY H. O'B. COOPER.

**206. I. DEFINITION.** — See note 1.

**207. II. ORIGIN AND NATURE OF RIGHT** — 1. **Origin of Right.** — See note 1.  
In **Regard to Chattel Mortgages.** — See notes 2, 3.

**208. 2. Nature of Right** — *a.* **EQUITY OF REDEMPTION PROPER AND STATUTORY RIGHT TO REDEEM DISTINGUISHED.** — See note 3.

*b.* **CHARACTERISTICS OF EQUITY OF REDEMPTION PROPER** —  
(1) *Is Inherent in All Mortgages.* — See note 4.

**209. (2) Attributes of Property in General.** — See note 1.

**210. (3) Dower in Equity of Redemption** — **At Common Law.** — See note 6.  
But the **Common-law Rule Has Been Changed.** — See note 8.

**213. c. CHARACTERISTICS OF STATUTORY RIGHT TO REDEEM.** — See note 1.

**214. III. WHO MAY REDEEM** — 1. **General Rule.** — See note 4.

**206. 1. Equity of Redemption Defined.** —  
*Thacker v. Morris*, 52 W. Va. 220.

**207. 1. Mortgagor's Estate Absolute at Law on Breach of Condition.** — *Loggie v. Chandler*, 95 Me. 220; *Stephenson v. Kilpatrick*, 166 Mo. 262.

The Purpose of the Equity of Redemption is to enable all who have interests or claims in the property which may be cut off to save those interests or claims, in so far as it may be done without impairing the rights of those in whose behalf the sale was made. *Law v. Citizens Bank*, 85 Minn. 411, 89 Am. St. Rep. 566.

**2. Chattel Mortgage — Mortgagee's Title Absolute at Law on Breach of Condition.** — *Leapold v. McCartney*, 14 Colo. App. 442; *Alexander v. Meyenberg*, 112 Ill. App. 223; *Loggie v. Chandler*, 95 Me. 220.

**3. Chattel Mortgages — Redemption in Equity.** — *Leapold v. McCartney*, 14 Colo. App. 442; *Loggie v. Chandler*, 95 Me. 220.

**208. 3. Equity of Redemption and Statutory Right Distinguished.** — The distinction between the statutory and equitable redemption is that the former is from the sale, while the latter is from the mortgage. *Rodman v. Quick*, 211 Ill. 546.

**4. Inherent in All Mortgages.** — *Johnson v. Prosperity Loan, etc., Assoc.*, 94 Ill. App. 260; *Barlow v. Cooper*, 109 Ill. App. 375; *Mooney v. Byrne*, 163 N. Y. 86; *Hughes v. Harlam*, 166 N. Y. 427, *affirming* 37 N. Y. App. Div. 528; *Braun v. Vollnier*, 89 N. Y. App. Div. 43; *Faulkner v. Cody*, (Supm. Ct. Spec. T.) 45 Misc. (N. Y.) 64.

**Nor Can It Be Restricted.** — It is not every agreement by the vendee to reconvey on payment of a certain sum within the specified time that constitutes a mortgage; but the parties may execute such conveyance with the intention that the title shall become absolute and the right of redemption determine so as to vest in the grantee the title absolute on default after the expiration of the time for payment, and if such intention actually appears there is no reason

why full effect should not be given to it. While it is true, as a general rule, that in the absence of such intention appearing equity will construe the transaction as a mortgage, with the right to redeem, yet such rule is not to be applied where another intention is evident. *Luesenhop v. Einsfeld*, 93 N. Y. App. Div. 68.

**Right Is Favored in Law.** — *Saw v. Citizens Bank*, 85 Minn. 411, 89 Am. St. Rep. 566.

**Form of Instrument.** — *Richter v. Noll*, 128 Ala. 198; *Greenwood Bldg., etc., Assoc. v. Stanton*, 28 Ind. App. 548; *Pickett v. Wadlow*, 94 Md. 564; *Faulkner v. Cody*, (Supm. Ct. Spec. T.) 45 Misc. (N. Y.) 64.

**209. 1. Equity of Redemption Is an Estate.** — *Santley v. Wilde*, (1899) 2 Ch. 474, *reversing* (1899) 1 Ch. 747.

**May Be Assigned.** — *Cooper v. Maurer*, 122 Iowa 321.

**210. 6. Not Subject to Dower at Common Law.** — *McDonald v. McDonald*, 120 Ga. 403; *Virgin v. Virgin*, 91 Ill. App. 188, *affirmed* 189 Ill. 144.

**8. Dower Right Extended to Equities of Redemption.** — *Re Luckhardt*, 29 Ont. 111; *Casteel v. Potter*, 176 Mo. 76; *Mowry v. Mowry*, 24 R. I. 565.

**213. 1. Statutory Right to Redeem — In General.** — *Rodman v. Quick*, 211 Ill. 546.

**214. 4. Who May Redeem in General — United States.** — *H. B. Claffin Co. v. Middlesex Banking Co.*, 113 Fed. Rep. 958.

*Alabama.* — *Rothschild v. Bay City Lumber Co.*, 139 Ala. 571, *citing* 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 214. See also *Pitts v. American Freehold Land Mortg. Co.*, 123 Ala. 469.

*Georgia.* — *Shumate v. McLendon*, 120 Ga. 396.

*Illinois.* — *Traeger v. Mutual Bldg., etc., Assoc.*, 192 Ill. 166.

*Maryland.* — *Snook v. Zentmyer*, 91 Md. 485.

*Minnesota.* — *Law v. Citizens Bank*, 85 Minn. 411, 89 Am. St. Rep. 566.

*Mississippi.* — *Houston v. National Mut. Bldg.,*

- 216.** The Title. — See note 1.  
 2. Heirs and Devisees. — See note 2.  
 3. Purchasers. — See note 3.
- 217.** See note 1.  
 A Purchaser of a Part. — See note 2.  
 4. Part Owners. — See note 4.
- 218.** See note 4.  
 5. Creditors — *a.* GENERAL CREDITORS. — See note 6.
- 219.** *b.* LIEN CREDITORS — (1) *Junior Mortgagees*. — See notes 1, 2.
- 221.** (2) *Judgment Creditors*. — See note 2.
- 222.** See note 1.  
 Necessity of Issuing Execution. — See note 3.
- 223.** 6. Dowress. — See notes 2, 3.
- 224.** 7. Tenants by Curtesy. — See note 1.  
 8. Personal Representatives. — See note 2.

etc., Assoc., 80 Miss. 45, 92 Am. St. Rep. 565, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 214-224.

*New Hampshire*. — Ross v. Leavitt, 70 N. H. 602.

*New York*. — Hughes v. Harlam, 166 N. Y. 427.

*Washington*. — Preston-Parton Milling Co. v. Horton, 22 Wash. 236, 79 Am. St. Rep. 928.

**216.** 1. Holder of Legal or Equitable Title. — Snook v. Zentmyer, 91 Md. 485.

2. Redemption by Heirs. — Clark v. Seagraves, 186 Mass. 430.

Legatee in Remainder. — Snook v. Zentmyer, 91 Md. 485.

3. Purchasers May Redeem. — Lancy v. Abington Sav. Bank, 177 Mass. 431; Houston v. National Mut. Bldg., etc., Assoc., 80 Miss. 31, 92 Am. St. Rep. 565, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 216.

Purchaser in Possession under Invalid Sale. — Law v. Citizens Bank, 85 Minn. 411, 89 Am. St. Rep. 566.

Purchaser at Execution Sale. — Pollard v. Harlow, 138 Cal. 390.

Minnesota Statute — Purchaser at Foreclosure Sale. — Hughes v. Olson, 74 Minn. 237, 73 Am. St. Rep. 343.

**217.** 1. Purchaser at Sale under Legal Process May Redeem. — Martin v. Turnbaugh, 153 Mo. 172.

2. Purchaser of Part of Mortgaged Premises. — Rothschild v. Bay City Lumber Co., 139 Ala. 571.

4. Redemption by Part Owner of Mortgaged Property. — McQueen v. Whetstone, 127 Ala. 417, 137 Ala. 301; Howser v. Cruikshank, 122 Ala. 256, 82 Am. St. Rep. 76.

**218.** 4. Part Owner Must Redeem Entire Property. — McQueen v. Whetstone, 127 Ala. 417.

Mortgagee May Accept Portion of Debt from Tenant in Common. — Dougherty v. Kubat, 67 Neb. 269.

6. General Creditors. — National Foundry, etc., Works v. Oconto City Water Supply Co., (C. C. A.) 113 Fed. Rep. 793; Huber v. Hess, 191 Ill. 305.

**219.** 1. Junior Mortgagee May Redeem Senior Mortgage. — American L. & T. Co. v. Atlanta Electric R. Co., 99 Fed. Rep. 318, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 219; Douthit v. Nabors, 133 Ala. 453; Rothschild v. Bay City Lumber Co., 139 Ala. 571; Illinois

Nat. Bank v. School Trustees, 111 Ill. App. 189, affirmed 211 Ill. 500; Jones v. Dutch, (Neb. 1902) 92 N. W. Rep. 735; Nichols v. Tingstad, 10 N. Dak. 172. See Brewer v. Conger, 27 Ont. App. 10.

Junior Mortgage Merged — No Right to Redeem. — San Jose Water Co. v. Lyndon, 124 Cal. 518.

Equitable Mortgage. — A party having an equitable mortgage in the shape of an absolute conveyance may redeem as "a creditor having a lien," without having first obtained a judicial determination that the conveyance or transfer is a mortgage. Scheibel v. Anderson, 77 Minn. 54, 77 Am. St. Rep. 664.

2. Statutory Right of Junior Mortgagee to Redeem. — Illinois Nat. Bank v. School Trustees, 111 Ill. App. 189, affirmed 211 Ill. 500.

**221.** 2. Judgment Creditors May Redeem. — Houston v. National Mut. Bldg., etc., Assoc., 80 Miss. 45, 92 Am. St. Rep. 565, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 221; Shumate v. McLendon, 120 Ga. 396; Etna L. Ins. Co. v. Beckman, 210 Ill. 394; Geddis v. Packwood, 30 Wash. 270.

Holder of Legal or Equitable Lien. — Snook v. Zentmyer, 91 Md. 485.

Judgment Creditor Made Defendant to Bill for Foreclosure. — Judgment creditors of the mortgagor are necessary parties defendant to a bill for foreclosure, but their right to redeem from the foreclosure sale is not cut off or affected by the decree of foreclosure. People v. Bowman, 181 Ill. 421, 72 Am. St. Rep. 265, following Boynton v. Pierce, 151 Ill. 197.

**222.** 1. Necessity of Lien. — White v. Costigan, (Cal. 1901) 63 Pac. Rep. 1075.

3. Execution Not Necessary if Judgment Creates a Lien. — See Morava v. Bonner, 205 Ill. 321.

**223.** 2. Redemption by Widow Entitled to Dower in Mortgaged Premises. — Law v. Citizens Bank, 85 Minn. 411, 89 Am. St. Rep. 566.

3. Wife of Mortgagor May Redeem in Husband's Lifetime. — Mackenna v. Fidelity Trust Co., 98 N. Y. App. Div. 480; Atwood v. Arnold, 23 R. I. 609.

**224.** 1. Tenants by Curtesy May Redeem. — Law v. Citizens Bank, 85 Minn. 411, 89 Am. St. Rep. 566.

2. Personal Representatives — Not Entitled to Redeem Mortgage of Fee-simple Estate at Common Law. — Clark v. Seagraves, 186 Mass. 430.

**224. IV. TIME TO REDEEM — 1. Equitable Right. — See note 5.****225.** Before Breach of Condition. — See note 1.

After Breach of the Condition. — See note 2.

**226. 2. Statutory Right. — See note 2.****V. TERMS OF REDEMPTION — 1. In Equity — a. PAYMENT OF MORTGAGE DEBT — (1) In General. — See note 3.****227.** See note 3.**229.** (2) *Quantity of Redemptioner's Interest* — Redemption by Dowress. — See note 1.(4) *Interest Payable on Redemption.* — See note 4.**230.** Rate of Interest After Maturity. — See note 3.

b. PAYMENT OF OTHER DEBTS BY REDEMPTIONER. — See note 4.

**232.** d. PAYMENT OF COSTS AND EXPENSES — (1) *Costs.* — See notes 1, 2, 3.**224. 5. No Time Fixed — Reasonable Time.** — *Turpie v. Lowe*, 158 Ind. 314, 92 Am. St. Rep. 310.**225. 1. No Redemption Before Debt Is Due.** — *Loggie v. Chandler*, 95 Me. 220.**No Specified Time When Debt Is Due — Reasonable Time.** — *Baker v. Bailey*, 204 Pa. St. 524; *Svenson v. Rohrer*, 206 Pa. St. 407.**2. Missouri — Six Months Usual Time.** — *Stephenson v. Kilpatrick*, 166 Mo. 262.**226. 2. Time for Redemption under Statute — Illinois.** — A judgment creditor's right to redeem after twelve months and within fifteen months from the foreclosure sale is not affected by the fact that after the expiration of the twelve months and before the expiration of the fifteen months he obtained a deed of the land from the mortgagor. The deed affects no merger of his judgment in the title so as to prevent redemption. *People v. Bowman*, 181 Ill. 421, 72 Am. St. Rep. 265.But if he causes the mortgaged premises to be sold under his judgment he is then entitled to redeem within twelve months from the date of such sale. *Illinois Nat. Bank v. School Trustees*, 111 Ill. App. 189, affirmed 211 Ill. 500.*North Dakota.* — *Nichols v. Tingstad*, 10 N. Dak. 172.**Statute Inapplicable to Decrees Prior to Passage.** — *Lachman v. Ottawa Circuit Judge*, 125 Mich. 27; *Michigan Trust Co. v. Libby*, 127 Mich. 45.**Statute Inapplicable to Sales Prior to Passage.** — *Malone v. Roy*, 134 Cal. 344; *Savings Bank v. Barrett*, 126 Cal. 413; *Benson v. Bunting*, 127 Cal. 532, 78 Am. St. Rep. 81; *Haynes v. Tredway*, 133 Cal. 400.**Absolute Deed.** — A mortgagor, who has given an absolute deed as security, is entitled to the statutory period of redemption. *Harrington v. Foley*, 108 Iowa 287.**3. Redemptioner Must Pay Entire Debt Secured with Interest — England.** — *Dingle v. Coppen*, (1899) 1 Ch. 726; *Rice v. Noakes*, (1900) 1 Ch. 213.*United States.* — *American L. & T. Co. v. Atlanta Electric R. Co.*, 99 Fed. Rep. 313.*Georgia.* — *Shumate v. McLendon*, 120 Ga. 396.*Illinois.* — *Carpenter v. Plagge*, 93 Ill. App. 445, affirmed in part 192 Ill. 82; *Rodman v. Quick*, 211 Ill. 546.*Indiana.* — *Butler v. Thornburgh*, 153 Ind. 530.*Kansas.* — *Evans v. Kahr*, 60 Kan. 719.*Maine.* — *Crummett v. Littlefield*, 98 Me. 317.*Missouri.* — See *Gibson v. Linville*, 88 Mo. App. 518.*Nebraska.* — *Jones v. Dutch*, (Neb. 1902) 92 N. W. Rep. 735; *Dougherty v. Kubat*, 67 Neb. 269.*Oregon.* — *Coughanour v. Hutchinson*, 41 Oregon 419, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 226.*Rhode Island.* — *Fenley v. Cassidy*, (R. I. 1899) 43 Atl. Rep. 296.**227. 3. Redemptioner Must Ascertain and Tender Sum Due.** — *Hamil v. Copeland*, 26 Colo. 178; *Evans v. Kahr*, 60 Kan. 719; *Loggie v. Chandler*, 95 Me. 220; *Munro v. Barton*, 95 Me. 262; *Lumsden v. Manson*, 96 Me. 357; *Marsden v. Walsh*, 24 R. I. 91; *Citizens' Nat. Bank v. Strauss*, 29 Tex. Civ. App. 407.**Tender Refused — Payment into Court.** — *Long v. Slade*, 121 Ala. 267.**California Statute — Mortgagee Absent from State.** — *Swain v. Jacks*, 125 Cal. 215.**After Foreclosure. — A Judgment Creditor as a redemptioner after sale is not required to pay the mortgage debt remaining after foreclosure.** *Williams v. Rouse*, 124 Ala. 160.**229. 1. Dowress Redeeming Must Pay Entire Debt.** — *Mackenna v. Fidelity Trust Co.*, 98 N. Y. App. Div. 480.**4. Interest on Interest Allowed.** — See *Chapman v. Cooney*, 25 R. I. 657.**230. 3. Interest Allowed at Contract Rate After Maturity.** — *Casey v. Gibbons*, 136 Cal. 368; *Evans v. Rice*, 96 Va. 50. See *Greenhaw v. Holmes*, (Ariz. 1902) 68 Pac. Rep. 537.**4. Payment of Collateral Debts by Redemptioner.** — *Carpenter v. Plagge*, 192 Ill. 95, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 230; *Mackenna v. Fidelity Trust Co.*, 98 N. Y. App. Div. 480.**Subsequent Advances to Mortgagor.** — *Carpenter v. Plagge*, 192 Ill. 96, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 230.**Alabama Statute — "Lawful Charges."** — *Anniston First Nat. Bank v. Elliott*, 125 Ala. 646, 82 Am. St. Rep. 268.**232. 1. Discretion of Court of Equity in Awarding Costs.** — *Rodman v. Quick*, 211 Ill. 546; *Ryer v. Morrison*, 21 R. I. 127.**By Mortgagee Not Party to Foreclosure.** — A junior mortgagee, who was not a party to a suit to foreclose a prior mortgage, in redeeming



**232.** 2. Terms of Statutory Redemption. — See note 8.

**233.** VI. ACCOUNTING ON REDEMPTION — 1. Liability to Account. — See note 1.

**234.** 3. Items of Account — *a.* CHARGES — (1) *Rents and Profits* — (a) General Rule. — See note 4.

**235.** (b) *Measure of Accountability*. — See note 2.

**236.** See notes 1, 2.

**237.** (2) *Waste*. — See note 1.

*b.* CREDITS — (1) *Repairs and Expenses*. — See note 2.

**238.** (2) *Improvements*. — See note 2.

is not required to pay the costs of the foreclosure suit. *Jones v. Dutch*, (Neb. 1902) 92 N. W. Rep. 735.

**232.** 2. Costs Ordinarily Imposed on Redemptioner. — *Dingle v. Coppen*, (1899) 1 Ch. 726; *Ryer v. Morrison*, 21 R. I. 127.

**Prior Tender.** — Upon a bill by a mortgagor to redeem, the costs of the suit are to be decreed against him, unless he established a prior tender of the amount due on the mortgage. *Liskey v. Snyder*, 56 W. Va. 610.

**3. Costs Sometimes Imposed on Mortgagee.** — *Ryer v. Morrison*, 21 R. I. 127.

**8. Terms of Statutory Redemption in General — United States.** — *Clarke v. Northwestern Mut. L. Ins. Co.*, (C. C. A.) 94 Fed. Rep. 262.

*Alabama.* — *Burke v. Brewer*, 133 Ala. 389; *Williams v. Rouse*, 124 Ala. 160.

*Illinois.* — *Traeger v. Mutual Bldg., etc., Assoc.*, 192 Ill. 166.

*Kansas.* — *Stewart v. Park College*, 68 Kan. 465.

*Maine.* — *Doe v. Littlefield*, 99 Me. 317; *Loggie v. Chandler*, 95 Me. 220.

*Missouri.* — *Sheridan v. Nation*, 159 Mo. 27; *Walmsley v. Dougherty*, 163 Mo. 298.

*North Dakota.* — *Nichols v. Tingstad*, 10 N. Dak. 172.

**Tender to One Not Authorized to Receive It.** — *Daggs v. Wilson*, 6 Ariz. 388.

**Notice Only to Persons Named in Statute.** — *Baggot v. Turner*, 21 Wash. 339.

**Fraud.** — A court of equity will not permit a fraud or trick to deprive a party of his right under the statute to redeem his property at a reasonable figure somewhere in the neighborhood of its real value. *Senft v. Vanek*, 209 Ill. 361.

**233.** 1. At Common Law the right to an accounting is cognizable only in equity, and when the mortgage is extinguished by redemption the right to an account dies with it. *Wilcox v. Cheviott*, 92 Me. 239.

**234.** 4. Mortgagee in Possession Must Account for Rents and Profits — *Alabama.* — *American Freehold Land Mortg. Co. v. Pollard*, 132 Ala. 155; *Whetstone v. McQueen*, 137 Ala. 301.

*California.* — *Benson v. Bunting*, 141 Cal. 462.

*Connecticut.* — See *McGrath v. McGrath*, 76 Conn. 289.

*Illinois.* — *Stevens v. Hadfield*, 178 Ill. 532. See also *Rodman v. Quick*, 211 Ill. 546.

*Iowa.* — *Stillman v. Rosenberg*, (Iowa 1899) 78 N. W. Rep. 913; *Dolan v. Midland Blast Furnace Co.*, 126 Iowa 254.

*Massachusetts.* — *Clark v. Seagraves*, 186 Mass. 430.

*Mississippi.* — *National Mut. Bldg., etc., Assoc. v. Houston*, 81 Miss. 386.

*Missouri.* — See *Gibson v. Linville*, 88 Mo. App. 518.

*Rhode Island.* — *Fenley v. Cassidy*, (R. I. 1899) 43 Atl. Rep. 296.

**Time for Redemption — Owner Not Liable to Purchaser — Indiana Statute.** — *World Bldg., etc., Co. v. Marlin*, 151 Ind. 630.

**Owner of Equity of Redemption Entitled to Rents and Profits.** — *Bogardus v. Moses*, 78 Ill. App. 223, *affirmed* 181 Ill. 554; *Stevens v. Hadfield*, 76 Ill. App. 420, *affirmed* 178 Ill. 532; *Glos v. Roach*, 80 Ill. App. 283, *affirmed* 181 Ill. 440.

**Provision in Mortgage.** — *Joliet First Nat. Bank v. Illinois Steel Co.*, 174 Ill. 140.

**235.** 2. Measure of Accountability. — *National Mut. Bldg., etc., Assoc. v. Houston*, 81 Miss. 386; *Coughanour v. Hutchinson*, 41 Oregon 419, *citing* 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 235.

**No Rental Value.** — On a bill to redeem from a mortgage on vacant land which has no rental value, the mortgagor cannot, in the accounting, receive credit either for use and occupation, or for interest in lieu thereof. *Bourgeois v. Gapen*, 58 Neb. 364.

**236.** 1. Fair Occupation Rent. — *Stillman v. Rosenberg*, (Iowa 1899) 78 N. W. Rep. 913.

**2. Improvement by Mortgagee.** — *American Freehold Land Mortg. Co. v. Pollard*, 132 Ala. 155.

**237.** 1. Mortgagee in Possession Accountable for Waste. — *American Freehold Land Mortg. Co. v. Pollard*, 132 Ala. 155; *Dolan v. Midland Blast Furnace Co.*, 126 Iowa 254. See *Chapman v. Cooney*, 25 R. I. 657. See also the title WASTE.

**2. Credit Allowed for Reasonable and Necessary Repairs.** — *American Freehold Land Mortg. Co. v. Pollard*, 132 Ala. 155; *McQueen v. Whetstone*, 127 Ala. 417, 137 Ala. 301; *Bourgeois v. Gapen*, 58 Neb. 364; *Coughanour v. Hutchinson*, 41 Oregon 419, *citing* 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 237; *Fenley v. Cassidy*, (R. I. 1899) 43 Atl. Rep. 296. See also *Rodman v. Quick*, 211 Ill. 546.

**238.** 2. Credit for Permanent Improvements Not Generally Allowed. — *American Freehold Land Mortg. Co. v. Pollard*, 132 Ala. 155; *McQueen v. Whetstone*, 127 Ala. 417, 137 Ala. 301; *Stillman v. Rosenberg*, (Iowa 1899) 78 N. W. Rep. 913. See also *Rodman v. Quick*, 211 Ill. 546; *Spangenberg v. Schneider*, 97 N. Y. App. Div. 200; *Coughanour v. Hutchinson*, 41 Oregon 419.

**Improvements After Institution of Suit to Redeem.** — *Benson v. Bunting*, 141 Cal. 462.

- 210.** (3) *Taxes, Assessments, and Prior Incumbrances Paid by Mortgagee.* — See note 2.
- 241.** (5) *Compensation to Mortgagee for Personal Services.* — See note 2.
- VII. CONTRIBUTION TO REDEEM.** — See note 7.
- 242.** See note 1.
- 243.** *Contribution Among Several Vendees.* — See note 2.
- VIII. RELINQUISHMENT OR BAR OF RIGHT — 1. Waiver or Release.** — See notes 3, 4.
- 244.** 2. *Foreclosure of Mortgage.* — See note 1.
- 245.** See notes 2, 3.

**Statutory Redemption — Alabama Statute.** — "The value of permanent improvements made by the purchaser is one of the charges which must be paid or tendered in order to perfect the statutory right to redeem land. Code, § 3517." *Williams v. Rouse*, 124 Ala. 160.

**240.** 2. *Credit Allowed for Taxes and Assessments Paid by Mortgagee.* — *McQueen v. Whetstone*, 127 Ala. 417, 137 Ala. 301; *McGrath v. McGrath*, 76 Conn. 289; *Stillman v. Rosenberg*, (Iowa 1899) 78 N. W. Rep. 913; *Crummett v. Littlefield*, 98 Me. 317; *Bourgeois v. Gapen*, 58 Neb. 364; *Coughanour v. Hutchinson*, 41 Oregon 419; *Fenley v. Cassidy*, (R. I. 1899) 43 Atl. Rep. 296. See also *Savings, etc., Soc. v. Davidson*, (C. C. A.) 97 Fed. Rep. 696; *Rodman v. Quick*, 211 Ill. 546.

**241.** 2. *Compensation for Personal Services Not Ordinarily Allowed.* — *Bourgeois v. Gapen*, 58 Neb. 364.

7. *Right to Contribution.* — See *Jones v. Matkin*, 118 Ala. 341. And see *Martin v. Turnbaugh*, 153 Mo. 172; *Fellows v. Fellows*, 69 N. H. 339.

**Sale of Several Lots.** — Where several lots are subject to a mortgage, and are sold to several purchasers, they must contribute ratably to the discharge of the mortgage in proportion to the value of their purchases. *Senft v. Vanek*, 209 Ill. 361.

**242.** 1. *Equities Must Be Equal.* — *Huber v. Hess*, 191 Ill. 305.

**243.** 2. *Successive Alienations of Mortgaged Property.* — See *Howser v. Cruikshank*, 122 Ala. 256.

3. *Waiver or Release Not Effected by Covenant in Mortgage or Contemporaneous Agreement — England.* — *Rice v. Noakes*, (1900) 2 Ch. 445, affirmed (1902) A. C. 24; *Biggs v. Hoddinott*, (1898) 2 Ch. 307; *Noakes v. Rice*, (1902) A. C. 24; *Jarrah Timber, etc., Corp. v. Samuel*, (1902) 2 Ch. 479, affirmed (1903) 2 Ch. 1; *Rice v. Noakes*, 81 L. T. N. S. 482, 69 L. J. Ch. 43, 48 W. R. 110.

*Illinois.* — *Johnson v. Prosperity Loan, etc., Assoc.*, 94 Ill. App. 260; *Barlow v. Cooper*, 109 Ill. App. 375.

*New York.* — *Mooney v. Byrne*, 163 N. Y. 86; *Hughes v. Harlam*, 166 N. Y. 427, affirming 37 N. Y. App. Div. 528; *Braun v. Vollmer*, 89 N. Y. App. Div. 43; *Faulkner v. Cody*, (Supm. Ct. Spec. T.) 45 Misc. (N. Y.) 64.

**Stipulation for Collateral Advantage.** — A fair and reasonable contract, by which the mortgagee obtains a collateral advantage, may be entered into, provided it does not fetter the equity of redemption. *Biggs v. Hoddinott*, (1898) 2 Ch. 307.

A "Clog" or "Fetter" upon the equity of redemption is something which is inconsistent with the idea of "security," and is in the nature of a repugnant condition. *Santley v. Wilde*, (1899) 2 Ch. 474.

By statute in *Tennessee* the right of redemption does not extend to a sale made under a power in a mortgage wherein the right of redemption is waived. *Hamilton v. Fowler*, (C. C. A.) 99 Fed. Rep. 18.

4. *Release by Agreement Subsequent to Mortgage.* — *Reeve v. Lisle*, (1902) A. C. 461; *Cassem v. Heustis*, 201 Ill. 208, 94 Am. St. Rep. 160; *Ross v. Leavitt*, 70 N. H. 602. See also *Faulkner v. Cody*, (Supm. Ct. Spec. T.) 45 Misc. (N. Y.) 64.

**Waiver of Right.** — *McDonald v. Beatty*, 10 N. Dak. 511.

**Burden of Proof on Mortgagee.** — *Liskey v. Snyder*, 56 W. Va. 610.

**Mutual Mistake — Inadequate Consideration.** — A subsequent agreement by the mortgagee to relinquish his right to redeem, made by mutual mistake, and without adequate consideration, is not enforceable. *Wells v. Geyer*, 12 N. Dak. 316.

**244.** 1. *Equity of Redemption Barred by Foreclosure.* — *Suttles v. Sewell*, 105 Ga. 129; *Francetown Sav. Bank v. Silver*, 122 Iowa 685; *Dolan v. Midland Blast Furnace Co.*, 126 Iowa 254; *Barnard v. Jersey*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 212; *Payne v. Long-Bell Lumber Co.*, 9 Okla. 683; *Geddis v. Packwood*, 30 Wash. 270.

**245.** 2. *Statutory Right to Redeem.* — *Payne v. Long-Bell Lumber Co.*, 9 Okla. 683; *Geddis v. Packwood*, 30 Wash. 270.

**In Missouri No Statute Exists** allowing land sold under a judgment foreclosing a mortgage or deed of trust to be redeemed. A judgment in such case stands on the same footing as any other judgment so far as the right of redemption is concerned. *White v. Smith*, 174 Mo. 186.

**Purchase by Cestui Que Trust — Mortgageor May Redeem.** — If the holder of a mortgage elects to foreclose by the power conferred therein, instead of proceeding on the mortgage by judgment, and the *cestui que trust* becomes the purchaser, the mortgageor may redeem in twelve months after the sale, but is required to give bond to secure the interest to accrue within a year. *White v. Smith*, 174 Mo. 186.

3. *Foreclosure Not a Bar as to Persons Not Parties to Proceedings — United States.* — *American L. & T. Co. v. Atlanta Electric R. Co.*, 99 Fed. Rep. 318, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 245.

**216.** 3. Acquisition of Title by Mortgagee. — See note 2.

**218.** 4. Lapse of Time — *a.* LIMITATION IN EQUITY. — See note 1.

**249.** See note 1.

**250.** The Time Begins to Run. — See note 1.

The Possession Which Will Set the Time Running. — See notes 2, 3.

*b.* LIMITATION BY STATUTE. — See note 4.

**251.** 5. Laches. — See note 3.

**IX. HOW RIGHT OF REDEMPTION IS ENFORCED.** — See note 5.

**252.** Necessity of Tender. — See note 2.

**EQUIVALENT.** — See note 5.

*Illinois.* — *Rodman v. Quick*, 211 Ill. 546; *Walker v. Warner*, 179 Ill. 16, 70 Am. St. Rep. 85.

*Indiana.* — *Butler v. Thornburgh*, 153 Ind. 530.

*Iowa.* — *Stastny v. Pease*, 124 Iowa 587.

*Michigan.* — *Walsh v. Robinson*, 135 Mich. 22.

*Nebraska.* — *Davis v. Greenwood*, (Neb. 1902) 96 N. W. Rep. 526; *Dougherty v. Kubat*, 67 Neb. 269; *Jones v. Dutch*, (Neb. 1902) 92 N. W. Rep. 735.

*North Dakota.* — *Nichols v. Tingstad*, 10 N. Dak. 172.

*Texas.* — *Citizens' Nat. Bank v. Strauss*, 29 Tex. Civ. App. 407.

**246.** 2. Equity of Redemption Barred by Conveyance to Mortgagee. — *Martin v. Turnbaugh*, 153 Mo. 172; *Braun v. Vollmer*, 89 N. Y. App. Div. 43.

Purchase by Mortgagee of Mortgagor. — *Noble v. Graham*, 140 Ala. 413.

**248.** 1. Limitation by Analogy to Actions to Foreclose. — *Gunter v. Smith*, 113 Ga. 18; *Walker v. Warner*, 179 Ill. 16, 70 Am. St. Rep. 85; *Moore v. Dick*, 187 Mass. 207; *Ross v. Leavitt*, 70 N. H. 602.

Redemption and Foreclosure Reciprocal Rights. — *Fitch v. Miller*, 200 Ill. 170; *Cassem v. Heustis*, 201 Ill. 208, 94 Am. St. Rep. 160; *Carpenter v. Plagge*, 192 Ill. 99; *Adams v. Holden*, 111 Iowa 54; *Dickson v. Stewart*, (Neb. 1904) 98 N. W. Rep. 1085.

**249.** 1. Unauthorized Extension of Time by Agent. — *Karcher v. Gans*, 13 S. Dak. 383, 79 Am. St. Rep. 893.

Redemption Prevented by Fraud. — *Stephenson v. Kilpatrick*, 166 Mo. 262.

**250.** 1. Time Begins to Run When Possession Is Taken. — *H. B. Claffin Co. v. Middlesex Banking Co.*, 113 Fed. Rep. 958; *Gunter v. Smith*, 113 Ga. 18; *Gray v. Williams*, 130 N. Car. 53.

2. Possession Must Be Open and Adverse. — *H. B. Claffin Co. v. Middlesex Banking Co.*, 113 Fed. Rep. 958; *Munro v. Barton*, 98 Me. 250.

Notice of Adverse Holding. — *Rigney v. De Graw*, 100 Fed. Rep. 213.

**3.** Possession Must Be Continuous and Undisturbed. — *H. B. Claffin Co. v. Middlesex Banking Co.*, 113 Fed. Rep. 958.

**4.** Limitation by Statute. — *Richter v. Noll*, 128 Ala. 198; *Dolan v. Midland Blast Furnace Co.*, 126 Iowa 254; *Houston v. National Mut. Bldg.*, etc., Assoc., 80 Miss. 31, 92 Am. St. Rep. 565; *Houts v. Olson*, 14 S. Dak. 475; *Houts v. Hoyne*, 14 S. Dak. 176. See also *Ross v. Leavitt*, 70 N. H. 602.

**251.** 3. Right to Redeem May Be Barred by Laches. — *Fitch v. Miller*, 200 Ill. 170; *Cassem*

*v. Heustis*, 201 Ill. 208; *Walker v. Warner*, 179 Ill. 16, 70 Am. St. Rep. 85; *Mason v. Stevens*, 91 Ill. App. 623; *Cooney v. Coppock*, 119 Iowa 486; *Adams v. Holden*, 111 Iowa 54; *Fennyery v. Ransom*, 170 Mass. 303; *MacGregor v. Pierce*, 17 S. Dak. 51; *Snipes v. Kelleher*, 31 Wash. 386. See also *Moore v. Dick*, 187 Mass. 207; *Brown v. Johnson*, 115 Wis. 430.

"Lapse of Time, even to the extent that all legal remedies of the creditor would be barred, would not operate as a redemption of the land and revest the title in the grantor or his heirs. Until the debt is actually paid, and paid in full, the legal title remains vested in the grantee." *Shumate v. McLendon*, 120 Ga. 396.

No Laches in Mississippi. — *Houston v. National Mut. Bldg.*, etc., Assoc., 80 Miss. 31, 92 Am. St. Rep. 565.

Suit by Heir Within Year After Majority — No Laches. — *Rainey v. McQueen*, 121 Ala. 191.

Four Years' Delay — No Laches. — *Grogan v. Valley Trading Co.*, 30 Mont. 229.

**5.** Right of Redemption Enforceable Only in Equity. — *American L. & T. Co. v. Atlanta Electric R. Co.*, 99 Fed. Rep. 313; *Manhattan L. Ins. Co. v. Wright*, (C. C. A.) 126 Fed. Rep. 82; *Leapold v. McCartney*, 14 Colo. App. 442; *Alexander v. Meyenberg*, 112 Ill. App. 223; *Walker v. Warner*, 179 Ill. 16, 70 Am. St. Rep. 85; *Moore v. Dick*, 187 Mass. 207; *Martin v. Turnbaugh*, 153 Mo. 172; *Faulkner v. Cody*, (Supm. Ct. Spec. T.) 45 Misc. (N. Y.) 64.

Right to Equitable Relief Refused — Purchaser Refused to Redeem or Permit Mortgagor. — *Traeger v. Mutual Bldg.*, etc., Assoc., 192 Ill. 166.

Right Purely Equitable. — The right of redemption is a purely equitable estate, and a court of chancery will not protect and enforce it, unless equitable considerations require it to do so. *Fitch v. Miller*, 200 Ill. 170.

Usurious Interest. — Although forfeiture of interest for usury is in the nature of a penalty, equity will aid a borrower to redeem a mortgage securing a usurious loan. *Bigler v. Jack*, 114 Iowa 667.

**252.** 2. Necessity of Tender. — *Long v. Slade*, 121 Ala. 267; *Baker v. Burdeshaw*, 132 Ala. 166; *Doe v. Littlefield*, 99 Me. 317; *Munro v. Barton*, 95 Me. 262; *Lumsden v. Manson*, 96 Me. 357. See *Loggie v. Chandler*, 95 Me. 220.

It Is Not Essential to the Equity of a Bill to Redeem for it to allege a previous tender of the sum admitted to be due on the alleged mortgage, nor is it required that such sum be brought into court on the filing of the bill. *Hammett v. White*, 128 Ala. 380.

**5.** Equivalent — Patent Law. — See *Farm-*



**253. ERECT — ERECTION.** — See note 3.

**256. ERROR.** — See note 2.

ers' Mfg. Co. v. Spruks Mfg. Co., 119 Fed. Rep. 594; *Beach v. Hobbs*, (C. C. A.) 92 Fed. Rep. 146.

**253. 3.** In construing a *Texas* burglary statute defining a house as any building *erected*, the court said: "'To *erect*' means 'to raise and set up in an upright or perpendicular position; set up; raise up. To raise, as a building; built or constructed.'" *Favro v. State*, 39 Tex. Crim. 452.

**Erect Does Not Include Purchase.** — An act authorizing a town board to *erect* a town hall will not authorize the purchase of an old building. *Barker v. Floyd*, (Supm. Ct. Tr. T.) 32 Misc. (N. Y.) 474, *affirmed* 61 N. Y. App. Div. 92.

**356. 2. Error of Judgment Not Equivalent to Negligence.** — *The Orcadian*, 116 Fed. Rep. 930.

**Distinguished from Fault.** — *The Manitoba*, 104 Fed. Rep. 145.

## ESCAPE.

BY M. G. BEAMAN.

**262. I. DEFINITIONS** — Actual or Constructive Escapes. — See note 2.

**266. II. ESCAPE IN CIVIL PROCEEDINGS** — **3. What Constitutes Escape** — Grounds of Liability — *a.* IN GENERAL. — See note 1.

**267. b. LAWFUL CUSTODY OF PRISONER.** — See note 4.

**270. d. ALLOWING PRISONERS JAIL LIBERTIES OR PRISON RULES** — (3) *Where Jail Liberties Given on Bond* — Question of Intention. — See note 3.

**285. 8. Defenses to Action** — *a.* BY SHERIFF — (3) *Discharge of Prisoner under Insolvent Laws.* — See note 5.

**295. III. ESCAPE AS A CRIMINAL OFFENSE** — **1. In General.** — See note 6.

**296. 2. Escape Without Force** — *a.* BY PRISONER — (1) *In General.* — See note 1.

(2) *By County Convict.* — See note 2.

(3) *Essentials to Commission of Offense* — (a) *Lawful Custody of Prisoner.* — See note 3.

**262. 2. Leaving Debtor in Charge of Constable Not Qualified to Serve Civil Process** may be an escape. *Bent v. Stone*, 184 Mass. 92.

**266. 1. The Act of Escape** — In General. — *Per Henderson, J.*, in *Ex p. Snodgrass*, 43 Tex. Crim. 359, *citing* 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 265.

**267. 4. Lawful Custody of Prisoner Essential to Maintenance of Action.** — *Jackson v. Comisky*, (Supm. Ct. App. T.) 30 Misc. (N. Y.) 622, *citing* 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 267, 268.

**Sheriff Not Liable for Escape if He Refuses to Receive Prisoner.** — *Saffier v. Dike*, 82 N. Y. App. Div. 485.

**270. 3.** It is a breach of the bond to leave the jail limits even for a few hours. Nothing but the act of God or the enemies of the country will excuse a breach. *Smith v. Grosslight*, 123 Mich. 87.

**285. 5. Escape After Discharge in Bankruptcy Imposes no Liability on Sheriff.** — *Walker v. Harder*, (Supm. Ct. Tr. T.) 39 Misc. (N. Y.) 749.

**295. 6.** Where the sentence is in the alternative, it is no defense to a prosecution for escape that the convict, several months thereafter, paid the amount of his fine to the sheriff. *Johnson v. State*, 122 Ga. 172.

**296. 1. Escape Without Force a Misdemeanor.** — *In re McCauley*, 123 Wis. 31, *citing* 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 395.

One who has been convicted of crime and delivered into the custody of the officer of a lawful chain-gang is guilty of an escape, under the *Georgia* statute (Pen. Code, § 314), if he voluntarily leaves such custody, though prior to the escape he was not fettered, but was treated as a "trustee" and allowed some measure of liberty not allowed to other convicts. *Johnson v. State*, 122 Ga. 172, *citing* 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 296.

**2. Escape of County Convict.** — *Mills v. State*, 41 Tex. Crim. 447.

**3.** The constitution of *Kentucky* which provides that convicts shall be confined at labor only within the walls of the penitentiary and that the general assembly shall not have power to authorize their employment elsewhere except, *inter alia*, when "in case of the destruction of the prison buildings they cannot be confined in the penitentiary," does not mean that all the prison buildings must be destroyed before the convicts may be employed outside the penitentiary. If a part of the penitentiary buildings used as a workshop is burned, the convicts employed in such shop may be put at work in another place outside the penitentiary until the burned shop is rebuilt. Therefore, a convict, who, while so employed outside the penitentiary, escapes from custody, is within the statute prescribing punishment in case a convict shall escape from the penitentiary, "or being out

- 296.** (4) *Justification by Prisoner.* — See note 5.
- 300.** *b. ESCAPE SUFFERED BY OFFICER* — (5) *Essentials to Commission of Offense* — (b) *Intent.* — See note 3.
- 301.** (7) *Evidence.* — See note 5.
- (8) *Criminal Liability of Sheriff for Acts of His Officers.* — See note 8.
- 302.** *3. Escape by Force* — *a. PRISON BREACH* — (1) *At Common Law.* — See note 8.
- 303.** (4) *Constituents of Offense* — (a) *Actual Breaking.* — See note 7.
- 304.** (c) *Lawful Imprisonment.* — See notes 2, 4.
- 305.** *c. RESCUE* — (1) *Definition.* — See note 3.
- 306.** (3) *Constituents of Offense* — (a) *Lawful Custody of Prisoner.* — See note 3.
- 307.** *4. Aiding and Assisting Prisoner to Escape* — *a. NATURE AND DEGREE OF OFFENSE* — (1) *At Common Law.* — See note 1.
- 308.** *c. CONSTITUTIONS OF OFFENSE* — (1) *Lawful Custody of Prisoner.* — See note 5.
- (2) *Knowledge of Lawful Custody.* — See note 6.
- 309.** (4) *Means Employed in Aiding Escape.* — See note 2.
- d. JUSTIFICATION BY ACCUSED.* — See note 3.
- 313.** *IV. RECAPTURE OF ESCAPING PRISONER* — *6. Recapture of Criminals* — *a. IN GENERAL.* — See notes 3, 4.

under guard shall escape from custody." *Harris v. Com.*, (Ky. 1901) 64 S. W. Rep. 434.

**296.** 5. Where the defendant, being arrested and brought before a magistrate, refused to surrender a pistol, and made his escape, it was held to be no justification that he had been threatened by another; for it must be presumed that the officer would protect him. *Hinkle v. Com.*, (Ky. 1902) 66 S. W. Rep. 816.

It is no defense to a prosecution for escape that the defendant left the chain-gang to avoid unmerited punishment at the hands of the officers. *Johnson v. State*, 122 Ga. 172.

**300.** *3. Kentucky Statute.* — Under Ky. Stat., § 1339, providing for the punishment of negligent escapes, suffered by an officer, the intent is immaterial, and the officer is liable even though the prisoner be released on the advice of a county judge, if such judge had no authority to order the release. *Lynch v. Com.*, 115 Ky. 309.

**301.** 5. *Necessity for Proof of Negligence.* — *U. S. v. Nix*, 189 U. S. 199.

*Question Is for Jury.* — *State v. Blackley*, 131 N. Car. 726.

*8. Sheriff Guilty if He Knows of Negligent Acts of Deputy.* — *Watts v. Com.*, 99 Va. 872.

**302.** 8. *Prison Breach.* — *In re McCauley*, 123 Wis. 31, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 302.

**303.** 7. *Actual Breaking Essential.* — *State v. King*, 114 Iowa 413, 89 Am. St. Rep. 371, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 303.

**304.** 2. Under Stat. Vt., § 5094, it is an offense to break out of a village lock-up, though it was established after the enactment of the statute. *State v. Dohney*, 72 Vt. 260.

*A Chain-gang* controlled by private persons is not a "lawful place of confinement," within Pen. Code Ga., § 314. *Daniel v. State*, 114 Ga. 533.

*4. Commitment on Informal Warrant Will Not Justify Prison Breach.* — *State v. Nauerth*, 62 Kan. 869, 64 Pac. Rep. 69.

**305.** 3. *Forcible Rescue.* — A forcible rescue may be accomplished without the exercise of physical force, if by threats, menaces, or demonstration an officer is compelled to yield thereto, and to let his prisoner go. *State v. McLeod*, 97 Me. 80.

**306.** 3. *Custody Essential.* — *Adams v. State*, 121 Ga. 163. See also *People v. Hochstim*, 76 N. Y. App. Div. 25.

*What Constitutes Jail.* — The crime is complete if the prisoner be lawfully confined for a violation of law, though the place of confinement is not county property. *Irvington v. State*, (Tex. Crim. 1904) 78 S. W. Rep. 928.

**307.** 1. *Escape When in Custody on Accusation.* — Under Pen. Code Tex., art. 229, which provides for the punishment of any one who aids a prisoner to escape when in custody on an accusation, a person who assists one who is in custody after conviction, is not subject to the statutory penalty. *Brannan v. State*, 44 Tex. Crim. 399.

**308.** 5. *Lawful Custody of Prisoner Essential.* — *King v. State*, 42 Fla. 260.

*6. Knowledge of Lawful Custody.* — *King v. State*, 42 Fla. 260.

**309.** 2. *Conveying Instrument into Jail.* — Under a statute making it punishable to convey into jail instruments suitable for effecting an escape, the offense is not committed where the instruments get only as far as the jailer's office. *People v. Webb*, 127 Mich. 29.

*Giving Prisoner Information.* — Sending a letter to a prisoner, explaining a cipher to be used in a subsequent letter, is only an attempt to commit the crime described in Pen. Code N. Y., § 87, if the letter is opened by the jailer before it is read by the prisoner. *People v. Buckley*, 91 N. Y. App. Div. 586.

*3. Innocence of Prisoner Immaterial.* — *State v. Daly*, 41 Oregon 515.

**313.** 3. *Recapture Without Warrant.* — *McQueen v. State*, 130 Ala. 136; *Williford v. State*, 121 Ga. 176.

**313.** *b.* RECAPTURE BY OFFICER. — See note 5.

*d.* AS RESPECTS PUNISHMENT FOR PRINCIPAL CRIME. — See note 9.

**313.** 4. Prisoner at Large by Permission. — Where the prisoner is allowed to be at large, under a promise to pay his fine, he cannot be rearrested as an escaped prisoner. *Scottsboro v. Johnson*, 121 Ala. 397.

5. Recapture of Criminal After Voluntary Escape.

— *People v. Mallary*, 195 Ill. 582, 88 Am. St. Rep. 212, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 313.

9. As Respects Punishment for Principal Crime. — *In re McCauley*, 123 Wis. 31, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 313.

## ESCHEAT.

BY ERNEST G. CHILTON.

**318.** I. DEFINITION AND NATURE — 3. The Substituted Escheat of the Modern Law — *a.* TO WHOM PROPERTY ESCHEATS. — See notes 9, 10.

**319.** *b.* CHARACTER OF THE STATE'S TITLE. — See note 6.

*c.* CONSTITUTIONALITY OF ESCHEAT STATUTES. — See note 11.

**320.** II. GROUNDS AND CAUSES — 1. Defect of Heirs. — See notes 1, 2.

**321.** 2. Alienage — Taking by Operation of Law. — See note 1.

What Law Governs. — See note 4.

**322.** III. PROPERTY SUBJECT — 1. Generally. — See notes 7, 8, 9, 10, 13.

**323.** 2. Trust Estates — In the United States. — See note 5.

**318.** 9. To Whom Property Escheats — In England. — *In re Barnett*, (1902) 1 Ch. 847, 71 L. J. Ch. 408.

10. In the United States. — *Com. v. Wisconsin Chair Co.*, 84 S. W. Rep. 535, 27 Ky. L. Rep. 170; *Hopkins v. Crossley*, 132 Mich. 612; *Young v. State*, 36 Oregon 417; *State v. O'Day*, 41 Oregon 495; *State v. Simmons*, (Oregon 1905) 79 Pac. Rep. 498; *State v. Unknown Heirs*, 113 Tenn. 298; *State v. Black*, 21 Tex. Civ. App. 242.

Escheat to County. — Sometimes by statute property escheats to the county in case of a failure of heirs. *Meadowcroft v. Winnebago County*, 181 Ill. 504; *Pacific Bank v. Hannah*, (C. C. A.) 90 Fed. Rep. 72.

**319.** 6. Modern Escheat Affects Personalty as Well as Realty. — *In re Barnett*, (1902) 1 Ch. 847, 71 L. J. Ch. 408; *Matter of Miner*, 143 Cal. 194; *State v. O'Day*, 41 Oregon 495.

11. When Alien Heirs Cannot Question Constitutionality of Statute. — It was held in *Indiana* that nonresident alien heirs, not having shown an impairment of their rights, could not question the constitutionality of a statute providing for an escheat to the state on account of alienage. *Donaldson v. State*, (Ind. 1903) 67 N. E. Rep. 1029.

**320.** 1. In the United States — *United States*. — *Pacific Bank v. Hannah*, (C. C. A.) 90 Fed. Rep. 72 (construing the *Washington* statute).

*California*. — *Matter of Miner*, 143 Cal. 194.

*Oregon*. — *State v. Simmons*, (Oregon 1905) 79 Pac. Rep. 498.

*Pennsylvania*. — *McCully's Estate*, 12 Pa. Super. Ct. 78.

*Tennessee*. — *State v. Unknown Heirs*, 113 Tenn. 298.

2. Corporation Holding Real Estate in Defiance of Law — No Ground of Escheat. — It is not a ground of escheat that a corporation has held for more than five years, contrary to a provision in the state constitution, realty which was not necessary for carrying on its business. *People v. Stockton Sav., etc., Soc.*, 133 Cal. 611, 85 Am. St. Rep. 225.

**321.** 1. *Donaldson v. State*, (Ind. 1903) 67 N. E. Rep. 1029.

Common-law Rule Abrogated by Statute. — In *Illinois* the strict rule of the common law relative to tracing claims of inheritance through alien blood has been abrogated by statute. *Meadowcroft v. Winnebago County*, 181 Ill. 504.

4. *Meadowcroft v. Winnebago County*, 181 Ill. 504. See also *Donaldson v. State*, (Ind. 1903) 67 N. E. Rep. 1029.

**322.** 7. *Linton's Estate*, 198 Pa. St. 438; *State v. Unknown Heirs*, 113 Tenn. 298.

8. Corporate Personalty "Goes" to the Crown — Common-law Rule. — Under the common law, upon the dissolution of a corporation "its real estate reverts, and its personal property goes to the crown." *Hopkins v. Crossley*, (Mich. 1904) 101 N. W. Rep. 822.

9. See *State v. O'Day*, 41 Oregon 495.

10. *Matter of Miner*, 143 Cal. 194.

13. Corporate Property. — The rule at common law, that the personalty of a corporation, on its dissolution, escheats to the crown, should be considered obsolete, and will not be followed to deprive the members of a dissolved corporation in which they had a pecuniary interest, of the corporate personalty. *Hopkins v. Crossley*, (Mich. 1904) 101 N. W. Rep. 822.

**323.** 5. United States — Statutory Provisions. — *Linton's Estate*, 198 Pa. St. 438.



**324. IV. ENFORCEMENT — 1. Accrual and Limitation of Actions.** — See notes 6, 7.

**325. 2. Who May Maintain Escheat Proceedings — a. THE STATE.** — See note 2.

*b. THE ESCHEATOR.* — See notes 10, 11, 13.

**3. Who May Contest Escheat Proceedings — In General.** — See note 14.

**326. An Administrator.** — See note 3.

**327. 4. Evidence — b. PRESUMPTIONS — Heirs.** — See note 2.

**328. V. CONSEQUENCES AND RESULTS OF ESCHEAT PROCEEDINGS — 1. Conclusiveness of Judgment.** — See note 2.

**2. When Title of State Vests — a. GENERAL RULE.** — See note 7.

**329. See note 1.**

*Devise — Purchase — Attainder.* — See note 5.

**330. b. WHERE PARTIES ARE IN POSSESSION.** — See notes 1, 2.

**331. 3. Disposition of Escheat Property — b. RELEASE AND CONVEYANCE — (1) After Termination of Escheat Proceedings.** — See note 3.

**324. 6. Limitation of Actions.** — Bousquet's Estate, 206 Pa. St. 534.

The owner last seized of certain property disappeared and was last heard of in 1860. Proceedings to escheat the property were commenced more than twenty-one years after the expiration of the seven years which the law presumes a person unheard of will continue to live. It was held that under the statute barring escheat proceedings after twenty-one years from the death of the owner last seized the state could not maintain the proceedings. Bousquet's Estate, 206 Pa. St. 534.

7. Bousquet's Estate, 206 Pa. St. 534.

**325. 2. Who May Maintain Proceedings.** — Hopkins v. Crossley, 132 Mich. 612. See also State v. O'Day, 41 Oregon 495.

10. State v. Simmons, (Oregon 1905) 79 Pac. Rep. 498.

11. Com. v. Farmers' Bank, 84 S. W. Rep. 732, 27 Ky. L. Rep. 153; Com. v. Wisconsin Chair Co., 84 S. W. Rep. 535, 27 Ky. L. Rep. 170; Linton's Estate, 198 Pa. St. 438; Bousquet's Estate, 206 Pa. St. 534.

**Removal of Escheator.** — The power to appoint an escheator given by the *Pennsylvania* statute does not carry with it the power of removal. Kelly's Estate, 8 Pa. Dist. 635.

13. See Bousquet's Estate, 206 Pa. St. 534.

**14. A Person Claiming under a Tax Title** may appear and contest escheat proceedings. State v. Unknown Heirs, 113 Tenn. 298.

**326. 3. See Bousquet's Estate, 206 Pa. St. 534.**

**327. 2. Burden of Proof.** — State v. Unknown Heirs, 113 Tenn. 298.

**328. 2. Judgment in Escheat Proceedings.** — Young v. State, 36 Oregon 424, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 328.

**7. General Rule as to When Title Vests.** — State v. Stevenson, 6 Idaho 367; Meadowcroft v. Winnebago County, 181 Ill. 504; Richardson v. Amsdon, (Supm. Ct. Spec. T.) 85 N. Y. Supp. 342; State v. Unknown Heirs, 113 Tenn. 298.

**329. 1. Overcoming Presumption of Heirs.** — Matter of Miner, 143 Cal. 194.

Under the *California* statute, when the heirs are nonresident aliens a conditional estate is vested in them, subject only to the contingency that if they fail to appear and assert their rights within five years the property then vests in the state, not strictly by escheat for want of heirs, but by virtue of the effect of the statute. Matter of Pendergast, 143 Cal. 135.

5. Richardson v. Amsdon, (Supm. Ct. Spec. T.) 85 N. Y. Supp. 342.

**Rule in Text Obtained at Common Law.** — It was likewise the rule at common law that an alien taking realty by deed would hold it against all except the state, and against the state until it obtained judgment by inquest of office or its equivalent. Donaldson v. State, (Ind. 1903) 67 N. E. Rep. 1029.

**330. 1. Descent.** — State v. Stevenson, 6 Idaho 367.

2. See Richardson v. Amsdon, (Supm. Ct. Spec. T.) 85 N. Y. Supp. 342.

**331. 3. Removal of Disability.** — Richardson v. Amsdon, (Supm. Ct. Spec. T.) 85 N. Y. Supp. 342.

# ESCROW.

BY LOUIS C. BOEHM.

- 334. I. DEFINITION.** — See note 1.  
**II. HOW CREATED** — 1. **In General.** — See note 2.  
No Particular Form of Words Necessary. — See note 3.
- 335. 2. The Contract or Instrument.** — See note 2.
- 336. 3. Delivery to Depositary.** — See note 3.  
Surrender of Control by Grantor. — See note 5.  
Control Not to Be Vested in Grantee or Obligee. — See note 6.
- 337. 4. The Depositary** — *a.* **IN GENERAL.** — See note 1.  
*b.* **GRANTOR'S AGENT.** — See note 3.  
*c.* **GRANTEE.** — See note 4.
- 339. Application of Doctrine to Unsealed Instruments.** — See note 2.  
*d.* **GRANTEE'S AGENT.** — See note 4.
- 342. 5. The Condition** — *b.* **BY WHOM PERFORMANCE TO BE MADE** —  
By Grantee. — See note 1.
- 343. d. WHETHER CONDITION MUST BE IN WRITING.** — See notes 2, 3.
- 344. III. FORCE AND EFFECT** — 1. **The Obligation upon Delivery to Depositary** — *a.* **OF DEPOSITOR.** — See note 4.
- 345. c. REVOCATION OR ALTERATION BY BOTH PARTIES.** — See note 2.
- 334. 1. Definition.** — *Schmid v. Frankfort*, 131 Mich. 197; *Tharaldson v. Everts*, 87 Minn. 168.
- 2. How Escrow Created in General.** — *Hillhouse v. Pratt*, 74 Conn. 113; *Tharaldson v. Everts*, 87 Minn. 168.
- 3. No Particular Form of Language Necessary to Constitute an Escrow.** — *Tharaldson v. Everts*, 87 Minn. 168.
- 335. 2. The Contract or Instrument to Be Delivered.** — *Bosea v. Lent*, (Supm. Ct. Tr. T.) 44 Misc. (N. Y.) 437; *Clark v. Campbell*, 23 Utah 569, 90 Am. St. Rep. 716.
- 336. 3. Actual Delivery to Depositary Necessary.** — *Farmers' L. & T. Co. v. Alcorn County*, (C. C. A.) 93 Fed. Rep. 579; *Woodruff v. Adair*, 131 Ala. 530, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 336; *Tharaldson v. Everts*, 87 Minn. 168; *Powers v. Rude*, 14 Okla. 381.
- 5. Surrender of Control by Grantor Necessary.** — *Woodruff v. Adair*, 131 Ala. 547, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 336.
- Sufficient Delivery.** — *Munro v. Bowles*, 187 Ill. 346; *Wright v. Werden*, 8 Ohio Dec. 1, 7 Ohio N. P. 122.
- 6. Control of Instrument Not to Be Vested in Grantee.** — *Bond v. Wilson*, 129 N. Car. 325, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 336.
- 337. 1. Delivery in Escrow to Be Made to Stranger Alone as General Rule.** — *Farmers' L. & T. Co. v. Alcorn County*, (C. C. A.) 93 Fed. Rep. 579.
- 3. Delivery to Grantor's Agent.** — If the grantor delivered notes to her servant in escrow, as if she were a stranger and not an agent, there was a good delivery in escrow. *Daggett v. Simonds*, 173 Mass. 340.
- 4. Delivery to Grantee or Obligee Inoperative as Escrow.** — *Farmers' L. & T. Co. v. Alcorn County*, (C. C. A.) 93 Fed. Rep. 579; *Woodruff v. Adair*, 131 Ala. 530, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 337; *Sargent v. Cooley*, 12 N. Dak. 8, quoting 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 337.
- 339. 2. Delivery to Payee or Grantee of Unsealed Instruments.** — See *Dils v. Pikeville Bank*, 109 Ky. 757.
- 4. Merchants' Ins. Co. v. Nowlin, (Tex. Civ. App. 1900) 56 S. W. Rep. 198; *Blair v. Security Bank*, 103 Va. 771, quoting 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 339.**
- "The delivery to the solicitor of the grantee of an instrument executed by the grantor will not convert the instrument from an escrow into a deed, provided the delivery is of a character negating its being a delivery to the grantee." *Dixon v. Bristol Sav. Bank*, 102 Ga. 469.
- 342. 1. Condition Ordinarily to Be Performed by Grantee.** — *Soward v. Moss*, 59 Neb. 71.
- 343. 2. See Forbis v. Reeves, 109 Ill. App. 98.**
- 3. Condition of Escrow May Rest in Parol.** — *Fulton v. Priddy*, 123 Mich. 298, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 343; *Tharaldson v. Everts*, 87 Minn. 168; *Pacific Nat. Bank v. San Francisco Bridge Co.*, 23 Wash. 425.
- 344. 4. Contract of Escrow Not to Be Rescinded by Depositor.** — *Fred v. Fred*, (N. J. 1901) 50 Atl. Rep. 776, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 344; *Tharaldson v. Everts*, 87 Minn. 168; *Gammon v. Bunnell*, 22 Utah 421.
- Escrow Without Consideration May Be Withdrawn by Grantor.** — *Mechanic's Nat. Bank v. Jones*, 76 N. Y. App. Div. 534, affirmed 175 N. Y. 518.
- 345. 2. Revocation or Alteration of Escrow**

**345. 2. Passing of Title — a. IN GENERAL — UPON PERFORMANCE OF CONDITION.** — See notes 3, 4.

*b. WHETHER ACTUAL REDELIVERY NECESSARY.* — See note 5.

**346. c. RELATION BACK TO FIRST DELIVERY — (2) By Fiction of Law** — (a) *In General.* — See note 4.

(b) *To Give Effect to Instrument — Death or Disability of Depositor.* — See note 5.

**348. (c) To Ward Off Intervening Claims of Creditors.** — See note 3.

**349. d. EFFECT OF PREMATURE DELIVERY — (1) On Grantee or Obligee.** — See note 1.

**350. Effect of Subsequent Performance of Condition.** — See note 1.

(2) *On Purchasers from Grantee or Obligee — Purchaser with Notice.* — See note 2.

*On Bona Fide Purchaser for Value.* — See note 3.

**351. (3) Consent or Subsequent Ratification of Depositor.** — See note 2.

**352. 3. Redelivery to Depositor.** — See note 2.

**353. ESSENTIAL.** — See note 4.

**ESTABLISH.** — See notes 6, 7.

by Both Parties. — *Beamer v. Morrison*, 210 Ill. 443.

**345. 3. Title Passes as General Rule upon Performance of Condition.** — *Schuur v. Rodenback*, 133 Cal. 85; *Fred v. Fred*, (N. J. 1901) 50 Atl. Rep. 776, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 345; *Bosea v. Lent*, (Supm. Ct. Tr. T.) 44 Misc. (N. Y.) 437; *Flanagan v. Great Cent. Land Co.*, 45 Oregon 335; *McKnight v. Reed*, 30 Tex. Civ. App. 204.

Where a deed was placed in escrow to be delivered, on payment at a certain time, and the grantee tendered payment after the time but before the grantor withdrew the deed, a delivery was good and passed title, as time was not of the essence. *Wright-Blodgett Co. v. Astoria Co.*, 45 Oregon 224.

**Depository Agent of Both Grantor and Grantee.** — *Mechanic's Nat. Bank v. Jones*, 76 N. Y. App. Div. 534, affirmed 175 N. Y. 518; *Gammon v. Bunnell*, 22 Utah 421.

**4. Passing of Title Where Performance of Condition Has Been Prevented by Grantor.** — *Fred v. Fred*, (N. J. 1901) 50 Atl. Rep. 776, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 345.

**5. General Rule — Redelivery — Passing of Estate.** — *Dixon v. Bristol Sav. Bank*, 102 Ga. 464.

**346. 4. Relation by Fiction of Law in General.** — *Tharaldson v. Everts*, 87 Minn. 168; *Fred v. Fred*, (N. J. 1901) 50 Atl. Rep. 776, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 346; *McKnight v. Reed*, 30 Tex. Civ. App. 204; *Gammon v. Bunnell*, 22 Utah 421.

**5. Relation Back by Reason of Death of Depositor.** — *Tharaldson v. Everts*, 87 Minn. 168; *Ranken v. Donovan*, 46 N. Y. App. Div. 225, affirmed 166 N. Y. 626.

**348. 3. Doctrine of Relation Not to Be Applied to Ward Off Intervening Claim of Creditors.** — Where the grantor deposited a deed in escrow conditioned that the grantee should receive it on the grantor's death, the consideration being nominal, the deed was not good against subsequent creditors without notice. *Rathmell v. Shirey*, 60 Ohio St. 187.

**349. 1. No Title Passes to Grantee until Per-**

**formance of Conditions.** — *Balfour v. Hopkins*, (C. C. A.) 93 Fed. Rep. 564; *Dixon v. Bristol Sav. Bank*, 102 Ga. 464; *Mays v. Shields*, 117 Ga. 814; *Fitch v. Miller*, 200 Ill. 170, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 349; *Hogue-land v. Arts*, 113 Iowa 634; *Matteson v. Smith*, 61 Neb. 761; *Powers v. Rude*, 14 Okla. 381.

Where a deed in escrow was procured from the depository by fraud it was set aside by the court because it was obtained by fraud and was never delivered. *Hanley v. Sweeny*, (C. C. A.) 109 Fed. Rep. 712.

**350. 1. Effect of Performance of Condition Subsequent to Premature Delivery.** — *Chicago, etc., R. Co. v. Linn*, 30 Ind. App. 92, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 350.

**2. Effect of Premature Delivery on Purchasers with Notice.** — *Mays v. Shields*, 117 Ga. 814.

**3. Effect of Premature Delivery on Bona Fide Purchaser.** — *Dixon v. Bristol Sav. Bank*, 102 Ga. 461.

**Negotiable Instruments.** — *Garrett v. Campbell*, 2 Indian Ter. 301.

**351. 2. Ratification of Premature Delivery.** — *Dixon v. Bristol Sav. Bank*, 102 Ga. 464.

**Effect of Recording Instrument with Grantor's Consent.** — Where a grantor executed a deed in escrow but directed that it be duly recorded and the deed contained nothing indicating that it was an escrow, the grantor was estopped as against an innocent purchaser. *Equitable Mortg. Co. v. Butler*, 105 Ga. 555.

**352. 2. Right of Depositor to Redelivery upon Nonperformance of Condition.** — *West Virginia, etc., R. Co. v. Harrison County Ct.*, 47 W. Va. 286, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 352.

**353. 4. Essential Oil.** — See *U. S. v. Hills Bros. Co.*, (C. C. A.) 107 Fed. Rep. 107.

**6. "The meaning of the word establish, as applied to the quantum of evidence, is to settle certainly or fix permanently what was before uncertain, doubtful, or disputed."** *Knights of Pythias v. Steele*, 107 Tenn. 7, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 353.

**7. Permanently Settled — Boundaries.** — *Egan v. Finney*, 42 Oregon 599.



**358. ESTATE.** — See note 1.

**359. In Its Broadest Sense.** — See note 1.

**361. Choses in Action.** — See note 1.

**362. Fee.** — See note 3.

**363. Restricted to Personality.** — See note 2.

**Same — Grades to Be Established.** — *O'Keefe v. Irvington Real Estate Co.*, 87 Md. 196.

**Establish Stations.** — *Yazoo, etc., R. Co. v. Baldwin*, 78 Miss. 57.

**Hospital.** — "The Act of April 20, 1899, P. L. 66, which declares it to be 'unlawful hereafter to *establish* or maintain any additional hospital, pest house, or burial ground in the built-up portions of cities,' does not prevent an *established* hospital from tearing down its existing building and constructing a new building upon the same site, or from erecting a larger building, so long as it does so on the location in which its hospital was maintained prior to the passage of the act." *Com. v. Charity Hospital*, 199 Pa. St. 119.

**Same — Completion.** — *In re Pierpoint's Will*, 72 Vt. 204.

**Counties — Organization and Establishment Distinguished.** — *Detroit First Nat. Bank v. Beltrami County*, 77 Minn. 43.

**Instructions.** — *Knights of Pythias v. Steele*, 107 Tenn. 8, quoting 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 357.

**Regular and Established Place of Business.** — *Weller v. Pennsylvania R. Co.*, 113 Fed. Rep. 505.

**Not Equivalent to Construct — Sewers.** — In construing a statute providing that the board of sewer commissioners may *establish* and maintain a sewer system, the court said: "The word *establish* is not used in the sense of to construct, and that is not its meaning etymologically." *Brockport v. Green*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 233. Compare *Hempstead v. Seymour*, (Supm. Ct. Tr. T.) 34 Misc. (N. Y.) 92.

**The Establishment of a Claim** against a decedent's estate is by allowance in the probate court or on appeal from it. *Brinkworth v. Hazlett*, 64 Neb. 592.

**358. 1.** *Lowery v. Powell*, 109 Ga. 192; *Messmore v. Williamson*, 189 Pa. St. 73.

**Succession Taxes.** — *Stellwagen v. Wayne Probate Judge*, 130 Mich. 166; *Black v. State*, 113 Wis. 205.

**Estate Duty — England.** — See *In re Leve-ridge*, (1901) 2 Ch. 830.

**359. 1. Estate Comprehends Everything, Both Realty and Personality.** — *In re Barden*, 101 Fed. Rep. 553; *In re Union Trust Co.*, (C. C. A.) 122 Fed. Rep. 937; *Equitable Guarantee, etc., Co. v. Rogers*, 7 Del. Ch. 398; *Lowery v. Powell*, 109 Ga. 192; *Dickson v. New York Biscuit Co.*, 211 Ill. 468; *Stolenburg v. Diercks*, 117 Iowa 25; *Carter v. Gray*, 58 N. J. Eq. 411; *Stewart v. Stewart*, 61 N. J. Eq. 25; *Messmore v. Williamson*, 189 Pa. St. 73; *State v. Fidelity, etc., Co.*, (Tex. Civ. App. 1904) 80 S. W. Rep. 544.

**Estate Includes Personality.** — *Greenwood v. Greenwood*, 178 Ill. 387.

**Estate or Interest.** — In *Dalrymple v. Security L. & T. R. Co.*, 9 N. Dak. 306, the court said: "But under the existing statutes in this state (Rev. Codes, §§ 5904, 5486), an action to quiet title may be maintained by any person 'having an *estate* or interest in real property' against another 'who claims an *estate* or interest adverse to him.' It is entirely clear that the phrase '*estate* or interest' includes both legal and equitable *estates* and interests, and under a recent statute a mere lien, if acquired under tax sales, may be considered and passed upon in such an action."

**Mortgages.** — See *Higgins v. Higgins*, 121 Cal. 487.

**Contingent Remainder an Estate.** — *Minnesota Debenture Co. v. Dean*, 85 Minn. 473.

**361. 1. Choses in Action.** — *State v. Fidelity, etc., Co.*, (Tex. Civ. App. 1904) 80 S. W. Rep. 544.

**362. 3. Estate Will Pass a Fee.** — *Carter v. Gray*, 58 N. J. Eq. 411.

**363. 2. Restricted to Personality.** — See *Har-kleroad v. Maxwell*, 77 Miss. 117.

# ESTATES.

BY ERNEST G. CHILTON.

**365. I. DEFINITION.** — See note 1.

**366. II. CLASSIFICATION OF ESTATES — 2. Estates with Regard to Quantity of Interest** — *a. ESTATES OF FREEHOLD* — (2) *Estates of Inheritance* — (b) *Estates in Fee Simple* — *aa. IN GENERAL.* — See note 8.

**367.** *bb. WORDS NECESSARY TO CREATE* — (*aa*) *In a Deed.* — See note 4.

**368.** See note 1.

(*bb*) *In a Devise.* — See notes 2, 3.

*cc. INCIDENTS* — (*aa*) *Power of Alienation.* — See note 4.

(*cc*) *Curtesy and Dower.* — See note 6.

**369.** (*c*) *Estates in Fee Qualified.* — See note 1.

**370.** See notes 1, 2, 3.

(*d*) *Estates in Fee Conditional.* — See note 4.

**365. 1. Estate Defined — Means an Interest in All Property.** — *Stolenburg v. Diercks*, 117 Iowa 30, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) [656] 365.

**366. 8. Estate in Fee Simple.** — U. S. *v. Hyde*, 132 Fed. Rep. 545, quoting 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 366; *Owings v. Hunt*, 53 S. Car. 187.

**367. 4. "Heirs" Necessary in Deed.** — See *Williams v. Hedrick*, (C. C. A.) 96 Fed. Rep. 657; *Spencer v. Spruell*, 196 Ill. 119; *Chamberlain v. Runkle*, 28 Ind. App. 599; *Jones v. Jones*, 201 Pa. St. 548.

**368. 1. United States.** — *Williams v. Hedrick*, (C. C. A.) 96 Fed. Rep. 657.

*Illinois.* — *Turner v. Hause*, 199 Ill. 464; *McFarland v. McFarland*, 177 Ill. 208.

*Indiana.* — *Chamberlain v. Runkle*, 28 Ind. App. 599.

*Iowa.* — *Teany v. Mains*, 113 Iowa 53.

*Kansas.* — *Palmer Oil, etc., Co. v. Blodgett*, 60 Kan. 712.

*Kentucky.* — *Dalmazzo v. Simmons*, 78 S. E. Rep. 179, 25 Ky. L. Rep. 1532; *McAdams v. Norton*, 78 S. W. Rep. 880, 25 Ky. L. Rep. 1719.

*Missouri.* — *Ball v. Woolfolk*, 175 Mo. 278.

**2. Heirs Not Necessary in Devise** — *Illinois.* — *McFarland v. McFarland*, 177 Ill. 208; *Muhlke v. Tiedemann*, 177 Ill. 606.

*Kentucky.* — *Miller v. Tilton*, (Ky. 1899) 49 S. W. Rep. 967; *Childers v. Logan*, (Ky. 1901) 65 S. W. Rep. 124.

*New Jersey.* — *Carter v. Gray*, 58 N. J. Eq. 411.

*New York.* — *Hilliker v. Bast*, 64 N. Y. App. Div. 552.

*Pennsylvania.* — *Serfass v. Serfass*, 190 Pa. St. 484.

**3. Illinois.** — *Summers v. Higley*, 191 Ill. 193; *Davis v. Ripley*, 194 Ill. 399; *Turner v. Hause*, 199 Ill. 464.

*Kansas.* — *Boston Safe Deposit, etc., Co. v. Stich*, 61 Kan. 474.

*Kentucky.* — *Dalmazzo v. Simmons*, 78 S. W. Rep. 179, 25 Ky. L. Rep. 1532; *McAdams v. Norton*, 78 S. W. Rep. 880, 25 Ky. L. Rep. 1719.

*Mississippi.* — *Johnson v. Delome Land, etc., Co.*, 77 Miss. 15.

*Missouri.* — *Rothwell v. Jamison*, 147 Mo. 601. *New Jersey.* — *Feit v. Richards*, 64 N. J. Eq. 16.

*Ohio.* — *Halley v. Hengstler*, 23 Ohio Cir. Ct. 504.

**4. Unlimited Power of Alienation.** — *Muhlke v. Tiedemann*, 177 Ill. 606. See also *McFarland v. McFarland*, 177 Ill. 208.

**6. Alderson v. Alderson**, 46 W. Va. 242.

**369. 1. Base Fee Defined** — *Georgia.* — *Atlanta Consol. St. R. Co. v. Jackson*, 108 Ga. 634; *Shealy v. Wammock*, 115 Ga. 913.

*Illinois.* — *Becker v. Becker*, 206 Ill. 56, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 368, 369.

*Kentucky.* — *Louisville Trust Co. v. Erdman*, (Ky. 1900) 58 S. W. Rep. 814.

*Maine.* — *Hall v. Cressey*, 92 Me. 514.

*North Carolina.* — *Methodist Protestant Church v. Young*, 130 N. Car. 8.

*Rhode Island.* — *Pierce v. Brown University*, 21 R. I. 392.

*Texas.* — *Green v. Gresham*, 21 Tex. Civ. App. 601.

**370. 1. Nature of Estate.** — See *Becker v. Becker*, 206 Ill. 56, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 368, 369.

**2.** See *Becker v. Becker*, 206 Ill. 56, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 368, 369.

**3. Exists in United States** — *Georgia.* — *Shealy v. Wammock*, 115 Ga. 913.

*Illinois.* — *Becker v. Becker*, 206 Ill. 56, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 368, 369; *Koeffler v. Koeffler*, 185 Ill. 261.

*Kentucky.* — *Aultman Co. v. Gibson*, 67 S. W. Rep. 57, 23 Ky. L. Rep. 2296.

*North Carolina.* — *Keith v. Scales*, 124 N. Car. 497; *Methodist Protestant Church v. Young*, 130 N. Car. 8.

*Rhode Island.* — *Pierce v. Brown University*, 21 R. I. 392.

**4. Conditional Fee Defined.** — *Owings v. Hunt*, 53 S. Car. 187; *Mattison v. Mattison*, 65 S. Car. 345; *Holman v. Wesner*, 67 S. Car. 307.

**370.** Effect of Birth of Issue. — See note 5.

**371.** (e) Estates in Fee Tail — *aa.* DEFINITION. — See note 1.

*bb.* KINDS OF ESTATES TAIL. — See note 2.

*cc.* ORIGIN. — See note 3.

**372.** *dd.* WORDS NECESSARY TO CREATE — In a Deed. — See note 1.

In a Devise. — See notes 2, 3.

**373.** See note 1.

**374.** See note 1.

*ff.* SUBJECTS OF ENTAIL. — See note 8.

*gg.* BARRING AND DEFEATING — By Common Recovery. — See note 10.

**375.** By Deed. — See note 4.

**370.** 5. Distinction Between Estate in Fee Conditional and Estate in Fee Simple. — A fee conditional was defined in *Owings v. Hunt*, 53 S. Car. 187, as a "fee restricted to some particular heirs, exclusive of others," to which fee all the rules relative to a fee simple are applicable, with the exception of its order of descent and the right of alienation to bar the donor.

**Liable for Debts.** — *Owings v. Hunt*, 53 S. Car. 187.

**Cannot Be Devised.** — *Owings v. Hunt*, 53 S. Car. 187.

**371.** 1. Estates Tail Defined. — *Wilmans v. Robinson*, 67 Ark. 517; *Cain v. Robertson*, 27 Ind. App. 198.

2. Estates Tail Classified. — *Rhodes v. Bouldrey*, (Mich. 1904) 101 N. W. Rep. 206, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 371; *Wilmans v. Robinson*, 67 Ark. 517; *Hertz v. Abrahams*, 110 Ga. 707; *Turner v. Hause*, 199 Ill. 464.

**Illustrations** — *Tail Special*. — *Calder v. Davidson*, (Tex. Civ. App. 1900) 59 S. W. Rep. 300; *Chamberlain v. Runkle*, 28 Ind. App. 599.

3. Origin of Estates Tail. — *Hertz v. Abrahams*, 110 Ga. 707.

**372.** 1. Proper Words in Deed — *United States*. — *Garth v. Arnold*, (C. C. A.) 115 Fed. Rep. 468.

*Arkansas*. — *Wilmans v. Robinson*, 67 Ark. 517.

*Illinois*. — *Spencer v. Spruell*, 196 Ill. 119.

*Indiana*. — *Chamberlain v. Runkle*, 28 Ind. App. 599.

*Kentucky*. — *Louisville Trust Co. v. Erdman*, (Ky. 1900) 58 S. W. Rep. 814. See also *Jones v. Mason*, (Ky. 1899) 53 S. W. Rep. 5.

*Pennsylvania*. — *Jones v. Jones*, 201 Pa. St. 548.

2. Proper Words in a Will — *Connecticut*. — *Horton v. Upham*, 72 Conn. 29.

*Kentucky*. — *Davis v. Davis*, (Ky. 1901) 65 S. W. Rep. 122; *Dulaney v. Dulaney*, 79 S. W. Rep. 195, 25 Ky. L. Rep. 1659.

*Missouri*. — *Miller v. Ensminger*, 182 Mo. 195.

*Pennsylvania*. — *Boyd v. Weber*, 193 Pa. St. 651; *Beilstein v. Beilstein*, 194 Pa. St. 152, 75 Am. St. Rep. 692; *Graham v. Abbott*, 208 Pa. St. 68; *Corrin v. Elliott*, 23 Pa. Super. Ct. 449; *Pifer v. Locke*, 205 Pa. St. 616; *McCafferty v. Duerr*, 207 Pa. St. 261; *Vilsack's Estate*, 207 Pa. St. 611.

3. Dying Without Issue. — *Hertz v. Abrahams*, 110 Ga. 707; *Gillie v. Marsh*, 186 Mass. 336; *Hall v. Cressey*, 92 Me. 514. See also *Rothwell v. Jamison*, 147 Mo. 601.

**Connecticut Doctrine.** — See *Horton v. Upham*, 72 Conn. 29.

**373.** 1. *Horton v. Upham*, 72 Conn. 29; *Hertz v. Abrahams*, 110 Ga. 707; *Hall v. Cressey*, 92 Me. 514; *Stoner v. Wunderlich*, 198 Pa. St. 158.

**374.** 1. *Hertz v. Abrahams*, 110 Ga. 707; *Palethorpe v. Palethorpe*, 194 Pa. St. 408; *Stouch v. Zeigler*, 196 Pa. St. 489. See also *Beilstein v. Beilstein*, 194 Pa. St. 152, 75 Am. St. Rep. 692.

8. **Personalty Cannot Be Entailed.** — *In re Tillinghast*, 25 R. I. 338. See also *Hertz v. Abrahams*, 110 Ga. 707. But see *Talbot v. Snodgrass*, 124 Iowa 681.

10. **Bar of Crown's Reversion.** — A reversion to the crown, expectant on the determination of an estate tail in realty granted by the crown to a subject for services, being excepted by section 18 of the Fines and Recoveries Act, 1833, from the operation of that Act, and protected by the statute 34 and 35 Hen. 8, c. 20, cannot be barred; and, although the consideration is not stated in the grant, it will be presumed after lapse of time — unless the grant on the face of it clearly shows that it is a voluntary gift — and the onus is on those who seek to take the grant out of the statute of Henry VIII. to prove the want of consideration. But where a grant from the crown shows on the face of it that it is a voluntary gift, the reversion expectant on the estate tail created thereunder is not within the statute of Henry VIII., and is barrable. *Robinson v. Giffard*, (1903) 1 Ch. 865.

**Recovery by Tenant in Tail — Declaration of Uses.** — When uses are declared upon a recovery by a tenant in tail, which do not exhaust the fee, the use so far as unexhausted results to the recoveror. *Lynch v. Clarkin*, (1900) 1 Ir. R. 178.

**375.** 4. **English Statute.** — An actual equitable tenant in tail in remainder may, with the consent of the equitable life tenant, execute a disentailing deed, and thereby bar his own issue male claiming under the estate in tail male limited to him and his heirs male, and also bar contingent estates limited in remainder to take effect after the determination or in defeasance of the vested estate in tail mail in remainder. *Cardigan v. Howe*, (1901) 2 Ch. 479.

**Disentailment of Lands to Be Purchased.** — A disentailing deed is effectual to bar an estate tail in lands to be purchased with certain money subject to a trust to be laid out in the purchase of lands after the death of a person who is still alive at the date of the disentailing deed.



**376.** *hh.* ABROGATION AND MODIFICATION. — See note 1.

**377.** (3) *Estates Not of Inheritance* — (b) *Conventional Life Estates* — *aa.* IN GENERAL. — See note 3.

*bb.* ESTATES PUR AUTRE VIE — *Occupancy.* — See note 7.

**378.** See note 1.

*cc.* METHOD OF CREATION. — See note 4.

*dd.* INCIDENTS — (*bb.*) *Right to Estovers.* — See note 8.

Thus, personal estate, the income of which is directed to be paid to A. for life, and the capital of which is, on his death, directed to be invested in the purchase of land to be settled to the uses of a strict settlement of real estate created by the same instrument, can be disentailed effectually in the lifetime of A., by the tenant in tail under the settlement with the consent of the tenant for life under the settlement. *In re Harvey*, (1901) 2 Ch. 290.

**Barred by Deed in Fee.** — *Gilkie v. Marsh*, 186 Mass. 336.

**Pennsylvania Statute.** — *Boyd v. Weber*, 193 Pa. St. 651.

**376. 1. Converted into Fee-simple Estate** — *Georgia.* — *Hertz v. Abrahams*, 110 Ga. 707.

*Indiana.* — *Chamberlain v. Runkle*, 28 Ind. App. 599; *Teal v. Richardson*, 160 Ind. 119.

*Kentucky.* — *Jones v. Mason*, (Ky. 1899) 53 S. W. Rep. 5; *Louisville Trust Co. v. Erdman*, (Ky. 1900) 58 S. W. Rep. 814; *Davis v. Davis*, (Ky. 1901) 65 S. W. Rep. 122; *Combs v. Eversole*, 64 S. W. Rep. 524, 23 Ky. L. Rep. 932; *Dulaney v. Dulaney*, 79 S. W. Rep. 195, 25 Ky. L. Rep. 1659.

*Maryland.* — *Travers v. Wallace*, 93 Md. 507.

*Michigan.* — *Rhodes v. Bouldrey*, (Mich. 1904) 101 N. W. Rep. 206.

*North Carolina.* — *Marsh v. Griffin*, 136 N. Car. 333.

*North Dakota.* — *Crandell v. Barker*, 8 N. Dak. 263.

*Pennsylvania.* — *Shoup v. De Long*, 190 Pa. St. 331; *Brinton v. Martin*, 197 Pa. St. 615; *Beilstein v. Beilstein*, 194 Pa. St. 152, 75 Am. St. Rep. 692; *Palethorpe v. Palethorpe*, 194 Pa. St. 408; *Stouch v. Zeigler*, 196 Pa. St. 489; *Lancaster v. Flowers*, 198 Pa. St. 614; *Jones v. Jones*, 201 Pa. St. 548; *Simpson v. Reed*, 205 Pa. St. 53; *Pifer v. Locke*, 205 Pa. St. 616; *McCafferty v. Duerr*, 207 Pa. St. 261; *Vilsacks' Estate*, 207 Pa. St. 611; *Graham v. Abbott*, 208 Pa. St. 68; *Corrin v. Elliott*, 23 Pa. Super. Ct. 449.

**Life Estate to First Donee and Fee Simple to Issue** — *Alabama Statute.* — *Wilson v. Alston*, 122 Ala. 630.

*Arkansas Statute.* — *Wilmans v. Robinson*, 67 Ark. 517.

*Illinois Statute.* — *Spencer v. Spruell*, 196 Ill. 119; *Turner v. Hause*, 199 Ill. 464.

*Missouri Statute.* — *Garth v. Arnolds*, (C. C. A.) 115 Fed. Rep. 468; *Miller v. Ensminger*, 182 Mo. 195.

*Rhode Island Statute.* — *Manchester*, Petitioner, 22 R. I. 636.

In Ohio it was held that the rule in *Shelley's* case applied where a conveyance was to the grantees and their heirs and directed that the premises conveyed should remain in the possession of the grantees during their lives. Hence

the grantees took an estate in fee simple. *Connecticut Mut. L. Ins. Co. v. Skinner*, 2 Ohio Cir. Dec. 688.

In Texas, where a deed ran to the grantee and the heirs of her body by her then husband, it was held that the rule in *Shelley's* case applied, and that the grantee took an estate in fee simple. *Calder v. Davidson*, (Tex. Civ. App. 1900) 59 S. W. Rep. 300.

**377. 3. Value of Life Estate.** — The opinions of witnesses familiar with the apparent physical condition of a life tenant are, in determining the value of the life estate, a safer guide than mortality tables. *Steiner v. Berney*, 130 Ala. 289. See also *Blum's Estate*, 3 Dauphin Co. Rep. (Pa.) 154.

**Life Estate in Personalty.** — *Dickinson v. Griggsville Nat. Bank*, 209 Ill. 350; *Chase v. Howie*, 64 Kan. 320; *Johnson v. Johnson*, 104 Ky. 714; *Offutt v. Divine*, (Ky. 1899) 53 S. W. Rep. 816; *Stallcup v. Cronley*, 78 S. W. Rep. 441, 25 Ky. L. Rep. 1675; *Matter of Rogers*, 161 N. Y. 108; *Jermain v. Sharpe*, (Supm. Ct. Spec. T.) 29 Misc. (N. Y.) 258; *Matter of Roffo*, 51 N. Y. App. Div. 35.

As to the rights of life tenants and remaindermen to dividends from corporate stock, see the title *DIVIDENDS*, vol. 9, p. 710.

**Estate Per Autre Vie Is Not Estate of Inheritance.** — *In re Inman*, (1903) 1 Ch. 241.

**7. Common Occupancy.** — *In re Inman*, (1903) 1 Ch. 241.

**378. 1. Special Occupancy.** — *In re Inman*, (1903) 1 Ch. 241.

**No Special Occupancy When Word "Heirs" Is Omitted from Grant.** — In order that an estate *per autre vie* may pass on the death of its owner intestate to his heir as special occupant, it is necessary that "heirs" should have been named expressly in the last grant (whether by deed or will) affecting the devolution of the estate. It is not sufficient that the word "heirs" should have been used in some previous grant and that all subsequent grants should have conveyed the whole estate as thereby limited without creating any fresh limitations. If the last grant omitted the word "heirs," the intestate's interest passes on his death to his administrator, and his heir does not take as special occupant. *In re Inman*, (1903) 1 Ch. 241. Compare *King v. King*, (1899) 1 I. R. 30.

**4. Created by Express Terms.** — *Myers v. Culum*, 152 Ind. 700.

**No Parol Agreement** suffices to create a life estate. *Smith v. Roe*, 3 Penn. (Del.) 233.

**8. When Life Tenant Not to Permit the Mining of Coal in Unlimited Quantities.** — A life tenant has no right to execute a mining lease whereby she permits the lessee to remove coal in unlimited quantities, when the mines were not in operation at the death of her donor. *Hook v. Garfield Coal Co.*, 112 Iowa 210.

**379.** (cc) *Liability for Waste.* — See note 2.

(ee) *Liability to Forfeiture* — aaa. *For Alienation.* — See note 6.

bbb. *For Disclaimer.* — See note 7.

**380.** (ff) *Liability of Under Tenant for Rent.* — See note 1.

b. *ESTATES LESS THAN FREEHOLD* — (2) *Estates for Years.* —

See note 9.

**381.** (3) *Estates at Will* — (a) *In General.* — See note 6.

**382.** (4) *Estates by Sufferance.* — See notes 1, 2, 3.

**379. 2. Waste.** — *Pardoe v. Pardoe*, 82 L. T. N. S. 547; *Kollock v. Webb*, 113 Ga. 762; *Chapman v. W. F. Epperson* Circled Heading Co., 101 Ill. App. 161; *Burke v. Millikin*, 69 N. H. 501.

**Force of "Without Impeachment of Waste."** — The words "without impeachment of waste" do not operate to license the destroyal of the estate or the commission of malicious waste. *Wiley v. Wiley*, (Neb. 1901) 95 N. W. Rep. 702.

**6. Colorado.** — *Cowell v. South Denver Real-Estate Co.*, 16 Colo. App. 108.

*Illinois.* — *Chicago, etc., R. Co. v. Vaughn*, 206 Ill. 234; *Dickinson v. Griggsville Nat. Bank*, 111 Ill. App. 183, *affirmed* 209 Ill. 350.

*Michigan.* — *Jeffers v. Sydnam*, 129 Mich. 440, 8 Detroit Leg. N. 1006.

*Minnesota.* — *Goodwin v. Clover*, 91 Minn. 438.

*South Carolina.* — *Ex p. Richardson*, 66 S. Car. 413.

*Texas.* — *Stephens v. Hewett*, 22 Tex. Civ. App. 303; *Bullock v. Sprowls*, (Tex. Civ. App. 1899) 54 S. W. Rep. 657, *affirmed* 93 Tex. 188.

**Life Tenant Not Able to Convey or Lease Beyond His Own Term.** — A life tenant cannot convey or lease his estate for a time extending beyond his own term, so that the death of a life tenant who has leased his estate instantly terminates the lease. *Johnson v. Grantham*, 104 Ga. 558.

**7. Termination by Mutual Consent.** — Where a life tenant and remainderman mutually con-

sented to an actual and continued change of possession, it was held that such consent operated as a termination of the life estate. *Curtis v. Hollenbeck*, 92 Ill. App. 34.

**380. 1. Rule Changed by Statute.** — *Gudgel v. Southerland*, 117 Iowa 309; *Collins v. Crownover*, (Tenn. Ch. 1900) 57 S. W. Rep. 357.

**9. Estate for Years Defined.** — *Hutcheson v. Bennefield*, 115 Ga. 994, *citing* 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 380.

**381. 6. Tenancy at Will** — *Arkansas.* — *St. Louis, etc., R. Co. v. Hall*, 71 Ark. 302.

*Indian Territory.* — *Rogers v. Hill*, 3 Indian Ter. 562.

*Michigan.* — *Landsberg v. Tivoli Brewing Co.*, 132 Mich. 651, 10 Detroit Leg. N. 63.

*Minnesota.* — *Paget v. Electrical Engineering Co.*, 82 Minn. 244.

*Rhode Island.* — *Maher v. James Hanley Brewing Co.*, 23 R. I. 323.

*South Carolina.* — *Matthews v. Hipp*, 66 S. Car. 162.

*Utah.* — *Utah Optical Co. v. Keith*, 18 Utah 464.

**382. 1. Tenancy by Sufferance.** — *Willis v. Harrell*, 118 Ga. 906; *Wood v. Page*, 24 R. I. 594; *Wamsganz v. Wolff*, 86 Mo. App. 205.

**2. Not Liable for Rent.** — *Martin v. Allen*, 67 Kan. 758.

**3. Notice Unnecessary.** — *Guvernator v. Kenin*, 66 N. J. L. 114.

# ESTOPPEL.

BY L. DARLINGTON.

**387. I. DEFINITION AND GENERAL NATURE.** — See note 1.

**388.** Odiousness of Estoppels. — See note 2.

The Doctrine Strictly Guarded. — See note 4.

Certainty Requisite as to Estoppels. — See note 5.

**389. II. ESTOPPEL BY RECORD — 1. JUDICIAL RECORDS — a. IN GENERAL.** — See note 1.

**390. b. JUDGMENTS — (1) As Between Parties and Privies.** — See note 1. Distinction When Judgment Invoked on Same or on Different Claim. — See note 2.

**391. (2) As Affecting Strangers.** — See note 2.

**392. III. BY DEED — 1. IN GENERAL.** — See note 3.

Application of Rule to Conveyances of Personality. — See note 6.

**2. Qualification of Doctrine — a. ESTOPPEL AGAINST ESTOPPEL.** — See notes 7, 9.

**387. 1. Estoppel Defined.** — *Lyon v. Tonawanda*, 98 Fed. Rep. 361, quoting 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 387; *Richolson v. Moloney*, 195 Ill. 575, quoting 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 387; *Williams v. Supreme Council, etc.*, 80 N. Y. App. Div. 402, quoting 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 387.

**388. 2. Estoppels Viewed as Odious.** — *Stroud v. Hancock*, 116 Ga. 332; *Harvin v. Blackman*, 108 La. 426.

**4. Estoppels Strictly Guarded.** — *Lyon v. Tonawanda*, 98 Fed. Rep. 361, wherein it is said that estoppels are not encouraged and are regarded as undesirable aliens. \*

**5. Certainty Required.** — *Lyon v. Tonawanda*, 98 Fed. Rep. 361, quoting 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 388; *Summerfield v. White*, 54 W. Va. 311. See also dissenting opinion of Grant, J., in *Great Hive, etc. v. Supreme Hive, etc.*, 135 Mich. 420, quoting 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 388.

**389. 1. Estoppel by Record in General.** — See *Citizens Light, etc., Co. v. St. Louis*, 34 Can. Sup. Ct. 495, reversing 13 Quebec K. B. 19.

**Judicial Decision Beyond Statutory Jurisdiction Not Res Judicata.** — *Toronto R. Co. v. Toronto*, (1904) A. C. 809, 91 L. T. N. S. 541, 20 Times L. Rep. 774.

**390. 1. Estoppel by Judgment — England.** — *Wakefield v. Cooke*, (1904) A. C. 31, 73 L. J. K. B. 88, 89 L. T. N. S. 707, affirming (1903) 1 K. B. 417; 72 L. J. K. B. 345, 88 L. T. N. S. 225, 67 J. P. 121, which overruled (1902) 1 K. B. 188; 71 L. J. K. B. 257, 86 L. T. N. S. 198, 66 J. P. 232; *Beardsley v. Beardsley*, (1899) 1 Q. B. 746; 68 L. J. Q. B. 270, 80 L. T. N. S. 51. See also *Uxbridge Union v. Winchester Union*, 91 L. T. N. S. 533, 68 J. P. 525.

**United States.** — *National Nickel Co. v. Nevada Nickel Syndicate*, 106 Fed. Rep. 110, quoting 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 390, affirming 112 Fed. Rep. 44.

*Idaho.* — *King v. Co-operative Sav., etc.*,

*Assoc.*, 6 Idaho 760, quoting 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 390.

*Minnesota.* — *Wagener v. St. Paul*, 82 Minn. 148.

*New Jersey.* — *Condit v. Bigalow*, 64 N. J. Eq. 504.

*Pennsylvania.* — *Kreamer v. Fleming*, 200 Pa. St. 414.

*Tennessee.* — *Mobile, etc., R. Co. v. Donovan*, 104 Tenn. 465.

*Washington.* — *Brier v. Traders' Nat. Bank*, 24 Wash. 695, quoting 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 390.

**Face of Judgment Must Show Extent of Estoppel.** — *Irish Land Commission v. Ryan*, (1900) 2 Ir. R. 565.

**2. Effect of Judgment as to Same and Different Cause of Action Distinguished.** — *Balby-with-Hexthorpe Dist. Council v. Millard*, 68 J. P. 81; *Linton v. National L. Ins. Co., (C. C. A.)* 104 Fed. Rep. 584; *James v. Germania Iron Co., (C. C. A.)* 107 Fed. Rep. 597; *Stone v. Salisbury*, 209 Ill. 56; *Pitts v. Oliver*, 13 S. Dak. 561; *Brier v. Traders' Nat. Bank*, 24 Wash. 695, quoting 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 390.

**391. 2. Conclusiveness of Judgment as to Strangers.** — *Allred v. Smith*, 135 N. Car. 443, dissenting opinion of Clark, C. J., citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 391.

**392. 3. Estoppel by Deed.** — *Van Husen v. Omaha Bridge, etc., R. Co.*, 118 Iowa 366; *Simmons v. Reinhardt*, (Ky. 1904) 78 S. W. Rep. 800; *Steele v. Culver*, 158 Mo. 136; *Tucker v. Pullman*, (Tenn. Ch. 1900) 58 S. W. Rep. 873.

**Conveyance with Secret Agreement.** — A grantor of property conveyed secretly subject to certain restrictions cannot set up such restrictions against an innocent third party dealing with the grantee without notice thereof. *Esty v. Cummings*, 80 Minn. 516.

**6. A Mortgagor of Chattels is estopped by the deed to deny ownership of such chattels.** *Layson v. Cooper*, 174 Mo. 211, 97 Am. St. Rep. 545.

**7. One Who Executes a Bond under circum-**



- 393.** *b. INVALID DEEDS* — (1) *In General*. — See note 1.  
*Effect of Covenants*. — See note 2.  
 (2) *Deed in Contravention of Statute*. — See note 3.  
*Conveyance of Married Woman*. — See note 4.
- 394.** (3) *Deed Affected with Fraud* — *Conveyance Obtained by Fraud*. — See note 2.
- 3.** *Persons Affected by Estoppel* — *a. GRANTORS AND PRIVIES* — (1) *In General*. — See notes 8, 9.
- 395.** (2) *Mortgagors* — *Where Mortgage Merely Creates Lien*. — See note 4.
- 396.** (3) *Married Women* — *Under Statutes*. — See note 1.  
*Joinder with Husband for Purpose of Releasing Dower*. — See note 4.  
 (5) *The State*. — See note 7.
- 398.** (6) *Grantor Acting in Different Characters* — *Deed in Fiduciary Capacity Usually Creates Estoppel in Individual Capacity*. — See notes 1, 2.
- 400.** *c. STRANGERS*. — See note 3.
- 4.** *Recitals* — *a. IN GENERAL*. — See notes 6, 7.

stances that would estop him to assert its invalidity for want of consideration cannot, in an action upon the bond, avoid liability on the ground that the plaintiff is estopped to assert that there was any consideration for the bond. *U. S. Fidelity, etc., Co. v. Ettenheimer*, (Neb. 1904) 99 N. W. Rep. 652.

**392.** **9. Estoppel by Judgment Against Estoppel by Deed.** — An estoppel by a subsequent judgment of a competent tribunal prevails over a prior estoppel by the covenants of a deed. *Boynton v. Haggart*, (C. C. A.) 120 Fed. Rep. 819.

**393.** **1. No Estoppel Created by Invalid Deed.** — *Faulk v. Calloway*, 123 Ala. 325; *Van Dyke v. Van Dyke*, 119 Ga. 830; *Altemus v. Nichols*, (Ky. 1903) 74 S. W. Rep. 221; *Smith v. Ingram*, 130 N. Car. 100, quoting 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 393; *Drake v. Howell*, 133 N. Car. 162; *Koppelman v. Koppelman*, 94 Tex. 40.

**Defective Deed.** — A grantor conveying land by a description so vague as to render its location impossible, cannot, after having located the land and put the grantee in possession, question the latter's title. *Barker v. Southern R. Co.*, 125 N. Car. 596, 74 Am. St. Rep. 658.

**Annulled Deed Works No Estoppel.** — An after-acquired title does not inure to the benefit of the grantee, where the deed of conveyance under which he claims has been canceled and annulled by a decree of court. *Troxell v. Stevens*, 57 Neb. 329.

**2. Effect of Covenants in Void Deeds.** — *Smith v. Ingram*, 130 N. Car. 100, quoting 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 393.

**3. Deed in Contravention of Statute.** — *Smith v. Ingram*, 130 N. Car. 100, quoting 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 393.

**4. Void Conveyance of Married Woman.** — *Smith v. Ingram*, 130 N. Car. 100, quoting 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 393.

**394.** **2. The Burden of Proving fraud in the procurement of a deed is upon the maker of such deed.** *Layson v. Cooper*, 174 Mo. 211, 97 Am. St. Rep. 545.

**8. Persons Affected by Estoppel by Deed in General.** — *Summerfield v. White*, 54 W. Va. 311.

**Estoppel Is Operative Against Creditors of Grantor.** — *Arlington State Bank v. Paulsen*, 59 Neb. 94.

**9. Meaning of Privy.** — *Allen v. Fitzgerald*, 23 Utah 597, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 394.

**395.** **4. Mortgage Deed Without Covenants. Where Mortgage Mere Lien, Creates No Estoppel.** — *Donovan v. Twist*, 85 N. Y. App. Div. 130.

**396.** **1. Estoppel by Deed Against Married Women under Statute.** — *Esty v. Cummings*, 80 Minn. 516.

**Operation of Covenants Against Husband Joining in Deed.** — See *Summerfield v. White*, 54 W. Va. 311.

**4. Joining to Release Dower Does Not Affect Independent Title.** — *Prior v. Loeb*, 119 Ala. 450. See also *State v. Kemmerer*, 15 S. Dak. 504.

**7. State Not Subject to Estoppel.** — In *Arkansas* the same rule prevails. *St. Louis Refrigerator, etc., Co. v. Langley*, 66 Ark. 48.

**398.** **1. Estoppel of Person Granting in Representative Capacity to Set Up Individual Claim.** — *Arlington State Bank v. Paulsen*, 59 Neb. 94.

**Conveyance by Agent.** — Where one as agent for another signs a deed conveying property, he is estopped from thereafter asserting against the grantee any adverse right, based on a title or interest outstanding in such agent at the time of the execution of the deed. *American Freehold Land Mortg. Co. v. Walker*, 119 Ga. 341.

**2. Lease by Trustee.** — A trustee having executed a lease of the trust property is estopped to deny that interests acquired by him in the property both before and after the execution of the lease are not subject to the terms thereof. *Lanyon Zinc Co. v. Freeman*, 68 Kan. 691.

**400.** **3. Estoppels by Deed as Against Strangers.** — *King v. Mead*, 60 Kan. 539; *Bartell v. Kelsey*, (Tex. Civ. App. 1900) 59 S. W. Rep. 631; *Illg v. Garcia*, 92 Tex. 251.

**6. Estoppel by Recitals.** — *Taylor v. Riggs*, 8 Kan. App. 323; *Lawson v. Conolly*, 51 La. Ann. 1753; *Kreps v. Kreps*, 91 Md. 692; *Elmira Mut. Bldg. Loan Assoc. v. Wahoo Tribe*, No. 119, 9 Kulp (Pa.) 487; *Kahn v. Kahn*, 94 Tex. 114; *Gonzales v. Batts*, 20 Tex. Civ. App. 421.

**Mortgagee Estopped.** — In *Monmouth Second Nat. Bank v. Gilbert*, 174 Ill. 485, 66 Am. St. Rep. 306, it was held that a mortgagee of chattels was estopped by recitals of ownership in the instrument.

**Absence of Reliance on Recitals.** — *Recitals*

**401.** See note 1.

**402.** *b.* RECITAL OF EXISTENCE OF STREET OR WAY. — See note 2.

**403.** **5. Covenants — *b.* OPERATION AS TO AFTER-ACQUIRED TITLE —**  
**(1) Requisites as to Instrument of Conveyance — (a) Instruments Containing Covenants**  
 — *aa.* IN GENERAL. — See note 2.

**Mortgages.** — See note 5.

**405.** *bb.* COVENANTS OF WARRANTY — **General Covenants.** — See note 2.

**406.** **Special Warranty.** — See note 1.

**408.** *ff.* COVENANT OF NONCLAIM. — See note 3.

**409.** **(b) Instruments Without Covenants — *aa.* IN GENERAL.** — See note 1.

which have not been relied on so as to cause a change of position do not operate as estoppels against the grantor. *Southern Home Bldg., etc., Assoc. v. Winans*, 24 Tex. Civ. App. 544.

**Recitals in a Void Deed** are not binding as an estoppel. *East Tennessee, etc., R. Co. v. Nashville, etc., R. Co.*, (Tenn. Ch. 1897) 51 S. W. Rep. 202.

**400.** **7. Operation of Particular and Essential Recitals.** — *Krauth v. Hahn*, (Ky. 1901) 65 S. W. Rep. 18; *McNaughton v. Burke*, 63 Neb. 704, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 400; *Van Winkle v. Van Winkle*, 95 N. Y. App. Div. 605; *Summerfield v. White*, 54 W. Va. 311.

**No Estoppel as to Third Persons.** — *Mayfield v. Robinson*, 22 Tex. Civ. App. 385.

Strangers to a deed are not bound by recitals contained therein. *Hart v. Meredith*, 27 Tex. Civ. App. 271.

**Unnecessary Recitals** will not operate as an estoppel. *Clark v. Sayers*, 55 W. Va. 512.

**401.** **1. General Recitals Inoperative by Way of Estoppel.** — *Brian v. Bonvillain*, 111 La. 441.

**402.** **2. Estoppel by Recital of Existence of Street or Way.** — *McDonald v. Stark*, 176 Ill. 456; *Hoskins v. J. B. Wathen Bros. Co.*, (Ky. 1898) 47 S. W. Rep. 595; *Driscoll v. Smith*, 184 Mass. 221; *McFarland v. Lindekugel*, 107 Wis. 474.

**A Description by Reference to a Plat** showing a way adjacent to the land described will also prevent the grantor from denying the existence thereof. *Clever v. Mahanke*, 120 Iowa 77.

To the same effect, see *Overland Machinery Co. v. Alpenfels*, 30 Colo. 163; *Owen v. Brookport*, 208 Ill. 35; *Lahtie v. New Orleans*, 52 La. Ann. 2099.

**403.** **2. General Rule as to Operation of Covenants upon an After-acquired Title.** — *Lyon v. Gombert*, 63 Neb. 630.

**Rights Not Conveyed** by a deed do not, on subsequent purchase by the grantor, inure to the benefit of the grantee. *Horne v. Hutchins*, 72 N. H. 211.

**5. Effect of Covenants in Mortgage upon After-acquired Title.** — *Hubbard v. Mulligan*, 13 Colo. App. 116; *Union Sav. Bank, etc., Co. v. Sewell*, 11 Ohio Dec. 665, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 403; *Peoples Sav. Bank v. Lewis*, 37 Wash. 344; *Weber v. Laidler*, 26 Wash. 144, 90 Am. St. Rep. 726.

**405.** **2. Effect of Covenants of General Warranty upon After-acquired Title — Arkansas.** — *Tupy v. Kocourek*, 66 Ark. 433.

*Kentucky.* — *Altemus v. Asher*, (Ky. 1903) 74 S. W. Rep. 245.

*Michigan.* — *Dye v. Thompson*, 126 Mich. 597.

*Minnesota.* — *Rooney v. Koenig*, 80 Minn. 483.  
*Missouri.* — *Johnson v. Johnson*, 170 Mo. 34.  
*Montana.* — *McDermott Min. Co. v. McDermott*, 27 Mont. 143.

*North Carolina.* — *Hallyburton v. Slagle*, 132 N. Car. 947.

*South Carolina.* — *Butler v. Butler*, 67 S. Car. 211.

*Texas.* — *Scates v. Fohn*, (Tex. Civ. App. 1900) 59 S. W. Rep. 837; *Logue v. Atkeson*, 35 Tex. Civ. App. 303.

*West Virginia.* — *Clark v. Sayers*, 55 W. Va. 512.

**Scope of Warranty.** — By the use of the words "and warrants" by a mortgagor in a deed the mortgage is to be construed as if full covenants of seizin, good right to convey, against incumbrances, of quiet enjoyment, and general warranty were fully written therein. (See 1 Starr & C. Annot. Stat. Ill. 1896 [2d ed.], p. 24, § 11.) *Roderick v. McMeekin*, 204 Ill. 625.

**Warranty with Exception of Particular Incumbrance.** — Where the only reference in a warranty deed to a mortgage on land is to except it from the covenant against incumbrances, the exception does not extend to or affect the covenant of warranty, and any title thereafter acquired by the grantor by the foreclosure of the mortgage will inure to the benefit of the grantee and his assigns. *Rooney v. Koenig*, 80 Minn. 483.

**406.** **1. Special Interest Conveyed.** — A warranty in a deed purporting to convey an interest in the land derived by the grantor from a particular source will not estop the grantor to assert another interest derived from a different source. *Cronkhite v. Strain*, 210 Ill. 331.

**408.** **3. Effect of Covenant of Nonclaim on After-acquired Title.** — *Compare Garlick v. Pittsburgh, etc., R. Co.*, 67 Ohio St. 223.

**409.** **1. Operation of Instruments Without Covenants as to After-acquired Title.** — *Altemus v. Asher*, (Ky. 1903) 74 S. W. Rep. 245; *Gjerstadengen v. Hartzell*, 9 N. Dak. 268, 81 Am. St. Rep. 575.

**In Montana by Statute**, § 267, div. 5, Gen. Laws Comp. Stat. 1887, it is provided that an after-acquired title of a grantor assuming to convey a fee simple absolute will inure to the benefit of the grantee though there be no warranty. *McDermott Min. Co. v. McDermott*, 27 Mont. 143.

**Title Possessed at Time of Conveyance Estopped.** — A conveyance without warranty by mere estoppel cuts off the assertion of any title or claim which the grantor had at the time of the conveyance. *Summerfield v. White*, 54 W. Va. 311.

**409.** *bb.* QUITCLAIM DEEDS. — See note 2.

**411.** *cc.* OPERATION OF RECITALS OR AVERMENTS. — See note 1.

**412.** (2) *Limitations of the Doctrine* — (a) Title Subsequently Acquired from Grantee. — See notes 3, 4.

**413.** (b) Title Subsequently Acquired in Different Right. — See note 1.

**414.** (c) Effect of Nonliability on Covenants — *bb.* WHERE CONVEYANCE IS VOID — (*bb*) Conveyance by Married Woman — Separate Estate. — See note 1.

*cc.* GRANTOR'S DISCHARGE IN BANKRUPTCY. — See note 3.

**415.** (3) *Against Whom Estoppel Operates* — Grantor's Heirs. — See note 3.

**421.** IV. ESTOPPEL IN PAIS — 1. General Statement. — See notes 1, 2, 3.

2. Misrepresentation or Concealment of Facts — *a.* IN GENERAL. —

See note 4.

**409.** 2. Operation of Quitclaim Deeds as to After-acquired Title. — *Morrison v. Whiteside*, 116 Ga. 459; *Taylor v. Wainman*, 116 Ga. 795; *Troxell v. Stevens*, 57 Neb. 329.

Under the Mississippi Code of 1880, § 1195, a quitclaim deed passes all interests of the grantor and estops him from asserting an after-acquired adverse title. *Leflore County v. Allen*, 80 Miss. 298.

**411.** 1. Operation of Recitals upon After-acquired Title. — *Hallyburton v. Slagle*, 132 N. Car. 947, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 403 [411]; *Balch v. Arnold*, 9 Wyo. 17. See also *Flanary v. Kane*, 102 Va. 565, holding a grantor estoppel from setting up an incumbency outstanding against the property at the time of the conveyance.

**412.** 3. Purchase of Beneficial Interest. — A grantor conveying lands by warranty deed to a trustee may subsequently purchase and hold the *cestui's* interest. *Condit v. Bigalow*, 64 N. J. Eq. 504, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 412.

**4.** Effect of Adverse Possession by Grantor Against Grantee. — *Horbach v. Boyd*, 64 Neb. 129; *Hallyburton v. Slagle*, 132 N. Car. 947.

A Mining Claim Abandoned by the Grantee and purchased from a relocater by the grantor will not inure to the grantee. *McDermott Min. Co. v. McDermott*, 27 Mont. 143.

**413.** 1. Effect of Covenants on Property Subsequently Acquired in Different Right. — *Lauve v. Wilson*, 114 La. 699.

**414.** 1. Under Statute in Texas. — *Logue v. Atkeson*, 35 Tex. Civ. App. 303.

In Nebraska the same rule holds as in Ohio. *Cooper v. Burns*, 133 Fed. Rep. 398.

**3.** Effect of Grantor's Discharge in Bankruptcy. — *Hallyburton v. Slagle*, 132 N. Car. 947.

**415.** 3. Claim by Inheritance. — *Sinclair v. Huntley*, 131 N. Car. 243.

**421.** 1. Limited Use of Estoppels in Pais at Common Law. — *Shapard Grocery Co. v. Hynes*, 3 Indian Ter. 74, quoting 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 421, (C. C. A.) 104 Fed. Rep. 449; *Davidson v. Kelley*, (Ky. 1901) 64 S. W. Rep. 623.

**2.** Estoppel in Pais Administered in Courts of Law — *United States*. — *Sullivan Timber Co. v. Mobile*, 110 Fed. Rep. 186, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 421; *Anglo-American Land, etc., Co. v. Lombard*, (C. C. A.) 132 Fed. Rep. 721.

*Indian Territory*. — *Shapard Grocery Co. v. Hynes*, 3 Indian Ter. 74, quoting 11 AM. AND

ENG. ENCYC. OF LAW (2d ed.) 421, *reversed* (C. C. A.) 104 Fed. Rep. 447.

*Kentucky*. — *Davidson v. Kelley*, (Ky. 1901) 64 S. W. Rep. 623; *Wright v. Williams*, (Ky. 1904) 77 S. W. Rep. 1128.

*Minnesota*. — *Western Land Assoc. v. Banks*, 80 Minn. 317.

*New Jersey*. — *Central R. Co. v. MacCartney*, 68 N. J. L. 165.

*Virginia*. — *Hoge v. Fidelity L. & T. Co.*, 103 Va. 1.

**3.** *Shapard Grocery Co. v. Hynes*, 3 Indian Ter. 74, *reversed* (C. C. A.) 104 Fed. Rep. 447.

**4.** Estoppel by Misrepresentation or Concealment of Facts — *England*. — *Rimmer v. Webster*, (1902) 2 Ch. 163, 71 L. J. Ch. 561, 86 L. T. N. S. 491; *Keith v. Gancia*, (1904) 1 Ch. 774, 73 L. J. Ch. 411, 90 L. T. N. S. 395. See also *Porter v. Moore*, (1904) 2 Ch. 367, 73 L. J. Ch. 729, 91 L. T. N. S. 484.

*Canada*. — *Zwicker v. Feindel*, 29 Can. Sup. Ct. 516.

*United States*. — *Given v. Times-Republican Printing Co.*, (C. C. A.) 114 Fed. Rep. 92; *Linton v. National L. Ins. Co.*, (C. C. A.) 104 Fed. Rep. 584.

*Alabama*. — *Fields v. Killion*, 129 Ala. 373; *Tapscott v. Gibson*, 129 Ala. 503.

*California*. — *Nicholson v. Randall Banking Co.*, 130 Cal. 533.

*Colorado*. — *Hubbard v. Mulligan*, 13 Colo. App. 116; *Murphy v. Gumaer*, 18 Colo. App. 183.

*District of Columbia*. — *Towles v. Tanner*, 21 App. Cas. (D. C.) 530.

*Georgia*. — *Wolff v. Hawes*, 105 Ga. 153; *Wright v. McCord*, 113 Ga. 881; *Northington v. Granade*, 118 Ga. 584.

*Illinois*. — *Johnson v. Waters*, 78 Ill. App. 418.

*Indiana*. — *Underwood v. Deckard*, 34 Ind. App. 198, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 421; *Dutton v. Ensley*, 21 Ind. App. 46, 69 Am. St. Rep. 340; *Shedd v. Webb*, 157 Ind. 585; *Moore v. Smith*, 29 Ind. App. 503.

*Indian Territory*. — *Perry v. Farrimond*, (Indian Ter. 1904) 82 S. W. Rep. 674, quoting 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 421; *Shapard Grocery Co. v. Hynes*, 3 Indian Ter. 74, *reversed* (C. C. A.) 104 Fed. Rep. 449.

*Iowa*. — *Riegel v. Ormsby*, 111 Iowa 10; *Rath v. Orr*, 119 Iowa 511; *Cleaver v. Mahanke*, 120 Iowa 77.

*Kentucky*. — *Duncan v. Allander*, 110 Ky. 828, (Ky. 1901) 62 S. W. Rep. 850; *Union Cent. L. Ins. Co. v. Johnson*, (Ky. 1903) 76 S. W. Rep. 335; *Wright v. Williams*, (Ky. 1904) 77 S. W. Rep. 1128.



**422. The Primary Ground.** — See note 1.

Applications of the Doctrine — Owner Representing Third Person as Owner. — See note 2.

**424. b. ESSENTIAL ELEMENTS** — (1) *In General* — Requisite Certainty as to Evidence. — See note 2.

Peculiar Application of Rule to Controversies Regarding Real Estate. — See note 3.

Affirmative Proof Required. — See note 4.

(2) *The Representation* — (a) *In General*. — See note 5.

*Louisiana.* — *Hibernia Nat. Bank v. Sarah Planting, etc., Co.*, 107 La. 650, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 421; *Curl v. Ruston State Bank*, 104 La. 548.

*Massachusetts.* — *O. Sheldon Co. v. Cooke*, 177 Mass. 441.

*Michigan.* — *National Lumberman's Bank v. Miller*, 131 Mich. 564, 100 Am. St. Rep. 623; *Christian v. Michigan Debenture Co.*, 134 Mich. 171; *Peirson v. Peirson*, (Mich. 1904) 100 N. W. Rep. 457.

*Missouri.* — *Citizens' Bank v. Burrus*, 178 Mo. 716; *Exchange Real Estate, etc., Co. v. Schuchmann Realty Co.*, 103 Mo. App. 24.

*New York.* — *White v. O'Brien*, (Supm. Ct. App. T.) 31 Misc. (N. Y.) 770; *Dierig v. Callahan*, (Supm. Ct. App. T.) 35 Misc. (N. Y.) 30; *Multz v. Price*, 91 N. Y. App. Div. 116; *Lopard v. Fritz*, (Supm. Ct. App. T.) 45 Misc. (N. Y.) 620; *Mattes v. Frankel*, 157 N. Y. 603, 68 Am. St. Rep. 804.

*Pennsylvania.* — *Ebert v. Johns*, 206 Pa. St. 395; *Plotts v. Warburton*, 20 Pa. Super. Ct. 496.

*South Dakota.* — *Sutton v. Consolidated Apex Min. Co.*, 14 S. Dak. 33; *Gionnonatti v. Michelletti*, 15 S. Dak. 126; *Shelby v. Bowden*, 16 S. Dak. 531.

*Tennessee.* — *Polk v. Williams*, 102 Tenn. 370; *Tucker v. Pullman*, (Tenn. Ch. 1900) 58 S. W. Rep. 873; *Smith v. Carmack*, (Tenn. Ch. 1901) 64 S. W. Rep. 372.

*Texas.* — *Breneman v. Mayer*, 24 Tex. Civ. App. 164; *Missouri, etc., R. Co. v. Yale*, 27 Tex. Civ. App. 10.

*Vermont.* — *Coolidge v. Ayers*, 76 Vt. 405.

*Virginia.* — *Mercantile Co-operative Bank v. Brown*, 96 Va. 614.

*Washington.* — *Brown v. Baruch*, 24 Wash. 572; *Young v. Stampfler*, 27 Wash. 350.

*Wisconsin.* — *Grunert v. Speich*, 114 Wis. 355.

**Statements Repeated Without Authority.** — Statements made by one person in conversation with another and subsequently repeated by the latter will not work an estoppel as against the former. *Ross v. Sutherland*, 32 Nova Scotia 243.

**422. 1. Foundation of Doctrine of Estoppel by Misrepresentation** — *Indiana.* — See *Hammond v. Evans*, 23 Ind. App. 501; *Roach v. Clark*, 28 Ind. App. 250.

*Kentucky.* — *Reid v. Benge*, 112 Ky. 810, 99 Am. St. Rep. 334.

*Mississippi.* — *Thomas v. Romano*, 82 Miss. 256.

*Missouri.* — *Spence v. Renfro*, 179 Mo. 417.

*Ohio.* — See *Insurance Co. of North America v. Miller*, 24 Ohio Cir. Ct. 667.

*Oregon.* — *Bloch v. Sammons*, 37 Oregon 602.

*South Carolina.* — *Carolina Nat. Bank v. State*, 60 S. Car. 465, 85 Am. St. Rep. 865.

*Texas.* — *Gulf City Trust Co. v. Hartley*, 20 Tex. Civ. App. 180.

*West Virginia.* — *Pocahontas Light, etc., Co. v. Browning*, 53 W. Va. 436. And see *Atkinson v. Plum*, 50 W. Va. 104.

**2. Owner of Property Representing Third Person as Owner** — *England.* — *Rimmer v. Webster*, (1902) 2 Ch. 163, 71 L. J. Ch. 561, 86 L. T. N. S. 491, 50 W. R. 517.

*United States.* — *Robb v. Day*, (C. C. A.) 90 Fed. Rep. 337.

*Arkansas.* — *Katz v. Goldman*, 69 Ark. 637.

*California.* — *Filippini v. Trobock*, (Cal. 1900) 62 Pac. Rep. 1066; *Cauhape v. Barnes*, 135 Cal. 107.

*Colorado.* — *McCroskey v. Mills*, 32 Colo. 271.

*Georgia.* — *Morris v. Rogers*, 104 Ga. 705; *Equitable Mortg. Co. v. Butler*, 105 Ga. 555; *Brice v. Sheffield*, 121 Ga. 216.

*Idaho.* — *Lick v. Munro*, 8 Idaho 510.

*Illinois.* — *Smith v. Willard*, 174 Ill. 538, 66 Am. St. Rep. 313.

*Iowa.* — *Nodle v. Hawthorn*, 107 Iowa 380.

*Kentucky.* — *Davidson v. Kelley*, (Ky. 1901) 64 S. W. Rep. 623; *Amyx v. Hurt*, (Ky. 1902) 68 S. W. Rep. 420; *York v. East Jellico Coal Co.*, (Ky. 1903) 76 S. W. Rep. 532.

*Minnesota.* — *Armstrong v. Freimuth*, 78 Minn. 94.

*New York.* — *Larremore v. Squires*, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 62; *Conde v. Lee*, 55 N. Y. App. Div. 401, affirmed 171 N. Y. 662.

*Oregon.* — *Bloch v. Sammons*, 37 Oregon 602.

*Tennessee.* — *Hale v. Morgan*, (Tenn. Ch. 1900) 63 S. W. Rep. 506; *Polk v. Gunther*, 107 Tenn. 16.

*Texas.* — *Hitchler v. Boyles*, 21 Tex. Civ. App. 230; *May v. Martin*, 32 Tex. Civ. App. 132; *Henry v. Thomas*, (Tex. Civ. App. 1903) 74 S. W. Rep. 599; *Morrison v. Balzer*, 35 Tex. Civ. App. 247.

**424. 2. Certainty Requisite as to Evidence of Essential Elements of Estoppel.** — *Sullivan v. Louisville, etc., R. Co.*, 128 Ala. 77, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 424; *McDonald v. Stark*, 176 Ill. 456; *Repass v. Richmond*, 99 Va. 508; *Young v. Stampfler*, 27 Wash. 350; *Hast v. Piedmont, etc., R. Co.*, 52 W. Va. 396.

**3. Application as Regards Real Estate.** — *Pocahontas Light, etc., Co. v. Browning*, 53 W. Va. 436.

**4. Affirmative Proof of Essential Elements Necessary.** — *Hollins v. Hubbard*, 38 N. Y. App. Div. 629, affirmed 165 N. Y. 534.

**5. Necessity of False Representation in General** — *United States.* — *Bump v. Butler County*, 93 Fed. Rep. 290; *Ft. Scott v. W. G. Eads Brokerage Co.*, (C. C. A.) 117 Fed. Rep. 51; *Barrett*

**425.** (b) *Statements of Opinion or of Law.* — See notes 1, 2.

(c) *Representations De Futuro.* — See note 4.

**426.** See note 1.

(d) *Fraudulent Procurement of Representation.* — See notes 2, 3.

**427.** (f) *Silence or Concealment of Facts* — *aa. IN GENERAL.* — See note 6.

*v. Twin City Power Co.*, 118 Fed. Rep. 861, affirmed (C. C. A.) 126 Fed. Rep. 302.

*Arizona.* — *Wiser v. Lawler*, (Ariz. 1900) 62 Pac. Rep. 695.

*Arkansas.* — *Miller-Jones Furniture Co. v. Ft. Smith Ice, etc., Co.*, 66 Ark. 287.

*Indiana.* — *Kuriger v. Joest*, 22 Ind. App. 633; *Farmers' Bank v. Orr*, (Ind. App. 1899) 55 N. E. Rep. 35.

*Indian Territory.* — *Robinson v. Nail*, 2 Indian Ter. 509.

*Iowa.* — *Rock Island Plow Co. v. Maynard Sav. Bank*, 123 Iowa 640.

*Louisiana.* — *Brian v. Bonvillain*, 111 La. 441.

*Massachusetts.* — *National Granite Bank v. Tyndale*, 176 Mass. 547; *Westlake v. Dunn*, 184 Mass. 260, 100 Am. St. Rep. 557.

*Missouri.* — *Shields v. McClure*, 75 Mo. App. 631; *Foley v. Boulware*, 86 Mo. App. 674; *Mexico First Nat. Bank v. Ragsdale*, 171 Mo. 168; *Harrison v. McReynolds*, 183 Mo. 533.

*Nebraska.* — *Arlington Mill, etc., Co. v. Jates*, 57 Neb. 286.

*New Hampshire.* — *Rice v. Connelly*, 71 N. H. 382.

*New Jersey.* — *Central R. Co. v. MacCartney*, 68 N. J. L. 165.

*New York.* — *Ackerman v. True*, 71 N. Y. App. Div. 143, reversed 175 N. Y. 353.

*South Dakota.* — *State v. Mellette*, 16 S. Dak. 297.

*Texas.* — *Workman's Mut. Aid Assoc. v. Monroe*, (Tex. Civ. App. 1899) 53 S. W. Rep. 1029.

*Utah.* — *Centennial Eureka Min. Co. v. Juab County*, 22 Utah 395; *Allen v. Fitzgerald*, 23 Utah 597.

*West Virginia.* — *Atkinson v. Plum*, 50 W. Va. 104, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 431; *Cautley v. Morgan*, 51 W. Va. 304, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 421-432.

*Wyoming.* — *Hogan v. Peterson*, 8 Wyo. 549.

**Facts Represented Must Be Material.** — *Western Land Assoc. v. Banks*, 80 Minn. 317.

**425. 1. Statements of Opinion Inoperative by Way of Estoppel.** — *Schoonover v. Osborne*, 117 Iowa 427; *Skavdale v. Moyer*, 21 Wash. 10.

**2. Statements of Law Inoperative by Way of Estoppel.** — *Ward v. Ward*, 131 Fed. Rep. 946; *Marsh v. Bridgeport*, 75 Conn. 495.

**Actions Based on a Mistake of Law Will Not Work an Estoppel** where the facts are within the knowledge of both parties. *Smith v. Sprague*, 119 Mich. 148, 75 Am. St. Rep. 384.

**4. Representations De Futuro Do Not Generally Raise Estoppel.** — *Whitechurch v. Cavanagh*, (1902) A. C. 117, 71 L. J. K. B. 400, 85 L. T. N. S. 349; *Marsh v. Bridgeport*, 75 Conn. 495; *Cornelius v. Farmers Ins. Co.*, 113 Iowa 183, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 424; *Vick v. Vick*, 126 N. Car. 123; *Lucas v. Johnson*, (Tex. Civ. App. 1901) 64 S. W. Rep. 823; *Elliot v. Whitmore*, 23 Utah 342, 90 Am. St. Rep. 700. See also *Hare v. Murphy*, 60 Neb. 135. But see *Johnson v. Blair*, 132 Ala. 128.

*Compare The M. F. Parker*, 88 Fed. Rep. 853, wherein one making repairs on a ship was held estopped to claim more than his estimate in reliance on which the ship was purchased.

**426. 1. Operation of Promise to Abandon Existing Right.** — *The New York Central No. 19*, 127 Fed. Rep. 473; *Conley v. Johnson*, 69 Ark. 513, 86 Am. St. Rep. 209; *Bradley v. Appanoose County*, 106 Iowa 105; *Gartland v. Connor*, (Ky. 1900) 59 S. W. Rep. 29; *Mish v. Lechlinder*, 89 Md. 275; *Barnard v. Patterson*, (Mich. 1904) 100 N. W. Rep. 893; *Larch Mountain Invest Co. v. Garbade*, 41 Oregon 123; *Gilbert v. Richardson*, (Tenn. Ch. 1898) 51 S. W. Rep. 134; *Elliot v. Whitmore*, 23 Utah 342, 90 Am. St. Rep. 700.

**The Abandonment of a Right May Be Inferred from the Conduct of the party estopped.** *Goldman v. Brinton*, 90 Md. 259.

**Agreement to Postpone Payment of Debt.** — Where a mortgagee consented to extend for a year the time of payment of an instalment due on the mortgage, and in reliance thereon the mortgagor applied the money to another purpose, it was held that the mortgagee could not before the expiration of the year bring a foreclosure suit without first making demand for the instalment. *Goldman v. Ehrenreich*, (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 433.

**2. Representations Induced by Fraud of Other Party Inoperative.** — *Dangerfield v. Atchison, etc., R. Co.*, 62 Kan. 85; *Rabb v. Pillot*, 52 La. Ann. 1534; *Dunn v. National Bank*, 15 S. Dak. 454.

**Good Faith** on the part of one seeking to establish an estoppel is essential. *Adams v. Ashman*, 203 Pa. St. 536.

**3. Schoolcraft v. Simpson**, 123 Mich. 215.

**427. 6. Silence or Concealment of Facts as Substitute for Misrepresentation — England.** — *In re Lewis*, (1904) 2 Ch. 656, 73 L. J. Ch. 748, 91 L. T. N. S. 242.

*Canada.* — *Dominion Bank v. Ewing*, 7 Ont. L. Rep. 90, affirmed 35 Can. Sup. Ct. 133, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 427, 428.

*United States.* — *Times-Republican Printing Co. v. Given*, 106 Fed. Rep. 253, affirmed (C. C. A.) 114 Fed. Rep. 92; *Commercial Nat. Bank v. Nacogdoches Compress, etc., Co.*, (C. C. A.) 133 Fed. Rep. 501.

*Alabama.* — *Glasser v. Meyrovitz*, 119 Ala. 152; *Thornton v. Savage*, 120 Ala. 449.

*Arizona.* — *Wiser v. Lawler*, (Ariz. 1900) 62 Pac. Rep. 695.

*California.* — *Newhall v. Hatch*, 134 Cal. 269.

*Connecticut.* — *Coburn v. Raymond*, 76 Conn. 484.

*Georgia.* — *Perkins Lumber Co. v. Thomas*, 117 Ga. 441.

*Illinois.* — *Vail v. Northwestern Mut. L. Ins. Co.*, 102 Ill. 567.

*Indiana.* — *Kuriger v. Joest*, 22 Ind. App. 633; *Farmers' Bank v. Orr*, (Ind. App. 1899) 55 N. E. Rep. 35; *Pritchett v. Ahrens*, 26 Ind. App.

**428.** See note 1.

*bb.* OMISSION TO ASSERT RIGHT — (*aa*) *General Principles.* — See note 3.

**429.** (*bb*) *Owner Permitting Sale of Personality by Third Person.* — See note 2.

56, 84 Am. St. Rep. 274; *Roach v. Clark*, 28 Ind. App. 250.

*Kentucky.* — *Clinton v. Franklin*, (Ky. 1904) 83 S. W. Rep. 142.

*Louisiana.* — *Hibernia Nat. Bank v. Sarah Planting, etc., Co.*, 107 La. 650, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 427; *Ledoux v. Lavedan*, 52 La. Ann. 311.

*Maine.* — *Bonney v. Greenwood*, 96 Me. 335.

*Minnesota.* — *Barchent v. Selleck*, 89 Minn. 513.

*Missouri.* — *Curtis v. Moore*, 162 Mo. 442; *Bright v. Miller*, 95 Mo. App. 270.

*Montana.* — *Smith v. Caldwell*, 22 Mont. 331.

*Nebraska.* — *Smith v. White*, 62 Neb. 56; *McGinley v. Brechtel*, (Neb. 1903) 95 N. W. Rep. 32.

*New Jersey.* — *Borden v. Hutchinson*, (N. J. 1901) 49 Atl. Rep. 1088; *Wolfinger v. McFarland*, (N. J. 1903) 54 Atl. Rep. 862.

*New York.* — *House v. Brilliant*, (Supm. Ct. App. T.) 46 Misc. (N. Y.) 432.

*North Dakota.* — *McDonald v. Beatty*, 10 N. Dak. 511.

*Ohio.* — *Insurance Co. of North America v. Miller*, 24 Ohio Cir. Ct. 667.

*Pennsylvania.* — *Paine v. Monongahela Nat. Bank*, 194 Pa. St. 403; *Paul v. Kunz*, 188 Pa. St. 504.

*Rhode Island.* — *Hunt v. Reilly*, 24 R. I. 68, 96 Am. St. Rep. 707, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 427.

*South Carolina.* — *Duncan v. Richardson*, 64 S. Car. 301.

*Texas.* — *Stanger v. Dorsey*, 22 Tex. Civ. App. 573; *Waggoner v. Dodson*, 96 Tex. 415.

*Utah.* — *Kimball v. Salisbury*, 19 Utah 161; *Pyper v. Salt Lake Amusement Assoc.*, 20 Utah 9; *Murphy v. Ganey*, 23 Utah 633.

*Virginia.* — *Kelly v. Fairmount Land Co.*, 97 Va. 227.

*West Virginia.* — *Cautley v. Morgan*, 51 W. Va. 304, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 421-432; *Pocahontas Light, etc., Co. v. Browning*, 53 W. Va. 436.

*Wisconsin.* — *Priewe v. Wisconsin State Land, etc., Co.*, 103 Wis. 537, 74 Am. St. Rep. 904.

**Acquiescence in Lease of Land.** — A part owner of property acquiescing in the lease thereof by another part owner cannot question the validity of the lease. *Willis v. McKinnon*, (Supm. Ct. Tr. T.) 37 Misc. (N. Y.) 386, modified and affirmed 79 N. Y. App. Div. 249.

**428.** 1. *Harris v. American Bldg., etc., Assoc.*, 122 Ala. 545; *Clark v. Kirby*, 18 Utah 258; *Radant v. Werheim Mfg. Co.*, 106 Wis. 600.

**3. Omission to Assert Right as Cause of Estoppel** — *Arizona.* — *Biggs v. Utah Irrigating Ditch Co.*, (Ariz. 1901) 64 Pac. Rep. 494.

*California.* — *Crescent Canal Co. v. Montgomery*, 143 Cal. 248.

*Indiana.* — *Indiana R. Co. v. Morgan*, 162 Ind. 331.

*Michigan.* — *Great Hive, etc., v. Supreme Hive, etc.*, 135 Mich. 392; *Pittsburgh, etc., Iron Co. v. Lake Superior Iron Co.*, 118 Mich. 109.

*New Jersey.* — *Knight v. Hallinger*, 58 N. J. Eq. 223.

*Pennsylvania.* — *In re Vacation of Melon Street*, 192 Pa. St. 331; *Redmond v. Excelsior Sav. Fund, etc., Assoc.*, 194 Pa. St. 643, 75 Am. St. Rep. 714.

*Utah.* — *Morrison v. Winn*, 17 Utah 484.

*West Virginia.* — *Despard v. Despard*, 53 W. Va. 443.

**Occupation and Improvement of Lands under Mistaken Claim of Ownership.** — *Hendrix v. Southern R. Co.*, 130 Ala. 205, 89 Am. St. Rep. 27; *Pacific Imp. Co. v. Carriger*, 136 Cal. xix, 68 Pac. Rep. 315; *Baillarge v. Clark*, 145 Cal. 589, 104 Am. St. Rep. 75; *Schafer v. Wilson*, 113 Iowa 475; *Iowa R. Land Co. v. Fehring*, 126 Iowa 1; *Lydick v. Gill*, (Neb. 1903) 94 N. W. Rep. 109; *Wampol v. Kountz*, 14 S. Dak. 334, 86 Am. St. Rep. 765; *Murphy v. Dafoe*, (S. Dak. 1904) 99 N. W. Rep. 86; *Lowther Oil Co. v. Miller-Sibley Oil Co.*, 53 W. Va. 501, 97 Am. St. Rep. 1027.

**Improvements on Property by Municipal Corporation.** — *First German Reformed Church v. Summit County*, 23 Ohio Cir. Ct. 553.

**By Long Acquiescence** in allowing private individuals to build and maintain wharves on its property, taxing and regulating them, a city is estopped to assert any claim to such lands which will destroy rights acquired therein. *Sullivan Timber Co. v. Mobile*, 110 Fed. Rep. 186, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 428, 429.

**Improvements under Invalid Statute — No Estoppel.** — One seeking to acquire title to land by improving it in accordance with a statute which had been declared invalid cannot claim an estoppel preventing one injured by such action from enjoining further prosecution of the work. *Priewe v. Wisconsin State Land, etc., Co.*, 103 Wis. 537, 74 Am. St. Rep. 904.

**Lien Acquired on Property Apparently Belonging to Another.** — A debtor who allows his creditor to secure a lien on property belonging to the debtor but which the creditor believes belongs to the debtor's father, whom he regards as responsible for the debt, is estopped from asserting the true fact of ownership. *Radant v. Werheim Mfg. Co.*, 106 Wis. 600.

**Lessor Failing to Make Known Forfeiture of Lease.** — A lessor failing to notify one supplying material for improvements to a lessee that such improvements would accrue to him because of forfeiture of the lease cannot rely on such forfeiture and defeat liens filed on the property. *Bell v. Groves*, 20 Wash. 602.

**Infringement of Right Not Apparent.** — Where a party has no reason to suppose that the act of another will infringe on his rights, he is not estopped by failure to protest against such act. *Carson v. Hayes*, 39 Oregon 97.

**429.** 2. **Permitting Sale of One's Own Property by Third Person.** — *Pease v. Dawson*, 197 Ill. 340, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 429; *Delfosse v. Metropolitan Nat. Bank*, 98 Ill. App. 123; *McAllister v. Stump, etc., Co.*, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.)



**430.** (cc) *Owner Permitting Conveyance of Realty by Third Person.* — See note 1.

(dd) *Owner Permitting Person to Give Credit on Faith of Ownership in Debtor.* —

See note 3.

**431.** (3) *The Intent or Design.* — See notes 1, 2.

438. See also *Rex v. Callaghan*, 8 Can. Crim. Cas. (Ont.) 143, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 429-431.

**Failure to Object to a Sheriff's Sale of Goods** seized on execution against another will estop the owner from making claim thereto. *Stephens v. Head*, 119 Ala. 511.

**Permitting Sale of Realty.** — A creditor standing by during the sale of his debtor's property and failing to make known his claim thereto will be estopped thereafter from asserting such claim. *Brady v. Carteret Realty Co.*, 66 N. J. Eq. 243.

**Assertion of Ownership Unknown to Real Owner.** — But where the declaration of one in possession of property that he is the owner thereof, is unknown to the real owner, the latter will not be estopped to assert his ownership as against an attaching creditor of the one in possession. *Wright v. Tanner*, 92 Minn. 94.

**430. 1. Effect of Owner Permitting Conveyance of Realty by Third Person** — *Georgia.* — *Berg v. Baer*, 104 Ga. 587.

*Kentucky.* — See *Fields v. Napier*, (Ky. 1904) 80 S. W. Rep. 1110.

*Louisiana.* — *Hibernia Nat. Bank v. Sarah Planting, etc., Co.*, 107 La. 650, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 430; *Kimbro v. Sarah Planting, etc., Co.*, 52 La. Ann. 1556..

*Missouri.* — *Manning v. Kansas, etc., Coal Co.*, 181 Mo. 359.

*New York.* — *Whitlock v. Gould*, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 521, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 430, affirmed 53 N. Y. App. Div. 637.

*South Dakota.* — See *Persons v. Van Tassal*, 15 S. Dak. 362.

*Tennessee.* — *Tennessee Coal, etc., Co. v. McDowell*, 100 Tenn. 565; *Nixon v. Russell*, (Tenn. Ch. 1901) 64 S. W. Rep. 297.

**Where a Person Who Holds a Contract of Purchase.** — *Wadge v. Kittleson*, 12 N. Dak. 452, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 429.

**A Lienor failing to inform the purchaser of the land charged of his claim cannot thereafter assert the same** *Dewey v. Goodman*, 107 Tenn. 244.

**3. Permitting Person to Give Credit on Faith of Ownership in Debtor.** — *Hauk v. Van Ingen*, 97 Ill. App. 642, affirmed 196 Ill. 20; *Smith v. Willard*, 174 Ill. 538, 66 Am. St. Rep. 313; *Steel v. Fitz Henry*, 78 Ill. App. 400; *Rieschick v. Klingelhoefner*, 91 Mo. App. 430; *Allen v. Exchange Nat. Bank*, 21 Tex. Civ. App. 450. See also *Rex v. Callaghan*, 8 Can. Crim. Cas. (Ont.) 143, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 429-431.

**An Equitable Owner of property permitting the holder of the legal title to execute a mortgage thereon without notifying the mortgagee cannot dispute the validity thereof.** *Atlanta Nat. Bldg., etc., Assoc. v. Gilmer*, 128 Fed. Rep. 203.

**An Incumbrancer Failing to Disclose His Claim on property on which another is about to make a loan will thereafter be estopped from assert-**

ing the same. *Harris v. American Bldg., etc., Assoc.*, 122 Ala. 545; *Ashurst v. Ashurst*, 119 Ala. 219.

**431. 1. Intent** — *United States.* — *Modern Woodmen of America v. Union Nat. Bank*, (C. C. A.) 108 Fed. Rep. 753; *Columbus, etc., R. Co.'s Appeal*, (C. C. A.) 109 Fed. Rep. 177.

*Arizona.* — *Wiser v. Lawler*, (Ariz. 1900) 62 Pac. Rep. 695.

*Florida.* — *Booth v. Lenox*, (Fla. 1903) 34 So. Rep. 566.

*Indiana.* — *Kuriger v. Joest*, 22 Ind. App. 633; *Farmers' Bank v. Orr*, (Ind. App. 1899) 55 N. E. Rep. 35. See also *Hammond v. Evans*, 23 Ind. App. 501.

*Indian Territory.* — *Robinson v. Nail*, 2 Indian Ter. 509.

*Iowa.* — *Iowa R. Land Co. v. Fehring*, 126 Iowa 1.

*Louisiana.* — *Hibernia Nat. Bank v. Sarah Planting, etc., Co.*, 107 La. 650, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 431.

*Missouri.* — *Bright v. Miller*, 95 Mo. App. 270; *Shields v. McClure*, 75 Mo. App. 631.

*Montana.* — *Sweetman v. Ramsey*, 22 Mont. 323.

*Nebraska.* — *Laing v. Evans*, 64 Neb. 454.

*North Dakota.* — *Gjerstadengen v. Hartzell*, 9 N. Dak. 268, 81 Am. St. Rep. 575.

*Ohio.* — *Welty v. Vulgamore*, 24 Ohio Cir. Ct. 572.

*Utah.* — *Norton v. Tufts*, 19 Utah 470; *Centennial Eureka Min. Co. v. Juab County*, 22 Utah 395.

*West Virginia.* — *Cautley v. Morgan*, 51 W. Va. 304, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 421-432; *Atkinson v. Plum*, 50 W. Va. 104, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 431; *Pocahontas Light, etc., Co. v. Browning*, 53 W. Va. 436.

*Wisconsin.* — *Loizeaux v. Fremder*, 123 Wis. 193.

*Wyoming.* — *Hogan v. Peterson*, 8 Wyo. 549.

**A Mere Casual Statement made in the course of conversation, there being no ground for supposing another will act thereon, will not work an estoppel.** *Kirchman v. Standard Coal Co.*, 112 Iowa 668; *Near v. Green*, 113 Iowa 647.

**2. Actual Intention to Mislead Not Necessary** — *California.* — *Newhall v. Hatch*, 134 Cal. 269.

*Kentucky.* — *Davidson v. Kelley*, (Ky. 1901) 64 S. W. Rep. 623.

*Missouri.* — *Williams v. Verity*, 98 Mo. App. 654.

*Nebraska.* — *Lydick v. Gill*, (Neb. 1903) 94 N. W. Rep. 109.

*New Jersey.* — *Central R. Co. v. MacCartney*, 68 N. J. L. 165.

*Texas.* — *Ward v. Cameron*, (Tex. Civ. App. 1903) 76 S. W. Rep. 240.

*Wisconsin.* — *Two Rivers Mfg. Co. v. Day*, 102 Wis. 328.

*Canada.* — *Ross v. Sutherland*, 32 Nova Scotia 243.

**Representations to Disinterested Person.** — Rep-

**432.** Thus Negligence — See note 1.

**433.** Application of Rule to Estoppel by Silence. — See note 1.

(4) *Knowledge of Facts by Party to Be Estopped* — (a) In General. —

See notes 2, 3.

**434.** See note 1.

(b) *Distinction Between Silence and Positive Act of Party to Be Estopped.* — See notes 2, 5.

(5) *Knowledge of Facts by Person Setting Up Estoppel* — (a) In General. — See note 6.

representations made to one who is justifiably supposed not to be interested in the subject-matter and who would not act thereon will not work an estoppel. *Rock Island Plow Co. v. Maynard Sav. Bank*, 123 Iowa 640.

**432. 1. Negligence as Substitute for Intention.** — *Nickerson v. Massachusetts Title Ins. Co.*, 178 Mass. 308; *Russell v. American Bell Telephone Co.*, 180 Mass. 467; *Gjerstadengen v. Hartzell*, 9 N. Dak. 268, 81 Am. St. Rep. 575; *Two Rivers Mfg. Co. v. Day*, 102 Wis. 328.

**433. 1. Estoppel by Silence — Silence Intentional or Negligent.** — *Rimmer v. Webster*, (1902) 2 Ch. 163, 71 L. J. Ch. 561, 86 L. T. N. S. 491, 50 W. R. 517; *Lower Latham Ditch Co. v. Loudon Irrigating Canal Co.*, 27 Colo. 267, 83 Am. St. Rep. 80; *Roach v. Clark*, 28 Ind. App. 250; *Hunt v. Reilly*, 24 R. I. 68, 96 Am. St. Rep. 707; *Norton v. Tufts*, 19 Utah 470.

**2. Knowledge of Facts on Part of Person to Be Estopped — California.** — *Faubel v. McFarland*, 144 Cal. 717.

*Colorado.* — *Lower Latham Ditch Co. v. Loudon Irrigating Canal Co.*, 27 Colo. 267, 83 Am. St. Rep. 80; *Davis v. Bower*, 29 Colo. 422.

*Indiana.* — *Huffman v. State*, 21 Ind. App. 449, 69 Am. St. Rep. 368; *Kuriger v. Joest*, 22 Ind. App. 633; *Farmers' Bank v. Orr*, (Ind. App. 1899) 55 N. E. Rep. 35; *Hammond v. Evans*, 23 Ind. App. 501; *Weston Paper Co. v. Pope*, 155 Ind. 394; *Silver v. Indiana State Board of Education*, (Ind. App. 1904) 72 N. E. Rep. 829.

*Indian Territory.* — *Robinson v. Nail*, 2 Indian Ter. 509.

*Iowa.* — *Baldwin v. German Ins. Co.*, 113 Iowa 314, 86 Am. St. Rep. 375; *Gill v. Patton*, 118 Iowa 88.

*Kansas.* — *Dangerfield v. Atchison*, etc., R. Co., 62 Kan. 85.

*Kentucky.* — *Milby v. Akridge*, (Ky. 1900) 59 S. W. Rep. 18; *Watson v. Prather*, (Ky. 1900) 65 S. W. Rep. 439; *Reid v. Benge*, 112 Ky. 810, 99 Am. St. Rep. 334; *Wyeth v. Renz-Bowles Co.*, (Ky. 1902) 66 S. W. Rep. 825.

*Louisiana.* — *Landry v. Landry*, 105 La. 362.

*Massachusetts.* — *Commercial Nat. Bank v. Bemis*, 177 Mass. 95.

*Missouri.* — *Smith v. Dowling*, 85 Mo. App. 514; *Shields v. McClure*, 75 Mo. App. 631; *Bright v. Miller*, 95 Mo. App. 270.

*Nebraska.* — *Smith v. White*, 62 Neb. 56; *Decker v. Decker*, 64 Neb. 239.

*New Jersey.* — *Stanwood v. Beck*, (N. J. 1902) 52 Atl. Rep. 353; *In re Bayley*, (N. J. 1904) 59 Atl. Rep. 215.

*New York.* — *Mulrein v. Weisbecker*, 37 N. Y. App. Div. 545; *Bryant v. Allen*, 54 N. Y. App. Div. 500; *General Contracting Co. v. Jones*, 61 N. Y. App. Div. 548.

*North Carolina.* — *Rawls v. White*, 127 N. Car. 17.

*North Dakota.* — *Gjerstadengen v. Hartzell*, 9 N. Dak. 268, 81 Am. St. Rep. 575.

*Pennsylvania.* — *Enterprise Transit Co. v. Hazelwood Oil Co.*, 20 Pa. Super. Ct. 127.

*Tennessee.* — *Lee v. Calvert*, (Tenn. Ch. 1900) 57 S. W. Rep. 627; *Parkey v. Ramsey*, 111 Tenn. 302.

*Utah.* — *Norton v. Tufts*, 19 Utah 470.

*Vermont.* — *Drouin v. Boston*, etc., R. Co., 74 Vt. 343.

*Virginia.* — *Chesapeake*, etc., R. Co. v. Walker, 100 Va. 69, quoting 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 433, 434.

*West Virginia.* — *Pocahontas Light*, etc., Co. v. Browning, 53 W. Va. 436.

*Wisconsin.* — *Two Rivers Mfg. Co. v. Day*, 102 Wis. 328.

**3. Effect of Ignorance of Party to Be Estopped Resulting from Gross Negligence — Illinois.** — *Smith v. Willard*, 174 Ill. 538, 66 Am. St. Rep. 313; *Richards v. Cline*, 176 Ill. 431.

*Iowa.* — *Schafer v. Wilson*, 113 Iowa 475.

*Kentucky.* — *Tichenor v. Owensboro Sav. Bank*, etc., Co., 113 Ky. 275.

*Minnesota.* — *Olson v. Fish*, 75 Minn. 228.

*New Jersey.* — *Central R. Co. v. Mac Cartney*, 68 N. J. L. 165.

*Pennsylvania.* — *Girard F. & M. Ins. Co. v. Canan*, 195 Pa. St. 589, quoting 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 433.

*Virginia.* — *Chesapeake*, etc., R. Co. v. Walker, 100 Va. 69, quoting 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 433, 434.

*Wisconsin.* — *Two Rivers Mfg. Co. v. Day*, 102 Wis. 328.

**434. 1. Party to Be Estopped Consciously Ignorant of Facts at Time of Professing Full Knowledge.** — *Chesapeake*, etc., R. Co. v. Walker, 100 Va. 69, quoting 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 433, 434.

**2. Silence Without Knowledge of Right, Inoperative by Way of Estoppel.** — *Thomas v. Romano*, 82 Miss. 256; *Chambers v. Bookman*, 67 S. Car. 432, quoting 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 434, notes 2-5; *Chesapeake*, etc., R. Co. v. Walker, 100 Va. 69, quoting 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 434, notes 2-5.

**5. Encouraging Another to Purchase Land in Ignorance of Title.** — *Bloch v. Sammons*, 37 Oregon 602, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 434; *Chambers v. Bookman*, 67 S. Car. 432, quoting 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 434; *Polk v. Gunther*, 107 Tenn. 16; *Chesapeake*, etc., R. Co. v. Walker, 100 Va. 69, quoting 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 434.

**6. Knowledge of Facts by Person Setting Up**

**435.** (b) Knowledge Implied from Occupancy of Land. — See note 1.

**436.** (c) Record as Notice of Title. — See notes 1, 4.

(6) Reliance upon Act or Representation. — See note 5.

**Estoppel** — *United States*. — *Columbus, etc., R. Co.'s Appeal*, (C. C. A.) 109 Fed. Rep. 177; *Davis v. Pryor*, (C. C. A.) 112 Fed. Rep. 274; *Ft. Scott v. W. G. Eads Brokerage Co.*, (C. C. A.) 117 Fed. Rep. 51.

*Arizona*. — *Wiser v. Lawler*, (Ariz. 1900) 62 Pac. Rep. 695.

*Colorado*. — *Lower Latham Ditch Co. v. Loudon Irrigating Canal Co.*, 27 Colo. 267, 83 Am. St. Rep. 80.

*Georgia*. — *Johnson v. Thomason*, 120 Ga. 531, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 434; *Equitable Mortg. Co. v. Butler*, 105 Ga. 555.

*Illinois*. — *Gallagher v. Northrup*, 215 Ill. 569, quoting 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 434; *Siegel v. Colby*, 176 Ill. 210; *Snyder v. Mt. Pulaski*, 176 Ill. 397; *Vail v. Northwestern Mut. L. Ins. Co.*, 192 Ill. 567; *McDonald v. Stark*, 176 Ill. 456.

*Indiana*. — *Kuriger v. Joest*, 22 Ind. App. 633; *Farmers' Bank v. Orr*, (Ind. App. 1899) 55 N. E. Rep. 35; *Silver v. Indiana State Board of Education*, (Ind. App. 1904) 72 N. E. Rep. 829. See also *Underwood v. Deckard*, 34 Ind. App. 198.

*Iowa*. — *Schoonover v. Osborne*, 117 Iowa 427.

*Kansas*. — *Farm Land Mortg., etc., Co. v. Hopkins*, 63 Kan. 678, quoting 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 434; *Gray v. Zellmer*, 66 Kan. 514.

*Kentucky*. — *McLaughlin v. Board of Education*, (Ky. 1904) 83 S. W. Rep. 568.

*Louisiana*. — *Sicard v. Schwab*, 112 La. 475, quoting 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 434; *Brian v. Bonvillain*, 111 La. 441.

*Massachusetts*. — See *National Granite Bank v. Tyndale*, 176 Mass. 547.

*Michigan*. — *Smith v. Sprague*, 119 Mich. 148, 75 Am. St. Rep. 384.

*Minnesota*. — *Western Land Assoc. v. Banks*, 80 Minn. 317; *Theobald v. Hopkins*, 93 Minn. 253.

*Mississippi*. — *Thomas v. Romano*, 82 Miss. 256, quoting 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 434; *Millsaps v. Shotwell*, 76 Miss. 923.

*Missouri*. — *Miller v. St. Louis, etc., R. Co.*, 162 Mo. 424, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 434; *St. Louis Safe Deposit, etc., Bank v. Kennett*, 101 Mo. App. 370; *Spence v. Renfro*, 179 Mo. 417; *Shields v. McClure*, 75 Mo. App. 631.

*Nebraska*. — *Moise v. Krug*, (Neb. 1904) 99 N. W. Rep. 816.

*New Jersey*. — *Central R. Co. v. Mac Cartney*, 68 N. J. L. 165.

*New York*. — *Ackerman v. True*, 71 N. Y. App. Div. 143, reversed 175 N. Y. 353.

*North Dakota*. — *Gjerstadengen v. Van Duzen*, 7 N. Dak. 612; *Gjerstadengen v. Hartzell*, 9 N. Dak. 268, 81 Am. St. Rep. 575.

*Pennsylvania*. — *Bright v. Allan*, 203 Pa. St. 394, 93 Am. St. Rep. 769; *Adams v. Ashman*, 203 Pa. St. 536.

*South Dakota*. — *State v. Mellette*, 16 S. Dak. 297.

*Tennessee*. — *Crabtree v. Winchester Bank*, 108 Tenn. 483.

*Texas*. — *Cartmell v. Chambers*, (Tex. Civ. App. 1899) 54 S. W. Rep. 362; *Gulf, etc., R. Co. v. Fenn*, 33 Tex. Civ. App. 352.

*Utah*. — *Centennial Eureka Min. Co. v. Juab County*, 22 Utah 395; *Hiskey v. Pacific States Sav., etc., Co.*, 27 Utah 409.

*Virginia*. — *Chesapeake, etc., R. Co. v. Walker*, 100 Va. 69, quoting 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 433, 434.

*West Virginia*. — *Aikinson v. Plum*, 50 W. Va. 104, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 434; *Pocahontas Light, etc., Co. v. Browning*, 53 W. Va. 436.

**435. 1. Knowledge Implied from Occupancy of Land by Person to Be Estopped.** — *Western Land Assoc. v. Banks*, 80 Minn. 317; *Lehman v. Murtoft*, 7 Pa. Super. Ct. 485.

**436. 1. Record as Notice of Title in Favor of Person Silent as to Title** — *United States*. — *Bump v. Butler County*, 93 Fed. Rep. 290.

*California*. — *Faubel v. McFarland*, 144 Cal. 717.

*Florida*. — *Price v. Stratton*, (Fla. 1903) 33 So. Rep. 644.

*Minnesota*. — *Western Land Assoc. v. Banks*, 80 Minn. 317; *Sanborn v. Van Dwyne*, 90 Minn. 215.

*Missouri*. — *Spence v. Renfro*, 179 Mo. 417; *Harrison v. McReynolds*, 183 Mo. 533.

*New Hampshire*. — *Quimby v. Williams*, 67 N. H. 489, 68 Am. St. Rep. 689.

*New York*. — *Driscoll v. Brooklyn Union El. R. Co.*, (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 120.

*Vermont*. — *Drouin v. Boston, etc., R. Co.*, 74 Vt. 343.

*West Virginia*. — *Cautley v. Morgan*, 51 W. Va. 304, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 435.

**4. Record Inoperative as Notice in Favor of Person Making Positive Misrepresentation.** — *Brice v. Sheffield*, 121 Ga. 216; *Spence v. Renfro*, 179 Mo. 417; *Borden v. Hutchinson*, (N. J. 1901) 49 Atl. Rep. 1088; *Helms v. Helms*, 135 N. Car. 164; *Two Rivers Mfg. Co. v. Day*, 102 Wis. 328. But see *Parkey v. Ramsey*, 111 Tenn. 302.

**5. Reliance upon Act or Representation Necessary** — *England*. — *Porter v. Moore*, (1904) 2 Ch. 367, 73 L. J. Ch. 729, 91 L. T. N. S. 484; *Bell v. Marsh*, (1903) 1 Ch. 528, 72 L. J. Ch. 360, 88 L. T. N. S. 605.

*United States*. — *Balfour v. Hopkins*, (C. C. A.) 93 Fed. Rep. 564; *Davis v. Pryor*, (C. C. A.) 112 Fed. Rep. 274; *Given v. Times-Republican Printing Co.*, (C. C. A.) 114 Fed. Rep. 92.

*California*. — *Newhall v. Hatch*, 134 Cal. 269; *Conway v. Supreme Council, etc.*, 137 Cal. 384; *Faubel v. McFarland*, 144 Cal. 717.

*Colorado*. — *Strahl v. Smith*, 30 Colo. 392.

*Florida*. — *Booth v. Lenox*, (Fla. 1903) 34 So. Rep. 566.

*Georgia*. — *Johnson v. Thomason*, 120 Ga. 531.

*Illinois*. — *Walls v. Ritter*, 180 Ill. 616; *Siegel v. Colby*, 176 Ill. 210; *Davis v. McCullough*, 192



**438.** See notes 1, 2.

- Ill. 277; *Richolson v. Moloney*, 195 Ill. 575; *Merriman v. Schmitt*, 211 Ill. 263; *Bruner v. Campbell*, 90 Ill. App. 632; *Schmitt v. Merriman*, 101 Ill. App. 443, *affirmed* 211 Ill. 263.
- Indiana*. — *Farmers' Bank v. Orr*, (Ind. App. 1899) 55 N. E. Rep. 35; *Underwood v. Deckard*, 34 Ind. App. 198.
- Indian Territory*. — *Robinson v. Nail*, 2 Indian Ter. 509.
- Iowa*. — *Fischer v. Johnson*, 106 Iowa 181; *Everson v. Sinclair*, 110 Iowa 135; *Kirchman v. Standard Coal Co.*, 112 Iowa 668; *Goodwin v. Goodwin*, 113 Iowa 319; *Sawyer v. Biggart*, 114 Iowa 489; *Brown v. Lambe*, 119 Iowa 404; *Winegardner v. Equitable Loan Co.*, 120 Iowa 485.
- Kansas*. — *King v. Mead*, 60 Kan. 539; *Medill v. Snyder*, 61 Kan. 15, 78 Am. St. Rep. 307; *Leavenworth Light, etc., Co. v. Waller*, 65 Kan. 514; *Hagerty v. Goodlad*, (Kan. 1905) 79 Pac. Rep. 664.
- Kentucky*. — *Watson v. Prather*, (Ky. 1901) 65 S. W. Rep. 439; *Water Supply Co. v. Georgetown*, (Ky. 1904) 81 S. W. Rep. 660; *McLaughlin v. Board of Education*, (Ky. 1904) 83 S. W. Rep. 568.
- Louisiana*. — *Rabb v. Pillot*, 52 La. Ann. 1534; *Brian v. Bonvillain*, 111 La. 441; *Sicard v. Schwab*, 112 La. 475.
- Maine*. — *Goodwin v. Norton*, 92 Me. 532.
- Michigan*. — *Church v. Case*, 122 Mich. 554; *Dallavo v. Richardson*, 134 Mich. 226.
- Minnesota*. — *Bates v. A. E. Johnson Co.*, 79 Minn. 354; *Theobald v. Hopkins*, 93 Minn. 253.
- Missouri*. — *Shields v. McClure*, 75 Mo. App. 631; *State v. O'Neil Lumber Co.*, 77 Mo. App. 538; *Smith v. Dowling*, 85 Mo. App. 514; *Mexico First Nat. Bank v. Ragsdale*, 171 Mo. 168; *St. Louis Safe Deposit, etc., Bank v. Kenneff*, 101 Mo. App. 370; *Citizens' Bank v. Burrus*, 178 Mo. 716; *Harrison v. McReynolds*, 183 Mo. 533.
- Montana*. — *Sweetman v. Ramsey*, 22 Mont. 323; *Smith v. Caldwell*, 22 Mont. 331.
- Nebraska*. — *Union State Bank v. Hutton*, 62 Neb. 664, *citing* 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 436; *Oak Creek Valley Bank v. Helmer*, 59 Neb. 176; *Smith v. White*, 62 Neb. 56; *Decker v. Decker*, 64 Neb. 239; *Columbus State Bank v. Carrig*, (Neb. 1902) 92 N. W. Rep. 324.
- New Hampshire*. — *Thompson v. Currier*, 70 N. H. 259.
- New Jersey*. — *Oram v. New Brunswick*, 64 N. J. L. 19; *McCormick v. Stephany*, 61 N. J. Eq. 208; *Mills v. Kelley*, 62 N. J. Eq. 213; *Hollins v. American Union Electric Co.*, (N. J. 1903) 56 Atl. Rep. 1041.
- New York*. — *Whitlock v. Gould*, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 521, *affirmed* 53 N. Y. App. Div. 637.
- North Carolina*. — *Faison v. Grandy*, 128 N. Car. 438, 83 Am. St. Rep. 693.
- North Dakota*. — *Gjerstadengen v. Hartzell*, 9 N. Dak. 268, 81 Am. St. Rep. 575.
- Ohio*. — *Welty v. Vulgamore*, 24 Ohio Cir. Ct. 572.
- Pennsylvania*. — *Atkins v. Payne*, 200 Pa. St. 557; *Williamsport v. Williamsport Pass. R. Co.*, 203 Pa. St. 1; *Harrington v. Stevenson*, 210 Pa. St. 10; *Beech v. Kuder*, 15 Pa. Super. Ct. 89.
- Rhode Island*. — *Hunt v. Reilly*, 24 R. I. 68, 96 Am. St. Rep. 707.
- South Dakota*. — *State v. Mellette*, 16 S. Dak. 297.
- Tennessee*. — *Furnish v. Burge*, (Tenn. Ch. 1899) 54 S. W. Rep. 90; *Parkey v. Ramsey*, 111 Tenn. 302.
- Texas*. — *Oliver v. Collins*, 20 Tex. Civ. App. 385; *Stanger v. Dorsey*, 22 Tex. Civ. App. 573; *Huff v. Maroney*, 23 Tex. Civ. App. 465; *Koppelman v. Koppelman*, 94 Tex. 40; *Waxahachie Nat. Bank v. Bielharz*, 94 Tex. 493; *Waggoner v. Dodson*, 96 Tex. 415; *Roach v. Springer*, (Tex. Civ. App. 1903) 75 S. W. Rep. 933.
- Utah*. — *Allen v. Fitzgerald*, 23 Utah 597.
- Vermont*. — *Drouin v. Boston, etc., R. Co.*, 74 Vt. 343.
- Virginia*. — *Repass v. Richmond*, 99 Va. 508; *Chesapeake, etc., R. Co. v. Walker*, 100 Va. 69; *Baltimore Dental Assoc. v. Fuller*, 101 Va. 627.
- West Virginia*. — *Standard Mercantile Co. v. Ellis*, 48 W. Va. 309; *Pocahontas Light, etc., Co. v. Browning*, 53 W. Va. 436.
- Wisconsin*. — *Davis v. Appleton*, 109 Wis. 580; *Priewe v. Wisconsin State Land, etc., Co.*, 103 Wis. 537, 74 Am. St. Rep. 904.
- 438. 1. Damage to Party Setting Up Estoppel Necessary** — *England*. — *Bell v. Marsh*, (1903) 1 Ch. 528, 72 L. J. Ch. 360, 88 L. T. N. S. 605, 51 W. R. 325.
- United States*. — *Columbus, etc., R. Co.'s Appeal*, (C. C. A.) 109 Fed. Rep. 177.
- Alabama*. — *Sullivan v. Louisville, etc., R. Co.*, 128 Ala. 77.
- Arizona*. — *Wiser v. Lawler*, (Ariz. 1900) 62 Pac. Rep. 695.
- California*. — *MacDonald v. Cool*, 134 Cal. 502; *Canale v. Copello*, 137 Cal. 22.
- Colorado*. — *Davis v. Bower*, 29 Colo. 422.
- Georgia*. — *Pearson v. Brown*, 105 Ga. 802.
- Illinois*. — *Foley v. Boulware*, 86 Mo. App. 674.
- Kentucky*. — *Louisville Banking Co. v. Asher*, (Ky. 1901) 65 S. W. Rep. 831; *Wyeth v. Renz-Bowles Co.*, (Ky. 1902) 56 S. W. Rep. 825; *Harrigan v. Advance Thresher Co.*, (Ky. 1904) 81 S. W. Rep. 261.
- Minnesota*. — *Western Land Assoc. v. Banks*, 80 Minn. 317.
- Missouri*. — *Mexico First Nat. Bank v. Ragsdale*, 171 Mo. 168; *Spence v. Renfro*, 179 Mo. 417; *Harrison v. McReynolds*, 183 Mo. 533; *Brinkerhoff-Faris Trust, etc., Co. v. Horn*, 83 Mo. App. 114.
- Nebraska*. — *Gallaher v. Lincoln*, 63 Neb. 339.
- New Jersey*. — *Central R. Co. v. MacCartney*, 68 N. J. L. 165.
- New York*. — *Kemble v. National Bank*, 94 N. Y. App. Div. 544.
- North Dakota*. — *Gjerstadengen v. Hartzell*, 9 N. Dak. 268, 81 Am. St. Rep. 575.
- Pennsylvania*. — *Silliman v. Whitmer*, 11 Pa. Super. Ct. 243, *affirmed* 196 Pa. St. 363; *Atkins v. Payne*, 190 Pa. St. 5.
- Rhode Island*. — *Sheldon v. Hamilton*, 22 R. I. 230, 84 Am. St. Rep. 839.
- Tennessee*. — *Bedford v. McDonald*, 102

**439. Representations Made After Change in Position. — See note 1.**

Inducement of Act Enforceable by Law. — See note 5.

(7) *Against Whom and for Whose Benefit Estoppel Operates.* — See notes 6, 7.**440. See note 1.**

Married Women and Infants. — See notes 2, 3.

**3. Acceptance of Conveyance or Possession — a. GRANTOR AND GRANTEE.** — See note 5.**441. Denial of Title to Avoid Payment of Purchase Money. — See note 2.****442. Title from Common Source. — See note 1.****443. b. LANDLORD AND TENANT.** — See note 1.Tenn. 358; *Lee v. Calvert*, (Tenn. Ch. 1900) 57 S. W. Rep. 627; *McLemore v. Charleston*, etc., R. Co., 111 Tenn. 639.*Texas.* — *Gulf City Trust Co. v. Hartley*, 20 Tex. Civ. App. 180; *Anderson v. Walker*, (Tex. Civ. App. 1899) 49 S. W. Rep. 937.*Utah.* — *Centennial Eureka Min. Co. v. Juab County*, 22 Utah 395.*Virginia.* — *Smith v. Powell*, 98 Va. 431; *Ashworth v. Tramwell*, 102 Va. 852.*Washington.* — *Hughes v. New York L. Ins. Co.*, 32 Wash. 1.*Wisconsin.* — *Frei v. McMurdo*, 101 Wis. 423.**438. 2. Reliance upon Silence.** — *Kuriger v. Joest*, 22 Ind. App. 633.**439. 1. Effect of Representations Made After Change in Position.** — *Siegel v. Colby*, 176 Ill. 210; *Thomas v. Sweet*, 111 Ky. 467; *O'Malley v. Wagner*, (Ky. 1903) 76 S. W. Rep. 356; *Rosencranz v. Swofford Bros. Dry Goods Co.*, 175 Mo. 518, 97 Am. St. Rep. 609; *Scott v. Lewis*, 40 Oregon 37; *Carnes v. Swift*, (Tex. Civ. App. 1900) 56 S. W. Rep. 85. See also *Western Land Assoc. v. Banks*, 80 Minn. 317.**5. Inducement of Act Enforceable by Law.** — *Western Land Assoc. v. Banks*, 80 Minn. 317, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 439; *St. Croix County v. Webster*, 111 Wis. 270.**6. Estoppel Inoperative for or Against Strangers.** — *Lyon v. Tonawanda*, 98 Fed. Rep. 361; *Booth v. Lenox*, (Fla. 1903) 34 So. Rep. 566; *Citizens' Bank v. Burrus*, 178 Mo. 716; *Oliver v. Lansing*, 59 Neb. 219; *Stoll v. Mutual Ben. L. Ins. Co.*, 115 Wis. 558, [citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 439] holding that one having received money as guardian is not estopped to claim second payment as executor.An Executor as representative of creditors of a decedent against whom an estoppel would have been operative is not estopped by representations of such decedent. *Starr v. Estey*, 69 N. H. 619.**Estoppels Operative for and Against Privies.** — *Robb v. Day*, (C. C. A.) 90 Fed. Rep. 337; *Filippini v. Trobeck*, (Cal. 1900) 62 Pac. Rep. 1066; *Equitable Mortg. Co. v. Butler*, 105 Ga. 555; *Richards v. Cline*, 176 Ill. 431; *Nickerson v. Massachusetts Title Ins. Co.*, 178 Mass. 308; *Nixon v. Russell*, (Tenn. Ch. 1901) 64 S. W. Rep. 297; *Pyper v. Salt Lake Amusement Assoc.*, 20 Utah 9; *Hamilton v. Buckman*, 118 Wis. 169.By Statute in Louisiana, Act No. 5, p. 12, of 1884, an estoppel against an ancestor is not effective against his "forced heirs." *Westmore v. Harz*, 111 La. 305.**Application to State.** — It has been held that equitable estoppels are not operative against the state. *State v. Paxson*, 119 Ga. 730; *Carolina Nat. Bank v. State*, 60 S. Car. 465, 85 Am. St. Rep. 865. But the contrary doctrine has been applied in *U. S. v. Stinson*, (C. C. A.) 125 Fed. Rep. 907; *State v. New Orleans*, etc., R. Co., 104 La. 685.**7. Estoppel Operative Only in Behalf of Person to or for Whom Representation was Made.** — *Booth v. Lenox*, (Fla. 1903) 34 So. Rep. 566.**440. 1. Operation of Representations Addressed to the Public in General.** — *Nodle v. Hawthorn*, 107 Iowa 380.**2. Operation of Estoppel Against Married Women and Infants.** — *Kern v. Raunser*, (Ky. 1899) 50 S. W. Rep. 838; *Waldron v. Harvey*, 54 W. Va. 608, 102 Am. St. Rep. 959.**3. Stith v. Carter, (Ky. 1901) 60 S. W. Rep. 725.****5. Estoppel by Acceptance of Possession by Grantee.** — *Barnes v. Barnes*, 113 Iowa 435, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 440.**Tenant Not Estopped as to Landlord's Widow's Dower Right.** — See *Smallridge v. Hazlett*, 112 Ky. 841.**441. 2. Denial of Grantor's Title to Avoid Payment of Purchase Money.** — *Townsend v. Kreigh*, 133 Mich. 245, affirmed 133 Mich. 246.**A Grantee Assuming to Pay Taxes** on lands purchased cannot deny his grantor's title, who was a purchaser at a tax sale, on the ground that the latter has never paid back taxes due thereon. *Muller v. Hoth*, 110 La. 105.**442. 1. Estoppel to Deny Title from Common Source.** — *Rocque v. Levecque*, 110 La. 306.**443. 1. Modern Rule as to Estoppel Against Tenant** — *United States*. — *Western Union Tel. Co. v. Pennsylvania R. Co.*, 120 Fed. Rep. 362, affirmed (C. C. A.) 123 Fed. Rep. 33.*Alabama.* — *Davis v. Williams*, 130 Ala. 530, 89 Am. St. Rep. 55.*California.* — *Ashton v. Golden Gate Lumber Co.*, (Cal. 1899) 58 Pac. Rep. 1.*District of Columbia.* — *Morris v. Wheat*, 11 App. Cas. (D. C.) 201.*Georgia.* — *Grizzard v. Roberts*, 110 Ga. 41; *Johnson v. Thrower*, 117 Ga. 1007; *Willis v. Harrell*, 118 Ga. 906.*Illinois.* — *Knefel v. Daly*, 91 Ill. App. 321; *Born v. Stafford*, 93 Ill. App. 10; *Barkman v. Barkman*, 107 Ill. App. 332; *Fleming v. Mills*, 182 Ill. 464.*Indiana.* — *Forgey v. Harvey*, 151 Ind. 507.*Indian Territory.* — *James v. Smith*, 3 Indian Ter. 447; *Saxe v. Thomas*, 3 Indian Ter. 536;

**444. The Principle.** — See note 1.

c. MORTGAGOR AND MORTGAGEE. — See note 3.

d. TRUSTEE AND CESTUI QUE TRUST. — See note 4.

Application of Rule to Executors and Administrators. — See note 6.

**446. V. WAIVER AND RATIFICATION** — Ratification. — See note 5.

VI. INCONSISTENT POSITIONS — 1. Generally. — See note 8.

Turner v. Gilliland, (Indian Ter. 1903) 76 S. W. Rep. 253.

Kansas. — Johnson v. Woodbury Trust Co., 63 Kan. 880, 64 Pac. Rep. 1030; Fry v. Boman, 67 Kan. 531.

Kentucky. — Mefford v. Franklin County, (Ky. 1900) 58 S. W. Rep. 993.

Louisiana. — Morgan City v. Dalton, 112 La. 9.

Missouri. — Stewart v. Miles, 166 Mo. 174.

Nebraska. — Carson v. Broady, 56 Neb. 648, 71 Am. St. Rep. 691; Wilson v. Lyons, (Neb. 1903) 94 N. W. Rep. 636.

New York. — Willis v. McKinnon, (Supm. Ct. Tr. T.) 37 Misc. (N. Y.) 386, modified 79 N. Y. App. Div. 249; Steele v. R. M. Gilmour Mfg. Co., 77 N. Y. App. Div. 199.

North Carolina. — Pool v. Lamb, 128 N. Car. 1; Shell v. West, 130 N. Car. 171.

Oklahoma. — Shy v. Brockhause, 7 Okla. 35.

Pennsylvania. — Ewing v. Cottman, 9 Pa. Super. Ct. 444, 43 W. N. C. (Pa.) 525; Mineral R., etc., Co. v. Flaherty, 24 Pa. Super. Ct. 236.

Tennessee. — Whitaker v. Whitaker, (Tenn. Ch. 1900) 62 S. W. Rep. 664.

West Virginia. — Wheeling First English Evangelical Lutheran Church v. Arkle, 1 W. Va. 92.

**444. 1.** Western Union Tel. Co. v. Pennsylvania R. Co., 120 Fed. Rep. 362, affirmed (C. C. A.) 123 Fed. Rep. 33, quoting 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 443; Sizer v. Clark, 116 Wis. 534, quoting 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 443.**3. Estoppel Against Mortgages.** — Upchurch v. Anderson, (Tenn. Ch. 1898) 52 S. W. Rep. 917.**Purchaser of Equity Estopped to Deny Validity of Senior Mortgage.** — A purchaser of the equity of redemption of real property under an appraisement recognizing the validity of a senior incumbrance is estopped to deny the validity thereof. Arlington Mill, etc., Co. v. Yates, 57 Neb. 286.**4. Estoppel Against Trustee.** — Sterling v. Sterling, 77 Minn. 12; Stetson v. Rosenberger, 15 Montg. Co. Rep. 14; Morris v. Morris, 48 W. Va. 430.**6. Executor Inventorying Property Not Estopped.** — An executor is not estopped to deny ownership of a decedent of certain chattels merely because he has included them in the inventory. Oertlett's Estate, 21 Pa. Co. Ct. 616, 7 Pa. Dist. 678.**446. 5.** Leavitt v. Fairbanks, 92 Me. 521.**8. Inconsistent Positions in General** — Alabama. — Smith v. Lusk, 119 Ala. 394.

Arkansas. — Womack v. Womack, 73 Ark. 281.

California. — Camp v. Land, 122 Cal. 167; Matter of McKeag, 141 Cal. 403, 99 Am. St. Rep. 80.

Colorado. — Herr v. Sullivan, 25 Colo. 190; Consolidated Home Supply Ditch, etc., Co. v. New Loveland, etc., Irrigation, etc., Co., 27 Colo. 521.

District of Columbia. — Richards v. Bippus, 18 App. Cas. (D. C.) 293.

Georgia. — Petty v. Brunswick, etc., R. Co., 109 Ga. 666.

Idaho. — Wells v. Alturas Commercial Co., 6 Idaho 506; Fremont County v. Warner, 7 Idaho 367.

Illinois. — Jebb v. Sexton, 84 Ill. App. 45; Sanitary Dist. v. Adam, 179 Ill. 406; Evanston v. Clark, 77 Ill. App. 234.

Indiana. — U. S. Express Co. v. Joyce, (Ind. 1904) 72 N. E. Rep. 865. See also Glendenning v. Superior Oil Co., 162 Ind. 642.

Iowa. — Bradley v. Appanoose County, 106 Iowa 105; Oliver v. Monona County, 117 Iowa 43; Farmers, etc., Bank v. Johnson, 118 Iowa 282; Lake City v. Fulkerson, 122 Iowa 569.

Kansas. — Ard v. Pratt, 61 Kan. 775.

Kentucky. — Kern v. Raunser, (Ky. 1899) 50 S. W. Rep. 838; Taylor v. Jenkins, (Ky. 1901) 65 S. W. Rep. 601.

Louisiana. — Kronenberger v. Hopkins, 111 La. 405; Moorman v. Plummer Lumber Co., 113 La. 429.

Maryland. — Baker v. Baker, 94 Md. 627.

Massachusetts. — Congress Constr. Co. v. Worcester Brewing Co., 182 Mass. 355.

Michigan. — Blodgett v. Foster, 120 Mich. 392; Tomlinson v. Cornett, 128 Mich. 171; Ilgenfritz v. Toledo, etc., R. Co., (Mich. 1904) 99 N. W. Rep. 878.

Minnesota. — Wrigley v. Watson, 81 Minn. 251.

Mississippi. — Gentry v. Gamblin, 79 Miss. 437; White v. Jenkins, (Miss. 1903) 33 So. Rep. 287.

Missouri. — Cornwall v. Ganser, 85 Mo. App. 678; Cadematori v. Gauger, 160 Mo. 352; Hannibal, etc., R. Co. v. Frowein, 163 Mo. 1; Duckett v. Keet, etc., Dry Goods Co., 99 Mo. App. 444.

Nebraska. — Green v. Lancaster County, 61 Neb. 473.

New Jersey. — Fleckenstein Bros. Co. v. Fleckenstein, (N. J. 1903) 53 Atl. Rep. 1043.

New York. — Standard American Pub. Co. v. Methodist Book Concern, 33 N. Y. App. Div. 409; Dwight v. Williams, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 667; Ladue v. Cooper, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 544; Johnstown Min. Co. v. Butte, etc., Consol. Min. Co., 60 N. Y. App. Div. 344; Bonta v. Gridley, 77 N. Y. App. Div. 33.

North Carolina. — Pearre v. Folb, 123 N. Car. 239; Treadway v. Payne, 127 N. Car. 436.

Ohio. — Cincinnati v. Covington, etc., Bridge Co., 10 Ohio Cir. Dec. 7902, 20 Ohio Cir. Ct. 396; American Exch. Bank v. Brenzinger, 10



**447. 2. In Court — a. IN GENERAL. — See note 1.**

Ohio Dec. 208. *Compare* *Andrews v. Settles*, 9 Ohio Cir. Dec. 191, 16 Ohio Cir. Ct. 638.

*Pennsylvania*. — *Bigley's Estate*, 30 Pittsb. Leg. J. N. S. (Pa.) 65; *Beaver v. Davidson*, 9 Pa. Super. Ct. 159; *Corbet v. Oil City Fuel Supply Co.*, 21 Pa. Super. Ct. 80; *Perkiomen Brick Co. v. Dyer*, 187 Pa. St. 470; *Keichline v. Hornung*, 189 Pa. St. 560; *Stough's Estate*, 196 Pa. St. 358.

*Tennessee*. — *Call v. Cozart*, (Tenn. Ch. 1898) 48 S. W. Rep. 312; *Long v. Gilbert*, (Tenn. Ch. 1900) 59 S. W. Rep. 414.

*Texas*. — *Gill v. First Nat. Bank*, (Tex. Civ. App. 1898) 47 S. W. Rep. 751; *Bull v. Jones*, (Tex. Civ. App. 1898) 47 S. W. Rep. 474; *Martin v. Rotan Grocery Co.*, (Tex. Civ. App. 1902) 66 S. W. Rep. 212; *Norton v. Wochler*, 31 Tex. Civ. App. 522; *Masterson v. Heitmann*, 33 Tex. Civ. App. 464.

*Utah*. — *Clark v. Kirby*, 18 Utah 258.

*Vermont*. — *Grand Isle v. Kinney*, 70 Vt. 381.

*Washington*. — *Boston Clothing Co. v. Solberg*, 28 Wash. 262; *State v. Whitworth*, 30 Wash. 47; *Standard Furniture Co. v. Van Alstine*, 31 Wash. 499.

*West Virginia*. — *Hast v. Piedmont, etc.*, R. Co., 52 W. Va. 396, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 446.

**Acceptance of Benefit under an Instrument —**  
*District of Columbia*. — *Utermehle v. Norment*, 22 App. Cas. (D. C.) 31, affirmed 197 U. S. 40.

*Georgia*. — *Compare* *Janes v. Cherokee Lodge* No. 66, 110 Ga. 627.

*Illinois*. — *Buchanan v. McLennan*, 192 Ill. 480; *Norris v. Downing*, 196 Ill. 91.

*Iowa*. — *Goldizen v. Goldizen*, 107 Iowa 280. See also *Burkhardt v. Burkhardt*, 107 Iowa 369.

*Kentucky*. — *Green v. Ponder*, (Ky. 1900) 58 S. W. Rep. 605; *Bennett v. Bennett*, (Ky. 1901) 65 S. W. Rep. 12; *Gentry v. Gentry*, (Ky. 1904) 77 S. W. Rep. 1115.

*Louisiana*. — *Hall v. Bossier Levee Dist.*, 111 La. 913.

*Michigan*. — *Cline v. Wixson*, 128 Mich. 255.

*Missouri*. — *Stone v. Cook*, 179 Mo. 534.

*New York*. — *Williams v. Whittell*, 69 N. Y. App. Div. 340.

*North Carolina*. — *Rawls v. White*, 127 N. Car. 17; *Treadaway v. Payne*, 127 N. Car. 436.

*Pennsylvania*. — *Wonsetler v. Wonsetler*, 23 Pa. Super. Ct. 321; *Callahan's Estate*, 5 Lack. Leg. N. (Pa.) 105.

*Tennessee*. — *Mobile, etc.*, R. Co. v. *Donovan*, 104 Tenn. 465; *Brown v. Brown*, 107 Tenn. 349.

*Texas*. — *Doty v. Barnard*, 92 Tex. 104; *Pryor v. Pendleton*, 92 Tex. 384.

**Accepting Benefits under Unconstitutional Statute.** — *Gross v. Whitley County*, 158 Ind. 531; *Deering v. Peterson*, 75 Minn. 118.

**Repudiation of Faulty Bond.** — A bond having been regarded as sufficient under the statute, it cannot be repudiated as insufficient by one who has derived advantages therefrom. *Stroud v. Hancock*, 116 Ga. 332.

**Devisee Denying Incident of the Devise.** — A devisee entering upon the lands devised is estopped from questioning the lien of a note on such land executed by the devisee in consideration of the devise. *Ballard v. Camplin*, 161 Ind. 16.

**Ignorance of Facts — Restoration of Benefits Received under an Instrument.** — One who has received benefits under a will in ignorance of its invalidity may, on offering to restore, attack the will. *Medill v. Snyder*, 61 Kan. 15, 78 Am. St. Rep. 307.

**447. 1. Inconsistent Positions in Court —**  
*United States*. — *Brooks v. Laurent*, (C. C. A.) 98 Fed. Rep. 647.

*Alabama*. — *Savage v. Johnson*, 127 Ala. 401; *Eldridge v. Grice*, 132 Ala. 667; *Taylor v. Crook*, 136 Ala. 354, 96 Am. St. Rep. 26.

*Idaho*. — *Stevens v. Hall*, 8 Idaho 549, quoting 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 447.

*Illinois*. — *Wineteer v. Simonson*, 75 Ill. App. 653; *Chicago, etc.*, R. Co. v. *Merriman*, 95 Ill. App. 628.

*Iowa*. — *Shropshire v. Ryan*, 111 Iowa 677; *Brown v. Lambe*, 119 Iowa 404.

*Kansas*. — *Carr v. Farrell*, 62 Kan. 565; *Howard v. Hooker*, (Kan. 1904) 78 Pac. Rep. 847.

*Louisiana*. — *Granger v. Sallier*, 110 La. 250; *Ingram v. Heintz*, 112 La. 496.

*Maryland*. — *Reichard v. Izer*, 95 Md. 451, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 446.

*Missouri*. — *Coney v. Laird*, 153 Mo. 408.

*Nebraska*. — *Columbia Nat. Bank v. German Nat. Bank*, 56 Neb. 803; *Leidigh v. Pribble*, 64 Neb. 860.

*New York*. — *Matter of Mount*, (Surrogate Ct.) 27 Misc. (N. Y.) 411; *Hong Sing v. Wolf Fein*, (N. Y. City Ct. Gen. T.) 33 Misc. (N. Y.) 608; *Lacey v. Lacey*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 196.

*Oklahoma*. — *Territory v. Cooper*, 11 Okla. 699.

*Pennsylvania*. — *Corey v. Edgewood*, 18 Pa. Super. Ct. 228; *Mullany's Adoption*, 25 Pa. Co. Ct. 561, quoting 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 446, 447.

*Texas*. — *Northington v. Taylor County*, (Tex. Civ. App. 1901) 62 S. W. Rep. 936; *Moor v. Moor*, (Tex. Civ. App. 1901) 63 S. W. Rep. 347.

*Utah*. — *Hall v. McNally*, 23 Utah 606; *Murphy v. Ganey*, 23 Utah 633.

*Virginia*. — *Rhea v. Shields*, 103 Va. 305.

*Washington*. — *Scott v. Mathews*, 25 Wash. 486.

*West Virginia*. — *Le Comte v. Freshwater*, 56 W. Va. 336, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 446. See also dissenting opinion of *Brannon, J.*, in *Freer v. Davis*, 52 W. Va. 1, 94 Am. St. Rep. 895, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 446, wherein it was held that as consent cannot confer jurisdiction, a plaintiff, upon whose bill there is a final decree and adjudication against him upon the matters set up in the bill, is not estopped to assert, upon appeal, that the court to which he resorted had no jurisdiction of the subject matter.

**Mistake.** — An erroneous allegation inadvertently made in a bill subsequently dismissed will not estop the party to allege correctly the facts in a second bill. *Marthinson v. Winyah Lumber Co.*, 125 Fed. Rep. 633.

**447.** *b. JUDICIAL ADMISSIONS — (1) Effect in Proceedings Where Made — (a) Admissions in Pleading or in Open Court.* — See note 2.

**448.** (1) *Admissions of Counsel.* — See note 2.

(2) *Effect upon Appeal or Second Trial.* — See note 5.

**449.** (3) *Effect in Another Suit.* — See note 2.

**450.** See notes 1, 2.

(5) *Admissions Made Through Mistake.* — See note 6.

**452.** **ET AL.** — See note 1.

**ET CETERA, ETC., &c.** — See note 2.

**447. 2. Effect of Judicial Admissions in Proceedings Where Made — Illinois.** — *Evanston v. Clark*, 77 Ill. App. 234; *Forthman v. Deters*, 206 Ill. 159, 99 Am. St. Rep. 145.

*Indian Territory.* — *Denison, etc., R. Co. v. Ranney-Alton Mercantile Co.*, 3 Indian Ter. 104, quoting 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 447, reversed (C. C. A.) 104 Fed. Rep. 595.

*Iowa.* — *Zalesky v. Home Ins. Co.*, 114 Iowa 516.

*Kentucky.* — *Linville v. Langford*, (Ky. 1898) 47 S. W. Rep. 248.

*Louisiana.* — *In re Immanuel Presb. Church*, 113 La. 911.

*Massachusetts.* — *Washburn-Crosby Co. v. Boston, etc., R. Co.*, 180 Mass. 252.

*Michigan.* — *Carver v. Detroit, etc., Plank-Road Co.*, 126 Mich. 458.

*Missouri.* — *Bushnell v. Farmers' Mut. Ins. Co.*, 91 Mo. App. 523; *Harrison v. McReynolds*, 183 Mo. 533.

*Nebraska.* — *Bankers' Bldg., etc., Assoc. v. Thomas*, (Neb. 1902) 92 N. W. Rep. 1044.

*Nevada.* — *Manning v. Bowman*, 26 Nev. 451, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 447.

*New York.* — *Jaeger v. Koenig*, (N. Y. City Ct. Gen. T.) 29 Misc. (N. Y.) 780, affirmed (Supm. Ct. App. T.) 30 Misc. (N. Y.) 580; *Carver v. Wagner*, 51 N. Y. App. Div. 47; *Le Boeuf v. Gray*, (Supm. Ct. Tr. T.) 42 Misc. (N. Y.) 632.

**Stipulations.** — A party who has stipulated for judgment against himself is estopped thereafter to question the jurisdiction of the court to enter such judgment. *Phelps v. Norman*, (Tex. Civ. App. 1900) 55 S. W. Rep. 978. See also *Dupree v. Duke*, 30 Tex. Civ. App. 360, to the effect that stipulations are binding on parties thereto.

**Admission of Law.** — An erroneous concession as to the law will not bind the party making it when the court has not been misled thereby. *Lexington v. Lafayette County Bank*, 165 Mo. 671.

**448. 2. Admissions of Counsel as Estoppel.** — *Pratt v. Conway*, 148 Mo. 291, 71 Am. St. Rep. 602.

**5. Effect of Admissions as Estoppel on Appeal.** — *Lexington v. Lafayette County Bank*, 165 Mo. 671; *Walker v. Sedalia*, 74 Mo. App. 70. See also *Peabody v. Munson*, 211 Ill. 324.

**Admissions Were Held Operative on Second Appeal in Shropshire v. Ryan, 111 Iowa 677.**

**449. 2. Operation of Admission Made in Another Suit.** — *Wall v. Mines*, 130 Cal. 27; *Booth v. Lenox*, (Fla. 1903) 34 So. Rep. 566,

citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 449; *Potter v. Fitchburg Steam Engine Co.*, 110 Ill. App. 430, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 449, reversed and remanded 211 Ill. 138; *Brown v. Haigh*, 113 La. 563; *Brady v. Foster*, 72 N. Y. App. Div. 416, quoting 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 449; *Hast v. Piedmont, etc., R. Co.*, 52 W. Va. 396, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 449. See also *Siegel v. Colby*, 176 Ill. 210; *Water Supply Co. v. Georgetown*, (Ky. 1904) 81 S. W. Rep. 660, holding that a defendant by adopting the answer of a codefendant is not estopped in a subsequent suit between such codefendants from denying statements made in such answer which were not necessary to the defense of the action.

*In Tennessee.* — *Lee v. Calvert*, (Tenn. Ch. 1900) 57 S. W. Rep. 627.

**450. 1. Effect of Plea of Guilty in Subsequent Civil Action for Same Cause.** — See *Wilson v. Bennett*, Sc. Ct. of Sess., 6 F. 269.

**Order Quashing Bastardy Order Not a Bar to Civil Suit** by employer of woman. *Anderson v. Collinson*, (1901) 2 K. B. 107, 70 L. J. K. B. 620, 84 L. T. N. S. 465.

**2. Ebbetts v. Conquest**, 82 L. T. N. S. 560; *Leavenworth Light, etc., Co. v. Waller*, 65 Kan. 514.

**Second Suit on Same Cause of Action.** — A contention successfully maintained in one suit will estop a party from taking an inconsistent position in regard thereto in a second suit involving the same issue. *Gentry v. Barron*, 109 Ga. 172.

**Amendment.** — A plaintiff alleging negligence on the part of the defendant is not thereby estopped from making an amendment setting forth that because of his ignorance of the negligence of the defendant he had been fraudulently induced to settle his claim. *Savannah, etc., R. Co. v. Pollard*, 116 Ga. 297.

**6. Effect as Estoppels of Admissions Made Through Mistake.** — *McLemore v. Charleston, etc., R. Co.*, 111 Tenn. 639.

**452. 1. Bill of Exceptions.** — The abbreviation *et al.*, when used in a bill of exceptions, cannot be held to designate any person or persons. *Orr v. Webb*, 112 Ga. 806.

**Acknowledgment of Service.** — See *Mutual Bldg. Loan, etc., Co. v. Dickinson*, 112 Ga. 469. *Bagley v. Rose Hill Sugar Co.*, 111 La. 272.

In defining actual malice it is improper to add the abbreviation *etc.* to the definition, as "actual ill-will, hatred, *etc.*," but such impropriety is not reversible error, unless it appears that the defendant was actually prejudiced. *Louisville Press Co. v. Tenny*, 105 Ky. 365.

**454.** *Ejusdem Generis.* — See note 1.

[**EVADE.** — See note 1a.]

**EVENT** — **EVENTUAL.** — See note 3.

**455.** **EVERY** — **EVERYTHING** — **EVERYWHERE.** — See note 2.

**456.** See note 1.

**454. 1.** *Bagley v. Rose Hill Sugar Co.*, 111 La. 272. See also *Whitaker v. Old Dominion Guano Co.*, 123 N. Car. 368.

1a. As to the meaning of the word *evade* in the Colonial Death Duties Act charging double duties for an attempt to *evade* the payment of the tax, see *Bullivant v. Atty.-Gen.*, (1901) A. C. 196; *Simms v. Registrar of Probates*, (1900) A. C. 323.

**3. Costs.** — *Benjamin v. Ver Nooy*, 168 N. Y. 578.

**455. 2.** *Geary v. Parker*, 65 Ark. 521; *Cox v. Island Min. Co.*, 65 N. Y. App. Div. 515; *Com. v. Brown*, 25 Pa. Super. Ct. 289.

**Every Person.** — See *State v. Hunt*, 129 N. Car. 686.

**Equivalent to Any.** — *Cox v. Island Min. Co.*, 65 N. Y. App. Div. 515.

**Each and Every Equivalent to All.** — In a tax deed reciting the sale of several disconnected tracts, the use in the granting clause of the words "and each and *every* separate tract and parcel thereof," in addition to the statutory form designating the property conveyed as "the real property last hereinbefore described," indicates a purpose to convey all of the land sold. *Gibson v. Kueffer*, 69 Kan. 534.

**456. 1.** *Chicago City R. Co. v. Tuohy*, 196 Ill. 410.

## EVICTION.

By W. J. BACON.

**458. II. DEFINITION AND CLASSIFICATION** — **1. Definition.** — See note 5.

**459. 2. Classification.** — See note 1.

**An Actual Eviction.** — See note 2.

**A Constructive Eviction.** — See note 3.

**Partial Eviction.** — See note 5.

**Eviction by Title Paramount.** — See note 6.

**460. III. GENERAL PRINCIPLES** — **1. Interest on Which Eviction May Be Predicated.** — See notes 1, 3.

**Failure to Deliver Possession.** — See note 4.

**461. 2. Intent of Landlord.** — See note 1.

**462.** See note 1.

**458. 5. Definition.** — *Fleming v. King*, 100 Ga. 449; *Griesheimer v. Bothman*, 105 Ill. App. 587, *citing* 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 458; *Rubens v. Hill*, 213 Ill. 523.

**459. 1. An Eviction May Be Either Total or Partial.** — *Talbott v. English*, 156 Ind. 299; *Moore v. Mansfield*, 182 Mass. 302, 94 Am. St. Rep. 657; *Kitchen Bros. Hotel Co. v. Philbin*, (Neb. 1902) 96 N. W. Rep. 487.

**2. Actual Eviction.** — *Seigel v. Neary*, (Supm. Ct. App. T.) 38 Misc. (N. Y.) 297; *Knotts v. McGregor*, 47 W. Va. 571, *citing* 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 459.

**3. Constructive Eviction.** — *Butler v. Newhouse*, (Supm. Ct. App. T.) 85 N. Y. Supp. 373.

**5. Partial Eviction.** — *Moore v. Mansfield*, 182 Mass. 302, 94 Am. St. Rep. 657; *Herpolsheimer v. Funke*, (Neb. 1901) 95 N. W. Rep. 688.

**6. Eviction by Title Paramount.** — *Lowery v. Yawn*, 111 Ga. 64; *Mattlage v. Mulherin*, 106 Ga. 834.

**460. 1. Deprivation of Use of Way.** — *Kitchen Bros. Hotel Co. v. Philbin*, (Neb. 1902) 96 N. W. Rep. 487.

**3. Termination of Tenant's Interest.** — *Wams-*

*ganz v. Wolff*, 86 Mo. App. 205; *Murphy v. Century Bldg. Co.*, 90 Mo. App. 621; *Utah Optical Co. v. Keith*, 18 Utah 464.

**4. Failure or Refusal to Deliver Possession.** — *Stiger v. Monroe*, 109 Ga. 460, *citing* 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 460; *Knotts v. McGregor*, 47 W. Va. 571, *citing* 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 460.

**Failure to Remove Property.** — *Moore v. Mansfield*, 182 Mass. 302, 94 Am. St. Rep. 657.

**461. 1. Acts Must Clearly Show Intention to Deprive Tenant of Possession.** — *Dennick v. Ekdahl*, 102 Ill. App. 199; *Moran v. Bergin*, 111 Ill. App. 313; *Riley v. Lally*, 172 Mass. 244; *Meeker v. Spalsbury*, 66 N. J. L. 60; *Perniciaro v. Veniero*, (Supm. Ct. App. T.) 90 N. Y. Supp. 369.

"A demand for rent or notice to surrender premises if not paid does not in and of itself in any way interfere with the possession of the premises by the tenant, and does not constitute an eviction actual or constructive." *Woodworth v. Harding*, 75 N. Y. App. Div. 54.

**462. 1. Trespass of Landlord Not an Eviction.** — *Fleming v. King*, 100 Ga. 449; *Talbott v.*



**463.** Presumption as to Intent. — See note 1.

**3.** Rule as to Acts of Third Persons. — See note 2.

**464.** See notes 2, 3.

**465.** Acts of Other Tenants of Same Landlord. — See note 3.

Acts of Public Authorities. — See note 5.

**466.** **4.** A Question for the Jury. — See note 2.

**6.** Effect of Partial Eviction. — See note 4.

**IV. WHAT CIRCUMSTANCES AMOUNT TO EVICTION — 1. Actual Eviction**

— **a.** EXPULSION OF TENANT AND TAKING POSSESSION. — See note 6.

**467.** See notes 2, 3.

**468.** See note 1.

Materiality of the Deprivation. — See note 3.

**469.** **b.** LEASING TO ANOTHER PERSON. — See notes 2, 3.

English, 156 Ind. 299; *Herpolsheimer v. Funke*, (Neb. 1901) 95 N. W. Rep. 688; *Meeker v. Spalsbury*, 66 N. J. L. 60.

**Entry Without Permission.** — *Schloss v. Schloss*, (Mich. 1904) 100 N. W. Rep. 392.

**Interference with Person.** — *Haas v. Ketcham*, (Supm. Ct. App. T.) 87 N. Y. Supp. 411.

**463. 1. Presumption of Intention to Evict.** — *Moore v. Mansfield*, 182 Mass. 302, 94 Am. St. Rep. 657.

**2. Act of Servant or Agent.** — *Haas v. Ketcham*, (Supm. Ct. App. T.) 87 N. Y. Supp. 411.

**464. 2. Shutting Off Light and Air.** — *A. H. Pugh Printing Co. v. Dexter*, 8 Ohio Dec. 557.

**Acts of Landlord in Character of Adjoining Owner.** — Where the landlord leased a portion of a store to a retail dealer and, after the latter had taken possession, unreasonably obstructed the show window of such retail dealer, it was held to amount to an eviction. *Herpolsheimer v. Funke*, (Neb. 1901) 95 N. W. Rep. 688. See also *Talbott v. English*, 156 Ind. 299, where it was held there was no eviction.

**3. Consent of Landlord.** — *Weiler v. Pancoast*, 71 N. J. L. 414, wherein the acts of the landlord consisted in permitting a part of the premises to be used for immoral purposes.

The landlord, during the tenancy, sold a portion of the demised premises to a third person, and on account of this sale an eviction subsequently took place of the tenant from the portion so sold. The conveyance of the landlord did not authorize the eviction. It was held that the tenant was not thereby evicted from that portion of the premises remaining in his possession. *Gribbie v. Toms*, 70 N. Y. L. 522.

**465. 3. Acts of Other Tenants.** — *Weiler v. Pancoast*, 71 N. J. L. 414.

**Acts of Other Tenants Not Constituting Eviction.** — Noise made by children in another part of an apartment house, exciting a tenant's nervous sensibilities and disturbing his rest, is not sufficient nuisance to constitute a constructive eviction. *Seaboard Realty Co. v. Fuller*, (Supm. Ct. App. T.) 33 Misc. (N. Y.) 109, 8 N. Y. Annot. Cas. 418.

**5. Acts of Landlord under Direction of Municipal Authority.** — *Fleming v. King*, 100 Ga. 449.

**466. 2. Question for Jury.** — *Rubens v. Hill*, 213 Ill. 523; *Dennick v. Ekdahl*, 102 Ill. App. 199; *Riley v. Lally*, 172 Mass. 244; *Faxon v. Jones*, 176 Mass. 138; *Hall v. Irvin*, 78 N. Y. App. Div. 107; *Butler v. Newhouse*, (Supm. Ct.

App. T.) 85 N. Y. Supp. 373; *Walters v. Transue*, 6 Northam. Co. Rep. (Pa.) 406; *Ewing v. Cottman*, 9 Pa. Super. Ct. 444.

**4. Eviction from Material Part May Be Eviction from Whole.** — *Smith v. McEnany*, 170 Mass. 26, 64 Am. St. Rep. 272; *Perniciaro v. Veniero*, (Supm. Ct. App. T.) 90 N. Y. Supp. 369; *Seigel v. Neary*, (Supm. Ct. App. T.) 38 Misc. (N. Y.) 297.

The landlord rented an entire house to the tenant, and, without knowledge of the tenant, goods of the landlord were left locked up in an attic room. The tenant, upon discovering that the landlord's goods were in the attic room, requested the use of the attic. The room, however, was retained by the landlord. It was held that the retention of the room by the landlord constituted a partial eviction. *Moore v. Mansfield*, 182 Mass. 302, 94 Am. St. Rep. 657.

**6. Forceful Expulsion.** — *Spencer v. Commercial Co.*, 30 Wash. 520.

**467. 2. Entry and Taking Possession.** — Where the landlord boarded up a doorway of a liquor store which opened into an alley and which the tenant under the lease was allowed to use, such act of the landlord was held to constitute an eviction from a substantial part of the premises and to suspend rent until the obstruction was removed. *Seigel v. Neary*, (Supm. Ct. App. T.) 38 Misc. (N. Y.) 297.

**3. Keeping Tenant Out.** — Supporting the text, see *Knotts v. McGregor*, 47 W. Va. 571, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 467.

**Circumstances Not Amounting to Eviction.** — An ejectment suit by the lessor, the defendants continuing in the possession and the plaintiff not interfering with the collection of rents from tenants or subtenants of the defendant, does not constitute an eviction. *Agar v. Winslow*, 123 Cal. 587, 69 Am. St. Rep. 84.

**468. 1. Taking Possession After Tenant Has Left.** — *Mershon v. Williams*, 62 N. J. L. 779.

**3. Materiality of Deprivation.** — *Talbott v. English*, 156 Ind. 299; *Moore v. Mansfield*, 182 Mass. 302, 94 Am. St. Rep. 657; *Seaboard Realty Co. v. Fuller*, (Supm. Ct. App. T.) 33 Misc. (N. Y.) 110, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 468; *Perniciaro v. Veniero*, (Supm. Ct. App. T.) 90 N. Y. Supp. 369. Compare *Smith v. McEnany*, 170 Mass. 26, 64 Am. St. Rep. 272.

**469. 2. Leasing to Another Person.** — *Starkweather v. Maginnis*, 196 Ill. 274, affirming 98 Ill. App. 143; *Dolton v. Sickel*, 66 N. J. L. 492;

**470.** *c.* DEPRIVATION OF USE OF PROPERTY. — See notes 2, 3.

**471.** 2. Constructive Eviction — *a.* THE DOCTRINE — IN GENERAL. — See notes 2, 3, 6.

**472.** *b.* RENDERING PREMISES UNSAFE OR UNFIT FOR OCCUPATION. — See note 2.

**474.** *c.* CREATION OR EXISTENCE OF NUISANCES. — See note 1.

**475.** See note 1.

*d.* DEPRIVATION OF EASEMENTS. — See note 2.

*e.* THREATS OF EXPULSION, UNREASONABLE DEMANDS, ASSAULTS, ETC. — See note 3.

*f.* ACTS PRODUCING DISCOMFORT OR ANNOYANCE. — See note 4.

**476.** See note 1.

**477.** *l.* REPAIRING OR REBUILDING. — See note 4.

*Knotts v. McGregor*, 47 W. Va. 571, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 469.

One of two cotenants surrendered his possession to the landlord and the latter placed a third person in possession as sole tenant. It was held to be an eviction of the second cotenant. *Hartford v. Taylor*, 181 Mass. 266.

**469.** 3. Abandonment by Tenant. — *Meeker v. Spalsbury*, 66 N. J. L. 60.

**470.** 2. Deprivation of Use Actual Eviction. — *Perniciaro v. Veniero*, (Supm. Ct. App. T.) 90 N. Y. Supp. 369. See also *Herpolsheimer v. Funke*, (Neb. 1901) 95 N. W. Rep. 688.

3. Partial Eviction. — *Moore v. Mansfield*, 182 Mass. 302, 94 Am. St. Rep. 657.

**471.** 2. Suit for Possession by Landlord. — *Agar v. Winslow*, 123 Cal. 587, 69 Am. St. Rep. 84.

3. Tenant Need Not Be Actually Expelled. — *Dennick v. Ekdahl*, 102 Ill. App. 199; *Moore v. Mansfield*, 182 Mass. 302, 94 Am. St. Rep. 657.

6. Interference with Beneficial Enjoyment Constructive Eviction. — *Agar v. Winslow*, 123 Cal. 587, 69 Am. St. Rep. 84; *Gallagher v. Burke*, 13 Pa. Super. Ct. 244.

**472.** 2. Rendering Premises Unsafe. — There was an eviction where the servants of the landlord, in making alterations and repairs on the building, tore down steps and railings, boarded up doors, and in other ways rendered the premises unsafe. *Wusthoff v. Schwartz*, 32 Wash. 337.

**474.** 1. Immoral Conduct of Other Tenants. — It was held to be a cause sufficient to justify the tenant to treat himself as evicted and abandon the premises, where the landlord rented a part of the building to a woman who used it for lewd purposes, the landlord failing, after due notice, to put an end to such improper use, he having legal power to do so. *Weiler v. Pancoast*, 71 N. J. L. 414.

Landlord Must Be Responsible. — *Seaboard Realty Co. v. Fuller*, (Supm. Ct. App. T.) 33 Misc. (N. Y.) 109, 8 N. Y. Annot. Cas. 418.

**475.** 1. Nuisance Dangerous to Life or Health. — *Beakes v. Haas*, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 796.

2. Deprivation of Easement Not Eviction. — *Meeker v. Spalsbury*, 66 N. J. L. 60; *Solomon v. Fantozzi*, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 61; *A. H. Pugh Printing Co. v. Dexter*, 8 Ohio Dec. 557, 5 Ohio N. P. 332.

3. Conduct of Landlord Not Amounting to Eviction. — The protest of the landlord as owner

of other lots on the same street against granting a license by the city council to the tenant to conduct a saloon on the demised lot was not considered such conduct as to amount to a constructive eviction, although the fact of such protest by the landlord gave the necessary majority of lots to defeat the tenant's petition for license as provided for by the city ordinances, and the landlord had expressly leased the premises for saloon purposes. *Kellogg v. Lowe*, 38 Wash. 293.

See also *Ewing v. Cottman*, 9 Pa. Super. Ct. 444, where the language and conduct of the landlord, who boarded with the tenant as provided by the terms of the lease, were held not to be such as amounted to an eviction.

4. Discomforts and Annoyances Not Amounting to Eviction. — The operation of an elevated railway along the street in front of the leased premises, to the annoyance and inconvenience of the tenant, is not an eviction, although such elevated railway was built with the consent of the owner of the leased premises. *Kistler v. Wilson*, 77 Ill. App. 149.

The landlord occupied rooms on the second floor of the demised premises and left a safe and desk in the tenant's saloon on the first floor, with the tenant's consent. It was held that this use of the premises by the landlord was a gratuity arising out of the friendly feeling of the tenant for him and that it could not "be strained into an eviction." *Moran v. Bergin*, 111 Ill. App. 313. See also *Roth v. Adams*, 185 Mass. 341.

**476.** 1. Acts or Omissions Which Amount to Eviction. — The failure of a landlord to cause the removal from the building of a woman who, with his knowledge, used a part thereof for purposes of prostitution, the landlord having the legal power to terminate her lease because of such use, was held to amount to an eviction as against another tenant of the same building. *Weiler v. Pancoast*, 71 N. J. L. 414.

The failure of the landlord to supply a sufficient quantity of heat, rendering the premises uninhabitable, is an eviction which warrants the tenant's abandonment of the premises. *Butler v. Newhouse*, (Supm. Ct. App. T.) 85 N. Y. Supp. 373.

**477.** 4. Entry to Repair or Rebuild Not Eviction. — *Robinson v. Henaghan*, 92 Ill. App. 620; *Talbot v. English*, 156 Ind. 299; *Schloss v. Schloss*, (Mich. 1904) 100 N. W. Rep. 202; *Ludington v. Seaton*, (Supm. Ct. App. T.) 32

**478.** See note 1.

**The Doctrine in Pennsylvania.** — See notes 5, 6.

*m.* FAILURE TO REPAIR. — See note 7.

**479.** See notes 1, 2.

*n.* NECESSITY FOR ABANDONMENT BY TENANT. — See note 3.

**480.** Tenant Must Abandon Within Reasonable Time. — See note 3.**481.** 3. Eviction by Title Paramount. — See note 2.**482.** 4. Effect of Appropriation under Right of Eminent Domain. — See note 7.

Misc. (N. Y.) 736; *Olson v. Schevlovitz*, 91 N. Y. App. Div. 405.

**Acts Done under Order of Municipal Authorities.** — The fumigation, repapering, and repainting of apartments of a tenant who had contracted smallpox, these measures being taken by the landlord in compliance with orders of the board of health, is not an eviction, the tenant's sickness being in no wise chargeable to the landlord. *Beaks v. Haas*, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 796.

**478. 1. Necessary Changes in Repairing.** — A wall built by a third person, with the landlord's consent, which encroached from nine inches to two feet for a distance of thirty-four feet, was held to constitute an eviction, although it did not materially change the character of the premises or render them uninhabitable. *Smith v. McEnany*, 170 Mass. 26, 64 Am. St. Rep. 272.

**5. Consent of Tenant.** — *Robinson v. Henaghan*, 92 Ill. App. 620; *Rosenbloom v. Finch*, (Supm. Ct. App. T.) 37 Misc. (N. Y.) 818; *Olson v. Schevlovitz*, 91 N. Y. App. Div. 405.

The tenant is not evicted where the landlord enters upon the premises and makes repairs, with the consent of the tenant. *Ludington v. Seaton*, (Supm. Ct. App. T.) 32 Misc. (N. Y.) 736.

The payment of rent by the tenant after the house has been rendered practically uninhabitable by repairs undertaken by the landlord is not such a constructive consent of the tenant as to prevent him from pleading eviction, where he in fact moves out of the house because of such repairs. *Wusthoff v. Schwartz*, 32 Wash. 337.

**6. Right of Entry to Repair Reserved by Terms of Lease.** — *Meeker v. Spalsbury*, 66 N. J. L. 60.

**7. Tenant May Be Evicted by Landlord's Neglect of Duty to Repair.** — *Prior v. Sanborn County*, 12 S. Dak. 90, quoting 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 478.

The destruction by fire, of the building on the demised premises, without the fault of either party, is not an eviction, in the absence of a covenant in the lease requiring the land-

lord to rebuild. *Moran v. Bergin*, 111 Ill. App. 313.

**479. 1. Repairs Made Necessary by Fault of Tenant.** — Where necessity for repairs arises through the negligence of the tenant, the tenant cannot hold the landlord responsible therefor nor treat the same as an eviction. *Robinson v. Henaghan*, 92 Ill. App. 620.

**2. Failure of Landlord to Make Repairs Stipulated in Lease Not Eviction.** — *Huber v. Ryan*, (Supm. Ct. App. T.) 32 Misc. (N. Y.) 428.

A tenant was not evicted by the failure of the landlord to repair, where the lease did not contain a covenant that the landlord would make repairs or remedy the decay or dilapidation of the building. *Roth v. Adams*, 185 Mass. 341.

**3. Tenant Must Abandon Premises.** — *Talbott v. English*, 156 Ind. 299; *Silverman v. Lurie*, (Supm. Ct. App. T.) 32 Misc. (N. Y.) 734; *Hall v. Irvin*, (Supm. Ct. App. T.) 38 Misc. (N. Y.) 123, 11 N. Y. Annot. Cas. 143.

**480. 3. Tenant Must Abandon Within Reasonable Time.** — *Kistler v. Wilson*, 77 Ill. App. 149; *Dennick v. Ekdahl*, 102 Ill. App. 199; *Seaboard Realty Co. v. Fuller*, (Supm. Ct. App. T.) 33 Misc. (N. Y.) 109; *Butler v. Carillo*, (Supm. Ct. App. T.) 88 N. Y. Supp. 941.

**Under What Circumstances Retaining Possession Will Not Forfeit Right to Abandon.** — *Marks v. Dellaglio*, 56 N. Y. App. Div. 299.

The tenant paid rent for a month in advance after the landlord had begun certain repairs. Later, the tenant abandoned the premises because the nature of the repairs rendered the premises unsafe. It was held that the payment by the tenant was not an acquiescence to the alterations subsequent to his payment. *Wusthoff v. Schwartz*, 32 Wash. 337.

**481. 2. Tenant May Peaceably Yield Possession and Treat Himself as Evicted.** — *Lowery v. Yawn*, 111 Ga. 64, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 481; *Stiger v. Monroe*, 109 Ga. 457.

**482. 7. Appropriation under Right of Eminent Domain Not Eviction.** — *Gugel v. Isaacs*, 21 N. Y. App. Div. 503, affirmed 162 N. Y. 636.



# EVIDENCE.

BY JOHN SIMPSON.

**489. IV. THINGS THAT NEED NOT BE PROVED — 2. Things of Which the Court Will Take Judicial Notice — a. IN THE COURT OF FIRST INSTANCE. —** See note 4.

**b. WHEN APPELLATE COURT WILL JUDICIALLY NOTICE. —** See note 5.

**491. V. DEGREES OF PROOF — 4. Satisfactory Evidence. —** See note 1.

**10. Preponderance of Evidence — a. CIVIL CASES. —** See note 9.

**492. c. CIVIL CASES BASED ON CRIMINAL ACT. —** See note 2.

**493. 11. Proof Beyond a Reasonable Doubt. —** See note 1.

**494. VI. FUNCTIONS OF JUDGE AND JURY — 1. Questions of Law for the Judge. —** See note 1.

**489. 4. Judicial Notice — Trial Court — Illinois. —** Pittsburgh, etc., R. Co. v. Moore, 110 Ill. App. 304.

**Kentucky. —** Pedigo v. Com., (Ky. 1902) 70 S. W. Rep. 659.

**Louisiana. —** State v. Judge, 105 La. 758.

**Massachusetts. —** Com. v. Pear, 183 Mass. 242.

**Nebraska. —** State v. Scott, 59 Neb. 499; George v. State, 59 Neb. 163.

**Texas. —** Galveston, etc., R. Co. v. Scott, 34 Tex. Civ. App. 501.

**Utah. —** Hilton v. Roylance, 25 Utah 129, 95 Am. St. Rep. 821.

**West Virginia. —** State v. Mitchell, 47 W. Va. 789, quoting 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 489, note 4.

**5. Appellate Court. —** Tischner v. Rutledge, 35 Wash. 285.

**491. 1. Belief to Reasonable Satisfaction is the requirement in Alabama. Arndt v. Cullman, 132 Ala. 540, 90 Am. St. Rep. 922; Moore v. Heineke, 119 Ala. 627; Coghill v. Kennedy, 119 Ala. 641.**

**9. Preponderance of Evidence — Civil Cases — Colorado. —** Smith v. Smith, 16 Colo. App. 333.

**Delaware. —** Weisman v. Commercial F. Ins. Co., 3 Penn. (Del.) 224.

**Georgia. —** Supreme Conclave, etc. v. Wood, 120 Ga. 328.

**Illinois. —** Illinois Steel Co. v. Wierzbicky, 206 Ill. 201, affirming 107 Ill. App. 69; West Chicago St. R. Co. v. Lieserowitz, 197 Ill. 607.

**Iowa. —** Ball v. Marquis, (Iowa 1902) 92 N. W. Rep. 691; Jerolman v. Chicago, etc., R. Co., 108 Iowa 177.

**Kansas. —** Chicago, etc., R. Co. v. Wood, 66 Kan. 613.

**Missouri. —** McKee v. Verdin, 96 Mo. App. 268.

**Nebraska. —** Link v. Campbell, (Neb. 1904) 100 N. W. Rep. 409; Davidson v. Davidson, (Neb. 1903) 97 N. W. Rep. 797; Jessen v. Donahue, (Neb. 1903) 96 N. W. Rep. 639; Schmuck v. Hill, (Neb. 1901) 96 N. W. Rep. 158; Western Mattress Co. v. Potter, (Neb. 1901) 95 N. W. Rep. 841.

**Ohio. —** Travelers' Ins. Co. v. Rosch, 23 Ohio Cir. Ct. 491.

**Texas. —** Kelly v. State, 44 Tex. Crim. 390.

**Virginia. —** Norfolk, etc., R. Co. v. Poole, 100 Va. 148, 4 Va. Sup. Ct. 42.

**492. 2. Civil Cases Based on Criminal Act. —** Blackmore v. Ellis, 70 N. J. L. 264, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 492; Kurz v. Doerr, 86 N. Y. App. Div. 507, quoting 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 492, affirmed 180 N. Y. 88, 105 Am. St. Rep. 716.

**English Rule Followed in Some Jurisdictions. —** Gage v. Eddy, 179 Ill. 492; Roberts v. Woods, 82 Ill. App. 630, reversed 185 Ill. 489.

**493. 1. Criminal Cases — Degree of Proof — Delaware. —** State v. Carr, 4 Penn. (Del.) 523; State v. Fahey, 3 Penn. (Del.) 594; State v. Magnell, 3 Penn. (Del.) 307; State v. Pratt, 3 Penn. (Del.) 264.

**Florida. —** Galloway v. State, (Fla. 1904) 36 So. Rep. 168.

**Georgia. —** Andrews v. State, 116 Ga. 83; Glover v. State, 114 Ga. 828; Shigg v. State, 115 Ga. 212.

**Illinois. —** Stanley v. People, 104 Ill. App. 294.

**Indiana. —** Clark v. State, 159 Ind. 60.

**Missouri. —** State v. Faulkner, 175 Mo. 546.

**Montana. —** State v. Felker, 27 Mont. 451.

**Nebraska. —** Lillie v. State, (Neb. 1904) 100 N. W. Rep. 316; Lamb v. State, (Neb. 1903) 95 N. W. Rep. 1050.

**New Jersey. —** State v. Lax, 71 N. J. L. 386.

**New Mexico. —** Territory v. Baca, 11 N. Mex. 559.

**North Carolina. —** State v. Wilcox, 132 N. Car. 1120.

**Pennsylvania. —** Com. v. Gutshall, 22 Pa. Super. Ct. 269.

**Virginia. —** Goldman v. Com., 100 Va. 865.

**Wisconsin. —** Bannen v. State, 115 Wis. 317.

**Canada. —** Reg. v. Winslow, 12 Manitoba 649.

**Every "Reasonable" Hypothesis only of innocence need be excluded, not every possible hypothesis. Walker v. State, 134 Ala. 86.**

**Every Fact Essential to Guilt Must Be Established Beyond Reasonable Doubt. —** Hodge v. Territory, 12 Okla. 108.

**494. 1. Questions of Law for Judge. —** Whitehouse Cannel Coal Co. v. Wells, (Ky. 1903) 74

- 495.** Construction of Pleadings. — See note 1.  
Construction of Contracts. — See notes 2, 3.
- 496.** Construction of Statutes. — See note 1.  
Admissibility of Evidence. — See notes 2, 3.
- 497.** Disputed Document the Basis of Suit. — See note 2.  
2. Questions of Fact for the Jury. — See note 3.
- 498.** All Disputed Facts Must Be Submitted to Jury. — See note 1.  
Credibility of Witnesses for Jury. — See note 2.

S. W. Rep. 736; State v. Woods, 112 La. 617; Territory v. Baca, 11 N. Mex. 559; State v. Yourex, 30 Wash. 611.

**495. 1. Pleadings to Be Construed by Court.** — Territory v. Baca, 11 N. Mex. 559.

**2. Contracts to Be Construed by Court** — *Illinois*. Telluride Power Transmission Co. v. Crane Co., 208 Ill. 218.

*Iowa*. — Clement v. Drybread, 108 Iowa 701.  
*Kentucky*. — Harmon v. Thompson, (Ky. 1905) 84 S. W. Rep. 569.

*Nebraska*. — McCormick Harvesting Mach. Co. v. Carpenter, (Neb. 1901) 95 N. W. Rep. 617.

*New York*. — Birch v. Kavanaugh Knitting Co., 34 N. Y. App. Div. 614, affirmed 165 N. Y. 617.

*South Carolina*. — Reid v. Courtenay Mfg. Co., 68 S. Car. 466; Riordan v. Doty, 56 S. Car. 111.

*Tennessee*. — Perry v. Williamson, (Tenn. Ch. 1899) 52 S. W. Rep. 887.

**3. Dobbs v. Campbell**, 66 Kan. 805; Slater v. U. S. Health, etc., Ins. Co., 133 Mich. 347.

**Contract by Letters.** — Stockwell v. Loecher, 9 Pa. Super. Ct. 241.

**496. 1. Statutes.** — Bank of China, etc., v. Morse, 168 N. Y. 458, 85 Am. St. Rep. 676; Ballentine v. Hammond, 68 S. Car. 153.

**2. Admissibility of Evidence.** — New York Cent., etc., R. Co. v. Difendaffer, (C. C. A.) 125 Fed. Rep. 893; Nickey v. Zonker, 31 Ind. App. 88; Territory v. Baca, 11 N. Mex. 559.

**3. Cole v. German**, Sav., etc., Soc., (C. C. A.) 124 Fed. Rep. 113; Libby v. Banks, 209 Ill. 109; Snooks v. Wingfield, 52 W. Va. 441.

**Preliminary Facts for the Court.** — Whether a deposition taken should be ordered to be filed with the clerk. Carr v. Adams, (N. H. 1899) 45 Atl. Rep. 1084.

The question of the remoteness of the evidence. Kendall v. Flanders, 72 N. H. 11.

**497. 2. Where Disputed Document the Basis of Suit.** — Davis v. Wood, 161 Mo. 17, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 497.

**3. Province of Jury.** — Bigelow v. Bigelow, 95 Me. 17; James v. Kansas City, 85 Mo. App. 20; Cohn v. Sidel, 71 N. H. 558.

**498. 1. Disputed Questions for Jury** — *United States*. — Chicago G. W. R. Co. v. Price, (C. C. A.) 97 Fed. Rep. 423; Speer v. Kearney County, (C. C. A.) 88 Fed. Rep. 749.

*Florida*. — Smith v. Klay, (Fla. 1904) 36 So. Rep. 54.

*Georgia*. — Telfair County v. Webb, 119 Ga. 916; Denson v. Denson, 111 Ga. 809.

*Illinois*. — Venice v. Griffin, 109 Ill. App. 410; Chipps v. Buxton, 109 Ill. App. 88; Gravadahl v. Chicago Refining Co., 85 Ill. App. 342; Wallen v. North Chicago St. R. Co., 82 Ill. App. 103.

*Michigan*. — McMillan v. Reaume, (Mich.

1904) 100 N. W. Rep. 166; Reid v. Detroit Ideal Paint Co., 132 Mich. 528.

*Minnesota*. — Price v. Standard L., etc., Ins. Co., 92 Minn. 238.

*Mississippi*. — Williams v. Southern R. Co., (Miss. 1903) 33 So. Rep. 972.

*New York*. — Tanenbaum v. Joseph, 93 N. Y. App. Div. 341; Blumberg v. Marks, (Supm. Ct. App. T.) 87 N. Y. Supp. 512; Malberg v. Sun Printing, etc., Assoc., (Supm. Ct. App. T.) 32 Misc. (N. Y.) 715; Kelly v. Brooklyn Heights R. Co., 51 N. Y. App. Div. 602; Sundheimer v. New York, 176 N. Y. 495; Marshall v. Buffalo, 176 N. Y. 545; Elmira Second Nat. Bank v. Weston, 161 N. Y. 520, 76 Am. St. Rep. 283.

*Oregon*. — North Pac. Lumber Co. v. Spore, 44 Oregon 462.

*Pennsylvania*. — Molloy v. U. S. Express Co., 22 Pa. Super. Ct. 173.

*South Dakota*. — Weller v. Hilderbrandt, (S. Dak. 1904) 101 N. W. Rep. 1108.

*Texas*. — Bonn v. Galveston, etc., R. Co., (Tex. Civ. App. 1904) 82 S. W. Rep. 808.

**2. Credibility of Testimony** — *Alabama*. — Townsend v. State, 137 Ala. 91.

*Delaware*. — State v. Brinte, 4 Penn. (Del.) 551.

*Georgia*. — Hargrove v. State, 117 Ga. 706; Mills v. State, 104 Ga. 502.

*Illinois*. — Carle v. People, 200 Ill. 494, 93 Am. St. Rep. 208; Junction Min. Co. v. Ench, 111 Ill. App. 346; Sullivan v. People, 108 Ill. App. 328; Evergreen Park v. Bailey, 107 Ill. App. 420; Peterson v. Fullerton, 106 Ill. App. 237; Supreme Tent, etc., v. Stensland, 105 Ill. App. 267, affirmed 206 Ill. 124, 99 Am. St. Rep. 137; Dick v. Zimmerman, 105 Ill. App. 615, affirmed 207 Ill. 636; Kean v. West Chicago St. R. Co., 75 Ill. App. 38; Quincy Gas, etc., Co. v. Bauman, 104 Ill. App. 600, affirmed 203 Ill. 295; Joliet R. Co. v. McPherson, 193 Ill. 629.

*Indiana*. — Jacobs v. Jolley, 29 Ind. App. 25.

*Iowa*. — State v. Hossack, 116 Iowa 194.

*Louisiana*. — State v. Washington, 107 La. 298.

*Michigan*. — Payne v. Union L. Guards, (Mich. 1904) 99 N. W. Rep. 376.

*Minnesota*. — White v. Collins, 90 Minn. 165.

*Missouri*. — State v. Sharp, 183 Mo. 715; Conner v. Missouri Pac. R. Co., 181 Mo. 397; Glasscock v. Swafford Bros. Dry Goods Co., 106 Mo. App. 657; Hugumin v. Hinds, 97 Mo. App. 346; Woodard v. Conney, 111 Mo. App. 152; Brown v. Mays, 80 Mo. App. 81; Cravens v. Hunter, 87 Mo. App. 456; Hester v. Fidelity, etc., Co., 78 Mo. App. 505.

*Nebraska*. — Parker v. State, 67 Neb. 555; Bankers' Union of World v. Schiverin, 67 Neb. 303; Muchow v. Reid, 57 Neb. 585.

*New Hampshire*. — Cohn v. Sidel, 71 N. H. 558.

**498.** Probative Effect of Evidence. — See note 3.

**499.** When Court May Direct a Verdict. — See note 1.

**500.** Directing Verdict for Plaintiff. — See note 1.

Directing Verdict for Defendant. — See note 2.

*New Jersey.* — *Acolia v. Elizabeth, etc., R. Co.*, (N. J. 1904) 57 Atl. Rep. 257.

*New Mexico.* — *Territory v. Baca*, 11 N. Mex. 559.

*New York.* — *Cullinan v. Furthmann*, 70 N. Y. App. Div. 110, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 498; *Sternaman v. Metropolitan L. Ins. Co.*, 94 N. Y. App. Div. 610, affirmed 181 N. Y. 514; *Fisher v. Union R. Co.*, 86 N. Y. App. Div. 365; *McCoy v. Munro*, 76 N. Y. App. Div. 435; *Hunt v. Dexter Sulphite Pulp, etc., Co.*, 100 N. Y. App. Div. 119.

*North Carolina.* — *Hinson v. Postal Tel. Cable Co.*, 132 N. Car. 460; *State v. Hall*, 132 N. Car. 1094; *State v. Wilcox*, 132 N. Car. 1120; *Cogdell v. Southern R. Co.*, 129 N. Car. 398.

*Ohio.* — *State v. Tuttle*, 67 Ohio St. 440, 93 Am. St. Rep. 689.

*Rhode Island.* — *Lebeau v. Dyerville Mfg. Co.*, (R. I. 1904) 57 Atl. Rep. 1092.

*Texas.* — *Galveston, etc., R. Co. v. Butshek*, 34 Tex. Civ. App. 194; *International, etc., R. Co. v. Ives*, 34 Tex. Civ. App. 49.

*Utah.* — *Meyers v. Highland Boy Gold Min. Co.*, 28 Utah 96.

*Vermont.* — *Tracy v. Grand Trunk R. Co.*, 76 Vt. 313.

**498. 3. Weight of Evidence** — *Alabama.* — *Hainsworth v. State*, 136 Ala. 13.

*Connecticut.* — *Wetherell v. Hollister*, 73 Conn. 622.

*Delaware.* — *Daniels v. Liebig Mfg. Co.*, 2 Marv. (Del.) 207.

*Illinois.* — *Chicago City R. Co. v. Bohnow*, 108 Ill. App. 346; *Chicago City R. Co. v. Iverson*, 108 Ill. App. 433; *Evergreen Park v. Bailey*, 107 Ill. App. 420; *Supreme Tent, etc., v. Stensland*, 105 Ill. App. 267, affirmed 206 Ill. 124, 99 Am. St. Rep. 137; *Dick v. Zimmerman*, 105 Ill. App. 615, affirmed 207 Ill. 636; *Kehl v. Abram*, 210 Ill. 218, affirming 112 Ill. App. 77; *Joliet R. Co. v. McPherson*, 193 Ill. 629.

*Massachusetts.* — *Com. v. Rogers*, 181 Mass. 184.

*Mississippi.* — *Miller v. State*, (Miss. 1904) 35 So. Rep. 690.

*Missouri.* — *Brown v. Mays*, 80 Mo. App. 81; *Woodard v. Conney*, 111 Mo. App. 152.

*Montana.* — *Whalen v. Harrison*, 26 Mont. 316.

*Nebraska.* — *Muchow v. Reid*, 57 Neb. 585; *Farmers' State Bank v. Yenney*, (Neb. 1905) 102 N. W. Rep. 617.

*New Mexico.* — *Territory v. Baca*, 11 N. Mex. 559.

*North Carolina.* — *Southern L. & T. Co. v. Benbow*, 135 N. Car. 303.

*South Dakota.* — *State v. Coleman*, 17 N. Dak. 594.

*Utah.* — *Meyers v. Highland Boy Gold Min. Co.*, 28 Utah 96.

*Wisconsin.* — *Kuenster v. Woodhouse*, 101 Wis. 216.

*Wyoming.* — *Curran v. State*, 12 Wyo. 553.

**499. 1. Court Directing Verdict** — *United*

*States.* — *Patillo v. Allen-West Commission Co.*, (C. C. A.) 131 Fed. Rep. 680; *Chicago G. W. R. Co. v. Roddy*, (C. C. A.) 131 Fed. Rep. 712; *Gentry v. Singleton*, (C. C. A.) 128 Fed. Rep. 679; *Shoup v. Marks*, (C. C. A.) 128 Fed. Rep. 32.

*Georgia.* — *McCullough v. Pritchett*, 120 Ga. 585.

*Nebraska.* — *Chesley v. Rocheford*, (Neb. 1903) 96 N. W. Rep. 241; *Linton v. Baker*, (Neb. 1901) 96 N. W. Rep. 251; *Wagoner v. Landon*, (Neb. 1901) 95 N. W. Rep. 496.

*New Hampshire.* — *Boston, etc., R. Co. v. Sargent*, 72 N. H. 455.

*New York.* — *McDonald v. Metropolitan St. R. Co.*, 46 N. Y. App. Div. 43, affirmed 167 N. Y. 66.

*Oklahoma.* — *Neelley v. Southwestern Cotton Seed Oil Co.*, 13 Okla. 356.

*South Carolina.* — *Reid v. Courtenay Mfg. Co.*, 68 S. Car. 466.

*Texas.* — *Gilbreath v. State*, (Tex. Civ. App. 1904) 82 S. W. Rep. 807.

*West Virginia.* — *Williams v. Belmont Coal, etc., Co.*, 55 W. Va. 84.

**500. 1. For the Plaintiff** — *Georgia.* — *Taylor v. American Freehold Land Mortg. Co.*, 106 Ga. 238.

*Illinois.* — *Marshall v. John Grosse Clothing Co.*, 184 Ill. 421, 75 Am. St. Rep. 181, affirming 83 Ill. App. 338.

*Michigan.* — *Neoter v. Baraga Tp.*, 133 Mich. 640.

*Missouri.* — *Hendley v. Globe Refining Co.*, 106 Mo. App. 20; *Hoster v. Lange*, 80 Mo. App. 234.

*Nebraska.* — *Winterringer v. Warder, etc., Co.*, (Neb. 1901) 95 N. W. Rep. 619.

*Texas.* — *Lancaster Gin, etc., Co. v. Murray Ginning System Co.*, 19 Tex. Civ. App. 110.

**2. For the Defendant** — *United States.* — *Marquardt v. Ball Engine Co.*, (C. C. A.) 122 Fed. Rep. 374; *Smyth v. New Orleans Canal, etc., Co.*, (C. C. A.) 93 Fed. Rep. 899; *Texas, etc., R. Co. v. Eason*, (C. C. A.) 92 Fed. Rep. 553.

*Delaware.* — *Creswell v. Wilmington, etc., R. Co.*, 2 Penn. (Del.) 210.

*Illinois.* — *Nolan v. Morris*, 108 Ill. App. 261; *Chicago City R. Co. v. Ahler*, 107 Ill. App. 397; *Boyle v. Illinois Cent. R. Co.*, 88 Ill. App. 255; *Barr v. Paris*, 87 Ill. App. 503; *Bjork v. Illinois Cent. R. Co.*, 85 Ill. App. 269; *Ryan v. Chicago*, 79 Ill. App. 28.

*Indian Territory.* — *Truskett v. Bronaugh*, (Indian Ter. 1903) 76 S. W. Rep. 294; *De Graffenried v. Wallace*, 2 Indian Ter. 657.

*Maine.* — *Day v. Boston, etc., R. Co.*, 97 Me. 528.

*Missouri.* — *Cogan v. Cass Ave., etc., R. Co.*, 101 Mo. App. 179.

*Nebraska.* — *Agnew v. Montgomery*, (Neb. 1904) 99 N. W. Rep. 820; *Sattler v. Chicago, etc., R. Co.*, (Neb. 1904) 98 N. W. Rep. 663.

*New Jersey.* — *Regan v. Palo*, 62 N. J. L. 30.

*New Mexico.* — *Armstrong v. Aragon*, (N. Mex. 1905) 79 Pac. Rep. 291.



**501. VII. RELEVANCY — 1. Definition and General Rule.** — See note 2.

**502.** See note 1.

**2. Evidence Bearing Directly on Facts in Issue.** — See note 2.

**3. Evidence Tending to Render More or Less Probable the Facts in Issue.** — See note 3.

**503. 4. Collateral Facts — a. GENERAL RULE.** — See note 1.

**b. CONDUCT OF PARTIES — (1) In General.** — See note 2.

**504. (3) Fabrication of Evidence.** — See note 2.

**(4) Attempts to Prevent Investigation.** — See note 3.

**(5) Escape, Concealment, or Disguise.** — See note 4.

*Oklahoma.* — *Kentucky Refining Co. v. Purcell Cotton Seed Oil Mills*, 13 Okla. 220.

*West Virginia.* — *Ritz v. Wheeling*, 45 W. Va. 262.

*Wisconsin.* — *O'Brien v. Chicago, etc.*, R. Co., 102 Wis. 628.

**Conflicting Evidence.** — *Sloss Iron, etc., Co. v. Tilson*, (Ala. 1904) 37 So. Rep. 427; *Kohner v. Capital Traction Co.*, 22 App. Cas. (D. C.) 181; *Lake Erie, etc., R. Co. v. Morrissey*, 177 Ill. 376; *Missouri Malleable Iron Co. v. Hoover*, 77 Ill. App. 437, *affirmed* 179 Ill. 107; *Roberts v. Chicago, etc., R. Co.*, 78 Ill. App. 526; *Shickle-Harrison, etc., Iron Co. v. Beck*, 112 Ill. App. 444, *affirmed* 212 Ill. 268; *Chicago, etc., R. Co. v. Burridge*, 107 Ill. App. 23, *reversed* 211 Ill. 9; *Pittsburg, etc., R. Co. v. Banfill*, 107 Ill. App. 254, *affirmed* 206 Ill. 553; *Humboldt Bldg. Assoc. Co. v. Ducker*, (Ky. 1904) 82 S. W. Rep. 969; *Chesapeake, etc., R. Co. v. Ogles*, (Ky. 1903) 73 S. W. Rep. 751; *Pewonka v. Stewart*, (N. Dak. 1904) 99 N. W. Rep. 1080.

Where there is some contradictory evidence, it is error to direct a verdict for the defendant, though the court is of opinion that a verdict for the plaintiff would be set aside. *Wagner v. Einhorn*, (Supm. Ct. App. T.) 88 N. Y. Supp. 370; *Dill v. Marmon*, (Ind. App. 1904) 71 N. E. Rep. 669; *McDonald v. Metropolitan St. R. Co.*, 167 N. Y. 66; *McCrystal v. O'Neill*, (Supm. Ct. App. T.) 86 N. Y. Supp. 84.

**Where the Plaintiff Has Made a Prima Facie Case**, it is error to grant a nonsuit. *Kroetch v. Empire Mill Co.*, 9 Idaho 277.

**501. 2. United States.** — *Pine River Logging Co. v. U. S.*, 186 U. S. 279.

*Iowa.* — *Evans v. Elwood*, 123 Iowa 92.

*Louisiana.* — *State v. Perry*, 51 La. Ann. 1074.

*Massachusetts.* — *Amsden v. Parmelee*, 177 Mass. 522.

*Nebraska.* — *Kastner v. State*, 58 Neb. 767.

*New Hampshire.* — *Gregg v. Northern R. Co.*, 67 N. H. 452.

*New York.* — *Heller v. Heine*, (Supm. Ct. App. T.) 42 Misc. (N. Y.) 188, *citing* 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 389.

**Must Have Visible Connection with Facts in Issue.** — See dissenting opinion in *Hamblin v. State*, 41 Tex. Crim. 135, *quoting* 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 501, note 2.

**Relevancy May Be Shown After Admission.** — See dissenting opinion in *Hamblin v. State*, 41 Tex. Crim. 135, *quoting* 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 501, note 2.

**Need Not Be Direct Evidence.** — *Gandy v. Bisell*, (Neb. 1902) 90 N. W. Rep. 883; *Reagan v. Manchester St. R. Co.*, 72 N. H. 298.

**Question of Remoteness.** — "Generally speaking, the question of remoteness, as justifying the exclusion of evidence, must depend upon all the considerations, including time, the character of the evidence, and all the surrounding circumstances which, in the opinion of the court, ought to have a bearing upon its worthiness to be brought into the consideration and determination of the matter in contention." *Prentice, J.*, in *State v. Kelly*, 77 Conn. 266.

Evidence is competent if not so remote but that, within reasonable probabilities, it tends to prove the issue. *Kavanaugh v. Wasau*, 120 Wis. 611.

**502. 1. General Rule as to Relevancy.** — *Nicola Bros. Co. v. Speer Box, etc., Co.*, (C. C. A.) 133 Fed. Rep. 914; *Gray v. State*, 42 Fla. 174.

**2. Evidence Bearing Directly on Facts in Issue.** — *Collins v. State*, 138 Ala. 57.

**3. Circumstantial Evidence.** — *Burton v. State*, 115 Ala. 1; *Currelli v. Jackson*, 77 Conn. 115; *Davis v. State*, (Fla. 1903) 35 So. Rep. 76; *Glassberg v. Olson*, 89 Minn. 195; *Chamberlain v. Chamberlain Banking House*, (Neb. 1903) 93 N. W. Rep. 1021; *Farmers' State Bank v. Yennet*, (Neb. 1905) 102 N. W. Rep. 617; *Texas Tram, etc., Co. v. Gwin*, (Tex. Civ. App. 1899) 52 S. W. Rep. 110.

**503. 1. Collateral Facts.** — *Swan v. Thompson*, 124 Cal. 193; *Funk v. U. S.*, 16 App. Cas. (D. C.) 478; *Teasley v. Bradley*, 120 Ga. 373; *Home F. Ins. Co. v. Kuhlman*, 58 Neb. 488, 76 Am. St. Rep. 111; *Matter of Shawmut Min. Co.*, 94 N. Y. App. Div. 156; *Bedenbaugh v. Southern R. Co.*, 69 S. Car. 1.

**2. General Rule — Conduct of Parties.** — *People v. Ardell*, 135 Cal. xix. 66 Pac. Rep. 970; *State v. Dennis*, 119 Iowa 688; *Hoag v. Wright*, 174 N. Y. 36, *citing* 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 503; *Nowack v. Metropolitan St. R. Co.*, 166 N. Y. 433, 82 Am. St. Rep. 691, *citing* 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 503; *Baines v. State*, 43 Tex. Crim. 490.

**504. 2. Fabrication of Evidence.** — *Hoag v. Wright*, 174 N. Y. 36; *Nowack v. Metropolitan St. R. Co.*, 166 N. Y. 433, 82 Am. St. Rep. 691.

**3. Attempts to Prevent Investigation.** — *Hoag v. Wright*, 174 N. Y. 36, *citing* 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 503.

**4. Attempt by Accused to Escape or to Conceal or Disguise Himself — Alabama.** — *Sherrill v. State*, 138 Ala. 3; *Nelson v. State*, 130 Ala. 83. *Florida.* — *Carr v. State*, (Fla. 1903) 34 So. Rep. 892.

*Georgia.* — *Johnson v. State*, 120 Ga. 135; *Smith v. State*, 106 Ga. 673, 71 Am. St. Rep. 286.

**504.** (6) *Destruction or Concealment of Evidence.* — See note 5.

**505.** (7) *Threats of the Person Assailed.* — See note 1.

*Communicated Threats.* — See note 2.

*Uncommunicated Threats.* — See note 3.

(8) *Threats Made by the Accused.* — See note 4.

**506.** *c. FACTS SHOWING MOTIVE OR INTENT* — (1) *In Criminal Cases.* — See notes 1, 4.

**507.** See notes 1, 2.

(2) *In Civil Cases.* — See notes 3, 4.

*Iowa.* — State *v. Phillips*, 118 Iowa 660; State *v. Wrand*, 108 Iowa 73.

*Kansas.* — State *v. Stewart*, 65 Kan. 371.

*Kentucky.* — Aiken *v. Com.*, (Ky. 1902) 68

S. W. Rep. 849; Nicely *v. Com.*, (Ky. 1900)

58 S. W. Rep. 995; Saylor *v. Com.*, (Ky. 1900)

57 S. W. Rep. 614.

*Louisiana.* — State *v. Middleton*, 104 La. 233.

*Missouri.* — State *v. Wills*, 106 Mo. App. 196;

State *v. Adler*, 146 Mo. 18; State *v. Garrison*,

147 Mo. 548.

*Montana.* — State *v. Lucey*, 24 Mont. 295.

*Nebraska.* — Kennedy *v. State*, (Neb. 1904)

99 N. W. Rep. 645; Williams *v. State*, (Neb.

1903) 95 N. W. Rep. 1014.

*Texas.* — McDonough *v. State*, (Tex. Crim.

1904) 84 S. W. Rep. 594; Andrews *v. State*,

(Tex. Crim. 1904) 83 S. W. Rep. 188; Buchanan

*v. State*, 41 Tex. Crim. 127.

*Vermont.* — State *v. Shaw*, 73 Vt. 149.

*Virginia.* — Anderson *v. Com.*, 100 Va. 860.

*Wisconsin.* — Paulson *v. State*, 118 Wis. 89.

**What Cannot Be Shown — Refusal to Flee or**

**Voluntary Surrender.** — Thomas *v. State*, (Fla.

1904) 36 So. Rep. 161.

**504. 5. Destruction or Concealment of Evi-**

**dence** — *Kentucky.* — Ward *v. Com.*, (Ky. 1904)

83 S. W. Rep. 649.

*Missouri.* — State *v. Alexander*, 184 Mo. 266.

*Montana.* — State *v. Mahoney*, 24 Mont. 281.

*Nebraska.* — Blair *v. State*, (Neb. 1904) 101

N. W. Rep. 17.

*New York.* — Hoag *v. Wright*, 174 N. Y. 36,

citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.)

503.

*North Dakota.* — State *v. Rozum*, 8 N. Dak.

548, citing 11 AM. AND ENG. ENCYC. OF LAW

(2d ed.) 504.

*Texas.* — Ezell *v. State*, (Tex. Crim. 1902)

71 S. W. Rep. 283; Gann *v. State*, (Tex. 1900)

57 S. W. Rep. 668.

**505. 1. Threats.** — State *v. Burton*, 63 Kan.

602; People *v. Taylor*, 177 N. Y. 237; People

*v. Gaimari*, 176 N. Y. 84; Wallace *v. State*, 44

Tex. Crim. 300.

**2. When Threats Communicated.** — Harkness

*v. State*, 129 Ala. 71; Lee *v. State*, 72 Ark. 436;

State *v. Nelson*, 68 Kan. 566; Nelson *v. State*,

(Tex. Crim. 1900) 58 S. W. Rep. 107.

**3. Uncommunicated Threats.** — Wilson *v.*

State, 140 Ala. 43; Webb *v. State*, 135 Ala. 36;

State *v. Warren*, 1 Marv. (Del.) 487; Ellis *v.*

State, 152 Ind. 326; State *v. Nelson*, 68 Kan.

566; State *v. Smith*, 164 Mo. 567.

**Uncommunicated Threats Admissible When Part**

**of Res Gestæ.** — Fields *v. State*, (Fla. 1903) 35

So. Rep. 185.

**4. Threats by Accused** — *Alabama.* — Tipton *v.*

State, 140 Ala. 39.

*California.* — People *v. Fitzgerald*, 138 Cal. 39.

*Colorado.* — Moore *v. People*, 26 Colo. 213.

*Connecticut.* — State *v. Tucker*, 75 Conn. 201.

*District of Columbia.* — McUin *v. U. S.*, 17

App. Cas. (D. C.) 323.

*Louisiana.* — State *v. Nix*, 111 La. 812.

*Montana.* — State *v. Sloan*, 22 Mont. 293.

*North Carolina.* — State *v. Rose*, 129 N. Car.

575.

*Oregon.* — State *v. Wong Gee*, 35 Oregon 276.

*Texas.* — Friday *v. State*, (Tex. Crim. 1904)

79 S. W. Rep. 815; Washington *v. State*, 46

Tex. Crim. 184; Poole *v. State*, 45 Tex. Crim.

348; Williams *v. State*, 40 Tex. Crim. 497;

Brown *v. State*, (Tex. Crim. 1899) 50 S. W.

Rep. 354.

**506. 1. Motive or Intent — Criminal Cases.** —

Reg. *v. Ollis*, (1900) 2 Q. B. 758, 69 L. J. Q. B.

918, 83 L. T. N. S. 251; Pirscher *v. U. S.*, (C.

C. A.) 133 Fed. Rep. 526; Higgins *v. State*, 157

Ind. 57; People *v. Doty*, 73 N. Y. App. Div. 78,

affirmed 175 N. Y. 164.

**4. Evidence of Motive — Against Accused —**

*Alabama.* — Mitchell *v. State*, 140 Ala. 118.

*Louisiana.* — State *v. Coleman*, 111 La. 303,

citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.)

506; State *v. Breaux*, 104 La. 540, citing 11 AM.

AND ENG. ENCYC. OF LAW (2d ed.) 506.

*Nebraska.* — Lillie *v. State*, (Neb. 1904) 100

N. W. Rep. 316.

*Ohio.* — State *v. Hahn*, 11 Ohio Dec. 311, 8

Ohio N. P. 101.

*Texas.* — Weaver *v. State*, 46 Tex. Crim. 607;

Baines *v. State*, 43 Tex. Crim. 490; Clark *v.*

State, (Tex. Crim. 1900) 59 S. W. Rep. 887;

Turner *v. State*, (Tex. Crim. 1900) 55 S. W.

Rep. 53.

**507. 1. Lack of Motive.** — Banks *v. State*,

157 Ind. 190; State *v. Breaux*, 104 La. 540,

citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.)

507.

**2. Testimony of Accused.** — State *v. Lowe*, 67

Kan. 183; State *v. Breaux*, 104 La. 540, cit-

ing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.)

507; State *v. Hall*, 132 N. Car. 1094; Neely *v.*

State, (Tex. Crim. 1900) 56 S. W. Rep. 625.

**The Testimony of the Defendant's Wife as to**

**his intent was held material in** Martin *v. State*,

44 Tex. Crim. 538.

**3. Motive — Civil Cases.** — Ramsey *v. Flowers*,

72 Ark. 316; Milwaukee Harvester Co. *v.*

Tymich, 68 Ark. 225; Phelps, etc., Co. *v. Sam-*

son, 113 Iowa 145; Van Ravenswaay *v. Covenant*

Mut. L. Ins. Co., 89 Mo. App. 73; Ettlinger *v.*

Weil, 94 N. Y. App. Div. 291; Hughes *v.*

Waples-Platter Grocer Co., 25 Tex. Civ. App.

212.

**4. Direct Testimony of the Actors — Not Con-**

**clusive** — *Georgia.* — Thompson *v. Glover*, 120

Ga. 440; Acme Brewing Co. *v. Central R., etc.*,

Co., 115 Ga. 494.

**508. d. FACTS SHOWING PREPARATION.** — See note 3.

*f. STATEMENTS OF PARTIES MADE OUT OF COURT* — (1) *Contradictory Statements.* — See notes 5, 6.

**509. g. RES INTER ALIOS ACTA** — (1) *General Rule.* — See note 3.

**510. (2) Facts Similar to Those in Issue** — (a) *In Civil Cases* — *aa. IN PROOF OF FRAUD.* — See note 1.

*bb. IN PROOF OF NEGLIGENCE.* — See notes 2, 3.

*Illinois.* — Partridge *v.* Cutler, 104 Ill. App. 89.

*Iowa.* — Warfield *v.* Clark, 118 Iowa 69.

*Maryland.* — Gambrill *v.* Schooley, 95 Md. 260.

*Nebraska.* — McCormick Harvesting Mach. Co. *v.* Hiatt, (Neb. 1903) 95 N. W. Rep. 627; Hackney *v.* Raymond Bros. Clark Co., (Neb. 1903) 94 N. W. Rep. 822.

*New York.* — Gray *v.* New York Cent., etc., R. Co., 77 N. Y. App. Div. 1.

*Ohio.* — Tucker *v.* Hendricks, 25 Ohio Cir. Ct. 426; Toledo Stove Co. *v.* Reep, 9 Ohio Cir. Dec. 467, 18 Ohio Cir. Ct. 58.

*Texas.* — Peightal *v.* Cotton States Bldg. Co., 25 Tex. Civ. App. 390; Wade *v.* Odle, 21 Tex. Civ. App. 656.

*Wisconsin.* — Moore *v.* May, 117 Wis. 192.

**508. 3. Facts Showing Preparation.** — State *v.* Kinsauls, 126 N. Car. 1095; Parker *v.* State, 46 Tex. Crim. 461; Chapman *v.* State, 43 Tex. Crim. 328.

**5. Contradictory Statements.** — Jones *v.* State, (Ala. 1904) 37 So. Rep. 390; McBlain *v.* Edgar, 65 N. J. L. 634, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 508.

**6.** McBlain *v.* Edgar, 65 N. J. L. 634, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 508.

**509. 3. Res Inter Alios Acta — General Rule.** — *United States.* — Tyler *v.* U. S., (C. C. A.) 106 Fed. Rep. 137; Edwards *v.* Bates County, (C. C. A.) 99 Fed. Rep. 905.

*Alabama.* — Southern R. Co. *v.* Bunnell, 138 Ala. 247; Andrews *v.* Tucker, 127 Ala. 602.

*Georgia.* — Merchants' Nat. Bank *v.* Greenwood, 113 Ga. 306.

*Illinois.* — Merritt *v.* Boyden, 191 Ill. 136, 85 Am. St. Rep. 246, affirming 93 Ill. App. 613; Buckley *v.* Acme Food Co., 113 Ill. App. 210.

*Kentucky.* — Danville, etc., Turnpike Road Co. *v.* Lincoln County Fiscal Ct., (Ky. 1903) 77 S. W. Rep. 379.

*Massachusetts.* — Post *v.* Leland, 184 Mass. 601.

*Nebraska.* — Patterson *v.* Humboldt First Nat. Bank, (Neb. 1905) 102 N. W. Rep. 765.

*New York.* — Brauer *v.* New York, 74 N. Y. App. Div. 210; Vacca *v.* Martucci, (Supm. Ct. App. T.) 90 N. Y. Supp. 356.

*North Carolina.* — Ridley *v.* Seaboard, etc., R. Co., 124 N. Car. 37; Story *v.* Norfolk, etc., R. Co., 133 N. Car. 59.

*South Carolina.* — Perry *v.* Jefferies, 61 S. Car. 292; Burwell, etc., Co. *v.* Chapman, 59 S. Car. 581.

*Texas.* — Beakley *v.* Reinier, (Tex. Civ. App. 1903) 78 S. W. Rep. 702; Walker *v.* State, (Tex. Crim. 1903) 72 S. W. Rep. 401; Stuart *v.* Kohlberg, (Tex. Civ. App. 1899) 53 S. W. Rep. 596.

*Virginia.* — Repass *v.* Richmond, 99 Va. 508.

*Wisconsin.* — Kelley *v.* La Crosse Carriage Co., 120 Wis. 84, 102 Am. St. Rep. 971; Coman *v.* Wunderlich, 122 Wis. 138.

**510. 1. Exceptions — In Proof of Fraud —** *United States.* — Wright *v.* Stewart, 130 Fed. Rep. 905; Olson *v.* U. S., (C. C. A.) 133 Fed. Rep. 849; Bryan *v.* U. S., (C. C. A.) 133 Fed. Rep. 495; Cunard Steamship Co. *v.* Kelley, (C. C. A.) 115 Fed. Rep. 678.

*Arkansas.* — Ramsey *v.* Flowers, 72 Ark. 316.

*Kentucky.* — Paducah First Nat. Bank *v.* Wisdom, 111 Ky. 135.

*Michigan.* — Beard *v.* Hill, 131 Mich. 246.

*Nebraska.* — Barbar *v.* Martin, 67 Neb. 445.

*Nevada.* — Swinney *v.* Patterson, 25 Nev. 411.

*New York.* — Ettlinger *v.* Weil, 94 N. Y. App. Div. 291; Chisholm *v.* Eisenhuth, 69 N. Y. App. Div. 134; Converse *v.* Sickles, 161 N. Y. 666, affirming 16 N. Y. App. Div. 49; Darling *v.* Klock, 165 N. Y. 623, affirming 33 N. Y. App. Div. 270.

*Ohio.* — Davis *v.* State, 10 Ohio Cir. Dec. 738, 20 Ohio Cir. Ct. 430.

*South Carolina.* — Brown *v.* Newell, 64 S. Car. 27.

*Texas.* — Houston Cotton Oil Co. *v.* Trammell, 96 Tex. 598, reversing (Tex. Civ. App. 1903) 72 S. W. Rep. 244.

*Washington.* — Stack *v.* Nolte, 29 Wash. 188.

**2. In Proof of Negligence —** *Alabama.* — Decatur Car Wheel, etc., Co. *v.* Mehaffey, 128 Ala. 242.

*Florida.* — Florida Cent., etc., R. Co. *v.* Mooney, (Fla. 1903) 33 So. Rep. 1010.

*Georgia.* — Central of Georgia R. Co. *v.* Duffey, 116 Ga. 346.

*Iowa.* — Dalton *v.* Chicago, etc., R. Co., 114 Iowa 257; Bach *v.* Iowa Cent. R. Co., 112 Iowa 241.

*Kentucky.* — Louisville Water Co. *v.* Weis, (Ky. 1903) 76 S. W. Rep. 356; Hughes *v.* General Electric Light, etc., Co., 107 Ky. 485.

*Montana.* — Bair *v.* Struck, 29 Mont. 45.

*Ohio.* — Baltimore, etc., R. Co. *v.* Van Horn, 12 Ohio Cir. Dec. 106, 21 Ohio Cir. Ct. 337.

*South Carolina.* — Ragsdale *v.* Southern R. Co., 69 S. Car. 429.

*Texas.* — Missouri, etc., R. Co. *v.* Sherman, (Tex. Civ. App. 1899) 53 S. W. Rep. 386.

*Utah.* — Whitmore *v.* Rio Grande Western R. Co., 24 Utah 215.

*Wisconsin.* — Kreider *v.* Wisconsin River Paper, etc., Co., 110 Wis. 645.

**Accident on Railroad Crossing.** — *Illinois Cent. R. Co. v. Griffin*, 184 Ill. 9.

**3. Georgia.** — Georgia Cotton Oil Co. *v.* Jackson, 112 Ga. 620.

*Illinois.* — Illinois Cent. R. Co. *v.* Treat, 179 Ill. 576; FitzSimons, etc., Co. *v.* Braum, 94 Ill. App. 533, affirmed 199 Ill. 390.

*Indiana.* — Indianapolis St. R. Co. *v.* Dawson, 31 Ind. App. 605.

*Massachusetts.* — Koplan *v.* Boston Gas Light Co., 177 Mass. 15.



**512.** *cc.* IN PROOF OF MALICE. — See note 1.

*dd.* TO SHOW HABIT OR SYSTEM IN BUSINESS. — See note 2.

*ee.* TO SHOW VALUE. — See note 3.

**513.** (b) In Criminal Cases — *aa.* IN PROOF OF CRIMINAL INTENT. — See note 1.

*Michigan.* — Rudell *v.* Grand Rapids Cold-Storage Co., (Mich. 1904) 99 N. W. Rep. 756.

*Minnesota.* — Byard *v.* Palace Clothing House Co., 85 Minn. 363.

*Missouri.* — Hall *v.* Jennings, 87 Mo. App. 627; Waddell *v.* Waddell, 87 Mo. App. 216.

*New Hampshire.* — Proctor *v.* White Mountain Freezer Co., 70 N. H. 3.

*New Jersey.* — Duysters *v.* Crawford, 69 N. J. L. 614.

*New York.* — Auld *v.* Manhattan L. Ins. Co., 165 N. Y. 610, *affirming* 34 N. Y. App. Div. 491; Wilder *v.* Metropolitan St. R. Co., 161 N. Y. 665, *affirming* 10 N. Y. App. Div. 364; Rogers *v.* New York, etc., Bridge, 159 N. Y. 556, *affirming* 11 N. Y. App. Div. 141.

*North Carolina.* — Raper *v.* Wilmington, etc., R. Co., 126 N. Car. 563.

*Ohio.* — Ashtabula *v.* Bartram, 2 Ohio Cir. Dec. 372.

*Pennsylvania.* — Moulton *v.* O'Bryan, 17 Pa. Super. Ct. 593.

*Texas.* — Meyer *v.* Wolnitzek, (Tex. Civ. App. 1901) 63 S. W. Rep. 1058; San Antonio *v.* Diaz, (Tex. Civ. App. 1901) 62 S. W. Rep. 549.

*Wisconsin.* — Chase *v.* Blodgett Milling Co., 111 Wis. 655.

**Defective Sidewalk.** — Yeager *v.* Spirit Lake, 115 Iowa 593; Buckley *v.* Kansas City, 95 Mo. App. 188. But see Smart *v.* Kansas City, 91 Mo. App. 586.

**Defective Highway.** — Madison Tp. *v.* Scott, 9 Kan. App. 871; Dow *v.* Wear, 68 N. H. 345; Beardslee *v.* Columbia Tp., 5 Lack. Leg. N. (Pa.) 290.

**Defective Gas Pipe.** — Logansport, etc., Natural Gas Co. *v.* Coate, 29 Ind. App. 299.

**Defective Sewer.** — Evidence of damage to other property, on another part of the sewer, at other times, under similar conditions, was held competent to show the incapacity of a sewer in Roberts *v.* Dover, 72 N. H. 147.

**In Proof of Notice.** — Maxwell *v.* Durkin, 185 Ill. 546, *affirming* 86 Ill. App. 257; Sugar Creek Coal Min. Co. *v.* Peterson, 75 Ill. App. 631, *reversed* 177 Ill. 324; Indianapolis St. R. Co. *v.* Dawson, 31 Ind. App. 605; Wabash R. Co. *v.* Kelley, 153 Ind. 119; Exton *v.* Central R. Co., 63 N. J. L. 356; Exton *v.* Central R. Co., 62 N. J. L. 7.

**Fire Set by Locomotives.** — Lake St. El. R. Co. *v.* Peterson, 93 Ill. App. 118; Carpenter *v.* Laswell, (Ky. 1901) 63 S. W. Rep. 609; Texas, etc., R. Co. *v.* Wooldridge, (Tex. Civ. App. 1901) 63 S. W. Rep. 905. But see Peacock *v.* Cooper, 27 Ont. App. 128.

**512. 1. In Proof of Malice.** — Alcorn *v.* Powell, (Ky. 1901) 60 S. W. Rep. 520; Gambrell *v.* Schooley, 95 Md. 260.

**2. Habit or System in Business** — *California.* — Lake Shore Cattle Co. *v.* Modoc Land, etc., Co., 130 Cal. 669; People *v.* Kelley, 146 Cal. 110.

*Illinois.* — People *v.* Alton, 179 Ill. 615.

*Minnesota.* — Eisenberg *v.* Matthews, 84 Minn. 76.

*Nebraska.* — Gandy *v.* Bissell, (Neb. 1902) 90 N. W. Rep. 883.

*New York.* — Lowenstein *v.* Lombard, 164 N. Y. 324.

*Ohio.* — Hoppe *v.* Parmalee, 11 Ohio Cir. Dec. 24, 20 Ohio Cir. Ct. 303.

*Texas.* — Washington L. Ins. Co. *v.* Berwald, (Tex. Civ. App. 1903) 72 S. W. Rep. 436.

*Vermont.* — Scott *v.* Bailey, 73 Vt. 49.

**3. To Show Value** — *Alabama.* — Clewis *v.* Malone, 131 Ala. 465; Tennessee Coal, etc., Co. *v.* State, (Ala. 1904) 37 So. Rep. 433; Ladd *v.* Ladd, 121 Ala. 583.

*Colorado.* — Lolloff *v.* Sterling, 31 Colo. 102.

*Connecticut.* — Lovejoy *v.* Isbell, 73 Conn. 368.

*Delaware.* — Curry *v.* Charles Warner Co., 2 Marv. (Del.) 98.

*Georgia.* — Conant *v.* Jones, 120 Ga. 568; Southern R. Co. *v.* Williams, 113 Ga. 335.

*Idaho.* — Lewis *v.* Utah Constr. Co., (Idaho 1904) 77 Pac. Rep. 336.

*Illinois.* — Dady *v.* Condit, 209 Ill. 488; Dady *v.* Condit, 104 Ill. App. 507, *affirmed* 209 Ill. 488.

*Indiana.* — B. L. Blair Co. *v.* Rose, 26 Ind. App. 487.

*Iowa.* — Harrison *v.* Harrison, 124 Iowa 525; Campbell *v.* Iowa Cent. R. Co., 124 Iowa 248.

*Kentucky.* — Louisville, etc., Electric R. Co. *v.* Whipps, (Ky. 1904) 80 S. W. Rep. 507; Paducah *v.* Allen, 111 Ky. 361, 98 Am. St. Rep. 422; Louisville, etc., R. Co. *v.* Kice, 109 Ky. 786; Woolfolk *v.* Lyons, (Ky. 1900) 59 S. W. Rep. 21.

*Louisiana.* — Robichaux *v.* Segura Sugar Co., 110 La. 706.

*Massachusetts.* — O'Malley *v.* Com., 182 Mass. 196.

*Michigan.* — Castner *v.* Darby, 128 Mich. 241.

*Mississippi.* — Levee Com'rs *v.* Nelms, 82 Miss. 416.

*New York.* — Gallagher *v.* Kingston Water Co., 164 N. Y. 602; Cuebas *v.* Klein, (N. Y. City Ct. Gen. T.) 61 N. Y. Supp. 923.

*North Carolina.* — Belding *v.* Archer, 131 N. Car. 287.

*Texas.* — Cooper *v.* Maggard, (Tex. Civ. App. 1904) 79 S. W. Rep. 607; St. Louis Southwestern R. Co. *v.* Hughes, (Tex. Civ. App. 1903) 73 S. W. Rep. 976; Wells, etc., Express Co. *v.* Williams, (Tex. Civ. App. 1902) 71 S. W. Rep. 314; Sullivan *v.* Missouri, etc., R. Co., 29 Tex. Civ. App. 429; Pacific Express Co. *v.* Lothrop, 20 Tex. Civ. App. 339.

**Cost Evidence of Value.** — Chicago *v.* Dickman, 105 Ill. App. 209; Swanson *v.* Keokuk, etc., R. Co., 116 Iowa 304; Conner *v.* Missouri Pac. R. Co., 181 Mo. 397; Harlam *v.* Green, (Supm. Ct. App. T.) 31 Misc. (N. Y.) 261, *affirming* (N. Y. City Ct. Gen. T.) 31 Misc. (N. Y.) 798.

**The Contrary Rule.** — U. S. *v.* Freeman, 113 Fed. Rep. 370; Union Pac. R. Co. *v.* Stanwood, (Neb. 1904) 98 N. W. Rep. 656; Rosenblum *v.* Riley, (Supm. Ct. App. T.) 84 N. Y. Supp. 884; McNicol *v.* Collins, 30 Wash. 318.

**513. 1. In Proof of Criminal Intent** —

**513.** *bb.* IN PROOF OF MALICE OR MALICIOUS INTENT. — See note 2.

**514.** *cc.* IN PROOF OF A SYSTEM OF CRIME. — See note 1.

*h.* FACTS FORMING PART OF THE SAME TRANSACTION AS THE FACTS IN ISSUE. — See note 2.

*United States.* — *U. S. v. Breese*, 131 Fed. Rep. 915; *Packer v. U. S.*, (C. C. A.) 106 Fed. Rep. 906.

*Alabama.* — *Wright v. State*, 138 Ala. 69.

*California.* — *People v. McGlade*, 139 Cal. 66; *People v. Bird*, 124 Cal. 32.

*Florida.* — *West v. State*, 42 Fla. 244; *Wallace v. State*, 41 Fla. 547; *Roberson v. State*, 40 Fla. 509.

*Illinois.* — *Whiteman v. People*, 83 Ill. App. 369.

*Indiana.* — *Higgins v. State*, 157 Ind. 57.

*Iowa.* — *State v. Desmond*, 109 Iowa 72; *State v. Ward*, (Iowa 1902) 91 N. W. Rep. 898.

*Kentucky.* — *Denham v. Com.*, (Ky. 1905) 84 S. W. Rep. 538.

*Louisiana.* — *State v. Williams*, 111 La. 179, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 513; *State v. Johnson*, 111 La. 935.

*Michigan.* — *People v. Nagle*, (Mich. 1904) 100 N. W. Rep. 273.

*Minnesota.* — *State v. Southall*, 77 Minn. 296.

*Missouri.* — *State v. Lewis*, 181 Mo. 235; *State v. Phillips*, 160 Mo. 503; *State v. Franke*, 159 Mo. 535.

*Nebraska.* — *Burlingim v. State*, 61 Neb. 276; *Davis v. State*, 58 Neb. 465.

*New Hampshire.* — *State v. Davis*, 69 N. H. 350.

*New Jersey.* — *Bullock v. State*, 65 N. J. L. 557, 86 Am. St. Rep. 668, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 510-514.

*New Mexico.* — *Territory v. McGinnis*, 10 N. Mex. 269.

*New York.* — *People v. Putnam*, 90 N. Y. App. Div. 125, affirmed 179 N. Y. 518.

*Oklahoma.* — *Beberstein v. Territory*, 8 Okla. 467.

*Pennsylvania.* — *Com. v. Birriolo*, 197 Pa. St. 371; *Com. v. Major*, 24 Pa. Co. Ct. 199, affirmed 198 Pa. St. 290.

*South Dakota.* — *State v. Halpin*, 16 S. Dak. 170.

*Texas.* — *Goodman v. State*, (Tex. Crim. 1904) 83 S. W. Rep. 196; *Taylor v. State*, (Tex. Crim. 1904) 81 S. W. Rep. 933; *Reese v. State*, 44 Tex. Crim. 34; *Parker v. State*, 43 Tex. Crim. 526; *Goodwyn v. State*, (Tex. Crim. 1901) 64 S. W. Rep. 251; *Brown v. State*, (Tex. Crim. 1900) 59 S. W. Rep. 1118; *Hamilton v. State*, 41 Tex. Crim. 644; *Pryor v. State*, 40 Tex. Crim. 643; *Colter v. State*, 41 Tex. Crim. 78; *Tidwell v. State*, 40 Tex. Crim. 42.

*Virginia.* — *Reed v. Com.*, 98 Va. 817.

**Other Crimes Cannot Be Shown — California.** — *People v. Carpenter*, 136 Cal. 391.

*Georgia.* — *Gay v. State*, 115 Ga. 204.

*Iowa.* — *State v. Roscum*, 119 Iowa 330.

*Kentucky.* — *Baker v. Com.*, 106 Ky. 212.

*Nebraska.* — *Morgan v. State*, 56 Neb. 696.

*New Jersey.* — *Bullock v. State*, 65 N. J. L. 557, 86 Am. St. Rep. 668, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 513.

*Oregon.* — *State v. O'Donnell*, 36 Oregon 222.

*Rhode Island.* — *State v. Letourneau*, (R. I. 1902) 51 Atl. Rep. 1048,

*Texas.* — *Scott v. State*, (Tex. Crim. 1902) 68 S. W. Rep. 680; *Barkman v. State*, (Tex. Crim. 1899) 52 S. W. Rep. 69; *Buck v. State*, (Tex. Crim. 1904) 83 S. W. Rep. 390.

**Incidental Proof of Other Crimes.** — *People v. Gleason*, 127 Cal. 323.

**An Extraneous Crime May Be Shown.** — In *Goodman v. State*, (Tex. Crim. 1904) 83 S. W. Rep. 196, it was held that evidence of theft might be given, though it established an extraneous crime, to show intent or motive for homicide.

**513. 2. In Proof of Malice.** — *State v. Williams*, 111 La. 181, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 513; *State v. Callaway*, 154 Mo. 91; *State v. Vance*, 29 Wash. 435.

**Fraud of Vendee of Goods.** — *Freeman v. Topkis*, 1 Marv. (Del.) 174; *Darling v. Klock*, 33 N. Y. App. Div. 270, affirmed 165 N. Y. 623.

**514. 1. In Proof of a System of Crime or Fraudulent Schemes — England.** — *Reg. v. Ollis*, (1900) 2 Q. B. 758, 69 L. J. Q. B. 918, 83 L. T. N. S. 251; *Reg. v. Rhodes*, (1899) 1 Q. B. 77, 68 L. J. Q. B. 83, 79 L. T. N. S. 360, 19 Cox C. C. 182.

*United States.* — *Wright v. Stewart*, 130 Fed. Rep. 905; *Withaup v. U. S.*, (C. C. A.) 127 Fed. Rep. 530; *Jack v. Mutual Reserve Fund L. Assoc.*, (C. C. A.) 113 Fed. Rep. 49; *U. S. v. Kenney*, 90 Fed. Rep. 257.

*Arkansas.* — *Ramsey v. Flowers*, 72 Ark. 316.

*California.* — *People v. Koller*, 142 Cal. 621.

*Florida.* — *Wallace v. State*, 41 Fla. 547.

*Iowa.* — *Sutton v. Kelliher*, 115 Iowa 632.

*Massachusetts.* — *Com. v. Lubinsky*, 182 Mass. 142.

*Minnesota.* — *State v. Bourne*, 86 Minn. 426.

*Missouri.* — *State v. Jones*, 171 Mo. 401, 94 Am. St. Rep. 786.

*Pennsylvania.* — *Wheeler v. Ahlers*, 189 Pa. St. 138.

*South Carolina.* — *State v. Allen*, 56 S. Car. 495.

*Texas.* — *Gray v. Freeman*, (Tex. Civ. App. 1905) 84 S. W. Rep. 1105; *Roach v. State*, (Tex. Crim. 1905) 84 S. W. Rep. 586; *Leach v. State*, 46 Tex. Crim. 507; *Taylor v. State*, (Tex. Crim. 1904) 81 S. W. Rep. 933; *White v. State*, 45 Tex. Crim. 602; *Hollar v. State*, (Tex. Crim. 1903) 73 S. W. Rep. 961; *Peterson v. State*, (Tex. Crim. 1902) 70 S. W. Rep. 978; *Skipwith v. State*, (Tex. Crim. 1902) 68 S. W. Rep. 278; *Mathis v. State*, (Tex. Crim. 1900) 58 S. W. Rep. 108; *Wilson v. State*, (Tex. Crim. 1900) 55 S. W. Rep. 68.

**2. Facts Forming Part of Same Transaction — United States.** — *Chicago Terminal Transfer R. Co. v. Stone*, (C. C. A.) 118 Fed. Rep. 19.

*Alabama.* — *Oakley v. State*, 135 Ala. 15; *Lowe v. State*, 134 Ala. 154; *Louisville, etc., R. Co. v. Stewart*, 128 Ala. 313; *Louisville, etc., R. Co. v. Mothershed*, 121 Ala. 650.

*California.* — *Rogers v. Manhattan L. Ins. Co.*, 138 Cal. 285.

*Kentucky.* — *Murray v. East End Imp. Co.*, (Ky. 1901) 60 S. W. Rep. 648,

**514. i.** ACTS AND DECLARATIONS OF CONSPIRATORS. — See note 3.

**j.** FACTS EXPLANATORY OR INTRODUCTORY OF RELEVANT FACTS. — See note 4.

**519. k.** CHARACTER OR REPUTATION OF PARTIES — In Criminal Cases. — See note 2.

**520. 5. Hearsay Evidence — a. DEFINITION AND GENERAL RULE.** — See note 2.

**521.** See note 1.

**522. d. EXCEPTIONS TO GENERAL RULE — (7) Declarations Concerning Matters of Pedigree.** — See note 11.

**523. (8) Res Gestæ.** — See note 1.

*Louisiana.* — Pharr *v.* Gall, 108 La. 307.

*Michigan.* — Herrick *v.* Wixom, 121 Mich. 389.

*Missouri.* — Linck *v.* Vorhauer, 104 Mo. App. 368.

*Montana.* — State *v.* Tighe, 27 Mont. 327.

*New York.* — Brand *v.* Borden's Condensed Milk Co., 95 N. Y. App. Div. 64; People *v.* Coombs, 36 N. Y. App. Div. 284, *affirmed* 158 N. Y. 532.

*South Dakota.* — Auby *v.* Rathbun, 11 S. Dak. 474.

*Texas.* — Gray *v.* State, 44 Tex. Crim. 470; Thomas *v.* State, 44 Tex. Crim. 344.

**514. 3. Acts and Declarations of Conspirators.** — Cohn *v.* Sidel, 71 N. H. 558, *citing* 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 514.

**4. Explanatory of Relevant Facts — United States.** — Crane *v.* Fry, (C. C. A.) 126 Fed. Rep. 278.

*Alabama.* — Sanders *v.* State, 134 Ala. 74.

*California.* — Muller *v.* Hale, 138 Cal. 163.

*Florida.* — Alford *v.* State, (Fla. 1904) 36 So. Rep. 436.

*Georgia.* — Moody *v.* State, 120 Ga. 868.

*Illinois.* — Overtom *v.* Chicago, etc., R. Co., 181 Ill. 323; People *v.* Alton, 179 Ill. 615.

*Indiana.* — Bradburn *v.* U. S., 3 Indian Ter. 604.

*Iowa.* — Patton *v.* Lund, 114 Iowa 201; State *v.* Wright, 112 Iowa 436.

*South Carolina.* — Merchants, etc., Bank *v.* Clifton Mfg. Co., 56 S. Car. 320; Hiers *v.* Risher, 54 S. Car. 405.

*Texas.* — Smith *v.* State, 46 Tex. Crim. 267; Ransom *v.* State, (Tex. Crim. 1902) 70 S. W. Rep. 960; International, etc., R. Co. *v.* True, 23 Tex. Civ. App. 523.

*Wisconsin.* — Prentiss *v.* Strand, 116 Wis. 647.

**Instances Where Such Facts Were Held Not Relevant.** — Clement *v.* Skinner, 72 Vt. 159.

**519. 2.** Maxwell *v.* State, (Tex. Crim. 1904) 78 S. W. Rep. 516; Johnson *v.* State, 42 Tex. Crim. 618; Rex *v.* Long, 11 Quebec K. B. 328.

**520. 2. Hearsay Evidence Defined.** — King *v.* Bynum, 137 N. Car. 495, *quoting* 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 520. For further citations see the annotations to the title HEARSAY EVIDENCE, vol. 15, p. 309.

**521. 1. General Rule — Inadmissible.** — Lake County *v.* Keene Five Cents Sav. Bank, (C. C. A.) 108 Fed. Rep. 505; Donaldson *v.* Dobbs, 35 Tex. Civ. App. 439. And see the annotations to the title HEARSAY EVIDENCE, vol. 15, p. 309.

**522. 11. Alabama.** — Locklayer *v.* Locklayer, 139 Ala. 354.

*California.* — Matter of Heaton, 135 Cal. 385; Russell *v.* Langford, 135 Cal. 356.

*Connecticut.* — Hartford *v.* Maslen, 76 Conn. 599.

*Georgia.* — Malone *v.* Adams, 113 Ga. 791, 84 Am. St. Rep. 259.

*Illinois.* — Chilvers *v.* Race, 196 Ill. 71.

*Iowa.* — Alston *v.* Alston, 114 Iowa 29.

*Kentucky.* — Mann *v.* Cavanaugh, 110 Ky. 776.

*Nebraska.* — Grand Lodge, etc., *v.* Bartes, (Neb. 1904) 98 N. W. Rep. 715.

*New York.* — Washington *v.* Savings Bank, 65 N. Y. App. Div. 338, *affirmed* 171 N. Y. 166, 89 Am. St. Rep. 800.

*Oregon.* — Young *v.* State, 36 Oregon 417.

*Texas.* — Wren *v.* Howland, 33 Tex. Civ. App. 87; Lord *v.* New York L. Ins. Co., 27 Tex. Civ. App. 139; Summerhill *v.* Darrow, 94 Tex. 71.

**523. 1. Res Gestæ — United States.** — Pittsburgh Plate Glass Co. *v.* Kerlin Bros. Co., (C. C. A.) 122 Fed. Rep. 414; Kansas City Southern R. Co. *v.* Moles, (C. C. A.) 121 Fed. Rep. 351; Jack *v.* Mutual Reserve Fund L. Assoc., (C. C. A.) 113 Fed. Rep. 49; Denver, etc., R. Co. *v.* Roller, (C. C. A.) 100 Fed. Rep. 738.

*Alabama.* — Montgomery St. R. Co. *v.* Shanks, 139 Ala. 489; Birmingham R., etc., Co. *v.* Mullen, 138 Ala. 614; Louisville, etc., R. Co. *v.* Landers, 135 Ala. 504; Carter *v.* Fulgham, 134 Ala. 238; Hereford *v.* Combs, 126 Ala. 369; La Fayette R. Co. *v.* Tucker, 124 Ala. 514; Smith *v.* Keyser, 115 Ala. 455.

*California.* — Rogers *v.* Manhattan L. Ins. Co., 138 Cal. 285; People *v.* Amaya, 134 Cal. 531.

*Colorado.* — Trumbull *v.* Donahue, 18 Colo. App. 460.

*Delaware.* — Di Prisco *v.* Wilmington City R. Co., 4 Penn. (Del.) 527.

*Florida.* — Anthony *v.* State, 44 Fla. 1.

*Georgia.* — Banks *v.* McCandless, 119 Ga. 793; Goodman *v.* State, 122 Ga. 111.

*Illinois.* — Chicago City R. Co. *v.* Bundy, 210 Ill. 39; Hoffman *v.* Chicago Title, etc., Co., 198 Ill. 452; Matzenbaugh *v.* People, 194 Ill. 108, 88 Am. St. Rep. 134; Boyd *v.* West Chicago St. R. Co., 112 Ill. App. 50; Chicago, etc., R. Co. *v.* White, 110 Ill. App. 23; Tri-City R. Co. *v.* Brennan, 108 Ill. App. 471; Reiten *v.* Lake St. El. R. Co., 85 Ill. App. 657.

*Indiana.* — Indianapolis St. R. Co. *v.* Schmidt, 163 Ind. 360; Cleveland, etc., R. Co. *v.* Carey, 33 Ind. App. 275; Place *v.* Baugher, 159 Ind. 222; St. Joseph Hydraulic Co. *v.* Globe Tissue Paper Co., 156 Ind. 665.



**523.** (9) *Evidence in a Former Proceeding — When Witness Is Dead.* — See note 2.

*Iowa.* — Robinson *v.* Halley, 124 Iowa 443; Battis *v.* Chicago, etc., R. Co., 124 Iowa 623; Quick *v.* Cotman, 124 Iowa 102; Urdangen *v.* Doner, 122 Iowa 533; Golden *v.* Vyse, 115 Iowa 726; State *v.* Bebb, 125 Iowa 494.

*Kansas.* — State *v.* Gillespie, 62 Kan. 469, 84 Am. St. Rep. 411.

*Kentucky.* — Mann *v.* Cavanaugh, 110 Ky. 776; Louisville, etc., Packet Co. *v.* Samuels, (Ky. 1900) 59 S. W. Rep. 3.

*Louisiana.* — State *v.* Breaux, 104 La. 540, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 523; Chretien *v.* New Orleans R. Co., 113 La. 761, 104 Am. St. Rep. 519.

*Massachusetts.* — Cashin *v.* New York, etc., R. Co., 185 Mass. 543; O'Connell *v.* Cox, 179 Mass. 250.

*Michigan.* — Proper *v.* Lake Shore, etc., R. Co., (Mich. 1904) 99 N. W. Rep. 283; Ensley *v.* Detroit United R. Co., 134 Mich. 195; People *v.* Sharp, 133 Mich. 378; Albion State Bank *v.* Knickerbocker, 125 Mich. 311; Moore *v.* Machen, 124 Mich. 216; People *v.* McArron, 121 Mich. 1.

*Minnesota.* — McDonald *v.* Bayha, 93 Minn. 139; O'Brien *v.* Northwestern Imp., etc., Co., 82 Minn. 136.

*Mississippi.* — Ward *v.* Yazoo, etc., R. Co., 79 Miss. 145.

*Missouri.* — Strode *v.* Conkey, 105 Mo. App. 12; Thomas *v.* Macon County, 175 Mo. 68; Shaefer *v.* Missouri Pac. R. Co., 98 Mo. App. 445; Cunningham *v.* Wabash R. Co., 79 Mo. App. 524.

*Montana.* — State *v.* Tighe, 27 Mont. 327.

*Nebraska.* — Pledger *v.* Chicago, etc., R. Co., (Neb. 1903) 95 N. W. Rep. 1057; Sullivan *v.* State, 58 Neb. 796.

*New Hampshire.* — Wallace *v.* Boston, etc., R. Co., 72 N. H. 504; Murray *v.* Boston, etc., R. Co., 72 N. H. 32, 101 Am. St. Rep. 660.

*New York.* — Johnson *v.* Cole, 178 N. Y. 364; Scheir *v.* Quirin, 177 N. Y. 568; Tibbits *v.* Phipps, 163 N. Y. 580; Birmingham Trust, etc., Co. *v.* Whitney, 95 N. Y. App. Div. 280; Hoffman *v.* Edison Electric Illuminating Co., 87 N. Y. App. Div. 371; P. Cox Shoe Mfg. Co. *v.* Gorsline, 63 N. Y. App. Div. 517; Livingston Middleditch Co. *v.* New York College of Dentistry, (Supm. Ct. App. T.) 31 Misc. (N. Y.) 259. And see dissenting opinion in Taylor *v.* New York Cent., etc., R. Co., 63 N. Y. App. Div. 586, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 884.

*North Carolina.* — Seawell *v.* Carolina Cent. R. Co., 133 N. Car. 515; Harrill *v.* South Carolina, etc., R. Co., 132 N. Car. 655; Means *v.* Carolina Cent. R. Co., 124 N. Car. 574.

*North Dakota.* — Balding *v.* Andrews, 12 N. Dak. 267.

*Oregon.* — Robson *v.* Hamilton, 41 Oregon 239; Jester *v.* Lipman, 40 Oregon 408.

*Pennsylvania.* — Shannon *v.* Castner, 21 Pa. Super. Ct. 294; Haggart *v.* California, 21 Pa. Super. Ct. 210.

*South Carolina.* — Williams *v.* Southern R. Co., 68 S. Car. 369; Oliver *v.* Columbia, etc., R. Co., 65 S. Car. 1.

*Texas.* — Gulf, etc., R. Co. *v.* Willoughby,

(Tex. Civ. App. 1904) 81 S. W. Rep. 829; Jones *v.* State, (Tex. Crim. 1905) 85 S. W. Rep. 5; Dolan *v.* Meehan, (Tex. Civ. App. 1904) 80 S. W. Rep. 99; Gulf, etc., R. Co. *v.* Hall, 34 Tex. Civ. App. 535; Missouri, etc., R. Co. *v.* Jones, 35 Tex. Civ. App. 584; Missouri, etc., R. Co. *v.* Schilling, 32 Tex. Civ. App. 417; Gresham *v.* Harcourt, 33 Tex. Civ. App. 196; McElroy *v.* Phink, (Tex. Civ. App. 1903) 74 S. W. Rep. 61; Nelson *v.* State, (Tex. Crim. 1900) 58 S. W. Rep. 107.

*Vermont.* — Terrill *v.* Tillison, 75 Vt. 193; State *v.* White, 77 Vt. 241.

*Washington.* — State *v.* Ripley, 32 Wash. 182.

*West Virginia.* — Sample *v.* Consolidated Light, etc., Co., 50 W. Va. 472.

*Wisconsin.* — Hupfer *v.* National Distilling Co., 119 Wis. 417; Charley *v.* Potthoff, 118 Wis. 258.

**523.** 2. *When Witness in Former Proceeding Dead — Arkansas.* — Kansas, etc., Coal Co. *v.* Galloway, 71 Ark. 351; Redd *v.* State, 65 Ark. 475.

*California.* — People *v.* Bird, 132 Cal. 261; People *v.* Esblae, 127 Cal. 243; People *v.* Plyler, 126 Cal. 379.

*Georgia.* — Denson *v.* Denson, 111 Ga. 809.

*Illinois.* — Bredt *v.* Simpson, 95 Ill. App. 333.

*Indiana.* — Wabash R. Co. *v.* Miller, (Ind. App. 1901) 59 N. E. Rep. 485; Western Assur. Co. *v.* McAlpin, 23 Ind. App. 220, 77 Am. St. Rep. 423.

*Kentucky.* — Fuqua *v.* Com., (Ky. 1904) 81 S. W. Rep. 923; Sievers-Carson Hardware Co. *v.* Curd, (Ky. 1903) 71 S. W. Rep. 506; Louisville, etc., R. Co. *v.* Whitley County Ct., (Ky. 1899) 49 S. W. Rep. 332.

*Massachusetts.* — Welch *v.* New York, etc., R. Co., 182 Mass. 84.

*Mississippi.* — Lipscomb *v.* State, 76 Miss. 223; Dukes *v.* State, 80 Miss. 353.

*Missouri.* — State *v.* Hudspeth, 159 Mo. 178; State *v.* Moore, 156 Mo. 204.

*Montana.* — Reynolds *v.* Fitzpatrick, 28 Mont. 170.

*New York.* — Taft *v.* Little, 178 N. Y. 127, reversing 78 N. Y. App. Div. 74; Willsen *v.* Metropolitan St. R. Co., 95 N. Y. App. Div. 388; Fortunato *v.* New York, 74 N. Y. App. Div. 441, modified 173 N. Y. 608; Morley *v.* Castor, 63 N. Y. App. Div. 38; Deering *v.* Schreyer, 88 N. Y. App. Div. 457.

*North Dakota.* — Persons *v.* Smith, 12 N. Dak. 403.

*Oregon.* — Wheeler *v.* McFerron, 38 Oregon 105.

*South Carolina.* — State *v.* Milam, 65 S. Car. 321; Garrett *v.* Weinberg, 54 S. Car. 127.

*Texas.* — Cooper *v.* Ford, 29 Tex. Civ. App. 253.

**Mere Offer to Testify.** — The rule of the text does not apply to what the deceased witness had merely offered to testify to on the former trial. Lane *v.* De Bode, 29 Tex. Civ. App. 602.

**California — Proof of Death.** — Under the California statute the fact of death must be shown by relevant and competent evidence, and proof by affidavit is insufficient. People *v.* Plyer, 126 Cal. 379.

**524.** When Witness Has Since Become Incompetent — By Acquiring an Interest. — See note 1.

By the Death of the Other Party to the Transaction. — See note 2.

By Becoming Insane. — See note 4.

By Age or Sickness. — See note 5.

When Witness Has Forgotten the Facts. — See note 6.

**525.** See note 1.

When Witness Is Out of Jurisdiction of Court. — See note 3.

**Virginia** — Rule Not Applicable in Criminal Cases. — *Montgomery v. Com.*, 99 Va. 833, 3 Va. Sup. Ct. Rep. 118.

**524. 1. Acquisition of Interest in the Controversy.** — *Bowie v. Hume*, 13 App. Cas. (D. C.) 286.

**2. Death of Other Party.** — *Western Assur. Co. v. McAlpin*, 23 Ind. App. 220, 77 Am. St. Rep. 423.

**4. Insanity.** — *Kansas, etc., Coal Co. v. Galloway*, 71 Ark. 351; *People v. Plyer*, 126 Cal. 379; *Pittsburg, etc., R. Co. v. Story*, 104 Ill. App. 132; *Deering v. Schreyer*, 88 N. Y. App. Div. 457.

**5. Age or Sickness.** — *State v. Wheat*, 111 La. 860; *Molloy v. U. S. Express Co.*, 22 Pa. Super. Ct. 173.

**Inability on Account of Sickness Must Be of Permanent Character.** — *Siefert v. Siefert*, 123 Mich. 664.

**6. Failure to Recall Facts.** — *State v. New Orleans Waterworks Co.*, 107 La. 1. See also *State v. Aspara*, 113 La. 940.

In *Arkansas* the rule as to the proof of testimony of witnesses given on a former trial appears to require no proof of the absence, death, or insanity of the witness, or his forgetfulness of the facts. *Kansas, etc., Coal Co. v. Galloway*, 71 Ark. 351.

**525. 1. State v. New Orleans Waterworks Co.**, 107 La. 1; *Edwards v. Gimbel*, 202 Pa. St. 30.

**3. Witness Out of Jurisdiction** — *Alabama*. — *Wilson v. State*, 140 Ala. 43; *Southern R. Co. v. Bonner*, (Ala. 1904) 37 So. Rep. 702; *Jacobi v. State*, 133 Ala. 1; *Birmingham Nat. Bank v. Bradley*, (Ala. 1900) 30 So. Rep. 546; *Kirkland v. State*, (Ala. 1904) 37 So. Rep. 352; *Lett v. State*, 124 Ala. 64; *Percy v. State*, 125 Ala. 52; *Burton v. State*, 115 Ala. 1; *Mitchell v. State*, 114 Ala. 1; *Burton v. State*, 107 Ala. 68.

*Arkansas*. — *Kansas, etc., Coal Co. v. Galloway*, 71 Ark. 351; *Wilkins v. State*, 68 Ark. 441.

*California*. — *People v. Lewandowski*, 143 Cal. 574; *People v. Buckley*, 143 Cal. 375; *People v. Moran*, 144 Cal. 48; *People v. Witty*, 138 Cal. 576; *People v. Bird*, 132 Cal. 261; *People v. McIntyre*, 127 Cal. 423; *People v. Plyer*, 126 Cal. 379; *People v. Reilly*, 106 Cal. 648.

*Colorado*. — *Emerson v. Burnett*, 11 Colo. App. 86.

*Connecticut*. — *Mechanics' Bank v. Woodward*, 74 Conn. 689.

*Georgia*. — *Owen v. Palmour*, 111 Ga. 885; *Atlanta, etc., Air-Line R. Co. v. Gravitt*, 93 Ga. 369, 44 Am. St. Rep. 145.

*Illinois*. — *M. Heminway, etc., Silk Co. v. Porter*, 94 Ill. App. 609.

*Kansas*. — *State v. Nelson*, 68 Kan. 566; *Smith v. Scully*, 66 Kan. 139; *Atchison, etc., R. Co. v. Osborn*, 64 Kan. 187, 91 Am. St. Rep. 189.

*Louisiana*. — *State v. Bollero*, 112 La. 850; *State v. Kline*, 109 La. 603; *State v. Timberlake*, 50 La. Ann. 308; *State v. Lejours*, 113 La. 676.

*Michigan*. — *Wheeler v. Jenison*, 120 Mich. 422.

*Minnesota*. — *Hill v. Winston*, 73 Minn. 80.

*Nebraska*. — *Ord v. Nash*, 50 Neb. 335.

*Oregon*. — *Wheeler v. McFerron*, 38 Oregon 105.

*Pennsylvania*. — *Giberson v. Patterson Mills Co.*, 187 Pa. St. 513; *Green v. Hopper*, 29 Pittsb. Leg. J. N. S. (Pa.) 342, 12 York Leg. Rec. (Pa.) 4.

*Utah*. — *State v. King*, 24 Utah 482, 91 Am. St. Rep. 808; *Reese v. Morgan Silver Min. Co.*, 17 Utah 489.

*Vermont*. — *McGovern v. Smith*, 75 Vt. 104.

In *Indiana* the evidence is only admitted where the witness is dead. *Wabash R. Co. v. Miller*, (Ind. App. 1901) 59 N. E. Rep. 485 (*Robinson, J., dissenting*).

**Absence Alone Held Not Sufficient** — *United States*. — *Salt Lake City v. Smith*, (C. C. A.) 104 Fed. Rep. 457.

*Alabama*. — *Southern R. Co. v. Bonner*, (Ala. 1904) 37 So. Rep. 702; *Sims v. State*, 139 Ala. 74; *Jacobi v. State*, 133 Ala. 1; *Percy v. State*, 125 Ala. 52; *Dennis v. State*, 118 Ala. 72; *Mitchell v. State*, 114 Ala. 1.

*Colorado*. — *Williams v. People*, 26 Colo. 272.

*Florida*. — *Dorman v. State*, (Fla. 1904) 37 So. Rep. 561.

*Illinois*. — *Chicago, etc., R. Co. v. Mayer*, 91 Ill. App. 372.

*Indiana*. — Temporary absence from the state is not sufficient. *Wabash R. Co. v. Miller*, 158 Ind. 174.

*Louisiana*. — In *Louisiana* "permanent absence" from the state must be shown. *State v. Banks*, 106 La. 480.

*Nebraska*. — *Wittenberg v. Mollyneaux*, 59 Neb. 203.

*Texas*. — *Houston, etc., R. Co. v. Smith*, (Tex. Civ. App. 1899) 51 S. W. Rep. 506.

**Under the Iowa Statute**, Acts 27th Gen. Assem., p. 16, c. 9, absence from the courtroom is sufficient. *Lanza v. Le Grand Quarry Co.*, 124 Iowa 659; *Fitch v. Mason City, etc., Traction Co.*, 124 Iowa 665.

*Ohio*. — In *State v. Wing*, 66 Ohio St. 407, it was held that the evidence on a former trial of a witness out of the jurisdiction of the court is not admissible unless absence is caused by the connivance or procurement of the opposite party.

**By Stipulation** transcripts of evidence given

**526.** Identity of Parties to Action. — See note 1.

Identity of Issues. — See note 2.

Evidence Taken in Preliminary Investigation. — See note 3.

**527.** Adverse Party Must Have Opportunity to Cross-examine. — See note 1.

Sufficient to Prove Substance. — See note 2.

on a former trial by nonresident witnesses are admissible. *Magnes v. Sioux City Nursery, etc., Co.*, 14 Colo. App. 219.

**526. 1. Identity of Parties** — *United States*. — *Metropolitan St. R. Co. v. Gumby*, (C. C. A.) 99 Fed. Rep. 192.

*Alabama*. — *Simmons v. State*, 129 Ala. 41.

*Colorado*. — *Woodworth v. Gorsline*, 30 Colo. 186; *Williams v. People*, 26 Colo. 272.

*Georgia*. — *Hooper v. Southern R. Co.*, 112 Ga. 96.

*Maryland*. — *Jacob Tome Institute v. Davis*, 87 Md. 591.

*Michigan*. — *Walterhouse v. Walterhouse*, 130 Mich. 89.

*Montana*. — *Graham v. Great Falls Water Power, etc., Co.*, 30 Mont. 393.

*New York*. — *Burnham v. Burnham*, 46 N. Y. App. Div. 513, *affirmed* 165 N. Y. 659.

*Oregon*. — *Wheeler v. McFerron*, 38 Oregon 105.

*Texas*. — *Ellis v. Le Bow*, 30 Tex. Civ. App. 449.

*Wisconsin*. — *Dunck v. Milwaukee County*, 103 Wis. 371; *David Adler, etc., Clothing Co. v. Thorp*, 102 Wis. 70.

In *Smith v. Keyser*, 115 Ala. 455, it was held that where the first action was brought by the plaintiff in his individual capacity and the second as a representative the variation was too technical to exclude the testimony.

**2. Identity of Issues** — *Alabama*. — *Simmons v. State*, 129 Ala. 41.

*California*. — *People v. Brennar*, 121 Cal. 495.

*Connecticut*. — *Mechanics' Bank v. Woodward*, 74 Conn. 689.

*Georgia*. — *Hooper v. Southern R. Co.*, 112 Ga. 96; *Whitaker v. Arnold*, 110 Ga. 857.

*Indiana*. — *Western Assur. Co. v. McAlpine*, 23 Ind. App. 220, 77 Am. St. Rep. 423.

*Mississippi*. — *Dukes v. State*, 80 Miss. 353, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 526, 527.

*Montana*. — *Graham v. Great Falls Water Power, etc., Co.*, 30 Mont. 393.

*North Dakota*. — *Persons v. Smith*, 12 N. Dak. 403.

*Oregon*. — *Wheeler v. McFerron*, 38 Oregon 105.

*Wisconsin*. — *Dunck v. Milwaukee County*, 103 Wis. 371.

**May Be Shown by Parol.** — The identity of issues, being a collateral fact, may be shown by parol evidence. *Lett v. State*, 124 Ala. 64.

**3. Preliminary Investigation** — *Alabama*. — *Wilson v. State*, 140 Ala. 43; *Percy v. State*, 125 Ala. 52.

*Arkansas*. — *Wilkins v. State*, 68 Ark. 441.

*California*. — *People v. Lewandowski*, 143 Cal. 574; *People v. Moran*, 144 Cal. 48; *People v. Witty*, 138 Cal. 576; *People v. Bird*, 132 Cal. 261; *People v. Plyler*, 126 Cal. 379; *People v. Cady*, 117 Cal. 10; *People v. Sierp*, 116 Cal. 249.

*Florida*. — *Saelling v. State*, (Fla. 1905) 37 So. Rep. 917.

*Louisiana*. — *State v. Bollero*, 112 La. 850; *State v. Banks*, 106 La. 480; *State v. Timberlake*, 50 La. Ann. 308.

*Missouri*. — *State v. Moore*, 156 Mo. 204.

*Utah*. — *State v. King*, 24 Utah 482, 91 Am. St. Rep. 808.

In *Idaho* the depositions of witnesses, taken on the preliminary examination, have been held not admissible in evidence on the trial. *State v. Potter*, 6 Idaho 584. But in *State v. White*, 7 Idaho 150, *distinguishing State v. Potter*, 6 Idaho 584, it was held that the deposition of the party upon whom an assault was committed taken on the preliminary examination was admissible under section 7588, Rev. Stat.

In *California* the statute has limited the common-law right of the prosecution in a criminal action to the introduction of evidence given in a preliminary examination, and excludes the right of introducing testimony given in former trials; but the right of the defendant to introduce testimony given in former trials remains the same. *People v. Bird*, 132 Cal. 261.

In *Louisiana* the provision of the constitution of 1898 that the accused shall have the right to be confronted with the witnesses against him is held not to affect the right of the state to introduce the testimony given on the preliminary examination by a witness absent from sickness. *State v. Wheat*, 111 La. 860; *State v. Kline*, 109 La. 603.

**527. 1. Opportunity to Cross-examine** — *Colorado*. — *Woodworth v. Gorsline*, 30 Colo. 186.

*Louisiana*. — *State v. Bollero*, 112 La. 850.

*Michigan*. — *Walterhouse v. Walterhouse*, 130 Mich. 89.

*Mississippi*. — *Dukes v. State*, 80 Miss. 353, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 526, 527.

*New York*. — *Taft v. Little*, 178 N. Y. 127; *Young v. Valentine*, 177 N. Y. 347; *Willson v. Metropolitan St. R. Co.*, 95 N. Y. App. Div. 388; *Deering v. Schreyer*, 88 N. Y. App. Div. 457; *Morley v. Castor*, 63 N. Y. App. Div. 38.

*Pennsylvania*. — *Com. v. Lenousky*, 206 Pa. St. 277.

*South Carolina*. — *State v. Milam*, 65 S. Car. 321.

*Utah*. — *State v. King*, 24 Utah 482, 91 Am. St. Rep. 808.

**2. Substance Only Need Be Proved.** — *Donald v. State*, 11 Ohio Cir. Dec. 483, 21 Ohio Cir. Ct. 124; *Cooper v. Ford*, 29 Tex. Civ. App. 253; *Houston, etc., R. Co. v. Smith*, (Tex. Civ. App. 1899) 51 S. W. Rep. 506. See also *Pittsburgh, etc., R. Co. v. Story*, 104 Ill. App. 132.

**A Certified Transcript of the Stenographer's Notes** is usually sufficient proof of the witness's testimony on the former trial. *People v. McIntyre*, 127 Cal. 423; *People v. Buckley*, 143 Cal. 375; *People v. Lewandowski*, 143 Cal. 574; *Atchison, etc., R. Co. v. Osborn*, 64 Kan. 187, 91 Am. St. Rep. 189; *Smith v. Scully*, 66 Kan.



**527.** By Showing Contradictory Statements. — See note 5.

**528.** IX. SUBSTANCE ONLY OF ISSUE NEED BE PROVED — 1. General Rule. — See note 2.

2. Matters of Description — *a.* GENERAL RULE. — See note 3.

**529.** *b.* WRITTEN INSTRUMENTS — (1) *Writings Obligatory.* — See note 1.

**530.** 3. Allegations of Value, Place, Time, Amount, Etc. — See note 7.

**531.** 4. Variance — *a.* DEFINITION. — See note 1.

**532.** *b.* REDUNDANCY OF ALLEGATION. — See notes 1, 2.

**533.** *c.* TEST OF SURPLUSAGE. — See note 1.

*e.* FATAL VARIANCE. — See note 3.

*f.* VARIANCES NOT FATAL. — See note 4.

**534.** *g.* VARIANCES CURED BY STATUTE. — See note 1.

139; *State v. Banks*, 106 La. 480. But see *Matter of Benton*, 131 Cal. 472; *In re Wiltsey*, 122 Iowa 423; *Jordan v. Howe*, (Neb. 1903) 95 N. W. Rep. 853.

**Whole of Testimony Must Be Stated.** — Where a witness undertakes to state the testimony of another given on a former trial, he must state, in substance, the whole of what was said on the particular subject which he is called to prove *Foley v. State*, 11 Wyo. 464; *Denson v. Denson*, 111 Ga. 809.

**An Incomplete Transcript** of the stenographer's notes of a witness's evidence, though correct as far as it goes, is inadmissible. *Beavers v. Bowen*, (Ky. 1904) 80 S. W. Rep. 1165.

**The Introduction of Part of an Agreed Statement of Facts** is not a legal way of proving the testimony. *Houston, etc., R. Co. v. Smith*, (Tex. Civ. App. 1899) 51 S. W. Rep. 506.

**527.** 5. *State v. Wiggins*, 50 La. Ann. 332.

**Contra.** — *West Chicago St. R. Co. v. Dooley*, 76 Ill. App. 424.

**528.** 2. Only Substance of Issue Need Be Proved. — *Western Assur. Co. v. McAlpine*, 23 Ind. App. 220, 77 Am. St. Rep. 423; *Terre Haute Electric R. Co. v. Lauer*, 21 Ind. App. 466; *Palmer v. Kinloch Telephone Co.*, 91 Mo. App. 106; *Plass v. Weil*, (Supm. Ct. App. T.) 39 Misc. (N. Y.) 777; *Hicks v. Galveston, etc., R. Co.*, 96 Tex. 355.

3. Matters of Description. — *Gibson v. Clark*, 132 Ala. 370; *Efrid v. State*, 44 Tex. Crim. 447.

**529.** 1. Written Contracts. — *New York L. Ins. Co. v. McPherson*, 137 Ala. 116.

**530.** 7. Time, Amount, Place, and Value. — *State v. Rogers*, (Mont. 1904) 77 Pac. Rep. 293.

**531.** 1. Cannot Recover on Different Set of Facts. — *York v. Farmers' Bank*, 105 Mo. App. 127.

**532.** 1. Allegation of Unnecessary Fact. — *Rosenberg v. Pimental*, 133 Cal. 302; *Kerr v. Topping*, 109 Iowa 150.

2. Where Unnecessary Allegation Qualifies that Which Is Material. — *Lake County v. Keene Five-Cents Sav. Bank*, (C. C. A.) 108 Fed. Rep. 505; *Geer v. Ouray County*, (C. C. A.) 97 Fed. Rep. 435.

**533.** 1. Test of Surplusage. — *Lake County v. Keene Five-Cents Sav. Bank*, (C. C. A.) 108 Fed. Rep. 505; *Geer v. Ouray County*, (C. C. A.) 97 Fed. Rep. 435; *Chicago, etc., R. Co. v. Wise*, 206 Ill. 453; *Bailey v. Gatewood*, 68 Kan. 231; *State v. Faulkner*, 175 Mo. 546; *Consumers' Ice Co. v. Jennings*, 100 Va. 719.

3. Fatal Variance — *California.* — *Foster v. Carr*, 135 Cal. 83.

*Colorado.* — *Bottom v. Barton*, 12 Colo. App. 53.

*Florida.* — *Louisville, etc., R. Co. v. Guyton*, (Fla. 1904) 36 So. Rep. 84; *Hinote v. Brigman*, 44 Fla. 589.

*Georgia.* — *Loyd v. Anderson*, 119 Ga. 875.

*Illinois.* — *Cassem v. Williams*, 104 Ill. App. 504.

*Indiana.* — *Everett v. Stuck*, 25 Ind. App. 279.

*New York.* — *Coverly v. Terminal Warehouse Co.*, 70 N. Y. App. Div. 82.

*Rhode Island.* — *Stearns v. Drake*, 24 R. I. 272.

*Texas.* — *Robinson v. National Surety Co.*, 31 Tex. Civ. App. 629; *West v. State*, 44 Tex. Crim. 417; *Letot v. Edens*, (Tex. Civ. App. 1898) 49 S. W. Rep. 109; *Western Union Tel. Co. v. Byrd*, 34 Tex. Civ. App. 594.

**Statutory Definition of Failure of Proof and Immaterial Variance.** — *Lewis v. Utah Constr. Co.*, (Idaho 1904) 77 Pac. Rep. 336.

4. Variances Not Fatal — *United States.* — *Salt Lake City v. Smith*, (C. C. A.) 104 Fed. Rep. 457.

*California.* — *Lyles v. Perrin*, 134 Cal. 417.

*Illinois.* — *Franklin Printing, etc., Co. v. Behrens*, 181 Ill. 340.

*Indiana.* — *Consolidated Stove Co. v. Williams*, 26 Ind. App. 131, 84 Am. St. Rep. 279.

*Kansas.* — *People's Nat. Bank v. Myers*, 65 Kan. 122; *Stout v. Crosby*, 10 Kan. App. 580, 63 Pac. Rep. 661.

*Massachusetts.* — *Meaney v. Kehoe*, 181 Mass. 424.

*Missouri.* — *Rumbolz v. Bennett*, 86 Mo. App. 174.

*Nebraska.* — *Toy v. McHugh*, 62 Neb. 820.

*North Dakota.* — *Halloran v. Holmes*, (N. Dak. 1904) 101 N. W. Rep. 310.

*Oregon.* — *West v. Eley*, 39 Oregon 461.

*Texas.* — *Gipson v. State*, (Tex. Crim. 1903) 77 S. W. Rep. 216.

Differences consisting mainly of abbreviations, misspelling, and the improper use of numerals were held to be immaterial in *Burlington v. State*, 61 Neb. 276.

**534.** 1. Variance Cured by Statute — *California.* — *Lyles v. Perrin*, 134 Cal. 417; *Foster v. Carr*, 135 Cal. 83; *Duke v. Huntington*, 130 Cal. 272.

*Idaho.* — *Lewis v. Utah Constr. Co.*, (Idaho 1904) 77 Pac. Rep. 336.

**534.** *h.* VARIANCES CURED BY AMENDMENT. — See note 2.

**535.** X. BURDEN OF PROOF. — See note 1.

XI. BEST AND SECONDARY EVIDENCE. — See note 2.

**536.** See note 1.

XII. EXPERIMENTAL EVIDENCE. — See note 2.

XIII. REAL EVIDENCE — 1. Definition. — See note 3.

**537.** 2. Wounds and Injuries. — See note 1.

*Kansas.* — Cherryvale First Nat. Bank *v.* Montgomery County Nat. Bank, 64 Kan. 134.

*Nebraska.* — Toy *v.* McHugh, 62 Neb. 820.

*North Dakota.* — Halloran *v.* Holmes, (N. Dak. 1904) 101 N. W. Rep. 310.

*South Dakota.* — Woodford *v.* Kelley, (S. Dak. 1904) 101 N. W. Rep. 1069; Meldrum *v.* Kenefick, 15 S. Dak. 370.

*Washington.* — Sterrett *v.* Northport Min., etc., Co., 30 Wash. 164.

**534. 2. Variance Cured by Amendment.** — Mayer *v.* Brensen, 180 Ill. 110, 72 Am. St. Rep. 196; Ross *v.* Shanley, 185 Ill. 390, *affirming* 86 Ill. App. 144; Stout *v.* Crosby, 10 Kan. App. 580, 63 Pac. Rep. 661; Halloran *v.* Holmes, (N. Dak. 1904) 101 N. W. Rep. 310; Harris *v.* Halverson, 23 Wash. 779. See also the title VARIANCE, 22 ENCYC. OF PL AND PR. 515.

**535. 1. Wetherell *v.* Hollister**, 73 Conn. 622, *citing* 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 535.

**2. Best Evidence** — *United States*. — Bradley Timber Co. *v.* White, (C. C. A.) 121 Fed. Rep. 779, *affirming* 119 Fed. Rep. 989.

*Alabama.* — Hammond *v.* Blue, 132 Ala. 337.

*Connecticut.* — Davis *v.* Ives, 75 Conn. 611.

*Georgia.* — Central of Georgia R. Co. *v.* Bernstein, 113 Ga. 175.

*Kentucky.* — Louisville Bridge Co. *v.* Louisville, etc., R. Co., 116 Ky. 258; Louisville, etc., R. Co. *v.* Hart County, 116 Ky. 186.

*Missouri.* — Montgomery *v.* Dormer, 181 Mo. 5, *citing* 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 535.

*North Dakota.* — Fisher *v.* Betts, 12 N. Dak. 197.

**536. 1. Secondary Evidence** — *Alabama.* — Kirkland *v.* State, (Ala. 1904) 37 So. Rep. 352. *Illinois.* — Howard *v.* Illinois Trust, etc., Bank, 189 Ill. 568.

*Kentucky.* — Pepper *v.* Pepper, (Ky. 1903) 74 S. W. Rep. 739.

*Michigan.* — Davis *v.* Teachout, 126 Mich. 135.

*Minnesota.* — Hurley *v.* West St. Paul, 83 Minn. 401.

*Missouri.* — Montgomery *v.* Dormer, 181 Mo. 5, *citing* 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 535.

*South Carolina.* — State *v.* Stevens, 16 S. Dak. 309; Miller *v.* Durst, 14 S. Dak. 587.

*Texas.* — Thomas *v.* State, 45 Tex. Crim. 111.

*Washington.* — Nunn *v.* Jordan, 31 Wash. 506.

*Wisconsin.* — Siegel *v.* Liberty, 118 Wis. 599.

**2. Experimental Evidence** — *United States.* — American Bell Telephone Co. *v.* National Telephone Mfg. Co., 109 Fed. Rep. 976; Taylor *v.* U. S., 89 Fed. Rep. 954.

*California.* — Sonoma County *v.* Stofen, 125 Cal. 32; People *v.* Phelan, 123 Cal. 551.

*Colorado.* — Starr *v.* People, 28 Colo. 184.

*Illinois.* — Hauser *v.* People, 210 Ill. 253; Chicago City R. Co. *v.* Brecher, 112 Ill. App. 106.

*Michigan.* — People *v.* Thompson, 122 Mich. 411.

*Nebraska.* — Lillie *v.* State, (Neb. 1904) 100 N. W. Rep. 316.

*New Hampshire.* — Whitcher *v.* Boston, etc., R. Co., 70 N. H. 242; Healey *v.* Bartlett, (N. H. 1904) 59 Atl. Rep. 617.

*New York.* — Clark *v.* Brooklyn Heights R. Co., 78 N. Y. App. Div. 478, *affirmed* 177 N. Y. 359.

*Ohio.* — Schweinfurth *v.* Cleveland, etc., R. Co., 60 Ohio St. 215.

*Rhode Island.* — Cheetham *v.* Union R. Co., (R. I. 1904) 58 Atl. Rep. 881.

*Texas.* — Olivaras *v.* San Antonio, etc., R. Co., (Tex. Civ. App. 1903) 77 S. W. Rep. 981; Rupe *v.* State, 42 Tex. Crim. 477; Schauer *v.* State, (Tex. Crim. 1900) 60 S. W. Rep. 249.

*Washington.* — Halverson *v.* Seattle Electric Co., 35 Wash. 600; Rowe *v.* Northport Smelting, etc., Co., 35 Wash. 101.

**3. Real Evidence** — *United States.* — Baggs *v.* Martin, (C. C. A.) 108 Fed. Rep. 33.

*Alabama.* — Northern Alabama R. Co. *v.* Mansell, 138 Ala. 548.

*California.* — People *v.* Sullivan, 129 Cal. 557.

*Illinois.* — Quincy Gas, etc., Co. *v.* Baumann, 203 Ill. 295, *affirming* 104 Ill. App. 600.

*Iowa.* — State *v.* Petersen, 110 Iowa 647; State *v.* Novak, 109 Iowa 717.

*Kansas.* — State *v.* Keenan, 7 Kan. App. 813, 55 Pac. Rep. 102.

*Massachusetts.* — Boucher *v.* Robeson Mills, 182 Mass. 500.

*Michigan.* — People *v.* Kinney, 124 Mich. 486.

*Missouri.* — State *v.* Gartrell, 171 Mo. 489; State *v.* Goddard, 146 Mo. 177.

*Nebraska.* — Savary *v.* State, 62 Neb. 166.

*Texas.* — Johnson *v.* State, 44 Tex. Crim. 332; Smith *v.* State, (Tex. Crim. 1900) 58 S. W. Rep. 101; House *v.* State, 42 Tex. Crim. 125; Barkman *v.* State, 41 Tex. Crim. 105; Head *v.* State, 40 Tex. Crim. 265.

*Washington.* — Roberts *v.* Port Blakely Mill Co., 30 Wash. 25.

*Wisconsin.* — Viellesse *v.* Green Bay, 110 Wis. 160.

**In the Discretion of the Court.** — Ewald *v.* Michigan Cent. R. Co., 107 Ill. App. 294.

**537. 1. Wounds and Injuries** — *Illinois.* — Ewald *v.* Michigan Cent. R. Co., 107 Ill. App. 294; Jefferson Ice Co. *v.* Zwicoski, 78 Ill. App. 646; Pritchard *v.* Moore, 75 Ill. App. 553; Swift *v.* O'Neill, 88 Ill. App. 162, *affirmed* 187 Ill. 337; Grand Lodge, etc., *v.* Randolph, 186 Ill. 89.

*Kentucky.* — Illinois Cent. R. Co. *v.* Clark, (Ky. 1900) 55 S. W. Rep. 609.

*Missouri.* — Orscheln *v.* Scott, 90 Mo. App. 352.

- 538.** 3. Weapons and Missiles. — See note 1.  
 6. Personal Resemblance. — See note 4.  
**539.** 7. Models, Diagrams, and Maps. — See note 1.  
 8. Photographs. — See note 2.

*Nebraska.* — Chicago, etc., *R. Co. v. Krayenbuhl*, (Neb. 1904) 98 N. W. Rep. 44; *Crete v. Hendricks*, (Neb. 1902) 90 N. W. Rep. 215.

*New Hampshire.* — *Nebonne v. New Concord R. Co.*, 68 N. H. 296.

*New York.* — *Perry v. Metropolitan St. R. Co.*, 68 N. Y. App. Div. 351.

*Tennessee.* — *Arkansas River Packet Co. v. Hobbs*, 105 Tenn. 29.

*Texas.* — *Missouri, etc., R. Co. v. Moody*, 35 Tex. Civ. App. 46; *Texas Midland R. Co. v. Brown*, (Tex. Civ. App. 1900) 58 S. W. Rep. 44.

**It Must Not Be Indecent.** — *Garvik v. Burlington, etc., R. Co.*, 124 Iowa 691. See also *Aspy v. Botkins*, 160 Ind. 170, where the defendant's request that a physician be allowed to inspect the female plaintiff's knee in presence of the jury was held properly refused.

**538.** 1. Weapons and Missiles. — *Barr v. People*, 30 Colo. 522; *People v. Flanigan*, 174 N. Y. 356; *State v. Costello*, 29 Wash. 366; *State v. Edwards*, 51 W. Va. 220.

4. *Contra.* — *State v. Neel*, 23 Utah 541.

**539.** 1. Models, Diagrams, and Maps — *United States.* — *Southern Pac. R. Co. v. Hall*, (C. C. A.) 100 Fed. Rep. 760; *Western Gas Constr. Co. v. Danner*, (C. C. A.) 97 Fed. Rep. 882.

*Alabama.* — *Garrison v. Glass*, 139 Ala. 512; *Jarvis v. State*, 138 Ala. 17; *Mann v. State*, 134 Ala. 1; *Burton v. State*, 115 Ala. 1.

*Arkansas.* — *Ragland v. State*, 71 Ark. 65.

*California.* — *Pickering Light, etc., Co. v. Savage*, 137 Cal. xix, 69 Pac. Rep. 846; *People v. Shears*, 133 Cal. 154.

*Connecticut.* — *Waterbury v. Waterbury Traction Co.*, 74 Conn. 152.

*Florida.* — *Rawlins v. State*, 40 Fla. 155.

*Georgia.* — *Acme Brewing Co. v. Central R., etc., Co.*, 115 Ga. 494; *Stiles v. State*, 113 Ga. 700; *Parker v. Salmons*, 113 Ga. 1167.

*Illinois.* — *Lake St. El. R. Co. v. Burgess*, 200 Ill. 628; *Wahl v. Laubersheimer*, 174 Ill. 338; *Sanitary Dist. v. Conroy*, 109 Ill. App. 367.

*Iowa.* — *McMahon v. Dubuque*, 107 Iowa 62, 70 Am. St. Rep. 143.

*Minnesota.* — *Fish v. Chicago, etc., R. Co.*, 82 Minn. 9, 83 Am. St. Rep. 398; *Hall v. Connecticut Mut. L. Ins. Co.*, 76 Minn. 401.

*New Jersey.* — *State v. Smith*, 68 N. J. L. 609.

*New York.* — *Clegg v. Metropolitan St. R. Co.*, 159 N. Y. 550; *O'Donohue v. Cronin*, 62 N. Y. App. Div. 379; *Bodine v. Andrews*, 47 N. Y. App. Div. 495.

*North Carolina.* — *State v. Wilcox*, 132 N. Car. 1120; *Arrowood v. South Carolina, etc., R. Co.*, 126 N. Car. 629.

*Pennsylvania.* — *Ruppert v. West Side Belt R. Co.*, 25 Pa. Super. Ct. 613.

*South Carolina.* — *Koon v. Southern R. Co.*, 69 S. Car. 101.

*Texas.* — *Barrow v. Gridley*, 25 Tex. Civ. App. 13; *Besson v. Richards*, 24 Tex. Civ. App. 64; *Houston v. Finnigan*, (Tex. Civ. App. 1905) 85 S. W. Rep. 470.

*Vermont.* — *Hyde v. Swanton*, 72 Vt. 242.

*Washington.* — *Franklin v. Engel*, 34 Wash. 480; *Moran Bros. Co. v. Snoqualmie Falls Power Co.*, 29 Wash. 292.

**2. Photographs** — *United States.* — *Denver, etc., R. Co. v. Roller*, (C. C. A.) 100 Fed. Rep. 738, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 539; *U. S. v. Ortiz*, 176 U. S. 422; *Tracy v. Baltimore, etc., R. Co.*, 98 Fed. Rep. 633.

*California.* — *People v. Mooney*, 132 Cal. 13; *People v. Crandall*, 125 Cal. 129.

*Colorado.* — *Mow v. People*, 31 Colo. 351.

*Connecticut.* — *State v. Cook*, 75 Conn. 267; *Wetherell v. Hollister*, 73 Conn. 622; *Cunningham v. Fair Haven, etc., R. Co.*, 72 Conn. 244; *McGar v. Bristol*, 71 Conn. 652.

*Georgia.* — *Berry v. Clark*, 117 Ga. 964.

*Illinois.* — *Howard v. Illinois Trust, etc., Bank*, 189 Ill. 568, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 539; *Lake Erie, etc., R. Co. v. Wilson*, 189 Ill. 89, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 539; *Chicago, etc., R. Co. v. Crose*, 113 Ill. App. 547, affirmed 214 Ill. 602, 105 Am. St. Rep. 135; *Chicago v. Vesey*, 105 Ill. App. 191; *Wabash R. Co. v. Prast*, 101 Ill. App. 167; *Fitzgerald v. Hedstrom*, 98 Ill. App. 109; *Williams v. Carterville*, 97 Ill. App. 160; *Chicago, etc., R. Co. v. Lawrence*, 96 Ill. App. 635; *People's Gas Light, etc., Co. v. Amphlett*, 93 Ill. App. 194; *Chicago, etc., R. Co. v. Myers*, 86 Ill. App. 401; *Wabash R. Co. v. Jenkins*, 84 Ill. App. 511; *Chicago, etc., R. Co. v. Corson*, 198 Ill. 98; *Iroquois Furnace Co. v. McCrear*, 191 Ill. 340, affirming 91 Ill. App. 337.

*Indiana.* — *Huntington v. Lusch*, 33 Ind. App. 476.

*Iowa.* — *State v. Hasty*, 121 Iowa 507; *Bach v. Iowa Cent. R. Co.*, 112 Iowa 241.

*Kentucky.* — *Hays v. Ison*, (Ky. 1903) 72 S. W. Rep. 733; *Vanarsdell v. Louisville, etc., R. Co.*, (Ky. 1901) 65 S. W. Rep. 858; *Paducah First Nat. Bank v. Wisdom*, 111 Ky. 135.

*Massachusetts.* — *Com. v. Fielding*, 184 Mass. 484; *De Forge v. New York, etc., R. Co.*, 178 Mass. 59, 86 Am. St. Rep. 464; *Com. v. Chance*, 174 Mass. 245, 75 Am. St. Rep. 306; *Dolan v. Mutual Reserve Fund L. Assoc.*, 173 Mass. 197.

*Michigan.* — *Sterling v. Detroit*, 134 Mich. 22; *People v. Carey*, 125 Mich. 535.

*Missouri.* — *Robinson v. St. Joseph*, 97 Mo. App. 503; *State v. Fulkerson*, 97 Mo. App. 599; *Baustian v. Young*, 152 Mo. 317, 75 Am. St. Rep. 462.

*Nebraska.* — *Carlson v. Benton*, 66 Neb. 486; *Geneva v. Burnett*, 65 Neb. 464, 101 Am. St. Rep. 628.

*New Hampshire.* — *Pritchard v. Austin*, 69 N. H. 367.

*New York.* — *Leeds v. New York Telephone Co.*, 79 N. Y. App. Div. 121, reversed 178 N. Y. 118; *Clary-Squire v. Press Pub. Co.*, 58 N. Y. App. Div. 362; *Stiasny v. Metropolitan St. R. Co.*, 172 N. Y. 656, affirming 58 N. Y. App. Div. 172.

*Ohio.* — *Tish v. Welker*, 5 Ohio Dec. 725, 7 Ohio N. P. 472.



**510.** 9. View of Premises by Jury. — See note 3.

**511.** XIV. EVIDENCE EXCLUDED BY PUBLIC POLICY — 2. Self-incriminating Evidence — *a.* BY PARTY TO THE ACTION — (1) *In Criminal Cases.* — See note 2.

(2) *In Civil Cases.* — See note 4.

*b.* BY WITNESSES WHO ARE NOT PARTIES. — See note 5.

*c.* PRIVILEGE — HOW CLAIMED. — See note 6.

**542.** *d.* DETERMINATION OF PRIVILEGE. — See note 1.

*e.* CONSTITUTIONAL PROTECTION. — See note 2.

Statutory Exemption from Prosecution. — See note 3.

**543.** 3. Testimony of Husband and Wife — *b.* UNDER STATUTORY PROVISIONS. — See note 1.

4. Transactions with Deceased Persons — *a.* AT COMMON LAW. — See note 2.

*b.* UNDER STATUTORY PROVISIONS. — See note 3.

*Oklahoma.* — *Smith v. Territory*, 11 Okla. 669.  
*Pennsylvania.* — *Com. v. Keller*, 191 Pa. St. 122; *Beardslee v. Columbia Tp.*, 188 Pa. St. 496, 68 Am. St. Rep. 883.

*South Carolina.* — *Virginia-Carolina Chemical Co. v. Kirven*, 57 S. Car. 445.

*Tennessee.* — *Record v. Chickasaw Cooperage Co.*, 108 Tenn. 657; *Livermore Foundry, etc., Co. v. Union Compress, etc., Co.*, 105 Tenn. 187.

*Texas.* — *Houston, etc., R. Co. v. Cluck*, (Tex. Civ. App. 1904) 84 S. W. Rep. 852; *San Antonio v. Talerico*, 98 Tex. 151, *modifying* (Tex. Civ. App. 1903) 78 S. W. Rep. 28; *Smith v. Bunch*, 31 Tex. Civ. App. 541; *Monson v. State*, (Tex. Crim. 1901) 63 S. W. Rep. 647; *Grooms v. State*, 40 Tex. Crim. 319.

*Washington.* — *Miller v. Dumon*, 24 Wash. 648.

*Wisconsin.* — *Paulson v. State*, 118 Wis. 89; *Hupfer v. National Distilling Co.*, 114 Wis. 279; *Mauch v. Hartford*, 112 Wis. 40; *Baxter v. Chicago, etc., R. Co.*, 104 Wis. 307.

Admission Subject to Discretion of Trial Court. — *Lake Erie, etc., R. Co. v. Wilson*, 87 Ill. App. 360, *reversed* 189 Ill. 89.

Identification. — A photograph of parties in a divorce case is not sufficiently identified by the plaintiff alone. *Pessolano v. Pessolano*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 16.

**540.** 3. *Nelson v. State*, (Tex. Crim. 1900) 58 S. W. Rep. 107.

**541.** 2. Self-incrimination — Common Law. — *Wyckoff v. Wagner Typewriter Co.*, 99 Fed. Rep. 158; *Sorenson v. Sorenson*, 189 Ill. 179, *citing* 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 541; *Howard v. Com.*, 110 Ky. 356; *Miskimins v. Shaver*, 8 Wyo. 392.

4. *Matter of Green*, 86 Mo. App. 216.

5. Strangers to the Record. — *Wallace v. State*, 41 Fla. 547; *State v. Abley*, 109 Iowa 61, 77 Am. St. Rep. 520.

6. Privilege Personal to Witness — *Illinois.* — *New York L. Ins. Co. v. People*, 195 Ill. 430; *Bolen v. People*, 184 Ill. 338.

*Michigan.* — *In re Moser*, (Mich. 1904) 101 N. W. Rep. 589.

*Missouri.* — *State v. Kennedy*, 154 Mo. 268.

*North Carolina.* — *State v. Morgan*, 133 N. Car. 743, *citing* 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 541.

*North Dakota.* — *State v. Ekanger*, 8 N. Dak. 559.

*Texas.* — *Duncan v. State*, 40 Tex. Crim. 591.  
*West Virginia.* — *State v. Hill*, 52 W. Va. 296.

**542.** 1. How Privilege Determined. — *Foot v. Buchanan*, 113 Fed. Rep. 156; *Bradley v. Clark*, 133 Cal. 196; *State v. Hill*, 52 W. Va. 296.

2. Constitutional Guaranty. — *In re Kanter*, 117 Fed. Rep. 356; *Foot v. Buchanan*, 113 Fed. Rep. 156; *In re Rosser*, 96 Fed. Rep. 305; *Blum v. State*, 94 Md. 375; *State v. Gardner*, 88 Minn. 130.

3. *In re Hess*, 134 Fed. Rep. 109; *People v. Butler St. Foundry, etc., Co.*, 201 Ill. 236; *In re Bell*, 69 Kan. 855; *State v. Jack*, 69 Kan. 387; *Ex p. Carter*, 166 Mo. 604; *People v. Court of Gen. Sess.*, 96 N. Y. App. Div. 201, *affirmed* 179 N. Y. 594; *In re Briggs*, 135 N. Car. 118; *Miller v. Brown*, 22 Pa. Co. Ct. 109, 29 Pittsb. Leg. J. N. S. (Pa.) 360.

For a full discussion of the subject see the title WITNESSES, vol. 30, p. 898.

**543.** 1. Statutes. — *Gosselin v. Rex*, 33 Can. Sup. Ct. 255.

2. Transactions with Deceased Persons — Common Law. — *Bagnell v. Chemical Bank*, 76 Mo. App. 121.

3. Statutes — *Alabama.* — *White v. Thompson*, 123 Ala. 610; *Moore v. Walker*, 124 Ala. 199; *Miller v. Mayer*, 124 Ala. 434; *Dicus v. Childress*, 128 Ala. 617; *Daniel v. Bradford*, 132 Ala. 262; *McDonald v. Harris*, 131 Ala. 359; *Deposit Bank v. Caffee*, 135 Ala. 208; *Englehart v. Richter*, 136 Ala. 562.

*Arkansas.* — *Cash v. Kirkham*, 67 Ark. 318.

*California.* — *Frazier v. Murphy*, 133 Cal. 91; *Kaltschmidt v. Weber*, 145 Cal. 596; *Stuart v. Lord*, 138 Cal. 672.

*Delaware.* — *Mitchell v. Woodward*, 2 Marv. (Del.) 311.

*District of Columbia.* — *Marmion v. McClellan*, 11 App. Cas. (D. C.) 467; *Tyler v. Kelch*, 19 App. Cas. (D. C.) 180; *Tuohy v. Trail*, 19 App. Cas. (D. C.) 79.

*Florida.* — *Chapin v. Mitchell*, 44 Fla. 225.

*Georgia.* — *Jewell v. Walker*, 109 Ga. 241; *Florida Cent., etc., R. Co. v. Usina*, 111 Ga. 697; *Rogers v. Chambers*, 112 Ga. 258; *Sivell v. Hogan*, 115 Ga. 567; *Horton v. Smith*, 115 Ga. 66; *Dowdy v. Watson*, 115 Ga. 42; *Hendrick v. Daniel*, 119 Ga. 358; *Johnston v. Coney*, 120 Ga. 676.

*Idaho*. — Coats *v.* Harris, 9 Idaho 458.

*Illinois*. — Walls *v.* Ritter, 180 Ill. 616; Feitl *v.* Chicago City R. Co., 113 Ill. App. 381, *affirmed* 211 Ill. 279; Dunlop *v.* Lamb, 182 Ill. 319; Sayles *v.* Christie, 187 Ill. 420; Yarde *v.* Yarde, 187 Ill. 636; Hawley *v.* Hawley, 187 Ill. 351; Yokem *v.* Hicks, 93 Ill. App. 667; Maher *v.* Title Guarantee, etc., Co., 95 Ill. App. 365; Matter of Tobin, 196 Ill. 484; Volbracht *v.* White, 197 Ill. 298; Loeb *v.* Stern, 198 Ill. 371, *affirming* 99 Ill. App. 637; Holton *v.* Dunker, 198 Ill. 407; Waugh *v.* Moan, 200 Ill. 298; Rothstein *v.* Siegel, 102 Ill. App. 600; Baker *v.* Baker, 202 Ill. 595; McAyeal *v.* Gullett, 105 Ill. App. 155, *affirmed* 202 Ill. 214; *In re* Maher, 210 Ill. 160; Cronin *v.* Supreme Council, etc., 199 Ill. 228, 93 Am. St. Rep. 127.

*Indiana*. — Foster *v.* Honan, 22 Ind. App. 252; Bowen *v.* O'Hair, 29 Ind. App. 466; Toner *v.* Wagner, 158 Ind. 447; Goodwin *v.* Bentley, 30 Ind. App. 477.

*Indian Territory*. — James *v.* Smith, 3 Indian Ter. 447.

*Iowa*. — Furenes *v.* Eide, 109 Iowa 511, 77 Am. St. Rep. 545; Matter of Perkins, 109 Iowa 217; McCorkendale *v.* McCorkendale, 111 Iowa 314; Watters *v.* McGreavy, 111 Iowa 538; *In re* Evans, 114 Iowa 240; Russell *v.* Smith, 115 Iowa 261; Clinton Sav. Bank *v.* Underhill, 115 Iowa 292; Hutton *v.* Doxsee, 116 Iowa 113; Boardman *v.* Brown, 114 Iowa 678; Lowery *v.* Lowery, 117 Iowa 704; *In re* Wickham, (Iowa 1902) 90 N. W. Rep. 600; Frick *v.* Kabaker, 116 Iowa 494; Stolenburg *v.* Diercks, 117 Iowa 25; Nordman *v.* Meyer, 118 Iowa 508; Garretson *v.* Kinkad, 118 Iowa 383; Ellis *v.* Newell, 120 Iowa 71; Luke *v.* Koenen, 120 Iowa 103; Huit *v.* Huit, 122 Iowa 338; *In re* Wiltsey, 122 Iowa 423; Ross *v.* Kirkwood, 123 Iowa 668.

*Kansas*. — Moyer *v.* Knapp, 9 Kan. App. 226; American Invest. Co. *v.* Coulter, 8 Kan. App. 841; Park *v.* Ensign, 10 Kan. App. 173; Miller *v.* McDowell, 63 Kan. 75; Crebbin *v.* Jarvis, 64 Kan. 885, 67 Pac. Rep. 531; Roach *v.* Roach, 69 Kan. 522.

*Kentucky*. — Cunningham *v.* Speagle, 106 Ky. 278; Kentucky Stove Co. *v.* Bryan, (Ky. 1905) 84 S. W. Rep. 537; Cornelius *v.* Miles, (Ky. 1899) 53 S. W. Rep. 517; Pope *v.* Pope, (Ky. 1900) 55 S. W. Rep. 194; Murray *v.* East End Imp. Co., (Ky. 1901) 60 S. W. Rep. 648; Whitlow *v.* Whitlow, 109 Ky. 573; Shoptaw *v.* Ridgway, (Ky. 1901) 60 S. W. Rep. 723; Knight *v.* Wilson, (Ky. 1900) 58 S. W. 439; Dunn *v.* Duncan, (Ky. 1901) 61 S. W. Rep. 1011; Warren Deposit Bank *v.* Younglove, 112 Ky. 767, (Ky. 1902) 67 S. W. Rep. 47; Maxey *v.* Bethel, (Ky. 1901) 64 S. W. Rep. 746; Smick *v.* Beswick, 113 Ky. 439; James *v.* Walker, (Ky. 1902) 68 S. W. Rep. 1106; Storey *v.* Louisville First Nat. Bank, (Ky. 1903) 72 S. W. Rep. 318; Elliott *v.* Campbell, (Ky. 1904) 78 S. W. Rep. 1122; Carpenter *v.* Rice, (Ky. 1904) 78 S. W. Rep. 458; Park Com'rs *v.* Marrett, (Ky. 1904) 80 S. W. Rep. 166; Turner *v.* Washburn, (Ky. 1904) 80 S. W. Rep. 460; Mann *v.* Cavanaugh, 110 Ky. 776; Hagins *v.* Arnett, (Ky. 1901) 64 S. W. Rep. 430; Burton *v.* Hill, (Ky. 1901) 64 S. W. Rep. 736; Townsend *v.* Wilson, 114 Ky. 504; Turner *v.* Mitchell, (Ky. 1901) 61 S. W. Rep. 468; Garnett *v.* Wills,

(Ky. 1902) 69 S. W. Rep. 605; Carpenter *v.* Carpenter, (Ky. 1902) 66 S. W. Rep. 814; Black *v.* Cox, (Ky. 1904) 82 S. W. Rep. 278; Garrott *v.* Rives, (Ky. 1904) 80 S. W. Rep. 519; Proctor *v.* Proctor, (Ky. 1904) 81 S. W. Rep. 272.

*Maryland*. — Polk *v.* Clark, 92 Md. 372.

*Michigan*. — Olin *v.* Henderson, 120 Mich. 149; Lorimer *v.* Lorimer, 124 Mich. 631; Shouldice *v.* McLeod, 130 Mich. 444; Gustafson *v.* Eger, 132 Mich. 387; Chaddock *v.* Chaddock, 134 Mich. 48; Peirson *v.* McNeal, (Mich. 1904) 100 N. W. Rep. 458; Albring *v.* Ward, (Mich. 1904) 100 N. W. Rep. 609; People's Nat. Bank *v.* Wilcox, (Mich. 1904) 100 N. W. Rep. 24.

*Minnesota*. — Reeves *v.* Sawyer, 88 Minn. 218; Lowe *v.* Lowe, 83 Minn. 206; Comstock *v.* Comstock, 76 Minn. 396.

*Mississippi*. — Steen *v.* Kirkpatrick, 84 Miss. 63; Watson *v.* Duncan, 84 Miss. 763; Moore *v.* Crump, 84 Miss. 612; Davis *v.* Viener, (Miss. 1900) 27 So. Rep. 877.

*Missouri*. — Eyermann *v.* Piron, 151 Mo. 107; Kane *v.* Kane, 79 Mo. App. 335; Powell *v.* Bosard, 79 Mo. App. 627; Miller *v.* Slupsley, 158 Mo. 643; Seatele *v.* Metropolitan L. Ins. Co., 81 Mo. App. 509; State *v.* Thompson, 81 Mo. App. 549; McElvain *v.* Garrett, 84 Mo. App. 300; C. E. Donnell Newspaper Co. *v.* Jung, 81 Mo. App. 577; Edwards *v.* Warner, 84 Mo. App. 200; Rice *v.* Shipley, 159 Mo. 399; Davis *v.* Wood, 161 Mo. 17; Patton *v.* Fox, 169 Mo. 97; Tucker *v.* Gentry, 93 Mo. App. 655; Winter *v.* Supreme Lodge, etc., 96 Mo. App. 1; Warfield *v.* Hume, 91 Mo. App. 541; Wilden *v.* McAllister, 91 Mo. App. 446; Reed *v.* Morgan, 100 Mo. App. 713; Johnston *v.* Johnston, 173 Mo. 91, 96 Am. St. Rep. 486; Cleveland *v.* Coulson, 99 Mo. App. 468; Kersey *v.* O'Day, 173 Mo. 560; Supreme Council, etc. *v.* Bevis, 106 Mo. App. 429; Ashbury *v.* Hicklin, 181 Mo. 658; Central Bank *v.* Thayer, 184 Mo. 61; Ladd *v.* Williams, 104 Mo. App. 390; Crosno *v.* J. W. Bowser Milling Co., 106 Mo. App. 236; Baker *v.* Reed, 162 Mo. 341; Sidway *v.* Missouri Land, etc., Co., 163 Mo. 342; Curd *v.* Brown, 148 Mo. 82; Carpenter *v.* Coats, 183 Mo. 52.

*Nebraska*. — Tecumseh Nat. Bank *v.* McGee, 61 Neb. 709; Harte *v.* Reichenberg, (Neb. 1902) 92 N. W. Rep. 987; Davidson *v.* Davidson, (Neb. 1901) 96 N. W. Rep. 409; Sorensen *v.* Sorensen, (Neb. 1904) 98 N. W. Rep. 837; Sorensen *v.* Sorensen, 56 Neb. 729.

*Nevada*. — Schwartz *v.* Stock, 26 Nev. 128.

*New Hampshire*. — White *v.* Dakin, 70 N. H. 632; Greely *v.* Willey, 71 N. H. 240; Bean *v.* Bean, 71 N. H. 538.

*New Jersey*. — Dickerson *v.* Payne, 66 N. J. L. 35; Adoue *v.* Spencer, 62 N. J. Eq. 782, 90 Am. St. Rep. 484, *reversing* 59 N. J. Eq. 231; Rairdon *v.* Sampson, 67 N. J. L. 346; Lodge *v.* Hulings, 64 N. J. Eq. 761; Baker *v.* Bancroft, 69 N. J. L. 223; Clawson *v.* Brewer, (N. J. 1904) 58 Atl. Rep. 598.

*New York*. — Beck *v.* Cooke, (N. Y. City Ct. Gen. T.) 27 Misc. (N. Y.) 185, *affirmed* (Supm. Ct. App. T.) 65 N. Y. Supp. 1127; Burdick *v.* Burdick, 180 N. Y. 261; Pringle *v.* Burroughs, 100 N. Y. App. Div. 366; Wakefield *v.* Wakefield, (N. Y. City Ct. Tr. T.) 92 N. Y. Supp. 399; Komp *v.* Luria, (Supm. Ct. Spec. T.) 46 Misc.

**548. XV. OPINION EVIDENCE.** — See note 2.

(N. Y.) 339; *Burns v. Mullin*, 42 N. Y. App. Div. 116; *Abelein v. Porter*, 45 N. Y. App. Div. 307; *O'Connor v. Ogdensburg Bank*, 51 N. Y. App. Div. 70; *Carpenter v. Romer, etc., Steamboat Co.*, 48 N. Y. App. Div. 363; *Bennett v. Bennett*, 50 N. Y. App. Div. 127; *Byerer v. Smith*, 55 N. Y. App. Div. 405; *Matter of Gabriel*, 161 N. Y. 644, (Supm. Ct. App. Div.) *affirming* 60 N. Y. Supp. 87; *Boyd v. Boyd*, 164 N. Y. 234, *reversing* 21 N. Y. App. Div. 361; *Matter of Meehan*, 59 N. Y. App. Div. 156; *Matter of Arkenburgh*, 58 N. Y. App. Div. 583; *Richardson v. Emmett*, 61 N. Y. App. Div. 205, *reversed* 170 N. Y. 412; *Burnham v. Burnham*, 46 N. Y. App. Div. 513, *affirmed* 165 N. Y. 659; *Hixson v. Rodbourn*, 67 N. Y. App. Div. 424, *reversing* (Supm. Ct. Tr. T.) 36 Misc. (N. Y.) 19; *Wangner v. Grimm*, 169 N. Y. 421, *affirming* 53 N. Y. App. Div. 626; *Hall v. Bond*, 68 N. Y. App. Div. 293; *Healy v. Malcolm*, 66 N. Y. App. Div. 501; *Hobart v. Verrault*, 74 N. Y. App. Div. 444; *Richardson v. Emmett*, 170 N. Y. 412, *reversing* 61 N. Y. App. Div. 205; *Mitchell v. Hollands*, 72 N. Y. App. Div. 224; *Meehan v. Heffernan*, 73 N. Y. App. Div. 615, 76 N. Y. Supp. 789; *Matter of Smith*, 75 N. Y. App. Div. 339; *Parker v. Parsons*, 79 N. Y. App. Div. 310; *Boyd v. Daily*, 85 N. Y. App. Div. 581, *affirmed* 176 N. Y. 613; *Dolan v. Leary*, 174 N. Y. 540, *affirming* 69 N. Y. App. Div. 459, which *affirmed* (Sup. Ct. Spec. T.) 68 N. Y. Supp. 91; *Hutton v. Smith*, 175 N. Y. 375; *Farrar v. Farmers' L. & T. Co.*, 85 N. Y. App. Div. 367; *Motz v. Motz*, 85 N. Y. App. Div. 4; *Connolly v. Keenan*, (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 589; *Munz v. Colvin*, 35 N. Y. App. Div. 188; *Smith v. Smith*, 100 N. Y. App. Div. 1; *Roberts v. Mack*, 98 N. Y. App. Div. 485; *Holland v. Holland*, 98 N. Y. App. Div. 366; *Matter of Neil*, (Surrogate Ct.) 35 Misc. (N. Y.) 254.

*North Carolina.* — *Gupton v. Hawkins*, 126 N. Car. 81; *Dunn v. Beaman*, 126 N. Car. 766; *Angel v. Angel*, 127 N. Car. 451; *Benedict v. Jones*, 129 N. Car. 475; *Luton v. Badham*, 129 N. Car. 7; *Robinson v. McDowell*, 130 N. Car. 246; *McGowan v. Davenport*, 134 N. Car. 526; *Benedict v. Jones*, 129 N. Car. 475; *Hall v. Holloman*, 136 N. Car. 34.

*Ohio.* — *Foxhever v. Order of Red Cross*, 24 Ohio Cir. Ct. 56.

*Pennsylvania.* — *Marschall's Estate*, 8 Pa. Dist. 313; *Fidelity Trust, etc., Co. v. Black*, 8 Pa. Dist. 580; *Robbins v. Farwell*, 193 Pa. St. 37; *Reiter v. McJunkins*, 194 Pa. St. 301; *Acklin v. McCalmont Oil Co.*, 201 Pa. St. 257; *Shroyer v. Smith*, 204 Pa. St. 310; *Murphy v. Murphy*, 24 Pa. Super. Ct. 547; *Winings v. Hearst*, 17 Pa. Super. Ct. 314; *Sunday v. Dietrich*, 16 Pa. Super. Ct. 640.

*South Carolina.* — *Rhodes v. Southern R. Co.*, 68 S. Car. 494.

*South Dakota.* — *Starkweather v. Bell*, 12 S. Dak. 146; *Bunker v. Taylor*, 13 S. Dak. 433.

*Tennessee.* — *Royston v. McCulley*, (Tenn. Ch. 1900) 59 S. W. Rep. 725; *Mason v. Willhite*, (Tenn. Ch. 1900) 61 S. W. Rep. 298.

*Texas.* — *Blackman v. Schierman*, 21 Tex. Civ. App. 517; *Lewis v. Whitworth*, (Tex. Civ.

App. 1899) 54 S. W. Rep. 1077; *Ehrenworth v. Putnam*, (Tex. Civ. App. 1900) 55 S. W. Rep. 190; *Garwood v. Schlichenmaier*, 25 Tex. Civ. App. 176; *Pennybacker v. Hazlewood*, 26 Tex. Civ. App. 183; *Gilroy v. Richards*, 26 Tex. Civ. App. 355; *Hedges v. Williams*, 26 Tex. Civ. App. 551; *Gillaspie v. Murray*, 27 Tex. Civ. App. 580; *Tompkins v. McGinn*, (Tex. Civ. App. 1905) 85 S. W. Rep. 452; *Neitch v. Hillman*, 29 Tex. Civ. App. 544; *McKnight v. Reed*, 30 Tex. Civ. App. 204; *Tenzler v. Tyrrell*, 32 Tex. Civ. App. 443; *Bridge v. Carter*, 33 Tex. Civ. App. 591; *Abbott v. Stiff*, (Tex. Civ. App. 1904) 81 S. W. Rep. 562; *Haberzettle v. Dearing*, (Tex. Civ. App. 1904) 80 S. W. Rep. 539; *Hazlewood v. Pennybacker*, (Tex. Civ. App. 1899) 50 S. W. Rep. 199.

*Vermont.* — *Foster v. King*, 73 Vt. 278; *Rickard v. Dana*, 74 Vt. 74; *Farmers' Nat. Bank v. Thomson*, 74 Vt. 442; *Haskell v. Holt*, 75 Vt. 413.

*Washington.* — *Whitney v. Priest*, 26 Wash. 48; *Matter of Alfstad*, 27 Wash. 175; *Bay View Brewing Co. v. Grubb*, 31 Wash. 34; *Kline v. Stein*, 30 Wash. 189.

*West Virginia.* — *Huntington, etc., Land Development Co. v. Thornburg*, 46 W. Va. 99; *Union Bank v. Nickell*, (W. Va. 1905) 49 S. E. Rep. 1003; *Carter v. Gill*, 47 W. Va. 504; *Lee v. Patton*, 50 W. Va. 20; *Poling v. Huffman*, 48 W. Va. 639.

*Wisconsin.* — *Brader v. Brader*, 110 Wis. 423; *Milwaukee Trust Co. v. Warren*, 112 Wis. 505; *Anderson v. Langen*, 122 Wis. 57; *Morgan v. Henry*, 115 Wis. 27.

*Wyoming.* — *Bliler v. Boswell*, 9 Wyo. 57; *Ullman v. Abbott*, 10 Wyo. 97.

**In the Federal Courts.** — *De Roux v. Girard*, (C. C. A.) 112 Fed. Rep. 89, *affirming* 105 Fed. Rep. 798; *In re Shaw*, 109 Fed. Rep. 780.

**548. 2. Opinion Evidence — United States.** — *Southern R. Co. v. Carson*, 194 U. S. 136, *affirming* *Carson v. Southern R. Co.*, 68 S. Car. 55; *Kiesel v. Sun Ins. Office*, (C. C. A.) 88 Fed. Rep. 243; *Ft. Pitt Gas Co. v. Evansville Contract Co.*, (C. C. A.) 123 Fed. Rep. 63.

*Alabama.* — *Birmingham R., etc., Co. v. Ellard*, 135 Ala. 433; *La Fayette R. Co. v. Tucker*, 124 Ala. 514; *Miller v. Mayer*, 124 Ala. 434.

*Arkansas.* — *St. Louis, etc., R. Co. v. Jacobs*, 70 Ark. 401.

*District of Columbia.* — *Kight v. Metropolitan R. Co.*, 21 App. Cas. (D. C.) 494.

*Georgia.* — *Central of Georgia R. Co. v. Goodwin*, 120 Ga. 83; *Sumner v. Sumner*, 118 Ga. 590, 98 Am. St. Rep. 133; *Milledgeville v. Wood*, 114 Ga. 370.

*Illinois.* — *Big Lake Special Drainage Dist. v. Highway Com'rs*, 199 Ill. 132; *Illinois Steel Co. v. Sitar*, 199 Ill. 116, *affirming* 98 Ill. App. 300; *Henry v. Stewart*, 185 Ill. 448, *affirming* 85 Ill. App. 170; *Illinois Steel Co. v. McNulty*, 105 Ill. App. 594.

*Iowa.* — *Healy v. Patterson*, 123 Iowa 73; *Collins v. Chicago, etc., R. Co.*, 122 Iowa 231; *Chicago University v. Emmert*, 108 Iowa 500.

*Louisiana.* — *State v. Robertson*, 111 La. 35.

*Maryland.* — *Tucker v. State*, 89 Md. 471.



**548. XVI. EXPERT EVIDENCE.** — See note 3.**XVII. PAROL EVIDENCE TO VARY WRITTEN CONTRACTS — General Rule.**

— See note 4.

*Montana.* — Metz v. Butte, 27 Mont. 506.  
*Nebraska.* — Union State Bank v. Hutton, (Neb. 1901) 95 N. W. Rep. 1061.

*New Jersey.* — Riley v. Camden, etc., R. Co., 70 N. J. L. 289.

*New Mexico.* — Territory v. Claypool, 11 N. Mex. 568.

*New York.* — Winters v. Naughton, 91 N. Y. App. Div. 80; Dittman v. Edison Electric Illuminating Co., 87 N. Y. App. Div. 68; Woarms v. Becker, 84 N. Y. App. Div. 491; Campbell v. Wayne Bldg., etc., Assoc., 51 N. Y. App. Div. 611; Gardner v. Friedrich, 163 N. Y. 568.

*North Carolina.* — Cogdell v. Wilmington, etc., R. Co., 130 N. Car. 313.

*Pennsylvania.* — Reese v. Clark, 198 Pa. St. 312; Underhill v. Wynkoop, 15 Pa. Super. Ct. 230; Seifred v. Pennsylvania R. Co., 206 Pa. St. 399; Siegler v. Mellinger, 203 Pa. St. 256, 93 Am. St. Rep. 768.

*Rhode Island.* — Ennis v. Little, 25 R. I. 342.

*South Carolina.* — Jones v. Seaboard Air Line R. Co., 67 S. Car. 181.

*South Dakota.* — Henry v. Taylor, 16 S. Dak. 424.

*Texas.* — Oakes v. Prather, (Tex. Civ. App. 1904) 81 S. W. Rep. 557; Martin v. Texas Brique, etc., Co., (Tex. Civ. App. 1903) 77 S. W. Rep. 651; Dallas Electric Co. v. Mitchell, 33 Tex. Civ. App. 424; Von Diest v. San Antonio Traction Co., 33 Tex. Civ. App. 577; Boston v. McMenamy, 29 Tex. Civ. App. 272; Thurman v. State, 45 Tex. Crim. 569.

*Utah.* — Black v. Rocky Mountain Bell Telephone Co., 26 Utah 451.

*Virginia.* — House v. House, 102 Va. 235.

**548. 3. Expert Evidence.** — *United States.* — Mexican Nat. R. Co. v. Slater, (C. C. A.) 115 Fed. Rep. 593, *affirmed* 194 U. S. 120; Chicago G. W. R. Co. v. Price, (C. C. A.) 97 Fed. Rep. 423.

*California.* — Dyas v. Southern Pac. Co., 140 Cal. 296.

*Illinois.* — Gundlach v. Schott, 192 Ill. 509, 85 Am. St. Rep. 348.

*Kansas.* — State v. Walke, 69 Kan. 183.

*Maine.* — Caven v. Bodwell Granite Co., 97 Me. 381.

*Maryland.* — See Baltimore Belt R. Co. v. Sattler, 100 Md. 306.

*Minnesota.* — Anderson v. Fielding, 92 Minn. 42; Bernier v. St. Paul Gaslight Co., 92 Minn. 214; Craig v. Benedictine Sisters Hospital Assoc., 88 Minn. 535.

*Mississippi.* — Roy v. Aberdeen First Nat. Bank, (Miss. 1903) 33 So. Rep. 494.

*Missouri.* — Wood v. Metropolitan St. R. Co., 181 Mo. 433; Buckalew v. Quincy, etc., R. Co., 107 Mo. App. 575.

*Montana.* — Coleman v. Perry, 28 Mont. 1.

*New Hampshire.* — Nebonne v. Concord R. Co., 68 N. H. 296.

*New Jersey.* — Elvins v. Delaware, etc., Tel. etc., Co., 63 N. J. L. 243, 76 Am. St. Rep. 217.

*Ohio.* — Ohio, etc., Torpedo Co. v. Fishburn, 61 Ohio St. 608, 76 Am. St. Rep. 437.

*Pennsylvania.* — Whitaker v. Campbell, 187 Pa. St. 113.

*Tennessee.* — Endowment Rank, etc. v. Steele, 108 Tenn. 624.

*Texas.* — Gulf, etc., R. Co. v. Matthews, 28 Tex. Civ. App. 92.

*Utah.* — Fritz v. Western Union Tel. Co., 25 Utah 263; Palmquist v. Mine, etc., Supply Co., 25 Utah 257.

*Vermont.* — Baker v. Sherman, 71 Vt. 439.

*Virginia.* — Norfolk R., etc., Co. v. Corletto, 100 Va. 355.

In Criminal Cases the rules as to the admission of expert evidence are the same as in civil cases. State v. Webb, 18 Utah 441.

**4. Parol Evidence.** — *United States.* — Delaware Indians v. Cherokee Nation, 193 U. S. 127; Rucker v. Bolles, (C. C. A.) 133 Fed. Rep. 858; Kalamazoo Corset Co. v. Simon, 129 Fed. Rep. 144, *affirmed* (C. C. A.) 129 Fed. Rep. 1005; Chilberg v. Lyng, (C. C. A.) 128 Fed. Rep. 899; Union Selling Co. v. Jones, (C. C. A.) 128 Fed. Rep. 672; Pitcairn v. Philip Hiss Co., (C. C. A.) 125 Fed. Rep. 110; Arnold v. Scharbauer, 118 Fed. Rep. 1008; Cold Blast Transp. Co. v. Kansas City Bolt, etc., Co., (C. C. A.) 114 Fed. Rep. 77.

*Alabama.* — Forbes v. Taylor, 139 Ala. 286.

*Arkansas.* — Anderson v. Wainwright, 67 Ark. 62.

*California.* — Swift v. Occidental Min., etc., Co., 141 Cal. 161; Withers v. Moore, 140 Cal. 591, *reversing* (Cal. 1903) 71 Pac. Rep. 697.

*Colorado.* — Oil Creek Gold Min. Co. v. Fairbanks, 19 Colo. App. 142; Hardwick v. McClurg, 16 Colo. App. 354; McIntosh-Huntington Co. v. Rice, 13 Colo. App. 393.

*Delaware.* — Gam v. Cordrey, 4 Penn. (Del.) 143.

*District of Columbia.* — Owens v. Wilkinson, 20 App. Cas. (D. C.) 51; Hartman v. Ruby, 16 App. Cas. (D. C.) 45.

*Georgia.* — Courier-Journal v. Howard, 119 Ga. 378; Bullard v. Brewer, 118 Ga. 918; Trammell v. Rome Mut. Loan Assoc., 118 Ga. 225; Southern Bell Telephone, etc., Co. v. Harris, 117 Ga. 1001; Heard v. Tappan, 116 Ga. 930; Foote, etc., Co. v. Malony, 115 Ga. 985; Bass Dry Goods Co. v. Granite City Mfg. Co., 113 Ga. 1142; Forsyth Mfg. Co. v. Castlen, 112 Ga. 199, 81 Am. St. Rep. 28.

*Illinois.* — Schneider v. Sulzer, (Ill. 1904) 72 N. E. Rep. 19, *quoting* 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 548; Halliday v. Mulligan, 113 Ill. App. 177; Telluride Power Transmission Co. v. Crane Co., 208 Ill. 218; Ellis v. Conrad Seipp Brewing Co., 207 Ill. 201; Vail v. Northwestern Mut. L. Ins. Co., 192 Ill. 567, *affirming* 92 Ill. App. 655; Kane v. Farrelly, 192 Ill. 521; Smith v. Rust, 112 Ill. App. 84; Osgood v. Skinner, 111 Ill. App. 606, *affirmed* 211 Ill. 229; Union Special Sewing Mach. Co. v. Lockwood, 110 Ill. App. 387; Fidelity F. Ins. Co. v. Illinois Trust, etc., Bank, 110 Ill. App. 92, *affirmed* 208 Ill. 375; Wheaton v. Bartlett, 105 Ill. App. 326; Sexton v. Barrie, 102 Ill. App. 586; Frank v. McDonald, 86 Ill. App. 336;

Columbia Casino Co. v. World's Columbian Exposition, 85 Ill. App. 369; F. F. Ide Mfg. Co. v. Sager Mfg. Co., 82 Ill. App. 685; Millikin v. Starr, 79 Ill. App. 443, *affirmed* 180 Ill. 458; Kempshall v. Vedder, 79 Ill. App. 368.

*Indiana*. — Henry School Tp. v. Meredith, 32 Ind. App. 607; Coppes v. Union Nat. Sav., etc., Assoc., 33 Ind. App. 367; Strunk v. Pritchett, 27 Ind. App. 582.

*Indian Territory*. — Crawford v. Duckworth, 3 Indian Ter. 10, *citing* 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 548.

*Iowa*. — Russell v. Smith, 115 Iowa 261; McKee v. Needles, 123 Iowa 195.

*Kansas*. — Rose v. Lanyon Zinc Co., 68 Kan. 126; Atchison, etc., R. Co. v. Truskett, 67 Kan. 26; Ehram v. Brown, 64 Kan. 466.

*Kentucky*. — Singer Mfg. Co. v. Witt, (Ky. 1904) 80 S. W. Rep. 1124; Voss v. Schebeck, (Ky. 1903) 76 S. W. Rep. 21; Johnson v. Zweigart, 114 Ky. 545.

*Louisiana*. — Ackerman v. Peters, 113 La. 156; St. Landry State Bank v. Meyers, 52 La. Ann. 1769.

*Maine*. — Kidson v. Bangor, 99 Me. 139; McLeod v. Johnson, 96 Me. 271.

*Massachusetts*. — Neale v. American Electric Vehicle Co., 186 Mass. 303; Menage v. Rosenthal, 175 Mass. 358.

*Michigan*. — McLeod v. Hunt, 128 Mich. 124; Helper v. MacKinnon Mfg. Co., (Mich. 1904) 101 N. W. Rep. 804; Crane v. Bayley, 126 Mich. 323.

*Missouri*. — Tufts v. Morris, 87 Mo. App. 98; Culbertson v. Young, 86 Mo. App. 277; Halliday v. Lesh, 85 Mo. App. 285; McClurg v. Whitney, 82 Mo. App. 625; Martin v. Witty, 104 Mo. App. 262; Standard Fireproofing Co. v. St. Louis Expanded Metal Fireproofing Co., 177 Mo. 559; Sims v. Greenfield, etc., R. Co., 102 Mo. App. 29; Howard v. Scott, 98 Mo. App. 509; First State Nat. Bank v. Noel, 94 Mo. App. 498.

*Montana*. — Largey v. Leggatt, 30 Mont. 148; Ming v. Pratt, 22 Mont. 262.

*Nebraska*. — Agnew v. Montgomery, (Neb. 1904) 99 N. W. Rep. 820; Bradley v. Basta, (Neb. 1904) 98 N. W. Rep. 697; Norfolk Beet Sugar Co. v. Berger, (Neb. 1901) 95 N. W. Rep. 336; Peterson v. Ferbrache, (Neb. 1903) 93 N. W. Rep. 1011; Te Poel v. Shutt, 57 Neb. 592.

*New Hampshire*. — Parsons v. Wentworth, (N. H. 1904) 59 Atl. Rep. 623.

*New Jersey*. — Mott v. Rutten, (N. J. 1904) 57 Atl. Rep. 1132; Russell v. Russell, 60 N. J. Eq. 282.

*New York*. — Mead v. Dunlevie, 174 N. Y. 108; Tripp v. Smith, 168 N. Y. 655, *affirming* 50 N. Y. App. Div. 499; Thompson v. Erie R. Co., 96 N. Y. App. Div. 539; Abramson-Engesser Co. v. McCafferty, (Supm. Ct. App. T.) 86 N. Y. Supp. 185; Hess v. Liebmann, (Supm. Ct. App. T.) 84 N. Y. Supp. 178; Kinney v. McBride, 88 N. Y. App. Div. 92; Gray v. Meyer, 88 N. Y. App. Div. 359; Rooney v. Thomson, (Supm. Ct. App. T.) 84 N. Y. Supp. 263; Townsend v. Greenwich Ins. Co., 86 N. Y. App. Div. 323, *affirmed* 178 N. Y. 634, *affirming* (Supm. Ct. Tr. T.) 39 Misc. (N. Y.) 87; Finck v. Bauer, (Supm. Ct. App. T.) 40 Misc. (N. Y.) 218; Parker v. North German Lloyd Steamship Co.,

74 N. Y. App. Div. 16; Miller v. Carpenter, 68 N. Y. App. Div. 346; O'Connor v. Green, 60 N. Y. App. Div. 553; Finck v. Schaubacher, (Supm. Ct. App. T.) 34 Misc. (N. Y.) 547; Tripp v. Smith, 50 N. Y. App. Div. 499, *affirmed* 168 N. Y. 655.

*North Dakota*. — Deacon v. Mattison, 11 N. Dak. 190.

*Ohio*. — J. Weller Co. v. Washington, 24 Ohio Cir. Ct. 407; Douglass v. Campbell, 24 Ohio Cir. Ct. 241; Harley v. Weber, 1 Ohio Cir. Dec. 369; Van Arsdale v. Brown, 9 Ohio Cir. Dec. 488, 18 Ohio Cir. Ct. 52; Curran v. Hauser, 8 Ohio Dec. 570, 6 Ohio N. P. 288; Nave v. Marshall, 9 Ohio Dec. 415, 6 Ohio N. P. 488.

*Oklahoma*. — Neverman v. Cass County Bank, 14 Okla. 417; Moorehead v. Davis, 13 Okla. 166; Liverpool, etc., Ins. Co. v. T. M. Richardson Lumber Co., 11 Okla. 579.

*Pennsylvania*. — Fry v. National Glass Co., 207 Pa. St. 505; Krueger v. Nicola, 205 Pa. St. 38; Fahey v. Howley, 22 Pa. Super. Ct. 472; Needy v. Western Maryland R. Co., 22 Pa. Super. Ct. 489.

*Rhode Island*. — Zanturjian v. Boornazian, 25 R. I. 151; Russell v. Morgan, 24 R. I. 134.

*Texas*. — Gulf, etc., R. Co. v. Fenn, 33 Tex. Civ. App. 352; Kalteyer v. Wipff, (Tex. Civ. App. 1901) 65 S. W. Rep. 207.

*Utah*. — McCall Co. v. Jennings, 26 Utah 459; Haskins v. Dern, 19 Utah 89.

*Virginia*. — Consumers Ice Co. v. Jennings, 100 Va. 719.

*West Virginia*. — Martin v. Monongahela R. Co., 48 W. Va. 542.

*Wisconsin*. — Johnson v. Pugh, 110 Wis. 167; Schmidt v. Schmidt, 123 Wis. 295; Mowatt v. Wilkinson, 110 Wis. 176; Coman v. Wunderlich, 122 Wis. 138; Hart v. Hart, 117 Wis. 639; John O'Brien Lumber Co. v. Wilkinson, 117 Wis. 468; Milwaukee Carnival Assoc. v. King, etc., Co., 112 Wis. 647; Shores Lumber Co. v. Stitt, 102 Wis. 450.

*Wyoming*. — Stickney v. Hughes, (Wyo. 1905) 79 Pac. Rep. 922.

**Applications of the Rule — Negotiable Instruments** — *United States*. — Earle v. Enos, 130 Fed. Rep. 467; Levy, etc., Mule Co. v. Kauffman, (C. C. A.) 114 Fed. Rep. 170.

*Alabama*. — Rice v. Gilbreath, 119 Ala. 424.

*Arkansas*. — Lawrence County Bank v. Arndt, 69 Ark. 406; Tisdale v. Mallett, 73 Ark. 431.

*California*. — Easton Packing Co. v. Kennedy, 131 Cal. xviii, 63 Pac. Rep. 130.

*Connecticut*. — Burns, etc., Lumber Co. v. Doyle, 71 Conn. 742, 71 Am. St. Rep. 235.

*Georgia*. — Thomas v. Bagley, 119 Ga. 778; American Harrow Co. v. Dolvin, 119 Ga. 186; Brewer v. Grogan, 116 Ga. 60.

*Illinois*. — Wheaton v. Bartlett, 105 Ill. App. 326; Bright v. Kenefick, 94 Ill. App. 137.

*Indiana*. — Prescott v. Hixon, 22 Ind. App. 139, 72 Am. St. Rep. 291.

*Iowa*. — Baily v. Birkhofer, 123 Iowa 59; Clement v. Houck, 113 Iowa 504.

*Kentucky*. — Beattyville Bank v. Roberts, (Ky. 1904) 78 S. W. Rep. 901.

*Massachusetts*. — Torpey v. Tebo, 184 Mass. 307; Clemens Electrical Mfg. Co. v. Walton, 173 Mass. 207; Henry Wood's Sons Co. v. Schaefer, 173 Mass. 443, 73 Am. St. Rep. 305.

*Michigan*. — Central Sav. Bank v. O'Connor,

132 Mich. 578, 102 Am. St. Rep. 433; First State Sav. Bank v. Webster, 121 Mich. 149.

*Mississippi*. — O'Neal v. McLeod, (Miss. 1900) 28 So. Rep. 23.

*Missouri*. — Milan First Nat. Bank v. Wells, 98 Mo. App. 573; St. Louis Third Nat. Bank v. Reichert, 101 Mo. App. 242; Poindexter v. McDowell, 110 Mo. App. 233.

*Nebraska*. — Mallory v. Fitzgerald, (Neb. 1903) 95 N. W. Rep. 601; Aultman v. Hawk, (Neb. 1903) 95 N. W. Rep. 695.

*New York*. — Oppenheimer v. Kruckman, (Supm. Ct. App. T.) 84 N. Y. Supp. 129; Prosser v. Miller, (N. Y. City Ct. Gen. T.) 37 Misc. (N. Y.) 841; Pratt, etc., Co. v. American Pneumatic Tool Co., 166 N. Y. 588, affirming 50 N. Y. App. Div. 369.

*Ohio*. — Eels v. Shea, 11 Ohio Cir. Dec. 304, 20 Ohio Cir. Ct. 527; Lillie v. Bates, 2 Ohio Cir. Dec. 54.

*Pennsylvania*. — Homewood People's Bank v. Heckert, 207 Pa. St. 231; Mahanoy City First Nat. Bank v. Dick, 22 Pa. Super. Ct. 445.

*South Dakota*. — Anderson v. Matheny, 17 S. Dak. 225.

*Texas*. — Ablowich v. Greenville Nat. Bank, 22 Tex. Civ. App. 273.

*Utah*. — Andrus v. Blazzard, 23 Utah 233.

**Mortgages.** — Moore v. Terry, 66 Ark. 393; Morris v. Calumet, etc., Canal, etc., Co., 91 Ill. App. 437, affirmed 195 Ill. 101; Coppes v. Union Nat. Sav., etc., Assoc., 33 Ind. App. 367; Moore v. Howe, 115 Iowa 62; Williams Bros. Co. v. Hammer, 132 Mich. 635; Holmes v. Holmes, 129 Mich. 412, 95 Am. St. Rep. 444; Disbrow v. Disbrow, 46 N. Y. App. Div. 111, affirmed 167 N. Y. 606; Sargent v. Cooley, 12 N. Dak. 1; Edgar v. Golden, 36 Oregon 449; W. C. Belcher Land Mortg. Co. v. Norris, (Tex. Civ. App. 1903) 78 S. W. Rep. 390; Magill v. Brown, 20 Tex. Civ. App. 662.

**Deeds of Conveyance** — *United States*. — McManus v. Chollar, (C. C. A.) 128 Fed. Rep. 902.

*Alabama*. — Donehoo v. Johnson, 120 Ala. 438.

*Arkansas*. — Davis v. Jernigan, 71 Ark. 494.

*Colorado*. — Highland Park Co. v. Walker, 13 Colo. App. 352.

*District of Columbia*. — Seitz v. Seitz, 11 App. Cas. (D. C.) 358; Towson v. Smith, 13 App. Cas. (D. C.) 48; McCartney v. Fletcher, 11 App. Cas. (D. C.) 1.

*Georgia*. — Wells v. Savannah, 107 Ga. 1.

*Illinois*. — Cameron v. Sexton, 110 Ill. App. 381, reversed 212 Ill. 146.

*Indiana*. — Christian v. Highlands, 32 Ind. App. 104.

*Iowa*. — Zuber v. Johnson, 108 Iowa 273; Van Husen v. Omaha Bridge, etc., R. Co., 118 Iowa 366.

*Kansas*. — Kansas City v. Banks, 9 Kan. App. 885, 61 Pac. Rep. 333.

*Kentucky*. — Holtheide v. Smith, (Ky. 1903) 74 S. W. Rep. 689.

*Louisiana*. — Clark v. Hedden, 109 La. 147.

*Maine*. — Phillips v. Laughlin, 99 Me. 26, 105 Am. St. Rep. 253.

*Massachusetts*. — Drew v. Wiswall, 183 Mass. 554.

*Michigan*. — Dye v. Thompson, 126 Mich. 597.

*Mississippi*. — Bower v. Chess, etc., Co., 83 Miss. 218.

*Missouri*. — Gorton v. Rice, 153 Mo. 676.

*New York*. — Riehlman v. Field, 81 N. Y. App. Div. 526; Wihlein v. Matthews, 172 N. Y. 154; Potter v. Boyce, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 467, reversed 73 N. Y. App. Div. 383; James v. Coe, (N. Y. City Ct. Gen. T.) 61 N. Y. Supp. 1099.

*North Carolina*. — Ward v. Gay, 137 N. Car. 397.

*Ohio*. — Ossman v. Schmitz, 24 Ohio Cir. Ct. 709; Groves v. Groves, 65 Ohio St. 442.

*Pennsylvania*. — Cundey v. Hall, 208 Pa. St. 335, 101 Am. St. Rep. 938.

*South Carolina*. — Jacobs v. Mutual Ins. Co., 56 S. Car. 558.

*Tennessee*. — Mee v. Mee, 113 Tenn. 453; McLemore v. Charleston, etc., R. Co., 111 Tenn. 639.

*Texas*. — Ford v. Boone, 32 Tex. Civ. App. 550; Schmidt v. Brittain, (Tex. Civ. App. 1905) 84 S. W. Rep. 677; McClendon v. Brockett, 22 Tex. Civ. App. 150; Cauble v. Worsham, 96 Tex. 86, 97 Am. St. Rep. 871, reversing (Tex. Civ. App. 1902) 69 S. W. Rep. 194; Walter v. Dearing, (Tex. Civ. App. 1901) 65 S. W. Rep. 380; Kahn v. Kahn, 94 Tex. 114.

*West Virginia*. — McClain v. Batton, 50 W. Va. 121; Richardson v. McConaughy, 55 W. Va. 546; Shaver v. Edgell, 48 W. Va. 502.

*Wisconsin*. — Desmond v. McNamara, 107 Wis. 126.

**Leases** — *United States*. — *In re Luckenbill*, 127 Fed. Rep. 984.

*Alabama*. — Thompson Foundry, etc., Co. v. Glass, 136 Ala. 648.

*California*. — Harloe v. Lambie, 132 Cal. 133.

*Illinois*. — Smith v. McEvoy, 98 Ill. App. 330; Rector v. Hartford Deposit Co., 190 Ill. 380, affirming 92 Ill. App. 175; Kuefel v. Daly, 91 Ill. App. 321; Fish v. Ryan, 88 Ill. App. 524.

*Michigan*. — Grashaw v. Wilson, 123 Mich. 364.

*Missouri*. — Tyler v. Giesler, 85 Mo. App. 278; Sandige v. Hill, 76 Mo. App. 540.

*New Jersey*. — Naughton v. Elliott, (N. J. 1904) 59 Atl. Rep. 869; Seitz Brewing Co. v. Ayres, 60 N. J. Eq. 190.

*New York*. — Kraus v. Smolen, (Supm. Ct. App. T.) 46 Misc. (N. Y.) 463; Gerry v. Siebrecht, (Supm. Ct. App. T.) 88 N. Y. Supp. 1034; Liebeskind v. Moore Co., (Supm. Ct. App. T.) 84 N. Y. Supp. 850; Kaven v. Chrystie, (Supm. Ct. App. T.) 84 N. Y. Supp. 470; Equitable L. Assur. Soc. v. Schum, (Supm. Ct. App. T.) 40 Misc. (N. Y.) 657; Nostrand v. Hughes, 54 N. Y. App. Div. 602; Stephens v. Ely, 162 N. Y. 79, reversing 14 N. Y. App. Div. 202.

*North Dakota*. — Merchants' State Bank v. Ruettell, 12 N. Dak. 510.

*Rhode Island*. — Watkins v. Greene, 22 R. I. 34.

*Texas*. — De Vitt v. Kaufman County, 27 Tex. Civ. App. 332; Woodward v. Ft. Worth, etc., R. Co., 35 Tex. Civ. App. 14; Boone v. Mierow, 33 Tex. Civ. App. 295; Greenhill v. Hunton, (Tex. Civ. App. 1902) 69 S. W. Rep. 440.

*Vermont*. — Goodsell v. Rutland-Canadian R. Co., 75 Vt. 375.

*Virginia*. — Richmond Ice Co. v. Crystal Ice Co., 103 Va. 465.

*Wisconsin*. — Hunter v. Hathaway, 108 Wis. 620.



**Guaranties.** — *West-Winfree Tobacco Co. v. Waller*, 66 Ark. 445; *Indiana Bicycle Co. v. Tuttle*, 74 Conn. 489; *Di Iorio v. Di Brasio*, 21 R. I. 208; *Schneider-Davis Co. v. Hart*, 23 Tex. Civ. App. 529; *Traders' Nat. Bank v. Washington Water Power Co.*, 22 Wash. 467.

**Releases of Damages.** — *Indianapolis Union R. Co. v. Houlihan*, 157 Ind. 494; *Atchison, etc., R. Co. v. Vanordstrand*, 67 Kan. 386; *Vaughan v. Mason*, 23 R. I. 348.

**Warranties.** — *McCormick Harvesting Mach. Co. v. Mackey*, 100 Mo. App. 400; *Neville v. Hughes*, 104 Mo. App. 455; *Hott v. McDonough*, 2 Ohio Cir. Dec. 100; *J. I. Case Threshing Mach. Co. v. Hall*, 32 Tex. Civ. App. 214; *Lloyd v. Sturgeon Falls Pulp Co.*, 85 L. T. N. S. 162. But see *Graves v. Pflueger*, 26 Tex. Civ. App. 488.

**Insurance Policies.** — *United States.* — *Indemnity Mut. Marine Assur. Co. v. United Oil Co.*, 88 Fed. Rep. 315; *Ocean Steamship Co. v. Aetna Ins. Co.*, 121 Fed. Rep. 882.

*Alabama.* — *Blanks v. Moore*, 139 Ala. 624; *Rutter v. Hanover F. Ins. Co.*, 138 Ala. 202.

*Maryland.* — *Prudential Ins. Co. v. Devoe*, 98 Md. 584.

*Minnesota.* — *Calmenson v. Equitable Mut. F. Ins. Co.*, 92 Minn. 390.

*New York.* — *Home Ins. Co. v. Continental Ins. Co.*, 89 N. Y. App. Div. 1, *affirmed* 183 N. Y. 389.

*North Carolina.* — *Grier v. Mutual L. Ins. Co.*, 132 N. Car. 542; *Hoffman v. Standard L., etc., Ins. Co.*, 127 N. Car. 337; *Kendrick v. Mutual Ben. L. Ins. Co.*, 124 N. Car. 315, 70 Am. St. Rep. 592.

*Ohio.* — *Union Cent. L. Ins. Co. v. Hook*, 62 Ohio St. 256; *Grand Lodge, etc., v. Bunker*, 23 Ohio Cir. Ct. 487.

*Texas.* — *Keller v. Liverpool, etc., Ins. Co.*, 27 Tex. Civ. App. 102; *Orient Ins. Co. v. Prather*, 25 Tex. Civ. App. 446.

*West Virginia.* — *Maupin v. Scottish Union, etc., Ins. Co.*, 53 W. Va. 557.

**Indorsement of Negotiable Instruments.** — *California.* — *Farmers' Exch. Bank v. Altura Gold Mill, etc., Co.*, 129 Cal. 263.

*Illinois.* — *Beloit Second Nat. Bank v. Woodruff*, 113 Ill. App. 6; *Kimmell v. Weil*, 95 Ill. App. 15.

*Minnesota.* — *Porter v. Winona, etc., Grain Co.*, 78 Minn. 210.

*New York.* — *Bird v. Kay*, 40 N. Y. App. Div. 533.

*Oregon.* — *Smith v. Bayer*, (Oregon 1905) 79 Pac. Rep. 497; *Carroll v. Nodine*, 41 Oregon 412, 93 Am. St. Rep. 743.

*Texas.* — *Barringer v. Wilson*, (Tex. Civ. App. 1904) 81 S. W. Rep. 533; *Barringer v. Wilson*, 97 Tex. 583.

*Virginia.* — *Riverview Land Co. v. Dance*, 98 Va. 239.

*Wisconsin.* — *Halbach v. Trester*, 102 Wis. 530.

*Canada.* — *Smith v. Squires*, 13 Manitoba 360.

**Bonds.** — *Bernard-Beere v. Klaw*, (Supm. Ct. App. T.) 35 Misc. (N. Y.) 27, *affirming* (N. Y. City Ct. Gen. T.) 32 Misc. (N. Y.) 765; *Mutual L. Ins. Co. v. Aldrich*, 44 N. Y. App. Div. 620; *Wylie v. Commercial, etc., Bank*, 63 S. Car. 406; *Bruel v. Leggitt, etc., Tobacco Co.*, 29 Tex. Civ. App. 405; *Wussow v. Hase*, 108 Wis. 382.

**Assignments.** — *Haynes v. Hobbs*, (Mich. 1904) 98 N. W. Rep. 978; *Hanes v. Sackett*, 56 N. Y. App. Div. 610; *Spies v. National City Bank*, 68 N. Y. App. Div. 70, *affirmed* 174 N. Y. 222.

**Public Records.** — *Illinois.* — *Godfrey v. Phillips*, 209 Ill. 584.

*Indiana.* — *Terre Haute, etc., R. Co. v. Flora*, 29 Ind. App. 442.

*Iowa.* — *Porter v. Butterfield*, 116 Iowa 725.

*Kentucky.* — *Barfield v. Gleason*, (Ky. 1901) 64 S. W. Rep. 959, *modifying* 111 Ky. 491.

*Michigan.* — *Cowley v. School Dist. No. 3*, 130 Mich. 634.

*Mississippi.* — *Hinson v. Forsdick*, (Miss. 1899) 25 So. Rep. 353.

*Missouri.* — *Lebanon Light, etc., Co. v. Lebanon*, 163 Mo. 254.

*North Carolina.* — *Wilson v. Markley*, 133 N. Car. 616.

*North Dakota.* — *Pickton v. Fargo*, 10 N. Dak. 469; *Sheets v. Paine*, 10 N. Dak. 103.

*Texas.* — *Jamison v. New York, etc., Land Co.*, (Tex. Civ. App. 1903) 77 S. W. Rep. 969; *Giddings v. Winfree*, 32 Tex. Civ. App. 99.

*West Virginia.* — *Benwood v. Wheeling R. Co.*, 53 W. Va. 465.

*Wisconsin.* — *Chippewa Bridge Co. v. Durand*, 122 Wis. 85.

**Judicial Records.** — *United States.* — *Blue Mountain Iron, etc., Co. v. Portner*, (C. C. A.) 131 Fed. Rep. 57.

*Georgia.* — *Kirkland v. Candler*, 114 Ga. 739.

*Illinois.* — *Rubel v. Title Guarantee, etc., Co.*, 199 Ill. 110.

*Indiana.* — *Oster v. Broe*, (Ind. 1902) 64 N. E. Rep. 918.

*Louisiana.* — *Wright-Blodgett Co. v. Elms*, 106 La. 150.

*Maine.* — *Pennell v. Card*, 96 Me. 392.

*Massachusetts.* — *Bent v. Stone*, 184 Mass. 92; *Speirs Fish Co. v. Robbins*, 182 Mass. 128.

*Michigan.* — *Sweet v. Gibson*, 123 Mich. 699.

*Missouri.* — *Cook v. Penrod*, 111 Mo. App. 128; *Board of Ministerial Relief v. Drummond*, 167 Mo. 54; *State v. Stinebaker*, 90 Mo. App. 280; *Sutton v. Cole*, 155 Mo. 206.

*North Dakota.* — *Clendenen v. Red River Valley Nat. Bank*, 12 N. Dak. 51.

*Ohio.* — *Cincinnati v. Hosea*, 10 Ohio Cir. Dec. 618.

*South Dakota.* — *Taylor v. Neys*, 11 S. Dak. 605.

*Tennessee.* — *Union, etc., Bank v. Memphis*, 107 Tenn. 66.

*Texas.* — *Irion v. Bexar County*, 26 Tex. Civ. App. 527.

*Washington.* — *Nickeus v. Lewis County*, 23 Wash. 125.

**Records of Private Corporations.** — *State v. Hancock*, 2 Penn. (Del.) 252; *Kalamazoo v. Kalamazoo Heat, etc., Co.*, 124 Mich. 74; *Royce v. Tyler*, 1 Ohio Cir. Dec. 428.

**Bills of Sale.** — *McEnery v. McEnery*, 110 Iowa 718; *Hogan v. Kelly*, 29 Mont. 485; *Neresheimer v. Smyth*, 167 N. Y. 202; *Coverdill v. Seymour*, 94 Tex. 9, *modifying* 94 Tex. 1, and *reversing* (Tex. Civ. App. 1901) 56 S. W. Rep. 221; *Putnam v. McDonald*, 72 Vt. 4.

**Contracts by Letter.** — *Davis v. Fidelity F. Ins. Co.*, 208 Ill. 375; *Coats v. Bacon*, 77 Miss. 320; *Lillis v. Mertz*, 89 N. Y. App. Div. 289.

**Bills of Lading.** — Portland Flouring Mills Co. v. British, etc., Marine Ins. Co., (C. C. A.) 130 Fed. Rep. 860; McElveen v. Southern R. Co., 109 Ga. 249, 77 Am. St. Rep. 371; Sonia Cotton-Oil Co. v. Steamer Red River, 106 La. 42, 87 Am. St. Rep. 293; Cleveland, etc., R. Co. v. La Tourette, 1 Ohio Cir. Dec. 486; Stevens v. Lake Shore, etc., R. Co., 11 Ohio Cir. Dec. 168, 20 Ohio Cir. Ct. 41.

**Contracts for Sale of Personalty** — *California*. — Hewitt v. San Jacinto, etc., Irrigation Dist., 124 Cal. 186.

*Connecticut*. — New Idea Pattern Co. v. Whelan, 75 Conn. 455.

*Georgia*. — Arnold v. Malsby, 120 Ga. 586; Wilson v. Hinnant, 117 Ga. 46; National Computing Scale Co. v. Eaves, 116 Ga. 511.

*Indiana*. — Smith v. Barber, 153 Ind. 322; Colles v. Lake Cities Electric R. Co., 22 Ind. App. 86.

*Iowa*. — Plano Mfg. Co. v. Eich, (Iowa 1904) 97 N. W. Rep. 1106; McCormick Harvesting Mach. Co. v. Markert, 107 Iowa 340; Tuttle v. Cone, 108 Iowa 468.

*Kansas*. — Ehrsam v. Brown, 64 Kan. 466.

*Louisiana*. — Welsh's Succession, 111 La. 801.

*Maryland*. — Samuel M. Lawder, etc., Co. v. Albert Mackie Grocery Co., 97 Md. 1.

*Massachusetts*. — Finnigan v. Shaw, 184 Mass. 112; Dean v. Washburn, etc., Mfg. Co., 177 Mass. 137.

*Michigan*. — Dowagiac Mfg. Co. v. Corbit, 127 Mich. 473, rehearing denied 127 Mich. 478; Price v. Marthen, 122 Mich. 655.

*Missouri*. — Walther v. Stampfli, 91 Mo. App. 398; Gill v. Johnson-Brinkman Commission Co., 84 Mo. App. 456; Russe v. Hendricks, 75 Mo. App. 386.

*Nebraska*. — Nebraska Land, etc., Co. v. Trauerman, (Neb. 1904) 98 N. W. Rep. 37.

*New York*. — Atwater v. Orford Copper Co., (Supm. Ct. App. T.) 85 N. Y. Supp. 426; Dady v. O'Rourke, 172 N. Y. 447.

*North Dakota*. — Reeves v. Bruening, (N. Dak. 1904) 100 N. W. Rep. 241.

*Ohio*. — Curran v. Hauser, 9 Ohio Dec. 468, 6 Ohio N. P. 281.

*Pennsylvania*. — Hatfield v. Thomas Iron Co., 208 Pa. St. 478; Melcher v. Hill, 194 Pa. St. 440.

*South Carolina*. — Burwell, etc., Co. v. Chapman, 59 S. Car. 581.

*Texas*. — Harris-Hearin Fountain Co. v. Pressler, 35 Tex. Civ. App. 360; Hopkins v. Woldert Grocery Co., (Tex. Civ. App. 1902) 66 S. W. Rep. 63; Dunovant v. Anderson, 24 Tex. Civ. App. 517.

*Washington*. — Minnesota Landstone Co. v. Clark, 35 Wash. 466.

*Wisconsin*. — Newell v. New Holstein Caning Co., 119 Wis. 635.

**Charter-parties.** — Johnson v. D. H. Bibb Lumbar Co., 140 Cal. 95.

**Contracts for Sale of Realty.** — Tripp v. Smith, 180 Mass. 122; Walker v. Mack, 129 Mich. 527; Vito v. Birkel, 209 Pa. St. 206; Blaikie v. McLennan, 33 Nova Scotia 558.

**Releases.** — Clark v. Mallory, 185 Ill. 227, affirming 83 Ill. App. 488; Drumm-Flato Commission Co. v. Barnard, 66 Kan. 568; Curro v. Altieri, (Supm. Ct. App. T.) 32 Misc. (N. Y.) 690.

**Stock Subscription.** — American Alkali Co. v. Bean, 125 Fed. Rep. 823, reversed (C. C. A.) 134 Fed. Rep. 57; Merrick v. Consumers' Heat, etc., Co., 111 Ill. App. 153; Gathright v. Oil City Land, etc., Co., (Ky. 1900) 56 S. W. Rep. 163; Shattuck v. Robbins, 68 N. H. 565.

**Account Offered in Evidence.** — State v. Elmore, 68 S. Car. 140.

**Series of Writings Embodying a Complete Contract.** — Gill v. General Electric Co., (C. C. A.) 129 Fed. Rep. 349, affirming 127 Fed. Rep. 241.

**Order for Goods.** — American Home Sav. Bank v. Guardian Trust Co., 210 Pa. St. 320.

**Building Contracts.** — Meader v. Allen, 110 Iowa 588; Daly v. Kingston, 177 Mass. 312; Norwood v. Lathrop, 178 Mass. 208; Mouat v. Montague, 122 Mich. 334.

**Contracts of Carriage.** — Morris v. Chesapeake, etc., Steamship Co., 125 Fed. Rep. 62; De Sola v. Pomares, 119 Fed. Rep. 373; Sloman v. National Express Co., 134 Mich. 16.

**Coupon Railroad Tickets.** — Walker v. Price, 62 Kan. 327, 84 Am. St. Rep. 392; Rolfs v. Atchison, etc., R. Co., 66 Kan. 272; Missouri, etc., R. Co. v. Harrison, 97 Tex. 611, reversing (Tex. Civ. App. 1903) 77 S. W. Rep. 1036; Missouri, etc., R. Co. v. Foster, 97 Tex. 618, reversing (Tex. Civ. App. 1904) 78 S. W. Rep. 1134.

**Contracts of Employment.** — Montgomery v. Aetna L. Ins. Co., (C. C. A.) 97 Fed. Rep. 913; Hartsell v. Masterson, 132 Ala. 275; Davis v. Fidelity F. Ins. Co., 208 Ill. 375; Alvord v. Cook, 174 Mass. 120; Harrington v. F. W. Brockman Commission Co., 107 Mo. App. 418; Williams v. Kansas City Suburban Belt R. Co., 85 Mo. App. 103; Eichenauer v. Rentz Candy Co., (Supm. Ct. Tr. T.) 43 Misc. (N. Y.) 151; Stowell v. Greenwich Ins. Co., 163 N. Y. 298, reversing 20 N. Y. App. Div. 188; McGarrigle v. McCosker, 83 N. Y. App. Div. 184, affirmed 178 N. Y. 637.

**Miscellaneous Contracts** — *United States*. — O'Shea v. New York, etc., R. Co., (C. C. A.) 105 Fed. Rep. 559.

*Illinois*. — Lord v. Haufe, 77 Ill. App. 91.

*Louisiana*. — Jones v. Jones, 51 La. Ann. 636.

*Maryland*. — American Nat. Bank v. Harlan, 89 Md. 675.

*Massachusetts*. — Merrigan v. Hall, 175 Mass. 508.

*Minnesota*. — Thompson v. Thompson, 78 Minn. 379; Bell v. Mendenhall, 78 Minn. 57.

*Missouri*. — Wear v. Schmelzer, 92 Mo. App. 314.

*Nebraska*. — Mefford v. Sell, (Neb. 1902) 92 N. W. Rep. 148.

*New Jersey*. — Russell v. Russell, 63 N. J. Eq. 282, affirming 60 N. J. Eq. 282.

*New York*. — Eden v. Silberberg, 89 N. Y. App. Div. 259; Liebel v. Light, (Supm. Ct. App. T.) 30 Misc. (N. Y.) 434; Hull v. Barth, 48 N. Y. App. Div. 500; Olin v. Arendt, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 270; Fellerman v. Goldberg, (Supm. Ct. App. T.) 28 Misc. (N. Y.) 235; Komp v. Raymond, 42 N. Y. App. Div. 32; Brantingham v. Huff, 179 N. Y. 53; Schesinger v. Keene, (Supm. Ct. App. T.) 88 N. Y. Supp. 1042.

*Ohio*. — Seeman v. Ohio Coal Min. Co., 12 Ohio Cir. Dec. 206, 22 Ohio Cir. Ct. 311; Richards v. Hale, 24 Ohio Cir. Ct. 468.

**550. XXI. LEGISLATIVE POWER OVER RULES OF EVIDENCE — 1. In General.**  
— See note 4.

**551. 2. Power to Determine Burden of Proof.** — See note 1.

**553. EXAMINE — EXAMINATION.** — See note 2.

**555. EXCEPT — EXCEPTION — Conveyances.** — See notes 2, 3.

**556. Proviso and Exception.** — See note 1.

Practice. — See note 2.

In Equity Practice. — See note 3.

[EXCESS. — See note 3*a*.]

**EXCESSIVE — EXCESSIVELY.** — See note 4.

*Oregon.* — *Milos v. Covacevich*, 40 *Oregon* 239.

*Pennsylvania.* — *Union Storage Co. v. Speck*, 194 *Pa. St.* 126.

*South Carolina.* — *Cape Fear Lumber Co. v. Evans*, 69 *S. Car.* 93.

*Texas.* — *Taylor v. Taylor*, (Tex. Civ. App. 1900) 54 *S. W. Rep.* 1039; *Pittman v. Harris*, 24 *Tex. Civ. App.* 503; *Pasteur Vaccine Co. v. Burkey*, 22 *Tex. Civ. App.* 232.

*Wisconsin.* — *Kammermayer v. Hilz*, 107 *Wis.* 101; *Hyde v. German Nat. Bank*, 115 *Wis.* 170.

*Wyoming.* — *Stickney v. Hughes*, 12 *Wyo.* 397.

**Rule Applies Only Between Parties to Contract and Their Privies** — *United States*. — *Central Coal, etc., Co. v. Good*, (C. C. A.) 120 *Fed. Rep.* 793.

*Alabama.* — *British, etc., Mortg. Co. v. Cody*, 135 *Ala.* 622.

*Indiana.* — *Central Coal, etc., Co. v. Good*, (*Indian Ter.* 1901) 64 *S. W. Rep.* 677.

*Iowa.* — *Livingston v. Heck*, 122 *Iowa* 74.

*Kentucky.* — *Marks v. Hardy*, (Ky. 1904) 78 *S. W. Rep.* 1105; *Marks v. Hardy*, (Ky. 1904) 78 *S. W. Rep.* 864; *Provident Sav. L. Assur. Soc. v. Johnson*, 115 *Ky.* 84.

*Massachusetts.* — *Wilson v. Mulloney*, 185 *Mass.* 430; *Walker Ice Co. v. American Steel, etc., Co.*, 185 *Mass.* 463.

*Nebraska.* — *Wayne First Nat. Bank v. Tolerton*, (Neb. 1903) 97 *N. W. Rep.* 248; *Crockett v. Miller*, (Neb. 1902) 96 *N. W. Rep.* 491.

*North Dakota.* — *Roberts v. Fargo First Nat. Bank*, 8 *N. Dak.* 474, quoting 11 *AM. AND ENG. ENCYC. OF LAW* (2d ed.) 548, note 4.

*Oregon.* — *Pacific Biscuit Co. v. Dugger*, 42 *Oregon* 513, citing 11 *AM. AND ENG. ENCYC. OF LAW* (2d ed.) 550.

*Tennessee.* — *Myers v. Taylor*, 107 *Tenn.* 364.

*Texas.* — *Hart v. Meredith*, 27 *Tex. Civ. App.* 271; *Kahle v. Stone*, 95 *Tex.* 106; *Pierce v. Johnson*, (Tex. Civ. App. 1899) 50 *S. W. Rep.* 610.

*Utah.* — *Olmstead v. Oregon Short Line R. Co.*, 27 *Utah* 515.

*Washington.* — *Corbin v. Oriental Trading Co.*, 32 *Wash.* 668; *Carmach v. Drum*, 32 *Wash.* 242, modifying 32 *Wash.* 236.

**550. 4. Power of Legislature over Rules of Evidence.** — See the title *CONSTITUTIONAL LAW*, vol. 6, p. 882.

**551. 1. Burden of Proof.** — *State v. Sheppard*, 64 *Kan.* 451, citing 11 *AM. AND ENG. ENCYC. OF LAW* (2d ed.) 551.

**Intoxicating Liquors.** — *State v. Sheppard*, 64 *Kan.* 451, citing 11 *AM. AND ENG. ENCYC. OF LAW* (2d ed.) 551.

**553. 2. Examination of Body — Insurance Policy.** — In construing a policy of accident insurance providing that any medical adviser of the company shall be allowed, as often as he requires, to *examine* the person or body of the assured in respect to the alleged injury or cause of death, the court said: "While an autopsy, speaking generally, always includes an *examination*, can it be said that an *examination* always includes an autopsy; or can it be fairly held that the simple word *examine*, as used in the policies sued on, would be accurately defined in the same words as those used to define either 'autopsy' or 'dissection,' when endeavoring to arrive at the mutual agreement of the parties at the time they were contracting? It seems to me not; particularly when construing policies for insurance against death from external causes only, and which ordinarily would only involve or require external inspection." *Sudduth v. Travelers' Ins. Co.*, 106 *Fed. Rep.* 822.

**555. 2. Reservation and Exception Distinguished.** — *Sears v. Ackerman*, 138 *Cal.* 583; *Dozier v. Toalson*, 180 *Mo.* 546; *Mount v. Hambley*, (Supm. Ct. Spec. T.) 22 *Misc.* (N. Y.) 454, affirmed 33 *N. Y. App. Div.* 103; *Myers v. Bell Telephone Co.*, 83 *N. Y. App. Div.* 625; *Chapman v. Mill Creek Coal, etc., Co.*, 54 *W. Va.* 195.

**3. Negaunee Iron Co. v. Iron Cliffs Co.**, 134 *Mich.* 264; *Chapman v. Mill Creek Coal, etc., Co.*, 54 *W. Va.* 195. And see *Bowers Hydraulic Dredging Co. v. Vare*, 112 *Fed. Rep.* 63.

**556. 1. Proviso and Exception Distinguished.** — *Western Assur. Co. v. J. H. Mohlman Co.*, (C. C. A.) 83 *Fed. Rep.* 811; *N. & M. Friedman Co. v. Atlas Assur. Co.*, 133 *Mich.* 212; *State v. St. Louis*, 174 *Mo.* 145; *Acker v. Richards*, 63 *N. Y. App. Div.* 305.

**2. Practice.** — *Snelling v. Yetter*, 25 *N. Y. App. Div.* 590.

**Objection Equivalent to Exception.** — *Ranahan v. Gibbons*, 23 *Wash.* 261.

**Protest Not Equivalent to Except.** — See *Robinson v. State*, 152 *Ind.* 304.

**3. Equity Practice.** — *Walker v. Jack*, (C. C. A.) 88 *Fed. Rep.* 576.

**3*a*. Excess Is Equivalent to Surplus**, which is defined by *Bouvier* thus: "That which is left from a fund which has been appropriated for a particular purpose; the overplus; the residue." *Ellis County v. Thompson*, 95 *Tex.* 22.

**4. Excessive or Improper Rate of Speed.** — *Central of Georgia R. Co. v. Johnston*, 106 *Ga.* 130.



# EXCHANGE OF PROPERTY.

By E. G. CHILTON.

**570.** II. EXCHANGE AND SALE DISTINGUISHED. — See note 2.

**571.** See note 1.

III. EXCHANGE OF INTERESTS IN LANDS — 1. Requisites of a Valid Exchange — *d.* MUST BE IN WRITING. — See note 7.

**573.** 6. Liability to Pay Incumbrances on Lands Exchanged. — See note 2.

7. Implied Warranty and Condition of Re-entry. — See notes 3, 4.

**574.** 8. Remedies — *a.* FOR BREACH OF CONTRACT OF EXCHANGE. — See notes 2, 3.

*b.* WHERE CONTRACT INDUCED BY FRAUD OR MISTAKE. — See note 4.

**570.** 2. Power Given to an Executor to sell does not authorize him to contract for the exchange of lands. *Ross v. Barr*, (Ky. 1899) 53 S. W. Rep. 658.

**571.** 1. *Vipond v. McKitterick*, 8 Quebec Q. B. 11.

7. Parol Agreement Consummated by Possession. — *Baldwin v. Sherwood*, 117 Ga. 827; *Jermyn v. McClure*, 195 Pa. St. 245.

In *Casey v. Castle*, 112 Wis. 32, a parol agreement for an exchange of lands was interposed without success in an ejectment action, but, from the language of the opinion of the court, the fair inference is that a parol agreement, founded on a sufficient agreement and definite as to the lands exchanged, is valid.

**573.** 2. Where Lands Exchanged Subject to Incumbrances. — *Thomas v. Ruhl*, (Supm. Ct. Tr. T.) 30 Misc. (N. Y.) 567. See also *Rochon v. Hudson*, 16 Quebec Super. Ct. 356.

Interest Allowed as Incumbrance. — Where in an exchange the defendant was allowed, as an incumbrance on the plaintiff's property, certain interest on mortgages, due but not earned, it was held that the defendant was liable for such interest, though she took the plaintiff's property subject to the mortgages. *Ruhl v. Thomas*, 57 N. Y. App. Div. 623.

Notes Given to Induce the Assumption of Existing Incumbrance. — But notes given by a party whose lands are encumbered, as part of the consideration for an exchange, are subject to set-off to the value of shortage in lands received by him, such shortage having been discovered subsequently to the exchange. *Frame v. Tabler*, (Tenn. Ch. 1898) 52 S. W. Rep. 1014.

Where Abstract Discloses Incumbrance in Addition to That Assumed. — A contract for the exchange of lands provided that one of the parties should furnish an abstract of clear title, except as to a certain incumbrance, which the other party agreed to assume. It was held that specific performance would not be enforced where the abstract of title disclosed an additional incumbrance. *Tryce v. Dittus*, 199 Ill. 180.

3. Warranty and Right of Re-entry. — *Green v. Veder*, (Tenn. Ch. 1900) 57 S. W. Rep. 519.  
Rescission for Failure to Perform Contract to

Convey Record Title to Entire Plot. — Where the defendants agreed to convey a valid record title to an entire plot, but as to a portion of the plot were only able to convey a title by adverse possession, a court of equity rescinded the entire contract. *Zunker v. Kuehn*, 113 Wis. 421.

4. Recovery of Value. — See *Letcher v. Reese*, 24 Tex. Civ. App. 537.

The general rule, that the measure of damage is the sum agreed upon as the value of the property at the time of exchange, does not apply where the realty is situate in another state and the plaintiff pleads misrepresentations as to its value. *Caumisar v. Conley*, 60 S. W. Rep. 375, 22 Ky. L. Rep. 1237.

**574.** 2. Damages for Breach of Contract. — See *Roche v. Smith*, 176 Mass. 595, 79 Am. St. Rep. 345; *Godfrey v. Rosenthal*, 17 S. Dak. 452.

Where Party Puts It Out of His Power to Perform. — *Way v. Miller*, 80 Mo. App. 382.

Measure of Damage. — *Bryant v. Everly*, (Ky. 1900) 57 S. W. Rep. 231.

Counsel fees paid by the plaintiff in a previous action for specific performance are not recoverable in an action for damages resulting from a breach of contract for the exchange of lands. *Kaufmann v. Kirker*, 22 Pa. Super. Ct. 201.

3. Specific Performance. — *Harland v. Harpold*, 182 Ill. 227; *Baker v. Allison*, 186 Ill. 613; *McDonald v. Bach*, (Supm. Ct. Spec. T.) 29 Misc. (N. Y.) 96, affirmed 169 N. Y. 615; *Evans v. Fox*, 8 Pa. Dist. 383.

When Specific Performance Will Not Be Enforced. — Where the evidence discloses that there was no mutuality of obligation and remedy, specific performance of a contract for the exchange of lands will not be enforced. *Tryce v. Dittus*, 199 Ill. 180.

Contract Indefinite — Specific Performance Refused. — Specific performance will not be enforced where the contract for exchange of lands is indefinite as to the time when a note and mortgage for the balance of the purchase price shall be payable. *Bentley v. Miller*, 18 Ohio Cir. Ct. 865.

4. Contract May Be Rescinded for Fraud or Mistake — *California*. — *Hartwig v. Clark*, 138 Cal.

**574.** All Lands Received Must Be Returned Before Rescission. — See notes 5, 6.

**575.** See note 1.

Vendor's Lien for Damages Resulting from Fraud. — See note 2.

**578.** IV. EXCHANGE OF GOODS — 2. Remedies — *b.* FOR FRAUD — Rescission. — See notes 1, 3.

Damages. — See note 6.

Choice of One Remedy Rejects the Other. — See note 7.

**579.** EXCISE. — See note 1.

EXCLUSIVE — EXCLUSIVELY. — See note 3.

668. See also *Norris v. Crandall*, 133 Cal. xix, 65 Pac. Rep. 568.

*District of Columbia.* — *Main v. Aukam*, 12 App. Cas. (D. C.) 375.

*Iowa.* — *Campbell v. Spears*, 120 Iowa 670.

*Maryland.* — See *Tifel v. Jenkins*, 93 Md. 744.

*Nebraska.* — *Nisley v. Spencer*, (Neb. 1901) 95 N. W. Rep. 798.

*New Jersey.* — *Stoll v. Wellborn*, (N. J. 1903) 56 Atl. Rep. 894.

*Texas.* — *Singleton v. Houston*, 35 Tex. Civ. App. 10; *Cooper v. Maggard*, (Tex. Civ. App. 1904) 79 S. W. Rep. 607; *Corbett v. McGregor*, (Tex. Civ. App. 1904) 84 S. W. Rep. 278.

But an exchange of lands will not be rescinded where it appears that the representations as to the nature of the lands were expressions of opinion, and that the plaintiff saw the premises and apparently relied on the judgment of his father who viewed the lands with him. *Buxton v. Jones*, 120 Mich. 522.

**Representations as to Quality of Land — Not Sufficient to Warrant Rescission.** — But representations as to the quality of lands, which are mere expression of opinion, do not warrant the rescission of a contract for the exchange of lands. *Tryce v. Dittus*, 199 Ill. 189.

**Evidence Not Justifying Rescission for Fraud.** — Where the plaintiff personally examined lands worth one thousand dollars and agreed to exchange therefor lands worth sixteen hundreds dollars, it was held that representations as to what could be produced on the land transferred to him and the value of such products would not justify a rescission of the contract for fraud. *Wilson v. Jackson*, 167 Mo. 135.

**Prompt and Seasonable Rescission.** — Prompt rescission of a contract for the exchange of lands does not depend alone on the lapse of time before asserting the right, but is governed somewhat by the circumstances of the case. *Beardsley v. Clem*, 137 Cal. 328. See also *Campbell v. Spears*, 120 Iowa 670.

**574. 5. A Tender of Deed of Lands Received** was held to be sufficient where it was made to the real owner after a fruitless endeavor to find a fictitious person who had been represented by the real owner to be the real owner. *Rohrof v. Schulte*, 154 Ind. 183.

**Returning Realty Encumbered After Coming into Possession.** — And the party seeking rescission must not only return all lands received, but must return them without incumbrances subsequent to coming into possession. *Bollnow v. Novacek*, 184 Ill. 463.

**6. Damages Resulting from Fraud or Mistake Recoverable.** — *Barbour v. Flick*, 126 Cal. 628.

**575. 1. Measure of Damages.** — *Barbour v. Flick*, 126 Cal. 628.

**2. Vendor's Lien.** — *Newburn v. Lucas*, 126 Iowa 85; *Griffin v. Gingell*, 79 S. W. Rep. 284, 25 Ky. L. Rep. 2031.

And the rule, that the wronged one is entitled to a vendor's lien on the land transferred by him, obtains where there is a failure of title to a portion of the land conveyed to him. *Johnson v. Burks*, 103 Mo. App. 221.

Where there is an existing incumbrance on lands received by one of the parties to an exchange, which incumbrance was not disclosed at the time of the agreement to exchange, the wronged party has a vendor's lien on the lands transferred by him to the amount of such incumbrance. *Bishop v. Seal*, 87 Mo. App. 256.

**578. 1. Rescission for Fraud.** — *Wilson v. Maxon*, 56 W. Va. 194; *Smeesters v. Schroeder*, 123 Wis. 116.

**3. Property Received Must Be Tendered Back.** — *Smeesters v. Schroeder*, 123 Wis. 116.

**Where Return of Property Impossible by Act of Wrongdoer.** — But where the wrongdoer has rendered it impossible to tender the return of the property received, the rule requiring restitution, or a tender thereof, is relaxed. *Gates v. Raymond*, 106 Wis. 657.

**6. Damages for Fraud.** — *Smeesters v. Schroeder*, 123 Wis. 116.

**7. Two Remedies Inconsistent.** — *Smeesters v. Schroeder*, 123 Wis. 116.

**579. 1. Patton v. Brady.** 184 U. S. 608.

**3. Exclusive Privileges.** — *Bohmer v. Haffen*, 161 N. Y. 390. See also *Weed v. Binghamton*, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 216.

**Exemptions — Exclusively for Educational Purposes.** — See *People v. Lawler*, 74 N. Y. App. Div. 553, *affirmed* 179 N. Y. 535; *People v. Sayles*, 32 N. Y. App. Div. 197, *affirmed* 157 N. Y. 677; *Matter of McCusker*, (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 446; *Young Men's Christian Assoc. v. Douglas County*, 60 Neb. 642.

**Same — Exclusively for Religious or Educational Purposes.** — *Pawtucket*, for Opinion, 24 R. I. 86.

**Exclusively Within City Limits.** — In construing an ordinance providing a license tax on "railroads — steam — for business done *exclusively* within the city of Columbia," etc., the court said: "This manifestly does not mean that only those doing business *exclusively* within the corporate limits of the city are liable to the tax, but the meaning clearly is that the railroad company is taxed only for the privilege of doing such of its business as is done *exclusively* within the city limits, and

**581. EXCUSABLE NEGLECT.** — See note 2.

**EXCUSE.** — See note 3.

**582. EXECUTED CONTRACTS.** — See note 2.

not for the privilege of doing any of the other business." Florida Cent., etc., R. Co. v. Columbia, 54 S. Car. 280.

**581. 2. Excusable Neglect.** — Brucker v. O'Connor, 115 Ga. 95; Deering Harvester Co. v. Thompson, 116 Ga. 418.

**3. Excuse.** — Hawaii v. Lo Kam, 13 Hawaii 14.

**582. 2. Mettel v. Gales,** 12 S. Dak. 639, quoting 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 582. See also Watkins v. Nugen, 118 Ga. 372.

## EXECUTION AND PROOF OF DOCUMENTS.

By E. G. CHILTON.

**584. II. MEANING OF EXECUTION.** — See note 3.

**585. III. PROOF OF EXECUTION** — 1. *Necessity for Proof* — a. *GENERAL RULE* — See note 2.

**587. b. EXCEPTIONS** — (1) *Adverse Party Claiming under Document.* — See note 1.

(2) *Ancient Documents.* — See note 2.

**584. 3. Includes Delivery.** — In Arrington v. Arrington, 122 Ala. 510, it was held that delivery is an incident essential to the execution of a mortgage or conveyance.

**Presumption as to Delivery.** — Miller v. Williams, 27 Colo. 34.

**Delivery Inferred from Circumstances.** — McCartney v. McCartney, 93 Tex. 359. See also Fitzpatrick v. Brigman, 130 Ala. 450; Arrington v. Arrington, 122 Ala. 510.

**585. 2. Proof of Execution Necessary** — United States. — Apache County v. Barth, 177 U. S. 538; Cunard Steamship Co. v. Kelley, (C. C. A.) 115 Fed. Rep. 678.

Alabama. — Collier v. Carlisle, 133 Ala. 478.

Georgia. — Sanford v. Tanner, 114 Ga. 1005. See also Vizard v. Moody, 119 Ga. 918.

Illinois. — Bonner v. Ames, 82 Ill. App. 93.

Kentucky. — Swafford v. Herd, 65 S. W. Rep. 803, 23 Ky. L. Rep. 1556.

Maine. — Egan v. Horrigan, 96 Me. 46.

Maryland. — Gambrill v. Schooley, 95 Md. 260.

Massachusetts. — Cashin v. New York, etc., R. Co., 185 Mass. 543.

Nebraska. — See German-American Bank v. Stickle, 59 Neb. 321.

New York. — See Corwin v. Breakstone, (Supm. Ct. App. T.) 88 N. Y. Supp. 364.

Oregon. — Hannan v. Greenfield, 36 Oregon 97.

Pennsylvania. — Schomaker v. Dean, 201 Pa. St. 439; Broadrick v. Broadrick, 25 Pa. Super. Ct. 225.

Tennessee. — Renshaw v. Tullahoma First Nat. Bank, (Tenn. Ch. 1900) 63 S. W. Rep. 194.

Texas. — Staples v. Word, (Tex. Civ. App. 1898) 48 S. W. Rep. 751; Smith v. Kenney, (Tex. Civ. App. 1899) 54 S. W. Rep. 801.

Vermont. — Nye v. Daniels, 75 Vt. 81.

**Lost Documents.** — Blakely Printing Co. v. Pease, 95 Ill. App. 341; Shea v. Seelig, 89 Mo. App. 146. See also Champenois v. Collins, (Miss. 1904) 36 So. Rep. 72.

**Ancient Documents.** — But it is only necessary

to prove the mere existence of an ancient lost document to lay a foundation for parol evidence of its contents. Smith v. Cavitt, 20 Tex. Civ. App. 558.

**Effect of Not Proving Execution by All the Makers.** — Proof of the execution of a quitclaim deed by one of several grantors therein named is sufficient for its admission in evidence, in so far, at least, as it is sought to affect the interest owned by the grantor whose execution is proved. Kolb v. Jones, 62 S. Car. 193.

**Execution a Question for Jury.** — McCartney v. McCartney, 93 Tex. 359. See also Chastain v. Porter, 130 Ala. 410.

**Proof of Agent's Authority Necessary.** — Johnson v. Dadeville, 127 Ala. 244.

**Power of Attorney Must Be Produced** — **Ancient Documents.** — The rule, that the power under which a deed was executed must be produced, does not apply where the deed is an ancient one and admissible without proof. Reuter v. Stuckart, 181 Ill. 529.

**Presumption from Proof of Corporate Seal.** — Almand v. Equitable Mortg. Co., 113 Ga. 983.

Proof that a contract purporting to have been executed by a corporation was signed by the president and secretary and had the corporate seal affixed is sufficient to authorize the admission of the contract in evidence, the presumption being that such officers did not exceed their powers in signing the contract. Quackenboss v. Globe, etc., F. Ins. Co., 177 N. Y. 71, reversing 77 N. Y. App. Div. 168.

**587. 1. Davis v. Clinton,** 79 S. W. Rep. 259, 25 Ky. L. Rep. 2021.

**Another Paper May Be Introduced in Evidence Where the One Produced Is Not Genuine.** — It was held that where the genuineness of the paper produced on notice is denied, the party calling for its production may introduce in evidence a copy of another paper which he testifies is a copy of the genuine one. Barnett v. Wilson, 132 Ala. 375.

**2. Ancient Documents Prove Themselves.** —



- 587.** *a.* EFFECT OF ADMISSIONS IN PLEADINGS. — See note 3.  
*d.* STATUTES DISPENSING WITH PROOF OF EXECUTION. — See note 4.  
**588.** Acknowledged and Recorded Documents. — See note 2.  
**589.** 2. Method of Proof — *a.* UNATTESTED DOCUMENTS. — See notes 1, 2, 3.  
*b.* ATTESTED DOCUMENTS — (1) *By Subscribing Witness* — (a) General Rule. — See note 5.  
**591.** Several Subscribing Witnesses. — See note 3.  
**593.** Effect of Statutes Making Parties Competent Witnesses. — See note 2.

Plaster *v.* Rigney, (C. C. A.) 97 Fed. Rep. 12; Hodge *v.* Palms, (C. C. A.) 117 Fed. Rep. 396.

**587.** 3. Execution Admitted in Plea. — Harloe *v.* Lambie, 132 Cal. 133; National Computing Scale Co. *v.* Eaves, 116 Ga. 511; Vizard *v.* Moody, 119 Ga. 918. See also Champenois *v.* Collins, (Miss. 1904) 36 So. Rep. 72; Hall *v.* Beston, 26 N. Y. App. Div. 105, affirmed 165 N. Y. 632.

**Allegation Not Denied.** — The requirement as to proof of execution of an instrument is dispensed with where the answer fails to directly deny the fact of execution. Garland *v.* Gaines, 73 Conn. 662, 84 Am. St. Rep. 182.

**Admission During Trial that Signatures of Officers and Corporate Seal Are Genuine.** — A contract bearing a corporate seal and executed by the proper officers of a corporation is admissible in evidence, without proof of authority to execute the contract and to affix the seal, where the genuineness of the signatures and seal is admitted during the course of the trial. National Bank of Commerce *v.* Atkinson, 8 Kan. App. 30.

**4. Proof Unnecessary When Execution Not Denied — Statutes.** — McGinty *v.* St. Paul, etc., R. Co., 74 Minn. 259; London, etc., Mortg. Co. *v.* St. Paul Park Imp. Co., 84 Minn. 144; Missouri, etc., R. Co. *v.* Clark, 35 Tex. Civ. App. 189. See also Vizard *v.* Moody, 119 Ga. 918.

**588.** 2. Proof of Execution of Acknowledged Instruments Unnecessary. — Stamphill *v.* Bullen, 121 Ala. 250; Ramsay *v.* People, 97 Ill. App. 296, affirmed 197 Ill. 594; Glos *v.* Gerrity, 190 Ill. 545; Stout *v.* Crosby, 10 Kan. App. 580, 63 Pac. Rep. 661.

**Acknowledged After Suit Brought.** — It was held in Cawfield *v.* Owens, 129 N. Car. 286, that a deed ruled out might be immediately reprobated in proper form and introduced in evidence.

**Acknowledgment of Deed after Death of Grantor.** — A deed is not admissible in evidence where it appears that the notary subscribed his name after the death of the grantor. Howard *v.* Russell, 104 Ga. 230.

**Alabama Statute — Recorded Deed.** — It was held that under the Alabama statute, which authorizes the registration of a mortgage without proof of execution or an acknowledgment of it, a mortgage is admissible in evidence, though neither acknowledged nor proved by the subscribing witness. Foxworth *v.* Brown, 120 Ala. 59.

**North Carolina Statute — Probate and Registration of Chattel Mortgage — Effect of.** — Under a statute, constituting a duly certified copy of an instrument required or allowed to be re-

corded sufficient evidence of such instrument, the probate and registry of a chattel mortgage furnish *prima facie* evidence of its execution. Griffith *v.* Richmond, 126 N. Car. 377.

**589.** 1. Proof of Handwriting of Maker. — Ballow *v.* Collins, 139 Ala. 543; Archer *v.* U. S., 9 Okla. 569.

**2. Proved by an Eyewitness.** — German-American Bank *v.* Stickle, 59 Neb. 321; Archer *v.* U. S., 9 Okla. 569.

**3.** Archer *v.* U. S., 9 Okla. 569.

**5. Proved by Subscribing Witness — Georgia.** — Howard *v.* Russell, 104 Ga. 230; Buchanan *v.* Simpson Grocery Co., 105 Ga. 393; Kirkland *v.* Downing, 106 Ga. 530.

*Nebraska.* — Cheston *v.* Wilson, (Neb. 1902) 89 N. W. Rep. 764.

*Oregon.* — Hannan *v.* Greenfield, 36 Oregon, 97.

*South Carolina.* — Swancey *v.* Parrish, 62 S. Car. 240.

**Who Is a Subscribing Witness — In General.** — Stone *v.* Cronin, 72 N. Y. App. Div. 565. See also Chastain *v.* Porter, 130 Ala. 410.

"It is enough to make the person a subscribing witness, if he be present when the instrument is executed, and subscribes his name as a witness, with the assent of the party who executes it." Smith *v.* Soper, 12 Colo. App. 264.

A person who was not present at the time of the signing of a note, and who subsequently, without the request or consent of the maker, affixed his signature does not come within the definition of an attesting witness. Schomaker *v.* Dean, 201 Pa. St. 439.

**A Person Present at the Execution of the Instrument.** — Stone *v.* Cronin, 72 N. Y. App. Div. 565.

**Names Signed in Usual Place.** — See also Arrington *v.* Arrington, 122 Ala. 510.

**Affixing Name as Attesting Witness Without Seeing Parties Sign Instrument.** — "A writing may be validly attested by one who did not see the parties to it sign, where they appear before him and acknowledge the signatures are their own, and request him to sign in attestation of the fact." Elston *v.* Roop, 133 Ala. 331.

**A Notary who subscribes the certificate of acknowledgment is not a subscribing witness.** Stone *v.* Cronin, 72 N. Y. App. Div. 565. But see Hayes *v.* Banks, 132 Ala. 356.

**591.** 3. Necessary to Account for All Witnesses. — Howard *v.* Russell, 104 Ga. 230. See also Smith *v.* Soper, 12 Colo. App. 264.

**593.** 2. View that Rule Is Changed. — Stamphill *v.* Bullen, 121 Ala. 250; Hayes *v.* Banks, 132 Ala. 356; Ballow *v.* Collins, 139 Ala. 543. See also Hall *v.* Beston, 26 N. Y. App. Div. 105, affirmed 165 N. Y. 632; Millar *v.* Doll,

**593.** Documents Not Required to Be Attested. — See note 4.

**594.** (c) Exceptions — *aa.* WITNESS DEAD. — See notes 2, 3.

**595.** *bb.* WITNESS ABROAD OR NOT TO BE FOUND. — See note 2.

**597.** *cc.* DISQUALIFIED WITNESS — (*aa*) *Disqualified Both at Time of Attestation and of Trial.* — See note 1.

**598.** *dd.* WITNESS DENYING OR FORGETTING. — See note 5.

**599.** *ee.* DOCUMENTS INTRODUCED COLLATERALLY. — See note 1.

**600.** (2) *By Other Evidence* — (*a*) *Handwriting of Witness or Maker.* — See note 2.

**601.** See notes 1, 2.

**602.** IV. SUFFICIENCY OF EVIDENCE — 2. Proof of Handwriting of Attesting Witness Sufficient. — See note 4.

54 N. Y. App. Div. 197; *Broadrick v. Broadrick*, 25 Pa. Super. Ct. 225.

**593.** 4. *Ballow v. Collins*, 139 Ala. 543.

**594.** 2. *Impossible to Produce Witness.* — *Cashin v. New York, etc., R. Co.*, 185 Mass. 543.

3. *Witness Dead.* — *Ratliff v. Ratliff*, 131 N. Car. 425; *Hanan v. Greenfield*, 36 Oregon 97; *Swancey v. Parrish*, 62 S. Car. 240.

**595.** 2. *Witness Out of Court's Jurisdiction.* — *Hutchins v. Wick*, 4 Ohio Dec. (Reprint) 170, 1 Cleve. L. Rep. 89; *Hannan v. Greenfield*, 36 Oregon 97; *Swancey v. Parrish*, 62 S. Car. 240. See also *Millar v. Doll*, 54 N. Y. App. Div. 197.

**597.** 1. *Witness to a Mortgage — Competency Not to Be Questioned by a Mortgagor.* — A mortgagor of realty, who may choose his own witnesses, is not in position to complain that the witnesses to the mortgages are interested. Read *v. Toledo Loan Co.*, 23 Ohio Cir. Ct. 25.

Where Statute Does Not Require that Witnesses to Conveyances Be Not Interested. — Where statute prescribes what shall constitute a proper attestation of a conveyance of realty, it was held that a member of a grantee corporation

is a proper attesting witness to the conveyance, since the statute does not require that the witnesses shall not be interested. Read *v. Toledo Loan Co.*, 23 Ohio Cir. Ct. 25.

**598.** 5. *Other Evidence Admissible When Witness Denies or Forgets.* — *Howard v. Russell*, 104 Ga. 230; *Buchanan v. Simpson Grocery Co.*, 105 Ga. 393; *Hannan v. Greenfield*, 36 Oregon 97.

**599.** 1. *Collateral Introduction of Documents.* — *Smith v. Soper*, 12 Colo. App. 264.

**600.** 2. *Handwriting of Witness.* — *Ratliff v. Ratliff*, 131 N. Car. 425; *Hannan v. Greenfield*, 36 Oregon 97.

**601.** 1. *View that Proof of Handwriting of Maker Is Proper.* — *Renshaw v. Tullahoma First Nat. Bank*, (Tenn. Ch. 1900) 63 S. W. Rep. 194.

2. *Renshaw v. Tullahoma First Nat. Bank*, (Tenn. Ch. 1900) 63 S. W. Rep. 194.

**602.** 4. *Sufficiency of Proof of Handwriting of Witness.* — *Hayes v. Banks*, 132 Ala. 356, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 602; *Murphy v. People*, 213 Ill. 154; *Ratliff v. Ratliff*, 131 N. Car. 425.

# EXECUTIONS.

BY HERBERT GANNAWAY.

## 609. I. DEFINITION. — See note 1.

A *Capias ad Satisfaciendum*. — See note 3.

A *Fieri Facias*. — See note 6.

A *Venditioni Exponas*. — See note 7.

## 610. II. ISSUANCE OF THE WRIT — 1. Prerequisites — a. STATUTORY REQUIREMENTS. — See note 2.

b. THE JUDGMENT OR DECREE — (1) *In General*. — See note 3.

**609. 1. Other Definitions.** — Taylor v. Ellis, 200 Pa. St. 191, giving the definition of the first paragraph of the note in 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 609.

An execution is the final process to enforce payment of a judgment. Mason, etc., Co. v. Mechanics' Lien, etc., Co., (Ky. 1904) 82 S. W. Rep. 290; Excelsior Needle Co. v. Globe Cycle Works, 48 N. Y. App. Div. 304.

An execution is the process of the court to enforce the payment of a debt. Tyler v. Williams, 53 S. Car. 367.

"An execution is simply a writ by which the judgment of the court is enforced." Mayer v. Morgan, 26 Wash. 71.

**3. Capias ad Satisfaciendum Defined.** — For examples of similar writs in the United States and expositions of the various statutes, see the following cases:

*Illinois*. — Whalen v. Billings, 104 Ill. App. 281; Subim v. Isador, 88 Ill. App. 96.

*Indiana*. — Joyce v. Everson, 161 Ind. 440.

*Massachusetts*. — Radovsky v. Sperling, (Mass. 1905) 72 N. E. Rep. 949.

*Michigan*. — Metcalf v. Moore, 128 Mich. 138.

*New York*. — Sherman v. Grinnell, 159 N. Y. 50; Padreshesky v. Walton, 65 N. Y. App. Div. 432; People v. Gill, 85 N. Y. App. Div. 192, affirmed 176 N. Y. 606; People v. Costigan, 54 N. Y. App. Div. 186; Hoyle v. McCrea, 42 N. Y. App. Div. 313; Salsberg v. Tobias, (Supm. Ct. App. T.) 88 N. Y. Supp. 967; Fisher v. Young, (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 552, affirmed 95 N. Y. App. Div. 619; Greenberg v. Laeov, (Supm. Ct. App. T.) 84 N. Y. Supp. 930; Holmes v. Leighton, (Supm. Ct. App. T.) 40 Misc. (N. Y.) 678; Auerbach v. Rogin, (Supm. Ct. App. T.) 40 Misc. (N. Y.) 695; Gottlieb v. Glazier, (Supm. Ct. App. T.) 25 Misc. (N. Y.) 765; Lehman v. Mayer, 68 N. Y. App. Div. 12.

*North Carolina*. — Carroll v. Montgomery, 128 N. Car. 278; Huntley v. Hasty, 132 N. Car. 279.

*Pennsylvania*. — Com. v. Deuel, 8 Pa. Dist. 431.

*Rhode Island*. — In re Kimball, 20 R. I. 688; Collection of Poll Tax, 21 R. I. 582; Shaw v. Silverstein, 21 R. I. 500; Taylor v. Bliss, (R. I. 1904) 57 Atl. Rep. 939.

*Vermont*. — Parker v. Parker, 71 Vt. 387; In re Jennison, 74 Vt. 40.

*Wisconsin*. — Reeg v. Adams, 113 Wis. 175; Enders v. Smith, 122 Wis. 640.

**6. Fieri Facias Defined.** — Taylor v. Tennessee Lumber Co., 107 Tenn. 45.

**7. Venditioni Exponas Defined.** — U. S. v. Hogg, (C. C. A.) 112 Fed. Rep. 909; Caffery v. Choctaw Coal, etc., Co., 95 Mo. App. 174; Taylor v. Tennessee Lumber Co., 107 Tenn. 45, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 609. See also Rain v. Young, 61 Kan. 428, 78 Am. St. Rep. 325.

**610. 2. Statutory Requirements as to Issuance of Writ.** — In cases where the statute requires leave of court before issuance of writ, a writ issued without such leave is not void, but liable to be set aside on motion. Aultman, etc., Co. v. Syme, 163 N. Y. 54, 79 Am. St. Rep. 565.

**3. Judgment as Prerequisite to Issue of Writ** — *Alabama*. — Hendon v. Delvichio, 137 Ala. 597, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 610; Brightman v. Merriwether, 121 Ala. 602.

*California*. — Brann v. Blum, 138 Cal. 644.

*Connecticut*. — Smith v. Jewell, 71 Conn. 473.

*Georgia*. — Scott v. Bedell, 108 Ga. 205;

Smith v. Bell, 107 Ga. 800, 73 Am. St. Rep. 151.

*Illinois*. — Merrick v. Carter, 205 Ill. 73.

*Kansas*. — Pratt v. Cook, 10 Kan. App. 144.

*Michigan*. — Purdy v. Law, 132 Mich. 622.

*Minnesota*. — Hoerr v. Meihofner, 77 Minn. 228, 77 Am. St. Rep. 674.

*Nebraska*. — Predohl v. O'Sullivan, 59 Neb. 311.

*New Jersey*. — Dawes v. Dawes, (N. J. 1899) 43 Atl. Rep. 984.

*New York*. — Goldberg v. Markowitz, 94 N. Y. App. Div. 237, affirmed 182 N. Y. 540.

*South Carolina*. — Tyler v. Williams, 53 S. Car. 367.

*Texas*. — Underwood v. Brown, 29 Tex. Civ. App. 163.

*Utah*. — McKibbin v. Brigham, 18 Utah 78.

*Washington*. — Whitworth v. McKee, 32 Wash. 83.

**Execution on a Dormant Judgment Is Void.** — De Ford v. Green, 1 Marv. (Del.) 316; Chenault v. Chappell, 8 Kan. App. 807; Seeley v. Johnson, 61 Kan. 337, 78 Am. St. Rep. 314; Watson v. Keystone Iron Works Co., (Kan. 1904) 78 Pac. Rep. 156; Denny v. Ross, (Kan. 1905) 79 Pac. Rep. 502; Predohl v. O'Sullivan, 59 Neb. 311.

**Execution on a Voidable Judgment Is Voidable.** — Pitkin v. Burnham, 62 Neb. 385, 89 Am. St.



**610.** (2) *Necessity of Entry.* — See notes 5, 6.

**611.** (4) *Effect of Payment or Tender* — *Payment.* — See note 3.  
*Tender.* — See note 4.

(5) *Necessity of Revivor* — (a) *Upon Death of Plaintiff.* — See note 5.

**612.** See note 1.

(b) *Upon Death of Defendant.* — See note 2.

**613.** See note 1.

*Under Statute.* — See notes 2, 4.

Rep. 763; *Ramsey v. Zapp*, (Tex. Civ. App. 1900) 57 S. W. Rep. 82.

Where the Judgment Lien Is Barred by Limitations, the execution is barred also. *Worsham v. Lancaster*, (Ky. 1898) 47 S. W. Rep. 448; *Sublette v. St. Louis, etc., R. Co.*, 81 Mo. App. 327. But see *Warner v. Bartle*, 39 N. Y. App. Div. 91.

*Order for Payment of Money into Court.* — In *Nebraska* it was held that an execution is the proper process to enforce a decree directing the defendant to pay money in his hands into court. This decision was in response to the argument that in such a case contempt proceedings and not execution afford the proper remedy. *Stuart v. Burcham*, 62 Neb. 84, 89 Am. St. Rep. 739.

*Docketing Judgment.* — Where it is provided by statute that an execution may be issued to any county in which the judgment has been docketed, it is a mere irregularity to issue an execution before the docketing of the judgment in the county to which the execution is issued. *Hoerr v. Meihofers*, 77 Minn. 228, 77 Am. St. Rep. 674.

In *Iowa* an execution may issue at any time within twenty years, and any land the judgment debtor may own may be levied on and sold though the lien of a judgment on real estate expires in ten years as against subsequent purchasers from the judgment debtor. *Hawkeye Ins. Co. v. Maxwell*, 119 Iowa 672.

*On Filing Memorandum of Costs.* — Where an appellate court has awarded costs, and the statutes provide for the filing of a memorandum of such costs with the clerk, such filing has the same effect as a formal entry of judgment, and execution may issue thereon as on a final judgment. *State v. District Ct.*, 27 Mont. 40.

*Enforcement of Lien for Attorney's Fees.* — An execution cannot issue to enforce an attorney's lien before the nature and extent thereof have been judicially determined. *Jones v. Duff Grain Co.*, (Neb. 1903) 95 N. W. Rep. 1.

**610.** 5. *Burton v. Kipp*, 30 Mont. 275.

**6.** *Entry of Judgment as Prerequisite to Issuance of Writ under Statute* — *United States.* — *Lynch v. Burt*, (C. C. A.) 132 Fed. Rep. 417.

*Georgia.* — *Levadas v. Beach*, 119 Ga. 613.

*Indiana.* — In *Indiana* the record must be read in open court, and signed by the judge before the writ is issued. *Logan v. Sult*, 152 Ind. 434.

*Minnesota.* — *Hoerr v. Meihofers*, 77 Minn. 228, 77 Am. St. Rep. 674.

*New Jersey.* — *Junior Order Bldg., etc., Assoc. v. Sharpe*, 63 N. J. Eq. 500.

*New York.* — *Harris v. Elliott*, 163 N. Y. 269.

*South Dakota.* — *McDonald v. Fuller*, 11 S. Dak. 355, 74 Am. St. Rep. 815.

**611.** 3. *Effect of Payment of Judgment upon Right to Issue Execution.* — *Baird v. Given*, 170

Mo. 302; *Faber v. Wagner*, 10 N. Dak. 287; *Deleshaw v. Edelen*, 31 Tex. Civ. App. 416.

**4.** *Effect of Tender of Payment on Right to Issue Execution.* — *Eppinger v. Scott*, 130 Cal. 275.

**5.** *Necessity of Revivor of Judgment at Common Law upon Plaintiff's Death.* — *Seeley v. Johnson*, 61 Kan. 337, 78 Am. St. Rep. 314; *Maxwell v. Leeson*, 50 W. Va. 361, 88 Am. St. Rep. 875.

*Where Writ Is Tested Prior to the Plaintiff's Death.* — *Hatcher v. Lord*, 115 Ga. 619.

*Death of One of Two or More Plaintiffs.* — See *Matter of Armstrong*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 327, where the execution was issued on motion after one of the parties was succeeded by his executor.

**612.** 1. *Necessity under Statute of Revivor of Judgment upon Plaintiff's Death.* — *Vogt v. Daily*, (Neb. 1904) 98 N. W. Rep. 31; *Maxwell v. Leeson*, 50 W. Va. 361, 88 Am. St. Rep. 875.

The death of the plaintiff does not abate a judgment, but merely suspends its operation until an administrator be appointed. *Ritchey v. Buricke*, (Ky. 1899) 54 S. W. Rep. 173.

**2.** *Necessity of Revivor of Judgment at Common Law upon Defendant's Death.* — *Blumenthal v. Tibbits*, 160 Ind. 70; *Seeley v. Johnson*, 61 Kan. 337, 78 Am. St. Rep. 314; *Rain v. Young*, 61 Kan. 428, 78 Am. St. Rep. 325; *Greer v. Simrall*, 59 S. W. Rep. 759, 22 Ky. L. Rep. 1037; *Yankton Sav. Bank v. Gutterson*, 15 S. Dak. 486; *Nashville Trust Co. v. Weaver*, 102 Tenn. 66; *Wessell v. Gross*, (Tenn. Ch. 1900) 57 S. W. Rep. 372. See also *Reddick v. Long*, 124 Ala. 260.

The lien of a judgment on land exists after the defendant's death and may be enforced in equity without revival, or in law by *scire facias*. *Maxwell v. Leeson*, 50 W. Va. 361, 88 Am. St. Rep. 875.

*Death of One of Two or More Defendants.* — *Forbes v. Thompson*, 2 Penn. (Del.) 530; *Loomis v. Ross*, 12 Pa. Super. Ct. 95.

**613.** 1. *No Necessity of Revivor When Writ Is Tested as of Day Before Defendant's Death.* — *Reddick v. Long*, 124 Ala. 260; *Hudgins v. McLain*, 116 Ga. 273; *Deering v. Wisler*, 21 Pa. Co. Ct. 156; *Nashville Trust Co. v. Weaver*, 102 Tenn. 66.

*Alias Execution.* — Where an alias execution performs the office of a *venditioni exponas* at common law, it is valid without a *scire facias*. *Rain v. Young*, 61 Kan. 428, 78 Am. St. Rep. 325.

**2.** In *Indiana*, it is provided by statute that the death of a defendant after the execution is placed in the hands of the sheriff shall not affect proceedings thereon. *Blumenthal v. Tibbits*, 160 Ind. 70.

In *Illinois*, a revivor of judgment is not required if execution issue within twelve months after the death of the defendant, and three

**614.** *c.* DEMAND AND NOTICE — Notice. — See note 1.

*d.* LEAVE OF COURT. — See note 3.

Notice of Motion for Leave of Court. — See note 4.

**2. Courts Out of Which the Writ May Issue — a. IN GENERAL. —**

See note 5.

**615.** See notes 2, 3.

Issuance Out of Court of Record on Justices' Judgments. — See note 7.

**616.** *b.* SOURCE OF AUTHORITY. — See note 2.

**3. Who May Sue Out the Writ — a. IN GENERAL. —** See note 8.

**617.** *b.* ATTORNEY. — See note 1.

*e.* DUTY OF CLERK OR OTHER OFFICER AS TO ISSUANCE — Upon

Application of Plaintiff — In General. — See note 7.

months' notice, in writing, be given to the personal representatives or heirs. *Wilson v. Lowmaster*, 181 Ill. 170. See also *Kinkade v. Gibson*, 209 Ill. 246.

**613.** 4. Statutes Classifying Debts of Decedents Inconsistent with Issue of Execution. — See *Yankton Sav. Bank v. Gutterson*, 15 S. Dak. 486.

**614.** 1. Notice as Prerequisite to Issuance. — *Kinkade v. Gibson*, 209 Ill. 246.

**3. Leave of Court to Issue Writ Unnecessary at Common Law.** — *Hoxie v. Bryant*, 131 Cal. 85; *Scott v. Bedell*, 108 Ga. 205; *Logan v. Sult*, 152 Ind. 434; *Knotts v. Crossly*, (Neb. 1901) 95 N. W. Rep. 848; *Cooper v. Bailey*, 69 N. Y. App. Div. 358.

Necessity of Leave After a Judgment Affirmed. — See *Halpin v. Coleman*, 66 N. Y. App. Div. 37.

Leave of Court Necessary After Five Years from Date of Judgment. — *Wheeler v. Eldred*, 137 Cal. 37; *Aultman, etc., Co. v. Syme*, 163 N. Y. 54.

**4. Notice of Applying for Leave of Court.** — *People v. Woodbury*, 70 N. Y. App. Div. 416.

**5. Out of What Court Writ May Issue in General.** — *De Vaughn v. Byrom*, 110 Ga. 904; *Levadas v. Beach*, 119 Ga. 613; *C. C. Ansley Co. v. O'Byrne*, 120 Ga. 618; *Lydick v. Chapey*, 64 Neb. 288; *Murray v. Briggs*, 29 Wash. 245.

Courts of Concurrent Jurisdiction. — *Lowenstein v. Young*, 8 Okla. 216.

Statutory Provisions for Filing Transcripts in Other Counties. — See *Montpelier Sav. Bank, etc., Co. v. Follett*, (Neb. 1903) 94 N. W. Rep. 635; *Evans v. Alridge*, 133 N. Car. 378; *Lowenstein v. Young*, 8 Okla. 216; *McDonald v. Fuller*, 11 S. Dak. 355, 74 Am. St. Rep. 815; *Murray v. Briggs*, 29 Wash. 245.

**615.** 2. Invalidity of Writ Issued by Court Not Rendering Judgment. — *Gresinger v. McCarter*, 9 Kan. App. 886, 61 Pac. Rep. 507; *Murray v. Briggs*, 29 Wash. 245.

**3. Statutes Authorizing Issuance Out of Another Court.** — *Wilcher v. Pool*, 121 Ga. 305; *Hansford v. Burdge*, 3 Kan. App. 162; *Moseley v. Stroud*, 80 S. W. Rep. 1182, 26 Ky. L. Rep. 287; *Hoerr v. Mehofer*, 77 Minn. 228, 77 Am. St. Rep. 674.

**7. Issuance Out of Court of Record on Justices' Judgments — Illinois.** — *Merrick v. Carter*, 205 Ill. 73; *Cox v. Spurgin*, 210 Ill. 398.

*Iowa.* — *Therne v. Bethenoid*, 106 Iowa 697. *Missouri.* — *Langford v. Few*, 146 Mo. 142, 69 Am. St. Rep. 606; *Bradley v. Hefferman*, 156 Mo. 653; *Reed v. Lowe*, 163 Mo. 519, 85 Am. St. Rep. 578; *Littlefield v. Ramsey*, 181 Mo. 613; *Mathewson v. Kilburn*, 183 Mo. 110.

*South Carolina.* — *Amick v. Amick*, 59 S. Car. 70.

*South Dakota.* — *Phillips v. Norton*, (S. Dak. 1904) 101 N. W. Rep. 727.

*Tennessee.* — *Crabtree v. Winchester Bank*, 108 Tenn. 483.

*Washington.* — Such an execution binds personality as well as realty. *Grant v. Cole*, 23 Wash. 542.

*West Virginia.* — *Erb v. Hendricks Co.*, 50 W. Va. 28; *Joseph Speidel Grocery Co. v. Warder*, 56 W. Va. 602.

**Requisites of Transcript.** — *Merrick v. Carter*, 205 Ill. 73.

An execution issued without any transcript at all is void. *Sterlinger v. Mackie*, (W. Va. 1905) 49 S. E. Rep. 942.

**Requisites of Execution Issued by Justice.** — *Cox v. Spurgin*, 210 Ill. 398; *Langford v. Few*, 146 Mo. 142, 69 Am. St. Rep. 606; *Reed v. Lowe*, 163 Mo. 519, 85 Am. St. Rep. 578; *Mathewson v. Kilburn*, 183 Mo. 110. See also *Levadas v. Beach*, 119 Ga. 613; *Walker v. Columbus State Bank*, 64 Kan. 884, 67 Pac. Rep. 552; *Littlefield v. Ramsey*, 181 Mo. 613.

But it has been held that no such presumption exists. *Langford v. Few*, 146 Mo. 142, 69 Am. St. Rep. 606; *Reed v. Lowe*, 163 Mo. 519, 85 Am. St. Rep. 578.

Before an execution issued by a justice of the peace can be levied on property in another county, it must be indorsed by the official signature of a justice of the latter county. *Dickson v. Burwell*, 113 Ga. 93.

**616.** 2. Issuance by State Courts Under Authority of Statute. — *Merrick v. Carter*, 205 Ill. 73.

**8. Who May Procure the Writ in General.** — *Lamb v. Dart*, 108 Ga. 602; *Brewer v. Nutt*, 118 Ga. 257; *Decker v. St. Louis, etc., R. Co.*, 92 Mo. App. 50; *Lambert v. Metropolitan St. R. Co.*, (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 579, affirmed 56 N. Y. App. Div. 624.

In *Illinois* a foreign corporation, though with no office in the state where service may be had, may procure a writ for collection of debts due it. *John Spry Lumber Co. v. Chappell*, 184 Ill. 539.

**617.** 1. Procurement of Writ by Attorney. — *Scott v. Bedell*, 108 Ga. 205.

**7. Issuance by Clerk upon Application — Ministerial Duty.** — *Whitmore v. Stewart*, 61 Kan. 254; *Scott v. Bedell*, 108 Ga. 205; *Braswell v. Brown*, 112 Ga. 740; *Williams v. McArthur*, 111 Ga. 28; *State v. Renick*, 157 Mo. 202; *Joseph Speidel Grocery Co. v. Warder*, 56 W. Va. 602.

**618.** See note 1.

Remedy Against Officer for Refusal or Failure to Issue — *Mandamus*. — See note 2.

Action for Damages. — See note 3.

4. Against Whom Writ May Issue — *b*. MARRIED WOMEN. — See note 6.

**619.** *d*. PUBLIC CORPORATIONS — (2) *Municipal Corporations*. — See notes 2, 3, 4.

**620.** *e*. QUASI-PUBLIC CORPORATIONS. — See notes 1, 2.

Abandonment of Franchise. — See note 3.

*f*. PRIVATE CORPORATIONS. — See note 4.

**621.** *g*. EXECUTORS AND ADMINISTRATORS — In Representative Capacity. — See notes 1, 2.

**618.** 1. When Proper Party Applies, Clerk Has No Discretion. — *Scott v. Bedell*, 108 Ga. 205; *Whitmore v. Stewart*, 61 Kan. 254; *State v. Renick*, 157 Mo. 292.

2. *Mandamus* Against Clerk to Compel Issuance of Writ. — *Scott v. Bedell*, 108 Ga. 205; *Whitmore v. Stewart*, 61 Kan. 254; *State v. Renick*, 157 Mo. 292. See also *People v. Woodbury*, 70 N. Y. App. Div. 416.

*Mandamus* May Also Issue Against the Officer to compel him to execute the writ. *Armstrong v. Stansel*, (Fla. 1904) 36 So. Rep. 762; *State v. Stokes*, 99 Mo. App. 236.

3. Action for Damages Against Clerk for Refusal to Issue Writ. — *Whitmore v. Stewart*, 61 Kan. 254.

6. Issuance of Writ Against Married Women under Statute. — *Smoot v. Judd*, 161 Mo. 673, 84 Am. St. Rep. 738; *Lowenstein v. Young*, 8 Okla. 216. See also *Desmond v. Young*, 173 Mass. 90.

**619.** 2. Property of Municipality for Public Purposes Not Subject to Execution. — *Kerr v. New Orleans*, (C. C. A.) 126 Fed. Rep. 920; *Walden v. Whigham*, 120 Ga. 646; *New Orleans v. Werlein*, 50 La. Ann. 1251; *Monroe v. Johnson*, 106 La. 350; *Gilbert v. Berlin*, 70 N. H. 396.

Taxes, Public Revenue, or property acquired in the collection of the same, are not subject to execution against the city. *Gordon v. Thorp*, (Tex. Civ. App. 1899) 53 S. W. Rep. 357.

3. Execution Against Private Property of Municipality. — *Kerr v. New Orleans*, (C. C. A.) 126 Fed. Rep. 920; *Ware v. Pleasant Grove Tp.*, 9 Kan. App. 700; *Monroe v. Johnson*, 106 La. 350; *Gordon v. Thorp*, (Tex. Civ. App. 1899) 53 S. W. Rep. 357. See also *Helena v. U. S.*, (C. C. A.) 104 Fed. Rep. 113; *State v. New Orleans*, 111 La. 374.

4. General Exemption in Favor of Municipality. — *Walden v. Whigham*, 120 Ga. 646; *Dolton v. Dolton*, 196 Ill. 154; *Geneva v. People*, 98 Ill. App. 315; *Princeville v. Hitchcock*, 101 Ill. App. 588; *Fairbanks Co. v. Kirk*, 12 Pa. Super. Ct. 210. See also *Weaver v. Ogden City*, 111 Fed. Rep. 323.

**620.** 1. Writ Not Issuable Against Property Used by Quasi-public Corporation for Public Purposes. — *Sherman County Irrigation, etc., Co. v. Drake*, 65 Neb. 699; *State v. Middletown Turnpike Co.*, 65 N. J. L. 73; *Wall v. Norfolk, etc., R. Co.*, 52 W. Va. 489, quoting 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 620. But see *Risdon Iron, etc., Works v. Citizens' Traction Co.*, 122

Cal. 94, 97 Am. St. Rep. 25; *Crouch v. Dakota, etc., R. Co.*, (S. Dak. 1904) 101 N. W. Rep. 722.

By Statute in Maine the real and personal property of any corporation is liable to levy on execution. *Poor v. Chapin*, 97 Me. 295.

In Texas, by statute all property of railroads of whatsoever character, including franchises, is subject to levy and sale. *San Antonio, etc., R. Co. v. San Antonio, etc., R. Co.*, (Tex. Civ. App. 1903) 76 S. W. Rep. 782.

2. Property Not Necessary for Public Uses. — *Risdon Iron, etc., Works v. Citizens' Traction Co.*, 122 Cal. 94, 68 Am. St. Rep. 25; *Wall v. Norfolk, etc., R. Co.*, 52 W. Va. 489, quoting 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 620.

3. Abandonment of Franchise Terminates Exemption. — It has been held in *Nebraska* that the exemption continues, in the absence of statutory enactment, though the corporation has been guilty of nonuser and abandonment. *Sherman County Irrigation, etc., Co. v. Drake*, 65 Neb. 699.

4. Issue of Writ Against Private Corporation. — *Jones v. Newman*, 110 Ga. 259; *Thompson v. Pfeiffer*, 60 Kan. 409; *Warner v. Imbeau*, 63 Kan. 415; *Poor v. Chapin*, 97 Me. 295; *Joseph Speidel Grocery Co. v. Warder*, 56 W. Va. 602.

**621.** 1. Writ Against Personal Representative in Representative Capacity at Common Law. — *Coker v. McConnell*, 104 Ga. 482; *Marshall v. Charland*, 109 Ga. 306; *Porter v. Rountree*, 111 Ga. 369; *Kinkade v. Gibson*, 209 Ill. 246; *Murphy v. Busick*, 22 Ind. App. 247; *DeLoach v. Sarratt*, 58 S. Car. 117; *Hendrix v. Holden*, 58 S. Car. 495; *Brock v. Kirkpatrick*, 60 S. Car. 322, 85 Am. St. Rep. 847.

2. Execution Against Individual Property of Representative — *Alabama*. — *Whetstone v. McQueen*, 137 Ala. 301.

*Delaware*. — *Allen v. Leach*, 7 Del. Ch. 232.

*Georgia*. — *Marshall v. Charland*, 109 Ga. 306; *Jones v. Dodd*, 108 Ga. 513; *Hurst v. DeKalb County*, 110 Ga. 33; *Porter v. Rountree*, 111 Ga. 369; *Stephens v. Atlanta*, 119 Ga. 666.

*Iowa*. — *Applegate v. Applegate*, 107 Iowa 312.

*Nebraska*. — *Lydick v. Chaney*, 64 Neb. 288.

*New York*. — *Matter of Quackenbos*, (Surrogate Ct.) 38 Misc. (N. Y.) 66.

*South Carolina*. — *DeLoach v. Sarratt*, 58 S. Car. 117; *Hendrix v. Holden*, 58 S. Car. 495;

*Brock v. Kirkpatrick*, 60 S. Car. 322, 85 Am. St. Rep. 847.

*Texas*. — *Pinkard v. Willis*, 24 Tex. App. 69;



**621.** By Statute. — See note 3.

In Individual Capacity. — See note 4.

### III. PROPERTY SUBJECT TO EXECUTION — 1. Personal Property —

*a.* MONEY. — See notes 6, 7.

**622.** See note 1.

*b.* CROPS, PLANTS, AND TREES — *Fructus Industriales*. — See note 3.

*Fructus Naturales*. — See note 4.

*c.* FIXTURES. — See note 5.

**623.** *d.* CHOSSES IN ACTION — (1) *In General*. — See notes 1, 3, 4.

Texas Sav. Loan Assoc. *v.* Banker, 26 Tex. Civ. App. 495.

**621.** 3. Statutes Prohibiting Execution Against Personal Representative. — Kilpatrick *v.* Haley, 14 Colo. App. 399.

By the New York Code of Civil Procedure. — Matter of Quackenbos, (Surrogate Ct.) 38 Misc. (N. Y.) 66.

Execution is granted by section 1240 of the Code against the executor when a final judgment has been rendered directing him to pay over funds in his hands to the beneficiary, and he has refused to do so. Harris *v.* Elliott, 163 N. Y. 269.

4. Writ Not Issuable Against Administrator Individually upon Judgment *De Bonis Testatoris*. — Texas Sav. Loan Assoc. *v.* Banker, 26 Tex. App. 117.

6. Money — *United States*. — New Orleans *v.* Stempel, 175 U. S. 309.

California. — Matter of Brown, 123 Cal. 399, 69 Am. St. Rep. 74.

Indiana. — Murphy *v.* Busick, 22 Ind. App. 247.

Massachusetts. — Hoar *v.* Tilden, 178 Mass. 157.

Nebraska. — Stuart *v.* Burcham, 62 Neb. 84, 89 Am. St. Rep. 739.

New Jersey. — Spencer *v.* Morris, 67 N. J. L. 500; White *v.* Koehler, 70 N. J. L. 526.

New York. — McNeeley *v.* Welz, 166 N. Y. 124; Bull *v.* Case, 165 N. Y. 578; Matter of Wyman, 76 N. Y. App. Div. 292.

Washington. — Adams *v.* National Bank of Commerce, 30 Wash. 20.

Wisconsin. — Williams *v.* Smith, 117 Wis. 142.

7. Statutes Making Money Subject to Execution. — Bull *v.* Case, 165 N. Y. 578; McNeeley *v.* Welz, 166 N. Y. 124; Harris *v.* Elliott, 163 N. Y. 269; Muller *v.* Flavin, 13 S. Dak. 595.

**622.** 1. Money Taken Applied in Satisfaction, Not Sold. — McNeeley *v.* Welz, 166 N. Y. 124; Adams *v.* National Bank of Commerce, 30 Wash. 20.

3. Crops Subject to Execution — *California*. — Curtner *v.* Lyndon, 128 Cal. 35; Summerville *v.* Kelliher, 144 Cal. 155.

Georgia. — Sams *v.* Thompson Hiles Co., 110 Ga. 648; Milton *v.* Albany Fertilizer Co., 113 Ga. 603; Blitch *v.* Lee, 115 Ga. 112; Garrison *v.* Parker, 117 Ga. 537.

Kentucky. — Goepper *v.* Phoenix Brewing Co., 115 Ky. 708.

Maryland. — State *v.* Fowler, 88 Md. 601, 71 Am. St. Rep. 452; Arnold *v.* Fowler, 94 Md. 497, 89 Am. St. Rep. 444.

Nebraska. — Johns *v.* Kamarad, (Neb. 1901) 96 N. W. Rep. 118; Hayes *v.* First State Bank, (Neb. 1904) 98 N. W. Rep. 423.

South Carolina. — Hendrix *v.* Holden, 38 S. Car. 495.

Statutes in Some States Protect Growing Crops Not Matured. — Tipton *v.* Martzell, 21 Wash. 273.

After Being Harvested. — Hayes *v.* First State Bank, (Neb. 1904) 98 N. W. Rep. 423. See also King *v.* Bosserman, 13 Pa. Super. Ct. 480; Tipton *v.* Martzell, 21 Wash. 273.

Matured crops not severed from the land go with the realty. Allen *v.* Ashburn, 27 Tex. Civ. App. 239.

An ungathered crop is considered part of the realty and not subject as personality. Parker *v.* Hale, (Tex. Civ. App. 1903) 78 S. W. Rep. 555.

Hops, etc., used in making beer, and unfinished beer in a state of intermediate fermentation are held not to be subject to execution, on the ground that there would be no market for the property and it would be worthless outside of the vats, cellars, etc. Goepper *v.* Phoenix Brewing Co., 115 Ky. 708.

Where the judgment debtor rented the land prior to the sale of land under execution, and the tenant planted crops and paid cash rent, it was held that the execution lien did not attach to the crops, and that the tenant could hold them against the execution purchaser. Johnson *v.* Cook, 96 Mo. App. 442.

4. Perennials Protected. — In Maryland it has been held that a growing crop of peaches is *fructus industriales* and so subject to execution; the trees or plants, etc., are *fructus naturales* and go with the realty. State *v.* Fowler, 88 Md. 601, 71 Am. St. Rep. 452; Arnold *v.* Fowler, 94 Md. 497, 89 Am. St. Rep. 444.

5. Chattels Annexed to Realty. — Broadbuss *v.* Smith, 121 Ala. 335, 77 Am. St. Rep. 61; Pritchett *v.* Samuel Weichselbaum Co., 119 Ga. 293; Monmouth Second Nat. Bank *v.* Gilbert, 174 Ill. 485, 66 Am. St. Rep. 306; Off *v.* Finkelstein, 200 Ill. 40; Crane Iron Works *v.* Wilkes, 64 N. J. L. 193; Edmunds *v.* Hobbie Piano Co., 97 Va. 588. See also Seiberling *v.* Miller, 207 Ill. 443; Beatty *v.* Smith, 14 S. Dak. 24.

A baker's tables, trays, etc., fastened to a building by nails are not subject to execution as personality. Taylor *v.* Plunkett, 4 Penn. (Del.) 467. See also Bender *v.* King, 111 Fed. Rep. 60.

**623.** 1. Choses in Action Not Subject to Execution at Common Law — *United States*. — New Orleans *v.* Stempel, 175 U. S. 309, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 623.

Georgia. — Armour Packing Co. *v.* Wynn, 119 Ga. 683.

Kentucky. — Goepper *v.* Phoenix Brewing Co., 115 Ky. 708.

Michigan. — Feige *v.* Burt, 118 Mich. 243, 74 Am. St. Rep. 390.

**623.** By Statute. — See note 6.

**624.** *c.* EQUITABLE INTERESTS. — See notes 2, 3.

*f.* INTERESTS OF MORTGAGOR AND MORTGAGEE IN CHATTELS —

Interest of Mortgagor. — See notes 5, 6, 7.

**625.** See note 1.

Statutes Allowing Levy on Equity of Redemption. — See note 2.

Interest of Mortgagee. — See note 5.

*g.* PROPERTY HELD ON BAILMENT OR BY AGENTS. — See notes 6, 7.

*Missouri.* — Caffery *v.* Choctaw Coal, etc., Co., 95 Mo. App. 174.

*New York.* — McNeeley *v.* Welz, 166 N. Y. 124.

*Pennsylvania.* — Tradesmen's Bldg., etc., Assoc. No. 3 *v.* Maher, 9 Pa. Super. Ct. 340.

*Wisconsin.* — O. L. Packard Machinery Co. *v.* Laev, 100 Wis. 644.

Even though the statutes make choses in action personal property and subject to execution, there are many choses in action which, from their intangible character, seem to be incapable of being made the subjects of direct levy and sale. Hoxie *v.* Bryant, 131 Cal. 85.

**623. 3. Bonds, Bills, and Notes.** — New Orleans *v.* Stempel, 175 U. S. 309, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 623.

**Tax Certificates.** — The rule of the text has been applied to liquor tax certificates. McNeeley *v.* Welz, 166 N. Y. 124.

**4. Book Accounts.** — Hoxie *v.* Bryant, 131 Cal. 85.

**6. Statutes Making Securities Subject to Execution** — *United States.* — New Orleans *v.* Stempel, 175 U. S. 309, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 623.

*California.* — Hoxie *v.* Bryant, 131 Cal. 85.

*Connecticut.* — Bartram *v.* Hopkins, 71 Conn. 505.

*Massachusetts.* — Desmond *v.* Young, 173 Mass. 90.

*Montana.* — *In re* Downey, (Mont. 1904) 78 Pac. Rep. 772.

*New Jersey.* — Walsh *v.* Rosso, 59 N. J. Eq. 123.

*New York.* — Bull *v.* Case, 165 N. Y. 578; McNeeley *v.* Welz, 166 N. Y. 124.

*South Dakota.* — Lindskog *v.* Schouweiler, 12 S. Dak. 176.

*Virginia.* — Boisseau *v.* Bass, 100 Va. 207, 93 Am. St. Rep. 956, 4 Va. Sup. Ct. 105.

**624. 2. Common-law Rule as to Equitable Interests.** — Snyder *v.* Smith, 185 Mass. 58; Feige *v.* Burt, 118 Mich. 243, 74 Am. St. Rep. 390; Murphy *v.* Wilson, 84 Mo. App. 178; North American Trust Co. *v.* Aymar, (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 576; Phoenix Min., etc., Co. *v.* Scott, 20 Wash. 48.

The income from personal property held in trust is not exempt from execution. Williams *v.* Smith, 117 Wis. 142. See also Matter of Seymour, 76 N. Y. App. Div. 300; Kelsey *v.* Webb, 94 N. Y. App. Div. 571.

**3. Enforcing Judgment Lien Against Equitable Property in Chancery.** — Snyder *v.* Smith, 185 Mass. 58; North American Trust Co. *v.* Aymar, (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 576. See also Craft *v.* Brandow, 61 N. Y. App. Div. 247.

**5. At Common Law Mortgagor's Interest Not Subject to Levy.** — Anderson *v.* Montgomery

County Nat. Bank, 64 Kan. 587; Schneider *v.* Anderson, 77 Minn. 124; Moore *v.* Calvert, 8 Okla. 358; Biehler *v.* Irwin, (Supm. Ct. App. T.) 84 N. Y. Supp. 574; Craft *v.* Brandow, 61 N. Y. App. Div. 247; McKibbin *v.* Brigham, 18 Utah 78.

**6. Mortgage Fraudulent as to Creditors.** — Fletcher *v.* Wrighton, 184 Mass. 547; Schneider *v.* Anderson, 77 Minn. 124; Howard *v.* Baum, 73 Mo. App. 235; McKibbin *v.* Brigham, 18 Utah 78.

**7. When Mortgagor Retains Possession the Property May Be Levied On.** — Christian, etc., Grocery Co. *v.* Michael, 121 Ala. 84, 77 Am. St. Rep. 30; Monmouth Second Nat. Bank *v.* Gilbert, 174 Ill. 485, 66 Am. St. Rep. 306; Fletcher *v.* Wrighton, 184 Mass. 547; Johns *v.* Kamarad, (Neb. 1901) 96 N. W. Rep. 118; Hayes *v.* First State Bank, (Neb. 1904) 98 N. W. Rep. 423; McNeeley *v.* Welz, 166 N. Y. 124; McCrea *v.* Hopper, 35 N. Y. App. Div. 572, affirmed 165 N. Y. 633; McKibbin *v.* Brigham, 18 Utah 78.

**If After Condition Broken the Mortgagor Retains Possession.** — Christian, etc., Grocery Co. *v.* Michael, 121 Ala. 84, 77 Am. St. Rep. 30.

In *Missouri* the rule has been long and well settled that the mortgagor's equity after condition broken is not subject to seizure and sale under execution at the instance of a creditor. Though at the time of the levy the mortgagor was in possession of the property, yet as the debt secured is past due, the mortgagee is then entitled to the immediate possession, and therefore the mortgagor has no interest in the mortgaged property that is subject to levy and sale under the execution. Burge *v.* Hunter, 93 Mo. App. 639.

**625. 1. When Mortgagee in Possession Not Subject as Mortgagor's Property.** — Monmouth Second Nat. Bank *v.* Gilbert, 174 Ill. 485, 66 Am. St. Rep. 306; Anderson *v.* Montgomery County Nat. Bank, 64 Kan. 587; Newman *v.* Mantle, 109 Ky. 292, 95 Am. St. Rep. 372; Biehler *v.* Irwin, (Supm. Ct. App. T.) 84 N. Y. Supp. 574; Craft *v.* Brandow, 61 N. Y. App. Div. 247; Moore *v.* Calvert, 8 Okla. 358.

**2. Statutory Enactments Changing the Common-law Rule.** — State *v.* Cryts, 87 Mo. App. 440; Osborne *v.* Hughey, 14 Okla. 29; Muller *v.* Flavin, 13 S. Dak. 595; Plunkett *v.* Hanschka, 14 S. Dak. 544.

**5. Mortgagee's Title Held Absolute on Default.** — Monmouth Second Nat. Bank *v.* Gilbert, 174 Ill. 485, 66 Am. St. Rep. 306; Biehler *v.* Irwin, (Supm. Ct. App. T.) 84 N. Y. Supp. 574; Thompson *v.* Fairbanks, 75 Vt. 361, 104 Am. St. Rep. 899.

**6. Fleet *v.* Hertz, 201 Ill. 603, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 625; Gaar *v.* Nichols, 115 Iowa 223.**

**Property in the Possession of a Factor.** — But

**626.** See note 1.

Levy on Property Bailed under Execution Against Bailor. — See note 2.

*h.* REMAINDERS AND FUTURE INTERESTS IN CHATTELS — Future

Interests to Vest on Performance of Contract. — See note 5.

**627.** See note 1.*j.* CORPORATE FRANCHISES. — See note 4.**628.** By Statute. — See note 1.*k.* PATENT RIGHTS AND COPYRIGHTS. — See notes 3, 5.**629.** *l.* JUDGMENTS. — See note 3.*m.* LEASEHOLD INTERESTS — In Real Property. — See note 4.

Whether Interest to Be Taken as Realty or Personalty. — See notes 6, 7.

**630.** *o.* PROPERTY OF WIFE FOR DEBTS OF HUSBAND. — See note 3.

Choses in Action. — See note 5.

**2. Real Property** — *a.* IN GENERAL. — See note 9.**631.** *b.* LIFE ESTATES. — See notes 3, 4.

see *Edmunds v. Hobbie Piano Co.*, 97 Va. 588, where, under the statute in *Virginia*, it is held that if one does business in his own name, without any addition and not under license as an auctioneer or commission merchant, all property, etc., acquired or used in the business, whether owned by him or not, is liable for his debts.

**Where One Holds Property as an Agent.** — *Jones v. Chenault*, 124 Ala. 610, 82 Am. St. Rep. 211; *Reeves v. McNeill*, 127 Ala. 175; *Pease v. Rand*, etc., Desk Co., 100 Ill. App. 244; *Magerstadt v. Schaefer*, 110 Ill. App. 166, *affirmed* 213 Ill. 351; *Sperling v. Stubblefield*, 105 Mo. App. 489; *Cox v. Patten*, (Tex. Civ. App. 1902) 66 S. W. Rep. 64; *Washington Nat. Bank v. Moyer*, 22 Wash. 622.

**625.** **7.** *Jones v. Chenault*, 124 Ala. 610, 82 Am. St. Rep. 211; *Reeves v. McNeill*, 127 Ala. 175; *Fleet v. Hertz*, 201 Ill. 603, *citing* 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 625; *Pease v. Rand*, etc., Desk Co., 100 Ill. App. 244; *Gaar v. Nichols*, 115 Iowa 223; *Cox v. Patten*, (Tex. Civ. App. 1902) 66 S. W. Rep. 64; *Washington Nat. Bank v. Moyer*, 22 Wash. 622.

**In Mississippi.** — *Longino v. Delta Bank*, 76 Miss. 395.

**626.** **1.** *Partlow v. Lickliter*, 100 Va. 631. See also *Wynn v. Irvine's Georgia Music House*, 109 Ga. 287; *Edmunds v. Hobbie Piano Co.*, 97 Va. 588.

**2.** *Newman v. Mantle*, 109 Ky. 292, 95 Am. St. Rep. 372.

**5.** *Boisseau v. Bass*, 100 Va. 207, 93 Am. St. Rep. 956, 4 Va. Sup. Ct. 105.

**627.** **1.** Future Earnings are not subject to execution. *Dease v. Reese*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 657.

**4. Franchises Not Subject to Execution at Common Law.** — *State v. Middletown Turnpike Co.*, 65 N. J. L. 73; *Wall v. Norfolk*, etc., R. Co., 52 W. Va. 489.

**628.** **1.** Statute Providing for Levy on Franchises. — *State v. Middletown Turnpike Co.*, 65 N. J. L. 73; *San Antonio*, etc., R. Co. v. *San Antonio*, etc., R. Co., (Tex. Civ. App. 1903) 76 S. W. Rep. 782.

**3. Copyrights and Patent Rights Not Liable to Execution at Law.** — *Wolf v. Bonta Plate Glass Co.*, 5 Lack. Leg. N. (Pa.) 51, 7 Northam. Co. Rep. (Pa.) 397.

**5. Patented or Copyrighted Articles Subject to Execution.** — An envelope which contains a complete description of the secret formula and process for the manufacture of compound oxygen gas is a substantial article capable of manual caption, sale, and delivery, and, therefore, the envelope and its contents may be sold on the common-law writ of execution. *Hanley v. Fidelity Ins.*, etc., Co., 8 Pa. Dist. 207.

**629.** **3. Jurisdictions Not Allowing Sale of Judgments under Execution.** — *Hoxie v. Bryant*, 131 Cal. 85.

**4. Leasehold Interests in Realty Subject to Execution.** — *Summerville v. Kelliher*, 144 Cal. 155; *Blitch v. Lee*, 115 Ga. 112; *Garrison v. Parker*, 117 Ga. 537; *Smith v. Scanlan*, 106 Ky. 572; *Yank v. Bordeaux*, 23 Mont. 205, 75 Am. St. Rep. 522; *Acklin v. Waltermier*, 10 Ohio Cir. Dec. 629, 19 Ohio Cir. Ct. 372; *Lefever v. Armstrong*, 15 Pa. Super. Ct. 565; *Reilley v. Anderson*, 33 Wash. 58.

**6. Leasehold Interests in Realty to Be Levied upon as Realty under Statute.** — *Reilley v. Anderson*, 33 Wash. 58, *quoting* 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 629.

**7. Leasehold Interests in Realty to Be Levied upon as Personalty at Common Law.** — *Reilley v. Anderson*, 33 Wash. 58.

**630.** **3. Wife's Chattels in Possession Pass to Husband by Marriage.** — *Desmond v. Young*, 173 Mass. 90; *Glaves v. Wood*, 87 Mo. App. 92; *Hewett v. Usher*, 11 S. Dak. 512.

**5. Husband May Reduce to Possession Wife's Choses in Action.** — *Scott v. Powers*, 78 S. W. Rep. 408, 25 Ky. L. Rep. 1640; *Glaves v. Wood*, 87 Mo. App. 92.

**9. Real Property — Rule at Common Law.** — *Clark v. Allen*, 117 Fed. Rep. 699; *Reddick v. Long*, 124 Ala. 260, wherein it is said that the remedy for the subjection of lands to a fi. fa. is wholly statutory.

**631.** **3. Life Estates.** — *Hatcher v. Smith*, 103 Ga. 843; *Henderson v. Harness*, 176 Ill. 302, 184 Ill. 520; *Du Four v. Bubb*, 199 Pa. St. 107; *Kreamer v. Fleming*, 200 Pa. St. 414; *Canada v. Holman*, (Tenn. Ch. 1901) 62 S. W. Rep. 372.

Where a life estate is levied on and sold as if it were an estate in fee, neither the order of sale nor indorsement of the levy showing otherwise, the levy and sale are void. *Gray v. Ward*, (Tenn. Ch. 1898) 52 S. W. Rep. 1028.



**631.** *c.* **CONDITIONAL ESTATES — An Offer for the Sale of Land.** — See note 5. **An Estate in Fee, or in Tail, Defeasible upon a Contingency.** — See note 7.

*e.* **REVERSIONS AND REMAINDERS.** — See notes 11, 12.

**632.** See notes 1, 2.

*f.* **EQUITABLE INTERESTS.** — See notes 3, 4.

*g.* **TRUST ESTATES — (1) *Interest of Cestui Que Trust.*** — See note 5.

**633.** See notes 1, 2.

**Beneficial Interest under Resulting Trust.** — See notes 3, 4.

**634.** (2) ***Naked Title of Trustee.*** — See note 1.

*h.* **INTERESTS OF HEIR AND DEVISEE.** — See note 2.

**631.** 4. *Du Four v. Bubb*, 199 Pa. St. 107.

5. *Provident L., etc., Co. v. Mills*, 91 Fed. Rep. 435.

7. *Higgins v. Downs*, 101 N. Y. App. Div. 119. See also *Hall v. French*, 165 Mo. 430; *Brown v. Tilley*, 25 R. I. 579.

11. **Reversion.** — *Rusk v. Hill*, 121 Ga. 378. But see *Brown v. Tilley*, 25 R. I. 579.

12. **Vested Remainder.** — *Dinsmoor v. Rowse*, 200 Ill. 555; *Taylor v. Taylor*, 118 Iowa 407; *Roach v. Dance*, 80 S. W. Rep. 1097, 26 Ky. L. Rep. 157; *Davis v. Brown*, (Tenn. Ch. 1901) 62 S. W. Rep. 381.

**632.** 1. **Contingent Remainder.** — *Hatcher v. Smith*, 103 Ga. 843; *Taylor v. Taylor*, 118 Iowa 407; *Nichols v. Guthrie*, 109 Tenn. 535.

2. See *Taylor v. Taylor*, 118 Iowa 407, wherein the court, while maintaining the general rule that contingent remainders are not subject to levy, say that where "the possibility is coupled with an interest," it may be subject to levy and execution.

3. **Execution Against Equitable Estates Not Allowed at Common Law.** — *Opelika Bank v. Kiser*, 119 Ala. 194; *Goepper v. Phoenix Brewing Co.*, 115 Ky. 708; *National Bank v. Tennessee Coal, etc., Co.*, 62 Ohio St. 564; *Silver v. Lee*, 38 Oregon 508; *Wilkins v. Johnson*, (Tenn. Ch. 1899) 54 S. W. Rep. 1001; *Phoenix Min., etc., Co. v. Scott*, 20 Wash. 48. See also *Dixon v. Fuller*, 196 Pa. St. 349.

4. **Rule under Statute as to Executions Against Equitable Estates — *United States.*** — *Schofield v. Ute Coal, etc., Co.*, (C. C. A.) 92 Fed. Rep. 269; *Green v. Daniels*, (C. C. A.) 115 Fed. Rep. 449.

*Alabama.* — *Merrill v. Witherby*, 120 Ala. 418, 74 Am. St. Rep. 39; *Opelika Bank v. Kiser*, 119 Ala. 194.

*Colorado.* — *Bell v. Murray*, 13 Colo. App. 217.

*Georgia.* — *Morris v. Rogers*, 104 Ga. 705.

*Illinois.* — *Whiteford v. Hootman*, 104 Ill. App. 562; *Henderson v. Harness*, 176 Ill. 302.

*Iowa.* — *Sheppard v. Messenger*, 107 Iowa 717.

*Minnesota.* — *Carey-Lombard Lumber Co. v. Bierbauer*, 76 Minn. 434; *Hook v. Northwest Thresher Co.*, 91 Minn. 482.

*Missouri.* — *Ryan v. Bradbury*, 89 Mo. App. 665.

*New Jersey.* — *Walsh v. Rosso*, (N. J. 1898) 41 Atl. Rep. 669.

*Pennsylvania.* — *Eberly v. Shirk*, 206 Pa. St. 414.

*Tennessee.* — *Renshaw v. Tullahonna First Nat. Bank*, (Tenn. Ch. 1900) 63 S. W. Rep. 194.

*Texas.* — *Matula v. Lane*, (Tex. Civ. App. 1900) 56 S. W. Rep. 112.

The *Ohio* statute makes "lands and tenements, including vested interests therein," subject to levy and sale for the payment of debts. *National Bank v. Tennessee Coal, etc., R. Co.*, 62 Ohio St. 564.

5. **Estate of Cestui Que Trust Not Subject to Execution at Common Law.** — *Henderson v. Harness*, 176 Ill. 302; *Silver v. Lee*, 38 Oregon 508.

**633.** 1. **Trust Estates Subject to Execution under Statute in United States.** — *Oliver v. Wilhite*, 201 Ill. 552; *Zimmerman v. Makepeace*, 152 Ind. 199; *Ebelharr v. Tennyly*, 80 S. W. Rep. 459, 25 Ky. L. Rep. 2257; *Walsh v. Rosso*, (N. J. 1898) 41 Atl. Rep. 669; *Silver v. Lee*, 38 Oregon 508.

While the general rule is as stated in the text, in *Texas* a spendthrift trust cannot be subjected to execution and levy. *Wood v. McClelland*, (Tex. Civ. App. 1899) 53 S. W. Rep. 381.

2. **Distinction Between Active and Passive Trusts.** — *Henderson v. Harness*, 176 Ill. 302; *Zimmerman v. Makepeace*, 152 Ind. 199; *Robinson v. Ingram*, 126 N. Car. 327; *Brace v. Van Eps*, 12 S. Dak. 191.

3. **Statutes Allowing Execution Against Beneficial Interest under Resulting Trust.** — *Ryan v. Bradbury*, 89 Mo. App. 665; *Walsh v. Rosso*, 59 N. J. Eq. 123; *Hirshfeld v. Howard*, (Tex. Civ. App. 1901) 60 S. W. Rep. 806; *Jones v. Meyer Bros. Drug Co.*, 25 Tex. Civ. App. 234.

But the property cannot be reached by execution against the trustee. *Hicks v. Pogue*, 33 Tex. Civ. App. 333.

4. **Statutes Not Allowing Execution Against Beneficial Interest under Resulting Trust.** — *Silver v. Lee*, 38 Oregon 508.

**634.** 1. ***Naked Title of Trustee Not Subject to Execution.*** — *Hardman v. Cooper*, 107 Ga. 251; *Hurst v. De Kalb County*, 110 Ga. 33; *Burt v. Kuhnen*, 113 Ga. 1143; *Bush v. Herring*, 113 Iowa 158; *Colyar v. Capital City Bank*, 103 Tenn. 723; *Brotherton v. Anderson*, 27 Tex. Civ. App. 587; *Hicks v. Pogue*, 33 Tex. Civ. App. 333.

The rule is different where the holder of the legal title has executed an unrecorded declaration of trust. *Home Sav., etc., Bank v. Peoria Agricultural, etc., Soc.*, 206 Ill. 9, 99 Am. St. Rep. 132.

2. **Heirs and Devisees.** — *Hardy v. Wallis*, 103 Ill. App. 141; *Lahr v. Ulmer*, 27 Ind. App. 107; *Atlee v. Bullard*, 123 Iowa 274; *Byerly v. Sherman*, 126 Iowa 447; *Greer v. Simrall*, 59 S. W. Rep. 759, 22 Ky. L. Rep. 1037; *Wright v. Ry-*

**634.** Real Estate to Be Converted into Money. — See note 4.

**635.** Devise — Option to Purchase. — See note 1.

i. ESTATE OF COTENANT. — See note 2.

j. INTERESTS OF MORTGAGOR AND MORTGAGEE — At Common Law.

— See note 4.

Under Modern Law. — See note 5.

**636.** k. INTEREST OF PURCHASER AT JUDICIAL OR EXECUTION SALE.

— See notes 2, 3.

l. RIGHT OF REDEMPTION FROM JUDICIAL OR EXECUTION SALE.

— See note 5.

**637.** m. LAND CONTRACTS — INTERESTS OF VENDOR AND VENDEE. —

See note 1.

**638.** See notes 1, 2.

land, 92 Md. 645; McCormick v. Skelly, 201 Pa. St. 184; Sanger v. Collum, (Tex. Civ. App. 1904) 78 S. W. Rep. 401.

Under an execution against the husband of a deceased wife, his unadmeasured distributive share in her real estate is not subject to levy. Brightman v. Morgan, 111 Iowa 482.

**634.** 4. But where the parties have elected to treat the property as real estate, this amounts to a reconversion, and the realty is subject. Atlee v. Bullard, 123 Iowa 274.

**635.** 1. Unrecorded Sales. — Where such sales were not recorded as required by law, the purchaser at execution sale takes good title against the unrecorded deeds. Sanger v. Collum, (Tex. Civ. App. 1904) 78 S. W. Rep. 401.

2. Interest of Cotenant — Alabama. — Emrich v. Gilbert Mfg. Co., 138 Ala. 316.

Georgia. — McDaniel v. Columbus Fertilizer Co., 109 Ga. 284.

Illinois. — Dinsmoor v. Rowse, 200 Ill. 555; Hardy v. Wallis, 103 Ill. App. 141; Miller v. McAlister, 197 Ill. 72.

Indiana. — Union Cent. L. Ins. Co. v. Dodds, 155 Ind. 365; Wagner v. Carskadon, (Ind. 1901) 60 N. E. Rep. 731; Lahr v. Ulmer, 27 Ind. App. 107.

Iowa. — Rippe v. Badger, 125 Iowa 725.

Kansas. — Trowbridge v. Cunningham, 63 Kan. 847.

Kentucky. — Stevenson v. Riddell, 68 S. W. Rep. 649, 24 Ky. L. Rep. 404.

Missouri. — Smoot v. Judd, 161 Mo. 673, 84 Am. St. Rep. 738.

Oregon. — Poppleton v. Bryan, 36 Oregon 69.

Texas. — Campbell v. Antis, 21 Tex. Civ. App. 161; Modisett v. National Bank, 23 Tex. Civ. App. 589; Boyce v. Hornberger, 29 Tex. Civ. App. 337; Sanger v. Collum, (Tex. Civ. App. 1904) 78 S. W. Rep. 401.

Utah. — Spalding v. Allred, 23 Utah 354.

4. Equity of Redemption — Common-law Rule. — Williams v. Baker, 62 N. J. Eq. 563; Bartlett v. Gilcreast, 72 N. H. 145; Wilkins v. Johnson, (Tenn. Ch. 1899) 54 S. W. Rep. 1001.

5. Modern Rule — Alabama. — Opelika Bank v. Kiser, 119 Ala. 194.

California. — Bennett v. Wilson, 122 Cal. 509, 68 Am. St. Rep. 61.

Georgia. — De Vaughn v. Byrom, 110 Ga. 904; Hitch v. Bailey, 115 Ga. 891; Milner v. Pitts, 117 Ga. 794.

Kentucky. — Smith v. Allen, 108 Ky. 368; Warden v. Troutman, (Ky. 1903) 74 S. W. Rep.

1085; Ebelharr v. Tenny, 80 S. W. Rep. 459, 25 Ky. L. Rep. 2257.

Massachusetts. — Lunt v. Cook, 175 Mass. 1, 78 Am. St. Rep. 472.

New Hampshire. — Thompson v. Currier, 70 N. H. 259; Carrasco v. Mason, 72 N. H. 158. But see Bartlett v. Gilcreast, 72 N. H. 145.

New Jersey. — Throckmorton v. O'Reilly, (N. J. 1903) 55 Atl. Rep. 56.

Ohio. — Stevens v. McCoy, 60 Ohio St. 540.

Pennsylvania. — Steele v. Walter, 204 Pa. St. 257.

South Dakota. — Muller v. Flavin, 13 S. Dak. 595.

Washington. — Jones v. Herrick, 35 Wash. 434.

Where land has been conveyed to secure a debt, it is not subject to levy and sale for debts of the grantor until it has been reconveyed to him. Parker v. Home Mut. Bldg., etc., Assoc., 114 Ga. 702.

**636.** 2. Execution Sale — Purchaser's Interest. — Oliver v. Dougherty, (Ariz. 1902) 68 Pac. Rep. 553. See also Goodin v. Wilson, 114 Ky. 716.

3. Lynch v. Burt, (C. C. A.) 132 Fed. Rep. 417; Strauss v. Tuckhorn, 200 Ill. 75.

5. Lynch v. Burt, (C. C. A.) 132 Fed. Rep. 417.

**637.** 1. Vendor and Vendee — Colorado. — A vendor retaining title until the payment of the purchase money has an interest subject to execution and levy. Green v. Daniels, (C. C. A.) 115 Fed. Rep. 449.

Arkansas. — A vendor's interest in lands is not subject to levy after he has given bond for title on receipt of a part of the price. Strauss v. White, 66 Ark. 167.

Georgia. — Shumate v. McLendon, 120 Ga. 396.

Kentucky. — Where the land has already been conveyed, the fact that the purchaser has not paid for it will not subject it to execution against the vendor as his property. Pryor v. Warford, (Ky. 1900) 54 S. W. Rep. 838.

Tennessee. — In Green v. Veder, (Tenn. Ch. 1900), 57 S. W. Rep. 519, it is held that where the naked title is in the vendee and he has paid no part of the purchase money, or there was to be no consideration, the land is subject as property of the vendor.

Texas. — Matula v. Lane, (Tex. Civ. App. 1900) 56 S. W. Rep. 112; Brotherton v. Anderson, 27 Tex. Civ. App. 587.

**638.** 1. Provident L., etc., Co. v. Mills, 91

**639.** *a.* MERE POSSESSION WITHOUT TITLE OR MERE CLAIM WITHOUT POSSESSION. — See notes 1, 2.

*p.* PROPERTY CONVEYED IN FRAUD OF CREDITORS. — See notes 4, 5.

*q.* INTERESTS IN PUBLIC LANDS — Time Purchase. — See note 6.

**640.** Mining Claims. — See note 2.

**IV. PROPERTY EXEMPT FROM EXECUTION — 2. Property in Custodia Legis — *a.* IN GENERAL. — See note 8.**

*b.* ATTACHED PROPERTY. — See note 9.

*c.* PROPERTY HELD UNDER PRIOR EXECUTION. — See note 10.

*d.* SURPLUS AFTER SATISFYING EXECUTION. — See note 11.

Fed. Rep. 435; *Merrell v. Witherby*, 120 Ala. 418, 74 Am. St. Rep. 39; *Strauss v. White*, 66 Ark. 167; *Chase v. Cameron*, 133 Cal. 231; *Hook v. Northwest Thresher Co.*, 91 Minn. 482; *Brooke v. Eastman*, 17 S. Dak. 347, quoting 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 637, 638; *Matula v. Lane*, (Tex. Civ. App. 1900) 56 S. W. Rep. 112.

**638. 2.** *Merrell v. Witherby*, 120 Ala. 418, 74 Am. St. Rep. 39; *Brooke v. Eastman*, 17 S. Dak. 347, quoting 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 638; *Matula v. Lane*, (Tex. Civ. App. 1900) 56 S. W. Rep. 112. But see *Opelika Bank v. Kiser*, 119 Ala. 194.

**639. 1. Mere Possession.** — *Logue v. Atkeson*, 35 Tex. Civ. App. 303; *Phoenix Min., etc., Co. v. Scott*, 20 Wash. 48.

Possession raises the presumption of title, which must be rebutted; otherwise the land is subject to sale on execution. *Clements v. Stuhbs*, 106 Ga. 448.

**2.** *Black v. Gate City Coffin Co.*, 115 Ga. 15.

**4. Property Conveyed in Fraud of Creditors — United States.** — *Lynch v. Burt*, (C. C. A.) 132 Fed. Rep. 417.

*Alabama.* — *Davidson v. Kahn*, 119 Ala. 364; *Gunn v. Hardy*, 130 Ala. 642.

*Illinois.* — *Scott v. Aultman Co.*, 211 Ill. 612.

*Indiana.* — *Owens v. Gascho*, 154 Ind. 225.

*Iowa.* — *Applegate v. Applegate*, 107 Iowa 312; *Stubblefield v. Gadd*, 112 Iowa 681; *Byers v. McEniry*, 117 Iowa 499.

*Kansas.* — *Miller v. Wilkerson*, 10 Kan. App. 576, 62 Pac. Rep. 253.

*Kentucky.* — *Scott v. Powers*, 78 S. W. Rep. 408, 25 Ky. L. Rep. 1640; *Smith v. Scanlan*, 106 Ky. 572.

*Massachusetts.* — *Berry v. Gates*, 175 Mass. 373.

*Minnesota.* — *Fryberger v. Berven*, 88 Minn. 311; *Brasie v. Minneapolis Brewing Co.*, 87 Minn. 456, 94 Am. St. Rep. 700.

*New Jersey.* — *Kinmonth v. White*, 61 N. J. Eq. 358.

*New York.* — *Lopez v. Campbell*, 163 N. Y. 340.

*Oregon.* — *Silver v. Lee*, 38 Oregon 508.

*Pennsylvania.* — *People's Nat. Bank v. Kern*, 193 Pa. St. 59.

*Tennessee.* — *Green v. Veder*, (Tenn. Ch. 1900) 57 S. W. Rep. 519.

*Texas.* — *Walters v. Cantrell*, (Tex. Civ. App. 1902) 66 S. W. Rep. 790; *Chamberlain v. Baker*, 28 Tex. Civ. App. 499.

*Washington.* — *Rohrer v. Snyder*, 29 Wash. 199.

*West Virginia.* — *Hanna v. Charleston Nat. Bank*, 55 W. Va. 185.

In *Illinois* a judgment creditor may treat land fraudulently conveyed by his debtor as the property of the debtor and levy on it, have it sold, and obtain a sheriff's deed therefor, and then file his bill to set aside the fraudulent conveyance; but a mere levy on such land does not create a lien prior to that obtained by another creditor who had filed a bill to set aside the fraudulent conveyance and obtained *lis pendens*, though the levying creditor also had the levy recorded. The statute does not provide that the recording of a levy in such case shall have any effect whatever, and it is only by a compliance with the statute that a lien is obtained by a levy of execution on land, because such liens are only constructive, and not resulting from the manual seizure or possession of the property. *Union Nat. Bank v. Lane*, 177 Ill. 171, 69 Am. St. Rep. 216, affirming 75 Ill. App. 299.

**5. Equity Proceedings.** — *Schofield v. Ute Coal, etc., Co.*, (C. C. A.) 92 Fed. Rep. 269; *Scott v. Aultman Co.*, 211 Ill. 612; *Gorman v. Glenn*, (Ky. 1904) 78 S. W. Rep. 873; *Fryberger v. Berven*, 88 Minn. 311.

**6. Public Lands.** — *Logue v. Atkeson*, 35 Tex. Civ. App. 303; *Martin v. Bryson*, 31 Tex. Civ. App. 98.

**640. 2.** *Phoenix Min., etc., Co. v. Scott*, 20 Wash. 48.

**8. Cannot Levy upon Property in Custody of the Law.** — *Camp v. Williams*, 119 Ga. 152; *Murphy v. Busick*, 22 Ind. App. 247; *Overton v. Warner*, 68 Kan. 96; *Pitkin v. Burnham*, 62 Neb. 385, 89 Am. St. Rep. 763; *Pelletier v. Greenville Lumber Co.*, 123 N. Car. 596, 68 Am. St. Rep. 837; *Mitchell v. Sims*, 124 N. Car. 411.

**9. Property Held by Attachment.** — *Pitkin v. Burnham*, 62 Neb. 385, 89 Am. St. Rep. 763. But see *Spencer v. McCloskey*, 7 Pa. Super. Ct. 578.

By statute in *Illinois*, a writ of special execution may issue for the sale of property which has already been levied on by writ of attachment and is in the custody of the law. *Keeley Brewing Co. v. Carr*, 198 Ill. 492.

**Where a Forthcoming Bond Has Been Given** and the property retained, it may be levied on unless a second forthcoming bond be given. *Harris v. Stewart*, 65 Ark. 566.

**10.** *Pitkin v. Burnham*, 62 Neb. 385, 89 Am. St. Rep. 763; *Taylor v. Ellis*, 200 Pa. St. 191. See also *Crane Iron Works v. Wilkes*, 64 N. J. L. 103; *Kotchie v. Golden Sovereigns*, (1898) 2 Q. B. 164.

**11. Surplus May Be Levied Upon.** — *Mayer v. Morgan*, 26 Wash. 71. See also *Larsen v. Ditto*, 90 Ill. App. 384.



- 641.** *e.* MONEY COLLECTED BY EXECUTION. — See note 1.  
*f.* PROPERTY IN HANDS OF ASSIGNEE. — See note 2.  
*g.* PROPERTY IN HANDS OF A GUARDIAN. — See note 3.  
*h.* PROPERTY IN HANDS OF RECEIVER. — See note 4.
- 642.** See note 1.  
*i.* REPLEVINED PROPERTY. — See note 2.
- V. FORM AND CONTENTS OF WRIT — In General.** — See note 4.
- 643.** Statutory Requirements. — See notes 1, 2.  
 Direction and Command. — See notes 4, 5.  
 Recitals as to Property. — See note 7.
- 644.** Date. — See notes 6, 7, 8.  
 Signature. — See note 9.

**641. 1. Money Collected by Execution Exempt.** — Mayer *v.* Morgan, 26 Wash. 71.

**Order of Court to Pay over Money.** — Hornish *v.* Ringen Stove Co., 116 Iowa 1.

**2. No Execution Against Assignee.** — Hoar *v.* Tilden, 178 Mass. 157.

**3. No Execution Against a Guardian.** — See *In re Clarke*, (1898) 1 Ch. 336. But see Koch *v.* Brockhan, 111 Ga. 334.

**4. No Execution Against Property in Hands of Receiver.** — Painter *v.* Painter, 138 Cal. 231, 94 Am. St. Rep. 47; People *v.* Finch, 19 Colo. App. 512; Campau *v.* Detroit Driving Club, 130 Mich. 417, 135 Mich. 575; Wright, etc., Co. *v.* Robinson, 79 Minn. 272; Fox *v.* Union Turnpike Co., (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 308; Pelletier *v.* Greenville Lumber Co., 123 N. Car. 596, 68 Am. St. Rep. 837.

Where a national bank is in charge of an examiner, but no receiver has been yet appointed, the tangible assets are subject to execution. Kimball *v.* Dunn, 89 Fed. Rep. 782.

**Liens Suspended.** — See Campau *v.* Detroit Driving Club, 135 Mich. 575.

**642. 1. Leave of Court Necessary.** — Savings, etc., Co. *v.* Bear Valley Irrigation Co., 89 Fed. Rep. 32; Campau *v.* Detroit Driving Club, 130 Mich. 417; Pelletier *v.* Greenville Lumber Co., 123 N. Car. 596, 68 Am. St. Rep. 837; Fox *v.* Union Turnpike Co., (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 308.

**2. Cannot Levy upon Replevined Property.** — Overton *v.* Warner, 68 Kan. 96.

**4. Form and Contents of Writ.** — Smith *v.* Bell, 107 Ga. 800, 73 Am. St. Rep. 151; Friedlander *v.* Fenton, 180 Ill. 312, 72 Am. St. Rep. 207; Hart *v.* O'Rourke, 151 Ind. 205.

**Writs Issued by Justices of the Peace.** — Johnson *v.* Whitfield, 124 Ala. 508, 82 Am. St. Rep. 196; Albritton *v.* Williams, 132 Ala. 647; Brann *v.* Blum, 138 Cal. 644; Grim *v.* Adkins, 21 Ind. App. 106; Hall *v.* Bramell, 87 Mo. App. 285.

**Surplusage.** — Jones *v.* Newman, 110 Ga. 259. See also Heidelberg *v.* Fenton, 79 Ill. App. 357.

**643. 1. Necessity to Comply with Statutory Requirements.** — Griffin *v.* Dauphin, 133 Ala. 543; O'Donnell *v.* Merguire, (Cal. 1900) 60 Pac. Rep. 981, 131 Cal. 527, 82 Am. St. Rep. 389; Graves *v.* Spry, 4 Penn. (Del.) 396; Sheppard *v.* Roberson, 106 Ga. 757; Miller *v.* Brooks, 120 Ga. 232; Kinkade *v.* Gibson, 209 Ill. 246; Halmes *v.* Dovey, 64 Neb. 122; Osborne *v.* Hughey, 14 Okla. 20.

**2. Substantial Compliance Sufficient.** — Jones *v.* Chenault, 124 Ala. 610, 82 Am. St. Rep. 211;

Sheppard *v.* Roberson, 106 Ga. 757; Fisher *v.* George S. Jones Co., 114 Ga. 648; Friedlander *v.* Fenton, 180 Ill. 312, 72 Am. St. Rep. 207; Taylor *v.* Buck, 61 Kan. 694, 78 Am. St. Rep. 346; Randall *v.* Ewell, (Ky. 1900) 55 S. W. Rep. 552; Keith *v.* Bolier, 92 Me. 550; Christy *v.* Springs, 11 Okla. 710.

**4. Direction in Name of State.** — Kipp *v.* Burton, 29 Mont. 96, 101 Am. St. Rep. 544.

**An Irregularity.** — It has been held that if the writ be amendable it will be given the same effect as if it had been amended. Brann *v.* Blum, 138 Cal. 644; Brush *v.* Smith, 141 Cal. 466. See also Kipp *v.* Burton, 29 Mont. 96, 101 Am. St. Rep. 544.

**5. Command to Levy, Etc.** — Where there is a command to levy, but it is not directed to any officer, it is a defect in form which may be amended. Johnson *v.* Whitfield, 124 Ala. 508, 82 Am. St. Rep. 196.

A mistake in being directed to the sheriff of the wrong county, when levy is made and sale held by the proper sheriff, is an irregularity that is amendable. Christy *v.* Springs, 11 Okla. 710.

Where the command to levy is omitted, it is valid, for the right to enforce the judgment follows as a matter of law. Bludworth *v.* Poole, 21 Tex. Civ. App. 551.

**7. Special Executions.** — Anderson *v.* Anderson, 123 Cal. 445; Miller *v.* Brooks, 120 Ga. 232.

**644. 6. The Date.** — Graves *v.* Spry, 4 Penn. (Del.) 396.

**Premature Issuance of the Writ** is an irregularity that does not render it void. Christian, etc., Grocery Co. *v.* Michael, 121 Ala. 84, 77 Am. St. Rep. 30.

**7. Should Bear Teste as of First Day of Term at Common Law.** — Heidelberg *v.* Fenton, 79 Ill. App. 357.

**8. Brann v. Blum, 138 Cal. 644; Dixon v. Dixon, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 652, reversed 89 N. Y. App. Div. 603; Courtland Wagon Co. v. Shields, (Tenn. Ch. 1896) 56 S. W. Rep. 275; Barnes v. Nix, (Tex. Civ. App. 1900) 56 S. W. Rep. 202.**

**9. Signature.** — O'Donnell *v.* Merguire, (Cal. 1900) 60 Pac. Rep. 981, 131 Cal. 527, 82 Am. St. Rep. 389; Lewis *v.* Russell, (Fla. 1904) 36 So. Rep. 166; Williams *v.* McArthur, 111 Ga. 28; Kipp *v.* Burton, 29 Mont. 96, 101 Am. St. Rep. 544; Mayer *v.* Morgan, 26 Wash. 71.

**An Irregularity in this respect is amendable by order of the court.** Taylor *v.* Buck, 61 Kan. 694, 78 Am. St. Rep. 346.

**645.** See notes 1, 2.

Seal. — See notes 3, 4.

Description of Judgment. — See note 5.

Conformity to Judgment. — See notes 7, 8, 9, 10.

Waiver of Informalities. — See note 11.

**646.** VI. LEVY — 1. Definition and General Considerations. — See note 1.

Necessity for Levy. — See note 3.

**647.** 3. When Made — *a.* IN GENERAL. — See note 6.*b.* BEFORE THE RETURN DAY. — See note 8.**648.** *c.* ON THE RETURN DAY. — See note 3.*d.* AFTER THE RETURN DAY. — See note 5.**649.** See notes 1, 2.**645.** 1. *Brann v. Blum*, 138 Cal. 644.2. Signature by Judgment Creditor or His Attorney. — Failure to sign in such cases does not render the writ void. *Lamb v. Dart*, 108 Ga. 602.3. The Seal. — *O'Donnell v. Merguire*, (Cal. 1900) 60 Pac. Rep. 981; *Lewis v. Russell*, (Fla. 1904) 36 So. Rep. 166; *Frankhouser v. Dewitt*, 9 Kan. App. 636; *Taylor v. Buck*, 61 Kan. 694, 78 Am. St. Rep. 346; *Kipp v. Burton*, 29 Mont. 96, 101 Am. St. Rep. 544; *Mayer v. Morgan*, 26 Wash. 71.4. That the Omission of a Seal May Be Cured by Amendment. — *Burton v. Kipp*, 30 Mont. 275; *Kipp v. Burton*, 29 Mont. 96, 101 Am. St. Rep. 544.Where the seal of the wrong court was attached by mistake, the defect may be cured by amendment. *Davelaar v. Blue Mound Invest. Co.*, 110 Wis. 470.Omission Held to Invalidate Writ. — *O'Donnell v. Merguire*, (Cal. 1900) 60 Pac. Rep. 981; *Frankhouser v. Dewitt*, 9 Kan. App. 636.5. Description of Judgment. — *Kinkade v. Gibson*, 209 Ill. 246; *Banfill's Petition*, 70 N. H. 132.Where a judgment was entered in vacation by confession and the writ contained an erroneous recital that the judgment was of the preceding term, the writ of execution is not invalid. *Friedlander v. Fenton*, 180 Ill. 312, 72 Am. St. Rep. 207.7. *Smith v. Bell*, 107 Ga. 800, 73 Am. St. Rep. 151; *Friedlander v. Fenton*, 180 Ill. 312, 72 Am. St. Rep. 207; *Grim v. Adkins*, 21 Ind. App. 106; *Berry v. Gates*, 175 Mass. 373.8. As to Parties Plaintiff. — *Banfill's Petition*, 70 N. H. 132; *Mayer v. Morgan*, 26 Wash. 71.9. As to Parties Defendant. — *Lamb v. Dart*, 108 Ga. 602; *Banfill's Petition*, 70 N. H. 132; *Mayer v. Morgan*, 26 Wash. 71.Where the name is omitted after the word "defendant," it may afterwards be filled in. *Brann v. Blum*, 138 Cal. 644.Where the judgment is against two defendants and one dies before execution issues, it is proper for the execution to issue against both, though the officer could not take the property of the decedent. *Forbes v. Thompson*, 2 Penn. (Del.) 530.10. As to the Amount. — *Brann v. Blum*, 138 Cal. 644; *Baird v. Given*, 170 Mo. 302; *Banfill's Petition*, 70 N. H. 132; *Mayer v. Morgan*, 26 Wash. 71.11. Waiver of Irregularities. — *Sheppard v.**Roberson*, 106 Ga. 757; *Lamb v. Dart*, 108 Ga. 602; *Fulkerson v. Taylor*, 102 Va. 314.Where nothing is said for twenty years, any irregularities in a writ of execution or the officer's return, rendering the sale under it voidable, will be considered waived. *Clark v. Glos*, 180 Ill. 556, 72 Am. St. Rep. 223.**646.** 1. Levy Defined. — *Lahr v. Ulmer*, 27 Ind. App. 107.3. Necessity for Levying upon Personalty — *United States*. — *New Orleans v. Stempel*, 175 U. S. 309.*California*. — *Hoxie v. Bryant*, 131 Cal. 85.*Colorado*. — *Duncan v. Burchinell*, 14 Colo. App. 471.*Georgia*. — *Moore v. Brown*, etc., *Furniture Co.*, 107 Ga. 139.*Illinois*. — *Larsen v. Ditto*, 90 Ill. App. 384.*Louisiana*. — *Gauthier v. Cason*, 107 La. 52.*Missouri*. — *Caffery v. Choctaw Coal*, etc., *Co.*, 95 Mo. App. 174; *Howard v. Baum*, 73 Mo. App. 235; *Hopke v. Lindsay*, 83 Mo. App. 85.*Oklahoma*. — *Moore v. Calvert*, 8 Okla. 358.*Pennsylvania*. — *Samuel v. Knight*, 9 Pa. Super. Ct. 352.*South Dakota*. — *Auby v. Rathbun*, 11 S. Dak. 474.*Texas*. — *Lynch v. Payne*, (Tex. Civ. App. 1899) 49 S. W. Rep. 406; *Hunstock v. Roberts*, (Tex. Civ. App. 1901) 65 S. W. Rep. 675; *Davis v. Jones*, 32 Tex. Civ. App. 424; *Adoue v. Wettermark*, 36 Tex. Civ. App. 585.**647.** 6. Within Statutory Time. — *U. S. v. Hogg*, (C. C. A.) 112 Fed. Rep. 909.8. May Levy During Life of Writ. — *U. S. v. Hogg*, (C. C. A.) 112 Fed. Rep. 909, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 647, 648.**648.** 3. Levy Made on Return Day. — *U. S. v. Hogg*, (C. C. A.) 112 Fed. Rep. 909, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 647, 648.5. No Levy After Return Day. — *U. S. v. Hogg*, (C. C. A.) 112 Fed. Rep. 909; *Chaney v. Burford Lumber Co.*, 132 Ala. 318, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 648, 649.Additional Levies. — *Shaney v. Burford Lumber Co.*, 132 Ala. 318.**649.** 1. Levy After Return Day Void. — *Chaney v. Burford Lumber Co.*, 132 Ala. 318, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 648, 649.2. Officer Commits a Trespass. — *Chaney v. Burford Lumber Co.*, 132 Ala. 318, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 648, 649.

**649.** 4. **How Made** — *b.* **STATUTORY REQUIREMENTS.** — See note 8.

**650.** See note 1.

*c.* **NOTICE AND DEMAND.** — See notes 2, 4.

*d.* **SELECTION OF PROPERTY** — (1) *By Debtor* — **Statutory Right.** —

See note 6.

**651.** **Waiver of Right.** — See note 1.

(3) *Encumbered and Aliened Realty.* — See note 4.

5. **Amount of Property to Be Taken.** — See note 6.

**652.** 6. **Levy upon Land** — *a.* **WHAT CONSTITUTES.** — See note 2.

**649.** 8. **Compliance with Statutory Requirements.** — *U. S. v. Hogg*, (C. C. A.) 112 Fed. Rep. 909; *Moore v. Brown, etc.*, Furniture Co., 107 Ga. 139; *Wilson v. Lowmaster*, 181 Ill. 170; *Cox v. Spurgin*, 10 Ill. 398; *Tyler v. Williams*, 53 S. Car. 367; *Auby v. Rathbun*, 11 S. Dak. 474.

**650.** 1. *Moore v. Brown, etc.*, Furniture Co., 107 Ga. 139; *Lahr v. Ulmer*, 27 Ind. App. 107; *Tyler v. Williams*, 53 S. Car. 367.

2. **Service and Levy Distinguished.** — *Adoue v. Wettermark*, 36 Tex. Civ. App. 585.

4. **Notice Required by Statute** — *Illinois.* — *Wilson v. Lowmaster*, 181 Ill. 170; *Miller v. McAlister*, 197 Ill. 72; *Kinkade v. Gibson*, 209 Ill. 246.

*Indiana.* — *Lahr v. Ulmer*, 27 Ind. App. 107. *Maryland.* — *State v. Fowler*, 88 Md. 601, 71 Am. St. Rep. 452.

*Ohio.* — *Ball v. Towle Mfg. Co.*, 67 Ohio St. 306, 93 Am. St. Rep. 682.

*South Dakota.* — *Auby v. Rathbun*, 11 S. Dak. 474.

*Tennessee.* — *Davis v. Brown*, (Tenn. Ch. 1901) 62 S. W. Rep. 381.

*Texas.* — *Johnson v. Daniel*, 25 Tex. Civ. App. 587.

*Wisconsin.* — *Bonnin v. Zuehlke*, 122 Wis. 128.

**Personal Notice.** — *Wilson v. Lowmaster*, 181 Ill. 170; *Kinkade v. Gibson*, 209 Ill. 246; *Crist v. Cosby*, 11 Okla. 635.

6. **Statutes Giving Debtor Right to Select.** — *Landrum v. Broadwell*, 110 Ga. 538; *Beck v. Avindino*, 29 Tex. Civ. App. 500, (Tex. Civ. App. 1903) 73 S. W. Rep. 539.

"The object of the service is to give the execution defendant an opportunity \* \* \* to designate the property to be levied upon." *Lahr v. Ulmer*, 27 Ind. App. 107.

Under the *Texas* statutes, if the owner be nonresident, the officer is not required to have an agent of the owner make a selection. *Samuels v. Revier*, (C. C. A.) 92 Fed. Rep. 199.

**Debtor Must Furnish Description of Property.** — *Beck v. Avindino*, 29 Tex. Civ. App. 500.

**651.** 1. **Waiver of Right.** — *Bagshawes v. Deacon*, (1898) 2 Q. B. 173.

4. **Encumbered Land.** — *Weber v. Gardner*, (Ky. 1904) 80 S. W. Rep. 481.

6. **Sufficient to Satisfy the Execution.** — *Mills v. Larrance*, 111 Ill. App. 140; *Monmouth Second Nat. Bank v. Gilbert*, 174 Ill. 485, 66 Am. St. Rep. 306; *State v. Fowler*, 88 Md. 601, 71 Am. St. Rep. 452; *Arnold v. Fowler*, 94 Md. 497, 89 Am. St. Rep. 444; *Hoar v. Tilden*, 178 Mass. 157.

**Price Obtainable at Sale to Be Considered.** — *Mills v. Larrance*, 111 Ill. App. 140.

**Excessive Levy Should Not Be Made** — *Georgia.*

— *Morris v. Rogers*, 104 Ga. 705; *Landrum v. Broadwell*, 110 Ga. 538; *Wilkinson v. Holton*, 119 Ga. 557; *Lumpkin v. Cureton*, 119 Ga. 64.

*Maryland.* — *State v. Fowler*, 88 Md. 601, 71 Am. St. Rep. 452; *Arnold v. Fowler*, 94 Md. 497, 89 Am. St. Rep. 444.

*South Dakota.* — *Tolerton, etc., Co. v. Petrie*, 12 S. Dak. 595.

*Tennessee.* — *Brien v. Robinson*, 102 Tenn. 157.

*Texas.* — *Allen v. Ashburn*, 27 Tex. Civ. App. 239.

**Liability of Sheriff for Making Excessive Levy** — *State v. Fowler*, 88 Md. 601, 71 Am. St. Rep. 452; *Arnold v. Fowler*, 94 Md. 497, 89 Am. St. Rep. 444.

An affidavit of illegality is not a remedy for an excessive levy. *Pinkston v. Harrell*, 106 Ga. 102, 71 Am. St. Rep. 242.

**Any Levy upon Land Not Excessive.** — *Morris v. Rogers*, 104 Ga. 705. But see *C. C. Ansley Co. v. O'Byrne*, 120 Ga. 618.

In *Miller v. McAlister*, 197 Ill. 72, it is held that it is the duty of the officer to sell no more land than is necessary to satisfy the execution and costs.

In *Indiana* the rents and profits of real estate must be offered on execution sale first when the land has been levied upon, and if these be insufficient or not bid for, the land may be sold. *Marmon v. White*, 151 Ind. 445.

Where the debtor owned two lots, each of greater value than the amount of the judgment, it was held to be excessive levy when the officer levied upon both and sold them in bulk. *Brien v. Robinson*, 102 Tenn. 157.

**Prior Liens.** — *Miller v. Baxter*, 108 Ga. 600.

**Property Not Divisible.** — Where the personal property is not divisible, although greatly exceeding in value the amount of the execution, it may all be levied on; but where possible it should be divided. *Wilkinson v. Holton*, 119 Ga. 557.

**652.** 2. **What Constitutes Proper Levy upon Land.** — *Hiles Carver Co. v. King*, 109 Ga. 180; *Conley v. Redwine*, 109 Ga. 640, 77 Am. St. Rep. 398; *Burt v. Rubley*, 113 Ga. 1144; *Jones v. Olson*, 17 Colo. App. 144; *Union Nat. Bank v. Lane*, 177 Ill. 171, 69 Am. St. Rep. 216; *Lahr v. Ulmer*, 27 Ind. App. 107; *Tyler v. Williams*, 53 S. Car. 367; *Whitworth v. McKee*, 32 Wash. 83; *Reilley v. Anderson*, 33 Wash. 58. See also *Dickson v. Burckmeyer*, 67 S. Car. 526.

The *Massachusetts* statute provides that the levy shall be considered as made at the time the land is taken — an actual taking being necessary. *Lunt v. Cook*, 175 Mass. 1, 78 Am. St. Rep. 472.

**Leasehold Interest.** — *Reilley v. Anderson*, 33 Wash. 58.



**654.** *b.* LAND NOT TO BE LEVIED UPON UNTIL PERSONALTY EXHAUSTED — (2) *United States Doctrine*. — See note 2.

**7. Levy upon Chattels** — *a.* RIGHT TO ENTER UPON THE DEBTOR'S PREMISES — (1) *In General*. — See notes 3, 4.

**655.** (2) *Right to Break and Force Doors*. — See note 1.

*b.* PAPER LEVY INSUFFICIENT. — See note 4.

**656.** *c.* MANUCAPTION AND REMOVAL OF GOODS — (2) *United States Doctrine*. — See note 2.

**657.** See note 1.

**654. 2. United States Doctrine — Personality**  
**First Subject** — *Arizona*. — *Oliver v. Dougherty*, (Ariz. 1902) 68 Pac. Rep. 553.

*Georgia*. — *Eaves v. Garner*, 111 Ga. 273; *Burt v. Rubley*, 113 Ga. 1144.

*Illinois*. — *Merrick v. Carter*, 205 Ill. 73.

*Indiana*. — *Marmion v. White*, 151 Ind. 445.

*Kentucky*. — *Middlesboro v. New South Brewing, etc., Co.*, 108 Ky. 351; *Allen v. Farley*, (Ky. 1903) 76 S. W. Rep. 538.

*Minnesota*. — *Cunningham v. Water-Power Sandstone Co.*, 74 Minn. 282.

*New Jersey*. — *Flaherty v. Cramer*, (N. J. 1898) 41 Atl. Rep. 482.

*Pennsylvania*. — *Boyer v. Miller*, 200 Pa. St. 589.

*Texas*. — *Ellis v. Harrison*, 24 Tex. Civ. App. 13; *Johnson v. Daniel*, 25 Tex. Civ. App. 587.

*Washington*. — *Mayer v. Morgan*, 26 Wash. 71.

**Existence of Personality Not Known**. — *Oliver v. Dougherty*, (Ariz. 1902) 68 Pac. Rep. 553; *Landrum v. Broadwell*, 110 Ga. 538; *Cunningham v. Water-Power Sandstone Co.*, 74 Minn. 282.

**Insufficient Personality**. — In *Massachusetts* it has been held that a levy may be made on real estate and chattels and enforced at the same time, but there can be only one satisfaction. *Hoar v. Tilden*, 178 Mass. 157.

**Presumption of Want of Personality**. — *Holcomb v. Hays*, (Ky. 1901) 62 S. W. Rep. 1028; *Bulat v. Londrigan*, 63 N. J. Eq. 22. See also *Wilson v. Addison*, 127 Mich. 680.

But this presumption may be rebutted by showing that there was sufficient personality. *Whitworth v. McKee*, 32 Wash. 83.

**Title of Innocent Purchaser**. — *Oliver v. Dougherty*, (Ariz. 1902) 68 Pac. Rep. 553; *Holcomb v. Hays*, (Ky. 1901) 62 S. W. Rep. 1028; *Allen v. Farley*, (Ky. 1903) 76 S. W. Rep. 538.

**Waiver of Debtor's Right**. — *Oliver v. Dougherty*, (Ariz. 1902) 68 Pac. Rep. 553; *Ellis v. Harrison*, 24 Tex. Civ. App. 13.

Where the owner is nonresident and fails to have an agent point out the property, the officer may levy upon land first. *Samuel v. Revier*, (C. C. A.) 92 Fed. Rep. 199. See also *Metz v. McAvoy Brewing Co.*, 98 Ill. App. 584; *York v. East Jellico Coal Co.*, 76 S. W. Rep. 532, 25 Ky. L. Rep. 927.

**Duty to Point Out Personality**. — If the debtor wishes the personality exhausted first, he should point it out to the levying officer. *Landrum v. Broadwell*, 110 Ga. 538.

**3. Officer's Right to Enter Debtor's Premises**. — *People v. Sylva*, 143 Cal. 63, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 654.

**4. Right of Creditor to Enter**. — *People v. Sylva*, 143 Cal. 63.

**655. 1. Outer Doors Not to Be Broken**. — See *Hillman v. Edwards*, 28 Tex. Civ. App. 308, holding that an officer committed a trespass by making a forcible entry through an open window and removing the lock on an inner door through which to carry out a chattel in the room.

**4. Paper Levy Insufficient**. — *Hoxie v. Bryant*, 131 Cal. 85; *Moore v. Brown, etc.*, Furniture Co., 107 Ga. 139; *Larsen v. Ditto*, 90 Ill. App. 384; *Samuel v. Knight*, 9 Pa. Super. Ct. 352; *Adoue v. Wettermark*, 36 Tex. Civ. App. 585. But see *Richart v. Goodpaster*, 116 Ky. 637.

**Inventory Furnished by Debtor**. — *Larsen v. Ditto*, 90 Ill. App. 384.

**656. 2. United States Doctrine — Cases Holding Manucaption Unnecessary** — *California*. — While the general rule is otherwise in California, with shares of stock manucaption is necessary. *West Coast Safety Faucet Co. v. Wulff*, 133 Cal. 315, 85 Am. St. Rep. 171.

*Georgia*. — *Moore v. Brown, etc.*, Furniture Co., 107 Ga. 139.

*Illinois*. — See *Larsen v. Ditto*, 90 Ill. App. 384.

*Indiana*. — *Owens v. Gascho*, 154 Ind. 225.

*Maryland*. — *State v. Fowler*, 88 Md. 601, 71 Am. St. Rep. 452.

*Massachusetts*. — *Hoar v. Tilden*, 178 Mass. 157.

*Michigan*. — *Vanosdall v. Hamilton*, 118 Mich. 533.

*Montana*. — In certain cases, manucaption is inconvenient and unnecessary. *In re Downey*, (Mont. 1904) 78 Pac. Rep. 772.

*Nebraska*. — *Battle Creek Valley Bank v. Madison First Nat. Bank*, 62 Neb. 825; *Meyer v. Michaels*, (Neb. 1903) 95 N. W. Rep. 63.

*Ohio*. — *Ball v. Towle Mfg. Co.*, 67 Ohio St. 306, 93 Am. St. Rep. 682.

*Pennsylvania*. — *Smith v. Nicola Bros. Co.*, 193 Pa. St. 562; *Taylor v. Ellis*, 200 Pa. St. 191.

**Seizure Waived by Debtor**. — *Burdge v. Thompson*, 9 Kan. App. 146; *Hoar v. Tilden*, 178 Mass. 157.

**Estoppel by Giving Forthcoming Bond**. — *Livingston v. Allen*, 83 Mo. App. 294.

**657. 1. Cases Holding Manucaption Necessary** — *United States*. — *New Orleans v. Stempel*, 175 U. S. 309.

*California*. — *Hoxie v. Bryant*, 131 Cal. 85.

*Colorado*. — *Duncan v. Burchinell*, 14 Colo. App. 471.

*Louisiana*. — *Gauthier v. Cason*, 107 La. 52.

*Missouri*. — *Howard v. Baum*, 73 Mo. App. 235; *Caffery v. Choctaw Coal, etc., Co.*, 95 Mo. App. 174; *Hopke v. Lindsay*, 83 Mo. App. 85.

*Oklahoma*. — *Moore v. Calvert*, 8 Okla. 358.

*South Dakota*. — *Auby v. Rathbun*, 11 S. Dak.

474.

**657.** Removal Before Sale. — See note 2.

**658.** Right of Officer to Remove. — See note 1.

d. NECESSITY FOR PUBLICITY. — See note 3.

e. VIEW OF GOODS NECESSARY. — See note 4.

f. DOMINION AND CONTROL OF PROPERTY. — See note 5.

**659.** g. CRITERION OF PROPER LEVY. — See note 1.

h. CONFUSION OF GOODS. — See note 2.

**660.** i. UNWIELDY ARTICLES. — See note 1.

k. PROPERTY INTRUSTED TO CUSTODIAN. — See notes 3, 4.

l. CHATTELS IN WHICH OTHER PERSONS HAVE AN INTEREST —

(2) *Chattels Held in Cotenancy or Joint Tenancy.* — See notes 6, 7.

*Texas.* — *Lynch v. Payne*, (Tex. Civ. App. 1899) 49 S. W. Rep. 406; *Hunstock v. Roberts*, (Tex. Civ. App. 1901) 65 S. W. Rep. 675; *Davis v. Jones*, 32 Tex. Civ. App. 424.

Manucaption is necessary where the property has been taken from the sheriff by writ of replevin but afterwards returned, according to provision of statute. *Uphaus v. Roof*, 68 Ohio St. 401.

**657.** 2. Must Be Removed Before Sale. — *Brock v. Berry*, 132 Ala. 95, 90 Am. St. Rep. 896; *Samuel v. Knight*, 9 Pa. Super. Ct. 352.

Continued Possession of Debtor Evidence of Fraud. — *Excelsior Needle Co. v. Globe Cycle Works*, 48 N. Y. App. Div. 304; *Platt-Barber Co. v. Groves*, 7 Pa. Super. Ct. 599, reversed 193 Pa. St. 475.

**658.** 1. Officer May Always Remove. — *Goepper v. Phoenix Brewing Co.*, 115 Ky. 708; *Wright, etc., Co. v. Robinson*, 79 Minn. 272.

Chattels in Debtor's Actual Possession. — *Meyer v. Michaels*, (Neb. 1903) 95 N. W. Rep. 63; *Smith v. Nicola Bros. Co.*, 193 Pa. St. 562.

3. Publicity of Levy. — *Moore v. Brown, etc., Furniture Co.*, 107 Ga. 139; *Vanosdall v. Hamilton*, 118 Mich. 533; *Hopke v. Lindsay*, 83 Mo. App. 85; *Auby v. Rathbun*, 11 S. Dak. 474.

4. Goods Subject to Control of Officer — *Georgia.* — *Moore v. Brown, etc., Furniture Co.*, 107 Ga. 139.

*Illinois.* — *Bennet v. Gilbert*, 194 Ill. 403; *Larsen v. Ditto*, 90 Ill. App. 384.

*Missouri.* — *Caffery v. Choctaw Coal, etc., Co.*, 95 Mo. App. 174.

*Nebraska.* — *Battle Creek Valley Bank v. Madison First Nat. Bank*, 62 Neb. 825.

*Pennsylvania.* — *Samuel v. Knight*, 9 Pa. Super. Ct. 352.

*South Dakota.* — *Auby v. Rathbun*, 11 S. Dak. 474.

*Texas.* — *Lynch v. Payne*, (Tex. Civ. App. 1899) 49 S. W. Rep. 406.

5. Officer Must Assume Control — *Georgia.* — *Moore v. Brown, etc., Furniture Co.*, 107 Ga. 139.

*Illinois.* — *Larsen v. Ditto*, 90 Ill. App. 384.

*Missouri.* — *Caffery v. Choctaw Coal, etc., Co.*, 95 Mo. App. 174; *Hopke v. Lindsay*, 83 Mo. App. 85.

*Nebraska.* — *Battle Creek Valley Bank v. Madison First Nat. Bank*, 62 Neb. 825.

*South Dakota.* — *Auby v. Rathbun*, 11 S. Dak. 474.

*Texas.* — In *Lynch v. Payne*, (Tex. Civ. App. 1899) 49 S. W. Rep. 406, the constable went with the execution to the defendant's store at eleven o'clock at night, and finding the store

locked, nailed strips across the door, read the execution, and notified the defendant the same night. It was held that these acts did not constitute a valid levy.

Seizure of Part in Name of Whole. — *Hunstock v. Roberts*, (Tex. Civ. App. 1901) 65 S. W. Rep. 675. But see *Samuel v. Knight*, 9 Pa. Super. Ct. 352.

**659.** 1. Acts Otherwise Amounting to Trespass — *United States.* — *Weller v. Hanaur*, 95 Fed. Rep. 236.

*Alabama.* — *Stephens v. Head*, 138 Ala. 455.

*Illinois.* — *Larsen v. Ditto*, 90 Ill. App. 384;

*Harris v. Nelson*, 113 Ill. App. 487.

*Kansas.* — *Hagar v. Haas*, 66 Kan. 333.

*Kentucky.* — *Goepper v. Phoenix Brewing Co.*, 115 Ky. 708.

*Maryland.* — *State v. Fowler*, 88 Md. 601, 71 Am. St. Rep. 452.

*Missouri.* — *State v. Davies*, 80 Mo. App. 239; *Parker v. Oxendine*, 85 Mo. App. 212.

*Nebraska.* — *Pitkin v. Burnham*, 62 Neb. 385, 89 Am. St. Rep. 763; *Battle Creek Valley Bank v. Madison First Nat. Bank*, 62 Neb. 825.

*South Dakota.* — *Auby v. Rathbun*, 11 S. Dak. 474.

2. Levy When Goods Confused. — *Greenberg v. Stevens*, 212 Ill. 606; *Tuttle v. Hemenway*, 92 Ill. App. 53. See also *Beaman v. Stewart*, 19 Colo. App. 222; *Matter of Camerick*, 34 N. Y. App. Div. 31.

**660.** 1. Levy upon Unwieldy Goods. — *Goepper v. Phoenix Brewing Co.*, 115 Ky. 708; *Vanosdall v. Hamilton*, 118 Mich. 533; *Hopke v. Lindsay*, 83 Mo. App. 85; *Meyer v. Michaels*, (Neb. 1903) 95 N. W. Rep. 63.

3. Custodian Appointed by Officer. — *Blyth v. People*, 16 Colo. App. 526; *Moore v. Brown, etc., Furniture Co.*, 107 Ga. 139; *Goepper v. Phoenix Brewing Co.*, 115 Ky. 708; *Hoar v. Tilden*, 178 Mass. 157; *Vanosdall v. Hamilton*, 118 Mich. 533.

The Debtor. — *Smith v. Nicola Bros. Co.*, 193 Pa. St. 562.

So may one in the employ of the debtor be selected as keeper. *Meyer v. Michaels*, (Neb. 1903) 95 N. W. Rep. 63.

4. *Hoar v. Tilden*, 178 Mass. 157.

6. *Spalding v. Allred*, 23 Utah 354.

7. All of Chattels Held in Cotenancy or Joint Tenancy Levied Upon. — *Hunstock v. Roberts*, (Tex. Civ. App. 1901) 65 S. W. Rep. 675; *Spalding v. Allred*, 23 Utah 354.

*Kentucky Statute.* — *Richart v. Goodpaster*, 116 Ky. 637.

The Interest Seized. — *Hunstock v. Roberts*, (Tex. Civ. App. 1901) 65 S. W. Rep. 675.

**661.** (3) *Partnership Chattels.* — See note 2.

**663.** (4) *Mortgaged Chattels.* — See notes 1, 2.

(5) *Pledged or Leased Chattels.* — See note 3.

8. *Levy upon Choses in Action.* — See notes 4, 5.

**664.** 9. *Execution Against Several Defendants.* — See note 1.

10. *When There Are Several Executions* — *a.* IN THE HANDS OF THE SAME OFFICER. — See notes 2, 3.

**665.** *b.* IN THE HANDS OF DIFFERENT OFFICERS. — See notes 1, 2.

Where the Right of Possession is not in the debtor, the officer should not attempt to take the goods, but he should make a levy by notice, and not disturb the possession of the joint tenant. *Davis v. Jones*, 32 Tex. Civ. App. 424.

**661.** 2. *Levy upon Partnership Chattels.* — *Weber v. Hertz*, 87 Ill. App. 601, *affirmed* 188 Ill. 68; *Hart v. Hiatt*, 2 Indian Ter. 245; *Lester v. Givens*, 74 Mo. App. 395; *Marks v. Stephens*, 38 Oregon 65, 84 Am. St. Rep. 750. But see *Ernest v. Woodworth*, 124 Mich. 1; *Krupp v. Adams*, 124 Mich. 215.

In Georgia and Michigan it is held that an execution against a member of a partnership individually cannot be levied on property belonging to the partnership. *Jolley v. Hardeman*, 111 Ga. 749; *Ernest v. Woodworth*, 124 Mich. 1; *Krupp v. Adams*, 124 Mich. 215.

**Statutory Regulation.** — *Jones v. Meyer Bros. Drug Co.*, 25 Tex. Civ. App. 234; *Davis v. Jones*, 32 Tex. Civ. App. 424; *Adoue v. Wettermark*, 36 Tex. Civ. App. 585; *Laramie First Nat. Bank v. Cook*, 12 Wyo. 492. See also *Summers v. Heard*, 66 Ark. 550.

**Nature of Interest Seized.** — *Lester v. Givens*, 74 Mo. App. 395.

Where specific articles are levied on, but no attempt is made to separate them from the rest of the stock, it is held not to be illegal under the rule that the levy must be made on the partner's interest in the whole stock. *Weber v. Hertz*, 87 Ill. App. 601, *affirmed* 188 Ill. 68.

**663.** 1. *Levy upon Mortgaged Chattels.* — *Monmouth Second Nat. Bank v. Gilbert*, 174 Ill. 485, 66 Am. St. Rep. 306.

**Statutory Provisions.** — *Plunkett v. Hanschka*, 14 S. Dak. 454.

2. *Levy Subordinate to Mortgagee's Rights.* — *Newman v. Mantle*, 109 Ky. 292, 95 Am. St. Rep. 372; *Plunkett v. Hanschka*, 14 S. Dak. 454.

**Mortgagee in Possession.** — Where some of the goods were received from the execution debtor under the mortgage and some under a bill of sale from a third person, it was held that it was the duty of the officer to ask the person in possession (the mortgagee) to point out those articles claimed under the mortgage, implying the officer's right to take them. *Sharp v. Lamy*, 37 N. Y. App. Div. 136.

**Value of Goods Not in Excess of Mortgage.** — When the value of goods is not in excess of the mortgage, in case of a levy subject to the mortgage nothing is covered by the levy.

3. *Pledged or Leased Chattels.* — *Marks v. Shoup*, 181 U. S. 562; *Newman v. Mantle*, 109 Ky. 292, 95 Am. St. Rep. 372; *Davis v. Jones*, 32 Tex. Civ. App. 424.

4. *McNeeley v. Welz*, 166 N. Y. 124.

5. *Levy upon Choses in Action.* — *Hoxie v. Bryant*, 131 Cal. 85; *McNeeley v. Welz*, 166 N.

Y. 124; *Bull v. Case*, 165 N. Y. 578; *In re Downey*, (Mont. 1904) 78 Pac. Rep. 772.

**Corporate Stock** — *California.* — *McFall v. Buckeye Grangers' Warehouse Assoc.*, 122 Cal. 468, 68 Am. St. Rep. 47; *West Coast Safety Faucet Co. v. Wulff*, 133 Cal. 315, 85 Am. St. Rep. 171.

*Idaho.* — *Wells v. Price*, 6 Idaho 490.

*Iowa.* — *Croft v. Colfax Electric Light, etc., Co.*, 113 Iowa 455.

*Michigan.* — *Feige v. Burt*, 118 Mich. 243, 74 Am. St. Rep. 390.

*Missouri.* — *Caffery v. Choctaw Coal, etc., Co.*, 95 Mo. App. 174.

*Tennessee.* — Authority to levy upon corporate stock must be found in the statute. *Nashville Trust Co. v. Weaver*, 102 Tenn. 66.

*Washington.* — *Hardin v. White Swan Min., etc., Co.*, 26 Wash. 583; *Daniel v. Gold Hill Min. Co.*, 28 Wash. 411.

*Wisconsin.* — *O. L. Packard Machinery Co. v. Laev*, 100 Wis. 644.

**664.** 1. *How Levy Made When Several Defendants.* — *Forbes v. Thompson*, 2 Penn. (Del.) 530; *Morris v. Rogers*, 104 Ga. 705; *Crayton v. Fox*, 106 Ga. 853; *Cooper v. Yearwood*, 119 Ga. 44; *West Duluth Land Co. v. Bradley*, 75 Minn. 275.

2. *Order of Levying Several Executions.* — *State v. Simmons*, 2 Penn. (Del.) 462; *Atlanta Trust, etc., Co. v. Nelms*, 115 Ga. 53; *Larsen v. Ditto*, 90 Ill. App. 384; *Pitkin v. Burnham*, 62 Neb. 385, 89 Am. St. Rep. 763; *Crane Iron Works v. Wilkes*, 64 N. J. L. 193. See also *Kelchner's Estate*, 11 Pa. Super. Ct. 595.

Where there are several executions in the hands of the same officer, and some of them are void, but others valid, the sale of the property will be upheld as being under the valid execution. *Shepherd v. Delph*, 58 S. W. Rep. 991, 22 Ky. L. Rep. 977; *Tyler v. Williams*, 53 S. Car. 367.

3. *Actual Seizure under Second Execution Unnecessary.* — *Pitkin v. Burnham*, 62 Neb. 385, 89 Am. St. Rep. 763.

**665.** 1. *Cannot Levy upon Property in Custodia Legis.* — *Camp v. Williams*, 119 Ga. 152; *Murphy v. Busick*, 22 Ind. App. 247; *Overton v. Warner*, 68 Kan. 96; *Pitkin v. Burnham*, 62 Neb. 385, 89 Am. St. Rep. 763; *Pelletier v. Greenville Lumber Co.*, 123 N. Car. 596, 68 Am. St. Rep. 837; *Mitchell v. Sims*, 124 N. Car. 411.

2. *Pitkin v. Burnham*, 62 Neb. 385, 89 Am. St. Rep. 763.

Where a constable levied on chattels in the sheriff's possession under prior executions, and the sheriff sold the chattels by virtue of prior and subsequent executions, the constable took priority over the subsequent executions of the sheriff. *Crane Iron Works v. Wilkes*, 64 N. J. L. 193.



**665. 11. Indorsement of the Levy — a. NECESSITY FOR INDORSEMENT. —**

See notes 3, 4.

**666. See note 1.***b. METHOD OF MAKING INDORSEMENT. — See note 2.***667. 13. Abandonment of Levy. — See note 3.****VII. LIEN AND PRIORITIES — 1. Distinction Between Judgment and Execution Liens. — See note 4.****668. 2. General Nature of an Execution Lien — a. DEFINITION. — See note 1.***b. EXECUTION MUST BE FOUNDED ON A VALID JUDGMENT. —*

See note 2.

*d. EFFECT OF LEVY — (1) On Personal Property. — See note 5.***669. e. WHEN THE LIEN BECOMES A VESTED RIGHT. — See note 2.****3. Commencement of the Lien — a. COMMON-LAW RULE. — See note 4.****665. 3. Usual to Make Indorsement of Levy.**— *Burt v. Rubley*, 113 Ga. 1144.**4. Indorsement of Levy on Land Necessary. —** *Jones v. Olson*, 17 Colo. App. 144; *Meade v. Wright*, (Ky. 1900) 56 S. W. Rep. 523; *Canfield v. Browning*, 69 N. J. L. 553; *Kennedy v. Roundtree*, 59 S. Car. 324, 82 Am. St. Rep. 841; *Hayes v. Gallaher*, 21 Tex. Civ. App. 88; *Buckner v. Vancleave*, 34 Tex. Civ. App. 312; *Mayer v. Morgan*, 26 Wash. 71.**Description of Land in Indorsement. —** *Jones v. Olson*, 17 Colo. App. 144; *Cooper v. Yearwood*, 119 Ga. 44; *Miller v. Brooks*, 120 Ga. 232; *Holcomb v. Hays*, (Ky. 1901) 62 S. W. Rep. 1028; *Canfield v. Browning*, 69 N. J. L. 553; *Hughes v. Helms*, (Tenn. Ch. 1898) 52 S. W. Rep. 460; *Hayes v. Gallaher*, 21 Tex. App. 88; *Bludworth v. Poole*, 21 Tex. Civ. App. 551; *Buckner v. Vancleave*, 34 Tex. Civ. App. 312. See also *Meade v. Wright*, (Ky. 1900) 56 S. W. Rep. 523; *Kennedy v. Roundtree*, 59 S. Car. 324, 82 Am. St. Rep. 841; *Stipe v. Shirley*, 27 Tex. Civ. App. 97.Where the land is mortgaged, a description of a wrong mortgage in the indorsement vitiates the levy. *Bartlett v. Gilcreast*, 72 N. H. 145.It is necessary that the interest of the execution debtor be stated, whether estate in fee, life estate, etc. *Gray v. Ward*, (Tenn. Ch. 1898) 52 S. W. Rep. 1028.**666. 1. Indorsement of Levy on Chattels. —** *State v. Fowler*, 88 Md. 601, 71 Am. St. Rep. 453; *Howard v. Baum*, 73 Mo. App. 235; *Mayer v. Morgan*, 26 Wash. 71.**2. Form of Indorsement. —** *Burt v. Rubley*, 113 Ga. 1144.**Unnecessary to State Time of Seizure. —** *McFall v. Buckeye Grangers' Warehouse Assoc.*, 122 Cal. 468, 68 Am. St. Rep. 47.Where a levy was made on personalty and realty, and there is this indorsement: "Levied July 8th, 1897, on personal property of defendant, as per schedule hereto annexed; \* \* \* levied on real estate as per schedule hereto annexed," as the second gave no date, it was presumed that it was after July 8th, and as this was after the return day, the levy was invalid. *Boyer v. Miller*, 50 Atl. Rep. 184, 200 Pa. St. 589.**Statutory Requirements. —** *Garner v. Clark*, 115 Ga. 666; *Howard v. Baum*, 73 Mo. App. 235.**667. 3. No Abandonment Because of Debtor's****Possession. —** *Samuel v. Knight*, 9 Pa. Super. Ct. 352.**4. Hawkeye Ins. Co. v. Maxwell, 119 Iowa 672, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 667.****668. 1. General Nature of Lien. —** *Snyder v. Smith*, 185 Mass. 58.**2. Execution on Void Judgment Gives No Lien —** *United States. — In re Breslauer*, 121 Fed. Rep. 910.*Alabama. —* *Hendon v. Delvichio*, 137 Ala. 597; *Brightman v. Merriwether*, 121 Ala. 602.*Georgia. —* *Sweeney v. Sweeney*, 119 Ga. 76, 100 Am. St. Rep. 159.*Iowa. —* *Cooley v. Barker*, 122 Iowa 440, 101 Am. St. Rep. 276; *McConkie v. Landt*, 126 Iowa 317.*Michigan. —* *Purdy v. Law*, 132 Mich. 622.*Missouri. —* *Howlett v. Turner*, 93 Mo. App. 20.*Nebraska. —* *Predohl v. O'Sullivan*, 59 Neb. 311.*New York. —* *Goldberg v. Markowitz*, 94 N. Y. App. Div. 237, affirmed 182 N. Y. 540.*Texas. —* *Underwood v. Brown*, 29 Tex. Civ. App. 163; *Burns v. Skelton*, 29 Tex. Civ. App. 453.And see *supra*, this title, **610. 3.****5. Levy Vests Title in Officer Making It. —** *Chaney v. Burford Lumber Co.*, 132 Ala. 318; *Bennet v. Gilbert*, 94 Ill. App. 505, affirmed 194 Ill. 403; *Gauthier v. Cason*, 107 La. 52; *Caffery v. Choctaw Coal, etc., Co.*, 95 Mo. App. 174; *Pitkin v. Burnham*, 62 Neb. 385, 89 Am. St. Rep. 763; *Pracht v. Gunn*, 69 N. Y. App. Div. 396.**Only the Title of the Debtor is vested by the levy. —** *Philadelphia Third Nat. Bank v. Atlantic City*, 126 Fed. Rep. 413, reversed (C. C. A.) 130 Fed. Rep. 751; *Jones v. Chenault*, 124 Ala. 610, 82 Am. St. Rep. 211; *Milner, etc., Co. v. De Loach Mill Mfg. Co.*, 139 Ala. 645, 101 Am. St. Rep. 63; *Newman v. Mantle*, 109 Ky. 292, 95 Am. St. Rep. 372; *Colyar v. Capital City Bank*, 103 Tenn. 723; *Barnes v. Krause*, (Tex. Civ. App. 1899) 53 S. W. Rep. 92.Where the value of mortgaged property is not in excess of the mortgage, an execution and levy against the mortgagor conveys no title. *Stack v. Olmsted*, 127 Mich. 359.**669. 2. Levy Creates a Vested Right. —** *Koch v. West*, 118 Iowa 468, 96 Am. St. Rep. 394.**4. Common-law Rule Prevails in Tennessee. —**

**670.** *b.* RULE ESTABLISHED BY STATUTE OF FRAUDS—(3) *Present Force of the Rule.*—See note 1.

**671.** *c.* MODERN TENDENCY TOWARDS ABOLITION OF LIEN BEFORE LEVY.—See note 4.

**672.** Property Levied on under One Execution Bound by Lien of Other Executions in Hands of Levying Officer.—See note 1.

**4. Extent of the Lien**—*a.* GENERAL RULE AS TO PROPERTY BOUND.—See note 2.

Debtor Must Have Title to Property.—See note 3.

*In re Darwin*, (C. C. A.) 117 Fed. Rep. 407; *Nashville Trust Co. v. Weaver*, 102 Tenn. 66.

**670.** 1. American Cases Recognizing Rule Established by Statute of Frauds.—*Colorado*.—*People v. Finch*, 19 Colo. App. 512.

*Kentucky*.—*Richart v. Goodpaster*, 116 Ky. 637.

*Maryland*.—*Prentiss Tool, etc., Co. v. Whitman, etc., Mfg. Co.*, 88 Md. 240.

*New Jersey*.—*Hall v. Nash*, 58 N. J. Eq. 554; *Canfield v. Browning*, 69 N. J. L. 553.

*Pennsylvania*.—*Spicks v. Prospect Brewing Co.*, 19 Pa. Super. Ct. 399; *Swick v. McLaughlin*, 4 Lack. Leg. N. (Pa.) 240. See also *Deering v. Wisler*, 21 Pa. Co. Ct. 156.

*Virginia*.—*Boisseau v. Bass*, 100 Va. 207, 93 Am. St. Rep. 956, 4 Va. Sup. Ct. 105.

**671.** 4. Modern Tendency Towards Abolition of Lien Before Levy.—*Summerville v. Kelliher*, 144 Cal. 155; *Jones v. Olson*, 17 Colo. App. 144; *Union Nat. Bank v. Lane*, 177 Ill. 171, 69 Am. St. Rep. 216; *Greer v. Simrall*, 59 S. W. Rep. 759, 22 Ky. L. Rep. 1037; *Pepperdine v. Seymour Bank*, 100 Mo. App. 387; *Lefever v. Armstrong*, 15 Pa. Super. Ct. 565.

The lien dates from the time of the service of notice by the officer as required by statute. *Ball v. Towle Mfg. Co.*, 67 Ohio St. 306, 93 Am. St. Rep. 682.

**Recording of Execution.**—*People v. Finch*, 19 Colo. App. 512; *Swift v. Guild*, 94 Me. 436, 80 Am. St. Rep. 406.

**672.** 1. Assignment of Interest Before Satisfaction of First Levy.—Where after the levy on one's interest in a crop he assigns that interest and the execution is satisfied, the assignee has a superior right to a subsequent levy of an execution, though made before the officer has lost his possession. *Curtner v. Lyndon*, 128 Cal. 35.

**2. Lien Extends to All Property Subject to Levy and Sale.**—*Richart v. Goodpaster*, 116 Ky. 637; *Wilson v. Addison*, 127 Mich. 680; *Boisseau v. Bass*, 100 Va. 207, 93 Am. St. Rep. 956, 4 Va. Sup. Ct. 105.

An execution is not a lien on property purchased by another creditor and in his possession before the writ was issued. *Owens v. Gascho*, 154 Ind. 225.

**Growing Crops.**—The rights of the execution debtor are terminated by confirmation of sale, and he can claim no rights to crops thereafter planted. *Jaques v. Dawes*, (Neb. 1902) 92 N. W. Rep. 570.

**The Property Must Have a Present Existence**, and an execution lien cannot exist on property which has only a future existence. *Boisseau v. Bass*, 100 Va. 207, 93 Am. St. Rep. 956, 4 Va. Sup. Ct. 105.

**Increase of Animals Levied On.**—See *Battle Creek Valley Bank v. Madison First Nat. Bank*, 62 Neb. 825.

**Lien on Both Real and Personal Property.**—*Wilson v. Addison*, 127 Mich. 680.

**3. Debtor Must Have Title to Property**—*United States*.—*Arnold v. Hatch*, 177 U. S. 276; *Provident L., etc., Co. v. Mills*, 91 Fed. Rep. 435.

*Alabama*.—*Reeves v. McNeill*, 127 Ala. 175; *Milner, etc., Co. v. De Loach Mill Mfg. Co.*, 139 Ala. 645, 101 Am. St. Rep. 63.

*Arizona*.—*Costello v. Friedman*, (Ariz. 1903) 71 Pac. Rep. 935.

*California*.—*Curtner v. Lyndon*, 128 Cal. 35; *Chase v. Cameron*, 133 Cal. 231; *Einstein v. State Bank*, 137 Cal. 47.

*Colorado*.—*Hartssock v. John Wright Hardware Co.*, 16 Colo. App. 48; *Beaman v. Stewart*, 19 Colo. App. 222.

*Delaware*.—*Taylor v. Plunkett*, 4 Penn. (Del.) 467.

*Georgia*.—*Black v. Gate City Coffin Co.*, 115 Ga. 15; *Jones v. Hightower*, 117 Ga. 749; *Lanier v. Bailey*, 120 Ga. 878.

*Indiana*.—*Owens v. Gascho*, 154 Ind. 225.

*Iowa*.—*Rust v. Morgan*, 114 Iowa 101.

*Kentucky*.—*Pryor v. Warford*, (Ky. 1900) 54 S. W. Rep. 838; *Bean v. Everett*, (Ky. 1900) 56 S. W. Rep. 403.

*Louisiana*.—*Hodge v. Monroe Mercantile Co.*, 105 La. 668.

*Michigan*.—*Feige v. Burt*, 118 Mich. 243, 74 Am. St. Rep. 390.

*Minnesota*.—*Wood v. Matter*, 88 Minn. 123.

*Missouri*.—*Houck v. Patty*, 100 Mo. App. 302.

*Montana*.—*Yank v. Bordeaux*, 23 Mont. 205, 75 Am. St. Rep. 522.

*North Carolina*.—*Johnston v. Case*, 131 N. Car. 491.

*Oregon*.—*Dimmick v. Rosenfeld*, 34 Oregon 101.

*Pennsylvania*.—*Natalie Anthracite Coal Co. v. Ryon*, 188 Pa. St. 138; *Kreamer v. Fleming*, 200 Pa. St. 414; *Schwab v. Woods*, 24 Pa. Super. Ct. 433.

*South Dakota*.—*Kieffer v. Smith*, 16 S. Dak. 433.

*Tennessee*.—*Nashville Trust Co. v. Weaver*, 102 Tenn. 66.

*Texas*.—*Puster v. Anderson*, 27 Tex. Civ. App. 626; *Cox v. Patten*, (Tex. Civ. App. 1902) 66 S. W. Rep. 64.

*Washington*.—*Washington Nat. Bank v. Moyer*, 22 Wash. 622; *Jones v. Herrick*, 35 Wash. 434.

*Wyoming*.—*Laramie First Nat. Bank v. Cook*, 12 Wyo. 492.

**673.** See note 1.

*d.* RULE AS TO PROPERTY ACQUIRED WHILE WRIT IS CURRENT.

— See note 4.

**674.** *e.* RULE AS TO PROPERTY DISPOSED OF WHILE WRIT IS CURRENT — (1) *Rule Stated.* — See note 1.

**675.** (2) *Modification in Favor of Bona Fide Purchasers.* — See note 3.

**677.** *f.* TERRITORIAL EXTENT OF LIEN — (1) *General Rule.* — See notes 4, 5.

(2) *Effect of Removal of Property.* — See note 6.

**678.** Removal Without State — Statute of Limitations. — See note 2.

5. Duration of the Lien — *a.* A MATTER OF STATUTORY REGULATION. — See note 5.

Money deposited in lieu of bail by a third person cannot be reached by a creditor of the accused, since the money belongs to the accused only for the purposes of the criminal proceeding. *People v. Gould*, 75 N. Y. App. Div. 524.

**Personal Property in Possession of Debtor Is Presumed to Belong to Him.** — *Tolerton*, etc., Co. v. *Petrie*, 12 S. Dak. 595.

And the officer is not liable for seizure. *Pilcher v. Hickman*, 132 Ala. 574, 90 Am. St. Rep. 930; *Downey v. Arnold*, 97 Ill. App. 91. See also *Eldridge v. Grice*, 132 Ala. 667.

**673. 1. Property Pledged or Encumbered.** — *Buena Vista Loan*, etc., Bank v. *Grier*, 114 Ga. 398; *Peoples Nat. Bank v. Wheedon*, 115 Ga. 782; *Hardin v. White Swan Min.*, etc., Co., 26 Wash. 583.

But if the purchaser at the execution sale is unaware that the property was pledged or assigned, he will have superior claims to the pledgee or assignee. *West Coast Safety Faucet Co. v. Wulff*, 133 Cal. 315, 85 Am. St. Rep. 171.

**Lien Subject to Prior Equities Against Debtor.** — There can be no levy unless there is an excess over prior liens and equities subject to levy. *Stack v. Olmsted*, 127 Mich. 359.

**4. Lien Attaches to Property Acquired While Writ Is Current.** — *In re Darwin*, (C. C. A.) 117 Fed. Rep. 407; *Monmouth Second Nat. Bank v. Gilbert*, 174 Ill. 485, 66 Am. St. Rep. 306; *Boisseau v. Bass*, 100 Va. 207, 93 Am. St. Rep. 956, 4 Va. Sup. Ct. 105.

**674. 1. Sale of Property Does Not Divest Lien.** — *In re Darwin*, (C. C. A.) 117 Fed. Rep. 407; *Hamilton v. Phillips*, 120 Ala. 177, 74 Am. St. Rep. 29; *Young v. Evans*, 118 Iowa 144; *Livingston v. Allen*, 83 Mo. App. 294.

**675. 3. Protection of Bona Fide Purchasers.** — *Chaney v. Burford Lumber Co.*, 132 Ala. 318; *Walker v. Hughes*, 108 Ga. 768; *Harvey v. Sanders*, 107 Ga. 740; *Eason v. Vandiver*, 108 Ga. 109.

**An Execution Creditor Is Not a Bona Fide Purchaser**, but takes subject to all the equities where he purchases at his own sale. The rule of *caveat emptor* applies.

*United States.* — *Barstow v. Beckett*, 122 Fed. Rep. 140.

*California.* — *Meherin v. Saunders*, 131 Cal. 681.

*Illinois.* — *Magerstadt v. Schaefer*, 110 Ill. App. 166, affirmed 213 Ill. 351; *Hengeveld v. Stuver*, 104 Ill. App. 362; *Nonotuck Silk Co. v. Levy*, 75 Ill. App. 55.

*New Jersey.* — *Throckmorton v. O'Reilly*, (N. J. 1903) 55 Atl. Rep. 56.

*Tennessee.* — *Colyar v. Capital City Bank*, 103 Tenn. 723.

*Texas.* — *Focke v. Garcia*, (Tex. Civ. App. 1898) 48 S. W. Rep. 755; *Hirsch v. Howell*, (Tex. Civ. App. 1900) 60 S. W. Rep. 887.

*Washington.* — *Lee v. Wrixon*, 37 Wash. 47; *Daniel v. Gold Hill Min. Co.*, 28 Wash. 411.

**677. 4. Execution Binds All Goods and Chattels Within the County.** — *Hamilton v. Phillips*, 120 Ala. 177, 74 Am. St. Rep. 29; *Zimmerman v. Makepeace*, 152 Ind. 199; *Gresienger v. McCarter*, 9 Kan. App. 886, 61 Pac. Rep. 507; *Mitchell v. Fidelity Trust*, etc., Co., (Ky. 1902) 67 S. W. Rep. 263; *Predohl v. O'Sullivan*, 59 Neb. 311; *Lowenstein v. Young*, 8 Okla. 216; *Crist v. Cosby*, 11 Okla. 635; *McDonald v. Fuller*, 11 S. Dak. 355, 74 Am. St. Rep. 815.

**Territorial Extent of Execution Issued by Justice of the Peace.** — See *Wilcher v. Pool*, 121 Ga. 305.

5. In North Carolina. — *Evans v. Alridge*, 133 N. Car. 378.

In Colorado the same rule prevails. *People v. Finch*, 19 Colo. App. 512.

In Iowa execution may issue from a district court to any county in the state. *King v. Nelson*, 120 Iowa 606.

6. Lien Not Lost by Removal of Goods from County. — *Hamilton v. Phillips*, 120 Ala. 177, 74 Am. St. Rep. 29.

**678. 2. Property Removed Beyond Limits of State.** — *Hamilton v. Phillips*, 120 Ala. 177, 74 Am. St. Rep. 29.

5. Illinois. — *Kinkade v. Gibson*, 209 Ill. 246.

In Kentucky. — If the lien of the judgment becomes barred, the execution lien is also barred. *Worsham v. Lancaster*, (Ky. 1898) 47 S. W. Rep. 448.

*Virginia.* — A judgment is barred after ten years from the return day of an execution on which there is no return, but where there is a return, the limitation is twenty years. *Rowe v. Hardy*, 97 Va. 674, 75 Am. St. Rep. 811.

*Alabama.* — The code authorizes registration of judgments and issuance of execution within ten years from the date of registration, if within a year from rendition of judgment. *Howard v. Corey*, 126 Ala. 283.

*Georgia.* — For an exposition of the Georgia statutes, see *Conley v. Redwine*, 109 Ga. 640, 77 Am. St. Rep. 398; *Ray v. Atlanta Banking Co.*, 110 Ga. 305.



**678.** *b.* RULE AS TO CESSATION OF LIEN ON RETURN DAY OF WRIT.  
— See note 6.

**679.** See note 1.

**680.** *c.* PROVISIONS FOR PRESERVING LIEN. — See notes 2, 3.

**682.** 6. Priorities — *a.* BETWEEN VARIOUS EXECUTION LIENS — (3)  
*Priority According to Delivery of Writ.* — See note 4.

**683.** (4) *Priority According to Time of Levy.* — See note 2.

**684.** (5) *Priority Between Executions from Different Courts.* — See note 2.

(6) *Priority Gained by Vigilance.* — See note 4.

(7) *Priorities Arising from the Judgment* — (a) *Priority According to Oldest Judgment.* — See notes 6, 7.

**685.** (8) *Effect of Levy under Junior Writ.* — See note 2.

*Sale under Junior Writ.* — See note 3.

**678.** 6. Lien Terminates at Return Day of Writ — *Alabama.* — Chaney *v.* Burford Lumber Co., 132 Ala. 318.

*Illinois.* — John Spry Lumber Co. *v.* Chappell, 184 Ill. 539.

*Missouri.* — Caffery *v.* Choctaw Coal, etc., Co., 95 Mo. App. 174, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 678.

*New Jersey.* — Canfield *v.* Browning, 69 N. J. L. 553, holding that an insufficient levy cannot be perfected by a levy made after such return day.

*New York.* — Peetsch *v.* Sommers, 31 N. Y. App. Div. 255; Lopez *v.* Campbell, 163 N. Y. 340.

*Pennsylvania.* — Rhodes *v.* Barnett, 196 Pa. St. 429; Boyer *v.* Miller, 200 Pa. St. 589; Spicks *v.* Prospect Brewing Co., 19 Pa. Super. Ct. 399.

*Rhode Island.* — East Greenwich Sav. Inst. *v.* Allen, 22 R. I. 339.

*Texas.* — Snodgrass *v.* Rutherford, (Tex. Civ. App. 1899) 54 S. W. Rep. 1054.

**679.** 1. Lien After Return Day as to Property Levied On. — Caffery *v.* Choctaw Coal, etc., Co., 95 Mo. App. 174, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 678 [679].

*Return of "Nulla Bona" Through Mistake.* — It has been held in *New York* where the return of *nulla bona* was made through the mistake of a deputy, and such return was set aside afterwards, that the lien under such execution was not lost so as to postpone the rights of the judgment creditor to those of a subsequent attaching creditor. Lopez *v.* Campbell, 163 N. Y. 540.

**680.** 2. Preservation of Original Lien by Alias and Pluries Writs. — Chaney *v.* Burford Lumber Co., 132 Ala. 318; Miller *v.* McAlister, 197 Ill. 72; Carr *v.* Keeley Brewing Co., 94 Ill. App. 225; Arkansas City First Nat. Bank *v.* Farmers' Nat. Bank, 61 Kan. 620; State *v.* Stokes, 99 Mo. App. 236; Bellows *v.* Sowles, 71 Vt. 214; Yatter *v.* Smilie, 72 Vt. 349; Adams *v.* National Bank of Commerce, 30 Wash. 20.

It has been held that the issuance of such writs, being entirely statutory, must be expressly authorized by statute. Keeley Brewing Co. *v.* Carr, 198 Ill. 492.

**3.** Preservation of Original Lien by Issuing Successive Executions. — Chaney *v.* Burford Lumber Co., 132 Ala. 318; Harrier *v.* Bassford, 145 Cal. 529; Watson *v.* Keystone Iron Works Co., (Kan. 1904) 78 Pac. Rep. 156; Davis *v.* Beall, 21 Tex. Civ. App. 183; Yatter *v.* Smilie, 72 Vt. 349.

*Failure to Return One Writ.* — McCrossin *v.* McCrossin, 21 Pa. Co. Ct. 33.

Where a second execution is issued before the return of the first, the second is voidable, but not void. Mollineaux *v.* Mott, 78 N. Y. App. Div. 493.

*Return of Execution Before Return Day.* — Chaney *v.* Burford Lumber Co., 132 Ala. 318.

**682.** 4. Writ First Delivered Takes Priority — *Colorado.* — People *v.* Finch, 19 Colo. App. 512.

*Illinois.* — Sidelinger *v.* Freeman, 86 Ill. App. 514.

*Kansas.* — Atchison Sav. Bank *v.* Wyman, 65 Kan. 314.

*Kentucky.* — Richart *v.* Goodpaster, 116 Ky. 637.

*Maryland.* — Prentiss Tool, etc., Co. *v.* Whitman, etc., Mfg. Co., 88 Md. 240.

*New Jersey.* — Hall *v.* Nash, 58 N. J. Eq. 554; Canfield *v.* Browning, 69 N. J. L. 553.

*New York.* — Lopez *v.* Campbell, 163 N. Y. 340.

*Pennsylvania.* — Spicks *v.* Prospect Brewing Co., 19 Pa. Super. Ct. 399.

*Virginia.* — Boisseau *v.* Bass, 100 Va. 207, 93 Am. St. Rep. 956, 4 Va. Sup. Ct. 105.

**683.** 2. Execution under Which First Levy Is Made Gains Priority. — Atchison Sav. Bank *v.* Wyman, 65 Kan. 314; Kinmonth *v.* White, 61 N. J. Eq. 358; Droege *v.* Baxter, 69 N. Y. App. Div. 58, affirmed 171 N. Y. 654; Sherrard *v.* Johnston, 193 Pa. St. 166, 74 Am. St. Rep. 680; Platt-Barber Co. *v.* Groves, 7 Pa. Super. Ct. 599, reversed 193 Pa. St. 475.

**684.** 2. Writs Delivered to Different Officers. — Sidelinger *v.* Freeman, 86 Ill. App. 514; Sidelinger *v.* Jones-Earl Shoe Co., 89 Ill. App. 188.

**4.** Priority Gained by Vigilance. — Atchison Sav. Bank *v.* Wyman, 65 Kan. 314; Bradley *v.* Heffernan, 156 Mo. 653.

**6.** Property Subject to Judgment Lien — Preference of Oldest Judgment. — Macon Sav. Bank *v.* Carter, 107 Ga. 778; Standard Oil Co. *v.* R. D. Cole Mfg. Co., 108 Ga. 227; Atlanta Trust, etc., Co. *v.* Nelms, 115 Ga. 53; Mayer *v.* Morgan, 26 Wash. 71.

**7.** Lien of Executions Attaching Simultaneously — Preference of Oldest Judgment. — Macon Sav. Bank *v.* Carter, 107 Ga. 778.

**685.** 2. Levy Made under Junior Writ — Sale Must Be for Satisfaction of Senior. — Atlanta Trust, etc., Co. *v.* Nelms, 115 Ga. 53.

**3.** Sale under Junior Writ — Proceeds Appli-

**686.** (10) *When There Is No Priority* — (a) *Writs Sued Out at Same Term.* — See note 3.

**687.** *b. BETWEEN EXECUTION AND OTHER LIENS* — (1) *General Rule.* — See notes 2, 3.

(2) *Various Liens and Claims Particularly Considered* — (a) *Attachment.* — See notes 4, 6.

**688.** (b) *Distress Warrant.* — See notes 2, 3.

(c) *Mortgage.* — See notes 4, 5, 6.

*cable to Senior.* — *Atlanta Trust, etc., Co. v. Nelms*, 115 Ga. 53.

**686.** 3. *Equality Between Executions Sued Out at Same Term of Court.* — *Rauh v. Aknovitch*, 59 Ohio St. 483, holding the rule applicable where one of the writs is issued on a transcript from another court.

**687.** 2. *Execution Lien Takes Precedence of Other Liens Subsequently Arising.* — *Griffin v. Dauphin*, 133 Ala. 543; *Curtner v. Lyndon*, 128 Cal. 35; *Paddock v. Staley*, 13 Colo. App. 363; *People v. Finch*, 19 Colo. App. 512; *Smith v. Simmons*, 2 Penn. (Del.) 462; *Therme v. Bethenoid*, 106 Iowa 697; *Prentiss Tool, etc., Co. v. Whitman, etc., Mfg. Co.*, 88 Md. 240; *Fellows v. Hoyt*, 69 N. H. 179; *Dewaters v. Kuhnle*, 199 Pa. St. 439; *Lefever v. Armstrong*, 15 Pa. Super. Ct. 565; *Mayer v. Morgan*, 26 Wash. 71.

3. *Existing Liens Not Displaced by Execution* — *Alabama.* — *Rust v. Electric Lighting Co.*, 124 Ala. 202.

*Delaware.* — *Isaacs v. Messick*, 1 Marv. (Del.) 259.

*Georgia.* — *Walker v. Hughes*, 108 Ga. 768; *Hitch v. Bailey*, 115 Ga. 891.

*Kentucky.* — *Wilson v. Flanders*, 114 Ky. 534.

*Michigan.* — *Stack v. Olmsted*, 127 Mich. 359.

*Minnesota.* — *Schneider v. Anderson*, 77 Minn. 124.

*Nebraska.* — *Hayes v. First State Bank*, (Neb. 1904) 98 N. W. Rep. 423.

*New Hampshire.* — *Carrasco v. Mason*, 72 N. H. 158.

*Oklahoma.* — *Mosier v. Momsen*, 13 Okla. 41.

*Pennsylvania.* — *Huey v. Prince*, 187 Pa. St. 151; *Cella's Estate*, 17 Pa. Super. Ct. 428.

*Texas.* — *John B. Hood Camp, etc., v. De Cordova*, 92 Tex. 202.

*Right to Redeem from Prior Incumbrances.* — *Porter v. Watson*, 69 Kan. 349; *Osborne v. Hughey*, 14 Okla. 29.

*A Lien upon Personal Property Not Reduced to Possession or Recorded.* — *Spicks v. Prospect Brewing Co.*, 19 Pa. Super. Ct. 399.

4. *Mere Delivery of Execution Gives Priority over Subsequent Attachment.* — *Lopez v. Campbell*, 163 N. Y. 340. See also *Corbett v. Provident Nat. Bank*, 23 Tex. Civ. App. 602.

6. *Levy of Attachment Gives Priority over Execution Subsequently Issued and Delivered.* — *Poor v. Chapin*, 97 Me. 295; *Pitkin v. Burnham*, 62 Neb. 385, 89 Am. St. Rep. 763; *Leonard v. Bowne*, 63 N. J. Eq. 488; *Lopez v. Campbell*, 163 N. Y. 340; *Finch v. Park*, 15 S. Dak. 339.

**688.** 2. *Priority of Execution over Subsequent Distress Warrant.* — *Moore v. Brown, etc., Furniture Co.*, 107 Ga. 139.

3. *Priority of Distress Warrant Levied Before Issue of Execution.* — *Camp v. Williams*, 119 Ga.

152; *Moore v. Brown, etc., Furniture Co.*, 107 Ga. 139.

4. *Priority Gained by Delivery of Execution Before Mortgage Is Executed.* — *Burdge v. Thompson*, 9 Kan. App. 146.

But where the levy is withheld by direction of the judgment creditor until after a mortgage has been executed, the priority is lost. *Ankele v. Elder*, 19 Colo. App. 330.

In *Oklahoma* before the lien of an execution can attach to mortgaged chattels, the officer must pay off or tender the amount of the mortgage lien or deposit the amount of the mortgage debt with the county treasurer for the use of the holder of the mortgage. *Moore v. Calvert*, 8 Okla. 358.

5. *Levy on Land Gives Priority over Subsequent Mortgage.* — *Greer v. Simrall*, 59 S. W. Rep. 759, 22 Ky. L. Rep. 1037; *National Bank v. Tennessee Coal, etc., Co.*, 62 Ohio St. 564; *Armstrong v. Carwile*, 56 S. Car. 463; *Smith v. Schwartz*, 21 Utah 126.

6. *Mortgage Has Priority over Subsequent Executions* — *Alabama.* — *Rust v. Electric Lighting Co.*, 124 Ala. 202.

*California.* — *Summerville v. Kelliher*, 144 Cal. 155.

*Colorado.* — *Ankele v. Elder*, 19 Colo. App. 330.

*Delaware.* — *Isaacs v. Messick*, 1 Marv. (Del.) 259.

*Georgia.* — *Hitch v. Bailey*, 115 Ga. 891.

*Indiana.* — *Marmon v. White*, 151 Ind. 445.

*Kansas.* — *Tucker v. McCrie*, 8 Kan. App. 228; *Phelps, etc., Co. v. Skinner*, 63 Kan. 364; *Anderson v. Montgomery County Nat. Bank*, 64 Kan. 587.

*Kentucky.* — *Worsham v. Lancaster*, (Ky. 1898) 47 S. W. Rep. 448; *Smith v. Allen*, 108 Ky. 368; *Kennedy v. Weber*, (Ky. 1901) 64 S. W. Rep. 514.

*Michigan.* — *Kozminski v. Kuzniak*, 118 Mich. 621; *Stack v. Olmsted*, 127 Mich. 359. See also *Flowers v. Reilly*, 125 Mich. 562.

*Minnesota.* — *Shneider v. Anderson*, 77 Minn. 124.

*Nebraska.* — *Hayes v. First State Bank*, (Neb. 1904) 98 N. W. Rep. 423.

*New Hampshire.* — *Carrasco v. Mason*, 72 N. H. 158.

*New York.* — *Sharp v. Lamy*, 37 N. Y. App. Div. 136; *Craft v. Brandow*, 61 N. Y. App. Div. 247; *V. Loewer's Gambrinus Brewing Co. v. Lithauer*, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 539.

*Ohio.* — *Stevens v. McCoy*, 60 Ohio St. 540.

*Oklahoma.* — *Moore v. Calvert*, 8 Okla. 358; *Osborne v. Hughey*, 14 Okla. 29.

*Pennsylvania.* — *Steele v. Walter*, 204 Pa. St. 257.

*South Carolina.* — *Armstrong v. Carwile*, 56 S. Car. 463.

**688.** Effect of Failure to Record Mortgage. — See note 7.

**689.** See notes 1, 2.

(d) Pledge. — See note 3.

(e) Unrecorded Conveyance. — See note 5.

*South Dakota.* — Plunkett v. Hanschka, 14 S. Dak. 454.

*Utah.* — Smith v. Schwartz, 21 Utah 126, 81 Am. St. Rep. 670.

**Mortgage of Goods to Be Afterwards Acquired.** — Christian, etc., Grocery Co. v. Michael, 121 Ala. 84, 77 Am. St. Rep. 30.

So will an execution have priority over a mortgage on the future increase of stock, the young having neither an actual nor potential existence. Battle Creek Valley Bank v. Madison First Nat. Bank, 62 Neb. 825.

**A Mortgage of Realty Acquires No Interest in Chattels Attached Thereto** where the tenant has the right to remove them. Broadus v. Smith, 121 Ala. 335, 77 Am. St. Rep. 61; Taylor v. Plunkett, 4 Penn. (Del.) 467.

**688. 7. Compliance with Recording Acts.** — Bencher v. Curtis, 119 Mich. 1, 75 Am. St. Rep. 376; Campbell v. Keys, 130 Mich. 127; McCrea v. Hopper, 35 N. Y. App. Div. 572, affirmed 165 N. Y. 633; Crouse v. Schoolcraft, 51 N. Y. App. Div. 160; Armstrong v. Carwile, 56 S. Car. 463; Williams v. Farmers Nat. Bank, 22 Tex. Civ. App. 581.

**Mortgage Recorded but Not Indexed.** — And where a recorded deed is not indexed it does not act as constructive notice. Koch v. West, 118 Iowa 468, 96 Am. St. Rep. 394.

In Iowa if the prior mortgage be recorded before the sale under execution is recorded it takes priority over the execution; but if the execution sale is first recorded, it has priority. Hendryx v. Evans, 120 Iowa 310.

**689. 1. Loss of Priority by Failure to Record Mortgage Before Delivery of Execution.** — Campbell v. Keys, 130 Mich. 127; National Bank v. Tennessee Coal, etc., Co., 62 Ohio St. 564. See also Armstrong v. Carwile, 56 S. Car. 463.

**2. Loss of Priority by Failure to Record Before a Levy.** — Belcher v. Curtis, 119 Mich. 1, 75 Am. St. Rep. 376; Gardner v. Mason, 130 Mich. 436; Johns v. Kamarad, (Neb. 1901) 96 N. W. Rep. 118; National Bank v. Tennessee Coal, etc., Co., 62 Ohio St. 564; Baughn v. Allen, (Tex. Civ. App. 1902) 68 S. W. Rep. 207.

**Actual Knowledge and Notice.** — Hendryx v. Evans, 120 Iowa 310.

Where the purchaser had actual notice of the unrecorded mortgage, though the execution creditor had not, the purchaser can avail himself of the equities of the creditor and has priority over the mortgage. Barnett v. Squyres, (Tex. Civ. App. 1899) 52 S. W. Rep. 612, affirmed 93 Tex. 193, 77 Am. St. Rep. 854.

**3. Priority of Right of Pledgee.** — Buena Vista Loan, etc., Bank v. Grier, 114 Ga. 398; Peoples' Nat. Bank v. Wheedon, 115 Ga. 782.

**5. Priority of Execution over Unrecorded Conveyance** — Alabama. — Hall v. Griffin, 119 Ala. 214; Danner v. Crew, 137 Ala. 617.

Delaware. — Short v. Short, 2 Penn. (Del.) 62.

Georgia. — Clements v. Stubbs, 106 Ga. 448; McCandless v. Inland Acid Co., 108 Ga. 618; Eason v. Vandiver, 108 Ga. 109.

Illinois. — Carter v. Reynolds, 106 Ill. App. 444.

Indiana. — Union Cent. L. Ins. Co. v. Dodds, 155 Ind. 365.

Michigan. — Gardner v. Mason, 130 Mich. 436.

Mississippi. — Hart v. Gardner, 81 Miss. 650.

Missouri. — Wilson v. Jackson, 167 Mo. 135.

New Hampshire. — Butler v. Wheeler, (N. H. 1905) 59 Atl. Rep. 935.

Texas. — John B. Hood Camp, etc., v. De Cordova, 92 Tex. 202; Central City Trust Co. v. Waco Bldg. Assoc., 95 Tex. 48; Sanger v. Collum, (Tex. Civ. App. 1904) 78 S. W. Rep. 401.

Virginia. — Fulkerson v. Taylor, 102 Va. 314.

Washington. — See Rohrer v. Snyder, 29 Wash. 199.

**Equitable Rights of Grantee in Unrecorded Conveyance.** — Uhl v. Weiden, 122 Mich. 638; Hicks v. Pogue, 33 Tex. Civ. App. 333.

But where there was an unrecorded declaration of trust executed by the holder of the legal title and no actual notice of the same, the supposed *cestui que trust* was held not to have priority. Home Sav., etc., Bank v. Peoria Agricultural, etc., Soc., 206 Ill. 9, 99 Am. St. Rep. 132.

Where one purchases land by parol and takes possession, he cannot maintain priority over judgment creditors until he has a perfect equitable title by paying all of the purchase money. Fulkerson v. Taylor, 102 Va. 314.

**Actual Notice of Conveyance.** — Hall v. Griffin, 119 Ala. 214; Danner v. Crew, 137 Ala. 617; Short v. Short, 2 Penn. (Del.) 62; Union Cent. L. Ins. Co. v. Dodds, 155 Ind. 365; Tucker v. McCrie, 8 Kan. App. 228; Perry v. Trimble, 76 S. W. Rep. 343, 25 Ky. L. Rep. 725; Jones v. Herrick, 35 Wash. 434.

Where there has been actual notice, it has been held that the purchaser will be protected to the extent that he has paid the purchase money, and to no greater extent. Fulkerson v. Taylor, 102 Va. 314.

Notice after levy and before sale will not prevent the operation of the rule. Johns v. Kamarad, (Neb. 1901) 96 N. W. Rep. 118. Contra, Bean v. Everett, (Ky. 1900) 56 S. W. Rep. 403.

In Iowa priority is accorded to the one first recording. Hendryx v. Evans, 120 Iowa 310.

**Where the Levy Is Required to Be Recorded,** priority is given to subsequent purchasers without notice of the unrecorded levy. Ponder v. Boaz, (Ky. 1902) 67 S. W. Rep. 833; Swift v. Guild, 94 Me. 436, 80 Am. St. Rep. 406; Gardner v. Mason, 130 Mich. 436. See also Park v. McReynolds, 111 Ky. 651; Butler v. Wheeler, (N. H. 1905) 59 Atl. Rep. 935.

**Where the Judgment Is Not Recorded Within Ten Days,** priority is given to bona fide purchasers. Eason v. Vandiver, 108 Ga. 109.

**Where the Sale Is Not Recorded until after the judgment lien expires,** the purchaser takes a title superior to that of the purchaser at judgment sale. Hines v. Moye, 125 N. Car. 8.



**689.** (f) *Mechanic's Lien.* — See note 6.

**690.** (g) *Vendor's Lien.* — See note 2.

(h) *Landlord's Lien for Rent.* — See note 3.

(i) *Claim for Wages.* — See note 5.

(j) *Dower.* — See note 6.

**7. Extinguishment or Suspension of the Lien — a. BY SATISFACTION**

— (1) *Rule Stated.* — See note 10.

**691.** (3) *Effect of Taking Body of Defendant under Ca. Sa.* — See note 3.  
d. *BY SETTING ASIDE OF EXECUTION.* — See note 6.

**692.** e. *BY ABANDONMENT, LACHES, OR PERVERSION OF WRIT —*

(1) *Lien Cannot Be Lost Without Fault of Plaintiff.* — See note 1.

(2) *Abandonment of Lien.* — See notes 2, 3, 4.

*Issue of Alias Writ.* — See note 5.

*Delay.* — See note 6.

**693.** (3) *Loss of Lien Through Laches.* — See notes 2, 3.

**Bona Fide Purchasers Only** have this right of priority over unrecorded conveyances, and an execution creditor purchasing at his own sale is not a *bona fide* purchaser. *Hacker v. White*, 22 Wash. 415; *Perry v. Trimble*, 76 S. W. Rep. 343, 25 Ky. L. Rep. 725.

**Recording Fi. Fa.** — Where statute requires a recording of fi. fa. within ten days from the rendition of the judgment, when it is not so recorded, a subsequent conveyance to a *bona fide* purchaser will be valid against the execution. *Harvey v. Sanders*, 107 Ga. 740.

**Delivery of Deed After Levy.** — Where the deed has been recorded but not delivered until after levy, the levy has priority. *Huffman v. Nixon*, 212 Mo. 303, 75 Am. St. Rep. 454.

**689. 6. Execution Does Not Divest Pre-existing Artisan's Lien.** — *Lemmon v. Osborn*, 153 Ind. 172.

**690. 2. Priority of Execution Where No Vendor's Lien Has Been Preserved.** — *Pugh v. Highley*, 152 Ind. 252, 71 Am. St. Rep. 327. See also *Ivey v. Coston*, 134 Ala. 259; *Brotherton v. Anderson*, 27 Tex. Civ. App. 587.

**3. Landlord's Lien on Crops Paramount.** — *Thomas v. Shell*, 76 Miss. 556.

**5. Wages Earned After Levy Not Preferred to Execution.** — *Hughes v. City Hall Bank*, 61 Ohio St. 386.

**6. Mere Delivery of Execution During Life of Husband Does Not Defeat Dower.** — *Marmon v. White*, 151 Ind. 445.

**10. Lien of Execution Extinguished by Satisfaction.** — *Dickerson v. Downs*, 108 Ga. 782; *Thornton v. Damm*, 120 Mich. 510.

**691. 3. Lien of Execution Lost if Body of Defendant Taken under Ca. Sa.** — *Cox v. Spurgin*, 210 Ill. 398. See also *Hoyle v. McCrea*, 42 N. Y. App. Div. 313.

**6. Lien Divested Where Execution Set Aside.** — *Cox v. Spurgin*, 210 Ill. 398; *Pitkin v. Burnham*, 62 Neb. 385, 89 Am. St. Rep. 763.

Where after the levy of an execution another is sued out and quashed, without any reference to the first, the quashing of the second will not affect the lien of the first. *Baer v. Ingram*, 99 Va. 200.

**Setting Aside of Sale.** — *Campau v. Detroit Driving Club*, 135 Mich. 575.

**692. 1. Lien Cannot Be Lost Without Fault of Plaintiff.** — *Sidelinger v. Jones-Earl Shoe Co.*, 89 Ill. App. 188; *Greer v. Simrall*, 59 S.

W. Rep. 759, 22 Ky. L. Rep. 1037; *Lopez v. Campbell*, 163 N. Y. 340; *Hughes v. City Hall Bank*, 61 Ohio St. 386; *Adams v. National Bank of Commerce*, 30 Wash. 20.

**2. Levy May Be Waived and Lien Acquired Thereby Abandoned.** — *Frazee v. Nelson*, 179 Mass. 456, 88 Am. St. Rep. 391; *Tolerton, etc., Co. v. Petrie*, 12 S. Dak. 595.

Where a constable holding chattels under an execution, delivered them to an assignee for the benefit of the creditors of the execution debtor, with an agreement between the officer and assignee that the chattels should remain subject to the execution lien, the lien was not abandoned. *Hughes v. City Hall Bank*, 61 Ohio St. 386.

**3. Abandonment Must Be Clearly Proved.** — *Meyer v. Michaels*, (Neb. 1903) 95 N. W. Rep. 63.

**4. Circumstances Amounting to Abandonment.** — *Chaney v. Burford Lumber Co.*, 132 Ala. 318; *Harvey v. Sanders*, 107 Ga. 740; *Keeley Brewing Co. v. Carr*, 198 Ill. 492; *Frazee v. Nelson*, 179 Mass. 456, 88 Am. St. Rep. 391; *Excelsior Needle Co. v. Globe Cycle Works*, 48 N. Y. App. Div. 304; *Moore v. Calvert*, 8 Okla. 358.

**Circumstances Not Amounting to Abandonment.** — *Greer v. Simrall*, 59 S. W. Rep. 759, 22 Ky. L. Rep. 1037; *Vanosdall v. Hamilton*, 118 Mich. 533; *Meyer v. Michaels*, (Neb. 1903) 95 N. W. Rep. 63; *Hughes v. City Hall Bank*, 61 Ohio St. 386; *Smith v. Nicola Bros. Co.*, 193 Pa. St. 562.

**A Question of Fact.** — *Bagshawes v. Deacon*, (1898) 2 Q. B. 173; *Vanosdall v. Hamilton*, 118 Mich. 533.

**5. Issue of Second Writ Not an Abandonment of Levy under First.** — *Arkansas City First Nat. Bank v. Farmers' Nat. Bank*, 61 Kan. 620.

**Sheriff Must Not Have Surrendered Possession under Original Levy.** — *Chaney v. Burford Lumber Co.*, 132 Ala. 318.

**6. Cases Must Be Determined from Particular Circumstances Shown.** — *Bagshawes v. Deacon*, (1898) 2 Q. B. 173.

**693. 2. Lien May Be Lost by Unreasonable Delay in Enforcing Execution.** — *Reddick v. Long*, 124 Ala. 260; *Harvey v. Sanders*, 107 Ga. 740; *Platt-Barber Co. v. Groves*, 7 Pa. Super. Ct. 599, reversed 193 Pa. St. 475; *Call v. Cozart*, (Tenn. Ch. 1898) 48 S. W. Rep. 312.

**694.** (4) *Loss of Lien Through Perversion of Writ* — (a) Rule Stated. — See notes 1, 2.

**695.** (b) Reason for the Rule. — See note 1.

(c) Modification of the Rule in Some Jurisdictions. — See note 2.

**696.** (d) *Circumstances Amounting to Perversion of Writ* — *aa. BURDEN OF PROOF.* — See note 2.

*bb. WHAT DELAY IS PERMISSIBLE.* — See note 3.

*Reasonable Indulgence.* — See notes 4, 5, 6.

**697.** *cc. WHAT INTERFERENCE WITH EXECUTION WILL POSTPONE LIEN.* — See note 1.

(e) Effect of Subsequent Instructions to Execute Writ. — See note 4.

**698.** (f) *Writ Issued to Be Executed Not Affected by Perversion of Prior Writs.* — See note 2.

*f. EFFECT OF APPEAL, OR WRIT OF ERROR, AND SUPERSEDEAS.* — See notes 3, 4.

*g. EFFECT OF STAY OF EXECUTION.* — See note 5.

**699.** *h. EFFECT OF GIVING FORTHCOMING OR DELIVERY BOND.* — See note 2.

*i. EFFECT OF INJUNCTION.* — See note 3.

**693.** 3. *Cases Wherein Delay Was Held Sufficient to Extinguish Lien.* — *Reddick v. Long*, 124 Ala. 260; *Harvey v. Sanders*, 107 Ga. 740; *Platt-Barber Co. v. Groves*, 7 Pa. Super. Ct. 599, *reversed* 193 Pa. St. 475; *Call v. Cozart*, (Tenn. Ch. 1898) 48 S. W. Rep. 312; *Smith v. Schwartz*, 21 Utah 126, 81 Am. St. Rep. 670.

*Cases Wherein Delay Was Held Not Sufficient to Extinguish Lien.* — *Sidelinger v. Jones-Earl Shoe Co.*, 89 Ill. App. 188; *Greer v. Simrall*, 59 S. W. Rep. 759, 22 Ky. L. Rep. 1037; *Schwartz v. Gabler*, 8 Pa. Super. Ct. 227.

**694.** 1. *Office of Execution Is to Collect, Not to Secure Debt.* — *Excelsior Needle Co. v. Globe Cycle Works*, 48 N. Y. App. Div. 304.

2. *Loss of Lien by Perversion of Writ.* — *In re Ferguson*, 95 Fed. Rep. 429; *Ankele v. Elder*, 19 Colo. App. 330; *Union Nat. Bank v. Lane*, 177 Ill. 171, 69 Am. St. Rep. 216; *McHale v. Westover*, 101 Ill. App. 276; *Excelsior Needle Co. v. Globe Cycle Works*, 48 N. Y. App. Div. 304; *Platt-Barber Co. v. Groves*, 7 Pa. Super. Ct. 599, *reversed* 193 Pa. St. 475; *Adams v. National Bank of Commerce*, 30 Wash. 20.

**695.** 1. *Delay Operates as Fraud on Junior Creditors.* — *McHale v. Westover*, 101 Ill. App. 276; *Excelsior Needle Co. v. Globe Cycle Works*, 48 N. Y. App. Div. 304; *Platt-Barber Co. v. Groves*, 7 Pa. Super. Ct. 599, *reversed* 193 Pa. St. 475.

2. *Lien Not Necessarily Postponed by Stay of Execution.* — *Schwartz v. Gabler*, 8 Pa. Super. Ct. 227; *Swick v. McLaughlin*, 4 Lack. Leg. N. (Pa.) 240.

**696.** 2. *Presumption that Writ Was Delivered to Be Executed.* — *Philip Kling Brewing Co. v. Mosher*, 23 Pa. Co. Ct. 265.

3. *Postponement of Sale to Avoid Sacrificing Property.* — See *McHale v. Westover*, 101 Ill. App. 276.

4. *Reasonable Indulgence to Save Goods from Sacrifice.* — *Smith v. Nicola Bros. Co.*, 193 Pa. St. 562.

5. *Delay to Avoid Subjecting Debtor's Family to Unnecessary Annoyance.* — *Schwartz v. Gabler*, 8 Pa. Super. Ct. 227.

6. *Permitting Debtor's Possession for Reasonable Time.* — *Smith v. Nicola Bros. Co.*, 193 Pa. St. 562; *Swick v. McLaughlin*, 4 Lack. Leg. N. (Pa.) 240; *Schwartz v. Gabler*, 8 Pa. Super. Ct. 227.

**697.** 1. *Instructions Held Inconsistent with Mandate of Writ.* — *In re Ferguson*, 95 Fed. Rep. 429; *Ankele v. Elder*, 19 Colo. App. 330; *Excelsior Needle Co. v. Globe Cycle Works*, 48 N. Y. App. Div. 304.

*A Mere Failure or Refusal to Give Directions.* — *Philip Kling Brewing Co. v. Mosher*, 23 Pa. Co. Ct. 265.

4. *Lien Cannot Be Revived to Take Precedence of Other Liens Acquired During Dormancy.* — *Ankele v. Elder*, 19 Colo. App. 330; *McHale v. Westover*, 101 Ill. App. 276; *Platt-Barber Co. v. Groves*, 7 Pa. Super. Ct. 599, *reversed* 193 Pa. St. 475.

**698.** 2. *Writ Issued to Be Executed Not Affected by Perversion of Prior Writs.* — *In re Ferguson*, 95 Fed. Rep. 429; *Philip Kling Brewing Co. v. Mosher*, 23 Pa. Co. Ct. 265.

3. *An Appeal Vacates an Execution.* — *Eppinger v. Scott*, 130 Cal. 275.

4. *Levy Not Defeated by Supersedeas.* — *Di Nola v. Allison*, 143 Cal. 106, 101 Am. St. Rep. 84; *Riegel v. Fields*, 9 Kan. App. 800; *Ware v. Pleasant Grove Tp.*, 9 Kan. App. 700.

*In States Where Review on Certiorari is allowed and the judgment is affirmed, the levy is not defeated and the original lien is preserved.* *In re Freeny*, 2 Marv. (Del.) 114.

5. *Stay by Order of Court Does Not Destroy Lien.* — *Anderson v. Anderson*, 123 Cal. 445; *Campau v. Detroit Driving Club*, 135 Mich. 575; *August v. Gilmer*, 53 W. Va. 65.

**699.** 2. *Lien Not Divested by Forthcoming or Delivery Bond, Etc.* — *Pratt v. Cook*, 10 Kan. App. 144; *Livingston v. Allen*, 83 Mo. App. 294.

3. *Injunction Merely Suspends Lien.* — *Wells v. Vansickle*, 112 Fed. Rep. 398; *Rain v. Young*, 61 Kan. 428, 78 Am. St. Rep. 325; *Mason, etc., Co. v. Mechanics' Lien, etc., Co.*, (Ky. 1904) 82 S. W. Rep. 290; *Snyder v. Smith*, 185 Mass. 58; *Modisett v. National Bank*, 23 Tex. Civ. App. 589.

**700.** *k.* EFFECT OF INTERPOSITION OF CLAIM TO PROPERTY BY THIRD PERSON. — See notes 4, 5, 6.

**701.** *l.* EFFECT OF FAILURE TO INDEMNIFY LEVYING OFFICER. — See note 2.

*m.* EFFECT OF DEATH OF EXECUTION DEBTOR. — See note 4.

**702.** Lien of Levy Continues After Defendant's Death. — See note 3.

**703.** VIII. SATISFACTION AND DISCHARGE — 2. By Levy and Sale — *a.* LEVY ON PERSONAL PROPERTY — (1) *General Rule — Satisfaction Presumed.* — See notes 1, 2.

**704.** The Reason of the Rule. — See note 1.

Value of Property. — See note 3.

(2) *The Satisfaction Merely Prima Facie.* — See note 7.

**705.** (3) *Circumstances Rebutting Presumption* — (a) *General Rule.* — See note 1.

**707.** (f) Abandonment of Invalid or Wrongful Levy. — See note 4.

**709.** (g) Release of Property under Forthcoming or Delivery Bond — Effect After Breach of Conditions. — See note 1.

(h) Delay or Postponement of Sale. — See note 3.

**710.** (j) Insufficiency of Proceeds — *bb.* APPLICATION OF PROCEEDS TO SUPERIOR CLAIMS. — See note 2.

**700.** 4. Lien Not Divested by Interposition of Claim by Third Person. — *Hilton, etc., Lumber Co. v. Clements*, 108 Ga. 791; *Jones v. Dodd*, 108 Ga. 513; *Oatts v. Wilkins*, 110 Ga. 319; *Brannon v. Barnes*, 111 Ga. 850; *Small v. Finch*, 31 Ind. App. 18; *Fletcher v. Wrighton*, 184 Mass. 547.

But the rule is otherwise where the statutory period for the duration of the lien expires while such claim is being contested. *Adams v. National Bank of Commerce*, 30 Wash. 20.

Giving of Bond and Receipt of Property by Claimant — Lien Divested in Pennsylvania. — See *Meyer v. Knight*, 21 Pa. Super. Ct. 1.

5. Lien Suspended as to Particular Property Levied On. — *Thompson v. American Mortg. Co.*, 107 Ga. 832; *Hilton, etc., Lumber Co. v. Clements*, 108 Ga. 791; *Collins v. Hill*, 115 Ga. 465; *Patterson v. Snow*, 24 Ind. App. 572; *Fletcher v. Wrighton*, 184 Mass. 547; *August v. Gilmer*, 53 W. Va. 65.

6. Lien Revived by Determination Adverse to Claimant. — *Malpass v. Georgia L. & T. Co.*, 108 Ga. 303.

**701.** 2. Lien Destroyed by Return of Property upon Refusal to Indemnify Sheriff. — *State v. Jenkins*, 170 Mo. 16.

4. Lien Not Lost by Death of Debtor. — *Hudgins v. McLain*, 116 Ga. 273; *Watson v. Moore*, 40 Oregon 204.

Lien Cannot Be Created After Death of Defendant. — *Reddick v. Long*, 124 Ala. 260; *Seely v. Johnson*, 61 Kan. 337, 78 Am. St. Rep. 314.

Death of Execution Plaintiff. — *Hatcher v. Lord*, 115 Ga. 619; *Maxwell v. Leeson*, 50 W. Va. 361, 88 Am. St. Rep. 875.

**702.** 3. Lien of Levy Continues After Death of Debtor. — *Hudgins v. McLain*, 116 Ga. 273.

**703.** 1. Levy on Sufficient Personal Property Is Prima Facie a Satisfaction — *Georgia*. — *Pinkston v. Harrell*, 106 Ga. 102, 71 Am. St. Rep. 242.

*Indiana*. — *Pugh v. Highley*, 152 Ind. 252, 71 Am. St. Rep. 327.

*Iowa*. — *Bowen v. Port Huron Engine, etc., Co.*, 109 Iowa 258, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 703.

*Montana*. — *Greene v. Montana Brewing Co.*, 28 Mont. 380.

*New Jersey*. — *Kinmonth v. White*, 61 N. J. Eq. 358.

*South Carolina*. — *Tyler v. Williams*, 53 S. Car. 367.

*South Dakota*. — *Tolerton, etc., Co. v. Petrie*, 12 S. Dak. 595, quoting 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 703.

*Washington*. — *Adams v. National Bank of Commerce*, 30 Wash. 20.

2. Burden of Proof. — *Tyler v. Williams*, 53 S. Car. 367; *Tolerton, etc., Co. v. Petrie*, 12 S. Dak. 595, quoting 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 703.

**704.** 1. Reason of the Rule. — *Kinmonth v. White*, 61 N. J. Eq. 358.

3. Property Must Be of Sufficient Value to Satisfy the Execution. — *Pinkston v. Harrell*, 106 Ga. 102, 71 Am. St. Rep. 242; *Bowen v. Port Huron Engine, etc., Co.*, 109 Iowa 258.

7. Presumption of Satisfaction from Levy May Be Rebutted. — *De Vaughn v. Byrom*, 110 Ga. 904; *Hollis v. Lamb*, 114 Ga. 740; *Murphy v. Busick*, 22 Ind. App. 247; *Bowen v. Port Huron Engine, etc., Co.*, 109 Iowa 258; *Kinmonth v. White*, 61 N. J. Eq. 358; *Tolerton, etc., Co. v. Petrie*, 12 S. Dak. 595; *Adams v. National Bank of Commerce*, 30 Wash. 20, quoting 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 704.

**705.** 1. *Adams v. National Bank of Commerce*, 30 Wash. 20, quoting 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 705.

**707.** 4. Abandonment of Invalid Levy. — *Massie v. McKee*, (Tex. Civ. App. 1900) 56 S. W. Rep. 119.

**709.** 1. Doctrine that There Is No Satisfaction — Remedies Cumulative. — *Reese v. Worsham*, 110 Ga. 449, 78 Am. St. Rep. 109.

3. Delay or Postponement of Sale under Execution. — *McHale v. Westover*, 101 Ill. App. 276; *Frazee v. Nelson*, 179 Mass. 456, 88 Am. St. Rep. 391; *Weatherby v. Slape*, 58 N. J. Eq. 550, 78 Am. St. Rep. 627.

**710.** 2. Application of Proceeds to Superior Claims. — *Bartles v. Dodd*, 56 W. Va. 383.



**711.** *b. Levy on Real Property.* — See notes 6, 7.

**712.** See note 1.

*Levy on Land Not Resulting in Satisfaction.* — See note 3.

*c. SATISFACTION IN FAVOR OF THIRD PERSONS — (1) In General.*

— See note 4.

(2) *Sureties.* — See note 5.

**713.** (3) *Junior Lienholders and Purchasers.* — See note 6.

**714.** 3. *By Payment.* — See note 1.

*In What Payment Must Be Made.* — See note 5.

*Payment by Another Than the Defendant.* — See note 6.

**715.** *Payment of a Judgment.* — See note 2.

4. *Vacation of Entry of Satisfaction.* — See note 4.

**711.** 6. *Levy on Land — Doctrine that It Is Prima Facie a Satisfaction.* — *Tyler v. Williams*, 53 S. Car. 367; *Bellows v. Sowles*, 71 Vt. 214.

7. *Doctrine that There Is No Prima Facie Satisfaction.* — *Andrews v. Scott*, 113 Ill. App. 581, affirmed 211 Ill. 612; *Scott v. Aultman Co.*, 211 Ill. 612; *Lemmon v. Osborn*, 153 Ind. 172; *Kinmonth v. White*, 61 N. J. Eq. 358; *Junior Order Bldg.*, etc., *Assoc. v. Sharpe*, 63 N. J. Eq. 500; *East Greenwich Sav. Inst. v. Allen*, 22 R. I. 339; *Hollon v. Hale*, 21 Tex. Civ. App. 194; *State Nat. Bank v. Hathaway*, (Tex. Civ. App. 1901) 61 S. W. Rep. 525; *Murray v. Briggs*, 29 Wash. 245.

**712.** 1. *Reason for the Distinction.* — *Kinmonth v. White*, 61 N. J. Eq. 358.

3. *Levy Not Resulting in Actual Satisfaction.* — *Scott v. Aultman Co.*, 211 Ill. 612, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 712; *Lemmon v. Osborn*, 153 Ind. 172; *Kinmonth v. White*, 61 N. J. Eq. 358; *East Greenwich Sav. Inst. v. Allen*, 22 R. I. 339; *Bellows v. Sowles*, 71 Vt. 214.

*Inability to Sell.* — *Gundry v. Brown*, (Neb. 1901) 96 N. W. Rep. 610.

*Refusal of Purchaser to Complete Purchase.* — *Simmons v. Cook*, 109 Ga. 553; *Scott v. Aultman Co.*, 211 Ill. 612, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 712; *Bradley v. Geo. Challoner's Sons Co.*, 103 Ill. App. 618; *Andrews v. Scott*, 113 Ill. App. 581, affirmed 211 Ill. 612; *Rowley v. Feldman*, 84 N. Y. App. Div. 400; *State Nat. Bank v. Hathaway*, (Tex. Civ. App. 1901) 61 S. W. Rep. 525.

*Levy of Void Execution.* — *Junior Order Bldg.*, etc., *Assoc. v. Sharpe*, 63 N. J. Eq. 500.

*Sale of Land Not Affecting Title.* — *Scott v. Aultman Co.*, 211 Ill. 612, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 712; *East Greenwich Sav. Inst. v. Allen*, 22 R. I. 339; *Hollon v. Hale*, 21 Tex. Civ. App. 194; *Messie v. McKee*, (Tex. Civ. App. 1900) 56 S. W. Rep. 119.

4. *Satisfaction in Favor of Third Persons.* — *Tolerton, etc., Co. v. Petrie*, 12 S. Dak. 595, quoting 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 712. See also *McHale v. Westover*, 101 Ill. App. 276.

5. *Satisfaction in Favor of Sureties.* — *Williams v. Riehl*, 127 Cal. 365, 78 Am. St. Rep. 60; *Ward v. McLamb*, 118 Ga. 811; *Flaherty v. Cramer*, (N. J. 1898) 41 Atl. Rep. 482.

**713.** 6. *Satisfaction in Favor of Junior Lienholders and Purchasers.* — *McHale v. Westover*, 101 Ill. App. 276; *Flatt-Barber Co. v. Groves*,

7 Pa. Super. Ct. 599, reversed 193 Pa. St. 475; *Tolerton, etc., Co. v. Petrie*, 12 S. Dak. 595, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 713.

**714.** 1. *Payment Is Satisfaction* — *Iowa.* — *Bowen v. Fort Huron Engine, etc., Co.*, 109 Iowa 258.

*Missouri.* — *Baird v. Given*, 170 Mo. 302.

*Nebraska.* — *Plattsmouth First Nat. Bank v. Gibson*, 60 Neb. 767.

*New York.* — *Hexter v. Pennsylvania R. Co.*, 43 N. Y. App. Div. 113.

*North Dakota.* — *Faber v. Wagner*, 10 N. Dak. 287.

*Oregon.* — *Barr v. Rader*, 33 Oregon 375.

*Pennsylvania.* — *Robinson v. Hart*, 23 Pa. Super. Ct. 299.

*Rhode Island.* — *East Greenwich Sav. Inst. v. Allen*, 22 R. I. 339, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 713, 714.

*Texas.* — *Deleshaw v. Edelen*, 31 Tex. Civ. App. 416.

Where one holds two notes against the same maker and one is merely collateral for the other, payment of the principal debt operates as satisfaction of a judgment and execution on the collateral note. *Lynch v. Burt*, (C. C. A.) 132 Fed. Rep. 417.

*Payment of Execution to an Attorney.* — *Powell v. Massey-Herndon Shoe Co.*, 69 Ark. 79; *Thornton v. Damm*, 120 Mich. 510.

*Payment to an Agent*, if the agent had actual or apparent authority to receive it, is a satisfaction. *Osborne v. Gatewood*, (Tex. Civ. App. 1903) 74 S. W. Rep. 72.

5. *Consent of Plaintiff.* — *Barr v. Rader*, 33 Oregon 375; *Robinson v. Hart*, 23 Pa. Super. Ct. 299.

Where the agent of the judgment creditor compromises the debt, and the creditor receives the money so paid, it will be a satisfaction. *Cobb v. Edson*, (Supm. Ct. App. T.) 84 N. Y. Supp. 916.

6. *Payment by a Third Person.* — *Robinson v. Hart*, 23 Pa. Super. Ct. 299.

**715.** 2. *Payment of Judgment.* — *Parker v. Oxendine*, 85 Mo. App. 212; *Plattsmouth First Nat. Bank v. Gibson*, 60 Neb. 767; *Faber v. Wagner*, 10 N. Dak. 287; *Deleshaw v. Edelin*, 31 Tex. Civ. App. 416.

4. *Vacating Satisfaction — On Motion.* — *East Greenwich Sav. Inst. v. Allen*, 22 R. I. 339; *Hollon v. Hale*, 21 Tex. Civ. App. 194; *Messie v. McKee*, (Tex. Civ. App. 1900) 56 S. W. Rep. 119.

**715.** Grounds for Vacating. — See note 6.

**IX. RELIEF AGAINST WRIT OR LEVY — 2. Relief Against Writ — Motion to Quash.** — See note 11.

**716.** Grounds for Quashing the Writ. — See notes 2, 3, 4, 5.

**717.** Injunction. — See notes 1, 2.

**715. 6. Void Writ, Levy, or Sale.** — East Greenwich Sav. Inst. *v.* Allen, 22 R. I. 339; Hollon *v.* Hale, 21 Tex. Civ. App. 194.

**11. Motion to Quash the Writ — Kentucky.** — Gorman *v.* Glenn, (Ky. 1904) 78 S. W. Rep. 873.

*Missouri.* — Force *v.* Van Patton, 149 Mo. 446; Parker *v.* Oxendine, 85 Mo. App. 212; Hathaway *v.* St. Louis, etc., R. Co., 94 Mo. App. 343; Buzzard *v.* Robertson, 107 Mo. App. 557.

*New Jersey.* — Dawes *v.* Dawes, (N. J. 1899) 43 Atl. Rep. 984.

*Oklahoma.* — Osborne *v.* Hughey, 14 Okla. 29.

*Oregon.* — Marks *v.* Stephens, 38 Oregon 65, 84 Am. St. Rep. 750.

*Pennsylvania.* — See Tradesmen's Bldg., etc., Assoc. *v.* Maher, 9 Pa. Super. Ct. 340.

*Tennessee.* — Dornan *v.* Benham Furniture Co., 102 Tenn. 303.

*Texas.* — Wingfield *v.* Hackney, 30 Tex. Civ. App. 39.

*Washington.* — Adams *v.* National Bank of Commerce, 30 Wash. 20.

*West Virginia.* — Blair *v.* Henderson, 49 W. Va. 282.

**A Justice of the Peace** has no jurisdiction of a motion to quash an execution. Carr *v.* Pennsylvania R. Co., 108 Mo. App. 388.

**In Georgia an Affidavit of Illegality** may be filed by the defendant in execution, but by no one else. State *v.* Sallade, 111 Ga. 700; Walker *v.* Equitable Mortg. Co., 112 Ga. 645; Rice *v.* Macon, 117 Ga. 401; Stephens *v.* Atlanta, 119 Ga. 666.

**In New York the relief against an execution** is to be had by a motion to vacate the execution. Fox *v.* Union Turnpike Co., (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 308; People *v.* Gill, 85 N. Y. App. Div. 192, affirmed 176 N. Y. 606.

**716. 2. Irregularities and Informalities Generally.** — Blair *v.* Henderson, 49 W. Va. 282.

An execution issued on a void judgment may be quashed, but not one issued on an erroneous judgment, as the time for such objections has passed. Blair *v.* Henderson, 49 W. Va. 282.

**One Execution on Two Judgments.** — Where one execution has been issued on two judgments, one of which is valid and the other void, the execution will be held to refer only to the valid execution and will be good. Fisher *v.* George S. Jones Co., 114 Ga. 648.

**3. Payment of Judgment.** — Parker *v.* Oxendine, 85 Mo. App. 212; Lewis *v.* Linton, 207 Pa. St. 320.

**4. Writ Issued Prematurely.** — Sheppard *v.* Roberson, 106 Ga. 757. But see Christian, etc., Grocery Co. *v.* Michael, 121 Ala. 84, 77 Am. St. Rep. 30.

**5. Execution Issued on Dormant Judgment.** — Spear *v.* Hill, 2 Marv. (Del.) 150; Sherrard *v.* Johnston, 193 Pa. St. 166, 74 Am. St. Rep. 680.

As to the rule under the *Georgia* statute, see Easterlin *v.* New Home Sewing Mach. Co., 115 Ga. 305.

**717. 1. Injunction — Georgia.** — Hitchcock *v.* Culver, 107 Ga. 184; Cincinnati, etc., R. Co. *v.* Cathcart, 111 Ga. 818; Racine Iron Co. *v.* McCommons, 111 Ga. 536; Koch *v.* Brockhan, 111 Ga. 334; Rice *v.* Macon, 117 Ga. 401; Armour Packing Co. *v.* Lovell, 118 Ga. 164; Reynolds, etc., Estate Mortg. Co. *v.* Kingsbery, 118 Ga. 254.

*Illinois.* — Greenberg *v.* Holmes, 100 Ill. App. 186; Grampp *v.* McBrearty, 109 Ill. App. 277.

*Indiana.* — Owens *v.* Gascho, 154 Ind. 225.

*Kansas.* — Warner *v.* Imbeau, 63 Kan. 415.

*Missouri.* — Parker *v.* Oxendine, 85 Mo. App. 212; Howlett *v.* Turner, 93 Mo. App. 20.

*New Jersey.* — White *v.* Smith, (N. J. 1904) 58 Atl. Rep. 817.

*Oklahoma.* — Crist *v.* Cosby, 11 Okla. 635.

*Oregon.* — Marks *v.* Stephens, 38 Oregon 65, 84 Am. St. Rep. 750.

*South Dakota.* — Beatty *v.* Smith, 14 S. Dak. 24.

*Tennessee.* — See Williams *v.* Pile, 104 Tenn. 273.

*Texas.* — Williams *v.* Farmers Nat. Bank, 22 Tex. Civ. App. 581; Givens *v.* Delprat, 28 Tex. Civ. App. 363; Wingfield *v.* Hackney, 30 Tex. Civ. App. 39; Hahn *v.* Willis, 31 Tex. Civ. App. 643.

*Wyoming.* — Ward *v.* Rees, 11 Wyo. 459.

See also the title **INJUNCTIONS**.

**2. United States.** — Provident L., etc., Co. *v.* Mills, 91 Fed. Rep. 435; Kerr *v.* New Orleans, (C. C. A.) 126 Fed. Rep. 920.

*California.* — Eppinger *v.* Scott, 130 Cal. 275; Einstein *v.* State Bank, 137 Cal. 47.

*Colorado.* — Bell *v.* Murray, 13 Colo. App. 217.

*Georgia.* — Cincinnati, etc., R. Co. *v.* Cathcart, 111 Ga. 818; Brewer *v.* Nutt, 118 Ga. 257; Coxwell *v.* Goddard, 119 Ga. 369.

*Illinois.* — Sinsabaugh *v.* Dun, 214 Ill. 70.

*Indiana.* — Owens *v.* Gascho, 154 Ind. 225.

Hart *v.* O'Rourke, 151 Ind. 205; Zimmerman *v.* Makepeace, 152 Ind. 199; Covert *v.* Bray, 26 Ind. App. 671.

*Iowa.* — Hawkeye Ins. Co. *v.* Huston, 115 Iowa 621; Cooley *v.* Barker, 122 Iowa 440, 101 Am. St. Rep. 276; McConkie *v.* Landt, 126 Iowa 317; Schiele *v.* Thede, 126 Iowa 398.

*Kansas.* — Gresienger *v.* McCarter, 9 Kan. App. 886, 61 Pac. Rep. 507; Overton *v.* Warner, 68 Kan. 96.

*Kentucky.* — Plummer *v.* Talbott, (Ky. 1899) 50 S. W. Rep. 1097; Bean *v.* Everett, (Ky. 1900) 56 S. W. Rep. 403.

*Louisiana.* — Dauchite Lumber Co. *v.* Lane, etc., Co., 52 La. Ann. 1937; Taft *v.* Donnes, 105 La. 699.

*Maryland.* — Wenzel *v.* Milbury, 93 Md. 427.

*Michigan.* — Krupp *v.* Adams, 124 Mich. 215.

*Missouri.* — Henman *v.* Westheimer, 110 Mo. App. 191.

*Nebraska.* — Predohl *v.* O'Sullivan, 59 Neb. 311; Sherman County Irrigation, etc., Co. *v.* Drake, 65 Neb. 699.

*New Hampshire.* — Fairfield *v.* Day, 72 N. H. 160.

**717. A Writ of Prohibition.** — See note 4.

**Certiorari.** — See note 6.

**The Writ of Audita Querela.** — See note 7.

**3. Motion to Quash or Set Aside Levy — Jurisdiction.** — See note 8.

**718. Irregularities in the Levy.** — See notes 3, 5, 7.

**719. EXECUTIVE.** — See note 1.

*New Jersey.* — *Brady v. Carteret Realty Co.*, 66 N. J. Eq. 243.

*Ohio.* — *Uphaus v. Roof*, 68 Ohio St. 401.

*Oklahoma.* — *McLain Land, etc., Co. v. Kelly*, 11 Okla. 26.

*Pennsylvania.* — *Natalie Anthracite Coal Co. v. Ryon*, 188 Pa. St. 138; *Barrell v. Adams*, 26 Pa. Super. Ct. 635.

*Tennessee.* — *Ellis v. Kolsky*, (Tenn. Ch. 1898) 52 S. W. Rep. 471; *Gray v. Ward*, (Tenn. Ch. 1898) 52 S. W. Rep. 1028; *Wilkins v. Johnson*, (Tenn. Ch. 1899) 54 S. W. Rep. 1001; *Wessell v. Gross*, (Tenn. Ch. 1900) 57 S. W. Rep. 372.

*Texas.* — *Warren v. Kohr*, 26 Tex. Civ. App. 331; *Foust v. Warren*, (Tex. Civ. App. 1903) 72 S. W. Rep. 404.

*Washington.* — *Grant v. Cole*, 23 Wash. 542; *Ross v. Howard*, 25 Wash. 1.

See also the title INJUNCTIONS.

**717. 4. Writ of Prohibition.** — *Taylor v. Bliss*, (R. I. 1904) 57 Atl. Rep. 939. See also the title PROHIBITION.

**6. Certiorari.** — *In re Freeny*, 2 Marv. (Del.) 114.

**7. Writ of Audita Querela.** — *East Greenwich Sav. Inst. v. Allen*, 22 R. I. 339.

**8. Motion to Quash or Set Aside Levy — Jurisdiction to Quash.** — *Pearce v. Miller*, 201 Ill. 188; *Pitkin v. Burnham*, 62 Neb. 385, 89 Am. St. Rep. 763; *Crist v. Cosby*, 11 Okla. 635. See also *Buzzard v. Robertson*, 107 Mo. App. 557.

**718. 3. Irregularities in the Levy — Disqualification of Officer.** — *Stacy v. Bernard*, (Colo. App. 1904) 78 Pac. Rep. 615.

**5. A Levy on Property Not Subject to Execution.** — *Pitkin v. Burnham*, 62 Neb. 385, 89 Am. St. Rep. 763; *Crist v. Cosby*, 11 Okla. 635.

**Vacation on Motion of Owner of Property.** — In *Georgia*, however, the owner may move to dismiss the levy, but cannot move to quash the attachment or judgment. *Morrison v. Anderson*, 111 Ga. 847.

**7. Other Cases of Illegality in the Levy.** — *Clark v. Glos*, 180 Ill. 556, 72 Am. St. Rep. 223.

Where the levy was made on an execution issued on a judgment fraudulently confessed, it is ground for vacation. *Pitkin v. Burnham*, 62 Neb. 385, 89 Am. St. Rep. 763.

**719. 1. Bribery — Executive Officer.** — *State v. Gardner*, 88 Minn. 130.

**Pilot Not Executive Officer.** — *Petterson v. State*, (Tex. Crim. 1900) 58 S. W. Rep. 100.



# EXECUTORS AND ADMINISTRATORS.

BY ALFRED PIZEY.

## 741. I. DEFINITIONS — An Executor. — See note 1.

An Administrator. — See note 2.

## II. ORIGIN OF ADMINISTRATION. — See notes 3, 4.

## III. WHEN ADMINISTRATION IS NECESSARY OR PROPER — 1. In General. — See note 5.

## 742. 2. Necessity for Purpose of Making Distribution. — See notes 1, 2.

**741. 1. Executor Defined.** — An executor is a person appointed to carry the will into effect or execution after the decease of the testator, and to dispose of his estate according to its tenor. *In re Lamb*, 122 Mich. 239.

**Term "Executor" May Include "Administrator" and Vice Versa.** — The term "administrator" may be fairly included within the term "executor." An executor performs all the duties of an administrator with regard to personalty — as to its care and collection, and as to turning it into money, and as to the payment of debts. Other duties may be imposed upon the executor by the will, as to distribution of the personalty, and as to the sale and management of the real estate. In other words, the term "executor" is a larger one than the term "administrator." The general thought on which they unite is the custody, care, and disposition of the estates of deceased persons. *Union Bank, etc., Co. v. Wright*, (Tenn. Ch. 1900) 58 S. W. Rep. 755.

It is often provided by statute that the term "executor" includes administrator and the term "administrator" includes executor, where the subject-matter justifies such use. See the statutes of the different states, and for illustrations *Ellyson v. Lord*, 124 Iowa 125; *Linthicum v. Polk*, 93 Md. 84.

**2. Character of Office.** — Administrators belong to the same class of officers as curators, guardians, receivers, referees, and the like, whose duties are private and concern private interests. They are in no sense of the term public officers. *Stevens v. Larwill*, 110 Mo. App. 140. To similar effect see *State v. Ennis*, 79 Mo. App. 12. Compare *Henry v. Henry*, (Neb. 1905) 103 N. W. Rep. 441; *Orlopp v. Schueller*, 26 Ohio Cir. Ct. 127.

**3. Origin of Administration.** — *Trites v. Humphreys*, 2 N. Bruns. Eq. Rep. 1.

**Ecclesiastical Administration Inapplicable to Conditions in United States.** — See *Viosca's Estate*, 197 Pa. St. 280, affirming 29 Pittsb. Leg. J. N. S. (Pa.) 299.

**The Primary Purpose and Reason for Administration** are, (1) to preserve the estate until distribution can be made; (2) to pay the debts of the decedent. *Matter of Smith*, 118 Cal. 462.

**4. Trites v. Humphreys**, 2 N. Bruns. Eq. Rep. 1.

**5. Necessity of Administration in General.** — *Matter of Strong*, 119 Cal. 663; *Mitchell v. Mitchell*, 132 N. Car. 350; *Matter of Crawford*, 11 Ohio Cir. Dec. 605, 21 Ohio Cir. Ct. 554, affirmed, on other grounds, 68 Ohio St. 58.

**Jurisdiction to Appoint an Administrator** does not mean that an administrator is necessarily to be appointed in the case of every one who dies intestate; but if the court deems it proper, or probably even if it have doubts about the propriety of the appointment, it should be made. *Holburn v. Pfannmiller*, 114 Ky. 831.

**Proof of Existence of Assets.** — The ownership of property claimed as assets cannot be finally settled by the court of probate, but may be considered and must be determined so far as is necessary to enable the court to exercise its jurisdiction in the appointment of an administrator. *Beach's Appeal*, 76 Conn. 118.

**742. 1. Power of Next of Kin to Dispense with Administration.** — *Colorado*. — *Waterhouse v. Churchill*, 30 Colo. 415.

*Connecticut*. — See *Ward v. Ives*, 75 Conn. 598.

*Georgia*. — *Johnson v. Hall*, 101 Ga. 687.

See also *Juhan v. Juhan*, 104 Ga. 253.

*Idaho*. — *Gwinn v. Melvin*, 9 Idaho 202.

*Michigan*. — See *Ewers v. White*, 114 Mich. 266.

*Minnesota*. — *Cooper v. Hayward*, 71 Minn. 374; *Granger v. Harriman*, 89 Minn. 303.

*Missouri*. — *Richardson v. Cole*, 160 Mo. 372, 83 Am. St. Rep. 479; *Mahoney v. Nevins*, (Mo. 1905) 88 S. W. Rep. 731; *McDowell v. Orphan School*, 87 Mo. App. 386. Compare *Perkins v. Goddin*, 111 Mo. App. 29.

*New Hampshire*. — *Stevens v. Meserve*, (N. H. 1905) 61 Atl. Rep. 420.

*New York*. — *Herrington v. Lowman*, 22 N. Y. App. Div. 266; *Matter of Losee*, (Surrogate Ct.) 46 Misc. (N. Y.) 363.

*North Carolina*. — Compare *Mitchell v. Mitchell*, 132 N. Car. 350.

*Pennsylvania*. — *Lloyd's Estate*, 10 Pa. Dist. 207, 24 Pa. Co. Ct. 567; *Dalrymple's Estate*, 31 Pa. Co. Ct. 177; *Ogden's Estate*, 9 Kulp (Pa.) 412; *Phillip's Estate*, 30 Pittsb. Leg. J. N. S. (Pa.) 77. See also *Schrack's Estate*, 9 Pa. Dist. 149.

*Tennessee*. — See *Willard v. Cunningham*, (Tenn. Ch. 1898) 48 S. W. Rep. 399.

*Texas*. — *Hynes v. Winston*, (Tex. Civ. App. 1899) 54 S. W. Rep. 1069.

*Wisconsin*. — Compare *McKenney v. Minahan*, 119 Wis. 651.

**Where There Are No Debts.** — *Austin v. Snider*, 17 Colo. App. 182; *Dickinson v. Hoes*, (Supm. Ct.) 33 Civ. Pro. (N. Y.) 101; *Rittenhouse's Estate*, 8 Pa. Dist. 700.

**When There Are No Creditors.** — *Angier v. Jones*, 28 Tex. Civ. App. 402.

**742.** 3. Necessity When There Are Creditors. — See note 3.

**743.** See note 1.

**744.** 5. Value of Estate. — See note 1.

**No Personalty or Debts.** — *Owen v. Ward*, 127 Mich. 693, 8 Detroit Leg. N. 483.

**Legatees of Specific Debt or Demand.** — In *Mississippi* it is held that if distribution without administration may be made by the distributees of an intestate, by parity or reason, it may also be done by legatees to whom a specific debt or demand has been given. Nor will this right be defeated by the possibility that the funeral expenses and costs of probate of will are outstanding charges against the estate. *Patton v. Pinkston*, (Miss. 1905) 38 So. Rep. 500.

**Testate Estates.** — The prospective commissions that may be earned by an executor named in the will do not constitute such an interest as gives to him a standing to interfere with or successfully to oppose a settlement and distribution. A family agreement or settlement made different from the provisions of a will supercedes the will or prevails over it. *Lloyd's Estate*, 10 Pa. Dist. 207, 24 Pa. Co. Ct. 567.

**Formal Administration by Agreement.** — An agreement providing for a formal administration only, for the purpose of clearing the title to the property, is a valid and binding agreement. *Matter of Field*, 33 Wash. 63.

**Dispute Among Heirs.** — Where heirs attempt to settle an estate, and there is a dispute, an executor or administrator may be appointed to settle the same. *Bruning v. Golden*, 159 Ind. 199.

**Under a Statute Requiring a Will to Be Probated** and fixing a penalty for a failure to do so, it seems that administration must be had; and where a settlement out of the court is challenged for fraud, administration is proper. *Seery v. Murray*, 107 Iowa 384.

**742. 2. Existence of Debts Not Essential to Jurisdiction.** — See *Matter of Strong*, 119 Cal. 663; *Ormsbee v. Piper*, 123 Mich. 265.

**Character of Administration Where There Are No Debts.** — In the absence of creditors, an administrator is a mere trustee for the next of kin, charged with the sole duty to collect, convert, and distribute the estate among the beneficiaries according to their respective interests. *Herrington v. Lowman*, 22 N. Y. App. Div. 266.

**Estate of Nonresident.** — Under the *California* statute providing for administration on the estate of any nonresident who has died leaving property in the state, it has been held not to be necessary to show that there are creditors or that the property requires care to preserve it, in order to obtain such letters. *Murphy v. Crouse*, 135 Cal. 14, 87 Am. St. Rep. 90.

**3. Rule that Administration Is Necessary When There Are Creditors.** — See *Carr v. Berry*, 116 Ga. 372.

**What Are Debts.** — A creditor subsequent to the death of the decedent, becoming such through the continuation of the business of a testator by his executors under authority conferred by the will, is entitled to an order for the administration of the estate, though there are no creditors of the testator himself. *Re Shorey*, 79 L. T. N. S. 349.

That a judgment is dormant does not pre-

vent its being a debt against the estate, so long as the right to bring an action upon it continues. *Conyers v. Bruce*, 109 Ga. 190.

A tax under the War Revenue Act of Congress is not a debt of the decedent, but a debt due from the distributees of the estate, and is not such a debt as necessitates administration. *Lloyd's Estate*, 10 Pa. Dist. 207, 24 Pa. Co. Ct. 567.

**Proof of Debts.** — If a creditor makes out a *prima facie* case, that is sufficient to authorize the appointment of an administrator. He need not conclusively prove the existence of the debt. *Conyers v. Bruce*, 109 Ga. 190.

**Distribution Without Administration Where Creditors Consent.** — See *Re Evans*, 3 Ont. L. Rep. 401.

**Nonexistence of Assets.** — There is no necessity for administration where the decedent left no personal estate. *Hall v. Metcalfe*, 114 Ky. 886; *Holburn v. Pfannmiller*, 114 Ky. 831. See also *infra*, this title, **744. 1.**

**Statutory Authority for Settlement Without Administration — Illinois.** — In Illinois, by statute, where the heirs are residents of the state and of age, and the estate is solvent, administration may be dispensed with by agreement. For the scope and effect of such agreements, see *Patterson v. Patterson*, 74 Ill. App. 321; *Bennett v. Morris*, 111 Ill. App. 150.

In *Missouri* it is well settled that personal property passes to the administrator, not to the heir, unless it be where the probate court, by order, dispenses with an administrator under section 2 of the administration statute, Rev. Stat. Mo., § 2. *Perkins v. Goddin*, 111 Mo. App. 429.

**Estate of Married Persons.** — Civ. Code Ga., § 3355, par. 1, provides that "upon the death of the husband, without lineal descendants, the wife is his sole heir, and upon payment of his debts, if any, may take possession of his estate, without administration." *Harrell v. Harrell*, (Ga. 1905) 51 S. E. Rep. 283; *Jackson v. Green*, (Ga. 1905) 51 S. E. Rep. 284; *Moore v. Smith*, 121 Ga. 479. For estates of married women, see *infra*, this title, **744. 4.**

**743. 1. Rule that Heirs by Paying or Giving Security to Pay Debts May Dispense with Administration.** — *Duffy's Succession*, 50 La. Ann. 795; *McNeely v. McNeely*, 50 La. Ann. 823; *Bray's Succession*, 50 La. Ann. 1209; *Wintz's Succession*, 111 La. 40; *Glancey's Succession*, 114 La. 766; *Truesdale v. Putegnat*, (Tex. Civ. App. 1900) 59 S. W. Rep. 307.

**Discretion of Judge.** — Where some of the heirs are beneficiaries, and there are debts, and creditors or heirs of age demand an administration, it should be ordered. *Bulliard's Succession*, 111 La. 186.

**744. 1. Value of Estate.** — As supporting the second paragraph of the original note see *Matter of Batchelder*, 123 Cal. 466; *Matter of Atwood*, 127 Cal. 427; *Matter of Richards*, 133 Cal. 524; *Matter of Neff*, 139 Cal. 71; *Lowery v. Powell*, 109 Ga. 192; *Smith v. Terry Peak Miners' Union*, 16 S. Dak. 631.



**744. 7. Estates of Married Women.** — See note 4.

**IV. APPOINTMENT AND TENURE OF OFFICE** — **1. Executors** — *a. HOW CONSTITUTED* — (1) *Source of Executor's Authority.* — See notes 6, 7, 8.

**745.** See notes 1, 2.

(2) *Terms by Which Executors May Be Appointed.* — See note 3.

**When the Value of the Estate Is Less than the Statutory Exemptions** allowed to the family of the decedent, administration is useless. *Jackson v. Wilson*, 117 Ala. 432; *Childers v. Henderson*, 76 Tex. 664; *Randolph v. White*, 135 Fed. Rep. 875.

**The Ownership by the Decedent of Personal Property** is the foundation of the grant of letters of administration, and the object of appointing an administrator is to use this property in paying debts and then to distribute what remains among those entitled to it. *Lowery v. Powell*, 109 Ga. 192.

**Under the Missouri Statute** authorizing the probate court to deny administration where the property is exempt and to turn the property over to those entitled to it, an order turning the assets over to the widow of the decedent, vests in her the powers and duties of an executrix or administratrix for purposes of the collection of the assets. *Warfield v. Hume*, 91 Mo. App. 541.

**744. 4. Administration on Estates of Married Women.** — *Gray v. Seeley*, 133 Mich. 319, 10 Detroit Leg. N. 172; *Locke v. McPherson*, 163 Mo. 493, 85 Am. St. Rep. 546, cited in *Grimes v. Reynolds*, 94 Mo. App. 576, which was affirmed on other grounds, 184 Mo. 679.

**Exception to Rule as to Married Women.** — The *Maryland* statute has no application to a right of action for the death of the wife given by Act Cong., Feb. 17, 1885 (23 U. S. Stat. at L. 307, p. 126), since the statute requires such claims to be enforced by action brought by or in the name of a personal representative of the deceased person. *Ferguson v. Washington*, etc., R. Co., 6 App. Cas. (D. C.) 525.

In *New York* the common-law rule obtains to the extent that if a married woman dies without descendants, her husband takes her estate absolutely, subject to the payment of her debts, but without the necessity of administration. *Matter of Thomas*, (Surrogate Ct.) 33 Misc. (N. Y.) 729. See also *Locke v. McPherson*, 163 Mo. 493, 85 Am. St. Rep. 546 (discussing the New York law).

In *North Carolina*, by statute, if the husband dies after his wife, but before administering, his executor or administrator or assignee must receive the personal property of the wife, as part of the estate of the husband, subject to her debts. *Wooten v. Wooten*, 123 N. Car. 219.

A married man, entitled to the personal property of his wife who died without children, and having the right to administer, may pay the debts and settle the estate without administration. *Engle v. Engle*, 21 Lanc. L. Rev. 285.

**Community Property.** — Upon the death of the wife, the husband, as in the case of the survivor of a commercial partnership, has the right to administer the community property for the payment of community debts, without any supervision of the probate court. *Levy v. Moody*, (Tex. Civ. App. 1905) 87 S. W. Rep. 205.

**6. Executor Derives Authority Solely from Will.**

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— *Fidelity*, etc., Co. v. *Freeman*, (C. C. A.) 109 Fed. Rep. 847; *In re Somervail*, 104 Wis. 72, quoting 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 744; *Saxe v. Saxe*, 119 Wis. 557, quoting 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 744.

**A Request by the Family of the Testator that the Executor Renounce**, in order that administration with the will annexed may be issued in accordance with their wishes, is unreasonable and inconsistent with proper respect for the memory of the deceased, and is properly refused. *McManus's Estate*, 212 Pa. St. 267.

**7. Probate Only Evidence of Executor's Right.** — *Fidelity*, etc., Co. v. *Freeman*, (C. C. A.) 109 Fed. Rep. 847; *In re Somervail*, 104 Wis. 72, quoting 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 744; *Saxe v. Saxe*, 119 Wis. 557, quoting 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 744.

**8. Mere Nomination in Will Not Sufficient to Constitute Executor.** — *Fidelity*, etc., Co. v. *Freeman*, (C. C. A.) 109 Fed. Rep. 847; *Burlington Protestant Hospital Assoc. v. Gerlinger*, 111 Iowa 293; *In re Van Vleck*, 123 Iowa 89; *In re Somervail*, 104 Wis. 72, quoting 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 744; *Saxe v. Saxe*, 119 Wis. 557, quoting 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 744.

**Right to Appoint Not a Vested Right.** — The right to appoint an executor or trustee by will to carry its provisions into effect is in no sense a vested right, but is restricted and regulated by statute, as is the action of the court in issuing letters conferring authority upon the person so appointed to act. *Matter of Avery*, (Surrogate Ct.) 45 Misc. (N. Y.) 529.

**745. 1. Nomination in Will Cannot Be Disregarded by Court, Except for Cause.** — *Kidd v. Bates*, 120 Ala. 79, 74 Am. St. Rep. 17; *Farmers' L. & T. Co. v. Smith*, 74 Conn. 625; *Clark v. Patterson*, 214 Ill. 533, 105 Am. St. Rep. 127, affirming 114 Ill. App. 312; *In re Sultzbach*, 5 Ohio Dec. 516, 5 Ohio N. P. 218; *In re Brennan*, 5 Ohio Dec. 499, 5 Ohio N. P. 490; *Saxe v. Saxe*, 119 Wis. 557, quoting 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 744, 745; *Rice v. Tilton*, (Wyo. 1905) 80 Pac. Rep. 828.

**Rejection and Removal.** — Letters to the person named in the will as executor cannot be refused. The remedy in case of his unfitness is by proceedings for his removal. *In re Oskamp*, 5 Ohio Dec. 584, 7 Ohio N. P. 665.

**Where Conditions Have So Changed Subsequent to the Death of a Decedent** that, had he anticipated them, he would, in all reasonable probability, as a prudent person, have selected another as executor, it is held in *Iowa* that the court is at liberty, in the exercise of its sound discretion, to reject the nomination contained in the will. *In re Van Vleck*, 123 Iowa 89.

**2. Probate Court Cannot Appoint Executor.** — *Saxe v. Saxe*, 119 Wis. 557, quoting 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 745.

**3. Appointment of Executors Either Express or**



**745.** Executor According to the Tenor of the Will. — See note 4.

**746.** See note 1.

Executor Must Be Named in Will. — See note 2.

Identity of Person Intended. — See note 3.

**747.** (4) *Delegation of Power to Appoint.* — See note 6.

**748.** (5) *Conditional, Qualified, or Limited Appointment.* — See note 1.

(6) *Substitutionary Appointment.* — See note 2.

**749.** (7) *Executor of Executor.* — See note 1.

**Constructive.** — *In re Hill*, 102 Mo. App. 617; *Hayes's Estate*, 7 Pa. Super. Ct. 160.

The Question Is One of Construction of each particular document. The cases have no bearing. In *Goods of Way*, (1901) P. 345.

**745. 4. Executor According to the Tenor.** — The appointment of a designated person "to hold and administer in trust all my estate well known to the said" person, constitutes him an executor according to the tenor. In *Goods of Way*, (1901) P. 345.

Where under a will, debts which a trustee therein appointed is directed to pay must of necessity be paid out of the estate, the effect of the will is to appoint the trustee executor according to the tenor. In *Goods of Cook*, (1902) P. 114.

Where a will expresses an intention to appoint executors, but fails to do so expressly, persons named therein as trustees, but not vested with any trust property, will be granted probate as executors according to the tenor. In *Goods of Kirby*, (1902) P. 188.

Provisions in a will directing persons named as trustees to convert, and allowing them to make charges, make them executors according to the tenor; and it seems that a marginal note referring to them as executors has the effect of appointing them executors expressly. In *Goods of Nussey*, 78 L. T. N. S. 169.

The practice of the *English Probate Court* in cases where some one is not named as executor in a will and no duties are indicated in the will that would constitute him executor thereof according to the tenor, but who has such an interest that, in spite of not being named as executor, he might be looked to to act as such, has been, not to grant probate, but to grant letters of administration with the will annexed. In *Goods of Pryse*, (1904) P. 301.

**746. 1. Language Insufficient to Constitute Executor According to Tenor.** — *In re Hill*, 102 Mo. App. 617. Compare *Hayes's Estate*, 7 Pa. Super Ct. 160.

**2. Executors Must Be Named in Body of Will.** — As supporting the first paragraph of the original note see *Monroe's Estate*, 8 Lack. Leg. N. (Pa.) 306.

**3. Identity of Person.** — In *Goods of Cooper*, (1899) P. 193, the will appointed certain executors, of whom one was described as "the said Thomas Cooper." The deceased had no friend, child, or relative so named, but he had a friend Thomas Stevenson who was named in the will as a trustee with other persons properly named as executors. The court struck out the name of "Cooper," and granted letters to "Thomas Stevenson, in the will described as Thomas \_\_\_\_\_." Citing In *Goods of De Rosaz*, 2 P. D. 66.

Under a provision in a will appointing "the

Roman Catholic Bishop of St. John and Rev. Thomas Connally, executors," it was held that the bishop took as executor in his personal and not in his corporate capacity, and letters should be granted to him. In *re Sweeney*, 37 Can. L. J. 706.

Under a clause appointing as executrix and legatee a person described in the will as "my granddaughter \_\_\_\_\_," evidence is admissible to show which of several granddaughters of the testator was intended. *Hubbuck's Estate*, (1905) P. 129.

**747. 6. Power to Appoint Executors May Be Delegated.** — *Brown v. Just*, 118 Mich. 678; *Boning's Estate*, 14 Pa. Dist. 236. See also *Lafferty's Estate*, 9 Pa. Dist. 385.

**748. 1. Conditional or Limited Appointment of Executors.** — *Kinney v. Keplinger*, 172 Ill. 449, reversing 71 Ill. App. 334.

**Limitation as to Place.** — Where a testator made a will and codicil in England, appointing executors, and subsequently went to New Zealand and there died, leaving a will made there which confirmed the previous will, disposed only of New Zealand assets, and appointed a different executor, probate was granted in England of all three documents to the English executors, with liberty to the foreign executor to come in. In *Goods of Green*, 79 L. T. N. S. 738.

**2. Testator May Provide for Substitution of Successor in Executorship.** — *Kinney v. Keplinger*, 172 Ill. 449, reversing 71 Ill. App. 334. See also *Saunders v. Bradley*, 6 Ont. L. Rep. 250.

**Substitution in Case of Death.** — *Kinney v. Keplinger*, 172 Ill. 449, reversing 71 Ill. App. 334; *Boning's Estate*, 14 Pa. Dist. 236.

**Substitution in Case of Executor "Not Serving."** — *Silkman's Estate*, 12 Luz. Leg. Reg. (Pa.) 349.

**Approval of Appointment by Court.** — Where a will provides that whenever the number of executors and trustees shall from any cause be reduced to two, they shall petition the court to appoint another and nominate to the court "such person as shall be a satisfactory colleague, and be approved by the court for capability and good character," a nomination will not be approved unless it clearly and satisfactorily appears to the interest and advantage of the estate and the beneficiaries under the trusts created. *Lafferty's Estate*, 9 Pa. Dist. 385.

**Approval of Appointment by Persons Interested in Estate.** — Under a will providing for substitutionary appointments subject to the approval of the persons interested in the estate, the court cannot fill vacancies arbitrarily against the objection of an interested person. *Cole v. Watertown*, 119 Wis. 133.

**749. 1. Executor of Executor is Executor of First Testator.** — *Jepson v. Martin*, 116 Ga. 772, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.)

**750.** See notes 2, 3.

**751.** *b. WHO MAY BE AN EXECUTOR* — (1) *In General*. — See note 1.

**752.** (3) *Infants*. — See note 2.

(4) *Corporations*. — See note 3.

**753.** *Corporations Created to Act as Fiduciaries*. — See note 1.

(5) *Aliens and Nonresidents*. — See note 3.

**754.** *c. ACCEPTANCE OF EXECUTORSHIP*. — See note 3.

*d. RENUNCIATION OF EXECUTORSHIP* — (1) *Right to Renounce*. —

See note 5.

(2) *Renunciation for a Consideration*. — See note 7.

748, 749; *Robbins v. Burrige*, 128 Mich. 25, 8 Detroit Leg. N. 509; *Grimes v. Pennsylvania R. Co.*, 189 Pa. St. 619, 69 Am. St. Rep. 830, *affirming* 7 Pa. Dist. 417; *Stewart v. Snyder*, 30 Ont. 110, *affirmed* 27 Ont. App. 423.

**750. 2. Devolution Recognized in United States.** — *Jepson v. Martin*, 116 Ga. 772.

**Devolution Prohibited by Statute.** — *Chevassus v. Burr*, 134 Cal. 434; *Chamberlain's Appeal*, 70 Conn. 363; *Robbins v. Burrige*, 128 Mich. 25, 8 Detroit Leg. N. 509; *Matter of Moehring*, 154 N. Y. 423; *Grimes v. Pennsylvania R. Co.*, 189 Pa. St. 619, *affirming* 7 Pa. Dist. 417.

**3. Administrator of Executor Is Not Representative of the Testator.** — *Kinney v. Keplinger*, 172 Ill. 449, *reversing* 71 Ill. App. 334.

**The Administrator of a Deceased Administrator.** — *Redfearn v. Craig*, 57 S. Car. 534.

**751. 1. Competency in General.** — *Clark v. Patterson*, 214 Ill. 533, 105 Am. St. Rep. 127, *affirming* 114 Ill. App. 312, *citing* 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 751; *In re Sultzbach*, 5 Ohio Dec. 516, 5 Ohio N. P. 218; *Saxe v. Saxe*, 119 Wis. 557.

**Criminals.** — Where the person appointed as executor has absconded and a warrant is out for his arrest on a charge of embezzling trust funds, the court is justified under the *English Probate Act* in passing him over and granting administration to others. In *Goods of Wright*, 79 L. T. N. S. 473.

**Litigation with Estate.** — An executor cannot at the same time be both plaintiff and defendant in the same suit, and so long as he is trying to enforce a claim against the estate in a court of common law, he is an improper person to be appointed to represent the estate as executor. *Cogswell v. Hall*, 183 Mass. 575, *citing* *Drake v. Green*, 10 Allen (Mass.) 124.

**752. 2. Infant May Be Executor at Common Law.** — *McKernan's Estate*, 14 Pa. Dist. 693, *citing* 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 752.

**Scope of Rule.** — The law in *Pennsylvania* permits a testator to appoint a minor an executor, but forbids him to exercise the office till he has reached lawful age. *McKernan's Estate*, 14 Pa. Dist. 693.

**Infant Disqualified During Minority by Statute.** — *In re Sultzbach*, 5 Ohio Dec. 516, 5 Ohio N. P. 218.

**3. Competency of Corporations.** — In *Goods of Martin*, 90 L. T. N. S. 264, it was said that letters testamentary have never yet been granted to corporate bodies as executors, and the matter is one with which the legislature must deal.

**Statutory Provisions Declaring What "Persons" Are Competent** to be appointed executors or ad-

ministrators of estate are confined, and intended to be confined, to natural persons, and do not include corporations. *Matter of Avery*, (Surrogate Ct.) 45 Misc. (N. Y.) 529.

**A Grant to a Syndic of a Corporation** will not be made when the will appoints individuals to act with the corporation, if the individuals will take probate. In *Goods of Martin*, 90 L. T. N. S. 264.

**753. 1. Corporations Created to Act as Fiduciaries.** — *Matter of Avery*, (Surrogate Ct.) 45 Misc. (N. Y.) 529; *Union Bank, etc., Co. v. Wright*, (Tenn. Ch. 1900) 58 S. W. Rep. 755. See also *Matter of Milhau*, (Surrogate Ct.) 28 Misc. (N. Y.) 366.

**Foreign Corporations** are not within the terms of the statute, in the absence of language clearly indicating that they were intended to be embraced. In *New York* the execution of this class of trusts by foreign corporations is expressly prohibited by Laws 1904, c. 492. *Matter of Avery*, (Surrogate Ct.) 45 Misc. (N. Y.) 529.

The *Connecticut Corporation Act* of 1901 (Pub. Acts 1901, p. 1348) prohibits a foreign corporation from engaging or continuing in any kind of business in the state, the transaction of which is not permitted to domestic corporations formed under the act; and such a corporation is incompetent to act as executor. *Farmers' L. & T. Co. v. Smith*, 74 Conn. 625.

**3. Citizens of United States Not "Aliens."** — A corporation located in and a resident of a foreign state is "an alien not an inhabitant of this state" within the statute, and incompetent to act as executor. *Matter of Avery*, (Surrogate Ct.) 45 Misc. (N. Y.) 520.

**Nonresidence in the State Where the Will Is Probated.** — *Hecht v. Carey*, (Wyo. 1904) 78 Pac. Rep. 705, *citing* 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 753.

Nonresidence does not disqualify one as an executor if he comes into the state and submits himself to the jurisdiction of the court, and personally conducts the affairs of the estate. *Rice v. Tilton*, (Wyo. 1905) 80 Pac. Rep. 828.

**California Statute.** — *Matter of Richardson*, 120 Cal. 344; *Matter of Kelley*, 122 Cal. 379.

**Nonresidents Disqualified by Statute.** — See *Stevens v. Larwill*, 110 Mo. App. 140.

**754. 3. Intermeddling.** — An executor by intermeddling with the estate accepts the office and can be compelled to take up probate. In *Goods of Coates*, 78 L. T. N. S. 820.

**5. Right to Renounce.** — *In re Dallas*, (1904) 2 Ch. 385; *Oakeshott v. Smith*, 104 N. Y. App. Div. 384.

**7. Agreement to Renounce for Consideration**



**754.** (3) *When Right of Renunciation May Be Exercised.* — See note 8.

**755.** See note 1.

(4) *How Renunciation May Be Made* — (a) **Express Renunciation** —

aa. **By Act of Record.** — See note 4.

**756.** (b) **Implied Renunciation.** — See note 2.

(5) *Effect of Renunciation* — (a) **General Rule.** — See note 3.

**757.** (6) *Retracting Renunciation* — (a) **Right to Retract in General.** — See notes 2, 3.

(b) **Right of One of Several Executors to Retract.** — See note 4.

**758.** **In England.** — See note 1.

**In the United States.** — See note 2.

**Void as Against Public Policy.** — *Oakeshott v. Smith*, 104 N. Y. App. Div. 384.

**Estoppel.** — An agreement by an executor with his coexecutor not to apply for letters is against public policy and cannot be enforced against him; and for the same reason he cannot by his acts and conduct be estopped from applying. *Matter of True*, 120 Cal. 352.

**754. 8. No Right to Renounce After Acting as Executor.** — *In re Dallas*, (1904) 2 Ch. 385; *In re Stevens*, (1897) 1 Ch. 422, affirmed on other grounds (1898) 1 Ch. 162.

**755. 1. Renunciation After Acceptance, by Leave of Court.** — *Malone's Estate*, 9 Pa. Dist. 115.

**4. The New York Statute.** — A renunciation made in open court, accepted and acted on by the judge, is valid, though it is provided by statute that it shall be made by a written instrument. *Matter of Baldwin*, 27 N. Y. App. Div. 506, appeal dismissed 158 N. Y. 713.

**756. 2. Renunciation Implied from Acts.** — Where the person nominated puts himself in a position of antagonism to the will and those for whose benefit he was to act, after the death of the testator, he in effect renounces the executorship, and the court may properly appoint another. *In re Van Vleck*, 123 Iowa 89.

**Renunciation Implied from Neglect or Refusal to Qualify.** — *Rice v. Tilton*, (Wyo. 1905) 80 Pac. Rep. 828, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 756.

Code Iowa, § 3290, providing that "if a person nominated as executor refuse to accept the trust or neglect to appear within ten days after his appointment and give bond as hereinafter prescribed," the office shall be vacant, has no application to an executor whose nomination has not been ratified by the court. *In re Van Vleck*, 123 Iowa 89.

By statute in *Wyoming* a renunciation is implied from the failure of the executor to apply for the probate of the will and the issuance of letters testamentary for thirty days after he has knowledge of the death of the testator. The statute applies to foreign as well as domestic wills. *Rice v. Tilton*, (Wyo. 1905) 80 Pac. Rep. 828.

**Filing Caveat.** — *Contra*, *Briggs v. Probate Ct.*, 23 R. I. 125.

**Foreign Executor.** — In *New York* the authority of a surrogate to decree that an executor be deemed to have renounced is limited to wills admitted to probate in his court, and does not extend to an executor named in a will which has been admitted to probate in another state and is merely filed or recorded in his office

on an exemplification of the foreign probate. *Baldwin v. Rice*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 64, modified and affirmed in 100 N. Y. App. Div. 241.

**3. Death or Renunciation of One of Several Executors.** — The ancient rule of the common law was that if one named with others as executor had died or refused to qualify or accept, the others could not execute the will. The rule was modified by Stat. 21 Hen. VIII., c. 4. This statute related only to cases where one or more of those nominated refused to accept. *Clark v. Patterson*, 214 Ill. 533, 105 Am. St. Rep. 127, affirming on other grounds 114 Ill. App. 312.

**757. 2. Renunciation May Be Retracted.** — *Matter of True*, 120 Cal. 352.

**New York Statute.** — See Code Civ. Pro. N. Y., § 2639; *Matter of Baldwin*, 27 N. Y. App. Div. 506, appeal dismissed 158 N. Y. 713; *Matter of Clute*, (Surrogate Ct.) 37 Misc. (N. Y.) 710.

**A Written Retraction Is Not Required if the renunciation was not in writing.** *Matter of Baldwin*, 27 N. Y. App. Div. 506, appeal dismissed 158 N. Y. 713.

**3. No Retraction After Issue of Letters with the Will Annexed.** — In *Goods of Stiles*, (1898) P. 12.

**4. Renunciation Not Conclusive When Coexecutors Take Probate.** — *Pruett v. Pruett*, 131 Ala. 578, quoting 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 757; *Briggs v. Probate Ct.*, 23 R. I. 125, quoting 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 757.

**Scope of Rule.** — The rule is confined to allowing the renouncing executor to come in and claim his right to withdraw his renunciation after the death, disability, or removal of the one who accepted and qualified; it does not apply until a vacancy exists in the office of the executor. *Briggs v. Probate Ct.*, 23 R. I. 125, distinguishing *Perry v. DeWolf*, 2 R. I. 103. See also *Pruett v. Pruett*, 131 Ala. 578, citing *Judson v. Gibbons*, 5 Wend. (N. Y.) 224.

**If the Acting Executor Absconds,** a renouncing executor may come in and administer. In *Goods of Stiles*, (1898) P. 12.

**758. 1. Statutory Rule in England.** — *In re Dallas*, (1904) 2 Ch. 385. See also *Briggs v. Probate Ct.*, 23 R. I. 125, quoting 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 758.

The statute does not prevent the court from allowing a retraction according to the old practice in a proper case. In *Goods of Stiles*, (1898) P. 12.

**2. Statutory Rule in United States.** — Under the *Alabama* statute creating preferences in the



- 759. 2. Administrators — a. JURISDICTION TO APPOINT ADMINISTRATORS — (1) By What Courts Exercised — In England.** — See note 1.  
 (2) *Jurisdictional Facts* — (a) **Death.** — See note 4.  
**760. Proof of Death.** — See note 2.  
**761. (b) Intestacy.** — See note 1.  
**Discovery of Will After Grant of Letters of Administration.** — See note 2.  
**762. (c) Residence Within Jurisdiction of Court.** — See note 1.

issuance of letters testamentary and of administration, which must be exercised by the party preferred within the time fixed, the failure of an executor to apply within the time loses him the right to have letters as against his coexecutors who do so apply. So long as the letters issued to the latter remain unrevoked, the court is without jurisdiction to make any further grant. *Pruett v. Pruett*, 131 Ala. 578.

In *Massachusetts*, after letters have been granted to one or more of several executors, the power of the probate court is exhausted, so long as the decree stands; and it has no jurisdiction to issue letters to the others. *Jewett v. Turner*, 172 Mass. 496; *Cogswell v. Hall*, 183 Mass. 575.

**759. 1. Jurisdiction in England Before Probate Court Act.** — See *Viosca's Estate*, 197 Pa. St. 280, *affirming* 29 Pittsb. Leg. J. N. S. (Pa.) 299.

**4. Administration on Estate of Living Person Is Void.** — *Beach's Appeal*, 76 Conn. 118; *Salomon v. People*, 191 Ill. 290, *affirming* 89 Ill. App. 374; *Nash v. Sawyer*, 114 Iowa 742; *Buster v. Warren*, 35 Tex. Civ. App. 644; *Perkins v. Owen*, 123 Wis. 238.

**Statute Authorizing Administration on Presumption of Death.** — See *Clapp v. Houg*, 12 N. Dak. 600, 102 Am. St. Rep. 589, holding unconstitutional a statute providing for the appointment of a special administrator without notice of any kind or character where "probate or general administration is denied because the death of the person whose estate is in question is not satisfactorily proved, but he is shown to have disappeared under circumstances which afford reasonable grounds to believe either that he is dead or has been secreted, confined, or otherwise unlawfully made away with."

A statute providing for administration, after notice by advertisement, for the due and orderly conservation of the property of an unknown or uncertain owner, with present but restricted use by those who appear to be owners, and a saving of the rights of the true owner should such a one subsequently appear and establish a claim, is not unconstitutional as depriving a person of property without due process of law. *Cunnius v. Reading School Dist.*, 198 U. S. 458, *affirming* 206 Pa. St. 469, which *reversed* 21 Pa. Super. Ct. 340, 25 Pa. Co. Ct. 17; *Ziegler's Estate*, 25 Pa. Co. Ct. 611.

**760. 2. Administration Granted on Presumption of Death.** — In *Goods of Harling*, (1900) P. 59; In *Goods of Johnson*, 78 L. T. N. S. 85; *Matter of Sanford*, 100 N. Y. App. Div. 479; *Hambright's Estate*, 18 Lanc. L. Rev. 407; *Ferrell v. Grigsby*, (Tenn. Ch. 1899) 51 S. W. Rep. 114; *Wisconsin Trust Co. v. Wisconsin M. & F. Ins. Co. Bank*, 105 Wis. 464. See also In *Goods of Matthews*, (1898) P. 17.

**Proof.** — The usual length of time required to raise a presumption of death may be abridged,

and the presumption sooner applied on proof of special circumstances tending to show an earlier death. In the latter case the presumption is to be determined as a question of fact on the evidence as to when the death probably occurred. *Czech v. Bean*, (County Ct.) 35 Misc. (N. Y.) 729.

In the appointment of a special or temporary administrator, whose powers are limited merely to the collection and preservation of the estate, the death need not be proven with the same certainty as in cases of general administration. *Czech v. Bean*, (County Ct.) 35 Misc. (N. Y.) 729.

**761. 1. Intestacy Essential to Grant of General Original Administration.** — *Matter of Ogden*, (Surrogate Ct.) 41 Misc. (N. Y.) 158.

On the second paragraph of the original note compare *Matter of Cameron*, 47 N. Y. App. Div. 120, *affirmed* 166 N. Y. 610.

**Proof of Intestacy.** — It will be presumed that a decedent died intestate, if there is no evidence to the contrary. *Matter of Cameron*, 47 N. Y. App. Div. 120, *affirmed* 166 N. Y. 610.

Where the persons beneficially interested under an alleged will fail to appear in answer to a citation to propound it, issued out of an action to set it aside, administration will be granted. In *Goods of Quick*, (1899) P. 187; In *Goods of Dennis*, (1899) P. 191, *following* In *Goods of Bootle*, 84 L. T. N. S. 570.

**Will Probated in Foreign State.** — *Downey v. Owens*, 98 N. Y. App. Div. 411.

**2. Discovery of Will After Grant of Administration.** — *Fidelity, etc., Co. v. Freeman*, (C. C. A.) 109 Fed. Rep. 847; *Sands v. Hickey*, 135 Ala. 322; *Perkins v. Owen*, 123 Wis. 238.

**Appointment of Administrator Is Adjudication of Intestacy.** — Letters of administration are *prima facie* evidence of intestacy, the finding of the fact of intestacy being necessarily involved in the grant of the letters. *McCormick v. Skelly*, 201 Pa. St. 184.

**Estate of Married Woman — Pennsylvania.** — Where a husband administers on his wife's estate and appropriates her entire personalty, and subsequently a will is discovered and probated and administration is revoked, the husband will be required to pay to the executor only one-half the estate, with interest, and may retain the other half as his own distributive share under his election to take against the will, subject to payment thereof of one-half of her indebtedness, if any. *Donnelly's Estate*, 11 Pa. Dist. 279.

**762. 1. Courts of Domicil Have Jurisdiction.** — *Holburn v. Pfanmiller*, 114 Ky. 831; *Mowry v. Latham*, 20 R. I. 786.

The words "last dwelt," in the Probate Act of *Nova Scotia*, § 2, which provides that the judge of probate for the county or district where the deceased last dwelt shall have power to

**762.** Local Courts in United States. — See note 3.

(d) Assets Within Jurisdiction of Court — *aa.* GENERAL RULE. — See note 4.

**763.** See notes 1, 2.

*bb.* WHEN NECESSARY. — See note 3.

grant letters, are equivalent to the words "last resided," and mean a fixed abode as distinguished from a mere temporary locality of existence. They do not have the same meaning as the words "last domiciled," the domicile depending on the intention of the party to make his dwelling place a permanent residence. *Re Fraser*, 30 Nova Scotia 272, McDonald, C. J., dissenting on the last proposition.

**Residence or Property Within Jurisdiction.** — In *Goods of Foy*, 78 L. T. N. S. 49; *Vance v. Southern R. Co.*, 138 N. Car. 460; *Tryon v. U. S.*, 32 Ct. Cl. 425.

**Domicil of Wife Is That of Husband.** — *McPherson v. McPherson*, 70 Mo. App. 330.

**762. 3. Probate Court in County of Residence** — *Alabama*, — *McDonnell v. Farrow*, 132 Ala. 227.

*Iowa*. — *Matter of King*, 105 Iowa 320; *McFarland v. Stewart*, 109 Iowa 561.

*Kansas*. — *Ewing v. Mallison*, 65 Kan. 484, 93 Am. St. Rep. 299.

*Kentucky*. — *Morrison v. Hampton*, (Ky. 1899) 49 S. W. Rep. 781; *Jones v. Lay*, 66 S. W. Rep. 720, 23 Ky. L. Rep. 2113.

*Louisiana*. — *Davis v. Martin*, (C. C. A.) 113 Fed. Rep. 6 (construing the Louisiana law).

*New Hampshire*. — Jurisdiction to grant administration on the estate of a person deceased is conferred on the judge of probate for the county in which such person was last an inhabitant. *Tilton v. O'Connor*, 68 N. H. 215.

*New York*. — *Matter of Sullivan*, (Surrogate Ct.) 24 Misc. (N. Y.) 357.

*Oregon*. — *Slate's Estate*, 40 Oregon 349; *Slate v. Henkle*, 45 Oregon 430.

*Pennsylvania*. — *Ubil v. Miller*, 16 Pa. Super. Ct. 497.

*Canada*. — *Trites v. Humphreys*, 2 N. Bruns. Eq. Rep. 1.

**4. Assets Give Jurisdiction** — *United States*. — *Thormann v. Frame*, 176 U. S. 350; *Coe Brass Mfg. Co. v. Savlik*, (C. C. A.) 93 Fed. Rep. 519; *Cincinnati, etc., R. Co. v. Thiebaud*, (C. C. A.) 114 Fed. Rep. 918; *U. S. v. Tyndale*, (C. C. A.) 116 Fed. Rep. 820.

*Kentucky*. — *Turner v. Louisville, etc., R. Co.*, 110 Ky. 879; *Louisville, etc., R. Co. v. Schumaker*, 112 Ky. 431, rehearing denied 108 Ky. 263.

*Missouri*. — *Stevens v. Larwill*, 110 Mo. App. 140; *In re Davison*, 100 Mo. App. 263.

*New Jersey*. — *Matter of Bracher*, 60 N. J. Eq. 350.

*New York*. — *Maas v. German Sav. Bank*, 73 N. Y. App. Div. 524, reversing (Supm. Ct. App. T.) 36 Misc. (N. Y.) 154, which affirmed (N. Y. City Ct. Gen. T.) 35 Misc. (N. Y.) 193, affirmed 176 N. Y. 377; *Czech v. Bean*, (County Ct.) 35 Misc. (N. Y.) 729.

*North Carolina*. — *Coleman v. Howell*, 131 N. Car. 125; *Morefield v. Harris*, 126 N. Car. 626.

*Pennsylvania*. — *Dalrymple's Estate*, 31 Pa. Co. Ct. 177.

*Rhode Island*. — *Williams v. Ripley*, 25 R. I. 510.

*Wyoming*. — *Bliler v. Boswell*, 9 Wyo. 57.

*Canada*. — *Trites v. Humphreys*, 2 N. Bruns. Eq. Rep. 1.

**Under the Ohio Statute**, to warrant administration of the estate of a nonresident, he must have been engaged in the prosecution of business in the state at the time of his decease and have left assets therein. *In re McCreight*, 9 Ohio Dec. 450, 6 Ohio N. P. 479.

**A Claim for Taxes**, not being enforceable under the *Nebraska* statutes except in the county where it accrued and the county of the adopted residence or place of abode of the tax debtor, will not support a grant of letters of administration elsewhere in the state. *Dawes County v. Furay*, (Neb. 1904) 99 N. W. Rep. 271.

**763. 1. Nonresident Decedent Leaving Assets in Several Counties.** — *Maas v. German Sav. Bank*, 73 N. Y. App. Div. 524, reversing (Supm. Ct. App. T.) 36 Misc. (N. Y.) 154, which affirmed (N. Y. City Ct. Gen. T.) 35 Misc. (N. Y.) 193, affirmed 176 N. Y. 377; *Matter of McCabe*, 84 N. Y. App. Div. 145, affirmed without opinion 177 N. Y. 584; *Matter of Fitch*, 160 N. Y. 87, 30 Civ. Proc. (N. Y.) 1, affirming 39 N. Y. App. Div. 609.

**County Where Principal Part of Estate Is Located.** — In some states the granting of letters to administer on the estate of a nonresident belongs to the probate judge of the county in which the principal part of the goods and estate shall be. *Viosca's Estate*, 197 Pa. St. 280, affirming 29 Pittsb. Leg. J. N. S. (Pa.) 299; *Dunlap v. Savings Bank*, 69 S. Car. 270, 104 Am. St. Rep. 796.

**Situs of Fund in Registry of Federal Court.** — A fund which is in the registry of a federal court sitting ordinarily or always in any particular county in the district and state is a fund in each county, and may be properly administered on in any county, unless there is some restriction in a particular case growing out of some special matter, as, for instance, the residence of the deceased, or the priority of application to some particular Probate Court. *U. S. v. Tyndale*, (C. C. A.) 116 Fed. Rep. 820.

**Application for Direction as to Jurisdiction.** — In *Ontario*, when applications for letters of administration on the estate of a deceased person are made in more than one Surrogate Court, on a statutory application for a direction as to which should have jurisdiction in the matter, preference will be given to that made by the party nearest in the order in which administration is usually granted. *Re Tougher*, 3 Ont. L. Rep. 144.

**2. Jurisdiction First Acquired Is Exclusive.** — *McDonnell v. Farrow*, 132 Ala. 227; *McFarland v. Stewart*, 109 Iowa 561; *Maas v. German Sav. Bank*, 73 N. Y. App. Div. 524, reversing (Supm. Ct. App. T.) 36 Misc. (N. Y.) 154, which affirmed (N. Y. City Ct. Gen. T.) 35 Misc. (N. Y.) 193, affirmed 176 N. Y. 377; *Long v. Richardson*, 26 Tex. Civ. App. 197; *Brown v. McGee*, 117 Wis. 389.

**3. When Assets Are Essential to Jurisdiction.** —



**763.** *cc.* ON WHAT ASSETS ADMINISTRATION MAY BE GRANTED. — See note 4.

**764.** See notes 1, 2.

*dd.* SITUUS OF ASSETS — (aa) *General Rule.* — See note 3.

Unless the statutes so require, and except in the case of nonresident decedents, the possession of an estate by the decedent is not a prerequisite to the jurisdiction for the appointment of an administrator. *Holburn v. Pfannmiller*, 114 Ky. 831, *citing* 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 762 [763].

If there are other legitimate functions to be performed, and which can only be performed by an administrator, letters of administration may be granted for the purpose though there is no estate to be administered, where there are no negative or prohibitory terms in the statute confining the right to cases where it can be shown that the decedent left assets. *Western Union Tel. Co. v. Lipscomb*, 22 App. Cas. (D. C.) 104.

The *Utah* statute contemplates a grant of administration in cases in which the deceased was neither a resident nor left property within the jurisdiction. *Matter of Tasanen*, 25 Utah 396.

**763. 4. On What Assets Administration May Be Granted — In General.** — *Beach's Appeal*, 76 Conn. 118; *Lowery v. Powell*, 109 Ga. 192; *Ex p. Jenkins*, 25 Ind. App. 532, 81 Am. St. Rep. 114.

**A Debt Due to the Decedent.** — *Czech v. Bean*, (County Ct.) 35 Misc. (N. Y.) 729.

A claim made by an administrator against the estate on which he is administering is assets on which administration of his estate can be granted. *Matter of Flynn*, 92 N. Y. App. Div. 379.

**Action for Death of Intestate.** — As supporting the first paragraph of the original note, see *In re Burnstine*, 131 Fed. Rep. 828, *citing* 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 763; *Washington Asphalt Block, etc., Co. v. Mackey*, 15 App. Cas. (D. C.) 410; *Western Union Tel. Co. v. Lipscomb*, 22 App. Cas. (D. C.) 104; *Chicago, etc., R. Co. v. Smith*, 77 Ill. App. 492, *affirmed* on other grounds 180 Ill. 453; *Ex p. Jenkins*, 25 Ind. App. 532, 81 Am. St. Rep. 114; *Missouri Pac. R. Co. v. Bradley*, 51 Neb. 596; *Matter of Paola*, (Surrogate Ct.) 36 Misc. (N. Y.) 514; *Vance v. Southern R. Co.*, 138 N. Car. 460; *Richards v. Riverside Iron Works*, 56 W. Va. 510.

As supporting the second paragraph of the original note, see *Hall v. Louisville, etc., R. Co.*, 102 Ky. 480; *Turner v. Louisville, etc., R. Co.*, 110 Ky. 879; *Ziemer v. Crucible Steel Co.*, 99 N. Y. App. Div. 169; *In re Mayo*, 60 S. Car. 401, *McIver, C. J., dissenting*. See also *Boston, etc., R. Co. v. Hurd*, (C. C. A.) 108 Fed. Rep. 116.

**Existence of Assets Above Exemptions.** — See *supra*, this title, **744. 1.**

**A Recognizance Bond** given to secure the release of a garnishment is not property. *Filer, etc., Co. v. Rainey*, 120 Fed. Rep. 718.

**Chose in Action Barred by Limitation.** — Administration may be granted on a chose in action belonging to the estate, though it appears to be barred by the statute of limitations, it not being shown that the defense of the statute would be or could be successfully interposed. *Colburn's Appeal*, 76 Conn. 378; *Ex p. Jenkins*, 25 Ind. App. 532, 81 Am. St. Rep. 114.

**Contingent Claim.** — A contingency that a policy of life insurance payable to a third person will be canceled for fraud, involving the return of premiums, is not an estate of the insured on which administration can be granted, but merely the chance that there will be one in case the policy is canceled. *Guerry v. Pullen*, 112 Ga. 314.

**Claim Unsupported by Evidence.** — The mere claim of the applicant for administration, wholly unsupported by any evidential fact, that certain land standing in the name of a third person was purchased with the decedent's money and is recoverable by his estate, is not property on which the administration can be granted. *Beach's Appeal*, 76 Conn. 118.

**764. 1. Assets Brought into Jurisdiction After Death.** — *U. S. v. Tyndale*, (C. C. A.) 116 Fed. Rep. 820 (construing the *Massachusetts* law); *Morefield v. Harris*, 126 N. Car. 626.

If assets of a nonresident are brought into the state solely for the purpose of the appointment of an administrator to prosecute a negligence action against a foreign corporation on a cause of action arising in, and between residents of, another state, such appointment, if made, is fraudulent and collusive; and under the *New York* statute declaring the effect of surrogate's decrees may be collaterally attacked on that ground. *Hoes v. New York, etc., R. Co.*, 173 N. Y. 435, *reversing* 73 N. Y. App. Div. 363.

**Assets Temporarily in Jurisdiction.** — *Matter of McCabe*, 84 N. Y. App. Div. 145, *affirmed* without opinion 177 N. Y. 584.

**2. Administration Granted on Real Estate Alone.** — *Trites v. Humphreys*, 2 N. Bruns. Eq. Rep. 1. See also *Mowry v. McQueen*, 80 Minn. 385 (construing the *Wisconsin* law); *Matter of Gennert*, 96 N. Y. App. Div. 8. *Compare* in *New York* *Spratt v. Syms*, 104 N. Y. App. Div. 232.

**In California.** — *Murphy v. Crouse*, 135 Cal. 14, 87 Am. St. Rep. 90.

**A Late English Statute.** — See *infra*, this title, **766. 4.**

**3. Situs of Assets — General Rule.** — Personal property, whether of a tangible or an intangible character, is considered as located, for the purposes of administration, in the territory of that state whose laws must furnish the remedies for its reduction into possession. *Richards v. Riverside Iron Works*, 56 W. Va. 510.

**A Cause of Action for Wrongful Death.** — *In re Burnstine*, 131 Fed. Rep. 828, *citing* 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 764; *In re Mayo*, 60 S. Car. 401, *McIvers, C. J., dissenting*; *Richards v. Riverside Iron Works*, 56 W. Va. 510. See also *Western Union Tel. Co. v. Lipscomb*, 22 App. Cas. (D. C.) 104. And see *supra*, this title, **763. 4.**

**Certificates of Stock.** — The situs of the property of a stockholder in a corporation is where the corporate property is situated. *Matter of Fitch*, 160 N. Y. 87, 30 Civ. Pro. (N. Y.) 1, *affirming* 39 N. Y. App. Div. 609; *Murphy v. Crouse*, 135 Cal. 14, 87 Am. St. Rep. 90. *Com-*



**764.** (bb) *Simple Contract Debts.* — See note 4.

**765.** See note 1.

**A Life-insurance Policy.** — See notes 2, 3.

**766.** (cc) *Specialty Debts.* — See note 2.

(dd) *Judgments.* — See note 3.

**b. ORIGINAL AND GENERAL ADMINISTRATORS — (i) Right to Appointment** — (a) **In General.** — See notes 4, 5.

**767.** See note 1.

**Priority of Right Prescribed by Statute.** — See note 2.

*pare* Michigan Trust Co. v. Probasco, 29 Ind. App. 109.

**Debts Evidenced by Bank Books and Certificates of Deposit.** — The situs of assets represented by bank books and certificates of deposit is at the domicil of the decedent, the place where the vouchers are, upon production of which alone they could be turned into money. Matter of Barandon, (Surrogate Ct.) 41 Misc. (N. Y.) 380.

**Personal Property Found on the Body of a Deceased Person Floating on the High Seas,** out of the territorial jurisdiction of any particular state and of the United States, is assets for purposes of administration in that state into which it is brought by the salvors. U. S. v. Tyndale, (C. C. A.) 116 Fed. Rep. 820.

**764. 4. Situs of Simple Contract Debts Is Residence of Debtor.** — Angier v. Jones, 28 Tex. Civ. App. 402.

**Contra,** under a statute providing that letters over the estate of a nonresident shall be granted only in the county where the principal part of the goods and estate of the decedent shall be. Viosca's Estate, 197 Pa. St. 280, *affirming* 29 Pittsb. Leg. J. N. S. (Pa.) 299.

**765. 1. Locality of Debt Evidenced by Bill or Note.** — Tryon v. U. S., 32 Ct. Cl. 425; Michigan Trust Co. v. Probasco, 29 Ind. App. 109. But see Bliler v. Boswell, 9 Wyo. 57.

**Note Secured by Mortgage on Land.** — Martin v. Stovall, 103 Tenn. 1.

**2. Situs of Life-insurance Policy — Place Where Debtor Insurer Resides.** — See Ellis v. Ellis, (Tenn. Ch. 1899) 54 S. W. Rep. 666. *Compare* Ellis v. Northwestern Mut. L. Ins. Co., 100 Tenn. 177; *Re* Ontario Mut. L. Ins. Co., 30 Ont. 666.

**Life-insurance Policy Not a Specialty.** — *Compare* *Re* Ontario Mut. L. Ins. Co., 30 Ont. 666.

**3. Policy Held Assets in Jurisdiction Where It Is at Decedent's Death.** — See *Re* Ontario Mut. L. Ins. Co., 30 Ont. 666.

**766. 2. Situs of Specialty Debts.** — Viosca's Estate, 197 Pa. St. 280, *affirming* 29 Pittsb. Leg. J. N. S. (Pa.) 299.

**Scope of Rule.** — The rule as to the locality of a specialty governing the jurisdiction in which letters of administration are to be granted has been held to be subject to the qualification that the specialty must be recoverable and enforceable in the country in which it is found at the death. *Re* Ontario Mut. L. Ins. Co., 30 Ont. 666.

Although the locality of a specialty has been determined to be where it is conspicuous at the time of the death, that means, where it is rightly conspicuous; and where it has been assigned, and the assignee is entitled in law to the possession of it, it must be held to have

been conspicuous, not where it actually was at the death, but where it rightly ought to have been at that time. *Re* Ontario Mut. L. Ins. Co., 30 Ont. 666, *per* Armour, C. J., *citing* Mayo v. Equitable L. Assur. Soc., 71 Miss. 590.

**3. Situs of Judgment.** — Where an administrator sends into another state a judgment obtained by him in the state of his appointment, that realty situated in the former state may be subjected to its payment, the judgment constitutes assets there for purposes of administration. Morefield v. Harris, 126 N. Car. 626.

**In Texas** it has been held that the situs of a judgment follows the residence of the owner and cannot in law be regarded as being situate elsewhere for purposes of administration. Angier v. Jones, 28 Tex. Civ. App. 402.

**4. English Statute.** — See Williams v. Williams, 24 App. Cas. (D. C.) 214.

**Right of Persons Interested in Real Estate Assets.** — By the Land Transfer Act 1897 (60 & 61 Vict., c. 65), part i., § 2, subsec. 4, "where a person dies possessed of real estate, the court shall, in granting letters of administration, have regard to the rights and interests of persons interested in his real estate, and his heir at law, if not one of the next of kin, shall be equally entitled to the grant with the next of kin, and provision shall be made by rules of court for adapting the procedure and practice in the grant of letters of administration to the case of real estate." In Goods of Ardern, (1898) P. 147; In Goods of Barnett, (1898) P. 145; In Goods of Roberts, (1898) P. 149; In Goods of Blenkinsop, 49 W. R. 336.

**Canada — Province of Ontario.** — The order in which administration is usually granted is: (1) Husband or wife; (2) child or children; (3) grandchild or grandchildren; (4) great grandchildren or other descendants; (5) father; (6) mother; (7) brothers or sisters. *Re* Tougher, 3 Ont. L. Rep. 144.

**Right to Administer Wholly Statutory.** — The right of administration, while a very valuable one, is not inherent, but statutory. It may be given or withheld in the wisdom of the legislature. Welsh v. Manwaring, 120 Wis. 377.

**5. Nature of Interest.** — See Williams v. Lancaster, 113 Ga. 1020.

**767. 1. Relatives Not Interested in Estate.** — See *infra*, this title, 772. 1.

**2. Priority Prescribed by Statute Is Matter of Right.** — Williams v. Williams, 24 App. Cas. (D. C.) 214; Shrum v. Naugle, 22 Ind. App. 98; Swart's Estate, 189 Pa. St. 71, 43 W. N. C. (Pa.) 353, 29 Pittsb. Leg. J. N. S. (Pa.) 332; *Ex p.* Small, 69 S. Car. 43, *quoting* 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 767; Welsh v. Manwaring, 120 Wis. 377.

**768.** See note 1.

**Necessity of Making Timely Application.** — See notes 2, 3.

(b) **Right of Husband to Administer** — *aa.* GENERAL RULE. — See note 4.

**769.** *bb.* EXISTENCE OF MARRIAGE RELATION. — See note 2.

*cc.* INTEREST IN WIFE'S ESTATE. — See note 4.

(c) **Right of Widow to Administer** — *aa.* GENERAL RULE. — See note 6.

**770.** **Exclusive Right of Widow.** — See notes 1, 2.

In *Michigan* it has been said that the statute is intended to place the administration in the hands of some one beneficially interested; and in some instances its express words have been disregarded in order to effectuate that intention. *In re Sprague*, 125 Mich. 357, 7 Detroit Leg. N. 520.

**Priority of Application.** — The whole scheme of preferences is based upon nearness of kin to the intestate. Priority of application is not a ground for preference except among creditors. *Matter of Hawley*, (Surrogate Ct.) 37 Misc. (N. Y.) 667.

**768.** 1. **Priority Prescribed by Statute Disregarded When Hazardous to Estate.** — In the *Goods of Ardern*, (1898) P. 147; *In re Brennan*, 5 Ohio Dec. 499, 5 Ohio N. P. 490; *Warner's Estate*, 207 Pa. St. 580, 99 Am. St. Rep. 804; *Failor's Estate*, 10 Pa. Super. Ct. 253; *Ex p. Small*, 69 S. Car. 43, quoting 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 767, 768. See also *infra*, this title, **779.** 2 *et seq.*

**Discretion of Probate Court in Rejecting Applicant as Unfit.** — See *McCallip v. Sharp*, 13 Ohio Dec. 650; *Schumacher v. McCallip*, 69 Ohio St. 500.

The statute prescribing who may administer is mandatory in a certain sense of that term; that is, as between parties who are fit and suitable for the office, the preference given by the statute should be maintained, and not departed from by the County Court. *Fitzgerald v. Smith*, 112 Tenn. 176.

2. **Necessity of Making Timely Application.** — *Buckner v. Buckner*, 87 S. W. Rep. 776, 27 Ky. L. Rep. 1032; *McLean v. Roller*, 33 Wash. 166, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 768. See also *Osmun v. Galbraith*, 131 Mich. 577, 9 Detroit Leg. N. 460, citing *Wilkinson v. Conaty*, 65 Mich. 614. And see *infra*, this title, **818.** 3.

**Where No Time Is Fixed by Statute** the application must be made within a reasonable time. *Rodes v. Boyers*, 106 Tenn. 434.

3. **Opportunity to Take Out Letters.** — *Wiggins v. Hudson*, 80 L. T. N. S. 296; In *Goods of Druce*, 81 L. T. N. S. 458; *In re Wooten*, (Tenn. 1905) 85 S. W. Rep. 1105. See also In *Goods of Harper*, (1899) P. 59. And see *infra*, this title, **771.** 1.

**Presumption of Death of Person First Entitled.** — See *Matter of Barr*, (Surrogate Ct.) 38 Misc. (N. Y.) 355.

**Special Circumstances Excusing Notice.** — See *Frost's Estate*, (1905) P. 140; In *Goods of Green*, 84 L. T. N. S. 61.

Where one entitled to administration had not been heard of for twenty-two years, letters were granted to the next in order without requiring the missing next of kin to be cited. In *goods of Callicott*, (1899) P. 189. To the same effect, see In *Goods of Chapman*, (1903) P. 192.

Where the widow of an intestate was shown to be a woman of dissolute habits, who had sixteen years before eloped with another man and had not since been heard from, a grant was made to the person next entitled without citation to her. In *Goods of Stevens*, (1898) P. 126.

A statutory provision that if the persons entitled to administer the estate of a deceased partner fail or neglect to take out letters for thirty days after the death, the surviving partner or partners may make application, does not supersede a general statute requiring a citation to the persons entitled before they can be held to have renounced. *Warnock v. Page*, 14 Ohio Dec. 278, citing 25 Ohio Cir. Ct. 695.

4. **Husband Has First Right to Administer on Estate of Deceased Wife.** — *Engle v. Engle*, 21 Lanc. L. Rev. 285; *Batley v. Mathews*, 23 R. I. 474; *Dorsey v. Dorsey*, 29 Ont. 475, affirmed on opinion below 30 Ont. 183.

**Exception to Rule Preferring Husband.** — *Bulliard's Succession*, 111 La. 186.

**Origin of Husband's Right to Administer.** — See *Locke v. McPherson*, 163 Mo. 493, 85 Am. St. Rep. 546 (discussing the *New York* law).

**769.** 2. **Husband Entitled to Administer Though Marriage Was Voidable.** — *Matter of Shiels*, 120 Cal. 347.

4. **Right Barred by Release of Interest in Estate.** — *Dorsey v. Dorsey*, 29 Ont. 475, affirmed on opinion below 30 Ont. 183.

But the husband should be cited in the proceedings to obtain the grant of letters, since he might dispute the release. In *Goods of Megson*, 80 L. T. N. S. 295.

6. **Widow Ordinarily Preferred to Next of Kin.** — *Frost's Estate*, (1905) P. 140; In *Goods of Cory*, 84 L. T. N. S. 270.

**Rule in Louisiana.** — *Bulliard's Succession*, 111 La. 186.

**770.** 1. **Exclusive Right of Widow to Administer.** — *Matter of Turner*, 142 Cal. 549; *Heins's Estate*, 22 Pa. Super. Ct. 31, affirming 18 Montg. Co. Rep. (Pa.) 177; *Truesdale v. Putegnat*, (Tex. Civ. App. 1900) 59 S. W. Rep. 307.

2. **Granting Administration to Widow Discretionary with Court.** — The *District of Columbia* statute provides that "if the intestate leave a widow and a child or children, administration, subject to the discretion of the court, shall be granted either to the widow or child, or one or more of the children, qualified to act as administrator; and further subject to the discretion of the court as follows: If there be a widow and no child, the widow shall be preferred." The words "and further subject to the discretion of the court as follows" have reference to the relations and conditions of persons prescribed in the succeeding sections of the act. *Williams v. Williams*, 24 App. Cas. (D. C.) 214.



- 770.** *bb.* EXISTENCE OF MARRIAGE RELATION. — See notes 3, 4.  
*cc.* RELEASE OF INTEREST IN HUSBAND'S ESTATE. — See note 5.  
*dd.* DESERTION. — See note 7.

**771.** (d) Right of Next of Kin to Administer. — See note 2.

**772.** See note 1.

(e) Right of Creditors to Administer — *aa.* GENERAL RULE. — See note 5.

**770. 3. Foreign Divorce.** — *Andrews v. Andrews*, 176 Mass. 92; *Heins's Estate*, 22 Pa. Super. Ct. 31, *affirming* 18 Montg. Co. Rep. (Pa.) 177.

**4. Widow's Right Not Barred by Divorce a Mensa et Thoro.** — *Heins's Estate*, 22 Pa. Super. Ct. 31, *affirming* 18 Montg. Co. Rep. (Pa.) 177.

**5. Release of Entire Interest in Estate Bars Right to Administer.** — *In re Sprague*, 125 Mich. 357, 7 Detroit Leg. N. 520.

**7. Misconduct of Widow.** — *Frost's Estate*, (1905) P. 140.

The rights of a widow in the estate of her husband cannot be questioned on the claim that during the lifetime of her husband she was unfaithful to her vows, *Matter of Neuman*, 124 Cal. 688.

**Mere Fact of Separation Not Sufficient.** — That a married woman had left her husband and was living apart from him will not affect her right to administer on his estate, where she was fully justified in leaving him because of his violence toward her. *Topham's Estate*, 12 Pa. Dist. 194, 28 Pa. Co. Ct. 374.

**771. 2. Next of Kin Entitled to Administer in Absence of Husband and Wife.** — *Stevens v. Larwill*, 110 Mo. App. 140; *Matter of Barr*, (Surrogate Ct.) 38 Misc. (N. Y.) 355; *Thompson v. Nowlin*, 51 W. Va. 346. See *Bulliard's Succession*, 111 La. 186; *Hill v. Grant*, (Tex. Civ. App. 1898) 44 S. W. Rep. 1016.

**Next of Kin a Bastard — At Common Law.** — See *In Goods of Hartley*, (1899) P. 40.

In *England* a grant of letters with the will annexed on the estate of a spinster is properly made to her illegitimate daughter, where the latter is entitled to the property under the terms of the will. *Frogley's Estate*, (1905) P. 137.

**In the United States.** — In *Matter of Heaton*, 139 Cal. xix, 237, on former appeal 135 Cal. 385, administration was refused to a nephew and letters were granted to an illegitimate daughter, who had been adopted by being received into the family of the decedent by consent of his wife, and otherwise treated as a legitimate child, as provided by Civ. Code Cal., § 230.

In *Louisiana* the surviving wife is called to the inheritance, and preferred to all the natural relations of the husband, and he to all her natural relations, except those of the descending line. *In re Nereaux*, 112 La. 572.

Where an unmarried woman having a son subsequently marries a man who is not the father of such son, the marriage does not legitimize him, and he is incompetent to administer the husband's estate. *Matter of Pfarr*, (Surrogate Ct.) 38 Misc. (N. Y.) 223.

**Children.** — The *California* statute places the children second in the list of those entitled to administer. *Matter of Coan*, 132 Cal. 401.

**Estate of Child Dying Intestate.** — If a child dies intestate without a wife, child, or father,

the mother is entitled to administration. *Re Tougher*, 3 Ont. L. Rep. 144.

**A Niece** is nearer of kin than a grandnephew and is entitled to administration. *Matter of Hawley*, (Surrogate Ct.) 37 Misc. (N. Y.) 667.

**An Only Daughter**, under the *Kentucky* statute, is the sole distributee of her father's estate and entitled to administer in preference to the intestate's mother. *Buckner v. Buckner*, 87 S. W. Rep. 776, 27 Ky. L. Rep. 1032.

**772. 1. Kindred of Decedent Not Interested in Estate May Be Entitled to Administer.** — *Williams v. Addison*, 93 Md. 41; *Matter of Lowenstein*, (Surrogate Ct.) 29 Misc. (N. Y.) 722; *Mowry v. Latham*, 20 R. I. 786. *Contra*, *Matter of Seymour*, (Surrogate Ct.) 33 Misc. (N. Y.) 271. See also *Matter of Haug*, (Surrogate Ct.) 29 Misc. (N. Y.) 36. And see *infra*, this title, **774. 3.**

In *California* by statute the relatives of the deceased are entitled to administer only when they are entitled to succeed to his personal estate or some part of it. *Matter of Wakefield*, 136 Cal. 110; *Matter of Edson*, 143 Cal. 607.

In *Georgia*, except in those cases where the law authorizes the county administrator or the clerk of the Superior Court to be appointed administrator upon an estate, the law does not recognize the right of any one to be appointed administrator unless he is an heir at law of the decedent, or a creditor of the estate, or otherwise interested therein as legatee or devisee, or has been selected by a majority of the heirs at law as administrator or has been associated as coadministrator with one who is entitled to the administration for some one or more of the reasons just referred to. *Towner v. Griffin*, 115 Ga. 965.

In *Michigan* it has been said that the statute is intended to place the administration in the hands of some one beneficially interested; and in some instances its express words have been disregarded in order to effectuate that intention. *In re Sprague*, 125 Mich. 357, 7 Detroit Leg. N. 520.

In *Ohio*, by statute, "next of kin means those relatives who, at the time of appointment, would inherit in case of intestacy." *McCallip v. Sharp*, 13 Ohio Dec. 650.

**Priority of Public Administrator.** — The statutes sometimes give to the public administrator priority of right over relatives having no interest in the estate. See *infra*, this title, **807. 3.**

**5. When Creditors of Decedent Are Entitled to Administer.** — In *Goods of Lowe*, 78 L. T. N. S. 566; In *Goods of Belham*, 84 L. T. N. S. 300; *Matter of Barr*, (Surrogate Ct.) 38 Misc. (N. Y.) 355; *McCallip v. Sharp*, 13 Ohio Dec. 650. See also *McNeely v. McNeely*, 50 La. Ann. 823.

**Creditor of Nonresident.** — See *In re McCreight*, 9 Ohio Dec. 450, 6 Ohio N. P. 479.



**773.** *bb.* PREFERENCE OF CREDITORS OVER NEXT OF KIN. — See note 1.

*cc.* PRIORITY OF RIGHT AMONG CREDITORS. — See note 2.

*dd.* WHAT CREDITORS ARE ENTITLED TO ADMINISTER. — See note 3.

Claim for Funeral Expenses. — See note 4.

**774.** Debts Barred by Limitation. — See note 1.

Assigned Claims. — See note 2.

(f) Appointment of Strangers or Representatives of Persons Entitled. — See note 3.

**775.** Appointment of Representatives of Persons Entitled to Administer. — See note 1.

**773.** 1. *Insolvency of Estate.* — See *In Goods of Lowe*, 78 L. T. N. S. 566.

2. *Creditor to Largest Amount Preferred.* — *Williams v. Williams*, 24 App. Cas. (D. C.) 214.

*Creditor First Applying Preferred.* — See *Matter of Hawley*, (Surrogate Ct.) 37 Misc. (N. Y.) 667.

*Principal Creditors.* — The right is sometimes conferred by the statute on one or more of the "principal creditors." *Matter of Sullivan*, 25 Wash. 430.

3. *Word "Creditor" Defined.* — See *Wilson's Estate*, 80 Ill. App. 217.

A *Person Indebted to the Estate* in a greater sum than the amount of his claim against it is not a creditor. *Wilson's Estate*, 80 Ill. App. 217. See also *Barber's Succession*, 52 La. Ann. 957.

But a person who has a claim against the estate is a creditor although he has in his hands money belonging to it in a greater amount, collected by him as agent of the decedent. He holds the money as a trustee for the estate and is therefore not its debtor. *Matter of Sullivan*, 25 Wash. 430.

*Proof of Claim.* — See *In re Neubert*, 58 S. Car. 469.

4. *Funeral Expenses.* — *Re Cunningham*, 31 Nova Scotia 264. *Contra*, *Matter of Sullivan*, 25 Wash. 430, where the court said: "The term 'creditors' as used in said section, relates only to such as were creditors of the deceased at the time of his death, or to holders of obligations created by the deceased himself." And *contra* also where the amount is small and the claim was contracted for the express purpose of obtaining the right to administer. *In re Neubert*, 58 S. Car. 469.

**774.** 1. *Debt Barred by Statute of Limitations.* — *In Goods of Druce*, 81 L. T. N. S. 458; *Re Cunningham*, 31 Nova Scotia 264.

2. *Claims Based on Contract with Executor or Administrator.* — *Wiesmann v. Daniels*, 114 Wis. 240.

*Doubtful Claims.* — See *Carpenter v. Wood*, 131 Mich. 314, 9 Detroit Leg. N. 322; *In re McCreight*, 9 Ohio Dec. 450, 6 Ohio N. P. 479.

*Office of Creditor Corporation.* — *Contra*, *McCallip v. Sharp*, 13 Ohio Dec. 650, where the court held that it is within the spirit of the statute to include the cashier of a corporation creditor as a creditor, and the appointment may be conferred upon him as its representative.

3. *Any Suitable Person May Be Appointed* — *England.* — *In Goods of Trigg*, (1901) P. 42.

*Canada.* — *Carr v. O'Rourke*, 3 Ont. L. Rep. 632.

*District of Columbia.* — *Williams v. Williams*, 24 App. Cas. (D. C.) 214.

*Kentucky.* — *Buckner v. Buckner*, 87 S. W. Rep. 776, 27 Ky. L. Rep. 1032.

*Maryland.* — *Williams v. Addison*, 93 Md. 41; *Jones v. Harbaugh*, 93 Md. 269.

*Michigan.* — *In re Sprague*, 125 Mich. 357, 7 Detroit Leg. N. 520.

*Nebraska.* — *Larson v. Union Pac. R. Co.*, (Neb. 1903) 97 N. W. Rep. 313.

*New York.* — *Matter of Ciotto*, 105 N. Y. App. Div. 143; *Matter of Paola*, (Surrogate Ct.) 36 Misc. (N. Y.) 514.

*Pennsylvania.* — *Schmidt's Estate*, 183 Pa. St. 129; *Warner's Estate*, 207 Pa. St. 580, 99 Am. St. Rep. 804; *Job's Estate*, 23 Pa. Super. Ct. 611, reversing 12 Pa. Dist. 97, 28 Pa. Co. Ct. 356, 19 Montg. Co. Rep. (Pa.) 170.

*Washington.* — *Matter of Sullivan*, 25 Wash. 430; *Sutton v. Osborne*, 31 Wash. 340; *McLean v. Roller*, 33 Wash. 166.

*Not Matter of Right.* — A stranger in blood to the deceased cannot apply for letters of administration as a matter of right. *In re Hill*, 102 Mo. App. 617.

*Consul-General of Country of Deceased Alien.* — The consul-general of Italy on his application will be appointed administrator over the estate of a citizen and subject of that country, where no person under the statute will consent to take the appointment, and he is otherwise competent to act; but not on the ground of any priority of right vested in him by virtue of the treaties between Italy and the United States. *Matter of Logiorato*, (Surrogate Ct.) 34 Misc. (N. Y.) 31, criticising *Matter of Fattosini*, (Surrogate Ct.) 33 Misc. (N. Y.) 18.

**775.** 1. *Guardian of Minor Next of Kin May Be Appointed Administrator.* — *In Goods of Lee*, (1898) 2 Ir. R. 81.

*Rule in the United States as to Right of Guardian to Administer.* — *Woodruff v. Snoover*, (N. J. 1900) 45 Atl. Rep. 950; *Matter of Hudson*, (Surrogate Ct.) 37 Misc. (N. Y.) 539, the court saying: "It is the policy of the statute to grant to the next of kin who are entitled to share in a decedent's estate the right to administer on the same, on the theory that those to whom the estate belonged would be most interested in the proper management of the same."

The *California* statute places the guardian of a minor and the adult members of the class to which the minor belongs on the same footing, as to the right to letters of administration. *Matter of Turner*, 143 Cal. 438, *McFarland, J., dissenting.*

*Committee or Guardian of Insane Person.* — *In Goods of Goldschmidt*, 78 L. T. N. S. 763; *In Goods of Unwin*, 87 L. T. N. S. 749.

By statute in *Illinois* the conservator of the estate of a lunatic, idiot, drunkard, or spendthrift, if a resident of the state, is invested with power, on the death of the ward, to make final settlement and distribution, without further letters of administration, and in such time

**776.** (2) *Right to Nominate Administrator* — (a) *Rule in England.* — See note 1.

**777.** (b) *Rule in United States.* — See note 2.

**778.** See note 1.

and manner as is required by law of administrators of the estates of deceased persons. *Lang v. Friesenecker*, 213 Ill. 598.

**Assignee in Bankruptcy.** — In Goods of Thacker, (1900) P. 15; In Goods of Agnese, (1900) P. 60.

A trustee in bankruptcy is a grantee within the *Michigan* statute (2 Comp. Laws Mich. 1897, § 9324), that the parties in interest shall be entitled to administration in the following order: "First, the widow, husband, or next of kin, or a grantee of the interest of one or more of them." *Osmun v. Galbraith*, 131 Mich. 577, 9 Detroit Leg. N. 460.

**Representatives of Person Entitled.** — In Goods of Thacker, (1900) P. 15; In Goods of Green, 84 L. T. N. S. 61; In Goods of M'Donagh, (1898) 2 Ir. R. 79.

Where both husband and wife perish in a general massacre, and there are no means of ascertaining which, if either, survived the other, or whether both perished at the same moment, administration will be granted on the estate of each to the respective next of kin. In Goods of Beynon, (1901) P. 141.

Where all the next of kin are dead, administration is properly granted to the legal representatives of the last surviving administrator, where they are the persons having the largest interest, by reason of a large sum of money being due their intestate on his administration account. *Re Cunningham*, 31 Nova Scotia 264.

**Rule Not Applicable Against Express Statute.** — See *In re Sprague*, 125 Mich. 357, 7 Detroit Leg. N. 520, where the court said further: "The statute applies to the situation at the time letters of administration are granted, and not to the situation at the time of the death of the deceased."

**Assignee of Next of Kin.** — Where the sole next of kin renounces his right to letters and assigns his interest in the property of the intestate, the assignee is entitled to the grant on applying therefor. In Goods of Quilliam, 79 L. T. N. S. 472.

As to "Special Circumstances," within the meaning of the *English* Probate Act, which will justify a grant to a stranger or to one not having priority of right, see In Goods of Potter, (1899) P. 265; In Goods of Harling, (1900) P. 59; In Goods of Moffatt, (1900) P. 152; In Goods of Brotherton, (1901) P. 139; In Goods of Chapman, (1903) P. 192; In Goods of Byrne, 84 L. T. N. S. 570; In Goods of Lalor, 85 L. T. N. S. 643; In Goods of Jackson, 87 L. T. N. S. 747; In Goods of Blenkinsop, 49 W. R. 336.

**776. 1. Administration May Be Granted to Nominee of Person Entitled — England.** — In Goods of Barton, (1898) P. 11; In Goods of Potter, (1899) P. 265.

**Power of Attorney to Nominate.** — In Goods of Abdul Hamid Bey, 78 L. T. N. S. 202.

**Solicitor of the Treasury as Nominee of the Crown.** — See In Goods of Hartley, (1899) P. 40.

**777. 2. Right of Nomination Given by Statute.** — *Matter of Dow*, 132 Cal. 309; *In re Watson*, (Mont. 1904) 78 Pac. Rep. 702; *Welsh v. Manwaring*, 120 Wis. 377.

**Discretion of Court in Appointing Nominee.** — See *Matter of Richardson*, 120 Cal. 344; *Matter of Healy*, 122 Cal. 162.

In *Georgia*, where two persons are nominated by the same number of distributees, and neither had any priority of right, the ordinary, or on appeal from his decision, the jury, may select the one best qualified for the office. *Jackson v. Jackson*, 101 Ga. 132.

**No Right to Nominate Unless Administration Is Vacant.** — See *Matter of Healy*, 122 Cal. 162.

**Right of Nomination Not Allowed.** — Compare in *Pennsylvania* as to nominations by the next of kin, *Job's Estate*, 23 Pa. Super. Ct. 611, reversing 12 Pa. Dist. 97, 28 Pa. Co. Ct. 356, 19 Montg. Co. Rep. (Pa.) 170, where the court said: "The register, in granting letters of administration, is bound to respect the nomination of the next of kin, when they decline to exercise their right to administer."

**Advisory Effect of Nomination.** — In *Tennessee*, while the County Court is not in any event bound to appoint the nominee of the next of kin, yet such nominee should be preferred, and, unless there are valid reasons, should be appointed. *In re Wooten*, (Tenn. 1905) 85 S. W. Rep. 1105.

**Nomination of One Member of a Class by the Others.** — In *Pennsylvania* the registrar, in granting letters of administration, has no discretion to disregard the nomination of the next of kin, except on the ground of personal unfitness or legal incompetency. *Swart's Estate*, 189 Pa. St. 71, 43 W. N. C. (Pa.) 353. See also *Failor's Estate*, 10 Pa. Super. Ct. 253.

**Nominee of Creditor.** — Under the *Washington* statute a creditor has no right to nominate, but only the right to ask his own appointment. *Matter of Sullivan*, 25 Wash. 430.

**778. 1. Persons Who Are Not Competent to Administer.** — *Matter of Brundage*, 141 Cal. 538; *Matter of Ferrigan*, 92 N. Y. App. Div. 376; *Matter of Flynn*, 92 N. Y. App. Div. 379; *In re Neidig*, 183 Pa. St. 492, 41 W. N. C. (Pa.) 331; *Matter of Sullivan*, 25 Wash. 430. See also *Mowry v. Latham*, 20 R. I. 786. *Contra*, as to nonresidents, *Strong v. Dignan*, 207 Ill. 385, 99 Am. St. Rep. 225.

Under the present law in *Montana*, a person, if incompetent to administer by reason of non-residence only, can request the appointment of a resident, and letters may be issued accordingly. *In re Craigie*, 24 Mont. 37.

**But a Surviving Husband or Wife.** — *Matter of Shiels*, 120 Cal. 347; *In re Craigie*, 24 Mont. 37; *McLean v. Roller*, 33 Wash. 166.

**A Widow on Remarrying.** — *Contra*, under the present *California* statute, *Matter of Dow*, 132 Cal. 309, distinguishing *Matter of Allen*, 78 Cal. 581.

**A Nonresident Alien.** — *Contra*, by statute, *In re Watson*, (Mont. 1904) 78 Pac. Rep. 702.

**779.** (c) *Revoking Nomination.* — See note 1.

(3) *Who Are Competent to Be Administrators* — (a) *In General.* —

See note 2.

**780.** See note 1.

(b) *Corporations.* — See note 2.

(c) *Married Women.* — See note 3.

(d) *Infants.* — See note 5.

(e) *Aliens and Nonresidents.* — See notes 6, 7.

**781.** (f) *Disqualifying Conditions or Habits* — *Insolvency.* — See note 1.

*Illiteracy.* — See note 5.

*Want of Business Experience and Capacity.* — See note 6.

*An Improvident Person.* — See note 7.

*Indebtedness to the Estate.* — See note 8.

*Prejudice Against or Hostility to the Other Next of Kin.* — See notes 10, 11.

*Effect of Nomination by Incompetent Person.* — Matter of Harrison, 135 Cal. 7; Matter of Brundage, 141 Cal. 538.

**779. 1. Revoking Nomination Before It Is Acted On.** — See Matter of Shiels, 120 Cal. 347.

**2. No One Incompetent Except as Declared by Statute.** — Matter of Brundage, 141 Cal. 538; Matter of Haley, (Surrogate Ct.) 21 Misc. (N. Y.) 777; Matter of Reichert, (Surrogate Ct.) 34 Misc. (N. Y.) 288, 9 N. Y. Annot. Cas. 472.

**780. 1. Illustration.** — The *Kansas* statute provides in general terms that if the persons primarily entitled "are incompetent, or evidently unsuitable for the discharge of the trust," their appointment may be refused. *Brown v. Dunlap*, (Kan. 1905) 79 Pac. Rep. 145.

In *Wyoming* the qualifications of an administrator are the same as those of an executor with two exceptions. The administrator must be a *bona fide* resident of the state, and must not be a married woman. *Rice v. Tilton*, (Wyo. 1905) 80 Pac. Rep. 828.

**Presumption as to Competency.** — The presumption is in favor of the applicant against the existence of any of the statutory disqualifications except those of nonresidence and nonage. Matter of Gordon, 142 Cal. 125.

**2. Corporation Not Competent to Act as Administrator.** — Matter of Ciotto, 105 N. Y. App. Div. 143.

**Statutory Authority to Act.** — Matter of Milhau, (Surrogate Ct.) 28 Misc. (N. Y.) 366. Bates's Annot. Stat. Ohio (1903), §§ 3821c, 3821f, authorizing trust companies to act as executors or administrators in certain counties of the state, is special legislation and unconstitutional. *Schumacher v. McCallip*, 69 Ohio St. 500.

Authority to accept and execute all trusts of every name and kind, "whether the trust be that of guardian, executor, trustee, the committee of an estate of a *non compos mentis*, or any other trust," confers power to act as administrator. *Union Bank, etc., Co. v. Wright*, (Tenn. Ch. 1900) 58 S. W. Rep. 755.

**3. Coverture Not a Disqualification.** — Matter of Dow, 132 Cal. 309.

**Married Women Disqualified by Statute.** — *Weaver v. Industrial Trust Co.*, 24 R. I. 35; *Rice v. Tilton*, (Wyo. 1905) 80 Pac. Rep. 828.

**5. Infants Not Competent.** — *Williams v. Williams*, 24 App. Cas. (D. C.) 214; Matter of

*Hudson*, (Surrogate Ct.) 37 Misc. (N. Y.) 539; *Thompson v. Nowlin*, 51 W. Va. 346.

**6. Resident Aliens.** — Under the *New York* statute only aliens who are residents of the state are competent to act as administrators. *Tanas v. Municipal Gas Co.*, 88 N. Y. App. Div. 251; Matter of Ferrigan, 92 N. Y. App. Div. 376; Matter of Flynn, 92 N. Y. App. Div. 379; Matter of Paola, (Surrogate Ct.) 36 Misc. (N. Y.) 514.

**7. Nonresidents Competent to Administer.** — *Foley v. Cudahy Packing Co.*, 119 Iowa 246; Matter of Tyers, (Surrogate Ct.) 41 Misc. (N. Y.) 378.

**Nonresidents Disqualified by Statute.** — Matter of Kelley, 122 Cal. 379; Matter of Brundage, 141 Cal. 538; *Ramsay v. Ramsay*, 196 Ill. 179, affirming 97 Ill. App. 270; *Strong v. Dignan*, 207 Ill. 385, 99 Am. St. Rep. 225; *In re Craigie*, 24 Mont. 37; *Hecht v. Carey*, (Wyo. 1904) 78 Pac. Rep. 705; *Rice v. Tilton*, (Wyo. 1905) 80 Pac. Rep. 828.

In *Georgia* none but citizens of the United States residing in the state are qualified to act as administrators, except in the case of a citizen of another state or territory who is heir at law, of equal, greater, or sole interest of the estate. *Jones v. Smith*, 120 Ga. 642.

A nonresident who comes into the state with the intention of making it his future home has been held to be entitled to letters. Matter of Newman, 124 Cal. 688; *Stevens v. Larwill*, 110 Mo. App. 140.

**Implied Disqualification of Nonresidents.** — See *In re Neubert*, 58 S. Car. 469; *McDevitt's Estate*, 9 Pa. Dist. 474; *Schmidt's Estate*, 183 Pa. St. 129.

**Nonresidence as Ground for Removal.** — See *infra*, this title, 823. 2 *et seq.*

**781. 1. Insolvency Disqualifies.** — *Failor's Estate*, 10 Pa. Super. Ct. 253.

**5. Discretion as to Appointment of Illiterate Person.** — Matter of Haley, (Surrogate Ct.) 21 Misc. (N. Y.) 777.

**6. Want of Business Experience and Capacity Not a Disqualification.** — Compare *Brown v. Dunlap*, (Kan. 1905) 79 Pac. Rep. 145.

**7. Improvidence Is a Disqualification.** — Matter of Ferguson, (Surrogate Ct.) 41 Misc. (N. Y.) 465.

**8. Indebtedness Not a Disqualification.** — *Kailer v. Kailer*, 92 Md. 147.

**10. Prejudice Against or Hostility to Other**



**782.** Use of Intoxicating Liquors. — See note 1.

Bad Character. — See note 2.

A Surviving Partner. — See note 3.

In Louisiana. — See note 4.

(4) *Preferences and Selections.* — See notes 5, 6, 7.**784.** (5) *Time When Appointment May Be Made.* — See notes 1, 2, 3, 5.Next of Kin Held Not Disqualification. — *Rice v. Tilton*, (Wyo. 1905) 80 Pac. Rep. 828.

**781. 11. Antagonistic Interests Held Sufficient Ground for Refusing Letters.** — *Carpenter v. Wood*, 131 Mich. 314, 9 Detroit Leg. N. 322; *Matter of Wallace*, 68 N. Y. App. Div. 649; *McCallip v. Sharp*, 13 Ohio Dec. 650; *In re Brennan*, 5 Ohio Dec. 499, 5 Ohio N. P. 490; *Malone's Estate*, 9 Pa. Dist. 115; *Failor's Estate*, 10 Pa. Super. Ct. 253; *Job's Estate*, 23 Pa. Super. Ct. 611, *reversing* 12 Pa. Dist. 97, 28 Pa. Co. Ct. 356, 19 Montg. Co. Rep. (Pa.) 170; *Schmidt's Estate*, 183 Pa. St. 129; *Warner's Estate*, 207 Pa. St. 580, 99 Am. St. Rep. 804. See also *Collins' Estate*, 14 Pa. Dist. 38. *Contra*, *Matter of Brundage*, 141 Cal. 538; *In re Wooten*, (Tenn. 1905) 85 S. W. Rep. 1105, where the court said: "It does not appear to be the policy of our laws to select for an administrator a person not interested in the estate, or one whose interest is not antagonistic to that of other beneficiaries in the estate. On the contrary, the leading consideration appears to be that the party selected should have an interest in the estate, and it does not matter if such interest is antagonistic to that of the other beneficiaries."

**782. 1. Habitual Drunkenness a Disqualification.** — *In Goods of Ardern*, (1898) P. 147; *Matter of Reichert*, (Surrogate Ct.) 34 Misc. (N. Y.) 288, (Surrogate Ct.) 9 N. Y. Annot. Cas. 472.

**2. Persons of Bad Character Disqualified.** — *Matter of Coan*, 132 Cal. 401. See also *supra*, this title, **770. 7.**

**Want of Integrity.** — The word "integrity" as used in this connection means soundness of moral principle and character, as shown by a person's dealing with others, in the making and performance of contracts, in fidelity and honesty in the discharge of trusts. In short, it is used as a synonym for probity, honesty, and uprightness in business relations with others. *Matter of Gordon*, 142 Cal. 125.

That a woman has been an unfaithful wife and violated her marital obligation, does not tend to show lack of integrity. *Matter of Newman*, 124 Cal. 688.

**Persons Convicted of Crime.** — *In Washington*, by statute, a person who has been convicted of any felony, or of a misdemeanor involving moral turpitude, is disqualified from acting as administrator. *McLean v. Roller*, 33 Wash. 166.

**3. Surviving Partner of Decedent Not Competent.** — *Malone's Estate*, 9 Pa. Dist. 115.

**Statutory Exception to Rule.** — *In Ohio*, by statute, if the persons entitled to administer on the estate of a person who was a member of a partnership fail to apply for thirty days after the death, application may be made by the surviving partner or partners. *Warnock v. Page*, 14 Ohio Dec. 278, *affirmed* 25 Ohio Cir. Ct. 695.

**4. Women Disqualified in Louisiana.** — As between one claiming as creditor and an heir,

even though that heir be the widow of the deceased, the Revised Civil Code recognizes the rights of the latter. *Barber's Succession*, 52 La. Ann. 957.

**5. Discretion of Probate Court in Making Selection.** — *Buckner v. Buckner*, 87 S. W. Rep. 776, 27 Ky. L. Rep. 1032; *Kailer v. Kailer*, 92 Md. 147; *Matter of Treadwell*, (Surrogate Ct.) 37 Misc. (N. Y.) 584; *Swart's Estate*, 189 Pa. St. 71, 43 W. N. C. (Pa.) 353, 29 Pittsb. Leg. J. N. S. (Pa.) 332.

**Statutory Preference.** — *Matter of Brundage*, 141 Cal. 538.

**6. Duty to Regard Wishes of Persons Interested.** — See *supra*, this title, **776. 1 et seq.**

**7. Preference of Males to Females.** — *Matter of Coan*, 132 Cal. 401; *Matter of Brundage*, 141 Cal. 538.

Under a statute providing that if several persons of the same degree of kindred to the intestate are entitled to administration, men must be preferred to women, those nearest of kin in the same class, though women, are nevertheless to be preferred to those of kindred more remote. *Matter of Hawley*, (Surrogate Ct.) 37 Misc. (N. Y.) 667.

**784. 1. Appointment Thirty Days After Death.** — *In Mowry v. Latham*, 20 R. I. 786, it was held that an appointment more than thirty days after the intestate's death was not invalid for the reason that the application therefor was made within thirty days of such death.

**2. Limitation of Time for Granting Original Administration — Connecticut.** — The existing statute in Connecticut provides that "administration of the estate of any person shall not be granted \* \* \* after ten years from his decease, unless the court of probate, upon written petition, and after public notice, shall find that the administration of said estate ought to be granted." *Colburn's Appeal*, 76 Conn. 378, *citing* *Gay's Appeal*, 61 Conn. 445.

*Iowa.* — *Cummings v. Lynn*, 121 Iowa 344.

*Maryland.* — *In Maryland*, if the fact of the deceased dying intestate is notorious, administration may be granted forthwith; otherwise it cannot be granted until twenty days after the death of the supposed intestate, and at least seven days after application therefor. *Jones v. Harbaugh*, 93 Md. 269; *Williams v. Addison*, 93 Md. 41.

*Pennsylvania.* — Twenty-one years except by the order of the registers' (Orphans') court upon due cause shown. *Hanbest's Estate*, 21 Pa. Super. Ct. 427, *reversing* 11 Pa. Dist. 418, 27 Pa. Co. Ct. 243.

*Texas.* — The statutory limitation applies to applications for ancillary as well as for domiciliary letters of administration. *Nelson v. Bridge*, 98 Tex. 523, *criticising* dictum in *Henry v. Roe*, 83 Tex. 450. A decree opening an administration on an application made after the expiration of four years is not void and sub-

**784.** (6) *Renunciation of Right to Administer.* — See notes 6, 7.

**785.** *Retraction of Renunciation.* — See note 4.

(7) *Validity and Effect of Appointment* — (a) *Collateral Attack.* — See note 6.

ject to collateral attack, but is merely voidable. *Nelson v. Bridge*, 98 Tex. 523, citing *Henry v. Roe*, 83 Tex. 450. *Compure State v. Zanco*, 18 Tex. Civ. App. 127, citing *Paul v. Willis*, 69 Tex. 261.

**784. 3. Limitation Not Applicable to Administration D. B. N.** — *Contra*, *Henbest's Estate*, 21 Pa. Super. Ct. 427, reversing 11 Pa. Dist. 418, 27 Pa. Co. Ct. 243.

*Laches in Applying for Administration D. B. N.* — See *Silkman's Estate*, 5 Lack. Jur. (Pa.) 299.

**5. Application by Creditor under Dormant Judgment.** — See generally, on the effect on the claim of a creditor of his delay in applying for administration, the title *LIMITATION OF ACTIONS*, **219. 5 et seq.** See also *Hoiles v. Riddle*, 26 Ohio Cir. Ct. 363.

**General Statutes of Limitation.** — A proceeding to appoint an administrator is a proceeding given to an heir or creditor of an intestate to protect a private right, and the general statutes of limitation are applicable thereto. *Gwinn v. Melvin*, 9 Idaho 202, the court saying: "While there is a conflict of authority upon this question, we think the better reasoning and weight of authority under statutes similar to our own is that such proceedings come within the statute of limitations."

**Laches in Applying for Administration.** — A widow is barred by laches from administering the estate of her husband, for the sole purpose of having her award set off and the homestead sold for its payment, by an unexplained delay of over seven years; and as she cannot assert her claim, her creditors cannot do it for her. *Jespersen v. Mech*, 213 Ill. 488.

Delay in the opening of a succession to which a creditor gives his sanction affords to him no ground of complaint. *Fatjo's Succession*, 52 La. Ann. 1561.

**6. Request for Appointment of Another.** — *Matter of Sullivan*, 25 Wash. 430.

**7. Renunciation Implied by Failure to Apply for Letters.** — *Williams v. Addison*, 93 Md. 41; *Jones v. Harbaugh*, 93 Md. 269; *In re Sprague*, 125 Mich. 357, 7 Detroit Leg. N. 520; *Sutton v. Osborne*, 31 Wash. 340. See also *Osmun v. Galbraith*, 131 Mich. 577, 9 Detroit Leg. N. 460.

**785. 4. No Retraction After Letters Granted to Another.** — *Jones v. Harbaugh*, 93 Md. 269.

**Instance Where Retraction Allowed.** — See *In Goods of Thacker*, (1900) P. 15; *Matter of Haug*, (Surrogate Ct.) 29 Misc. (N. Y.) 36; *Warner's Estate*, 207 Pa. St. 580.

**Filing Renunciation.** — A renunciation not evidenced or filed as required by the provisions of Code Civ. Pro. N. Y., § 2663, does not conclude the person renouncing from subsequently retracting it with the approval of the surrogate. *Matter of Sanford*, 100 N. Y. App. Div. 479; *Matter of Treadwell*, (Surrogate Ct.) 37 Misc. (N. Y.) 584.

**Filing Retraction.** — The filing of a retraction in *New York* can become effective only by the permission and in the discretion of the surro-

gate, exercised with reference to the facts shown in the particular case. *Matter of Clute*, (Surrogate Ct.) 37 Misc. (N. Y.) 710.

**6. Rule Forbidding Collateral Attack — Alabama.** — *Beasley v. Howell*, 117 Ala. 499; *Bromberg v. Sands*, 127 Ala. 411; *McDonnell v. Farrow*, 132 Ala. 227; *McGhee v. Willis*, 134 Ala. 281; *McGehee v. McCarley*, (C. C. A.) 91 Fed. Rep. 462, reversed on other grounds (C. C. A.) 103 Fed. Rep. 55 (construing the Alabama law).

*California.* — *Matter of Strong*, 119 Cal. 663. *Delaware.* — *Wilcox v. Wilmington City R. Co.*, 2 Penn. (Del.) 157.

*Georgia.* — *Jones v. Smith*, 120 Ga. 642; *Sharpe v. Hodges*, 121 Ga. 798.

*Illinois.* — *People v. Salomon*, 184 Ill. 490; *Salomon v. People*, 191 Ill. 290, affirming 89 Ill. App. 374; *Brink's Express Co. v. O'Donnell*, 88 Ill. App. 459.

*Indiana.* — *Michigan Trust Co. v. Probasco*, 29 Ind. App. 109.

*Iowa.* — *Beresford v. American Coal Co.*, 124 Iowa 34, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 785; *Matter of King*, 105 Iowa 320; *Seery v. Murray*, 107 Iowa 384; *McFarland v. Stewart*, 109 Iowa 561.

*Kansas.* — *Thompson v. Burge*, 60 Kan. 549, 72 Am. St. Rep. 369.

*Michigan.* — *Benjamin v. Early*, 123 Mich. 93; *Ormsbee v. Piper*, 123 Mich. 265.

*Missouri.* — *In re Davison*, 100 Mo. App. 263.

*Montana.* — *State v. Woody*, 20 Mont. 413.

*Nebraska.* — *Elgutter v. Missouri Pac. R. Co.*, 53 Neb. 748.

*North Carolina.* — *Vance v. Southern R. Co.*, 138 N. Car. 460, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 785; *In re Bowman*, 121 N. Car. 373; *Richmond, etc., R. Co. v. Gorman*, 7 App. Cas. (D. C.) 91 (construing the North Carolina law).

*Ohio.* — *Carr v. Hull*, 65 Ohio St. 394; *Hoffman v. Fleming*, 66 Ohio St. 143; *Toledo, etc., R. Co. v. Beard*, 11 Ohio Cir. Dec. 406, 20 Ohio Cir. Ct. 681.

*Oregon.* — *Slate's Estate*, 40 Oregon 340.

*Pennsylvania.* — *Ubil v. Miller*, 16 Pa. Super. Ct. 497.

*South Carolina.* — *Hendrix v. Holden*, 58 S. Car. 495, distinguishing *Hartley v. Glover*, 56 S. Car. 69; *In re Mayo*, 60 S. Car. 401, *McIver, C. J., dissenting*; *Dunlap v. Savings Bank*, 69 S. Car. 270, 104 Am. St. Rep. 796.

*South Dakota.* — *McKinzie v. U. S.*, 34 Ct. Ct. 278 (discussing a South Dakota appointment).

*Tennessee.* — *Ferrell v. Grigsby*, (Tenn. Ch. 1899) 51 S. W. Rep. 114; *Kendrick v. Mason*, (Tenn. Ch. 1901) 62 S. W. Rep. 359.

*Texas.* — *State v. Zanco*, 18 Tex. Civ. App. 127; *Strickland v. Sandmeyer*, 21 Tex. Civ. App. 351; *Hill v. Grant*, (Tex. Civ. App. 1898) 44 S. W. Rep. 1016; *Roy v. Whitaker*, (Tex. Civ. App. 1898) 50 S. W. Rep. 491; *Rogers v. Tompkins*, (Tex. Civ. App. 1905) 87 S. W. Rep. 379.



*Washington.*—McLean v. Roller, 33 Wash. 166.

*Wyoming.*—Lethbridge v. Lauder, (Wyo. 1904) 76 Pac. Rep. 682, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 785.

*The Rule in New York* as declared by statute, Code Civ. Pro. N. Y., § 2473, is that "where the jurisdiction of a Surrogate's Court to make, in a case specified in the last section, a decree or other determination, is drawn in question, collaterally, and the necessary parties were duly cited or appeared, the jurisdiction is presumptively, and, in the absence of fraud or collusion, conclusively, established, by an allegation of the jurisdictional facts, contained in a written petition or answer, duly verified, used in the Surrogate's Court. The fact that the parties were duly cited is presumptively proved by a recital to that effect in the decree." Under this statute the appointment of an administrator may be collaterally attacked if fraudulent or collusive. *Hoes v. New York, etc., R. Co.*, 173 N. Y. 435, reversing on other grounds 73 N. Y. App. Div. 363. For other New York decisions, see *Van Gaasbeek v. Staples*, 85 N. Y. App. Div. 271, affirmed without opinion 177 N. Y. 524; *Tanas v. Municipal Gas Co.*, 88 N. Y. App. Div. 251; *Smith v. Blood*, 106 N. Y. App. Div. 317; *Zierner v. Crucible Steel Co.*, 99 N. Y. App. Div. 169; *Shaw v. New York Cent., etc., R. Co.*, 101 N. Y. App. Div. 246; *McCarthy v. Supreme Ct., etc.*, 107 N. Y. App. Div. 185; *Czech v. Bean, (County Ct.)* 35 Misc. (N. Y.) 729; *Baldwin v. Rice, (Supm. Ct. Spec. T.)* 44 Misc. (N. Y.) 64, modified and affirmed 100 N. Y. App. Div. 241; *Otto v. Regina Music-Box Co.*, 87 Fed. Rep. 510 (construing the New York law); *Coe Brass Mfg. Co. v. Savlik, (C. C. A.)* 93 Fed. Rep. 519 (construing the New York law).

*Application of Rule to Administrators Other than General Administrators.*—See *Breeding v. Breeding*, 128 Ala. 412; *Henley v. Johnston*, 134 Ala. 646, 92 Am. St. Rep. 48; *Jepson v. Martin*, 116 Ga. 772; *Strickland v. Sandmeyer*, 21 Tex. Civ. App. 351, *Barney v. Babcock*, 115 Wis. 409. As to public administrators, see *infra*, this title, **806, 3, 808, 2.**

Where an administrator *de bonis non* is appointed by the proper court, having jurisdiction, he is at least administrator *de facto*, and, being such, the regularity of his appointment cannot be questioned in a collateral proceeding. *Frothingham v. Petty*, 197 Ill. 418.

Failure of an original administrator to act, or attempt to do so, or to object to a subsequent appointment, may authorize the inference in a collateral proceeding, in the absence of evidence to the contrary, that he had been removed or had resigned, leaving the administration vacant. *Lethbridge v. Lauder, (Wyo. 1904)* 76 Pac. Rep. 682.

An order setting aside a provision in a will appointing a person independent executrix and appointing her administratrix with the will annexed, so as to require an administration of the estate under the orders and control of the court, cannot be collaterally attacked. *King v. Battaglia, (Tex. Civ. App. 1905)* 84 S. W. Rep. 839.

The appointment of a temporary administrator is not conclusive on the question of the de-

cedent's residence in the county where the appointment was made, on an application for the appointment of a general administrator in another county, claimed to have been the county of his true residence. *Matter of Damke*, 133 Cal. 433. *Contra, Nash v. Sawyer*, 114 Iowa 742.

*Appointments by Clerk of Court.*—The act and judgment of the clerk of the court in exercising statutory authority to appoint an executor or administrator stands as the act and judgment of the court, unless proper and timely objection is taken thereto in that tribunal, and the same effect must be given to it. *Beresford v. American Coal Co.*, 124 Iowa 34.

**When Appointment Is Void.**—The appointment of an administrator is void and subject to collateral attack where letters previously granted are in force or where there is a competent executor. *Ellis v. Ellis, (1905)* 1 Ch. 613; *Sands v. Hickey*, 135 Ala. 322; *Razor v. Mehl*, 25 Ind. App. 645; *Nash v. Sawyer*, 114 Iowa 742; *Ubil v. Miller*, 16 Pa. Super. Ct. 497; *Viosca's Estate*, 29 Pittsb. Leg. J. N. S. (Pa.) 299, affirmed 197 Pa. St. 280; *Roy v. Whitaker, (Tex. Civ. App. 1898)* 50 S. W. Rep. 491.

Where a want of jurisdictional facts is shown by the record in the proceeding for the appointment or by the letters granted, the appointment is void. *Lee v. Allen*, 100 Md. 7; *McKenzie v. U. S.*, 34 Ct. Cl. 278.

So the grant of letters is void where notice of the application, required by statute, was not given. *Rusk v. Hill*, 117 Ga. 722. *Contra*, as to the notice of appointment required by the *Texas* statute to be published by the administrator, the only effect of a failure to publish being to render him liable for any damages to creditors occasioned thereby. *Tiboldi v. Palms*, 34 Tex. Civ. App. 318, affirmed 97 Tex. 414.

Under Code Civ. Pro. N. Y., § 2476, subsec. 4, the surrogate has no jurisdiction to grant letters of administration with the will annexed without production and proof of the will before him. *Spratt v. Syms*, 104 N. Y. App. Div. 232.

By the revocation of a grant of probate of a forged will, the grant is made void *ab initio*, for there was in fact no will to be proved. *Chan Kit San v. Ho Fung Hang, (1902)* A. C. 257.

The resignation of an administrator does not oust the jurisdiction which the court has acquired over the estate, and the probate court of another county cannot on such resignation entertain proceedings to settle the estate and appoint an administrator. *Beasley v. Howell*, 117 Ala. 499.

Where administration is granted after a statutory limitation against the exercise of the right to administer has run the grant is void. *Cummings v. Lynn*, 121 Iowa 344. See also *State v. Zanco*, 18 Tex. Civ. App. 127, citing *Paul v. Willis*, 69 Tex. 261. *Contra, Nelson v. Bridge*, 98 Tex. 523, citing *Henry v. Roe*, 83 Tex. 450.

**When Appointment Is Merely Voidable.**—Where the appointee was an infant. *Missouri, etc., R. Co. v. McWhorter*, 69 Kan. 345.

Where no petition for the appointment was filed. *Blackman v. Mulhall, (S. Dak. 1905)* 104 N. W. Rep. 250.

Where the service of notice of the application is irregular. *Contra, Kammerer v. Morlock*, 125



**787.** See notes 1, 2.

(b) **Acts Done under Invalid Appointment.** — See notes 3, 4, 5.

(c) **Debtor of Testator Appointed Executor — Rule at Common Law.** — See note 6.

Mich. 320, 7 Detroit Leg. N. 528; Hartley v. Glover, 56 S. Car. 69, Gary, A. J., *dissenting*.

When administration was not necessary. *Bruning v. Golden*, 159 Ind. 199; *Holburn v. Pfanmiller*, 114 Ky. 831; *Ormsbee v. Piper*, 123 Mich. 265; *Matter of Crawford*, 11 Ohio Cir. Dec. 605, 21 Ohio Cir. Ct. 554, *affirmed* on other grounds 68 Ohio St. 581; *Strickland v. Sandmeyer*, 21 Tex. Civ. App. 351.

Where the applicant was not entitled to administration. *Buckner v. Louisville, etc., R. Co.*, 87 S. W. Rep. 777, 27 Ky. L. Rep. 1009; *McCooley v. New York, etc., R. Co.*, 182 Mass. 205; *Larson v. Union Pac. R. Co.*, (Neb. 1903) 97 N. W. Rep. 313, refusing to follow *Haug v. Primeau*, 98 Mich. 91, and saying that "the competency of the person making the application, or of the person nominated for administrator, goes, not to the authority of the court to make an appointment, but to the manner in which that authority shall be exercised;" *Sutherland v. St. Lawrence County*, (Supm. Ct. Tr. T.) 42 Misc. (N. Y.) 38, *reversed* 101 N. Y. App. Div. 299; *Thompson v. Nowlin*, 51 W. Va. 346.

Where the appointment was made by the court of the wrong county. *Razor v. Mehl*, 25 Ind. App. 645; *In re Davison*, 100 Mo. App. 263; *Brown v. McGee*, 117 Wis. 389.

When an oath of office and bond were not taken. *Harris v. Coates*, 8 Idaho 491; *Beresford v. American Coal Co.*, 124 Iowa 34; *Olson v. Fish*, 75 Minn. 228. See also *infra*, this title, **809. 3 et seq.**; **907. 1 et seq.**

Absence from the letters of the impress of the seal necessary to authenticate them, the letters reciting that it was affixed and their authenticity having been many times postulated and presumed by those interested, has been held to render the letters voidable merely. *Dennis v. Bint*, 122 Cal. 39, 68 Am. St. Rep. 17.

If letters apparently in chief are issued when they should be *de bonis non*, and without qualifying or limiting the grant of administration, the grant is not void, but has only the effect of an excess of power. *Sands v. Hickey*, 135 Ala. 322, *citing* *Moseley v. Mastin*, 37 Ala. 219.

**Presumption of Validity.** — See *Blackman v. Mulhall*, (S. Dak. 1905) 104 N. W. Rep. 250, *citing* *Phillips v. Phillips*, 13 S. Dak. 231.

**Collateral Facts.** — Facts not necessarily involved in the determination, which will exclude the jurisdiction of the court in a particular case, may be proven, and the grant thereby impeached, even on collateral attack, provided the record is silent as to such facts. *Beasley v. Howell*, 117 Ala. 499.

**In an Action by an Administratrix to Recover for the Wrongful Death of the Decedent**, under the Michigan statute, the right of the plaintiff to letters of administration as widow of the decedent cannot be attacked, but evidence is admissible to prove that she was not in fact his widow. *Phillips v. Heraty*, 135 Mich. 453, 11 Detroit Leg. N. 174, *denying rehearing* in 135 Mich. 446, *distinguishing* *James v. Emmet Min.*

*Co.*, 55 Mich. 347, two judges *dissenting*. See also, under a similar statute, *Morton v. Grand Trunk R. Co.*, 8 Ont. L. Rep. 372; *Doyle v. Diamond Flint Glass Co.*, 8 Ont. L. Rep. 499, *reversing* on other grounds 7 Ont. L. Rep. 747.

**Letters as Evidence of Validity of Will.** — A grant of letters testamentary is *prima facie* evidence of the validity of the will. *McCormick v. Skelly*, 201 Pa. St. 184. See generally the title PROBATE AND LETTERS OF ADMINISTRATION, **135. 7.**

**787. 1. Administrator Cannot Impeach Appointment.** — *Nash v. Sawyer*, 114 Iowa 742; *Dobler v. Strobel*, 9 N. Dak. 104, 81 Am. St. Rep. 530.

**2. Rule Permitting Collateral Attack.** — See *Beach's Appeal*, 76 Conn. 118; *Ewing v. Mallison*, 65 Kan. 484, 93 Am. St. Rep. 299; *Hall v. Louisville, etc., R. Co.*, 102 Ky. 480; *Davis v. Martin*, (C. C. A.) 113 Fed. Rep. 6 (construing the *Louisiana* law); *Boston, etc., R. Co. v. Hurd*, (C. C. A.) 108 Fed. Rep. 116 (discussing the *New Hampshire* law); *Vance v. Southern R. Co.*, 138 N. Car. 460.

It seems to be the law of *Massachusetts* that under some circumstances the conditions under which administration has been granted by a probate court may be looked into collaterally by other courts, for the purpose of determining whether the grant was valid or void. *U. S. v. Tyndale*, (C. C. A.) 116 Fed. Rep. 820.

**A Liberal Construction** will be given in *Kentucky* to the terms and language used in orders and judgments of such inferior courts, to arrive at their true meaning; and by the express mandate of the Code, immaterial errors such as do not affect the substantial rights of the parties will be disregarded. *Louisville, etc., R. Co. v. Edmonds*, 64 S. W. Rep. 727, 23 Ky. L. Rep. 1049.

**3. Acts Done under Voidable Appointment Are Valid.** — *Buckner v. Louisville, etc., R. Co.*, 87 S. W. Rep. 777, 27 Ky. L. Rep. 1009.

**4. Acts Done under Void Appointment Are Void.** — *Ellis v. Ellis*, (1905) 1 Ch. 613.

**5. Valid Acts Done under Void Appointment.** — *Ellis v. Ellis*, (1905) 1 Ch. 613.

**6. Debt Released at Common Law.** — *Buckel v. Smith*, (Ky. 1904) 82 S. W. Rep. 1001, 235, 26 Ky. L. Rep. 991.

The contrary has been uniformly held in *Massachusetts* and asserted to be the doctrine of the common law of *England*. *Bassett v. Fidelity, etc., Co.*, 184 Mass. 210, 100 Am. St. Rep. 552, *reviewing* the *Massachusetts* decisions and saying: "When the estate has a claim against the executor or administrator himself, he is incapacitated from performing that duty and taking to himself that office. For that reason, on broad principles of policy it was laid down by the common law of *England* that he must yield all controversy as to the debt due from himself and treat it as an asset of the estate. No one is bound to accept the office, and if he elects to do so he thereby tacitly assents to this condi-

**788.** See note 1.

Rule in Equity. — See note 2.

Rule in United States. — See note 3.

**789.** (d) Creditor of Testator Appointed Executor. — See note 1.

(e) Appointment as Evidence of Death. — See note 2.

**790.** c. SECONDARY AND LIMITED ADMINISTRATORS — (1) *Administrators with the Will Annexed* — (b) *When Appointment Is Authorized*. — See notes 3, 5, 6.

**791.** (c) Right to Appointment — General Principles. — See notes 2, 3.

tion." See also *Hodge v. Hodge*, 90 Me. 505, 60 Am. St. Rep. 285.

**If There Are Not Sufficient Assets.** — Probate Judge *v. Sulloway*, 68 N. H. 511, 73 Am. St. Rep. 619; *Mason's Estate*, 42 Oregon 177, 95 Am. St. Rep. 734.

**788. 1. Appointment of Debtor as Administrator Not Extinguishment of Debt.** — No such rule ever prevailed in *New York* in respect to administrators, and the provisions of the statutory law on the subject have no application to such personal representatives. *Matter of Davis*, (Surrogate Ct.) 37 Misc. (N. Y.) 326.

**2. Debt Not Released in Equity.** — In *Wisconsin* the debt will not be discharged when creditors of the estate would be prejudiced thereby or where the will shows an intention that it shall remain a subsisting obligation. *Robinson v. Hodgkin*, 99 Wis. 327. To similar effect see *Phillips v. Duckett*, 112 Ill. App. 587.

**3. Rule in Equity Adopted in United States — Debt Not Extinguished.** — *Arnold v. Arnold*, 124 Ala. 550; *Howell v. Anderson*, 66 Neb. 575. And see the cases cited in the preceding note, and *infra*, this note.

**Equity Rule Declared by Statute.** — In many states it is declared by statute that the debt shall not be discharged by the appointment, but shall constitute assets in the hands of the executor.

*California.* — *Matter of Walker*, 125 Cal. 242, 73 Am. St. Rep. 40.

*Illinois.* — *Clark v. Patterson*, 214 Ill. 533, 105 Am. St. Rep. 127, *affirming* 114 Ill. App. 312; *Phillips v. Duckett*, 112 Ill. App. 587.

*Maryland.* — *Hoffman v. Armstrong*, 90 Md. 123.

*Missouri.* — *Wilson v. Ruthrauff*, 82 Mo. App. 435.

*New Hampshire.* — Probate Judge *v. Sulloway*, 68 N. H. 511, 73 Am. St. Rep. 619.

*New York.* — *Keegan v. Smith*, 60 N. Y. App. Div. 168, *reversing* on other grounds (Supm. Ct. App. T.) 33 Misc. (N. Y.) 74, which *reversed* (N. Y. City Ct. Gen. T.) 31 Misc. (N. Y.) 651, *affirmed* without opinion 172 N. Y. 624; *Matter of David*, (Surrogate Ct.) 44 Misc. (N. Y.) 337.

*Ohio.* — *James v. West*, 67 Ohio St. 28; *Jones v. Willis*, 72 Ohio St. 189; *Cheney v. Powell*, 11 Ohio Cir. Dec. 279, 20 Ohio Cir. Ct. 398; *Fox v. Keister*, 9 Ohio Dec. 316, 6 Ohio N. P. 327.

*Oregon.* — *Mason's Estate*, 42 Oregon 177, 95 Am. St. Rep. 734; *United Brethren First Church v. Akin*, 45 Oregon 247.

*Pennsylvania.* — *Anderson v. Anderson*, 183 Pa. St. 480, 41 W. N. C. (Pa.) 329.

**789. 1. Appointing Creditor Executor Not an Extinguishment of Debt.** — *Anderson v. Anderson*,

183 Pa. St. 480, 41 W. N. C. (Pa.) 329. See also *Wilkinson's Estate*, 192 Pa. St. 117.

**Receipt of Assets.** — *In re Rhoades*, (1899) 2 Q. B. 347, *affirming* (1899) 1 Q. B. 905; *Jordan v. Hardie*, 131 Ala. 72.

The right of retainer, as the term itself implies, is applicable only to a fund which the legal representative has actually or constructively got into his possession. *Pulman v. Meadows*, (1901) 1 Ch. 233.

**2. Letters of Administration Are Evidence of Death.** — *Garthwaite v. Tulare Bank*, 134 Cal. 237; *Cock v. Abernathy*, 77 Miss. 872; *McCormick v. Skelly*, 201 Pa. St. 184.

**790. 3. Administrator C. T. A. Appointed When Will Does Not Name Executor.** — In *Goods of Pryse*, (1904) P. 301.

**Will of Married Woman.** — See *In re Peacock*, (1902) 1 Ch. 552.

**5. Independent Executors — Texas.** — See *Roy v. Whitaker*, 92 Tex. 346; *In re Grant*, 93 Tex. 68.

Administration after the original administration of an independent executor is the nature of an administration *de bonis non*. *Bell v. Farmers', etc.*, Nat. Bank, 33 Tex. Civ. App. 408, *citing* *Dwyer v. Kalteyer*, 68 Tex. 558.

**6. Absence of Executor.** — In *Goods of Massey*, (1899) P. 270; In *Goods of Campion*, (1900) P. 13.

**791. 2. Right to Administration with the Will Annexed Follows Right of Property.** — Code Civ. Pro. N. Y., § 2643, does not give the right to administer to persons as persons, as does section 2660, but it gives it to the persons named because of their property rights and interests, in order that vested rights may be protected. *Matter of Clute*, (Surrogate Ct.) 37 Misc. (N. Y.) 710.

Under Code Civ. Pro. N. Y., § 2643, subdiv. 3, which provides that in a case where there are no persons qualified to take, or who will consent to receive letters under the two preceding subdivisions, such letters shall be granted to the "husband or wife, or to one or more of the next of kin, or to one or more of the heirs or devisees so qualified," the words "next of kin" mean only those who in any given case are entitled to share in the unbequeathed assets, and are, therefore, persons interested in the estate. *Matter of Goggin*, (Surrogate Ct.) 43 Misc. (N. Y.) 233.

**3. Statutory Regulation of Right to Administration with the Will Annexed — Alabama.** — *Sands v. Hickey*, 135 Ala. 322.

*California.* — *Matter of McDonald*, 118 Cal. 277; *Matter of Von Buncken*, 120 Cal. 343; *Matter of Richardson*, 120 Cal. 344; *Matter of Brundage*, 141 Cal. 538. The statute applies to

- 792.** Universal or Residuary Legatees. — See note 1.  
 Disqualification of Person Entitled. — See note 3.
- 793.** Death of Person Entitled. — See note 1.  
 (2) *Administrators De Bonis Non* — (b) Jurisdiction. — See note 4.  
 (c) When Appointment Is Authorized. — See note 5.
- 794.** See note 1.

the probate of foreign wills, where the controversy as to who shall administer is between persons interested in the will. *Matter of Coan*, 132 Cal. 401.

*Michigan*. — *American Missionary Assoc. v. Hall*, (Mich. 1904) 101 N. W. Rep. 535, 11 Detroit Leg. N. 562.

*Missouri*. — *Stevens v. Larwill*, 110 Mo. App. 140.

*New York*. — See *Matter of Haug*, (Surrogate Ct.) 29 Misc. (N. Y.) 36; *Matter of Clute*, (Surrogate Ct.) 37 Misc. (N. Y. 710; *Matter of Goggin*, (Surrogate Ct.) 43 Misc. (N. Y.) 233.

*Pennsylvania*. — *Job's Estate*, 23 Pa. Super. Ct. 611, reversing 12 Pa. Dist. 97, 28 Pa. Co. Ct. 356; *Padelford's Estate*, 7 Pa. Dist. 711, affirmed 189 Pa. St. 634. The statute has no application to the case of a foreign will, one probated in a foreign state, but applies only to wills of decedents domiciled and dying within the commonwealth and therein probated. *Heins's Estate*, 22 Pa. Super. Ct. 31, affirming 18 Montg. Co. Rep. (Pa.) 177.

**792. 1. Universal Legatees Entitled to Administration with the Will Annexed.** — *Woodruff v. Snoover*, (N. J. 1900) 45 Atl. Rep. 980; *Matter of Goggin*, (Surrogate Ct.) 43 Misc. (N. Y.) 233.

**Legatee in Trust.** — See *In Goods of Lalor*, 85 L. T. N. S. 643.

**Nominee of Assignee of Residuary Legatee.** — See *In Goods of Campion*, (1900) P. 13.

**The Assignee of a Sole Legatee** is entitled to administer, at least where the next of kin consent to the issuance of letters to him. *Matter of Clute*, (Surrogate Ct.) 37 Misc. (N. Y.) 710.

**Where the Residuum of the Estate Is Divided Equally among several persons,** no one of them is in strictness a residuary legatee, entitled to preference in administration over the others, but they are remaindermen or general legatees and to be classed together. *Matter of Treadwell*, (Surrogate Ct.) 37 Misc. (N. Y.) 584. *Contra*, *Matter of Ferguson*, (Surrogate Ct.) 41 Misc. (N. Y.) 465.

**3. Guardian of Infant Beneficiary.** — *Woodruff v. Snoover*, (N. J. 1900) 45 Atl. Rep. 980.

*In New York*. — *Matter of Milhau*, (Surrogate Ct.) 28 Misc. (N. Y.) 366; *Matter of Goggin*, (Surrogate Ct.) 43 Misc. (N. Y.) 233.

**793. 1. Executor of Deceased Beneficiary.** — *Woodruff v. Snoover*, (N. J. 1900) 45 Atl. Rep. 980.

**Personal Representative of Deceased Legatee Excluded by Statute.** — *Contra* under Code Civ. Pro. N. Y., § 2660, subdiv. 9, enacted in 1894, considered in connection with section 2643, *Matter of Goggin*, (Surrogate Ct.) 43 Misc. (N. Y.) 233. See also *Matter of Haug*, (Surrogate Ct.) 29 Misc. (N. Y.) 36.

**4. Jurisdiction — Court Which Granted Original Administration.** — *Lunsford v. Lunsford*, 122 Ala. 242.

The courts of probate in *Nova Scotia* have all the jurisdiction formerly exercised by the ecclesiastical courts in England, and this includes the right of granting administration *de bonis non*. *Re Cunningham*, 31 Nova Scotia 264.

**5. Administration Must Be Vacant.** — *Beasley v. Howell*, 117 Ala. 499; *Kinney v. Kepfinger*, 172 Ill. 449, reversing 71 Ill. App. 334; *Hart's Estate*, 11 Pa. Dist. 783.

**Disappearance of Administrator.** — In *Goods of Loveday*, (1900) P. 154; In *Goods of Colclough*, (1902) 2 I. R. 499.

**Effect of Final Discharge.** — See *Dauphin's Succession*, 113 La. 208, 112 La. 103.

As supporting the second paragraph of the original note, see *Michigan Trust Co. v. Probasco*, 29 Ind. App. 109.

An administrator *de bonis non* may be appointed after the final discharge, where a legatee remains unpaid and the discharge was had without notice to him. *Cole v. Shaw*, 134 Mich. 499, 10 Detroit Leg. N. 530.

If, after an administrator has been duly discharged, assets of the estate are discovered, which had not been drawn into the administration, and there remain unsatisfied duly allowed claims of creditors, the old administration cannot be reopened and revived, but an administrator *de bonis non* must be appointed, and a new administration opened. *Ratliff v. Magee*, 165 Mo. 461. *Compare* *Byers v. Weeks*, 105 Mo. App. 72.

An administration *de bonis non* will not be granted to do that which was left undone in the original administration, without cause or excuse, such as the sale of lands to pay debts. *Derge v. Hill*, 103 Mo. App. 281.

**The Termination of the Authority of a Married Woman as Administratrix** terminates the authority of the husband, associated with her by virtue of the marriage, and leaves the administration vacant. *Sands v. Hickey*, 135 Ala. 322, citing *Rambo v. Wyatt*, 32 Ala. 363, 70 Am. Dec. 544.

**Collateral Attack on Appointment — Presumption as to Regularity.** — See *supra*, this title, 785. 6.

**794. 1. Unadministered Assets Essential to Appointment of Administrator D. B. N.** — *Enlow v. Bethel College*, 67 S. W. Rep. 980, 24 Ky. L. Rep. 31, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 793 *et seq.*; *Hodge v. Hodge*, 90 Me. 505, 60 Am. St. Rep. 285; *In re Mallary*, 127 Mich. 119, 8 Detroit Leg. N. 1077; *Owen v. Ward*, 127 Mich. 693, 8 Detroit Leg. N. 483; *Howell v. Anderson*, 66 Neb. 575.

**What Are Unadministered Assets.** — Property of the estate retained by an executor and not included in his inventory and settlement constitutes unadministered assets under the *Indiana* statute. *Michigan Trust Co. v. Probasco*, 29 Ind. App. 109.



**795.** See notes 1, 2, 3.

**796.** But on the Death of the Executor Leaving an Executor. — See note 1.

Where a Will Appointing an Executor Does Not Dispose of All the Estate. — See note 2.

(d) Time Within Which Appointment Must Be Made. — See notes 3, 4.

(e) Right to Appointment. — See note 6.

**797.** Administrators De Bonis Non with the Will Annexed. — See note 1.

(f) Validity of Appointment. — See note 2.

**798.** See note 1.

(3) *Special and Temporary Administrators* — (a) Power to Make Appointment. — See note 2.

Real estate descends directly to the heirs or devisees, and is not unadministered assets when the estate is not indebted. *Griffin v. Warburton*, 23 Wash. 231.

**795. 1. Unpaid Debts.** — *Carr v. Berry*, 116 Ga. 372; *Enlow v. Bethel College*, 67 S. W. Rep. 989, 24 Ky. L. Rep. 31, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 793.

**Debts Barred by Limitation.** — *Hubbard*, Petitioner, 185 Mass. 22.

**2. Unpaid Legacies.** — *Enlow v. Bethel College*, 67 S. W. Rep. 989, 24 Ky. L. Rep. 31, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 793; *Cole v. Shaw*, 134 Mich. 499, 10 Detroit Leg. N. 530.

As supporting the second paragraph of the original note in the case of specific legacies, see *Matter of Robinson*, (Surrogate Ct.) 37 Misc. (N. Y.) 336.

**3. Appointment Merely to Distribute Estate.** — *Chamberlin's Appeal*, 70 Conn. 363; *Enlow v. Bethel College*, 67 S. W. Rep. 989, 24 Ky. L. Rep. 31, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 793. See also *Bristol Sav. Bank v. Holley*, 77 Conn. 225, citing *Chamberlin's Appeal*, 70 Conn. 363, and saying: "The administration of a dead man's estate is never complete until all the assets have been turned over to those rightfully entitled to them;" *Dickinson v. Colonial Trust Co.* (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 668. But see *contra Bromberg v. Sands*, 127 Ala. 411; *Keith v. McCord*, 140 Ala. 402; *Austin v. Snider*, 17 Colo. App. 182.

**If Nothing Remains to Be Done.** — *Owen v. Ward*, 127 Mich. 693, 8 Detroit Leg. N. 483.

**Outstanding Indebtedness Against the Estate** is not sufficient to the validity of the appointment of an administrator *de bonis non*. *Francisco v. Wingfield*, 161 Mo. 542; *Strickland v. Sandmeyer*, 21 Tex. Civ. App. 351.

**Appointment to Execute Power of Sale for Distribution.** — An administrator *de bonis non* is properly appointed to carry out the terms of a will providing for a sale and distribution of real estate after the death of a life beneficiary. *Cushman v. Albee*, 183 Mass. 108.

**Carrying On Decedent's Business.** — Power to carry on a testator's business, given by will to his executor, is attached to the person, and not to the office, and on the executor's death an administrator *de bonis non* cannot be appointed to continue it. *Best's Estate*, 22 Lanc. L. Rev. 6.

**Duties in Connection with Trust Funds.** — Where no administrative duties remain to be performed, the appointment of an administrator *de bonis non* confers upon him no powers and imposes no duties in connection with a trust

fund provided for by the will of the decedent. *Enlow v. Bethel College*, 67 S. W. Rep. 989, 24 Ky. L. Rep. 31.

**Property Divided by Agreement of Beneficiaries.** — Where the widow of a testator under the will and an agreement between the beneficiaries of the estate, approved by the probate court, is vested with a life interest in so much of a designated fund as shall be necessary for her comfortable support and maintenance, and that which shall remain at her death is assigned to the heirs at law, no administrative functions remain to be performed relative to such property. *Hinn v. Gersten*, 122 Wis. 222.

**796. 1. Death of Executor Leaving Executor.** — *Jepson v. Martin*, 116 Ga. 772.

**2. Property Undisposed of by Will Appointing Executor.** — *Lamar v. Gardner*, 113 Ga. 781; *Matter of Haughian*, (Surrogate Ct.) 37 Misc. (N. Y.) 457.

**3. Appointment of Administrators De Bonis Non Is Not Limited.** — *Contra*, *Hanbest's Estate*, 21 Pa. Super. Ct. 427, reversing 11 Pa. Dist. 418, 27 Pa. Co. Ct. 243.

**Laches in Applying for Administration D. B. N.** — See *Silkman's Estate*, 5 Lack. Jur. (Pa.) 299.

**4. When Debts Are Barred by Limitation, or Payment May Be Presumed.** — *Hubbard*, Petitioner, 185 Mass. 22.

**6. Interest in Estate.** — *In re Wooten*, (Tenn. 1905) 85 S. W. Rep. 1105.

**Statutory Regulation.** — The *Oregon* statute provides that whenever all the executors or administrators die, resign, or are removed, administration of the estate remaining unadministered shall be granted to those next entitled, if they be competent and qualified. *Herren's Estate*, 40 Oregon 90.

**797. 1. Residuary Legatees Generally Preferred.** — See *supra*, this title, **791. 2 et seq.**

**2. Presumption of Regularity.** — See *supra*, this title, **785. 6.**

**798. 1. Designation of Character.** — *Sands v. Hickey*, 135 Ala. 322.

**2. Power to Grant Limited Administration.** — "Such appointment seems to have been originally assumed by probate courts as a matter of necessity. With us it has long been sanctioned by law." *Guthrie v. Welch*, 24 App. Cas. (D. C.) 562.

In *New York* the power to appoint a temporary administrator is restricted to cases where a proceeding is pending for the probate of a will or the issuing of letters of administration in chief. *Matter of Hill*, (Surrogate Ct.) 43 Misc. (N. Y.) 583.

**798.** (b) When Appointment Is Authorized. — See note 4.

**799.** (c) Selection of Special or Temporary Administrators — In General. — See note 1.

Appointment of Person Nominated as Executor. — See note 2.

**800.** (e) Tenure of Office. — See note 2.

(f) The Several Kinds of Special and Temporary Administrators — *aa*. LIMITATION AS TO TIME — (*aa*) *Administrators Durante Minoritate*. — See notes 4, 5.

**801.** (*bb*) *Administrators Durante Absentia*. — See note 3.

(*cc*) *Administrators Pendente Lite*. — See note 6.

**803.** At What Time Administration Pendente Lite May Be Granted. — See note 1.

Tenure of Office. — See note 2.

**798.** 4. Appointment of Temporary Administrators — In General. — *Moran v. Hammer*, 109 Ky. 333; *Matter of Crawford*, 11 Ohio Cir. Dec. 605, 21 Ohio Cir. Ct. 554, *affirmed* on other grounds 68 Ohio St. 58.

Receiver Appointed Pending Appeal from Original Grant. — In *Texas*, where an appeal has been taken from an order refusing to appoint a temporary administrator, a receiver for the estate may be appointed pending the determination of the appeal. *Long v. Richardson*, 26 Tex. Civ. App. 197.

**799.** 1. Selection of Appointee a Matter of Discretion. — *Guthrie v. Welch*, 24 App. Cas. (D. C.) 562 (holding, in the case of an administrator *ad colligendum*, that while the court is under no limitations whatever as to the person or persons whom it will appoint, the wishes of the parties in interest are and should be usually regarded); *In re Davenport*, 66 N. J. Eq. 300, *citing Dietz v. Dietz*, 38 N. J. Eq. 483, *affirmed Davenport v. Davenport*, (N. J. 1904) 60 Atl. Rep. 379.

**2. It Is Discretionary.** — *Harrison v. Clark*, 95 Md. 308.

**Washington Statute.** — An executor petitioning for the probate of the will is a "party" within the terms of a statute providing that "the judge may in his discretion, appoint a special administrator (other than one of the parties)," when, by reason of an action concerning the proof of a will, or from any other cause, there shall be a delay in granting letters testamentary or of administration; and incompetent to receive the appointment. *Hartley v. Lord*, 38 Wash. 432.

**Executor Charged with Undue Influence.** — The rule which would ordinarily require the court to refuse to appoint an executor the temporary administrator of the estate of a decedent whom he is charged with having unduly influenced in the execution of a will is not so absolute and inflexible as to admit of no exception. *Matter of Hilton*, (Surrogate Ct.) 29 Misc. (N. Y.) 532.

**800.** 2. Special Administration Superseded by Grant of General Administration. — *Richmond v. Campbell*, 71 Minn. 453; *Matter of Choate*, 105 N. Y. App. Div. 356; *Ball v. Ball*, (Tex. Civ. App. 1898) 45 S. W. Rep. 605. See also *infra*, this title, **803.** 2.

Where an Executor or Administrator Is Appointed for a Limited Period. — *Ball v. Ball*, (Tex. Civ. App. 1898) 45 S. W. Rep. 605; *Willis v. Pinkard*, 21 Tex. Civ. App. 423.

**4. Appointment Durante Minoritate.** — *Matter of Russell*, 64 N. J. Eq. 313. See also *In Goods of Ardern*, (1898) P. 147.

**5. Appointment of Guardian of Minor.** — *Woodruff v. Snoover*, (N. J. 1900) 45 Atl. Rep. 980. See also *In Goods of Ardern*, (1898) P. 147.

**801.** 3. Appointment Durante Absentia. — *In Goods of Lee*, (1898) 2 Ir. R. 81.

**6. Administrator May Be Appointed Pendente Lite.** — *McDonnell v. Farrow*, 132 Ala. 227; *Bruning v. Golden*, 159 Ind. 199; *Union Trust Co. v. Soderer*, 171 Mo. 675; *Matter of Crawford*, 11 Ohio Cir. Dec. 605, 21 Ohio Cir. Ct. 554, *affirmed* on other grounds 68 Ohio St. 58.

**Necessity for Protection of Estate.** — *Contra, In re Marsh*, (N. J. 1903) 55 Atl. Rep. 299, where the court said: "The intervention of the court by the appointment of an administrator *pendente lite*, which will occasion expense to the estate, ought not \* \* \* to take place, unless there is some reasonable ground to apprehend that if no such appointment be made there will be loss to the estate."

**Administrator Pendente Lite Defined.** — The administrator thus appointed "during the time of such contest" is commonly called an administrator *pendente lite*, which means an administrator "during litigation." *State v. Guinotte*, 156 Mo. 513.

**Reason for Appointment — Testate Estates.** — The chief reason for granting administration *pendente lite* is to collect and preserve the estate until, by the determination of a pending controversy, it shall be decided whether the decedent left a valid will, so that the court may know who is entitled to administer. *Harrison v. Clark*, 95 Md. 308.

**803.** 1. Where the Will Has Been Admitted to Probate. — Under the *New York* statute, where an appeal is taken from a decree admitting a will to probate and granting letters testamentary, the powers of the executor cease, unless he is authorized to act by express order of the surrogate. *Matter of Hopkins*, 95 N. Y. App. Div. 57, *affirming* (Surrogate Ct.) 41 Misc. (N. Y.) 83.

**Appointment Pending Appeal from Decree Removing Executor.** — An administrator *pendente lite* may, in a proper case, be appointed pending an appeal from a decree removing an executor. *In re Marsh*, (N. J. 1903) 55 Atl. Rep. 299.

**2. An Appeal from the Decree Operates as an Extension.** — *Mayer v. Schneider*, 112 Ill. App. 628, *affirmed* 212 Ill. 286; *State v. Guinotte*, 156 Mo. 513, two judges dissenting; *Carroll v. Reid*, 158 Mo. 319. See also *Matter of Gihon*, (Surrogate Ct.) 27 Misc. (N. Y.) 626.

**Grant of General Letters.** — In *Maryland* it is provided by statute that the granting of letters

**804.** *bb. LIMITATION AS TO SUBJECT-MATTER — (aa) Administration Granted for Particular Purpose — bbb. Administrators ad Litem. — See note 2.*

**805.** *ccc. Administrators ad Colligendum. — See note 2.*

*(bb) Administration Granted in Respect to Particular Property. — See note 3.*

**806.** *d. PUBLIC ADMINISTRATORS — (1) In General — Definition. — See note 1.*

*Nature of Public Administration. — See note 3.*

testamentary or of administration shall operate to revoke a previous grant of letters *pendente lite*. *Baldwin v. Mitchell*, 86 Md. 379. But a decree setting aside and declaring void a will does not have the effect of revoking such previous grant. *Harrison v. Clark*, 95 Md. 308.

**804. 2. Administrators Ad Litem. — Ex p.** *Baker*, 118 Ala. 185; *Kirwin v. Malone*, 45 N. Y. App. Div. 93.

**Appointment Authorized if Administration Is Vacant or Representative Disqualified. —** *Keith v. McCord*, 140 Ala. 402.

**Appointment for Purpose of Suing General Administrator. —** *Emerick v. Hileman*, 71 Ill. App. 512, *affirmed* 177 Ill. 368; *Stone v. Haskins*, 97 Ill. App. 3; *Phillips v. Duckett*, 112 Ill. App. 587.

The conversion of property of the decedent after his death, by the general administrator, is not a claim for which recovery can be had in such actions. The remedy therefor is in the proceeding to settle his account. *Garretson v. Kinkead*, 118 Iowa 383.

**Appointment to Defend Claim Against Estate Made by General Administrator. —** See *Grimes v. Reynolds*, 94 Mo. App. 576, *affirmed* on other grounds 184 Mo. 679.

**Instances Where Appointment Refused. —** An administrator *ad litem* for a deceased heir is not proper in a proceeding to sell real estate to pay debts. When, after inheriting, one of the heirs dies, there is no abeyance, but title to his interest, though undivided, is immediately transmitted to his heirs, who are the necessary parties. *Poole v. Daughdrill*, 129 Ala. 208.

The power to appoint an administrator *ad litem* should be strictly construed and be exercised in cases of necessity only. A statute providing that an action for a tort committed by a person in his lifetime may be maintained against his executors or administrators does not include such administrators. *Hunter v. Boyd*, 3 Ont. L. Rep. 183.

The appointment cannot be made in an action brought without right or title, as where the sole next of kin, no personal representative having been appointed, sues to set aside a transfer by the decedent of his personal property, on the ground of undue influence, want of consideration, and fraud. Such a suit involves general administration. *Fairfield v. Ross*, 4 Ont. L. Rep. 534. So of a similar suit brought by creditors. *Trites v. Humphreys*, 2 N. Bruns. Eq. Rep. 1.

**805. 2. Administrators ad Colligendum. —** In *Goods of Bolton*, (1899) P. 186; *Guthrie v. Welch*, 24 App. Cas. (D. C.) 562; *People v. Salomon*, 184 Ill. 490; *In re Wincox*, 85 Ill. App. 613, *affirmed* 186 Ill. 445.

**Real Estate Assets — England. —** While grants *ad colligendum*, in the absence of a statute to the contrary, are applicable to personal

estate only, a statute directing that where a person dies possessed of real estate the heir at law shall be equally entitled to administration with the next of kin makes such grants applicable to real estate. In *Goods of Roberts*, (1898) P. 149.

**3. Administration Limited to Particular Property or Interests. —** In *Goods of Kingwell*, 81 L. T. N. S. 461. See also *Ditmas v. McKane*, 92 N. Y. App. Div. 344.

Where a decedent dies vested with the legal title to property, the beneficial interest in which belongs to another person, the latter or his representative is entitled to a grant limited to such assets. In *Goods of Agnese*, (1900) P. 60.

Where the sole next of kin are nonresidents and refuse to apply for probate, administration with the will annexed will be granted to a specific legatee limited to the property specifically given to him by the will. In *Goods of Baldwin*, (1903) P. 61.

The court will grant letters of administration to the *cestui que trust* of a trust fund, limited to that fund, after the death of the trustee, on the consent of his personal representatives. In *Goods of Ratcliffe*, (1889) P. 110.

Under certain circumstances a grant of letters of administration, limited to such property as a married woman could not dispose of by will, may still be made to her husband, notwithstanding the Married Women's Property Act, 45 & 46 Vict., c. 75, and the fact that she died testate. In *Goods of Leman*, (1898) P. 215; In *Goods of Donovan*, 78 L. T. N. S. 567. See also In *Goods of Tréfond*, (1899) P. 247.

In granting, for the purpose of conveyance, administration limited to certain leasehold property of a testator, the will should be annexed to the grant. In *Goods of Butler*, (1898) P. 9.

**806. 1. Purposes of Statutes Authorizing Public Administrators. —** The statutes relative to the office of the public administrator are not enacted for the benefit of that official, or to enable him or his counsel and friends to obtain commissions, fees, and costs, but they are remedial statutes, intended to supply something needed for the efficient administration of successions in which the parties in interest are not upon the spot. *Bossu's Succession*, (La. 1905) 38 So. Rep. 878.

**3. Public Administrator on Same Footing as Others. —** *Bailey v. McAlpin*, 122 Ga. 616; *State v. Ennis*, 79 Mo. App. 12, 2 Mo. App. Rep. 346; *Brewer v. Hutton*, 45 W. Va. 106, 72 Am. St. Rep. 804.

In *California* it is provided by statute that when no direction is given in the chapter of the laws relating to public administrators for his government and guidance in the discharge of his duties or for the administration of an estate in his hands, the provisions relating to ad-



**806.** (2) *How Appointed.* — See note 4.

(3) *Committing Estates to Public Administrator.* — See note 5.

**807.** See note 1.

*In Case of the Refusal.* — See note 2.

*Priority of Right of Public Administrators.* — See note 3.

ministrators generally will govern. *Los Angeles County v. Kellogg*, 146 Cal. 590.

**Collateral Attack.** — See *infra*, this title, **808**, 2.

**806. 4. In Alabama.** — *Daly v. Mallory*, 123 Ala. 170.

**Public Administrator a County Officer.** — *Los Angeles County v. Kellogg*, 146 Cal. 590.

**Clerk of Court ex Officio Public Administrator.** — *Hartley v. Glover*, 56 S. Car. 69.

**County Judge ex Officio Public Administrator.** — Under Laws S. Dak. 1901, p. 205, c. 123, § 2, providing that when a person dies leaving no estate, except personal property of trifling value, the judge of the County Court shall take charge of the estate personally, or by some person he may appoint, and pay out of it the burial and other expenses, and set apart to the widow and minor children, if any, the residue, the responsibility of gathering and distributing such property is on the judge, and a person appointed by him to take physical possession of the property is a mere custodian, and has not legal capacity to sue to recover assets. *Smith v. Terry Peak Miners' Union*, 16 S. Dak. 631.

**5. Vacant Administration.** — *In re Hill*, 102 Mo. App. 617; *Matter of Ferrigan*, 92 N. Y. App. Div. 376; *Matter of Flynn*, 92 N. Y. App. Div. 379.

In *Kentucky* probate courts have no jurisdiction to place an estate in the hands of the public administrator unless it is shown that the decedent has been dead more than three months and that no one else has applied for letters. *Underwood v. Underwood*, 111 Ky. 966, *Hobson, J., dissenting*.

**In Louisiana, After an Administration Has Been Closed** by the transfer of the property to the universal legatee, the appointment of the public administrator does not have the effect of bringing the property back into the succession. *Casey v. Abraham*, 113 La. 581.

**807. 1. Various Statutory Provisions.** — In *Georgia* provision is made for county administrators who are bound to qualify when, because of the meagre assets, inability to give bond, or want of resident heirs or of persons interested, the estate is likely to be unrepresented. *Bailey v. McAlpin*, 121 Ga. 111.

The provision in *Starr & Curt. Annot. Stat. Ill.* (1902), c. 3, § 18, par. 6, that "in all cases where the intestate is a nonresident, and in all cases where the intestate is without a widow, next of kin, or creditors in this state, administration shall be granted to the public administrator of the proper county, when such county contains a population of two hundred thousand inhabitants or over," is special legislation and unconstitutional. *Strong v. Dignan*, 207 Ill. 385, 99 Am. St. Rep. 225.

In *South Dakota* the statute provides for administration by the county judge of estates consisting solely of personal property of trifling value. *Smith v. Terry Peak Miners' Union*, 16 S. Dak. 631.

Under Stat. Wis., § 3819, whenever no widow,

surviving husband, or next of kin, known to the court, reside in the state, the public administrator may be appointed and proceed with the administration, "until administration \* \* \* shall, upon proper application of some person entitled to apply therefor, be granted to some other person." *Welsh v. Manwaring*, 120 Wis. 377.

**2. Public Administrator Compellable to Act.** — *State v. Kennedy*, 73 Mo. App. 384.

**3. Priority of Right of Public Administrator.** — In *California* the public administrator is the eighth in order of the persons and classes of persons entitled to letters of administration under Code Civ. Pro. Cal., § 1365. *Matter of Healy*, 122 Cal. 162.

Where a person dies leaving a will wherein no executor is named, the case is not within a statute providing that "if the sole executor or all the executors are incompetent, or renounce, or fail to apply for letters, or appear and qualify, letters of administration with the will annexed must be issued as designated and provided for the grant of letter in cases of intestacy;" and the public administrator is not entitled to administer the estate as against a legatee. *Matter of Von Buncken*, 120 Cal. 343.

In *Louisiana* the public administrator is entitled to the appointment in testate successions "when there is no surviving husband or wife or heir, present or represented in the state, who is qualified to assume and who claims the right to assume the duties of such office," and, has priority of right over legatees. *Bossu's Succession*, (La. 1905) 38 So. Rep. 878.

**Right as Against Next of Kin.** — As against relatives not entitled to share in the estate the public administrator has preference. *Matter of Wakefield*, 136 Cal. 110; *Matter of Lowenstein*, (Surrogate Ct.) 29 Misc. (N. Y.) 722.

In *British Columbia* the official administrator will not be allowed to take out letters of administration in opposition to the nonresident heirs of the deceased, they having an attorney in fact within the province to manage the estate, and there being no evidence that the deceased had any debts or any substantial personal property, though he dies possessed of considerable real estate within the province subject to a mortgage. *In re Lelaire*, 9 British Columbia 429.

**Guardian of Next of Kin.** — *Contra*, *Matter of Hudson*, (Surrogate Ct.) 37 Misc. (N. Y.) 539, refusing to follow *Speckles v. Public Administrator*, 1 Dem. (N. Y.) 475, stated in the original note.

**Preference over Nominees of Person Entitled to Administer.** — *Contra* by statute, *In re Watson*, (Mont. 1904), 78 Pac. Rep. 702.

An unauthorized nomination for appointment as administrator serves to invoke the discretion of the court, which may, in the exercise of that discretion, appoint the person nominated to the exclusion of the public administrator. *Matter of Harrison*, 135 Cal. 7.

**808.** (4) *Necessity of Letters or Order of Court.*— See notes 1, 2.

(5) *Tenure of Office.*— See notes 3, 4.

*c.* ADDITIONAL APPOINTMENT.— See note 7.

**809.** See notes 1, 2.

**3. Qualification of Executors and Administrators.**— See notes 3, 4.

**810.** *Failure to Qualify.*— See notes 1, 2.

**Priority over Creditors—New York—Reason for Rule.**—The office of the public administrator was created for the purpose of providing a public official who should take charge of the estates where there was no next of kin entitled to act, on the theory that it would be better for such estates to have some competent public official act in preference to a creditor who would manifestly be interested to the extent of his claim only. *Matter of Hudson*, (Surrogate Ct.) 37 Misc. (N. Y.) 539.

**Priority over Relatives Having No Interest.**—Under Code Civ. Pro. N. Y., § 2669, relating to Kings county, if there are no next of kin entitled to a distributive share of the estate, who are competent and willing to serve, the public administrator has priority of right over other persons, such as relatives having no interest in the estate. *Matter of Gilchrist*, (Surrogate Ct.) 37 Misc. (N. Y.) 543, *affirmed* without opinion 79 N. Y. App. Div. 637.

**808. 1. Letters Necessary to Enable Public Administrator to Act.**—*Bailey v. McAlpin*, 122 Ga. 616.

**2. Order of Court Unnecessary—Estate Exposed to Loss.**—*In re Hill*, 102 Mo. App. 617.

In *California*, while the public administrator may in some cases act wholly by virtue of his office, he must, with all convenient dispatch after thus acting, produce letters of administration thereon in like manner and on like proceedings as letters of administration are issued to other persons. *Los Angeles County v. Kellogg*, 146 Cal. 590.

**Collateral Attack.**—The relation of a public administrator to the estate, when he has taken charge of it under the statute, on his own motion, and filed the required notice, is no more subject to collateral attack than if he had taken charge of it by order of the probate court, or under letters of administration. *Vermillion v. Le Clare*, 89 Mo. App. 55, *distinguishing* *McCabe v. Lewis*, 76 Mo. 296; *Lewis v. McCabe*, 76 Mo. 307.

**3. Expiration of Term.**—In *Alabama* the term of the public administrator expires with that of the judge making the appointment, unless the succeeding judge shall continue the incumbent in office. *Daly v. Mallory*, 123 Ala. 170.

**4. Successor in Office Not Entitled to Pending Administration.**—*Bailey v. McAlpin*, 122 Ga. 616; *In re Craigie*, 24 Mont. 43, *quoting* 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 808. See also *State v. Kennedy*, 73 Mo. App. 384, 163 Mo. 510.

In *California* the public administrator retains his official character while acting under letters of appointment so far as the particular estate is concerned, even though his term of office has expired. *Los Angeles County v. Kellogg*, 146 Cal. 590.

**Compensation of Public Administrator Acting After Expiration of Term.**—Under a statute

making the office of public administrator a salaried office and declaring that the salary shall be in full compensation for all services, the administrator is not entitled to extra compensation for services rendered in the administration of estates after the expiration of his term of office. *Los Angeles County v. Kellogg*, 146 Cal. 590.

**7. Person Entitled to Administration May Have Associate Appointed.**—See *In Goods of Thacker*, (1900) P. 15.

When, instead of an individual, a class of persons is first entitled to administration, the one out of that class whom the court, in the exercise of its discretionary powers, has selected for the appointment is the "person first entitled," within a statutory provision that "administration may be granted to two or more persons with the consent of the person first entitled." *Kailer v. Kailer*, 92 Md. 147.

**Designation of Character of Appointment.**—The fact that a person appointed as associate administrator is misnamed "special administrator" will not vitiate the appointment. *Lethbridge v. Lauder*, (Wyo. 1904) 76 Pac. Rep. 682.

**Appointment Discretionary with Court.**—See *Shrum v. Naugle*, 22 Ind. App. 98; *Kailer v. Kailer*, 92 Md. 147.

**809. 1. Selection of Associate to the Exclusion of Relatives.**—Only a person entitled to administer has the right to complain that another is associated with him in the office of administrator. *Buckner v. Louisville, etc., R. Co.*, 87 S. W. Rep. 777, 27 Ky. L. Rep. 1009.

**2. Consent of Person Entitled Necessary.**—*Williams v. Williams*, 24 App. Cas. (D. C.) 214; *Shrum v. Naugle*, 22 Ind. App. 98.

In *England* the chancery court is empowered by statute, *Judicial Trustees' Act* 1896, to appoint a judicial trustee to act with an executor or administrator. *In re Ratcliff*, (1898) 2 Ch. 352.

**3. Publication of Notice to Creditors** is not a prerequisite to the representative entering upon his duties. *Conser's Estate*, 40 Oregon 138.

**4. Oath Required in United States.**—In *Oregon*, where a bond is given in a sum fixed by a reasonable provision contained in the will, the executor is not required to take the oath prescribed in cases where the undertaking is wholly dispensed with. *Conser's Estate*, 40 Oregon 138.

**810. 1. Acts Before Qualification Void.**—*Andrews v. Minor*, 58 S. W. Rep. 443, 22 Ky. L. Rep. 561. See also *Coy v. Gaye*, (Tex. Civ. App. 1904) 84 S. W. Rep. 441. And see in this connection the discussion of the powers of executors and administrators before probate or grant of letters, and the doctrine that letters relate back to the death of the decedent, *infra*, this title, 906. 3 *et seq.*

**2. Acts Done Without Qualifying Held Valid.**—An administrator cannot take advantage of



# **§10. 4. Termination of Authority — a. DISCHARGE ON COMPLETING ADMINISTRATION. — See note 4.**

**Until the Administration Is Completed. — See note 5.**

his own neglect or wrong, and thus escape responsibility. If he is not administrator *de jure*, he is *de facto*, and is held as firmly as if he were administrator *de jure*, and he may close up the estate if neither creditors nor heirs object. *Harris v. Coates*, 8 Idaho 491. And see *supra*, this title, **785. 6. When Appointment Is Merely Voidable; infra, this title, **868. 5.****

**§10. 4. Notice Must Be Given. —** *Anderson v. Seifert*, 112 Ga. 912.

**When Estate Is Fully Settled. —** An estate cannot be held to be fully settled and the executor's or administrator's duties as such closed, until he has paid the debts of the estate, and the legacies provided for in the will, and filed with the judge of probate evidence of this fact. *Marskey v. Lawrence*, 121 Mich. 577.

Where the debts of the decedent have been paid by the devisee, there is no further reason for continuing administration by a creditor, and his letters should be revoked. *Adamson v. Parker*, (Ark. 1905) 85 S. W. Rep. 239.

An order approving the final account of a personal representative and granting his discharge is proper, though litigation involving the estate is pending, if no rights will be prejudiced thereby. *Hallett v. Lathrop*, (Colo. App. 1904) 77 Pac. Rep. 1096.

The fact that some land belonging to the estate may be still on hand cannot prevent the discharge of the representative. The closing of the administration leaves it to the heirs. *De Berry v. Wootters*, (Tex. Civ. App. 1900) 57 S. W. Rep. 885.

The distribution of an estate is generally the last act of administration, and closes the concern. *Mathews's Appeal*, 72 Conn. 555.

**Effect of Discharge. —** After his discharge an executor has nothing to do with the estate, his authority in that respect having ceased. He can no more be sued in that capacity than he can sue as executor. *State v. Kenrick*, 159 Mo. 631. See *infra*, this title, **813. 5, 827. 1**, and for the effect of a discharge on the liability of the representative to settle his accounts, *infra*, **1183. 2.**

Where an executor settles his account, distributes the estate, and is discharged pursuant to an agreement entered into with the persons beneficially interested, retaining a portion of the assets under a claim that it may be required to pay an inheritance tax, the amount to be distributed later if not so required, he thereafter holds the amount in his individual capacity under the agreement, and not in his representative capacity. *Thompson v. Thompson*, 180 N. Y. 311, *reversing* 70 N. Y. App. Div. 242, 88 N. Y. App. Div. 618.

**5. Discharge Not Authorized Until Completion of Administration. —** *Cowherd v. Kitchen*, 57 Neb. 426; *Ehrngren v. Gronlund*, 19 Utah 411. See also *Fewlass v. Keeshan*, (C. C. A.) 88 Fed. Rep. 573 (discussing Ohio law).

A formal discharge contained in a decree on final accounting applies only as to the accounts of the parties up to that period. The trust of an administrator or executor is an enduring one,

and the court has no power, in the absence of a statute conferring it, to discharge the personal representative upon the settlement of what purports to be a final account and thus extinguish his authority as trustee. *Hazlett v. Blakely*, (Neb. 1903) 97 N. W. Rep. 808.

**Approval of Final Account Not of Itself Termination of Administration. —** *Ramser v. Blair*, 123 Ala. 139; *Whetstone v. McQueen*, 137 Ala. 301; *Miguez v. Delcambre*, 109 La. 1090; *Francisco v. Wingfield*, 161 Mo. 542; *Tonnies v. McIntyre*, 82 Mo. App. 268; *Matter of Chase*, (Surrogate Ct.) 40 Misc. (N. Y.) 616; *Reynold's Estate*, 195 Pa. St. 225. Compare *People v. Kohlsaat*, 66 Ill. App. 505, *affirmed* on other grounds 168 Ill. 37. *Contra* if followed by a final decree assigning the residue of the estate to the heirs or distributees, and distribution accordingly. *State v. Probate Ct.*, 84 Minn. 289. Compare *Security Trust Co. v. Dent*, (C. C. A.) 104 Fed. Rep. 380 (construing Minnesota statute).

**Executor Who Is Also Trustee. —** Where the same person is appointed executor and trustee, he still remains executor and may be sued on any claim for duty, though he has administered the estate and is *functus officio* as executor. *In re Timmis*, (1902) 1 Ch. 176.

When executors under a surrogate's decree upon their accounting turn over to themselves as trustees the balance of the estate found to be in their hands, it is in effect a discharge with respect to the property so turned over, but it does not follow from this that their functions as executors are thereby absolutely terminated. On the contrary, they continue as executors with respect to the assets not turned over. *Mahoney v. Bernhard*, 45 N. Y. App. Div. 499, *affirmed* on opinion below 169 N. Y. 589; *Willets v. Haines*, 96 N. Y. App. Div. 5, *affirmed* 182 N. Y. 543; *Rosen v. Ward*, 96 N. Y. App. Div. 262.

The office of executor, as such, ends with distribution, and a trust, beginning then, as to a distributed several share, is entirely outside of it, even though conferred upon him by the designation of executor. *Hart's Estate*, 12 Pa. Dist. 47, 28 Pa. Co. Ct. 126.

Executors and trustees under a will become *functus officio* as executors when the estate has been fully administered and awarded to them as trustees. *Henson's Estate*, 12 Pa. Dist. 326.

*In Equity*, which looks to the real transactions of the parties, and regards as done what ought to have been done, the power of an executor to maintain a suit must be regarded as terminated, where he is sole residuary legatee and the estate has been fully settled. *Moffitt v. Rosencrans*, 136 Cal. 416.

**Conditional Discharge. —** See *Cosgrove v. U. S.*, 33 Ct. Cl. 167 (construing the Kansas law); *Van Buren v. Cooperstown First Nat. Bank*, 53 N. Y. App. Div. 80, *affirmed* without opinion 169 N. Y. 610; *Barney v. Babcock*, 115 Wis. 409.

**Louisiana. —** As to closing administration by transfer of possession of the property to the



**810.** *b.* EXPIRATION OF STATUTORY PERIOD. — See note 6.

**811.** *c.* RESIGNATION — (1) *At Common Law.* — See notes 2, 3, 4.

**812.** (2) *By Statute.* — See notes 1, 2, 3, 4.

**813.** Effect of Resignation. — See note 5.

heirs or universal legatee upon their paying the debts of the succession or furnishing security for their payment, see *Duffy's Succession*, 50 La. Ann. 795; *McNeely v. McNeely*, 50 La. Ann. 823; *Bray's Succession*, 50 La. Ann. 1209; *Aronstein's Succession*, 51 La. Ann. 1052; *Kellogg's Succession*, 51 La. Ann. 1304; *Hart's Succession*, 52 La. Ann. 364; *Willis's Succession*, 109 La. 281; *Casey v. Abraham*, 113 La. 581. See also *Dauphin's Succession*, 112 La. 103.

Where the creditors of the estate consent to the delivery of possession, there is no legal obstacle in the way of the heirs receiving possession of the property, and such voluntary delivery by the administrator terminates his administration, and transfers the claim of creditors over against the heirs. *Barton v. Burbank*, 114 La. 224, citing *Scott v. Briscoe*, 36 La. Ann. 278.

**Under the Code of Porto Rico**, after the designation of the heir or heirs *ab intestato* by a final judgment or ruling of the court, the judge may order that all the property, books, and papers of the intestate be turned over to the heirs, and that the administrator render his account of his administration of the estate, and thereupon judicial intervention shall cease. The effect of these proceedings is to permit the heir *ab intestato*, after such final decision, to receive and collect the estate. *Sixto v. Sarria*, 196 U. S. 175.

**Estoppel of Representative.** — Where the representative invoked the action of the court which resulted in his discharge, he is estopped to deny its validity on the ground that his accounts had not been settled. *Matter of McDermott*, 127 Cal. 450.

**Presumption of Continuance.** — Where appointment is shown, its continued existence will be presumed, until it appears that the estate has been administered by the payment of the debts and the collection of the assets. *Barr v. Sullivan*, 75 Miss. 536.

**810. 6. In Texas.** — A temporary administration expires by force of law at the succeeding term of court after its grant, unless then extended; and when the time expires the law directs that it shall be closed. *Ball v. Ball*, (Tex. Civ. App. 1898) 45 S. W. Rep. 605.

**In Wisconsin.** — See *Mackin v. Hobbs*, 116 Wis. 528.

The statutory provision does not limit the functions of an executor after the expiration of the period. If no final settlement is had before its expiration, he is required to administer the estate under the will. *Lindemann v. Rusk*, (Wis. 1905) 104 N. W. Rep. 119.

**811. 2. Resignation Not Permitted at Common Law.** — *Roy v. Whitaker*, 92 Tex. 346, (Tex. Civ. App. 1898) 50 S. W. Rep. 491. Compare *In Goods of Thacker*, (1900) P. 15.

**3. Probate Court Not Authorized to Accept Resignation.** — *Broadway's Succession*, 114 La. 492, where the court said: "We have been referred to no codal or statutory provision of the

laws of this state which authorizes or permits the resignation of an administrator. While such an officer may be removed, dismissed, or superseded for certain causes, this must be done by direct action, and it is made the duty of the judge, upon becoming acquainted with any fact sufficient to justify removal, to direct suit to be instituted for that purpose. Code Prac., arts. 1013-1019." Compare *Willis v. Berry*, 104 La. 114.

**4. Power to Remove Includes Acceptance of Resignation.** — See *Roy v. Whitaker*, (Tex. Civ. App. 1898) 50 S. W. Rep. 491.

**812. 1. Resignation Authorized by Statute.** — *Lunsford v. Lunsford*, 122 Ala. 242.

**Jurisdiction to Accept Resignation.** — In *Texas* the District Court has no power to receive or accept the resignation of a personal representative. This can be done only in the County Court. *Wells v. Houston*, (Tex. Civ. App. 1900) 56 S. W. Rep. 233.

**Public Administrators.** — *State v. Kennedy*, 73 Mo. App. 384, 163 Mo. 510. See also *Los Angeles v. Kellogg*, 146 Cal. 590.

**Independent Executors.** — *Roy v. Whitaker*, 92 Tex. 346, (Tex. Civ. App. 1898) 50 S. W. Rep. 491.

**An Agreement to Resign for a Consideration** is illegal and void as against public policy. *Currier v. Clark*, 19 Colo. App. 250. Compare *Cummings v. Robinson*, 95 Md. 83, 759, where it was held that where there are no creditors whose interests can be affected, an agreement by one coadministrator with the other, the latter being the sole distributee of the estate, that the former will apply for a discharge and release in consideration of a designated sum of money in satisfaction of a claim made by him against the decedent and of his commissions, is valid and binding. As to renunciation for a consideration, see *supra*, this title, 754. 7.

**2. Right Is Conditional.** — No vacancy in the administration is created by the resignation of an executor until the court has acted upon and accepted it. *Silkman's Estate*, 12 Luz. Leg. Reg. (Pa.) 349.

**3. Permitting Resignation Discretionary with Court.** — *Kaulbach v. Mader*, 35 Nova Scotia 219.

**4. What Constitutes Good Cause.** — Contemplated removal of the representative from the state. See *Willis v. Berry*, 104 La. 114, where the court said: "Before leaving the state he should have filed a complete account of his gestion and resigned his trust."

Contemplated removal of the representative from the county of his appointment. *Marley's Estate*, 18 Pa. Super. Ct. 303.

**813. 5. Effect of Resignation in General.** — Upon the resignation of a personal representative, the title to the assets of the estate, and all the rights and duties of further administration, devolve upon his successor, by operation of law, and he ceases to have any interest in the estate. *Banning v. Gotshall*, 62 Ohio St. 210.

**814.** See note 1.*d.* MARRIAGE OF EXECUTRIX OR ADMINISTRATRIX — At Common Law.

— See note 5.

By Statute. — See note 6.

**815.** *e.* REMOVAL FROM OFFICE OR REVOCATION OF LETTERS — (1) *The Power.* — See note 1.

By What Court Exercised. — See note 2.

Jurisdiction in Equity. — See note 4.

**814. 1. Jurisdiction of Probate Court.** — For the purpose of compelling an executor or administrator to settle his final account, the jurisdiction of the probate court continues after resignation. *Hudson v. Barratt*, 62 Kan. 137; *Graffam v. Ray*, 91 Me. 234. See also *infra*, this title, **1183. 2.**

**5. Husband of Executrix or Administratrix Entitled to Administer in Her Right.** — In *Alabama*, by virtue of the marriage of an administratrix, her husband becomes associated with her in the administration. *Sands v. Hickey*, 135 Ala. 322.

**6. Statutory Rule — Powers of Executrix or Administratrix Extinguished by Marriage.** — In *re Sultzbach*, 5 Ohio Dec. 516, 5 Ohio N. P. 218.

**Under the Existing Rhode Island Statute** the marriage of an administratrix does not *ipso facto* vacate the office, Pub. Stat. R. I., c. 184, § 20, which expressly so provided, having been repealed. *Weaver v. Industrial Trust Co.*, 24 R. I. 35.

**815. 1. Removal of Executors.** — A probate court should not defeat the will of the testator by removing his chosen executor for light or trivial causes, and particularly for matters which could be readily adjusted in the settlement of his accounts. It should be extremely careful in adopting a measure so harsh and severe. But, on the other hand, to the probate court is given, in the first instance, the supervision and protection of estates of deceased persons, with power, in the exercise of that supervision, to remove an executor when, in its discretion, such step is necessary for the protection of the estate. *Matter of Bell*, 135 Cal. 194.

**Administrators Pendente Lite.** — Statutes conferring the power to remove any executor or administrator and enumerating the grounds therefor apply to administrators *pendente lite*. *Perrett's Estate*, 14 Pa. Super. Ct. 611.

**Statutory Grounds Not Exclusive.** — *Guthrie v. Welch*, 24 App. Cas. (D. C.) 562; *Koury v. Castillo*, (N. Mex. 1905) 79 Pac. Rep. 293.

**2. Jurisdiction Generally in Courts of Probate Exclusively.** — *Villamil v. Hirsch*, 138 Fed. Rep. 690; *Koury v. Castillo*, (N. Mex. 1905) 79 Pac. Rep. 293; *Fox v. Keister*, 9 Ohio Dec. 316, 6 Ohio N. P. 327; *Munger v. Jeffries*, 10 Ohio Dec. 12, 7 Ohio N. P. 55; *In re Wooten*, (Tenn. 1905) 85 S. W. Rep. 1105; *Stone v. Simmons*, 56 W. Va. 88.

**Review of Court's Action.** — Where exclusive jurisdiction to remove executors and administrators is conferred on the probate court, its jurisdiction is final as well as original unless further provision is made by statute for a review of its orders in such matters. *Monger v. Jeffries*, 62 Ohio St. 149; *Stafford v. American Missionary Assoc.*, 12 Ohio Cir. Dec. 442, 22 Ohio Cir. Ct. 399.

**Jurisdiction of Register in Pennsylvania.** — In Pennsylvania the register having power to grant letters testamentary or of administration, on the discovery of a will, after having granted letters of administration, may revoke such letters as improvidently granted and probate the will. *Kern's Estate*, 212 Pa. St. 57.

**Order of Removal Not Subject to Collateral Attack.** — *Howell v. Dinneen*, 16 S. Dak. 618.

**4. Rule that Equity Has no Jurisdiction to Revoke Letters.** — *Collins v. Carr*, 112 Ga. 868; *Mannhardt v. Illinois Staats Zeitung Co.*, 90 Ill. App. 315; *Stone v. Simmons*, 56 W. Va. 88. See also *Borrowe v. Corbin*, 31 N. Y. App. Div. 172, *affirmed* without opinion 165 N. Y. 634.

As to enjoining an executor because of his bankruptcy, compare *Bennett v. Kimball*, 175 Mass. 199.

In England the chancery court is empowered by statute, Judicial Trustees Act, 1896, to remove an executor or administrator and appoint a judicial trustee in his place. *In re Ratcliff*, (1898) 2 Ch. 352.

**Injunctive Relief — Receivers.** — It is well settled that a court of chancery will not, except in extraordinary cases, supersede the probate court in the administration of an estate, by injunction or the appointment of a receiver. *Strauss v. Phillips*, 183 Ill. 9, *affirming* 91 Ill. App. 373, *citing* *Harding v. Shepard*, 107 Ill. 264, and *Shepard v. Speer*, 140 Ill. 238. To similar effect see *Kidd v. Bates*, 124 Ala. 670; *Collins v. Carr*, 112 Ga. 868; *Gould v. Glass*, 120 Ga. 50; *Stone v. Simmons*, 56 W. Va. 88.

As to injunctions against personal representatives to prevent waste, see *infra*, this title, **973. 8.**

Where coexecutors are authorized by will to vote the stock owned by the testator in a corporation in which he had a controlling interest, and one of the executors has been enjoined from voting pending a proceeding in the probate court for his removal, a bill in equity will lie at the suit of a person interested in the vote of the stock to enjoin the other executors from exercising the right until the termination of the probate proceeding. *Villamil v. Hirsch*, 138 Fed. Rep. 690.

A court of equity will not usually take jurisdiction of the acts of executors in the management of the estate in cases where the Surrogate's Court has power to act, unless special circumstances are shown which make it necessary to bring into action the power of the court to supplement the powers in regard to which the Surrogate's Court is defective, or because, for some other reason, full and complete justice cannot be done in that court. *Borrowe v. Corbin*, 31 N. Y. App. Div. 172, *affirmed* on opinion below 165 N. Y. 634.

A court of equity may enjoin an ancillary ad-

**816.** See note 1.

**Revocation Only for Cause.** — See note 3.

**Discretion of Court.** — See note 4.

(2) *Who May Apply for Removal.* — See note 5.

**818.** See note 1.

(3) *Grounds for Removal* — (a) **Improvident or Irregular Appointment.** —

See notes 2, 3.

ministrator from removing any portion of the assets of the estate from the jurisdiction of the court, except in pursuance of a decree from the probate court; but it cannot enjoin him from thus acting contrary to the directions of such court. *Ingersoll v. Coram*, 132 Fed. Rep. 168, *affirmed* (C. C. A.) 132 Fed. Rep. 226.

Creditors do not represent the estate, and cannot take charge of any of the property or maintain any sort of action at law for it or its proceeds; and where the personal representative has refused to take charge of it, equity will lend its aid by appointing a receiver to put it in a marketable condition and sell it. *Buskirk v. Peek*, (W. Va. 1905) 50 S. E. Rep. 432.

A court of a chancery cannot appoint a receiver over the estate of a decedent after the granting of letters of administration thereon, and if a receiver has been appointed prior to the granting of letters, his powers cease after the grant; and he will be discharged and directed to deliver over the property to the personal representative. *Sanker v. Mattison*, 11 Ohio Cir. Dec. 125, *citing* *Matter of Colvin*, 3 Md. Ch. 278.

*Executor Who Is Also Trustee.* — A court of equity has jurisdiction to enjoin a trustee from acting, and the power may be exercised where the trustee is also executor, although the functions are intermingling and inseparable. *Bentley v. Dixon*, 60 N. J. Eq. 353.

**816. 1. It Is Only in Extreme Cases**, if at all, that a court of equity has power to remove an executor or administrator. *Kidd v. Bates*, 124 Ala. 670.

**3. Letters Revoked Only for Cause.** — *Matter of Strong*, 119 Cal. 663; *Matter of Shiels*, 120 Cal. 347; *Guthrie v. Welch*, 24 App. Cas. (D. C.) 562, distinguishing the right to remove a mere collector; *Fox v. Keister*, 9 Ohio Dec. 316, 6 Ohio N. P. 327.

**Statutory Grounds.** — See *Mills' Estate*, 40 Oregon 424.

**4. Revocation Is Discretionary.** — *In re Ratcliff*, (1898) 2 Ch. 352; *Matter of Bell*, 135 Cal. 194; *Guthrie v. Welch*, 24 App. Cas. (D. C.) 562; *Cosby v. Weaver*, 107 Ga. 761; *Fox v. Keister*, 9 Ohio Dec. 316, 6 Ohio N. P. 327; *Stafford v. American Missionary Assoc.*, 12 Ohio Cir. Dec. 442, 22 Ohio Cir. Ct. 399; *Perrett's Estate*, 14 Pa. Super. Ct. 611; *Clancy v. McElroy*, 30 Wash. 567.

**The Discretion Is Very Broad** under a statute which, after alluding to a number of specific causes, adds, "or any other cause which in the opinion of such court renders it for the best interest of the estate that such executor or administrator be removed." *In re Sultzbach*, 5 Ohio Dec. 516, 5 Ohio N. P. 218.

**Removal After Time for Final Settlement Has Arrived.** — Nothing but useless delay and accumulation of costs and expenses would be

accomplished by the removal of an administrator where the time for the final settlement of the succession has arrived and proceedings to that end are pending. *Willis's Succession*, 109 La. 281; *Conery's Succession*, 111 La. 113. See also *In re Dimmick*, 111 La. 655.

**5. Interest in General.** — *Fox v. Keister*, 9 Ohio Dec. 316, 6 Ohio N. P. 327.

**Any Person Interested May Apply for Removal of Executor or Administrator.** — *In re McIntire*, 1 Alaska 73; *Re Barnes*, 36 Oregon 279; *Perrett's Estate*, 14 Pa. Super. Ct. 611.

**Who Are Creditors.** — An assignment of its claim by a corporation creditor having no right to administer, after an administrator has been appointed, gives to the assignee no right to apply for removal. *Matter of Ciotto*, 105 N. Y. App. Div. 143.

**Debtors.** — As supporting the first paragraph of the original note, see *Missouri Pac. R. Co. v. Bradley*, 51 Neb. 596; *Missouri Pac. R. Co. v. Jay*, 53 Neb. 747; *Edney v. Baum*, 59 Neb. 147; *Hoes v. New York, etc., R. Co.*, 173 N. Y. 435, *reversing* on other grounds 73 N. Y. App. Div. 363; *In re Mayo*, 60 S. Car. 401. See also *McCooley v. New York, etc., R. Co.*, 182 Mass. 205.

**One Whose Appointment as Administrator Is Void.** — *Razor v. Mehl*, 25 Ind. App. 645.

**Right of Nominee of Person Rightfully Entitled to Apply for Revocation.** — See *Matter of Shiels*, 120 Cal. 347.

**An Attorney** whose fees have been decreed to be a charge against the estate is a competent petitioner for the removal of the administrator. *Mills' Estate*, 40 Oregon 424.

**Where the Assets Have Been Distributed**, administration will not be revoked at the suit of a person who claims title to them and alleges that distribution was made to the wrong persons, since he can sue the distributees in equity for the recovery of the assets. *Mohan v. Broughton*, (1900) P. 56, *affirming* (1899) P. 211.

**818. 1. Removal Ex Mero Motu or at Suggestion of Amicus Curiae.** — *In re McIntire*, 1 Alaska 73; *Stafford v. American Missionary Assoc.*, 12 Ohio Cir. Dec. 442, 22 Ohio Cir. Ct. 399; *Re Barnes*, 36 Oregon 279.

**2. Improvident Grant to Person Not Entitled to Administer.** — *Matter of Thomas*, (Surrogate Ct.) 33 Misc. (N. Y.) 729; *Matter of Pfarr*, (Surrogate Ct.) 38 Misc. (N. Y.) 223; *Matter of Tyers*, (Surrogate Ct.) 41 Misc. (N. Y.) 378; *Matter of Avery*, (Surrogate Ct.) 45 Misc. (N. Y.) 529; *Koury v. Castillo*, (N. Mex. 1905) 79 Pac. Rep. 293, *citing* 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 818; *In re McCreight*, 9 Ohio Dec. 450, 6 Ohio N. P. 479; *Job's Estate*, 23 Pa. Super. Ct. 611, *reversing* 12 Pa. Dist. 97, 28 Pa. Co. Ct. 356, 19 Montg. Co. Rep. (Pa.) 170; *Perkins v. Owen*, 123 Wis. 238. See also *Warner's Estate*, 207 Pa. St. 580, 99 Am.



**819. (b) Probate of Will After Appointment of Administrator.** — See note 2.

(c) **Setting Aside Will After Appointment of Administrator with Will Annexed.** — See note 3.

(e) **Appointment Procured by Fraud or False Suggestion.** — See note 6.  
**But False Suggestion of Immaterial Facts.** — See note 7.

(f) **Misconduct.** — See note 8.

St. Rep. 804; *Thompson v. Nowlin*, 51 W. Va. 346.

In Montana no person other than the surviving husband or wife, child, father, mother, brother, or sister of the intestate may obtain the revocation of letters, for the reason that he or she is better entitled to them. *In re Craigie*, 24 Mont. 37.

**Unnecessary Administration.** — See Matter of Losee, (Surrogate Ct.) 46 Misc. (N. Y.) 363.

**Appointment of Minor.** — In Pennsylvania it is held that a minor is incompetent to act as executor, and if appointed his letters will be revoked, subject, however, to be regranted to him after he becomes of age, if he is then qualified in other respects. *McKernan's Estate*, 14 Pa. Dist. 693.

**An Appointment Made in Proceedings Instituted After Proceedings Have Been Commenced in Another County to Settle the Estate** is improvident and unauthorized; the jurisdiction of court in the proceeding first instituted being exclusive, unless and until it is determined that the facts do not authorize the appointment to be made in that county. *McDonnell v. Farrow*, 132 Ala. 227.

**The Appointment of One of Several Executors**, whose right has been lost by failure to apply within the time fixed by statute, and the application and appointment within that time of his co-executors, is void and properly revoked. *Pruett v. Pruett*, 131 Ala. 578.

**Notice of and Hearing on Application.** — Failure to give notice of application for appointment, and have a trial or hearing to determine the qualifications of the applicant, are not grounds for removal where the law does not require such proceedings. *Stevens v. Larwill*, 110 Mo. App. 140. See also *Dobler v. Strobel*, 9 N. Dak. 104.

**Irregularities in the Proceedings for the Appointment**, as failure of the petition to aver jurisdictional facts, are no ground for removal, where such facts actually did exist and are made to appear on the application to remove. Matter of Ciotto, 105 N. Y. App. Div. 143.

**818. 3. Waiver of Right.** — *Williams v. Ad-dison*, 93 Md. 41; *Jones v. Harbaugh*, 93 Md. 269; *Rodes v. Boyers*, 106 Tenn. 434; *Sutton v. Osborne*, 31 Wash. 340.

**Consent to the Issuing of Letters to a Person Incompetent** to administer the estate does not estop the persons consenting from maintaining a proceeding for his removal. Matter of Avery, (Surrogate Ct.) 45 Misc. (N. Y.) 529.

**819. 2. Discovery of Will After Appointment.** — *Kern's Estate*, 212 Pa. St. 57; *Donnelly's Estate*, 11 Pa. Dist. 279.

**3. Setting Aside Probate of Will.** — The validity of a will cannot be collaterally attacked in a proceeding for a partition of property of the estate; and the commencement of such suit affords no ground for the removal, during its

pendency, of an administrator with the will annexed. *Stevens v. Larwill*, 110 Mo. App. 140.

**6. Fraud in Obtaining Letters — Ground Independent of Statute.** — *Koury v. Castillo*, (N. Mex. 1905) 79 Pac. Rep. 293, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 819 and supporting the whole text paragraph..

**7. False Suggestion of Immaterial Facts**, such as that there were no creditors of the estate, is no ground for revoking the letters where the only creditor was a corporation having no right to administer. Matter of Ciotto, 105 N. Y. App. Div. 143.

**8. Sale of Property Without Order of Court.** — *Betts v. Cobb*, 121 Ala. 154.

**Refusal to Obey Orders of the Court.** — See Matter of Cowen, 105 N. Y. App. Div. 596. Otherwise when the order is void. *Snook v. Zentmyer*, 90 Md. 705.

**Burden of Proof.** — *In re Sylvar*, (Cal. 1905) 81 Pac. Rep. 663.

**Failure to Convert Assets into Money.** — A refusal to sell stocks for which an offer has been made is not ground for removal, where the stocks are valuable and the refusal has not resulted in loss to the estate. *Locher's Estate*, 23 Lanc. L. Rev. 129.

**Falsely Representing Facts to Court.** — An administrator who falsely represents to the court that he has received the purchase price of property sold under its order, and who fails to collect a balance due before executing the deed, as directed in the order of confirmation, is properly removed. *Mills' Estate*, 40 Oregon 424.

**Exercise by Representative of Right of Retainer.** — A creditor of the estate cannot be removed as administrator for claiming his right of retainer, though if he retains the amount of his debt nothing will remain to satisfy other creditors. In *Goods of Belham*, 84 L. T. N. S. 300.

**Retention of Commissions and Counsel Fees Without Authority of Court.** — Retaining commissions and counsel fees in a larger amount than the law allows, if done in good faith and under an agreement with the beneficiaries of the estate, is not ground for removal. *Jones v. Harbaugh*, 93 Md. 269.

**Concealment of Knowledge of Will.** — The mere fact that an executor has concealed from the court knowledge of a will executed by the wife of the testator, without anything more, does not operate, as matter of law, to disqualify him from acting. Concealment of the will and of knowledge of it might be due to an honest belief on his part that it was not necessary to produce it. *McGuinness v. Hughes*, 188 Mass. 201.

**Collusive Compromise and Settlement of a claim** in favor of the estate, in disregard of its interests, is ground for removal, irrespective of the question whether the compromise is binding on the estate. *Bozeman v. May*, 132 Ala. 233.

**Fraud Committed by the Attorney of a Distribu-**

**821. Transactions for Individual Benefit.** — See note 1.(g) Neglect of Duty — *aa.* IN GENERAL. — See note 2.*bb.* WASTE OR MISMANAGEMENT. — See note 3.**822. cc.** FAILURE TO GIVE BOND. — See note 1.

tee who was authorized to settle with the administrator cannot be attributed to the latter, unless he knew of it or had reason to suspect it. *Jones v. Harbaugh*, 93 Md. 269.

**821. 1. Dealing with Assets for Individual Benefit.** — *Matter of Heyen*, (Surrogate Ct.) 40 Misc. (N. Y.) 511; *Matter of Patterson*, (Surrogate Ct.) 41 Misc. (N. Y.) 66; *Fox v. Keister*, 9 Ohio Dec. 316, 6 Ohio N. P. 327; *Re Part-ridge*, 31 Oregon 297.

**2. Refusal or Neglect to Perform Duties Is Ground for Revocation.** — *In re Carver*, 123 Cal. 102; *Frothingham v. Petty*, 197 Ill. 418; *Haynes v. Carpenter*, 86 Mo. App. 30; *Matter of Truesdell*, (Surrogate Ct.) 40 Misc. (N. Y.) 336. See also *In re Cannon*, (Del. 1904) 58 Atl. Rep. 1039.

Where an administrator has failed to carry out the administration and cannot be found, the letters will be revoked and a new grant will be made. In *Goods of Loveday*, (1900) P. 154, followed in *In Goods of Colclough*, (1902) 2 Ir. R. 499.

**Failure to Deposit Funds.** — *Benton's Succession*, 106 La. 494; *Capwell v. Murphy*, 21 R. I. 262.

**Delay in Completing Administration.** — As supporting the second paragraph of the original note see *In re Sylvar*, (Cal. 1905) 81 Pac. Rep. 663.

**Refusal to Sue to Set Aside Fraudulent Conveyance.** — See *Marks v. Coats*, 37 Oregon 609; *Fehringer v. Commercial Nat. Bank*, 23 Utah 393.

**Failure to Publish Notice to Creditors.** — See *Re Barnes*, 36 Oregon 279.

An administrator will not be removed for failure to publish notice to creditors where he is prohibited by statute from taking any further proceedings in the administration, the value of the estate being less than the family allowances. *Matter of Atwood*, 127 Cal. 427.

**Refusal to Apply for an Order to Sell Real Estate** when such sale is necessary for the satisfaction of claims against the estate is ground for revocation of letters. *Lukens's Estate*, 10 Pa. Dist. 118, citing *Hutchison's Estate*, 10 Pa. Co. Ct. 592.

**3. Waste or Mismanagement Is Ground for Revocation.** — *In re Carver*, 123 Cal. 102; *Haynes v. Carpenter*, 86 Mo. App. 30; *Sharpless's Estate*, 209 Pa. St. 69, affirming 13 Pa. Dist. 33, 19 Montg. Co. Rep. (Pa.) 120.

It has never been doubted that, under his general jurisdiction of matters of administration, the probate judge has power to revoke letters of administration for waste or misappropriation of the assets, or complete unfitness for the trust, and this without regard to the administrator having been appointed from the preferred class. *Ex p. Small*, 69 S. Car. 43.

**Error of Judgment.** — See *Bauernschmidt v. Bauernschmidt*, (Md. 1905) 60 Atl. Rep. 437.

**Acting on Advice of Counsel.** — *Jones v. Harbaugh*, 93 Md. 269. See also *Bauernschmidt v. Bauernschmidt*, (Md. 1905) 60 Atl. Rep. 437.

**A Merely Technical Maladministration.** — Con-

*ery's Succession*, 111 La. 113; *Houghteling v. Stockbridge*, (Mich. 1904) 99 N. W. Rep. 759, 11 Detroit Leg. N. 100.

That the estate has in fact suffered no loss ought not to induce the court to pass over a plain dereliction of duty on the part of the representative. If he is retained in his office and continues to manage the estate upon his own conceptions of his duty as trustee, the result may be losses which he may not be able to make good. *In re Marsh*, (N. J. 1904) 56 Atl. Rep. 886.

**The Making of Unauthorized Investments** with a large part of the funds of the estate is such carelessness or wantonness as amounts to misconduct in the execution of the office and warrants removal. The facts that no apparent loss has resulted from the investments, at the time of the application, that the interested persons have not, upon the accounting of the personal representative, sought to have him charged with them as in the case of a devastavit, and that the representative is financially responsible, do not alter the case. *Matter of Avery*, (Surrogate Ct.) 45 Misc. (N. Y.) 529.

**Paying Out Funds of Estate Without Authority.** — See *Benton's Succession*, 106 La. 494.

**Acting Under Order of Court.** — Acts done in good faith under orders of the probate court will not furnish grounds for removal, though the orders were in excess of the jurisdiction of the court or otherwise improper. *Stevens v. Larwill*, 110 Mo. App. 140.

**Release of Service Contract Made with Attorneys.** — The mere fact that an executor released a contract made by him with attorneys, which fixed the value of their fees for services to be rendered to the estate, resulting in their obtaining an allowance from the court in a greater sum, is not sufficient ground for his removal. *Fox v. Keister*, 9 Ohio Dec. 316, 6 Ohio N. P. 327.

**Failure to Accept Bid in Increased Amount After Close of Sale of Real Estate.** — Failure of an administrator to accept a bid for real estate after the sale thereof has been closed is not ground for removal; nor is insistence by him on confirmation of the sale, where such bidder was, within his knowledge, without means to make the offer good, and had tendered no bond to cover loss which might result to the estate from a resale. *Rinkel v. Rinkel*, 107 Mo. App. 74.

**Repairing Real Property** when authorized by the will does not constitute waste or mismanagement. *Fox v. Keister*, 9 Ohio Dec. 316, 6 Ohio N. P. 327.

**822. 1. Failure to Give Bond Is Ground for Revocation.** — *Betts v. Cobb*, 121 Ala. 154; *In re Craigie*, 24 Mont. 37. See also *infra*, this title, 865. 2.

An order requiring an administrator to cease to act as such if bond is not given by a date named does not effect his removal in the event that he fails to execute the bond. A further order removing him is necessary. *Karn v. Seaton*, 62 S. W. Rep. 737, 23 Ky. L. Rep. 101.

**822.** *dd.* FAILURE TO MAKE INVENTORY. — See note 2.

**823.** *cc.* FAILURE TO ACCOUNT. — See note 1.

(h) Removal from Jurisdiction of Court. — See note 2.

(i) Unfitness and Incapacity — *aa.* UNFITNESS — (*aa*) *In General.* — See note 5.

**824.** (*bb*) *Unfriendly Relations or Adverse Interests.* — See note 1.

**Independent Executors.** — See *Roy v. Whitaker*, (Tex. Civ. App. 1898) 50 S. W. Rep. 491.

**822. 2. Failure to Make Inventory Is Ground for Revocation.** — Matter of Rathgeb, 125 Cal. 302; *Hayes v. Carpenter*, 86 Mo. App. 30; *Lewellyn v. Lewellyn*, 87 Mo. App. 9; *Re Barnes*, 36 Oregon 279; *Marks v. Coats*, 37 Oregon 609; *Re Bolander*, 38 Oregon 490.

**Excuse for Failure.** — *Clancy v. McElroy*, 30 Wash. 567.

**Failure to Inventory Debt Due from Executor or Administrator.** — An executor or administrator will not be removed for failing to include in his inventory a debt due from himself to the estate, in the absence of evidence of fraudulent intent. *Lancaster's Estate*, 7 Del. Co. Rep. (Pa.) 584.

**823. 1. Failure to Settle Accounts.** — Matter of Rathgeb, 125 Cal. 302; *Haynes v. Carpenter*, 86 Mo. App. 30; *Lewellyn v. Lewellyn*, 87 Mo. App. 9. See also Matter of Hickey, (Surrogate Ct.) 34 Misc. (N. Y.) 360.

**But Mere Failure to Make Regular Settlements.** — *Willis's Succession*, 109 La. 281.

**Necessity for Demand and Order.** — The failure to file annual accounts is not, of itself, sufficient to justify destitution, unless such failure continues after demand and order for an account. *Benton's Succession*, 106 La. 494.

**Excuse for Failure.** — See *Cosby v. Weaver*, 107 Ga. 761.

**Inaccuracies and Illegal Credits in the Account** filed are not ground for revocation. The remedy in such cases, in the absence of fraud, is to surcharge the account, within the time allowed by law for the purpose. *Appler v. Merryman*, 91 Md. 706.

**2. Removal from State Ground for Revocation.** — *Linn v. Hagan*, 87 S. W. Rep. 763, 27 Ky. L. Rep. 996; (by statute); *In re Pickands*, 7 Ohio Dec. 476, 5 Ohio N. P. 493; *In re Neubert*, 58 S. Car. 469; *Lethbridge v. Lauder*, (Wyo. 1904) 76 Pac. Rep. 682. See also *In Goods of Colclough*, (1902) 2 Ir. R. 499, *citing In Goods of Loveday*, (1900) P. 154.

**Nonresident Executor.** — A nonresident appointed executor, who does not come and submit himself to the jurisdiction of the court after his appointment, is within a statutory provision authorizing the removal of an executor who "has permanently removed from the state." Matter of Kelley, 122 Cal. 379.

Where the appointment of a nonresident as executor is authorized, the fact that he is or becomes after the appointment a nonresident cannot be invoked as a ground for his removal from office, except in the event that he fails to come into the state and personally conduct the business of the estate at such times and as frequently as its interests and the interests of those concerned in its settlement may require. *Hecht v. Carey*, (Wyo. 1904) 78 Pac. Rep. 705.

**Temporary Removal for the benefit of the health of members of the family of an executor or administrator, on account of business, or for**

purposes of pleasure or travel, is not a removal from the state requiring revocation of letters. Matter of McKnight, 80 N. Y. App. Div. 284, *affirmed* without opinion 179 N. Y. 522.

Absence from the state, though continuous, is not ground for removal, if it is not intended to be permanent and good reasons exist for it. Matter of Magoun, (Surrogate Ct.) 41 Misc. (N. Y.) 352.

**5. Unfitness in General.** — Where an ignorant and illiterate person, entitled to administer, was persuaded by his attorney to have the wife of the latter appointed to act with him, whereupon the attorney took charge of the estate and sought to use the assets for his own benefit, it was held that sufficient cause existed to warrant the removal of the administratrix. Matter of Ferrigan, 42 N. Y. App. Div. 1, *affirmed* without opinion 160 N. Y. 689.

In Matter of Kasson, 46 N. Y. App. Div. 348, unauthorized investments in managing another estate as guardian, whereby funds belonging to it were lost, were held under the circumstances of the particular case not sufficient to warrant removal, retention being conditional on the giving of bond.

**There Should Be Undoubted Proof.** — See Matter of Treadwell, (Surrogate Ct.) 37 Misc. (N. Y.) 584.

**824. 1. Unfriendly Relations with a Coexecutor.** — Matter of Wheaton, (Surrogate Ct.) 37 Misc. (N. Y.) 184; *Sharpless's Estate*, 209 Pa. St. 69, *affirming* 13 Pa. Dist. 33, 19 Montg. Co. Rep. (Pa.) 120.

Interference with a coexecutor in the management of the estate is not ground for removal, where the interference is for the best interests of the estate. *Bucher's Estate*, 18 York Leg. Rec. (Pa.) 31.

**Hostility to Beneficiaries of the Estate.** — That the attorneys of an administrator, with his knowledge and acquiescence, are also in the employ of one of the heirs who claims title to the estate to the exclusion of the other heirs warrants his removal. *In re Healy*, (Cal. 1901) 66 Pac. Rep. 175, *affirmed* 137 Cal. 474.

That the representative has sued for and recovered assets of the estate from one of the beneficiaries is no ground for removal. A hostile and unfriendly feeling on the part of the administrator is not material or of any consequence unless it is of a character to prevent such management of the estate by him as prudence, sound policy, and the interests of heirs, devisees, and creditors require. *Stevens v. Larwill*, 110 Mo. App. 140. For other cases holding the facts shown to be insufficient to warrant removal on the ground of hostility and adverse interests, see *Rementer's Estate*, 12 Pa. Dist. 396, 28 Pa. Co. Ct. 638; *Mulley's Estate*, 4 Lack. Jur. (Pa.) 293, 17 York Leg. Rec. (Pa.) 102.

**Adverse Interests.** — Matter of Bell, 135 Cal. 104; *Flynn v. Flynn*, 183 Mass. 365; Matter of Wallace, 68 N. Y. App. Div. 649. See also



**824.** (cc) *Financial Circumstances.* — See note 2.

(dd) *Indebtedness to Estate.* — See note 3.

**825.** (ee) *Litigation with Estate.* — See note 1.

bb. *INCAPACITY.* — See note 2.

cc. *UNSUITABLENESS EXISTING AT TIME OF APPOINTMENT.* — See note 3.

**826.** (4) *How Removal or Revocation Is Effected* — (a) *In General.* — See notes 1, 2.

(b) *Annulment of Will or Revocation of Probate.* — See note 3.

(c) *Discovery of Will After Grant of Administration.* — See note 5.

(d) *Second Grant of Letters.* — See note 7.

(e) *Disqualification.* — See note 8.

(f) *Cancellation of Bond.* — See note 9.

(g) *Removal of Trustee Who Is Also Executor.* — See note 10.

Clark v. Patterson, 214 Ill. 535, affirming 114 Ill. App. 312; Malone's Estate, 9 Pa. Dist. 115.

**824. 2. Letters Revoked for Insolvency.** — Matter of Truesdell, (Surrogate Ct.) 40 Misc. (N. Y.) 336; Sharpless's Estate, 209 Pa. St. 69, affirming 13 Pa. Dist. 33, 19 Montg. Co. Rep. (Pa.) 120.

**The Poverty of an Executor.** — Lancaster's Estate, 7 Del. Co. Rep. (Pa.) 584.

**3. Indebtedness to the Estate.** — Fox v. Keister, 9 Ohio Dec. 316, 6 Ohio N. P. 327.

**Denial of Indebtedness to the Estate.** — Compare Haines v. Christie, 17 Colo. App. 272, where the court said: "If an executor or administrator should refuse to collect debts due to the estate from others, he would be justly chargeable with mismanagement; and surely his refusal to account to the estate for money owing to it by himself cannot be characterized by any milder term."

**825. 1. Administrator ad Colligendum.** — The removal by the probate court of a collector appointed in a will contest on the ground that he is interested in the litigation, is not an abuse of the discretion of the court. Guthrie v. Welch, 24 App. Cas. (D. C.) 562.

**2. Insanity.** — Where one of several persons to whom letters testamentary have been granted is insane, the letters may be revoked and a fresh grant made to the others, reserving power to the incompetent to join in the grant, should he, on recovering his sanity, wish to do so. Shaw's Estate, (1905) P. 92.

**Business Incapacity.** — See *In re Courtney*, (Mont. 1905) 79 Pac. Rep. 317.

**3. Unsuitableness Existing at Time of Appointment.** — See McGuinness v. Hughes, 188 Mass. 201; Lancaster's Estate, 7 Del. Co. Rep. (Pa.) 584.

**826. 1. Direct Proceeding Necessary.** — Matter of Smith, (Surrogate Ct.) 40 Misc. (N. Y.) 331; Fox v. Keister, 9 Ohio Dec. 316, 6 Ohio N. P. 327; Briggs v. Probate Ct., 23 R. I. 125. See also Broadway's Succession, 114 La. 492.

**Letters Cannot Be Revoked in a Collateral Proceeding.** — See Stevens v. Larwill, 110 Mo. App. 140.

A proceeding to remove an administrator should be conducted separately from proceedings to settle his account. *In re McIntire*, 1 Alaska 73.

**Estoppel.** — Where an administrator has had a direct action for his removal dismissed on the ground that such relief is prayed in a pend-

ing opposition to his account, he is estopped from objecting to its consideration in the latter proceeding. Willis's Succession, 109 La. 281.

**Evidence — Judicial Notice.** — The rule is well settled that a probate court, in determining the sufficiency of a petition for the removal of an administrator, may take judicial notice of its records and prior proceedings in the administration. Mills' Estate, 40 Oregon 424.

**Suspension of Representative Pending Hearing.** — Under a statute providing that the judge may suspend the powers of the representative for certain specified causes, and then cite him to appear and show cause why his letters should not be revoked, suspension of the representative is not an absolute prerequisite to his removal. Matter of Kelley, 122 Cal. 379.

**2. Power of Court to Act ex Mero Motu.** — See *supra*, this title, 818. 1.

**3. Annulment of Will Revokes Executor's Authority.** — Hudson v. Barratt, 62 Kan. 137.

**5. Discovery of Will After Grant of Administration.** — In *Pennsylvania* the possibility that administration may be superseded by a will is expressly provided for in the bond given by every administrator, one condition of which is that "if it shall hereafter appear that any last will and testament was made by the said decedent and the same shall be proved according to law," the letters of administration shall be surrendered into the register's office (Act Pa., March 15, 1832, § 24, P. L. 139). Kern's Estate, 212 Pa. St. 57; Donnelly's Estate, 11 Pa. Dist. 279.

**7. The Appointment of an Administrator De Bonis Non** revokes any former grant of letters, under the *Alabama* statute. *Ex. p. Lunsford*, 117 Ala. 221.

**8. Marriage of Administratrix.** — See *supra*, this title, 814. 6.

**9. Cancellation of Bond Not Revocation of Letters.** — *Karn v. Seaton*, 62 S. W. Rep. 737, 23 Ky. L. Rep. 101.

**10. Removal of Trustee Who Is Also Executor.** — A court of equity cannot remove an executor; but where a person is both executor and trustee, if the office of trustee is separate from and independent of the office of executor, a court of equity may remove him from the office of trustee and leave him to act as executor; or if he has completed his duties as executor and is holding and administering the estate as trustee, a court of equity may remove him. *Mannhardt v. Illinois Staats Zeitung Co.*, 90 Ill. App. 315.

- 827.** (5) *Effect of Removal*—(a) *In General*.—See note 1.  
 (b) *Validity of Previous Acts*.—See notes 2, 3.  
**828.** (c) *Reappointment*.—See note 2.  
**829.** *V. ASSETS*—1. *What Are Assets in General*.—See note 1.

Executors who have fully administered the estate and to whom the assets have been awarded as trustees under the will, become *functus officio* as executors. On being removed as trustees, they have no further power to act in either capacity, and a formal decree removing them from the executorship is unnecessary. *Henson's Estate*, 12 Pa. Dist. 326.

**827. 1. Revocation Terminates Authority.**—*Matter of Blair*, 49 N. Y. App. Div. 417; *Knight v. Hamaker*, 33 Oregon 154; *Rutenic v. Hamakar*, 40 Oregon 444. See also *Byrne's Estate*, 122 Cal. 260, modified on other grounds 122 Cal. 267; *Upton v. Dennis*, 133 Mich. 238, 10 Detroit Leg. N. 132.

**Accounts Must Be Settled on Revocation.**—The revocation of letters or the resignation or removal of an executor or administrator does not affect the jurisdiction of the probate court to require an accounting. *Hudson v. Barratt*, 62 Kan. 137. See *infra*, this title, **1183. 2**.

**2. If Letters Are Voidable Only.**—*Hudson v. Barratt*, 62 Kan. 137.

**Discovery of Will After Grant of Letters.**—*Fidelity, etc., Co. v. Freeman*, (C. C. A.) 109 Fed. Rep. 847; *Sands v. Hickey*, 135 Ala. 322; *Perkins v. Owen*, 123 Wis. 238.

**Effect of Revocation on Pending Action.**—*Peck v. Agnew*, 126 Cal. 607.

A judgment against an administrator rendered after he has been removed from office is invalid. *More v. More*, 127 Cal. 460, affirming 129 Cal. xviii, 53 Pac. Rep. 1077.

**3. Conflict of Early Authorities.**—It was at one time held that an administration was void upon the subsequent production and probate of a will. But later the rule was modified so as to apply only to those cases in which administration had actually deprived the executor of some right, and not to those cases in which only the rights of other persons interested in the estate were concerned, in which latter case the administration was voidable only. In the United States the rule itself has been much further restricted, if not obliterated, by the effect of statutory regulations in all the states in regard to the settlement of estates of deceased persons. *Fidelity, etc., Co. v. Freeman*, (C. C. A.) 109 Fed. Rep. 847.

**828. 2. Reappointment of Administrators.**—Where letters have been revoked because the person appointed was an infant and incompetent to act, he may be reappointed on becoming of age. *McKernan's Estate*, 20 Montg. Co. Rep. 207.

**829. 1. Estoppel to Deny that Property Received Is Assets.**—*Benton's Succession*, 106 La. 404; *Henderson's Succession*, 113 La. 101; *Warfield v. Hume*, 91 Mo. App. 541; *Matter of Alfstad*, 27 Wash. 175; *In re Starr*, 2 Ont. L. Rep. 762. See also *Overstreet v. Reddick*, 117 Ga. 331. Compare *infra*, this title, **861. 3 et seq.**

Of this rule it has been said: "Appellant cites a number of cases in support of the first point, but upon examination we find all these to be cases where the money was actually the property of the estate, and liable for the debts

thereof. Certainly, where the administrator comes into possession of property, and refuses to inventory it upon the claim that it does not belong to the estate, but belongs to some third person or to himself, no estoppel as to the title can be pleaded simply because, as in this case, the property was received in a representative capacity." *Matter of Belt*, 29 Wash. 535, 92 Am. St. Rep. 916.

The authorities on the subject of estoppel do not seem to deal with an administrator who claims ownership in the disputed property himself, the actual possession of which was not changed by the administration; but rather with cases where the property originally came into the administrator's hands as estate property, and to which he asserted no prior ownership. *Filley v. Murphy*, 30 Wash. 1.

Where an administrator establishes a debt in his own favor against the estate and makes a sale of real property, the title to which stands in the name of the decedent, to satisfy the claim and costs of administration, he is estopped from afterwards setting up an equitable title in himself to the premises. *Veeder v. McKinley-Lanning L. & T. Co.*, 61 Neb. 892.

An executor who has recovered a judgment as such representative is estopped as executor to deny that he came into the fund in his representative capacity, but as an individual is no more estopped by the judgment than he would be had any other person as executor brought the action. *Leonard v. Harney*, 63 N. Y. App. Div. 294, modified on other grounds 173 N. Y. 352.

**Liquor License.**—In *Pennsylvania* it is held that a liquor license has a twofold operation: First, as conferring the privilege of selling liquor; and second, as an adjudication that the place in which the privilege is to be exercised is "necessary for the accommodation of the public," desiring to purchase. The first is purely personal, and, necessarily, dies with the licensee. The effect of the second continues with a greater or less degree of permanency. It relates to the realty—enhancing the value of an unexpired term, if the licensee was merely tenant for years, the enhancement in such case being personal assets, but inuring to the benefit of the heir or devisee if the licensee was himself the owner. While not *per se* an asset of the estate of the person to whom the license was granted, it is incident to the good will of the business and available to creditors so far as it may enhance the value of his ownership—either as tenant or proprietor—of the place at which it gave him the right to carry it on. *Maguire's Estate*, 10 Pa. Dist. 238; *Revell's Estate*, 11 Pa. Dist. 784; *Auer's Estate*, 14 Pa. Dist. 114. To similar effect, see *Brady's Estate*, 21 Pa. Super. Ct. 397; *Mueller's Estate*, 8 Pa. Dist. 70, affirmed 190 Pa. St. 601; *Wilson's Estate*, 9 Pa. Dist. 742; *Schmidt's Estate*, 14 Pa. Dist. 139; *Immendorf's Estate*, 21 Pa. Co. Ct. 268, affirmed 190 Pa. St. 590; *Ruppel's Estate*, 32 Pittsb. Leg. J. N. S. (Pa.) 233; *Schroeter's Es-*



**830. Doctrine as to Exempt Property.** — See note 2.**2. Assets in Respect to Different Kinds of Property — a. PERSONAL PROPERTY GENERALLY — (1) Rule Stated.** — See note 3.

tate, 33 Pittsb. Leg. J. N. S. (Pa.) 431; Fechter's Estate, 34 Pittsb. Leg. J. N. S. (Pa.) 323.

**Estate Passes to Representative as It Existed at Time of Death.** — An executor or administrator takes, and administers upon, the estate as it existed at the time of the death of the testate or intestate. *People v. Petrie*, 191 Ill. 497, 85 Am. St. Rep. 268, *affirming* 94 Ill. App. 652.

The decedent's title when he died is the criterion of the title which devolves upon his administrator. *Tye v. Tye*, 88 Mo. App. 330.

**Property in Possession of Decedent under License to Use.** — A personal representative has no action for money deposited in the name of his decedent "as manager," where the money did not belong to the decedent, but to the person by whom he was employed at the time of his death. *Grinstead v. Phoenix Nat. Bank*, (Ky. 1898) 44 S. W. Rep. 952.

**Money Deposited in Decedent's Name "as Manager."** — An administrator has no right of action for money deposited in the name of his decedent "as manager," where the money did not belong to the decedent, but to the person by whom he was employed at the time of his death. *Grinstead v. Phoenix Nat. Bank*, (Ky. 1898) 44 S. W. Rep. 952.

**Property Pledged by the decedent is not property of the estate in the hands of the administrator.** The lien of the pledgee is dependent upon possession. If possession could be taken by the administrator, the lien would be destroyed. *Bell v. Mills*, (C. C. A.) 123 Fed. Rep. 24.

The pledgee is entitled to be paid in full before the administrator is entitled to take the property as assets of the estate. *Barnes v. Scottish American Mortg. Co.*, 29 Tex. Civ. App. 443.

**Money Deposited in the Name of a Married Woman** need not go through the hands of her personal representative on her death, if it is not her property, but that of her husband. *Mains v. Webber*, 131 Mich. 213, 9 Detroit Leg. N. 269.

**830. 2. Exemptions.** — As supporting the first paragraph of the original note, see *Matter of Liddle*, (Surrogate Ct.) 35 Misc. (N. Y.) 173.

As supporting the second paragraph of the note, see *Thompson v. Thompson*, 78 S. W. Rep. 418, 25 Ky. L. Rep. 1626; *Crawford v. Nassoy*, 173 N. Y. 163, *reversing* 55 N. Y. App. Div. 433; *Matter of Keough*, (Surrogate Ct.) 42 Misc. (N. Y.) 387.

A watch, watch-chain, ring, and a valuable shirt-stud are not within a statute exempting "wearing apparel," but constitute assets of the estate. *Coffinberry v. Madden*, 30 Ind. App. 360, 96 Am. St. Rep. 349.

A statute exempting property from the claims of creditors does not free it from liability for funeral and testamentary expenses. *Re Tatham*, 2 Ont. L. Rep. 343.

Property set apart by the probate court under authority of statute, in lieu of specific property exempt under the code, is necessarily an asset

of the estate and continues as such until segregated by the action of the court in setting it apart as exempt. *Moore v. McLure*, 124 Ala. 120.

**Homestead Exemption.** — As supporting the first paragraph of the original note, see *Williams v. O'Neal*, 119 Ga. 175; *Keene v. Wyatt*, 160 Mo. 1, *disapproving* *Broyles v. Cox*, 153 Mo. 242, 77 Am. St. Rep. 714, and *In re Powell*, 157 Mo. 151, *Marshall, J., dissenting*; *Robbins v. Boulware*, (Mo. 1905) 88 S. W. Rep. 674.

As supporting the second paragraph of the note, see *Randolph v. White*, 135 Fed. Rep. 875 (construing the *Texas* statute).

In *California*, where no homestead is selected during the lifetime of the decedent, one set off afterwards for the use of the surviving husband or wife and the minor children is within the rule. *Matter of Tittel*, 139 Cal. 149.

In *Florida* the administrator can never take, or be entitled to take, possession of the homestead land, or have any interest in or concern therewith. *Finlayson v. Love*, 44 Fla. 551.

In *Iowa* the statute provides that the surviving husband or wife may elect to retain the homestead for life in lieu of dower interest in the real estate of the deceased; but if there be no survivor, the homestead descends to the issue of either husband or wife, according to the rules of descent, unless otherwise directed by will, and is to be held by such issue exempt from any antecedent debts of their parents or their own, except those of the owner thereof contracted prior to its acquisition. *Porter v. Perkins*, 125 Iowa 55.

In *Nebraska* the homestead is exempt from debts and liabilities of the estate, and is not assets in the hands of the personal representative, except in so far as its value exceeds the statutory limitation. *Solt v. Anderson*, 63 Neb. 734; *W. J. Perry Live Stock Commission Co. v. Biggs*, (Neb. 1903) 94 N. W. Rep. 712.

The *Ohio* statute allowing a homestead in surplus proceeds where the premises are sold in satisfaction of a lien having priority over the homestead right includes a voluntary sale by the widow and heirs for the purpose of satisfying such lien; and if they turn over the surplus proceeds to the administrator, they are not assets in his hands. *Bretz v. Moore*, 26 Ohio Cir. Ct. 66.

See also *infra*, this title, **1092. 2.**

**If the Exempt Property Is in the Hands of a Third Person.** — *James v. Smith*, 3 Indian Ter. 447. See also *Matter of Campbell*, 96 N. Y. App. Div. 561.

**Rights and Remedies of Persons Entitled to Exempt Property.** — An administrator has no title, possession, or right of possession to property which the statute declares is not assets subject to appraisal, but belongs absolutely to the widow. She is entitled to the same remedies to protect or recover the property that any other owner has, and is not required to go into the Surrogate's Court to bring the representative to account. *Crawford v. Nassoy*, 173 N. Y. 163, *reversing* 55 N. Y. App. Div. 433.

**3. Personalty Specifically Bequeathed.** — *Robin-*



**831.** See notes 1, 2, 3.

(2) *Good Will of Decedent's Business.* — See notes 4, 5.

**832.** *Partnership Business* — *Commercial Partnerships.* — See note 1.

(3) *Debts and Rights of Action* — (a) *In General.* — See note 3.

son v. Adams, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 537.

**Community Property as Assets.** — See Matter of Young, 123 Cal. 337; Matter of Wickersham, 139 Cal. 652, *affirming* (Cal. 1902) 70 Pac. Rep. 1079; Messick v. Mayer, 52 La. Ann. 1161; Childs v. Lockett, 107 La. 270; Carlton v. Goebler, 94 Tex. 93; Montreal Bank v. Buchanan, 32 Wash. 480.

**Joint Estates.** — An executor or administrator takes no title to a joint estate on the death of a joint tenant. Haven v. Haven, 181 Mass. 573.

A note payable to husband or wife goes on the death of the husband to the wife by right of survivorship, and does not become assets of his estate. Wells v. Moore, 68 Mo. App. 499.

Where money belonging to husband and wife was deposited by the husband in their joint names "to be drawn by either, or in the event of the death of either to be drawn by the survivor," it is not at the death of the husband part of his estate, but passes to the wife in her own right. *Re Ryan*, 32 Ont. 224. See generally the title HUSBAND AND WIFE, **851**. 2 *et seq.*

**Property Left to Executor in Trust.** — The general rule that where there is a devise or bequest to an executor in trust, the executor receives the property or fund at once as trustee, and it never becomes assets, must be subject to the qualifications, first, that if needed as assets the title of the executor is superior to that of the trustee, so that the former may take, use, and account for it as assets; and, second, if the property is not reduced to the form or condition in which it is to be distributed as trust property, the duty of thus transforming it may devolve upon and be exercised by the executor as such, and that this will be the case unless the will distinctly provides that this duty shall devolve upon the trustee as such. In such cases, the same person being both executor and trustee, he will not take in the latter capacity until he has fully discharged his duties in the former capacity, and not until the fund or property has been distinctly set apart as trust property. Matter of Crawford, 11 Ohio Cir. Dec. 605, 21 Ohio Cir. Ct. 554, *affirmed* on other grounds 68 Ohio St. 58.

**Beneficial Life Interest in Personalty.** — Property in which a person has a beneficial interest for life, with power to use so much of it, principal as well as income, as may be necessary to his comfortable support and maintenance, is liable for debts contracted by him for the purposes indicated; and on his death his personal representative is entitled to the possession of such property till it shall have been regularly assigned in due course of administration. Hinn v. Gersten, 122 Wis. 222.

**Corporation Property of Which Decedent Was Real Owner.** — Where the decedent transferred his property to a corporation, in which the only stockholders besides himself were several of his children, to each of whom he transferred a few shares of stock, without consideration,

merely to qualify them as corporators, he is the real, substantial owner of the property, and it will be treated in equity as assets of his estate. Bauernschmidt v. Bauernschmidt, (Md. 1905) 60 Atl. Rep. 437.

**Commissions Due to Deceased Representative.** — The executor or administrator of a deceased executor or administrator is entitled to receive for the estate of the latter any balance of fees or compensation due to the decedent as such representative. State v. Probate Ct., 76 Minn. 132.

**Personalty of Unknown Ownership Found Buried in Decedent's Land.** — Title to personal property the ownership of which is unknown, found buried in real estate belonging to a decedent, passes with the real estate to his heirs or devisees; and the property is not assets in the hands of his personal representative. Burdick v. Chesebrough, 94 N. Y. App. Div. 532.

**Property Disposed of by Gift Causa Mortis.** — Property disposed of by the decedent by valid gift *causa mortis* is not assets of the estate to which his personal representative is entitled. Deneff v. Helms, 42 Oregon 161.

**A Monument** purchased by a decedent during his lifetime is assets of the estate and may be sold for the payment of debts. Matter of Willard, 9 Ohio Dec. 824.

**Wearing Apparel of a Married Woman** belongs to the husband, no evidence to the contrary appearing, and does not constitute assets of her estate. *In re Hall*, 70 Vt. 458.

**831. 1. Property Covered by a Chattel Mortgage** given by the decedent, when invalidated through failure of the mortgagee to file or renew it, becomes assets so far as needed to pay debts. Rock Springs First Nat. Bank v. Ludvigsen, 8 Wyo. 230. See *infra*, this title, **903**. 1, *Representation of Creditors*.

**2. An Option to Purchase Designated Property** within a given time, at a stipulated price, upon the credit of the person owning such right, is not assignable, and, upon the death of the person holding the option within the time limited for its exercise without his having exercised it, it does not pass into the hands of his administrator as an asset of his estate. Sims v. Cordele Ice Co., 119 Ga. 597.

**3. Shares of Stock.** — Fitzsimmons v. Lindsay, 205 Pa. St. 79.

**Right to Seat in Stock Exchange.** — See Nashua Sav. Bank v. Abbott, 181 Mass. 531, 92 Am. St. Rep. 430.

**4. Good Will Is Assets.** — See *supra*, this title, **829**. 1. *Liquor License*; *infra*, this title, **1197**. 5. *The Good Will of a Decedent's Business*.

**5. Proof of Value Necessary.** — Scudder v. Ames, 142 Mo. 187.

**832. 1. Good Will of Commercial Partnership.** — Scudder v. Ames, 142 Mo. 187.

**3. Choses in Action for Rent** of real estate which had accrued at the time of the lessor's decease pass to his personal representative. Broadwell v. Banks, 134 Fed. Rep. 470.

**833.** All Causes of Action Relating to the Person. — See note 1.

Causes of Action Relating to Real Estate. — See notes 2, 3.

**834.** (b) Death by Wrongful Act. — See note 1.

(c) Debts Due from Executor or Administrator. — See note 3.

**835.** See note 1.

(4) *Effects Appropriated by Decedent to Special Purposes.* — See note 2.

**833. 1. Actions to Recover Personalty.** — *Bridges v. Williams*, 28 Tex. Civ. App. 38. See also *infra*, this title, **903. 1. Representation of Creditors**; **978. 1 et seq.**

The Administrator of the Succession of a Bailee is entitled to continue the possession of his decedent, and has an action to revendicate this possession as against a mere trespasser. *Gragard's Succession*, 106 La. 298.

**2. Action for Breach of Real Covenants.** — *Handley's Estate*, 14 Pa. Dist. 710.

**3. Actions for Trespass or Other Injury to Land.** — In *Goods of Pryse*, (1904) P. 301; *Garvy v. Coughlan*, 92 Ill. App. 582; *Reilly v. Erie R. Co.*, 63 N. Y. App. Div. 415. See also *Davenport's Estate*, 10 Pa. Dist. 121; *Granger v. O'Neill*, 31 Nova Scotia 462.

Otherwise of a right accruing after the death of the owner. *Cook v. Garfield Coal Co.*, 112 Iowa 210.

Under a will giving to the executor possession and control of the estate until the youngest child of the testator became of age, the right of action for an injury to real estate resulting from a negligent tort is in the executor. *Hendricks v. Southern R. Co.*, (Ga. 1905) 51 S. E. Rep. 415.

**Appropriation of Land by Municipality or Railroad Company.** — See *Indianapolis, etc., R. Co. v. Price*, 153 Ind. 31; *De Haven's Estate*, 12 Pa. Dist. 680. Compare *Mountz v. Philadelphia, etc., R. Co.*, 203 Pa. St. 128.

Otherwise of a right accruing after the death of the owner. *Helbling's Estate*, 33 Pittsb. Leg. J. N. S. (Pa.) 53, 32 Pittsb. Leg. J. N. S. (Pa.) 378.

**Real Property in Foreign State.** — A representative has no right of action for waste where the property is situated in a foreign state. *Price v. Ward*, 25 Nev. 203, *Bonnifield, C. J., dissenting.*

**834. 1. Right of Action for Death by Wrongful Act Not General Assets.** — *Washington Asphalt Block, etc., Co. v. Mackey*, 15 App. Cas. (D. C.) 410; *Western Union Tel. Co. v. Lipscomb*, 22 App. Cas. (D. C.) 104; *Cleveland, etc., R. Co. v. Osgood*, (Ind. App. 1905) 73 N. E. Rep. 285; *Friend v. Burleigh*, 53 Neb. 674; *Cogswell v. Concord, etc., R. Co.*, 68 N. H. 192; *Hoes v. New York, etc., R. Co.*, 73 N. Y. App. Div. 363, *reversed* on other grounds 173 N. Y. 435; *Vance v. Southern R. Co.*, 138 N. Car. 460; *Engle's Estate*, 7 Pa. Dist. 434; *Boulden v. Pennsylvania R. Co.*, 205 Pa. St. 264 (construing *New Jersey* statutes); *Richards v. Riverside Iron Works*, 56 W. Va. 510; *Robertson v. Chicago, etc., R. Co.*, 122 Wis. 66, 106 Am. St. Rep. 925. See also *Kintz v. Schoentgen*, (Iowa 1900) 84 N. W. Rep. 670.

**Right Held General Assets in Some Jurisdictions.** — *Hoes v. New York, etc., R. Co.*, 73 N. Y.

App. Div. 363, *reversed* on other grounds 173 N. Y. 435 (construing the *Connecticut* statute).

**3. Debts Due from Executor or Administrator Are Assets in Hand** — *Alabama.* — *Arnold v. Arnold*, 124 Ala. 550.

*California.* — *Matter of Walker*, 125 Cal. 242, 73 Am. St. Rep. 40.

*Illinois.* — *Clark v. Patterson*, 214 Ill. 533, 105 Am. St. Rep. 127, *affirming* 114 Ill. App. 312; *Phillips v. Duckett*, 112 Ill. 587.

*Maine.* — *Hodge v. Hodge*, 90 Me. 505, 60 Am. St. Rep. 285.

*Massachusetts.* — *Bassett v. Fidelity, etc., Co.*, 184 Mass. 210, 100 Am. St. Rep. 552.

*Missouri.* — *Wilson v. Ruthrauff*, 82 Mo. App. 435.

*Nebraska.* — *Howell v. Anderson*, 66 Neb. 575.

*New Hampshire.* — *Probate Judge v. Sullo-way*, 68 N. H. 511, 73 Am. St. Rep. 619.

*New York.* — *Keegan v. Smith*, 60 N. Y. App. Div. 168, *reversing* on other grounds (Supm. Ct. App. T.) 33 Misc. (N. Y.) 74, which *reversed* (N. Y. City Ct. Gen. T.) 31 Misc. (N. Y.) 651, *affirmed* without opinion 172 N. Y. 624; *Matter of Davis*, (Surrogate Ct.) 37 Misc. (N. Y.) 326; *Matter of David*, (Surrogate Ct.) 44 Misc. (N. Y.) 337.

*Ohio.* — *Jones v. Willis*, 72 Ohio St. 189; *Cheney v. Powell*, 11 Ohio Cir. Dec. 279, 20 Ohio Cir. Ct. 398; *Fox v. Keister*, 9 Ohio Dec. 316, 6 Ohio N. P. 327.

*Oregon.* — *Mason's Estate*, 42 Oregon 177, 95 Am. St. Rep. 734; *United Brethren First Church v. Akin*, 45 Oregon 247.

*Pennsylvania.* — *Anderson v. Anderson*, 183 Pa. St. 480, 41 W. N. C. (Pa.) 329.

*Wisconsin.* — *Robinson v. Hodgkin*, 99 Wis. 327.

**Debt of Firm of Which Executor Was Member.** — *Bassett v. Fidelity, etc., Co.*, 184 Mass. 210, 100 Am. St. Rep. 552. *Contra*, *James v. West*, 67 Ohio St. 28, where the court held that the rule is so far unsatisfactory that it should not be extended, but should be confined to cases in which the administrator owes the debt individually and unconditionally.

**835. 1. Effect of Rule on Interest.** — *Matter of Davis*, (Surrogate Ct.) 37 Misc. (N. Y.) 326.

**2. Deposit for Funeral Expenses.** — *Burge v. Burge*, 76 S. W. Rep. 873, 25 Ky. L. Rep. 979.

**Property Placed in Escrow** for another's benefit to be delivered after the decedent's death is not assets. *Burge v. Burge*, 76 S. W. Rep. 873, 25 Ky. L. Rep. 979; *Daggett v. Simonds*, 173 Mass. 340.

**An Assignment of Interest in Life-insurance Policies** in trust for children of the assignor is within the rule. *Matter of McAleenan*, 53 N. Y. App. Div. 193, *affirmed* 165 N. Y. 645.

**Deposit in Trust.** — *Pierce v. Woodbury*, (Me,

**836.** (5) *Property Accruing After Death.* — See note 1.

**837.** (6) *Legacies and Distributive Shares.* — See note 1.

(7) *Interests in Partnerships.* — See note 2.

**838.** *b. REAL PROPERTY GENERALLY — (1) General Principles — (a) Common-law Rule.* — See note 1.

1905) 60 Atl. Rep. 424, quoting 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 835, and saying: "The very essence of this rule is that the 'directions are complied with by the depository.'" The conditions not being performed, the doctrine of special appropriation does not apply.

**836. 1. Dividends on Shares of Stock.** — Dividends of stock in which the decedent had only a life interest, or which constitute a specific legacy under his will, declared after his death, are not assets of his estate. *Matter of Kane*, 64 N. Y. App. Div. 566.

Surplus earnings of a corporation distributed in dividends after the death of a person having only a life interest in the income of stock of the corporation are not assets of his estate, but belong to the remainderman. *Connolly's Estate*, 198 Pa. St. 137.

Dividends declared after the death of the owner, on shares of stock constituting a specific legacy, go to the legatee, and not to the executor. *Gordon v. James*, (Miss. 1905) 39 So. Rep. 18; *Queen's Estate*, 11 Pa. Dist. 301. See further the titles **DIVIDENDS**, **719. 1**; **LEGACIES AND DEVISES**, **714. 5**.

**837. 1. Legacies and Distributive Shares Are Assets.** — *Savin v. Webb*, 96 Md. 504. See further the title **LEGACIES AND DEVISES**, **731, 749, 750**.

Where, in the distribution of an estate which is insufficient to pay the legacies and annuities in full, the court has directed that a sum of money be laid out in the purchase of a government annuity to satisfy a proportionate amount of an annuity given to a married woman with restraint on anticipation, and she dies before the annuity is purchased, the capital apportioned to the annuity belongs to her estate, and is payable to her personal representative. *In re Ross*, (1900) 1 Ch. 162.

Under a will giving to a beneficiary the income of a fund for life, and providing that "the principal of his deposit shall be paid to his executor or administrator and go to his heirs," the principal is not assets of the life beneficiary's estate, but is held by his representative in trust for his heirs. *Thayer v. Fairchild*, 25 R. I. 509.

Under a will which vests absolutely a share in the proceeds of a sale of the testator's real estate, if the distributee is dead at the time of the sale, an award of the share to his administrator is not improper, leaving the question of whether it is real or personal estate in his hands, for adjudication on the settlement of his account. *Bergdoll's Estate*, 11 Pa. Dist. 702.

**Lapsed Legacies.** — Under some of the statutes enacted to save legacies which would otherwise lapse, title vests in the issue of the deceased legatee, and does not constitute assets of his estate. *Suydam v. Voorhees*, 58 N. J. Eq. 157; *Canfield v. Canfield*, 62 N. J. Eq. 578.

**Annuity for a Term or *Pur Autre Vie*.** — A gift of an annuity for a term or *pur autre vie* is a

gift to the annuitant and his personal representatives during the term or life of the *cestui que vie*; and on the death of the annuitant before the expiration of the period, the annuity continues to his representative. *In re Follett*, 23 R. I. 409.

**Income from Real Estate** to which a person is entitled under a will, which accrues during his lifetime, is personal property to be awarded to his legal representatives. *Bergdoll's Estate*, 11 Pa. Dist. 699, 701.

**Right of Action to Enforce Payment of Legacy Charged on Land.** — The right of the legatee to pursue a statutory remedy to enforce the payment of a vested legacy charged on land inures on his death to his legal representatives. *In re Moran*, 13 Pa. Super. Ct. 251; *Palm's Estate*, 13 Pa. Super. Ct. 296.

**2. Interest in Partnership Not Assets Before Liquidation.** — *Wood v. Brown*, 121 Ga. 471; *Matter of Irvin*, 87 N. Y. App. Div. 466; *Matter of Grant*, (Surrogate Ct.) 27 Civ. Pro. (N. Y.) 21; *Miller v. Berry*, (S. Dak. 1905) 104 N. W. Rep. 311; *Altgelt v. Alamo Nat. Bank*, 98 Tex. 252, reversing (Tex. Civ. App. 1904) 79 S. W. Rep. 582, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 837; *In re Auerbach*, 23 Utah 529; *McKinzie v. U. S.*, 34 Ct. Cl. 278. See also *infra*, this title, **980. 4 et seq.**

**Farming on Shares.** — A contract between the owner of land and another, whereby each party shall furnish a certain proportion of the seed, implements, and stock, the land to be occupied and cultivated by the latter, the product to be shared between them, is a tenancy only, and not a partnership within this rule. *Shrum v. Simpson*, 155 Ind. 160.

**Where the Surviving Partner Dies** before the partnership estate has been settled, his administrator holds it, not as a part of his estate, but as the surviving partner himself held it, in trust; and he is accountable as a trustee for the completion of such trust. *Franklin v. Trickey*, (Ariz 1905) 80 Pac. Rep. 352.

**838. 1. Common-law and Statutory Liability of Heirs and Devisees — England.** — *In re Chant*, (1905) 2 Ch. 225.

*Arkansas.* — *Hall v. Cole*, 71 Ark. 601.

*Georgia.* — *Moore v. Smith*, 121 Ga. 479.

*Illinois.* — *Mackin v. Haven*, 187 Ill. 481, affirming 88 Ill. App. 434; *Van Vuren v. Longstreet*, 108 Ill. App. 159; *Tinker v. Babcock*, 107 Ill. App. 78, affirmed 204 Ill. 571.

*Indiana.* — *Clevenger v. Matthews*, (Ind. App. 1905) 75 N. E. Rep. 23.

*Kansas.* — *Cooper v. Ives*, 62 Kan. 395; *Black v. Elliott*, 63 Kan. 211, 88 Am. St. Rep. 239.

*Kentucky.* — *Jones v. Comer*, 76 S. W. Rep. 392, 25 Ky. L. Rep. 773, rehearing denied (Ky. 1903) 77 S. W. Rep. 184; *Hill v. Mayes*, 79 S. W. Rep. 276, 25 Ky. L. Rep. 2023; *Alderson v. Alderson*, 83 S. W. Rep. 1129, 26 Ky. L. Rep. 1260.

*Maryland.* — *Seldner v. Katz*, 96 Md. 212.

*Missouri.* — *Bealey v. Blake*, 70 Mo. App. 229.



**838. (b) Statutory Rule.** — See note 2.

*Nevada.* — Price v. Ward, 25 Nev. 203.

*New Hampshire.* — *Ela v. Ela*, 70 N. H. 163.

*New Jersey.* — Ransom v. Brinkerhoff, 56 N. J. Eq. 149, reversed on other grounds 57 N. J. Eq. 312; Lippincott v. Smith, (N. J. 1905) 60 Atl. Rep. 330.

*New York.* — De Crano v. Moore, 50 N. Y. App. Div. 361, modifying (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 303; Matter of Hatch, 97 N. Y. App. Div. 496, reversed 182 N. Y. 320; Hughes v. Golden, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 128; Matter of Summers, (Surrogate Ct.) 37 Misc. (N. Y.) 575.

*North Dakota.* — Blakemore v. Roberts, 12 N. Dak. 394.

*South Carolina.* — Brock v. Kirkpatrick, 60 S. Car. 322, 85 Am. St. Rep. 847; Jennings v. Parr, 62 S. Car. 306.

*Texas.* — Nelson v. Bridge, 98 Tex. 523.

*Virginia.* — Leavell v. Smith, 99 Va. 374.

*West Virginia.* — Knotts v. McGregor, 47 W. Va. 566; Turk v. Hevener, 49 W. Va. 204; McConaughy v. Bennett, 50 W. Va. 172; McClung v. Sieg, 54 W. Va. 467.

*After Decree Against Executor or Administrator.* — In Reading Trust Co. v. Pennsylvania Trust Co., 26 Pa. Super. Ct. 599, it was held that after a decree in favor of a creditor in a proceeding instituted by him in the probate court for the recovery of his claim, the personal representative is alone responsible for payment of the debt. The creditor cannot thereafter proceed against lands in the hands of a devisee, even though the devisee participated in the distribution.

**Simple Contract Debts Where Land Is Charged by Will with Payment of Debts.** — See Suydam v. Voorhees, 58 N. J. Eq. 157.

**838. 2. Lands Subject to Debts by Statute.** — *Alabama.* — Brown v. Mize, 119 Ala. 10; Henley v. Johnston, 134 Ala. 646, 92 Am. St. Rep. 48; Taylor v. Crook, 136 Ala. 354, 96 Am. St. Rep. 26; Griffith v. Rudisill, (Ala. 1904) 37 So. Rep. 83.

*Arkansas.* — James v. Gibson, 73 Ark. 440; Collins v. Paepcke-Leicht Lumber Co., (Ark. 1905) 84 S. W. Rep. 1044.

*California.* — Ryer v. Fletcher-Ryer Co., 126 Cal. 482.

*Illinois.* — Burr v. Bloemer, 174 Ill. 638; People v. Huffman, 182 Ill. 390, reversing on other grounds 78 Ill. App. 345; People v. Lanham, 189 Ill. 326, reversing 91 Ill. App. 101; Richardson v. Ranson, 99 Ill. App. 258.

*Indiana.* — Wood v. Wood, 150 Ind. 600; Moore v. Moore, 155 Ind. 261.

*Iowa.* — Herriott v. Potter, 115 Iowa 648.

*Kansas.* — Black v. Elliott, 63 Kan. 211, 88 Am. St. Rep. 239; Stewart v. Rogers, (Kan. 1905) 80 Pac. Rep. 58.

*Maryland.* — Seldner v. Katz, 96 Md. 212.

*Minnesota.* — Fleming v. McCutcheon, 85 Minn. 152.

*Mississippi.* — Ashley v. Young, 79 Miss. 129.

*Missouri.* — Emmons v. Gordon, 140 Mo. 490, 62 Am. St. Rep. 734; Hall v. Farmers', etc., Bank, 145 Mo. 418; Hopkins v. Thompson, 73 Mo. App. 401.

*Nebraska.* — Motley v. Motley, 53 Neb. 375, 68 Am. St. Rep. 608; Lewon v. Heath, 53 Neb.

707; Tunncliffe v. Fox, (Neb. 1903) 94 N. W. Rep. 1032.

*Nevada.* — Price v. Ward, 25 Nev. 203.

*New Jersey.* — Lippincott v. Smith, (N. J. 1905) 60 Atl. Rep. 330.

*New York.* — Matter of Richmond, 168 N. Y. 385, affirming 62 N. Y. App. Div. 624; Matter of Foley, 39 N. Y. App. Div. 248; Little Falls Nat. Bank v. King, 53 N. Y. App. Div. 541; Richmond v. Freemans Nat. Bank, 86 N. Y. App. Div. 152; Matter of Hatch, 97 N. Y. App. Div. 496, reversed 182 N. Y. 320; Matter of Summers, (Surrogate Ct.) 37 Misc. (N. Y.) 575.

*North Dakota.* — Blakemore v. Roberts, 12 N. Dak. 394.

*Ohio.* — Carr v. Hull, 65 Ohio St. 394; *In re Cavagna*, 11 Ohio Dec. 725, 8 Ohio N. P. 557; Kummer v. Lapp, 13 Ohio Dec. 491; Herron v. Comstock, (C. C. A.) 139 Fed. Rep. 370 (construing the Ohio statute).

*Oregon.* — State v. O'Day, 41 Oregon 495.

*Pennsylvania.* — Kiskaddon v. Dodds, 21 Pa. Super. Ct. 351.

*Tennessee.* — Pearson v. Gillenwaters, 99 Tenn. 446, 462, 63 Am. St. Rep. 844; Yoe v. Sansom, (Tenn. Ch. 1898) 48 S. W. Rep. 317; Read v. Franklin, (Tenn. Ch. 1900) 60 S. W. Rep. 215.

*Texas.* — Carleton v. Goebler, 94 Tex. 93.

*Washington.* — Griffin v. Warburton, 23 Wash. 231; *In re Smith*, 25 Wash. 539; Demaris v. Barker, 33 Wash. 200; Noble v. Whitten, 38 Wash. 262.

*West Virginia.* — Shahan v. Shahan, 48 W. Va. 477, 86 Am. St. Rep. 68; McClung v. Sieg, 54 W. Va. 467.

*Canada.* — Trites v. Humphreys, 2 N. Bruns. Eq. Rep. 1.

**Lands Not Applicable Until Personalty Exhausted.** — Upon the death of an intestate estate, both real and personal, stands charged with the debts of the decedent — the personal estate primarily; secondarily, when the personalty is exhausted, the real estate. Gordon v. James, (Miss. 1905) 39 So. Rep. 18.

In general, the administrator of an intestate estate has nothing to do with the real estate, unless the sale of it is necessary to pay the debts of the estate and the charges of administration; and the executor of a will has nothing to do with the real estate unless some power is given to him by law over it, or the sale of it is necessary to pay legacies, debts, and charges of administration. The real estate ordinarily passes directly to the heirs or devisees. Jones v. Treadwell, 169 Mass. 430.

Where there are no debts or other legal charges which it is the lawful duty of the executor to pay, he has no authority to meddle with an estate specifically devised to a person for his use as land, as a devise carrying coal royalty or rents due under a sale by the decedent of a mining right. Duffy's Estate, 209 Pa. St. 390, 17 Pa. Super. Ct. 244.

In the absence of debts the representative has no concern either with the land or with a charge thereon in favor of a third person, created by will. Garman v. Glass, 197 Pa. St. 101.

*Florida.* — Finlayson v. Love, 44 Fla. 551; Scott v. Jenkins, (Fla. 1902) 35 So. Rep. 101.

**838.** What Is Real Property. — See note 3.

**839.** (c) Distinction Between Realty and Proceeds Thereof as Assets. — See note 2.

(2) Estates for Life or Years. — See note 3.

**840.** See note 1.

**A Still Broader Rule Obtains** in some jurisdictions. See *supra*, this title, **764**. 2. *A Late English Statute*, and see *In Goods of Hartley*, (1899) P. 40; *Ponnamma v. Arumogam*, (1905) A. C. 383; *Ianson v. Clyde*, 31 Ont. 579; *Re Way*, 6 Ont. L. Rep. 614; *Re Hopkins*, 32 Ont. 315; *Stevenson v. Roberts*, 25 Tex. Civ. App. 577; *Rock Springs First Nat. Bank v. Ludvigsen*, 8 Wyo. 230.

**Distinction Between Real and Personal Property as Assets.** — On the death of the ancestor his estate takes a dual course as to title — the personalty vests in the executor or administrator, while the realty vests in the heir or devisee. As to the realty, the personal representative has only a power, to be exercised in the mode, manner, and within the time prescribed by law. *Taylor v. Crook*, 136 Ala. 354, 96 Am. St. Rep. 26.

**838. 3. Contract to Purchase Land.** — *Cutler v. Meeker*, (Neb. 1904) 99 N. W. Rep. 514; *Matter of Davis*, 43 N. Y. App. Div. 331.

**Certificate of Purchase at Execution Sale.** — *Compare Palmer v. Riddle*, 180 Ill. 461.

**Oil Produced from Wells on Real Estate** owned by the decedent descends and belongs to the heirs as part and parcel of the realty. *Johnson's Estate*, 30 Pittsb. Leg. J. N. S. (Pa.) 365.

**Vendor's Lien.** — The legal title which remains in the vendor, where a lien is reserved in his deed to secure the purchase money, descends to the heirs of the vendor. *McCord v. Hames*, (Tex. Civ. App. 1905) 85 S. W. Rep. 504.

**Partnership Lands** are not held in *Canada* by the partners as co-owners of real estate, and must in the devolution upon death be distributed and applied as personal estate and as legal assets. *Re Fulton*, 7 Ont. L. Rep. 445. See generally the title **PARTNERSHIP**, **98**. 3, **106**. 4 *et seq.*

**Where a Will Works an Equitable Conversion** of the real estate of the testator, on a sale by the executor under the power, the proceeds are personally unimpressed with the character of real estate; and the right to have and receive the money is vested exclusively in him. *Garvey v. U. S. Fidelity, etc., Co.*, 77 N. Y. App. Div. 391.

**Proceeds of Sale under Power Given by Will.** — Where a power of sale given in a will is in no sense personal to the executors, and does not constitute a personal trust or confidence, but, on the contrary, is one of those powers annexed to and following the office of executor, the purchase money received from the sale is personal assets in the hands of the representative. *Francisco v. Wingfield*, 161 Mo. 542.

If the power to sell is general, either for the general purposes of the estate, or for the purpose of paying legacies in case of a deficiency of personalty applicable to that purpose, and a sale has actually been made, the proceeds are assets for the payment of debts, since the remedy of creditors against the land has thereby been destroyed. *Matter of Newell*, (Surrogate Ct.) 38 Misc. (N. Y.) 563, *distinguishing Mat-*

*ter of McComb*, 117 N. Y. 378. To similar effect see *Matter of Plummer*, (Surrogate Ct.) 38 Misc. (N. Y.) 536; *Matter of Barandon*, (Surrogate Ct.) 41 Misc. (N. Y.) 380.

After sale the proceeds must be administered under the order and direction of the probate court. *Wisker v. Rische*, 167 Mo. 522.

The proceeds of a sale of real estate for distribution under a power in a will are not applicable to the payment of the testator's debts, where the statutory lien of debts upon the real estate had expired before the sale. *Cooper's Estate*, 206 Pa. St. 628, 98 Am. St. Rep. 799.

**A Liquor License** relates to the realty, the place where the liquor is sold for the accommodation of the public, and if the licensee was the owner of the premises, it inures to the benefit of the heirs or devisees on his death. The proceeds of a sale of the property, therefore, though enhanced in value by reason of the license, are realty for purposes of distribution. *Maguire's Estate*, 10 Pa. Dist. 238. See further *supra*, this title, **829**. 1. *Liquor License*.

**Contract to Pay Debts in Consideration of Conveyance of Real Estate by Heirs.** — Money paid to an executor or administrator by the heirs of a decedent to prevent the sale of the decedent's real estate for his debts is assets of the estate. A contract, then, of the grantee to pay the debts of an estate in consideration of the heirs conveying to him a portion of the lands of the decedent may be well said to be assets in the hands of the administrator. *Stewart v. Rogers*, (Kan. 1905) 80 Pac. Rep. 58.

**839. 2. Rule that Proceeds of Sale to Pay Debts Are Assets.** — *People v. Lanham*, 189 Ill. 326, *reversing* 91 Ill. App. 101. See generally the cases cited in the two preceding notes.

**3. Leaseholds Are Chattels.** — *McCormick v. Stephany*, 57 N. J. Eq. 257; *Glannetti v. Smith*, 66 N. J. L. 374, *affirmed* 67 N. J. L. 687; *Furlong's Estate*, 10 Pa. Dist. 527; *Rickard v. Dana*, 74 Vt. 74; *Reilley v. Anderson*, 33 Wash. 58, *citing* 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 839.

**A Privilege of Renewal or Purchase**, incident to a lease, is a chattel interest, and passes primarily to the legal representative of the lessee and not to the heir. *Bean v. Reynolds*, 15 App. Cas. (D. C.) 125, *distinguishing* *Prout v. Roby*, 15 Wall. (U. S.) 471; *McCormick v. Stephany*, 57 N. J. Eq. 257, 61 N. J. Eq. 208; *Rickard v. Dana*, 74 Vt. 74.

**840. 1. Estate for Years Is Realty by Statute.** — *Rupp v. Rupp*, 11 Colo. App. 36.

So of certain leasehold interests in land held by or under lease from the Seneca Nation of Indians. *Matter of McKay*, (Surrogate Ct.) 33 Misc. (N. Y.) 520.

In *Ohio*, by statute, permanent leaseholds renewable forever are subject to the same law of descents and distributions as estates in fee are or may be subject to. *Broadwell v. Banks*, 134 Fed. Rep. 470; *Gausen v. Moormann*, 5 Ohio Dec. 287, 5 Ohio N. P. 254.

**840.** (3) *Land Purchased by Executor or Administrator.* — See note 2.

(4) *Mortgages* — (a) *Interest of Mortgagees.* — See note 3.

(b) *Interest of Mortgagor.* — See note 4.

**841.** (5) *Rents and Profits of Real Estate* — (a) *Rents Accruing During Lifetime of Owner.* — See note 2.

(b) *Rents Accruing After Death of Owner.* — See note 3.

**842.** *Rents Accruing After Death Made Assets by Statute.* — See note 1.

**840. 2. Purchase with Funds of Estate.** — *Matter of Franklin*, (Surrogate Ct.) 26 Misc. (N. Y.) 107; *Mustin's Estate*, 8 Pa. Dist. 180; *McKee v. Ellis*, (Tex. Civ. App. 1904) 83 S. W. Rep. 880.

**Purchase at Foreclosure of Contract.** — *Clapp v. Tower*, 11 N. Dak. 556.

**Purchaser at Foreclosure of Mortgage.** — *Kenny v. Keplinger*, 89 Ill. App. 570; *Aulbach v. Read*, 77 S. W. Rep. 204, 25 Ky. L. Rep. 1130; *Matter of Ross*, (Surrogate Ct.) 33 Misc. (N. Y.) 163. See also *Matter of Van Sise*, (Surrogate Ct.) 38 Misc. (N. Y.) 155. *Contra* a purchase at a sale under a mortgage given by the decedent. *Finley's Estate*, 10 Pa. Dist. 272, 25 Pa. Co. Ct. 261.

**3. Mortgage Is Personal Property.** — See *Gill v. Anglo-American Assoc.*, (Ky. 1899) 52 S. W. Rep. 929; *McCauseland v. Baltimore Humane Impartial Soc.*, 95 Md. 741 (immaterial that the notes secured by the mortgage are lost and never came into possession of the personal representative); *Jones v. Green*, 11 Ohio Cir. Dec. 548, 21 Ohio Cir. Ct. 96. *Contra* in jurisdictions where the mortgage passes the legal title. *Hughes v. Gay*, 132 N. Car. 50.

**The Rule Applies to Conveyances of Land Absolute in Form** but in fact intended as security for the payment of a debt. *Hawes v. Williams*, 92 Me. 483.

**In Massachusetts**, by statute, the mortgaged premises and the debt secured thereby are declared to be personal assets; and, if the deceased has not in his lifetime obtained possession of the premises, his executor or administrator is authorized to take possession of the premises by open and peaceable entry or by action in like manner as the deceased might have done if living. *Cunningham v. Davis*, 175 Mass. 217.

**4. Equity of Redemption.** — *Rainey v. McQueen*, 121 Ala. 191; *Matter of Knapp*, (Surrogate Ct.) 25 Misc. (N. Y.) 133, 28 Civ. Pro. (N. Y.) 220; *Matter of McKay*, (Surrogate Ct.) 33 Misc. (N. Y.) 520.

**841. 2. Rents Accruing in Lifetime of Owner.** — *Broadwell v. Banks*, 134 Fed. Rep. 470; *Travelers' Ins. Co. v. Childs*, 25 Colo. 360; *Clark v. Seagraves*, 186 Mass. 430; *Coberly v. Coberly*, 189 Mo. 1; *Bealey v. Blake*, 70 Mo. App. 229; *Myers v. Bolton*, 89 Hun (N. Y.) 342, modified on other grounds 157 N. Y. 393, rehearing denied 158 N. Y. 665; *Jay v. Kirkpatrick*, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 550; *Matter of Foulds*, (Surrogate Ct.) 35 Misc. (N. Y.) 171; *Duffy's Estate*, 209 Pa. St. 390 (coal royalty or rent); *Woman's College v. Horne*, (Tenn. Ch. 1900) 60 S. W. Rep. 609.

**3. Rents Accruing After Death of Owner Not Assets.** — *United States.* — *Herron v. Comstock*, (C. C. A.) 139 Fed. Rep. 370, citing 11 AM.

AND ENG. ENCYC. OF LAW (2d ed.) 841; *Broadwell v. Banks*, 134 Fed. Rep. 470.

*Illinois.* — *Richardson v. Richardson*, 87 Ill. App. 354; *Hollahan v. Sowers*, 111 Ill. App. 263.

*Kentucky.* — *Campbell v. Sacray*, (Ky. 1898) 44 S. W. Rep. 980; *Norris v. Williams*, 65 S. W. Rep. 439, 23 Ky. L. Rep. 1497; *Costigan v. Truesdell*, 83 S. W. Rep. 98, 26 Ky. L. Rep. 971. *Massachusetts.* — *Clark v. Seagraves*, 186 Mass. 430.

*Missouri.* — *Bealey v. Blake*, 70 Mo. App. 229. *New Hampshire.* — *Clough v. Clough*, 71 N. H. 412.

*New York.* — *Myers v. Bolton*, 89 Hun (N. Y.) 342, modified on other grounds, 157 N. Y. 393, rehearing denied 158 N. Y. 665; *Priester v. Hohloch*, 70 N. Y. App. Div. 256; *Jay v. Kirkpatrick*, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 550; *Matter of McKay*, (Surrogate Ct.) 33 Misc. (N. Y.) 520.

*North Carolina.* — *Baptist Female University v. Borden*, 132 N. Car. 476.

*Ohio.* — *In re Gallagher*, 7 Ohio Dec. 548, 5 Ohio N. P. 518.

*Pennsylvania.* — *Hall's Estate*, 8 Pa. Dist. 8; *Howard's Estate*, 8 Pa. Dist. 125; *Donnelly's Estate*, 8 Pa. Dist. 182; *Finley's Estate*, 11 Pa. Dist. 289; *Tomlinson v. Trenton*, etc., St. R. Co., 31 Pa. Co. Ct. 81.

*Tennessee.* — *Read v. Franklin*, (Tenn. Ch. 1900) 60 S. W. Rep. 215.

*Virginia.* — *Lightner v. Speck*, (Va. 1897) 28 S. E. Rep. 326.

**Insolvency of Estate.** — *Vance v. Vance*, 116 Ky. 520. *Contra* in *North Carolina*, where it is held that rents of land can be subjected by the personal representative, when required to pay debts; that inasmuch as the land can be sold to make assets to pay debts, it is to the interest of the heir or devisee that the rents should be first so applied, and save the land. *Shell v. West*, 130 N. Car. 171.

**Real Estate Converted by Will.** — Where there is a conversion of the real estate by the will, the rents result to the heirs, so far as the purposes of the conversion do not exhaust the realty. *Hallowell's Estate*, 9 Pa. Dist. 90.

**Rents Made Assets by Will.** — *Penn v. Penn*, 87 S. W. Rep. 306, 27 Ky. L. Rep. 946; *Bird v. Hawkins*, 58 N. J. Eq. 229.

**842. 1. Rents Accruing After Death Made Assets by Statute.** — *Rupp v. Rupp*, 11 Colo. App. 36; *Munger v. Doolan*, 75 Conn. 656; *Bealey v. Blake*, 70 Mo. App. 229.

In *Iowa* the administrator may, by direction of the court, take charge of any real estate belonging to the deceased and apply the profits to the payment of claims against the estate of the deceased, whenever the personal assets of the estate are insufficient. *In re Pennock*, 122 Iowa 622.

**Rents and Profits Accruing During Year of**



- 843.** Rents Collected by Executor or Administrator. — See notes 1, 2.  
 Lease by Executors and Administrators. — See note 3.  
 (6) *Proceeds of Sale of Real Property* — (a) *Sale Made by Deceased Owner.*  
 — See note 4.  
**844.** (b) *Sale to Pay Deceased Owner's Debts.* — See note 1.  
 (c) *Sale under Foreclosure of Mortgage.* — See note 3.  
 (e) *Partition Sale.* — See note 6.  
 (7) *Growing Crops.* — See note 7.  
**845.** (8) *Award in Condemnation Proceedings.* — See note 1.  
 (9) *Squatters' Claims.* — See note 2.  
**846.** c. *INSURANCE MONEY* — (1) *Fire Insurance.* — See notes 1, 2.  
 (2) *Life Insurance.* — See notes 3, 4, 5.

**Decedent's Death.** — In *Mississippi* rents of lands of the testator accruing during the year of his death and the crops remaining on the lands at the date of his death, whether gathered or still in the field, matured or unmatured, are alike considered assets of the decedent, whether testate or intestate. *Gordon v. James*, (Miss. 1905) 39 So. Rep. 18.

**843. 1. Rents Collected by Executor or Administrator Are Assets.** — See *infra*, this title, **1209. 2 et seq.**

2. See *infra*, this title, **1208. 5.**

**3. Rent Reserved in Lease by Executors or Administrators.** — See *infra*, this title, **1058. 2 et seq.**

**4. Unpaid Purchase Money of Land Sold by Decedent.** — *Gilmore v. Gilmore*, 60 Kan. 606; *Rockford v. Rockford*, (Ky. 1890) 56 S. W. Rep. 992; *Delaneville v. Duhe*, 114 La. 62; *Bowen v. Lansing*, 129 Mich. 117, 95 Am. St. Rep. 427, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 843; *Wagstaff v. Marcy*, (Supm. Ct. Tr. T.) 25 Misc. (N. Y.) 121; *Stang v. Newberger*, 8 Ohio Dec. 80, 6 Ohio N. P. 60; *Righy's Estate*, 8 Pa. Super. Ct. 108, 42 W. N. C. (Pa.) 434; *Sutton's Estate*, 13 Pa. Super. Ct. 492, affirmed 200 Pa. St. 163; *Schoonover v. Ralston*, 25 Pa. Super. Ct. 375. See also *Canfield v. Canfield*, 62 N. J. Eq. 578; *infra*, this title, **941. 5 et seq.**

**Sale of Mining or Quarrying Right.** — *Gardner's Estate*, 199 Pa. St. 524.

**844. 1. Proceeds of Sale under Order of Court to Pay Debts.** — See *supra*, this title, **838. 2, 3.**

**Interest of Heir in Surplus Proceeds.** — *Contra*, *Raleigh's Estate*, 206 Pa. St. 451, affirming 11 Pa. Dist. 165, 27 Pa. Co. Ct. 418.

**Sale under Power in Will.** — See *supra*, this title, **838. 3.**

**3. Foreclosure After Death of Owner of Equity of Redemption.** — *Matter of Knapp*, (Surrogate Ct.) 25 Misc. (N. Y.) 133, 28 Civ. Pro. (N. Y.) 220. See also *Bowman v. Knorr*, 206 Pa. St. 272; *Fidelity Ins., etc., Co. v. Sampson*, 209 Pa. St. 214.

**Insufficiency of Personality.** — The surplus proceeds are assets for the payment of the debts of the decedent, if needed for that purpose. *Powell v. Harrison*, 88 N. Y. App. Div. 228.

**6. Proceeds of Partition Sale Not Assets of Decedent's Estate.** — See *Smith v. Smith*, 174 Ill. 52.

**Order of Court Making Proceeds Assets.** — *In re DeSerisy*, 11 Ohio Dec. 666, 8 Ohio N. P. 694; *In re Cavagna*, 11 Ohio Dec. 725, 8 Ohio N. P. 557.

**7. Crops Growing on Decedent's Land Are Personality.** — *Gordon v. James*, (Miss. 1905) 39 So. Rep. 18; *Reeve's Estate*, 12 Luz. Leg. Reg. (Pa.) 137; *Berry v. Berry*, 55 S. Car. 303; *Trimmier v. Darden*, 61 S. Car. 220. See also *Locke v. Klunker*, 123 Cal. 231.

**Land Covered by Homestead Right.** — Where land of the estate is covered by a homestead right, the owner of the homestead is entitled to all the rents, issues, and products during the existence of the homestead, and consequently to crops growing thereon. *Mahoney v. Nevins*, (Mo. 1905) 88 S. W. Rep. 731.

**845. 1. Land Taken for Public Use Before Owner's Death.** — See *supra*, this title, **833. 3.** *Appropriation of Land by Municipal or Railroad Company.*

**Land Taken After Owner's Death.** — *Compare McKeeby v. Los Angeles*, 125 Cal. 639.

**2. Squatter's Claim on Public Land Not Assets.** — *Towner v. Rodegeb*, 33 Wash. 153, 99 Am. St. Rep. 936, quoting 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 845.

**846. 1. Insurance on Real Estate — Proceeds Are Realty.** — *Matter of Kane*, (Surrogate Ct.) 38 Misc. (N. Y.) 276 (not applicable except in case of deficiency of personality); *O'Brien's Estate*, 19 Pa. Co. Ct. 467; *Callahan's Estate*, 5 Lack. Leg. N. (Pa.) 105. See also *Moore v. McLure*, 124 Ala. 120.

**2. Right of Action for Proceeds.** — Where the policy is payable to the individual or his personal representative, the fund may be sued for by the administrator, though it represents a loss on real estate. *Baldwin v. Pennsylvania F. Ins. Co.*, 206 Pa. St. 248, reversing on other grounds 20 Pa. Super. Ct. 238.

**3. Insurance Money — Policy Payable to Insured or His Legal Representatives.** — *Matter of Miller*, 121 Cal. 353; *Conway v. Carter*, 11 N. Mex. 419; *Leonard v. Harney*, 173 N. Y. 352, reversing 63 N. Y. App. Div. 294; *Pietri v. Seguenot*, 96 Mo. App. 258. See also *Hano's Estate*, 8 Pa. Dist. 353, 22 Pa. Co. Ct. 561.

**4. Statutory Exemption from Debts.** — See *Moore v. McLure*, 124 Ala. 120; *Pietri v. Seguenot*, 96 Mo. App. 258.

Funeral expenses and expenses of administration, such as an attorney's fee to which the administrator is entitled, are not debts, within the meaning of such a statute. *Dobbs v. Chandler*, 84 Miss. 372.

**5. Policy Payable to Third Person Not Assets.** — *Kendrick v. Ray*, 173 Mass. 305, 73 Am. St. Rep. 289; *Matter of Myers*, 36 N. Y. App. Div. 625; *Sterritt v. Lee*, 44 N. Y. App. Div. 619;

**847.** (3) *Mutual Benefit Insurance.* — See note 1.

**848.** *d.* PROPERTY CONVEYED BY DECEDENT IN FRAUD OF CREDITORS. — See notes 1, 2.

*e.* GOVERNMENT CLAIMS — Existing Legal Right. — See note 3.

**849.** *Gratuities or Donations.* — See note 1.

*f.* TRUST PROPERTY. — See notes 2, 3.

Matter of Fay, (Surrogate Ct.) 25 Misc. (N. Y.) 468; Plaut v. Mutual L. Ins. Co., 26 Ohio Cir. Ct. 499; Oertlett's Estate, 21 Pa. Co. Ct. 616, 7 Pa. Dist. 678; Bramlett v. Mathis, 71 S. Car. 123; Hancock v. Fidelity Mut. L. Ins. Co., (Tenn. Ch. 1899) 53 S. W. Rep. 181; Matter of Duncombe, 3 Ont. L. Rep. 510.

**Limitation of Amount.** — Bartram v. Hopkins, 71 Conn. 505.

**Insurer Vested with Right of Choice as to Payee.** — A provision in an insurance policy giving to the insurer the absolute right of choice as to the payee, the amount of the policy, in the event that the right is not exercised, to be paid to the executor or administrator of the insured, is valid and binding; and the legal representative is entitled to recover the amount as assets only where the insurer fails to act under the provision. Cromwell's Estate, 14 Pa. Dist. 404.

**Estoppel of Executor to Claim Proceeds of Policy Payable to Himself.** — An executor who has had the will admitted to probate and has qualified thereunder cannot be heard to set up a claim to the proceeds of a life-insurance policy payable to himself, in opposition to a different disposition of them made by the will; nor in such case can the disposition made by the will be allowed to prejudice the rights of creditors. Henderson's Succession, 113 La. 101.

**847. 1. Mutual Benefit Insurance Not Assets.** — People v. Petrie, 191 Ill. 497, 85 Am. St. Rep. 268, affirming 94 Ill. App. 652, quoting 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 847; Murphy v. Dorsey, 23 Ohio Cir. Ct. 157; Hartz's Estate, 20 Lanc. L. Rev. 25; Compton's Estate, 8 Lack. Leg. N. (Pa.) 320; Gould v. United Traction Employees' Mut. Aid Assoc., 26 R. I. 142.

**A Policy Payable Merely to the "Legal Heirs"** of the decedent is assets of his estate. Matter of Duncombe, 3 Ont. L. Rep. 510. Compare Griffith v. Hawes, 5 Ont. L. Rep. 439.

**In the Absence of Proof of Right as Beneficiary** the proceeds belong to the estate as assets. Rigby's Estate, 18 Pa. Super. Ct. 5.

**848. 1. Statutes — Property Fraudulently Conveyed Is Assets.** — See *infra*, this title, 978. 1 *et seq.*, 1095. 6 *et seq.*

**2. Personal Representative Not Entitled to Recover Property Fraudulently Conveyed.** — See *infra*, this title, 978. 1 *et seq.*, 1095. 6 *et seq.*

**Property Recovered at Suit of Creditors Constitutes Assets.** — In *Missouri*, when a deed executed by the decedent is set aside as fraudulent at the suit of creditors, the property thus recovered is assets in the hands of his personal representative. St. Francis Mill Co. v. Sugg, 169 Mo. 130.

**3. Claims Against the Government Are Assets.** — Massenberg v. Denison, (C. C. A.) 107 Fed. Rep. 18.

**Where an Appropriation Is Specifically Made to the Administrator of the estate the amount ap-**

propriated constitutes estate assets. Nutt v. Forsythe, 84 Miss. 211.

**Land Certificates.** — See Santana Live-Stock, etc., Co. v. Pendleton, (C. C. A.) 81 Fed. Rep. 784. Compare Hovorka v. Havlik, (Neb. 1903) 93 N. W. Rep. 990; Cutler v. Meeker, (Neb. 1904) 99 N. W. Rep. 514. And see *infra*, this title, 1093. 5 *et seq.*

**Arrears of Salary — Circuit Judges.** — *In re Joslyn*, 117 Mich. 442.

**Unpatented Mining Claims under Federal Statutes.** — O'Connell v. Pinnacle Gold Mines Co., 131 Fed. Rep. 106.

**Claims under Federal Homestead and Preemption Laws**, as to which the right to a patent has not accrued, do not constitute assets of the estate. Wittenbrock v. Wheaton, 128 Cal. 150, 79 Am. St. Rep. 32; Gjerstadengen v. Van Duzen, 7 N. Dak. 612, 66 Am. St. Rep. 679; Demars v. Hickey, (Wyo. 1905) 80 Pac. Rep. 521. See also Avila v. Pereira, 120 Cal. 589.

**849. 1. Gratuities from Government Not Assets.** — Tarrt v. Wahl, 77 Ill. App. 578.

**Pensions.** — As supporting the second paragraph of the original note, see Matter of Liddle, (Surrogate Ct.) 35 Misc. (N. Y.) 173; Wilson's Estate, 2 Blair Co. Rep. (Pa.) 351.

Real property purchased with pension money is not exempt after the death of the pensioner, and may be sold for the payment of his debts. Smith v. Blood, 106 N. Y. App. Div. 317.

**French Spoliation Claims.** — See Healey v. Cole, 95 Me. 272.

**2. Property Held in Trust by Decedent Is Not Assets of His Estate.** — *In re Dutard*, (Cal. 1905) 81 Pac. Rep. 519; *In re Richardson*, (Iowa 1904) 100 N. W. Rep. 797; O'Brien v. New England Trust Co., 183 Mass. 186; Matter of Glover, 101 Mo. App. 732, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 849; Ulrici v. Boeckeler, 72 Mo. App. 661; Rockwood v. School Dist., 70 N. H. 388; Farmers' L. & T. Co. v. Pendleton, 179 N. Y. 486, reversing 90 N. Y. App. Div. 607, which affirmed (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 256; Trought's Estate, 12 Pa. Dist. 137; Bickley's Estate, 14 Pa. Dist. 253; *In re Belt*, 29 Wash. 535, 92 Am. St. Rep. 916, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 849. See also Sprague v. Walton, 145 Cal. 228; Deering Harvester Co. v. Keifer, 11 Ohio Cir. Dec. 270, 20 Ohio Cir. Ct. 311; Staib's Estate, 11 Pa. Super. Ct. 447.

**Identity of Fund.** — The identity of a trust fund consisting of money may be preserved so long as it may be followed and distinguished from all other funds, not by identifying the individual pieces or coins, but by showing a separate and independent fund or value, readily distinguishable from all other funds. Elizalde v. Elizalde, 137 Cal. 634.

The mere act by a trustee of mingling trust money with his own by depositing the different moneys in a bank in his individual name, with



**850.** *g.* PROPERTY SUBJECT TO POWER OF APPOINTMENT. — See note 1.

*h.* FOREIGN ASSETS. — See note 3.

**851.** See note 1.

**854.** 3. Assets in Respect to Character as Legal or Equitable — *d.* DISTINCTION ABOLISHED BY STATUTE IN UNITED STATES. — See note 2.

**VI. INVENTORY AND APPRAISAL** — 1. Necessity for Making Inventory — *a.* RULE IN ENGLAND. — See note 3.

*b.* RULE IN UNITED STATES. — See note 4.

*c.* WHEN INVENTORY MAY BE DISPENSED WITH. — See note 5.

**855.** See note 1.

2. Object of Inventory and Appraisal. — See note 2.

3. What Property Inventoried — *a.* IN GENERAL. — See note 3.

nothing done by the banker to distinguish the trust money from the individual money, does not necessarily prevent an identification of the trust fund. Equity will undertake to disentangle the accounts and give to the *cestui que trust* the portion that belongs to him. *Cushman v. Goodwin*, 95 Me. 353.

**849.** 3. Deposit in Trust. — A deposit of money by a person in trust for a person not living at the time, or a deposit in trust for a person living as to which the depositor retains complete dominion over the chose and refrains from making any declaration respecting it or giving any notice concerning it, constitutes assets of his estate on his death and goes to his legal representative. *Nicklas v. Parker*, (N. J. 1905) 61 Atl. Rep. 267. *Contra*, as to a deposit in the name of a living person. *Matter of Totten*, 179 N. Y. 112, reversing 89 N. Y. App. Div. 369.

**850.** 1. Property Subject to Power of Appointment. — *In re Moore*, (1901) 1 Ch. 691; *In re Peacock*, (1902) 1 Ch. 552; *In re Fearnside*, (1903) 1 Ch. 250. See also *In re Dixon*, (1902) 1 Ch. 248; *Waite v. Larocque*, 12 App. Cas. (D. C.) 410. *Contra*, *In re Treasure*, (1900) 2 Ch. 648, where the court said: "Where there is an appointed fund, \* \* \* the executors do not take it by virtue of their office, but because \* \* \* the donee of the power must be considered to have appointed the property to the executors as trustees." Followed in *In re Power*, (1901) 2 Ch. 659; *In re Maddock*, W. N. (1901) 118.

**Limited Power.** — Where the power of appointment is a limited one, a mere power of selection of the persons to whom the property shall go, the estate subject to the power is not assets for the payment of the donee's debts, and his executor, as such, has no right to receive the fund for purposes of distribution. *Solis's Estate*, 14 Pa. Dist. 237.

3. Administration Does Not Extend Beyond Jurisdiction of Court Granting It. — See the title FOREIGN EXECUTORS AND ADMINISTRATORS, 916. 3.

**851.** 1. Collection of Foreign Assets. — *State v. Fulton*, (Tenn. Ch. 1898) 49 S. W. Rep. 297. See generally the title FOREIGN EXECUTORS AND ADMINISTRATORS, 932. 1 *et seq.*, 942. 3 *et seq.*

It is the duty of executors to seek for assets wherever they can be found. *Matter of Newell*, (Surrogate Ct.) 38 Misc. (N. Y.) 563.

**854.** 2. Distinction Abolished by Statute in

United States. — *Elstroth v. Young*, 88 Mo. App. 418.

3. Necessity of Inventory — Rule in England. — It has always been the privilege of an executor or administrator voluntarily to render an inventory in any case in which he is liable to be called upon, and in order to exonerate himself from liability it is always a prudent thing for him to do. *Cunnington v. Cunnington*, 2 Ont. L. Rep. 511.

4. Necessity of Inventory — Rule in United States. — See *In re Belt*, 29 Wash. 535, 92 Am. St. Rep. 916.

5. A Bond Given by an Executor Who Is Also Residuary Legatee. — *In re Vedder*, 122 Mich. 439.

**855.** 1. Power of Testator to Dispense with Inventory. — *Compare Matter of Warner*, 53 N. Y. App. Div. 565.

2. Object of Inventory and Appraisal. — *In re Osburn*, 36 Oregon 8; *In re Bolander*, 38 Oregon 490. To the same effect see *Matter of Huntington*, (Surrogate Ct.) 39 Misc. (N. Y.) 477; *Conser's Estate*, 40 Oregon 138; *Fleming's Estate*, 10 Pa. Dist. 259, 25 Pa. Co. Ct. 269.

An inventory in its origin was a means by which an heir or executor might, in accepting a succession, limit his liability to the property included in the inventory. This original purpose has to some extent affected the use of the inventory; but its use is now regulated by statute and serves various purposes, among which is the securing through probate records of all information relating to estates of deceased persons needful to all persons interested therein and to the court in the performance of its statutory duties. *Hopkins's Appeal*, 77 Conn. 614.

3. Property Exempt from Execution. — In *New York* exempt property must be included in the inventory, the object of including it being to identify it as part of the property of the decedent. *Crawford v. Nassoy*, 173 N. Y. 163, reversing 55 N. Y. App. Div. 433; *Matter of Keough*, (Surrogate Ct.) 42 Misc. (N. Y.) 387.

**Choses in Action.** — In support of the *Maryland* doctrine see *Wrightson v. Tydings*, 94 Md. 358, approving *Shafer v. Shafer*, 85 Md. 561.

**Property Held by the Decedent in Trust**, not being assets of the estate, need not be inventoried in *Washington*, though it comes into the possession of the representative. *In re Belt*, 29 Wash. 535, 92 Am. St. Rep. 916.

**Property Pledged by Decedent.** — Personal property which a decedent in his lifetime hypothe-



**856.** *b.* REAL PROPERTY. — See notes 1, 2.

*c.* PROPERTY FRAUDULENTLY CONVEYED. — See note 4.

*d.* PROPERTY IN FOREIGN JURISDICTION. — See note 5.

**857.** *e.* PARTNERSHIP PROPERTY. — See note 1.

*f.* DEBTS DUE FROM EXECUTOR OR ADMINISTRATOR. — See note 2.

4. Time of Making. — See note 3.

**858.** 5. By Whom Made — Inventory. — See note 3.

Appraisal. — See note 5.

6. Compelling Inventory — Power to Compel. — See note 6.

Who May Require Return of Inventory. — See note 7.

**859.** 7. Correction of Inventory and Appraisal. — See notes 4, 6.

cated as collateral security should not be included in the inventory and appraisal, thus fixing a liability therefor in the executor or administrator. The interest of the estate in the property or the proceeds of its sale, if any, on the settlement of the indebtedness, is a proper subject for an additional inventory. *Moore's Estate*, (Pa. 1901) 48 Atl. Rep. 884, less fully reported in 198 Pa. St. 611.

**856.** 1. Real Estate Not to Be Inventoried Unless Required by Statute. — *Fleming's Estate*, 10 Pa. Dist. 259, 25 Pa. Co. Ct. 269.

2. Statutes Requiring Real Estate to Be Inventoried. — *Noble v. Whitten*, 38 Wash. 262.

Conveyance of Land Absolute in Form but Intended as Mortgage. — Where a conveyance of land, absolute in form, is in fact an equitable mortgage, it may properly be inventoried as real estate of the mortgagee instead of personal property. *Hawes v. Williams*, 92 Me. 483.

4. Property Fraudulently Conveyed by Decedent. — *Marks v. Coats*, 37 Oregon 609.

5. Court May Order Inventory of Foreign Assets. — The probate court may direct an administrator to include in his inventory the personal property of a decedent who is a domiciled resident, wherever situated. *Hopkins's Appeal*, 77 Conn. 644, citing *Gallup's Appeal*, 77 Conn. 617; *Bridgeport Trust Co.'s Appeal*, 77 Conn. 657.

**857.** 1. Discretion of Court. — As supporting the second paragraph of the original note see *Moore's Estate*, (Pa. 1901) 48 Atl. Rep. 884, less fully reported 198 Pa. St. 611.

Partnership Interest — Statutes Requiring Inventory. — See *Esterly v. Rua*, (C. C. A.) 122 Fed. Rep. 609 (construing the *Alaska* statute); *American Tube Works v. Tucker*, 185 Mass. 236; *In re Alfstad*, 27 Wash. 175; *Shelby v. Creighton*, 65 Neb. 485, 101 Am. St. Rep. 630 (construing the *Wyoming* statute).

Value of Interest Incapable of Inventory. — The interest of the deceased partner in the assets of the firm cannot be inventoried and appraised by the administrator or executor as required of assets by the statute, because the surviving partner is entitled to the exclusive possession and control of the assets of the partnership, free from the interference of the executor or administrator of the deceased partner. *Altgelt v. Alamo Nat. Bank*, 98 Tex. 252, reversing on other grounds (Tex. Civ. App. 1904) 79 S. W. Rep. 582.

2. Debt Due from Executor or Administrator Must Be Inventoried. — *Hodge v. Hodge*, 90 Me. 505, 60 Am. St. Rep. 285; *Matter of Davis*, (Surrogate Ct.) 37 Misc. (N. Y.) 326.

3. Time of Making Inventory and Appraisal — *Oregon*. — *Conser's Estate*, 40 Oregon 138.

*Pennsylvania*. — Within thirty days after the grant of letters. *Fleming's Estate*, 10 Pa. Dist. 259, 25 Pa. Co. Ct. 269.

**858.** 3. Administrators De Bonis Non. — In *Ohio* under statute, Rev. Stat. Ohio, § 6023, administrators *de bonis non* need not file an inventory, unless in the opinion of the court it is necessary. *In re Rierdon*, 5 Ohio Dec. 606, 5 Ohio N. P. 516.

5. Appointment of Appraisers in the United States. — In *Mississippi* the administrator has nothing to do with the appointment of appraisers. *O'Brien v. Wilson*, 82 Miss. 93.

A Special Administrator has no authority to have appraisers appointed in the absence of a statute conferring it. *In re Ford*, 29 Mont. 283.

Fees of Appraisers. — See *Fleming's Estate*, 10 Pa. Dist. 259, 25 Pa. Co. Ct. 269.

Appraisement of Property Bequeathed by Will. — The personal property must be appraised though the will gives most of it to the widow. The will may be set aside and the legal representatives required to account for it. *Mayrand v. Mayrand*, 96 Ill. App. 478.

Liability for Failure to Make Appraisal. — The failure to have certain property appraised will not warrant a judgment for damages against the representative, in the absence of evidence that any loss to the estate resulted therefrom. *Lippert v. Lippert*, 110 Iowa 550.

6. Probate Court May Compel Return of Inventory. — *Lewis v. Parrish*, (C. C. A.) 115 Fed. Rep. 285; *Humphrey v. Conger*, 7 App. Cas. (D. C.) 23; *In re Bolander*, 38 Oregon 490.

7. Any Person Interested in the Estate. — *In re Pickands Estate*, 7 Ohio Dec. 476, 5 Ohio N. P. 493.

Creditors of Decedent. — In *New York* it is held that even if a discretionary power could be spelled out from the statute, to require the exhibition of the affairs of the estate on the request of a person holding an unproved and disallowed demand, such discretion should be exercised only where the surrogate is satisfied that the claim is probably meritorious, and that the opposition to it is vexatious and probably unreasonable. *Matter of Huntington*, (Surrogate Ct.) 39 Misc. (N. Y.) 477.

An Heir or Devisee has the right to compel the filing of an inventory of the estate, but no duty rests upon him to do so. *Woodruff v. Snowden*, 10 Ohio Dec. 123, 7 Ohio N. P. 520.

**859.** 4. Rule that Ecclesiastical Courts May Entertain Objections to Inventories. — *Compare Re*

**860.** 8. Additional Inventory. — See note 1.

10. Failure to Make. — See note 7.

**861.** See note 2.

11. Effect of Inventory and Appraisal — *a*. EVIDENCE OF ASSETS. —

See note 3.

**862.** *b*. EVIDENCE OF DECEDENT'S OWNERSHIP. — See note 1.

Russell, 8 Ont. L. Rep. 481, Meredith, J., *dissenting*, holding that in Ontario the Circuit Court has no jurisdiction to determine the ownership of property omitted from the inventory, where the claim that it belongs to the estate is disputed.

**859.** 6. Correction Permitted in United States. — Emerick v. Hileman, 71 Ill. App. 512, *affirmed* 177 Ill. 368; Cronshaw v. Cronshaw, 21 R. I. 54.

**Property Omitted.** — Matter of Goundry, 57 N. Y. App. Div. 232.

In many jurisdictions, however, the rule is otherwise, and an exception lies to an inventory for omission to include assets of the estate. Linthicum v. Polk, 93 Md. 84; Tygard v. Falor, 163 Mo. 234; *In re Glenn*, 23 Ohio Cir. Ct. 297; Moore v. Mertz, (Tex. Civ. App. 1905) 85 S. W. Rep. 312.

The Washington statute does not require property or money to be inventoried, unless it belongs to the estate. The probate court, therefore, has jurisdiction to determine *prima facie* the fact whether or not the property belongs to the estate and is an asset thereof. This adjudication is not binding upon any person afterwards claiming the property in another forum, but is for the purpose only of determining whether the administrator shall be forced to make an inventory thereof. *In re Belt*, 29 Wash. 535, 92 Am. St. Rep. 916.

In Texas the probate court has no jurisdiction to order real estate to be included in an inventory, where the proceeding would involve a trial and determination of the title to the premises. Miers v. Betterton, 18 Tex. Civ. App. 430.

**Striking Property from Inventory.** — The probate court has no power to strike from an inventory property listed by the representative and claimed by him as assets, the possession of which is claimed by another. Such a controversy necessarily involves a pure question of title, which cannot be tried and determined by that court. *In re Bolander*, 38 Oregon 490.

**860.** 1. Rule that Additional Inventory May Be Made. — Hopkins's Appeal, 77 Conn. 644; Bridgeport Trust Co.'s Appeal, 77 Conn. 657; Conser's Estate, 40 Oregon 138; Moore's Estate, (Pa. 1901) 48 Atl. Rep. 884, less fully reported in 198 Pa. St. 611; Texas Loan Agency v. Dingee, 33 Tex. Civ. App. 118. *Contra*, as to the second paragraph of the original note, Moore v. Mertz, (Tex. Civ. App. 1905) 85 S. W. Rep. 312.

**Presumption of Filing.** — Where the statute authorizes a supplementary inventory, the presumption that such inventory was filed will prevail in support of a deed by an administrator conveying property not described in his original inventory. Jamison v. Dooley, 34 Tex. Civ. App. 428.

**7. Evidence of Misconduct.** — See Humphrey v. Conger, 7 App. Cas. (D. C.) 23.

The failure to file an inventory where there was little occasion for it and no injury resulted therefrom will not subject the representative to any penalty, or affect his standing before the court. Mulford v. Mulford, (N. J. 1902) 53 Atl. Rep. 79.

**Omission of Assets from Inventory.** — The wilful omission of assets from an inventory and account of an executor is a fraud or its equivalent. Bohrer's Estate, 7 Pa. Dist. 307.

The fact of a nonappraisal of certain property of the estate cannot affect the validity of the final account if all the property received, or which by reasonable diligence should have been received, has been punctiliously accounted for. If there had never been any inventory or appraisal, and the executor had faithfully and economically administered the whole estate, and had fully and fairly accounted therefor, he would be entitled to an order settling his account and to a discharge. Conser's Estate, 40 Oregon 138.

**861.** 2. Statutory Penalty. — Atwood v. Lockwood, 76 Conn. 555.

**3. Inventory Is Prima Facie Evidence of Assets.** — Matter of Lazarus, 13 Hawaii 242; Porter v. Long, 124 Mich. 584, 7 Detroit Leg. N. 337; Matter of Rogers, 153 N. Y. 316, *affirming* (Supm. Ct. Gen. T.) 36 N. Y. Supp. 1132; Hamm v. Hutchins, 19 Tex. Civ. App. 209; Devine v. U. S. Mortgage Co., (Tex. Civ. App. 1898) 48 S. W. Rep. 585.

The effect of the inventory is to make the representative liable, *prima facie*, for all that it contains, and to throw on him the burden of discharging himself. For this reason, it is more likely to omit what it ought to contain than to contain what ought to be omitted. Fleming's Estate, 10 Pa. Dist. 259, 25 Pa. Co. Ct. 269.

**862.** 1. Not Conclusive as to Decedent's Ownership. — Wood v. Brown, 121 Ga. 471; Tartt v. Wahl, 77 Ill. App. 578; Dodge v. Lunt, 181 Mass. 320; *In re Bayley*, (N. J. 1904) 59 Atl. Rep. 215; Tunncliffe v. Fox, (Neb. 1903) 94 N. W. Rep. 1032; *In re Bolander*, 38 Oregon 490; Siebert v. Steinmeyer, 204 Pa. St. 419; Hart's Estate, 9 Pa. Dist. 274; *In re Belt*, 29 Wash. 535, 92 Am. St. Rep. 916; Filley v. Murphy, 30 Wash. 1.

**Estoppel to Deny Decedent's Ownership.** — Oertlett's Estate, 21 Pa. Co. Ct. 616, 7 Pa. Dist. 678; Gray v. Cockrel, 20 Tex. Civ. App. 324.

That there is no distinction as to estoppel, between a voluntary inventory and one compelled by the court, see Read v. Franklin, (Tenn. Ch. 1900) 60 S. W. Rep. 215.

**Land as Assets.** — An inventory and appraisal of real estate as the property of the decedent constitute *prima facie* evidence that the land is not exempt as homestead property. Hamm v. Hutchins, 19 Tex. Civ. App. 209.

**862.** *c.* EVIDENCE OF VALUE. — See note 2.

**863.** VII. ADMINISTRATION BONDS — 1. Necessity of Bond — *a.* BONDS OF ADMINISTRATORS. — See note 1.

*b.* BONDS OF EXECUTORS — (1) *Rule in England.* — See note 2.

(2) *Rule in United States.* — See note 5.

**864.** Power of Court to Require Bond. — See notes 3, 4.

Facts Authorizing Court to Require Bond. — See note 5.

**865.** See note 1.

*c.* NEW OR ADDITIONAL BONDS. — See note 2.

**866.** Additional Bond on Sale of Real Estate. — See note 2.

**862.** 2. Inventory and Appraisal Prima Facie Evidence of Value. — *Wood v. Brown*, 121 Ga. 471; *Emerick v. Hileman*, 71 Ill. App. 512, affirmed 177 Ill. 368; *Matter of Rogers*, 153 N. Y. 316, affirming (Supm. Ct. Gen. T.) 36 N. Y. Supp. 1132; *Matter of Baker*, (Surrogate Ct.) 27 Misc. (N. Y.) 126; *Matter of Van Sise*, (Surrogate Ct.) 38 Misc. (N. Y.) 155; *Conser's Estate*, 40 Oregon 138; *In re Kalbfell*, 184 Pa. St. 25, 41 W. N. C. (Pa.) 333; *In re Semple*, 189 Pa. St. 385, reversing on other grounds 28 Pittsb. Leg. J. N. S. (Pa.) 431; *Delp v. Edlis*, 190 Pa. St. 25, 43 W. N. C. (Pa.) 535.

**863.** 1. Nonresident Appointed Administrator. — By 2 Code Ga., § 3366, a nonresident appointed administrator under that section is required to give bond. *Jones v. Smith*, 120 Ga. 642. Administrator Appointed on Presumption of Death. — See *Hambright's Estate*, 18 Lanc. L. Rev. 407.

**2. Bonds Not Required of Executors at Common Law.** — *Municipal Ct. v. Whaley*, 25 R. I. 289, 105 Am. St. Rep. 890.

**5. Bond Required unless Dispensed with by Will.** — Naming a person as executor does not, as at common law, make him executor in fact upon the testator's death, but ordinarily gives to him the right only to become such by compliance with the provisions of the statute. *Burlington Protestant Hospital Assoc. v. Gerlinger*, 111 Iowa 293; *In re Van Vleck*, 123 Iowa 80. And an executor has no power to intermeddle with or dispose of the assets by virtue of being named in the will, except under pressing necessity, but must first qualify as required by law. *Wood v. Donaldson*, 87 Mo. App. 1.

**864.** 3. Court May Require Security. — *Betts v. Cobb*, 121 Ala. 154; *Gibson v. Fishback*, 60 S. W. Rep. 396, 22 Ky. L. Rep. 1267; *Busch v. Rapp*, 63 S. W. Rep. 479, 23 Ky. L. Rep. 605; *Matter of Wischmann*, 80 N. Y. App. Div. 520; *In re Sultzbach*, 5 Ohio Dec. 516, 5 Ohio N. P. 218; *Cohen's Estate*, 9 Kulp (Pa.) 116; *Mulley's Estate*, 4 Lack. Jur. (Pa.) 293, 17 York Leg. Rec. (Pa.) 102. See also *Matter of Kason*, 46 N. Y. App. Div. 348.

**Independent Executors or parties taking under wills appointing such executors may be required to give bond on a showing of necessity therefor.** *In re Grant*, 93 Tex. 68; *Farmers', etc., Nat. Bank v. Bell*, 31 Tex. Civ. App. 124; *Roy v. Whitaker*, (Tex. Civ. App. 1898) 50 S. W. Rep. 491; *Morton v. Morris*, (Tex. Civ. App. 1900) 56 S. W. Rep. 559.

**4. Persons Interested May Demand Security.** — *Duggan v. Lamar*, 106 Ga. 855; *McNeely v. McNeely*, 50 La. Ann. 823.

**A Creditor Is Interested.** — *Betts v. Cobb*, 121 Ala. 154.

**5. For Facts Held to Be Insufficient to Warrant an Order for a Bond** see *In re Woolsey*, (N. J. 1904) 59 Atl. Rep. 463.

**865.** 1. Necessity of Bond Determined by Probate Judge. — *Matter of Wischmann*, 80 N. Y. App. Div. 520.

**2. Insufficiency of Former Bond.** — *Elizalde v. Murphy*, 146 Cal. 168; *Bennett v. Kimball*, 175 Mass. 199; *Berkeley v. Kennedy*, 62 N. Y. App. Div. 609. See also *Wilson's Estate*, 9 Pa. Dist. 742.

**Discretion of Court.** — In *Louisiana* it is discretionary with the court to require a personal representative to give an additional bond, but its decision is subject to review. *Weeks's Succession*, 104 La. 573.

**Increase of Penalty to Cover Property Omitted.** — The penalty of a bond may be increased to cover the value of property omitted from the inventory which is not shown to be assets, where it is claimed with some show of reason to belong to the estate. *Matter of Goundry*, 57 N. Y. App. Div. 232.

**If the Estate Has Been Completely Administered** no new bond can be required. *Hanlon v. Wheeler*, (Tex. Civ. App. 1898) 45 S. W. Rep. 821.

**The Fact that an Executor Has Given a Residuary Legatee's Bond** exempts him from giving additional security conditioned on his returning an inventory, where the statute exempts him from rendering an account to the probate court, an inventory being a part of an account from which he is expressly exempted by the statute. *Leonard v. Clark*, 24 R. I. 470.

**866.** 2. Additional Bond on Sale of Real Estate — *California.* — *Slater v. McAvoy*, 123 Cal. 437.

*Iowa.* — *Ellyson v. Lord*, 124 Iowa 125.

*Illinois.* — *Stoff v. McGinn*, 178 Ill. 46; *People v. Huffman*, 182 Ill. 390, reversing on other grounds 78 Ill. App. 345; *Frothingham v. Petty*, 197 Ill. 418.

*Indiana.* — *Rogers v. State*, 26 Ind. App. 144; *Cullen v. State*, 28 Ind. App. 335.

*Maine.* — *Snow v. Russell*, 93 Me. 362, 74 Am. St. Rep. 350; *Snow*, Appellant, 96 Me. 570.

*Michigan.* — *White v. Schaberg*, 131 Mich. 319, 9 Detroit Leg. N. 323.

*Mississippi.* — *Sharpley v. Plant*, 79 Miss. 175, 89 Am. St. Rep. 588.

*Nebraska.* — *Melcher v. Schluter*, (Neb. 1904) 98 N. W. Rep. 1082.

*New York.* — *Matter of Sargent*, 42 N. Y. App. Div. 301, affirming (Surrogate Ct.) 25 Misc. (N. Y.) 261; *Matter of Georgi*, (Surrogate Ct.) 21 Misc. (N. Y.) 419.



**867.** Who May Apply for New Bond. — See note 1.

*d.* BOND OF OFFICER ACTING EX OFFICIO AS PUBLIC ADMINISTRATOR. — See note 4.

*e.* SPECIAL BOND OF SOLE OR RESIDUARY LEGATEE. — See notes 5, 6.

**868.** *g.* FAILURE TO GIVE BOND. — See note 5.

**869.** See note 1.

*h.* CANCELLATION OF BOND. — See note 2.

**2. Validity and Requisites** — *a.* FORM AND RECITALS — In the United States. — See note 4.

**870.** Necessity of Statutory Conditions. — See notes 1, 2.

**871.** See notes 1, 2, 4.

**Public Administrators.** — Healy *v.* Superior Ct., 127 Cal. 659.

**867. 1. Any Person Interested May Apply.** — A person not interested in the assets of an estate has no right to raise any question as to the sufficiency or legality of the surety upon an administrator's bond which has been accepted by the ordinary. Jones *v.* Smith, 120 Ga. 642.

**Creditor.** — The right of a creditor to call for additional security is not determined by the amount of his claim. He has the right to make the demand, if the facts of the case, independently of any consideration of amount of claim, are such as will justify the order. Weeks's Succession, 104 La. 573.

**4. Officer Acting ex Officio Public Administrator Liable on Official Bond.** — Daly *v.* Mallory, 123 Ala. 170; Healy *v.* Superior Ct., 127 Cal. 659; Nickals *v.* Stanley, 146 Cal. 724; Bailey *v.* McAlpin, 122 Ga. 616. See also Brink's Express Co. *v.* O'Donnell, 88 Ill. App. 459. *Contra* of the clerk of the Superior Court in Georgia, Duggan *v.* Lamar, 106 Ga. 855.

**5. Special Bond of Representative Who Is Sole or Residuary Legatee.** — Olson *v.* Fish, 75 Minn. 228; Tilton *v.* Tilton, 70 N. H. 325; Tidd *v.* Bloch, 26 Ohio Cir. Ct. 113; Leonard *v.* Clark, 24 R. I. 470.

In Louisiana the heir accepting the succession unconditionally may be compelled to give security for the debts of the succession or submit to an administration of the property of the deceased. Bray's Succession, 50 La. Ann. 1209; Hart's Succession, 52 La. Ann. 364.

**Illegal Conditions in Bond.** — The bond is not invalidated, so far as the conditions contained therein are lawful, by the addition of unnecessary or illegal conditions. Probate Ct. *v.* Adams, 27 R. I. 97.

**6. Effect of Bond.** — As supporting the second paragraph of the original note see Moody *v.* Davis, 67 N. H. 300; Richardson *v.* Bailey, 69 N. H. 384, 76 Am. St. Rep. 176.

**Substituting Bond in Common Form.** — Olson *v.* Fish, 75 Minn. 228; Adams *v.* Probate Ct., 26 R. I. 239.

**Obligation to Pay Legacies.** — The obligation under a residuary legatee's bond to pay legacies the amounts of which are fixed by the will is absolute, and no suit is required to establish the duty. Probate Ct. *v.* Adams, 27 R. I. 97.

**Effect on Administration.** — By giving the special bond the legatee is for most purposes no less an executor or administrator than he would be if the regular bond had been given. *In re Vedder*, 122 Mich. 439.

**868. 5. Appointment Not Void Because No Bond Was Given.** — Harris *v.* Coates, 8 Idaho 491; Beresford *v.* American Coal Co., 124 Iowa 34; Olson *v.* Fish, 75 Minn. 228; *In re Craigie*, 24 Mont. 41, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 868. See also *supra*, this title, **810. 2.**

**Waiver by Court of Order Requiring Bond.** — See Hendron *v.* Kinner, 110 Iowa 544.

**869. 1. Administration Void for Want of Bond.** — Andrews *v.* Minor, 58 S. W. Rep. 443, 22 Ky. L. Rep. 561. See also Coy *v.* Gaye, (Tex. Civ. App. 1904) 84 S. W. Rep. 441. See also *supra*, this title, **810. 1**, and see in this connection the discussion of the powers of executors and administrators before probate or grant of letters, and the doctrine that letters relate back to the death of the decedent, *infra*, this title, **906. 3 et seq.**

**The Administration Is Suspended.** — Davis *v.* Davis, 72 N. H. 326.

**2. Appointment Not Revoked by Cancellation of Bond.** — Karn *v.* Seaton, 62 S. W. Rep. 737, 23 Ky. L. Rep. 101.

**4. Form of Bond in United States.** — See Robbins *v.* Burrigge, 128 Mich. 25, 8 Detroit Leg. N. 509; Mortenson *v.* Berghold, 64 Neb. 208; Probate Judge *v.* Sulloway, 68 N. H. 511, 73 Am. St. Rep. 619; Adams *v.* Probate Ct., 26 R. I. 239.

**Bond of Executors.** — In Rhode Island the probate judge is authorized to prescribe the form of bond to be given by executors. Chamberlain *v.* Anthony, 21 R. I. 331.

**870. 1. Substantial Compliance with Statute Sufficient.** — Com. *v.* Miller, 195 Pa. St. 230.

**The Bond of an Administrator with the Will Annexed** is sufficient to bind him and his sureties though it is in the form given by an administrator *de bonis non* or by an ordinary administrator. Newberger *v.* Finney, 9 Ohio Cir. Dec. 720, 17 Ohio Cir. Ct. 215; Com. *v.* Miller, 195 Pa. St. 230.

**2. Omission of Name of Estate.** — Where the bond is lost and the record of it is offered in evidence, the omission of the name of the estate will not render it void, its execution not being denied by the sureties. Com. *v.* Remaley, 17 Pa. Super. Ct. 249.

**871. 1. Additional Conditions.** — Probate Ct. *v.* Adams, 27 R. I. 97; Yost *v.* Ramey, 103 Va. 117.

**2. Failure to Recite Amount of Penalty.** — *Contra*, McManus *v.* Harrigan, (Supm. Ct. Tr. T.) 41 Misc. (N. Y.) 615.

**Bond Naming no Obligee.** — Tidball *v.* Young, 58 Neb. 261.

- 872.** *a.* AMOUNT OF PENALTY — In General. — See note 1.  
**873.** Force and Effect of Estimate. — See note 1.  
 Bond in Reduced Penalty. — See note 2.  
 Reducing Penalty After Execution of Bond. — See note 4.  
**874.** *c.* SURETIES — (2) *When Dispensed With.* — See note 4.  
 (3) *Who May Be Sureties — Nonresidents.* — See note 5.  
**875.** See note 1.  
 Attorneys. — See note 2.  
 Husband and Wife. — See note 3.  
 Guaranty Companies. — See note 4.

**Omission of Conditions Required by Law.** — The omission from the bond of conditions required by law does not invalidate it. It binds the obligors to the extent of the legal and unexceptionable conditions which it contains. *Yost v. Ramey*, 103 Va. 117.

**The Rhode Island Statute** in effect specifically declares that the obligations imposed by law shall not be impaired by the circumstance that the bond is imperfect or that an error was committed in giving or accepting it; that the instrument, unless appealed from, shall thereafter be considered for all purposes a bond, and its deficiencies otherwise supplied according to the facts. *Adams v. Probate Ct.*, 26 R. I. 239.

**871. 4. Voluntary Bond.** — *Awtrey v. Campbell*, 118 Ga. 464.

**872. 1. Amount of Penalty in Louisiana.** — *Weeks's Succession*, 104 La. 573.

**873. 1. Penalty Fixed According to Actual Value.** — The inventory is by law made the basis for the security. This, of course, means a correct inventory. If it includes property not belonging to the estate, being made upon a wrong legal basis, it may be made to conform to the facts or the law, and the bond fixed accordingly. To a certain extent there exists some judicial discretion in the original fixing of the amount of the bond. *Weeks's Succession*, 104 La. 573.

**2. Bond in Reduced Penalty.** — Where part of the estate consists of funds in chancery which will be distributed direct to the beneficiaries, security will be required only for the residue. In *Goods of Leach*, 80 L. T. N. S. 170.

**Bond of Administrator Pendente Lite.** — In *New Jersey* the amount of security to be given by an administrator *pendente lite* is a matter within the discretion of the Orphans' Court. In *re Davenport*, 66 N. J. Eq. 300.

**Under Code Civ. Pro. N. Y.**, § 2595, where the value of the estate or fund is so great that the surrogate deems it expedient not to require security in the full amount prescribed by law, he may direct the deposit of any securities belonging to the estate for the payment of money, with the county treasurer or with a trust company, subject to his special order only, and fix the amount of the bond with respect to the value of the remainder of the estate or fund. *Ditmas v. McKane*, 92 N. Y. App. Div. 344.

**4. Depreciation in Value or Disbursement of Assets No Ground for Reduction.** — *Weeks's Succession*, 104 La. 573.

**874. 4. Special Circumstances Necessary.** — Where it seems desirable that the widow of the decedent as administratrix should be allowed to

continue his business, the court, though having no power to authorize her thus to act in administering the estate, may dispense with sureties on her bond. In *Goods of Cory*, (1903) P. 62.

In the case of an estate where all the debts had been paid, and the persons applying for administration were entitled, as the duly constituted legal personal representatives in two other estates, to receive the whole of the residue, the court dispensed with sureties and directed that the bond of the applicants alone should be accepted. In *Goods of Paton*, (1901) P. 188.

**Administration by Assignee in Bankruptcy.** — *Astbury's Estate*, 80 L. T. N. S. 296.

**Administration by Public Officer.** — In *Goods of Best*, (1901) P. 333.

**Administration by Committee of Insane Person.** — Where the committee of an insane person, who has given security as such, takes administration in right of his ward, the grant will be made on his guardian's bond. In *Goods of Unwin*, 87 L. T. N. S. 749.

**Nominee of Board of Education.** — Where a board of education is the residuary legatee named in the will and letters are granted to its nominee, sureties may be dispensed with. *Bryan's Estate*, (1905) P. 88.

**5. Nonresident Sureties.** — In *Goods of Goldschmidt*, 78 L. T. N. S. 763.

**875. 1. Resident Sureties Required by Statute.** — Under 2 Code Ga., § 3366, sureties on the bond of a nonresident appointed administrator under that section are required to be resident citizens of the state. *Jones v. Smith*, 120 Ga. 642.

The *Pennsylvania* Act of March 15, 1832, requires the register of wills to take a bond, with two or more sufficient sureties, inhabitants of the commonwealth, before letters testamentary are issued to an executor who is not an inhabitant of the commonwealth. *McCahan v. Reeder*, 10 Pa. Dist. 298, 25 Pa. Co. Ct. 148.

**2. Attorneys Disqualified by Statute.** — *Beresford v. American Coal Co.*, 124 Iowa 34.

**3. Husband or Wife of Administrator May Be Surety on Administration Bond.** — *Contra*, that the wife of an administrator should not be accepted on his bond, *Weeks's Succession*, 104 La. 573.

**4. Guaranty Companies — Competent as Sureties.** — *Rabasse's Succession*, 54 La. Ann. 590; *Com. v. Miller*, 195 Pa. St. 230; *Clark's Estate*, 10 Pa. Super. Ct. 423, *reversed* on other grounds 195 Pa. St. 520.

**Foreign Surety Companies.** — In *Indiana*, by statute, foreign surety companies may be re-



- 875.** (4) *Number of Sureties.* — See note 6.
- 876.** (5) *Justification of Sureties.* — See note 3.
- d.* EXECUTION — (1) *Signature.* — See note 6.
- 878.** 3. *Custody of Bonds.* — See note 6.
4. *Counter Security.* — See note 7.
- 879.** 5. *Liabilities on Administration Bonds* — *a.* GENERAL NATURE AND EXTENT OF LIABILITIES — The Liabilities of the Sureties. — See note 3.
- 880.** The Bond Is Retrospective. — See note 2.
- Fraud in Procuring Sureties' Signatures. — See note 3.
- Irregular Execution of Bond. — See note 4.
- Irregular Grant of Administration. — See note 5.
- 882.** Joint Bonds. — See note 1.
- The Amount for Which the Sureties May Be Held Liable. — See notes 3, 4.
- b.* PROPERTY COVERED BY BOND — (1) *General Rule.* — See note 6.

ceived as sureties on the bond of personal representatives. *Barricklow v. Stewart*, 31 Ind. App. 446.

**875.** 6. *Effect of Giving Only One Surety.* — A bond given by only one surety is not void, where the surety is a trust company entitled under the law of its incorporation to act as surety on administration bonds. *Com. v. Miller*, 195 Pa. St. 230.

**876.** 3. *Incorporeal Rights* are not to be excluded in determining the competency of a surety, if they are in the state and liable to seizure for the payment of debts. *Weeks's Succession*, 104 La. 573.

6. *Bond Void if Not Signed by Principal.* — *Contra* as to joint and several bonds, *Kenck v. Parchen*, 22 Mont. 519, 74 Am. St. Rep. 625.

*Signature of the Principal in the Body of the Instrument* is a sufficient signing by him. *Kenck v. Parchen*, 22 Mont. 519, 74 Am. St. Rep. 625.

**878.** 6. *Bond Must Be Filed in Proper Office.* — *Richardson v. Whitworth*, 103 Ga. 741.

7. *Counter Security May Be Required.* — *Wright v. Williams*, 93 Md. 66.

**879.** 3. *Liabilities of Sureties Limited by Terms of Bond.* — *People v. Huffman*, 182 Ill. 390, *reversing* on other grounds 78 Ill. App. 345; *People v. Petrie*, 191 Ill. 497, 85 Am. St. Rep. 268, *affirming* 94 Ill. App. 652; *Robbins v. Burrigide*, 128 Mich. 25, 8 Detroit Leg. N. 509; *Com. v. Magee*, 24 Pa. Super. Ct. 329.

*Bond Standing in Lieu of Undertaking on Appeal.* — In *California*, by statute, when a personal representative who has given an official bond appeals from a judgment or order made in proceedings had in the estate of which he is executor or administrator, his official bond stands in the place of an undertaking on appeal. *Matter of McDermott*, 127 Cal. 450.

*Statutory Penalty.* — A provision making an administrator to collect liable for a penalty for failure to turn over to his successor money or property coming into his hands cannot be enforced against the sureties on his bond. *Salomon v. People*, 89 Ill. App. 374, *affirmed* on other grounds 191 Ill. 290.

*Conditions Not Required by Statute.* — It has been held that where the requisites of the bond are fixed by statute, conditions contained in it which the law does not require are void. *Yost v. Ramey*, 103 Va. 117.

**880.** 2. *Bond Is Retrospective.* — The breach of duty as to which the bond is given as se-

curity is the failure to make a final accounting. In this respect the bond of an executor or administrator differs from the bond of a public officer. *Ellyson v. Lord*, 124 Iowa 125.

3. *Fraud in Procuring Sureties' Signatures.* — *Fuller v. Dupont*, 183 Mass. 596; *United Brethren First Church v. Akin*, 45 Oregon 247.

*Duress.* — Where the law requires a bond with certain conditions, the pressure of the court or officer demanding it is not the pressure of official power, but the pressure of the law; and the party who has only complied with a legal obligation will not be heard to say that he did not act voluntarily. *Yost v. Ramey*, 103 Va. 117.

4. *Sureties Estopped to Dispute Terms and Binding Force of Bond.* — *Olson v. Fish*, 75 Minn. 228; *Joy v. Elton*, 9 N. Dak. 428. See also *Adams v. Probate Ct.*, 26 R. I. 239.

5. *Sureties Estopped to Question Regularity of Letters.* — *Nash v. Sawyer*, 114 Iowa 742; *Ellyson v. Lord*, 124 Iowa 125; *Buckner v. Louisville, etc., R. Co.*, 87 S. W. Rep. 777, 27 Ky. L. Rep. 1009; *Joy v. Elton*, 9 N. Dak. 428; *Hoffman v. Fleming*, 66 Ohio St. 143, holding that "in cases where the condition of a deed has reference to any particular thing, the obligor shall be estopped to say there is no such thing." See also *Barney v. Babcock*, 115 Wis. 409.

*Even if the Letters Are Void.* — *Hoffman v. Fleming*, 66 Ohio St. 143.

*Failure to Issue Letters.* — When the court, by proper orders, appoints a person executor or administrator, the appointment is not void though no letters were issued. The letters are simply evidence of the appointment. *Tidd v. Bloch*, 26 Ohio Cir. Ct. 113.

**882.** 1. *Joint Bond of Joint Representatives — Each Liable for Other's Defaults.* — *Speise's Estate*, 21 Lanc. L. Rev. 185; *Municipal Ct. v. Whaley*, 25 R. I. 289, 105 Am. St. Rep. 890. *Compare Palmer v. Ward*, 91 N. Y. App. Div. 440.

3. *Liability of Sureties Coextensive with Liability of Principal.* — *Probate Judge v. Sulloway*, 68 N. H. 511, 73 Am. St. Rep. 619; *United Brethren First Church v. Akin*, 45 Oregon 247.

4. *Liability of Surety Cannot Exceed Penalty of Bond.* — *Bailey v. McAlpin*, 122 Ga. 616.

*Interest on Penalty.* — That interest is recoverable on the penalty of the bond, see *Ellyson v. Lord*, 124 Iowa 125.

6. *All Moneys Received.* — *Lafferty v. Young*, 125 N. Car. 296.



- 883.** (3) *Property Not Received in Representative Capacity.* — See note 3.  
**885.** (5) *Real Estate.* — See note 1.  
 Proceeds of Sale under Power in Will. — See note 2.  
 Statutory Provisions. — See note 4.  
**886.** (6) *Allowances to Decedent's Family.* — See note 2.  
**887.** (7) *Debts Due from Executor or Administrator.* — See notes 1, 2, 4.

**Property Received Before Execution of Bond.** — *Ellyson v. Lord*, 124 Iowa 125.

**883. 3. Property Not Received in Representative Capacity — Sureties Not Liable.** — *Jackson v. Wilson*, 117 Ala. 432; *Nickals v. Stanley*, 146 Cal. 724; *People v. Petrie*, 94 Ill. App. 652, affirmed 191 Ill. 497, 85 Am. St. Rep. 268; *Campbell v. Sacray*, (Ky. 1898) 44 S. W. Rep. 980; *Emmons v. Gordon*, 140 Mo. 490, 62 Am. St. Rep. 734; *Murphy v. Dorsey*, 23 Ohio Cir. Ct. 157; *Gould v. United Traction Employees' Mut. Aid Assoc.*, 26 R. I. 142.

**Dower Interest in Proceeds of Sale of Real Estate.** — *Cullen v. State*, 28 Ind. App. 335.

**Assets of First Estate Received by Administrator of Deceased Executor.** — The sureties on the bond of the administrator of an executor are not liable for the failure of their principal to account for assets of the first estate coming into his hands. *Robbins v. Burrigide*, 128 Mich. 25, 8 Detroit Leg. N. 509. *Contra*, *Clark v. Pence*, 111 Tenn. 20.

**Property Belonging to Third Persons.** — For property of third persons taken and retained by an executor or administrator he may be sued in his representative capacity, and when his liability is established, the sureties are liable on his official bond. *Schmitt v. Jacques*, 26 Tex. Civ. App. 125; *Hill v. Escort*, (Tex. Civ. App. 1905) 86 S. W. Rep. 367. See further *infra*, this title, **943. 2 et seq.**

**885. 1. Sureties Not Liable in Respect to Real Estate — Bond Conditioned to Administer Goods, Chattels, and Credits.** — *Rogers v. State*, 26 Ind. App. 144; *Cullen v. State*, 28 Ind. App. 336; *Campbell v. Sacray*, (Ky. 1898) 44 S. W. Rep. 980; *Jennings v. Parr*, 62 S. Car. 306.

Where the statute does not give to an administrator a right to the possession of the real estate, neither he nor his bondsmen are liable for the rents and profits. In the absence of an agreement, he is responsible only to the heirs. *Russell v. Wheeler*, 129 Mich. 41, 8 Detroit Leg. N. 836.

**Money Adjudged and Received as Personalty.** — Where the court adjudges money to be personalty, and the representative, acquiescing therein, receives it as such, he and his sureties become liable for its safe keeping and proper disposition, although it turns out to have been real assets. *Lafferty v. Young*, 125 N. Car. 296.

**The Sureties on an Additional Bond given after the proceeds of a sale of real property have become a part of the general assets of the estate are liable for the misappropriation of such proceeds.** *Ellyson v. Lord*, 124 Iowa 125.

**2. Proceeds of Real Estate Sold under Will — Sureties Not Liable.** — *People v. Huffman*, 182 Ill. 390, reversing on other grounds 78 Ill. App. 345; *Francisco v. Wingfield*, 161 Mo. 542; *Finley's Estate*, 11 Pa. Dist. 289.

**4. Liability of Sureties Extended by Statute.** —

*Kehnast v. Daum*, 6 Ohio Dec. 401, 4 Ohio N. P. 366.

**In Alabama** executors and administrators are required to give bond with sureties in a sum not less than double the value of the personal property, and double the estimated value of the rent of the real estate of the decedent, for a term of three years, or at the discretion of the judge of probate, in a sum not less than double the estimated value of the real and personal property of the estate. *Griffith v. Rudisill*, (Ala. 1904) 37 So. Rep. 83.

**In Missouri.** — As supporting the second paragraph of the original note, see *Emmons v. Gordon*, 140 Mo. 490, 62 Am. St. Rep. 734; *Francisco v. Wingfield*, 161 Mo. 542; *Lyons v. Lyons*, 101 Mo. App. 494.

**Effect of Special Bond.** — In some jurisdictions requiring a special bond to be given covering the proceeds of real estate sold by an executor or administrator, the remedy on the special bond is exclusive, and no liability attaches to the sureties on the general bond with respect to such proceeds. *People v. Huffman*, 182 Ill. 390, reversing on other grounds 78 Ill. App. 345; *Rogers v. State*, 26 Ind. App. 144; *Cullen v. State*, 28 Ind. App. 335.

In *Iowa* it has been held that where no special bond is given the sureties on the general bond are liable for the proceeds of the sale after they have become a portion of the general assets of the estate. *Ellyson v. Lord*, 124 Iowa 125.

In *Michigan* the special bond is only an additional security, and does not supersede the general bond or affect it in any way. *White v. Schaberg*, 131 Mich. 319, 9 Detroit Leg. N. 323.

**886. 2. Failure to Pay Over the Proceeds of a Life-insurance Policy** exempt by statute and required to be paid to the family will render the sureties liable. *Conway v. Carter*, 11 N. Mex. 419, citing *Kelley v. Mann*, 56 Iowa 625.

**887. 1. Rule that Sureties Are Liable for Debt of Insolvent Representative — Alabama.** — See *Arnold v. Arnold*, 124 Ala. 550.

*Massachusetts.* — *Bassett v. Fidelity, etc., Co.*, 184 Mass. 210, 100 Am. St. Rep. 552.

*New Hampshire.* — *Probate Judge v. Sulloway*, 68 N. H. 511, 73 Am. St. Rep. 619.

*Ohio.* — *James v. West*, 67 Ohio St. 28; *Cheney v. Powell*, 11 Ohio Cir. Dec. 279, 20 Ohio Cir. Ct. 398; *Fox v. Keister*, 9 Ohio Dec. 316, 6 Ohio N. P. 327.

*Oregon.* — *United Brethren First Church v. Akin*, 45 Oregon 247.

**There Is No Distinction Between Executors and Administrators** in the application of the rule in *Ohio*. *James v. West*, 67 Ohio St. 28.

**2. Rule that Sureties Are Not Liable for Debts of Insolvent Representative — California.** — *Matter of Walker*, 125 Cal. 242, 73 Am. St. Rep. 40, distinguishing *Treweek v. Howard*, 105

**888.** *c. ACTS AND FUNCTIONS COVERED BY BOND.* — See notes 5, 6.

**889.** *Executor or Administrator Acting in Other Fiduciary Capacities.* — See note 3.

**890.** See note 2.

*d. BREACH OF BOND* — (1) *Failure to Return Inventory.* — See note 3.

**891.** (2) *Maladministration.* — See note 4.

**892.** See note 3.

Cal. 434; *Sanchez v. Forster*, 133 Cal. 614; *Matter of Thomas*, 140 Cal. 397.

*Kentucky.* — *Buckel v. Smith*, 82 S. W. Rep. 235, 1001, 26 Ky. L. Rep. 494, 991.

*Maryland.* — In Maryland the bond is protected by statute if the administrator or executor was insolvent, or unable to pay his debts at the time of his qualification, but his commissions are applied to the payment of the debt by that section, and if he be a distributee the amount due by him must be deducted whether it was a debt due to the decedent or incurred to the estate itself after the decedent's death. *Linthicum v. Polk*, 93 Md. 84, citing *Hoffman v. Armstrong*, 90 Md. 130.

*Michigan.* — *Sanders v. Dodge*, (Mich. 1905) 103 N. W. Rep. 597, 12 Detroit Leg. N. 137.

*Missouri.* — *Wilson v. Ruthrauff*, 82 Mo. App. 435.

*Nebraska.* — *Howell v. Anderson*, 66 Neb. 575.

*New York.* — *Keegan v. Smith*, 60 N. Y. App. Div. 168, reversing on other grounds (Supm. Ct. App. T.) 33 Misc. (N. Y.) 74, which reversed (N. Y. City Ct. Gen. T.) 31 Misc. (N. Y.) 651, affirmed 172 N. Y. 624; *Matter of David*, (Surrogate Ct.) 44 Misc. (N. Y.) 337.

*Pennsylvania.* — *Bard's Estate*, 13 Pa. Dist. 552, 21 Lanc. L. Rev. 81.

**887. 4. Partial Financial Ability.** — In California the sureties are liable to the extent that the representative, during his administration of the estate, had the financial ability to pay the debt and failed to do so. *Sanchez v. Forster*, 133 Cal. 614; *Matter of Thomas*, 140 Cal. 397.

**Estate as Preferred Creditor.** — If, in law, the representative can prefer one debt over another, which ordinarily may be done, it is his duty to pay the debt to the estate of his decedent, in so far as he is able to do so. *Matter of Walker*, 125 Cal. 242, 73 Am. St. Rep. 40.

**888. 5. Acts and Functions Covered** — **Performance of Duties Imposed by Law.** — *Bailey v. McAlpin*, 121 Ga. 111; *Givens v. Flannery*, 105 Ky. 451.

**Liability in General.** — Sureties on an administration bond are responsible for fidelity and good faith in the management of the trust estate and in the distribution of its funds among those entitled thereto. *Matter of Gall*, 42 N. Y. App. Div. 255.

**6. Acts Beyond Scope of Powers and Duties Not Covered.** — *Bird v. Mitchell*, 101 Ga. 46; *Johnson v. Hall*, 101 Ga. 687; *Campbell v. Sacray*, (Ky. 1898) 44 S. W. Rep. 980; *Russell v. Wheeler*, 129 Mich. 41, 8 Detroit Leg. N. 836; *Emmons v. Gordon*, 140 Mo. 490, 62 Am. St. Rep. 734; *Riggin v. Creath*, 60 Ohio St. 114; *Cheney v. Powell*, 11 Ohio Cir. Dec. 279, 20 Ohio Cir. Ct. 398; *Jennings v. Parr*, 62 S. Car. 306.

**889. 3. Bond Covers Only Duties as Personal Representative.** — *State v. Whitehouse*, 75 Conn.

410; *Freeman v. Brown*, 115 Ga. 23; *People v. Huffman*, 182 Ill. 390, reversing on other grounds 78 Ill. App. 345; *People v. Petrie*, 94 Ill. App. 652, affirmed 191 Ill. 497, 85 Am. St. Rep. 268; *Givens v. Flannery*, 105 Ky. 451.

**If the Two Offices Are Not Clearly Separable.** — *Ehrngren v. Gronlund*, 19 Utah 411.

**A Person Appointed Both Trustee and Executor.** — *People v. Petrie*, 94 Ill. App. 652, affirmed 191 Ill. 497, 85 Am. St. Rep. 268, citing *People v. Huffman*, 182 Ill. 390.

**Sureties Not Estopped by Attitude of Representative Towards Particular Property.** — Language in the petition for letters, the inventory, and receipts given for payments taken by the representative, and the giving by him of a bond fixed in a sufficiently large amount to cover the amount, showing that he thought certain funds to be assets of the estate, are not conclusive upon the sureties that he received and held the money in his representative capacity. *People v. Petrie*, 94 Ill. App. 652, affirmed 191 Ill. 497, 85 Am. St. Rep. 268.

**890. 2. Executor or Administrator Acting in Other Capacities.** — *Ellyson v. Lord*, 124 Iowa 125; *Betts v. Avery*, 46 N. Y. App. Div. 342; *Joy v. Elton*, 9 N. Dak. 428; *Wallber v. Wilmanns*, 116 Wis. 246. Compare *Flannery v. Givens*, (Ky. 1899) 52 S. W. Rep. 962.

Separation and partial administration of the trust fund terminates the relation of personal representative. *Freeman v. Brown*, 115 Ga. 23.

An executor charged with the investment of a fund for a particular purpose does not relieve himself and his sureties from liability for the fund until the investment is actually made. *Ellyson v. Lord*, 124 Iowa 125.

**A Final Settlement.** — *McCloud v. Hewlett*, 135 Cal. 361; *Barney v. Babcock*, 115 Wis. 409.

**3. Failure to Return Inventory Is Breach of Bond.** — *Hodge v. Hodge*, 90 Me. 505, 60 Am. St. Rep. 285. See also *McKim v. Haley*, 173 Mass. 142.

**A Citation to Inventory Assets.** — *Contra*, by statute, *Municipal Ct. v. McCulla*, 21 R. I. 273.

**Return of Imperfect Inventory.** — In *Wilson v. Ruthrauff*, 82 Mo. App. 435, it was held that a failure to inventory property because claimed by the representative himself is a breach of the bond, if it in fact belongs to the estate, however conscientious he may be in making the claim.

**891. 4. Failure to Take Proper Security.** — *State v. Taylor*, 100 Mo. App. 481.

**The Measure of Damages** of the person injured is the difference between what he received and what he should have received if there had been no breach of the bond. His rights are not enlarged by the wrongful act of the administrator. *State v. Taylor*, (Mo. App. 1905) 87 S. W. Rep. 7.

**892. 3. Acts Done at Request of Parties in Interest.** — *Johnson v. Hall*, 101 Ga. 687; *Fuller v. Wilbur*, 170 Mass. 506.



**893.** Waste or Misappropriation. — See note 1.

Failure to Deliver Assets to Successor. — See note 2.

Payment of Debts. — See note 4.

**894.** (3) Failure to Account. — See notes 2, 4.

**893. 1. Waste or Misappropriation Is Breach of Bond.** — *Allen v. Leach*, 7 Del. Ch. 232; *Pollock v. Cox*, 108 Ga. 430; *Braswell v. Brown*, 112 Ga. 740; *Ormes v. Brown*, 22 Ind. App. 569; *Fuller v. Dupont*, 183 Mass. 596; *State v. Taylor*, 100 Mo. App. 481; *Conway v. Carter*, 11 N. Mex. 419; *Mahoney v. Stewart*, 123 N. Car. 106; *Probate Ct. v. Carr*, 20 R. I. 592; *Thompson v. Nowlin*, 51 W. Va. 346. See also *Matter of Feierabend*, (Surrogate Ct.) 38 Misc. (N. Y.) 524.

**Effect of Final Settlement of Account.** — A final settlement of the representative's account and distribution of the assets will not release the sureties to persons whom he wrongfully omitted to make parties thereto, and who subsequently establish a right to share in such assets. *Matter of Gall*, 47 N. Y. App. Div. 490, 42 N. Y. App. Div. 255, 40 N. Y. App. Div. 114.

It would be a farce to hold that the sureties were released when the representative's account was settled and he was directed what to do with the balance, and to hold that they were not liable for his thereafter misappropriating such balance. *Betts v. Avery*, 46 N. Y. App. Div. 342.

**The Expense of Further Administration of an Estate** through an administrator *de bonis non*, necessitated by the removal of the original representative for misappropriating the funds of the estate, is expense for which he and the sureties on his bond are liable. *American Surety Co. v. Piatt*, 67 Kan. 294.

**2. Failure to Deliver Assets to Successor.** — *Hibberd v. Bailey*, (C. C. A.) 129 Fed. Rep. 575, reversing on other grounds *sub nom. In re Wiseman*, 123 Fed. Rep. 185, affirmed (C. C. A.) 129 Fed. Rep. 575; *Salomon v. People*, 191 Ill. 290, affirming 89 Ill. App. 374; *Nash v. Sawyer*, 114 Iowa 742; *Flanagan v. Fidelity, etc., Co.*, (Supm. Ct. Spec. Ct.) 32 Misc. (N. Y.) 424; *Rutenic v. Hamakar*, 40 Oregon 444.

**Failure After Revocation of Letters.** — While the revocation of letters of administration terminates the authority of the administrator as the representative of the estate, his liability on account of acts done while in office, or the retention of assets of the estate after removal, does not cease, and therefore the sureties on his official bond are just as much bound for his failure to account for the assets of the estate in his hands at the time of removal as they are for his misappropriation of assets while in office. *Bailey v. McAlpin*, 122 Ga. 616.

**4. Statutory Right of Creditor to Sue on Bond.** — See *infra*, this note. See also *infra*, this title, 900. 1, 2.

The Maryland statute in force in the *District of Columbia* requires that before action on the bond, execution on the judgment against the administrator must have been returned *nulla bona*, or showing made of such insolvency, etc., as would render the creditor remediless. *American Bonding, etc., Co. v. U. S.*, 23 App. Cas. (D. C.) 535.

In *Rhode Island* a creditor cannot sue upon

the bond unless the executor or administrator shall refuse or neglect to pay, or shall fail to show reasonable cause therefor after being cited before the probate court, and he must first have his debt ascertained by judgment unless the same shall have been allowed otherwise. *Probate Ct. v. Williams*, 23 R. I. 515, explaining *Municipal Ct. v. McCulla*, 21 R. I. 273; *Municipal Ct. v. Wilbour*, 23 R. I. 95.

**Failure to Pay Debts Approved and Ordered to Be Paid Is Breach.** — *Com. v. Kean*, 19 Pa. Super. Ct. 576; *Roberts v. Weadock*, 98 Wis. 400.

No direct order to pay is necessary, the allowance of the claim constituting a judgment binding the parties. *Johanson v. Hoff*, 70 Minn. 140.

**A Claim Must Be Duly Established.** — In *Massachusetts* there is no breach of the bond until the debt has been established by a judgment and the administrator has refused to pay the judgment on demand. *McIntire v. Cottrell*, 185 Mass. 178.

**Community Property.** — In *Louisiana* a husband administering community property after the death of the wife is absolutely bound for the payment of debts of the community, and if he fails in his duty, he is responsible on his bond. *Irwin v. Flynn*, 110 La. 829.

**Sufficiency of Assets to Discharge Judgment Obtained in Action to Enforce Debt.** — A judgment in an action against a personal representative to enforce a debt or liability of his intestate is not binding on the sureties on his bond, so as to preclude or estop them from denying that the administrator had come into possession of assets with which to discharge the indebtedness. *Woodall v. Wright*, (Ala. 1904) 37 So. Rep. 846.

**Expense of Administration Allowed.** — Failure to distribute to an attorney an amount allowed and ordered paid out of the assets as an attorney's fee is a breach of the bond for which the attorney may sue. *Smith v. Rhodes*, 68 Ohio St. 500.

**A Voluntary Payment by Sureties of the amount of the bond to a distributee does not discharge their liability as against creditors.** *Com. v. Kean*, 13 Pa. Super. Ct. 167.

**894. 2. Failure to Account Is Breach of Bond** — *Slater v. McAvoy*, 123 Cal. 437; *Hodge v. Hodge*, 90 Me. 505, 60 Am. St. Rep. 285; *McKim v. Haley*, 173 Mass. 112; *Fuller v. Wilbur*, 170 Mass. 506.

**Curing Failure.** — See *Lippert v. Lippert*, 110 Iowa 550; *Fuller v. Dupont*, 183 Mass. 596.

**A Statutory Penalty for failure of an executor to account, recoverable in a civil action on his bond, exists in Iowa.** *Lippert v. Lippert*, 110 Iowa 550.

**4. No Breach until Citation to Account Is Disobeyed.** — *Municipal Ct. v. McCulla*, 21 R. I. 273, explained in *Probate Ct. v. Williams*, 23 R. I. 515; *Probate Ct. v. Potter*, 24 R. I. 274. Compare *Slater v. McAvoy*, 123 Cal. 437.

**No Formal Decree Requiring an Account is necessary.** It is enough that the representative has



- 895.** (4) *Failure to Distribute or Pay Legacies.* — See notes 1, 2.  
*Failure to Pay a Legacy.* — See note 3.  
*e. RELEASE OR DISCHARGE OF SURETIES — (1) In General.* — See note 4.
- 896.** *So, Too, an Alteration of the Bond.* — See note 1.  
 (2) *Discharge of Principal.* — See note 3.
- 897.** (3) *Death of Surety.* — See note 2.  
 (4) *Giving New Bond.* — See note 3.  
 (5) *Release by Order of Court.* — See note 4.
- 898.** See note 2.  
 (6) *Statute of Limitations.* — See note 3.

been ordered to state his accounts and has neglected to do so. *Fuller v. Cushman*, 170 Mass. 286.

**895. 1. Failure to Distribute — Not Breach unless Distribution Has Been Deceaded.** — *Scruggs v. Scruggs*, 105 Fed. Rep. 28; *Ganser v. Ganser*, 83 Minn. 199, 85 Am. St. Rep. 461; *State v. Probate Ct.*, 84 Minn. 289; *Kirk v. Baker*, 26 Mont. 190; *Mortenson v. Berghold*, 64 Neb. 208. See also *Lydick v. Chaney*, 64 Neb. 288; *infra*, this title, 900. 1.

**Failure to Pay an Allowance Deceaded to the Widow.** — *Braswell v. Brown*, 112 Ga. 740.

**2. Neglect to Apply for Decree of Distribution.** — *Probate Ct. v. Carr*, 20 R. I. 592; *Municipal Ct. v. McCulla*, 21 R. I. 273.

**3. Failure to Pay Legacy Is Breach of Bond.** — *State v. Babb*, 77 Mo. App. 277; *Probate Ct. v. Williams*, 23 R. I. 515.

**4. Joint Bonds.** — Under a statute permitting the obligee in an administrator's bond to sue all or any one or more of the obligors, where an action is commenced against the principal and surety, its dismissal as to the principal will not discharge the surety from liability. *McAllister v. People*, 28 Colo. 156.

A judgment against the executor or administrator by confession or default, in a suit on a joint bond, does not have the effect of discharging the sureties. *Blagden v. U. S.*, 18 App. Cas. (D. C.) 370.

**Voluntary Surrender of Means to Satisfy Claim.** — Where the person injured by the default of the representative has the means of satisfaction of the claim in his hands, and voluntarily surrenders it, he thereby discharges the sureties to the extent of such means. *Eddy v. People*, 187 Ill. 304, *reversing* 88 Ill. App. 265.

**Release of Surety.** — A release of one surety does not discharge the others under a statutory provision that "a release of one of two or more joint debtors does not extinguish the obligation of any of the others," whether the release results from operation of law or by the direct act of the party with whom or for whose benefit the obligation was entered into. *Elizalde v. Murphy*, 146 Cal. 168.

**896. 1. Alteration of Bond Releases Sureties.** — See *In Goods of Cowardin*, 86 L. T. N. S. 261.

**3. A Discharge Procured by Fraud** practiced on the probate court will not release the sureties from liability. *Pollock v. Cox*, 108 Ga. 430.

**897. 2. Death of Surety Does Not Discharge Liability.** — *Ransom v. Brinkerhoff*, 56 N. J. Eq. 149, *reversed* 57 N. J. Eq. 312; *Crim v. England*, 46 W. Va. 480, 76 Am. St. Rep. 826.

**3. Effect of New Bond.** — The sureties on an administrator's bond are not discharged by the execution of a new bond, though the latter was intended as a substitute for the former, if the new bond is void by reason of fraudulent alterations. *Elizalde v. Murphy*, 146 Cal. 168.

**4. Release by Order of Court on Application of Surety.** — *Matter of Sogaard*, (Surrogate Ct.) 39 Misc. (N. Y.) 519.

**Only Subsequent Defaults.** — *Wiemann v. Mainegra*, 112 La. 305.

**Where No Future Breach** could by any possibility occur, no new bond will be required. *Matter of Lawyers' Surety Co.*, (Surrogate Ct.) 25 Misc. (N. Y.) 136.

**898. 2. Power to Release Sureties Is Statutory.** — Query whether the statute applies to special bonds, required to be given by an administrator before selling real estate. *Matter of Lawyers' Surety Co.*, (Surrogate Ct.) 25 Misc. (N. Y.) 136.

**3. Statute of Limitations.** — *Street v. Henry*, 124 Ala. 153, *Presley v. Weakley*, 135 Ala. 517, 93 Am. St. Rep. 39; *Hall v. Cole*, 71 Ark. 601; *Pollock v. Cox*, 108 Ga. 430; *Craddock v. Payton*, 114 Ky. 298; *Smith v. Hardesty*, 83 S. W. Rep. 646, 26 Ky. L. Rep. 1266; *Olson v. Fish*, 75 Minn. 228; *Ganser v. Ganser*, 83 Minn. 199, 85 Am. St. Rep. 461, *overruling* *Wood v. Myrick*, 16 Minn. 494; *Betts v. Avery*, 46 N. Y. App. Div. 342; *Gilbert v. Marsh*, 7 Ohio Dec. 230, 4 Ohio N. P. 338; *Com. v. Miller*, 195 Pa. St. 230.

**A Right of Action Accrues to a Distributee.** — *Mortenson v. Berghold*, 64 Neb. 208.

**Effect of Laches on Suit in Equity.** — See *Street v. Henry*, 124 Ala. 153, *approving* *Rives v. Morris*, 108 Ala. 527; *Presley v. Weakley*, 135 Ala. 517, 93 Am. St. Rep. 39; *Brinkerhoff v. Ransom*, 57 N. J. Eq. 312, *reversing* 56 N. J. Eq. 149.

**Statutes of Nonclaim.** — The special statute of limitations does not operate as a bar to the maintenance of the action. That relates to suits or claims by creditors, and not to an action upon the bond of the representative. *Fuller v. Dupont*, 183 Mass. 596.

An action against an heir or legatee of a surety on an executor's bond is not barred because no claim was filed against the estate of the surety, where it appears that the executor's account was not filed until after the surety's estate was settled. An executor's liability continues until his account is settled and the estate is fully administered. *Wallber v. Wilmanns*, 116 Wis. 246.

**Public Administrators.** — A public administra-

**898. f. REMEDIES AGAINST SURETIES — (i) At Law — (a) Who May Sue.** — See note 4.

**899. An Administrator de Bonis Non.** — See notes 1, 2.

**900. (b) When Right of Action Accrues.** — See notes 1, 2.

tor, as to his rights, duties, and liabilities, stands exactly on the same legal footing as an ordinary administrator, and is not within a statute limiting the time within which actions must be brought upon the bond of a sheriff, coroner, "or other officer." *State v. Ennis*, 79 Mo. App. 12, 2 Mo. App. Rep. 346.

**898. 4. Who May Sue on Bond — Any Person Interested in Estate.** — See *Gilbert v. Marsh*, 7 Ohio Dec. 230, 4 Ohio N. P. 338; *Probate Ct. v. Potter*, 22 R. I. 326.

**Assignee of Legatee or Distributee May Sue.** — *Jacobs v. Bogart*, 128 Ala. 678.

A valid assignment of a distributive share is a defense to an action on the bond brought by the assignor. *Drew v. Provost*, (Me. 1905) 60 Atl. Rep. 794.

**Heirs at Law May Sue.** — *Williams v. Lancaster*, 113 Ga. 1020.

**899. 1. Administrator de Bonis Non Cannot Sue at Common Law on Bond of Predecessor.** — *State v. Fidelity, etc., Co.*, 100 Md. 256; *Parker v. Stevens*, 61 N. J. Eq. 163.

**Refusal of Predecessor to Deliver Unadministered Assets.** — That an administrator *de bonis non* may sue on his predecessor's bond for failure to deliver unadministered assets, see *Meservy v. Kalloch*, 97 Me. 91.

**2. Statutory Right of Administrator de Bonis Non to Sue on Bond of Predecessor — California.** — *Slater v. McAvoy*, 123 Cal. 437.

*Georgia.* — *Bailey v. McAlpin*, 122 Ga. 616.

*Indiana.* — *Sheeks v. State*, 156 Ind. 508; *Ormes v. Brown*, 22 Ind. App. 569; *Michigan Trust Co. v. Probascio*, 29 Ind. App. 109.

*Iowa.* — *Ellyson v. Lord*, 124 Iowa 125.

*Missouri.* — *Francisco v. Wingfield*, 161 Mo. 542.

*New York.* — *Dunne v. American Surety Co.*, 43 N. Y. App. Div. 91; *Matter of Scudder*, (Surrogate Ct.) 21 Misc. (N. Y.) 179; *Flanagan v. Fidelity, etc., Co.*, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 424; *Dunne v. American Surety Co.*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 584.

*Ohio.* — *Jones v. Willis*, 66 Ohio St. 114.

*Oregon.* — *Herren's Estate*, 40 Oregon 90.

*Pennsylvania.* — *Com. v. Wood*, 14 Pa. Dist. 509; *Hibberd v. Bailey*, (C. C. A.) 129 Fed. Rep. 575, *reversing* on other grounds *sub nom. In re Wiseman*, 123 Fed. Rep. 185 (construing the *Pennsylvania* statute).

*Texas.* — *Strickland v. Sandmeyer*, 21 Tex. Civ. App. 351.

**Kansas Statute.** — In Kansas the action may be brought only when the former administrator has resigned or has been removed, or when his letters have been revoked. It is brought for the benefit of all creditors and of every one else interested in the estate. *American Surety Co. v. Piatt*, 67 Kan. 294. See also *Hudson v. Barratt*, 62 Kan. 137.

**900. 1. Judgment or Decree Essential to Right of Action — Alabama.** — *Presley v. Weakley*, 135 Ala. 517, 93 Am. St. Rep. 39.

*California.* — *Reither v. Murdock*, 135 Cal. 197; *Nickals v. Stanley*, 146 Cal. 724.

*Kentucky.* — *Craddock v. Payton*, 114 Ky. 298.

*Maine.* — *Drew v. Provost*, 98 Me. 422.

*New York.* — *Scharmann v. Schoell*, 38 N. Y. App. Div. 528; *Garvey v. U. S. Fidelity, etc., Co.*, 77 N. Y. App. Div. 391.

*Oregon.* — *Herren's Estate*, 40 Oregon 90.

*Utah.* — *Reed v. Hume*, 25 Utah 248.

In *Louisiana* the necessary conditions precedent to recourse against the sureties include in the main the recovery of final judgment against the administrator or executor, the issue of an execution, and the return *nulla bona* after due diligence to make the money and the calls on the parties. *Hayes v. Dugas*, 51 La. Ann. 447; *Wiemann v. Mainegra*, 112 La. 305.

**Two Prior Judgments Required.** — Otherwise now by statute in *Virginia* and *West Virginia*. *Thompson v. Mann*, 53 W. Va. 432.

**2. An Exception to the Rule.** — *Slater v. McAvoy*, 123 Cal. 437; *American Surety Co. v. Piatt*, 67 Kan. 294. See also *Bailey v. McAlpin*, 122 Ga. 616; *Dunne v. American Surety Co.*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 584. And see generally *infra*, this title, **902. 3.**

**Actions by Creditors.** — See *supra*, this title, **893. 4.**

**Effect of Decree.** — In *New York*, in respect to the liability of the sureties, a decree against the executor or administrator has the same effect as if an execution had been issued against the decedent in his lifetime and had been returned unsatisfied. *Code Civ. Pro. N. Y.*, § 2606; *Matter of Scudder*, (Surrogate Ct.) 21 Misc. (N. Y.) 179.

**Effect of Admission of Amount Due.** — Where the sum due from the personal representative is admitted by the surety, a decree of the judge of probate establishing and ordering payment is not necessary to a suit on the bond. *Probate Judge v. Sulloway*, 68 N. H. 511, 73 Am. St. Rep. 619; *Ransom v. Brinkerhoff*, 56 N. J. Eq. 149, *reversed* on other grounds 57 N. J. Eq. 312.

**A Notice to the Sureties of the default of the principal is not necessary to complete a breach of the bond.** *Ransom v. Brinkerhoff*, 56 N. J. Eq. 149, *reversed* on other grounds 57 N. J. Eq. 312.

**Preliminary Judgment or Decree Not Necessary.** — *Bailey v. McAlpin*, 122 Ga. 616; *In re Pound*, 166 Mo. 419. See also *Williams v. Lancaster*, 113 Ga. 1020; *Awtrey v. Campbell*, 118 Ga. 464. *Contra* in *Georgia* of a suit by a creditor, to which, however, certain exceptions prescribed by statute exist. *Richardson v. Whitworth*, 103 Ga. 741.

In *Georgia*, under the Act of December 13, 1820, as construed by the courts, judgment must have been obtained against the personal representative before suit could be brought on his bond. Prior to that act two judgments must have been obtained against him, one in his representative and the other in his individual capacity. Under the existing statutes as codified in 1863 and 1868, however, a suit



**901.** There Must Also Be a Present Right. — See note 1.  
(c) Evidence. — See note 2.

may be brought against an administrator and the sureties on his bond in the first instance, and it is not necessary to establish a liability against him either in his representative or individual capacity by judgments in prior suits. *Bailey v. McAlpin*, 122 Ga. 616.

Before suing on a bond under Pub. Stat. Mass., c. 143, § 13, for mismanagement of the estate and failure to render an account after being cited to do so, it is not required that demand be made upon the personal representative, or that his default shall be established by a judgment against him. *Fuller v. Dupont*, 183 Mass. 596.

In *New Hampshire* an action will lie on the bond at any time after a breach, though parties in interest may not have their claims in such condition as will entitle them to the benefit of the security. Judgment goes for the full amount of the penalty and stands as security for all persons who subsequently establish claims in the probate court. *Probate Judge v. Lee*, 72 N. H. 247, citing *Probate Judge v. Lane*, 51 N. H. 342.

Under Stat. Wis., § 4014, providing that the County Court may permit an action on an executor's bond when the amount due has been ascertained and ordered paid, if the executor shall neglect to pay it when demanded, it is not necessary that a devastavit and default be determined against the executor before the commencement of an action on the bond. *Wallber v. Wilmanns*, 116 Wis. 246, modifying *Barth v. Graf*, 101 Wis. 27.

**Action by Residuary Legatees.** — Under Gen. Laws R. I., c. 218, § 29, giving to a residuary legatee the right to bring an action of account or in the nature of an action of account against the executor, and providing that such right is without prejudice to any other remedies, such legatee may sue on the executor's bond without first obtaining judgment against the executor. *Probate Ct. v. Potter*, 22 R. I. 326, *distinguishing Drown v. Staples*, 18 R. I. 117.

**901. 1. Time of Distribution Postponed by Will.** — See *Freeman v. Brown*, 115 Ga. 23.

**2. Evidence — Judgment or Decree Against Principal Conclusive Against Sureties — Alabama.** — *Street v. Henry*, 124 Ala. 153; *Presley v. Weakley*, 135 Ala. 517, 93 Am. St. Rep. 39.

*District of Columbia.* — See *American Bldg., etc., Co. v. U. S.*, 23 App. Cas. (D. C.) 543, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 901.

*Illinois.* — *People v. Huffman*, 182 Ill. 390, reversing on other grounds 78 Ill. App. 345.

*Iowa.* — *Carpenter v. U. S. Fidelity, etc., Co.*, 123 Iowa 209.

*Kentucky.* — *Frazer v. Frazer*, 76 S. W. Rep. 13, 25 Ky. L. Rep. 473.

*Louisiana.* — *Contra, Wiemann v. Mainegra*, 112 La. 305, holding that while the record of the succession is good evidence in a suit against the sureties, as to the manner and result of the administration, and the judgment is conclusive in their favor in so far as that no judgment for a greater amount can be rendered against them, they are *res inter alios acta* and not conclusive

against them whether as to the fact or the extent of the breach of the obligation.

*Massachusetts.* — *Fuller v. Cushman*, 170 Mass. 286; *McKim v. Haley*, 173 Mass. 112; *Bassett v. Fidelity, etc., Co.*, 184 Mass. 210, 100 Am. St. Rep. 552.

*Missouri.* — *State v. Kennedy*, 163 Mo. 510.

*Montana.* — *Kenck v. Parchen*, 22 Mont. 519, 74 Am. St. Rep. 625.

*Nebraska.* — See *Mortenson v. Berghthold*, 64 Neb. 208.

*New Mexico.* — *Conway v. Carter*, 11 N. Mex. 419.

*New York.* — *Matter of Lawson*, 42 N. Y. App. Div. 377.

*North Dakota.* — *Joy v. Elton*, 9 N. Dak. 428, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 901.

*Ohio.* — *Smith v. Rhodes*, 68 Ohio St. 500.

*Oklahoma.* — *Greer v. McNeal*, 11 Okla. 519.

*Oregon.* — *United Brethren First Church v. Akin*, 45 Oregon 247, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 901.

*Pennsylvania.* — *Yung's Estate*, 199 Pa. St. 35, affirming 9 Pa. Dist. 476; *Com. v. Ruhl*, 199 Pa. St. 40; *Com. v. Wood*, 14 Pa. Dist. 509.

*Utah.* — *Ehrngren v. Gronlund*, 19 Utah 411.

*Wisconsin.* — *Barney v. Babcock*, 115 Wis. 409; *Wallber v. Wilmanns*, 116 Wis. 246.

**The Reason.** — *Joy v. Elton*, 9 N. Dak. 428.

By whatever decree of the probate court the principal is bound, the sureties are bound. This is because they are privies to the decree, and have, in legal effect, so stipulated in the bond. *Probate Judge v. Sulloway*, 68 N. H. 511, 73 Am. St. Rep. 610.

**Judgment on Claim Barred by Limitation.** — *McKim v. Haley*, 173 Mass. 112.

**Fraud or Collision.** — *McKim v. Haley*, 173 Mass. 112.

**Effect of Subsequent Settlement in Probate Court.** — *McIntire v. Cottrell*, 185 Mass. 178.

**An Order Granting Leave to Sue the Sureties** is not *res judicata* on the merits of the claim claim against them. *Robbins v. Burrigide*, 128 Mich. 25, 8 Detroit Leg. N. 509, citing *Perkins v. Cheney*, 114 Mich. 568, *distinguishing Clark v. Fredenburg*, 43 Mich. 263.

**A Settlement by the Successor of an Executor or Administrator** whether an administrator *de bonis non* or the personal representative of a deceased executor or administrator, is not binding on the sureties on the bond of his predecessor in the administration. As to them it would be *res inter alios acta*. They are not bound by acts done by the personal representatives or successors of their principal, for whose fidelity they have not promised to answer. No judicial ascertainment of the liability of an administrator after his death can be binding upon his sureties unless they are parties to the proceeding. *Street v. Henry*, 124 Ala. 153; *Presley v. Weakley*, 135 Ala. 517, 93 Am. St. Rep. 39; *Reither v. Murdock*, 135 Cal. 197; *Probate Judge v. Sulloway*, 68 N. H. 511, 73 Am. St. Rep. 610; *Herren's Estate*, 40 Oregon 00.

**Decree Against Representative for Debt Due by**



**902.** See note 1.

(2) *In Equity*. — See note 3.

**903.** VIII. POWERS, DUTIES, AND LIABILITIES IN GENERAL — 1. Summary of Duties. — See note 1.

**Him to Estate.** — In *New York*, where a representative is not liable for a debt due from him to the estate, if he is insolvent at the time of his appointment and during the continuance of the administration, it is held that a judgment against him on his accounting is *prima facie* binding on his sureties, placing on them the burden of proving inability, but is not conclusive. *Keegan v. Smith*, 60 N. Y. App. Div. 168, *reversing* (Supm. Ct. App. T.) 33 Misc. (N. Y.) 74, *affirming* (N. Y. City Ct. Gen. T.) 31 Misc. (N. Y.) 651, *affirmed* 172 N. Y. 624.

**Failure of Representative to Defend Action or Suit.** — Where the executor or administrator has neglected to make any kind of a defense which could legally have been made, such as a plea of the statute of limitations, of *nulla bona*, or *plene administravit*, it has been held that the sureties are entitled to make it and have their day in court thereon. *Burgess v. Young*, 97 Me. 386.

**Sureties as Parties to Proceeding to Settle Account.** — In *New York* it is compulsory upon the accounting representative to make the sureties upon his official bond parties to his proceeding for an accounting. *Matter of Sill*, (Surrogate Ct.) 41 Misc. (N. Y.) 270.

**Judgment or Decree in Favor of Principal.** — A judgment in favor of the principal is necessarily conclusive in favor of the surety, since the liability of the principal is the only basis upon which that of the surety can be predicated; and for the same reason a judgment against the principal is conclusive in favor of the surety in so far as that no judgment for a greater amount can be rendered against him. *Wiemann v. Maineagra*, 112 La. 305. To similar effect see *Richardson v. Whitworth*, 103 Ga. 741.

**902. 1. Judgment or Decree Against Principal Only Prima Facie Evidence Against Sureties.** — *Brown v. Wiley*, 107 Ga. 85.

**Sufficiency of Assets of Estate to Satisfy Judgment.** — A judgment fixing the amount to be allowed for the support of the family of the decedent is neither conclusive nor *prima facie* evidence that the representative has sufficient assets with which to pay it, no such issue being triable in the proceeding. *Wood v. Brown*, 121 Ga. 471.

In *West Virginia* it is held that under general principles of law, the judgment or decree is conclusive as to its own existence and the amount and justness of the debt, but is only *prima facie* evidence on the question of the sufficiency of the assets of the estate to satisfy it. *Crim v. England*, 46 W. Va. 480, 76 Am. St. Rep. 826.

**3. Cases Affirming Equitable Jurisdiction.** — *Keith v. McCord*, 140 Ala. 402; *Slater v. McAvoy*, 123 Cal. 437; *American Surety Co. v. Piatt*, 67 Kan. 294; *Scharmann v. Schoell*, 23 N. Y. App. Div. 398, 38 N. Y. App. Div. 528; *Dunne v. American Surety Co.*, 43 N. Y. App. Div. 91, 34 Misc. (N. Y.) 584; *Thompson v. Nowlin*, 51 W. Va. 346; *Thompson v. Mann*, 53 W. Va. 432.

**903. 1. Duties in General — Indiana.** — *Bruning v. Golden*, 159 Ind. 199.

*Kentucky.* — *Holburn v. Pfannmiller*, 114 Ky. 831; *Burbank v. Duncan*, (Ky. 1899) 53 S. W. Rep. 19.

*Minnesota.* — *Granger v. Harriman*, 89 Minn. 303.

*New York.* — *Matter of Te Culver*, (Surrogate Ct.) 22 Misc. (N. Y.) 217; *Matter of Fidelity Loan, etc., Co.*, (Surrogate Ct.) 23 Misc. (N. Y.) 211; *Matter of Thompson*, (Surrogate Ct.) 41 Misc. (N. Y.) 420, *affirmed* 87 N. Y. App. Div. 609, 178 N. Y. 554.

*Ohio.* — *West v. Dean*, 8 Ohio Cir. Dec. 797, 15 Ohio Cir. Ct. 261; *Matter of Wolfe*, 7 Ohio Dec. 220, 4 Ohio N. P. 336.

*Virginia.* — *Breckinridge v. Breckinridge*, 98 Va. 561.

An executor or administrator is a trustee of a special class having certain special duties. His duty primarily is to administer the personal estate by getting in the assets of the decedent and paying debts and legacies therefrom, but some other duties may be added without making him anything but an executor or administrator. Thus, an executor may be required to defer payment of a legacy for any specified time, or during the life of a designated person, and in the meantime to apply the income to the use of the beneficiary, and he will, notwithstanding, be an executor. *Matter of Post*, (Surrogate Ct.) 30 Misc. (N. Y.) 551.

**Representative Character of Executors and Administrators — In General.** — An administrator is charged with the duty of protecting the estate against unjust claims and demands. He is the representative of every person interested in the estate, and as such has the undoubted right to test the accuracy of the judgments and orders of the County Court in the allowance of claims against the estate. *Herman v. Beck*, (Neb. 1903) 94 N. W. Rep. 512.

Administrators stand in the place, and are regarded as the representatives, of the deceased person for the purpose of adjusting and settling his business affairs and distributing his estate among those entitled thereto; and they are deemed to stand in the position of trustees for all the persons interested in the estate, whether as creditors, next of kin, or otherwise. *Matter of Miner*, (Surrogate Ct.) 39 Misc. (N. Y.) 605.

**Actions for Recovery of Immovable Property.** — In *Louisiana*, where the heirs have not accepted the succession and there are creditors of the estate, the administrator may stand in judgment for the protection of the rights of the persons interested, in suits for the recovery of immovable property. *Vicksburg, etc., R. Co. v. Tibbs*, 112 La. 51; *Williams v. Chaplain*, 112 La. 1075; *Delaneuville v. Duhé*, 114 La. 62.

**Representation of Creditors.** — *Ford v. Stuart First Nat. Bank*, 201 Ill. 120, *reversing* 100 Ill. App. 70; *Stewart v. Rogers*, (Kan. 1905) 80 Pac. Rep. 58; *Gragard's Succession*, 106 La. 305, 110 La. 703; *Irwin v. Flynn*, 110 La. 829; *Thibodeaux v. Thibodeaux*, 112 La. 906; *Hughes*

**904. Duty to Make Speedy Settlement. — See note 1.**

*v. Golden*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 128; *Smith's Estate*, 43 Oregon 595.

On the right of an executor or an administrator to represent creditors in setting aside fraudulent conveyances made by the decedent during his lifetime, see *infra*, this title, **978. 1 et seq.**

An administrator represents two sets of persons — the creditors of his decedent and the heirs. His first duty is to collect the estate and pay the debts. After the debts are paid, there may be something for the heirs. In collecting debts and prosecuting and defending claims he represents the creditors as well as the heirs. *Perkins v. Goddin*, 111 Mo. App. 429.

If a chattel mortgage or mortgage of real estate would be fraudulent or void against creditors of the mortgagor, if attacked by them in his lifetime, it will be fraudulent or void against his legal representatives, to the extent, at least, that the property is needed to satisfy claims. *Blackman v. Baxter*, 125 Iowa 118, two judges dissenting; *Bagley v. Harmon*, 91 Mo. App. 23, distinguishing *Hughes v. Menefee*, 29 Mo. App. 192; *Hemley v. Harmon*, 103 Mo. App. 233; *Lembeck, etc., Brewing Co. v. Kelly*, 63 N. J. Eq. 401; *Rock Springs First Nat. Bank v. Ludvigsen*, 8 Wyo. 230.

**Powers of Administrators Wholly Statutory.** — Administrators are creatures of statute, and have no powers except those conferred therein. *Rice v. Conwill*, 35 Tex. Civ. App. 341.

**Administrator and Executor, qua Executor.** — An executor's and an administrator's duties are the same, the only difference being that the executor is named by the deceased, while an administrator is the person provided by statute to act in the event of the deceased not making any nomination. *Matter of Haughian*, (Surrogate Ct.) 37 Misc. (N. Y.) 457.

**Administrators and Administrators C. T. A.** — An administrator differs from an administrator with the will annexed, not in respect to his right to collect debts due to the estate, but only in respect to the distribution of the assets. Each represents the estate in all controversies with its debtors. *Fidelity, etc., Co. v. Freeman*, (C. C. A.) 109 Fed. Rep. 847.

**Powers and Duties as to Personalty and as to Realty Distinguished.** — As to the personalty, the personal representative is the owner, and holds the title for the beneficial interest of the creditors and heirs. In dealing with it he acts voluntarily as the owner, and solely in his personal capacity. In such transactions he represents no principal, and upon well-established rules he assumes all liabilities as personal in character, relying upon his lien for indemnity out of the estate for expenses and liabilities incurred in a proper administration of his trust. In the disposition of real estate his duties are imposed by law and directed by the court, under the authority of the statute, and can be carried out only in the prescribed manner. He has no interest in or control over the property, except as he executes the mandates of the court to enforce creditors' claims against the decedent's real estate. *Wisconsin Trust Co. v. Chapman*, 121 Wis. 479, 105 Am. St. Rep. 1032.

Ordinarily, the only duties vesting in an

executor or administrator are to take possession, collect assets, pay debts, and retain the estate for distribution. They have nothing to do with the real estate. *O'Brien v. Jackson*, 42 N. Y. App. Div. 171, reversed on other grounds 167 N. Y. 31.

The functions of an executor, *qua* executor, are, in general, confined to the administration and distribution of the personal estate of the testator, including, of course, proceeds of sale of real estate converted into personalty by an order to sell contained in the will, or resulting from a sale under order of court for payment of debts. *Henson's Estate*, 12 Pa. Dist. 326.

**Duties of Executor as Executor and as Trustee.**

— Ordinarily the duties of an executor are similar to those which in the event of intestacy would devolve upon an administrator. That is to say, in either capacity the duties are to administer upon the estate by collecting and reducing to possession its assets and, after paying debts, to have the balance in hand for distribution. It is only at this point that a distinction arises, which is that an executor makes distribution under the will and an administrator under the law. Other duties imposed upon the executor, or any power conferred, not appertaining to the duties just enumerated, belong to him, not as incidents to his office of executor, but in an entirely distinct character — that of trustee. *Matter of Union Trust Co.*, 70 N. Y. App. Div. 5, reversing (Surrogate Ct.) 35 Misc. (N. Y.) 260, appeal dismissed 172 N. Y. 494. To similar effect see *In re Timmis*, (1902) 1 Ch. 176; *Fidelity, etc., Co. v. Freeman*, (C. C. A.) 109 Fed. Rep. 847; *Currier v. Johnson*, 19 Colo. App. 94; *Marshall v. Meyers*, 96 Mo. App. 643; *Guthrie v. Cincinnati Gas, etc., Co.*, 15 Ohio Dec. 23; *Hart's Estate*, 12 Pa. Dist. 47, 28 Pa. Co. Ct. 126; *Jones v. Probate Ct.*, 25 R. I. 361, approving *Grinnell v. Baker*, 17 R. I. 49; *Union Bank, etc., Co. v. Wright*, (Tenn. Ch. 1900) 58 S. W. Rep. 755.

Some difficulty has been experienced in locating the line to be drawn between the duties to be performed by the executor *virtute officii* and those which devolve upon him as trustee. It depends upon whether, under the wording of the will, reliance is had on the individual or the officer. *Boland v. Tiernay*, 118 Iowa 59.

The official function of an executor is not to hold money, but to distribute it. If he is to hold it at all, he must do so as trustee and by virtue of some direction or intent of the testator. *Gitt's Estate*, 203 Pa. St. 263.

**Delegation of Powers.** — Acts which are merely mechanical or ministerial may be committed by the administrator to an agent, but in matters of discretion, where the very existence of the property of the estate may be at stake, the power must be exercised by the administrator. *Rice v. Conwill*, 35 Tex. Civ. App. 341, citing *Terrell v. McCown*, 91 Tex. 231.

**904. 1. Duty to Make Speedy Settlement.** — *Willis v. Berry*, 104 La. 114; *Piper's Estate*, 208 Pa. St. 636, affirming 12 Pa. Dist. 443, 28 Pa. Co. Ct. 589; *Henson's Estate*, 12 Pa. Dist. 326; *Robinson's Estate*, 24 Pa. Co. Ct. 588.



**904.** 2. Degree of Diligence and Skill Required. — See note 3.

**905.** 3. Burial of Decedent — *a.* DUTY TO PROVIDE FUNERAL. — See notes 1, 2.

Right to Body for Purpose of Burial. — See note 3.

**906.** *b.* LIABILITY FOR FUNERAL EXPENSES. — See notes 1, 2.

**904.** 3. Measure of Diligence and Skill — Entire Good Faith and Reasonable Prudence and Care — *Alaska.* — *In re McIntire*, 1 *Alaska* 73.

*Iowa.* — *Officer v. Officer*, 120 *Iowa* 389, 98 *Am. St. Rep.* 365.

*Kentucky.* — Germania Safety Vault, etc., Co. *v. Driskell*, 66 *S. W. Rep.* 610, 23 *Ky. L. Rep.* 2050.

*Michigan.* — *Owen v. Potter*, 115 *Mich.* 556.

*Mississippi.* — *O'Brien v. Wilson*, 82 *Miss.* 93.

*New York.* — *Matter of Fidelity Loan, etc., Co.*, (*Surrogate Ct.*) 23 *Misc. (N. Y.)* 211; *Matter of Thompson*, (*Surrogate Ct.*) 41 *Misc. (N. Y.)* 421, *affirmed* 87 *N. Y. App. Div.* 609, 178 *N. Y.* 554.

*Pennsylvania.* — *In re Semple*, 189 *Pa. St.* 385, *reversing* 28 *Pittsb. Leg. J. N. S. (Pa.)* 431; *Orne's Estate*, 7 *Pa. Dist.* 337, *affirmed* 192 *Pa. St.* 626; *Schilskey's Estate*, 12 *Pa. Dist.* 181, 28 *Pa. Co. Ct.* 241; *Greiner's Estate*, 14 *Pa. Dist.* 348.

What might be reasonable for a man to do with his own property might not be a proper dealing with trust property. *Re Barker*, 77 *L. T. N. S.* 712.

**905.** 1. Burial of Decedent — Care of Grave. — The first duty imposed is to have the body of the decedent buried. This is not a duty necessarily imposed on the next of kin, but rather upon the executor, and the cost thereof is given by the law the status of a preferred claim on the funds held by the executor. The second duty imposed is to arrange for the care of the grave of the decedent. This also is properly chargeable to the estate of the decedent and a duty of an executor. *Hayes's Estate*, 7 *Pa. Super. Ct.* 160. See also *Pettigrew v. Pettigrew*, 207 *Pa. St.* 313, 99 *Am. St. Rep.* 795; *O'Reilly v. Kelly*, 22 *R. I.* 151, 84 *Am. St. Rep.* 833.

2. Funeral Must Be According to Station and Estate. — *Sinnott v. Kenaday*, 14 *App. Cas. (D. C.)* 1, *reversed* on other grounds 179 *U. S.* 606; *Phillips v. Duckett*, 112 *Ill. App.* 587; *Matter of Liss*, (*Surrogate Ct.*) 39 *Misc. (N. Y.)* 123; *Cullen's Estate*, 7 *Pa. Dist.* 394, *affirmed* 8 *Pa. Super. Ct.* 494; *Bard's Estate*, 13 *Pa. Dist.* 552, 21 *Lanc. L. Rev.* 81; *Immendorf's Estate*, 21 *Pa. Co. Ct.* 268, *affirmed* 190 *Pa. St.* 590; *O'Reilly v. Kelly*, 22 *R. I.* 151, 84 *Am. St. Rep.* 833.

3. Right of Executor to Decedent's Body. — Under a statute giving to the surviving husband or widow the first right to administration, the right of control of the body of the decedent for interment belongs to such survivor, and a waiver of the right to administer will not include a waiver of such right of control, unless it be express or absolute. *Pettigrew v. Pettigrew*, 207 *Pa. St.* 313, 99 *Am. St. Rep.* 795.

Right of Next of Kin as Against Executor or Administrator. — *O'Donnell v. Slack*, 123 *Cal.* 285; *Enos v. Snyder*, 131 *Cal.* 68, 82 *Am. St. Rep.* 330.

The Widow of the Decedent. — The duties of the executor or administrator terminate with the first interment, and on the question of reinterment, involving a removal to another locality, he is not a party in interest. The controversy, if there be one, must be between next of kin. *Pettigrew v. Pettigrew*, 207 *Pa. St.* 313, 99 *Am. St. Rep.* 795.

**906.** 1. Liability in Representative Capacity for Funeral Expenses. — *O'Reilly v. Kelly*, 22 *R. I.* 151, 84 *Am. St. Rep.* 833. See also *O'Donnell v. Slack*, 123 *Cal.* 285.

Any friend, if the matter be not attended to by the family, executor, or administrator, even, may authorize an undertaker to attend to the funeral, and the estate will be liable for a reasonable amount. *Nashville Trust Co. v. Carr*, (*Tenn. Ch.* 1900) 62 *S. W. Rep.* 204.

In *New York*, before the Act of April 5, 1901, *Laws* 1901, c. 293, there was no cause of action against an administrator in his representative capacity for the funeral expenses of his intestate. This was a personal and not representative liability. *Matter of Kalbfleisch*, 78 *N. Y. App. Div.* 464. *Contra* where the expense was not incurred under contract or employment of the representative. *Patterson v. Buchanan*, 40 *N. Y. App. Div.* 493, 29 *Civ. Pro. (N. Y.)* 238; *Pache v. Oppenheim*, 93 *N. Y. App. Div.* 22, *reversing* on other grounds (*Supm. Ct. App. T.*) 84 *N. Y. Supp.* 926; *Riley v. Waller*, (*Supm. Ct. Tr. T.*) 22 *Misc. (N. Y.)* 63.

Promise to Pay Funeral Expenses Binds Estate. — *Contra*, *Matter of Schulz*, (*Surrogate Ct.*) 26 *Misc. (N. Y.)* 688.

The principle that contracts made with an executor or administrator are personal and do not bind the estate has been applied so strictly that it has been held that an action will not lie against the personal representative, as such, for the funeral expenses of his decedent. *Whitten v. Fincastle Bank*, 100 *Va.* 546. See *infra*, this title, **932**. 5 *et seq.*

Promise to Pay for Tombstone. — *Lutton's Estate*, 17 *Pa. Super. Ct.* 342. See also *Phillips v. Duckett*, 112 *Ill. App.* 587. *Contra*, *Hocor v. Lavery*, 51 *N. Y. App. Div.* 74.

Funeral Ordered by Third Person. — *Kenyon v. Brightwell*, 120 *Ga.* 606. Compare the cases cited *supra*, this note.

Tombstone Ordered by Widow. — Where the widow of the deceased ordered and paid for a tombstone, if the claim is reasonable and one which the administrator could have contracted, she is entitled to be subrogated to the rights, against the estate, of the person who furnished the monument. *Pease v. Christman*, 158 *Ind.* 642; *Hocor v. Lavery*, 51 *N. Y. App. Div.* 74.

2. Individual Liability — Personal Contract. — *Patterson v. Buchanan*, 40 *N. Y. App. Div.* 493, 29 *Civ. Pro. (N. Y.)* 238; *Matter of Schulz*, (*Surrogate Ct.*) 26 *Misc. (N. Y.)* 688. See *infra*, this title, **932**. 5 *et seq.*



**906. 4. Powers Before Probate or Grant of Letters—*a.* EXECUTORS—****(1) Common-law Rule—(a) In General.**—See note 3.**(b) Power to Sue.**—See notes 4, 5.**907. (2) Modern Rule.**—See notes 1, 2.**908. *b.* ADMINISTRATORS—(1) In General.**—See note 1.**(2) Doctrine that Letters Relate Back.**—See notes 2, 3.**909.** See notes 1, 2.

**906. 3. Powers Before Probate.**—Fidelity, etc., *Co. v. Freeman*, (C. C. A.) 109 Fed. Rep. 847; *Pruett v. Pruett*, 131 Ala. 578; *Wheeler v. Chicago Title, etc., Co.*, 217 Ill. 128; *Fillinger v. Conley*, 163 Ind. 584; *Allison v. Cocke*, 106 Ky. 763.

**4. Executor Cannot Sue Before Probate.**—Fidelity, etc., *Co. v. Freeman*, (C. C. A.) 109 Fed. Rep. 847; *Pruett v. Pruett*, 131 Ala. 578; *Wheeler v. Chicago Title, etc., Co.*, 217 Ill. 128; *Allison v. Cocke*, 106 Ky. 763.

**5. May Commence Actions.**—*Wheeler v. Chicago Title, etc., Co.*, 217 Ill. 128.

**907. 1. Common-law Doctrine Modified by Statute in the United States.**—*Wheeler v. Chicago Title, etc., Co.*, 217 Ill. 128; *Fillinger v. Conley*, 163 Ind. 584; *Baker v. Cauthorn*, 23 Ind. App. 611, 77 Am. St. Rep. 443; *Burlington Protestant Hospital Assoc. v. Gerlinger*, 111 Iowa 293; *Allison v. Cocke*, 106 Ky. 763; *Andrews v. Minor*, 58 S. W. Rep. 443, 22 Ky. L. Rep. 561; *Wood v. Donaldson*, 87 Mo. App. 1; *Matter of Mitchell*, 36 N. Y. App. Div. 542, *affirmed* 161 N. Y. 654; *Matter of Avery*, (Surrogate Ct.) 45 Misc. (N. Y.) 529; *Probate Ct. v. Thornton*, 21 R. I. 518. See also *In re Lamb*, 122 Mich. 239; *Goodell v. Sanford*, (Mont. 1904) 77 Pac. Rep. 522. And see *supra*, this title, **809. 3 et seq.**

**Rule in Alabama.**—*Pruett v. Pruett*, 131 Ala. 578

**In New Hampshire** an executor has no power to act until he has given bond. *Davis v. Davis*, 72 N. H. 326.

**Payment of Funeral Expenses.**—See *Patterson v. Buchanan*, 40 N. Y. App. Div. 493, 29 Civ. Pro. (N. Y.) 238; *Matter of Schulz*, (Surrogate Ct.) 26 Misc. (N. Y.) 688.

**Sale of Real Estate under Power in Will.**—An executor, appointed under a will vesting him with the power to sell real estate, cannot act under such power until the will is probated and he has qualified under his appointment. *Coy v. Gaye*, (Tex. Civ. App. 1904) 84 S. W. Rep. 441.

**Statutory Use of Word "Executor."**—Under the limitations now generally placed upon the common-law doctrine which conferred extensive powers upon an executor before probate, the word "executor," as generally used in statutes relating to such personal representatives, means an executor confirmed by appointment and fully installed in his office. *In re Somervail*, 104 Wis. 72.

**2. Probate or Letters Testamentary Relate Back to Testator's Death.**—*Nance v. Gray*, (Ala. 1905) 38 So. Rep. 916; *Wheeler v. Chicago Title, etc., Co.*, 217 Ill. 128, *citing* 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 907; *Baker v. Cauthorn*, 23 Ind. App. 611, 77 Am. St. Rep. 442; *Allison v. Cocke*, 106 Ky. 763; *Richardson v. Bailey*, 69 N. H. 384, 76 Am. St. Rep. 176.

**Offices of Necessity or of Humanity** performed by an executor before appointment should be ratified after probate, if no other objection than that of time can be urged against the manner of performance. *Fillinger v. Conley*, 163 Ind. 584.

**Garnishment of Executor or Administrator.**—A statute authorizing the garnishment of an executor or administrator with respect to property belonging to a beneficiary of the estate does not authorize the bringing of such proceeding until after the executor or administrator has qualified. *Wheeler v. Chicago Title, etc., Co.*, 217 Ill. 128.

**908. 1. Administrator's Title and Authority Derived from Letters.**—*Otto v. Regina Music-Box Co.*, 87 Fed. Rep. 510.

**2. Letters of Administration Relate Back to Time of Death.**—*Hodges v. Kimball*, (C. C. A.) 91 Fed. Rep. 845, *reversing* 87 Fed. Rep. 545; *Blackman v. Baxter*, 125 Iowa 118; *Brown v. Howell*, 66 N. J. L. 25, *citing* 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 908, same case on subsequent appeal 68 N. J. L. 292; *Ambrose v. Byrne*, 61 Ohio St. 146; *Casto v. Murray*, (Oregon 1905) 81 Pac. Rep. 883, *citing* 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 908; *Martin v. Fowler*, 51 S. Car. 164. See also *Probate Ct. v. Thornton*, 21 R. I. 518.

**Title to Real Estate.**—The doctrine of relation back applies to title to the decedent's real estate, in jurisdictions where title to real property devolves upon the personal representative. *In Goods of Pryse*, (1904) P. 301.

**3. Letters Legalize Acts Done Before Appointment.**—*Martin v. Fowler*, 51 S. Car. 164.

Such taking of the title cannot make wrongful the intervening possession of the heirs, whose duty it is to take possession of and preserve the property until an administrator can be appointed. *Hardy v. Wallis*, 103 Ill. App. 141; *Casto v. Murray*, (Oregon 1905) 81 Pac. Rep. 883.

**Actions Commenced Before Grant of Letters.**—*Doyle v. Diamond Flint Glass Co.*, 8 Ont. L. Rep. 499, *reversing* 7 Ont. L. Rep. 747.

**909. 1. Causes of Action Accruing After Death of Intestate.**—*Casto v. Murray*, (Oregon 1905) 81 Pac. Rep. 883.

**Action of Tort for Distraining and Selling Decedent's Goods.**—An action of tort for distraining and selling the decedent's goods cannot be maintained upon a title of the administrator by relation, so far as the distress would have been lawful had the plaintiff at the time been administrator in fact. If the fictitious possession, in case it had been real, would have converted the alleged wrong into a rightful act, then such act cannot, through the fiction, be treated as a tort. *Brown v. Howell*, 66 N. J. L. 25, 68 N. J. L. 292.

**2. Doctrine of Relation Applicable Only to Acts**

**909.** 5. Powers of Executor Pending Contest of Will. — See notes 3, 4.

**910.** 6. Right to Advice and Instructions of Court. — See notes 1, 5.

7. Duty to Defend Will. — See notes 6, 7.

**911.** 8. Maintenance and Care of Decedent's Family. — See note 1.

9. Payment of Decedent's Debts — *a.* DUTY TO PAY DEBTS. — See note 2.

**Beneficial to Estate.** — *Casto v. Murray*, (Oregon 1905) 81 Pac. Rep. 883.

**909. 3. Pending Litigation.** — *Cropper v. McLane*, 6 App. Cas. (D. C.) 119; *Sterrett v. National Safe Deposit, etc., Co.*, 10 App. Cas. (D. C.) 131; *Butler v. Keller*, 19 Pa. Super. Ct. 472; *Briggs v. Probate Ct.*, 23 R. I. 125. See also *Read v. Franklin*, (Tenn. Ch. 1900) 60 S. W. Rep. 215.

Under the *New York* statutes the powers of an executor cease pending proceedings for the revocation of the will, except for the recovery or preservation of the property, the collection and payment of debts, and such other acts as he is expressly allowed to perform by an order of the surrogate made upon notice to the petitioner. *Matter of Hughes*, (Surrogate Ct.) 41 Misc. (N. Y.) 75. See also *Matter of Choate*, 105 N. Y. App. Div. 356.

**4. Executor Without Authority Pending Contest as to Probate.** — *Floor v. Floor*, 87 S. W. Rep. 272, 27 Ky. L. Rep. 894.

**Appeal from Decree of Probate.** — In *New York* it is provided by statute that where an appeal is taken from a decree admitting a will to probate or granting letters testamentary, or letters of administration, the powers of the executor shall cease, unless he is authorized to act by express order of the surrogate. *Matter of Hopkins*, 95 N. Y. App. Div. 57, *affirming* (Surrogate Ct.) 41 Misc. (N. Y.) 83.

**Statute Conferring Extensive Powers During Contest.** — See *Sanker v. Mattison*, 11 Ohio Cir. Dec. 125.

**910. 1. Advice of Court in Case of Difficulty or Doubt.** — *Stoff v. McGinn*, 178 Ill. 46, *followed in* *Mulligan v. Lambe*, 178 Ill. 130; *McCalla v. McCalla*, 46 Cinc. L. Bul. 280.

**Circumstances Rendering Instructions Proper.** — That the court will not take the place of counsel to act as general legal adviser to the executor or administrator, see *Kaikainahaole v. Allen*, 14 Hawaii 527.

**Scope of Rule.** — See *Hughes v. Hughes*, 30 Ind. App. 591.

**What May Be Determined in Suit for Construction.** — The right of executors to employ one of their number as agent to look after the estate and pay to him therefor a sum in excess of his commissions cannot be properly determined in a suit to construe the will, but should be left for the executors' accounting. *Russell v. Hilton*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 642, *modified on other grounds* 80 N. Y. App. Div. 178, which was *affirmed* 175 N. Y. 525.

**5. Jurisdiction of Probate Courts — Alabama.** — *Jordan v. Hardie*, 131 Ala. 72.

*California.* — *Toland v. Earl*, 129 Cal. 148, 79 Am. St. Rep. 100.

*District of Columbia.* — *McIntire v. McIntire*, 14 App. Cas. (D. C.) 337, *affirmed* 192 U. S. 116.

*Maine.* — *Small v. Thompson*, 92 Me. 539; *In re Stilphen*, (Me. 1905) 60 Atl. Rep. 888.

*Massachusetts.* — *Sherman v. American Cong. Assoc.*, (C. C. A.) 113 Fed. Rep. 609, *affirming* 98 Fed. Rep. 495 (construing the Massachusetts statutes).

*New Jersey.* — *Swain v. Smith*, 61 N. J. Eq. 590; *Macy v. Mercantile Trust Co.*, (N. J. 1904) 59 Atl. Rep. 586.

*New York.* — *Kager v. Brenneman*, 47 N. Y. App. Div. 63, 30 Civ. Pro. (N. Y.) 168; *Matter of McCabill*, (Surrogate Ct.) 29 Misc. (N. Y.) 450; *Matter of Robinson*, (Surrogate Ct.) 42 Misc. (N. Y.) 169.

*Pennsylvania.* — *Morton's Estate*, 201 Pa. St. 269, *followed in* *Jacoby's Estate*, 201 Pa. St. 442.

*Washington.* — *Reformed Presb. Church v. McMillan*, 31 Wash. 643.

**Jurisdiction Exclusive.** — In some states the exclusive jurisdiction of the probate court over the administration of the estates of decedents extends to all questions of the construction of the will as to which the remedy in the probate court is adequate to give complete relief. *Appleby v. Watkins*, (Minn. 1905) 104 N. W. Rep. 301; *Reischick v. Reiger*, (Neb. 1903) 94 N. W. Rep. 156; *Youngson v. Bond*, (Neb. 1903) 95 N. W. Rep. 700, *affirming on rehearing* 64 Neb. 615.

**6. Executor Required to Resist Contest of Will.** — *Henderson's Succession*, 113 La. 101. See also *Hughes v. Hughes*, 30 Ind. App. 591; *infra*, this title, 1236. 4 *et seq.*, 1243. 3 *et seq.*

**Right to Defend Authority.** — An executor, whether named in the will or by delegated power, has the right to defend in the courts his authority to act. *Brown v. Just*, 118 Mich. 678.

**7. Executor Not Required to Resist Contest of Will.** — See *infra*, this title, 1236. 4 *et seq.*, 1243. 3 *et seq.*

**911. 1. Maintenance and Care of Decedent's Family.** — See *infra*, this title, 1270. 1 *et seq.*

**2. Usual Method Pursued.** — The usual way in which charges against an estate are satisfied is for the administrator to collect the debts owing to the deceased and to sell personal property not specifically bequeathed and use the proceeds for that purpose. *Walker v. Hill*, (N. H. 1905) 60 Atl. Rep. 1017.

**Duty of Executors and Administrators Alike.** — A creditor cannot be prejudicially affected by the terms of a will. His rights are fixed and determined by the law and not in any manner controlled by the will of his debtor. A creditor's right to be paid out of the assets of his debtor's estate does not depend upon testamentary provisions, but is secured by the law, and is the same and none other, both in testate and intestate estates. Both the executor and administrator take the property of the deceased person precisely as it was left at the time of decease, whether such condition is the result of



**911.** *b.* LIABILITIES IN RESPECT TO DEBTS — (1) *Liability to Estate* — See notes 3, 4, 6.

**912.** (2) *Liability to Creditors* — (b) *Liability Arising Out of Devastavit* — *aa.* IN GENERAL. — See note 2.

*bb.* DISREGARDING PRIORITIES IN PAYMENT OF DEBTS. — See notes 3, 4.

**913.** But the Payment of One or More Creditors of Any Class. — See note 1.

*cc.* PAYMENT OF LEGACIES AND DISTRIBUTIVE SHARES. — See note 3.

**914.** (c) *Liability Arising Out of Contract* — *aa.* IN GENERAL. — See notes 6, 7.

**915.** *bb.* REQUISITES OF CONTRACT TO BIND EXECUTOR OR ADMINISTRATOR — (*aa*) *Necessity of Writing*. — See note 3.

**918.** *c.* RIGHTS AND REMEDIES OF EXECUTOR OR ADMINISTRATOR — (1) *Payment with Individual Funds* — *Reimbursement and Subrogation*. — See notes 1, 2.

the operation of the law or the act of the party himself. *Richardson v. Richardson*, 87 Ill. App. 354.

**When Duty Arises.** — The official duty to pay demands against the estate does not arise until a claim has been duly exhibited; and it cannot be enforced until it has been established by suit or in some other authorized mode. *Caulfield v. Green*, 73 Conn. 321.

**911.** 3. *Duty to Resist Unfounded Claims.* — *Winchell v. Sanger*, 73 Conn. 399; *Ray v. Moore*, 24 Ind. App. 480; *Herman v. Beck*, (Neb. 1903) 94 N. W. Rep. 512; *Hale v. White*, 47 W. Va. 700.

If action or suit be brought by the claimant, it is the legal duty of the personal representative to make proper defense thereto, under penalty of being charged with any loss occasioned by his negligence or failure to do so. *Hanna v. Galford*, 55 W. Va. 160.

**4. A Void Order of Court or One Procured by Fraud or Collusion** is no protection to the representative in the payment of invalid and illegal claims. *Marshall v. Coleman*, 187 Ill. 586, *affirming* 89 Ill. App. 41; *In re Osburn*, 36 Oregon 8. See also *Matter of Watson*, 101 N. Y. App. Div. 550.

**6. Failure to Pay Debts** — *Permitting Land to Be Sold to Satisfy Mortgage Debt.* — *In re Patrick*, (Neb. 1904) 100 N. W. Rep. 939.

**912.** 2. *Liability Arising Out of Devastavit.* — *Parker v. Latimer*, 59 S. Car. 330.

**3. Disregarding Priorities in Payment of Debts** — *Liability to Preferred Creditors.* — *In re Hankey*, (1899) 1 Ch. 541; *Valentine v. Britton*, 127 N. Car. 57.

**A Creditor Who Is Not Injured** by payment out of order, as where the assets of the estate would be exhausted by the payment of claims having priority over his, has no cause of action. *Gwinn v. Trotter*, 112 Ga. 703.

**4. Payment Without Notice of Superior Debt.** — *In re Fludyer*, (1898) 2 Ch. 562.

Under the *West Virginia* Code the administrator is liable if he pays within twelve months after qualification, with or without notice. After the expiration of twelve months the rule as to notice operates. *McCoy v. Jack*, 47 W. Va. 201.

**913.** 1. *Preference of Creditors Over Others of Same Class.* — See *In re Hankey*, (1899) 1 Ch. 541.

**3. Payment of Legacies and Distributive Shares Before Payment of Debts** — *Executor or Adminis-*

*trator Liable to Creditors.* — See *infra*, this title, 971. 4.

**914.** 6. *Liability Arising Out of Contract.* — See *infra*, this title, 932. 5 *et seq.*

**7. Promise to Pay as Executor.** — *De Coudres v. Union Trust Co.*, 25 Ind. App. 271, 81 Am. St. Rep. 95; *Dallas County v. Club Land, etc.*, Co., 95 Tex. 200, *reversing in part* on other grounds 26 Tex. Civ. App. 449; *Wick v. Dawson*, 48 W. Va. 469; *Thompson v. Mann*, 53 W. Va. 432. See also *Henry v. Henry*, (Neb. 1905) 103 N. W. Rep. 441.

**915.** 3. *Writing Necessary under Statute of Frauds.* — *Flannery v. Chidgey*, 33 Tex. Civ. App. 638.

**918.** 1. *Payment from Individual Funds* — *Reimbursement from Estate.* — *Smith v. Hayward*, 5 Ohio Dec. 462, 5 Ohio N. P. 501; *Bentley's Estate*, 196 Pa. St. 497; *Ruppel's Estate*, 32 Pittsb. Leg. J. N. S. (Pa.) 233; *Gray v. Cockrell*, 20 Tex. Civ. App. 324.

**Reimbursement Out of Real Estate Assets.** — If the personal assets prove insufficient and the executor has paid debts out of his own money, he may, if the land is ordered to be sold, reimburse himself out of the proceeds of the sale. *Freehold First Nat. Bank v. Thompson*, 61 N. J. Eq. 188.

Where an executor has personality of the estate applicable to the exoneration of real property from a mortgage executed by decedent, payment of the mortgage out of his own funds gives him no right to reimbursement out of the real estate, to which mortgagees holding under a void mortgage executed by such executor can be subrogated. *Dougherty v. Connolly*, 61 N. J. Eq. 421.

**Right of Subrogation of Creditor of Representative.** — Persons lending money to a personal representative to enable him to pay the debts of the estate are entitled to be subrogated to the rights of the representative, to the extent that the money lent has been rightfully used for that purpose. *Freehold First Nat. Bank v. Thompson*, 61 N. J. Eq. 188; *Hamlin v. Smith*, 72 N. Y. App. Div. 601. See also *Henry v. Henry*, (Neb. 1905) 103 N. W. Rep. 441. *Contra*, *Smith v. Hayward*, 5 Ohio Dec. 462, 5 Ohio N. P. 501.

**Where an Executor Accounts to the Estate for the Amount of an Uncollected Note** he becomes in equity the owner of the note, and entitled to receive the money from the makers for his reimbursement and indemnity. *Cunnington v.*



**918.** (2) *Improper Payments* — (a) *Recovery from Creditor* — At Common Law. — See note 3.

But Where the Statutes Require a Ratable Distribution of the Assets. — See note 5.

**919.** The Reason of the Rule. — See note 4.

10. Power to Waive Statute of Limitations — a. GENERAL STATUTE — (1) *Waiver by Failure to Plead*. — See note 7.

**920.** See notes 1, 2, 3.

**921.** (2) *Authorization by Testator or Heirs*. — See note 1.

Cunnington, 2 Ont. L. Rep. 511. To the same effect see *Nance v. Gray*, (Ala. 1905) 38 So. Rep. 916.

**918. 2. Contra.** — *Russell v. Wheeler*, 129 Mich. 41, 8 Detroit Leg. N. 836; *Suydam v. Voorhees*, 58 N. J. Eq. 157; *Matter of O'Brien*, 39 N. Y. App. Div. 321; *Matter of Quartlander*, (Surrogate Ct.) 29 Misc. (N. Y.) 566; *Hoover's Estate*, 9 Kulp (Pa.) 126; *Rowe's Estate*, 11 Kulp (Pa.) 36; *Gray v. Cockrell*, 20 Tex. Civ. App. 324.

**Misapplication of Funds in Payment of Debts.** — Executors applying funds of the estate not applicable for that purpose to the payment of debts, on being surcharged with the amount, are entitled to be subrogated to the rights of the creditors so paid. *Salinger v. Black*, 68 Ark. 449; *Lefevre's Estate*, 200 Pa. St. 531, same case on former appeals, 193 Pa. St. 225, 171 Pa. St. 404.

**As to Subrogation of a Creditor of a Representative** who has advanced money for the payment of the indebtedness of the estate, to the rights of creditors whose claims are thus satisfied, see *Veeder v. McKinley-Lanning L. & T. Co.*, 61 Neb. 892. Compare *Eiermann v. People's Trust*, etc., Co., 21 Lanc. L. Rev. 170.

**The Right May Be Waived** by the conduct and declarations of the creditor showing no intention to claim reimbursement. *Ross v. Battle*, 113 Ga. 742.

**3. Voluntary Payment by Executors Who Are also Legatees.** — Legatees who, as executors, have satisfied an invalid claim voluntarily, and without fraud or mistake, are not in a position to demand its return. *Yocum v. Commercial Nat. Bank*, 195 Pa. St. 411, affirming 8 Pa. Dist. 631.

**5. Statutory Rule — Recovery of Overpayments under Mistake as to Solvency of Estate.** — *Tarplee v. Capp*, 25 Ind. App. 56. See also *infra*, this title, **973. 7. Representative as Such May Bring Suit**.

**919. 4. Reason of Rule — Payment under Mistake of Fact.** — *Tarplee v. Capp*, 25 Ind. App. 56.

**7. Rule that General Statute May Be Waived.** — *Friedman v. Shamblyn*, 117 Ala. 454; *Freehold First Nat. Bank v. Thompson*, 61 N. J. Eq. 188; *Rowe's Estate*, 11 Kulp (Pa.) 36. See also *Equitable L. Assur. Soc. v. Chesley*, 64 N. J. Eq. 348, reversing 63 N. J. Eq. 219; *Yocum v. Commercial Nat. Bank*, 8 Pa. Dist. 631, affirming 195 Pa. St. 411; *Claghorn's Estate*, 10 Pa. Dist. 91; *In re Huger*, 100 Fed. Rep. 805 (construing the *South Carolina* law); *Fullerton v. Bailey*, 17 Utah 85. Compare *Hunter v. Hunter*, 63 S. Car. 78, 90 Am. St. Rep. 663.

**The Personal Representative of an Administrator**

has no connection in law with the estate of the first decedent, and cannot, in *South Carolina*, waive the bar of the statute. *Redfearn v. Craig*, 57 S. Car. 534.

**920. 1. Right of Legatees, etc., to Plead Statute.** — *Dunn v. Beaman*, 126 N. Car. 766; *Yocum v. Commercial Nat. Bank*, 8 Pa. Dist. 631, affirming 195 Pa. St. 411; *Claghorn's Estate*, 10 Pa. Dist. 91.

**The Heir or Devisee** has the right to plead the statute of limitations against all debts of every character. *Taylor v. Crook*, 136 Ala. 354, 96 Am. St. Rep. 26.

**Insolvent Estates.** — See *Freehold First Nat. Bank v. Thompson*, 61 N. J. Eq. 188; *Mason v. Taft*, 23 R. I. 388; *Smith v. Sprout*, (Tenn. Ch. 1900) 58 S. W. Rep. 376.

**2. Rule that General Statute May Not Be Waived — Arkansas.** — Compare *Scott v. Penn*, 68 Ark. 492, wherein it was said that "an administrator is not bound to plead the statute of limitations, under ordinary circumstances."

*California.* — *Reay v. Heazelton*, 128 Cal. 335. *Illinois.* — The tendency of the decisions in this state has been in favor of the position that the statute should be insisted upon by the administrator against claims which are barred by its terms. *Marshall v. Coleman*, 187 Ill. 556, affirming 89 Ill. App. 41, citing, for the different rules on the subject, 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 919, 920.

*Nebraska.* — *Fitzgerald v. Chariton First Nat. Bank*, 64 Neb. 260.

*New York.* — *Hamlin v. Smith*, 72 N. Y. App. Div. 601; *Matter of Goss*, 98 N. Y. App. Div. 489; *Matter of Pray*, (Surrogate Ct.) 40 Misc. (N. Y.) 516.

*Ohio.* — *Baen v. Weller*, 12 Ohio Dec. 128. See also *Crouse v. Frybarger*, 12 Ohio Cir. Dec. 254, 22 Ohio Cir. Ct. 315.

*West Virginia.* — *Stiles v. Laurel Fork Oil, etc., Co.*, 47 W. Va. 838; *Findley v. Cunningham*, 53 W. Va. 1.

**Burden of Proof.** — When a claim or part of a claim is allowed, which on its face is barred by the statute, the administrator ought to be required to satisfy the objecting parties and the court that the question of the statute was considered before making such allowance. *Matter of Knab*, (Surrogate Ct.) 38 Misc. (N. Y.) 717.

**3. Waiver as to Debts Barred After Debtor's Death.** — *Jones v. Powning*, 25 Nev. 399. See also *Hunter v. Hunter*, 63 S. Car. 78.

**921. 1. Consent of Heirs to Waiver of Statute.** — *Hamlin v. Smith*, 72 N. Y. App. Div. 601; *Matter of Miles*, (Surrogate Ct.) 33 Misc. (N. Y.) 147, reversed 61 N. Y. App. Div. 562, but affirmed 170 N. Y. 75. See also *Findley v. Cunningham*, 53 W. Va. 1.

- 921.** (3) *Waiver Not Binding on Realty or Heirs.* — See note 2.  
 (4) *Waiver as to Individual Claims.* — See note 3.  
**922.** (5) *Waiver by Acknowledgment or Promise to Pay.* — See notes 1, 2.  
**923.** (6) *Interrupting Running of Statute.* — See note 1.  
 (7) *Waiver by Joint Executor or Administrator* — (a) **Rule in England.**  
 — See note 2.  
**924.** (b) **Rule in United States.** — See notes 1, 2.  
 b. **SPECIAL STATUTE.** — See note 4.

**921. 2. Waiver of Statute Cannot Subject Realty to Claim.** — *Brock v. Kirkpatrick*, 60 S. Car. 322, 85 Am. St. Rep. 847. See also *Findley v. Cunningham*, 53 W. Va. 1; *infra*, this title, **1081**. 1, 2. *Contra*, *Freehold First Nat. Bank v. Thompson*, 61 N. J. Eq. 188.

**Where the Representative Is Also an Heir** his acknowledgment and promise will bind him individually to the extent of his interest. *Divine v. Miller*, 70 S. Car. 225, 106 Am. St. Rep. 743.

**Judgment Debt.** — The lien of a judgment recovered against a debtor during his lifetime cannot be revived against the administrator of his estate after the right of action on the judgment has been barred by limitation. *Brantley v. Bittle*, 72 S. Car. 179.

**3. Rule Permitting Waiver as to Individual Claims.** — *Brown v. Greene*, 181 Mass. 109, 92 Am. St. Rep. 404; *In re Starr*, 2 Ont. L. Rep. 762. See also *Willis v. Sutton*, 116 Ga. 283.

**Rule Forbidding Waiver as to Individual Claims.** — *Farrow v. Nevin*, 44 Oregon 496; *Eckert's Estate*, 18 Lanc. L. Rev. 58; *Hartz's Estate*, 20 Lanc. L. Rev. 25. See also *In re Ward*, 12 Ohio Cir. Dec. 44, 21 Ohio Cir. Ct. 753.

**Retainer as Against Land or Its Proceeds.** — Retainer by an executor or administrator cannot be exercised against land or its proceeds until the claim is established, after adversary proceedings commenced within the period of limitations. *Taylor v. Crook*, 136 Ala. 354, 96 Am. St. Rep. 26.

**Debt Barred at Decedent's Death.** — An administrator cannot retain assets in satisfaction of a debt due to himself which was barred by the statute of limitations at the death of the intestate. *Beckham v. Beckham*, 113 Ga. 381, *distinguishing* *Baker v. Bush*, 25 Ga. 594, 71 Am. Dec. 193.

**922. 1. Rule that Acknowledgment or Promise to Pay Removes Bar.** — *Hewes v. Hurff*, 69 N. J. L. 263.

**2. Rule that Acknowledgment or Promise to Pay Does Not Remove Bar.** — *Bambrick v. Bambrick*, 157 Mo. 423; *Matter of Bradley*, (Surrogate Ct.) 25 Misc. (N. Y.) 261, *affirmed* 42 N. Y. App. Div. 301; *Miller v. Ewing*, 68 Ohio St. 176; *Hoss v. Crouch*, (Tenn. Ch. 1898) 48 S. W. Rep. 724; *Findley v. Cunningham*, 53 W. Va. 1. See also *Crouse v. Frybarger*, 12 Ohio Cir. Dec. 254, 22 Ohio Cir. Ct. 315.

**A Partial Payment by an administrator on account of a claim barred by the statute in the lifetime of his intestate is not sufficient in New York to revive the claim against the estate.** *Hamlin v. Smith*, 72 N. Y. App. Div. 601.

**3. Personal Liability on Promise to Pay Barred De** — *Hamlin v. Smith*, 72 N. Y. App. Div. 601.

**923. 1. Part Payment Interrupts Running of Statute.** — *Slattery v. Doyle*, 180 Mass. 27; *Hamlin v. Smith*, 72 N. Y. App. Div. 601; *Matter of Bradley*, (Surrogate Ct.) 25 Misc. (N. Y.) 261, *affirmed* 42 N. Y. App. Div. 301.

**Acknowledgment or Promise to Pay Interrupts Running of Statute.** — *Hamilton v. Wright*, 87 S. W. Rep. 1093, 27 Ky. L. Rep. 1144, *quoting* 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 923; *Willis's Succession*, 109 La. 281; *Divine v. Miller*, 70 S. Car. 225, 106 Am. St. Rep. 743. See also *Hunter v. Hunter*, 63 S. Car. 78, 90 Am. St. Rep. 663.

**Statutory Regulation.** — *Findley v. Cunningham*, 53 W. Va. 1, two judges dissenting.

**The Acknowledgment Must Be an Unqualified Admission** of a subsisting debt, which the party is liable for and willing to pay. *Kesterson v. Hill*, 101 Va. 539.

**Allowance of Claim as Debt Against Estate.** — See *Crouse v. Frybarger*, 12 Ohio Cir. Dec. 254, 22 Ohio Cir. Ct. 315.

**Right to Waive Bar of Statute and Right to Acknowledge Subsisting Debt Distinguished.** — There is a plain distinction between the right of an executor to revive an indebtedness against his testator's estate, which had been extinguished by law, and his right to acknowledge, and to keep in force, a subsisting obligation, by making payments from time to time upon the principal of the debt, or by way of keeping down the interest. In one case he in effect creates an indebtedness, while in the other he is performing a moral obligation and is executing a duty recognized by law. *Holly v. Gibbons*, 176 N. Y. 520, 177 N. Y. 401, *reversing* 67 N. Y. App. Div. 628.

**2. Rule in England.** — See *Astbury v. Astbury*, (1898) 2 Ch. 111.

**924. 1. Rule in United States — Promise by One Binds All.** — See *Hewes v. Hurff*, 69 N. J. L. 263.

**2. Rule Questioned in New York.** — *Compare* *Hamlin v. Smith*, 72 N. Y. App. Div. 601, holding that a partial payment, though made by one of two corepresentatives alone, without the consent of the other, saves the obligation from the operation of the statute up to that time. To the same effect see *Matter of Bradley*, (Surrogate Ct.) 25 Misc. (N. Y.) 261, *affirmed* on other grounds, 42 N. Y. App. Div. 301.

**4. Special Statute Cannot Be Waived — California.** — *Barclay v. Blackinton*, 127 Cal. 189. *Connecticut.* — *Winchell v. Sanger*, 73 Conn. 399; *Dime Sav. Bank v. McAlenney*, 76 Conn. 141.

*Massachusetts.* — *Stebbins v. Scott*, 172 Mass. 356; *Hubbard, Petitioner*, 185 Mass. 22. *Minnesota.* — *Gilman v. Maxwell*, 79 Minn. 377.



**924.** 11. Submission to Arbitration — *a.* POWER TO SUBMIT TO ARBITRATION. — See note 5.

**925.** Statutory Rule. — See note 2.

**926.** *c.* EFFECT OF AWARD — (1) *Effect as Between Parties.* — See note 2.

(2) *Effect as Between Personal Representatives and Estate.* — See note 3.

**12. Compromise, Composition, and Release of Claims** — *a.* THE POWER — (1) *At Common Law.* — See note 4.

**928.** (2) *By Statute.* — See note 1.

The Effect of These Statutes. — See notes 2, 3.

*Mississippi.* — Cockrell *v.* Seasongood, (Miss. 1902) 33 So. Rep. 77.

*Nebraska.* — Fitzgerald *v.* Chariton First Nat. Bank, 64 Neb. 260.

*North Dakota.* — Farwell *v.* Richardson, 10 N. Dak. 34.

*Ohio.* — Miller *v.* Ewing, 68 Ohio St. 176; Crouse *v.* Frybarger, 12 Ohio Cir. Dec. 254, 22 Ohio Cir. Ct. 315.

*Rhode Island.* — Thompson *v.* Hoxsie, 25 R. I. 377.

*Utah.* — Fullerton *v.* Bailey, 17 Utah 85.

*Wisconsin.* — Fields *v.* Mundy, 106 Wis. 383, 80 Am. St. Rep. 39.

**Debt Due to Executor or Administrator.** — Where the common-law right of retainer exists, the special statute of limitations relating to claims against the estate has no application to a debt to the estate from the executor or administrator. Brown *v.* Greene, 181 Mass. 109, 92 Am. St. Rep. 404.

**924.** 5. Power at Common Law to Submit to Arbitration. — Sullivan *v.* Nicoulin, 113 Iowa 76; Unterrainer *v.* Seelig, 13 S. Dak. 148.

**Source of Power.** — The power of an administrator to submit to arbitration is said to be based upon the fact that he has power to prosecute or defend suits. Cogswell *v.* Concord, etc., R. Co., 68 N. H. 102.

The power arose by reason of the full dominion which the law gives to the executor or administrator over the assets, and the full discretion which is vested in him for the settlement and liquidation of all claims due to and from the estate. District of Columbia *v.* Bailey, 171 U. S. 161, reversing on other grounds 9 App. Cas. (D. C.) 360.

**925.** 2. Statutory Power in the United States. — Matter of Eichman, (Surrogate Ct.) 33 Misc. (N. Y.) 322; McLeod *v.* Graham, 132 N. Car. 473, citing Lassiter *v.* Upchurch, 107 N. Car. 411. See also Sullivan *v.* Nicoulin, 113 Iowa 76.

**926.** 2. Award Binding on Parties and Estate. — McLeod *v.* Graham, 132 N. Car. 473; Unterrainer *v.* Seelig, 13 S. Dak. 148. Compare Turner *v.* Louisville, etc., R. Co., 110 Ky. 879.

**Wrongful Revocation of the Submission** gives rise to a cause of action against the executor or administrator in his individual and not in his representative capacity. Magoun *v.* Magoun, 84 N. Y. App. Div. 232.

**3. Personal Representative Individually Liable if Estate Is Injured by Award.** — District of Columbia *v.* Bailey, 171 U. S. 161, reversing on other grounds 9 App. Cas. (D. C.) 360; Sullivan *v.* Nicoulin, 113 Iowa 76.

**Where Executors Compromise a Suit Contesting the Will,** and a second contest is afterwards instituted by other persons in which the will is sustained, omitting certain clauses, and the assets are insufficient to pay legacies, they are not entitled to credit for the money spent in compromising the first suit. Graham *v.* M'Cashin, (1901) 1 Ir. R. 404.

**4. Common-law Power to Compromise or Compound Claims.** — *In re Houghton*, (1904) 1 Ch. 622; Nance *v.* Gray, (Ala. 1905) 38 So. Rep. 916; Johnson's Appeal, 71 Conn. 590; Pittsburgh, etc., R. Co. *v.* Gipe, 160 Ind. 360, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 926-930; Cogswell *v.* Concord, etc., R. Co., 68 N. H. 102; Matter of Gilman, 92 N. Y. App. Div. 462, affirmed 178 N. Y. 606; Sechrist's Estate, 18 York Leg. Rec. (Pa.) 77; Scully's Estate, 31 Pittsb. Leg. J. N. S. (Pa.) 307. See also Freehold First Nat. Bank *v.* Thompson, 61 N. J. Eq. 188; Moore's Estate, (Pa. 1901) 48 Atl. Rep. 884, less fully reported 198 Pa. St. 611.

**A Special or Temporary Administrator,** unless expressly authorized to do so, has no authority to compromise a disputed claim. Germania L. Ins. Co. *v.* Peetz, (Tex. Civ. App. 1898) 47 S. W. Rep. 687.

**Recognition of Claim of Person in Possession of Property.** — Where a person in possession of property claims the right to retain it as owner, the allowance of his claim by the personal representative to its full extent is a compromise. *In re Houghton*, (1904) 1 Ch. 622.

**Determination of Validity and Justice of Compromise.** — That the probate court has no equity jurisdiction to set aside assignments of claims for fraud or mistake does not preclude its passing upon the validity and justice of settlements made by legal representatives in administering the estate. Such power is a part of its jurisdiction to pass upon and adjudicate accounts of executors or administrators. Matter of Meyer, 95 N. Y. App. Div. 443, affirmed 181 N. Y. 562.

**928.** 1. Statutory Authority in United States. — Logan *v.* Central Iron, etc., Co., 139 Ala. 548; Johnson's Appeal, 71 Conn. 590; Oakes *v.* Gillilan, (Neb. 1901) 95 N. W. Rep. 511; Matter of Gilman, 82 N. Y. App. Div. 186, reversing (Surrogate Ct.) 30 Misc. (N. Y.) 762; Matter of Gilman, 92 N. Y. App. Div. 462, affirmed 178 N. Y. 606.

**In New Hampshire** the statute applies to claims against insolvent persons only. As to other claims the common-law right and its limitations remain unchanged. Cogswell *v.* Concord, etc., R. Co., 68 N. H. 102.

**2. Effect of Statutes in General.** — *In re*



**928.** (3) *By Will or from Beneficiaries.* — See note 5.

**929.** *b.* WHEN COMPROMISE OR COMPOSITION IS PROPER. — See notes 1, 4.

*c.* WHAT CLAIMS MAY BE COMPROMISED OR COMPOUNDED. — See note 7.

**930.** *d.* VALIDITY AND EFFECT OF COMPROMISE OR COMPOSITION. — See note 1.

**931.** *e.* DIFFERENCE BETWEEN COMPROMISE OR COMPOSITION AT COMMON LAW AND UNDER STATUTE. — See note 1.

13. Set-off of Debts. — See note 2.

**932.** 14. Confession of Judgment. — See note 1.

15. Contracts — *a.* CONTRACTS MADE BY EXECUTOR OR ADMINISTRATOR — (1) *Contracts to Pay Money* — (a) *New Consideration* — *aa.* GENERAL RULE. — See note 5.

Houghton, (1904) 1 Ch. 622; *Logan v. Central Iron, etc., Co.*, 139 Ala. 548; *Pittsburgh, etc., R. Co. v. Gipe*, 160 Ind. 360, *citing* 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 926-930; *Matter of Gilman*, 92 N. Y. App. Div. 462, *affirmed* 178 N. Y. 606.

**928.** 3. Leave of Court Essential in Some Jurisdictions. — *Pullins v. Smith*, 106 Ky. 418. See also *Cheever v. Ellis*, 134 Mich. 645, 10 Detroit Leg. N. 624; *Matter of Bronson*, 69 N. Y. App. Div. 487.

A Cause of Action for Wrongful Death, not being assets of the estate, is not within the statute, and may be compromised without obtaining leave of court. *Pittsburgh, etc., R. Co. v. Gipe*, 160 Ind. 360.

5. Compromise Authorized by Beneficiaries. — *Edenborn's Estate*, 10 Pa. Dist. 184.

**929.** 1. Compromise Must Be for Benefit of Estate. — *Brosnan v. Kramer*, 135 Cal. 36; *Pullins v. Smith*, 106 Ky. 418.

The power of an administrator to make a compromise which renders the estate solvent is not taken away by a representation of apparent insolvency, followed by a decree for a commission or by an order for proof of claims to be made before the court itself. *Cook v. Richardson*, 178 Mass. 125.

4. Compromise to Obtain Possession of Assets. — *Matter of Gilman*, 82 N. Y. App. Div. 186, *reversing* (Surrogate Ct.) 39 Misc. (N. Y.) 762.

7. Legacies. — See *Matter of Wagner*, (Surrogate Ct.) 40 Misc. (N. Y.) 490.

Action Brought by Decedent. — A settlement that is unwise and improvident or collusive and in fraud of the rights of legatees or distributees may be set aside. *Tecumseh Nat. Bank v. McGee*, 61 Neb. 709.

Compromise of Action Against Executor. — See *Moore's Estate*, (Pa. 1901) 48 Atl. Rep. 884, less fully reported 108 Pa. St. 611.

Claim for Death by Wrongful Act. — *Logan v. Central Iron, etc., Co.*, 139 Ala. 548; *Richmond, etc., R. Co. v. Gorman*, 7 App. Cas. (D. C.) 91; *Brink's Express Co. v. O'Donnell*, 88 Ill. App. 459; *Pittsburgh, etc., R. Co. v. Gipe*, 160 Ind. 360, *citing* 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 926-930; *Foot v. Great Northern R. Co.*, 81 Minn. 493, 83 Am. St. Rep. 395; *Cogswell v. Concord, etc., R. Co.*, 68 N. H. 192; *Matter of Anderson*, 84 N. Y. App. Div. 550.

Claim under Decedent's Contract to Sell Real Estate. — *Harriman v. Tyndale*, 184 Mass. 534.

**930.** 1. Beneficiaries Bound by Compromise or Compositions Made in Good Faith. — *Scudder v. Ames*, 142 Mo. 187; *Matter of Meyer*, 95 N. Y. App. Div. 443, *affirmed* 181 N. Y. 562; *Scully's Estate*, 31 Pittsb. Leg. J. N. S. (Pa.) 307; *Sechrist's Estate*, 18 York Leg. Rec. (Pa.) 77.

**931.** 1. Exercise of Common-law Power — Personal Representative Must Show Propriety. — *Logan v. Central Iron, etc., Co.*, 139 Ala. 548.

Compromise under Statute Imposes No Liability. — In *Missouri* the order of compromise is merely interlocutory in its nature, standing as a part of the administration proceeding under the control of the court, and is open and subject to review and correction at the final settlement. *In re Hutton*, 92 Mo. App. 132.

2. Set-off by and Against Personal Representative. — See *Ainsworth v. State Bank*, 119 Cal. 470, 63 Am. St. Rep. 135; *Virgin v. Virgin*, 101 Ill. App. 135; *Moise's Succession*, 107 La. 717; *Weeks v. O'Brien*, 25 N. Y. App. Div. 206, (Supm. Ct. App. Div.) 27 Civ. Pro. (N. Y.) 86; *Gross v. Gross*, (Supm. Ct. App. T.) 26 Misc. (N. Y.) 385, *affirming* (N. Y. City Ct. Gen. T.) 25 Misc. (N. Y.) 297; *Matter of Wait*, (Surrogate Ct.) 39 Misc. (N. Y.) 74, 12 N. Y. Annot. Cas. 141, *citing* *Stilwell v. Carpenter*, 59 N. Y. 414; *Gallen's Estate*, 10 Pa. Dist. 262, 25 Pa. Co. Ct. 265, *affirmed* on other grounds 18 Pa. Super. Ct. 365; *Gates v. Gilmer*, (Tenn. Ch. 1898) 48 S. W. Rep. 280. And see generally the title SET-OFF, RECOUPMENT, AND COUNTERCLAIM, 526. 7 *et seq.*; 533. 7 *et seq.*; 562. 2, 604. 5 *et seq.*; 625. 4 *et seq.*

Set-off of Debts Against Legacy or Distributive Share. — See *infra*, this title, 1170. 8.

**932.** 1. Confession of Judgment Binds Estate. — See *Carpenter v. Lindauer*, (N. Mex. 1904) 78 Pac. Rep. 57; *Strause v. Braunreuter*, 14 Pa. Super. Ct. 125.

A Judgment to a Trustee for Sundry Creditors to save costs and to avoid sacrificing the estate is valid. *Watts's Estate*, 6 Pa. Dist. 627.

5. No Power to Bind Estate by Original Contract — *United States*. — *Kelley v. Kelley*, 84 Fed. Rep. 420.

*Alabama*. — *Eufaula Nat. Bank v. Manassas*, 124 Ala. 379.

*California*. — See *Melone v. Ruffino*, 129 Cal. 514, 79 Am. St. Rep. 127.

*Georgia*. — *Hughes v. Treadaway*, 116 Ga. 663.

*Illinois*. — *Banerle v. Long*, 187 Ill. 475,

**933.** See note 1.

**934.** **The Only Effect of Such Contracts.** — See notes 1, 2, 3.  
**The Validity of the Contract.** — See note 4.

*affirming* 88 Ill. App. 177, *quoting* 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 932; *McAuley v. O'Connor*, 92 Ill. App. 592.

*Iowa.* — *Valley Nat. Bank v. Crosby*, 108 Iowa 653, *citing* 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 932.

*Kansas.* — *Shrigley v. Black*, 59 Kan. 487.

*Kentucky.* — *Rice v. Strange*, 72 S. W. Rep. 756, 24 Ky. L. Rep. 1945.

*Nebraska.* — *Burleigh v. Palmer*, (Neb. 1905) 103 N. W. Rep. 1068.

*New York.* — *Weeks v. O'Brien*, 25 N. Y. App. Div. 206, 27 Civ. Pro. (N. Y.) 86; *Metropolitan Trust Co. v. McDonald*, 52 N. Y. App. Div. 424; *Olin v. Arendt*, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 270. See also *Guthmann v. Meurer*, (N. Y. City Ct. Gen. T.) 31 Misc. (N. Y.) 810. *Compare* *Matter of Fidelity Loan, etc., Co.*, (Surrogate Ct.) 23 Misc. (N. Y.) 211.

*North Carolina.* — *Morehead Banking Co. v. Morehead*, 122 N. Car. 318.

*Ohio.* — *West v. Dean*, 8 Ohio Cir. Dec. 797, 15 Ohio Cir. Ct. 261.

*Pennsylvania.* — *Auer's Estate*, 14 Pa. Dist. 114.

*South Carolina.* — *Elmore v. Elmore*, 58 S. Car. 289, *quoting* 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 932.

*West Virginia.* — *Wick v. Dawson*, 48 W. Va. 469, *citing* 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 932.

**Rule and Corollary.** — An executor is not answerable, in his representative capacity, for any cause of action not created by the decedent himself, and on like principle he cannot recover in his own right for a cause accruing to the decedent. *Weil v. Townsend*, 25 Pa. Super. Ct. 638.

**An Administrator Is Not an Agent of His Intestate,** but derives his authority solely from the statute, and is with respect thereto a public officer. *Henry v. Henry*, (Neb. 1905) 103 N. W. Rep. 441.

**Right of Representative to Reimbursement Out of Estate.** — Ordinarily, executors and administrators must do many acts and make many contracts for which they are liable personally, but for which they are entitled to be reimbursed ultimately on the presentation and allowance of their accounts by the probate court. *Painter v. Kaiser*, 27 Nev. 421. See also *supra*, this title, **918. 1.**

**Debts Contractable.** — No debt binding the estate of a decedent can be contracted after his death, except for expenses of administration and for the purpose of realizing assets. *Corr's Estate*, 8 Pa. Dist. 209.

**Right of Subrogation of Creditor of Representative.** — Wherever the account of the trustee or executor is in such a condition that he would be entitled to be reimbursed from the funds of the estate, should he pay his creditor, and he has become insolvent, or for any reason cannot pay, the creditor may be allowed to take his place, and be paid out of the estate to the same extent. *Gates v. McClenahan*, 124 Iowa 593.

**Equitable Actions** have been permitted on contracts of the administrator directly against the estate, where because of his insolvency, or some other sufficient reason, their remedy against him is inadequate. But this is always based on a *quantum meruit* or benefit received. *Valley Nat. Bank v. Crosby*, 108 Iowa 651. See also *O'Brien v. Jackson*, 167 N. Y. 31, *reversing* on other grounds 42 N. Y. App. Div. 171; *infra*, this subdivision, **935. 2.**

**933. 1. Benefit to Estate.** — *Kelley v. Kelley*, 84 Fed. Rep. 420; *O'Brien v. Jackson*, 167 N. Y. 31, *reversing* on other grounds 42 N. Y. App. Div. 171; *Carideo v. Austin*, 88 N. Y. App. Div. 35; *Olcott v. De Jorin*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 735; *West v. Dean*, 8 Ohio Cir. Dec. 797, 15 Ohio Cir. Ct. 261; *Eiermann v. People's Trust, etc., Co.*, 21 Lanc. L. Rev. 170; *Elmore v. Elmore*, 58 S. Car. 289, *quoting* 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 933; *Reynolds-McGinness Co. v. Green*, (Vt. 1905) 61 Atl. Rep. 556; *Wick v. Dawson*, 48 W. Va. 469.

**The Exercise of a Power of Renewal** contained in a lease and vested in the decedent as lessee is a contract falling within the rule. *Chisolm v. Toplitz*, 82 N. Y. App. Div. 346, *affirmed* on opinion below 178 N. Y. 599.

**934. 1. Individual Liability of Personal Representatives on Their Contracts.** — *Maxon v. Jones*, 128 Cal. 77; *McAuley v. O'Connor*, 92 Ill. App. 592; *De Coudres v. Union Trust Co.*, 25 Ind. App. 271, 81 Am. St. Rep. 95; *O'Brien v. Jackson*, 167 N. Y. 31, *reversing* on other grounds 42 N. Y. App. Div. 171; *Metropolitan Trust Co. v. McDonald*, 52 N. Y. App. Div. 424; *Chambers v. Greenwald*, (Supm. Ct. App. T.) 94 N. Y. Supp. 504; *West v. Dean*, 8 Ohio Cir. Dec. 797, 15 Ohio Cir. Ct. 261; *Reynolds-McGinness Co. v. Green*, (Vt. 1905) 61 Atl. Rep. 556; *Wick v. Dawson*, 48 W. Va. 469. See also *Melone v. Ruffino*, 129 Cal. 514, 79 Am. St. Rep. 127; *Moran v. Morrill*, 78 N. Y. App. Div. 440, *affirmed* 177 N. Y. 563.

**2. Stipulation Against Personal Liability.** — *Maxon v. Jones*, 128 Cal. 77; *De Coudres v. Union Trust Co.*, 25 Ind. App. 271, 81 Am. St. Rep. 95.

**3. Designation of Representative Capacity Does Not Preclude Individual Liability.** — *De Coudres v. Union Trust Co.*, 25 Ind. App. 271, 81 Am. St. Rep. 95; *Dallas County v. Club Land, etc., Co.*, 95 Tex. 200, *reversing* in part on other grounds 26 Tex. Civ. App. 449; *Wick v. Dawson*, 48 W. Va. 469; *Thompson v. Mann*, 53 W. Va. 432. See also *Henry v. Henry*, (Neb. 1905) 103 N. W. Rep. 441.

**4. Instances of Contracts Held to Be Binding.** — A contract by which the promisor agreed that after his appointment as executor he would pay to the legatees named in the will the amount of their respective proportions of any money coming into his hands in excess of a designated sum is valid and binding upon the executor personally. *Painter v. Kaiser*, 27 Nev. 420; *Esden v. Kaiser*, 27 Nev. 432; *Kent v. Kaiser*, 27 Nev. 435.



**935.** *bb. CONTRACTS FOR SERVICES—(aa) In General. — See note 1.*  
*(bb) Employment of Counsel. — See note 2.*

An executor who borrows money for the estate of the decedent may bind himself personally for the repayment of the money if it is not used as agreed at the time of the loan. *Frick v. Shimer*, 26 Pa. Super. Ct. 563.

**A Contract Within the Statute of Frauds** must be in writing. *Flannery v. Chidgey*, 33 Tex. Civ. App. 638.

The contract of an executor or administrator in which he does not limit his personal liability, though for the benefit of the estate, is not a debt of the estate, but an original undertaking and not within the statute of frauds. *Reynolds-McGinness Co. v. Green*, (Vt. 1905) 61 Atl. Rep. 556, *citing* *Bellows v. Sowles*, 57 Vt. 164, 52 Am. Rep. 118.

**Contract to Pay Commissions of Broker for Sale of Real Estate.**—The fact that an executor, at the time when he employed brokers to sell real estate, did not have a license from the probate court to execute the conveyance does not invalidate the contract, at least where he was authorized to sell by the persons interested in the estate, and did procure and have such license at the time when a purchaser was found. *Reynolds-McGinness Co. v. Green*, (Vt. 1905) 61 Atl. Rep. 556.

**935. 1. Contracts for Services in Settlement of Estate—Individual Liability.**—*Matter of Willard*, 139 Cal. 501; *Valley Nat. Bank v. Crosby*, 108 Iowa 651; *Ex p. Simmons*, 69 S. Car. 385. See also *McWilliams v. Elder*, 52 La. Ann. 995.

**Erection or Completion of Improvements on Real Estate.**—An administrator has no authority to contract for the erection or completion of improvements on real estate where he is not entitled to possession, and persons furnishing labor and materials under such contract acquire no valid lien on the premises. *Waldermeyer v. Loebig*, 183 Mo. 363, *citing* *Langston v. Canterbury*, 173 Mo. 122.

It is not within the power of a personal representative, without an order of court, to make a contract which will give the right to file liens on the estate property, and the subsequent consent or agreement of the heirs cannot legalize or vitalize his unauthorized act. *San Francisco Paving Co. v. Fairfield*, 134 Cal. 220; *Chappius v. Blankman*, 128 Cal. 362.

**2. Rule that Employment of Counsel Does Not Bind Estate—Alabama.**—*Taylor v. Crook*, 136 Ala. 354, 96 Am. St. Rep. 26.

*Arkansas.*—*Bryan v. Craig*, 64 Ark. 438; *Paget v. Brogan*, 67 Ark. 522; *Parker v. Mayo*, 72 Ark. 513.

*California.*—*Matter of Brignole*, 133 Cal. 162. See also *Matter of Carpenter*, 146 Cal. 661.

*Illinois.*—*McAuley v. O'Connor*, 92 Ill. App. 592.

*Iowa.*—*Rickel v. Chicago, etc., R. Co.*, 112 Iowa 148; *Clark v. Sayre*, 122 Iowa 591; *Matter of Sawyer*, 124 Iowa 485.

*Nebraska.*—*Burleigh v. Palmer*, (Neb. 1905) 103 N. W. Rep. 1068.

*New York.*—*Parker v. Day*, 155 N. Y. 383, *reversing* (Buffalo Super. Ct. Gen. T.) 12 Misc. (N. Y.) 510, which *reversed* (Buffalo Super. Ct. Eq. T.) 9 Misc. (N. Y.) 298; *Shaffer v. Bacon*, 35 N. Y. App. Div. 248, *affirmed* 161 N. Y.

635; *Olcott v. De Jerrin*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 735.

*North Carolina.*—*Lindsay v. Darden*, 124 N. Car. 307.

*Pennsylvania.*—*Kalbfell's Estate*, 17 Pa. Super. Ct. 255, *affirming* 30 Pittsb. Leg. J. N. S. (Pa.) 325.

*Washington.*—*Nash v. Wakefield*, 30 Wash. 556; *Matter of Sullivan*, 36 Wash. 217.

*Wisconsin.*—*Wiesmann v. Daniels*, 114 Wis. 240; *Vaughn v. Walsh*, 122 Wis. 486.

**In Nevada** the rule is changed by statute. Fees for attorneys' services are made a direct charge against the estate, and are allowed to the attorneys employed. The remedy by allowance out of the funds of the estate is both ample and exclusive, and an action to recover the amount will not lie against the personal representative. *Torreyson v. Bowman*, 26 Nev. 369.

**Exception to Rule.**—Where the services are of value to the estate, and the remedy against the representative is unavailing because of his insolvency or nonresidence, a suit in equity will lie to enforce payment of the reasonable value of the services out of the assets. *Pike v. Thomas*, 65 Ark. 437; *Gates v. McClenahan*, 124 Iowa 593; *Thompson v. Nowlin*, 51 W. Va. 346. See also *Taylor v. Crook*, 136 Ala. 354, 96 Am. St. Rep. 26.

**Attorney's Lien.**—The fees of an attorney being a personal liability of the executor or administrator, the attorney can have no lien for the amount on assets of the estate. *Rickel v. Chicago, etc., R. Co.*, 112 Iowa 153; *Waite v. Willis*, 42 Oregon 288. *Contra*, *Burleigh v. Palmer*, (Neb. 1905) 103 N. W. Rep. 1068; *Matter of Regan*, 167 N. Y. 338, *reversing* on other grounds 58 N. Y. App. Div. 1; *Arkenburgh v. Arkenburgh*, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 760, *affirmed* 49 N. Y. App. Div. 636, 64 N. Y. Supp. 742, 176 N. Y. 551; *Matter of Crouch*, (Surrogate Ct.) 41 Misc. (N. Y.) 349; *In re McGuire*, 106 N. Y. App. Div. 131.

An attorney cannot withhold from an administrator money collected by him for the estate on the plea that the deceased, in his lifetime, had become indebted to him for legal services. *In re Thresher*, 29 Mont. 11.

Where a client dies before the termination of the relation of client and attorney, the attorney is entitled to a lien to secure charges for services performed for the deceased as well as those performed for the representative of his estate. *Meloy v. Meloy*, 24 App. Cas. (D. C.) 239, *citing* *Hurlbert v. Brigham*, 56 Vt. 368.

**Attorney's Fee an Expense of Administration.**—The compensation of the attorney of the legal representative, while not a claim against the estate, is an expense of administration, allowed to the representative, the amount of which is to be fixed by the court and paid out of the estate. *Matter of Kruger*, 123 Cal. 391. See also *infra*, this title, **1240. 1 et seq.**

The question as to what shall be allowed to the executor or administrator from the estate, for legal services, as well as all other necessary expenses, is one solely between such executor or administrator on the one side, and



**936.** *cc.* BORROWING MONEY. — See note 5.

*dd.* MAKING OR INDORSING BILLS AND NOTES. — See note 7.

**937.** *dd.* EXCEPTIONS TO GENERAL RULE — (*bb.*) *Expenses Incidental to Administration.*

— See note 2.

**938.** (*cc.*) *Statutory Authority to Contract.* — See note 1.

(*dd.*) *Testamentary Authority to Contract.* — See note 2.

those entitled to succeed to the residue of the estate, after the payment of the expense of administration, on the other. Whatever allowance is made for the services of the attorney must be made to the executor or administrator, and cannot be made to the attorney. *Matter of Kruger*, 143 Cal. 141. To the same effect see *State v. District Ct.*, 25 Mont. 33; *Matter of Welling*, 51 N. Y. App. Div. 355, motion for reargument denied 53 N. Y. App. Div. 639. See also *Stephens v. Cassity*, 104 Mo. App. 210. *Contra* *Baker v. Cauthorn*, 23 Ind. App. 611, 77 Am. St. Rep. 443; *Crim v. England*, 46 W. Va. 480, 76 Am. St. Rep. 826; *Carpenter v. U. S. Fidelity, etc., Co.*, 123 Wis. 209. See also *Matter of Kasson's Estate*, 119 Cal. 489, as to a contract to pay a fee, the amount to be fixed by the court, which it was said released the executor from any individual liability whatever.

Sums expended by an executor for attorney's fees do not constitute a debt in his favor against the estate which his successor in the administration is authorized to allow and pay. His only remedy is to obtain a credit therefor on the judicial settlement of his account. *Matter of Blair*, 67 N. Y. App. Div. 116.

The claim of an attorney for fees for services rendered to one executor cannot be allowed on an accounting by a coexecutor, since the claimant is not a creditor of the estate. *Christian's Estate*, 12 Pa. Dist. 368, *Ashman, J., dissenting.*

*Effect of Allowance.* — Credit to the representative in his account for an attorney's fee does not constitute a judgment or adjudication in favor of the attorney against either the estate or the representative, and cannot be made the foundation of an action by him against either. The decree only fixes the allowance of the fee as expense to the administrator. *McKee v. Soher*, 138 Cal. 367, *Beatty, C. J., dissenting.* To the same effect see *McKown's Estate*, 17 Pa. Super. Ct. 253, *citing Fitzsimmons v. Safe Deposit, etc., Co.*, 189 Pa. St. 514; *Bayle's Estate*, 12 Pa. Dist. 73, 28 Pa. Co. Ct. 125. *Contra*, that the amount when allowed becomes a demand against the estate in favor of the attorney and can be pursued as such if not paid by the legal representative. *Smith v. Rhodes*, 68 Ohio St. 500; *Mills's Estate*, 40 Oregon 424.

In the absence of an express contract fixing the amount, the representative is personally liable for the reasonable value of the services; and that amount may be recovered from him though a smaller sum has been allowed to him by the probate court. *Briggs v. Breen*, 123 Cal. 657, *Beatty, C. J., dissenting.*

**936. 5. No Authority to Bind Estate for Borrowed Money.** — *Sterrett v. Barker*, 119 Cal. 492; *De Coudres v. Union Trust Co.*, 25 Ind. App. 271, 81 Am. St. Rep. 95; *Rice v. Strange*, 72 S. W. Rep. 756, 24 Ky. L. Rep. 1945; *Lyman*

*v. National Bank of Republic*, 181 Mass. 437; *Howe v. Richardson*, 186 Mass. 259; *Hamlin v. Smith*, 72 N. Y. App. Div. 601; *Smith v. Hayward*, 5 Ohio Dec. 462, 5 Ohio N. P. 501; *Frick v. Shimer*, 26 Pa. Super. Ct. 563; *Breckinridge v. Breckinridge*, 98 Va. 561; *Whitten v. Fincastle Bank*, 100 Va. 546; *La Banque Jacques Cartier v. Gratton*, 30 Can. Sup. Ct. 317.

**Order of Court Authorizing Borrowing of Money.** — See *Mustin's Estate*, 188 Pa. St. 544, 43 W. N. C. (Pa.) 204.

**7. Making or Indorsing Bills and Notes Imposes No Liability on Estate.** — *Glisson v. Weil*, 117 Ga. 842; *De Coudres v. Union Trust Co.*, 25 Ind. App. 271, 81 Am. St. Rep. 271; *Valley Nat. Bank v. Crosby*, 108 Iowa 651; *Freehold First Nat. Bank v. Thompson*, 61 N. J. Eq. 188, *citing Hellier v. Lord*, 55 N. J. L. 367; *Montreal Bank v. Buchanan*, 32 Wash. 480, *quoting* 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 936.

**937. 2. Power to Incur Debts for Incidental Expenses of Administration.** — *Contra*, *Valley Nat. Bank v. Crosby*, 108 Iowa 651, holding that all allowances for expenses of administration are made to the administrator, and not as fixed by his agreement, but based on *quantum meruit* alone; *Carpenter v. U. S. Fidelity, etc., Co.*, 123 Wis. 209, holding that expenses incurred by a personal representative in the performance of his duties are in all cases the individual liabilities of such representative. See generally *supra*, this title, **932. 5 et seq.**; and see *supra*, this title, **918. 1.**

In *New York* the necessary expenses of administering an estate may be regarded as a charge upon, though not a debt against, the estate. *Shaffer v. Bacon*, 35 N. Y. App. Div. 248, *affirmed* without opinion, 161 N. Y. 635.

**Expense Incurred under Order of Court.** — It would be unreasonable to hold that the administrator must be liable primarily or otherwise for an expense which he has been compelled to incur by a mandate of the court which had the jurisdiction to control his action. *Fleming v. Kelly*, 18 Colo. App. 23.

**938. 1. Plantation Supplies.** — Statutory authority to carry on the decedent's plantation and keep the buildings in tenantable repair confers no authority to contract to pay for permanent improvements placed on the land. *Rice v. Conwill*, 35 Tex. Civ. App. 341.

**2. Testamentary Authority to Bind Estate by Contract.** — *Brannon v. Ober, etc., Co.*, 106 Ga. 168; *Ferris v. Van Ingen*, 110 Ga. 102. See also *Lambertson v. Vann*, 134 N. Car. 108; *infra*, this title, **1058. 2 et seq.**, **1059. 4 et seq.**

**Terms of Will.** — Power given to an executor to sell land confers on him authority to enter into such contracts as may be incidentally appropriate to the exercise of the power, including the employment of an agent on commission to aid him in making the sale. *Ingham v. Ryan*, 18 Colo. App. 347.

**938.** (b) *Obligation of Decedent as Consideration.* — See notes 4, 5.

**939.** *Ratification of Void Transaction.* — See note 3.

(2) *Contracts Other than to Pay Money.* — See note 4.

b. *CONTRACTS MADE BY DECEDENT* — (1) *Power and Duty to Perform in General.* — See note 5.

**940.** See note 1.

A naked power of sale of real estate confers no authority upon executors to contract to charge the estate with the expenses of repairs or improvements. *Ashby v. Ashby*, 59 N. J. Eq. 547.

Power to sell, especially where the broadest discretion as to terms and conditions is vested in the executors, gives of necessity the power to contract, and with that the power to enforce the contract. *Strauss v. Bendheim*, 162 N. Y. 469, reversing 44 N. Y. App. Div. 82.

Authority to incur expense is not alone sufficient to empower the executor to create obligations against the estate for the funds used. *O'Brien v. Jackson*, 167 N. Y. 31, reversing 42 N. Y. App. Div. 171.

A provision in a will that "it is my wish that my husband [whom the will appointed sole executor] continue the clothing business as now conducted" does not show any intention to charge the estate with any debt which he might contract in the course of such business. *Saperstein v. Ullman*, 49 N. Y. App. Div. 446, three judges dissenting, affirmed 168 N. Y. 636, 678, three judges dissenting.

A will expressing entire confidence in the person named as executor and giving to him the entire management, control, and disposition of the assets of the estate confers power on the executor to borrow money to pay debts on his note as executor. *Prieto v. Leonards*, 32 Tex. Civ. App. 205.

An independent executor charged with the duty of collecting all the property of the estate and all debts due to it, and vested with a general power to sell all property, real and personal, has authority to convey away land belonging to the estate in payment for services rendered to the executor in the discharge of his duties. *Baker v. Hamblen*, (Tex. Civ. App. 1905) 85 S. W. Rep. 467, citing *Murrell v. Wright*, 78 Tex. 519, distinguishing *Teal v. Terrell*, 48 Tex. 509.

**Liability of Executors for Breach of Contract.** — An executory contract made by executors, and not founded on an obligation of the testator, renders them liable only individually, though authorized by the will. *Williamson v. Stevens*, 84 N. Y. App. Div. 518, 13 N. Y. Annot. Cas. 197.

Damages for breach of a contract to sell real estate cannot be recovered against executors in their official capacity, though they had power to sell under the will. *Carideo v. Austin*, 88 N. Y. App. Div. 35.

**938. 4. Contracts in Consideration of Obligations of Decedent.** — *Jenkins v. Phillips*, 41 N. Y. App. Div. 389. Compare *Jones v. Peebles*, 133 Ala. 290, two judges dissenting; *Montreal Bank v. Buchanan*, 32 Wash. 480.

**5. Power to Bind Estate Limited to Assets in Hand.** — *Jenkins v. Phillips*, 41 N. Y. App. Div. 389. See also *Carpenter v. Lindauer*, (N. Mex. 1904) 78 Pac. Rep. 57.

**939. 3. Personal Representative Cannot Ratify Void Transaction of Decedent.** — Acknowledgment by a personal representative of a claim which has no foundation, with part payment and a promise to pay the balance, will not bind the estate so as to render it liable. *Wireman's Estate*, 7 Pa. Dist. 759, 43 W. N. C. (Pa.) 334.

**4. Agreement to Sell Property of Estate.** — *Strauss v. Bendheim*, 162 N. Y. 469, reversing 44 N. Y. App. Div. 82, modifying and affirming (Supm. Ct. Spec. T.) 28 Misc. (N. Y.) 660.

**An Agreement to Resell Land** at the same price at which it was bid in at an administrator's sale, which was void because of misdescription, is not binding on the estate. *Craig v. Anderson*, (Neb. 1902) 92 N. W. Rep. 640.

**5. Contracts of Decedent Binding on Personal Representative.** — *Jones v. Peebles*, 133 Ala. 290; *Allen v. Confederate Pub. Co.*, 121 Ga. 773; *Mecartney v. Carbine*, 108 Ill. App. 282; *State v. Taylor*, 100 Mo. App. 481; *Matter of Corbin*, 101 N. Y. App. Div. 25; *Pugh v. Baker*, 127 N. Car. 2; *Wiggins v. Pender*, 132 N. Car. 628; *Walsh's Estate*, 35 Pittsb. Leg. J. N. S. (Pa.) 289; *Volk v. Stowell*, 98 Wis. 385. See also *Sayward v. Houghton*, 119 Cal. 545; *Rupp v. Rupp*, 11 Colo. App. 36; *O'Brien v. New England Trust Co.*, 183 Mass. 186; *Russell v. Fenner*, 11 Ohio Cir. Dec. 754, 21 Ohio Cir. Ct. 527; *Fitzsimmons v. Lindsay*, 205 Pa. St. 79.

**The Covenants in a Lease.** — *Magruder v. Hornot*, 110 La. 585.

**Building Contracts.** — *In re Day*, (1898) 2 Ch. 510; *Allam's Estate*, 199 Pa. St. 573.

**Insolvent Estates.** — Where the estate is insolvent it is the duty of the representative to conserve the interest of all the creditors and not to administer the estate so as to work a preference in favor of any creditor; he therefore has no right to perform an executory contract entered into by the decedent, whereby the latter agreed to deliver crops and farm produce raised by him in consideration of money and merchandise advanced, which should be satisfied out of the proceeds. *Schermerhorn v. Gardenier*, (Supm. Ct. Tr. T.) 46 Misc. (N. Y.) 280.

**Contractual Right to Settle Dissolved Partnership.** — A contractual right and duty of one of the members of a dissolved partnership to collect outstanding assets and distribute the proceeds in a certain way passes on his death to his representative. *McDowell v. North*, 24 Ind. App. 435.

**A Power of Attorney to Sell Property**, given by the decedent, if not coupled with an interest, does not survive the person giving it and is not binding on his personal representative. *Fisher v. Southern L. & T. Co.*, 138 N. Car. 90.

**940. 1. Contracts Involving Personal Taste or Skill.** — *Paris v. Greig*, 12 Hawaii 274; *Caruthers v. Caruthers*, 99 Ill. App. 402; *Me-*



**941.** (2) *Contracts Relating to Sale or Purchase of Real Estate* — (a) *Contracts to Sell Real Estate.* — See notes 6, 7.

**942.** (b) *Contracts to Purchase Real Estate.* — See note 1.

**16. Liability for Tortious or Negligent Acts.** — See notes 5, 6.

*cartney v. Carbine*, 108 Ill. App. 282; *Cooper v. Eyrich*, 41 W. N. C. (Pa.) 370. See also *Fisher v. Southern L. & T. Co.*, 138 N. Car. 90.

**941. 6. Enforcement of Contract Against Vendee of Decedent.** — *Bryant v. Atlantic Coast Line R. Co.*, 119 Ga. 607; *Gilmore v. Gilmore*, 60 Kan. 606; *Delaneville v. Duhé*, 114 La. 62; *Jackson v. Phillips*, 57 Neb. 189; *Clapp v. Tower*, 11 N. Dak. 556; *Wollenberg v. Rose*, 41 Oregon 314; *Huggin's Estate*, 204 Pa. St. 167. See also *supra*, this title, **843. 4.**

**Rescission of Contract.** — See *Stang v. Newberger*, 8 Ohio Dec. 80, 6 Ohio N. P. 60; *Oakes v. Gillilan*, (Neb. 1901) 95 N. W. Rep. 511.

**Where the Vendee Becomes Executor of the vendor's estate** he may rescind the contract, being bound, however, to exercise good faith in the transaction. *Sutton's Estate*, 13 Pa. Super. Ct. 492, *affirmed* 200 Pa. St. 163.

**Vendor's Lien.** — The legal title which remains in the vendor, where a lien is reserved in his deed to secure the purchase money, descends to the heirs of the vendor. *McCord v. Hames*, (Tex. Civ. App. 1905) 85 S. W. Rep. 504, *citing Hamblen v. Folts*, 70 Tex. 136.

**7. Statutory Provisions.** — In many jurisdictions provision is made by statute for bringing the necessary parties into the probate court or a court of equity and obtaining an order or decree authorizing performance of the contract and the execution of the necessary conveyance to pass the title. *Butman v. Butman*, 213 Ill. 104; *May v. Boyd*, 97 Me. 398, 94 Am. St. Rep. 509; *Nazro v. Long*, 179 Mass. 451; *Solt v. Anderson*, 62 Neb. 153, *reversed* on rehearing on other grounds 63 Neb. 734; *Holmes v. Columbia Nat. Bank*, (Neb. 1903) 97 N. W. Rep. 26; *Rigby's Estate*, 8 Pa. Super. Ct. 108, 42 W. N. C. (Pa.) 434; *In re White*, 13 Pa. Super. Ct. 201; *Schoonover v. Ralston*, 25 Pa. Super. Ct. 375; *Hartshorn v. Smith*, (S. Dak. 1905) 104 N. W. Rep. 467; *Maxson v. Jennings*, 19 Tex. Civ. App. 700; *Dutton v. Wright*, (Tex. Civ. App. 1905) 85 S. W. Rep. 1025. See also *Re McIntyre*, 7 Ont. L. Rep. 548.

Without adequate authority from a competent court, an executor or administrator, as such, cannot make a deed to real estate, but the deed must come from the heirs, to carry a good title. *Wollenberg v. Rose*, 41 Oregon 314. See also *Murdock v. Kelly*, 62 N. Y. App. Div. 562.

An administrator *pendente lite* is within a statute authorizing specific performance by decree of the Orphans' Court, on application of the executor or administrator. *Logan's Estate*, 21 Pa. Co. Ct. 455.

In *Montana* it has been doubted whether, under the provisions of the organic act of the state, probate courts can be clothed by the legislature with equitable power to make a decree authorizing and directing an executor or administrator to execute such conveyance. *Bullerdick v. Hermsmeyer*, 32 Mont. 541.

**Delivery by Executor of Deed Left to Him by Will.** — Where a deed to property is placed in

the hands of the executor by the last will and testament of the grantor, to be delivered on payment of the balance due on the purchase price, a delivery by him on performance by the grantee is valid and effectual to pass the title. *Dettmer v. Behrens*, 106 Iowa 585, 68 Am. St. Rep. 326.

**942. 1. Executor or Administrator Not Ordinarily Entitled to Enforce Performance of Contract to Convey Land to Decedent.** — See *Brown v. Mize*, 119 Ala. 10; *Hovorka v. Havlik*, (Neb. 1903) 93 N. W. Rep. 990; *Cutler v. Meeker*, (Neb. 1904) 99 N. W. Rep. 514.

**Privilege to Purchase Contained in Lease.** — See *supra*, this title, **839. 3.**

**Payments on Contract.** — Where there is a contract for the purchase of land it descends in equity to the heirs of the vendee as real estate, and they may call on the executors or administrator to discharge the contract out of the personal estate of the vendee so as to enable the heirs to demand a conveyance from the vendor. *Matter of Davis*, 43 N. Y. App. Div. 331.

**5. Torts of Executor or Administrator Create Only Personal Liability — California.** — *Toner v. Meussdorffer*, 123 Cal. 462.

*Georgia.* — *Anderson v. Foster*, 105 Ga. 563; *Carr v. Tate*, 107 Ga. 237; *Cumberland Island Co. v. Bunkley*, 108 Ga. 756.

*Indiana.* — *Moore v. Moore*, 155 Ind. 261.

*Missouri.* — *Emmons v. Gordon*, 140 Mo. 490, 62 Am. St. Rep. 734.

*New York.* — *Matter of Yetter*, 44 N. Y. App. Div. 404, *affirmed* 162 N. Y. 615; *Reimers v. Schmitt*, 68 N. Y. App. Div. 299; *Lawyers' Surety Co. v. Reinach*, (N. Y. City Ct. Gen. T.) 23 Misc. (N. Y.) 242, *affirmed* (Supm. Ct. App. T.) 25 Misc. (N. Y.) 150; *Blum v. Dabritz*, (Supm. Ct. App. T.) 39 Misc. (N. Y.) 800, *affirming* (N. Y. City Ct. Spec. T.) 78 N. Y. Supp. 207, *citing* 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 942; *Watson v. Moriarty*, (Supm. Ct. Tr. T.) 59 N. Y. Supp. 73.

*Ohio.* — *Deschler v. Franklin*, 11 Ohio Cir. Dec. 188, 20 Ohio Cir. Ct. 56.

*Pennsylvania.* — *Skivington v. Palmer*, 4 Lack. Jur. (Pa.) 245; *Kline v. Richards*, 4 Lack. Jur. (Pa.) 249; *Hay v. Parks*, 7 Northam. Co. Rep. (Pa.) 391, 14 York Leg. Rec. (Pa.) 180.

*South Carolina.* — *Elmore v. Elmore*, 58 S. Car. 289, *quoting* 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 942.

*Texas.* — *Coutlett v. U. S. Mortgage Co.*, 94 Tex. 164.

**For False Representations on the sale of property of the estate the executor or administrator is personally liable.** *Andrews v. Platt*, 77 Conn. 63; *Maneer v. Sanford*, 24 Can. L. T. 70.

**Torts of Servant of Administrator** — Where a servant employed by an administrator in carrying on the business of his decedent commits a tort while acting within the course of his employment, the administrator is liable therefor in his individual capacity. *Kalua v. Camarinos*, 11 Hawaii 557.



**943. 17. Liability for Taking Property of Third Persons.** — See note 1.

Liability in Representative Capacity. — See notes 2, 3.

**944. IX. MANAGEMENT AND CARE OF ESTATE — 1. In General — a. CUSTODY AND PRESERVATION OF ESTATE — (1) General Principles.** — See note 2.

(2) *Management of Estate for Benefit of Heirs.* — See note 3.

**Revoking Submission to Arbitration.** — An administrator is liable in his individual and not in his representative capacity for damages flowing from his wrongful revocation of a submission to arbitration of matters connected with the administration of the estate. *Magoun v. Magoun*, 84 N. Y. App. Div. 232.

**Failure of Representative to Return Property for Taxation.** — Where there is no statute requiring an executor or administrator to make lists for taxation of property which the decedent omitted to return during his lifetime, he cannot be held personally liable to pay the taxes upon such property. *Scott v. People*, 210 Ill. 594.

**942. 6. Negligence.** — *Elmore v. Elmore*, 58 S. Car. 289, quoting 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 942.

**943. 1. Individual Liability for Taking Property of Third Persons.** — See *Lazarus v. Carter*, 11 Hawaii 541; *Johnston v. McCain*, 188 Pa. St. 513.

**Property in Temporary Possession of the Decedent at His Death** has been held to fall within the rule. *Elmore v. Elmore*, 58 S. Car. 289, quoting 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 943, by a divided court, two judges *contra*. See also *Hunnicut v. Higginbotham*, 138 Ala. 472.

**Property Covered by Lien.** — A pledge of property by the decedent is enforceable against the proceeds of the property in the hands of the administrator of his estate. *Nashua Sav. Bank v. Abbott*, 181 Mass. 531, 92 Am. St. Rep. 430.

**Trust Funds.** — Property held by the decedent in trust, on coming into the possession of his personal representative is held by him for the *cestui que trust*, to whom he is liable either in his individual or his representative capacity. *In re Belt*, 29 Wash. 535, 92 Am. St. Rep. 946.

**Executor De Son Tort.** — That the estate of a decedent cannot be made liable for the act or contract of one who, without authority as executor or administrator, undertakes its settlement, is proved by the mere statement; and if the proceeds of goods purchased by such person, or the goods themselves, find their way into the inventory filed by a subsequently appointed administrator, it is no less clear that the creditor who has parted with his title cannot follow them into the Orphans' Court. His remedy is exclusively in the courts of common law, and against the person with whom he has dealt. *Fahy's Estate*, 10 Pa. Dist. 399, 25 Pa. Co. Ct. 448.

**2. Liability in Representative Capacity — Money Applied to Use of Estate.** — *Carideo v. Austin*, 88 N. Y. App. Div. 35; *Schmitt v. Jacques*, 26 Tex. Civ. App. 125. See also *Valley Nat. Bank v. Crosby*, 108 Iowa 651; *Rice v. Connelly*, 71 N. H. 382; *Moran v. Morrill*, 78 N. Y. App. Div. 440 (affirmed without opinion 177 N. Y.

563), *Ingraham, J., contra*, holding the case to be not one coming within the exception, and citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 943.

In such case a recovery does not diminish the estate, because the property was never properly a part of the estate. *Alexander v. Greacen*, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 526.

That an administrator has treated a fund as assets of the estate and distributed it as such does not convert it into assets as against third persons having title to it. *Matter of Warren*, 105 N. Y. App. Div. 582.

**Scope of Rule.** — In *Nickals v. Stanley*, 146 Cal. 724, it was held that an action which was simply an action at law against the estate, based upon the alleged personal tort of the administrator, in appropriating to the use of the estate the property of another, would not lie. In further discussion the court said: "It may be that, where the property of another has been actually used for the benefit of an estate, an action in equity may, under some circumstances, be maintained against the estate and those interested in the property thereof, to have the claim of the owner made a charge against such assets of the estate as may properly be held chargeable therewith."

**Real Estate.** — Under the *Minnesota* statute which provides that "an executor shall have the right to possession of the real estate of the decedent," where a testator's adverse possession of real estate, the ownership of which was in a third person, comes into the hands of the executor, he is liable in his representative capacity. *Pabst Brewing Co. v. Small*, 83 Minn. 445.

**3. Election as to Personal or Representative Liability.** — *Schmitt v. Jacques*, 26 Tex. Civ. App. 125; *Hill v. Escort*, (Tex. Civ. App. 1905) 86 S. W. Rep. 367. See also *Mathew v. Mathew*, 138 Cal. 334.

**944. 2. Preservation of Estate — Ordinary Care Required.** — *Matter of Freud*, 131 Cal. 667, 82 Am. St. Rep. 407; *Henderson Trust Co. v. Stuart*, 108 Ky. 167, quoting 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 944; *Guthrie v. Cincinnati Gas, etc., Co.*, 15 Ohio Dec. 23, quoting 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 944. See *supra*, this title, 904. 3.

**Land Situated in Foreign State.** — It may be questionable whether it is not the duty of a personal representative to care for foreign lands coming to the estate in his charge through a settlement effected by him, without any request from the persons interested in the estate. *Powell v. Foster*, 71 Vt. 160.

**3. Speculation with Assets Forbidden.** — See *infra*, this title, 982. 2 *et seq.*

**Engaging in Trade.** — See *infra*, this title, 974. 2 *et seq.*, 982. 2 *et seq.*, 1207. 2., 1217. 1.

**945.** (3) *Confusion of Trust Property with Individual Property.* — See note 1.

(4) *Insurance.* — See note 3.

**946.** (5) *Payment of Taxes* — (a) *Taxes on Personal Property.* — See note 2.

(b) *Taxes on Real Estate* — *aa. TAXES ACCRUING BEFORE OWNER'S DEATH.* — See note 3.

*bb. TAXES ACCRUING AFTER OWNER'S DEATH* — (*aa*) *General Rule.* — See note 4.

(*bb*) *Real Estate Required for Payment of Debts.* — See note 5.

**947.** (*cc*) *Real Estate in Possession of Personal Representative.* — See note 1.

(*dd*) *Testamentary Direction to Pay Taxes.* — See note 2.

(c) *Property Mortgaged to Estate.* — See note 3.

(7) *Deposit of Funds* — (a) *Duty and Propriety.* — See note 7.

**948.** *Statutory Requirements* — *In Louisiana.* — See note 1.

*In New York.* — See notes 2, 3.

**945. 1. Duty to Keep Trust Property Separate.** — Hunt v. Smith, 58 N. J. Eq. 25.

**3. Scope of Rule.** — A failure to take out insurance is not necessarily such negligence as, in case of loss, will render the personal representative liable for its value, but his liability for such failure is a question to be determined from the facts of each particular case; the cost of the insurance, value of the property, its liability to destruction by fire, and whether or not the representative had money in his hands that could be used for the purpose, are the cardinal elements to be considered. Where the property is already insured the failure of the representative to take out a vacancy permit on its becoming unoccupied is such negligence in the care of the property as will make him liable for injury resulting therefrom. *Henderson Trust Co. v. Stuart*, 108 Ky. 167.

**946. 2. Taxes on Personal Property Payable by Personal Representative.** — *Graham v. Russell*, 152 Ind. 186; *Cullop v. Vincennes*, 34 Ind. App. 667; *Langston v. Canterbury*, 173 Mo. 122.

**Succession Taxes.** — Succession taxes are usually a charge upon the respective shares of devisees and legatees, and not upon the estate, though the personal representative is frequently accountable for them in the first instance. *Berry v. Gaukroger*, (1903) 2 Ch. 116; *In re King*, (1904) 1 Ch. 363; *Re Holland*, 3 Ont. L. Rep. 406; *In re Pearce*, 10 British Columbia 280; *In re Chesney*, (Cal. 1905) 81 Pac. Rep. 679; *Fitzgerald v. Rhode Island Hospital Trust Co.*, 24 R. I. 59. And see the title SUCCESSION TAXES, 355. *1 et seq.*

*In England* the payment of estate or probate duty on personalty is a necessary incident to the obtaining of the grant of letters, and is a charge against the estate, which the executor or administrator is bound to incur in order to put himself in the position of legal personal representative. *In re Clemow*, (1900) 2 Ch. 182, followed in *In re Treasure*, (1900) 2 Ch. 648. See also *In re King*, (1904) 1 Ch. 363.

**Property in Hands of Ancillary Administrator.** — See *Dorris v. Miller*, 105 Iowa 564.

**3. Taxes Accruing on Real Estate Before Owner's Death** — *Illinois.* — *Sexton v. Sikking*, 90 Ill. App. 667.

*Indiana.* — *Graham v. Russell*, 152 Ind. 186.

*New York.* — *Matter of Doheny*, 70 N. Y. App. Div. 370, affirmed 171 N. Y. 691; *Matter*

of Franklin, (Surrogate Ct.) 26 Misc. (N. Y.) 107; *Matter of Liss*, (Surrogate Ct.) 39 Misc. (N. Y.) 123; *Kelly v. Pratt*, (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 31.

*Pennsylvania.* — *Decker's Estate*, 22 Pa. Co. Ct. 46.

*South Carolina.* — *Trimmier v. Darden*, 61 S. Car. 220.

*Virginia.* — *Breckinridge v. Breckinridge*, 98 Va. 561.

Where taxes are not a general or personal charge against the owner, but only a charge against the land itself, the rule is otherwise. *Matter of Hewitt*, (Surrogate Ct.) 40 Misc. (N. Y.) 322, citing *Krueger v. Schlinger*, (Supm. Ct. Spec. T.) 19 Misc. (N. Y.) 221.

**Tax Liens.** — The failure of the representative to pay taxes does not release the tax lien affixed by statute or otherwise upon the land. *Boring v. Jobe*, (Tenn. Ch. 1899) 53 S. W. Rep. 763.

**4. No Duty to Pay Taxes Accruing on Realty After Owner's Death.** — *Sexton v. Sikking*, 90 Ill. App. 667; *Lawson v. Acton*, 57 N. J. Eq. 107; *Gausen v. Moormann*, 5 Ohio Dec. 287, 5 Ohio N. P. 254; *In re O'Brien*, 14 Ohio Dec. 319. *Contra*, in *Texas*, where both real and personal property constitute assets of the estate. *Hanrick v. Gurley*, 93 Tex. 458.

**5. Realty Required for Payment of Debts.** — See *infra*, this title, 1274. 3 *et seq.*

**947. 1. Real Estate Taken Charge of by Administrator.** — *Long v. Landman*, 118 Mich. 174; *Langston v. Canterbury*, 173 Mo. 122. See also *infra*, this title, 1274. 3 *et seq.*

**2. Testamentary Direction to Pay Taxes.** — See *Penn v. Penn*, 87 S. W. Rep. 306, 27 Ky. L. Rep. 946, and *infra*, this title, 1274. 3 *et seq.*

**3. Taxes on Property Mortgaged to Estate.** — *Penn v. Penn*, 87 S. W. Rep. 306, 27 Ky. L. Rep. 946.

**7. Duty to Deposit Funds.** — *Officer v. Officer*, 120 Iowa 389, 98 Am. St. Rep. 365.

**948. 1. Louisiana Statute.** — *Benton's Succession*, 106 La. 494.

**2. New York Statute Compelling Deposit.** — *Matter of Hoagland*, 51 N. Y. App. Div. 347, affirmed 164 N. Y. 573; *Matter of Bodkin*, 88 N. Y. App. Div. 33.

Query whether the summary remedy prescribed for the safekeeping of assets, concededly the property of the estate, is appropriate for the trial of an issue of ownership of property between one executor, claiming title as an indi-

**948.** (b) Selection of Depositary. — See note 4.

(c) Loss of Funds Deposited — Failure of Depositary — *aa.* IN GENERAL. — See note 7.

**949.** See note 4.

*bb.* DEPOSIT IN INDIVIDUAL NAME. — See note 6.

**950.** *dd.* FAILURE TO PAY OUT FUNDS ON DEPOSIT. — See note 1.

(8) Investments and Loans — (a) Duty to Invest Funds of Estate. — See notes 2, 3, 4.

**952.** Special Administrators. — See note 3.

(c) Character of Investments — *aa.* RULE IN ABSENCE OF REGULATION BY STATUTE OR WILL — (*aa.*) Government Securities. — See note 7.

**953.** (*bb.*) Real Estate. — See note 1.

The Purchase and Improvement of Land. — See note 3.

**954.** (*cc.*) Foreign Investments. — See note 1.

**955.** (*ee.*) Other Species of Investments — Shares of Stock of Private Corporations. — See notes 1, 2.

**956.** Engaging in Business or Trade. — See note 3.

*bb.* CHARACTER OF INVESTMENTS REGULATED BY STATUTE — (*aa.*) Rule in England. —

See note 4.

**957.** (*bb.*) Rule in the United States — Securities Designated by Statute. — See note 2.

vidual, and his coexecutors? Matter of Freligh, (Surrogate Ct.) 42 Misc. (N. Y.) 11.

**948.** 3. Requirement that Temporary Administrators Shall Deposit Funds. — Matter of Philp, (Surrogate Ct.) 29 Misc. (N. Y.) 263.

4. Deposit with Private Banker or with Other Individual. — See *In re Sylvar*, (Cal. 1905) 81 Pac. Rep. 663.

7. Failure of Depositary — No Liability When Due Care Was Exercised. — *Caruthers v. Caruthers*, 99 Ill. App. 402; *Officer v. Officer*, 120 Iowa 389, 98 Am. St. Rep. 365; *Harding v. Canfield*, 73 Minn. 244.

**949.** 4. Bank of Doubtful Solvency. — *Germania Safety Vault, etc., Co. v. Driskell*, 66 S. W. Rep. 610, 23 Ky. L. Rep. 2050.

6. Mingling Funds of Estate with Individual Funds. — *Officer v. Officer*, 120 Iowa 389, 98 Am. St. Rep. 365.

**950.** 1. Failure to Pay Out Funds on Deposit. — *Caruthers v. Caruthers*, 99 Ill. App. 402.

2. Investment of Funds Not One of Primary Duties. — *Fitzgerald v. Paisley*, 110 Iowa 98; *Guthrie v. Cincinnati Gas, etc., Co.*, 15 Ohio Dec. 23; *Collier's Estate*, 30 Pa. Co. Ct. 607.

3. Funds Subject to Immediate Disbursement or Distribution — No Right or Duty to Invest. — *Caruthers v. Caruthers*, 99 Ill. App. 402; *Brigham v. Morgan*, 185 Mass. 27; *Matter of Ryer*, 94 N. Y. App. Div. 449, *affirmed* 180 N. Y. 532; *Matter of Sudds*, (Surrogate Ct.) 32 Misc. (N. Y.) 182, *appeal dismissed* 75 N. Y. App. Div. 612.

4. Duty to Invest Unemployed Funds. — *Dicks Estate*, 183 Pa. St. 647, 41 W. N. C. (Pa.) 367. See also *Tucker v. Stewart*, 121 Iowa 714, *citing* 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 950.

**952.** 3. Special Administrators Not Required to Invest. — *People v. Salomon*, 184 Ill. 490.

7. Investment in Government Securities Favored. — *Matter of Wotton*, 59 N. Y. App. Div. 584, *affirmed* 167 N. Y. 629. See also *Matter of Johnson*, 57 N. Y. App. Div. 494, *affirmed* 170 N. Y. 139.

The English Rule, in the absence of definite instructions, usually confines trustees to government bonds and real estate securities. *Duncklee v. Butler*, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 58.

**953.** 1. Investment on Real-estate Security Favored. — *Matter of Wotton*, 59 N. Y. App. Div. 584, *affirmed* 167 N. Y. 629.

3. Purchase and Improvement of Land Not Authorized as Investment. — *West v. Dean*, 8 Ohio Cir. Dec. 797, 15 Ohio Cir. Ct. 261. See also *Ferguson's Estate*, 204 Pa. St. 253; *Carr's Estate*, 24 Pa. Super. Ct. 369, *reversing* on other grounds 8 Del. Co. Rep. (Pa.) 566.

**954.** 1. Foreign Investments Prohibited. — *Brigham v. Morgan*, 185 Mass. 27; *Matter of Ball*, 55 N. Y. App. Div. 284.

Statement of the Rule. — See *Macy v. Mercantile Trust Co.*, (N. J. 1904) 59 Atl. Rep. 586.

**955.** 1. Investing in Stock of Private Corporations Not Allowed in England. — Executors and trustees have no authority to enter into, or the court to sanction, an agreement to convert a business in which the testator was a partner into a limited company, and receive in exchange shares and debentures to the extent of his interest. *In re Morrison*, (1901) 1 Ch. 701.

2. Rule in United States — Investment in Stocks of Private Corporations Not Allowed in Some Jurisdictions. — *Schlegel's Estate*, 13 Pa. Dist. 764.

**956.** 3. Investment in Trade or Business Not Allowed. — See *infra*, this title, **974. 2 et seq.**, **982. 2 et seq.**, **1207. 2.**

4. The English Statute. — See in *Quebec*, *Hill v. Campbell*, 15 Quebec Super. Ct. 125.

**957.** 2. The Pennsylvania Statute. — *Schlegel's Estate*, 13 Pa. Dist. 764.

The range of investment permitted to a fiduciary is a very limited one: government, state, and municipal bonds, mortgages properly secured, and, with the permission of the court, ground rents; but apart from the fact that they are not always readily attainable except for



**958.** *cc.* CHARACTER OF INVESTMENTS REGULATED BY WILL. — If No Positive Instructions Are Given. — See note 4.

**959.** Discretion Given to Executor by Will. — See note 1.

**961.** (g) Change of Investments. — See notes 3, 4.

**962.** (h) Liabilities of Executor or Administrator — *bb.* LOSS OR DEPRECIATION OF INVESTMENTS — (*aa*) Investments Made Without Authority. — See note 5.

(*bb*) Investments in Unauthorized Securities. — See note 7.

**963.** See note 1.

Assent of Beneficiaries to Improper Investment. — See note 4.

**964.** *cc.* CARE AND PRUDENCE IN MAKING INVESTMENTS. — See note 1.

**966.** (i) Investments Made by Decedent — *bb.* RETAINING AUTHORIZED INVESTMENTS. — See note 2.

small amounts, ground rents are not considered desirable, because, while they may be paid off at the pleasure of the tenant, they are not debts which can be collected at the will of the creditor, and a sale, therefore, is always necessary, no matter what may be the emergency requiring the investment to be realized. *Miller's Estate*, 14 Pa. Dist. 163.

**Effect of Statutes.** — The fact that the legislature has given the right to invest in particular securities in addition to those allowed by the courts is an indication of its policy that the power to make investments is not to be enlarged further than it already has been by statute. *Matter of Wotton*, 59 N. Y. App. Div. 584, *affirmed* 167 N. Y. 629.

**958. 4. General Directions to Invest Safely — Discretion as to Security.** — *Guthrie v. Cincinnati Gas, etc., Co.*, 15 Ohio Dec. 23, *citing* 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 958.

**959. 1. Discretion Given to Executor by Will.** — *Dunklee v. Butler*, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 58.

**961. 3. Change of Investments by Order of Court.** — See *Hill v. Campbell*, 15 Quebec Super. Ct. 125.

**4. Statutory Authority to Change Investments.** — Rev. Stat. Ohio, § 6080, conferring upon the probate court "authority to direct any executor or administratrix to sell any stock in any corporation on terms prescribed by that statute," empowers the court to order a sale of securities for the purpose of preventing loss to the estate. *Guthrie v. Cincinnati Gas, etc., Co.*, 15 Ohio Dec. 23.

**962. 5. Investments Made Without Authority — Executor or Administrator Personally Liable for Loss.** — *Brigham v. Morgan*, 185 Mass. 27.

**Investments by Executor or Administrator in His Individual Name.** — Whenever a trustee, charged with the duty of investing money belonging to and for the benefit of another, invests it in such a way as to make it possible for him to profit by the investment individually, he makes himself personally liable for any loss which may occur by reason of said investment. *Carr's Estate*, 24 Pa. Super. Ct. 369, *reversing* on other grounds 8 Del. Co. Rep. (Pa.) 556.

**7. Compliance with Law or Order of Court — Representative Not Personally Liable.** — *Siechrist v. Bose*, 87 Md. 284; *Oesterla v. Gaither*, 90 Md. 40.

**963. 1. Investment in Unauthorized Securities — Executor or Administrator Personally Liable for Loss.** — *Macy v. Mercantile Trust Co.*, (N.

J. 1904) 59 Atl. Rep. 586; *Schlegel's Estate*, 13 Pa. Dist. 764.

Unauthorized investments are not illegal in the ordinary use of that term, but illegal in the sense that the investor takes the risk and must make the principal good with legal interest in event of loss. Where he takes the risk, however, and that successfully, he should not be charged with a penalty. *Matter of Downs*, (Surrogate Ct.) 39 Misc. (N. Y.) 621.

**4. Election by Beneficiaries to Accept Improper Investment or to Hold Representative Liable.** — In the absence of fraud and collusion, one who borrows from an administrator money belonging to the estate of his intestate, although such loan be made without an order of court, will not be treated as a trustee *in invitum*, and held to an accounting at the instance of the *cestui que trust*. In such a case the *cestui que trust* may adopt the contract, or he may repudiate it and hold the administrator liable. *Wilson v. Stevens*, 129 Ala. 630, 87 Am. St. Rep. 86.

Where the executor has died and his estate is admittedly insolvent, his successor in the administration is entitled to receive the *pro rata* share of the dead executor's estate as a creditor, and also to collect the investments and evidence of loans, applying the proceeds thereof towards the reduction of the debt due by the dead executor. Should a balance remain after paying the debt, the executor of the executor will be entitled to it. *Bickley's Estate*, 14 Pa. Dist. 253.

**964. 1. Measure of Liability — Good Faith and Ordinary Prudence.** — *Cheever v. Ellis*, 134 Mich. 645, 10 Detroit Leg. N. 624; *Macy v. Mercantile Trust Co.*, (N. J. 1904) 59 Atl. Rep. 586; *Matter of Johnson*, 57 N. Y. App. Div. 494, *affirmed* 170 N. Y. 139.

**The Presumption**, which stands until overcome by proof, is always that due care was exercised by a fiduciary in making his investments, and where this is the case he is not responsible for loss arising from subsequent depreciation in value. *Lehigh's Estate*, 11 Pa. Dist. 176.

**966. 2. Retaining Authorized Securities.** — Where money of the estate is well invested in mortgage on lands owned by one of the distributees, payment can be had and declared when needed for distribution by charging the amount against the share of the distributee; and if not needed for other purposes it is the duty of the representative to leave it so invested until that time arrives. *Matter of Davis*, (Surrogate Ct.) 37 Misc. (N. Y.) 326.

**966.** *cc.* RETAINING UNAUTHORIZED INVESTMENTS. — See notes 3, 4.

**967.** (g) *Loss of Assets* — (a) *Liability in General* — *The Doctrine in Equity*. — See note 3.

**968.** (b) *Loss Resulting from Acts of Third Persons* — *aa.* ACTS OF INDIVIDUALS — (*bb*) *Conversion or Loss by Agent or Attorney*. — See note 3.

**969.** (c) *Loss Resulting from Accidental Causes* — *aa.* DEPRECIATION IN VALUE. — See note 3.

**970.** (10) *Waste of Assets* — (b) *What Constitutes Waste* — *aa.* CONVERSION OF ASSETS. — See note 4.

**971.** *bb.* PAYMENT OF DEBTS. — See notes 1, 2, 3.

**966. 3. Retaining Unauthorized Securities.** — *Matter of Avery*, (Surrogate Ct.) 45 Misc. (N. Y.) 529; *Guthrie v. Cincinnati Gas, etc., Co.*, 15 Ohio Dec. 23. See also *Owens v. Owens*, 84 Miss. 673. *Compare Van Winkle v. Blackford*, 54 W. Va. 621; *Hill v. Campbell*, 15 Quebec Super. Ct. 125.

**Rule Limited.** — The rule with regard to the duty of a fiduciary into whose hands investments made by the testator himself may come differs widely from that which governs in making his own investments. In the latter case he is responsible if he deviates from the line marked out by the law; while in the former, much is left to his discretion, and if, in its honest and proper exercise, he delays realization, he may not be held liable for a loss thus arising. *Donnelly's Estate*, 8 Pa. Dist. 182. To similar effect see *Matter of Ball*, 55 N. Y. App. Div. 284; *Matter of Wotton*, 59 N. Y. App. Div. 584, *affirmed* 167 N. Y. 629; *Matter of Douglas*, 60 N. Y. App. Div. 64.

**Rise in Value of Securities Subsequent to Conversion.** — Since it is the duty of an executor or administrator to convert unauthorized securities into money, he cannot be charged with any loss occasioned by reason of a rise in their market value subsequent to such conversion by him. *Matter of New York L. Ins., etc., Co.*, 86 N. Y. App. Div. 247.

**4. Authority Given by Will to Retain Decedent's Investments.** — *Matter of Chapman*, (Surrogate Ct.) 32 Misc. (N. Y.) 187, *affirmed* 59 N. Y. App. Div. 624, 167 N. Y. 619.

**967. 3. Doctrine in Equity — No Liability for Loss Not Caused by Fault or Negligence.** — *Owen v. Potter*, 115 Mich. 556. See also *supra*, this title, **904. 3**; *infra*, this title, **1276. 5**.

**Between an Executor and Legatees**, a case is to be decided upon a more liberal view of the discretion and power of the executor than as against creditors. *In re Semple*, 189 Pa. St. 385, *reversing* 28 Pittsb. Leg. J. N. S. (Pa.) 431.

**968. 3. Liability for Acts of Agents and Attorneys.** — *In re De Clifford*, (1900) 2 Ch. 707; *Clark v. Bellamy*, 27 Ont. App. 435, *reversing* 30 Ont. 532; *Dover v. Denne*, 3 Ont. L. Rep. 664; *Matter of Beam*, 8 Kan. App. 835; *Schilsky's Estate*, 12 Pa. Dist. 181, 28 Pa. Co. Ct. 241.

**Permitting Agent or Attorney to Retain Funds Collected.** — *Cheever v. Ellis*, 134 Mich. 645, 10 Detroit Leg. N. 624; *Reilly v. Porcher*, 46 N. Y. App. Div. 290.

**Employment of Person in Confidence of Decedent.** — An executor or administrator cannot divest himself of all responsibility regarding his trust by employing as agent to act in his stead a per-

son who had been in the confidence and employment of the decedent. *Cheever v. Ellis*, 134 Mich. 645, 10 Detroit Leg. N. 624.

**969. 3. Depreciation in Value.** — *Re Barker*, 77 L. T. N. S. 712; *Mathews v. Sheehan*, 76 Conf. 654, 100 Am. St. Rep. 1017; *Van Winkle v. Blackford*, 54 W. Va. 621; *Matter of Thorp*, (Surrogate Ct.) 31 Misc. (N. Y.) 581. See also *Moore's Estate*, (Pa. 1901) 48 Atl. Rep. 884, less fully reported 198 Pa. St. 611; and see *infra*, this title, **1276. 5**.

**Delay in Expectation of Rise in Market.** — *Matter of Thompson*, (Surrogate Ct.) 41 Misc. (N. Y.) 420, *affirmed* 87 N. Y. App. Div. 609, 178 N. Y. 554.

**970. 4. Conversion to Individual Use.** — *Harrison v. Perea*, 168 U. S. 311; *Allen v. Leach*, 7 Del. Ch. 232; *Braswell v. Brown*, 112 Ga. 740; *Matter of Feierabend*, (Surrogate Ct.) 38 Misc. (N. Y.) 524; *Beishlag's Estate*, 7 Pa. Dist. 127, 20 Pa. Co. Ct. 583. See also *Porter v. Rountree*, 111 Ga. 369; *Morton v. Morris*, (Tex. Civ. App. 1900) 56 S. W. Rep. 559.

**Failure to Pay Debt Due to Estate.** — The mere failure of a representative to pay a debt due by him to the estate, which is charged against him in his accounts, is not a fraudulent misrepresentation and conversion of assets. *Culbreth v. Smith*, 124 N. Car. 289.

**Good Will and Property Appertaining to Decedent's Liquor Business.** — *In re Buck*, 185 Pa. St. 57, 64 Am. St. Rep. 616; *Mueller's Estate*, 8 Pa. Dist. 70, *affirmed* 190 Pa. St. 601; *Immen-dorf's Estate*, 21 Pa. Co. Ct. 268, *affirmed* 190 Pa. St. 590. And see *supra*, this title, **829. 1. Liquor License**.

**971. 1. Payment of Debts.** — See *supra*, this title, **971. 2 et seq.**

As supporting the rule that payment without notice of superior debts is not a devastavit, and for authority that the rule applies to debts due to the executor himself, see *In re Fludyer*, (1898) 2 Ch. 562, 79 L. T. N. S. 208.

**2. Payment in Full of Claim Against Insolvent Estate.** — *Wulbern v. Timmons*, 55 S. Car. 456. See also *Brewer v. Hutton*, 45 W. Va. 106, 72 Am. St. Rep. 804; *infra*, this title, **1257. 3**; **1258. 2**.

**Debt Due to Executor.** — The right of an executor to prefer one creditor and the right to retain his own debt are in many respects the same thing in substance and principle; though no doubt the latter can, while the former cannot, be exercised after an administration decree. *In re Hankey*, (1899) 1 Ch. 541.

**3. Payment of Unjust and Illegal Claims Is Waste.** — *Hibberd v. Hubbard*, 211 Pa. St. 331, *reversing* 13 Pa. Dist. 12, 29 Pa. Co. Ct. 422.



**971.** *cc.* PAYMENT OF OR ASSENT TO LEGACIES. — See note 4.

*dd.* MINGLING ASSETS WITH INDIVIDUAL PROPERTY. — See note 6.

*ee.* MISMANAGEMENT OR SQUANDERING OF ASSETS GENERALLY. — See note 7.

**972.** (c) Liability of Executor or Administrator for Acts of Third Persons. — See note 3.

(d) Effect of Waste or Conversion. — *aa.* LIABILITY OF EXECUTOR OR ADMINISTRATOR — (cc) To Whom Liability Exists. — See note 6.

But if a Legatee or Distributee Assents. — See note 7.

The application of assets to the payment of mortgages, without authority, is waste. *Matter of Schulz*, (Surrogate Ct.) 26 Misc. (N. Y.) 688.

**971. 4. Premature Payment of or Assent to Legacy Is Devastavit.** — *Whetstone v. McQueen*, 137 Ala. 301; *Sinnott v. Kenaday*, 12 App. Cas. (D. C.) 115; *Mertens v. Roche*, 39 N. Y. App. Div. 398; *Geisz v. Geisz*, 7 Pa. Dist. 615, 21 Pa. Co. Ct. 466; *Mustin's Estate*, 8 Pa. Dist. 180; *Boring v. Jobe*, (Tenn. Ch. 1899) 53 S. W. Rep. 763; *Turk v. Hevener*, 49 W. Va. 204. See also *supra*, this title, **913. 3 et seq.**

The claim might be barred by laches, or by the statute of limitations, or perhaps by conduct on the part of the claimant which was inequitable as between himself and the executor; but mere ignorance of the claim is no defense, unless where distribution was made by order of the court. *Stewart v. Snyder*, 27 Ont. App. 423, *affirming* 30 Ont. 110.

**Retainer by Executor of His Share in Estate.** — See *In re Fludyer*, (1898) 2 Ch. 562, 79 L. T. N. S. 298.

**Distribution Before Notice to Creditors.** — In *Maryland* distribution made before the expiration of the six months' notice provided for by statute is at the risk of the representative and his sureties. *Jones v. Harbaugh*, 93 Md. 269; *Yakel v. Yakel*, 96 Md. 240.

**6. Mingling Assets with Individual Property.** — *Officer v. Officer*, 120 Iowa 389, 98 Am. St. Rep. 365.

**7. Illustrations.** — An administrator having no authority to lend the money of the estate is accountable for any loss in consequence of lending. *Caruthers v. Caruthers*, 99 Ill. App. 402.

A sale of property by an executor for less money than is offered by others at the time is waste. *Johnson v. Johnson*, 72 Mo. App. 386.

A personal representative is liable for loss sustained by the estate through his negligently permitting real estate to be sacrificed for the satisfaction of liens which there is sufficient personal estate to discharge. *In re Patrick*, (Neb. 1904) 100 N. W. Rep. 939.

The administrators of the insolvent estate of a deceased mortgagor are not liable in damages to his mortgagee as upon a devastavit, because they release the purchaser of the equity of redemption in the mortgaged property from his liability to indemnify the mortgagor in respect of the mortgage, no claim having been made upon them by the mortgagee in respect to the mortgage. *Higgins v. Trusts Corp.*, 27 Ont. App. 432, *affirming* 30 Ont. 684.

**972. 3. Not Liable for Waste by Coexecutor or Coadministrator** — *New Jersey*. — *King v. Foerster*, 61 N. J. Eq. 584.

*New York*. — *Farmers' L. & T. Co. v. Pendleton*, 179 N. Y. 486, *reversing* 90 N. Y. App. Div. 607 mem., 85 N. Y. Supp. 1130, which *affirmed* (Supm. Ct. Spec. T.) 37 Misc. (N. Y.)

256; *Matter of Smith*, 46 N. Y. App. Div. 318, *affirmed* 166 N. Y. 620; *Matter of Adams*, 51 N. Y. App. Div. 619, *modifying* on other grounds (Surrogate Ct.) 30 Misc. (N. Y.) 184, *affirmed* 166 N. Y. 623; *Matter of Barrett*, 58 N. Y. App. Div. 45; *Matter of Hoagland*, 79 N. Y. App. Div. 56; *Matter of Provost*, 87 N. Y. App. Div. 86; *Palmer v. Ward*, 91 N. Y. App. Div. 449; *Matter of Johnson*, (Surrogate Ct.) 42 Misc. (N. Y.) 651. See also *Matter of Campbell*, (Surrogate Ct.) 21 Misc. (N. Y.) 133.

*Pennsylvania*. — *Myer v. Myer*, 187 Pa. St. 247, 42 W. N. C. (Pa.) 445; *In re Starr*, 190 Pa. St. 162; *Mueller's Estate*, 8 Pa. Dist. 70, *affirmed* 190 Pa. St. 601; *Graham's Estate*, 8 Pa. Dist. 479, 22 Pa. Co. Ct. 540; *Ripple's Estate*, 9 Kulp (Pa.) 66, 112.

*Rhode Island*. — *Municipal Ct. v. Whaley*, 25 R. I. 289, 105 Am. St. Rep. 890.

*Contra*, in *Tennessee*, where corepresentatives are jointly liable for a devastavit of one of them, though the one who receives the assets and is guilty is primarily liable. *Boring v. Jobe*, (Tenn. Ch. 1899) 53 S. W. Rep. 763.

**The Rule Is Otherwise** where coexecutors or co-administrators act jointly in administering the estate, or where those not acting connive at the devastavit or omit to perform their whole duty towards the estate in the matter.

*Alabama*. — *Langley v. Langley*, 121 Ala. 70.

*Kentucky*. — *Grundy v. Drye*, 104 Ky. 825.

*New York*. — *Meldon v. Devlin*, 31 N. Y. App. Div. 146, *affirmed* 167 N. Y. 573; *Matter of Peck*, 31 N. Y. App. Div. 407, *appeal dismissed* 161 N. Y. 655; *Matter of Hunt*, (Surrogate Ct.) 38 Misc. (N. Y.) 613, *reversed* on other grounds 88 N. Y. App. Div. 52; *Matter of Dougherty*, (Surrogate Ct.) 43 Misc. (N. Y.) 468.

*Pennsylvania*. — *Irvine's Estate*, 203 Pa. St. 602; *Sinkler's Estate*, 10 Pa. Dist. 399, 25 Pa. Co. Ct. 417; *Bickley's Estate*, 13 Pa. Dist. 323; *Auer's Estate*, 14 Pa. Dist. 273.

*Ireland*. — *Lowe v. Shields*, (1902) 1 Ir. R. 320.

**6. To Whom Liable — Heirs, Creditors, or Others Interested in Estate.** — *Braswell v. Brown*, 112 Ga. 740; *Parker v. Stevens*, 61 N. J. Eq. 163. *Compare*, as to estates not fully administered, *Graffam v. Ray*, 91 Me. 234, where the court said: "If the defendant is guilty of a devastavit, as plaintiff claims, the liability is to the estate of Dodge, and not to this plaintiff personally. The funds may be needed to pay debts or general legacies, or administration expenses. The plaintiff is entitled only to so much of the estate as may remain after these superior claims are satisfied; but nothing till then."

**Where the Estate Is Insolvent** the injury is to the estate and to creditors, and the heirs have no right of action. *Herbert v. Harbert*, (Tex. Civ. App. 1900) 59 S. W. Rep. 504.

**7. Assent by Legatee or Distributee** — *United*



**973.** *cc.* ENFORCEMENT OF LIABILITY. — See notes 6, 7, 8.

*b.* CONTINUING DECEDENT'S BUSINESS — (1) *The Power.* — See note 9.

*States.* — *Hiller v. Ladd*, (C. C. A.) 85 Fed. Rep. 703.

*Connecticut.* — *Mathews v. Sheehan*, 76 Conn. 654, 100 Am. St. Rep. 1017.

*Kentucky.* — See *Beale v. Barnett*, 64 S. W. Rep. 838, 23 Ky. L. Rep. 1118; *Germania Safety Vault, etc., Co. v. Driskell*, 66 S. W. Rep. 610, 23 Ky. L. Rep. 2050.

*Michigan.* — See *Houghteling v. Stockbridge*, (Mich. 1904) 99 N. W. Rep. 759, 11 Detroit Leg. N. 100.

*Missouri.* — *State v. Stuart*, 74 Mo. App. 182. *Nebraska.* — *Johnson v. Pulver*, (Neb. 1901) 95 N. W. Rep. 697.

*New York.* — *Matter of Douglas*, 60 N. Y. App. Div. 64.

*Pennsylvania.* — *Rine v. Hall*, 187 Pa. St. 264, 42 W. N. C. (Pa.) 333; *In re Semple*, 189 Pa. St. 385, reversing 28 Pittsb. Leg. J. N. S. (Pa.) 431; *Columbia Ave. Sav. Fund, etc., Co. v. Lewis*, 190 Pa. St. 558; *Hoff's Estate*, 7 Pa. Dist. 93; *Donnelly's Estate*, 8 Pa. Dist. 182.

*Tennessee.* — *Pearson v. Gillenwaters*, 99 Tenn. 446, 462, 63 Am. St. Rep. 844.

*Virginia.* — *Breckinridge v. Breckinridge*, 98 Va. 561.

*Canada.* — *Hill v. Campbell*, 15 Quebec Super. Ct. 125.

And see *infra*, this title, **1185. 2; 1319. 5.**  
**Infant Legatee or Distributee.** — Assent by the guardian *ad litem* of an infant legatee or distributee will not discharge the representative from liability. *Matter of Kennedy*, 120 Cal. 458.

**973. 6. Actions Against Executors or Administrators for Waste.** — See *supra*, this title, **893. 1.**

**The Remedy on the Bond Is Cumulative**, and not substitutional. A decree finding a devastavit may be enforced directly against the representative's property. *Allen v. Leach*, 7 Del. Ch. 232.

**For Statutory Proceedings in the Probate Court** to determine devastavit, on application of a creditor, instituted after final settlement, see *Wilson v. Ruthrauff*, 42 Mo. App. 435.

**For Liability of a Devisee of a Deceased Executor** for devastavit committed by the latter in administering the estate of his decedent, see *Dodd v. Lindsley*, 57 N. J. Eq. 334.

**7. Recovery of Assets from Third Persons** — *United States.* — *Central Nat. Bank v. Fitzgerald*, 94 Fed. Rep. 16.

*Nebraska.* — *Arlington State Bank v. Paulsen*, 57 Neb. 717, overruled 59 Neb. 94; *McGlave v. Fitzgerald*, (Neb. 1903) 93 N. W. Rep. 692.

*New York.* — *Buffalo Loan, etc., Co. v. Leonard*, 154 N. Y. 141, affirming 9 N. Y. App. Div. 384; *Shaffer v. Bacon*, 35 N. Y. App. Div. 248, affirmed 161 N. Y. 635; *Mertens v. Roche*, 39 N. Y. App. Div. 398; *Washburn v. Benedict*, 46 N. Y. App. Div. 484; *Hamlin v. Smith*, 72 N. Y. App. Div. 601.

*Pennsylvania.* — *Hibberd v. Hubbard*, 211 Pa. St. 331, reversing 13 Pa. Dist. 12, 29 Pa. Co. Ct. 422; *Beishlag's Estate*, 7 Pa. Dist. 127, 20 Pa. Co. Ct. 583.

*West Virginia.* — *Brewer v. Hutton*, 45 W. Va. 106, 72 Am. St. Rep. 804.

*Canada.* — *Uffner v. Lewis*, 27 Ont. App. 242.

**As to Statutory Proceedings in the Probate Court** instituted by creditors to compel restitution from legatees, see *Clinton's Estate*, 9 Pa. Dist. 455, 24 Pa. Co. Ct. 218.

**Representative as Such May Bring Suit.** — See *Parks v. Mockenhaupt*, 133 Cal. 424; *Hight v. Walker*, 179 Ill. 209; *Tarplee v. Capp*, 25 Ind. App. 56; *Moss v. Cohen*, 158 N. Y. 240, reversing (C. Pl. Gen. T.) 15 Misc. (N. Y.) 108, which affirmed (C. Pl. Spec. T.) 11 Misc. (N. Y.) 184.

In *Ward v. Ward*, 12 Ohio Cir. Dec. 59, it was said to be almost certain that neither heir nor legatee could maintain the suit, at least not until after administration by and discharge of the personal representative, though they might proceed against him to compel him to act.

No unauthorized individual transaction of a personal representative can estop recovery in his official capacity. *Edney v. Baum*, (Neb. 1903) 97 N. W. Rep. 252.

Funds of an estate deposited with a justice of peace by an executor, as bail, may be recovered from the county by the administrator with the will annexed, where the justice was without authority to fix bail in the particular case. *Sutherland v. St. Lawrence County*, (Supm. Ct. Tr. T.) 42 Misc. (N. Y.) 38, reversed 101 N. Y. App. Div. 299.

The representative may assign the claim to the sureties on his bond, and action may be brought by them for the benefit of the persons entitled. *Lawyers' Surety Co. v. Reinach*, (Supm. Ct. App. T.) 25 Misc. (N. Y.) 150, affirming (N. Y. City Ct. Gen. T.) 23 Misc. (N. Y.) 242.

**Funds Used to Improve Lands Owned by Administrator Jointly with Other Persons.** — Where an administrator uses money of the estate to erect a building on land jointly owned by him with others, no lien will attach to the interests of the latter for its repayment, unless they participated in or otherwise abetted him in such wrongdoing. *Moore v. McLure*, 124 Ala. 120.

**8. Injunction Against Waste.** — *Compare Mahoney v. Stewart*, 123 N. Car. 106.

A prohibition against suing a personal representative within twelve months after his appointment has no application to a suit to prevent waste, at least where the personal representative is insolvent and not under bond. *Lester v. Stephens*, 113 Ga. 495.

**9. No Authority to Carry on Decedent's Business** — *Alabama.* — *Eufaula Nat. Bank v. Manassas*, 124 Ala. 381, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 973.

*California.* — *Matter of Freud*, 131 Cal. 667, 82 Am. St. Rep. 407.

*Colorado.* — *Fleming v. Kelly*, 18 Colo. App. 23.

*Connecticut.* — *Mathews v. Sheehan*, 76 Conn. 654, 100 Am. St. Rep. 1017.

*Michigan.* — *Frey v. Eisenhardt*, 116 Mich. 160.

**974.** Winding up Business. — See note 1.

(2) *Individual Liability*. — See note 2.

**975.** See notes 1, 2, 3, 4.

*New Jersey*. — *Shipman v. Lord*, 58 N. J. Eq. 380. See also *Ivins v. Jacob*, (N. J. 1904) 58 Atl. Rep. 941.

*New York*. — *Matter of Corbin*, 101 N. Y. App. Div. 25.

*Ohio*. — See *Russell v. Fenner*, 11 Ohio Cir. Dec. 754, 21 Ohio Cir. Ct. 527.

*Oregon*. — *In re Osburn*, 36 Oregon 8.

*Pennsylvania*. — *Hibberd v. Hubbard*, 13 Pa. Dist. 12, 29 Pa. Co. Ct. 422, reversed on other grounds 211 Pa. St. 331; *Corr's Estate*, 8 Pa. Dist. 209; *Dillenkofer's Estate*, 34 Pittsb. Leg. J. N. S. (Pa.) 303, 17 York Leg. Rec. (Pa.) 177. See also *Mustin's Estate*, 188 Pa. St. 544, 43 W. N. C. (Pa.) 204.

*Independent Executors*. — The principle applies with the same force to an independent executor that it does to an executor under the direction of a court, for the only difference between the two is that one can act independently within the scope of the powers granted to him by the statute or will, while the other must act under the orders and with the approval of a court. Both must be governed by the warrant of authority given by will or statute, and the same rules of construction of the will, granting the authority, are applicable in both cases. *Altgelt v. Sullivan*, (Tex. Civ. App. 1903) 79 S. W. Rep. 333. See also *Altgelt v. Alamo Nat. Bank*, 98 Tex. 252, reversing (Tex. Civ. App. 1904) 79 S. W. Rep. 582.

*Continuation of Business Authorized by Articles of Copartnership*. — *Barber v. Murphy*, (Ky. 1901) 62 S. W. Rep. 804; *Porter v. Long*, 124 Mich. 584, 7 Detroit Leg. N. 337; *Matter of Meyer*, 95 N. Y. App. Div. 443, affirmed 181 N. Y. 562; *Fidelity Title, etc., Co. v. Bell*, 188 Pa. St. 637.

*Continuation of Business Authorized by Will*. — See *Brannon v. Ober, etc., Co.*, 106 Ga. 168; *Roberts v. Hale*, 124 Iowa 296; *Gordon v. McDougall*, 84 Miss. 715; *In re Patrick*, (Neb. 1904) 100 N. W. Rep. 939; *Matter of Hickey*, (Surrogate Ct.) 34 Misc. (N. Y.) 360; *Lambertson v. Vann*, 134 N. Car. 108; *Furst v. Armstrong*, 202 Pa. St. 348, 90 Am. St. Rep. 653; *Egan v. Wirth*, 26 R. I. 363; *Nash v. Wakefield*, 30 Wash. 556; *Braun v. Braun*, 14 Manitoba 346.

*A Wish Expressed by a Testatrix* that her husband, whom the will appoints sole executor, shall continue the business, does not authorize him to carry it on in his representative capacity. *Saperstein v. Ullman*, 49 N. Y. App. Div. 446, three judges dissenting, affirmed 168 N. Y. 636, 678, three judges dissenting.

*A Surviving Partner* has no right to continue the business of the partnership for a period of years as a going concern, and, having no such right himself, he cannot confer it upon his executor. *Frey v. Eisenhardt*, 116 Mich. 160.

*A Direction that the Executor Have Ample Time* to pay debts and wind up the estate before division and partition among the legatees confers no authority to continue the decedent's business. *Altgelt v. Sullivan*, (Tex. Civ. App. 1903) 79 S. W. Rep. 333.

*Will Providing for Loan to New Firm*. — A will

which, though expressly authorizing the executors to continue the business, divides all the profits among the surviving partners, after payment to the estate of interest on the capital invested by the testator, provides simply for a loan at interest to the new firm and does not render the estate liable as a partner. *Fulton's Estate*, 12 Pa. Dist. 725.

*Suit for Construction as to Authority to Continue Business*. — Where executors have carried on the decedent's business for a considerable period of time, under a clause in the will authorizing them to settle up and dispose of it "as speedily as the same can be judicially done," a court of equity will not pass on the propriety of such a construction of the provision or direct as to future continuance. *Tierney v. Tierney*, (N. J. 1897) 38 Atl. Rep. 971.

*Power of Court as Against Creditors of Estate*. — The court has no jurisdiction to authorize the continuation of the business of a decedent by his personal representative, where a majority of the creditors of the estate in interest and amount are opposed thereto. *Jones's Estate*, 23 Pa. Co. Ct. 513.

**974. 1. Difference Between Carrying on and Winding up Business**. — *Matter of Fernandez*, 119 Cal. 579; *Wiemann's Succession*, 112 La. 293; *In re Semple*, 189 Pa. St. 385, reversing 28 Pittsb. Leg. J. N. S. (Pa.) 431; *Greiner's Estate*, 14 Pa. Dist. 348. See also *Matter of Smith*, 118 Cal. 462; *Palmer v. Item Pub. Co.*, 200 Pa. St. 186. Compare, as to power to make purchases, *In re Osburn*, 36 Oregon 8.

*Winding up Manufacturing Business*. — See *Fleming v. Kelly*, 18 Colo. App. 23.

*Completing Building Contracts*. — See *Allam's Estate*, 199 Pa. St. 573.

**2. Individual Liability for Debts Contracted**. — *Blum v. Dabritz*, (Supm. Ct. App. T.) 39 Misc. (N. Y.) 800, affirming (N. Y. City Ct. Spec. T.) 78 N. Y. Supp. 207, citing 11 AM. AND. ENG. ENCYC. OF LAW (2d ed.) 974; *Corr's Estate*, 8 Pa. Dist. 209.

*Partnership Business — Liability of Executor as Partner*. — An executor who is also the son of the testator cannot be held personally liable as a partner in a banking business in which the testator was a partner, merely because he permits, as executor, the testator's capital to remain in the business, and permits credits to be entered in his passbook as executor for a share of the profits of the business. *Tisch v. Rockafellow*, 209 Pa. St. 419.

*Continuation of Business by Third Person, to Whom Will Bequeaths It*. — Where the business is carried on by a third person for his own benefit, under a bequest in the will, the executor is not personally liable on the contracts made in the course of the business, in the absence of acts on his part constituting an estoppel. *American Tube Works v. Tucker*, 185 Mass. 236; *Fleming v. Fleming*, 204 Pa. St. 648.

**975. 1. Not Entitled to Profits, Though Liable for Losses**. — *Nivens v. Nivens*, (C. C. A.) 133 Fed. Rep. 39, reversing on other grounds (Indian Ter. 1903) 76 S. W. Rep. 114, (Indian Ter.



- 976.** (3) *Right to Indemnity.* — See note 1.  
 (4) *Assets Applicable to Continuance of Business.* — See note 2.  
**977.** (5) *Statutory Modification of Doctrine.* — See note 2.  
*Individual Liability under Statute.* — See note 5.

1901) 64 S. W. Rep. 604; *Matter of Smith*, 118 Cal. 462; *Fleming v. Kelly*, 18 Colo. App. 23; *Frey v. Eisenhardt*, 116 Mich. 160; *Matter of Peck*, 79 N. Y. App. Div. 296, *affirmed* 177 N. Y. 538; *Allam's Estate*, 199 Pa. St. 573; *Greiner's Estate*, 14 Pa. Dist. 348; *Dillenkofer's Estate*, 34 Pittsb. Leg. J. N. S. (Pa.) 303, 17 York Leg. Rec. (Pa.) 177.

**975. 2. Not Accountable for Losses When Acting under Will in Good Faith.** — *Whitman's Estate*, 195 Pa. St. 144; *Waddell's Estate*, 196 Pa. St. 294; *Smith's Estate*, 30 Pittsb. Leg. J. N. S. (Pa.) 188.

**3. Consent or Acquiescence of Beneficiaries.** — *Mathews v. Sheehan*, 76 Conn. 654, 100 Am. St. Rep. 1077; *In re Semple*, 189 Pa. St. 385, *reversing* 28 Pittsb. Leg. J. N. S. (Pa.) 431; *Whitman's Estate*, 195 Pa. St. 144; *Orne's Estate*, 7 Pa. Dist. 337, *affirmed* 192 Pa. St. 626; *Hibberd v. Hubbard*, 13 Pa. Dist. 12, 29 Pa. Co. Ct. 422, *reversed* on other grounds 211 Pa. St. 331; *Hodges v. Hodges*, (1899) 1 Ir. R. 480. *Compare* *Corr's Estate*, 8 Pa. Dist. 209.

**An Heir or Beneficiary Who Is a Minor** is not bound by the action of the administrator in carrying on the business with the assent of the other heirs or beneficiaries. *Wiemann's Succession*, 112 La. 293; *Wiemann v. Mainegra*, 112 La. 305.

**4.** *Matter of Freud*, 131 Cal. 667, 82 Am. St. Rep. 407.

**976. 1. Right as Against Creditors of Estate.** — The personal representative has no right to resort to the assets for the payment of liabilities incurred in carrying on the business as against creditors not assenting to his continuing it. *Braun v. Braun*, 14 Manitoba 346, *citing* *Dowse v. Gorton*, (1891) A. C. 199; *M'Aloon v. M'Aloon*, (1900) 1 Ir. R. 367; *Allam's Estate*, 199 Pa. St. 573. See also *Jones's Estate*, 23 Pa. Co. Ct. 513.

**Subrogation of Creditors of Representative to His Right of Indemnity.** — Creditors of a legal representative have no right whatever against the estate, but they have a right to sue the trustee who has incurred the debt. If the trustee on his part has a clear account, and therefore a right of indemnity against the estate, the creditors are subrogated to that right, and for that purpose may be allowed to intervene. *In re Frith*, (1902) 1 Ch. 342; *Braun v. Braun*, 14 Manitoba 346. See also *Re Shorey*, 79 L. T. N. S. 349.

**2. Restriction to Capital Already Employed.** — *Roberts v. Hale*, 124 Iowa 296, *citing* 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 976; *Frey v. Eisenhardt*, 116 Mich. 760; *M. Eisenstadt Jewelry Co. v. Mississippi Valley Trust Co.*, 72 Mo. App. 514; *Matter of Hickey*, (Surrogate Ct.) 34 Misc. (N. Y.) 360; *Allam's Estate*, 199 Pa. St. 573; *McArdle v. West Philadelphia Title, etc. Co.*, 7 Pa. Super. Ct. 328, 42 W. N. C. (Pa.) 236. *Compare* *McMillan v. Hendricks*, (Tex. Civ. App. 1898) 46 S. W. Rep. 859; *Furst v. Armstrong*, 202 Pa. St. 348, where the court said: "The testator conferred the power to

carry on the business and that implied, in the absence of anything in the will to the contrary, the right to appropriate sufficient assets of the estate to accomplish the object."

**Real Property Employed in Business.** — Whether the property "embarked in trade" be real or personal can make no difference. The test is whether it was a part of the capital devoted by the testator to the prosecution of his business. If so, it is answerable for the debts incurred by the executor in continuing the enterprise in accordance with the directions of the will. *Roberts v. Hale*, 124 Iowa 296.

**Authority to Employ General Assets.** — See *Ferris v. Van Ingen*, 110 Ga. 102.

**Business Conducted at a Profit.** — Where the business was conducted at a profit no reason exists for the application of the rule prevailing in some cases that an expense incurred in the conduct of the business should not be allowed as a claim against the general estate, but that for indemnity therefor the creditor or the administrator, if he has paid it, should be limited to the assets employed in the business. *Fleming v. Kelly*, 18 Colo. App. 23.

**977. 2. Statutory Authority to Continue Business for Limited Time.** — *McMillan v. Hendricks*, (Tex. Civ. App. 1898) 46 S. W. Rep. 859; *Rice v. Conwill*, 35 Tex. Civ. App. 341; *Altgelt v. Oliver*, (Tex. Civ. App. 1905) 86 S. W. Rep. 28.

**Nature of Business — Partnership Business.** — The Texas statute confers no authority on the personal representative of a deceased partner to carry on the partnership business or administer the partnership estate. The business must be such as employs property which is a part of the estate to be administered by the executor or administrator, whereas a partnership estate, on the death of one of the partners, is to be administered by the survivor or survivors. *Altgelt v. Alamo Nat. Bank*, 98 Tex. 252, *reversing* (Tex. Civ. App. 1904) 79 S. W. Rep. 582.

If at the time of his death the testator had become the sole owner of the business in which he had formerly been a partner only, the statute confers authority to continue it. *Altgelt v. Sullivan*, (Tex. Civ. App. 1903) 79 S. W. Rep. 333.

**Cultivation of Decedent's Land.** — Advances made to an administrator to provide means for growing crops on the plantation of the decedent are entitled to be paid out of the crops, and the administrator has authority by law to sell a sufficiency thereof to pay them. *Starling v. Wyatt*, (Miss. 1900) 27 So. Rep. 526.

**Live Stock — Postponement of Lien.** — Authority to carry on the decedent's plantation authorizes the use of the live stock of the estate in the business, but cannot be construed as postponing the enforcement of a lien upon such stock held by a creditor of the estate. *Stafford v. Dunovant*, (Tex. Civ. App. 1904) 81 S. W. Rep. 65.

**5. Individual Liability Not Taken Away by Statute.** — *Miller v. Didisheim*, 95 Ill. App. 321, *quoting* *Smith v. Williams*, 178 Ill. 420.

**Order of Court Gives Right to Indemnity Out of**



**978.** *c.* SETTING ASIDE FRAUDULENT CONVEYANCES. — See note 1. See also the title FRAUDULENT SALES AND CONVEYANCES, **333**, 2 *et seq.*

**979.** See note 2.

**980.** See note 1.

**Action to Recover Value of Land Fraudulently Conveyed.** — See note 3.

*d.* PARTNERSHIP ESTATES. — See note 4.

**Estate.** — See *McMillan v. Hendricks*, (Tex. Civ. App. 1898) 46 S. W. Rep. 859.

**978. 1. Personal Representative Bound by Acts of Decedent.** — *Freeman v. Pullen*, 119 Ala. 235. *Contra* in *Arkansas* under the Act of April 19, 1895, *Moore v. Waldstein*, (Ark. 1905) 85 S. W. Rep. 416.

**Rule that Fraudulent Conveyances Cannot Be Avoided at Suit of Personal Representative.** — *Freeman v. Pullen*, 119 Ala. 235; *Deearth v. Bute*, 71 Ill. App. 487; *Richardson v. Richardson*, 87 Ill. App. 354; *Richardson v. Ranson*, 99 Ill. App. 258; *Stam v. Smith*, 183 Mo. 464; *Hayes v. Fry*, 110 Mo. App. 20, *Ellison, J., dissenting*. See also *St. Francis Mill Co. v. Sugg*, 169 Mo. 130; *William J. Lemp Brewing Co. v. La Rose*, 20 Tex. Civ. App. 575.

**Fraud of the Grantee**, whereby the decedent was victimized, may be set up by the personal representative. In such case the rule has no application. *Hayes v. Fry*, 110 Mo. App. 20.

**979. 2. Rule that Fraudulent Conveyances May Be Avoided at Suit of Personal Representative — California.** — *Ackerman v. Merle*, 137 Cal. 157.

*Idaho.* — See *Brown v. Perrault*, 5 Idaho 729.

*Indiana.* — *Jarrell v. Brubaker*, 150 Ind. 260.

*Iowa.* — *Mallow v. Walker*, 115 Iowa 238, 91 Am. St. Rep. 158.

*Massachusetts.* — *Flynn v. Flynn*, 183 Mass. 365.

*Michigan.* — *Beith v. Porter*, 119 Mich. 365, 75 Am. St. Rep. 402.

*Minnesota.* — *Richmond v. Campbell*, 71 Minn. 453.

*Nebraska.* — *Hofmann v. Tucker*, 58 Neb. 457.

*New Hampshire.* — *Matthews v. Hutchins*, 68 N. H. 412.

*New Jersey.* — *Schwalber v. Ehman*, 62 N. J. Eq. 314.

*North Carolina.* — *Webb v. Atkinson*, 124 N. Car. 447.

*Ohio.* — *Baen v. Weller*, 12 Ohio Dec. 129; *Hoffman v. Kiefer*, 10 Ohio Cir. Dec. 304, 19 Ohio Cir. Ct. 401. See also *Lowman v. Sewall*, 9 Ohio Cir. Dec. 177, 16 Ohio Cir. Ct. 466, *reversing* on other grounds 4 Ohio Dec. 1.

*Oregon.* — *Marks v. Coats*, 37 Oregon 609.

*Tennessee.* — *Montgomery v. Clark*, (Tenn. Ch. 1898) 46 S. W. Rep. 466.

*Wisconsin.* — *Ecklor v. Wolcott*, 115 Wis. 19.

*Wyoming.* — *Rock Springs First Nat. Bank v. Ludvigsen*, 8 Wyo. 230.

**A Special Administrator.** — *Contra*, *Richmond v. Campbell*, 71 Minn. 453; *Larson v. Johnson*, 72 Minn. 441.

**Right of Creditors to Sue.** — The right of creditors to sue is not generally taken away by the statutes which extend the power of the legal representative, but their right is sometimes limited to exceptional cases, such as cases where the representative is indifferent, recalcitrant, or

hostile, and refuses to initiate the proceedings. *Barker v. Battey*, 62 Kan. 584; *McCord v. Knowlton*, 79 Minn. 299; *Campbell v. Heiland*, 55 N. Y. App. Div. 95; *Webster v. Ballard*, 4 Ohio Dec. (Reprint) 419, 2 Cleve. L. Rep. 137; *Hoffman v. Kiefer*, 10 Ohio Cir. Dec. 304, 19 Ohio Cir. Ct. 401; *Fehringer v. Commercial Nat. Bank*, 23 Utah 393.

In *North Carolina* the right of the representative is exclusive, where no equities are involved giving to the Superior Court jurisdiction at the suit of creditors, and on his refusal to sue the remedy of creditors is by a special proceeding in the probate court to compel him to do so. *Baker v. Carter*, 127 N. Car. 92.

**Statutory Right.** — In some jurisdictions the right of creditors to sue is regulated by statute to a greater or less extent. *Lilienthal v. Drucklieb*, (C. C. A.) 92 Fed. Rep. 753 (construing the *New York* statute); *Montgomery v. Boyd*, 78 N. Y. App. Div. 64, 63 N. Y. App. Div. 190, 60 N. Y. App. Div. 133; *Richter v. Leiby*, 99 Wis. 512.

A statute providing for the bringing of a suit by a creditor in the name of the executor or administrator, by leave of court, does not apply where the administrator is the grantee in the deed. In such case he can proceed in his own name. *Farmers' Nat. Bank v. Thomson*, 74 Vt. 442.

**Right of Heirs to Sue.** — Where the legal representative refuses to act, the heirs have a right of action to have the conveyance set aside. *Bem v. Shoemaker*, 10 S. Dak. 453.

Where the executor is the fraudulent grantee in the deed and refuses to bring the suit, it may be brought by the heirs at law of the deceased. *Moore v. Waldstein*, (Ark. 1905) 85 S. W. Rep. 416.

**980. 1. Limitation of Personal Representative's Authority — Deficiency of Assets.** — *Baen v. Weller*, 12 Ohio Dec. 128; *Hoffman v. Kiefer*, 10 Ohio Cir. Dec. 304, 19 Ohio Cir. Ct. 401. See generally the cases cited in the preceding note.

**Who Are Creditors.** — *Hofmann v. Tucker*, 58 Neb. 457; *Rock Springs First Nat. Bank v. Ludvigsen*, 8 Wyo. 230.

**Proof of Indebtedness.** — See *Matthews v. Hutchins*, 68 N. H. 412.

**Under the Arkansas Statute** the deed may be "set aside and canceled for the use and benefit of the heirs at law of the fraudulent grantor, saving the rights of creditors and purchasers without notice." *Moore v. Waldstein*, (Ark. 1905) 85 S. W. Rep. 416.

**3. Action to Recover Value of Land Fraudulently Conveyed.** — So far as concerns "the respective rights of the administrator and the heirs, the proceeds of such real estate sold would be regarded, as between them, as real estate in the final distribution; but as between the estate of the grantor and the fraudulent grantee such real estate in the possession of innocent third

**981.** See notes 1, 2, 3.

**Statutory Authority of Partner's Personal Representatives.** — See note 5.

*c.* **TRUST ESTATES — In England.** — See note 8.

**982.** *In the United States.* — See note 1.

*f.* **DEALING WITH ESTATE FOR INDIVIDUAL BENEFIT — (1) In General.** — See note 2.

parties cannot be recovered. The only thing remaining is a right of action for money, and there is no reason why the administrator cannot proceed to enforce this chose in action. When he recovers he will hold the proceeds in trust for the person to whom the real estate if unsold would have gone." *Parker v. Simpson*, 180 Mass. 334.

**980. 4. Partnership Estate.** — *Rohn v. Rohn*, 98 Ill. App. 509, *affirmed* 204 Ill. 184, 89 Am. St. Rep. 185. See also the title **PARTNERSHIP**, **96. 2 et seq.**, **220. 2.**

**A Surviving Partner Is Entitled to Custody of the Books of the Firm** as against the executor of a deceased partner, although the business, including stock, fixtures, and book accounts, was bequeathed to the executor by the will. *Stief's Estate*, 10 Pa. Dist. 446, 25 Pa. Co. Ct. 396.

**981. 1. Title of Personal Representative of Surviving Partner.** — Where a surviving partner dies before the partnership estate has been settled, his administrator holds it as the surviving partner himself held it, in trust; and he is accountable as a trustee for the completion of such trust. *Franklin v. Trickey*, (Ariz. 1905) 80 Pac. Rep. 352.

**2. Right to Inquire into Condition of Affairs.** — *Conrad v. Fuller*, 98 Va. 16; *Stehn v. Hayssen*, (Wis. 1905) 102 N. W. Rep. 1074.

In order to secure his rights the personal representative may have an action against the surviving partner, calling him to account, but he cannot enforce claims and maintain actions to reduce to possession the assets of the partnership. *Secor v. Tradesmen's Nat. Bank*, 92 N. Y. App. Div. 294.

**Jurisdiction of Probate Court.** — In *New York* the management of copartnership affairs by a surviving partner who is also executor of the deceased partner's estate is not the subject of an accounting in the Surrogate's Court. *Matter of Irvin*, 87 N. Y. App. Div. 466.

In *Pennsylvania*, while ordinarily the probate court has no power to settle the partnership account, it is otherwise where the surviving partner is the executor or administrator of his deceased associate. In such a case the legal representative must charge himself in his account with the value of the partnership interest, or he does not account fully for the property that has come into his hands; and the probate court has exclusive jurisdiction in the settlement of accounts. *Moore v. Fidelity Trust Co.*, 134 Fed. Rep. 489, *affirmed* (C. C. A.) 138 Fed. Rep. 1, 1008, *Acheson*, Cir. J., *dissenting* as to the exclusiveness of the jurisdiction of the probate court in such a case. See also *De Coursey's Estate*, 211 Pa. St. 92.

**3. Administrator May See that Debts Are Paid and Residue Distributed.** — *Secor v. Tradesmen's Nat. Bank*, 92 N. Y. App. Div. 294.

**5. Personal Representative May Take Possession unless Surviving Partner Gives Bond.** — *Esterly*

*v. Rua*, (C. C. A.) 122 Fed. Rep. 609, *quoting* *Code Alaska*, tit. 2, § 791; *Byers v. Weeks*, 105 Mo. App. 72; *Shelby v. Creighton*, 65 Neb. 485, 101 Am. St. Rep. 630 (construing the *Wyoming* statutes); *In re Alfstad*, 27 Wash. 175.

**Surviving Partner as Administrator of Estate.** — In *Ohio*, by statute, the surviving partner or partners may apply for letters of administration on the decedent's estate, if the persons entitled to administer fail or neglect to apply for thirty days after his death. *Warnock v. Page*, 14 Ohio Dec. 278, *affirmed* 25 Ohio Cir. Ct. 695.

**Effect of Bond.** — The giving of the bond and its approval by the probate court do not constitute an adjudication that the property in the possession of the alleged partner and claimed by him to be partnership property is such property, and not assets of the estate. *Strode v. Gilpin*, 187 Mo. 383.

**Duty of Representative as to Trust Estates.** — Where the personal representative has not acted or agreed to act as trustee he has the right to decline to undertake performance of the trust. *In re Ridley*, (1904) 2 Ch. 774.

**8. Administration of Fund by Cestui Que Trust.** — The court will grant letters of administration to the *cestui que trust* of a trust fund, limited to that fund, after the death of the trustee, on the consent of his personal representatives. In *Goods of Ratcliffe*, (1899) P. 110.

**982. 1. Duty of Representative as to Trust Estates — General Rule in United States.** — *Deiterman v. Ruppel*, 200 Ill. 199; *Cooper v. Hayward*, 71 Minn. 374; *In re Belt*, 29 Wash. 535, 92 Am. St. Rep. 916. See also *Haines v. Hay*, 169 Ill. 93, *reversing* on other grounds 67 Ill. App. 445; *Wilder v. Wilder*, 75 Vt. 178.

**Duty of Representative of Deceased Executor or Administrator as to Trust Estate of First Decedent.** — See *Matter of Trask*, (Surrogate Ct.) 27 Civ. Pro. (N. Y.) 7.

**2. Personal Representative Cannot Deal with Estate for Individual Benefit — Arkansas.** — *Jacoway v. Hall*, 67 Ark. 346, *citing* 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 982.

*California.* — *Firebaugh v. Burbank*, 121 Cal. 186; *Matter of McDougald*, 146 Cal. 196.

*Illinois.* — *Haines v. Hay*, 169 Ill. 93, *reversing* on other grounds 67 Ill. App. 445; *Miller v. Rich*, 204 Ill. 444.

*Missouri.* — *Baldwin v. Dalton*, 168 Mo. 20.

*New York.* — *Reynolds v. Aetna L. Ins. Co.*, 28 N. Y. App. Div. 591, *affirmed* 160 N. Y. 635; *Matter of Davis*, (Surrogate Ct.) 37 Misc. (N. Y.) 326; *Kelly v. Pratt*, (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 31.

*Pennsylvania.* — *Buck's Estate*, 185 Pa. St. 57, 64 Am. St. Rep. 616; *Mueller's Estate*, 8 Pa. Dist. 70, *affirmed* 190 Pa. St. 601; *Miller's Estate*, 14 Pa. Dist. 163; *Cope's Estate*, 27 Pa. Co. Ct. 365, 4 Lack. Jur. (Pa.) 45.

*South Carolina.* — *Turnipseed v. Sirrine*, 60 S. Car. 272.



**983.** (2) *Dealing with Claims Against Estate* — (a) *Purchase at Discount*. — See note 1.

In Some Jurisdictions. — See note 2.

**984.** 2. *Personal Property* — a. *TITLE AND RIGHT TO POSSESSION* — (1) *Devolution of Title to Decedent's Personalty* — (a) *At Common Law*. — See note 1.

*Tennessee*. — *Bland v. Gollaher*, (Tenn. Ch. 1898) 48 S. W. Rep. 320.

*Purchase of Property of Estate*. — The failure to move within a reasonable time to set aside the purchase as voidable will bar the right. *Word v. Davis*, 107 Ga. 780.

A purchase by an administrator from a legatee of a legacy bequeathed him by the decedent, if fair and for an adequate consideration, is valid. *Lombard v. Carter*, 36 Oregon 266; *Littell v. Hackley*, (C. C. A.) 126 Fed. Rep. 309.

The fact that an executor, in realizing on corporation stock of doubtful value owned by the estate, obtains a personal interest in the corporate enterprises furnishes no ground for complaint against him, if the transactions were concluded by him in good faith and were for the best interests of the estate. *Houghteling v. Stockbridge*, (Mich. 1904) 99 N. W. Rep. 759, 11 Detroit Leg. N. 100.

*Purchase of Real Estate*. — An executor or administrator not having possession of land for purposes of administration may purchase in his own right the interest of any of the heirs therein, directly or at a sale on execution or other process, if he acts fairly and in good faith; but any fraud or misrepresentation on his part will render such sale voidable. *Cornish v. Johns*, (Ark. 1905) 85 S. W. Rep. 764; *Schneider v. Schneider*, 125 Iowa 1; *Fleming v. McCutcheon*, 85 Minn. 152; *Woman's College v. Horne*, (Tenn. Ch. 1900) 60 S. W. Rep. 609, where the court said: "His duties as administrator relate alone to personal property, though on behalf of creditors he might file a bill to subject real estate." See also *Morton v. Johnston*, 124 Mich. 561.

An administrator has no right to purchase land in his own right at a sheriff's sale under executions issued upon a judgment in his own favor and one held by him as administrator. At such sale he represents the interest of the estate as much as he does his own, and the duty rests upon him to see that the property brings as much as possible. *Montgomery v. Black*, (Ark. 1905) 86 S. W. Rep. 1006.

An administrator may buy lands which belong to his intestate from a purchaser who, in good faith, acquired the title thereto at a valid sale under a deed of trust executed by the intestate. *O'Brien v. Wilson*, 82 Miss. 93.

Where the attorney for an administrator purchases the curtesy interest in the decedent's real estate, and makes a profit out of the purchase by selling it to the purchaser of the reversion at the administrator's sale, the profits thus made must be accounted for to the estate. *In re Robbins*, (Minn. 1905) 103 N. W. Rep. 217.

*Accountability That of Trustee*. — While the legal title to personal property belonging to an estate vests in the administrator on his appointment and qualification, he holds it in trust, and is accountable to the court appointing him

after the manner of trustees generally. *Carpenier v. U. S. Fidelity, etc., Co.*, 123 Wis. 209.

*Contract to Share Fees of Attorneys for Estate*. — A contract by an administrator with his attorneys by which he is to receive a portion of their fees in consideration of services to be rendered by him in the litigation to conduct which they were employed is against public policy and void. *In re Evans*, 22 Utah 366, 83 Am. St. Rep. 794.

*Surviving Partner Executor of Deceased Partner*. — The equitable principle that a trustee cannot deal with himself with respect to trust property applies to a surviving partner who is also executor of the estate of the deceased partner. *Egan v. Wirth*, 26 R. I. 363.

*Profits Accruing Through Unauthorized Continuance of Decedent's Business*. — An executor who continues the business of the decedent without authority cannot withhold from the estate any portion of the earnings of the business to his own use or profit as compensation for his services. *Matter of Peck*, 79 N. Y. App. Div. 296, affirmed 177 N. Y. 508. See generally *supra*, this title, 975. 1.

*Purchase by Executor or Administrator at His Own Sale*. — See *infra*, this title, 1021. 1 *et seq.*, 1052. 3 *et seq.*, 1144. 6 *et seq.*

**983.** 1. *Representative Cannot Buy Claims Against Estate for Individual Profit*. — *Jacoway v. Hall*, 67 Ark. 340; *Matter of Rainforth*, (Surrogate Ct.) 40 Misc. (N. Y.) 609.

*Scope of Prohibition*. — The prohibition does not extend to legatees or distributees or to sureties on the bond of the executor or administrator. Any one except the representative may lawfully buy claims of creditors or other persons at a discount and collect their face value. *Owen v. Potter*, 115 Mich. 556; *Luther v. Hunter*, 7 N. Dak. 544.

*Claims Against Decedent for Moneys Received by Him as Guardian or Agent*. — An executor may purchase claims against his testator for moneys received by the latter as guardian or agent, if no such money has come into his hands as executor and there is no fraud or concealment on his part. *Murray v. Barden*, 132 N. Car. 136.

**2. Effect of Statutory Provisions — Purchase Not Absolutely Void**. — *Matter of McDougald*, 146 Cal. 191.

**984.** 1. *All Personalty Passes to the Executor or Administrator at Common Law — United States*. — *Scruggs v. Scruggs*, 105 Fed. Rep. 28; *Burnes v. Burnes*, (C. C. A.) 137 Fed. Rep. 781, affirming 132 Fed. Rep. 485.

*Connecticut*. — *Ives v. Beecher*, 75 Conn. 153.

*Georgia*. — *Juhan v. Juhan*, 104 Ga. 253; *Harrell v. Harrell*, (Ga. 1905) 51 S. E. Rep. 283.

*Illinois*. — *Irwin v. Sample*, 213 Ill. 160.

*Iowa*. — *Herriott v. Potter*, 115 Iowa 648; *Blackman v. Baxter*, 125 Iowa 118.

*Kansas*. — *Black v. Elliott*, 63 Kan. 211, 88 Am. St. Rep. 239.



**984.** The Title of the Executor or Administrator Is Exclusive.— See notes 2, 3.

**985.** (b) Modern Doctrine.— See note 1.

(2) When Title Vests in Representative — (a) Executors.— See note 2.

(b) Administrators.— See note 3.

**986.** (3) Nature of Title — (a) In General.— See note 2.

*Maine.* — Merrill v. Wooster, 99 Me. 460.

*Massachusetts.* — Flynn v. Flynn, 183 Mass.

365.

*Mississippi.* — Gordon v. James, (Miss. 1905)

39 So. Rep. 18.

*Missouri.* — Langston v. Canterbury, 173 Mo.

122; Strode v. Gilpin, 187 Mo. 383; McDowell

v. Orphan School, 87 Mo. App. 386; Tye v. Tye,

88 Mo. App. 330; Perkins v. Goddin, 111 Mo.

App. 429.

*New Hampshire.* — Bartlett v. Hill, 69 N. H.

197.

*New Jersey.* — Schrafft v. Wolters, 61 N. J.

Eq. 467.

*New York.* — Berkeley v. Kennedy, 62 N. Y.

App. Div. 609; Garvey v. U. S. Fidelity, etc.,

Co., 77 N. Y. App. Div. 391; Lane v. Albertson,

78 N. Y. App. Div. 607; Huyler v. Dolson, 101

N. Y. App. Div. 83; Robinson v. Adams, (Supm.

Ct. Spec. T.) 30 Misc. (N. Y.) 537; Dickinson

v. Colonial Trust Co., (Supm. Ct. Spec. T.) 33

Misc. (N. Y.) 668.

*Ohio.* — Matter of Crawford, 11 Ohio Cir.

Dec. 605, 21 Ohio Cir. Ct. 554, affirmed on other

grounds 68 Ohio St. 58.

*Oregon.* — State v. O'Day, 41 Oregon 495;

Casto v. Murray, (Oregon 1905) 81 Pac. Rep.

883.

*Tennessee.* — Boring v. Jobe, (Tenn. Ch.

1899) 53 S. W. Rep. 763.

*Wisconsin.* — Hemmy v. Hawkins, 102 Wis.

56, 72 Am. St. Rep. 863; McKenney v. Mina-

han, 119 Wis. 651; Stehn v. Hayssen, (Wis.

1905) 102 N. W. Rep. 1074; Weaver v. Meyer,

32 Ind. App. 587 (construing the Wisconsin

statutes).

**Choses in Action.** — Indianapolis, etc., R. Co.

v. Price, 153 Ind. 31; Coffinberry v. McClellan,

(Ind. 1905) 73 N. E. Rep. 97.

**Power of Executor or Administrator.** — At com-

mon law an executor or administrator had the

same power over the personal estate of his de-

cedent that the latter had at the time of his

death. Pittsburgh, etc., R. Co. v. Gipe, 160 Ind.

360.

**984. 2. Title to Personalty Is Exclusive** —

*United States.* — Scruggs v. Scruggs, 105 Fed.

Rep. 28; Moore v. Fidelity Trust Co., (C. C.

A.) 138 Fed. Rep. 1, affirming 134 Fed. Rep. 489.

*Alabama.* — Blackburn v. Fitzgerald, 130 Ala.

584.

*California.* — Freese v. Hibernia Sav., etc.,

Soc., 139 Cal. 392.

*Florida.* — Scott v. Jenkins, (Fla. 1902) 35

So. Rep. 101.

*Massachusetts.* — Flynn v. Flynn, 183 Mass.

365.

*New Jersey.* — McCormick v. Stephany, 57 N.

J. Eq. 257.

*New York.* — Smith v. New York Second

Nat. Bank, 169 N. Y. 467, reversing 52 N. Y.

App. Div. 631; Garvey v. U. S. Fidelity, etc.,

Co., 77 N. Y. App. Div. 391; Huyler v. Dolson,

101 N. Y. App. Div. 83; Robinson v. Adams,

(Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 537.

*Tennessee.* — Willard v. Cunningham, (Tenn.

Ch. 1898) 48 S. W. Rep. 399.

*West Virginia.* — Turk v. Hevener, 49 W.

Va. 204.

**3. Title to Personalty Specifically Bequeathed.** —

Robinson v. Adams, (Supm. Ct. Spec. T.) 30

Misc. (N. Y.) 537. See also *infra*, this title,

**1009. 4 et seq.**

In *Utah* it is provided by statute that in case

of a specific devise or legacy the title passes

by the will, but possession can be obtained only

from the personal representative. Williamson

v. Beardsley, (C. C. A.) 137 Fed. Rep. 467.

**985. 1. In California and Texas.** — Matter

of Miller, 121 Cal. 353; Stevenson v. Roberts,

25 Tex. Civ. App. 577; William J. Lemp

Brewing Co. v. La Rose, 20 Tex. Civ. App.

575.

Both real and personal property descend to

the heir or to the beneficiary named in the will,

with a qualified right in the personal repre-

sentative, who holds it for the purpose of ad-

ministration, more like a receiver than a com-

mon-law executor. The title is not in him, nor

has he the power of disposal, save by order of

the court. Murphy v. Crouse, 135 Cal. 14, 87

Am. St. Rep. 90.

Under a trust deed of real and personal

property, executed by a person for his own

benefit, and reciting that upon his decease the

property should be turned over to "the heirs,

executors, or administrators of said trustor, as

the same may in and by law be proper and

provided," on his dying testate the property

goes to his executor, since the law provides

that when a will is left and an executor is ap-

pointed the estate shall be turned over to him.

Heintz v. Hoover, 138 Cal. 372.

In *Louisiana* the rule is the same as in *Cal-*

*ifornia* and *Texas*. McDermott's Succession, 51

La. Ann. 173.

**2. Title of Executor Vests at Death of Testator.**

— Pruett v. Pruett, 131 Ala. 578; Wheeler v.

Chicago Title, etc., Co., 217 Ill. 128; Matter of

Hoagland, 51 N. Y. App. Div. 347, affirmed 164

N. Y. 573. See also *supra*, this title, **906. 3**

*et seq.* Contra, that such was the rule under

the common law, but that the common law has

been abrogated by the statutes which make the

right of an executor to administer depend upon

his qualifying as such under the law, and limit

his powers to that of a mere trustee, taking

nothing in his own right, but everything for

others, see Burlington Protestant Hospital

Assoc. v. Gerlinger, 111 Iowa 293. See also

*supra*, this title, **809. 3 et seq.**

**3. Title of Administrator Vests When Letters**

**Are Granted.** — See *supra*, this title, **908. 1**

*et seq.*

**986. 2. Title of Executor or Administrator**

**Fiduciary in Character** — *California.* — Matter

of Wood, 143 Cal. 522.

*Connecticut.* — Chamberlin's Appeal, 70 Conn.

363.

*District of Columbia.* — Sinnott v. Kenaday,

**987. An Exception to the Common-law Rule.** — See note 2.

(b) **Residue After Payment of Debts and Legacies** — *aa. RULE IN ENGLAND AT COMMON LAW.* — See note 3.

**988. bb. RULE IN EQUITY.** — See note 1.**991. cc. RULE IN ENGLAND UNDER STATUTE** — **Terms of Statute.** — See note 2.**992. dd. RULE IN UNITED STATES.** — See note 2.(4) **Right to Possession of Personality.** — See notes 3, 4, 5.

14 App. Cas. (D. C.) 1, *reversed* on other grounds 179 U. S. 606.

*Iowa.* — Burlington Protestant Hospital Assoc. *v.* Gerlinger, 111 Iowa 293; Blackman *v.* Baxter, 125 Iowa 118.

*Minnesota.* — Granger *v.* Harriman, 89 Minn. 303.

*Missouri.* — Richardson *v.* Cole, 160 Mo. 372, 83 Am. St. Rep. 479; McDowell *v.* Orphan School, 87 Mo. App. 386; Byers *v.* Weeks, 105 Mo. App. 72.

*New York.* — Huyler *v.* Dolson, 101 N. Y. App. Div. 83; Dickinson *v.* Colonial Trust Co., (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 668; Matter of Avery, (Surrogate Ct.) 45 Misc. (N. Y.) 529.

*South Carolina.* — Redfearn *v.* Craig, 57 S. Car. 534.

*Texas.* — Stevenson *v.* Roberts, 25 Tex. Civ. App. 577.

An administrative title, such as executors usually have to the personal property of their testator, for the purposes of administration, is good against all the world except the beneficiaries, but as to them is a mere aid and instrument to pass it forward to them in the due course of administration as the law and the will appoint, free and clear of further needs or liens of the estate. Steinway *v.* Steinway, 163 N. Y. 183, *affirming* 24 N. Y. App. Div. 104; Lane *v.* Albertson, 78 N. Y. App. Div. 607.

Thus the share of a married woman in a deceased person's estate, though still in the hands of the administrator of the estate and undistributed, is within a statute giving to a married man title to certain of his wife's personality when she dies intestate "owning personal property in her own name." Wood *v.* Donaldson, 87 Mo. App. 1.

**Formal Transfers of Title Unnecessary.** — Upon payment of all debts, legacies, and charges, the title to the remaining assets at once vests in the legatees or distributees, without any formal transfer from the legal representative of the estate. Matter of McCarthy, (Surrogate Ct.) 26 Civ. Pro. (N. Y.) 397; Matter of Mullon, 145 N. Y. 104.

**987. 2. An Executor Who Is Residuary Legatee.** — Moody *v.* Davis, 67 N. H. 300; Richardson *v.* Bailey, 69 N. H. 384.

**3. Right of Executor to Residue** — **Rule at Common Law.** — Sinnott *v.* Kenaday, 14 App. Cas. (D. C.) 1, *reversed* on other grounds 179 U. S. 606; Wood *v.* Donaldson, 87 Mo. App. 1.

**Rule Formerly Applicable to Administrators.** — Wood *v.* Donaldson, 87 Mo. App. 1.

**988. 1. Rule in Equity** — **Intention of Testator Governs.** — Sinnott *v.* Kenaday, 14 App. Cas. (D. C.) 1, *reversed* on other grounds 179 U. S. 606.

**991. 2. English Rule Changed by Statute.** —

Sinnott *v.* Kenaday, 14 App. Cas. (D. C.) 1, *reversed* on other grounds 179 U. S. 606.

**992. 2. Rule in United States** — **Executor Not Entitled to Residue.** — Chamberlin's Appeal, 70 Conn. 363; Sinnott *v.* Kenaday, 14 App. Cas. (D. C.) 1, *reversed* on other grounds 179 U. S. 606; Wood *v.* Donaldson, 87 Mo. App. 1, tracing the history of the statutory changes. See also Burlington Protestant Hospital Assoc. *v.* Gerlinger, 111 Iowa 293.

**3. Executor or Administrator Entitled to Possession of All Decedent's Personality.** — Scruggs *v.* Scruggs, 105 Fed. Rep. 28; Burnes *v.* Burnes, (C. C. A.) 137 Fed. Rep. 781, *affirming* 132 Fed. Rep. 485.

**Administrator Pendente Lite.** — See Union Trust Co. *v.* Soderer, 171 Mo. 675, and see *infra*, this title, **1339. 2 et seq.**

**Order of Court Unnecessary to Authorize Taking Possession.** — It is the right of an administrator to take possession of all the personal property left by the intestate without an order therefor from the probate court, because the title to the personality, for the purposes of administration, vests in him. Langston *v.* Canterbury, 173 Mo. 122.

**Specific Legacies.** — The legatee of a specific legacy is entitled to possession immediately upon the death of the testator, unless the property may be needed to pay debts. Robinson's Estate, 24 Pa. Co. Ct. 588.

Specific articles in the possession of the person to whom they are bequeathed may be allowed to remain in his possession if manual delivery would entail hardship, on his giving bond to pay their appraised value in case they should be needed to pay debts. Bohrer's Estate, 7 Pa. Dist. 307.

**4. Executor or Administrator May Sue for Possession.** — Personality passes to the administrator, and it is not only his right, but his duty, to sue for and recover it. Perkins *v.* Goddin, 111 Mo. App. 429.

**Pending Appeal from Order Refusing to Revoke Letters.** — A decree for the payment to an administrator of money belonging to the estate will not be denied on the ground that an appeal has been taken from the overruling of a motion for the revocation of his letters. Melanpy *v.* O'Bryonville Bldg., etc., Co., 13 Ohio Dec. 102.

**5. Widow or Next of Kin Cannot Sue for Recovery of Assets.** — Scruggs *v.* Scruggs, 105 Fed. Rep. 28; Moore *v.* Fidelity Trust Co., (C. C. A.) 138 Fed. Rep. 1, *affirming* 134 Fed. Rep. 480; People's Nat. Bank *v.* Cleveland, 117 Ga. 008; Flynn *v.* Flynn, 183 Mass. 365; Byers *v.* Weeks, 105 Mo. App. 72; Edney *v.* Baum, (Neb. 1903) 97 N. W. Rep. 252.

**Exceptions to Rule.** — See *infra*, this title, **996. 5. Exceptions to Rule that Authority Is Exclusive.**

- 993.** *b. DISCOVERY OF ASSETS*—(1) *By Bill in Equity*.—See note 3.  
 (2) *By Statutory Proceeding in Probate Court*—(a) *Statutory Remedy in General*.—See note 4.  
**994.** (b) *Nature and Scope*.—See notes 1, 2, 3.

**Creditors.**—Statutory proceedings in aid of execution for the recovery of property from third persons are available to creditors of the estate, after the time has arrived when the execution can be issued against the personal representative. *Lauer v. Smith*, 24 Ohio Cir. Ct. 47, *affirmed* 65 Ohio St. 563.

An exception to the rule probably exists where an heir who has lawfully taken possession of the goods or chattels of an intestate is deprived thereof by a wrongdoer, in which case the bare possession will ordinarily be a sufficient title to authorize the maintenance of an action of replevin to recover the property. *Casto v. Murray*, (Oregon 1905) 81 Pac. Rep. 883.

**Settlement Without Administration—Executors De Son Tort.**—Heirs at law cannot generally sue in their own name to recover their distributive share in personalty, without alleging that there was no administration, and no necessity for any; but they have a cause of action against an executor *de son tort*, where there is no legal representative of the estate. *Allen v. Hurst*, 120 Ga. 763. See also *supra*, this title, **742**, 1; *infra*, this title, **1351**, 4.

**993. 3. Bill in Equity Lies for Discovery of Assets.**—*Schrafft v. Wolters*, 61 N. J. Eq. 467; *Starkweather v. Williams*, 21 R. I. 55. See also *Phillips v. Phillips*, 23 Tex. Civ. App. 532.

**Jurisdiction in Equity Is Not Divested.**—*Starkweather v. Williams*, 21 R. I. 55.

**Bill by Creditors.**—See *People's Nat. Bank v. Kern*, 8 Pa. Dist. 72, *affirmed* 193 Pa. St. 59; *United Firemen's Ins. Co. v. McCartney*, 8 Pa. Dist. 110.

**4. Discovery Authorized by Statute—District of Columbia.**—*Richardson v. Daggett*, 24 App. Cas. (D. C.) 440.

*Illinois.*—*Adams v. Adams*, 81 Ill. App. 637, *affirmed* 181 Ill. 210; *Mulvihill v. White*, 89 Ill. App. 88; *Kraher v. Launtz*, 90 Ill. App. 496; *Mahoney v. People*, 98 Ill. App. 241.

*Kansas.*—*Hudson v. Barratt*, 62 Kan. 137.

*Maine.*—*Alden v. Thompson*, 92 Me. 86.

*Missouri.*—*Ex p. Gfeller*, 178 Mo. 248; *Eckerle v. Wood*, 95 Mo. App. 378.

*New York.*—*O'Brien v. Baker*, 65 N. Y. App. Div. 282, *affirming* (Surrogate Ct.) 34 Misc. (N. Y.) 436; *Matter of Richardson*, (Surrogate Ct.) 31 Misc. (N. Y.) 666.

**Creditors or Other Persons Interested in the Estate** may maintain the proceeding in *Missouri*. *Tygar v. Falor*, 163 Mo. 234; *Ex p. Gfeller*, 178 Mo. 248.

In some states, by the express terms of the statute, the proceedings lie against the executor or administrator at the suit of persons interested in the estate. *Linthicum v. Polk*, 93 Md. 84; *Tygar v. Falor*, 163 Mo. 234; *Wilson v. Ruthrauff*, 82 Mo. App. 435.

Where the application is sustained by the probate court, objection that the applicant is not a person interested in the estate cannot be entertained in a collateral proceeding. *Ex p. Gfeller*, 178 Mo. 248; *Eckerle v. Wood*, 95 Mo. App. 378.

**Discovery of Real Estate**, when needed to pay debts, may be had in *Massachusetts* on petition of an administrator with the will annexed. *Dickey v. Taft*, 175 Mass. 4.

**994. 1. Scope of Proceeding.**—The examination is not generally confined to a proceeding to compel the delivery over of property of a decedent, but lies against one not charged with possession to obtain information concerning the assets of the estate. *O'Brien v. Baker*, 65 N. Y. App. Div. 282, *affirming* (Surrogate Ct.) 34 Misc. (N. Y.) 436.

**Compelling Delivery of Property.**—In *Illinois* the court is authorized to make such order in the premises as the case may require, and it may in a proper case order the property or effects to be delivered up, or the proceeds or value thereof, in case there has been a conversion. *Martin v. Martin*, 170 Ill. 18, *reversing* on other grounds 68 Ill. App. 169. See also *Mahoney v. People*, 98 Ill. App. 241.

In *New York* it is not within the province of the court to determine a conflicting claim of title, but it may adjudge, as between the parties to the proceeding, a right to possession. *Matter of Scott*, (Surrogate Ct.) 34 Misc. (N. Y.) 446.

In *Pennsylvania* the Orphans' Court has jurisdiction to compel the surrender to the personal representatives of a decedent, of assets improperly withheld by one whose title is colorable only. *McClean's Estate*, 11 Pa. Dist. 103, 26 Pa. Co. Ct. 360. To similar effect see *Tyson's Estate*, 191 Pa. St. 218; *Coover's Estate*, 27 Pa. Super. Ct. 12; *McGrann's Estate*, 12 Pa. Dist. 219; *Herstine's Estate*, 29 Pa. Co. Ct. 481.

Where there is no adverse title claimed by the defendant, an order of delivery will follow as a matter of course. *Richardson v. Daggett*, 24 App. Cas. (D. C.) 440.

**2. Determination of Ownership.**—*Richardson v. Daggett*, 24 App. Cas. (D. C.) 440; *Martin v. Martin*, 170 Ill. 418, *reversing* on other grounds 68 Ill. App. 169; *In re Wolford*, 10 Kan. App. 283; *Linthicum v. Polk*, 93 Md. 84; *Matter of Richardson*, (Surrogate Ct.) 31 Misc. (N. Y.) 666; *Matter of Scott*, (Surrogate Ct.) 34 Misc. (N. Y.) 446; *McGrann's Estate*, 12 Pa. Dist. 219, 28 Pa. Co. Ct. 246.

In *New York*.—*Matter of Peyser*, 35 N. Y. App. Div. 447; *Matter of McCarthy*, (Surrogate Ct.) 26 Civ. Pro. (N. Y.) 309.

A mere denial by the person cited that he has in his possession property, or information as to property of the decedent, does not justify a revocation of the order, as that question is to be settled by the examination under oath of the person cited to appear. *O'Brien v. Baker*, 65 N. Y. App. Div. 282, *affirming* (Surrogate Ct.) 34 Misc. (N. Y.) 436.

A special administrator is a mere temporary custodian of the property of the estate; and his right to possession is not that contemplated by the provision requiring the surrogate to dismiss the proceeding on the filing of a written answer,



**995.** *c. COLLECTION OF ASSETS* — (1) *General Rule.* — See note 1.

(2) *Collection of Debts* — (a) *Duty and Authority to Collect.* — *aa. IN GENERAL.*

— See note 5.

**996.** *Incidental Powers.* — See note 3.

*Necessity of Collecting Debts.* — See note 4.

*bb. AUTHORITY ORDINARILY EXCLUSIVE.* — See note 5.

duly verified, that he is the owner of the property or entitled to the possession thereof by virtue of a lien thereon or special property therein. *O'Brien v. Baker*, 65 N. Y. App. Div. 282, *affirming* (Surrogate Ct.) 34 Misc. (N. Y.) 436, two judges *dissenting*.

**Determination by Consent.** — Under Code Civ. Pro. N. Y., § 2710, "if the witness admits having the control of the property, but the facts as to the petitioner's right are in dispute, the proceeding shall end, unless the parties consent to its determination by the surrogate, in which case it shall be so determined." *In re McGuire*, 106 N. Y. App. Div. 131.

**Good Faith of Claim of Ownership Made.** — The court has no authority to determine the right to the property where there is a *bona fide* dispute as to the title; but it may try the good faith of the claim to ownership. *Johnson v. Johnson*, 82 Mo. App. 350; *Wilson v. Ruthrauff*, 82 Mo. App. 435.

A mere assertion of title by a claimant unsupported by conveyance or proof of any kind is not generally sufficient to oust the jurisdiction of the court. *Friedman's Estate*, 7 Pa. Dist. 517, 21 Pa. Co. Ct. 309.

**991. 3. Summary Proceeding Not Designed for Collecting Debts.** — *Richardson v. Daggett*, 24 App. Cas. (D. C.) 440; *Martin v. Martin*, 170 Ill. 18, *reversing* on other grounds 68 Ill. App. 169; *McGrann's Estate*, 14 Pa. Dist. 261, *overruling* 14 Pa. Dist. 52; *In re Wolford*, 10 Kan. App. 283.

**995. 1. Duty to Get Assets into Possession.** — *Matter of Baker*, (Surrogate Ct.) 27 Misc. (N. Y.) 126. See also *supra*, this title, **903. 1.**

As a primary principle, the administrator of the decedent is *prima facie* entitled to receive and collect all of the personal assets of his estate. *Yeany v. Yeany*, 12 Pa. Dist. 439.

**Property in Pledge.** — An administrator is not entitled to the possession of property of which the decedent was not in possession and not entitled to possession at the time of his death, as where it had been pledged as security for payment of the purchase price. *Fulton v. National Bank*, 26 Tex. Civ. App. 115.

**5. Duty to Collect Debts.** — It is the duty of an administrator to try to collect debts apparently due the estate, and not to resist their collection and set up defenses against them. He should not depreciate the estate committed to his trust, but should seek to preserve and collect its assets, leaving to those who seem to be its debtors the task of bringing forward and proving their defenses, if they have any. *Egan v. Clark*, 87 Ill. App. 246.

The duty to collect the debts is for the benefit of the creditors as well as for the benefit of the next of kin. *Fortunato v. New York*, 31 N. Y. App. Div. 271.

**Contracts Executed by Personal Representative.** — Where an executor or administrator con-

tracts in his official capacity, this, *prima facie* at least, gives to him a right to enforce or forfeit the contract by suit or otherwise. *Stein v. Waddell*, 37 Wash. 634.

**Contract to Pay Debts of Estate.** — A contract of the grantee to pay the debts of an estate in consideration of the heirs conveying to him a portion of the lands of the decedent is assets in the hands of the administrator; and, being assets, he may bring an action upon it and enforce it. *Stewart v. Rogers*, (Kan. 1905) 80 Pac. Rep. 58.

**996. 3. Extent of Power.** — The executor has the full legal title to choses in action and debts due the deceased, and may release, compound, discharge, and transfer them, being answerable for improvidence in the exercise of that power. *Nance v. Gray*, (Ala. 1905) 38 So. Rep. 916.

The power to collect debts includes the power to bring an action for an accounting against a surviving partner, or to set aside transfers of personal property made by the deceased during his lifetime, on account of his unsoundness of mind, or having been obtained by undue influence or fraud. *Bruning v. Golden*, 159 Ind. 199.

**4. Specific Legacies.** — Securities bequeathed to testamentary trustees become immediately vested in them upon the death of the testator, and unless needed to pay debts or expenses, the only duty devolving upon the executor is to possess himself of the property and hand it over. If he collects the securities and reinvests the proceeds, he will be vested with the title to the securities in which the money is re-invested and required to pay the cash. *Matter of Ryer*, 94 N. Y. App. Div. 449, *affirmed* 180 N. Y. 532.

**5. Rule that Authority Is Exclusive.** — *Noble v. Tate*, 119 Ala. 399, 140 Ala. 469; *Blackburn v. Fitzgerald*, 130 Ala. 584; *Burge v. Burge*, 76 S. W. Rep. 873, 25 Ky. L. Rep. 979; *Sharp v. Citizens' Bank*, (Neb. 1904) 98 N. W. Rep. 50; *Rigby's Estate*, 8 Pa. Super. Ct. 108, 42 W. N. C. (Pa.) 434.

**Exceptions to Rule that Authority Is Exclusive.** — *Austin v. Snider*, 17 Colo. App. 182; *Bruning v. Golden*, 159 Ind. 199; *Tecumseh Nat. Bank v. McGee*, 61 Neb. 709; *Fleischmann v. Fleischmann*, 54 N. Y. App. Div. 202; *Rathbun v. Brownell*, (Supm. Ct. Spec. T.) 43 Misc. (N. Y.) 307; *Sixta v. Heiser*, 14 S. Dak. 346; *Dulany v. Smith*, 97 Va. 130; *Reager v. Chappelear*, (Va. 1905) 51 S. E. Rep. 170; *Matheny v. Ferguson*, 55 W. Va. 656. See also *McGlave v. Fitzgerald*, (Neb. 1903) 93 N. W. Rep. 692; *Beaty v. Downing*, 96 Va. 451; *Conrad v. Fuller*, 98 Va. 16.

The right of heirs or distributees to personal property can be asserted, in exceptional cases, without the aid of administration. *McDowell v. Orphan School*, 87 Mo. App. 386. See *supra*, this title, **742. 1.**

**997.** *dd.* FOREIGN DEBTORS. — See notes 3, 4.

**998.** See note 1.

*ee.* PERFORMANCE OF DUTY — (*aa.*) *Promptness and Diligence.* — See note 2.

**999.** See note 1.

(*bb.*) *Actions Against Debtors — Uncollectible Debts.* — See note 5.

(*cc.*) *Foreclosure of Mortgages.* — See note 6.

**1000.** *Power to Buy In Property at Foreclosure Sale.* — See note 1.

(*dd.*) *Receiving Payment — aaa. General Rule.* — See note 2.

*bbb.* *Taking Property in Payment.* — See note 3.

*ccc.* *Taking Notes or Securities in Payment.* — See note 5.

**1002.** (*b.*) *Liability for Failure to Collect — aa. LIABILITY FOR DEBTS AS ASSETS IN HAND.* — See notes 2, 3.

*bb.* *LOSS BY FAILURE TO COLLECT — (aa.) General Rule.* — See note 4.

While the legal title to the personal property of the estate passes to the legal representative, the equitable title is in the beneficiaries of the estate; and where there are no debts, a court of equity will not go through the formula of enforcing an administrator's mere naked legal right that he may uselessly distribute it to the persons entitled. *Richardson v. Cole*, 160 Mo. 372, 83 Am. St. Rep. 479; *Mahoney v. Nevins*, (Mo. 1905) 88 S. W. Rep. 731.

Where the surviving member of a partnership who is also administrator of the deceased partner's estate has administered the estate and been discharged without having settled the partnership business, and no administrator *de bonis non* has been appointed, an action in equity may be maintained by the heir to administer the partnership. *Byers v. Weeks*, 105 Mo. App. 72.

**Claims for Reimbursement to Decedent as Surety** — The legal right to represent the estate in the matter of the adjustment of claims for reimbursement to his intestate as a surety is in the administrator, and not in the heirs. *Harris v. Harris*, 92 Ill. App. 455.

**Partnership Interests.** — An administrator having been appointed, all rights in any of the personal property left by the deceased, including the right to recover his interest in a co-partnership, are vested in that administrator, and must be sued for by him. *Stehn v. Haysen*, (Wis. 1905) 102 N. W. Rep. 1074.

**Assignment of Right to Sue.** — Under Civ. Code Ga., § 3427, if the administrator for any cause declines to place any claim in suit, he may assign it to a distributee or creditor, and thus confer upon such assignee the right to prosecute a suit in his own name; the proceeds of the claim when collected to go to the administrator to be distributed by him. *Juhan v. Juhan*, 104 Ga. 253.

**997. 3. Duty to Collect Debts.** — *Maas v. German Sav. Bank*, 73 N. Y. App. Div. 524, *reversing* (Supm. Ct. App. T.) 36 Misc. (N. Y.) 154, which *affirmed* (N. Y. City Ct. Gen. T.) 35 Misc. (N. Y.) 193, *affirmed* 176 N. Y. 377; *State v. Fulton*, (Tenn. Ch. 1898) 49 S. W. Rep. 297. *Contra*, *Purdy v. Purdy*, (Ky. 1897) 42 S. W. Rep. 89.

**4. Powers of Executor or Administrator with Respect to Foreign Debt.** — See the title FOREIGN EXECUTORS AND ADMINISTRATORS, **926.** 4 *et seq.* **932.** 1 *et seq.*

**998. 1. Sale and Transfer of Claims Against**

**Foreign Debtor.** — See the title FOREIGN EXECUTORS AND ADMINISTRATORS, **942.** 3 *et seq.*

**2. Must Act Promptly.** — See *infra*, this title, **1003.** 2.

**999. 1. One Year.** — *Lowman v. Lowman*, 69 S. Car. 543.

In *Georgia* an administrator or executor is allowed twelve months' time in which to ascertain the condition of the estate intrusted to his care. *Ehrlich v. Silverstein*, 121 Ga. 54.

**5. Not Required to Sue on Bad Debts.** — *Matter of Hosford*, 62 N. Y. App. Div. 626; *Smith's Estate*, 194 Pa. St. 259. See also *Stille's Succession*, 52 La. Ann. 1538.

**Indemnity as to Costs.** — *Cogswell v. Concord*, etc., R. Co., 68 N. H. 192; *Harris v. Orr*, 46 W. Va. 261, 76 Am. St. Rep. 815.

**6. Power to Foreclose Mortgages.** — See *supra*, this title, **840.** 3.

**1000. 1. Bidding In Land at Foreclosure Sale.** — See *supra*, this title, **840.** 2; *infra*, this title, **1066.** 1 *et seq.*

**2. General Rule — Payment Must Be in Money.** — *Matter of Long Island L. & T. Co.*, 92 N. Y. App. Div. 5; *Poston v. Jones*, 122 N. Car. 536.

**3. Purchase of Land to Secure Payment of Debt.** — See *Matter of Hosford*, 62 N. Y. App. Div. 626; *McKee v. Ellis*, (Tex. Civ. App. 1904) 83 S. W. Rep. 880.

**5. Taking Notes or Securities in Payment — Power to Bind Estate.** — In *New York* the rule is well settled that where an executor takes a chose in action as a new security for a debt or obligation due to his testator, he takes it in his representative capacity. *Weeks v. O'Brien*, 25 N. Y. App. Div. 206, 27 Civ. Pro. (N. Y.) 86.

**1002. 2. Debts Not Assets in Hand until Collected.** — See *infra*, this title, **1201.** 4.

**3. Presumption as to Collection.** — *McIntire v. McIntire*, 14 App. Cas. (D. C.) 337, *affirmed* 192 U. S. 116; *Hallway v. Eckler*, 105 Mo. App. 585; *Walworth v. Bartholomew*, 76 Vt. 1, *citing* 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1002. Compare *Bramlett v. Mathis*, 71 S. Car. 123.

**Where an Administrator Inventories a Debt as Doubtful or Desperate.** — *Wrightson v. Tydings*, 94 Md. 358, *approving* *Shafer v. Shafer*, 85 Md. 561.

**4. Not Liable Unless Derelict — Georgia.** — *Prior v. Prior*, 113 Ga. 1154.

*Iowa.* — *Lippert v. Lippert*, 110 Iowa 550.

*Kentucky.* — *Cook v. Barnes*, (Ky. 1897) 43 S. W. Rep. 682.

**1003.** See note 1.

Loss Resulting from Delay. — See note 2.

**1004.** See note 1.

Degree of Negligence Necessary to Impose Individual Liability. — See note 5.

(bb) Excusing Failure to Collect — *aaa. In General.* — See notes 6, 7.

**1005.** See note 1.

bbb. Insolvency of Debtor. — See note 2.

d. SALE AND TRANSFER OF PERSONAL PROPERTY — (1) *Authority to Sell* — (a) *At Common Law* — *aa. In General.* — See note 3.

*Michigan.* — Cheever v. Ellis, 134 Mich. 645, 10 Detroit Leg. N. 624.

*New York.* — Matter of Hosford, 27 N. Y. App. Div. 427; Matter of Hosford, 62 N. Y. App. Div. 626; Matter of Guldenkirch, (Surrogate Ct.) 35 Misc. (N. Y.) 123.

*Pennsylvania.* — Graham's Estate, 8 Pa. Dist. 479, 22 Pa. Co. Ct. 540.

*Tennessee.* — Pearson v. Gillenwaters, 99 Tenn. 446, 462, 63 Am. St. Rep. 844.

*West Virginia.* — Harris v. Orr, 46 W. Va. 261, 76 Am. St. Rep. 815.

See also *infra*, this title, **1276. 5.**

**Degree of Diligence Required.** — A personal representative is not the insurer of the collection of the claims of his decedent. At most, he is responsible for the exercise of such diligence and prudence as men of discretion and intelligence would ordinarily use in their own private affairs. Matter of Sharp, 61 N. J. Eq. 601.

**Debt Due from Executor or Administrator.** — See *supra*, this title, **887. 1 et seq.**

**1003. 1. Liability for Loss Resulting from Negligence** — *California.* — Matter of Kennedy, 120 Cal. 458; *In re Carver*, 123 Cal. 102.

*Michigan.* — Cheever v. Ellis, 134 Mich. 645, 10 Detroit Leg. N. 624.

*New York.* — Matter of Long Island L. & T. Co., 93 N. Y. App. Div. 5; Matter of Baker, (Surrogate Ct.) 27 Misc. (N. Y.) 126.

*Pennsylvania.* — Crouse's Estate, 16 Pa. Super. Ct. 12; Carr's Estate, 24 Pa. Super. Ct. 369, reversing 8 Del. Co. Rep. (Pa.) 556.

*Vermont.* — *In re Hall*, 70 Vt. 458.

See also *infra*, this title, **1197. 5, 1276. 5.**

**2. Loss Resulting from Delay — Individual Liability.** — Caruthers v. Caruthers, 99 Ill. App. 402; Matter of Hosford, 27 N. Y. App. Div. 427; Matter of McManus, 66 N. Y. App. Div. 53, reversing on other grounds (Surrogate Ct.) 35 Misc. (N. Y.) 678; Kauffeld's Estate, 28 Pa. Super. Ct. 162, reversing 35 Pittsb. Leg. J. N. S. (Pa.) 174.

**Failure of Executor or Administrator to Pay His Own Debt While Able.** — See Matter of David, (Surrogate Ct.) 44 Misc. (N. Y.) 337, and see *supra*, this title, **887. 4.**

**1004. 1. Delay at Request or Instance of Persons Beneficially Interested.** — Pearson v. Gillenwaters, 99 Tenn. 446, 462, 63 Am. St. Rep. 844.

**5. Gross Negligence Necessary to Impose Individual Liability.** — Graham's Estate, 8 Pa. Dist. 479, 22 Pa. Co. Ct. 540; Harris v. Orr, 46 W. Va. 261, 76 Am. St. Rep. 815.

**6. Ignorance of Existence of Claim Excuses Failure to Collect.** — O'Brien v. Wilson, 82 Miss. 93; Matter of Guldenkirch, (Surrogate Ct.) 35 Misc. (N. Y.) 123.

**7. Acting on Advice of Attorney.** — Matter of

Sharp, 61 N. J. Eq. 601; Matter of Ball, 55 N. Y. App. Div. 284; Pearson v. Gillenwaters, 99 Tenn. 446, 462, 63 Am. St. Rep. 844. See also *Re Barker*, 77 L. T. N. S. 712.

But the advice of an attorney will not relieve an executor from the duty of active vigilance in the collection of the assets left by his decedent; he is bound to know his duty in that regard. Matter of Hosford, 27 N. Y. App. Div. 427.

**Where Attorney Is Debtor.** — Where the attorney of the decedent during his lifetime and of the executor after his death is the debtor, the executor must seek disinterested advice from an independent source in order to shield himself behind legal advice. Carr's Estate, 24 Pa. Super. Ct. 369, reversing 8 Del. Co. Rep. (Pa.) 556.

**1005. 1. Failure to Collect — Burden of Proof.** — Walworth v. Bartholomew, 76 Vt. 1, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1004, 1005. See also *supra*, this title, **1002. 3.**

**2. Insolvency of Debtor Excuses Failure to Collect.** — Prior v. Prior, 113 Ga. 1154; Edensborn's Estate, 10 Pa. Dist. 184; Harris v. Orr, 46 W. Va. 261, 76 Am. St. Rep. 815.

**Debt of Executor or Administrator.** — Campbell v. Drais, 125 Cal. 253. See also *supra*, this title, **887. 1 et seq.**

**3. Power of Disposal Absolute at Common Law.** — Broadwell v. Banks, 134 Fed. Rep. 470; Edney v. Baum, (Neb. 1903) 97 N. W. Rep. 252; Hemmy v. Hawkins, 102 Wis. 56, 72 Am. St. Rep. 863.

**Giving Away Assets.** — Matter of Suess, (Surrogate Ct.) 37 Misc. (N. Y.) 459.

**The Interest of the Decedent in a Partnership.** — Compare Altgelt v. Alamo Nat. Bank, 98 Tex. 252, reversing (Tex. Civ. App. 1904) 79 S. W. Rep. 582. *Contra, In re Auerbach*, 23 Utah 529.

An executor or administrator has no title to a mortgage belonging to a partnership of which the decedent was a member, and cannot make a valid assignment of such mortgage. Miller v. Berry, (S. Dak. 1905) 104 N. W. Rep. 311.

**Power to Assign or Release Debts.** — See McCleary v. Chipman, 32 Ind. App. 489.

**Fixtures** cannot be separated from real estate and sold as personal property, and the Orphans' Court has no jurisdiction to authorize it. Walters's Estate, 10 Kulp (Pa.) 221.

**Property Pledged.** — Under Code Civ. Pro. Cal., § 1524, interests in personal property pledged may be sold in the same manner as other personal property, when it appears for the best interests of the estate. Bell v. Mills, (C. C. A.) 123 Fed. Rep. 24.

Where property of the estate subject to a chattel mortgage is sold by the personal repre-



**1007.** *cc.* SALE IN SATISFACTION OF DEBTS OF EXECUTOR OR ADMINISTRATOR. — See notes 2, 3.

(b) Statutory Sales under Order of Court. — See note 4.

**1008.** See note 1.

**1009.** (c) Testamentary Authority to Sell. — See note 2.

(d) Sale of Property Specifically Bequeathed. — See note 4.

**1010.** See note 2.

(e) Sale of Choses in Action — *aa.* IN GENERAL. — See note 4.

**1011.** See note 1.

Transfers in Satisfaction of the Decedent's Debts. — See note 2.

**1012.** Leave of Court to Sell Choses in Action. — See note 1.

**1013.** *dd.* FOREIGN DEBTS. — See note 1.

**1015.** (2) *Manner and Terms of Sale* — (b) *Modern Doctrine* — *aa.* PUBLIC OR PRIVATE SALE. — See note 1.

sentatives, the lien creditor has the first claim on the proceeds. *Baker v. Becker*, 67 Kan. 831.

**Assignment of Decedent's Contract.** — A contract right which is coupled with liabilities, or involves a relation of personal confidence between the parties, cannot be transferred by the administrator of the promisee without the consent of the promisor. *Sims v. Cordele Ice Co.*, 119 Ga. 597.

**Election by Beneficiaries to Take Property in Specie.** — Where it does not appear that the sale is necessary for the payment of debts or legacies, and is not made so by the terms of the will, the beneficiaries may elect to take the property *in specie*. *Lane v. Albertson*, 78 N. Y. App. Div. 607.

**1007. 2. Sale in Satisfaction of Individual Debts.** — See *infra*, this title, **1027. 1 et seq.**, **1032. 1 et seq.**

**3. Rule of Equity Followed in the United States.** — See *Snyder v. Jack*, 140 Cal. 584, *sub nom.* *Horton v. Jack*, 126 Cal. 521, 115 Cal. 29, (Cal. 1894) 37 Pac. Rep. 652; *Lang v. Metzger*, 86 Ill. App. 117.

**4. Statutory Power of Sale — Order of Court Necessary.** — *In re McIntire*, 1 Alaska 73; *Redfearn v. Craig*, 57 S. Car. 534; *Altgelt v. Alamo Nat. Bank*, 98 Tex. 252, *reversing* (Tex. Civ. App. 1904) 79 S. W. Rep. 582. See also *Hawes v. Williams*, 92 Me. 483.

**Public Sale.** — The *Illinois* statute provides that "when it is necessary for the proper administration of the estate, the executor or administrator shall, as soon as convenient, after making the inventory and appraisement, sell at public sale all the personal property, goods, and chattels of the decedent, when ordered to do so by the County Court." *Starr & Curt. Annot. Stat. Ill.* (1896) c. 3, par. 91. See *Richley v. Childs*, 114 Ill. App. 173.

**Land Certificates or Contracts.** — In *Texas* a sale of a land certificate, which is personal property, is valid though made without any order of court, especially where the estate is less than five hundred dollars in value, in which event the statute authorizes a sale of its effects and a settlement of the estate in as summary a manner as possible. *Massenberg v. Denison*, (C. C. A.) 107 Fed. Rep. 18 (construing the *Texas* statutes).

In some jurisdictions by statute an administrator cannot sell the interest of the estate

in an executory contract for the purchase of lands, except as real estate and after license. *Hovorka v. Havlik*, (Neb. 1903) 93 N. W. Rep. 990, *citing* *Baxter v. Robinson*, 11 Mich. 520; *Cutler v. Mecker*, (Neb. 1904) 99 N. W. Rep. 514.

**1008. 1. These Statutes Are Merely Directory.** — *Edney v. Baum*, (Neb. 1903) 97 N. W. Rep. 252.

**Necessity of Following Order of Court.** — Where the administrator seeks the authority of the court and obtains it, he must be held bound to pursue the authority granted to entitle him to protection from liability. *Morton v. Johnston*, 124 Mich. 561.

**1009. 2. In Some Jurisdictions.** — *Redfearn v. Craig*, 57 S. Car. 534.

**4. Chattels Specifically Bequeathed May Be Sold.** — *Schell v. Depervin*, 198 Pa. St. 600, 82 Am. St. Rep. 820; *Williamson v. Beardsley*, (C. C. A.) 137 Fed. Rep. 467 (under the *Utah* statute).

**1010. 2. Necessity of Sale — Payment of Debts.** — *Ramser v. Blair*, 123 Ala. 139; *Alexander v. Bates*, 127 Ala. 328.

**4. Executor or Administrator May Transfer Choses in Action.** — *Broadwell v. Banks*, 134 Fed. Rep. 470.

**A Debt Due from the Executor or Administrator** to the estate becomes assets in his hands upon his appointment as such representative, and a sale of the debt is unauthorized and void. *Cheney v. Powell*, 11 Ohio Cir. Dec. 279, 20 Ohio Cir. Ct. 398.

**1011. 1. Propriety of Selling Choses in Action.** — See generally, *Holt v. Rust-Owen Lumber Co.* 2 Neb. (unofficial) 170, 96 N. W. Rep. 613.

**2. Transfer in Payment of Debts.** — See *supra*, this title, **1007. 2, 3.**

**1012. 1. License to Sell Choses in Action Required by Statute.** — *Marshall v. Meyers*, 96 Mo. App. 643.

**In Ohio.** — *Broadwell v. Banks*, 134 Fed. Rep. 470. See also *Guthrie v. Cincinnati Gas, etc., Co.*, 15 Ohio Dec. 23.

**1013. 1. Rule Denying Authority to Assign Claims Against Nonresident.** — See the title FOREIGN EXECUTORS AND ADMINISTRATORS, **942. 3 et seq.**

**1015. 1. Public Sale Required by Statute.** — The *Georgia* statute requires all sales by administrators to be at public outcry, except annual crops sent off to market, and vacant lands. *Fussell v. Dennard*, 118 Ga. 270.

**1016.** *bb.* TIME OF MAKING SALE.—In the United States.—See note 2.

**1017.** If, on the Other Hand, He Is Guilty of Unreasonable Delay.—See note 2.

*dd.* WHO MAY MAKE SALE.—See note 7.

*ee.* PRICE AND TERMS OF PAYMENT.—See notes 9, 10.

**1018.** Commodities Receivable in Payment.—See note 2.

**1019.** *ff.* SECURITY FOR PRICE.—See notes 1, 2.

**1020.** Approval of Security.—See note 8.

**1021.** (3) *Purchase by Executor or Administrator*—(a) General Rule.—See note 1.

A Purchase by an Executor or Administrator from a Third Person.—See note 2.

**A Stock of Goods.**—See *contra*, *In re Osburn*, 36 Oregon 8, Bean, J., dissenting.

**1016. 2. Discretion as to Time of Sale.**—*Nicholson v. Whitlock*, 57 S. Car. 36.

It is much the safer rule for an administrator to convert the assets of the decedent into money immediately. But this is not always practicable nor always to the best interest of the estate. *Allam's Estate*, 199 Pa. St. 573.

**Eighteen Months.**—The *New York* statute assumes that the duties vesting in an executor or administrator to take possession, collect assets, pay debts, and prepare the estate for distribution can be done in eighteen months except in special cases, when a longer period is required. *O'Brien v. Jackson*, 42 N. Y. App. Div. 171, reversing on other grounds 167 N. Y. 31.

Where no modifying facts are shown to shorten or lengthen the reasonable time, the period of eighteen months may serve as a just standard; yet it might be the duty of an administrator to sell earlier than that, or to wait longer, according to the circumstances and exigencies of the particular case. *Matter of Thompson*, (Surrogate Ct.) 41 Misc. (N. Y.) 420, affirmed 87 N. Y. App. Div. 609, 178 N. Y. 554.

**One Year.**—In *Pennsylvania* the duty of an executor to file an account at the expiration of a year does not imply or involve the duty of converting assets of the estate into cash, if there is a reasonable belief that by holding them a sacrifice can be avoided; and in this respect more latitude is allowed as against legatees than where the rights of creditors are affected. *Donnelly's Estate*, 8 Pa. Dist. 182.

**Objections to Time Fixed by Executor or Administrator.**—It is not a good ground of objection to an application by an administrator for leave to sell stocks in an incorporated company for the purpose of paying debts, that the market is depressed and that for this reason the property will not sell for its full value. *Jackson v. Warthen*, 111 Ga. 834.

The next of kin cannot impose upon administrators the burden of following their own desires and wishes as to the management of the fraction of an estate that is supposed to represent the distributive share of each. *Matter of Thompson*, (Surrogate Ct.) 41 Misc. (N. Y.) 420, affirmed without opinion 87 N. Y. App. Div. 609, 178 N. Y. 554.

**Sale of Bank Stock and Like Securities.**—See *Pearson v. Gillenwaters*, 99 Tenn. 446, 462, 63 Am. St. Rep. 844.

An administrator cannot be held liable for a

considerable appreciation of the value of stock occurring after he has sold it for the purpose of paying debts that are overdue. *Matter of Fidelity Loan, etc., Co.*, (Surrogate Ct.) 23 Misc. (N. Y.) 211.

**1017. 2. Unreasonable Delay.**—*Re Barker*, 77 L. T. N. S. 712; *Mathews v. Sheehan*, 76 Conn. 654, 100 Am. St. Rep. 1017.

**7. Sale May Be Made by Agent.**—*Kelly v. Wimbish*, (Tex. Civ. App. 1901) 65 S. W. Rep. 386.

**Auctioneers.**—In *Louisiana* employment of an auctioneer is authorized by statute. *Rabasse's Succession*, 51 La. Ann. 590; *Trouilly's Succession*, 52 La. Ann. 276; *Landry v. Laplos*, 113 La. 697.

**9. Appraised Value as Minimum Price.**—In *Alaska* no property can be sold otherwise than at public auction at a price less than its appraised value. *In re McIntire's Estate*, 1 Alaska 73.

**10. Inadequate Price—Executor or Administrator Personally Liable.**—*Matter of Feierabend*, (Surrogate Ct.) 38 Misc. (N. Y.) 524.

**1018. 2. Taking Other Property in Payment Not Authorized.**—See *Edney v. Baum*, (Neb. 1903) 97 N. W. Rep. 252.

Executors and trustees have no power to make, or the court jurisdiction to sanction, the sale of a testator's business for shares or debentures in a company to be formed to take it over. *In re Morrison*, (1901) 1 Ch. 701.

**1019. 1. Security Required When Sale Is on Credit.**—See *Meek v. Beaver*, 25 Ind. App. 576.

**2. Personal Liability for Failure to Take Security.**—*English v. Horne*, 102 Ga. 770; *State v. Taylor*, (Mo. App. 1905) 87 S. W. Rep. 7.

**1020. 8. The Representative Cannot Arbitrarily Reject Security Offered** which is of the kind required by the statute, where the sureties have the requisite qualifications. *Hamilton v. Bonham*, 10 Ohio Cir. Dec. 834, 20 Ohio Cir. Ct. 252.

**1021. 1. The Administrator's Attorney.**—An attorney who has merely acted in specific matters affecting the estate, when called upon by the administrator, and who has not acted as attorney in connection with the specific transaction, is not precluded from purchasing property from the representative. *Beale v. Barnett*, 64 S. W. Rep. 838, 23 Ky. L. Rep. 1118.

A Purchase from a Legatee of his interest in the estate is not within a statute invalidating a purchase made by an executor or administrator at his own sale. *Lombard v. Carter*, 36 Oregon 266.

**2. Purchase Through Third Persons Prohibited.**

**1023.** (b) *Exceptions to General Rule* — *aa. EXCEPTIONS ARISING OUT OF SPECIAL CIRCUMSTANCES* — And in Some Jurisdictions. — See note 1.

(c) *Effect of Purchase* — *aa. EFFECT AS TO PERSONS INTERESTED IN ESTATE.* — See note 3.

**1024.** *The Sale Is Not Void.* — See note 2.

**1025.** *cc. EFFECT AS TO EXECUTOR OR ADMINISTRATOR.* — See notes 2, 3.

**1026.** (4) *Warranties and Representations* — (b) *Express Warranty.* — See note 1.

**1027.** (5) *Validity of Sale* — (a) *General Rule.* — See note 1.

**1028.** See note 1.

*Evidence of Fraud or Collusion.* — See note 2.

**1029.** (b) *Effect of Statutory Provisions.* — See notes 2, 3.

**1031.** (6) *Rights and Liabilities of Purchasers* — (b) *Application of Purchase Money.* — See note 3.

**1032.** *e. MORTGAGE OR PLEDGE BY EXECUTORS AND ADMINISTRATORS* — (1) *Authority to Mortgage or Pledge.* — See note 1.

**1033.** (2) *Validity of Mortgage or Pledge.* — See notes 1, 2.

— *Matter of Yetter*, 44 N. Y. App. Div. 404, affirmed on opinion below 162 N. Y. 615.

*The Husband of an Administratrix.* — *Lowery v. Idson*, 117 Ga. 778.

*Purchase by Partner of Executor with Partnership Funds.* — *Wilbanks v. Crosno*, 112 Ill. App. 503.

**1023.** 1. *Purchase at Appraised Value.* — A purchase by the administrator of personal property belonging to the estate at its appraised value will not be upheld if there is any suspicion of fraud or unfairness. *Queeney's Estate*, 12 Luz. Leg. Reg. (Pa.) 25.

3. *Purchase Voidable at Election of Persons Interested.* — *Lowery v. Idleson*, 117 Ga. 778.

**1024.** 2. *Purchase by Administrator Good Until Set Aside.* — *Benson v. Benson*, 97 Mo. App. 460; *Sullivan v. Sweeny*, 189 Pa. St. 474.

**1025.** 2. *Liability for Value.* — *Matter of Yetter*, 44 N. Y. App. Div. 404, affirmed 162 N. Y. 615.

*In Case of a Purchase by a Partner of the Executor with Partnership Funds* the executor is liable for the full amount of the profits resulting from the purchase, and not merely for his share. *Wilbanks v. Crosno*, 112 Ill. App. 503.

3. *Representative Cannot Avoid His Own Purchase.* — *Benson v. Benson*, 97 Mo. App. 460. Compare *Sullivan v. Sweeny*, 189 Pa. St. 474.

**1026.** 1. *No Authority to Bind Estate by Express Warranty.* — *Whiteside v. Flora*, 27 Pa. Co. Ct. 25, 8 Del. Co. Rep. (Pa.) 459, 19 Lanc. L. Rev. (Pa.) 299.

**1027.** 1. *Unnecessary Sale.* — Objection that a sale was unnecessary cannot be raised by the persons beneficially interested, where the sale was made with their knowledge and consent. *Beale v. Barnett*, 64 S. W. Rep. 838, 23 Ky. L. Rep. 1118.

**1028.** 1. *Setting Aside Sale — Collusion Between Purchaser and Executor or Administrator.* — *McDermott's Succession*, 51 La. Ann. 173. See also *Lang v. Metzger*, 86 Ill. App. 117.

2. *Inadequate Price.* — *Maxwell v. Burns*. (Tenn. Ch. 1900) 59 S. W. Rep. 1067.

**1029.** 2. *The Statutes Are Said to Be Merely Directory.* — *Edney v. Baum*, (Neb. 1903) 97 N. W. Rep. 252.

3. *Failure to Publish Notice of Sale*, in the manner and for the time required by the order, is ground in *Tennessee* for setting aside the sale. *Maxwell v. Burns*, (Tenn. Ch. 1900) 59 S. W. Rep. 1067.

**1031.** 3. *Purchaser Not Required to See to Application of Purchase Money.* — *Cochrane's Estate*, 202 Pa. St. 415, affirming 2 Blair Co. Rep. (Pa.) 194. See also *Getty v. Larkin*, 59 Kan. 548.

**1032.** 1. *Executor or Administrator May Mortgage or Pledge Personal Property.* — *Schell v. Deperven*, 198 Pa. St. 600, 82 Am. St. Rep. 820, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1031, 1032, followed in *Schell v. Deperven*, 198 Pa. St. 591; *McCreery v. Bluefield First Nat. Bank*, 55 W. Va. 663, quoting 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1031, 1032; *Hemmy v. Hawkins*, 102 Wis. 56, 72 Am. St. Rep. 863. *Contra*, *Parks v. Mockenhaupt*, 133 Cal. 424.

*Status of Contract.* — The contract of borrowing can bind the executor only personally in the first instance, because of the fact that the estate as such is not a person, and the executor cannot contract otherwise. *Lyman v. National Bank of Republic*, 181 Mass. 437. See *supra*, this title, 932. 5 *et seq*

A *Testamentary Power of Sale*, standing alone and unaided by other provisions in the will, does not authorize a mortgage or pledge. *Freeman v. Bristol Sav. Bank*, 76 Conn. 212.

**1033.** 1. *Mortgagee or Pledgee in Good Faith Not Affected by Breach of Trust.* — *Lyman v. National Bank of Republic*, 181 Mass. 437; *Smith v. New York Second Nat. Bank*, 169 N. Y. 467, reversing 52 N. Y. App. Div. 631; *Schell v. Deperven*, 198 Pa. St. 591; *Prieto v. Leonards*, 32 Tex. Civ. App. 205; *McCreery v. Bluefield First Nat. Bank*, 55 W. Va. 663; *Hemmy v. Hawkins*, 102 Wis. 56, 72 Am. St. Rep. 863.

*Property Specifically Bequeathed.* — The fact that the property is specifically bequeathed does not impose upon the purchaser or pledgee any greater duty to inquire into the necessity of the sale or pledge than if it were merely an ordinary asset of the estate. *Schell v. Deperven*, 198 Pa. St. 600, 82 Am. St. Rep. 820.

2. *Notice of Breach of Trust Defeats Rights of*



**1035.** *f.* PERSONAL PROPERTY SUBJECT TO LIENS OR CHARGES. — See note 1.

**3. Real Property — a. TITLE AND RIGHT TO POSSESSION — (1)**  
*Common-law Rule.* — See note 2.

**1036.** See notes 1, 3, 4.

**Mortgagee or Pledgee.** — Schell *v.* Deperven, 198 Pa. St. 591.

**A Sale under a Mortgage Taken with Notice** passes no title to the purchaser. Richley *v.* Childs, 114 Ill. App. 174.

**1035. 1. Duty to Pay off Liens or Charges on Personal Property.** — Matter of Armstrong, 125 Cal. 603; Matter of Freud, 131 Cal. 667, 82 Am. St. Rep. 407; Houghteling *v.* Stockbridge, (Mich. 1904) 99 N. W. Rep. 759, 11 Detroit Leg. N. 100; *In re* Horsfall, 20 Mont. 495; State *v.* Taylor, 100 Mo. App. 481; Heck's Estate, 31 Pittsb. Leg. J. N. S. (Pa.) 347; Barnes *v.* Scottish-American Mortg. Co., 29 Tex. Civ. App. 443.

**Property Pledged.** — An administrator *de bonis non* cannot recover from a *bona fide* pledgee assets pledged by his predecessor in the administration, without paying the debt, though the proceeds of the pledge were misappropriated by the latter. Lyman *v.* National Bank of Republic, 181 Mass. 437.

**Certificates of Stock Pledged to Secure Margin Accounts.** — See Mathews *v.* Sheehan, 76 Conn. 654, 100 Am. St. Rep. 1017.

**Contesting Validity of Lien or Charge.** — See Gragard's Succession, 106 La. 298.

**2. No Title or Right to Realty at Common Law Unless Given by Will — United States.** — Kohn *v.* McKinnon, 90 Fed. Rep. 623; Scruggs *v.* Scruggs, 105 Fed. Rep. 28; Russell *v.* Russell, 129 Fed. Rep. 434; Herron *v.* Comstock, (C. C. A.) 139 Fed. Rep. 370.

*Georgia.* — Juhan *v.* Juhan, 104 Ga. 253.

*Illinois.* — Richardson *v.* Richardson, 87 Ill. App. 354; Lane *v.* Thorn, 103 Ill. App. 215.

*Indiana.* — Moore *v.* Moore, 155 Ind. 261.

*Iowa.* — Valley Nat. Bank *v.* Crosby, 108 Iowa 651; Cummings *v.* Lynn, 121 Iowa 344.

*Kentucky.* — Row *v.* Johnston, (Ky. 1904) 78 S. W. Rep. 906.

*Massachusetts.* — Jones *v.* Treadwell, 169 Mass. 430.

*Mississippi.* — Gordon *v.* James, (Miss. 1905) 39 So. Rep. 18.

*Missouri.* — Stark *v.* Kirchgraber, 186 Mo. 633, 105 Am. St. Rep. 629.

*Pennsylvania.* — Knowles's Estate, 12 Pa. Dist. 631; Tasker's Estate, 14 Pa. Dist. 435; Tomlinson *v.* Trenton, etc., St. R. Co., 31 Pa. Co. Ct. 81.

*Rhode Island.* — Jones *v.* Probate Ct., 25 R. I. 361.

*Texas.* — Rice *v.* Conwill, 35 Tex. Civ. App. 341.

*West Virginia.* — Dearing *v.* Selvey, 50 W. Va. 4.

*Wisconsin.* — Wisconsin Trust Co. *v.* Chapman, 121 Wis. 479, 105 Am. St. Rep. 1032.

**The Title to Real Estate Vests in the Heirs.** — Ordinarily an administrator has no rights, as such, in the land of his decedent who has left heirs or devisees, except to subject the land to the payment of his decedent's debts. Halstead *v.* Coen, 31 Ind. App. 302.

**Testamentary Provisions in General.** — It requires the express terms of the will, or necessary implication arising from the words of the testator, to exonerate the general personal estate from the payment of debts, or to postpone its primary responsibility. Bird *v.* Hawkins, 58 N. J. Eq. 229.

A will giving to executors full power over all the effects whatever, with full power to sell all or any of the real estate, and declaring the intention of the testator to be "to clothe them with the same power to do any and everything with all the property belonging to my estate that I could do were I alive and managing it myself," confers on the executors authority to make a deed to real estate confirming and supplying a lost deed executed by the testator. Coal Creek Consol. Coal Co. *v.* East Tennessee Iron, etc., Co., 105 Tenn. 563.

**Perfecting Title to Land.** — An administrator has no concern in perfecting the title to the real estate of his decedent. Bailey *v.* Larrance, 104 Ill. App. 662.

**The Deeds in the Chain of Title** belong to the parties beneficially interested, and not to the representative, when no title vests in him. Thomas's Estate, 8 Pa. Dist. 400, 22 Pa. Co. Ct. 518. See also Buck's Estate, 10 Pa. Dist. 331, 25 Pa. Co. Ct. 259.

**Exceptions to Rule — Land Constituting Personal Assets.** — See Cunningham *v.* Davis, 175 Mass. 217, and see *supra*, this title, **840**. 2; *infra*, this title, **1068**. 1 *et seq.*

**1036. 1. Devise that Executor Shall Sell Gives Only Naked Power — Colorado.** — Cowell *v.* South Denver Real Estate Co., 16 Colo. App. 108.

*Delaware.* — *In re* Journey, 7 Del. Ch. 1.

*Indiana.* — Nelson *v.* Nelson, (Ind. App. 1904) 72 N. E. Rep. 482.

*Iowa.* — Boland *v.* Tiernay, 118 Iowa 59.

*Kentucky.* — Labrot *v.* Seiler, (Ky. 1898) 45 S. W. Rep. 102.

*Maine.* — Bradt *v.* Hodgdon, 94 Me. 559, *citing* 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1035 *et seq.*

*Mississippi.* — Whitfield *v.* Thompson, 85 Miss. 749.

*Missouri.* — Emmons *v.* Gordon, 140 Mo. 490, 62 Am. St. Rep. 734.

*New Jersey.* — Ashby *v.* Ashby, 59 N. J. Eq. 547; Baldwin *v.* Tucker, 61 N. J. Eq. 412.

*New York.* — Parker *v.* Beer, 65 N. Y. App. Div. 598, *affirmed* 173 N. Y. 332.

*Ohio.* — Matter of Crawford, 11 Ohio Cir. Dec. 605, 21 Ohio Cir. Ct. 554, *affirmed* on other grounds 68 Ohio St. 58; Martin *v.* Spurrier, 23 Ohio Cir. Ct. 110.

*Pennsylvania.* — Geisz *v.* Geisz, 7 Pa. Dist. 615, 21 Pa. Co. Ct. 466; Tasker's Estate, 14 Pa. Dist. 435.

*Tennessee.* — Moore *v.* Bedford, (Tenn. Ch. 1900) 56 S. W. Rep. 1038.

**Executors Who Are Merely Given a Power in Trust.** — Where there is a general power of sale conferred upon executors, they are author-

**1037.** (2) *Modification of Common-law Rule*—(b) *Statutory Right to Possession of Realty*—*aa. IMMEDIATE RIGHT TO POSSESSION—In Some States of the Union.*—See notes 4, 5.

*bb. CONDITIONAL RIGHT TO POSSESSION.*—See note 6.

ized to pay the expenses of superintendence, necessary repairs, insurance, and taxes out of the rents thereof. *Brearley v. Molten*, 62 N. J. Eq. 345.

**1036. 3. If Necessary to Carry Out the Provisions of the Will.**—*Martin v. Spurrier*, 23 Ohio Cir. Ct. 110.

**4. Devise of Land to Executors to Sell Vests Title in Them**—*Georgia.*—*Penn v. Mutual Cotton Oil Co.*, 106 Ga. 152; *Harris v. Kittle*, 119 Ga. 29.

*Indiana.*—*Halstead v. Coen*, 31 Ind. App. 302. *Maine.*—*Bradt v. Hodgdon*, 94 Me. 559, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1035 et seq.

*Nebraska.*—*Arlington State Bank v. Paulsen*, 57 Neb. 717, overruled 59 Neb. 94.

*New Jersey.*—*Bird v. Hawkins*, 58 N. J. Eq. 229.

*New York.*—*Merritt v. Merritt*, 32 N. Y. App. Div. 442, affirmed 161 N. Y. 634; *Spitzer v. Spitzer*, 38 N. Y. App. Div. 436; *Russell v. Hilton*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 642, modified on other grounds 80 N. Y. App. Div. 178, which was affirmed on opinion below 175 N. Y. 525.

*Pennsylvania.*—*Peirce v. Peirce*, 199 Pa. St. 4.

*Tennessee.*—*Moore v. Bedford*, (Tenn. Ch. 1900) 56 S. W. Rep. 1038.

**In New York.**—See *Hubbard v. Housley*, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 276, affirmed 43 N. Y. App. Div. 129, which was affirmed without opinion 160 N. Y. 688.

*Michigan.*—This statutory provision has been copied and incorporated into the statutes of Michigan. *Parkhurst v. Trumbull*, 130 Mich. 408, 9 Detroit Leg. N. 96.

**Devise to Executors in Trust.**—*Rutherford Land, etc., Co. v. Sanntrock*, (N. J. 1899) 44 Atl. Rep. 938, affirmed 60 N. J. Eq. 471; *Hubbard v. Housley*, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 276, affirmed 43 N. Y. App. Div. 129, which was affirmed without opinion 160 N. Y. 688.

**Effect of Sale on Judgment Liens Against Legatees.**—A sale by executors in whom title is vested discharges the premises from prior judgment liens against legatees owning individual shares, no levy having theretofore attached. *Penn v. Mutual Cotton Oil Co.*, 106 Ga. 152.

**Nature of Title.**—Executors take no title in the real estate as such. They are vested with the power to deal with it as personal estate for the purposes of the execution of the trust created by the will. Regardless of who acquires the title, they take exactly that quantity of interest which the purposes of the trust require, and no other. *Boland v. Tiernay*, 118 Iowa 59.

Vesting title in the executor gives to him no power to dispose of the real estate by gift. *Arlington State Bank v. Paulsen*, 57 Neb. 717, overruled 59 Neb. 94.

**1037. 4. Rule that Executor or Administrator Has Immediate Right to Possession**—*California.*—*Plass v. Plass*, 121 Cal. 131; *Ryer v. Fletcher*

*Ryer Co.*, 126 Cal. 482; *Collins v. O'Lavery*, 136 Cal. 31; *Ukiah Bank v. Rice*, 143 Cal. 265, 101 Am. St. Rep. 118; *Webb v. Winter*, (Cal. 1901) 65 Pac. Rep. 1028.

*Connecticut.*—*Munger v. Doolan*, 75 Conn. 656.

*Florida.*—See *infra*, this title, **1038. 2.**

*Minnesota.*—*Kern v. Cooper*, 91 Minn. 121.

*North Dakota.*—*Blakemore v. Roberts*, 12 N. Dak. 394.

*Oregon.*—*Ladd v. Mills*, 44 Oregon 224.

*Utah.*—*Jenkins v. Jensen*, 24 Utah 108, 91 Am. St. Rep. 783.

*Washington.*—*Matter of Alfstad*, 27 Wash. 175; *Noble v. Whitten*, 38 Wash. 262.

*Wyoming.*—*Rock Springs First Nat. Bank v. Ludvigsen*, 8 Wyo. 230.

**Rule in Other States.**—In *Alabama* an administrator has the right of possession during the period allowed by law for the settlement of the estate, for it cannot then be known with certainty that the land will not be needed for the payment of debts. After that period he has only a *prima facie* right of possession, overcome by a showing on the part of the heir or devisee that the administrator or executor has no need for possession of the land for the purpose of administration. *Griffith v. Rudisill*, (Ala. 1904) 37 So. Rep. 83, citing *Banks v. Speers*, 97 Ala. 569, and *Butts v. Broughton*, 72 Ala. 294. See also *Spear v. Banks*, 125 Ala. 227; *Ex p. Barker*, 127 Ala. 203.

Under the *Georgia* statute, 2 Code Ga., § 3357, "upon the appointment of an administrator, the right to the possession of the whole estate is in him, and so long as such administrator continues, the right to recover possession of the estate from third persons is solely in him. If there be no administration, or if the administrator appointed consents thereto, the heirs at law may take possession of the lands, or may sue therefor in their own right." *Greenfield v. McIntyre*, 112 Ga. 691; *Green v. Underwood*, 108 Ga. 354; *Davitt v. Southern R. Co.*, 108 Ga. 665; *Dixon v. Rogers*, 110 Ga. 509; *Crummey v. Bentley*, 114 Ga. 746; *Doris v. Story*, 122 Ga. 611.

**Foreign Lands.**—A statute giving to the administrator the right of possession of the lands of the decedent, and the right to the rents, issues, and profits thereof for the purpose of administration, making the same assets in his hands for the payment of debts, has no application to lands situated in another state, and under another jurisdiction. *Price v. Ward*, 25 Nev. 203.

**5. No Distinction Between Realty and Personalty as to Representative's Title.**—*Toland v. Earl*, 129 Cal. 148, 79 Am. St. Rep. 100; *Rock Springs First Nat. Bank v. Ludvigsen*, 8 Wyo. 230.

**6. Conditional Right to Possession—Necessity for Payment of Debts, Legacies, Etc.**—*Alabama.*—See *supra*, this title, **1037. 4.**

*Arkansas.*—*Cook v. Franklin*, 73 Ark. 23.

*Michigan.*—See *Long v. Landman*, 118 Mich. 174.

**1038.** See notes 1, 2.

**1039.** See note 1.

cc. RIGHT TO POSSESSION DENIED. — See note 2.

dd. NATURE OF POSSESSORY RIGHT. — See notes 3, 4, 5, 6.

**1040.** b. SALE OF REAL PROPERTY — (1) *Doctrine at Common Law.* — See note 3.

*Nebraska.* — *Tunncliffe v. Fox*, (Neb. 1903) 94 N. W. Rep. 1632. Compare *Lewon v. Heath*, 53 Neb. 707; *Nelson v. O'Rourke*, (Neb. 1904) 98 N. W. Rep. 1068.

*Nevada.* — Compare Gen. Stat. Nev., § 2783; *Price v. Ward*, 25 Nev. 203.

**1038. 1. Absence of Heirs.** — *Valley Nat. Bank v. Crosby*, 108 Iowa 651; *Schneider v. Schneider*, 125 Iowa 1.

**Character of Administration for Absent Heirs.** — The executor or administrator is virtually but the agent of the owners to care for the estate, collect rents, and do other acts for their benefit under the direction of the court. *Herriott v. Potter*, 115 Iowa 648.

**2. Possession When Authorized by Order of Court.** — In *Florida* under the existing statute the heir is entitled to the possession of the land until the personal representative shall take possession of or sell it, under the order of the court, for the payment of debts. *Rose v. Withers*, 39 Fla. 460; *Finlayson v. Love*, 44 Fla. 551; *Johnson v. McKinnon*, 45 Fla. 388; *Scott v. Jenkins*, (Fla. 1902) 35 So. Rep. 101. Practically the same rule now obtains in *Iowa*, *In re Pennoek*, 122 Iowa 622; and in *Missouri*, *Hall v. Farmers, etc.*, Bank, 145 Mo. 418; *Union Trust Co. v. Soderer*, 171 Mo. 675; *Langston v. Canterbury*, 173 Mo. 122.

**1039. 1. Actual Possession Necessary to Exclude Heir.** — *Lewon v. Heath*, 53 Neb. 707.

**2. Rule Denying Right to Possession of Realty.** — *Travelers' Ins. Co. v. Childs*, 25 Colo. 360; *Black v. Elliott*, 63 Kan. 211, 88 Am. St. Rep. 239. See also *Stevenson v. Scott*, 188 Pa. St. 234.

**3. Possession of Administrator Only Temporary or Limited.** — *Griffith v. Rudisill*, (Ala. 1904) 37 So. Rep. 83, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1039; *Youngson v. Bond*, 64 Neb. 615, affirmed on rehearing (Neb. 1903) 95 N. W. Rep. 700.

**The Right to Possession Ceases.** — *Cole v. Jermain*, 77 Conn. 374.

**4. Right to Possession Includes Right to Rents.** — *Griffith v. Rudisill*, (Ala. 1904) 37 So. Rep. 83, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1039.

**5. Right to Possession Gives Interest in Land.** — *Griffith v. Rudisill*, (Ala. 1904) 37 So. Rep. 83, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1039. See also *Price v. Ward*, 25 Nev. 203.

**6. Incidental Rights and Powers.** — *Griffith v. Rudisill*, (Ala. 1904) 37 So. Rep. 83, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1039.

**Prosecution and Defense of Suits Relating to Lands.** — The right of an executor or administrator to prosecute or defend suits relating to the real estate, such as actions of ejectment, to quiet title, and the like, is not uniform in the different states, depending largely upon the scope and extent of his statutory rights. See generally cases cited *supra*, this subdivision, re-

lating to the right to possession. See also *Ryer v. Fletcher Ryer Co.*, 126 Cal. 482; *Collins v. O'Lavery*, 136 Cal. 31; *Bailey v. Larrance*, 104 Ill. App. 662; *Nixon v. Seal*, (Miss. 1900) 27 So. Rep. 875; *Blakemore v. Roberts*, 12 N. Dak. 394; *Ladd v. Mills*, 44 Oregon 224, distinguishing *King v. Boyd*, 4 Oregon 327 (contra, *Kohn v. McKinnon*, 90 Fed. Rep. 623, construing the Oregon statute adopted as the law of Alaska, citing *King v. Boyd*, 4 Oregon 326); *Hanrick v. Gurley*, 93 Tex. 458.

In *Louisiana*, where the surviving member of a community subsequently dies, leaving individual debts unpaid, necessitating an administration, it becomes the duty of the administrator of his succession to institute suit for partition of the property held in indivision by it and third persons. *Wilson v. Wilson*, 107 La. 139. And see further, for the law of Louisiana relating to this right, *supra*, this title, **903. 1. Actions for Recovery of Immovable Property.**

**1040. 3. Executors or Administrators Have No Power to Sell Real Estate at Common Law — Colorado.** — *Cowell v. South Denver Real Estate Co.*, 16 Colo. App. 108.

*Illinois.* — *Burr v. Bloemer*, 174 Ill. 638; *People v. Huffman*, 182 Ill. 390, reversing on other grounds 78 Ill. App. 345.

*Indiana.* — *Moore v. Moore*, 155 Ind. 261.

*New York.* — *Correll v. Lauterbach*, 12 N. Y. App. Div. 531, affirmed 159 N. Y. 553.

*Ohio.* — *Carr v. Hull*, 65 Ohio St. 394, 87 Am. St. Rep. 623.

*Pennsylvania.* — *Wildermuth v. Long*, 196 Pa. St. 541.

*South Carolina.* — *Hunter v. Hunter*, 58 S. Car. 382, 79 Am. St. Rep. 845.

*Texas.* — *Club Land, etc., Co. v. Dallas County*, 26 Tex. Civ. App. 449, reversed in part on other grounds 95 Tex. 200; *Coy v. Gaye*, (Tex. Civ. App. 1904) 84 S. W. Rep. 441.

*Washington.* — *Demaris v. Barker*, 33 Wash. 200.

*Wisconsin.* — *Wisconsin Trust Co. v. Chapman*, 121 Wis. 479.

**Injunction Against Unauthorized Sale.** — See *Beaty v. Stapleton*, 110 Ga. 580.

**Presumption of Power After Lapse of Time.** — Where a bond for title recites that the makers purport to act in an administrative capacity, their power so to act will be presumed after great lapse of time. *Lynch v. Pittman*, 31 Tex. Civ. App. 553.

**Manner of Sale.** — Land belonging to the estate of a decedent can be sold only in the manner prescribed by law. If the decedent dies intestate, the land must be sold by the administrator. If the decedent dies testate, the land must be sold by the executor or administrator with the will annexed in the manner provided in the will. In the absence of the provisions in the will on the subject, the land must be sold in the manner prescribed by law for sales.



**1040.** (2) *Power of Sale Given by Will* — (a) *Express Power of Sale.* — See note 4.

**1041.** See notes 1, 2, 3, 4.

by administrators. *Scales v. Chambers*, 113 Ga. 920.

**1040. 4. Sale of Land Authorized by Will — Leave of Court Not Necessary — California.** — *Sharp v. Loupe*, 120 Cal. 89; *Ukiah Bank v. Rice*, 143 Cal. 265, 101 Am. St. Rep. 118.

*Colorado.* — *Ingham v. Ryan*, 18 Colo. App. 347.

*Georgia.* — *Penn v. Mutual Cotton Oil Co.*, 106 Ga. 152.

*Illinois.* — *Kurtz v. Graybill*, 192 Ill. 445, affirming 91 Ill. App. 76.

*Maine.* — *Bradt v. Hodgdon*, 94 Me. 559.

*Mississippi.* — *Gordon v. McDougall*, 84 Miss. 715.

*Missouri.* — *Wisker v. Rische*, 167 Mo. 522, quoting 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1040; *Emmons v. Gordon*, 140 Mo. 490, 62 Am. St. Rep. 734.

*New Hampshire.* — *Bartlett v. Hill*, 69 N. H. 197.

*New Jersey.* — *Hatt v. Rich*, 59 N. J. Eq. 492.

*New York.* — *Walter v. Tomkins*, 71 N. Y. App. Div. 21, affirmed without opinion 179 N. Y. 555.

*Ohio.* — *Hunt v. Hayes*, 10 Ohio Cir. Dec. 388, 19 Ohio Cir. Ct. 151; *Matter of Crawford*, 11 Ohio Cir. Dec. 605, 21 Ohio Cir. Ct. 554, affirmed on other grounds 68 Ohio St. 58.

*Pennsylvania.* — *Cobleigh's Estate*, 8 Lack. Leg. N. (Pa.) 107, reversed on other grounds 23 Pa. Super. Ct. 271; *Mulley's Estate*, 10 Kulp (Pa.) 523.

*Texas.* — *Holmes v. Sanders*, (Tex. Civ. App. 1899) 51 S. W. Rep. 333; *Holmes v. Stone*, (Tex. Civ. App. 1899) 51 S. W. Rep. 518.

**Revocation.** — A clause in a will nominating certain persons as executors and giving to them a power of sale is not revoked, so far as the power is concerned, by a codicil substituting other persons as executors. *Bruce v. Goodbar*, 104 Tenn. 638.

**Will Failing to Name Executor — Order of Court Necessary.** — Where the testator fails to name an executor, the administrator with the will annexed must seek the aid of the court in making the sale. *Geisler v. Mauk*, (Tenn. Ch. 1898) 48 S. W. Rep. 344.

**Rights of Creditors.** — As between the beneficiaries and the executor, the power to dispose of property may be ample, but it cannot be exercised in their favor to the prejudice of creditors, or in favor of one creditor against another. *Betts v. Cobbs*, 121 Ala. 154.

The pendency of a suit by a creditor asking a settlement of the estate therein does not affect the power of the executors to sell. *Mersman v. Worthington*, 72 S. W. Rep. 1094, 24 Ky. L. Rep. 2115. See also *Hamilton v. Hamilton*, (Ky. 1899) 51 S. W. Rep. 170.

**Release of Purchase-money Lien Existing in Favor of Decedent.** — A power to make title to the testator's real estate includes the power to release premises from a vendor's lien existing in his favor. *Gill v. Anglo-American Assoc.*, (Ky. 1890) 52 S. W. Rep. 920.

**Exchange of Lands.** — The power to raise a fund

by the sale of real estate does not include authority to barter the land directed to be sold for other land, whether with or without the expectation of profit. *Ross v. Barr*, (Ky. 1899) 53 S. W. Rep. 658.

A will conferring upon an executor "full power to sell or dispose of any or all of the above real estate should he think it to the interest of my children to do so, and, should he pay off any debt or debts now standing against such real estate, the same to be deducted from such sale or sales," gives to him no power to exchange the real estate for other lands. *Confederation L. Assoc. v. Clarkson*, 6 Ont. L. Rep. 606.

**Liberal Construction of Power.** — A power of sale in a will should receive a liberal construction, in order to effect the true purpose and intent of the testator, in contradistinction to the strict construction usually given to such powers when contained in a deed or power of attorney. *Ross v. Barr*, (Ky. 1899) 53 S. W. Rep. 658.

**Election by Beneficiaries to Take Land Instead of Its Proceeds.** — See *Ukiah Bank v. Rice*, 143 Cal. 265, 101 Am. St. Rep. 118; *Matter of Pforr*, 144 Cal. 127; *Boland v. Tiernay*, 118 Iowa 59; *Schaupp v. Jones*, 12 Ohio Dec. 197; *Hanbest v. Grayson*, 206 Pa. St. 59, affirming 11 Pa. Dist. 497, 27 Pa. Co. Ct. 548; *Harrah's Estate*, 7 Pa. Dist. 170, 20 Pa. Co. Ct. 606; *Snyder's Estate*, 9 Pa. Dist. 128; *Lloyd's Estate*, 10 Pa. Dist. 207, 24 Pa. Co. Ct. 567; *Buck's Estate*, 10 Pa. Dist. 331, 25 Pa. Co. Ct. 264. See also *Logan v. Bean*, 87 S. W. Rep. 1110, 27 Ky. L. Rep. 1081; and the title CONVERSION AND RECONVERSION, 480. 3 *et seq.*

**Leave of or Confirmation by Court Required by Statute.** — See *infra*, this title, 1052. 2.

**1041. 1. Power of Sale May Be Either Express or Implied.** — *Bradt v. Hodgdon*, 94 Me. 559; *Wisker v. Rische*, 167 Mo. 522, quoting 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1041. See also *Terrell v. McCown*, 91 Tex. 231, reversing on other grounds (Tex. Civ. App. 1897) 40 S. W. Rep. 54.

**2. Discretionary Power of Sale.** — *Whitfield v. Thompson*, 85 Miss. 749; *Wisker v. Rische*, 167 Mo. 522, quoting 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1041; *Parker v. Beer*, 65 N. Y. App. Div. 598, affirmed 173 N. Y. 332; *Bédford v. Bedford*, 110 Tenn. 204.

That a personal representative may be compelled to exercise a discretionary power of sale, see *White v. Crossman*, (N. J. 1905) 61 Atl. Rep. 529; *Carey's Estate*, 9 Kulp (Pa.) 340.

Where the will provides that the executors shall not be answerable to any one for "mistakes or errors of judgment, or other, or except for actual malfeasance," in the absence of malfeasance a court of equity cannot compel the exercise of the power. *Levett v. Polhemus*, 86 N. Y. App. Div. 495.

The exercise of the power will not be interfered with by the courts merely on the ground of unreasonableness, but only for fraud or manifest abuse of discretion. *Brown's Estate*, 20 Lanc. L. Rev. (Pa.) 244.

**1042. Incidents to Power of Sale.** — See note 2.

Limitation of Power. — See note 3.

What Property May Be Sold. — See note 4.

**1043. (b) Implied Power of Sale** — *aa.* IN GENERAL. — See note 1.

Necessity of Power. — See note 2.

*Debts Charged on Real Estate.* — Where the power of sale given to the executor is a discretionary restrictive authority, he cannot be compelled in equity to sell the property for the payment of debts; and under the terms of Code Civ. Pro. N. Y., § 2749, as to creditors whose debts are charged upon the real estate by the will, resort cannot be had to the Surrogate's Court to compel a sale. Their remedy is by action to establish their lien. *Little Falls Nat. Bank v. King*, 53 N. Y. App. Div. 541.

**Peremptory Power of Sale.** — *Lash v. Lash*, 209 Ill. 595; *Thissell v. Schillinger*, 186 Mass. 180; *Carpenter v. Bonner*, 26 N. Y. App. Div. 462; *Russell v. Hilton*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 642, modified on other grounds 80 N. Y. App. Div. 178, which was affirmed on opinion below 175 N. Y. 525; *McClane v. McClane*, 207 Pa. St. 465, reversing *sub nom.* *McClane v. Railroad Co.*, 34 Pittsb. Leg. J. N. S. (Pa.) 107; *Severns's Estate*, 211 Pa. St. 65, 68; *Dearing v. Selvey*, 50 W. Va. 4.

A peremptory power of sale imposes a duty on the executor, the performance of which may be compelled in equity for the benefit of the persons interested. *Holly v. Gibbons*, 176 N. Y. 520, 98 Am. St. Rep. 694, 177 N. Y. 401, reversing 67 N. Y. App. Div. 628.

While the court will enforce the due execution of a power coupled with a duty or trust, it will not interfere with the discretion of trustees as to the particular time or manner of their *bona fide* exercise of it. *In re O'Connor*, 12 Manitoba 325.

**1041. 3. Object of Power Must Be Specified.** — *Wisker v. Rische*, 167 Mo. 522, quoting 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1041.

**4. Sale Must Be under Power, if Given by Will, and Not under Statute.** — *Wisker v. Rische*, 167 Mo. 522, quoting 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1041; *Matter of Rowley*, (Surrogate Ct.) 38 Misc. (N. Y.) 622.

**Whenever an Executor Has a Power under a Will.** — *Ukiah Bank v. Rice*, 143 Cal. 265, 101 Am. St. Rep. 118; *Emmons v. Gordon*, 140 Mo. 490, 62 Am. St. Rep. 734. See also *Bradt v. Hodgdon*, 94 Me. 559; *Cobleigh's Estate*, 8 Lack. Leg. N. (Pa.) 107, reversed on other grounds 23 Pa. Super. Ct. 271; *Mulley's Estate*, 10 Kulp (Pa.) 523.

**1042. 2. Power to Create Easements.** — Executors, in selling land under a general power in the will, may divide it into lots, and lay out streets through it, and thus create easements of a right of way in the several purchasers, if the estate will be benefited by such a disposition of the property; and deeds made by them for lots, with the description by boundaries on such streets, will create an easement of the right to use the streets. *Hohokus Tp. v. Erie R. Co.*, 65 N. J. L. 353, citing *Earle v. New Brunswick*, 38 N. J. L. 47.

But that executors as such cannot grant a permanent easement through land, see *McClane v. McClane*, 207 Pa. St. 465, reversing *sub nom.*

*McClane v. Railroad Co.*, 34 Pittsb. Leg. J. N. S. (Pa.) 107.

In *England*, construing the Lands Clauses Consolidation Act, 1845, it has been held that an executor or administrator who has no estate or interest in the land, but only a power to sell it, is not empowered to grant an easement over it. *In re Barrow-in-Furness*, (1903) 1 Ch. 339.

**Release of Surface or Lateral Support of Mineral Lands.** — Under a will authorizing executors to sell and convey the coal underlying certain of the lands of which the testator died seized, with the usual mining privileges, they have no power to waive and release the right of surface or lateral support. *Allshouse's Estate*, 23 Pa. Super. Ct. 146.

**3. Power of Sale for Specified Purposes.** — *McMillan v. Cox*, 109 Ga. 42; *Petit v. Flint*, etc., R. Co., 114 Mich. 362.

**If the Person Whose Consent Is Required Dies Before the Power Is Exercised.** — *Wisker v. Rische*, 167 Mo. 522.

**As to Power to Sell a Homestead** on refusal of the beneficiaries to occupy it and pay taxes and repairs necessary for its preservation, see *Ayers v. Courvoisier*, 101 N. Y. App. Div. 97.

**4. Property to Be Sold Should Be Designated by Will.** — *Herb v. Walther*, 6 Pa. Dist. 687.

**A Power to Sell Securities** belonging to the testator cannot be construed to enable the executor to sell real estate. *Pratt v. Worrell*, 66 N. J. Eq. 194.

**Power to Sell Testator's Business.** — Where the power extends only to the sale of the testator's business, no authority exists to sell land not used in the conduct of the business. *O'Reilly v. Platt*, 80 N. Y. App. Div. 348.

**Discretion of Executor.** — Where the authority given in the will is general and applies to all the estate of the decedent, the executor is vested with a discretion to determine what property shall be sold. *Sharp v. Loupe*, 120 Cal. 89; *Siefke v. Siefke*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 77.

**1043. 1. Implied Power of Sale** — **Intention of Testator Governs.** — *Chandler v. Thompson*, 62 N. J. Eq. 723.

A clause in the will, "I hereby desire that my executor sell," impliedly confers power to sell. *Herb v. Walther*, 6 Pa. Dist. 687.

**Blending Realty and Personality into One Fund.** — *Poulter v. Poulter*, 193 Ill. 641.

**2. Power of Sale Implied if Necessary to Carry Out Will.** — *Poulter v. Poulter*, 193 Ill. 641, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1043; *Corse v. Chapman*, 153 N. Y. 466, affirming (Supm. Ct. Gen. T.) 36 N. Y. Supp. 1124; *Siefke v. Siefke*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 77; *Dearing v. Selvey*, 50 W. Va. 4.

**Power of Sale Not Implied Merely Because Beneficial to Estate.** — *Chandler v. Thompson*, 62 N. J. Eq. 723; *Murdock v. Kelly*, 62 N. Y. App. Div. 562.

**1013.** *bb.* DIRECTIONS AS TO PAYMENT OF DEBTS AND LEGACIES — **Express Direction.** — See notes 3, 4.

Devise to Executor. — See note 5.

**1044.** Devise After Payment of Debts. — See note 1.

**1045.** Charging Debts on Real Estate — **Rule in England.** — See note 1.  
**Rule in the United States.** — See note 2.

*cc.* DIRECTIONS AS TO DISTRIBUTION OF ESTATE. — See note 3.

**1046.** See note 1.

*ee.* DEVISE TO EXECUTORS TO INVEST. — See note 3.

*ff.* DIRECTION TO SELL WITHOUT DESIGNATING PERSON. — See note 5.

**1047.** (c) **Manner and Terms of Sale** — *aa.* **IN GENERAL.** — See note 1.

**1043. 3. Power of Sale Implied from Direction to Pay Debts with the Proceeds of Land.** — *Smith v. McIntyre*, (C. C. A.) 95 Fed. Rep. 585; *American Channel Coal Co. v. Clemens*, 132 Ind. 163; *Coulter v. Bradley*, 163 Ind. 311; *Chandler v. Thompson*, 62 N. J. Eq. 723; *Matter of Rowley*, (Surrogate Ct.) 38 Misc. (N. Y.) 622; *Carleton v. Hausler*, 20 Tex. Civ. App. 275. See also *Matter of Ryder*, 41 N. Y. App. Div. 247.

**Empowering Executors to Execute Proper Titles to Purchasers** is in all respects substantially equivalent to devising the property to the executors for sale for payment of debts. *Gordon v. McDougall*, 84 Miss. 715.

**4. Power of Sale Not Implied Merely from Direction to Pay Debts.** — *Chandler v. Thompson*, 62 N. J. Eq. 723; *Matter of O'Brien*, 39 N. Y. App. Div. 321; *Matter of Liddle*, (Surrogate Ct.) 35 Misc. (N. Y.) 173; *Leavell v. Smith*, 99 Va. 374.

**5. Power of Sale Implied from Devise to Executor After Payment of Debts.** — *Compare Matter of O'Brien*, 39 N. Y. App. Div. 321.

**1044. 1. Power of Sale Not Implied from Devise to Third Person After Debts Are Paid.** — *Matter of Van Vleck*, (Surrogate Ct.) 32 Misc. (N. Y.) 419.

**1045. 1. Statutory Rule in England — Charge of Debts on Land Gives Power of Sale.** — The English rule is in force in *Ontario*. *Re Bradburn*, 3 Ont. L. Rep. 351. See also *Re Ross*, 7 Ont. L. Rep. 433.

The statute was passed to enable property which was charged with debts and legacies to be sold in any event, *i. e.*, by the devisee if there was a devisee, by the executor if there was no devisee. *In re Barrow-in-Furness*, (1903) 1 Ch. 339.

Prior to the passage of the statute there had been much discussion in the English courts on the subject, and to some extent the rule was unsettled. *Chandler v. Thompson*, 62 N. J. Eq. 723.

**2. Rule in United States — Power of Sale Not Implied from Mere Charge of Debts on Realty.** — *Poole v. Daughdrill*, 129 Ala. 208.

**3. Directing Executor to Divide or Distribute Estate** — *Georgia*. — *Penn v. Mutual Cotton Oil Co.*, 106 Ga. 152.

*Illinois*. — *Stoff v. McGinn*, 178 Ill. 46; *Lash v. Lash*, 209 Ill. 595.

*Massachusetts*. — *May v. Brewster*, 187 Mass. 524.

*New Jersey*. — *Cook v. Cook*, (N. J. 1900) 47 Atl. Rep. 732; *Varick v. Smith*, 67 N. J. Eq. 1.  
*New York*. — *Merritt v. Merritt*, 32 N. Y.

App. Div. 442, *affirmed* 161 N. Y. 634; *Matter of Newell*, (Surrogate Ct.) 38 Misc. (N. Y.) 563.

*Ohio*. — *Schaupp v. Jones*, 12 Ohio Dec. 197.  
*Tennessee*. — *Bedford v. Bedford*, 110 Tenn. 204; *Cowan v. Cowan*, (Tenn. Ch. 1899) 53 S. W. Rep. 1101.

**Province of Ontario.** — The Ontario Devolution of Estates Act confers power on executors and administrators to sell for purposes of distribution where there are no debts as well as where there are debts. *In re Bradley*, 6 Ont. L. Rep. 397; *Re Ross*, 7 Ont. L. Rep. 433.

**Sale to Prevent Loss.** — A will conferring power on the executor to sell the property of the estate in case it cannot be divided in kind authorizes a sale of land which would lose in value if thus divided. *Offutt v. Hall*, 87 S. W. Rep. 785, 27 Ky. L. Rep. 1072.

**Failure of the Executor to Exercise the Power** does not divest devisees of title to the land. *Boland v. Tiernay*, 118 Iowa 59.

**Election of Beneficiaries to Take Land.** — The power may be extinguished by election of beneficiaries to take the land instead of the proceeds of the sale, if the rights of others are not thereby prejudiced. *Boland v. Tiernay*, 118 Iowa 59. See also *supra*, this title, **1040. 4.**

**1046. 1. A Mere Direction to Distribute.** — *Poulter v. Poulter*, 193 Ill. 641, *citing* 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1045, 1046; *Chandler v. Thompson*, 62 N. J. Eq. 723.

**3. Devise to Executors to Invest and Pay over Income Implies Power of Sale.** — *Cook v. Cook*, (N. J. 1900) 47 Atl. Rep. 732; *Salmon v. Salmon*, (Supm. Ct. Spec. T.) 24 Misc. (N. Y.) 416; *Siefke v. Siefke*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 77; *Dearing v. Selvey*, 50 W. Va. 4.

**5. Directing a Sale Without Naming the Person to Sell.** — *Lash v. Lash*, 209 Ill. 595, *citing* 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1046; *Smith v. Courtney*, 85 S. W. Rep. 1101, 27 Ky. L. Rep. 642, *citing* *Marrett v. Babb*, 91 Ky. 90; *Martin v. Spurrier*, 23 Ohio Cir. Ct. 110; *Bedford v. Bedford*, 110 Tenn. 204; *Lawrence v. Barber*, 116 Wis. 294.

**In Pennsylvania.** — *Snyder's Estate*, 9 Pa. Dist. 128; *Krug's Estate*, 9 Pa. Dist. 239.

**1047. 1. Manner and Terms of Sale — Directions of Will Must Be Followed.** — See *Gordon v. McDougall*, 84 Miss. 715.

**Sale Bonds.** — A statute requiring an executor or administrator selling real estate under an order of court to give a special sale bond has no application to sales by an executor under a power contained in the will. *Bradt v. Haddon*, 94 Me. 559.



**1048.** See notes 1, 2.

*bb. TIME OF MAKING SALE — (aa) When Time Is Prescribed by Will —*

*aaa. In General.* — See note 3.

**1049.** *bbb. Direction to Sell at Future Time or on Happening of Contingency.* — See notes 1, 3.

*(bb) When Time Is Not Prescribed by Will — aaa. In General.* — See note 4.

**1050.** See notes 1, 2.

**1048. 1. Advisory Directions.** — See Clifford *v. Morrell*, 22 N. Y. App. Div. 470.

**2. Manner and Terms Not Prescribed by Will — Discretion of Executor.** — Ingham *v. Ryan*, 18 Colo. App. 347; Offutt *v. Hall*, 87 S. W. Rep. 785, 27 Ky. L. Rep. 1072; Hatt *v. Rich*, 59 N. J. Eq. 492; Orne's Estate, 7 Pa. Dist. 337, *affirmed* 192 Pa. St. 626; Sharp *v. Greene*, 22 Wash. 677.

**Advertisement of Sale.** — See Herb *v. Walther*, 6 Pa. Dist. 687.

**3. Direction to Sell Within Specified Time.** — Brearley *v. Molten*, 62 N. J. Eq. 345; Molton *v. Sutphin*, 66 N. J. Eq. 20; Spitzer *v. Spitzer*, 38 N. Y. App. Div. 436; Herb *v. Walther*, 6 Pa. Dist. 687; Dice's Estate, 32 Pittsb. Leg. J. N. S. (Pa.) 242; Myers *v. Cady*, 22 R. I. 549.

**The Devolution of Estates Act, Ontario**, Rev. Stat. Ont., § 13, which provides that real estate not disposed of by executors or administrators within twelve months after the testator's death, shall go to the devisees or heirs beneficially entitled, unless the executors or administrators have registered a caution as therein provided, does not apply to sales under a power in a will containing express directions as to the time and manner of conversion. Hewett *v. Jermyn*, 29 Ont. 383, *following In re Koch*, 25 Ont. 262. See also Mercer *v. Neff*, 29 Ont. 680.

**Extension of Time by Agreement.** — The time for the conversion of the property may be extended by the agreement of all persons interested. Harrah's Estate, 7 Pa. Dist. 170, 20 Pa. Co. Ct. 606.

**1049. 1. Sale Cannot Be Made Before Time Prescribed.** — Petit *v. Flint*, etc., R. Co., 114 Mich. 362; Hatt *v. Rich*, 59 N. J. Eq. 492; Ryan *v. Dodds*, 65 N. J. Eq. 436; Pratt *v. Worrell*, 66 N. J. Eq. 194; Ayers *v. Courvoisier*, 101 N. Y. App. Div. 97.

**Testamentary Provisions Construed.** — In Kurtz *v. Graybill*, 192 Ill. 445, *affirming* 91 Ill. App. 76, a clause in a will, "as to the said farm I desire my executors not to sell the same until they can get thirty dollars per acre for the same," was held, when considered in connection with the other provisions, not to preclude the executor from selling, if the contingency failed to happen within a reasonable time.

Where a testator by his will had directed as follows: "I hereby authorize and empower my executors to sell all or any of my estate, real or personal, not herein specifically bequeathed or devised, either at public or private sale, and to execute and deliver good and sufficient deeds for all real estate sold, for the purpose of executing this will," it was held that the executors could not make title in the absence of any necessity to sell the real estate. Eberly *v. Koller*, 209 Pa. St. 298.

Under a will providing that "ore land shall remain unsold until it shall bring ten thousand dollars," and "after the death of my wife all the real estate" shall be sold, it was held that

after the death of the wife the land could be sold without limitation as to price. Knaub's Estate, 13 York Leg. Rec. (Pa.) 161.

**An Injunction Will Lie** to prevent a contemplated sale where conditions precedent have not happened. McClane *v. McClane*, 207 Pa. St. 465, *reversing sub nom. McClane v. Railroad Co.*, 34 Pittsb. Leg. J. N. S. (Pa.) 107; Deierler's Estate, 10 Kulp (Pa.) 525.

**3. Discretionary Power to Sell at Time Other than That Named in Will.** — Hanbest *v. Grayson*, 206 Pa. St. 59, *affirming* 11 Pa. Dist. 497, 27 Pa. Co. Ct. 548.

**4. Time of Sale Discretionary with Executor When Not Fixed by Will.** — Busch *v. Rapp*, 63 S. W. Rep. 479, 23 Ky. L. Rep. 605; Carpenter *v. Bonner*, 26 N. Y. App. Div. 462; Matter of Ryder, 41 N. Y. App. Div. 247; Orne's Estate, 7 Pa. Dist. 337, *affirmed* 192 Pa. St. 626; Lukens's Estate, 10 Pa. Dist. 118.

**Power of Court to Order Immediate Sale.** — Severns's Estate, 211 Pa. St. 65, 68. See also *supra*, this title, **1041. 2.**

In the exercise of the power of sale, the executors necessarily should use reasonable prudence to see that the real estate is not sacrificed, but under pretense of protecting or regulating the estate they cannot continue indefinitely to refuse to sell the real estate or to wait for some imaginary rise in value of the same. Matter of Levy, (Surrogate Ct.) 41 Misc. (N. Y.) 68, *affirmed* without opinion 97 N. Y. App. Div. 630.

**Sale After Termination of Duties as Executor.** — A power of sale given to an executor *virtute officii* ceases on the termination of his duties as executor, and cannot afterwards be exercised by him, though he continues to act under the will as trustee. Goad *v. Montgomery*, 119 Cal. 552, 63 Am. St. Rep. 145; Boland *v. Tiernay*, 118 Iowa 59. See also Henson's Estate, 12 Pa. Dist. 326.

**1050. 1. Mere Lapse of Time.** — Hatt *v. Rich*, 59 N. J. Eq. 492; Clifford *v. Morrell*, 22 N. Y. App. Div. 470; Bedford *v. Bedford*, 110 Tenn. 204.

A power given to the executor as such manifestly embraces only the right to make a sale for the best interests of the estate, and implies a limitation on the right to exercise it and probably on the limit of its duration. Cowell *v. South Denver Real Estate Co.*, 16 Colo. App. 108.

It is at least doubtful whether a power of sale, given as a mere incident to the office of executor, could be validly exercised seventeen years after the death of the testator, where the estate has been not only presumptively, but actually, fully administered and awarded to the executors as trustees under the will. Henson's Estate, 12 Pa. Dist. 326.

**2. Liability for Rise in Value After Sale.** — Executors are not liable for a speculative rise in the value of real estate subsequent to the

**1050.** bbb. Direction to Sell for Specified Purposes. — See note 3.

**1051.** cc. PRICE AND TERMS OF PAYMENT. — See notes 1, 2, 3.

dd. DELEGATION OF POWER. — See note 4.

**1052.** See note 1.

ee. NECESSITY OF CONFIRMATION. — See note 2.

(a) Purchase by Executor — aa. GENERAL RULE. — See note 3.

sale, if they exercised ordinary prudence in selling. *Scully's Estate*, 31 Pittsb. Leg. J. N. S. (Pa.) 307.

**1050.** 3. Direction to Sell for Specified Purposes — Power Ceases with the Purpose. — *Walter v. Tomkins*, 71 N. Y. App. Div. 21, affirmed 179 N. Y. 555; *Trask v. Sturges*, 170 N. Y. 482, reversing 56 N. Y. App. Div. 625; *Slokom v. Knight*, 20 Lanc. L. Rev. 9.

**1051.** 1. Duty to Obtain Best Price. — *Johnson v. Johnson*, 72 Mo. App. 386.

Inadequate Price — Resale. — The Orphans' Court may set aside a sale of real estate, where the purchase price is palpably inadequate. *Fricke's Estate*, 16 Pa. Super. Ct. 38.

2. Sale under Power Must Be for Money. — *Clark v. Clark*, 172 Ill. 355.

3. Regulations as to Credit by Will or Court Decree. — See *Ross v. Barr*, (Ky. 1899) 53 S. W. Rep. 658; *Geisler v. Mauk*, (Tenn. Ch. 1898) 48 S. W. Rep. 344.

4. Power of Sale Cannot Be Delegated. — *Dyer v. Winston*, 33 Tex. Civ. App. 412.

Ratification by Executor of Sale Made by Agent. — See *Gates v. Dudgeon*, 173 N. Y. 426, 93 Am. St. Rep. 608, where the court said: "An executor or trustee, to whom a power has been given by a will, may not delegate his judgment and discretion in the execution of the power, but having exercised the judgment and discretion with which he has been invested, we know of no authority which prohibits him from delegating to others the performance of his determination in regard thereto;" reversing on other grounds 72 N. Y. App. Div. 562.

Sale through Referee. — There is no authority in law for a court, in compelling the exercise of a power of sale, to direct the sale to be made through a referee, it not having been charged or found that the executor was unfit or without capacity to make it. *Holly v. Gibbons*, 176 N. Y. 520, 98 Am. St. Rep. 694, 177 N. Y. 401, reversing 67 N. Y. App. Div. 628.

Statutory Authority to Delegate Power. — The Georgia statute, Civ. Code Ga., § 3000, expressly authorizes executors and administrators to sell and convey property by attorney in fact in all cases where they may lawfully sell and convey in person. *Scales v. Chambers*, 113 Ga. 920.

**1052.** 1. Delegation of Authority to Execute Deed. — An executor having a power of sale can have an abstract prepared to effectuate the sale, can have contracts or deeds prepared for the same purpose, and likewise, if he deems it necessary, can employ an agent and contract to pay him commissions for aiding him in such sale. *Ingham v. Ryan*, 18 Colo. App. 347.

Execution of Written Contract of Sale. — Where two executors have orally agreed to a contract for the sale of the land, authority to reduce the agreement to writing and formally sign it may be delegated by one to the other. *Roe v. Smith*,

(Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 89, affirmed 97 N. Y. App. Div. 633.

2. Confirmation by Court Required in Some Jurisdictions. — *Ukiah Bank v. Rice*, 143 Cal. 265, 101 Am. St. Rep. 118.

*The California Statute*. — *Matter of Pforr*, 144 Cal. 127.

Effect of Contract on Power of Executor. — In making the sale the executors exhaust their power to deal with the property, unless, upon reporting it to the court, confirmation is refused. *Bennallack v. Richards*, 125 Cal. 427.

Liability of Executor Who Is Sole Residuary Legatee. — Where an executrix who is the sole residuary legatee of the estate contracts to sell the land, without being empowered to do so by the court, the contract is binding upon her personally and operates as an equitable transfer of the ownership of the property. *Moffitt v. Rosencreans*, 136 Cal. 416.

Limitations on Power of Court to Refuse Confirmation. — When a proper memorandum of the sale is made, the executors have exercised the power conferred upon them by the will, and the sale, in the absence of fraud or irregularity, is binding upon the estate, subject to confirmation; and the court must confirm it unless the price bid is disproportionate to the value of the property and it is made to appear that an increased bid of ten per cent. can be obtained. *Matter of Robinson*, 142 Cal. 152.

Character of Sale Not Affected by Statutory Requirement of Confirmation. — A sale by an executor under a power in the will is not a judicial sale, nor does the statutory requirement that no title shall pass until the sale be confirmed give to it the incidents of a judicial sale. The purchaser deals with the executor in making the purchase as he would with any other vendor, and his rights and liabilities are governed by the rules applicable to such sales generally. The sale is treated as if made under the power; and the purchaser is required to examine the sufficiency of this power, as he is that of any other power under which a sale may be made. *Goodell v. Sanford*, 31 Mont. 163, approving *Matter of Pearsons*, 98 Cal. 603.

Consent of Official Guardian. — In Ontario, on a sale for purposes of distribution, the consent of the official guardian is required in behalf of infants, lunatics, and nonconcurring heirs or devisees. *In re Bradley*, 6 Ont. L. Rep. 397; *Re Ross*, 7 Ont. L. Rep. 433. See also *Re Fulton*, 7 Ont. L. Rep. 445.

3. Indirect Purchase. — *Elmstedt v. Nicholson*, 186 Ill. 580.

Authority to Purchase Given by Will. — Co-executors may lawfully sell to one of their number if expressly empowered by the will to do so, though sales made by an executor or administrator to himself are declared void by statute. *Curtis v. Brewer*, (Mich. 1905) 103 N. W. Rep. 579, 12 Detroit Leg. N. 105.

**1052.** *bb.* EXCEPTIONS TO GENERAL RULE. — See note 4.

**1053.** *cc.* EFFECT OF PURCHASE BY EXECUTOR. — See note 1.

(e) **Warranty by Executor.** — See note 2.

(f) **Title and Rights of Purchaser** — *aa.* IN GENERAL. — See note 3.

**1054.** See note 1.

*bb.* NONCOMPLIANCE BY EXECUTOR WITH TERMS OF WILL. — See notes 3, 4.

**1055.** See note 1.

*cc.* CONVEYANCE — RECITALS. — See note 2.

*dd.* SETTING ASIDE SALE — SUBROGATION TO RIGHTS OF CREDITORS. — See notes 4, 5.

*ee.* RULE OF CAVEAT EMPTOR. — See note 6.

**1052. 4. Purchase by Executor under Leave of Court.** — *McPherran's Estate*, 212 Pa. St. 425.

**1053. 1. Purchase by Executor Voidable but Not Void.** — *Stickel v. Crane*, 189 Ill. 211. See also *Cunningham's Estate*, 212 Pa. St. 441.

**2. Executor Cannot Bind Estate by Warranty.** — *Bauerle v. Long*, 187 Ill. 475, *affirming* 88 Ill. App. 177; *Ross v. Barr*, (Ky. 1899) 53 S. W. Rep. 658; *Whiteside v. Flora*, 27 Pa. Co. Ct. 25, 8 Del. Co. Rep. (Pa.) 459, 19 Lanc. L. Rev. 290.

**3. Bona Fide Purchaser Ordinarily Takes Good Title.** — *Fletcher v. American Trust, etc., Co.*, 111 Ga. 360, 78 Am. St. Rep. 164, *citing* 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1053; *Busch v. Rapp*, 63 S. W. Rep. 479, 23 Ky. L. Rep. 605; *Keas's Estate*, 9 Pa. Dist. 269; *Sharp v. Greene*, 22 Wash. 677.

A person to whom the will directs the executor to offer the property at a designated price, before selling it at private or public sale, may refuse the offer and become the purchaser at a lower price at the executor's sale. *Mason v. Devenny*, 30 Pittsb. Leg. J. N. S. (Pa.) 216, 14 York Leg. Rec. (Pa.) 75.

**If the Power of Sale Is for the Payment of Debts** the purchaser is not ordinarily required to ascertain the existence of debts. *Smith v. McIntyre*, (C. C. A.) 95 Fed. Rep. 585; *Mercer v. Neff*, 39 Ont. 680; *Re Bradburn*, 3 Ont. L. Rep. 351; *Keas's Estate*, 9 Pa. Dist. 269.

But inquiry as to debts may be necessitated by lapse of sufficient time to raise a presumption of payment. *Smith v. McIntyre*, (C. C. A.) 95 Fed. Rep. 585; *Fletcher v. American Trust, etc., Co.*, 111 Ga. 361, 78 Am. St. Rep. 164. *Compare*, as to leaseholds, *In re Verrell*, (1903) 1 Ch. 65.

**Burden of Proof.** — Persons complaining of the exercise of a power of sale to pay debts have the burden of showing that there were no debts when the sale was made. *Terrell v. McCown*, 91 Tex. 231, *reversing* (Tex. Civ. App. 1897) 40 S. W. Rep. 54.

**Validity Against Creditors — Sale under Power for Payment of Legacies.** — *Keas's Estate*, 9 Pa. Dist. 269.

**Sale for Purpose of Making Distribution.** — In *Georgia*, by statute, where the property is not sold for the payment of debts, but for the purpose of making distribution, "annuities or legacies or debts charged upon it by testaments attach thereto, and follow the lands in the hands of all persons." *Bell v. Watkins*, 104 Ga. 345.

**1054. 1. Sale Not Made under Power Given by Will.** — *Clark v. Clark*, 172 Ill. 355; *Goodell v. Sanford*, 31 Mont. 163.

A sale of a tract of land by proceeding in equity to pay debts cannot be referred to a power under the will to sell a part thereof to pay debts. *Rice v. Bamberg*, 68 S. Car. 184.

**3. Consent and Acquiescence of Persons Interested.** — See *Columbia Ave. Sav. Fund, etc., Co. v. Lewis*, 190 Pa. St. 558; *Geisler v. Mauk*, (Tenn. Ch. 1898) 48 S. W. Rep. 344.

**4. Power of Sale for Special Purpose.** — *Cowell v. South Denver Real Estate Co.*, 16 Colo. App. 108; *McMillan v. Cox*, 109 Ga. 42; *Petit v. Flint, etc., R. Co.*, 114 Mich. 362; *Goodell v. Sanford*, 31 Mont. 163; *Pratt v. Worrell*, 66 N. J. Eq. 194; *Walter v. Tomkins*, 71 N. Y. App. Div. 21, *affirmed* without opinion 179 N. Y. 555; *Columbia Ave. Sav. Fund, etc., Co. v. Lewis*, 190 Pa. St. 558; *Geisz v. Geisz*, 7 Pa. Dist. 615, 21 Pa. Co. Ct. 466. See also *Lyons v. Shannahan*, 64 N. Y. App. Div. 264.

**1055. 1. Happening of Contingency to Be Determined by Executor.** — The court, in passing on the sale, is not authorized to consider whether it was necessary, where the will leaves the determination of this question to the judgment of the executor. *Matter of Wickersham*, 139 Cal. 652, *affirming* (Cal. 1902) 70 Pac. Rep. 1079.

**2. Conveyance Need Not Recite Power of Sale.** — *Smith v. McIntyre*, (C. C. A.) 95 Fed. Rep. 585. See also *Carpenter v. Webb*, 4 Penn. (Del.) 34.

**4. Setting Aside Sale — Subrogation of Purchaser to Rights of Creditor.** — *Hunter v. Hunter*, 58 S. Car. 382, 79 Am. St. Rep. 345, 63 S. Car. 78.

The sale not being absolutely void, it is the duty of the court on setting it aside to adjust the equities between the parties and provide for the repayment of the purchase price. *Stickel v. Crane*, 189 Ill. 211.

Where none of the money received was expended for the benefit of the estate, or of any one having an interest in or claim against it, the purchaser acquires no right to have his money refunded before the land can be recovered. *Coy v. Gaye*, (Tex. Civ. App. 1904) 84 S. W. Rep. 441.

**5. Lien for Money Paid.** — *Hunter v. Hunter*, 63 S. Car. 78, 90 Am. St. Rep. 663.

**Liability of Purchaser for Rents and Profits.** — See *Boland v. Tiernay*, 118 Iowa 59.

**6. Rule of Caveat Emptor.** — *Goodell v. Sanford*, 31 Mont. 163; *Neary v. Neary*, (Neb. 1903) 97 N. W. Rep. 302.

The sale passes only such interest in and title to the property sold as the decedent had



- 1056.** *ff.* APPLICATION OF PURCHASE MONEY. — See note 1.
- 1057.** If the Power Is Given to Sell for Payment of Legacies Alone. — See note 1.  
(g) Liabilities of Executor. — See note 2.
- 1058.** c. LEASE OF REAL PROPERTY — (1) *Doctrine at Common Law.*  
— See note 1.  
(2) *Power to Lease Given by Will.* — See note 2.  
(3) *Statutory Authority to Lease.* — See note 3.
- 1059.** Leases under Order of Probate Court. — See note 2. ' *d.* MORTGAGE OF REAL PROPERTY — (1) *Doctrine at Common Law.* — See note 3.  
(2) *Power to Mortgage Given by Will.* — See note 4.

at his death. *Matter of Wickersham*, 139 Cal. 652, *affirming* (Cal. 1902) 70 Pac. Rep. 1079.

**Compelling Purchaser to Take Title.** — A purchaser of leaseholds from an executor will not be compelled to take title where he has notice that there are no debts of the testator remaining unpaid and no evidence is produced of any other reason for selling. *In re Verrell*, (1903) 1 Ch. 65.

**1056. 1. General Rule — Purchaser Not Bound to See to Application of Purchase Money.** — *Smith v. McIntyre*, (C. C. A.) 95 Fed. Rep. 585; *Keas's Estate*, 9 Pa. Dist. 269.

**1057. 1. And the Reason of This.** — *Keas's Estate*, 9 Pa. Dist. 269.

**2. Postponing Time of Sale.** — An executor is not liable for loss caused by mere errors of judgment in postponing the time of sale, where the will gives him a large discretion in that matter; nor is he liable for departing from strict compliance with the will where the result to the estate is not a loss, but a gain. *Cunningham's Estate*, 212 Pa. St. 441.

**1058. 1. Executor or Administrator Cannot Lease Real Property at Common Law.** — *Campbell v. Sacray*, (Ky. 1898) 44 S. W. Rep. 980; *Tasker's Estate*, 14 Pa. Dist. 435; *Tomlinson v. Trenton*, etc., St. R. Co., 31 Pa. Co. Ct. 81.

**Assent or Acquiescence of Heirs.** — The act of the administrator in renting the land with the acquiescence of the heirs, for the purpose of paying debts, is lawful and valid. *Ashley v. Young*, 79 Miss. 129. To similar effect see *Brent v. Chipley*, 104 Mo. App. 645.

**2. Power Given by Will to Lease Realty.** — *Halestead v. Coen*, 31 Ind. App. 302; *Russell v. Hilton*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 642, *modified* on other grounds 80 N. Y. App. Div. 178, which was *affirmed* on opinion below 175 N. Y. 525. See also *In re Soulard*, 141 Mo. 642.

**Implied Power to Lease.** — *Peirce v. Peirce*, 195 Pa. St. 417.

**A Mere Naked Power of Sale.** — *Peirce v. Peirce*, 195 Pa. St. 417.

**Disposal of Gas and Oil Rights.** — Power to lease does not confer power to dispose of gas and oil rights in premises which were not known to contain such products at the time of the decedent's death. *Lanyon Zinc Co. v. Freeman*, 68 Kan. 691.

**3. Power to Lease for Limited Period Given by Statute.** — *Jones v. Peebles*, 133 Ala. 290; *Griffith v. Rudisill*, (Ala. 1904) 37 So. Rep. 83.

**Administrator Pendente Lite — Real Estate Involved in Controversy.** — *In re Soulard*, 141 Mo. 642.

**Termination of Right.** — An administrator has no right of possession to or authority to lease the real property after the debts of the estate have been paid and his final settlement is adjudicated. *Jackson v. O'Rourke*, (Neb. 1904) 98 N. W. Rep. 1068.

**Alteration of Lease Given by Testator.** — An executor has no power to alter or modify a lease executed by the testator, which would be in effect making a new lease, without an order of the probate court under proceedings had for that purpose. *Brosnan v. Kramer*, 135 Cal. 36.

**The Principle of Caveat Emptor** applies to leases of real estate executed by personal representatives as fully as to sales of such property made by them. *Miller v. Gray*, 136 Cal. 261.

**1059. 2. Leases under Order of Probate Court.** — *Hall v. Farmers*, etc., Bank, 145 Mo. 418; *Bealey v. Blake*, 70 Mo. App. 229; *Brent v. Chipley*, 104 Mo. App. 645; *State v. Second Judicial Dist. Ct.*, 24 Mont. 1.

**Leases under Order of Court of Equity.** — In a suit in equity by the heirs at law against the widow of the decedent who is also administratrix of his estate and who claims an interest in the real property, it is the duty of the court not only to protect the rights of the decedent, but also the rights of creditors; and it has jurisdiction to authorize the administratrix to lease the property during the pendency of the litigation. *Ex p. Barker*, 127 Ala. 203.

**3. Executor or Administrator Cannot Mortgage Real Property in Common Law.** — *Webb v. Winter*, (Cal. 1901) 65 Pac. Rep. 1028; *Valley Nat. Bank v. Crosby*, 108 Iowa 657, *citing* 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1059; *Henry v. Henry*, (Neb. 1905) 103 N. W. Rep. 441; *Arnoux v. Phyfe*, 6 N. Y. App. Div. 605, *affirmed* without opinion 159 N. Y. 552; *Wisconsin Trust Co. v. Chapman*, 121 Wis. 479.

**Jurisdiction of Equity to Confer Authority to Mortgage.** — See *Hughes v. Treadaway*, 116 Ga. 663.

**Proceeds Applied for Benefit of Estate.** — Where the proceeds of the mortgage have been applied in discharging legal incumbrances on the estate and in payment of its debts, the estate, having received the benefit of the money, ought in equity to repay it with interest, though the mortgage was unauthorized. *Thomas v. Provident Life, etc., Co.*, (C. C. A.) 138 Fed. Rep. 348.

**4. Power to Mortgage Given by Will.** — An executor under a will giving the power to mortgage and sell realty has no power to borrow money on his own note or otherwise for the

- 1060.** Mortgage for Individual Purposes. — See note 1.  
 Implied Power to Mortgage Realty. — See note 2.  
 Implication from Power to Sell. — See note 3.

purpose of improving such estate. *Shipman v. Lord*, 58 N. J. Eq. 380, *affirmed* on opinion below 60 N. J. Eq. 484.

A power to mortgage "for the payment of my debts and purposes of my estate" confers no authority on an executrix to mortgage to obtain funds to carry on the business of the decedent, where she is empowered by the will to carry it on for her sole and separate use and benefit; or to pay taxes, interest, and repairs for which she is personally liable as life tenant. *Columbia Ave. Sav. Fund, etc., Co. v. Lewis*, 190 Pa. St. 558.

**Status of Contract Entered into by Executor in Exercising Power.** — The power to raise money for payment of debts in such way as an executor shall deem best, necessarily implies authority to secure the loan by mortgage. It also implies authority to enter into a contract binding the estate for repayment of the loan, including attorneys' fees and costs in case the debt has to be collected by suit, where such provisions are not improper or unusual. *Fletcher v. American Trust, etc., Co.*, 111 Ga. 300, 78 Am. St. Rep. 164. To the same effect, of a statutory power to mortgage, *Lawrey v. Sterling*, 41 Oregon 518; *Wisconsin Trust Co. v. Chapman*, 121 Wis. 479. *Contra*, that a power to mortgage confers no authority to execute promissory notes for the money borrowed and thereby bind the estate for any deficiency, to warrant the title to the premises, or to contract to pay taxes and attorneys' fees, *De Coudres v. Union Trust Co.*, 25 Ind. App. 271, 81 Am. St. Rep. 95.

There is no difference, on the question of the right of *bona fide* incumbrancers, between a sale under a power to sell to pay debts and a mortgage given to secure a loan under a power to raise money to pay debts. *Fletcher v. American Trust, etc., Co.*, 111 Ga. 300, 78 Am. St. Rep. 164. See also *Stevenson v. Roberts*, 25 Tex. Civ. App. 577, and see *supra*, this title, **1053**, 3 *et seq.*

**1060. 1. Mortgage to Secure Individual Debt of Executor Is Invalid.** — *Bertram v. Ross*, 66 S. W. Rep. 638, 23 Ky. L. Rep. 1927. See also *Camden Safe Deposit, etc., Co. v. Lord*, 67 N. J. Eq. 489.

**Individual Liability of Executor Who Is Interested in Premises.** — A mortgage executed by an executor, though unauthorized and therefore not binding upon the estate, is nevertheless binding upon him personally to the extent of his individual interest in the premises. *Webb v. Winter*, (Cal. 1901) 65 Pac. Rep. 1028; *Shrigley v. Black*, 59 Kan. 487; *Columbia Ave. Sav. Fund, etc., Co. v. Lewis*, 190 Pa. St. 558. Compare *Henry v. Henry*, (Neb. 1905) 103 N. W. Rep. 441, where the court said: "One who without authority contracts in the name of another cannot dispute that he intended to obligate somebody, and, as no one but himself can be bound, he is presumed to have intended to bind himself; but one who without authority executes a mortgage upon the land of another, although he may render himself civilly liable in damages for his fraud, cannot be presumed to have in-

tended to create a lien upon one or more of several tracts of land belonging to himself."

**2. Real Estate Used by Testator in Conduct of His Business.** — A will authorizing the executor to carry on the testator's business and conferring unlimited power of control and management authorizes him to mortgage real estate used in the business to secure its indebtedness. *Roberts v. Hale*, 124 Iowa 296.

**Mortgage of Undivided Interest of Heir of Deceased.** — A clause in a will providing that the executor shall keep the real estate together for a designated period of time, unless he shall think it better to make an earlier division, confers only a power of division, and does not authorize the executor to direct or consent to a mortgage of the undivided interest of a devisee. *Garman v. Hawley*, 132 Mich. 321, 9 Detroit Leg. N. 630.

**3. Naked Power to Sell Does Not Include Power to Mortgage.** — *Webb v. Winter*, (Cal. 1901) 65 Pac. Rep. 1028; *O'Brien v. Flint*, 74 Conn. 502; *Parkhurst v. Trumbull*, 130 Mich. 408, 9 Detroit Leg. N. 96; *Arlington State Bank v. Paulsen*, 57 Neb. 717, *overruled* 59 Neb. 94; *Freifeld v. Mankowski*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 303 *Tasker's Estate*, 14 Pa. Dist. 435. *Contra*, as to independent executors, *Stevenson v. Roberts*, 25 Tex. Civ. App. 577; *Prieto v. Leonards*, 32 Tex. Civ. App. 205.

**Consent and Acquiescence of the Persons Beneficially Interested** will render the mortgage valid. *Shimmel v. Morse*, 57 N. Y. App. Div. 434, *affirming* (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 257.

**Power to "Dispose" of Real Estate.** — To "dispose of" imports finality, and only where a power to sell would include a power to mortgage, which is not the case in *New Jersey*, would those words, unmodified and undefined, imply such a power. *Rutherford Land, etc., Co. v. Santrock*, 60 N. J. Eq. 471, *disapproving* dictum in (N. J. 1899) 44 Atl. Rep. 938, *cited* in *Dubois v. Van Valen*, 61 N. J. Eq. 331.

**Sale for Purpose of Indirectly Raising Money by Mortgage.** — A sale made in bad faith, without consideration, for the purpose of indirectly raising money by mortgage on the land, is void as against all persons charged with notice of the facts. *Dougherty v. Connolly*, 61 N. J. Eq. 421. See also *Olyphant v. Phyfe*, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 64, *reversed* in part 48 N. Y. App. Div. 1, which was *affirmed* on opinion below, 166 N. Y. 630. *Contra*, where the proceeds were used for the benefit of the estate, *Thomas v. Provident Life, etc., Co.*, (C. C. A.) 138 Fed. Rep. 348, *Ross, Cir. J., dissenting*.

**Request that Sale Be Deferred So Long as Practicable.** — A provision in a will that certain real estate be retained "so long as the same may be expedient in a judicial administration" of the estate is simply a request that the executor should defer a sale so long as practicable under the law relating to the settlement of estates, and does not authorize him to mortgage the property. *Brown v. Brown*, 70 N. H. 623.

**1061.** See note 1.

Application of Proceeds. — See note 2.

**1062.** (3) *Power to Mortgage under Order of Probate Court.* — See note 1.

*c.* EXONERATION OF ENCUMBERED PROPERTY—(1) *Incumbrances Created by Decedent* — (a) *Common-law Doctrine.* — See note 3.

**1063.** (b) *Statutory Doctrine* — In the United States. — See notes 3, 5, 6.

**1061. 1. Power to Mortgage Implied from Power of Sale in Certain Cases.** — Thomas v. Provident Life, etc., Co., (C. C. A.) 138 Fed. Rep. 348; Columbia Ave. Sav. Fund, etc., Co. v. Lewis, 190 Pa. St. 558.

Where legacies are made a charge on the real estate and the will gives a power to sell for the purpose of satisfying them and a power to mortgage "for the purpose of facilitating the management, preservation, and productiveness" of the estate, a mortgage is authorized to satisfy the legacies, where such course conserves and advances the interests concerned. Freifeld v. Mankowski, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 303.

**Right Given by Statute.** — See Mercer v. Neff, 29 Ont. 680.

**Statement of Rule.** — The true principle is that a power to sell and convey may include the power to mortgage, but it does not necessarily do so; and whether such power is or is not included depends upon the character of the estate, the words granting the power, and the purpose for which the debt was created. McMillan v. Cox, 109 Ga. 42.

**2. Mortgagees Not Required to See to Application of Proceeds.** — Danziger v. Deline, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 635, affirmed 51 N. Y. App. Div. 618; Prieto v. Leonards, 32 Tex. Civ. App. 205. See also Camden Safe Deposit, etc., Co. v. Lord, 67 N. J. 489.

**Scope of Rule.** — The rule applies only when the power to mortgage is legally exercised. Shipman v. Lord, 58 N. J. Eq. 380, affirmed on opinion below 60 N. J. Eq. 484; Columbia Ave. Sav. Fund, etc., Co. v. Lewis, 190 Pa. St. 558; Wallace v. Grant, 27 Wash. 130. See also McMillan v. Cox, 109 Ga. 42.

**1062. 1. Power to Mortgage Real Estate under Order of Court** — *California.* — Fast v. Steele, 127 Cal. 202; Matter of Freud, 131 Cal. 667, 82 Am. St. Rep. 407; Stambach v. Emerson, 139 Cal. 282, affirming (Cal. 1902) 69 Pac. Rep. 856; Matter of Pforr, 144 Cal. 127; Matter of Shively, 145 Cal. 400.

*Indiana.* — Smith v. Eels, 27 Ind. App. 321.

*Michigan.* — Long v. Landman, 118 Mich. 174; Russell v. Wheeler, 129 Mich. 41, 8 Detroit Leg. N. 836.

*Oregon.* — Lawrey v. Sterling, 41 Oregon 518.

*Pennsylvania.* — Hemphill v. Pry, 188 Pa. St. 243; Grubb v. Galloway, 203 Pa. St. 236, 93 Am. St. Rep. 764; Smith's Estate, 8 Lack. Leg. N. (Pa.) 308; Kurtz's Estate, 16 Lanc. L. Rev. 205. See also Corbett's Estate, 10 Pa. Dist. 59, 31 Pittsb. Leg. J. N. S. (Pa.) 101.

**Taxes and Assessments** against the premises are debts for which the property can be mortgaged. Long v. Landman, 118 Mich. 174.

**3. Duty to Pay Incumbrances on Realty — Rule at Common Law.** — Swift v. Harley, 20 Ind. App. 614; Freehold First Nat. Bank v. Thompson, 61 N. J. Eq. 188; Dougherty v. Connolly, 61 N. J.

Eq. 421; Mahoney v. Stewart, 123 N. Car. 106; Ambrose v. Byrne, 61 Ohio St. 146; Moore's Estate, (Pa. 1901) 48 Atl. Rep. 884, less fully reported 198 Pa. St. 611. See also Benton v. Benton, 106 La. 99; Equitable L. Assur. Soc. v. Chesley, 63 N. J. Eq. 219.

**1063. 3. If It Appears to Have Been the Intention of the Testator.** — Knight v. Newkirk, 92 Mo. App. 258.

**5. Duty to Discharge Incumbrances on Realty — General and Statutory Authority** — *Alabama.* — Griffith v. Rudisill, (Ala. 1904) 37 So. Rep. 83. *California.* — Matter of Freud, 131 Cal. 667, 82 Am. St. Rep. 407.

*Hawaii.* — Kahoomana v. Carvalho, 11 Hawaii 516.

*Indiana.* — Swift v. Harley, 20 Ind. App. 614; Fry v. Lawson, 32 Ind. App. 364.

*Kentucky.* — Cockrill v. Lindon, (Ky. 1897) 43 S. W. Rep. 451.

*Louisiana.* — Williams v. Chaplain, 112 La. 1075.

*Massachusetts.* — Clark v. Seagraves, 186 Mass. 430.

*Michigan.* — Russell v. Wheeler, 129 Mich. 41, 8 Detroit Leg. N. 836.

*Minnesota.* — Fleming v. McCutcheon, 85 Minn. 152.

*Missouri.* — Springfield Grocer Co. v. Walton, 95 Mo. App. 526, distinguishing Scudder v. Ames, 89 Mo. 496.

*Nebraska.* — In re Patrick, (Neb. 1904) 100 N. W. Rep. 939.

*New Jersey.* — Equitable L. Assur. Soc. v. Chesley, 63 N. J. Eq. 219; Freehold First Nat. Bank v. Thompson, 61 N. J. Eq. 188.

*Pennsylvania.* — Moore's Estate, (Pa. 1901) 48 Atl. Rep. 884, less fully reported 198 Pa. St. 611; Finley's Estate, 10 Pa. Dist. 272, 25 Pa. Co. Ct. 261. See also Hall's Estate, 8 Pa. Dist. 8.

*Tennessee.* — Yoe v. Sansom, (Tenn. Ch. 1898) 48 S. W. Rep. 317; Nashville Trust Co. v. Carr, (Tenn. Ch. 1900) 62 S. W. Rep. 204.

*Texas.* — Curran v. Texas Land, etc., Co., 24 Tex. Civ. App. 499.

*West Virginia.* — Shahan v. Shahan, 48 W. Va. 477, 86 Am. St. Rep. 68.

See also *infra*, this title, **1093. 1, 1260. 1, 2, 1274. 3 et seq.**

**Redemption by Order of Court.** — See Salinger v. Black, 68 Ark. 449.

**Foreign Lands.** — A duty to discharge incumbrances on realty has no application to real estate situated in a foreign state. Price v. Ward 25 Nev. 203. Bonfield, C. J., *dissenting*.

**Mortgage Executed by Representative.** — Assets of the estate may properly be applied in payment of a real estate mortgage legally executed by an executor or administrator for the purpose of raising funds. Matter of Shively, 145 Cal. 400.

**6. Statutory Authority to Redeem Land.** — See generally the cases cited in the preceding note.



**1064.** The New York Statute. — See note 1.

(2) *Incumbrances Prior to Decedent's Title.* — See notes 4, 5.

A Mere Assumption of the Debt. — See note 6.

**1066.** *f.* PURCHASE OF REAL PROPERTY BY EXECUTOR OR ADMINISTRATOR — (1) *Purchase of Property Belonging to Third Persons* — (a) *General Principles.* — See note 1.

(c) *Purchase of Property Sold for Debts Due Estate.* — See notes 5, 6.

**1067.** See note 1.

On the Other Hand. — See note 2.

(2) *Purchase of Real Property Belonging to Estate* — (a) *Purchase from Heirs.* — See note 3.

**1068.** (3) *Authority to Sell Property Purchased.* — See note 1.

**1069.** X. SALE OF REAL ESTATE UNDER ORDER OF COURT — 1. Power to Order Sale — *a.* FOR PAYMENT OF DEBTS — (3) *Rule in United States.* — See note 4.

**1070.** *b.* FOR OTHER PURPOSES. — See notes 1, 2, 3, 4.

**1064.** 1. *Reimbursement for Payments Made.* — Payments made by an executor in good faith and for the benefit of the persons entitled to the property may be reimbursed out of any funds in his possession belonging to such person. *Matter of McKay*, (Surrogate Ct.) 33 Misc. (N. Y.) 520.

*Real Estate Worth More than Amount Due Thereon.* — Where real estate covered by valid and enforceable liens is worth much more than the amount due thereon, it is the duty of executors, upon general principles, when foreclosure is threatened, to preserve the estate from waste and destruction by paying off and discharging such liens. *Hetzel v. Easterly*, 96 N. Y. App. Div. 517.

*Exoneration of Encumbered Property Authorized by Will.* — See *Mabbett v. Mabbett*, 29 N. Y. App. Div. 609; *Hetzel v. Easterly*, 96 N. Y. App. Div. 517.

4. *Property Acquired by Decedent Subject to Incumbrances.* — *In re Patrick*, (Neb. 1904) 100 N. W. Rep. 939; *Peters's Estate*, 16 Pa. Super. Ct. 462.

5. *If the Decedent Makes the Debt Secured a Personal Obligation.* — *Swift v. Harley*, 20 Ind. App. 614; *Peters's Estate*, 16 Pa. Super. Ct. 462.

6. *Mere Assumption of Incumbrance Not Sufficient to Exonerate Realty.* — *Peters's Estate*, 16 Pa. Super. Ct. 462.

**1066.** 1. *No Power Ordinarily to Purchase Real Property for Estate.* — See generally *supra*, this title, 840. 2, 953. 3, 982. 1 *et seq.*; *infra*, this title, 1207. 5.

*Purchase at Sale of Decedent's Real Estate to Make Partition.* — In the absence of express statutory authority executors have no right to accept or reject realty of the estate at the appraised value in partition proceedings. *Ferguson's Estate*, 204 Pa. St. 253.

5. *Purchase of Land for Debts Due Estate — Becomes Trustee for Estate.* — *Aulbach v. Read*, 77 S. W. Rep. 204, 25 Ky. L. Rep. 1130.

6. *Election by Beneficiaries.* — *Carr's Estate*, 24 Pa. Super. Ct. 369, *reversing* on other grounds 8 Del. Co. Rep. (Pa.) 556.

**1067.** 1. *Purchase to Protect Estate.* — *Matter of Ross*, (Surrogate Ct.) 33 Misc. (N. Y.) 163.

2. *Purchase by the Administrator of a Tax Title on property of the estate is held in Michigan*

not to be a proper charge against him if he did not take the title in the interest of the estate, but for himself individually. *Morton v. Johnston*, 124 Mich. 561.

3. *Purchase from Heirs — Realty Not Required for Payment of Debts.* — See generally *supra*, this title, 982. 2.

**1068.** 1. *Land Purchased by Executor or Administrator May Be Sold as Personal Assets.* — *Clapp v. Tower*, 11 N. Dak. 556.

*Partnership Real Estate.* — Real estate constituting assets of a partnership of which the decedent is a member is personal assets and may be sold as such. *Re Fulton*, 7 Ont. L. Rep. 445.

*Land Purchased at Sale under Mortgage Given by Decedent.* — A purchase by executors at a sale under a mortgage given by the testator is merely a method of wiping out the mortgage debt, and gives to them the legal title only, the beneficial ownership remaining in the devisees; and they can make no valid conveyance of the land without the joinder or consent of the beneficial owners and to the prejudice of other real estate acquired under the will. *Finley's Estate*, 10 Pa. Dist. 272, 25 Pa. Co. Ct. 261.

**1069.** 4. *Power to Order Sale Purely Statutory.* — *Bryan v. Craig*, 64 Ark. 438; *Matter of Foley*, 39 N. Y. App. Div. 248; *Wisconsin Trust Co. v. Chapman*, 121 Wis. 479.

*A Liberal Construction.* — *Matter of Foley*, 39 N. Y. App. Div. 248; *Matter of Georgi*, 44 N. Y. App. Div. 180, *affirmed* on opinion below 162 N. Y. 660; *Matter of Georgi*, (Surrogate Ct.) 21 Misc. (N. Y.) 419; *Carr v. Hull*, 65 Ohio St. 394, 87 Am. St. Rep. 623; *Kummer v. Lapp*, 13 Ohio Dec. 491.

**1070.** 1. *Sale for Purpose of Distribution — Alabama.* — *Brown v. Mize*, 119 Ala. 10; *Washington v. Bogart*, 119 Ala. 377; *Thomas v. Caldwell*, 136 Ala. 518; *Griffith v. Rudisill*, (Ala. 1904) 37 So. Rep. 83.

*Georgia.* — *Finch v. Du Bignon*, 117 Ga. 113. *Kentucky.* — *Zehnder v. Schoenbachler*, 70 S. W. Rep. 278, 24 Ky. L. Rep. 947.

*Minnesota.* — *Kelly v. Slack*, 93 Minn. 489.

*Pennsylvania.* — *Gross's Estate*, 26 Pa. Co. Ct. 219, 18 Montg. Co. Rep. (Pa.) 122. See also *Douty's Estate*, 196 Pa. St. 432.

A request for the order by all the parties in interest is a prerequisite to the sale; but if consent by one or more is unreasonably withheld,

**1070.** 2. Jurisdiction — *a.* COURTS OF PROBATE. — See note 5.

**1071.** See notes 1, 2, 5.

**1072.** *b.* COURTS OF EQUITY. — See notes 2, 3.

3. Who May Apply for Order of Sale — *a.* PERSONAL REPRESENTATIVES OF DECEDENT. — See note 4.

**1073.** *b.* CREDITORS. — See notes 2, 4.

it is expressly provided that a sale may be decreed notwithstanding such refusal. *Goddard's Estate*, 198 Pa. St. 454, *affirming* 9 Pa. Dist. 703, *citing* *Freeman's Estate*, 181 Pa. St. 405, 59 Am. St. Rep. 659; *Krug's Estate*, 9 Pa. Dist. 239. See also *Bullock's Estate*, 9 Pa. Dist. 690.

The act has no application to petitions filed in the Orphans' Court by an executor or administrator for an order of sale for the payment of debts. *Kiskaddon v. Dodds*, 21 Pa. Super. Ct. 351, *following* *Spencer v. Jennings*, 114 Pa. St. 619, 123 Pa. St. 184, and *Jacoby v. McMahon*, 174 Pa. St. 133, 189 Pa. St. 1, *reaffirmed* (Pa. 1898) 41 Atl. Rep. 1119.

**1070.** 2. Sale of Real Estate to Pay Legacies. — *Kelly v. Slack*, 93 Minn. 489.

Legacies and annuities are charges against an estate within a statute providing that if the personal effects are found inadequate to satisfy the debts and charges, a sufficient portion of the real estate may be ordered sold for that purpose. *Ellyson v. Lord*, 124 Iowa 125.

In Pennsylvania. — *Dunn's Estate*, 8 Pa. Dist. 289, 16 Lanc. Law Rev. 278.

3. Sale for Benefit of Estate. — *Matter of Leonis*, 138 Cal. 194; *Deppe v. Ford*, 89 Minn. 253; *Kelly v. Slack*, 93 Minn. 489; *Freke v. Berg*, 193 Pa. St. 442.

A Comprehensive Statute. — *Gutter v. Dallamore*, 144 Cal. 665.

The statute cannot be applied to estates of persons deceased at the time of its enactment. As to such estates it is unconstitutional. *Matter of Packer*, 125 Cal. 396, 73 Am. St. Rep. 58; *Matter of Freud*, 131 Cal. 667, 82 Am. St. Rep. 407; *Matter of Newlove*, 142 Cal. 377.

4. Estoppel of Heirs. — Where the heirs requested and procured the administrator to make a sale of land for the purpose of making distribution, their title passes to the purchaser by estoppel, and a stranger to the proceeding, particularly after a considerable lapse of time, cannot impeach it. *Whitaker v. Thayer*, (Tex. Civ. App. 1905) 86 S. W. Rep. 364, *citing* *Delk v. Punchard*, 64 Tex. 364.

5. Jurisdiction — Probate Courts. — *Carroll v. Baxter*, 65 N. J. L. 478.

Appellate Courts. — The jurisdiction of the District Court, authorized to try *de novo* an appeal from an order of the County Court made in administration proceedings, extends only to the determination of the questions presented by the appeal; and such court has no jurisdiction to order a sale of the property of the estate, where that question is not involved. *Levy v. Moody*, (Tex. Civ. App. 1905) 87 S. W. Rep. 205.

**1071.** 1. Concurrent Jurisdiction of Probate Courts and Superior Courts. — *Tidd v. Bloch*, 26 Ohio Cir. Ct. 113.

2. Jurisdiction of Court Granting Letters. — The Kentucky statute provides that a sale for the payment of debts must be brought in the

county in which the personal representative qualifies. *De Haven v. De Haven*, 104 Ky. 41.

Jurisdiction of Courts of Equity. — See *infra*, this title, **1072.** 2, 3.

5. Land in Another State. — *Seldner v. Katz*, 96 Md. 212.

**1072.** 2. Jurisdiction Not Inherent in Courts of Equity. — *Huffstедler v. Kidler*, 67 Ark. 239; *Letson v. Evans*, (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 437, *citing* *Hogan v. Kavanaugh*, 138 N. Y. 417.

Equity May Have Jurisdiction under Special Circumstances; as when a construction of the will is necessary — a matter not within the jurisdiction of the probate court. *Jordan v. Hardie*, 131 Ala. 72.

3. Jurisdiction Conferred on Courts of Equity. — *Holburn v. Pfannmiller*, 114 Ky. 831; *Gordon v. James*, (Miss. 1905) 39 So. Rep. 18; *Harris v. Thomas*, (Tenn. Ch. 1899) 52 S. W. Rep. 706; *Leavell v. Smith*, 99 Va. 374, *citing* Code Va., § 2668; *Trites v. Humphreys*, 2 N. Bruns. Eq. 1.

4. The Right and Duty of Representative to Apply for Order of Sale. — *Henley v. Johnston*, 134 Ala. 646, 92 Am. St. Rep. 48; *Matter of Roach*, 139 Cal. 17; *Irwin v. Flynn*, 110 La. 829, *citing* *Lehmann's Succession*, 41 La. Ann. 987; *Matter of Sargent*, 42 N. Y. App. Div. 301, *affirming* (Surrogate Ct.) 25 Misc. (N. Y.) 261; *In re Cavagna*, 11 Ohio Dec. 725, 8 Ohio N. P. 557; *Trites v. Humphreys*, 2 N. Bruns. Eq. 1.

Demand on Administrator. — Where a duty to apply rests on the administrator, it is not necessary to his right to petition that there should first be a demand made on him to sell. *Matter of Roach*, 139 Cal. 17.

**1073.** 2. Remedy of Creditors — Compelling Representative to Apply. — *Lukens's Estate*, 10 Pa. Dist. 118.

4. Creditors May Apply for a Sale of Real Estate. — *Matter of Roach*, 139 Cal. 17; *Matter of Sargent*, 42 N. Y. App. Div. 301, *affirming* (Surrogate Ct.) 25 Misc. (N. Y.) 261; *Matter of Knapp*, (Surrogate Ct.) 25 Misc. (N. Y.) 133, 28 Civ. Pro. (N. Y.) 220; *Blount County Bank v. Smith*, (Tenn. Ch. 1898) 48 S. W. Rep. 206; *Harris v. Thomas*, (Tenn. Ch. 1899) 52 S. W. Rep. 706; *McConaughy v. Bennett*, 50 W. Va. 172. Compare in North Carolina, *Strickland v. Strickland*, 129 N. Car. 84, *citing* *Dickey v. Dickey*, 118 N. Car. 956.

Creditors of the Executor. — While an executor is entitled to reimburse himself by a sale of real estate, for money borrowed and used by him in paying claims against the estate, his creditor has no such right. *Smith v. Hayward*, 5 Ohio Dec. 462, 5 Ohio N. P. 501.

If the Administrator Has Paid Debts in Excess of Assets. — *Matter of O'Brien*, 39 N. Y. App. Div. 321; *Smith v. Hayward*, 5 Ohio Dec. 462, 5 Ohio N. P. 501; *Honeywell's Estate*, 10 Kulp



**1073.** *c.* OTHER PERSONS. — See note 5.

**4. Time for Making Application** — *a.* STATUTORY LIMITATION. — See note 6.

**1074.** See note 2.

*b.* RULE IN ABSENCE OF STATUTORY LIMITATION. — See note 3.

**1075.** See notes 1, 2.

(Pa.) 164; *Leavell v. Smith*, 99 Va. 374. See also *infra*, this title, **1080**. 3.

**1073. 5. Purchaser of Interest of Heirs.** — A purchaser of the interests of heirs in lands of the estate is not within the terms of a statute giving the right to make the application to a "creditor or other person interested in the estate." *Stark v. Kirchgraber*, 186 Mo. 633, 105 Am. St. Rep. 629.

**6. Time for Making Application — Statutory Limitation — In New York.** — *Richmond v. Freemans Nat. Bank*, 86 N. Y. App. Div. 152; *Hughes v. Golden*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 128; *Early v. Korn*, (Supm. Ct. Spec. T.) 89 N. Y. Supp. 392.

The proceeding is commenced by the filing of the petition, and if that is done within the three years, the fact that the citation did not issue for nearly four years thereafter will not oust the jurisdiction of the court. *Matter of Van Vleck*, (Surrogate Ct.) 32 Misc. (N. Y.) 419.

New parties may be brought into a proceeding pending at the time of the expiration of the statutory period, by amendment, though no new proceedings could be instituted. *Matter of Ibert*, 48 N. Y. App. Div. 510.

**In New Jersey.** — *Freehold First Nat. Bank v. Thompson*, 61 N. J. Eq. 188; *Hohokus Tp. v. Eric R. Co.*, 65 N. J. L. 353; *Podesta v. Binns*, (N. J. 1905) 60 Atl. Rep. 315.

**In Ontario**, where, by statute, real as well as personal estate is made to devolve upon the legal personal representative, it is provided by Act 1891, 54 Vict., c. 18, § 1, that real estate not disposed of by the executors within twelve months after the death shall then be deemed to be vested in the devisees or heirs beneficially entitled thereto, without any conveyance by the executors — unless a caution has been registered. The further Act of 1893, 56 Vict., c. 20, provides for the registration of a caution after the expiration of the twelve months in certain cases, which shall have the same effect as one registered within twelve months, save as regards persons who have acquired valuable rights, etc. *Ianson v. Clyde*, 31 Ont. 579. For other decisions under the Acts, see *Re Martin*, 3 Ont. L. Rep. 284; *In re Starr*, 2 Ont. L. Rep. 762; *Byer v. Grove*, 2 Ont. L. Rep. 754.

**Limitation of Time Within Which Administration Can Be Granted.** — Where the time within which the original administration can be granted is limited by statute, the realty cannot be subjected to the payment of debts by administration granted after the expiration of the statutory period. *Cummings v. Lynn*, 121 Iowa 344.

The *Washington* statute expressly provides that no real estate of a deceased person shall be liable for his debts, unless letters testamentary or of administration are granted within six years from the date of his death. *In re*

*Smith*, 25 Wash. 539; *Gleason v. Hawkins*, 32 Wash. 464.

**Statutory Lien of Creditors — Pennsylvania.** — After the expiration of a time fixed by statute within which creditors are given a lien on the real estate of a decedent, no sale can be had for the payment of debts, which are not liens of record. *Hoover's Estate*, 9 Kulp (Pa.) 126; *Honeywell's Estate*, 9 Kulp (Pa.) 340. See also *Cooper's Estate*, 206 Pa. St. 628, 98 Am. St. Rep. 799.

Where the lien of unscheduled debts expires after a sale for their payment has been ordered, the order fails; and if the sale should be made, no title passes. Actual settlement and discharge of the debts has the same effect. *Walsh's Estate*, 12 Pa. Dist. 218, 28 Pa. Co. Ct. 193, 19 Montg. Co. Rep. (Pa.) 133.

**Land Aliened by Heir or Devisee.** — See *infra*, this title, **1096**. 3 *et seq.*

**1074. 2. Delay in Prosecuting Proceeding.** — *Matter of Braker*, 48 N. Y. App. Div. 443.

**3. Rule that Application Must Be Within Reasonable Time.** — *Black v. Robinson*, 70 Ark. 185; *Derge v. Hill*, 103 Mo. App. 281.

**Character of Rule.** — The rule is not an application, strictly, of the equitable doctrine of laches, for it lacks some of the elements of that doctrine; nor of the statute of limitation, though it is applied in cases at law as well as in equity; but it is *sui generis*, rather an application of the statute period of limitation to the equitable doctrine of laches in part, so as to prevent the abuse by creditors of the right to enforce demands against the lands of a decedent after unreasonable delay. *James v. Gibson*, 73 Ark. 440.

No hard and fast rule has ever been promulgated, so far as we are aware, defining what lapse of time in such a case will amount to laches, and every case must necessarily be governed by its own particular facts and circumstances. *Smith Estate*, 43 Oregon 595.

**If a Sale Is Ordered.** — See *Moody v. Looscan*, (Tex. Civ. App. 1898) 44 S. W. Rep. 621.

The delay can be set up to prevent the sale, but cannot be used to invalidate it in a collateral proceeding, when the rights of innocent parties have intervened. It is a matter of defense which cannot be made available after the sale. *Kelley v. Laconia Levee Dist.* (Ark. 1905) 85 S. W. Rep. 249, *distinguishing* *James v. Gibson*, 73 Ark. 440.

That seven years elapsed after the entry of the order to sell before the sale was made, will not render the sale void. *Graham v. Brock*, 212 Ill. 579.

**1075. 1. In Alabama** the proceeding to subject lands to any liability, whether to debts anterior to the administration or costs of administration, must in all cases be commenced against the owner of the land within the period



**1076.** 5. Preventing Exercise of Power — *a.* PAYING OR SECURING DEBTS. — See note 1.

*b.* POWER OF SALE IN WILL. — See note 2.

**1077.** See note 1.

*c.* OTHER MATTERS AFFECTING EXERCISE OF POWER. — See notes 2, 4.

**1078.** See note 5.

6. Requisites to Exercise of Power — *a.* EXISTENCE OF CLAIMS AGAINST ESTATE — (1) *For What Claims Sale May Be Ordered* — (a) What Constitute Claims Against Estate in General. — See note 6.

**1079.** (b) Debts Existing in Lifetime of Decedent. — See note 1.

of limitations. *Taylor v. Crook*, 136 Ala. 354, 96 Am. St. Rep. 26.

In Arkansas seven years' delay without reasonable excuse is sufficient to bar the right, and it is immaterial whether the delay occurred before or after the administration commenced. *James v. Gibson*, 73 Ark. 440.

In Illinois. — *People v. Lanham*, 189 Ill. 326, reversing 91 Ill. App. 101; *Graham v. Brock*, 212 Ill. 579; *Brown v. Morgan*, 84 Ill. App. 233.

In Iowa it has been held that, in the absence of peculiar circumstances excusing delay, the application should be made within the time allowed for filing and allowance of claims. *Milburn v. East*, (Iowa 1905) 102 N. W. Rep. 1116, citing *McCrary v. Tasker*, 41 Iowa 255, and *Conger v. Cook*, 56 Iowa 117.

**1075.** 2. Excuses for Delay. — An heir who was administrator for a considerable portion of the time and responsible for most of the delay, cannot be heard to complain. *Black v. Robinson*, 70 Ark. 185.

Where the land was covered by a homestead right which prevented its sale, the delay is excusable. *People v. Lanham*, 189 Ill. 326, reversing 91 Ill. App. 101.

A failure to discover any real property belonging to the estate, for a considerable time, will excuse delay, where every reasonable effort was made to find such property. *Milburn v. East*, (Iowa 1905) 102 N. W. Rep. 1116.

Where the persons attacking the sale are guilty of laches, and no injury has resulted from the delay in applying for leave to sell, they are not entitled to relief. *Robbins v. Boulware*, (Mo. 1905) 488 S. W. Rep. 674.

**1076.** 1. Bond for Payment of Debts. — *Davis v. Kendall*, 161 Ind. 412; *Matter of Pitcher*, 61 N. J. Eq. 614.

Only Sales for Payment of Debts. — *Seery v. Murray*, 107 Iowa 384.

2. Power of Sale in Will. — See *supra*, this title, 1040. 4.

**1077.** 1. The New York Statute. — *Matter of Richmond*, 168 N. Y. 385, affirming mem. judgment 62 N. Y. App. Div. 624; *Holly v. Gibbons*, 176 N. Y. 520, 98 Am. St. Rep. 694, 177 N. Y. 401, reversing mem. judgment 67 N. Y. App. Div. 628; *Little Falls Nat. Bank v. King*, 53 N. Y. App. Div. 541; *Parker v. Beer*, 65 N. Y. App. Div. 598, affirmed 173 N. Y. 332; *Matter of Van Vleck*, (Surrogate Ct.) 32 Misc. (N. Y.) 419; *Matter of Rowley*, (Surrogate Ct.) 38 Misc. (N. Y.) 622. See also *Matter of Newell*, (Surrogate Ct.) 38 Misc. (N. Y.) 563.

It is apparent from Code Civ. Pro., § 2759, that a decree can be made notwithstanding

the property was effectually devised, expressly charged with the payments of debts and funeral expenses, or is subject to a valid power of sale for the payment thereof, if it is not practicable to enforce the charge or to execute the power, and the creditor has effectually relinquished the same. *Matter of Wood*, 70 N. Y. App. Div. 321.

In Alabama lands may be sold by an executor, or by an administrator with the will annexed, for the payment of debts, when the will confers no power to sell for such purpose, or, in case of intestates, when the personal estate is insufficient for the purpose. *Griffith v. Rudisill*, (Ala. 1904) 37 So. Rep. 83.

2. Discretion of Court. — *Himelspark's Estate*, 8 Pa. Dist. 327; *Lukens's Estate*, 10 Pa. Dist. 118; *Wright v. Taylor*, 26 Pa. Co. Ct. 369. See also *Mackin v. Hobbs*, 116 Wis. 528.

Land of Little Value. — If the value of the land is so little that the whole would not produce more than the expenses of administration, a sale should not be ordered. *Matter of Cook*, 137 Cal. 184.

Where Amount Could Be Raised by Mortgage. — The court is not bound to refuse an order of sale whenever it appears that the required amount of money can be raised by mortgage. *Matter of Newlove*, 142 Cal. 377.

Depression in Market Value of Real Estate. — It is not a good ground of objection to an application by an administrator for leave to sell lands for the purpose of paying debts, that the market is depressed, and that for this reason the property will not sell for its full value. *Jackson v. Warthen*, 111 Ga. 834.

4. Injunction Against Sale. — *Williams v. Lancaster*, 113 Ga. 1020; *Williams v. Gerber*, 75 Mo. App. 18; *Doll v. Cash*, 61 N. J. Eq. 108; *Himelspark's Estate*, 8 Pa. Dist. 327; *Demaris v. Barker*, 33 Wash. 200.

**1078.** 5. In Pennsylvania. — *Himelspark's Estate*, 8 Pa. Dist. 327. See also *Butt's Estate*, 20 Lanc. L. Rev. 41.

6. Liability of Decedent as Surety on Bond. — Liability as surety on a bond is a debt, within the meaning of a statute charging the debts of a decedent on his real estate. *Savings, etc., Assoc. v. Tarrt*, 81 Miss. 276.

**1079.** 1. Existence of Debts in Lifetime of Decedent Required. — *McGaw v. Gortner*, 96 Md. 489; *Ianson v. Clyde*, 31 Ont. 579. See also *Shapley v. Plant*, 79 Miss. 175, 89 Am. St. Rep. 588.

Debts Due Executor for Money Advanced to Pay Debts of Decedent. — See *supra*, this title, 1073. 4.

- 1079.** (c) Expenses of Administration, Costs and Commissions. — See notes 3, 4, 5.  
**1080.** See note 1.  
 (d) Funeral Expenses. — See note 2.  
 (e) Statutory Allowances to Family. — See note 3.  
**1081.** (f) Debts Barred by Statute of Limitations. — See notes 1, 2.

**Breach of Decedent's Contract to Sell Real Estate.** — A claim for unliquidated damages for breach by decedent's heirs of a contract to sell real estate entered into by him during his lifetime, is not a debt for which his real estate can be sold. *McGaw v. Gortner*, 96 Md. 489.

**Estates of Married Women.** — The husband and not the wife is *prima facie* liable for necessary supplies furnished the family. *Doll v. Cash*, 61 N. J. Eq. 108.

**1079. 3. Sale Not Allowed to Pay Expenses of Administration** — *Alabama*. — Expenses of administration are not chargeable against the lands unless the administration must be extended over the lands for the payment of debts of the ancestor created by him. *Taylor v. Crook*, 136 Ala. 354, 96 Am. St. Rep. 26.

*New York*. — *Matter of Quatlander*, (Surrogate Ct.) 29 Misc. (N. Y.) 566.

*Ohio*. — *Carr v. Hull*, 65 Ohio St. 394, 87 Am. St. Rep. 623, *distinguishing* *Welsh v. Perkins*, 8 Ohio 52.

*In Arkansas*. — *Collins v. Paepcke-Leicht Lumber Co.*, (Ark. 1905) 84 S. W. Rep. 1044.

**4. Sale Not Allowed to Pay Costs Against Representative.** — *Carr v. Hull*, 65 Ohio St. 394, 87 Am. St. Rep. 623. See also *Granger v. O'Neil*, 31 Nova Scotia 462.

That a part of the costs had accrued prior to the death of the decedent and the revivor of the action in the name of his representative, constitutes no exception to the rule, no award having been made against the former. *Matter of Foley*, 39 N. Y. App. Div. 248.

**5. Sale Not Allowed to Pay Commissions of Representative.** — *Carr v. Hull*, 65 Ohio St. 394, 87 Am. St. Rep. 623.

**1080. 1. Sale for Expenses of Administration Allowed** — *California*. — *Matter of Freud*, 131 Cal. 667, 82 Am. St. Rep. 407; *Matter of Roach*, 139 Cal. 17. See also *Matter of Heydenfeldt*, 127 Cal. 456; *In re Koppikus*, (Cal. 1905) 81 Pac. Rep. 732.

*Minnesota*. — This rule obtained in *Minnesota* prior to Laws 1901, c. 89. Query, whether it has been changed by that statute. *Deppe v. Ford*, 89 Minn. 253.

*Pennsylvania*. — *Reynold's Estate*, 195 Pa. St. 225; *Lutton's Estate*, 17 Pa. Super. Ct. 342, *affirming* 10 Kulp (Pa.) 161; *Honeywell's Estate*, 9 Kulp (Pa.) 340; *Turner's Estate*, 20 Lanc. L. Rev. 38.

*Utah*. — *Matter of Thorn*, 24 Utah 209.

**Canada — Province of Ontario.** — Under the *Ontario* Devolution of Estates Act, the expenses attending the execution of a will and the administration of an estate as well as debts are chargeable ratably upon the real and personal property. *Re Thomas*, 2 Ont. L. Rep. 660; *Re Way*, 6 Ont. L. Rep. 614.

**Sale for Costs Against Representative.** — Where an executor, without direct authority or obtaining indemnity, and with the knowledge of the fact that the personal estate is insufficient to satisfy a judgment for costs against him, brings

an action to recover a sum of money alleged to belong to the testator, and is defeated, he is not entitled to be recouped his costs out of specifically devised real estate. *In re Champagne*, 7 Ont. L. Rep. 537.

**2. Sale for Payment of Funeral Expenses** — *California*. — A sale may be had to defray the cost of the burial of the decedent and the erection of a monument over the grave, in accordance with a direction contained in the will, though subsequent to the burial the body was exhumed and cremated and the ashes were not returned to the grave. *In re Koppikus*, (Cal. 1905) 81 Pac. Rep. 732; *Matter of Pfohl*, (Surrogate Ct.) 20 Misc. (N. Y.) 627.

*Pennsylvania*. — See *Lutton's Estate*, 17 Pa. Super. Ct. 342, *affirming* 10 Kulp (Pa.) 161; *Fisher's Estate*, 16 Lanc. L. Rev. 333, 29 Pittsb. Leg. J. N. S. (Pa.) 168.

*Tennessee*. — *Nashville Trust Co. v. Carr*, (Tenn. Ch. 1900) 62 S. W. Rep. 204.

*Utah*. — *Matter of Thorn*, 24 Utah 209.

**Canada — Province of Ontario.** — Under the *Ontario* Devolution of Estates Act funeral expenses as well as debts are chargeable ratably upon the real and the personal estate. *Re Way*, 6 Ont. L. Rep. 614.

**The Cost of a Monument or Headstone.** — *In re Chesney*, (Cal. 1905) 81 Pac. Rep. 679.

**Estates of Married Women.** — The funeral expenses of a married woman are a debt of her husband and not of her estate. *Doll v. Cash*, 61 N. J. Eq. 108. See *infra*, this title, **1262. 2 et seq.**

**3. Sale to Pay Statutory Allowances to Family.** — *Matter of Tittel*, 139 Cal. 149; *Reinhardt v. Seaman*, 208 Ill. 448; *Rush v. Kelley*, 34 Ind. App. 449; *Jones v. Allen*, 8 Ohio Dec. 338, 6 Ohio N. P. 518; *Johnson v. Weatherford*, 31 Tex. Civ. App. 180.

**Sale to Pay Advances Made by Representative.** — An executor or administrator who has advanced money in payment of statutory allowances is entitled to reimburse himself out of the proceeds of a sale of real estate. *Reynold's Estate*, 195 Pa. St. 225; *Hartz's Estate*, 20 Lanc. L. Rev. 25. See also *supra*, this title, **1073. 4.**

**1081. 1. Debts Barred by Limitation — Sale Not Authorized.** — *Black v. Elliott*, 63 Kan. 211, 88 Am. St. Rep. 239; *Matter of Knapp*, (Surrogate Ct.) 25 Misc. (N. Y.) 133, 28 Civ. Pro. (N. Y.) 220; *Smith v. Wildman*, 194 Pa. St. 294, 178 Pa. St. 245; *Meskill's Estate*, 8 Pa. Dist. 52. See *supra*, this title, **921. 2.**

**If the Representative Pays a Debt Which Is Barred.** — *Rowe's Estate*, 11 Kulp (Pa.) 36. See also *Kurtz's Estate*, 16 Lanc. L. Rev. 205.

**2. Heir May Plead Statute.** — *Kornegay v. Mayer*, 135 Ala. 141; *Black v. Elliott*, 63 Kan. 211, 88 Am. St. Rep. 239; *Matter of Knapp*, (Surrogate Ct.) 25 Misc. (N. Y.) 133, 28 Civ. Pro. (N. Y.) 220; *Brock v. Kirkpatrick*, 60 S. Car. 322.



- 1082.** (g) *Debts Secured on Real Estate.* — See note 1.  
 (2) *Proof of Claims* — (a) *General Rule.* — See note 3.  
**1083.** (b) *Presentation and Allowance of Claims.* — See note 5.  
**1084.** See note 1.  
 (c) *Judgment Against Executor or Administrator.* — See notes 2, 3, 4, 5.  
 (3) *Contest by Heirs or devisees.* — See note 6.

**1082. 1. Sale to Pay Debts Secured by Mortgage.** — *Matter of Freud*, 131 Cal. 667, 82 Am. St. Rep. 407; *Underwood v. Cartwright*, (Ky. 1898) 47 S. W. Rep. 580. See also *Nashville Trust Co. v. Carr*, (Tenn. Ch. 1900) 62 S. W. Rep. 204.

Where it is provided by statute that a sale of real estate shall be subject to any mortgage thereon existing at the death of the intestate, land cannot be sold to satisfy such indebtedness. *Fleming v. McCutcheon*, 85 Minn. 152.

**Mortgage Debt Having Priority over Dower Interest.** — In *Indiana* a sale to satisfy a mortgage debt which has priority over the dower interest of the widow of the decedent is expressly empowered by statute. *Denton v. Arnold*, 151 Ind. 188.

**3. Existence of Debts Must Be Proved.** — *Miller v. Mayer*, 124 Ala. 434; *Snow, Appellant*, 96 Me. 570; *Dyson v. Jones*, 65 S. Car. 308; *Barksdale v. Ward*, (Tenn. Ch. 1898) 46 S. W. Rep. 771.

**Testimony of Creditors.** — As supporting the second paragraph of note, see *Miller v. Mayer*, 124 Ala. 434; *Poole v. Daughdrill*, 129 Ala. 208.

**A Decree of Insolvency.** — *Friedman v. Shamblin*, 117 Ala. 454; *Henley v. Johnston*, 134 Ala. 646, 92 Am. St. Rep. 48.

**Allowance of Claim in Probate and Judgment for Debt as Evidence.** — See *infra*, this title, **1084. 1 et seq.**

**Admissions of Heirs.** — The heirs of a decedent are not his representatives, in such sense as to make their admissions evidence of his indebtedness. *Kornegay v. Mayer*, 135 Ala. 141.

**Application for Letters as Evidence.** — The application for letters of administration on the estate is not admissible in evidence against the heirs to fix their status as such heirs or for any other purpose. *Kornegay v. Mayer*, 135 Ala. 141.

**Scope of Inquiry — New Jersey.** — The court has no right to try the validity of the debts. The only subject of inquiry is whether the claims presented to the representative are correctly stated by him. *Matter of Pitcher*, 61 N. J. Eq. 614; *Doll v. Cash*, 61 N. J. Eq. 108; *Freehold First Nat. Bank v. Thompson*, 61 N. J. Eq. 188.

**Sale to Reimburse Executor or Administrator for Money Advanced to Pay Debts.** — An executor or administrator who pays debts of the estate out of his own funds has the right only to be substituted in the place of creditors whose debts he pays, and must establish his claim by the same kind of testimony which would be demanded of them. *Leavell v. Smith*, 99 Va. 374, citing *Street v. Street*, 11 Leigh (Va.) 521, and *Gist v. Cockey*, 7 Har. & J. (Md.) 134.

**Burden of Proof.** — The burden of proof is on the administrator applying for the order to sell, and the heirs do not assume it by setting up the statute of nonclaims. The administrator

is regarded as holding the affirmative of the issue, and, to maintain it, is bound to prove due filing or presentment of the claims. *Kornegay v. Mayer*, 135 Ala. 141.

**1083. 5. Presentation and Allowance Not Required.** — *Randel v. Randel*, 64 Kan. 254. *Contra*, *Cheairs v. Cheairs*, 81 Miss. 662.

**1084. 1. Allowance Not Conclusive on Heir or Devisee.** — *Ford v. Stuart First Nat. Bank*, 201 Ill. 120, reversing on other grounds 100 Ill. App. 70; *Lane v. Thorn*, 103 Ill. App. 215; *Milburn v. East*, (Iowa 1905) 102 N. W. Rep. 1116; *Black v. Elliott*, 63 Kan. 211, 88 Am. St. Rep. 239; *Corbett's Estate*, 10 Pa. Dist. 59, 31 Pittsb. Leg. J. N. S. (Pa.) 101.

**Allowance in Probate as Prima Facie Evidence.** — The weight of authority seems to be in support of the proposition that the allowance in probate is *prima facie* sufficient to authorize an order for the sale of the real estate. *Milburn v. East*, (Iowa 1905) 102 N. W. Rep. 1116.

**2. Judgment Against Representative Only Prima Facie Evidence Against Heir or Devisee.** — *Black v. Elliott*, 63 Kan. 211, 88 Am. St. Rep. 239; *Matthews v. Hutchins*, 68 N. H. 412; *Matter of Knapp*, (Surrogate Ct.) 25 Misc. (N. Y.) 133, 28 Civ. Pro. (N. Y.) 220; *Lutton's Estate*, 10 Kulp (Pa.) 161, affirmed 17 Pa. Super. Ct. 342; *Turk v. Hevener*, 49 W. Va. 204; *Janson v. Clyde*, 31 Ont. 570.

**3. Appearance by Heir.** — *Erck v. Erck*, 107 Tenn. 77.

**4. Rule in Maryland.** — *Jacob Tome Institute v. Davis*, 87 Md. 591.

**5. Rule in Arkansas.** — This seems to be the rule in *Arkansas*. See *Jackson v. Gorman*, 70 Ark. 88.

**Rule in South Carolina.** — While, as a general proposition, it is true that lands of an intestate may be sold under a judgment recovered against the administrator on a debt of the intestate, yet if the lands have passed into the actual and exclusive possession of the heirs before the judgment has been recovered, and before any lien has thus been fixed upon them, they can no longer be sold under such judgment, and can only be reached by the usual proceedings to subject real estate in the hands of the heir to the payment of the debts of the ancestor, to which proceedings the heir would, of course, be a necessary party. *Brook v. Kirkpatrick*, 60 S. Car. 322, approving *Huggins v. Oliver*, 21 S. Car. 159. See also *Hendrix v. Holden*, 58 S. Car. 495.

**6. Heirs or Devisees May Contest Debts.** — *Finch v. Du Bignon*, 117 Ga. 113; *Matter of Knapp*, (Surrogate Ct.) 25 Misc. (N. Y.) 133, 28 Civ. Pro. (N. Y.) 220; *In re De Serisy*, 11 Ohio Dec. 666, 8 Ohio N. P. 694; *Corbett's Estate*, 10 Pa. Dist. 59, 31 Pittsb. Leg. J. N. S. (Pa.) 101.

**The Grantee of an Heir of a part of the land sought to be sold is a person interested in the**



**1085. b. INSUFFICIENCY OF PERSONAL PROPERTY — (1) General Rule.**

— See notes 2, 3.

**1086. (2) Deficiency Arising After Death.** — See notes 3, 4, 5.**1087.** See note 1.**1088. (3) Sufficient Personalty in Another State.** — See note 1.

estate, and entitled to oppose the application for the order of sale. *In re Steward*, (Cal. 1905) 81 Pac. Rep. 728.

**1085. 2. Testate Estates.** — In the administration of testate estates the personal property is the primary fund for the payment of debts and general legacies, unless a contrary intention on the part of the testator satisfactorily appears. *Dauel v. Arnold*, 201 Ill. 570, affirming 103 Ill. App. 298, quoting *Reid v. Corrigan*, 143 Ill. 402. To the same effect, see *Baptist Female University v. Borden*, 132 N. Car. 476.

**3. Insufficiency of Personal Property — Alabama.** — *Miller v. Mayer*, 124 Ala. 434; *Griffith v. Rudisill*, (Ala. 1904) 37 So. Rep. 83.

*Arkansas.* — *Adamson v. Parker*, (Ark. 1905) 85 S. W. Rep. 239.

*Kentucky.* — *Auxier v. Clarke*, (Ky. 1904) 82 S. W. Rep. 605.

*Indiana.* — *Moore v. Moore*, 155 Ind. 261; *Swift v. Harley*, 20 Ind. App. 614.

*Maine.* — *Snow, Appellant*, 96 Me. 570.

*Maryland.* — *Constable v. Camp*, 87 Md. 173.

*Missouri.* — *Langston v. Canterbury*, 173 Mo. 122.

*New Jersey.* — *Ford v. Westervelt*, 55 N. J. Eq. 485.

*New York.* — *Matter of Meagley*, 39 N. Y. App. Div. 83.

*Ohio.* — *Snider v. Graham*, 8 Ohio Cir. Dec. 3, 14 Ohio Cir. Ct. 386; *Baen v. Weller*, 12 Ohio Dec. 128.

*Pennsylvania.* — *Tomlinson v. Trenton*, etc., St. R. Co., 31 Pa. Co. Ct. 81; *Miller's Estate*, 18 Lanc. L. Rev. 53.

*South Carolina.* — *Dyson v. Jones*, 65 S. Car. 308.

*Tennessee.* — *Boring v. Jobe*, (Tenn. Ch. 1899) 53 S. W. Rep. 763; *Nashville Trust Co. v. Carr*, (Tenn. Ch. 1900) 62 S. W. Rep. 204.

*Washington.* — *Wallace v. Grant*, 27 Wash. 130.

*West Virginia.* — *McConaughy v. Bennett*, 50 W. Va. 172.

*Canada.* — *Trites v. Humphreys*, 2 N. Bruns. Eq. 1.

**Amount of Indebtedness in Excess of Personalty.**

— Whatever the amount of the indebtedness may be, if it exceeds the value of the personalty, it is a proper case for the exercise of the jurisdiction under the statute. *Miller v. Mayer*, 124 Ala. 434.

**Testate Estates.** — If the testator devise and bequeath by general terms his entire estate, unless the will contains evidence of a manifest intent on his part to commingle land and personalty, the personal estate must, as in case of intestacy, be first exhausted, before any portion of the lands can be used. *Gordon v. James*, (Miss. 1905) 39 So. Rep. 18.

**Error in Schedule of Debts.** — An order of sale will not be set aside for error in the schedule of debts, if sufficient indebtedness remains to require a sale to pay the same. *Paxson's Estate*, 13 Pa. Dist. 78, 29 Pa. Co. Ct. 427.

**Compelling Application of Personalty Not Inventoried.** — Persons interested may proceed against an administrator who is seeking to sell the real estate for the payment of debts, to compel him to apply to their payment, personal property belonging to the estate which he has failed to inventory as assets. *Duffield v. Walden*, 102 Iowa 676.

**Debt Secured by Lien on the Real Estate.** — In states where the heirs are entitled to have debts secured by lien on the real estate of the decedent satisfied out of the personalty, a sale to pay such a debt cannot be had unless the personalty is insufficient for the purpose. *Nashville Trust Co. v. Carr*, (Tenn. Ch. 1900) 62 S. W. Rep. 204, citing *O'Conner v. O'Conner*, 88 Tenn. 76. As to the exoneration of encumbered real estate, see *supra*, this title, **1062. 3 et seq.**

**1086. 3. Deficiency Arising After Death Without Fault of Representative or Creditors.** — *Pearson v. Gillenwaters*, 99 Tenn. 446, 462, 63 Am. St. Rep. 844.

**4. Realty Subject to Sale Notwithstanding Devastavit.** — *Moore v. Moore*, 155 Ind. 261. See also *Wright v. Taylor*, 26 Pa. Co. Ct. 369, discussing the different rules on the subject and quoting 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1086.

**Failure of Representative to Pay His Own Indebtedness to Estate.** — That a debt is due from an executor or administrator, sufficient in amount to satisfy the indebtedness of the estate, is no answer to an application to sell, if the representative has never been able to pay since his appointment. *Campbell v. Drais*, 125 Cal. 253. See *supra*, this title, **887. 1 et seq.**

**5. Realty Not Subject to Sale When Deficiency Results from Devastavit.** — *Spear v. Banks*, 125 Ala. 227, 103 Ala. 436; *Matter of Very*, (Surrogate Ct.) 24 Misc. (N. Y.) 139, 28 Civ. Pro. (N. Y.) 163; *Stiller's Estate*, 8 Pa. Dist. 400, 23 Pa. Co. Ct. 24; *Wright v. Taylor*, 26 Pa. Co. Ct. 369, quoting 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1086; *Boring v. Jobe*, (Tenn. Ch. 1899) 53 S. W. Rep. 763. See also *Matter of Meagley*, 39 N. Y. App. Div. 83; *Matter of Quarlander*, (Surrogate Ct.) 29 Misc. (N. Y.) 566.

**Pursuit by Creditor of Other Remedies.** — The devastavit of an executor or administrator, though preventing creditors from obtaining an order from the Orphans' Court to sell land for the payment of their debts, does not preclude them from enforcing, in the courts of general jurisdiction, a statutory lien given creditors of a decedent. *Wright v. Taylor*, 26 Pa. Co. Ct. 369.

**1087. 1. Deficiency Resulting from Devastavit — Remedy on Bond Must Be Exhausted.** — See *Wright v. Taylor*, 26 Pa. Co. Ct. 369, discussing the different rules on the subject and quoting 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1086, 1087. Compare, in *Alabama*, *Jordan v. Hardie*, 131 Ala. 72.

**1088. 1. Personalty in Another State.** — *Cooper v. Ives*, 62 Kan. 395.

- 1088.** (4) *Proof of Deficiency* — (a) *In General*. — See note 3.  
 (b) *Settlement of Accounts*. — See note 4.  
**1089.** (5) *Exhaustion of Personality*. — See notes 1, 2.  
**1090.** 7. *Property or Interests Subject to Sale* — *a. IN GENERAL*. — See notes 1, 3.  
**1091.** *b. EQUITABLE INTERESTS*. — See note 7.  
**1092.** *c. HOMESTEADS*. — See note 2.  
*In Tennessee*. — See note 3.  
*d. ENCUMBERED PROPERTY*. — See note 4.

**1088. 3. Deficiency of Personal Assets Must Be Proved.** — *Miller v. Mayer*, 124 Ala. 434; *Poole v. Daughdrill*, 129 Ala. 208; *Smith's Estate*, 43 Oregon 595.

**4. Sale to Pay Expenses of Administration — Filing of Account.** — A sale for the purpose of paying the expenses of administration will not be ordered until the executor or administrator has filed his account. *Honeywell's Estate*, 9 Kulp (Pa.) 340.

**1089. 1. Rule that Exhaustion of Personality Must Be Shown.** — *Auxier v. Clarke*, (Ky. 1904) 82 S. W. Rep. 605; *Kummer v. Lapp*, 13 Ohio Dec. 491.

**2. In North Carolina.** — The general rule that the personality must be first exhausted in the payment of debts, includes debts secured by mortgages on the real estate. *Mahoney v. Stewart*, 123 N. Car. 106, *distinguishing Moore v. Dunn*, 92 N. Car. 67.

**The Tennessee Statute.** — *Callender v. Turpin*, (Tenn. Ch. 1901) 61 S. W. Rep. 1057.

**1090. 1. All Real Estate Subject to Sale for Payment of Debts.** — *Tyndale v. Stanwood*, 182 Mass. 534.

**Oil Produced from Real Estate.** — A petition to sell oil produced from wells sunk in real estate of the decedent, for the payment of debts, will not lie. The proper remedy is a sale of the land itself. *Johnson's Estate*, 30 Pittsb. Leg. J. N. S. (Pa.) 365.

**Real Property Purchased with Pension Money** is not exempt after the death of the pensioner and may be sold for the payment of his debts. *Smith v. Blood*, 106 N. Y. App. Div. 317. As to the exemption in favor of pension moneys, see the title EXEMPTIONS (FROM EXECUTION), 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 142 *et seq.*

**3. Undivided Interest Covered by Specific Devise.** — The Orphans' Court has no authority to direct the sale of an undivided interest that has been devised to a particular person, to the relief of other devisees. *Hemphill v. Pry*, 188 Pa. St. 243.

**Community Property.** — *Matter of Wickersham*, 139 Cal. 652, *affirming* (Cal. 1902) 70 Pac. Rep. 1079; *Messick v. Mayer*, 52 La. Ann. 1161; *Childs v. Lockett*, 107 La. 270; *Carlton v. Goebler*, 94 Tex. 93.

**1091. 7. "An Executory Contract for the Purchase of Land."** — *Hovorka v. Havlik*, (Neb. 1903) 93 N. W. Rep. 990; *Cutler v. Meeker*, (Neb. 1904) 99 N. W. Rep. 514.

**1092. 2. Homestead Not Subject to Sale During Period of Exemption.** — *Mueller v. Conrad*, 178 Ill. 276; *People v. Lanham*, 189 Ill. 326, *reversing* 91 Ill. App. 101; *Reinhardt v. Seaman*, 208 Ill. 448; *Virgin v. Virgin*, 91 Ill.

App. 188, *affirmed* 189 Ill. 144; *Porter v. Perkins*, 125 Iowa 55; *Tindall v. Peterson*, (Neb. 1904) 98 N. W. Rep. 688, judgment *modified* on other grounds on rehearing (Neb. 1904) 99 N. W. Rep. 659; *Bixby v. Jewell*, (Neb. 1904) 101 N. W. Rep. 1026; *Dignowity v. Baumblatt*, (Tex. Civ. App. 1905) 85 S. W. Rep. 834, *citing Childers v. Henderson*, 76 Tex. 664. See also *Newell v. Johns*, 128 Ala. 584; *Ousler v. Robinson*, 72 Ark. 339, and *supra*, this title, **830. 2.**

**An Exception.** — *Weber v. Weber*, 76 S. W. Rep. 507, 25 Ky. L. Rep. 908.

**Presumption.** — *Phillips v. James*, 115 Ga. 425.

**Preferred Debts.** — In some jurisdictions certain debts such as debts for trust funds, mechanics', laborers', and vendors' liens, and debts secured by mortgage on the premises, have priority over the homestead right by force of statute. *Huffstедler v. Kibler*, 67 Ark. 239; *Bixby v. Jewell*, (Neb. 1904) 101 N. W. Rep. 1026.

**3. Remainder in Homestead Subject to Sale.** — The rule stated in the text also obtains in several other states. *Williams v. O'Neal*, 119 Ga. 175; *Holburn v. Pfannmiller*, 114 Ky. 831; *Keene v. Wyatt*, 160 Mo. 1, *disapproving Broyles v. Cox*, 153 Mo. 242, 77 Am. St. Rep. 714, and *In re Powell*, 157 Mo. 151, *Marshall, J., dissenting*; *Robbins v. Boulware*, (Mo. 1905) 88 S. W. Rep. 674. See also *Houf v. Brown*, 171 Mo. 207.

**Homestead Set Off After Decedent's Death.** — A statutory homestead set off after the death of the decedent for the use of the surviving husband or wife and the minor children is within this rule. *Matter of Tittel*, 139 Cal. 149.

**Value of Land in Excess of Homestead Right.** — The value of land in excess of the value of the homestead exemption as fixed by statute is liable for the debts of the estate. *W. J. Perry Live Stock Commission Co. v. Biggs*, (Neb. 1903) 94 N. W. Rep. 712.

**4. Encumbered Property Subject to Sale — Mortgages.** — *Rainey v. McQueen*, 121 Ala. 191; *Texas Loan Agency v. Dingee*, 33 Tex. Civ. App. 118; *Shahan v. Shahan*, 48 W. Va. 477, 86 Am. St. Rep. 68, *quoting* 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1092. See also *Jarrell v. Brubaker*, 150 Ind. 260.

**Real Estate Subject to Dower** — In *Indiana*. — *Cullen v. State*, 28 Ind. App. 335; *Fry v. Lawson*, 32 Ind. App. 364.

**The Statutory Right to Redeem from a Foreclosure Sale** is a mere privilege personal in those in whom the statute vests it, and not an interest in the land. *Rainey v. McQueen*, 121 Ala. 191. *Contra* by statute, *Costigan v. Truesdell*, 83 S. W. Rep. 98, 26 Ky. L. Rep. 971.

**1093.** See notes 1, 2, 3, 4.

*e.* INTEREST IN PUBLIC LANDS. — See note 5.

**1094.** See notes 1, 2, 3.

An Entry under the Pre-emption Laws. — See note 5.

*f.* LAND HELD OR CLAIMED ADVERSELY BY THIRD PERSONS —

(1) *In General.* — See note 8.

**1095.** In Georgia. — See note 3.

(2) *Land Conveyed by Decedent in Fraud of Creditors.* — See note 6.

**1096.** See note 2.

**1093. 1. Pendency of Foreclosure Suit — Proceedings to Sell Not Affected.** — *Shahan v. Shahan*, 48 W. Va. 477, 86 Am. St. Rep. 68, quoting 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1092-3.

As to which proceeding to sell the property should be allowed precedence, is to be determined in different cases by their special facts. *Loeper's Succession*, 105 La. 772.

**2. Protection of Incumbrancers.** — *Shahan v. Shahan*, 48 W. Va. 477, 86 Am. St. Rep. 68, quoting 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1093.

The lands of a decedent on which valid subsisting liens are existing at his death, do not pass into the administration of his estate, whether solvent or insolvent, for distribution or the payment of debts, unaffected by such liens, but subject to them. *Hood v. Hammond*, 128 Ala. 569, 86 Am. St. Rep. 159.

**3. Power to Remove Incumbrances Before Sale Denied.** — *Erck v. Erck*, 107 Tenn. 77. See also *Freehold First Nat. Bank v. Thompson*, 61 N. J. Eq. 188; *supra*, this title, **1063. 5.**

**4. Power to Remove Incumbrance Asserted in Massachusetts.** — See *Tyndale v. Stanwood*, 182 Mass. 534; *Clark v. Seagraves*, 186 Mass. 430.

**5. Interest under Entry Paid for but Not Completed by Patent.** — *Lubbock v. Binnes*, 20 Tex. Civ. App. 407. See also *Avila v. Pereira*, 120 Cal. 589.

**1094. 1. Headright Certificates.** — *Moody v. Loosan*, (Tex. Civ. App. 1898) 44 S. W. Rep. 621.

Where the land has been located and patented, and the proceedings had in the probate court concerning the sale and conveyance indicate that the property intended to be sold, and which was sold, was land, an objection that the property sold was the certificate and not the land is untenable. *Whitaker v. Thayer*, (Tex. Civ. App. 1905) 86 S. W. Rep. 364.

**2. Land Certificate Subject to Sale by Statute.** — *Hovorka v. Havlik*, (Neb. 1903) 93 N. W. Rep. 990, citing *Baxter v. Robinson*, 11 Mich. 520; *Cutler v. Meeker*, (Neb. 1904) 99 N. W. Rep. 514.

**3. Necessity of Locating Certificate Before Sale.** — *Lubbock v. Binns*, 20 Tex. Civ. App. 407; *Odell v. Kennedy*, 26 Tex. Civ. App. 439.

**5. Pre-emption and Homestead Claims Not Subject to Sale.** — *Wittenbrock v. Wheadon*, 128 Cal. 150, 79 Am. St. Rep. 32; *Gjerstadengen v. Van Duzen*, 7 N. Dak. 612, 66 Am. St. Rep. 679; *Towner v. Rodegeb*, 33 Wash. 153, 99 Am. St. Rep. 936; *Demars v. Hickey*, (Wyo. 1905) 80 Pac. Rep. 521.

**8. Doubtful Title** — *California*. — *Matter of Newlove*, 142 Cal. 377.

*Kansas.* — *Randel v. Randel*, 64 Kan. 254. *Massachusetts.* — *Tyndale v. Stanwood*, 182 Mass. 534.

*Nebraska.* — *Martin v. Bond*, 64 Neb. 868. *New Jersey.* — *Podesta v. Binns*, (N. J. Eq. 1905) 60 Atl. Rep. 815.

*Pennsylvania.* — *Walker's Estate*, 23 Pa. Co. Ct. 657.

*Texas.* — *Hamm v. Hutchins*, 19 Tex. Civ. App. 209.

**Suit to Enjoin Sale.** — A person, though in possession of land and claiming ownership, has no right to enjoin a probate sale of the premises on the ground that the succession has no title. *Rapides Lumber Co. v. Hartiens*, 111 La. 793.

**Adverse Title Is Evidence.** — A petition by an administrator for the sale of real estate was opposed by a person claiming an interest in the land under a deed from one of the heirs. On an objection to the offer of such deed in evidence it was held that its introduction did not involve the determination of any adverse claim to the property of the estate, but was proper for the purpose of establishing a right in the contestant to object to a sale of the entire property. *In re Steward*, (Cal. 1905) 81 Pac. Rep. 728.

**The Orphans' Court Cannot Try Title.** — *In re Devine*, 62 N. J. Eq. 703; *Bodder's Estate*, 13 Pa. Dist. 470; *Hamm v. Hutchins*, 19 Tex. Civ. App. 209.

But such court may ascertain of what real estate the decedent died seized. *Walker's Estate*, 23 Pa. Co. Ct. 657.

**In North Carolina.** — See *Straughan v. Tysor*, 124 N. Car. 229; *Wilson v. Brown*, 134 N. Car. 400.

**1095. 3. Statutory Rule in Georgia.** — *Heard v. Phillips*, 101 Ga. 691; *Davitte v. Southern R. Co.*, 108 Ga. 665; *Lowe v. Bivins*, 112 Ga. 341. See also *Watkins v. Gilmore*, 121 Ga. 488.

**Burden of Proof.** — One who asserts that such adverse possession existed when sale was made is under the burden of proving that fact affirmatively. *Harris v. Cole*, 114 Ga. 295.

**Adverse Possession No Defense to Application for Leave to Sell.** — *Finch v. Du Bignon*, 117 Ga. 113.

**6. Fraudulent Conveyances — Power to Sell Denied.** — See *Barker v. Battey*, 62 Kan. 584.

**1096. 2. Power to Sell Expressly Given by Statute** — *Massachusetts.* — In *Massachusetts* the executor or administrator may obtain a license to sell land fraudulently conveyed and sell it within one year thereafter, or he may bring an action for possession by virtue of such license and sell within one year after possession



**1096.** (3) *Land Aliened by Heir or Devisee.* — See notes 4, 5, 6.

**1097.** (5) *Land Sold for Partition.* — See note 2.

(6) *Land Partitioned by Order of Court.* — See note 3.

g. *QUANTITY TO BE SOLD.* — See notes 4, 5.

**1098.** 8. *Preliminaries to Making Sale* — *b. SPECIAL SALE BOND* — (1) *Necessity of Bond.* — See note 3.

is obtained. 2 Rev. Laws Mass., c. 146, § 17; Tyndale v. Stanwood, 182 Mass. 534, 186 Mass. 59.

*North Carolina.* — Harrington v. Hatton, 129 N. Car. 146.

*Ohio.* — Baen v. Weller, 12 Ohio Dec. 128; Webster v. Ballard, 4 Ohio Dec. (Reprint) 419, 2 Cleve. L. Rep. 137. See also Lowman v. Sewall, 9 Ohio Cir. Dec. 177, 16 Ohio Cir. Ct. 466, reversing on other grounds 4 Ohio Dec. 1.

**1096.** 4. *The Kentucky Statute* (Stat. Ky. 1903, § 2087) provides: "When the heir or devisee shall alien, before suit brought, the estate descended or devised, he shall be liable for the value thereof, with legal interest from the time of alienation, to the creditors of the decedent or testator; but the estate so aliened shall not be liable to the creditors in the hands of a bona fide purchaser for valuable consideration, unless action is instituted within six months after the estate is devised or descended to subject the same." Alderson v. Alderson, 83 S. W. Rep. 1129, 26 Ky. L. Rep. 1260. See also Pritchard v. Smith, 107 Ky. 483.

5. *The Rhode Island Statute.* — While the land remains in the hands of the heir it may be sold, though the three years and six months have expired. It is the alienation of the land after that time which terminates the charge thereon as against the rights of the administrator. Honeyman v. Kelliher, 20 R. I. 564.

6. *Alienation by Heir of Devisee — Power of Sale Not Defeated.* — Savings, etc., Assoc. v. Tarrt, 81 Miss. 276; Hohokus Tp. v. Erie R. Co., 65 N. J. L. 353; Richmond v. Freemans Nat. Bank, 86 N. Y. App. Div. 152.

An heir or devisee can convey his title subject only to the rights of the estate creditors. New York L. Ins. Co. v. Brown, 32 Colo. 365; Glover v. Coit, 36 Tex. Civ. App. 104.

*In New Jersey.* — Hohokus Tp. v. Erie R. Co. 65 N. J. L. 353; Freehold First Nat. Bank v. Thompson, 61 N. J. Eq. 188; Podesta v. Binns, (N. J. 1905) 60 Atl. Rep. 815.

*Consent of Administrator to Alienation by Heir.* — Moore v. Moore, 155 Ind. 261.

**1097.** 2. *Land Sold in Partition — Subsequent Sale to Pay Debts.* — Hall v. Gabbert, 213 Ill. 208.

*Contra.* — Brock v. Kirkpatrick, 60 S. Car. 322, citing Jones v. Wightman, 2 Hill L. (S. Car.) 580.

3. *Land Partitioned by Order of Court.* — *Contra* by statute. *In re Cavagna*, 11 Ohio Dec. 725, 8 Ohio N. P. 557.

4. *Quantity to Be Sold — Sufficiency to Pay Debts* — *United States.* — Santana Live-stock, etc., Co. v. Pendleton, (C. C. A.) 81 Fed. Rep. 784.

*California.* — Matter of Cook, 137 Cal. 184; Matter of Roach, 139 Cal. 17.

*Kentucky.* — Auxier v. Clarke, (Ky. 1904) 82 S. W. Rep. 605.

*Maine.* — Snow, Appellant, 96 Me. 570.

*Maryland.* — Constable v. Camp, 87 Md. 173.

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*New Jersey.* — Hohokus Tp. v. Erie R. Co., 65 N. J. L. 353.

*Texas.* — Texas Land, etc., Co. v. Dunovant, (Tex. Civ. App. 1905) 87 S. W. Rep. 208.

*Selection of Land to Be Sold.* — The Orphans' Court can order the sale or that a mortgage be given on the real estate of which a decedent died seized or so much thereof as may be necessary to pay his debts, but it has no authority to direct the sale of an undivided interest therein that has been devised to a particular person to the relief of other devisees. Hemphill v. Pry, 188 Pa. St. 243.

5. *Sale in Excess of Amount Required to Pay Debts.* — The *California* statute as it existed prior to the amendment of 1893 authorized all the real estate to be sold where the residue after a sale of sufficient to pay debts, legacies, and expenses of administration, would be of such a character, with reference to its future disposition among the heirs or devisees, as clearly to render it for the best interests of all concerned that the same should be sold. Matter of Newlove, 142 Cal. 377.

*In Kentucky.* — A sale of more land than is necessary to pay debts is void as to infants, unless the property sold was indivisible. Louisville Banking Co. v. Pranger, 68 S. W. Rep. 632, 24 Ky. L. Rep. 408.

*In Louisiana* the entire estate may be sold in order to effect a partition, and thereby enable the administrator of the succession to realize the funds necessary to pay debts, where it is not susceptible of division in kind. Wilson v. Wilson, 109 La. 1075.

*The Maine Statute* authorizes such sale where the residue would be greatly depreciated by a sale of any portion. Snow, Appellant, 96 Me. 570.

*The Minnesota Statute* provides that if it appears to the court, without regard to the necessity for such sale, that it would be for the best interests of the estate of the decedent, and of all persons interested therein, that the real estate described in the petition or any part thereof be sold, the probate court may license the sale of the same. Kelly v. Slack, 93 Minn. 489.

*Question of Fact for Court.* — Whether it would be for the advantage, benefit, and best interests of the estate, or of those interested therein, to order a sale of all the real estate or of only a part, is a question of fact, to be determined by the trial court upon the evidence before it in reference thereto. *In re Steward*, (Cal. 1905) 81 Pac. Rep. 728.

*Order to Sell All — Sale of Part Only.* — Such sale, when for an amount sufficient to pay the indebtedness of the estate, on being approved by the court exhausts the power, and a sale of other parcels under the order is void. Cole v. Jerman, 77 Conn. 374.

**1098.** 3. *Special Bond Required by Statute.*

**1099.** See note 1.

**1100.** (2) *Requisites, Validity, and Effect of Bond* — Effect on General Administration Bond. — See note 2.

(3) *Failure to Give Bond.* — See note 3.

c. APPRAISEMENT BEFORE SALE. — See note 5.

**1101.** 9. *Manner and Terms of Sale* — a. IN GENERAL. — See notes 5, 6.

**1102.** b. PUBLIC OR PRIVATE SALE. — See notes 1, 2.

**1103.** c. TIME OF SALE. — See note 1.

d. ADJOURNMENT OF SALE. — See note 5.

— *Slater v. McAvoy*, 123 Cal. 437; *Matter of Sargent*, 42 N. Y. App. Div. 301, *affirming* (Surrogate Ct.) 25 Misc. (N. Y.) 261; *Matter of Georgi*, (Surrogate Ct.) 21 Misc. (N. Y.) 419.

**Land in Foreign State.** — That the land to be sold is situated in a foreign state does not take the case out of the statute. *People v. Huffman*, 182 Ill. 390, *reversing* on other grounds 78 Ill. App. 345.

**1099.** 1. *Sale of More Realty than Is Necessary to Pay Debts.* — *Melcher v. Schluter*, (Neb. 1904) 98 N. W. Rep. 1082.

**1100.** 2. *Sureties on General Bond Not Liable.* — *People v. Huffman*, 182 Ill. 390, *reversing* on other grounds 78 Ill. App. 345; *Rogers v. State*, 26 Ind. App. 114; *Cullen v. State*, 28 Ind. App. 335.

**In Michigan.** — *White v. Schaberg*, 131 Mich. 319, 9 Detroit Leg. N. 323.

**Where No Special Bond Is Given**, the sureties on the general bond are liable for the proceeds of the sale after they have become a portion of the general assets of the estate. *Ellyson v. Lord*, 124 Iowa 125.

**3. Sale Vitiating by Failure to Give Bond.** — *Snow v. Russell*, 93 Me. 362; *Snow, Appellant*, 96 Me. 570; *Sharpley v. Plant*, 79 Miss. 175, 89 Am. St. Rep. 588.

**Sale Not Vitiating by Failure to Give Bond.** — See *Stoff v. McGinn*, 178 Ill. 46.

**Failure Resulting from Oversight.** — *Frothingham v. Petty*, 197 Ill. 418.

**5. The Kentucky Statute** requires appraisal before any real estate shall be sold under an order or judgment of the court, other than an execution. *Vivion v. Vivion*, (Ky. 1899) 50 S. W. Rep. 984.

**1101.** 5. *Manner and Terms* — Order of Sale Must Be Strictly Followed. — *Veihdorfer's Estate*, 26 Pa. Co. Ct. 317.

**Order of Sale Should Fix Terms.** — *Underwood v. Cartwright*, (Ky. 1898) 47 S. W. Rep. 580.

**6. No Power to Vary Terms of Sale.** — The preliminary agreement resulting from the announced terms of the sale survives the deed, in the absence of evidence showing that the executory contract between the parties was intended to be superseded by the conveyance. *Alexander v. Greacen*, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 526.

**The Terms Announced at the Sale.** — *Matter of Georgi*, (Surrogate Ct.) 35 Misc. (N. Y.) 685.

**Representative Cannot Impose Terms.** — *Contra*, *Broadwell v. Sammons*, 69 S. W. Rep. 1084, 24 Ky. L. Rep. 814, where it was said that "what the court may properly do in this respect by order, we perceive no reason why parties *sui juris* may not do by agreement."

**1102.** 1. *Public Sale Required by Statute.* — The Georgia statute requires all sales by administrators to be at public outcry, except annual crops sent off to market and vacant lands. *Fussell v. Dennard*, 118 Ga. 270.

**Sale Not Within Statute of Frauds Requiring Memorandum.** — A memorandum of the sale by the auctioneer, his clerk, or agent, or other note of contract, is not essential to public auction sales of land made by executors or administrators. *Culli v. House*, 133 Ala. 304. *Contra*, *Crowley v. Hicks*, 98 Wis. 566, *citing* *Bamber v. Savage*, 52 Wis. 110.

**2. The Pennsylvania Statute** of May 9, 1889, P. L. 182, authorizes the court, in all cases where, under the existing laws, it has power to order the sale of real estate for the debts of decedents, and for other purposes, to decree and approve a private sale, if, in its opinion, under all the circumstances, a better price can be obtained at private than at public sale; as where the interest shall be undivided, or for other sufficient cause. *O'Brian v. Wiggins*, 14 Pa. Super. Ct. 37; *Smith's Estate*, 188 Pa. St. 222, *followed* *Stevenson v. Scott*, 188 Pa. St. 234.

An order under the statute may be to sell at either public or private sale, authorizing the representative to try both ways, if necessary, before the return day. *Smith's Estate*, 188 Pa. St. 222.

Prior to the enactment of this statute, proceedings in the Orphans' Court, upon the petition of an executor or an administrator for an order of sale for the payment of debts, were governed by the Act of March 29, 1832, which act merely contemplated a public sale and not a private sale. The retroactive and curative statute of April 4, 1901, however, cures the defect in such private sales as come within its terms and validates the titles acquired under them. *Kiskaddon v. Dodds*, 21 Pa. Super. Ct. 351.

**1103.** 1. *In Washington*, the statute requires that any sale made by an administrator must be made within six months from the date fixed by him when he will commence to receive bids. *Matter of Bryant*, 38 Wash. 337.

**Extending Time of Sale.** — The Wisconsin statute provides that the sale shall be made within one year after the making of the order, but allows an extension of time by the court, on good cause being shown, for a period not longer than two years. *Stat. Wis.*, § 3889; *Mackin v. Hobbs*, 116 Wis. 528.

**5. Adjournment of Sale.** — *Bean v. Kirkpatrick*, 105 Ga. 476; *Slocum's Estate*, 14 Pa. Dist. 39.

An executor or administrator, except where his discretion is controlled by the order of sale, can withdraw property offered at any time be-

**1104.** *c.* PLACE OF SALE. — See note 1.

*f.* NOTICE OF SALE — (1) *Necessity of Notice.* — See notes 2, 3.  
(2) *Mode of Giving Notice* — (a) *Publication in Newspaper.* — See

note 4.

**1105.** The Period of Publication. — See note 2.

**1107.** *g.* SALE IN PARCELS OR EN MASSE. — See note 1.

*h.* WHO MAY MAKE SALE. — See note 3.

**1108.** See notes 2, 3.

fore it has been knocked off to the bidder, and the latter acquires no right to compel a conveyance where that is done. *Tillman v. Dunman*, 114 Ga. 406, 88 Am. St. Rep. 28.

**1104. 1. Place of Sale Fixed by Statute.** — In *Kansas* the sale is directed to be made at the door of the court house, or at such other place as the court may direct. Having power to fix the place in the first instance, the court may ratify and confirm a sale made at another place than that advertised. *Thompson v. Burge*, 60 Kan. 549.

In *Kentucky* the statute provides that unless the order direct otherwise the sale shall be made at the door of the court house of the county. *Underwood v. Cartwright*, (Ky. 1898) 47 S. W. Rep. 580.

**2. Notice of Sale Required.** — *Matter of Georgi*, 44 N. Y. App. Div. 180, *affirmed* on opinion below 162 N. Y. 660; *McNeill v. Fuller*, 121 N. Car. 209; *Texas Land, etc., Co. v. Dunovant*, (Tex. Civ. App. 1905) 87 S. W. Rep. 208. See also *infra*, this title, **1118. 2 et seq.**

**Beneficiary Heirs Not Entitled to Notice.** — *Irwin v. Flynn*, 110 La. 829.

**Widow and Heirs Not Entitled to Specific Notice.** — *Smith's Estate*, 188 Pa. St. 222; *Irwin v. Guthrie*, 198 Pa. St. 267.

**Judgment Creditors of Heir or Devisee Not Entitled to Notice.** — *Kummer v. Lapp*, 13 Ohio Dec. 491, *citing* Anonymous, 11 Ohio Dec. (Reprint) 159, 25 Cinc. L. Bull. 102.

**3. Notice of Private Sale Required.** — *Fussell v. Dennard*, 118 Ga. 270.

**Statute Silent as to Notice.** — Where the statute is silent as to notice, such notice should nevertheless be given as would be equivalent to the notice required under pre-existing legislation which it is necessary to invoke in order to sustain the jurisdiction of the court to decree the sale. *O'Brian v. Wiggins*, 14 Pa. Super. Ct. 37, *citing* *Smith's Estate*, 188 Pa. St. 222.

**4. Defects in the Advertisement.** — *Robbins v. Boulware*, (Mo. 1905) 88 S. W. Rep. 674.

**1105. 2. Publication for a Shorter Period.** — *Young v. Downey*, 145 Mo. 250, 68 Am. St. Rep. 568, 150 Mo. 317. *Contra*, *Robbins v. Boulware*, (Mo. 1905) 88 S. W. Rep. 674. *Compare*, as to notice of intention to apply for order of sale, *Thompson v. Burge*, 60 Kan. 549, 72 Am. St. Rep. 369.

**Presumption that Notice Was Published for Requisite Time.** — *Bradley v. Drone*, 187 Ill. 175, 79 Am. St. Rep. 214.

**Notice to Show Cause Why Sale Should Not Be Ordered.** — A sale is not invalidated by the fact that the notice to show cause why the sale should not be ordered was not published for the requisite length of time. *Blackman v. Mulhall*, (S. Dak. 1905) 104 N. W. Rep. 250, in which case the court said that "where there is some notice the

irregularity or insufficiency thereof cannot be questioned in the collateral proceeding."

**1107. 1. Sale in Parcels or En Masse.** — *Voorhees v. Bailey*, 59 N. J. Eq. 292. See also in this connection *supra*, this title, **1042. 2.**

Under Const. Miss., art. 12, § 18, all lands sold in pursuance of decrees of courts or execution are required to be divided into tracts not to exceed one hundred and sixty acres. *Shannon v. Summers*, (Miss. 1905) 38 So. Rep. 345.

The principle that justifies an executor, in selling under a power contained in the will, in dividing the property into lots, laying streets through it, and creating easements of a right of way in the several purchasers, if the estate will be benefited by such a disposition of the property, applies equally to the Orphans' Court, in the exercise of its discretion. Indeed, unless the court has such discretion, it would be difficult, on any principle, to give full scope to the statutory provisions which exact from it the duty of seeing to it that no more of the lands of the deceased shall be used than is necessary to pay the debts. *Hohokus Tp. v. Erie R. Co.*, 65 N. J. L. 353.

An order to sell the lands of the estate in bulk is erroneous unless based on evidence showing that such a sale will be for the best interests of the estate. Where several parcels of the land are covered by mortgages, an equitable distribution of the proceeds between the lien creditors cannot be made with any degree of certainty, where the sale is in bulk, unless the several parcels are shown to be of equal value per acre. *Texas Land, etc., Co. v. Dunovant*, (Tex. Civ. App. 1905) 87 S. W. Rep. 208.

**3. Sale by Commissioners.** — *Harris v. Brown*, 123 N. Car. 419. See also *Boyd v. Emmons*, 103 Ky. 393.

**Refusal of Representative to Act.** — The *New York* statute provides that if the representative refuses to act, a freeholder can be designated by the surrogate to make the sale. *Matter of Sargent*, 42 N. Y. App. Div. 301, *affirming* (*Surrogate Ct.*) 25 Misc. (N. Y.) 261.

**1108. 2. Representative Cannot Delegate Authority.** — *Lavera v. McNeny*, (Neb. 1904) 98 N. W. Rep. 679.

**He May Employ an Auctioneer.** — *Compare* *Scales v. Chambers*, 113 Ga. 920, *distinguishing* between an auctioneer and a mere crier of the sale, and holding that the representative may employ a person to cry the sale, such person being a mere servant acting solely as the mouthpiece of the administrator and subject at all times to his commands. See also *Landry v. Laplos*, 113 La. 697.

In *Louisiana* employment of an auctioneer is authorized by statute. *Rabasse's Succession*, 51 La. Ann. 590; *Trouilly's Succession*, 52 La. Ann. 276; *Landry v. Laplos*, 113 La. 697.



**1108.** *i.* PRICE AND TERMS OF PAYMENT — (1) *In General.* — See note 4.

(2) *Cash or Credit.* — See note 7.

**1109.** See notes 2, 4, 5.

**1110.** (4) *Security for Price.* — See notes 1, 2.

If the Executor or Administrator Fails to Take Security. — See note 4.

(5) *Inadequacy of Price.* — See notes 5, 6.

**1111.** See note 1.

In Louisiana. — See note 3.

10. Report and Confirmation of Sale — *a.* NECESSITY. — See note 5.

**1112.** See notes 1, 2.

**Sale on Application of Joint Administrators.** — Where joint administrators make application in their joint capacity for a sale of real estate, all must join in conducting and consummating the sale. *Kreider's Estate*, 17 *Lanc. L. Rev.* 201.

**1108. 3.** In Georgia executors and administrators are expressly authorized to sell and convey property by attorney in fact in all cases where they may lawfully sell and convey in person. *Scales v. Chambers*, 113 *Ga.* 920.

**A Purchase by the Agent.** — *James v. Kelley*, 107 *Ga.* 446, 73 *Am. St. Rep.* 135.

**4. Requiring Deposit.** — Where sale is for cash, the representative has the right to demand that the bidder make a deposit, as a guaranty that he will consummate the purchase if the court approves the sale. *Mueller v. Conrad*, 178 *Ill.* 276.

**7. Sale May Be on Credit.** — *Howison v. Oakley*, 118 *Ala.* 215; *Underwood v. Cartwright*, (Ky. 1898) 47 *S. W. Rep.* 580.

**1109. 2. Terms Prescribed by Advertisement of Sale.** — *Irwin v. Flynn*, 110 *La.* 829.

**4. Sale May Be Cash Sale Though Payment Is Not Made in Money.** — The fact that after an adjudication that the sale was for cash, the price was not paid in cash, does not necessarily preclude it from being a sale for cash, within an order to thus sell. An adjudicatee at a sale may occupy such relations toward the property sold, or toward the parties who are to receive the money arising from the sale, as will justify the sheriff and in fact will sometimes prevent him from enforcing a cash payment of the bid. That is a matter of frequent occurrence. *Childs v. Lockett*, 107 *La.* 270.

**5. Set-off of Claims Against Estate.** — *Reinhardt v. Seaman*, 208 *Ill.* 448; *Childs v. Lockett*, 107 *La.* 270; *Irwin v. Guthrie*, 198 *Pa. St.* 267; *Becker v. Espenshade*, 8 *Pa. Dist.* 525.

**Purchase by First Mortgagee.** — In Louisiana a purchaser who is the holder of a first mortgage on the premises is entitled to retain from his bid the amount due thereon, on giving bond for the payment of the money in case he should be called upon to pay it in the course of the settlement of the succession. *Matter of Bellow*, 108 *La.* 477, citing *Tertrou v. Durand*, 30 *La. Ann.* 1108.

**Waiver of Right of Set-off.** — Where a mortgagee waives his lien by failure to present it and obtain its allowance as a claim against the estate, if he purchases the property at the sale he cannot set off the amount against the purchase price. *Matter of Turner*, 128 *Cal.* 388.

**Agreement Between Purchaser and Adminis-**

**trator** — See *In re Albert*, 80 *Mo. App.* 557, 2 *Mo. App. Rep.* 701.

**1110. 1. Security for Price.** — *Howison v. Oakley*, 118 *Ala.* 215.

**2. Retaining Lien for Purchase Money.** — *Washington v. Bogart*, 119 *Ala.* 377.

**4. Failure to Take Security.** — *Miller v. Anders*, 21 *Tex. Civ. App.* 72.

**5. Sale for Inadequate Price Held Unfair Sale.** — *McBride's Estate*, 9 *Pa. Dist.* 216, 23 *Pa. Co. Ct.* 544; *Metz's Estate*, 14 *York Leg. Rec. (Pa.)* 136; *Kreider's Estate*, 17 *Lanc. L. Rev.* 201; *James v. Nease*, (Tex. Civ. App. 1902) 69 *S. W. Rep.* 110. See also *Geisler v. Mauk*, (Tenn. Ch. 1898) 48 *S. W. Rep.* 344.

**There Must Be a Probability of a Better Price.** — *Durrett v. Bradford*, 58 *S. W. Rep.* 540, 22 *Ky. L. Rep.* 623; *Waddington's Estate*, 7 *Pa. Dist.* 499; *Snyder's Estate*, 29 *Pa. Co. Ct.* 465, 30 *Pa. Co. Ct.* 614; *Behring's Estate*, 31 *Pittsb. Leg. J. N. S. (Pa.)* 156.

**Statutory Provisions Relative to Vacating Sales for Inadequacy of Price.** — *Matter of Griffith*, 127 *Cal.* 543; *Matter of Leonis*, 138 *Cal.* 194; *Rohlf v. Snyder*, (Neb. 1905) 103 *N. W. Rep.* 49.

**6. Public Sale Not Void for Inadequacy of Price.** — *Auxier v. Clarke*, (Ky. 1904) 82 *S. W. Rep.* 605; *Costigan v. Truesdell*, 83 *S. W. Rep.* 98, 26 *Ky. L. Rep.* 971; *Ryan v. Wilson*, (N. J. 1902) 52 *Atl. Rep.* 993, affirmed 64 *N. J. Eq.* 797; *Sharp v. Greene*, 22 *Wash.* 677. See also *Reinhardt v. Seaman*, 208 *Ill.* 448.

**1111. 1. Appraised Value.** — In Kentucky if the property does not bring two-thirds of its appraised value, it may be redeemed within one year from the time of the sale. *Vivion v. Vivion*, (Ky. 1899) 50 *S. W. Rep.* 984.

**3. Appraised Value — Rule in Louisiana.** — In Louisiana the property cannot legally be sold at the first offering, for cash, for less than two-thirds of the appraisement. *Thibodeaux v. Thibodeaux*, 112 *La.* 906.

**5. Sale under Order of Probate Court Is Judicial Sale.** — *Davis v. Martin*, (C. C. A.) 113 *Fed. Rep.* 6; *Pierce v. Vansell*, (Ind. App. 1905) 74 *N. E. Rep.* 554; *Irwin v. Flynn*, 110 *La.* 829; *Podesta v. Binns*, (N. J. 1905) 60 *Atl. Rep.* 815, citing 11 *AM. AND ENG. ENCYC. OF LAW* (2d ed.) 1111.

**1112. 1. Representative Must Make Report of Sale.** — *State v. Cunningham*, 6 *Idaho* 113; *Hohokus Tp. v. Erie R. Co.*, 65 *N. J. L.* 353; *Joyner v. Futrell*, 136 *N. Car.* 301; *Colvin's Estate*, 27 *Pa. Co. Ct.* 513, 33 *Pittsb. Leg. J. N. S. (Pa.)* 282.

**2. Confirmation Necessary to Pass Title — Alabama.** — *Howison v. Oakley*, 118 *Ala.* 215.

- 1112.** *b.* TIME FOR REPORT AND CONFIRMATION. — See notes 6, 7.  
*c.* OBJECTIONS TO CONFIRMATION. — See note 8.
- 1113.** See note 1.  
 Inadequacy of Price. — See notes 2, 3.
- 1114.** *d.* PROOF OF CONFIRMATION. — See note 1.  
*e.* EFFECT OF CONFIRMATION. — See notes 2, 3, 5.
- 1115.** 11. Validity of Sale — *a.* EXISTENCE OF JURISDICTIONAL FACTS  
 — (1) *General Rule.* — See notes 1, 4.

*California.* — Matter of Leonis, 138 Cal. 194.  
*Idaho.* — State v. Cunningham, 6 Idaho 113.  
*New Jersey.* — Ryan v. Wilson, 64 N. J. Eq. 797, affirming (N. J. 1902) 52 Atl. Rep. 993;  
 Hohokus Tp. v. Erie R. Co., 65 N. J. L. 353.  
*North Carolina.* — Joyner v. Futrell, 136 N. Car. 301.  
*Tennessee.* — Geisler v. Mauk, (Tenn. Ch. 1898) 48 S. W. Rep. 344.  
*Texas.* — Fishback v. Page, 17 Tex. Civ. App. 183.

**1112.** 6. Report at Next Term of Court After Sale. — Colvin's Estate, 27 Pa. Co. Ct. 513, 33 Pittsb. Leg. J. N. S. (Pa.) 282.

**7. Failure to Report at Next Term.** — Report and confirmation at the same term during which the sale was made do not render the sale void. Custer v. Holler, 160 Ind. 505.

A sale may be returned and confirmed after the return day named in the order. The confirmation of a sale made after the day on which the order was returnable cures the irregularity in the execution of the order. Colvin's Estate, 27 Pa. Co. Ct. 513, 33 Pittsb. Leg. J. N. S. (Pa.) 282.

**8. Confirmation Discretionary with Court.** — Under the *Alabama* statute payment of or security for the purchase price is a prerequisite to confirmation. Culli v. House, 133 Ala. 304.

**1113.** 1. Fairness and Regularity of Sale. — Howison v. Oakley, 118 Ala. 215; Underwood v. Cartwright, (Ky. 1898) 47 S. W. Rep. 580; Doyle v. Whitridge, 97 Md. 711; Ryan v. Wilson, (N. J. 1902) 52 Atl. Rep. 993, affirmed 64 N. J. Eq. 797; Veihdorfer's Estate, 26 Pa. Co. Ct. 317.

**Mode of Conducting Sale.** — The approval of the court should be given or withheld upon consideration, not merely of matters pertinent to the avoidance of a complete contract, but of all matters pertinent to the question of accepting the proposal presented. Among those matters is evidently the propriety of the mode in which the auction was conducted. Ryan v. Wilson, 64 N. J. Eq. 797, affirming (N. J. 1902) 52 Atl. Rep. 993.

**Hour of Sale.** — Eleven o'clock A. M. for a sale in the country is not an unreasonable hour, and a provision fixing that time is no ground for setting aside the sale. Metz's Estate, 14 York Leg. Rec. (Pa.) 136.

**Destruction of Buildings by Fire** after the making of the sale is not a ground for setting it aside, the remedy of the purchaser, if he has any, being a credit for their value against the purchase price. Farabee's Estate, 13 Pa. Dist. 789, 29 Pa. Co. Ct. 334.

**2. Mere Inadequacy of Price Not Ground for Refusing Confirmation.** — Ryan v. Wilson, (N. J. 1902) 52 Atl. Rep. 993, affirmed 64 N. J. Eq. 797; Snyder's Estate, 30 Pa. Co. Ct. 614. See

also *infra*, this title, **1127.** 1 *et seq.* Compare Howison v. Oakley, 118 Ala. 215.

**Contra.** — James v. Nease, (Tex. Civ. App. 1902) 69 S. W. Rep. 110.

**3. Probability of Better Price as Ground for Refusing Confirmation.** — See Sheridan's Estate, 10 Kulp (Pa.) 157.

**1114.** 1. Presumption of Confirmation. — Santana Live-Stock, etc., Co. v. Pendleton, (C. C. A.) 81 Fed. Rep. 784.

**2. Confirmation Adjudicates Regularity of Sale.** — Thompson v. Burge, 60 Kan. 549, 72 Am. St. Rep. 369; Fishback v. Page, 17 Tex. Civ. App. 183; Altgelt v. Mernitz, (Tex. Civ. App. 1904) 83 S. W. Rep. 891. See also Wheelock v. Lake, 117 Mich. 11.

**3. Confirmation Passes Equity to Legal Title.** — Matter of Bell, 125 Cal. 539.

**5. Void Sale Not Validated by Confirmation.** — State v. Cunningham, 6 Idaho 113; Bell v. Shaffer, 154 Ind. 413.

**1115.** 1. Jurisdictional Facts Must Appear by the Record. — See Friedman v. Shamblin, 117 Ala. 454.

The heir is not divested of his title to a decedent's lands without the decree of the court, passed upon proceedings sufficient to confer jurisdiction upon the court to order a sale and conveyance. To uphold the conveyance, those proceedings must be shown, even on collateral attack. Reddick v. Long, 124 Ala. 260. See *contra*, McNew v. Martin, 60 S. W. Rep. 412, 22 Ky. L. Rep. 1275.

**4. Courts of Probate Regarded as Superior Courts** — *Arkansas.* — Blevins v. Case, 66 Ark. 416

*California.* — Matter of Cook 137 Cal. 184.

*Georgia.* — Adams v. Adams, 113 Ga. 824; Phillips v. James 115 Ga. 425; Williams v. O'Neal, 119 Ga. 175.

*Illinois.* — Cassell v. Joseph, 184 Ill. 378; Bradley v. Drone, 187 Ill. 175, 79 Am. St. Rep. 214.

*Indiana.* — Denton v. Arnold, 151 Ind. 188.

*Missouri.* — Young v. Downey, 145 Mo. 250, 68 Am. St. Rep. 568; Covington v. Chamblin, 156 Mo. 574; Robbins v. Boulware, (Mo. 1905) 88 S. W. Rep. 674.

*New Jersey.* — Hohokus Tp. v. Erie R. Co., 65 N. J. L. 353; Lawson v. Acton, 57 N. J. Eq. 107; Podesta v. Binns, (N. J. 1905) 60 Atl. Rep. 815.

*South Carolina.* — Rice v. Bamberg, 59 S. Car. 498; Dyson v. Jones, 65 S. Car. 308.

*South Dakota.* — Blackman v. Mulhall, (S. Dak. 1905) 104 N. W. Rep. 250.

**Every Reasonable Presumption.** — Mason v. Odum, 210 Ill. 471, 102 Am. St. Rep. 180.

**If the Record Has Been Lost.** — Morris v. House, 125 N. Car. 550.

**Lapse of Time Between Grant of Letters and Order of Sale.** — That considerable time had

**1116.** See note 1.

(2) *Valid Grant of Probate or Administration.* — See note 2.

**1117.** See note 1.

(3) *Application for Leave to Sell.* — See note 2.

**1118.** See note 1.

(4) *Notice of Application.* — See note 2.

**1119.** See notes 1, 2.

**1120.** *b. ERRORS OR IRREGULARITIES IN PROCEEDING.* — See note 3.

elapsed when the order of sale was entered, during which no order had been made in the administration proceedings, is not sufficient to prove that the succession had been closed, and will not avail in a collateral proceeding to defeat the probate sale. *Boslet v. Thomas*, (Tex. Civ. App. 1904) 80 S. W. Rep. 115.

**1116. 1. Want of Jurisdiction Apparent of Record.** — *Collins v. Paepcke-Leicht Lumber Co.*, (Ark. 1905) 84 S. W. Rep. 1044; *Fussell v. Denard*, 118 Ga. 270; *Callaway v. Irvin*, 123 Ga. 344; *Young v. Downey*, 145 Mo. 250, 68 Am. St. Rep. 568; *Langston v. Canterbury*, 173 Mo. 122; *Stark v. Kirchgraber*, 186 Mo. 633, 105 Am. St. Rep. 629; *Smith v. Wildman*, 194 Pa. St. 294, 178 Pa. St. 245, 56 Am. St. Rep. 760, *distinguished* *Grubb v. Galloway*, 203 Pa. St. 236, 93 Am. St. Rep. 764; *Rice v. Bamberg*, 59 S. Car. 498.

**2. Necessity of Duly Constituted Executor or Administrator.** — *Henley v. Johnston*, 134 Ala. 646, 92 Am. St. Rep. 48; *Hanbest's Estate*, 21 Pa. Super. Ct. 427, *reversing* 11 Pa. Dist. 418, 27 Pa. Co. Ct. 243; *Hartley v. Glover*, 56 S. Car. 69; *Buster v. Warren*, 35 Tex. Civ. App. 644; *Byer v. Grove*, 2 Ont. L. Rep. 754.

**1117. 1. Invalidity of Appointment of Administrator.** — *Henley v. Johnston*, 134 Ala. 646, 92 Am. St. Rep. 48; *Dennis v. Bint*, 122 Cal. 39, 68 Am. St. Rep. 17; *Frothingham v. Petty*, 197 Ill. 418; *Thompson v. Burge*, 60 Kan. 549, 72 Am. St. Rep. 369; *Carr v. Hull*, 65 Ohio St. 394, 87 Am. St. Rep. 623; *Blackman v. Mulhall*, (S. Dak. 1905) 104 N. W. Rep. 250; *Nelson v. Bridge*, 98 Tex. 523, (Tex. Civ. App. 1905) 87 S. W. Rep. 885; *Moseley v. Stucken*, 26 Tex. Civ. App. 290.

**2. Application or Petition Necessary to Give Jurisdiction.** — *Rainey v. McQueen*, 121 Ala. 191; *Lawson v. Acton*, 57 N. J. Eq. 107; *McNeill v. Fuller*, 121 N. Car. 209; *O'Brian v. Wiggins*, 14 Pa. Super. Ct. 37.

**The Averments in the Petition.** — *Neville v. Kenney*, 125 Ala. 149, 82 Am. St. Rep. 230.

**Description of Property.** — *Baum v. Roper*, 132 Cal. 42; *McNew v. Martin*, 60 S. W. Rep. 412, 22 Ky. L. Rep. 1275; *Boslet v. Thomas*, (Tex. Civ. App. 1904) 80 S. W. Rep. 115.

**Application by Person Having No Right to Apply.** — A sale under an application by a person to whom the statute does not give the right to apply for a sale is void. *Stark v. Kirchgraber*, 186 Mo. 633, 105 Am. St. Rep. 629.

**Substantial Compliance with Statutory Requirements Necessary.** — A sale or mortgage of the real estate of a deceased person is in derogation of the common law, and is authorized, if at all, by statute; and when authorized by statute, the statute must, in substance at least, be complied with. *Wallace v. Grant*, 27 Wash. 130.

**1118. 1. Under the Minnesota Statute.** — *Smith v. Barr*, 83 Minn. 354.

**2. Rule that Proceeding Is in Rem.** — *Friedman v. Shamblin*, 117 Ala. 454; *Neville v. Kenney*, 125 Ala. 149, 82 Am. St. Rep. 230.

**1119. 1. Rule that Notice Is Not Jurisdictional** — *Alabama.* — *Friedman v. Shamblin*, 117 Ala. 454; *Neville v. Kenney*, 125 Ala. 149, 82 Am. St. Rep. 230.

*South Dakota.* — *Blackman v. Mulhall*, (S. Dak. 1905) 104 N. W. Rep. 250, *concurring* opinion of Haney, J., stating the different rules and citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1118.

*Texas.* — But see *contra* *Texas Land*, etc., Co. v. Dunovant, (Tex. Civ. App. 1905) 87 S. W. Rep. 208, holding that the general rule that the appearance and answer of the defendant is a waiver of citation is not applicable to proceedings for the sale of the real estate of a decedent, where the notice required by a statute is not directed to any particular person, but must be given in such public manner as to charge the world with notice, and unless so given renders the sale void.

See also *supra*, this title, **1104. 2 et seq.**

**Appearance of Guardian ad Litem of Minor Heirs Required.** — *Ball v. Clothier*, 34 Wash. 299.

**Sale by Executor under Will Probated in Common Form.** — Under 2 Civ. Code Ga., § 3281, where a will is probated in common form and the executor, under proper order, sells land of the estate, an heir though he has no notice of the probate cannot recover the land from one who *bona fide* and without notice purchased it at the sale. *Venable v. Veal*, 112 Ga. 677.

**2. Rule that Notice Is Jurisdictional** — *Illinois.* — *Burr v. Bloemer*, 174 Ill. 638; *Heppe v. Szczepanski*, 209 Ill. 88, 101 Am. St. Rep. 221.

*Kansas.* — *Thompson v. Burge*, 60 Kan. 549, 72 Am. St. Rep. 369.

*Missouri.* — *Hill v. Taylor*, 99 Mo. App. 524.

*New York.* — *Matter of Georgi*, 44 N. Y. App. Div. 180, *affirmed* on opinion below 162 N. Y. 660.

*North Carolina.* — *McNeill v. Fuller*, 121 N. Car. 209.

*South Carolina.* — *Rice v. Bamberg*, 68 S. Car. 184.

**Mortgage of Real Estate.** — The same rule applies to proceedings to mortgage the real estate for the payment of debts. *Baker v. Edwards*, 156 Ind. 53.

**Notice of Purpose to Apply for Order of Sale.** — *Young v. Downey*, 150 Mo. 317.

**Presumption of Notice from Lapse of Time and Loss of Papers.** — *Morris v. House*, 125 N. Car. 550.

**1120. 3. Errors or Irregularities Not Ground for Collateral Attack** — *Alabama.* — *Friedman v. Shamblin*, 117 Ala. 454; *Neville v. Kenney*, 125 Ala. 149, 82 Am. St. Rep. 230; *Poole v. Daughdrill*, 129 Ala. 208.



**1122.** *c. AUTHORITY TO SELL—(1) Order or Decree of Sale.*—See note 1.

*California.*—*Baum v. Roper*, 132 Cal. 42.  
*Illinois.*—*Bradley v. Drone*, 187 Ill. 175, 79 Am. St. Rep. 214; *Frothingham v. Petty*, 197 Ill. 418; *Reinhardt v. Seaman*, 208 Ill. 448.

*Indiana.*—*Denton v. Arnold*, 151 Ind. 188; *Custer v. Holler*, 160 Ind. 505.

*Kansas.*—*Thompson v. Burge*, 60 Kan. 549, 72 Am. St. Rep. 369.

*Kentucky.*—*McNew v. Martin*, 60 S. W. Rep. 412, 22 Ky. L. Rep. 1275; *Allsop v. Deposit Bank*, 69 S. W. Rep. 1102, 24 Ky. L. Rep. 762; *Smith v. Hardesty*, 83 S. W. Rep. 646, 26 Ky. L. Rep. 1266.

*Minnesota.*—*Smith v. Barr*, 83 Minn. 354; *Deppe v. Ford*, 89 Minn. 253.

*Missouri.*—*Robbins v. Boulware*, (Mo. 1905) 88 S. W. Rep. 674; *Matter of Hesche*, 73 Mo. App. 612.

*Nebraska.*—*Haight v. Hayes*, (Neb. 1902) 92 N. W. Rep. 297.

*New Jersey.*—*Hohokus Tp. v. Erie R. Co.*, 65 N. J. L. 353.

*North Carolina.*—*Harris v. Brown*, 123 N. Car. 419; *Smith v. Huffman*, 132 N. Car. 600.

*South Dakota.*—*Blackman v. Mulhall*, (S. Dak. 1905) 104 N. W. Rep. 250.

*Texas.*—*Grant v. Hill*, (Tex. Civ. App. 1898) 44 S. W. Rep. 1027; *Barton v. Davidson*, (Tex. Civ. App. 1898) 45 S. W. Rep. 400; *Harrison v. Dunn*, (Tex. Civ. App. 1898) 45 S. W. Rep. 731.

**Collateral and Direct Attack Distinguished.**—The proceedings of the court in such cases are subject to review and reversal, as in other cases, upon a direct attack made by appeal from an order directing the sale, and upon such review any substantial departure from the statutory\* requirements compels a reversal; the distinction being that upon collateral attack the proceeding will be sustained, and the purchaser's title held good, unless it appears that the court did not acquire jurisdiction to order the sale; while upon direct attack by appeal from the order it may be reversed for error, though the court had jurisdiction. *Matter of Cook*, 137 Cal. 184.

**The Necessity of the Sale.**—*Washington v. Govan*, 73 Ark. 612; *Gutter v. Dallamore*, 144 Cal. 665; *Adams v. Adams*, 113 Ga. 824; *Irwin v. Flynn*, 110 La. 829; *Grubb v. Galloway*, 203 Pa. St. 236, 93 Am. St. Rep. 764, *distinguishing* *Smith v. Wildman*, 178 Pa. St. 245, 56 Am. St. Rep. 760, 194 Pa. St. 294; *Blackman v. Mulhall*, (S. Dak. 1905) 104 N. W. Rep. 250; *Texas Land, etc., Co. v. Dunovant*, (Tex. Civ. App. 1905) 87 S. W. Rep. 208.

**Presumption of Regularity.**—*Mott v. Ft. Edward Water Works Co.*, 79 N. Y. App. Div. 179; *Morris v. House*, 125 N. Car. 550; *Fink v. Miller*, 19 Pa. Super. Ct. 556.

**Description of Property.**—*McNew v. Martin*, 60 S. W. Rep. 412, 22 Ky. L. Rep. 1275. See also *infra*, this title, 1117. 2.

**Proceeding Against Minor.**—The premature appointment of a guardian *ad litem* for a minor heir, or the entry of the order of sale before the time for appearance but after service, are irregularities merely and will not avoid the sale on collateral attack. *Rice v. Bolton*, (Iowa 1904) 100 N. W. Rep. 634. *Compare* *Ball v. Clothier*, 34 Wash. 299.

**Sale Not Made at Place Authorized.**—In *Louisiana* a sale made at another place than that authorized is a mere irregularity, curable by the prescription of five years, and does not render the sale void. *Landry v. Laplos*, 113 La. 697.

**Order Granted Administrator, Executed by Administrator D. B. N.**—The execution by an administrator *de bonis non* of an order of sale granted an administrator who was removed before its execution, does not render the sale void. *Irwin v. Guthrie*, 198 Pa. St. 267.

**1122. 1. No Authority to Sell Without Leave of Court**—*Arkansas.*—*Bryan v. Craig*, 64 Ark. 438.

*Georgia.*—*Waller v. Hogan*, 114 Ga. 383; *Hall v. Davis*, 122 Ga. 252. *Compare* *Keen v. McAfee*, 116 Ga. 728, an action to recover the purchase price of the land sold, where the court said: "It was the duty of the purchaser to ascertain, before bidding at the sale, whether the executors had competent authority to sell. A purchaser at judicial sale is bound to look to the judgment, the levy, and the deed."

*Indiana.*—*Bell v. Shaffer*, 154 Ind. 413.

*Minnesota.*—*Hanson v. Ingwaldson*, 77 Minn. 533, 77 Am. St. Rep. 692.

*North Carolina.*—*McNeill v. Fuller*, 121 N. Car. 209.

*South Carolina.*—*Hunter v. Hunter*, 58 S. Car. 382, 79 Am. St. Rep. 845.

*Texas.*—*Coy v. Gaye*, (Tex. Civ. App. 1904) 84 S. W. Rep. 441.

Administrators acting under and by authority of the court can do neither more nor less than the order and decree of the court permits them to do. *Nantahala Marble, etc., Co. v. Thomas*, (C. C. A.) 106 Fed. Rep. 379.

**The Texas Statute.**—*Compare* *Fishback v. Page*, 17 Tex. Civ. App. 183, *citing* *Pelham v. Murray*, 64 Tex. 477, and *doubting* *Ball v. Collins*, (Tex. 1887) 5 S. W. Rep. 622.

**Property Not Within Terms of Order of Sale.**—*Nichols v. Little*, 115 Ga. 600; *Messick v. Meyer*, 52 La. Ann. 1161; *Roberts v. Thomason*, 174 Mo. 378; *Francisco v. Billingsley*, (Tenn. Ch. 1898) 48 S. W. Rep. 323. See also *Rice v. Bolton*, (Iowa 1904) 100 N. W. Rep. 634.

**Presumption of Order from Lapse of Time.**—*Massenberg v. Denison*, (C. C. A.) 107 Fed. Rep. 18.

**An Order for the Sale of a Reversion in realty** after the expiration of the widow's dower constitutes valid authority to sell the fee if the widow dies before the sale takes place. *Adams v. Adams*, 113 Ga. 824.

**Scope of Order to Sell All Decedent's Real Estate.**—An order to sell all the real estate belonging to the estate is broad enough to cover every interest in land owned by it, whether in possession or in expectancy. *Oliver v. Powell*, 114 Ga. 592.

**Grant of Easement Not Authorized by Order.**—An administrator cannot by his deed impose an easement on other land of the decedent than that he was empowered to sell. *Baker v. Willard*, 171 Mass. 220.

**Order Reserving Certain Real Estate Until Balance of Estate Has Been Exhausted.**—Under an

**1122.** *d.* EXECUTION OF ORDER OR DECREE. — See note 6.

**1123.** *e.* CURATIVE STATUTES. — See note 2.

**1124.** See note 2.

*f.* RATIFICATION OF INVALID SALE. — See notes 3, 4.

order of sale reserving certain real estate until after all of the other property of the estate has been sold or offered for sale, and further providing that the property reserved shall not be sold until the balance of the estate has been exhausted, a sale of such property after the other lands of the estate have been offered for sale and not sold for want of bids, is valid. *Matter of Bryant*, 38 Wash. 337.

**Minutes of Order Need Not Be Signed by Judge.**

— The signature of the judge to the probate minutes is not essential to the validity of the order. *Norwood v. Snell*, 95 Tex. 582, (Tex. Civ. App. 1902) 69 S. W. Rep. 642.

**Vacation Order.** — Where it is provided by statute that when the judge shall order the sale while sitting at chambers, the order or license given shall be filed in the office of the clerk of the district court where letters of administration are granted, and be recorded by him in the record book of said office, before any sale shall be made, noncompliance with the statute goes to the jurisdiction, and involves the authority of the administrator to act. *Veeder v. McKinley-Lanning L. & T. Co.*, 61 Neb. 892.

**1122. 6. Exchange of Lands.** — An order of sale, based on an application to sell land to pay debts, does not authorize an exchange of lands for the personal benefit of the representative. *Cole v. Jerman*, 77 Conn. 374.

**1123. 2. Curative Statutes — The Indiana Statute.** — *Custer v. Holler*, 160 Ind. 505.

**The Massachusetts Statute.** — Pub. Stat. Mass., c. 142, § 22, gives a remedy in equity when any act or proceeding of a person acting as administrator under the appointment or license of a probate court is void by reason of any irregularity or want of jurisdiction or authority of the court. *Nazro v. Long*, 179 Mass. 451.

**The Michigan Statute.** — See *Upton v. Gerber*, (Mich. 1904) 98 N. W. Rep. 854, 10 Detroit Leg. N. 976.

**The Minnesota Statute** as it now exists is substantially similar to the *Indiana* statute. Whenever the record is silent or wanting in material particulars as to such essentials, or any of them, the sale may be collaterally attacked within the time limited. *Cater v. Steeves*, (Minn. 1905) 103 N. W. Rep. 885.

**The New York Statute** provides: "The title of a purchaser in good faith at a sale pursuant to a decree made as prescribed in this title is not, nor is the validity of a mortgage or lease made as prescribed in this title, in any way affected where a petition was presented and the proper persons were duly cited and a decree authorizing a mortgage, lease, or sale was made as prescribed in this title, by any omission, error, defect, or irregularity occurring between the return of the citation and the making of the decree, except so far as the same would affect the title of the purchaser at a sale made pursuant to the directions contained in a judgment rendered by the Supreme Court." *Smith v. Blood*, 106 N. Y. App. Div. 317.

**The Pennsylvania Statute** of April 4, 1901, P.

L. 66, declares valid and effectual all private sales theretofore made upon petition of executors or administrators for the payment of debts, provided that adequate security, conditioned for the faithful application of the purchase money, shall have been given by such executors or administrators, as the case may be, in accordance with such decrees; and that the act shall not apply to any case theretofore judicially adjudicated. *Kiskaddon v. Dodds*, 21 Pa. Super. Ct. 351.

**The Texas Statute** cures irregularities in sales made by foreign executors prior to the passage of the act. *Laws Tex.* 1893, p. 102; *Simpson v. Johnson*, (Tex. Civ. App. 1898) 44 S. W. Rep. 1076.

**The Washington Statutes Provide that** "In case of an action relating to any estate sold by an executor, administrator or guardian, in which an heir or person claiming under the deceased, or in which the ward or any person claiming under him, shall contest the validity of the sale, it shall not be voided on account of any irregularity in the proceedings: Provided, it appears (1) that the executor, administrator, or guardian was ordered to make the sale by the probate or superior court having jurisdiction of the estate; (2) that he gave a bond which was approved by the probate or superior judge, in case a bond was required upon granting the order; (3) that he gave notice of the time and place of sale, as in the order and by law prescribed; and (4) that the premises were sold accordingly, by public auction, and the sale confirmed by the court, and that they are held by one who purchased them in good faith." *Ball v. Clothier*, 34 Wash. 299.

**Retrospective Operation of Statute.** — *Kiskaddon v. Dodds*, 21 Pa. Super. Ct. 351.

**1124. 2. Omission Cured by Statute.** — In *Indiana* a sale is not invalidated by a report and confirmation at the same term during which the sale was had, instead of at the next term as directed by statute. *Custer v. Holler*, 160 Ind. 505.

In *Nebraska* a sale is not invalidated by reason of the fact that the application for a license was set for hearing prematurely or that there were no debts. *Haight v. Hayes*, (Neb. 1902) 92 N. W. Rep. 297.

In *Washington* the statute is held to relate only to irregularities and not to matters which go to the jurisdiction of the probate court; that the failure to give notice to the minor heirs or to appoint a guardian *ad litem* for them goes to the jurisdiction and renders the sale void. *Ball v. Clothier*, 34 Wash. 299.

**3. Ratification of Invalid Sale.** — *Crane v. Lowe*, 59 Kan. 606; *Ray v. McLain*, 106 La. 780; *Podesta v. Binns*, (N. J. 1905) 60 Atl. Rep. 815, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1124; *Hartley v. Glover*, 56 S. Car. 69. See also *Young v. Downey*, 150 Mo. 317.

**4. Ratification by Accepting Proceeds of Sale.** —



**1125.** 12. Vacating and Setting Aside Sales — *a.* JURISDICTION — (1) *Courts of Probate.* — See notes 1, 2.

(2) *Courts of Equity.* — See note 4.

**1126.** *b.* PERSONS ENTITLED TO RELIEF. — See note 2.

**1127.** *c.* GROUNDS OF RELIEF — (2) *Inadequacy of Price.* — See notes 1, 2.

**A Court of Equity.** — See note 3.

*Meddis v. Kenney*, 176 Mo. 200, 98 Am. St. Rep. 496; *Fink v. Miller*, 19 Pa. Super. Ct. 556.

**Obtaining Judgment Against Administrator for Proceeds of Sale.** — Heirs at law who bring an administrator to an accounting, and obtain against him a judgment, in part based upon the proceeds of land sold by him, thereby ratify the sale of the property, and cannot afterwards assert its invalidity. *Battle v. Wright*, 116 Ga. 218.

**1125.** 1. Power of Probate Court to Vacate Sale. — *Howison v. Oakley*, 118 Ala. 215. See also *supra*, this title, **1112.** 8 *et seq.*

**2. Probate Court Cannot Set Aside Sale After Confirmation and Conveyance.** — *Brittain's Estate*, 28 Pa. Super. Ct. 144, *affirming* 12 Luz. Leg. Reg. (Pa.) 219; *Walsh's Estate*, 12 Pa. Dist. 218, 28 Pa. Co. Ct. 193, 19 Montg. Co. Rep. (Pa.) 133; *Bodder's Estate*, 13 Pa. Dist. 471, 14 Pa. Dist. 53; *Farabee's Estate*, 13 Pa. Dist. 789, 29 Pa. Co. Ct. 334; *Albright's Estate*, 6 Lack. Leg. N. (Pa.) 108; *Brittain's Estate*, 12 Luz. Leg. Reg. (Pa.) 219; *Behring's Estate*, 31 Pittsb. Leg. J. N. S. (Pa.) 156.

As a general rule the Orphans' Court has power to alter, revise, revoke, or amend its judgments upon cause being shown at any time during the term at which the original judgment was entered, and after the term has passed it has no such power. On the one hand, the rights of innocent third parties may intervene in such way that no relief can be given even if the term has not passed; while, on the other hand, the judgment entered may, for want of jurisdiction, or by reason of fraud, mistake, or misapprehension, be vacated or amended though the term has passed. *Corbett's Estate*, 10 Pa. Dist. 59, 31 Pittsb. Leg. J. N. S. (Pa.) 101.

**Statutory Authority Essential to Exercise of Power.** — The order of sale cannot be vacated or modified by the probate court on the ground of error, either of law or fact, in the absence of statutory authority for such revision. *Matter of Leonis*, 138 Cal. 194. To the same effect *Costigan v. Truesdell*, 83 S. W. Rep. 98, 26 Ky. L. Rep. 971.

**4. Setting Aside Sale After Consummation — Equity Jurisdiction.** — See *infra*, this title, **1126.** 4 *et seq.*

**1126.** 2. Only Parties in Interest Can Impugn Sale. — *Elting v. Biggsville First Nat. Bank*, 68 Ill. App. 204, *affirmed* 173 Ill. 368; *Mouser v. Bagwell*, 76 S. W. Rep. 826, 25 Ky. L. Rep. 1032; *Matter of Wood*, 70 N. Y. App. Div. 321.

**Guardian of Infant Heirs May Bring Suit.** — *Rol. v. Stum*, (Ky. 1898) 46 S. W. Rep. 223.

**Mortgagees of Widow and Heirs.** — Where the widow and the heir mortgaged their interests in the real estate and used the proceeds for the support of the family, the income from the property of the estate and the proceeds of the

mortgages being sufficient for the purpose, a sale of the mortgaged premises by the widow as executrix to pay family allowances is in fraud of the rights of the mortgagees, and they are entitled to relief against such sale. *Curtis v. Schell*, 129 Cal. 208, 79 Am. St. Rep. 107; *Savings Bank v. Schell*, 142 Cal. 505.

**1127.** 1. Probate Court May Set Aside Sale for Inadequacy of Price. — *McBride's Estate*, 9 Pa. Dist. 216, 23 Pa. Co. Ct. 544; *Kreider's Estate*, 17 Lanc. L. Rev. 201; *Metz's Estate*, 14 York Leg. Rec. (Pa.) 136; *James v. Nease*, (Tex. Civ. App. 1902) 69 S. W. Rep. 110. See also *Geisler v. Mauk*, (Tenn. Ch. 1898) 48 S. W. Rep. 344.

**Scope of Rule.** — Mere inadequacy of a bid, if the sale is regular, will not warrant the court in setting the sale aside and ordering a resale. This rule does not rest on the right of a purchaser, because when he bids he understands that it is subject to the approval of the court; but it rests upon the grounds of public policy. It is adopted to encourage the attendance of bidders at judicial sales. It is only when a bid is unconscionably below the value of a property, so low as to raise the inference that the sale must have been in some way fraudulent or irregular, that mere inadequacy will avoid the sale. *Ryan v. Wilson*, (N. J. 1902) 52 Atl. Rep. 993, *affirmed* 64 N. J. Eq. 797.

**Probability of Better Price.** — *Waddington's Estate*, 7 Pa. Dist. 499; *Snyder's Estate*, 29 Pa. Co. Ct. 465, 30 Pa. Co. Ct. 614; *Behring's Estate*, 31 Pittsb. Leg. J. N. S. (Pa.) 156.

A reservation in the order of a right to set aside the sale for inadequacy of price is valid; and a decree may be rendered accordingly, without regard to the probability of a better price being obtained. *Durrett v. Bradford*, 58 S. W. Rep. 540, 22 Ky. L. Rep. 623.

**2. The California Statute.** — *Matter of Griffith*, 127 Cal. 543; *Matter of Leonis*, 138 Cal. 194.

**In Nebraska** the sale may be set aside if a sum greater by ten per cent. than the amount of the bid, together with the expenses of resale, is offered for the property before confirmation, regardless of the actual value of the land or the motives of the person making the offer. *Rohlf v. Snyder*, (Neb. 1905) 103 N. W. Rep. 49.

**3. Mere Inadequacy of Price Not Ground in Equity for Setting Aside Sale.** — *Vivion v. Vivion*, (Ky. 1898) 50 S. W. Rep. 984; *Auxier v. Clarke*, (Ky. 1904) 82 S. W. Rep. 605; *Costigan v. Truesdell*, 83 S. W. Rep. 98, 26 Ky. L. Rep. 971; *Sharp v. Greene*, 22 Wash. 677. See also *Reinhardt v. Seaman*, 208 Ill. 448.

While a sale will not be set aside for mere inadequacy of consideration, the fact that the consideration is inadequate will be considered in connection with any circumstances establishing fraud or overreaching upon the part of the



**1128.** (3) *Fraud*. — See notes 1, 2, 3.

**1129.** (4) *Purchaser in Fiduciary or Official Relation*. — See note 6.

**1130.** *d. TIME FOR BRINGING SUIT*. — See notes 2, 3.

**1131.** *e. BONA FIDE PURCHASERS*. — See note 1.

**13. Resale** — *a. IN GENERAL*. — See note 3.

**1132.** *b. RE SALE AT RISK OF DELINQUENT BIDDER*. — See notes 2, 4.

purchasers. *Cobleigh's Estate*, 23 Pa. Super. Ct. 271, reversing 8 Lack. Leg. N. (Pa.) 107.

**1128. 1. Fraud as Ground for Setting Aside Sale — California**. — *Savings Bank v. Schell*, 142 Cal. 505.

*Illinois*. — *Heppie v. Szczepanski*, 209 Ill. 88, 101 Am. St. Rep. 221.

*Kansas*. — *McAdow v. Boten*, 67 Kan. 136.

*Kentucky*. — *Roll v. Stum*, (Ky. 1898) 46 S. W. Rep. 223.

*New Jersey*. — *Lawson v. Acton*, 57 N. J. Eq. 107.

*North Carolina*. — *Murray v. Southerland*, 125 N. Car. 175; *Morrow v. Cole*, 132 N. Car. 678.

*Pennsylvania*. — See also *Corbett's Estate*, 10 Pa. Dist. 59, 31 Pittsb. Leg. J. N. S. (Pa.) 101.

**Facts Held Insufficient to Show Fraud**. — *James v. Kelley*, 107 Ga. 446, 73 Am. St. Rep. 135; *Reinhardt v. Seaman*, 208 Ill. 448; *McDermott's Succession*, 51 La. Ann. 173; *Smith v. Barr*, 83 Minn. 354.

The fact that the sale of an executor or administrator is irregular or even void will not suffice to establish that he was guilty of fraud. *Williamson v. Beardsley*, (C. C. A.) 137 Fed. Rep. 467.

**The Burden of Proving Fraud** is on the persons attacking the sale. *Salinger v. Black*, 68 Ark. 449.

**2. Concealing Facts from Heirs**. — *Albright's Estate*, 6 Lack. Leg. N. (Pa.) 108.

**3. Preventing Competitive Bidding Renders Sale Voidable**. — *Cobleigh's Estate*, 23 Pa. Super. Ct. 271, reversing 8 Lack. Leg. N. (Pa.) 107; *Kreider's Estate*, 17 Lanc. L. Rev. 201. See also *McDermott's Succession*, 51 La. Ann. 173; *Ryan v. Wilson*, 64 N. J. Eq. 797, affirming (N. J. 1902) 52 Atl. Rep. 993.

**Bid Announced by Representative for Person Not Present**. — It is no objection to a sale that the representative, in good faith, received and announced, at the time and place of sale, a *bona fide* bid previously communicated to him by a person not then present with the purpose and object of becoming a bidder. *James v. Kelley*, 107 Ga. 445, 73 Am. St. Rep. 135.

**1129. 6. A Purchase by the Law Partner of the Attorney for the Administrator**, who subsequently transfers it to such attorney, is not void, *per se*, and will not be set aside in the absence of evidence of bad faith or fraud. *Gibson v. Gossom*, 65 Ark. 631.

**Purchase by Agent of Administrator**. — A purchase by one employed by the administrator to make the sale as his agent is voidable. *James v. Kelley*, 107 Ga. 446, 73 Am. St. Rep. 135.

**1130. 2. Time for Instituting Proceeding — Statutory Limitation — The California Statute**. — Though no settlement of the final account is made, the statute commences to run after a reasonable time has elapsed within which it might have been settled; and in the case of

persons under any legal disability, from the date when the disability is removed. *Dennis v. Bint*, 122 Cal. 39, 68 Am. St. Rep. 17.

**The Indiana Statute**. — *Armstrong v. Hufty*, (Ind. 1899) 55 N. E. Rep. 443. See also *Pierce v. Vansell*, (Ind. App. 1905) 74 N. E. Rep. 554.

**The Kansas Statute** saves the right of minor heirs for a period of two years after the disability of infancy has been removed. *Thompson v. Burge*, 60 Kan. 549, 72 Am. St. Rep. 369.

**The Louisiana Statute** provides that attacks on public sales, for informalities connected with or growing out of the same, shall be barred by prescription of five years. *Sicard v. Gumbel*, 112 La. 483; *Thibodeaux v. Thibodeaux*, 112 La. 906.

**The Mississippi Statute** provides as to sales made under order of the chancery court, in good faith, and the purchase money paid, that the action must be brought within two years after possession taken by the purchaser. *Shannon v. Summers*, (Miss. 1905) 38 So. Rep. 345.

**The Utah Statute** provides that no action for the recovery of any estate sold by an executor or administrator in the course of any probate proceeding, can be maintained by any heir or other person claiming under the decedent, unless it be commenced within three years next after such sale. An action to set aside the sale may be instituted and maintained at any time within three years from the discovery of fraud or other lawful grounds upon which the action is based. *Williamson v. Beardsley*, (C. C. A.) 137 Fed. Rep. 467.

**3. Suit Must Be Brought Within Reasonable Time — Alabama**. — *Rainey v. McQueen*, 121 Ala. 191.

*Arkansas*. — *Griffin v. Caldwell*, 72 Ark. 451.

*Illinois*. — *Robb v. Howell*, 180 Ill. 177; *Cassell v. Joseph*, 184 Ill. 378; *Mason v. Cdum*, 210 Ill. 471, 102 Am. St. Rep. 180.

*North Carolina*. — *Harris v. Brown*, 123 N. Car. 419.

*Oregon*. — *Loomis v. Rosenthal*, 34 Oregon 585.

*Pennsylvania*. — *Jacoby v. McMahon*, 189 Pa. St. 1, following former judgment in same case 174 Pa. St. 133; *Fink v. Miller*, 19 Pa. Super. Ct. 556.

**1131. 1. Facts Charging Purchaser with Notice**. — *Langley v. Langley*, 121 Ala. 70.

**3. Necessity of Resale When Price Bid Is Inadequate**. — *Howison v. Oakley*, 118 Ala. 215. See also *In re Parker*, (Neb. 1904) 101 N. W. Rep. 233.

**1132. 2. Resale at Expense of Delinquent Bidder**. — *Howison v. Oakley*, 118 Ala. 215; *Phillips v. James*, 115 Ga. 425.

The right to resell at the risk of the purchaser where he wrongfully refuses to perform, is a condition implied by law in every judicial sale, and express statutory authority therefor is not essential. *Thomas v. Caldwell*, 136 Ala. 518.

**1133.** *c.* NECESSITY OF ORDER TO RESELL. — See note 2.

**14.** Title, Rights, and Liabilities of Purchaser — *a.* WHAT TITLE PASSES BY SALE. — See notes 4, 5.

**1134.** *b.* WHEN TITLE AND RIGHT OF POSSESSION VEST. — See notes 1, 2, 3.

*c.* RIGHT TO RENTS AND PROFITS. — See note 6.

But Growing Crops. — See note 7.

**Confirmation.** — Otherwise in *Alabama*. *Cull v. House*, 133 Ala. 304.

**Effect on Liability of Destruction of Buildings Before Resale.** — That the buildings on the premises were destroyed by fire after the close of the bidding and before confirmation could be had does not affect the liability. *Thomas v. Caldwell*, 136 Ala. 518.

**Invalid Sale.** — Where the judgment or decree authorizing the sale is inadequate to transfer the title, the failure or refusal of the purchaser to take the property does not render him liable for any deficiency resulting on resale. *Tilton v. Pearson*, 67 Ill. App. 372.

**Remedy by Resale Not Exclusive.** — The remedy by resale is not exclusive, but an action may be brought against the purchaser to compel him to consummate the purchase and pay the purchase price. *Crouse v. Peterson*, 130 Cal. 169, 80 Am. St. Rep. 89.

**1132.** **4.** The Result Must Be as Soon as Practicable. — *Howison v. Oakley*, 118 Ala. 215.

**1133.** **2.** Order of Sale Necessary on Default of Purchaser. — *Tilton v. Pearson*, 67 Ill. App. 372.

**4.** Purchaser Acquires Only Such Title as Decedent Had — *United States*. — *O'Connell v. Pinnacle Gold Mines Co.*, 131 Fed. Rep. 106.

*Georgia.* — *Howell v. James Lumber Co.*, 102 Ga. 595; *Keen v. McAfee*, 116 Ga. 728.

*Kentucky.* — *Mouser v. Bagwell*, 76 S. W. Rep. 826, 25 Ky. L. Rep. 1032.

*Louisiana.* — *Rapides Lumber Co. v. Hartiens*, 111 La. 793.

*New Hampshire.* — *Lahey v. Broderick*, 72 N. H. 180.

*Pennsylvania.* — *Bodder's Estate*, 13 Pa. Dist. 470; *Walker's Estate*, 23 Pa. Co. Ct. 657; *Tomlinson v. Trenton*, etc., St. R. Co., 31 Pa. Co. Ct. 81.

*Tennessee.* — *Francisco v. Billingsley*, (Tenn. Ch. 1898) 48 S. W. Rep. 323.

*Texas.* — *O'Connor v. Vineyard*, 91 Tex. 488; *Altgelt v. Mernitz*, (Tex. Civ. App. 1904) 83 S. W. Rep. 891.

*Washington.* — *Towner v. Rodegeb*, 33 Wash. 153, 99 Am. St. Rep. 936.

*Wyoming.* — *Demars v. Hickey*, (Wyo. 1905) 80 Pac. Rep. 521.

What the administrator sells is the right, title, and interest of his intestate. *Tyndale v. Stanwood*, 182 Mass. 534.

**The Representative Cannot by Any Reservation or Exception in His Deed, whether made in pursuance of an order of court or not, create a new right or interest in the land conveyed.** *Blankenship v. Whaley*, 124 Cal. 300.

**Fixtures.** — Machinery and appliances affixed to mill property by an executor as devisee under the will, with the intent that they should form a part of the permanent structure, become a part thereof and pass by the sale. *Richmond v. Freemans Nat. Bank*, 86 N. Y. App. Div. 152.

**5. Individual Rights of Administrator Not Acquired by Purchaser.** — *Gjerstadengen v. Van Duzen*, 7 N. Dak. 612, 66 Am. St. Rep. 679.

**1134.** **1.** Inceptive Interest Acquired When Property Is Struck Off. — The purchaser thereby becomes entitled to have the sale confirmed, if there is no valid reason within the law why it should not be confirmed. *Matter of Leonis*, 138 Cal. 194, citing *Dunn v. Dunn*, 137 Cal. 51.

The purchaser has such an interest in the premises as will entitle him to maintain an action against a wrongdoer for an injury done to the premises between the day of sale and the consummation thereof. *Colvin's Estate*, 27 Pa. Co. Ct. 513, 33 Pittsb. Leg. J. N. S. (Pa.) 282; *Tomlinson v. Trenton*, etc., St. R. Co., 31 Pa. Co. Ct. 81.

**2. Equitable Title Vests on Confirmation of Sale and Payment of Price.** — *Matter of Bell*, 125 Cal. 539. See also *Joyner v. Futrell*, 136 N. Car. 301.

One who purchases land at an Orphans' Court sale and pays the purchase money necessary to entitle him to a deed has an inceptive interest, so that, on the confirmation of the sale, his title will be subject to the lien of judgments obtained against him in the interval between sale and confirmation. *Colvin's Estate*, 27 Pa. Co. Ct. 513, 33 Pittsb. L. J. N. S. (Pa.) 282.

**3. Right to Possession — Confirmation of Sale and Payment of Price.** — *Norris v. Williams*, 65 S. W. Rep. 439, 23 Ky. L. Rep. 1497; *Hyder v. O'Brien*, (Tenn. Ch. 1898) 48 S. W. Rep. 262.

**Statutory Right of Redemption from Sale.** — In *Kentucky* a statutory right to redeem exists for one year after the sale, where the premises sell for less than two-thirds of their appraised value, and prior to the expiration of this time the purchaser is not entitled to possession. *Costigan v. Truesdell*, 83 S. W. Rep. 98, 26 Ky. L. Rep. 971.

In *Pennsylvania* payment of purchase price, confirmation, and receipt of deed are necessary to the right of possession. *Stevenson v. Scott*, 188 Pa. St. 234, citing *Greenough v. Small*, 137 Pa. St. 132, 21 Am. St. Rep. 859; *Walsh's Estate*, 12 Pa. Dist. 218, 28 Pa. Co. Ct. 103.

**6. Purchaser Entitled to Rents and Profits Accruing After He Becomes Entitled to Possession.** — *Norris v. Williams*, 65 S. W. Rep. 439, 23 Ky. L. Rep. 1497; *Pearson v. Gillenwaters*, 99 Tenn. 446, 462, 63 Am. St. Rep. 844; *Hyder v. O'Brien*, (Tenn. Ch. 1898) 48 S. W. Rep. 262.

**7. Purchaser Held Not Entitled to Growing Crops.** — Judicial sales are peculiarly within the discretion of the chancellor, and he has a broad discretion in protecting those who by their industry have growing crops on the land. *Norris v. Williams*, 65 S. W. Rep. 439, 23 Ky. L. Rep. 1497.

**1134.** *d.* EFFECT OF IRREGULARITIES OR ERRORS IN PROCEEDING TO SELL. — See note 8.

**1135.** See note 3.

*e.* PROPERTY SUBJECT TO INCUMBRANCES. — See note 5.

**1136.** See notes 1, 2.

The Dower Right of the Decedent's Widow. — See notes 3, 4.

[Curtesy Estate. — See note 4*a.*]

**1137.** Incumbrances Created by the Heirs or Devisees. — See note 1.

*f.* RULE OF CAVEAT EMPTOR. — See notes 7, 8, 9.

**1134.** 8. Title of Purchaser Not Affected by Errors or Irregularities. — *Venable v. Veal*, 112 Ga. 677; *Denton v. Arnold*, 151 Ind. 188. And see *supra*, this title, **1120**, 3.

**1135.** 3. Purchaser Not Bound to Look Beyond Order of Sale — Louisiana. — It is a well-settled rule in Louisiana that in the case of judicial sales, which include a sale under the order of a probate court, the purchaser need not look beyond the jurisdiction of the court and the sufficiency of the order to warrant the sale. *Davis v. Martin*, (C. C. A.) 113 Fed. Rep. 6 (construing law of Louisiana); *Irwin v. Flynn*, 110 La. 829.

5. Sale Is Subject to Incumbrances as General Rule — Indiana. — *Bell v. Shaffer*, 154 Ind. 413. *Massachusetts*. — *Tyndale v. Stanwood*, 182 Mass. 534.

Minnesota. — *Fleming v. McCutcheon*, 85 Minn. 152.

New Jersey. — *Matter of Voorhees*, 57 N. J. Eq. 291.

Pennsylvania. — *Wylie's Estate*, 7 Pa. Dist. 748; *Miller's Estate*, 9 Pa. Dist. 510.

West Virginia. — *Shahan v. Shahan*, 48 W. Va. 477, 86 Am. St. Rep. 68, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1135.

Waiver of Lien. — Under the statutes of some states liens as well as other debts must be presented for allowance; and on a failure to do so within the time limited the claim becomes barred. *Texas Loan Agency v. Dingee*, 33 Tex. Civ. App. 118; *Tiboldi v. Palms*, 34 Tex. Civ. App. 318, affirmed on other grounds 97 Tex. 414. See the title DEBTS OF DECEDENTS, vol. 8, p. 1071.

**1136.** 1. Sale Free of Incumbrances — Kentucky. — *Underwood v. Cartwright*, (Ky. 1898) 47 S. W. Rep. 580.

Louisiana. — *Davis v. Martin*, (C. C. A.) 113 Fed. Rep. 6 (construing Louisiana law); *Childs v. Lockett*, 107 La. 270.

New Jersey. — *Matter of Voorhees*, 57 N. J. Eq. 291; *Voorhees v. Bailey*, 59 N. J. Eq. 292; *Freehold First Nat. Bank v. Thompson*, 61 N. J. Eq. 188.

Pennsylvania. — *Sheridan's Estate*, 10 Kulp (Pa.) 225.

West Virginia. — *Shahan v. Shahan*, 48 W. Va. 477, 86 Am. St. Rep. 68.

Judgment Liens — Private Sales. — *O'Brian v. Wiggins*, 14 Pa. Super. Ct. 37.

Sale for Purposes of Distribution. — *Bentzel v. Wambaugh*, 14 York Leg. Rec. (Pa.) 141.

Municipal Tax Liens. — A statute authorizing a sale free of incumbrances includes liens for municipal taxes. *Herrington v. Tolbert*, 110 Ga. 528.

2. Illustration. — After a sale has been made

free and clear of incumbrances, under an order not authorizing such sale, and the incumbrances have been liquidated out of the proceeds, the equities of the case require that the sale be allowed to stand; and the power to thus sell may be conferred by amendment of the original order. *Matter of Voorhees*, 57 N. J. Eq. 291.

3. Sale Ordinarily Subject to Dower. — *Mowry v. McQueen*, 80 Minn. 385 (construing Wisconsin law); *Casteel v. Potter*, 176 Mo. 76; *Smith's Estate*, 43 Oregon 595, citing *Whiteaker v. Belt*, 25 Oregon 490.

Estoppel to Claim Dower. — Where the widow is made a party to an application to sell the entire real estate for the purpose of paying the debts of an estate and makes no appearance but consents to the sale, she is estopped both by the decree and her conduct from claiming a distributive share in the land or the proceeds. *In re Pennock*, 122 Iowa 622.

In Illinois, where land subject to mortgages which are binding upon the widow is sold, she is entitled to have dower assigned or reserved only out of the proceeds of the sale of the equity of redemption. *Virgin v. Virgin*, 189 Ill. 144, 91 Ill. App. 188.

In Indiana a designated portion of the real estate descends to the widow free from all claims of general creditors. *Bell v. Shaffer*, 154 Ind. 413; *Fry v. Lawson*, 32 Ind. App. 364.

In Pennsylvania a widow's rights are superior to those of legatees or devisees but inferior to those of creditors. A sale of real estate for the payment of debts bars dower, and the purchaser acquires the title discharged of any claim by the widow. *Keas's Estate*, 9 Pa. Dist. 269.

In the absence of a decree providing that a sale for distribution, under the Act of June 12, 1893, shall be clear of dower, it remains a charge. *Gross's Estate*, 26 Pa. Co. Ct. 219, 18 Montg. Co. Rep. (Pa.) 122.

4. Sale Free of Dower Authorized by Statute. — In Indiana, under certain conditions, the court may order the sale of the entire estate and require one-third of the proceeds to be paid to the widow. *Cullen v. State*, 28 Ind. App. 335; *Denton v. Arnold*, 151 Ind. 188.

4*a.* An Estate by the Curtesy is an incumbrance subject to which a sale will be made. *Tyndale v. Stanwood*, 182 Mass. 534.

**1137.** 1. Incumbrances by Heirs or Devisees Divested by Sale. — The incumbrancer is entitled to enforce the lien against any interest of the heir or devisee in the proceeds of the sale. *Gutter v. Dallamore*, 144 Cal. 665.

7. Rule of Caveat Emptor Applies — Alabama. — *Culli v. House*, 133 Ala. 304.

California. — *Miller v. Gray*, 136 Cal. 261.

Georgia. — *Keen v. McAfee*, 116 Ga. 728.



**1138.** See notes 1, 2, 3.

**1139.** See note 2.

**1140.** *g.* LIABILITY FOR PURCHASE MONEY — Defects in the Title or Irregularities in the Sale. — See note 1.

Nor Can Illegality in the Appointment of the Executor or Administrator. — See note 2.

If the Sale Is Void. — See note 4.

**1141.** *h.* REFUSAL OF PURCHASER TO PERFORM. — See note 2.

If the Sale Is Voidable. — See note 5.

*i.* RIGHTS AND LIABILITIES OF PURCHASER ON AVOIDANCE OF SALE. — See notes 6, 7.

**1142.** If the Purchaser Was Put in Possession. — See notes 2, 3.

*Illinois.* — Shup *v.* Calvert, 174 Ill. 500; Sexton *v.* Sicking, 90 Ill. App. 667.

*Massachusetts.* — Tyndale *v.* Stanwood, 182 Mass. 534.

*North Dakota.* — Gjerstadengen *v.* Van Duzen, 7 N. Dak. 612, 66 Am. St. Rep. 679.

*Pennsylvania.* — Tomlinson *v.* Trenton, etc., St. R. Co., 31 Pa. Co. Ct. 81.

*Texas.* — Club Land, etc., Co. *v.* Dallas County, 26 Tex. Civ. App. 449, reversed in part on other grounds 95 Tex. 200.

*Washington.* — Towner *v.* Rodegeb, 33 Wash. 153, 99 Am. St. Rep. 936.

**Scope of Rule.** — It is undoubtedly true that the rule *caveat emptor* applies to Orphans' Court sales no less than to sales by the sheriff under execution, but purchasers are entitled to the protection of the court if application for relief is made before rights have intervened. Bodder's Estate, 13 Pa. Dist. 471, 14 Pa. Dist. 53.

**1137. 8. Purchaser Without Remedy for Defective Title After Confirmation.** — Keen *v.* McAfee, 116 Ga. 728; Foley *v.* Boulware, 86 Mo. App. 674; Podesta *v.* Binns, (N. J. 1905) 60 Atl. Rep. 815, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1137.

**9. Warranty of Title.** — Shup *v.* Calvert, 174 Ill. 500; Sexton *v.* Sicking, 90 Ill. App. 667; Dallas County *v.* Club Land, etc., Co., 95 Tex. 200, reversing in part on other grounds 26 Tex. Civ. App. 449.

**1138. 1. Representations.** — Culli *v.* House, 133 Ala. 304; Motley *v.* Motley, 53 Neb. 375, 68 Am. St. Rep. 608; Fahrig *v.* Schimpff, 199 Pa. St. 423, 85 Am. St. Rep. 796; Club Land, etc., Co. *v.* Dallas County, 26 Tex. Civ. App. 449, reversed in part on other grounds 95 Tex. 200.

**Agreement by Administrator to Pay Taxes.** — The administrator has no authority to engage to pay the taxes on the land sold which accrued after the death of the decedent, his estate not being liable therefor. Sexton *v.* Sicking, 90 Ill. App. 667.

**2. If Fraud Has Been Practiced.** — Altgelt *v.* Mernitz, (Tex. Civ. App. 1904) 83 S. W. Rep. 891.

**3. Purchaser Misled by Persons Conducting Sale.** — Veihdorfer's Estate, 26 Pa. Co. Ct. 317.

A widow selling land as administratrix is under no legal obligation to inform the purchaser of her right of dower. Foley *v.* Boulware, 86 Mo. App. 674.

**1139. 2. Rule of Caveat Emptor Held Not Applicable to Secret Defects.** — Blankenship *v.*

Whaley, 124 Cal. 300; Tomlinson *v.* Trenton, etc., St. R. Co., 31 Pa. Co. Ct. 81. See also Smith *v.* Blood, 106 N. Y. App. Div. 317.

As supporting the second paragraph of note see Nelson *v.* Bridge, (Tex. Civ. App. 1905) 87 S. W. Rep. 885.

**1140. 1. Defects in Title Not Ground for Relief of Purchaser.** — Keen *v.* McAfee, 116 Ga. 728; Podesta *v.* Binns, (N. J. 1905) 60 Atl. Rep. 815; Fahrig *v.* Schimpff, 199 Pa. St. 423, 85 Am. St. Rep. 796; Altgelt *v.* Mernitz, (Tex. Civ. App. 1904) 83 S. W. Rep. 891.

**2. Illegality in Appointment of Executor or Administrator.** — See *supra*, this title, **1116. 2 et seq.**

**4. A Purchaser in Possession.** — Keen *v.* McAfee, 116 Ga. 728.

**1141. 2. Compelling Purchaser to Complete Purchase.** — Matter of Leonis, 138 Cal. 194; Keen *v.* McAfee, 116 Ga. 728.

The liability of the purchaser for the amount of his bid is fixed by the return and confirmation, and he cannot set up in an action to enforce it either a failure of title, misrepresentations by the administrator, or other matter attacking the validity of the sale. His day in court to make such objection is at the return of the sale, and if he submit to the decree of the court confirming it, he cannot afterwards be heard against it collaterally. Fahrig *v.* Schimpff, 199 Pa. St. 423, 85 Am. St. Rep. 796.

**5. Voidable Sale — Refusal to Comply with Bid.** — Crouse *v.* Peterson, 130 Cal. 169, 80 Am. St. Rep. 89; Doyle *v.* Whitridge, 97 Md. 711.

**Purchaser in Possession.** — The purchaser should not be allowed to remain in possession, and at the same time set up the invalidity of the sale by which he acquired that possession. Before the defendant can make this defense, if he can make the defense at all, he should surrender the land. Keen *v.* McAfee, 116 Ga. 728.

**6. Reimbursement of Purchaser for Price Paid.** — Sharpley *v.* Plant, 79 Miss. 175, 89 Am. St. Rep. 588; Patillo *v.* Martin, 107 Mo. App. 653; Holmes *v.* Columbia Nat. Bank, (Neb. 1903) 97 N. W. Rep. 26; Ball *v.* Clothier, 34 Wash. 299.

**7. Subrogation of Purchase to Rights of Creditors.** — Baker *v.* Edwards, 156 Ind. 53; Louisville Banking Co. *v.* Pranger, 68 S. W. Rep. 632, 24 Ky. L. Rep. 408; Wylie's Estate, 7 Pa. Dist. 748.

**1142. 2. Purchaser in Possession Must Account for All Rents and Profits.** — Betram *v.* Ross, 66 S. W. Rep. 638, 23 Ky. L. Rep. 1927;

**1142.** *k.* VENDEES OF PURCHASER. — See note 5.

**1143.** 15. Rights of Heirs and Devisees — Fraudulent Sale. — See notes 6, 7.

**1144.** Rents and Profits Accruing Before Sale. — See note 3.

Contribution Between Heirs. — See note 5.

**1145.** 16. Purchase by Executor or Administrator — *a.* RIGHT TO BECOME PURCHASER — (1) *General Rule.* — See note 6.

**1145.** See notes 1, 2.

**1146.** See note 2.

**1147.** The Rule Is Based on Considerations of Policy. — See note 2.

(2) *Exceptions to General Rule.* — See note 3.

**1148.** *b.* RIGHT TO ACQUIRE TITLE OF PURCHASER. — See notes 1, 2.

Sharpley *v.* Plant, 79 Miss. 175, 89 Am. St. Rep. 588.

**1142.** 3. Credit Allowed for Repairs, Taxes, Etc. — Betram *v.* Ross, 66 S. W. Rep. 638, 23 Ky. L. Rep. 1927; Sharpley *v.* Plant, 79 Miss. 175, 89 Am. St. Rep. 588; Patillo *v.* Martin, 107 Mo. App. 653; Ball *v.* Clothier, 34 Wash. 299.

5. Vendee of Purchaser Not Affected by Purchaser's Fraud. — Morrow *v.* Cole, 132 N. Car. 678; Nelson *v.* Bridge, (Tex. Civ. App. 1905) 87 S. W. Rep. 885.

**1143.** 6. Injunction Against Wrongful Sale. — See *supra*, this title, 1077. 4.

7. Damages for Wrongful Sale. — Irwin *v.* Flynn, 110 La. 829; Carey's Estate, 34 Pittsb. Leg. J. N. S. (Pa.) 58.

**1144.** 3. Rents and Profits. — See *supra*, this title, 1134. 6 *et seq.*

5. Marshaling Assets in Settling Indebtedness of Estate. — *In re* Roberts, (1902) 2 Ch. 834; New York L. Ins. Co. *v.* Brown, 32 Colo. 365.

6. Representative Cannot Purchase at His Own Sale — *Alabama.* — Cottingham *v.* Moore, 128 Ala. 209.

*Connecticut.* — See Cole *v.* Jerman, 77 Conn. 374.

*Georgia.* — James *v.* Kelley, 107 Ga. 446, 73 Am. St. Rep. 135; Pirkle *v.* Cooper, 113 Ga. 828; Moore *v.* Carey, 116 Ga. 28; Lowery *v.* Idleson, 117 Ga. 778; Griffin *v.* Stephens, 119 Ga. 138.

*Illinois.* — Mason *v.* Odum, 210 Ill. 471, 102 Am. St. Rep. 180.

*Iowa.* — Walker *v.* Walker, (Iowa 1905) 102 N. W. Rep. 435, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1129, 1144.

*Louisiana.* — Tucker *v.* Benedict, 114 La. 203.

*New Jersey.* — Voorhees *v.* Bailey, 59 N. J. Eq. 292.

*Ohio.* — Fox *v.* Keister, 9 Ohio Dec. 316, 6 Ohio N. P. 327.

Purchase After Resignation from Office. — After the representative has resigned, a purchase by him from his successor in office is not objectionable, in the absence of fraud or collusion. Woodward *v.* Curtis, 10 Ohio Cir. Dec. 400, 19 Ohio Cir. Ct. 15.

**1145.** 1. Purchase Through Third Person — *Alabama.* — Cottingham *v.* Moore, 128 Ala. 209.

*Colorado.* — French *v.* Woodruff, 25 Colo. 339.

*Georgia.* — Moore *v.* Carey, 116 Ga. 28.

*Illinois.* — Miller *v.* Rich, 204 Ill. 444; Elting *v.* Biggsville First Nat. Bank, 68 Ill. App. 204, affirmed 173 Ill. 368.

*Iowa.* — Walker *v.* Walker, (Iowa 1905) 102

N. W. Rep. 435, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1129, 1145.

*Nebraska.* — Veeder *v.* McKinley-Lanning, L. & T. Co., 61 Neb. 893.

*New Jersey.* — Voorhees *v.* Bailey, 59 N. J. Eq. 292.

*North Carolina.* — McNeill *v.* Fuller, 121 N. Car. 209.

*Oregon.* — Loomis *v.* Rosenthal, 34 Oregon 585.

*Pennsylvania.* — Brittain's Estate, 28 Pa. Super. Ct. 144, affirming 12 Luz. Leg. Reg. 219.

*Texas.* — See Bauman *v.* Chambers, 17 Tex. Civ. App. 242.

2. Administrator Forbidden to Derive Any Benefit from Sale. — Moore *v.* Carey, 116 Ga. 28; Sharpley *v.* Plant, 79 Miss. 175, 89 Am. St. Rep. 588.

A Purchase by a Firm of Which the Administrator Is a Member. — Willis *v.* Berry, 104 La. 114.

A Sale to the Wife of the Administrator. — Moore *v.* Carey, 116 Ga. 28, citing Reed *v.* Aubrey, 91 Ga. 435, 44 Am. St. Rep. 49; Kreider's Estate, 17 Lanc. L. Rev. 201.

Purchase by Husband of Administratrix — To the Contrary. — Lowery *v.* Idleson, 117 Ga. 778.

Sale to Satisfy Claim of Partnership of Which Administrator Is a Member. — An administrator is not a person interested in the purchase, within this rule, from the facts that the firm of which he is a member has a claim against the estate, which is one of the claims to satisfy which the land is sold, and that the land was bought by another member of the firm; and the sale is valid in the absence of fraud or collusion. Griffith *v.* Maxfield, 66 Ark. 513.

**1146.** 2. The Wisconsin Statute. — Gibson *v.* Gibson, 102 Wis. 501.

**1147.** 2. Reasons for Rule. — French *v.* Woodruff, 25 Colo. 339; Lowery *v.* Idleson, 117 Ga. 778; Miller *v.* Rich, 204 Ill. 444; Mason *v.* Odum, 210 Ill. 471, 102 Am. St. Rep. 180; Veeder *v.* McKinley-Lanning, L. & T. Co., 61 Neb. 892; Voorhees *v.* Bailey, 59 N. J. Eq. 292.

3. [Exceptions to General Rule] — In *Alabama.* — As supporting the third paragraph of note see Washington *v.* Bogart, 119 Ala. 377; Smith *v.* Lusk, 119 Ala. 394; Cottingham *v.* Moore, 128 Ala. 209.

In *Louisiana.* — Irwin *v.* Flynn, 110 La. 829.

In *Missouri.* — Baldwin *v.* Dalton, 168 Mo. 20.

In *Pennsylvania.* — See Reid *v.* Clendenning, 193 Pa. St. 406.

In *Tennessee.* — See Fennell *v.* Loague, 107 Tenn. 239.

**1148.** 1. Executor or Administrator May

- 1149.** *c. VALIDITY AND EFFECT — (1) In General.* — See notes 1, 2, 3.  
*(2) Ratification and Acquiescence.* — See note 4.
- 1150.** See notes 1, 2.  
*d. SETTING ASIDE SALE — (1) By Whom.* — See note 3.
- 1151.** See notes 1, 2.  
*(2) Against Whom — (b) Subsequent Purchasers.* — See notes 4, 5.
- 1152.** *(4) Time for Bringing Suit.* — See note 1.

**Purchase from Bona Fide Purchaser.** — *Loomis v. Rosenthal*, 34 Oregon 585.

**1148. 2. Strong Presumption of Indirection.** — See *Voorhees v. Bailey*, 59 N. J. L. 292.

**1149. 1. Purchase Merely Voidable and Not Void** — *Alabama*. — *Cottingham v. Moore*, 128 Ala. 209.

*Colorado*. — *French v. Woodruff*, 25 Colo. 339.

*Georgia*. — *Lowery v. Idleson*, 117 Ga. 778.

*Illinois*. — *Mason v. Odum*, 210 Ill. 471, 102 Am. St. Rep. 180.

*Louisiana*. — But see *contra*, *Willis v. Berry*, 104 La. 114; *Tucker v. Benedict*, 114 La. 203. For statutory exceptions to the rule of these cases see *supra*, this title, **1147. 3. In Louisiana.**

*Nebraska*. — *Shelly v. Creighton*, 65 Neb. 485, 101 Am. St. Rep. 630.

*Pennsylvania*. — *Shellahamer v. Wade*, 25 Pa. Co. Ct. 252.

*Wisconsin*. — *Gibson v. Gibson*, 102 Wis. 501.

**The Term "Void" as Used in a Statute.** — See *Veeder v. McKinley-Lanning, L. & T. Co.*, 61 Neb. 892.

**2. Purchase by Executor or Administrator Characterized as Void.** — *Branner v. Nichols*, 61 Kan. 356; *Sharpley v. Plant*, 79 Miss. 175, 89 Am. St. Rep. 588.

**3. Inaccurate Use of Term "Void."** — *Cottingham v. Moore*, 128 Ala. 209; *Shelby v. Creighton*, 65 Neb. 485, 101 Am. St. Rep. 630; *Gibson v. Gibson*, 102 Wis. 501. See also *Veeder v. McKinley-Lanning L. & T. Co.*, 61 Neb. 892.

**4. Purchase May Be Ratified.** — *Littell v. Hackley, (C. C. A.)* 126 Fed. Rep. 309; *Voorhees v. Bailey*, 59 N. J. Eq. 292. See also *Ross v. Battle*, 113 Ga. 742.

**Some of the Heirs May Ratify.** — *Compare Pirkle v. Cooper*, 113 Ga. 828, where the court said of the sale: "There could be no such thing as a partial annulment of it."

**Decree Against Representative for Proceeds of Sale.** — A decree settling the final account of the representative, which included the proceeds of the sale, amounts to an election to affirm the sale, where made without objection, the court and the beneficiaries having full knowledge of the facts. *Shelby v. Creighton*, 65 Neb. 485, 101 Am. St. Rep. 630; *Rhodes v. Caswell*, 41 N. Y. App. Div. 229.

**Discharge of Administrator by Consent Without an Accounting.** — Discharge of the administrator and his sureties without the rendition of an account, though with the consent of the heirs, does not estop them from suing to recover the land. *Tucker v. Benedict*, 114 La. 203.

**1150. 1. The Acceptance of the Purchase Money.** — *Voorhees v. Bailey*, 59 N. J. Eq. 292; *Rhodes v. Caswell*, 41 N. Y. App. Div. 229.

**Guardian and Ward.** — A guardian has no authority to consent that the property of his ward may be purchased by the administrator, in this

irregular way; and the receipt by him of the ward's proportionate amount of the proceeds will not estop the latter from having the sale set aside. Acts of the ward on reaching majority may, however, constitute ratification. *Moore v. Carey*, 116 Ga. 28, 119 Ga. 91.

**2. Acquiescence Presumed from Lapse of Time** — *Arkansas*. — *Griffin v. Caldwell*, 72 Ark. 451.

*Illinois*. — *Mason v. Odum*, 210 Ill. 471, 102 Am. St. Rep. 180.

*Kentucky*. — *Johnson v. Poff*, 109 Ky. 396.

*Tennessee*. — *Fennell v. Loague*, 107 Tenn. 239.

*Missouri*. — See also *Baldwin v. Dalton*, 168 Mo. 20.

**When Acquiescence Begins.** — *Branner v. Nichols*, 61 Kan. 356.

**The Length of Time.** — *Johnson v. Poff*, 109 Ky. 396.

**3. Any Party in Interest May Set Aside Sale** — *Arkansas*. — *Montgomery v. Black*, (Ark. 1905) 86 S. W. Rep. 1006.

*Georgia*. — *Pirkle v. Cooper*, 113 Ga. 828.

*Illinois*. — *Miller v. Rich*, 204 Ill. 444.

*Iowa*. — *Walker v. Walker*, (Iowa 1905) 102 N. W. Rep. 435.

*Louisiana*. — *Tucker v. Benedict*, 114 La. 203.

**1151. 1. Strangers Cannot Question Validity.** — *Williams v. J. P. Williams Co.*, 122 Ga. 178, 106 Am. St. Rep. 100.

**A Legatee or Distributee Has No Right of Action,** where if the sale were set aside the indebtedness against it would consume its value, leaving nothing to be distributed. *Trahan v. Simon*, 51 La. Ann. 809.

**2. The Representative or Persons Interested with Him.** — *Shellahamer v. Wade*, 25 Pa. Co. Ct. 252. See also *Fahrig v. Schimpff*, 199 Pa. St. 423; *American Freehold Land Mortg. Co. v. Macdonell*, 93 Tex. 398, *reversing* (Tex. Civ. App. 1899) 54 S. W. Rep. 259.

**4. Subsequent Purchasers.** — *Sharpley v. Plant*, 79 Miss. 175, 89 Am. St. Rep. 588; *Veeder v. McKinley-Lanning L. & T. Co.*, 61 Neb. 892.

**5. Bona Fide Purchasers Protected.** — *Irwin v. Flynn*, 110 La. 829.

A sale by an administrator to his wife, of property purchased by him at his own sale, may be valid if she bought in good faith for value, and without notice. *Moore v. Carey*, 116 Ga. 28.

**1152. 1. Suit Must Be Brought Within Reasonable Time.** — *Cottingham v. Moore*, 128 Ala. 209; *Lowery v. Idleson*, 117 Ga. 778; *Griffin v. Stephens*, 119 Ga. 138.

**Statutes of Limitation.** — *Salinger v. Black*, 68 Ark. 449; *Mason v. Odum*, 210 Ill. 471, 102 Am. St. Rep. 180; *Willis v. Berry*, 104 La. 114; *Cole v. Boyd*, (Neb. 1903) 93 N. W. Rep. 1003; *Fennell v. Loague*, 107 Tenn. 239; *Gibson v. Gibson*, 108 Wis. 102.

A statute of limitations of two years where



- 1152.** (6) *Accounting on Setting Aside Sale.* — See note 5.
- 1153.** If He Has Sold the Premises. — See note 1.
17. *Conveyance* — *a.* NECESSITY OF DEED. — See notes 5, 6, 7.
- 1154.** *b.* AUTHORITY TO EXECUTE — (1) *Order or Decree to Convey* —
- (a) *Necessity.* — See note 1.
- 1155.** (b) *Administrator De Bonis Non.* — See note 2.
- c.* TO WHOM MADE — (2) *Assignee of or Person Designated by Purchaser.* — See note 6.
- d.* TIME FOR MAKING DEED. — See note 8.
- 1156.** *e.* VALIDITY AND REQUISITES OF DEED — (1) *Recitals* —
- (a) *Recital of Authority to Convey.* — See note 4.
- 1157.** (b) *Recital of Grantor's Character.* — See note 4.
- (c) *Recital of Consideration.* — See note 6.
- (d) *Description of Property.* — See note 8.

"the sale is made in good faith and the purchase money paid" does not apply where there was a secret agreement between the purchaser and the administrator that a debt due him from the latter should be counted as cash in the payment of the amount bid. *Sharpley v. Plant*, 79 Miss. 175, 89 Am. St. Rep. 588.

**Adverse Possession.** — In equity personal representatives are trustees, holding the titles which they have for the benefit of the estate, and therefore they cannot use the deeds, conveying to them such titles, as color of title made in good faith. *Miller v. Rich*, 204 Ill. 444.

**1152. 5. Accounting by Executor or Administrator in Possession.** — *Miller v. Rich*, 204 Ill. 444; *Branner v. Nichols*, 61 Kan. 356.

**Profits Inadequate to Reimburse Representative.** — If the proceeds be inadequate to reimburse the representative for his outlay, he must bear the loss; and he cannot, to avoid such loss, demand that the court decree a resale to be conducted by some one other than himself, in order that he may be a competitive bidder, and thus force the property to bring a higher price than it otherwise would. *Pirkle v. Cooper*, 113 Ga. 828.

**1153. 1. Resale to Bona Fide Purchaser — Accounting for Profit.** — *Cope's Estate*, 27 Pa. Co. Ct. 366, 4 Lack. Jur. (Pa.) 45.

**5. Rule that Deed Is Necessary to Pass Title.** — *Tomlinson v. Trenton, etc.*, St. R. Co., 31 Pa. Co. Ct. 81.

This rule does not prevent the title being good without deed, if the money is paid and the purchaser goes into possession by consent. *Frick Coke Co. v. Laughead*, 203 Pa. St. 168.

**6. It Was Formerly the Rule in Texas.** — Judgment on a note given for the purchase price and foreclosure of lien on the land securing the payment thereof will perfect the sale. *Miller v. Anders*, 21 Tex. Civ. App. 72.

**7. Deed Held Merely Evidence of Title Vested in Purchaser.** — As supporting the second paragraph of note, see also *Whitaker v. Thayer*, (Tex. Civ. App. 1905) 86 S. W. Rep. 364, citing *Erhart v. Bass*, 54 Tex. 97.

**1154. 1. Order to Convey Required by Statute.** — *Matter of Leonis*, 138 Cal. 194; *Hohokus Tp. v. Erie R. Co.*, 65 N. J. L. 353.

In *Indiana* the statute requires that the administrator's deed shall describe the kind of record, the number of the volume, and the page wherein the order or judgment of the court is

entered, by virtue of which the administrator is authorized to execute the particular deed. *Pierce v. Vansell*, (Ind. App. 1905) 74 N. E. Rep. 554.

**Formal Order Not Always Necessary.** — *Joyner v. Futrell*, 136 N. Car. 301.

**1155. 2. Rule that Administrator De Bonis Non May Execute Deed.** — *Goodwynne v. Belterby*, 116 Ga. 901, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1155. See also *Irwin v. Guthrie*, 198 Pa. St. 267.

**6. Deed to Person Designated by Purchaser.** — *West v. Burgie*, (Ark. 1905) 88 S. W. Rep. 557, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1155.

**8. Relation Back of Deed Executed Before Confirmation of Sale.** — Until the confirmation of the sale the administrator has no power to convey, but upon confirmation a deed previously made will take effect. *El Paso v. Ft. Dearborn Nat. Bank*, 96 Tex. 496, reversing on other grounds (Tex. Civ. App. 1903) 71 S. W. Rep. 799.

**1156. 4. Authority to Sell Must Be Recited.** — A deed without the recital will have effect as a conveyance if the other proceedings showing authority to make it are produced. *El Paso v. Ft. Dearborn Nat. Bank*, 96 Tex. 496, reversing on other grounds (Tex. Civ. App. 1903) 71 S. W. Rep. 799; *Odell v. Kennedy*, 26 Tex. Civ. App. 439.

**Recital as Evidence.** — A mere recital in the deed that the sale by the administrator was in pursuance of an order of the ordinary granting leave to sell is not even *prima facie* evidence that such order was in fact granted. *Waller v. Hogan*, 114 Ga. 383.

**1157. 4. Recital of Grantor's Character.** — The deed is sufficient to pass title without reciting the official character of the grantor. *Odell v. Kennedy*, 26 Tex. Civ. App. 439.

**6. Recital as Evidence.** — Recitals showing the consideration for the deed are but hearsay declarations and cannot be used as evidence to show an equitable title in the grantee, where his legal title fails owing to the invalidity of the sale. *Walker v. Patterson*, 33 Tex. Civ. App. 650.

**8. Deed Must Describe Property Sold.** — *Nantahala Marble, etc., Co. v. Thomas*, (C. C. A. 106 Fed. Rep. 379.

When the order grants leave to sell certain specified land, before a plaintiff claiming title

**1158.** (6) *Presumption of Regularity.* — See note 7.

**1159.** *f. OPERATION AND EFFECT OF DEED* — (1) *In General* — *Covenants of Warranty or of Seizin.* — See notes 2, 3.

(2) *Deed as Evidence of Recitals Therein.* — See notes 4, 5.

**18. Disposal of Proceeds** — *a. COSTS AND EXPENSES OF SALE.* — See note 6.

*b. DISCHARGE OF INCUMBRANCES.* — See note 7.

**1160.** *c. DISTRIBUTION OF SURPLUS.* — See note 1.

**XI. DISTRIBUTION OF ESTATE** — **1. Duty to Pay Legacies and Distributive Shares** — *a. LEGACIES* — (1) *In General.* — See note 2.

under an administrator's deed executed in pursuance of such order can recover the land conveyed in such deed, it must affirmatively appear that the land described in the order is the same land conveyed by the deed and for which the action is brought. *Hall v. Davis*, 122 Ga. 252.

**Description Held Sufficient.** — *El Paso v. Ft. Dearborn Nat. Bank*, 96 Tex. 496, *reversing* on other grounds (Tex. Civ. App. 1903) 71 S. W. Rep. 799.

**1158. 7. Presumption of Regularity.** — *Cairns v. Horsman*, 35 N. Bruns. 436.

An administrator's deed is not subject to impeachment because the land conveyed did not appear in the original inventory of the decedent's estate. It will be presumed that a supplementary inventory was filed as provided by statute. *Jamison v. Dooley*, 34 Tex. Civ. App. 428.

**1159. 2. Covenants of Warranty or Seizin Not Binding on Estate.** — *Whiteside v. Flora*, 27 Pa. Co. Ct. 25; *Dallas County v. Club Land, etc.*, Co., 95 Tex. 200, *reversing* in part on other grounds 26 Tex. Civ. App. 449.

**3. Covenants Referable to Representative Character Not Personally Binding.** — *Dallas County v. Club Land, etc.*, Co., 95 Tex. 200, *reversing* in part on other grounds 26 Tex. Civ. App. 449.

**4. Deed as Evidence of Facts Recited — Lapse of Time.** — *Pierce v. Vansell*, (Ind. App. 1905) 74 N. E. Rep. 554.

**5. The Michigan Statute** provides that such deeds shall be *prima facie* evidence of the regularity of all the proceedings required by law anterior to the making thereof, and of the authority of the representative to execute the same. *Wheelock v. Lake*, 117 Mich. 11.

**6. Payment of Costs and Expenses Out of Proceeds of Sale.** — *Houston v. Houston*, 2 Marv. (Del.) 270; *Neguelou's Succession*, 52 La. Ann. 1495; *Haile's Succession*, 52 La. Ann. 1529; *Bayle's Estate*, 12 Pa. Dist. 73, 28 Pa. Co. Ct. 125, 19 Montg. Co. Rep. (Pa.) 134; *Burgard's Estate*, 26 Pa. Co. Ct. 177; *Greer v. Riley*, 92 Tex. 699.

**Sale to Creditor Holding Lien on Premises — Pennsylvania.** — In Pennsylvania, by statute, where the purchaser has a lien against the premises sold, the amount due him may be applied on his bid; but in any event a sum sufficient to cover all legal costs payable out of the proceeds, including commissions on the sale, can be demanded. *Becker v. Espenshade*, 8 Pa. Dist. 525.

**Costs and Expenses of Administration.** — General creditors must be postponed to the necessary burdens of administration; and so far the proceeds of the sale of real estate are like the other assets. The administrator is entitled to

take out his commission, taxes paid by him, and expenses of administration, including reasonable compensation for necessary legal assistance whether in the matter of the sale or other matters arising out of his duties. *Elstroth v. Young*, 88 Mo. App. 418. *Compare Elstroth v. Young*, 94 Mo. App. 351, holding that the administrator is entitled to his commission for distributing the proceeds of the sale, but the fund cannot be used for the purpose of making good deficiencies in the expenses of administration. *Citing Ritchey v. Withers*, 72 Mo. 556.

An attorney's fee for services rendered the administrator is not entitled to priority of payment out of the proceeds over a valid mortgage lien covering the premises sold. *Day v. Davis*, (Ky. 1898) 47 S. W. Rep. 769.

Costs and expenses of the general administration are not payable out of the proceeds of the sale of real estate, under the *New York* statute; but only such amount as may be found due the administrator on account of debts and funeral expenses. *Matter of Summers*, (Surrogate Ct.) 37 Misc. (N. Y.) 575.

An attorney employed by an administrator to bring action to sell lands in aid of assets is entitled to a fee out of the proceeds of such sale. *Glen v. Gerald*, 64 S. Car. 236.

**Expense of Publishing Handbills, etc., Announcing Sale.** — The expense of publishing handbills, circulars, etc., relating to the sale is not an expense for publishing legal notices of the sale, but for extra advertising; and not chargeable against the proceeds, in the absence of agreement or order of court sanctioning it. *Matter of McGee*, 65 N. Y. App. Div. 460.

**Time When Allowance Made.** — An allowance for the expenses, including counsel fee, of a sale of real estate cannot be made until the sale has been had and the fund for their payment secured. *Jennings's Estate*, 10 Pa. Dist. 90.

**7. Discharge of Incumbrances.** — *Matter of McGee*, 65 N. Y. App. Div. 460; *Ambrose v. Byrne*, 61 Ohio St. 146; *Sheridan's Estate*, 10 Kulp (Pa.) 225; *Rowe's Estate*, 11 Kulp (Pa.) 36; *Barnes v. Scottish-American Mortg. Co.*, 29 Tex. Civ. App. 443; *Shahan v. Shahan*, 48 W. Va. 477, 86 Am. St. Rep. 68, *citing* 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1159. See also *Smith's Estate*, 8 Lack. Leg. N. (Pa.) 308.

**1160. 1. Surplus Passes as Real Estate.** — *Smith v. Smith*, 174 Ill. 52; *Elstroth v. Young*, 88 Mo. App. 418.

**2. Duty to Pay Legacies Subordinate to Duty to Pay Debts.** — *Murphy v. Busick*, 22 Ind. App. 247, 72 Am. St. Rep. 304; *Rogers v. State*, 26 Ind. App. 144; *Constable v. Camp*, 87 Md. 173; *Matter of Jones*, (Surrogate Ct.) 28 Misc. (N.



**1160.** (2) *Assent of Executor.* — See note 4.

**1161.** The Effect of the Assent. — See notes 1, 2.

No Particular Form. — See note 4.

**1162.** (3) *Taking Security from Legatee for Life.* — See note 1.

**1163.** *b.* DISTRIBUTIVE SHARES. — See notes 1, 2.

**2. By Whom Payment or Delivery May Be Made — a. BY EXECUTOR OR ADMINISTRATOR.** — See note 3.

**1164.** See note 1.

**3. To Whom Payment or Delivery May Be Made — a. IN GENERAL.** — See notes 3, 4.

Y.) 338; *Baptist Female University v. Borden*, 132 N. Car. 476. See also the title LEGACIES AND DEVISEES, vol. 18, p. 785.

**Specific Legacies.** — *Ford v. Westervelt*, 55 N. J. Eq. 485.

**The Retention of Assets.** — See *In re Driskel*, 100 N. Y. App. Div. 171.

**Specific and General Legacies.** — Specific legacies cannot be made liable for debts until general legacies are entirely exhausted. *Constable v. Camp*, 87 Md. 173.

**Payment of Taxes.** — The *California* statute (Pol. Code Cal., § 3752), requiring all taxes to be paid before distribution can be made, has for its object the protection of the revenues of the state. If the tax is in fact paid, it is no objection to distribution that there is an outstanding tax title in the person who pays it. *Coursen's Estate*, 133 Cal. xix, 65 Pac. Rep. 965.

**Expenses of Administration.** — The executor or administrator is bound to administer the estate, and the expense incurred, so far as it is reasonable and necessary, is a charge to be paid before distribution can be had. *Matter of Hatch*, 97 N. Y. App. Div. 496, reversed 182 N. Y. 320. See the title DEBTS OF DECEDENTS, vol. 8, p. 1036.

**1160. 4. Assent of Executor to Legacy Required.** — See generally on the subject of this section, the title LEGACIES AND DEVISEES, vol. 18, p. 786 *et seq.*

**Assent Compelled by Court of Equity.** — *Lester v. Stephens*, 113 Ga. 495; *Johnson v. Porter*, 115 Ga. 401.

**1161. 1. Assent Passes Legal Title to Legatee.** — *People's Nat. Bank v. Cleveland*, 117 Ga. 908; *Phillips v. Smith*, 119 Ga. 556; *Watkins v. Gilmore*, 121 Ga. 488.

**2. Assent Is Irrevocable.** — *Watkins v. Gilmore*, 121 Ga. 488; *Matter of McCarthy*, (Surrogate Ct.) 26 Civ. Pro. (N. Y.) 397.

Where nothing further appears than that legatees and devisees of the property of a decedent lived with the executrix, who had a life interest in it, until her death and thereafter remained in possession, no such assent by the executrix is shown as will prevent due administration of the estate for the payment of debts. *Harris v. Cole*, 114 Ga. 295.

**4. Assent May Be Either Express or Implied.** — *Matter of McCarthy*, (Surrogate Ct.) 26 Civ. Pro. (N. Y.) 397.

**Presumption of Assent.** — *Haven v. Haven*, 60 N. H. 204; *Phillips v. Smith*, 119 Ga. 556.

**1162. 1. Taking Security from Life Legatee.** — See on the subject treated in this section, the title LEGACIES AND DEVISEES, vol. 18, p. 789 *et seq.*

**1163. 1. Only Assets Remaining After Payment of Debts Are Subject to Distribution.** — *Wood v. Donaldson*, 87 Mo. App. 1, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1163.

**2. Duty to Apply for Order of Distribution.** — *Wood v. Donaldson*, 87 Mo. App. 1, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1163.

**3. Administrator Who Is Nominee of Person Entitled to Administer.** — Where letters of administration have been granted to a person as attorney of the person entitled, the attorney is administrator for all purposes, and is not justified in paying over assets to his principal for distribution, but must distribute them himself. *In re Rendell*, (1901) 1 Ch. 230.

**Duty of Administrator and Not of Court.** — The act of making distribution is the primary duty of administrators and not of the court. The court, by decree, determines the rights of the parties, and directs the amounts to be paid to each, but the administrators are to make the payment and distribution as so directed. *Matter of Te Culver*, (Surrogate Ct.) 22 Misc. (N. Y.) 217. And see *infra*, this title, **1164. 3. Payment into Court.**

**1164. 1. Trust Property.** — The personal representative of a deceased executor or administrator cannot be compelled to deliver to a beneficiary property held in trust by the first decedent. *Matter of Trask*, (Surrogate Ct.) 27 Civ. Pro. (N. Y.) 7.

**3. Responsibility of Finding Distributee Rests with Representative.** — The function of the court is ended when it has ascertained the name and the share of the distributee; the responsibility of finding the distributee rests with the accountant. *Brooke's Estate*, 13 Pa. Dist. 29, 29 Pa. Co. Ct. 466.

**Payment to Wrong Person — England.** — *In re Timmis*, (1902) 1 Ch. 176.

*California.* — *Matter of Kennedy*, 120 Cal. 458; *Matter of Cummins*, 143 Cal. 525.

*Connecticut.* — *State v. Whitehouse*, 75 Conn. 410.

*Hawaii.* — *Matter of Phillips*, 12 Hawaii 284.

*Iowa.* — *Kintz v. Schoentgen*, (Iowa 1900) 84 N. W. Rep. 679.

*Montana.* — *Kirk v. Baker*, 26 Mont. 190.

*Nebraska.* — *Boales v. Ferguson*, 55 Neb. 565.

*New York.* — *Seger v. Farmers' L. & T. Co.*, 103 N. Y. App. Div. 39.

*Ohio.* — *Banning v. Gotshall*, 62 Ohio St. 210; *In re Koenhnken*, 25 Ohio Cir. Ct. 245, modifying 11 Ohio Dec. 799, 8 Ohio N. P. 657.

*Pennsylvania.* — *In re Starr*, 190 Pa. St. 162; *Bear's Estate*, 9 Pa. Super. Ct. 492, 43 W. N. N. C. (Pa.) 469.



**1164. Payment to Third Persons.** — See note 5.

**1165. b. INFANTS.** — See notes 1, 3.

*South Carolina.* — Turnipseed v. Sirrine, 60 S. Car. 272.

*Tennessee.* — Faver v. Parker, 101 Tenn. 141. See also *infra*, this title, **1174. 5.**

The representative cannot recover payments voluntarily made to a wrong person, not under a mistake of fact, but under a mistake of law. Phillips v. McConica, 59 Ohio St. 1, 69 Am. St. Rep. 753.

Where an administrator allowed a person not entitled to share in the distribution, it was held, in determining his liability, that the rightful heirs should be held to account for so much of the fruits of the administrator's unlawful disbursement of trust funds as came to them, by way of gift or inheritance, from the person to whom he improperly gave recognition as an heir. Rusk v. Hill, 117 Ga. 722.

**Insane or Otherwise Incompetent Legatees or Distributees.** — A committee of the property of an incompetent is authorized to receive payment. Wright v. Hayden, (Supm. Ct. Tr. T.) 31 Misc. (N. Y.) 116.

**Payment to Legatee After Notice of Assignment.** — A payment to a legatee after notice of an assignment of his interest is at the risk of the personal representative; and he is not entitled to credit therefor on the assignment being sustained. Stewart v. Fallon, (N. J. 1904) 58 Atl. Rep. 96.

**Payment into Court.** — The court has no jurisdiction to order funds of the estate paid into court, in the absence of a statute authorizing it; and such payment will not relieve the personal representative from liability for any loss sustained thereby. Matter of Sarment, 123 Cal. 331; Matter of Te Culver, (Surrogate Ct.) 22 Misc. (N. Y.) 217; Matter of Sackett, (Surrogate Ct.) 38 Misc. (N. Y.) 463.

An executor is entitled to discharge the duties of his trust, and he should not be required to surrender the estate committed to his charge by paying the funds into court before distribution is ordered, unless for grave reasons. Reed v. Reed, 74 S. W. Rep. 207, 24 Ky. L. Rep. 2438.

An order directing an administrator to pay money into court is not complied with by a payment made to the judge. It must be made to the county clerk, who alone has the right to receive and is the custodian of money paid into the probate court under its orders. James v. Craighead, (Tex. Civ. App. 1902) 69 S. W. Rep. 241.

**Payments under Order of Court.** — See *infra*, this title, **1174. 3.**

**1164. 4. Literal Compliance with Will Not Always Sufficient.** — See Henning v. Maclean, 2 Ont. L. Rep. 169, affirmed 4 Ont. L. Rep. 666, which was affirmed 33 Can. Sup. Ct. 305.

**5. Payment to Third Persons.** — Spear v. Banks, 125 Ala. 227; Matter of Mount, (Surrogate Ct.) 27 Misc. (N. Y.) 411; Matter of Ryder, 41 N. Y. App. Div. 247; *In re* Stephens, (Surrogate Ct.) 64 N. Y. Supp. 990. Compare James v. Withers, 126 N. Car. 715, Clark, J., dissenting.

**Jurisdiction of Probate Court Where Validity of Assignment Is Disputed.** — The probate court has

no jurisdiction to determine the validity of an equitable assignment among the heirs. The remedy is by bill in equity. Crockett v. Sibley, (N. H. 1905) 61 Atl. Rep. 469.

**Payment to Attorney.** — Counsel appearing before an auditing judge for a distributee, legatee, or creditor always has authority to receive the amount awarded his client and to give the requisite acquittance. Whiteside's Estate, 8 Pa. Dist. 274.

**Adverse Claim to Legacy or Distributive Share.** — In some jurisdictions adverse claims to a legacy or distributive share cannot be determined by the probate court in ordering distribution, but must be adjudicated in the common-law courts. Bergeron v. Cote, 98 Me. 415; Matter of Arkenburgh, 38 N. Y. App. Div. 473, cited Dunn v. Arkenburgh, 48 N. Y. App. Div. 518, which was affirmed on opinion below, 165 N. Y. 669; Matter of Meyer, 95 N. Y. App. Div. 443, affirmed on opinion below, 181 N. Y. 562, citing Matter of Randall, 152 N. Y. 508, which reversed 80 Hun (N. Y.) 229; Matter of Wood, (Surrogate Ct.) 38 Misc. (N. Y.) 64; Matter of Losee, (Surrogate Ct.) 46 Misc. (N. Y.) 363; *In re* Stephens, (Surrogate Ct.) 64 N. Y. Supp. 990.

**Burden of Proof.** — The burden of proving that a payment made to a third person was authorized is upon the legal representative. Matter of Phillips, 12 Hawaii 284.

**1165. 1. Payment to the Father or Other Relative of an Infant.** — See Faver v. Parker, 101 Tenn. 141.

Where a relative to whom payments have been made subsequently becomes general guardian of the infant, the administrator is entitled to credit for such payments. Matter of Schweibert, (Surrogate Ct.) 25 Misc. (N. Y.) 464.

**3. Payment to General Guardians.** — Gitt's Estate, 203 Pa. St. 263. See also *Re* Harrison, 18 Ont. Pr. 303.

**Payment to Guardian Ad Litem.** — Where the legacy was small and the expense of having a guardian appointed would absorb a large part of it, the court, in a suit to construe the will, ordered it paid to the guardian *ad litem* to be held by him until the minors attained their majority; unless in the meantime general guardians should be appointed or the court order otherwise. Cook v. Providence First Universalist Church, 23 R. I. 62.

**Foreign Guardian.** — Banning v. Gotshall, 62 Ohio St. 210.

**Contra.** — Gardiner v. Thorndike, 183 Mass. 81, where the court said: "Our attention has been called to no case, nor are we aware of any, where a voluntary payment made to a foreign guardian, like this one, has been declared invalid, except where forbidden by some statute of the state where the payment was made. Under the common law we think that, as in the case of an administrator or executor, so in the case of a guardian, a voluntary payment to the foreign representative or his authorized agent is good, and will discharge the debtor *pro tanto*." Conn. 410; Buck's Estate, 10 Pa. Dist. 330.

**Contra** by statute, State v. Whitehouse, 75

**1166.** *d.* REPRESENTATIVES OF DECEASED LEGATEES AND DISTRIBUTEES. — See notes 3, 4.

*e.* ABSENT OR UNKNOWN LEGATEES AND DISTRIBUTEES. — See note 5.

**4. Time for Payment or Delivery — *a.* IN GENERAL — In the United States.** — See note 8.

**1167.** See notes 1, 2.

**1166. 3. Payment to Personal Representative of Deceased Legatee or Distributee.** — *Banning v. Gotshall*, 62 Ohio St. 210; *Anderson v. Anderson*, 183 Pa. St. 480, 41 W. N. C. (Pa.) 329; *Bergdoll's Estate*, 11 Pa. Dist. 701, 699; *Witmer's Estate*, 19 Lanc. L. Rev. 324; *Uffner v. Lewis*, 27 Ont. App. 242. See also *Bear's Estate*, 9 Pa. Super. Ct. 492, 43 W. N. C. (Pa.) 469; *In re Moran*, 13 Pa. Super. Ct. 251.

**Administrator Ad Litem.** — Where there is no general administration an administrator *ad litem* may be appointed to receive payment. *Keith v. McCord*, 140 Ala. 402.

**4. Payment to the Distributee of a Legatee.** — *Ward v. Ivcs*, 75 Conn. 598; *In re Sprague*, 125 Mich. 357, 7 Detroit Leg. N. 520; *Matter of Maybee*, (Surrogate Ct.) 40 Misc. (N. Y.) 518; *Matter of Losee*, (Surrogate Ct.) 46 Misc. (N. Y.) 363; *Schrack's Estate*, 9 Pa. Dist. 149; *Ogden's Estate*, 9 Kulp (Pa.) 412.

**5. Absent or Unknown Legatees or Distributees — Application to Court for Instructions.** — In *Alaska* it seems that payment should be ordered to be made to the clerk of the District Court, who is *ex officio* secretary and treasurer of the district. *In re McIntyre*, 1 Alaska 73.

The consul-general of Italy has the right to receive a distributive share of the estate of a deceased Italian subject, in behalf of a distributee resident in Italy, and the latter need not be cited and paid directly. *Matter of Davenport*, (Surrogate Ct.) 43 Misc. (N. Y.) 573, citing *Matter of Tartaglio*, (Surrogate Ct.) 12 Misc. (N. Y.) 245.

**Statutory Regulations.** — In many jurisdictions statutory regulations exist for cases in which legatees or distributees are absent or unknown. *Missouri*. — *Matter of Glover*, 101 Mo. App. 725.

*New York*. — Code Civ. Pro. (N. Y.), §§ 2747, 2784, 2754; *Matter of Mitchell*, 88 N. Y. App. Div. 504; *Kinneally v. People*, 98 N. Y. App. Div. 102; *Matter of Te Culver*, (Surrogate Ct.) 22 Misc. (N. Y.) 217.

*Oregon*. — *State v. O'Day*, 41 Oregon 495.

*Canada*. — *Uffner v. Lewis*, 27 Ont. App. 242.

**Presumption of Death of Legatee or Distributee.** — An absent or unknown legatee or distributee will not be presumed to be dead for the purpose of distributing his share in the estate, unless the circumstances of the case are such that his not having been heard of for a long period of years cannot be accounted for without assuming his death. *Dunn v. Travis*, 56 N. Y. App. Div. 317.

In *Pennsylvania*, in case payment is made to the supposed heirs of a person presumed to be dead, security will be exacted for repayment if it turns out that he is still alive. Generally, however, his estate will not be distributed without an administration founded on the presump-

tion, for which provision is made by statute. *McCann's Estate*, 14 Pa. Dist. 316; *Ziegler's Estate*, 25 Pa. Co. Ct. 611 (citing *Meaher's Estate*, 10 Pa. Co. Ct. 221), on subsequent hearing 19 Lanc. L. Rev. 358, 16 York Leg. Rec. (Pa.) 79, 2 Blair Co. Rep. (Pa.) 322; *Sherwood's Estate*, 26 Pa. Co. Ct. 589, where the court said: "Where a presumption of death arises because of the absence of a person for a period of seven years his estate ought not to be distributed without an administration, for the court would not be justified in decreeing payment of the share of such person in an estate without requiring security. An administration is the logical and most convenient method of discharging the estate of a decedent from a further or continuing responsibility for such share." *Affirmed* on other grounds 206 Pa. St. 465.

And see *supra*, this title, **729. 4. 760. 2.**

**8. Time for Payment of Legacies and Distributive Shares in United States — Two Years Allowed.** — *In re Pound*, 166 Mo. 419; *Edwards v. Lemmond*, 136 N. Car. 329.

**One Year Allowed.** — *Murphy v. Busick*, 22 Ind. App. 247, 72 Am. St. Rep. 304; *Macy v. Mercantile Trust Co.*, (N. J. 1905) 59 Atl. Rep. 586; *Congregational Unitarian Soc. v. Hale*, 29 N. Y. App. Div. 396; *Matter of Bronner*, (Surrogate Ct.) 30 Misc. (N. Y.) 31; *Matter of Stanton*, (Surrogate Ct.) 41 Misc. (N. Y.) 278; *Rastaetter's Estate*, 15 Pa. Super. Ct. 549; *Haggerty's Estate*, 13 Pa. Dist. 663, 29 Pa. Co. Ct. 57; *Robinson's Estate*, 24 Pa. Co. Ct. 588; *Forney v. Ebersole*, 18 Lanc. L. Rev. 207; *Redfearn v. Craig*, 57 S. Car. 534; *Woolley v. Sullivan*, 92 Tex. 28.

**1167. 1. Will Extending Time for Distribution.** — *Brown v. Ferren*, (N. H. 1904) 58 Atl. Rep. 870; *Macy v. Mercantile Trust Co.*, (N. J. 1905) 59 Atl. Rep. 586.

**2. Payment Not Compellable Within Statutory Period.** — *Matter of Sheid*, 122 Cal. 528; *In re McAlpin*, 8 Ohio Dec. 654; *Rastaetter's Estate*, 15 Pa. Super. Ct. 549.

**Decree of Distribution.** — Ordinarily a distributee cannot maintain an action against the administrator until there has been a decree of distribution. *Flynn v. Flynn*, 183 Mass. 365.

**Estates Ready for Distribution.** — By statute in some states it is the duty of the representative to pay all debts and legacies in full and distribute the estate, whenever the condition of the estate warrants it. *Sinnott v. Kenaday*, 12 App. Cas. (D. C.) 115; *Johanson v. Hoff*, 70 Minn. 140.

It is not the full and complete administration of the estate that marks the period for distribution, but the payment of or allowance for all debts and claims made known against the estate after notice given; and when that is done, it at once becomes the duty of the administrator to deliver up and distribute the residue of the estate

**1167.** *b.* PAYMENTS WITHIN USUAL OR STATUTORY PERIOD. — See notes 4, 5.

**1168.** See note 1.

*c.* POSTPONING PAYMENT. — See note 2.

to those entitled thereto. *Sterrett v. National Safe Deposit, etc., Co.*, 10 App. Cas. (D. C.) 131.

**1167. 4. Authority to Pay Legacies Before End of Year.** — *Kraus v. Kraus*, 81 Minn. 484, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1167; *Re Holland*, 3 Ont. L. Rep. 406.

Distribution on a voluntary accounting under Code Civ. Pro. N. Y., § 2728, subd. 2, can only be had where the accounting is by the administrator of an intestate estate. In case of executors the law contemplates that the estate shall remain within the jurisdiction of the court and in the hands of the representative, until the expiration of one year from the issuance of letters. *Matter of Lawson*, (Surrogate Ct.) 36 Misc. (N. Y.) 96; *Matter of Lansing*, (Surrogate Ct.) 37 Misc. (N. Y.) 177. See also *Matter of Bronner*, (Surrogate Ct.) 30 Misc. (N. Y.) 31.

**5. Payments in Advance of Distribution.** — An administrator may, if he wishes, assume the risk of payment to the proper parties. *State v. Whitehouse*, 75 Conn. 410, citing *Merwin's Appeal*, 75 Conn. 33; *Yakel v. Yakel*, 96 Md. 240; *Kraus v. Kraus*, 81 Minn. 484. See also *infra*, this title, **1174. 5 et seq.**

An administrator cannot be charged with maladministration for distributing property without a decree of the court authorizing it, if it is done after the debts of the estate and the costs and charges of administration have been paid, and if it is made to those having the right to the property. *Griffin v. Warburton*, 23 Wash. 231, *distinguishing* cases decided under a former statute.

Administrators may vest in the distributees of an estate both title and possession of their respective shares of its property before an order of distribution is made by the probate court. *Burnes v. Burnes*, (C. C. A.) 137 Fed. Rep. 781, *affirming* 132 Fed. Rep. 485.

**1168. 1. Payment Compellable Within Statutory Period** — In *Illinois*. — *Murdock v. Murdock*, 111 Ill. App. 375.

**In New York.** — A judicial settlement may be had before the estate is ready for distribution unless distribution in kind is agreed to or ordered, as is indicated by the statute, which provides that, where an account is judicially settled "and any part of the estate remains and is ready to be distributed \* \* \* the decree must direct the payment and distribution thereof." Code Civ. Pro., § 2743. *Matter of Thompson*, (Surrogate Ct.) 41 Misc. (N. Y.) 420, *affirmed* without opinion 87 N. Y. App. Div. 609, 178 N. Y. 554.

Code Civ. Pro. N. Y., § 2722, enables creditors to obtain payment in whole or in part in advance of the settlement of the estate, whether the estate is solvent or insolvent. *Matter of Miner*, (Surrogate Ct.) 39 Misc. (N. Y.) 605, *citing* *Thomson v. Taylor*, 71 N. Y. 217, *distinguishing* *McKeown v. Fagan*, 4 Redf. (N. Y.) 320.

**In California.** — *Matter of Hale*, 121 Cal. 125; *Matter of Mitchell*, 121 Cal. 391; *In re Dutard*,

(Cal. 1905) 81 Pac. Rep. 519; *In re Thayer*, (Cal. 1905) 81 Pac. Rep. 658. See also *Matter of Spanier*, 120 Cal. 698.

A partial distribution on the petition of the representative is without jurisdiction and void, the statute authorizing it to be made only on the petition of an heir, devisee, or legatee. *Alcorn v. Buschke*, 133 Cal. 655.

In making partial distribution it is necessary to take into consideration the amount which will be required on final settlement for commissions, attorney's fees, and charges to close the administration. *Matter of Straus*, 144 Cal. 553.

**In Montana and Nevada** the *California* statute has been enacted. *In re Foley*, 24 Nev. 197, 291.

Assignees of legatees or distributees under undisputed assignments, and persons who, though not recognized in the will, become distributees by virtue of a compromise agreement entered into by the persons beneficially interested in the estate, are heirs, devisees, or legatees, within the provision giving such persons the right to apply for such distribution. *In re Davis*, 27 Mont. 490, 235; *Ingersoll v. Coram*, 127 Fed. Rep. 418.

**In Missouri** probate courts have jurisdiction to make orders of distribution for the payment of debts at each annual settlement of an administrator, and are required to do so by the administration law. *Elstroth v. Young*, 78 Mo. App. 651.

**Specific Legatees.** — The legatee of a specific legacy is entitled to the possession immediately upon the death of the testator, unless the property may be needed to pay debts. *Robinson's Estate*, 24 Pa. Co. Ct. 588. *Compare* *Bohrer's Estate*, 7 Pa. Dist. 307.

And see also *infra*, this title, **1177. 1 et seq.**

**2. Postponing Distribution.** — *Matter of Withers*, 23 N. Y. App. Div. 404; *Matter of McCarthy*, (Surrogate Ct.) 26 Civ. Pro. (N. Y.) 397; *Ensley v. Ensley*, 105 Tenn. 107.

No distribution of the estate will be made pending an application for the sale of real estate to raise funds necessary to pay charges and funeral expenses. *In re Koppikus*, (Cal. 1905) 81 Pac. Rep. 733.

It is only when the purposes of the trust have ended and the sole duty of making payment to the heir or legatee remains, and the representative, in violation of his duty, has failed to make his final settlement, that suit may be brought for failure to make such payments. *Clarke v. Sinks*, 144 Mo. 448.

An objection to distribution on the ground that litigation involving property of the estate is pending, is not sustainable where it appears from the record that whatever litigation there has been concerning the estate has been finally determined. *Drasdo v. Jobst*, (Wash. 1905) 81 Pac. Rep. 857.

**The Fact that There Are Unconverted Claims.** — Where property remains unsold after every effort has been made to sell it, and a forced sale will result in loss, payment can only be awarded of the actual cash balance, anything beyond that



**1168. 5. Mode of Payment — a. IN GENERAL.** — See notes 2, 3.  
**And Personalty May Be Distributed in Kind.** — See note 5.

being suspended until sale has been made. *Harvey's Estate*, 11 Pa. Dist. 83, 26 Pa. Co. Ct. 500.

**The Necessity of Retaining Funds for a Particular Purpose** furnishes no occasion or excuse for delaying the settlement of the balance of the estate, and the payment of the legacies which are due; there being sufficient funds for the payment of all legacies, whether due or not. *Brown v. Farren*, (N. H. 1904) 58 Atl. Rep. 870.

**Unpaid Debts.** — If there are debts due by the estate the administrator can plead and prove them in the action to compel distribution, and thus protect himself and the creditors. *Williams v. Lancaster*, 113 Ga. 1020.

**Legacies Payable in Futuro.** — The right of an executor to make an appropriation as against a legatee — that is to say, to set aside in satisfaction of the legacy so as to free the residuary estate for distribution — is established by a long line of authorities, and laid down in numerous text-books, and is founded upon the common-sense view that an executor must be allowed to make appropriations to meet particular legacies in order to prevent delay in the conversion of an estate and the consequent injustice which might follow if the distribution of the residuary estate were unduly delayed. *Re Hall*, 87 L. T. N. S. 560, *reversed* on other grounds (1903) 2 Ch. 226.

**Distributee Wrongfully Retaining Property of Estate.** — Payment to a distributee cannot be refused because he is retaining certain personal property alleged to belong to the estate. *Homeyard's Estate*, 13 Pa. Dist. 259.

**Proof of Necessity for Keeping Estate Open.** — If necessity exists for keeping the estate open beyond the time that ordinarily might be considered reasonable, the same should be made to appear by the accounts, statements, and exhibits which it is the duty of the representative to make to the court which appointed him. *Willis v. Berry*, 104 La. 114.

**Discretion of Court.** — The court has a discretion to grant or refuse the order, and, when executors are doing their best to realize the assets and are in no default, the application should be refused. *In re O'Connor*, 12 Manitoba 325.

**Time of Distribution Postponed by Will.** — See *supra*, this title, 1167. 1.

**1168. 2. Illustrations.** — *State v. Conrad*, 1 Marv. (Del.) 417; *Riggin v. Creath*, 60 Ohio St. 114; *In re Watson*, 189 Pa. St. 150; *In re Fischer*, 189 Pa. St. 179, 43 W. N. C. (Pa.) 436, *modifying* 28 Pittsb. Leg. J. N. S. (Pa.) 383.

A verbal agreement by an executor with a minor heir, whereby he obtained permission to retain and use the amount of a legacy, at a settled rate of interest, will be set aside as fraudulent and void, where the executor was in failing financial circumstances at the time, which fact was withheld from and unknown to the legatee. *Ehrngren v. Gronlund*, 19 Utah 411.

**3. Payment by Investing Funds in Legatee's Name.** — An investment by an executor, of the amount of a legacy, in compliance with an order of court, and the allowance of the amount in settlement of his account, discharges the executor

from all liability therefor. *Siechrist v. Bose*, 87 Md. 284.

**5. Distribution in Kind — England.** — *In re Nickels*, (1898) 1 Ch. 630.

*Idaho*. — *Harris v. Coates*, 8 Idaho 491.

*Maryland*. — *Hoffman v. Hoffman*, 38 Md. 60.

*Missouri*. — *Ladd v. Stephens*, 147 Mo. 319.

*Nebraska*. — *Cowherd v. Kitchen*, 57 Neb. 426.

*New York*. — *Matter of Thompson*, (Surrogate Ct.) 41 Misc. (N. Y.) 420, *affirmed* without opinion 87 N. Y. App. Div. 609, 178 N. Y. 554.

*North Carolina*. — *Baptist Female University v. Borden*, 132 N. Car. 476.

*Pennsylvania*. — *Yerkes's Estate*, 8 Pa. Dist. 36.

**Rule Stated.** — Under a trust for conversion each person is entitled of course to money, and the principle is this: that where the trustee is directed to convert and to pay the beneficiary money, it must be competent for him to agree with the beneficiary that he will sell the beneficiary the property against the money which otherwise he would have to pay to him. This rule is not confined to personal estate, but extends to chattels real and also it seems to real estate. *In re Beverly*, (1901) 1 Ch. 681.

**Right of Legatee to Distribution in Kind.** — *Lane v. Albertson*, 78 N. Y. App. Div. 607.

**Statutory Authority to Distribute in Kind.** — *Rogers v. Dickey*, 117 Ga. 819; *Stevens v. Meserve*, (N. H. 1905) 61 Atl. Rep. 420.

**Rule Applies to Property Held for Conversion under Directions in Will.** — The legatee, residuary or other, may, in satisfaction of his legacy, consent to accept securities from the executors, whether held by them for conversion under the general rule for settlement or under special directions of the will. *Macy v. Mercantile Trust Co.*, (N. J. 1905) 59 Atl. Rep. 586.

**Fixing Value of Property by Agreement.** — No rule of law precludes adult beneficiaries of the estate from agreeing as to the reasonable value of property distributed in kind in making a just division of the assets and for purposes of the settlement of the account of the personal representative. *Matter of Ross*, (Surrogate Ct.) 33 Misc. (N. Y.) 163.

**Certificates of Stock.** — Payment of a legacy in shares of stock is not within a provision in the articles of the association, prohibiting a member from selling and transferring his shares without first offering the same for sale to the association, or, if it decline the option, to a member thereof. *Lane v. Albertson*, 78 N. Y. App. Div. 607.

Payment in kind, of property consisting of certificates of corporate stock, cannot be refused by executors who are also legatees for fear that the other legatees may not agree with them as to the proper management of the corporation. *McDowell's Estate*, 8 Del. Co. Rep. (Pa.) 172, 17 Montg. Co. Rep. (Pa.) 43, 14 York. Leg. Rec. (Pa.) 193.

**Distribution to Minor Heirs.** — *Stevens v. Meserve*, (N. H. 1905) 61 Atl. Rep. 420; *Matter of McCormick*, (Surrogate Ct.) 46 Misc. (N. Y.) 386.

**1170. Acts Not Effective as Payments.** — See note 3.**c. RETAINER OF DEBTS DUE FROM LEGATEE OR DISTRIBUTE**— (1) *General Rule.* — See note 8.**1171. See notes 1, 2.**

Presumptively the function of conversion of the property of the decedent belongs to the executor or administrator; and the propriety of a payment in kind, where the property consists of unauthorized securities and the distributee is a minor represented by guardian, is a question for the court, *Schlegel's Estate*, 13 Pa. Dist. 764.

**1170. 3. Individual Note of Administrator to Guardian of Infant Distributee.** — *Tucker v. Stewart*, 121 Iowa 714.

**8. Retainer of Debts Out of Legacy or Distributive Share** — *United States*. — *Cowen v. Adams*, (C. C. A.) 78 Fed. Rep. 536, 80 Fed. Rep. 448, affirmed without opinion 174 U. S. 800.

*Alabama.* — *Noble v. Tate*, 119 Ala. 399, 140 Ala. 469; *Caldwell v. Caldwell*, 121 Ala. 598.

*Illinois.* — *Egan v. Clark*, 87 Ill. App. 246.

*Louisiana.* — *Kernan's Succession*, 105 La. 592.

*Maryland.* — *Hoffman v. Hoffman*, 88 Md. 60; *Hofiman v. Armstrong*, 90 Md. 123.

*Massachusetts.* — *Haskell v. Hill*, 169 Mass. 124.

*Michigan.* — *In re Mallary*, 127 Mich. 119, 8 Detroit Leg. N. 1077.

*Missouri.* — *Hopkins v. Thompson*, 73 Mo. App. 401. See also *Berkmeir v. Peters*, 111 Mo. App. 177.

*North Carolina.* — *Johnston v. Cutchin*, 133 N. Car. 119.

*New York.* — *Matter of Warner*, (Surrogate Ct.) 39 Misc. (N. Y.) 432; *Matter of Robinson*, (Surrogate Ct.) 45 Misc. (N. Y.) 551; *In re Schmidt*, (Surrogate Ct.) 58 N. Y. Supp. 595.

*Ohio.* — *Woodruff v. Snowden*, 10 Ohio Dec. 123, 7 Ohio N. P. 520.

*Pennsylvania.* — *Geisz v. Geisz*, 7 Pa. Dist. 615, 21 Pa. Co. Ct. 466. See also *Eckes's Estate*, 8 Pa. Dist. 252, 22 Pa. Co. Ct. 287.

*Wisconsin.* — See *Fitch v. Huntington*, (Wis. 1905) 102 N. W. Rep. 1066.

**The Fact that the Debtor Legatee Had Become a Bankrupt.** — *Wick v. Hickey*, (Iowa 1905) 103 N. W. Rep. 469. See also *In re Ellis*, 5 Ohio Dec. 330, 5 Ohio N. P. 207.

**An Executor or Administrator Who Is a Legatee or Distributee and Also a Debtor of the Estate** is bound to apply his share in liquidation of such indebtedness. *Sanchez v. Forster*, 133 Cal. 614; *Linthicum v. Polk*, 93 Md. 84. See also *Matter of Arkenburgh*, 69 N. Y. App. Div. 618, affirmed 171 N. Y. 688.

**Limitation by Will on Amount Which May Be Retained.** — The amount which may be retained may be limited by will of the decedent to less than the amount of the indebtedness. *In re Cummings*, 120 Iowa 421.

**Retainer as Against Advancement.** — Whether the amount due the estate is a debt or an advancement, it is retainable; if a debt, by reason of what is called the right of detention or set-off; and, if an advancement, it should be brought into hotchpot as provided by statute. *Wick v. Hickey*, (Iowa 1905) 103 N. W. Rep. 469.

**Liability of Distributee as Surviving Partner of Decedent.** — The liability of a distributee who is the surviving partner of the decedent, for the latter's interest in the partnership estate, is a debt within this rule. *Noble v. Tait*, 140 Ala. 469; *Hoffman v. Armstrong*, 90 Md. 123.

**Retainer Out of Income of Fund Placed in Trust.** — The right cannot be exercised against the income of a fund placed in trust for the distributee. To permit this would be to allow the estate as creditor to reach property of the debtor which an ordinary creditor could not reach. *Matter of Bogert*, (Surrogate Ct.) 41 Misc. (N. Y.) 598; *Matter of Knibbs*, (Surrogate Ct.) 45 Misc. (N. Y.) 83. *Contra*, *Matter of Foster*, (Surrogate Ct.) 38 Misc. (N. Y.) 347.

**Interest on Indebtedness.** — Simple interest on the indebtedness is properly chargeable to the date of settlement; and the right of retainer applies as to both principal and interest. *Matter of Downs*, (Surrogate Ct.) 39 Misc. (N. Y.) 621.

**Jurisdiction of Probate Court.** — The surrogate's court has power to determine the question of the indebtedness of a legatee or distributee of the estate for purposes of retainer, though the debt is disputed, it being necessary to the adequate exercise of its jurisdiction over matters of distribution. *Matter of Robinson*, (Surrogate Ct.) 42 Misc. (N. Y.) 169. To the same effect, *Holden v. Spier*, 65 Kan. 412.

**1171. 1. Retainer Against Assignee of Legatee or Distributee.** — *Wick v. Hickey*, (Iowa 1905) 103 N. W. Rep. 469; *Hart's Estate*, 9 Pa. Dist. 274; *Landmesser's Estate*, 13 Pa. Super. Ct. 467; *Rust's Estate*, 14 Pa. Dist. 317; *Heister's Estate*, 26 Pa. Co. Ct. 49, 18 Montg. Co. Rep. (Pa.) 33; *Boyer v. Robinson*, 26 Wash. 117.

**Retainer Against Next of Kin of Deceased Distributee.** — Where a testator gives to his legatee a share of his estate but directs a deduction from such share of any debt owing to him by the legatee, and by a codicil directs that the share which by his will he had given to the legatee shall go to the legatee's son, the son takes the share subject to deduction of his father's debts to testator. *De Haven's Estate*, 207 Pa. St. 147, 152, reversing in part 5 Dauphin Co. Rep. (Pa.) 233, 7 Dauphin Co. Rep. (Pa.) 219.

**Retainer Against Trustee of Insolvent Legatee.** — *Hoffman v. Armstrong*, 90 Md. 123.

**2. Set-off and Retainer Distinguished.** — *Dingle v. Coppen*, (1899) 1 Ch. 726.

**"This Right Is Not One of Set-off."** — "It matters not by what name the proceeding is called, — whether 'retainer,' 'advancement,' 'set-off,' or 'assets in the hands of the legatee;' the practical result is the same, and it rests upon wholesome principles of right and justice, which can be administered in probate courts without the aid of a court of conscience." *Holden v. Spier*, 65 Kan. 412, quoting with approval *In re Lietman*, 149 Mo. 112, 73 Am. St. Rep. 374.



- 1171.** (2) *What Debts May Be Retained* — (a) *In General*. — See note 3.  
**1172.** (b) *Debts Barred by Statute of Limitations* — *In England*. — See notes 2, 3. *In the United States*. — See notes 4, 5.  
 (d) *Debts Due to Executor or Administrator Individually*. — See note 7.  
**1173.** See note 1.  
 (3) *Retainer from Proceeds of Real Estate*. — See notes 3, 4.  
 6. *Effect of Distribution* — *a*. *IN GENERAL*. — See notes 5, 6.

**1171. 3. A Debt to the Executor or Administrator in His Representative Capacity.** — A debt due the representative through the satisfaction by him of the liability of the decedent as surety for the distributee is subject to retainer. *Hopkins v. Thompson*, 73 Mo. App. 401.

**Debt Due from Administrator to Estate.** — Such right also exists when the debt has been incurred to the estate itself by the distributee as administrator, after the decedent's death. *Hoffman v. Armstrong*, 90 Md. 123, citing *Gosnell v. Flack*, 76 Md. 423.

**Married Woman's Estate — Liability of Husband for Her Physician's Bills and Funeral Expenses.** — A married man being liable at common law for the funeral expenses and physician's bill of his wife, the amount of such indebtedness may be retained out of his share in her estate. *Brand v. Brand*, 109 Ky. 721. See also *infra*, this title, **1262. 2 et seq.**

**Overpayments to Legatee.** — Where a legatee has been overpaid, the other beneficiaries are entitled to have the distribution equalized before he, or any one claiming under him, shall receive any further portion. *Landmesser's Estate*, 13 Pa. Super. Ct. 467. To similar effect, *In re Mallary*, 127 Mich. 119, 8 Detroit Leg. N. 1077.

**1172. 2. Rule in England — Debts Barred by Limitation May Be Retained.** — *Boden v. Mier*, (Neb. 1904) 98 N. W. Rep. 701.

The exercise of the right depends on whether there is due from the legatee or distributee a debt for which but for the statute of limitations he could have been sued. *Re Wheeler*, (1904) 2 Ch. 66, 91 L. T. N. S. 227.

The rule has no application to a statute-barred debt owed by a person who is claiming a legal right to damages against the estate; but is confined to persons such as legatees who have a claim merely on the bounty of the testator. *Dingley v. Coppen*, (1899) 1 Ch. 726.

**3. English Theory of Lien.** — *Matter of Warner*, (Surrogate Ct.) 39 Misc. (N. Y.) 432.

**4. English Rule Followed in United States.** — *Holden v. Spier*, 65 Kan. 412; *Matter of Warner*, (Surrogate Ct.) 39 Misc. (N. Y.) 432.

**5. English Doctrine Not Followed in United States.** — *Noble v. Tait*, 140 Ala. 469, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1172.

**Other American Cases.** — *Boden v. Mier*, (Neb. 1904) 98 N. W. Rep. 701; *Sherer's Estate*, 17 Lanc. L. Rev. 382.

**Debt Put in Judgment.** — Where judgment has been obtained on the debt the amount may be retained though the judgment could not have been rendered had the debtor not waived the statute of limitations. *Heister's Estate*, 26 Pa. Co. Ct. 49, 18 Montg. Co. Rep. (Pa.) 33, citing *Sheppard's Estate*, 180 Pa. St. 57.

**7. No Retainer for Debts Due Executor or Ad-**

**ministrator Individually.** — *Horton v. Hill*, 138 Ala. 625.

**1173. 1. Debts Due Executor or Administrator Individually — Set-off Against Personal Liability for Legacy or Distributive Share.** — See *Dingle v. Coppen*, (1899) 1 Ch. 726; *Horton v. Hill*, 138 Ala. 625.

**In Equity** the rule is that a debt due to an administrator individually from a distributee may be allowed as a payment on the distributee's share of the estate. *Preston v. Davis*, 102 Va. 178, citing *Hooper v. Hooper*, 32 W. Va. 526.

**3. Retainer Allowed Out of Proceeds of Realty.** — *Hopkins v. Thompson*, 73 Mo. App. 401; *Keever v. Hunter*, 62 Ohio St. 616; *Woodruff v. Woodruff*, 23 Ohio Cir. Ct. 408; *Hartman's Estate*, 12 Pa. Super. Ct. 69, 17 Lanc. L. Rev. 41; *Heister's Estate*, 26 Pa. Co. Ct. 49, 18 Montg. Co. Rep. (Pa.) 33; *Royer v. Robinson*, 26 Wash. 117.

**Equalization of Shares of Legatees or Distributees.** — Where some of the legatees or distributees have been voluntarily overpaid their shares, or are otherwise indebted to the estate, the right of retainer out of the proceeds of a sale of the real estate may be exercised if necessary to secure equalization of their shares. *Tobias v. Richardson*, 26 Ohio Cir. Ct. 81; *Wittmann's Estate*, 9 Pa. Dist. 47; *Githen's Estate*, 10 Pa. Dist. 375. *Contra*, *Cockrill v. London*, (Ky. 1897) 43 S. W. Rep. 451.

In equalizing distribution on account of overpayments made to a legatee the fact that the only fund out of which the excess can be retained is the proceeds of real estate is of no consequence. A devisee who takes real or personal property in contravention of a will, and so disappoints another devisee, shall have nothing under the will until compensation is made to the disappointed devisee. *Landmesser's Estate*, 13 Pa. Super. Ct. 467.

**4. Devisee of Specific Realty.** — The indebtedness of a devisee of specific realty is not, without judgment and levy by the executor, a charge upon or set-off against the realty so specifically devised. *Woodruff v. Snowden*, 10 Ohio Dec. 123, 7 Ohio N. P. 520. See also *Woodruff v. Woodruff*, 23 Ohio Cir. Ct. 408.

**The Massachusetts Statute** empowering the probate court to apply a debt toward the payment of a legacy or of a distributive share has reference only to such shares as are, or have become in the course of administration, personal property or estate. *Jones v. Treadwell*, 169 Mass. 430.

**5. Effect of Payment in General — Satisfaction of Legacy or Distributive Share.** — *Kraus v. Kraus*, 81 Minn. 484, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1173.

**6. Payment to the Sole Distributee of a Legatee.** — See *supra*, this title, **1166. 4, 5.**



- 1174.** *b.* PAYMENTS UNDER ORDER OR DECREE. — See note 3.  
*c.* PAYMENTS BEFORE ORDER OR DECREE. — See note 5.

**1175.** See note 1.

**1176.** *e.* OVERPAYMENT. — See notes 3, 4.

**1177.** 7. Indemnity and Protection of Executor or Administrator — *a.* REFUNDING BONDS — (1) *When Required.* — See note 1.

**1174.** 3. Order of Distribution Protects Executor or Administrator Making Payment — *California.* — Matter of Bell, 131 Cal. 1.

*Connecticut.* — Haven's Appeal, 69 Conn. 684; Chamberlain's Appeal, 70 Conn. 363.

*Kansas.* — Miller v. Baker, 9 Kan. App. 883, 58 Pac. Rep. 1002.

*Kentucky.* — Hill v. Mayes, 79 N. W. Rep. 276, 25 Ky. L. Rep. 2023.

*Massachusetts.* — Lamson v. Knowles, 170 Mass. 295; Harris v. Starkey, 176 Mass. 445, 79 Am. St. Rep. 322.

*Minnesota.* — Kraus v. Kraus, 81 Minn. 484, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1174.

*New York.* — Rosen v. Ward, 96 N. Y. App. Div. 262.

*Pennsylvania.* — Piper's Estate, 208 Pa. St. 636, affirming 12 Pa. Dist. 443, 28 Pa. Co. Ct. 589; Mays's Estate, 25 Pa. Super. Ct. 267.

**Void Orders.** — Where the order of the court is void and of no effect, it will not afford the personal representative any protection from liability for wrongful payments. Matter of Kennedy, 120 Cal. 458; Matter of Spanier, 120 Cal. 698; Matter of Bell, 142 Cal. 97; O'Bryan v. Wilson, (Miss. 1905) 38 So. Rep. 509; Springfield Grocer Co. v. Walton, 95 Mo. App. 526; Matter of Killan, 172 N. Y. 547, reversing on other grounds 66 N. Y. App. Div. 312; Matter of Lancaster, (Surrogate Ct.) 28 Misc. (N. Y.) 595; Johnson v. Weir, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 683; Faver v. Parker, 101 Tenn. 141; Matter of Sullivan, 36 Wash. 217; Uffner v. Lewis, 27 Ont. App. 242. See also Canfield v. Canfield, (C. C. A.) 118 Fed. Rep. 1.

**Order Annulled and Set Aside.** — The representative is chargeable with knowledge of the power of the court, for good cause shown, to annul and set aside its orders. Clemes v. Fox, 25 Colo. 39.

**Order Reversed on Appeal.** — Payments made in good faith under an order of court will protect the representative, though the order is subsequently reversed, if it has not been superseded at the time the payments were made. Story v. Story, 62 S. W. Rep. 865, 22 Ky. L. Rep. 1869, denying rehearing in (Ky. 1901) 61 S. W. Rep. 279; Ernst v. Freeman, 129 Mich. 271, 8 Detroit Leg. N. 947. *Contra*, Coulter v. Lyda, 102 Mo. App. 401.

**5. Distribution Before Order or Decree — Personal Liability to Creditor.** — Hoffman v. Hoffman, 88 Md. 60; Matter of McCarthy, (Surrogate Ct.) 26 Civ. Pro. (N. Y.) 397. See also Potter v. Mortimer, 114 Ill. App. 422, affirmed 213 Ill. 178; *supra*, this title, **1167. 5**; *infra*, this title, **1268. 3 et seq.**

An administrator at his peril declares persons to be interested as heirs or other claimants, and pays or delivers to them any part of the money or other property of the estate, be-

fore such persons have been formally by the court in probate proceedings declared to be such, and before he is ordered by the court to make distribution, after report and accounts made and allowed, showing the condition of the estate. Kirk v. Baker, 26 Mont. 190.

**The Allowance of an Administrator's Account.** — Banning v. Gotshall, 62 Ohio St. 210. *Contra*, Matter of Fernandez, 119 Cal. 579, criticizing dictum in Matter of Dunne, 65 Cal. 378; Skilkin v. Central Trust Co., 80 N. Y. App. Div. 206; Watkins v. Sansom, 22 Tex. Civ. App. 178.

**Statutory Forms of Distribution.** — Statutory forms of distribution are not exclusive or intended to deprive coparceners or tenants in common of any of the powers which they have at common law to divide or alienate their estates; distribution under an order, decree, or agreement satisfactory to the rightful distributees, protects the personal representative, though the statutory methods are not followed. Dickinson's Appeal, 54 Conn. 224; Merwin's Appeal, 75 Conn. 33; State v. Whitehouse, 75 Conn. 410.

**1175. 1. Debts Not Known to Executor or Administrator.** — See *supra*, this title, **971. 4.**

**1176. 3. Overpayment — Executor or Administrator Becomes Liable to Person Injured.** — Matter of Robertson, 51 N. Y. App. Div. 117, affirmed on opinion below 165 N. Y. 675; Kiser's Estate, 34 Pittsb. Leg. J. N. S. (Pa.) 147; Turk v. Hevener, 49 W. Va. 204; Uffner v. Lewis, 27 Ont. App. 242; *Re* McIntyre, 7 Ont. L. Rep. 548.

**Overpayment by Executor of Legacy to Himself.** — See Turnipseed v. Sirrine, 60 S. Car. 272.

**4. If an Overpayment Is Made under an Order of Court.** — Harris v. Starkey, 176 Mass. 445, 79 Am. St. Rep. 322.

**1177. 1. Refunding Bonds — Distribution Before Expiration of Time for Presentation of Claims.** — Matter of Hale, 121 Cal. 125; Matter of Mitchell, 121 Cal. 391; *In re* Pound, 166 Mo. 419, distinguishing State v. Stephenson, 12 Mo. 178; Noble v. Whitten, 34 Wash. 507. See also Haebler v. John Eichler Brewing Co., (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 576, affirmed 42 N. Y. App. Div. 95, motion to dismiss appeal denied 160 N. Y. 664; Matter of Bronner, (Surrogate Ct.) 30 Misc. (N. Y.) 31.

**The California Statute.** — Matter of Hale, 121 Cal. 125; *In re* Chesney, (Cal. 1905) 81 Pac. Rep. 679.

It is only in cases where the time for presenting claims has expired, and all claims allowed have been paid or are secured by mortgage upon real estate sufficient to pay them, that the court is authorized to dispense with the bond. Matter of Mitchell, 121 Cal. 391, 126 Cal. 248.

**Where a Suit Is Pending Against the Estate,** which is not being actively prosecuted, dis-

**1177.** In Some States. — See note 3.

**1178.** In England. — See note 3.

(3) *Who May Be Required to Give Bond.* — See note 5.

(5) *Failure to Require Bond.* — See note 8.

**1179.** See note 1.

*b.* IMPOUNDING OR RETAINING ASSETS. — See note 2.

*c.* COMPELLING LEGATEES AND DISTRIBUTEES TO REFUND

WITHOUT BOND. — See notes 5, 6.

**1180.** See note 1.

tribution will be ordered on the distributees giving refunding bonds. *Alexander's Estate*, 13 Pa. Dist. 459.

**1177. 3. Refunding Bond Required Before Payment in Any Event.** — *Klicka v. Klicka*, 105 Ill. App. 369.

In Pennsylvania refunding bonds cannot be required on distribution after one year from grant of letters, unless the proceedings are taken under the Act of Feb. 24, 1834, P. L. 70, though the representative may take refunding receipts. *Haggerty's Estate*, 13 Pa. Dist. 663, 29 Pa. Co. Ct. 57.

The act makes no provision for refunding bonds where the distributable fund is derived from the sale of real estate under a testamentary power to sell or a decree of partition. *McAvoy's Estate*, 8 Pa. Dist. 233.

Where distribution is awarded by the court to a legatee or distributee or where the court approves of a previous distribution, made voluntarily, the executor or administrator has no right to demand a refunding bond, and, as a necessary consequence, cannot be made liable for not having done so. *Piper's Estate*, 208 Pa. St. 636, *affirming* 12 Pa. Dist. 443, 28 Pa. Co. Ct. 589.

**Distribution under Administration Granted on Presumption of Death.** — *Smith v. Fidelity, etc., Co.*, 21 Lanc. L. Rev. 321; *Beck's Estate*, 16 Lanc. L. Rev. 215. See also *supra*, this title, 760. 2; 1166. 5.

**Requiring Account Before Distribution.** — While the usual and more commendable practice is to require the officer of the estate to render a written report or account to the court, before ordering such distribution, the condition of the estate may be determined by other evidence. *Murdock v. Murdock*, 111 Ill. App. 375.

**1178. 3. Security Against Contingent Liabilities.** — The same rule obtains in some other jurisdictions. *McAvoy's Estate*, 8 Pa. Dist. 233, *citing* *Duval's Appeal*, 38 Pa. St. 120, and saying: "When occasion calls for it, the court may order security at its pleasure;" *Fitzpatrick's Estate*, 8 Pa. Dist. 726, 9 Pa. Dist. 88; *Ryan's Estate*, 9 Pa. Dist. 339. See also *Matter of Roffo*, 51 N. Y. App. Div. 35.

Pending an appeal by distributees, without supersedeas, from an order of distribution, distribution in conformity with the order may be adjudged by the Orphans' Court, conditioned on proper and sufficient refunding bonds being given for the protection of the representative in case of reversal. *Newhard's Estate*, 9 Pa. Dist. 764.

**5. Death of Distributee After Execution of Bond but Before Payment.** — Where a distributee dies pending the proceedings for distribution, payment may be made to his executor on a refund-

ing bond executed by the distributee before his death. *Murdock v. Murdock*, 111 Ill. App. 375.

**8. The Failure of the Court to Require the Bond.** — *In re Pound*, 166 Mo. 419.

**1179. 1. Voluntary Payment — Personal Liability of Executor or Administrator to Creditor.** — *Rastaetter's Estate*, 15 Pa. Super. Ct. 549; *Haggerty's Estate*, 13 Pa. Dist. 663, 29 Pa. Co. Ct. 57; *Boring v. Jobe*, (Tenn. Ch. 1899) 53 S. W. Rep. 763; *Turk v. Hevener*, 49 W. Va. 204.

**Agreement of Distributees to Protect Representative from Loss.** — Where payment is made under an agreement with the legatees and distributees by which they are to protect the representative from loss, the former may be compelled to make restitution at the suit of creditors. *Clinton's Estate*, 9 Pa. Dist. 455, 24 Pa. Co. Ct. 218.

**2. Impounding or Retaining Assets in Default of Refunding Bond.** — *Matter of Rasch*, (Surrogate Ct.) 26 Misc. (N. Y.) 459, 28 Civ. Pro. (N. Y.) 98; *Fitzpatrick's Estate*, 8 Pa. Dist. 726, 9 Pa. Dist. 88.

The ground for such practice is that of indemnity to the executor, rather than the protection of persons having contingent claims against the estate. *In re Nixon*, (1904) 1 Ch. 638.

**Liability on Leases Held by Testator.** — The court will not set aside any part of the assets of an estate to indemnify executors against possible liabilities which may arise in respect of leases formerly held by the testator, unless there is privity of estate between the executors and the lessors. *In re Nixon*, (1904) 1 Ch. 638.

**New York Statute.** — The New York Code provides, under certain circumstances, that the accounting party must retain in his hands the probable amount of a claim so as to protect a creditor. An executory contract by which the decedent, as lessor, might at a future time have become liable to his lessee for buildings erected on the land by the latter, is not within the terms of the act. *Matter of Henshaw*, (Surrogate Ct.) 37 Misc. (N. Y.) 536.

**5. Legatee Compelled to Refund if Debts Appear.** — *McClung v. Sieg*, 54 W. Va. 467.

**6. Rule in United States — English Rule Followed in Some Jurisdictions.** — *Lurnes v. Burnes*, (C. C. A.) 137 Fed. Rep. 781, *affirming* 132 Fed. Rep. 485. And see *supra*, this title, 1161. 2.

**Extent of Relaxation of English Rule in Virginia and West Virginia.** — *McClung v. Sieg*, 54 W. Va. 467.

**Reimbursement Barred by Voluntary Payment Without Refunding Bond or Agreement.** — *Geisz v. Geisz*, 7 Pa. Dist. 615, 21 Pa. Co. Ct. 466.

**1180. 1. Rule that Overpayment by Mistake May Be Recovered by Executor or Administrator.** — *Lutjen v. Lutjen*, 63 N. J. Eq. 391; *Lawyers'*



**1181. XII. ACCOUNTING — 1. Duty to Account — a. IN GENERAL.** — See note 4.

**1182. Representatives of Deceased Executor or Administrator.** — See notes 2, 3, 4.

*Surety Co. v. Reinach*, (Supm. Ct. App. T.) 25 Misc. (N. Y.) 150, *affirmed* (N. Y. City Ct. Gen. T.) 23 Misc. (N. Y.) 242. See also *Ward v. Ward*, 12 Ohio Cir. Dec. 59.

**Reversal of Decree of Distribution.** — *Ashton v. Heydenfeldt*, 127 Cal. 442; *Ashton v. Hegerty*, 130 Cal. 516; *Ashton v. Zeila Min. Co.*, 134 Cal. 408; *Story v. Story*, 62 S. W. Rep. 865, 22 Ky. L. Rep. 1869, *denying rehearing* in (Ky. 1901) 61 S. W. Rep. 279.

**In New York.** — *Lawyers' Surety Co. v. Reinach*, (N. Y. City Ct. Gen. T.) 23 Misc. (N. Y.) 242, *affirmed* (Supm. Ct. App. T.) 25 Misc. (N. Y.) 150.

**Jurisdiction of Probate Court.** — The surrogate has no power to render a decree in favor of the representative for the amount of an overt payment made to a legatee. *Johnson v. Weir*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 683.

**1181. 4. Duty to Keep Accounts.** — The law contemplates that those charged with the settlement of the estates of dead men should from time to time render accounts of their stewardship. *Willis v. Berry*, 104 La. 114.

Executors must never forget that their acts are subject to the closest and most rigid examination, and that the only way to avoid suspicion of dishonesty is to be able to show at any time each and every transaction accurately. *Matter of Stanton*, (Surrogate Ct.) 41 Misc. (N. Y.) 278.

**Province of Account.** — The province of the account is simply to learn what the representative had received from the estate (and everything received is to be accounted for), and how much he has paid out on expenses and the debts of the decedent. The balance remains for distribution. *White's Estate*, 23 Pa. Super. Ct. 552.

**Estoppel to Deny Liability to Account.** — *Haris v. Coates*, 8 Idaho 491; *Dobler v. Strobel*, 9 N. Dak. 104, 81 Am. St. Rep. 530; *In re Osburn*, 36 Oregon 8. But see *infra*, this title, 1184. 1; 1345. 1.

**Formal Requisites of Account.** — See *infra*, this title, 1309. 2 *et seq.*

**1182. 2. Representative of Deceased Representative Must Account for Assets Received by Him.** — *Berry's Estate*, 8 Pa. Dist. 50.

**Accounting for Trust Property of First Decedent.** — *Matter of Trask*, (Surrogate Ct.) 27 Civ. Pro. (N. Y.) 7.

**3. Representative of Deceased Representative Must Settle His Decedent's Accounts.** — *Hoagland v. Cooper*, 65 N. J. Eq. 407; *Matter of Irvin*, 68 N. Y. App. Div. 158; *Jones v. Willis*, 72 Ohio 189; *Houseman's Estate*, 11 Pa. Dist. 87, 26 Pa. Co. Ct. 477; *Graham's Estate*, 14 Pa. Dist. 5, 18 York Leg. Rec. (Pa.) 147; *Cunnington v. Cunningham*, 2 Ont. L. Rep. 511.

*And in some jurisdictions, etc.* *In re Moehring*, 154 N. Y. 423; *Matter of Scudder*, (Surrogate Ct.) 21 Misc. (N. Y.) 179; *Matter of Trask*, (Surrogate Ct.) 27 Civ. Pro. (N. Y.) 7.

**Contra in Texas**, where, under the construction given the Texas statutes, the death of an executor or administrator entirely severs the re-

lation theretofore existing between him and the estate, and no other person, nor the probate court itself, can restore that relation and adjudicate the rights of the first estate as against the estate of the deceased executor or administrator, nor the rights asserted by the representative of the deceased executor or administrator against the first estate. *McClellan v. Mangum*, 33 Tex. Civ. App. 193.

**A Surviving Executor — Personal Representative of Deceased Administrator Must Account De Novo.** — *Matter of Schlesinger*, 36 N. Y. App. Div. 77, *reversing* on other grounds (Surrogate Ct.) 24 Misc. (N. Y.) 456; *Matter of Steencken*, 51 N. Y. App. Div. 417.

**Matters Involved in Settlement.** — The settlement of the account involves not only the receipts and expenditures by the dead representative, but also his liability for his management and control of the assets either received by him, or which ought to have been received by him. In effect, the sole inquiry is to ascertain the amount due by the dead representative to the estate at the date of his death. *Tasker's Estate*, 14 Pa. Dist. 435.

**Necessity for Settlement.** — The settlement of such an account is essential, and until it has been had, the administrator *de bonis non* of the original decedent can neither proceed as a creditor against the estate of the deceased executor, nor can he demand payment of moneys standing in his name as executor. *Bickley's Estate*, 13 Pa. Dist. 461.

**Venue of Proceeding to Settle Account.** — As the account must be filed in the county in which the original administration was granted, the fact that administration of the estate of the deceased executor or administrator has been granted in another county is, manifestly, immaterial. *Bickley's Estate*, 13 Pa. Dist. 461.

**Payment and Delivery Over of Property.** — The executor or administrator of an executor or administrator files a statement of the administration to give information to determine the liability, if any, of the decedent's representative's estate and fix a measure of responsibility for the administrator *de bonis non*. The balance found upon such an accounting is not for distribution. It is not payable to legatees or distributees, but to the administrator *de bonis non*, to whom the beneficiaries must look for their interests. *Gressle's Estate*, 29 Pa. Co. Ct. 97, 21 Lanc. L. Rev. 73.

Under the *New York* statute, it is discretionary with the Surrogate's Court on such accounting, whether it shall require the representative to pay and deliver over the property in his hands, to the court, to his successor in office, or to third persons authorized by law to receive the same. This does not authorize the court to order payment or delivery to be made to legatees or distributees. *In re Moehring*, 154 N. Y. 423; *Mount v. Mount*, 68 N. Y. App. Div. 144; *Matter of Irvin*, 68 N. Y. App. Div. 158. See generally *infra*, this title, 1325. 4 *et seq.*

Where no debts remain to be satisfied, assets accounted for by the personal representatives



- 1183.** Representative Who Has Been Removed or Discharged. — See note 2.  
 Executor to Whom Probate Was Refused. — See note 4.  
 Executor or Administrator Acting in Another Capacity. — See note 5.

- 1184.** An Executor de Son Tort. — See note 1.  
 Sureties on an Administration Bond. — See note 3.

Distinction Between Final and Intermediate Accounting. — See notes 4, 5.

- 1185.** *b.* RELEASE FROM LIABILITY TO ACCOUNT — Want of Assets. — See note 1.

of a deceased executor or administrator may be distributed directly to the parties entitled thereto, instead of indirectly through the administrator *de bonis non* of the original decedent. Garman's Estate, 211 Pa. St. 264, *approving dictum* in Carter v. Trueman, 7 Pa. St. 315; Tasker's Estate, 14 Pa. Dist. 435. See *supra*, this title, 742. 1.

**Access to Books and Papers of Deceased Representative.** — For the purpose of settling the account the legal representative of the deceased executor or administrator is entitled to free access to the books and papers relating to the executorship in the hands of the representative succeeding to the administration of the first estate, but is not entitled to their exclusive possession. Eckart's Estate, 14 Pa. Dist. 423. To similar effect, Thomas's Estate, 8 Pa. Dist. 400, 22 Pa. Co. Ct. 518.

**1182.** 4. Hartson v. Elden, 58 N. J. Eq. 478; Matter of Trask, (Surrogate Ct.) 27 Civ. Pro. (N. Y.) 7; Herren's Estate, 40 Oregon 90.

**1183.** 2. Removed Executor or Administrator May Be Required to Account. — Hudson v. Barratt, 62 Kan. 137; Cummings v. Robinson, 95 Md. 83; Francisco v. Wingfield, 161 Mo. 542; James v. West, 67 Ohio St. 28; *In re* Morrisson, 68 Ohio St. 252; Rutenic v. Hamaker, 40 Oregon 444; Lockard's Estate, 10 Pa. Dist. 192.

**In Texas.** — McClellan v. Mangum, 33 Tex. Civ. App. 193.

**Judgment Closing Succession and Putting Heirs in Possession.** — In *Louisiana* a judgment closing the succession and sending the heirs into possession does not release the personal representative from his liability to account to the heirs; nor does partition of the property among the coheirs, which is in no wise inconsistent with its continued possession by him. Weimann's Succession, 106 La. 387. See also McNeely v. McNeely, 50 La. Ann. 824. Otherwise as to creditors, their remedy after the rendition of such a judgment being against the persons in possession. Duffy's Succession, 50 La. Ann. 795.

**In Ohio** it has been held that the probate court has no jurisdiction to compel an accounting in such a case, unless the account was in process of settlement when the representative was removed. *In re* Miller, 11 Ohio Dec. 624, 8 Ohio N. P. 385.

**4. Executor to Whom Probate Was Refused.** — Compare Davis v. Davis, 72 N. H. 326.

**5. Executor or Administrator Acting in Another Capacity.** — Matter of Underhill, 35 N. Y. App. Div. 434, *affirmed* without opinion 158 N. Y. 721; Matter of Crawford, 11 Ohio Cir. Dec. 605, 21 Ohio Cir. Ct. 554, *affirmed* on other grounds 68 Ohio St. 58; Wallber v. Wilmanns, 116 Wis. 246.

**1184.** 1. Executor De Son Tort Not Accountable in Probate Court. — Davis v. Davis, 72 N. H. 326. But see *supra*, this title, 1181. 4. *Estoppel to Deny Liability to Account; infra*, this title, 1345. 1. Acting under Void Letters of Administration.

**3. Sureties on Administration Bond Cannot Be Required to Account.** — For exceptions to this rule see cases cited *supra*, this title, 899. 2, 902. 3.

**4. Intermediate Accounting Not Conclusive.** — See *infra*, this title, 1310. 6 *et seq.*

**5. Final Settlement Conclusive as to All Parties.** — See *infra*, this title, 1312. 1 *et seq.*

**What Constitutes Final Accounting.** — A final account is one made with a view to the immediate distribution of the estate. Matter of Grant, 131 Cal. 426.

A partial account of an executor or administrator is not a mere inconclusive memoranda of the business transacted by the accountant. When regularly submitted, passed upon, and confirmed by the Orphans' Court, a partial account is final and conclusive with respect to all matters properly included in it, and its confirmation is an adjudication of all things embraced in it, with like effect as if it were a final account. Crouse's Estate, 16 Pa. Super. Ct. 212, *quoting* with approval Galloway's Estate, 5 Pa. Super. Ct. 272.

An account, though termed a final account, is not such if it shows that the administration of the estate is not completed and the court does not audit and settle it as a final account. Thomas v. Hawpe, 35 Tex. Civ. App. 311.

**1185.** 1. Want of Assets. — Redmond v. Redmond, 112 Ky. 760; Thomas's Estate, 8 Pa. Dist. 385; Graham's Estate, 8 Pa. Dist. 479, 22 Pa. Co. Ct. 540; Gallagher's Estate, 8 Pa. Dist. 699; Thomas's Estate, 9 Pa. Dist. 87; Baxter's Estate, 10 Pa. Dist. 97; Stuart's Estate, 10 Pa. Dist. 130, 24 Pa. Co. Ct. 448; Stoker's Estate, 10 Pa. Dist. 375; Conway's Estate, 11 Pa. Dist. 163; Bestford's Estate, 10 Kulp (Pa.) 223. See also Cummings v. Robinson, 95 Md. 83; Matter of Smith, 46 N. Y. App. Div. 318, *affirmed* on opinion below 166 N. Y. 620.

**Effect of Disbursement of All Assets Received.** — The obligation to account cannot be evaded by the fact that the representative has paid out all the moneys of the estate which came into his hands. Lockard's Estate, 10 Pa. Dist. 192.

**Property Not Constituting Assets.** — Where an executor never received any personal property for which to account, and all the moneys ever received by him were collected from the rents of real estate, not in the capacity of trustee, but as agent for the owners of the land, he cannot be required to file an account in the Orphans' Court. Crook's Estate, 11 Pa. Dist. 387.

**1185.** Accounting Dispensed with by Agreement or Acquiescence. — See note 2.

Accounting Dispensed with by Bond to Pay Debts and Legacies. — See note 3.

Executor or Administrator Acting in Different Capacity. — See note 4.

**1186.** But He Is Not Relieved of Liability. — See notes 1, 2, 3.

Lapse of Time — Statute of Limitations. — See note 6.

**1187.** In New York. — See notes 1, 2.

**1185. 2. Accounting Dispensed with by Agreement or Acquiescence** — *Louisiana*. — *Franciez's Succession*, 49 La. Ann. 1732; *In re Dimmick*, 111 La. 655. See also *Willis v. Berry*, 104 La. 114.

*Michigan*. — See *Nowland v. Rice*, (Mich. 1904) 101 N. W. Rep. 214.

*Missouri*. — *State v. Stuart*, 74 Mo. App. 182.

*New York*. — *Matter of Douglas*, 60 N. Y. App. Div. 64.

*Pennsylvania*. — *Hoff's Estate*, 7 Pa. Dist. 93; *Donnelly's Estate*, 8 Pa. Dist. 182; *Root's Estate*, 8 Pa. Dist. 223; *Henry's Estate*, 8 Pa. Dist. 649, 23 Pa. Co. Ct. 290, 5 Lack. Leg. N. (Pa.) 320, 6 Lack. Leg. N. (Pa.) 74, *affirmed* 198 Pa. St. 382; *Hart's Estate*, 9 Pa. Dist. 274; *Reinert's Estate*, 9 Pa. Dist. 405; *Meyer's Estate*, 13 Pa. Dist. 191, 30 Pa. Co. Ct. 84; *Wilt's Estate*, 13 Pa. Dist. 483; *Armstrong's Estate*, 16 Montg. Co. Rep. (Pa.) 9. See also *Marshall's Estate*, 32 Pittsb. Leg. J. N. S. (Pa.) 247; *Kiser's Estate*, 34 Pittsb. Leg. J. N. S. (Pa.) 147.

*Rhode Island*. — *Tillinghast v. Brown University*, 25 R. I. 284.

*West Virginia*. — *Dearing v. Selvey*, 50 W. Va. 4.

See also *supra*, this title, **972. 7**; *infra*, **1186. 6 et seq.**, **1319. 5**.

**3. Accounting Dispensed with by Bond to Pay Debts and Legacies.** — *Tilton v. Tilton*, 70 N. H. 325; *Leonard v. Clark*, 24 R. I. 470.

**4. Administrator Acting in Different Capacity.** — See in this connection *supra*, this title, **890. 2**.

**When Executor Ceases to Act as Such.** — *Matter of Smith*, 66 N. Y. App. Div. 340, *affirmed* without opinion 179 N. Y. 563.

**1186. 1. Procuring Assets to Be Charged in Account of Successor.** — The acceptance of a certificate of deposit in an insolvent bank, by an administrator *de bonis non*, does not prevent the persons interested in the estate from proceeding against the former administrator for a partial loss of the deposit, resulting from his negligence. *Germania Safety Vault, etc., Co. v. Driskell*, 66 S. W. Rep. 610, 23 Ky. L. Rep. 2050.

**2. Bequest of Estate to Executrix for Life.** — *Maxwell v. McCreery*, 57 N. J. Eq. 287; *Heath's Estate*, 10 Pa. Dist. 281, 25 Pa. Co. Ct. 258; *Matter of Hunt*, 84 N. Y. App. Div. 159, *affirmed* on opinion below 179 N. Y. 570.

**3. Settlement with Legatees Out of Court.** — *Hanlon v. Wheeler*, (Tex. Civ. App. 1898) 45 S. W. Rep. 821. But see generally cases cited *supra*, this title, **1185. 2**; *infra*, this title, **1319. 5**.

In *Connecticut* it has been held that distribution by agreement of the parties is but a substitute for distribution by appointed distributors and does not put an end to the jurisdiction of the probate court over the settlement

of the account. *Mathews's Appeal*, 72 Conn. 555.

**6. Statute of Limitations Not a Bar.** — *Jacoway v. Hall*, 67 Ark. 340; *McRoberts v. Carneal*, (Ky. 1898) 44 S. W. Rep. 442; *Gilbert v. Marsh*, 7 Ohio Dec. 230, 4 Ohio N. P. 338; *In re Fischer*, 189 Pa. St. 179, 43 W. N. C. (Pa.) 436; *Smith v. Moore*, 102 Va. 260. See also *Rivers's Estate*, 13 Pa. Dist. 762; *Wallber v. Wilmanns*, 116 Wis. 246.

**Rule Stated.** — The liability of an executor to pay a legacy is not grounded on any lending or contract. He is a trustee who is charged by the will with the performance of the duty of paying legacies, and against that form of obligation the statute of limitations is no bar. *Stough's Estate*, 196 Pa. St. 358, *quoting* *Etter v. Greenawalt*, 98 Pa. St. 422. See also *Lutjen v. Lutjen*, 63 N. J. Eq. 391, *reversed* on other grounds 64 N. J. Eq. 773.

An executor of an estate holding as such does not hold adversely to the heirs or devisees thereof; hence no mere delay in closing up the estate, no matter how long continued, can operate to vest title in him to the exclusion of such heirs or devisees. *Reformed Presb. Church v. McMillan*, 31 Wash. 643.

**In Texas** it is provided by statute (Rev. Stat. Tex., art. 1882), that any person interested in the administration may proceed, after any lapse of time, to compel a settlement of the estate, when it does not appear from the record that the administration thereof has been closed. *Thomas v. Hawpe*, 35 Tex. Civ. App. 311.

**Statutes Expressly Made Applicable** — *Ontario*. — *Uffner v. Lewis*, 27 Ont. App. 242; *Stewart v. Snyder*, 27 Ont. App. 423, *affirming* 30 Ont. 110; *Clark v. Bellamy*, 27 Ont. App. 435, *reversing* 30 Ont. 532.

**1187. 1. Rule in New York — Limitation by Analogy.** — *Matter of Barnes*, (Surrogate Ct.) 25 Misc. (N. Y.) 279; *Matter of Boylan*, (Surrogate Ct.) 25 Misc. (N. Y.) 281, 28 Civ. Pro. (N. Y.) 233; *Matter of Cruikshank*, (Surrogate Ct.) 40 Misc. (N. Y.) 325, *criticising* *Matter of Longbotham*, 38 N. Y. App. Div. 607.

**Action to Recover Legacy or Distributive Share.** — Code Civ. Pro. N. Y., § 1819, provides that the cause of action to recover a legacy or distributive share provided by that section "is deemed to accrue when the executor's or administrator's account is judicially settled, and not before." *Congregational Unitarian Soc. v. Hale*, 29 N. Y. App. Div. 396.

**2. Limitation of Special Proceeding Applicable to Accounting.** — *Matter of Schlesinger*, 36 N. Y. App. Div. 77, *reversing* on other grounds (Surrogate Ct.) 24 Misc. (N. Y.) 456; *Matter of Longbotham*, 38 N. Y. App. Div. 607, *overruling* *Matter of Taylor*, 30 N. Y. App. Div. 213, *criticised* on other grounds *Matter of Cruikshank*, (Surrogate Ct.) 40 Misc. (N. Y.) 325; *Matter of Smith*, 66 N. Y. App. Div. 340,



**1188. Delay in Application for Accounting.** — See note I.

*affirmed* without opinion 179 N. Y. 563; Matter of Boylan, (Surrogate Ct.) 25 Misc. (N. Y.) 281, 28 Civ. Pro. (N. Y.) 233.

**Part Payment of a Legacy.** — Matter of Irvin, 68 N. Y. App. Div. 158.

**If the Use of the Estate Is Beneficial for Life.** — Matter of Jones, 51 N. Y. App. Div. 420; Matter of McCormick, (Surrogate Ct.) 27 Misc. (N. Y.) 416.

**That Right Is Barred Must Clearly Appear.** — A person obtaining possession of property as executor should not be permitted to acquire title thereto by failure of those interested to require him to account, unless there is no avenue of escape from such an inequitable result. If there be no doubt about the facts, the better practice is to grant the order. Matter of Irvin, 68 N. Y. App. Div. 158, *approved* Matter of Meyer, 98 N. Y. App. Div. 7, which was *affirmed* on opinion below 181 N. Y. 553, and Matter of Rothschild, (Surrogate Ct.) 42 Misc. (N. Y.) 161.

**Voluntary Accounting.** — Where the representative voluntarily institutes proceedings for the settlement of his account, and cites the persons interested to appear, his right to plead the statute, if it exists at all in such a case, is waived. Matter of Lyth, (Surrogate Ct.) 32 Misc. (N. Y.) 608.

**Infant Legatees and Heirs at Law.** — As to persons under age when the cause of action accrues, the time of such disability is not a part of the time limited. Matter of Pond, (Surrogate Ct.) 40 Misc. (N. Y.) 66. See also Matter of Barnes, (Surrogate Ct.) 25 Misc. (N. Y.) 279.

**Liability of Personal Representative of Deceased Executor.** — Where an executor dies before the statute has run against his liability to account, it will not run against the liability of his personal representative to settle the account, until the expiration of the statutory period after the latter's appointment. Matter of Irvin, 68 N. Y. App. Div. 158, *citing* Matter of Rogers, 153 N. Y. 316.

An action by an administrator against the executor of his successor in the administration, in which an accounting is not asked but a judgment is sought for money collected by the deceased representative and not accounted for, is an action on an implied contract and barred by the six years' statute of limitations. *Constantine v. Constantine*, 91 N. Y. App. Div. 607, *citing* *Libby v. Van Derzee*, 80 N. Y. App. Div. 494, which was *affirmed* without opinion in 176 N. Y. 591.

**Accounting for Proceeds of Real Estate.** — The rule has no application to an accounting for the proceeds of real estate, an executor or administrator having primarily nothing to do with the decedent's real property; and the right to call them to an account for such moneys will not accrue until they have received it. Matter of Sargent, 42 N. Y. App. Div. 301, *affirming sub non*. Matter of Bradley, (Surrogate Ct.) 25 Misc. (N. Y.) 261.

**In Conflict with Previous Decisions.** — In a late case it has been held of executors, that by virtue of the relation thus created the executor becomes trustee of those persons entitled to

take pursuant to the will; and occupying such relation, the statute of limitations will not begin to run until, by some act sufficient for the purpose, he repudiates his liability of trustee. Matter of Meyer, 98 N. Y. App. Div. 7, *affirmed* on opinion below 181 N. Y. 553, *distinguishing* Matter of Rogers, 153 N. Y. 316, relied on by the cases supporting the rule stated in the text. To the same effect, Matter of Jones, 51 N. Y. App. Div. 420, *affirming* (Surrogate Ct.) 30 Misc. (N. Y.) 354, Ingraham, J., *dissenting*; Matter of Lyth, (Surrogate Ct.) 32 Misc. (N. Y.) 608, *citing* *Young v. Young*, (C. Pl. Gen. T.) 2 Misc. (N. Y.) 381.

**Accounting by Executor as Testamentary Trustee.** — In cases where trust duties are imposed on an executor, and final administration by payment to legatees is deferred, the right to a final accounting only accrues at the time fixed for final distribution. If the trust duties are continuing, the statute does not begin to run until after a repudiation of the trust obligation is openly made by the trustee and brought to the notice of the beneficiary. Matter of Post, (Surrogate Ct.) 30 Misc. (N. Y.) 551. To the same effect, Matter of McCormick, (Surrogate Ct.) 27 Misc. (N. Y.) 416. See also Matter of Smith, 66 N. Y. App. Div. 340, *affirmed* without opinion 179 N. Y. 563.

**Proceeding by Judgment Creditor.** — The right of a judgment creditor to institute proceedings for an accounting as a means of enforcing his judgment arises on the rendition of the judgment, and the statute does not begin to run until that time. Matter of Gall, 40 N. Y. App. Div. 14, 42 N. Y. App. Div. 255, *citing* *Congregational Unitarian Soc. v. Hale*, 34 N. Y. App. Div. 387; same case, on subsequent appeal, Matter of Gall, 182 N. Y. 270, *modifying* on other grounds mem. judg. 102 N. Y. App. Div. 624; Matter of O'Brien, (Surrogate Ct.) 33 Misc. (N. Y.) 17. *Compare* Matter of Cruikshank, (Surrogate Ct.) 40 Misc. (N. Y.) 325.

**1188. 1. Accounting Excused by Lapse of Time.** — *Hunt v. Smith*, 58 N. J. Eq. 25; *Hart's Estate*, 9 Pa. Dist. 274; *Hedderly's Estate*, 12 Pa. Dist. 72, 28 Pa. Co. Ct. 64, 19 Montg. Co. Rep. (Pa.) 132; *Meyer's Estate*, 13 Pa. Dist. 191, 30 Pa. Co. Ct. 84; *Wilt's Estate*, 13 Pa. Dist. 483; *Washburn's Estate*, 9 Kulp (Pa.) 60; *Armstrong's Estate*, 16 Montg. Co. Rep. (Pa.) 9; *McCluen's Estate*, 35 Pittsb. Leg. J. N. S. (Pa.) 297; *Tate v. Jones*, 98 Va. 544.

**Stale Claims.** — *Covington v. Griffin*, 98 Va. 124.

**Laches of Persons under Disability.** — Where the petitioner for an account as residuary legatee is the wife of the executor, laches in the assertion of her right to an account will not be attributed to her until the coverture has ended. *Boyd's Estate*, 12 Pa. Dist. 280, 28 Pa. Co. Ct. 426.

Laches is not to be imputed to persons incapable by reason of minority of acting for themselves during the continuance of such incapacity. And even though there be a guardian or committee of the person under a legal disability, the laches or acquiescence of a guardian or committee is not the laches or acquiescence of the minor or the lunatic. *Graham's Estate*, 14 Pa. Dist. 5, 18 York Leg. Rec. (Pa.) 147.



**1189.** See notes 1, 3.

**2. Jurisdiction in Matters of Accounting — a. COURTS OF PROBATE**

— In England. — See note 5.

**1190.** See note 1.

In the United States. — See note 4.

Exclusive Jurisdiction of Courts of Probate. — See note 5.

**1191.** **b. COURTS OF EQUITY.** — See note 2.

In the United States. — See notes 3, 5.

**1189. 1. Excusing Laches.** — *Holzer v. Thomas*, (N. J. 1905) 61 Atl. Rep. 154; *Stewart's Estate*, 212 Pa. St. 327; *McCluen's Estate*, 36 Pittsb. Leg. J. N. S. (Pa.) 73.

**3. If No Account Has Ever Been Filed.** — *Fulmer v. Cushman*, 170 Mass. 286.

If it is admitted an account was never filed, any presumption arising from lapse of time is overcome, and in such a case delay is rarely held sufficient to bar the right to an account. *Graham's Estate*, 14 Pa. Dist. 5, 18 York. Leg. Rec. (Pa.) 147, citing *Norris's Appeal*, 71 Pa. St. 106.

**5. Limitation of Powers of Ecclesiastical Courts.** — Upon the old law this much seems clear, that the ecclesiastical court had authority to insist that everything of which the deceased dies possessed, and only the property left at the death, should be fairly included in the inventory and accountable for by the executor. *Re Russell*, 8 Ont. L. Rep. 481. See *supra*, this title, **859. 4 et seq.**

**1190. 1. Canada — Province of Ontario.** — The surrogate courts of the province are invested with the authority and jurisdiction over executors and administrators and the rendering of inventories and accounts, conferred in England on the ordinary under the statute 21 Hen. VIII., ch. 5. *Cunnington v. Cunningham*, 2 Ont. L. Rep. 511; *Re Russell*, 8 Ont. L. Rep. 481.

**4. Probate Court May Require Account ex Mero Motu.** — See *infra*, this title, **1196. 1, 2.**

**6. Exclusive Jurisdiction of Probate Court — Arkansas.** — *Huffstедler v. Kibler*, 67 Ark. 239. *California.* — *Toland v. Earl*, 129 Cal. 148, 79 Am. St. Rep. 100; *Nickals v. Stanley*, 146 Cal. 724.

*Colorado.* — *McKinnon v. Hall*, 10 Colo. App. 291.

*Maine.* — *Graffam v. Ray*, 91 Me. 234; *Hawes v. Williams*, 92 Me. 483.

*Massachusetts.* — *Greene v. Brown*, 180 Mass. 308; *Jordan v. Taylor*, 98 Fed. Rep. 643 (construing Massachusetts law).

*Michigan.* — *Canfield v. Canfield*, (C. C. A.) 118 Fed. Rep. 1, construing Michigan law and citing *Wooden v. Kerr*, 91 Mich. 188.

*Minnesota.* — *Starkey v. Sweeney*, 71 Minn. 241; *Betcher v. Betcher*, 83 Minn. 215.

*Missouri.* — *Stephens v. Cassidy*, 104 Mo. App. 210; *Scruggs v. Scruggs*, 105 Fed. Rep. 28 (construing Missouri law).

*Nebraska.* — *Boales v. Ferguson*, 55 Neb. 565; *Youngson v. Bond*, (Neb. 1903) 95 N. W. Rep. 700, affirming 64 Neb. 615. See also *McGlave v. Fitzgerald*, 67 Neb. 417.

*North Carolina.* — In North Carolina the contrary rule seems to obtain. See also *infra*, this title, **1191. 5.**

*Ohio.* — *Tidd v. Bloch*, 27 Ohio Cir. Ct. 113.

*Oregon.* — *Herren's Estate*, 40 Oregon 90; *Butenic v. Hamaker*, 40 Oregon 444; *State v. O'Day*, 41 Oregon 495.

*Pennsylvania.* — *Wilson v. Smith*, (C. C. A.) 126 Fed. Rep. 916 (construing Pennsylvania law); *Moore v. Fidelity Trust Co.*, (C. C. A.) 138 Fed. Rep. 1, affirming 134 Fed. Rep. 489 (construing Pennsylvania law).

*West Virginia.* — *Hale v. White*, 47 W. Va. 700; *Thompson v. Nowlin*, 51 W. Va. 346; *Thompson v. Mann*, 53 W. Va. 432; *Stone v. Simmons*, 50 W. Va. 88.

**1191. 2. Canada — Province of Ontario.** — The jurisdiction of the ecclesiastical court as to accounting was of a very restricted character, and no greater measure of jurisdiction in scope, though there may be in details, is now vested in the surrogate courts of the province. For full inquiry and accounting resort must be had to the administrative powers of the high court. *Re Russell*, 8 Ont. L. Rep. 481, *Meredith, J., dissenting.*

**3. Jurisdiction Given to Probate Courts Held Not Exclusive — Alabama.** — *Jordan v. Hardie*, 131 Ala. 72.

*California.* — Under the present constitution of California the contrary rule is now established. See *supra*, this title, **1190. 5.**

*Georgia.* — *Adams v. Adams*, 113 Ga. 824; *Williams v. Lancaster*, 113 Ga. 1020.

*Kentucky.* — In Kentucky the jurisdiction of courts of equity is conferred by statute authorizing a legal representative, legatee, distributee, or creditor of a deceased person, to bring a bill for the settlement of the estate. *Holburn v. Pfannmiller*, 114 Ky. 831; *Ashford v. Tipton*, (Ky. 1899) 53 S. W. Rep. 268; *Foster v. Foster*, 71 S. W. Rep. 524, 24 Ky. L. Rep. 1396; *Alderson v. Alderson*, 83 S. W. Rep. 1129, 26 Ky. L. Rep. 1260.

*New Jersey.* — *Hoagland v. Cooper*, 65 N. J. Eq. 407. See also *Tierney v. Tierney*, (N. J. 1897) 38 Atl. Rep. 971.

*New York.* — See cases cited *infra*, this note, *The Object of the Statute.*

*North Carolina.* — In North Carolina the jurisdiction of courts of equity to entertain administration suits at the instance of creditors, devisees, or legatees has been uniformly recognized and frequently exercised. Such suits are less frequent since the distinction between legal and equitable assets has been abolished, and full powers in settlement of estates conferred upon courts of probate. *Fisher v. Southern L. & T. Co.*, 138 N. Car. 90.

**The Object of the Statute.** — The scope of this doctrine is somewhat difficult to determine, the opinions of the courts containing no very clear statements on the subject. On general principles equity has jurisdiction where special cir-

**1192.** *c.* COURTS OF LAW. — See note 1.**3. Who May Require Accounting — The General Rule.** — See note 3.**1193.** See notes 1, 2, 3, 4, 5.

cumstances exist necessitating its interference. Special circumstances must also appear to warrant the interference of the court, after proceedings for an accounting have been instituted in the court of probate. Otherwise the right generally exists to proceed in chancery without alleging any special equity, if the jurisdiction is strictly concurrent. See *Noble v. Tate*, 119 Ala. 399, 140 Ala. 469; *Norwood v. Tyson*, 138 Ala. 269; *Suydam v. Voorhees*, 58 N. J. Eq. 157; *Bird v. Hawkins*, 58 N. J. Eq. 229; *Freehold First Nat. Bank v. Thompson*, 61 N. J. Eq. 188; *Mulford v. Mulford*, (N. J. 1902) 53 Atl. Rep. 79; *Palmer v. Ward*, 91 N. Y. App. Div. 449, citing *Sanders v. Soutter*, 126 N. Y. 193.

In *New York* it has been stated that in the Supreme Court, Second Judicial District, equity will entertain a suit for an accounting unless the jurisdiction of the Surrogate's Court has already been invoked, though the case has no special features showing that a complete remedy cannot be had in the latter court; but that in the First Judicial Department, the contrary has been held. *Haughian v. Conlon*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 584. See *Ludwig v. Bungart*, 48 N. Y. App. Div. 613, *reversing* (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 247; *Steinway v. Von Bernuth*, 59 N. Y. App. Div. 261, two justices *dissenting*; *Borrowe v. Corbin*, 31 N. Y. App. Div. 172, *affirmed* on opinion below 165 N. Y. 634. Compare, as to Second Judicial Department, *Levett v. Polhemus*, 86 N. Y. App. Div. 495; *Steinway v. Von Bernuth*, 82 N. Y. App. Div. 596, *quoting* with approval *Fernandez v. Fernandez*, 15 N. Y. App. Div. 469.

In *Kentucky* settlements in the probate court are only *prima facie* evidence, subject to be surcharged and falsified in chancery. *Turley v. Barnes*, 103 Ky. 127, citing *Scott v. Kennedy*, 12 B. Mon. (Ky.) 515.

**Effect of Pendency of Proceedings in Equity.** — After a proceeding for settlement of the accounts has been commenced in equity, a subsequent proceeding commenced and adjudicated in the probate court is without jurisdiction. *Hall v. Hall*, (Tenn. Ch. 1900) 59 S. W. Rep. 203.

**1191. 5. Special Grounds of Equitable Interference.** — *Central Nat. Bank v. Fitzgerald*, 94 Fed. Rep. 16; *Sutton v. Read*, 176 Ill. 69; *Elting v. Biggsville First Nat. Bank*, 68 Ill. App. 204, *affirmed* 173 Ill. 368; *McGlave v. Fitzgerald*, 67 Neb. 417, *discussing* the different rules as to jurisdiction in equity and *quoting* 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1191; *Hanna v. Galford*, 55 W. Va. 160. See also *Stager v. Crabtree*, 177 Ill. 59, *supra*, this title, **1190. 5, 1191. 3.**

**1192. 1. Accounting Not to Be Had in Action at Law.** — *Graffam v. Ray*, 91 Me. 234.

**3. Parties in Interest Only Can Require Accounting — Illinois.** — *Maurer v. Bowman*, 169 Ill. 586, *affirming* 65 Ill. App. 261.

*Louisiana.* — *Rabasse's Succession*, 50 La. Ann. 746.

*New York.* — *Matter of Egan*, 89 N. Y. App. Div. 565; *Matter of Thompson*, (Surrogate Ct.) 41 Misc. (N. Y.) 223.

*Oregon.* — *Re Chambers*, 38 Oregon 131.

*Pennsylvania.* — *Smith's Estate*, 7 Pa. Dist. 754, 43 W. N. C. (Pa.) 248; *Price's Estate*, 9 Pa. Dist. 511, 24 Pa. Co. Ct. 224; *McManemin's Estate*, 11 Pa. Dist. 338; *Flaherty's Estate*, 4 Lack. Jur. (Pa.) 354; *Emig's Estate*, 17 York Leg. Rec. (Pa.) 99.

*Rhode Island.* — *Burch v. Champlin*, (R. I. 1900) 52 Atl. Rep. 988.

**Administration Suits in Equity — North Carolina.** — While Code N. Car., § 1511, would seem to contemplate actions by creditors, its purpose is to give to the court, if it did not already have it, jurisdiction to entertain suits brought by any party interested in the proper administration of an estate. *Fisher v. Southern L. & T. Co.*, 138 N. Car. 90.

**Heirs at Law.** — *Adams v. Adams*, 113 Ga. 824; *Wiemann's Succession*, 106 La. 387.

**A Widow**, in order to choose intelligently whether she will take under her husband's will, may compel an exhibition of the account of his personal estate. *White's Estate*, 23 Pa. Super. Ct. 552.

**A Guardian of Infant Legatee** has the right to institute proceedings for an accounting. *Buffalo Loan, etc., Co. v. Leonard*, 154 N. Y. 141, *affirming* 9 N. Y. App. Div. 384.

**A Remainderman** is entitled to an account from one who is both life tenant and executrix, where considerable time has elapsed since an account has been filed; and his rights are not affected by the facts that the executrix is his mother and that the other children are all averse to his proceeding. *Heath's Estate*, 10 Pa. Dist. 281, 25 Pa. Co. Ct. 258.

**Administrators De Bonis Non.** — See *infra*, this title, **1327. 1, 1334. 2.**

The successor of a personal representative in the administration of the estate is entitled to contest the accounts of his predecessor as a person interested. *Matter of Spanier*, 120 Cal. 698.

**1193. 1. Prima Facie Showing of Interest Sufficient.** — *Schlemmer's Estate*, 12 Pa. Dist. 137, 28 Pa. Co. Ct. 247. See also *Bortin's Estate*, 12 Pa. Dist. 265, 28 Pa. Co. Ct. 496.

**A Creditor of the Representative** for services rendered him *qua* executor is not entitled to compel an account, where the debt is denied, until the question of fact has been determined by the verdict of a jury in due course of legal proceedings. *Ashoff's Estate*, 14 Pa. Dist. 333.

**Discretion of Court.** — The right to compel an account is not an absolute right, regardless of circumstances, but is within the sound discretion of the court. *Matter of Withers*, 23 N. Y. App. Div. 404; *Singerly's Estate*, 9 Pa. Dist. 261, 23 Pa. Co. Ct. 575.

Where the expense of filing an account is unwarranted, the account not being necessary to the protection of the rights of the applicant, the court will not require one to be filed. *Powers's Estate*, 10 Pa. Dist. 165; *Maule's*



**1194.** Creditors of a Decedent. — See notes 1, 2.

Legatees and Distributees. — See notes 4, 5, 6.

**1195.** See note 2.

Estate, 13 Pa. Dist. 142, 5 Lack. Jur. (Pa.) 160.

A second account is not demandable as of right. Price's Estate, 9 Pa. Dist. 511, 24 Pa. Co. Ct. 224.

**1193. 2. A Duly Verified Allegation of Interest Is Sufficient.** — Matter of Dority, 40 N. Y. App. Div. 236.

Where it appears that petitioners are children of the decedent, this relation creates an interest by operation of law, and the application will not be dismissed because their particular interests are not set out. Matter of Meyer, 98 N. Y. App. Div. 7, *affirmed* on opinion below, 181 N. Y. 553.

As to persons other than creditors the surrogate may ordinarily examine into the question whether the applicant is a party interested in the estate. Matter of St. John, 104 N. Y. App. Div. 460, 622, 623; Matter of Thompson, (Surrogate Ct.) 41 Misc. (N. Y.) 223. See, as to creditors, *infra*, this title, **1194. 1. In New York.**

**3. The Validity of the Petitioner's Claim.** — Clinton's Estate, 8 Pa. Dist. 455, 23 Pa. Co. Ct. 209. See *infra*, this title, **1194. 1. In New York.**

**4. Release of Interest.** — See *supra*, this title, **1185. 1 et seq., 1186. 3; infra, 1319. 5.**

**5. Contingent Interests.** — Tunncliffe v. Fox, (Neb. 1903) 94 N. W. Rep. 1032; Raeder's Estate, 10 Pa. Dist. 282, 31 Pittsb. Leg. J. N. S. (Pa.) 357.

"Every Person Entitled Either Absolutely or Contingently." — Matter of Killan, 172 N. Y. 547, *reversing* on other grounds 66 N. Y. App. Div. 312; Matter of Dority, 40 N. Y. App. Div. 236; Matter of Hunt, 84 N. Y. App. Div. 159, *affirming* (Surrogate Ct.) 38 Misc. (N. Y.) 30, *affirmed* without opinion 179 N. Y. 570; Matter of St. John, 104 N. Y. App. Div. 460, 622, 623.

**1194. 1. Creditors or Their Representatives May Require Accounting.** — Clinton's Estate, 8 Pa. Dist. 455, 23 Pa. Co. Ct. 209; Mahon's Estate, 8 Lack. Leg. N. (Pa.) 258; Helbling's Estate, 33 Pittsb. Leg. J. N. S. (Pa.) 53.

**Who Are Creditors.** — In *New York* funeral expenses are not a debt against the estate, and a third person who has paid them is not a person interested either as creditor or otherwise. Matter of Schulz, (Surrogate Ct.) 26 Misc. (N. Y.) 688.

A stockholder of a corporation has no standing to apply for an accounting on a claim alleged to exist in favor of the corporation, though it has failed after demand to apply in its own behalf. Matter of Huntington, (Surrogate Ct.) 39 Misc. (N. Y.) 477.

**In New York.** — See generally Matter of Merritt, 35 N. Y. App. Div. 337; Matter of Blum, 83 N. Y. App. Div. 161; Matter of Warren, 105 N. Y. App. Div. 582; Matter of Hickey, (Surrogate Ct.) 34 Misc. (N. Y.) 360; Matter of Thurber, (Surrogate Ct.) 37 Misc. (N. Y.) 155; Matter of Fonda, (Surrogate Ct.) 38 Misc. (N. Y.) 407; Matter of Thompson, (Surrogate Ct.) 41 Misc. (N. Y.) 223.

**Contra**, on the second proposition stated in the note, as to general creditors, the court holding that where the claim is disputed by the personal representative, the surrogate, having no power to order payment of the claim, should not require the accounting. Matter of Whitehead, 38 N. Y. App. Div. 319; Matter of Huntington, (Surrogate Ct.) 39 Misc. (N. Y.) 477. See also Matter of Reinach, (Surrogate Ct.) 41 Misc. (N. Y.) 78.

**2. Failure to Present Claims.** — In *New Jersey* it is provided by a statute that if an administrator shall neglect to make a final settlement within one year of the time of his administration being granted, a creditor who shall be barred by a decree of the Orphans' Court may present a petition to the court for payment of his claim. Equitable L. Assur. Soc. v. Chesley, 64 N. J. Eq. 348, *reversing* on other grounds 63 N. J. Eq. 219.

**4. Legatees and Distributees.** — Harrell v. Warren, 105 Ga. 476; Fingleton v. Kent Circuit Judge, 116 Mich. 211; Matter of Rainforth, (Surrogate Ct.) 37 Misc. (N. Y.) 660.

**Residuary Legatee.** — Bird v. Hawkins, 58 N. J. Eq. 229.

**5. A Right to a Decree for Distribution.** — Matter of Rainforth, (Surrogate Ct.) 37 Misc. (N. Y.) 660.

A legatee is a "person interested" and qualified to compel an accounting, though the time when the legacy is to be paid is postponed by the will. Matter of Jones, (Surrogate Ct.) 30 Misc. (N. Y.) 354, *affirmed* 51 N. Y. App. Div. 420.

**6. Personal Representative of Deceased Legatee or Distributee May Require Accounting.** — The personal representative of a deceased legatee or distributee, and not his children, has the right to exact an accounting. Maxwell v. McCreery, 57 N. J. Eq. 287.

**1195. 2. Judgment Creditor of Heir May Require an Accounting.** — But see Gallagher's Estate, 8 Pa. Dist. 699.

**Attachment Creditor of Legatee or Distributee.** — Voinche v. Brouillette, 50 La. Ann. 370; Gallagher's Estate, 8 Pa. Dist. 699; Agnew's Estate, 8 Pa. Dist. 699; Hart's Estate, 9 Pa. Dist. 347; Raeder's Estate, 10 Pa. Dist. 282, 31 Pittsb. Leg. J. N. S. (Pa.) 357.

An attaching creditor of a legatee whose share in the estate is held by the executors in trust, payable at their discretion, has no such interest as will entitle him to compel an account. Locher's Estate, 18 Lanc. L. Rev. 6.

**A Receiver in Supplementary Proceedings.** — Compare *In re Stephens*, (Surrogate Ct.) 64 N. Y. Supp. 990.

**Purchaser of Distributive Share.** — Starkey v. Sweeney, 71 Minn. 241; Smith's Estate, 7 Pa. Dist. 754, 43 W. N. C. (Pa.) 248.

The assignee of a legatee of a specific chattel has no right to compel the executrix, who is the legatee of the rest of the personal property, to account, there being no debts due from the decedent. Matter of Egan, 89 N. Y. App. Div. 565.



**1195.** The Executor or Administrator. — See notes 3, 4.

4. Time of Rendering Accounts — Rule in England. — See note 5.

**1196.** In the United States. — See notes 1, 2.

**1195. 3. Accounting on Petition of Executor or Administrator.** — Harrell v. Warren, 105 Ga. 476.

This right or privilege extends to the executor or administrator of a deceased personal representative. Since he can be compelled to render an account of his decedent's administration of the first estate, he may render it voluntarily. *Cunnington v. Cunningham*, 2 Ont. L. Rep. 511.

**4. Joint Executors.** — McManus's Estate, 212 Pa. St. 267.

**5. Executor or Administrator Not Obligated to Account at Common Law until Cited.** — It has always been the privilege of an executor or an administrator, however, to render an account voluntarily in any case in which he is liable to be called on, and in order to exonerate himself from liability it is always a most prudent thing for him to do. *Cunnington v. Cunningham*, 2 Ont. L. Rep. 511.

**1196. 1. Periodical Accounting in the United States — California.** — The California statute also requires the representative to render an account six months after his appointment, and at any time when required by the court of its own motion, or upon the application of any person interested in the estate. *Matter of Adams*, 131 Cal. 415.

Public administrators are required by the Civil Code, § 1736, to make semi-annual returns. *Matter of Hedrick*, 127 Cal. 184.

*Georgia.* — In Georgia an accounting can be compelled after the expiration of twelve months from the qualification of the representative. *Adams v. Adams*, 113 Ga. 824; *Williams v. Lancaster*, 113 Ga. 1020.

*Kansas.* — In Kansas the statute provides for an accounting in the probate court annually, and at other times, and as often as the court may require, until the final settlement is made. *Hudson v. Barratt*, 62 Kan. 137.

*Louisiana.* — In Louisiana it is the duty of executors and administrators to file a full account of their administration at least once in twelve months. *Weeks's Succession*, 104 La. 573.

*Maryland.* — In Maryland an executor or administrator has a year from the date of the issuance of his letters within which to render an account, before one can be compelled. *Jones v. Harbaugh*, 93 Md. 269.

*New Jersey.* — In New Jersey it is the duty of the representative, without compulsion, to account within one year after the grant of letters, or at the first regular term of the court after the expiration of that year, unless further time is expressly granted. Not so accounting, he can be cited to account by any one interested in the estate at the ensuing term. After two years delay, without the consent of the court, it becomes the duty of the surrogate to compel an account. In addition to these provisions the court is empowered, at its will, to call upon the representative to account. *Maxwell v. McCreery*, 57 N. J. Eq. 287.

*New York.* — See *Matter of Crowley*, (Sur-

rogate Ct.) 33 Misc. (N. Y.) 624; *Matter of Miner*, (Surrogate Ct.) 39 Misc. (N. Y.) 605.

By Code Civ. Pro. N. Y., § 2728, as amended in 1895, an executor or administrator after having duly published the statutory notice to creditors to exhibit their claims, may apply for a judicial settlement of his accounts. *Matter of Bronner*, (Surrogate Ct.) 30 Misc. (N. Y.) 31; *Matter of Lawson*, (Surrogate Ct.) 36 Misc. (N. Y.) 96; *Matter of Lansing*, (Surrogate Ct.) 37 Misc. (N. Y.) 177.

Code Civ. Pro. N. Y., § 2725, subd. 1, provides that the surrogate may, in his discretion, make an order requiring an executor or administrator to render an intermediate account "where an application for an order, permitting an execution to issue on a judgment against the executor or administrator, has been made by the judgment creditor, as prescribed in section 1826 of this act." *Congregational Unitarian Soc. v. Hale*, 34 N. Y. App. Div. 387.

On the death of a personal representative, his executor or administrator may be required to settle the accounts of his decedent as representative of the first decedent, immediately upon his appointment. *Matter of Rogers*, 153 N. Y. 316, *affirming* mem. judg. (Supm. Ct. Gen. T.) 36 N. Y. Supp. 1132; *Matter of Scudder*, (Surrogate Ct.) 21 Misc. (N. Y.) 179, *citing* *Matter of Wiley*, 119 N. Y. 642; *Matter of Trask*, (Surrogate Ct.) 27 Civ. Pro. (N. Y.) 7.

*Ohio.* — In Ohio the statute provides that an executor or administrator shall, within eighteen months after appointment, render an account, and in like manner render further accounts every twelve months thereafter, until the estate shall be wholly settled; and where an administrator has died before his estate has been fully administered, his executor or administrator is required to render a final account of such administration within six months. *Matter of Morrison*, 68 Ohio St. 252.

*Oregon.* — The Oregon statute requires the representative to render a verified account, within the first ten days of April and October of each year. *Re Chambers*, 38 Oregon 131; *Rutenic v. Hamakar*, 40 Oregon 444.

*Pennsylvania.* — *Clinton's Estate*, 8 Pa. Dist. 661, 23 Pa. Co. Ct. 209; *Schlemmer's Estate*, 12 Pa. Dist. 137, 28 Pa. Co. Ct. 247; *Miller's Estate*, 14 Pa. Dist. 163.

An account can be compelled at the expiration of one year and thereafter when legally required. *Rastaetter's Estate*, 15 Pa. Super. Ct. 549.

*Texas.* — In Texas it is the duty of an executor or administrator, upon the payment of all the debts known to exist against the estate, to file his account for final settlement. *Rev. Stat. Tex. 1895, art. 2190*; *Cobb v. Speers*, (Tex. Civ. App. 1899) 49 S. W. Rep. 666.

**Administrator Removed from Office.** — A statutory provision which allows a year to elapse from the death of an intestate before the rendering of an account by an administrator, does not apply where he has been dismissed within the year. *Lockard's Estate*, 10 Pa. Dist. 192.

**1197. 5. Failure to Account.** — See notes 2, 3, 4.

**6. Charges — a. WHAT PROPERTY MUST BE ACCOUNTED FOR IN GENERAL — The General Rule.** — See note 5.

**Provision in Will Fixing Time for Accounting.** — A provision in a will fixing a time for accounting different from that fixed by statute is not enforceable as against creditors but is binding upon distributees. *Linthecum v. Vowel*, 80 S. W. Rep. 1090, 26 Ky. L. Rep. 221.

**Settlement of Final Account Pending Appeal from Order of Partial Distribution.** — It is no objection to a final account that it was settled by the court pending an appeal from an order making partial distribution of the estate, no questions as to distribution being involved in the settlement. *In re Thayer*, (Cal. 1905) 81 Pac. Rep. 658.

**1196. 2. Accounting May Be Required at Any Time.** — *Smith's Estate*, 7 Pa. Dist. 754, 43 W. N. C. (Pa.) 248. See also *Humphrey v. Conger*, 7 App. Cas. (D. C.) 23; *Hartson v. Elden*, 58 N. J. Eq. 478; *supra*, note 1.

**In Kentucky.** — *Brand v. Brand*, 109 Ky. 721; *Craddock v. Payton*, 114 Ky. 298; *Linthecum v. Vowel*, 80 S. W. Rep. 1090, 26 Ky. L. Rep. 221; *Faulkner v. Tucker*, 83 S. W. Rep. 579, 26 Ky. L. Rep. 1130.

**Accounting Required by Court on Its Own Motion.** — It is clearly within the power of the probate court to order the filing of an account by a delinquent administrator, whether moved thereto by an interested party or not. *Matter of Morrison*, 68 Ohio St. 252.

**Pendency of Litigation Involving Funds of Estate.** — Where the funds of the estate are involved in litigation, as yet undetermined, the representative is relieved from a present accounting. *Smythe's Estate*, 11 Pa. Dist. 441, 27 Pa. Co. Ct. 170, *citing Keily's Estate*, 9 Pa. Co. Ct. 175.

**Account Ordered for Specific Purpose.** — A decree for an account for a specific purpose, as to satisfy the widow of decedent that her annuity under the will is secure, cannot be turned into a general overhauling of the estate. *Young's Estate*, 202 Pa. St. 431.

**1197. 2. Failure to Account — Strict Proof Required.** — *Cosby v. Weaver*, 107 Ga. 761. See also *Humphrey v. Conger*, 7 App. Cas. (D. C.) 23; *Hunt v. Smith*, 58 N. J. Eq. 25.

It is the duty of an executor to account without compulsion, and on his failure to do so the court will not put unnecessary burdens upon persons injured by such neglect. *Budd v. Hardenbergh*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 90.

**Refusal to Grant Relief from Contract to Executor Who Has Not Accounted.** — A nonresident executrix, of a deceased executor, who has been ordered but has neglected to render an account of his proceedings as executor, will not be granted any relief against a stipulation made by her under which some moneys have been paid her from the estate of the deceased executor and which contemplates further payments. The application is addressed to the discretion of the court, and until she obeys its orders she is not in a position to ask favors of it. *Matter of Wade*, (Surrogate Ct.) 38 Misc. (N. Y.) 154.

**Statement of Account by Court.** — In *Pennsylvania*, under the Act of March 29, 1832, P. L.

207, if the representative fails or refuses to file an account one may be stated against him by the court, if the facts warrant it. *In re Starr*, 190 Pa. St. 162.

**Failure to File Account Promptly.** — It is the duty of the administrator to file an account promptly, and, not having done so, it is peculiarly his duty to keep accurate accounts and vouchers and be able to file an account at any time. *Reed's Estate*, 22 Pa. Super. Ct. 635.

**What Constitutes Refusal to Account.** — See *supra*, this title, 894. 4.

**3. Failure to Account Is Breach of Bond.** — *Slater v. McAvoy*, 123 Cal. 437; *Hodge v. Hodge*, 90 Me. 505; *McKim v. Haley*, 173 Mass. 112; *Fuller v. Wilbur*, 170 Mass. 506.

**Statutory Penalty Recoverable by Action on Bond.** — *Lippert v. Lippert*, 110 Iowa 550.

**4. Failure to Account Is Cause for Revoking Letters.** — See *supra*, this title, 823. 1.

**Interest on Balance.** — *Conery's Succession*, 111 La. 113; *In re Dimmick*, 111 La. 655.

**Statutory Penalty — Rhode Island.** — The Rhode Island statute provides that "if any executor or administrator, after being cited as aforesaid, shall neglect or refuse to render an account pursuant thereto for the space of thirty days without assigning to said court satisfactory reason therefor, such executor or administrator shall be held accountable for the full value of the personal property of the deceased, with interest, and shall be entitled to no compensation for his services." *West v. Municipal Ct.*, 25 R. I. 84.

**5. All the Property of a Decedent.** — *Matter of Kennedy*, 120 Cal. 458; *Matter of Gianelli*, 146 Cal. 139; *Bauernschmidt v. Bauernschmidt*, (Md. 1905) 60 Atl. Rep. 437; *Conser's Estate*, 40 Oregon 138; *White's Estate*, 23 Pa. Super. Ct. 552.

**Property Not Received by the Executor or Administrator.** — The right to require an accounting for money or property received by a personal representative does not accrue, as a general rule, until it has been received by him. *Matter of Rothschild*, (Surrogate Ct.) 42 Misc. (N. Y.) 161.

An administrator is not chargeable with property of which he had no knowledge. *O'Brien v. Wilson*, 82 Miss. 93.

The legal representative of an executor or administrator is not accountable for assets of the first decedent's estate, taken over by the deceased representative as distributee of that estate, which did not actually come into his hands. *Nolde's Estate*, 27 Pa. Super. Ct. 413, *affirming* 21 Lanc. L. Rev. 59.

An accountant should charge himself only with moneys or other personal estate actually in his possession or under his control; otherwise, the court may unwittingly make distribution of moneys, etc., not in his hands, and subject him to embarrassment caused by an order to pay the award, and the prospect of attachment for nonpayment. *Eisenmann's Estate*, 12 Pa. Dist. 322.

**In Case Any Loss Is Sustained by the benefi-**



ciaries in consequence of the executor's neglect, devastated, or other default, he will be surcharged with the amount.

England. — *Re Barker*, 77 L. T. N. S. 712.

California. — *In re Carver*, 123 Cal. 102.

Illinois. — *Caruthers v. Caruthers*, 99 Ill. App. 402.

Kentucky. — *Foster v. Foster*, 71 S. W. Rep. 524, 24 Ky. L. Rep. 1396.

Maryland. — *Hoffman v. Armstrong*, 90 Md. 123.

Michigan. — *Cheever v. Ellis*, 134 Mich. 645, 10 Detroit Leg. N. 624; *Porter v. Long*, (Mich. 1904) 98 N. W. Rep. 990, 10 Detroit Leg. N. 987; same case on former appeal, 123 Mich. 584.

Minnesota. — *Ryan v. Williams*, 92 Minn. 506.

New York. — *Matter of Hosford*, 62 N. Y. App. Div. 626; *Matter of Van De Veer*, 63 N. Y. App. Div. 495; *Levett v. Polhemus*, 86 N. Y. App. Div. 495; *Matter of Long Island L. & T. Co.*, 92 N. Y. App. Div. 5; *Matter of Baker*, (Surrogate Ct.) 27 Misc. (N. Y.) 126; *Matter of Feierabend*, (Surrogate Ct.) 38 Misc. (N. Y.) 524.

Pennsylvania. — *Irvine's Estate*, 203 Pa. St. 602; same case on former appeal, 209 Pa. St. 321; *Crouse's Estate*, 16 Pa. Super. Ct. 212; *Carr's Estate*, 24 Pa. Super. Ct. 369, reversing 8 Del. Co. Rep. (Pa.) 556; *Kauffeld's Estate*, 28 Pa. Super. Ct. 162, reversing 35 Pittsb. Leg. J. N. S. (Pa.) 174; *Furlong's Estate*, 10 Pa. Dist. 527; *Lahey's Estate*, 13 Pa. Dist. 533, 30 Pa. Co. Ct. 287; *Harris's Estate*, 12 Luz. Leg. Reg. (Pa.) 58; *Campbell's Estate*, 32 Pittsb. Leg. J. N. S. (Pa.) 409.

Vermont. — *In re Hall*, 70 Vt. 458.

Virginia. — *Beaty v. Downing*, 96 Va. 451.

An executor will be surcharged with loss to the estate due to his continuing the occupation of the testator's rented apartments, instead of terminating the lease, as he might have done, and storing the goods, only from the date of the issuance of his letters. *Matter of Murray*, (Surrogate Ct.) 40 Misc. (N. Y.) 433.

An executor or administrator is responsible for losses to the estate due to expenditures of moneys belonging to it for the purpose of rectifying errors made by his attorney. *Matter of Hayes*, (Surrogate Ct.) 40 Misc. (N. Y.) 500.

**The Good Will of a Decedent's Business.** — *Matter of Yetter*, 44 N. Y. App. Div. 404, affirmed on opinion below 162 N. Y. 615; *Matter of Feierabend*, (Surrogate Ct.) 38 Misc. (N. Y.) 524.

For the conversion of the good will of a liquor business, and the stock, fixtures, and other personalty used in carrying it on, see *Matter of Suess*, (Surrogate Ct.) 37 Misc. (N. Y.) 459; *supra*, this title, 829. 1. *Liquor License* — *Pennsylvania*.

**Proof of Receipt by Representative.** — Possession by an administrator of part of a sum of money proved to have been left by the decedent buried in the ground, is sufficient, if unexplained, to warrant a charge for the whole sum. *Bauernschmidt v. Bauernschmidt*, (Md. 1905) 60 Atl. Rep. 437.

**Wearing Apparel of Testator.** — Wearing apparel of a married woman is presumed to belong to the husband, in the absence of evidence

to the contrary, and need not be accounted for by her executor. *In re Hall*, 70 Vt. 458.

**Advancements.** — *In re Cummings*, 120 Iowa 421; *Thomas's Estate*, 9 Pa. Dist. 87. Compare *Boring v. Jobe*, (Tenn. Ch. 1899) 53 S. W. Rep. 763.

**Estates of Married Women — Money on Deposit.** — Money on deposit in the name of a married woman is *prima facie* her money, for which her husband as executor or administrator of her estate must account. *Matter of Holmes*, 79 N. Y. App. Div. 264, affirmed without opinion 176 N. Y. 603; *Crosetti's Estate*, 211 Pa. St. 490.

**Burden of Proof** — *California*. — The burden of proof is on the person charging maladministration to make out a *prima facie* case, except that in so far as the executor or administrator has admitted assets, he is bound to account for or produce them. *Matter of Vance*, 141 Cal. 624.

*Georgia*. — *Adams v. Adams*, 113 Ga. 824.

*Missouri*. — *Ladd v. Stephens*, 147 Mo. 319.

*New York*. — *Farmers L. & T. Co. v. Pendleton*, 179 N. Y. 486, reversing 90 N. Y. App. Div. 607, which affirmed on opinion below (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 256; *Matter of Mitchell*, 36 N. Y. App. Div. 542, affirmed without opinion 161 N. Y. 654; *Matter of Peck*, 75 N. Y. App. Div. 296, affirmed 171 N. Y. 538; *Matter of Koch*, (Surrogate Ct.) 33 Misc. (N. Y.) 153; *Matter of Suess*, (Surrogate Ct.) 37 Misc. (N. Y.) 459; *Matter of Wagner*, (Surrogate Ct.) 40 Misc. (N. Y.) 490; *Matter of Hayes*, (Surrogate Ct.) 40 Misc. (N. Y.) 500.

*Pennsylvania*. — *McPherran's Estate*, 212 Pa. St. 425; *Hart's Estate*, 9 Pa. Dist. 347; *Bard's Estate*, 13 Pa. Dist. 552, 21 Lanc. L. Rev. 81; *Ripple's Estate*, 9 Kulp (Pa.) 66, 112; *O'Donnell's Estate*, 9 Kulp (Pa.) 123; *Fendrick's Estate*, 20 Lanc. L. Rev. 69.

See also *infra*, this title, 1200. 6 *et seq.*, 1202. 1 *et seq.*

Thus, where the representative disputes the correctness of his inventory with respect to the value or ownership of the property, placed thereon as assets, he has the burden of proof. *Wood v. Brown*, 121 Ga. 471; *In re Bayley*, 67 N. J. Eq. 566; *In re Kalbfell*, 184 Pa. St. 480, 41 W. N. C. (Pa.) 333.

In the absence of proof of loss by negligence, the representative cannot be charged in his final account with damages. *Matter of Armstrong*, 125 Cal. 603.

**Surcharges and Credits.** — Where a personal representative stands charged with money belonging to the estate, he cannot be charged with it a second time, when he has wasted it in illegal payments. Credit for such payments being disallowed, the charge still remains. *Hughes Estate*, 19 Pa. Super. Ct. 534.

An executor is properly surcharged with money borrowed by him and used in the administration, where he has taken credit in his account for the payments made with it. *Fitzpatrick's Estate*, 12 Pa. Dist. 730.

**Proceeds of Sale of Property Charged in Inventory.** — Where property sold is already charged in the inventory at a valuation equal to or greater than the selling price, the representative cannot be compelled to double his liability by charging him with the money it sold for. *Dorscheimer's Estate*, 9 Pa. Dist. 46.



**1198.** Money or Property of Third Persons. — See notes 1, 2.

**1199.** Property Received in Other than Representative Right. — See note 1.

**Retention of Property Without Appraisal as Exem.** — Where a widow, administratrix of her husband's estate, retains personalty, without having it appraised as exempt property, she is properly surcharged in her account with its value. *Grove's Estate*, 12 York Leg. Rec. (Pa.) 180.

**Measure of Value for Failure to Take Possession of Tangible Property.** — The amount chargeable against the representative for loss due to a failure to take possession of tangible property such as machinery, is its actual value at the time of the decedent's death and not its cost or value when new. *Fiscus's Estate*, 13 Pa. Super. Ct. 615.

**Application of Equitable Principles in Settling Account.** — In adjusting the accounts of an executor or administrator, the Surrogate's Court is governed by principles of equity as well as of law, and it is at all times competent for the representative, unimpeded by technical rules, to show the fairness of his dealings, the real nature of his transactions, and the amount for which he should be held liable. *Matter of Woodward*, 69 N. Y. App. Div. 286, *approving* Redf. Law & Pr. Surr. Ct. (5th ed.) 775, *citing* *Matter of Wagner*, 119 N. Y. 28.

**1198. 1. Money or Property of Third Person — In General — Florida.** — *Anderson v. Northrop*, 44 Fla. 472.

*Iowa.* — *Matter of Brown*, 113 Iowa 351.

*Michigan.* — *Reed v. Whipple*, (Mich. 1905) 103 N. W. Rep. 548.

*New York.* — *Matter of Myers*, 36 N. Y. App. Div. 625; *Matter of McAleenan*, 53 N. Y. App. Div. 193, *affirmed* 165 N. Y. 645; *Matter of Kane*, (Surrogate Ct.) 38 Misc. (N. Y.) 276; *Matter of Bulwinkel*, (Surrogate Ct.) 42 Misc. (N. Y.) 471.

*Pennsylvania.* — *Deffy's Estate*, 209 Pa. St. 390; *Oertlett's Estate*, 21 Pa. Co. Ct. 616, 7 Pa. Dist. 678; *Compton's Estate*, 8 Lack. Leg. N. (Pa.) 320; *Hartz's Estate*, 20 Lanc. L. Rep. 25; *Stauffer's Estate*, 21 Lanc. L. Rev. 100.

*Tennessee.* — *Royston v. McCulley*, (Tenn. Ch. 1900) 59 S. W. Rep. 725; *Read v. Franklin*, (Tenn. Ch. 1900) 60 S. W. Rep. 215.

**Money or Property Belonging to Representative Individually.** — *Matter of Barefield*, (Surrogate Ct.) 36 Misc. (N. Y.) 745, *affirmed* 177 N. Y. 387, which *reversed* 82 N. Y. App. Div. 463; *Matter of Snyder*, (Surrogate Ct.) 37 Misc. (N. Y.) 59; *Matter of Biggers*, (Surrogate Ct.) 39 Misc. (N. Y.) 426; *Matter of Hewitt*, (Surrogate Ct.) 40 Misc. (N. Y.) 322; *Hertzler's Estate*, 22 Pa. Super. Ct. 592; *Gross's Estate*, 9 Pa. Dist. 76; *Jones v. Probate Ct.*, 25 R. I. 361.

**Advance Payment Received by Executor on Contract to Sell Real Estate.** — Advance payments made to an executor to bind an agreement entered into by him to sell the decedent's real estate, do not become assets of the estate where the sale is never consummated, and are not chargeable to him in his account. *Crawford's Estate*, 10 Pa. Super. Ct. 587, 14 Pa. Super. Ct. 85.

**Proceeds of Recovery for Death by Wrongful**

**Act.** — Proceeds of the settlement of a claim for wrongful death of decedent, exempt to the widow and heirs, received and wrongfully expended by his legal representatives, are chargeable in his account. *Kintz v. Schoentgen*, (Iowa 1900) 84 N. W. Rep. 679.

**Intermingling Money of Estate with Other Moneys.** — Where an administrator has mingled money of the estate with other moneys and is unable to separate the two funds, he is chargeable with the whole amount. *Weimann's Succession*, 112 La. 293; *Matter of Hayes*, (Surrogate Ct.) 40 Misc. (N. Y.) 500.

**Money Collected and Disbursed as Executor under Belief of Duty, Entertained by All Persons Interested.** — Where all the interested parties construe a will as imposing upon the executor the duty of collecting and disbursing certain money legacies to be paid by the devisee of the testator's land, and the executor, acting upon this interpretation of the will, collects the money and pays all the legacies, except one, the representative of the executor after his death will not be heard to claim that the executor acted merely as agent of the parties. *Stough's Estate*, 196 Pa. St. 358.

**Presumption — Burden of Proof.** — The *prima facie* presumption is that funds accounted for by an administrator as assets of the estate belong to the estate, and a third person claiming title to or interest in the property has the burden of proof. *Fague's Estate*, 19 Pa. Super. Ct. 638.

If an administrator receives money, alleged to be due his decedent in the capacity of agent, and pays it over to one claiming to be the principal, he does so at his own risk, and with the burden on him of proving that his decedent was without title, in whole or in part. *Collin's Estate*, 14 Pa. Dist. 38.

**Jurisdiction of Probate Court.** — In some states the ownership of property coming into the hands of an executor or administrator by virtue of his appointment, claimed by third persons, cannot be adjudicated in the probate court; but that court will consider it to be assets, leaving the claimants to their proper action for its recovery. *In re Barker*, 26 Mont. 279; *State v. District Ct.*, 26 Mont. 369; *Wheelock's Estate*, 33 Nova Scotia 357; *Matter of Alfstad*, 27 Wash. 175. See also *infra*, this title, **1201. 3.**

In *New York* the probate court on the accounting has jurisdiction to pass on a claim of ownership of the property made by the representative and determine whether he is chargeable with it as assets. *Matter of Ammarell*, (Surrogate Ct.) 38 Misc. (N. Y.) 399; *Matter of Brintnall*, (Surrogate Ct.) 40 Misc. (N. Y.) 67, *citing* *Merchant v. Merchant*, 2 Bradf. (N. Y.) 432.

In *Pennsylvania* it is settled law that as a general rule no one can claim in the distribution of a fund in the Orphans' Court except through the decedent as creditor, legatee, or next of kin. There is, however, an exception recognized in many cases, as, for instance, where the fund may be shown to be wrongfully

**1199.** The Time of the Receipt Is Immaterial. — See note 2.

**1200.** *b.* THE INVENTORY. — See note 6.

**1201.** See note 2.

included in the account either because, though in the name of the decedent, it is really a trust or where title or ownership is in another person. *Crossetti's Estate*, 211 Pa. St. 490; *Moore's Estate*, 211 Pa. St. 338, *affirming* in part 13 Pa. Dist. 137. *Compare Wilson's Estate*, 2 Blair Co. Rep. (Pa.) 351.

The probate court has jurisdiction to direct the executrix of a deceased executor to pay to the trustee under the will of the original decedent, moneys belonging to his estate and clearly earmarked as such. *Bickley's Estate*, 14 Pa. Dist. 253, 31 Pa. Co. Ct. 143.

An administrator who has taken into his hands moneys not belonging to the succession, is suable therefor in a direct action. The claimant cannot be required to proceed through an action for an accounting. *Casey v. Abraham*, 113 La. 581.

**1198. 2. If the Equitable Title to Property Received by an Executor or Administrator Is in a Third Person.** — See generally cases cited in the preceding note. See also *Huggins's Estate*, 204 Pa. St. 167.

**1199. 1. Property Received in Other than Representative Right Not Chargeable in Account.** — *Ferris v. Nelson*, 60 N. Y. App. Div. 430; *Matter of Maybee*, (Surrogate Ct.) 40 Misc. (N. Y.) 518; *Berry's Estate*, 8 Pa. Dist. 50; *Conway's Estate*, 11 Pa. Dist. 163; *Rine v. Hall*, 187 Pa. St. 264, 42 W. N. C. (Pa.) 333. See also *Merritt v. Merritt*, 32 N. Y. App. Div. 442, *affirmed* without opinion 161 N. Y. 634; *Whelock's Estate*, 33 Nova Scotia 357, *infra*, this title, **1208. 5 et seq.**

**Profits of Land Occupied by Executor.** — See *infra*, this title, **1211. 1 et seq.**

Money voted to executors as officers of a corporation in which the estate is largely interested and of which the testator was an officer at and before his death, as extra compensation for their services as such officers, in accordance with a usage of long standing, is not assets of the estate for which they can be compelled to account in the probate court. *Matter of Schaefer*, 65 N. Y. App. Div. 378, *reversing* (Surrogate Ct.) 34 Misc. (N. Y.) 34, *affirmed* without opinion, 171 N. Y. 686.

Where a person undertakes to convey "all his rights, title, and interest of, and in," certain real property, belonging to the estate of a decedent, on being subsequently appointed administrator of the estate he cannot be compelled to account for the purchase price received by him. *Wildermuth v. Long*, 196 Pa. St. 541.

**2. Property Received Before Death of Decedent.** — *Matter of Mitchell*, 36 N. Y. App. Div. 542, *affirmed* without opinion 161 N. Y. 654; *Lovell's Estate*, 21 Pa. Super. Ct. 378; *Boring v. Jobe*, (Tenn. Ch. 1899) 53 S. W. Rep. 763, *Neil, J., dissenting*. See also *Cormier's Succession*, 52 La. Ann. 876.

A husband as executor of his wife's estate is chargeable with the rents of her real estate received by him during her lifetime as agent for her, and not in his own right, or under a

gift fraudulent and void as to creditors. *Mahon's Estate*, 202 Pa. St. 201.

Goods furnished the representative, during the lifetime of the decedent, in part satisfaction of a debt due from the latter to the former, are not chargeable in the account. *Hughes's Estate*, 19 Pa. Super. Ct. 534.

Where a married woman gave money to her husband to be used in the purchase of a home, and it was so used by him, he will not be surcharged therewith on his account as the administrator of her estate. *Kreider's Estate*, 22 Lanc. L. Rev. 81.

**1200. 6. Amount of Inventory Prima Facie Chargeable** — *Georgia*. — *Wood v. Brown*, 121 Ga. 471.

*Hawaii*. — *Matter of Lazarus*, 13 Hawaii 242. *Illinois*. — *Emerick v. Hileman*, 71 Ill. App. 512, *affirmed* 177 Ill. 368; *Tartt v. Wahl*, 77 Ill. App. 578.

*Massachusetts*. — *Dodge v. Lunt*, 181 Mass. 320.

*Michigan*. — *Porter v. Long*, 124 Mich. 584, 7 Detroit Leg. N. 337.

*Nebraska*. — *Tunnicliffe v. Fox*, (Neb. 1903) 94 N. W. Rep. 1032.

*New Jersey*. — *In re Bayley*, 67 N. J. Eq. 566.

*New York*. — *Matter of Rogers*, 153 N. Y. 316, *affirming* mem. judgment (Supm. Ct. Gen. T.) 36 N. Y. Supp. 1132; *Matter of Baker*, (Surrogate Ct.) 27 Misc. (N. Y.) 126; *Matter of Van Sise*, (Surrogate Ct.) 38 Misc. (N. Y.) 155; *Matter of Feierabend*, (Surrogate Ct.) 38 Misc. (N. Y.) 524.

*Oregon*. — *In re Osburn*, 36 Oregon 8, *citing* 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1200; *Re Bolander*, 38 Oregon 490; *Conser's Estate*, 40 Oregon 138.

*Pennsylvania*. — *In re Kalbfell*, 184 Pa. St. 25, 41 W. N. C. (Pa.) 333; *In re Semple*, 189 Pa. St. 385, *reversing* on other grounds 28 Pittsb. Leg. J. N. S. (Pa.) 431; *Delp v. Edlis*, 190 Pa. St. 25, 43 W. N. C. (Pa.) 535; *Siebert v. Steinmeyer*, 204 Pa. St. 419; *Oertlett's Estate*, 7 Pa. Dist. 678, 21 Pa. Co. Ct. 616; *Hart's Estate*, 9 Pa. Dist. 274; *Fleming's Estate*, 10 Pa. Dist. 259, 25 Pa. Co. Ct. 269. See also *Bennet's Estate*, 21 Lanc. L. Rev. 134.

*Texas*. — *Hamm v. Hutchins*, 19 Tex. Civ. App. 209; *Gray v. Cockrell*, 20 Tex. Civ. App. 324; *Devine v. U. S. Mortgage Co.*, (Tex. Civ. App. 1898) 48 S. W. Rep. 585.

*Washington*. — *Matter of Belt*, 29 Wash. 535, 92 Am. St. Rep. 916; *Filley v. Murphy*, 30 Wash. 1.

**Estoppel to Deny Decedent's Ownership.** — An executor or administrator is not estopped by his inventory from showing that the property did not belong to the decedent. *Oertlett's Estate*, 21 Pa. Co. Ct. 616, 7 Pa. Dist. 678; *Gray v. Cockrell*, 20 Tex. Civ. App. 324. *Compare Read v. Franklin*, (Tenn. Ch. 1900) 60 S. W. Rep. 215.

**1201. 2. Failure to Sell Within Reasonable Time.** — See *supra*, this title, **1016. 1 et seq.**  
**Sale Without Leave of Court.** — See *supra*, this title, **1029. 2 et seq.**; **1204. 2.**



**1201.** If Any Property Was Omitted. — See note 3.

*c.* CHOSSES IN ACTION. — See note 4.

**1202.** See notes 1, 2, 4.

**1203.** Foreign Debts. — See note 2.

Debts of Executor or Administrator. — See note 5.

**1201. 3. Assets Not Inventoried.** — *Hoffman v. Armstrong*, 90 Md. 123; *Porter v. Long*, 124 Mich. 584, 7 Detroit Leg. N. 337; *Matter of Mitchell*, 36 N. Y. App. Div. 542, *affirmed* without opinion 161 N. Y. 654; *Matter of Goundry*, 57 N. Y. App. Div. 232; *Reed's Estate*, 22 Pa. Super. Ct. 635; *Mueller's Estate*, 8 Pa. Dist. 70, *affirmed* 190 Pa. St. 601; *Immendorf's Estate*, 21 Pa. Co. Ct. 268, 4 Lack. Leg. N. (Pa.) 266, *affirmed* 190 Pa. St. 590; *Robinson v. Hodgkin*, 99 Wis. 327.

**Debt of Executor or Administrator.** — The rule applies to debts owing by the administrator or executor and omitted from the inventory, as well as to debts owing by third persons. *Jones v. Willis*, 72 Ohio St. 189, *citing Matter of Raab*, 16 Ohio St. 274.

**The Burden of Proof.** — *Matter of Rogers*, 153 N. Y. 316, *affirming judgment* (Supm. Ct. Gen. T.) 36 N. Y. Supp. 1132; *Matter of Baker*, 42 N. Y. App. Div. 370; *Matter of Arkenburgh*, 58 N. Y. App. Div. 583; *Matter of Van Sise*, (Surrogate Ct.) 38 Misc. (N. Y.) 155; *In re Glenn*, 23 Ohio Cir. Ct. 397; *Bramlett v. Mathis*, 71 S. Car. 123. See also *supra*, this title, **1197. 5**; *infra*, **1202. 1 et seq.**

When it appears that funds of the estate have passed into the possession of the representative, and are not included in the inventory, the burden is then shifted, and cast upon him, to show a legal and sufficient reason for withholding the same therefrom. *Matter of Taber*, (Surrogate Ct.) 30 Misc. (N. Y.) 172, *affirmed* without opinion 54 N. Y. App. Div. 629.

**Lapse of Time as a Defense to Charge.** — *Hunt v. Smith*, 58 N. J. Eq. 25.

**Jurisdiction of Probate Court.** — In some states the probate court has no jurisdiction to determine the ownership of property omitted from the inventory, where the claim that it belongs to the estate is disputed. *Wilson v. Ruthrauff*, 82 Mo. App. 435; *Re Russell*, 8 Ont. L. Rep. 481, *Meredith, J., dissenting*. Otherwise in New York, see New York cases cited *infra* this note, *The Burden of Proof*; *supra*, this title, **859.6**. See generally, *supra*, this title, **1198. 1**.

**4. Choses in Action Not Generally Chargeable until Collected** — *Georgia*. — *Arendale v. Smith*, 107 Ga. 494.

*Kansas*. — *Matter of Beam*, 8 Kan. App. 835. *New Jersey*. — *Mulford v. Mulford*, (N. J. 1902) 53 Atl. Rep. 79.

*New York*. — *Matter of Hosford*, 62 N. Y. App. Div. 626; *Matter of Guldenkirch*, (Surrogate Ct.) 35 Misc. (N. Y.) 123; *Matter of Woodbury*, (Surrogate Ct.) 40 Misc. (N. Y.) 143.

*Pennsylvania*. — *Smith's Estate*, 194 Pa. St. 259; *Allam's Estate*, 199 Pa. St. 573; *Marley's Estate*, 18 Pa. Super. Ct. 303; *Edenborn's Estate*, 10 Pa. Dist. 184; *McDonald's Estate*, 13 Pa. Dist. 483.

*Texas*. — *Kearney v. Nicholson*, (Tex. Civ. App. 1901) 67 S. W. Rep. 361.

*West Virginia*. — *Harris v. Orr*, 46 W. Va. 261, 76 Am. St. Rep. 815.

**A Note Which an Executor Could Have Collected.** — *Hallway v. Eckler*, 105 Mo. App. 585; *Harris's Estate*, 12 Luz. Leg. Reg. (Pa.) 58; *Campbell's Estate*, 32 Pittsb. Leg. J. N. S. (Pa.) 409.

**1202. 1. The Burden of Proving Uncollectibility.** — *McIntire v. McIntire*, 14 App. Cas. (D. C.) 337, *affirmed* 192 U. S. 116; *Hallway v. Eckler*, 105 Mo. App. 585; *Walworth v. Bartholomew*, 76 Vt. 1, *citing 11 AM. AND ENG. ENCYC. OF LAW* (2d ed.) 1202. See generally on the burden of proof, *supra*, this title, **1197. 5**; **1201. 3**.

**Debt Due from Executor or Administrator.** — Where a note executed by the personal representative jointly with his decedent is unexplained and not included in his account, the burden is on him to show that he did not owe any of said amount. But if he was insolvent and unable to pay the part he owed, his bondsmen should not be held, and the burden is on the parties asking for the surcharge of such administrator to show that he was able to pay it. *Bard's Estate*, 13 Pa. Dist. 552, 21 Lanc. L. Rev. 81.

**2. Evidence of Collectibility Necessary.** — *Bramlett v. Mathis*, 71 S. Car. 123.

**4. Evidence of Nonpayment Necessary — Debt Inventoried as "Sperate."** — See *Wrightson v. Tydings*, 94 Md. 358, *citing Shafer v. Shafer*, 85 Md. 561.

**1203. 2. Foreign Debts Not Collected Are Not Chargeable.** — *Bridgeport Trust Co.'s Appeal*, 77 Conn. 657.

Failure to exercise due diligence to recover personal property beyond the jurisdiction of the state, or to collect a debt owing to the decedent by a nonresident, will subject the representative to a liability for its value. *Maas v. German Sav. Bank*, 73 N. Y. App. Div. 524, *reversing* (Supm. Ct. App. T.) 36 Misc. (N. Y.) 154, which *affirmed* (N. Y. City Ct. Gen. T.) 35 Misc. (N. Y.) 193, *affirmed* 176 N. Y. 377.

**5. Debts of Executor or Administrator Generally Chargeable as Cash — California.** — *Matter of Walker*, 125 Cal. 242, 73 Am. St. Rep. 40; *Sanchez v. Forster*, 133 Cal. 614; *Matter of Thomas*, 140 Cal. 397.

*Missouri*. — *Wilson v. Ruthrauff*, 82 Mo. App. 435.

*Nebraska*. — *Howell v. Anderson*, 66 Neb. 575. *New Hampshire*. — *Probate Judge v. Sullo-way*, 68 N. H. 511, 73 Am. St. Rep. 610.

*New York*. — *Matter of Mitchell*, 36 N. Y. App. Div. 542, *affirmed* without opinion 161 N. Y. 654; *Keegan v. Smith*, 60 N. Y. App. Div. 168, *reversing* on other grounds (Supm. Ct. App. T.) 33 Misc. (N. Y.) 74, which *reversed* (N. Y. City Ct. Gen. T.) 31 Misc. (N. Y.) 651, *affirmed* without opinion 172 N. Y. 624.

*Ohio*. — *Jones v. Willis*, 72 Ohio St. 189.

*Oregon*. — *Mason's Estate*, 42 Oregon 177, 95 Am. St. Rep. 734; *Eugene United Brethren First Church v. Akin*, 45 Oregon 247.

*Pennsylvania*. — *Bard's Estate*, 13 Pa. Dist. 552, 21 Lanc. L. Rev. 81.



**1204.** *d.* SALES BY EXECUTORS AND ADMINISTRATORS. — See note 2.

**1206.** *e.* INCOME, PROFITS, AND INCREASE OF PERSONAL PROPERTY.

— See note 1.

**1207.** If Without Authority He Continues the Decedent's Business or Engages in Business with the Funds of the Estate. — See notes 2, 3.

**The Debt of a Firm of Which the Executor or Administrator Is a Member.** — *Bassett v. Fidelity, etc., Co.*, 184 Mass. 210, 100 Am. St. Rep. 552. *Contra*, *James v. West*, 67 Ohio St. 28.

**The Executor or Administrator May Always Contest His Indebtedness.** — The possession by the representative of the evidence of his indebtedness raises no presumption of payment by him during the lifetime of the decedent. *Arnold v. Arnold*, 124 Ala. 550.

**An Administrator Who Purchases Land at His Own Sale** is under obligation to pay for the land, while in his representative capacity he was under the duty of receiving payment. Because of the union in him of such obligation and duty, the law renders him chargeable as administrator with the purchase money due from him individually, though the same was not otherwise collected. *Langley v. Langley*, 135 Ala. 383.

**1204. 2. Sales Without Leave of Court.** — See *supra*, this title, **1007. 4 et seq.**, **1012. 1**, **1029. 2, 3**; *infra*, **1276. 5**.

**Sale on Credit.** — See *supra*, this title, **1018. 3 et seq.**

**Private Sale.** — See *supra*, this title, **1015. 1. Time of Sale.** — See *supra*, this title, **1015. 2 et seq.**

**Inadequate Price.** — See *supra*, this title, **1017. 10**.

Where the sale appears to have been made after due notice and in good faith, and the amount received, though small, is not shown to be inadequate, the representative is not liable to a surcharge. *Matter of Foulds*, (Surrogate Ct.) 35 Misc. (N. Y.) 171.

**Purchase by Executor or Administrator at His Own Sale.** — *Falk's Estate*, 22 Lanc. L. Rev. 331. See also *Matter of Yetter*, 44 N. Y. App. Div. 404, *affirmed* on opinion below 162 N. Y. 615.

An executor or administrator authorized by law to purchase at his own sale acquires thereby a title in fee simple, and is not responsible to the estate for any profits he may realize on the transaction. *McPherran's Estate*, 212 Pa. St. 425.

**Appraised Value.** — In *California* the personal representative must account for the excess when he sells any part of the estate for more than the appraisement, and if any is sold for less than the appraisement he is not responsible for the loss, if the sale has been justly made. *Matter of Gianelli*, 146 Cal. 139.

**Assent of Beneficiaries to Sale as Made.** — Where the beneficiaries assent to the sale as made, they cannot charge the executor or administrator with any loss resulting therefrom. *Beale v. Barnett*, 64 S. W. Rep. 838, 23 Ky. L. Rep. 1118.

**1206. 1. Income and Profits Are Chargeable in Account.** — *Matter of More*, 121 Cal. 609; *Matter of Gianelli*, 146 Cal. 139; *Conser's Estate*, 40 Oregon 138; *Connolly's Estate*, 198 Pa. St. 137; *Read v. Franklin*, (Tenn. Ch. 1900)

60 S. W. Rep. 215; *Robertson v. Breckinridge*, 98 Va. 569.

**The Burden of Proving the Profits Realized.** — See *infra*, this title, **1207. 2**.

**1207. 2. Profits Made in Trade with Trust Funds.** — *Fleming v. Kelly*, 18 Colo. App. 23; *Wiemann's Succession*, 112 La. 293; *Matter of Woodbury*, (Surrogate Ct.) 40 Misc. (N. Y.) 143; *Matter of Rainforth*, (Surrogate Ct.) 40 Misc. (N. Y.) 609; *Cope's Estate*, 27 Pa. Co. Ct. 366, 4 Lack. Jur. (Pa.) 45; *Ruppel's Estate*, 32 Pittsb. Leg. J. N. S. (Pa.) 233. See also *Auer's Estate*, 14 Pa. Dist. 114; *supra*, this title, **973. 9 et seq.**, **982. 2 et seq.**

**Rule Stated.** — The rule as to the unlawful employment of the funds of the estate is quite simple. The estate is to suffer no loss, and the executor is to make no gain. This does not mean that the executor is to be charged for all money invested in the speculation, and also with all that is received from it, but only that he must make good the loss resulting from the business, or, if a profit has been earned, that he must account for it to the estate. *Matter of Smith*, 118 Cal. 462.

The obligation incurred by an executor or administrator who continues the business of the decedent without authority is to report and account to the surrogate for the actual net profits made in such business, because, under the well-settled and familiar rule of equity, such profits become an asset of the estate; but he is in no way responsible to the surrogate nor to the estate for not having made more. His primary liability is for all the assets of the estate and for such profits as he actually made from them, not for what he might have made had he managed the business more economically and with greater discretion. *Matter of Peck*, 79 N. Y. App. Div. 296, *affirmed* 177 N. Y. 538.

**Only Net Profits Recoverable.** — The measure of the recovery must be confined to the profits. On no just theory can the representative be denied allowance for the necessary expenses incurred in carrying on the business. *Matter of Suess*, (Surrogate Ct.) 37 Misc. (N. Y.) 459.

**Continuation of Business by Third Person.** — An administrator is not chargeable with the proceeds of the business where it is carried on by another person, unless the proceeds were received by him or under his control; though such person acquired the ownership of the property from the representative, with notice of the trust and without consideration or for a consideration moving personally to the representative. *Matter of Suess*, (Surrogate Ct.) 37 Misc. (N. Y.) 459.

**Completing Contracts of Decedent.** — The principle to be deduced from the authorities seems to be that an administrator is vested with a sound discretion as to whether or not he will complete contracts of the decedent that survive his death; and if he acted as a cautious and prudent man would act under similar circumstances and in good faith, he will not be surcharged,

**1207.** Use of Personality by Executor or Administrator. — See note 4.

*f.* REAL ESTATE — (1) *In General*. — See note 5.

**1208.** (2) *Proceeds of Real Estate*. — See notes 1, 2.

(3) *Rents and Profits of Real Estate* — (a) *General Rule*. — See note 5.

though the consequence may be bad. Allam's Estate, 199 Pa. St. 573. See *supra*, this title, 939. 5.

**Profits of Sale of Property — Effect of Order of Approval.** — An order approving an executor's sale is not a bar to compelling an accounting for profits wrongfully made by him thereat. Wilbanks v. Crosno, 112 Ill. App. 503.

**Burden of Proof.** — The burden is upon the beneficiaries to establish the amount of the net profits or that they are more than the executor reports. If they fail to show that he made any profits, and he reports none, but yet show that he used the trust fund in his own business, they are entitled to interest thereon because of such wrongful use. Matter of Peck, 79 N. Y. App. Div. 296, *affirmed* 177 N. Y. 538; Matter of Suess, (Surrogate Ct.) 37 Misc. (N. Y.) 459.

The rule requiring vouchers on an accounting by a personal representative has no application on such an issue. Matter of Suess, (Surrogate Ct.) 37 Misc. (N. Y.) 459.

**Representative Chargeable with Losses.** — Where an administrator takes upon himself the burden of running the decedent's farm and engages laborers thereon, he takes the risk of making it pay, and when he declines to admit that he made anything for the estate, he will not be allowed credit for payments to his laborers. Reed's Estate, 22 Pa. Super. Ct. 635.

In case of loss the representative is chargeable with the value of the interest and not entitled to credit for operating expenses. Dillenkofers Estate, 34 Pittsb. Leg. J. N. S. (Pa.) 303, 17 York Leg. Rec. (Pa.) 177.

If, in continuing decedent's business without authority, the representative lays out funds of the estate in the purchase of new goods, he is chargeable with having paid such sums on his own account. *In re Osburn*, 36 Oregon 8.

**1207. 3. Property Acquired in Business.** — Eufaula Nat. Bank v. Manassas, 124 Ala. 379.

**4. Use of Property by Executor or Administrator.** — Turnipseed v. Sirrine, 60 S. Car. 272; Glosson v. Glosson, 104 Tenn. 391.

**5. Real Estate, as Such, Is Not a Proper Item.** — *In re Gill*, (Surrogate Ct.) 42 Misc. (N. Y.) 457, *affirmed* without opinion 101 N. Y. App. Div. 607. See generally *supra*, this title, 838. 1 *et seq.*, 1035. 2.

**Real Estate as Personal Assets.** — Kager v. Brennenman, 47 N. Y. App. Div. 63, 30 Civ. Pro. (N. Y.) 168; Matter of Franklin, (Surrogate Ct.) 26 Misc. (N. Y.) 107. See *supra*, this title, 840. 2.

**Equitable Mortgage.** — Where a conveyance to the decedent, absolute in form, is in fact an equitable mortgage, the land may be inventoried either as personal assets or as real estate. In the latter case, the representative becomes chargeable when it is reduced to cash by redemption or sale. Hawes v. Williams, 92 Me. 483.

**Insurance Money.** — A personal representative is not accountable as such for proceeds of in-

surance on real estate of the decedent. Matter of Kane, (Surrogate Ct.) 38 Misc. (N. Y.) 276.

**1208. 1. An Administrator Who Receives a Fund Which Is in Law Deemed Real Property.** — Dearing v. Selvey, 50 W. Va. 4.

**Contract of Sale Made by Decedent.** — Proceeds of sale of quarrying right made by decedent are payable to the executor, and he is properly surcharged therefor in the settlement of his account. Gardner's Estate, 199 Pa. St. 524.

**Surplus Proceeds of Sheriff's Sale of Real Estate.** — See Weyant's Estate, 11 Pa. Dist. 177.

**2. Proceeds of Sales.** — Ukiah Bank v. Rice, 143 Cal. 265, 101 Am. St. Rep. 118; Matter of McKay, 75 N. Y. App. Div. 78, *modifying* (Surrogate Ct.) 37 Misc. (N. Y.) 590; Matter of Bradley, (Surrogate Ct.) 25 Misc. (N. Y.) 261, *affirmed* 42 N. Y. App. Div. 301. See *supra*, this title, 838. 3 *et seq.*

For the rule in *Missouri* as stated in a late case, see *infra*, this title, 1209. 2.

**Amount Chargeable.** — The amount reported to the court by the personal representative as having been received for the real estate is properly charged against him, though a less sum was in fact obtained. McNeill v. Fuller, 121 N. Car. 209.

An administrator who accepts the purchase price for land, without verifying the correctness of the amount, and on subsequently finding a shortage does not attempt to collect the balance due, is chargeable with the full cash price. Carpenter v. Stowe, 75 Vt. 114.

**5. Rents and Profits Accruing After Death of Owner — Michigan.** — Russell v. Wheeler, 129 Mich. 41, 8 Detroit Leg. N. 836.

*Nebraska.* — Tunncliffe v. Fox, (Neb. 1903) 94 N. W. Rep. 1032.

*New Hampshire.* — Clough v. Clough, 71 N. H. 412.

*New York.* — Matter of Mount, (Surrogate Ct.) 27 Misc. (N. Y.) 411; Matter of McKay, (Surrogate Ct.) 33 Misc. (N. Y.) 520.

*Ohio.* — *In re Gallagher*, 7 Ohio Dec. 548, 5 Ohio N. P. 518.

*Pennsylvania.* — Duffy's Estate, 209 Pa. St. 390; Hallowell's Estate, 9 Pa. Dist. 90; Hall's Estate, 10 Pa. Dist. 215; Crook's Estate, 11 Pa. Dist. 387; Kite's Estate, 12 Pa. Dist. 397, 28 Pa. Co. Ct. 560; Paxons Estate, 13 Pa. Dist. 78, 29 Pa. Co. Ct. 427; Rementer's Estate, 13 Pa. Dist. 313; Rosenstall's Estate, 16 York Leg. Rec. (Pa.) 64, 33 Pittsb. Leg. J. N. S. (Pa.) 72.

*Rhode Island.* — Jones v. Probate Ct., 25 R. I. 361.

*Tennessee.* — Read v. Franklin, (Tenn. Ch. 1900) 60 S. W. Rep. 215.

**Special Circumstances.** — An administrator may take charge of an intestate's real estate with the consent of the heirs, and account for the rents in the Orphans' Court, if there is no objection; but if there is an objection, he cannot account for the rents in that court, even if to do so would save delay and expense. Finley's Estate, 11 Pa. Dist. 289. To the same effect,

**1209.** See note 1.

But This Rule Is Not of Universal Application. — See note 2.

(b) Rents Collected under Statutory Authority. — See note 3.

**1210.** (c) Rents and Profits Passing to Executor under Will. — See note 1.**1211.** (d) Land Occupied by Executor or Administrator. — See note 1.

Possession by Administrator as Purchaser. — See note 2.

g. FOREIGN ASSETS. — See note 5.

**1212.** h. INTEREST — (1) When Interest Is Chargeable — (a) General Principles. — See notes 2, 3.

Marshall's Estate, 32 Pittsb. Leg. J. N. S. (Pa.) 247.

**Lands Purchased with Funds of the Estate.** — Lands purchased by an executor or administrator with funds of the estate are personal assets, and he is chargeable in his account with the rents and profits received therefrom. *Kager v. Brenneman*, 47 N. Y. App. Div. 63, 30 Civ. Pro. (N. Y.) 168. See also *Brinckerhoff v. Farias*, 52 N. Y. App. Div. 256, affirmed 170 N. Y. 427. See generally *supra*, this title, **840**, 2.

**Proceeds of Suit on Covenant of General Warranty.** — Money received by executors in settlement of a suit brought by them on a covenant of general warranty in a conveyance to their testator, cannot be regarded as rents, profits, or proceeds of a sale of the land, and is properly charged in their administration account. *Handley's Estate*, 14 Pa. Dist. 710.

**1209. 1. Liability to Account as Trustee.** — *Russell v. Russell*, 129 Fed. Rep. 434, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1208; *Clough v. Clough*, 71 N. H. 412; *Gausen v. Moormann*, 5 Ohio Dec. 287, 5 Ohio N. P. 254; *Yerkes's Estate*, 10 Pa. Dist. 204; *Tasker's Estate*, 14 Pa. Dist. 435. See also *Callahan's Estate*, 5 Lack. Leg. N. (Pa.) 105; *Deirerler's Estate*, 10 Kulp (Pa.) 525.

**Extent of Liability.** — Only the rental value of the property during the time it was actually under rent is chargeable in the account, if the representative made every reasonable effort to keep it occupied and productive. *Anderson v. Northrop*, 44 Fla. 472.

**2. Rule that Executor or Administrator Is Chargeable with Rents Actually Received.** — *Lyons v. Lyons*, 101 Mo. App. 494.

The rule in *Missouri* as stated in a late case is that whenever an executor or administrator comes into possession of real estate by virtue of his office, whether by force of statute or under the terms of a will, he is chargeable with all rents and proceeds of sale arising therefrom and received by him in the exercise of his official functions. *Francisco v. Wingfield*, 161 Mo. 542.

**3. Statutory Liability to Account for Rents and Profits.** — See *supra*, this title, **842**, 1.

**1210. 1. Rents and Profits Passing to Executor under Will.** — *Penn v. Penn*, 87 S. W. Rep. 306, 27 Ky. L. Rep. 946; *Bird v. Hawkins*, 58 N. J. Eq. 229. See also *Matter of Moore*, 103 Iowa 474; *Brinckerhoff v. Farias*, 52 N. Y. App. Div. 256, affirmed 170 N. Y. 427; *Gressle's Estate*, 29 Pa. Co. Ct. 97, 21 Lanc. L. Rev. 73; *Robinson v. Hodgkin*, 99 Wis. 327.

**If a Power of Sale Operates as an Immediate Conversion.** — *Hinnescheid's Estate*, 12 Luz. Leg. Reg. (Pa.) 23.

So far as the purposes of the conversion do not exhaust the real estate, the rents result to the heirs. *Hallowell's Estate*, 9 Pa. Dist. 90.

**Proceeds of Timber Cut from Real Estate.** — Executors are chargeable with the value of timber cut from the real property of the estate and sold by them. *Finley v. Pearson*, 76 S. W. Rep. 374, 25 Ky. L. Rep. 766.

**1211. 1. Land Occupied by Executor or Administrator.** — *Matter of More*, 121 Cal. 609; *McNeely v. McNeely*, 50 La. Ann. 823; *Conery's Succession*, 111 La. 113; *Connolly's Estate*, 198 Pa. St. 137; *Tasker's Estate*, 14 Pa. Dist. 435; *Matter of Alfstad*, 27 Wash. 175.

**Land Not Needed to Pay Debts.** — When land occupied by an executor is devised by the will to another for life, and is not needed to pay debts, his liability for rents and profits, if any exists, is to the life beneficiary and not to the estate. *Clough v. Clough*, 71 N. H. 412.

**2. Possession by Administrator as Purchaser at His Own Sale.** — *Pirkle v. Cooper*, 113 Ga. 828; *Miller v. Rich*, 204 Ill. 444; *Branner v. Nichols*, 61 Kan. 356.

**5. Foreign Assets.** — See *Scudder v. Ames*, 142 Mo. 187.

**1212. 2. Death of Executor Before Accounting.** — If an executor dies before accounting for funds on which he is liable for interest, he can only be charged with interest up to the time of his death, and the amount is a debt against his estate for which a claim must be presented. *Bemmerly v. Woodward*, 124 Cal. 568.

**Funds Not Belonging to Estate.** — Where funds come into the hands of the representative which are not assets of the estate, he is properly charged with interest thereon until finally disbursed by him, if he retains and treats them as assets. *Offutt v. Divine*, (Ky. 1899) 53 S. W. Rep. 816.

**3. Interest Not Chargeable Except under Special Circumstances** — *Alabama*. — *Siniard v. Green*, 123 Ala. 527.

*Arkansas*. — *Howard v. Manning*, 65 Ark. 122.

*California*. — *Matter of Sarment*, 123 Cal. 331; *Matter of Marre*, 127 Cal. 128.

*Iowa*. — *Dorris v. Miller*, 105 Iowa 564.

*Kentucky*. — *Briggs v. Walker*, 102 Ky. 359, affirmed 171 U. S. 466.

*Missouri*. — *Scudder v. Ames*, 142 Mo. 187.

*Pennsylvania*. — *Bear's Estate*, 9 Pa. Super. Ct. 492, 43 W. N. C. (Pa.) 469.

*Vermont*. — *In re Hall*, 70 Vt. 458.

There is no hard and fast rule fixing the liability of executors for interest. The rate is to be determined from an examination of all the circumstances in each case, the most important of which is good or bad faith, as the case may be. *Matter of Wells*, (Surrogate Ct.) 39 Misc. (N. Y.) 621.



**1214.** Discretion of Court. — See notes 1, 2.

(b) Interest Received or Which Should Have Been Received. — See notes 3, 4.

**1215.** (c) Use of Funds by Executor or Administrator. — See note 1.

**1216.** See note 1.

**1217.** Option as to Interest or Profits. — See note 1.

(d) Mingling Funds of Estate with Individual Funds. — See notes 3, 4.

**The Burden of Proof.** — Matter of Sarment, 123 Cal. 331; *In re Sylvar*, (Cal. 1905) 81 Pac. Rep. 663; Collier's Estate, 30 Pa. Co. Ct. 607.

**Where There Is an Apparent Reason or Necessity for Retaining the Money.** — See *infra*, this title, 1219. *1 et seq.*

**1214. 1. Discretion of Court.** — Matter of Sarment, 123 Cal. 331; Matter of Marre, 127 Cal. 128; Dorris v. Miller, 105 Iowa 564; Nicholson v. Whitlock, 57 S. Car. 36; Tucker v. Richards, 58 S. Car. 22.

**2. Executor or Administrator Acting in Good Faith.** — Matter of Woodbury, (Surrogate Ct.) 40 Misc. (N. Y.) 143; Nicholson v. Whitlock, 57 S. Car. 36; Tucker v. Richards, 58 S. Car. 22.

**3. Interest Received by Executor or Administrator.** — Matter of Woodbury, (Surrogate Ct.) 40 Misc. (N. Y.) 143; Lutjen v. Lutjen, 63 N. J. Eq. 391, *reversed* on other grounds 64 N. J. Eq. 773; Mutchmore's Estate, 9 Pa. Dist. 293, 24 Pa. Co. Ct. 257; Bollinger's Estate, 10 Pa. Dist. 223; *Re McIntyre*, 7 Ont. L. Rep. 548.

**4. Interest Not Collected.** — *In re Barclay*, (1899) 1 Ch. 674; Owens v. Owens, 84 Miss. 673.

**If the Executor or Administrator Is Indebted to the Estate.** — Phillips v. Duckett, 112 Ill. App. 587; *In re Dimmick*, 111 La. 655; Matter of Davis, (Surrogate Ct.) 37 Misc. (N. Y.) 326; Matter of Brintnall, (Surrogate Ct.) 40 Misc. (N. Y.) 67; Yost's Estate, 23 Pa. Super. Ct. 223; Baird's Estate, 13 Pa. Dist. 552, 21 Lanc. L. Rev. 81; Miller's Estate, 22 Lanc. L. Rev. 49; McGonnigle's Estate, 31 Pittsb. Leg. J. N. S. (Pa.) 27; Brennenman's Estate, 14 York Leg. Rec. (Pa.) 14.

An executor or administrator who fails to account for his indebtedness to the estate is chargeable with interest, at least from the date of the writ, in a suit on his bond to recover the amount. Bassett v. Fidelity, etc., Co., 184 Mass. 210, 100 Am. St. Rep. 552.

Where the representative collected money during the lifetime of the decedent as his agent, and fails to account for it, he is properly charged with interest from the date of the collection. Hill v. Fly, (Tenn. Ch. 1899) 52 S. W. Rep. 731.

**Shifting an Investment Resulting in Loss of Assets.** — Where a personal representative shifts an investment of money, there being no necessity therefor, which results in its loss, a charge of interest at the rate that the fund would have earned had the investment not been changed, is proper. Matter of Scudder, (Surrogate Ct.) 21 Misc. (N. Y.) 179.

**Money on Deposit, Not Credited with Interest Prior to Decedent's Death.** — In the absence of evidence or a clear presumption that a bank in which decedent had money on deposit, which had not been credited with interest for several years prior to his death, owed interest thereon, a surcharge against the representative for fail-

ure to collect interest for those years is not warranted. Staib's Estate, 11 Pa. Super. Ct. 447.

**1215. 1. Use of Funds by Executor or Administrator** — Iowa. — Matter of Brown, 113 Iowa 351.

Mississippi. — Owens v. Owens, 84 Miss. 673. New York. — Matter of Baker, 57 N. Y. App. Div. 44; Matter of Peck, 79 N. Y. App. Div. 296, *affirmed* 177 N. Y. 538; Matter of Woodbury, (Surrogate Ct.) 40 Misc. (N. Y.) 143.

Pennsylvania. — Myers's Estate, 13 Pa. Super. Ct. 476; Flynn's Estate, 21 Pa. Super. Ct. 130; Hoffman's Estate, 15 York Leg. Rec. (Pa.) 114; Hensler's Estate, 18 Lanc. L. Rev. 317, 2 Blair Co. Rep. 6; Heck's Estate, 31 Pittsb. Leg. J. N. S. (Pa.) 347.

South Carolina. — Lowman v. Lowman, 69 S. Car. 543.

Texas. — Thomas v. Hawpe, 35 Tex. Civ. App. 311.

**Retaining Commissions Before Judicial Allowance.** — Kenan v. Graham, 135 Ala. 585; Matter of Carter, 132 Cal. 113; Davidson v. Story, 106 Ga. 799; Matter of Furniss, 86 N. Y. App. Div. 96.

Where the retention of the commissions is referable to consent or agreement by the persons beneficially interested in the estate, interest will not be charged. Noble v. Jackson, 124 Ala. 311, 132 Ala. 230; Matter of Franklin, (Surrogate Ct.) 26 Misc. (N. Y.) 107; Matter of Ross, (Surrogate Ct.) 33 Misc. (N. Y.) 163, *citing* Beard v. Beard, 140 N. Y. 260.

**Executor Who Is Surviving Partner of Testator — Partnership Assets.** — An executor who is also surviving partner of the testator is chargeable with interest on funds of the concern fraudulently or wrongfully appropriated by him to his own use. Porter v. Long, 136 Mich. 150, 10 Detroit Leg. N. 687.

**Interest on Dividends on Stock Transferred to Administrator Individually.** — Interest on dividends received on stock belonging to the estate which the administrator has had transferred to himself individually, will be charged from the time of their receipt by him. Walworth v. Bartholomew, 76 Vt. 1.

**1216. 1. The Missouri Statute.** — *In re Burke*, 96 Mo. App. 295.

**1217. 1. Option as to Interest or Profits.** — Matter of Peck, 79 N. Y. App. Div. 296, *affirmed* 177 N. Y. 538; Matter of Suess, (Surrogate Ct.) 37 Misc. (N. Y.) 459; Matter of Rainforth, (Surrogate Ct.) 40 Misc. (N. Y.) 609; Hughes's Estate, 19 Pa. Super. Ct. 534; Cope's Estate, 27 Pa. Co. Ct. 366, 4 Lack. Jur. (Pa.) 45.

**3. Mingling Funds of Estate with Individual Funds.** — Harrison v. Perea, 168 U. S. 311; *In re Burke*, 96 Mo. App. 295; Myers v. Bolton, 157 N. Y. 393, *rehearing denied* without opinion 158 N. Y. 665, *modifying* on other grounds 89 Hun (N. Y.) 342; Matter of Stanton, (Surrogate Ct.) 41 Misc. (N. Y.) 278; Flynn's Estate,

**1218.** (e) **Unemployed Funds** — *aa.* **FUNDS RETAINED PENDING SETTLEMENT.** — See note 1.

**Delay in Making Settlement.** — See note 2.

**1219.** *bb.* **FUNDS RETAINED FOR PURPOSES OF ADMINISTRATION OR TO MEET CONTINGENCIES.** — See note 1.

**1220.** See notes 1, 2, 3, 4.

21 Pa. Super. Ct. 130. Compare rule in *California*, note 4, *infra*.

**Deposit in Bank of Which Executor or Administrator Is Officer or Owner.** — *Owens v. Owens*, 84 Miss. 673; *Johnson v. Pulver*, (Neb. 1901) 95 N. W. Rep. 697; *Matter of Adams*, 51 N. Y. App. Div. 619, *modifying* on other grounds, (Surrogate Ct.) 30 Misc. (N. Y.) 184, *affirmed* without opinion 166 N. Y. 623; *Matter of Thorp*, (Surrogate Ct.) 31 Misc. (N. Y.) 581; *Dolan's Estate*, 15 Pa. Super. Ct. 20.

Otherwise where it was necessary for him to keep the money on hand and unemployed. *Matter of Johnson*, 57 N. Y. App. Div. 494, *affirmed* 170 N. Y. 139.

**Funds to Which Executor Is Himself Entitled.** — Where the only party who could claim the interest is the accountant himself, who has acquired the fund by assignment, a formal surcharge for interest is useless. *Lahey's Estate*, 13 Pa. Dist. 533.

**1217. 4. Rule to the Contrary.** — The mere fact that the representative mingles funds of the estate with his own funds will not justify charging him with interest thereon, since he has the right to their custody and there is no provision of law requiring him to keep them separate from all other funds. *Matter of Sarment*, 123 Cal. 331. To similar effect, *Hartson v. Elden*, 58 N. J. Eq. 478.

**1218. 1. Time Allowed for Settlement.** — See *Dorris v. Miller*, 105 Iowa 564; *Tippin v. Perry*, 122 Ga. 120; *Owens v. Owens*, 84 Miss. 673; *Miller's Estate*, 14 Pa. Dist. 163, opinion of Penrose, J.

In *South Carolina*, as a general rule, an administrator is chargeable with interest only from the beginning of the year succeeding that in which he received his appointment; and all funds received during the current year are to be regarded as unproductive until the end thereof, and all expenditures made during the course of the year should be regarded as made before the balance is struck that is to bear interest. *Nicholson v. Whitlock*, 57 S. Car. 36; *Tucker v. Richards*, 58 S. Car. 22.

In *Illinois*. — *Marshall v. Coleman*, 187 Ill. 556, *affirming* 89 Ill. App. 41; *Haskins v. Martin*, 103 Ill. App. 115.

If There Was No Necessity. — See *infra*, this title, **1219. 1 et seq.**

After the Lapse of Such Period. — See *infra*, this title, **1228. 1.**

**2. Unreasonable Delay in Making Settlement** — *Alabama*. — *Noble v. Jackson*, 124 Ala. 311, 132 Ala. 230.

*California*. — *Matter of Armstrong*, 125 Cal. 603.

*Hawaii*. — *Matter of Akana*, 13 Hawaii 388, 11 Hawaii 420.

*Illinois*. — *Marshall v. Coleman*, 187 Ill. 556, *affirming* 89 Ill. App. 41; *Haskins v. Martin*, 103 Ill. App. 115.

*Iowa*. — See *Tucker v. Stewart*, 121 Iowa 714, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1218.

*Mississippi*. — *Owens v. Owens*, 84 Miss. 673.

*Nebraska*. — *Johnson v. Pulver*, (Neb. 1901) 95 N. W. Rep. 697.

*Pennsylvania*. — *Crouse's Estate*, 16 Pa. Super. Ct. 212; *Reed's Estate*, 22 Pa. Super. Ct. 635; *Fendrick's Estate*, 20 Lanc. L. Rev. 69.

*South Carolina*. — *Nicholson v. Whitlock*, 57 S. Car. 36; *Lowman v. Lowman*, 69 S. Car. 543.

**The Mere Fact of Delay** will not justify charging interest if the persons interested have not been injured or the representative benefited, and the value of the estate has been enhanced thereby. *Kenan v. Graham*, 135 Ala. 585.

**Laches in Compelling Settlement.** — Laches on the part of beneficiaries in not compelling settlement is properly considered in computing the amount of interest to be charged. *McRoberts v. Carneal*, (Ky. 1898) 44 S. W. Rep. 442.

**Presumptions.** — All presumptions are in favor of the regularity of the management of the estate by the administrator; and it is incumbent upon the party alleging delay in making settlement to prove it. *In re Sylvar*, (Cal. 1905) 81 Pac. Rep. 663.

**1219. 1. Funds Retained to Meet Exigencies of Administration.** — *Matter of Johnson*, 57 N. Y. App. Div. 494, *affirmed* 170 N. Y. 139; *Bear's Estate*, 9 Pa. Super. Ct. 492, 43 W. N. C. (Pa.) 469; *In re Hall*, 70 Vt. 458.

**Funds Held Pending Litigation.** — *Matter of Marre*, 127 Cal. 128; *Truett v. Williams*, 101 Ga. 311; *Phelps v. Fitch*, 178 Mass. 442; *Hartson v. Elden*, 58 N. J. Eq. 478; *Matter of Corle*, 61 N. J. Eq. 409; *James v. West*, 67 Ohio St. 28; *Betz's Estate*, 15 Pa. Super. Ct. 563, 18 Lanc. L. Rev. 97; *Reed's Estate*, 22 Pa. Super. Ct. 635.

**Agreement Fixing Time as of Date of Receipt of Funds.** — *McIntire v. McIntire*, 14 App. Cas. (D. C.) 337, *affirmed* 192 U. S. 116.

**1220. 1. Necessity of Retention Determined on Facts of Each Case.** — An executor is not chargeable with interest on funds retained by him under an erroneous conception of the effect of the will, where part of it has been rightfully used to pay a debt against the estate and the balance has been invested and the income paid to the beneficiary. *Matter of Chapman*, (Surrogate Ct.) 32 Misc. (N. Y.) 187, *affirmed* on opinion below 59 N. Y. App. Div. 624, 167 N. Y. 619.

**2. Proof that Funds Were Actually Kept in Hand.** — *McIntire v. McIntire*, 14 App. Cas. (D. C.) 337, *affirmed* 192 U. S. 116.

**3. Burden of Proof.** — *McIntire v. McIntire*, 14 App. Cas. (D. C.) 337, *affirmed* 192 U. S. 116.

**4. Application for Order of Distribution.** — *Noble v. Jackson*, 124 Ala. 311.

- 1220.** *dd.* FAILURE TO DISTRIBUTE OR DISBURSE. — See note 6.  
**1222.** *cc.* FAILURE TO INVEST OR RETAIN INVESTMENTS. — See note 1.  
**1223.** See notes 1, 3.  
**1224.** (1) Interest on Assets Lost or Wasted. — See notes 1, 2, 3.  
**1225.** (2) Rate of Interest — In England. — See notes 1, 2.

**1220. 6. Failure to Distribute or Disburse Funds** — *Alabama*. — Noble v. Jackson, 124 Ala. 311, 132 Ala. 230.

*Arkansas*. — Jacoway v. Hall, 67 Ark. 340.

*Idaho*. — Harris v. Coates, 8 Idaho 491.

*Illinois*. — Marshall v. Coleman, 187 Ill. 556, affirming 89 Ill. App. 41.

*Mississippi*. — Owens v. Owens, 84 Miss. 673.

*Missouri*. — *In re* Pound, 166 Mo. 419; State v. Babb, 77 Mo. App. 277; Berkmeir v. Peters, 111 Mo. App. 717.

*New York*. — *In re* Driskel, 100 N. Y. App. Div. 171; Matter of Woodbury, (Surrogate Ct.) 40 Misc. (N. Y.) 143.

*Pennsylvania*. — Reed's Estate, 22 Pa. Super. Ct. 635.

*South Carolina*. — Nicholson v. Whitlock, 57 S. Car. 36.

*Virginia*. — Preston v. Davis, 102 Va. 178.

**If the Beneficiaries Are Equally Guilty of Laches.** — Tucker v. Stewart, 121 Iowa 714. See also *In re* Anning, 34 N. Bruns. 308. Compare Reed's Estate, 22 Pa. Super. Ct. 635.

**Even if the Beneficiaries Are Infants.** — Wilvert's Estate, 11 Pa. Dist. 660, 26 Pa. Co. Ct. 641, 5 Dauphin Co. Rep. (Pa.) 161.

**If There Is No One Legally Qualified to Receive the Balance.** — Matter of Schweibert, (Surrogate Ct.) 25 Misc. (N. Y.) 464.

**Time of Payment Discretionary under Terms of Will.** — Brooks v. Hanna, 10 Ohio Cir. Dec. 480, 19 Ohio Cir. Ct. 216.

**Funds Not Kept Ready for Distribution.** — An offer of payment to legatees, refused by them, will not relieve the representative of liability for interest, where the amount offered is not thereafter kept ready to meet a demand for payment, either by special deposit or payment into court. Godwin's Estate, 22 Pa. Super. Ct. 469.

**Joint Executors.** — An executor is not chargeable with interest on funds not distributed, for a period during which they were in the custody and control of his coexecutor, whether with or without his consent, but only from the time they came into his possession. *In re* Starr, 190 Pa. St. 162.

**1222. 1. Failure to Invest.** — *In re* Barclay, (1899) 1 Ch. 674; Matter of Lazarus, 13 Hawaii 242; State v. Babb, 77 Mo. App. 277; Matter of Philip, (Surrogate Ct.) 29 Misc. (N. Y.) 263; Matter of Woodbury, (Surrogate Ct.) 40 Misc. (N. Y.) 143; Matter of Stanton, (Surrogate Ct.) 41 Misc. (N. Y.) 278; Dicks Estate, 183 Pa. St. 647, 41 W. N. C. (Pa.) 367; McGonnigle's Estate, 31 Pittsb. Leg. J. N. S. (Pa.) 28.

**Duty to Invest.** — As a general rule an executor or administrator is not bound to invest the funds of the estate. His duty is to administer, not to invest. Collier's Estate, 30 Pa. Co. Ct. 607. See *supra*, this title, 950. 2 *et seq.*

Mere neglect by an administrator to invest moneys which he may be called on to pay over

to the distributees at any moment, is no ground for charging him with interest, if he keeps the money ready to be paid over when called for. Indeed, he is not authorized to loan a fund to which adult distributees are immediately entitled, at their risk and without authority from them. Matter of Sudds, (Surrogate Ct.) 32 Misc. (N. Y.) 182, appeal dismissed 75 N. Y. App. Div. 612.

**1223. 1. Reasonable Time for Making Investments Allowed.** — Tippin v. Perry, 122 Ga. 120.

**3. Withdrawing Investments or Interest-bearing Deposits.** — Matter of Lazarus, 13 Hawaii 242; Dick's Estate, 183 Pa. St. 647, 41 W. N. C. (Pa.) 367.

**Money Withdrawn by Order of Court.** — Where money is withdrawn under the order and direction of the court, the representative is not liable for interest. Dorris v. Miller, 105 Iowa 564.

**1224. 1. Interest Not Chargeable on Funds Lost — Rule in England and Canada.** — See *Re* Barker, 77 L. T. N. S. 712.

Executors who as legatees are overpaid by inadvertence under an order of court, and without fraud or misconduct on their part, are not chargeable with interest on the amount of the overpayment. Boys' Home v. Lewis, 3 Ont. L. Rep. 208.

**Interest Chargeable on Funds Lost — Rule in United States.** — Marshall v. Coleman, 187 Ill. 556, affirming 89 Ill. App. 41.

2. Brigham v. Morgan, 185 Mass. 27; Matter of Adams, (Supm. Ct. App. Div.) 64 N. Y. Supp. 591, 51 N. Y. App. Div. 619, modifying on other grounds (Surrogate Ct.) 30 Misc. (N. Y.) 184; Matter of Scudder, (Surrogate Ct.) 21 Misc. (N. Y.) 179; Matter of Suess, (Surrogate Ct.) 37 Misc. (N. Y.) 459; Donnelly's Estate, 11 Pa. Dist. 279. See also Owens v. Owens, 84 Miss. 673; Hill v. Fly, (Tenn. Ch. 1899) 52 S. W. Rep. 731.

**Joint Executors.** — An executor who is liable for his coexecutor's devastavit, though not a party to it, will be charged with interest only from the date of his discovery of the misconduct. Matter of Dougherty, (Surrogate Ct.) 43 Misc. (N. Y.) 468.

**3. On Improper Payments Disallowed.** — Compare Hensler's Estate, 18 Lanc. L. Rev. 317, 2 Blair Co. Rep. (Pa.) 6.

**1225. 1. Rate of Interest in England — Four Per Cent. in Ordinary Cases.** — The practice now adopted, at any rate by all judges of first instance in the Chancery Division, is to charge three-per cent. instead of four. *In re* Barclay, (1899) 1 Ch. 674.

**2. Rate of Interest When Funds Are Used by Executor or Administrator.** — Where the personal representative has acted improperly, or has employed the trust money in trade for his own benefit, or has been guilty of other acts of misconduct, the court visits him with interest at five per cent. *In re* Barclay, (1899) 1 Ch. 674.



**1226.** In the United States. — See note 1.

If He Calls in Money Which Was Bearing Interest. — See note 2.

As to Interest Accruing on Securities or Deposits. — See note 3.

**1227.** Failure to Settle Accounts. — See note 1.

Use of Funds by Executor or Administrator. — See note 3.

(3) *Computation of Interest* — (a) *Period of Computation*. — See note 5.

**1228.** See note 1.

If the Executor or Administrator Is Indebted to the Decedent. — See note 3.

**1226.** 1. *Rate of Interest in United States — Legal Interest Generally Chargeable.* — *Offutt v. Divine*, (Ky. 1899) 53 S. W. Rep. 816; *Owens v. Owens*, 84 Miss. 673, citing *Troup v. Rice*, 55 Miss. 278; *State v. Babb*, 77 Mo. App. 277.

*Discretion of Court.* — The rate of interest is to a certain extent discretionary with the trial court. *Harrison v. Perea*, 168 U. S. 311.

*If Money Is Allowed to Remain on Deposit Without Interest.* — *Matter of Philip*, (Surrogate Ct.) 29 Misc. (N. Y.) 263.

*Exception to Rule Charging Legal Rate.* — *Wilvert's Estate*, 11 Pa. Dist. 660, 26 Pa. Co. Ct. 641, 5 Dauphin Co. Rep. (Pa.) 161. See also *Fendrick's Estate*, 20 Lanc. L. Rev. 69.

In view of the limited range of investments permitted to a fiduciary, and the low rate of interest derivable from authorized investments, it must be a very extreme case of gross negligence, that would justify the surcharge of a trustee who had failed to invest when he could, with a higher rate of interest than three or, at the highest, four per cent. *Miller's Estate*, 14 Pa. Dist. 163.

*Statutes Prescribing Rate.* — Civ. Code Ga., § 3498, provides that interest shall be at the rate of seven per cent. per annum, without compounding, for six years, and after that time at the rate of six per cent. per annum, annually compounded. Greater interest may be recovered by showing the actual receipt of more or use of the funds to greater profit. *Tippin v. Perry*, 122 Ga. 120.

In *Illinois* an administrator is chargeable with ten per cent. annual interest on moneys, bonds, notes, and credits, unless cause is shown to the court why interest should not be taxed. *Marshall v. Coleman*, 187 Ill. 556, affirming 89 Ill. App. 41.

In *Louisiana* an executor or administrator who fails to deposit funds of the estate, to keep the bank book of deposit in his official name, or who withdraws funds after deposit, contrary to the prohibition contained in Civ. Code, § 1150, is liable for twenty per cent. interest on the amount in addition to all special damage suffered. *Conery's Succession*, 111 La. 113; *In re Dimmick*, 111 La. 655.

*2. Calling in Money at Interest.* — *Matter of Lazarus*, 13 Hawaii 242; *Dick's Estate*, 183 Pa. St. 647, 41 W. N. C. (Pa.) 367.

*Call Authorized by Order of Court.* — Where money is called in under the order and direction of the court the representative is not liable for interest lost. *Dorris v. Miller*, 105 Iowa 564.

*3. Executor or Administrator Chargeable with Interest Actually Received.* — *In re Barclay*, (1899) 1 Ch. 674; *Owens v. Owens*, 84 Miss. 673; *Lutjen v. Lutjen*, 63 N. J. Eq. 391, reversed on other grounds 64 N. J. Eq. 773; *Matter of Scudder*, (Surrogate Ct.) 21 Misc.

(N. Y.) 179; *Matter of Woodbury*, (Surrogate Ct.) 40 Misc. (N. Y.) 143; *Mutchmore's Estate*, 9 Pa. Dist. 294, 24 Pa. Co. Ct. 257; *Bollinger's Estate*, 10 Pa. Dist. 223.

*Only Interest Actually Made.* — *Fitzgerald v. Paisley*, 110 Iowa 98; *Matter of Sudds*, (Surrogate Ct.) 32 Misc. (N. Y.) 182, appeal dismissed 75 N. Y. App. Div. 612; *Matter of Wells*, (Surrogate Ct.) 39 Misc. (N. Y.) 621; *Matter of Woodbury*, (Surrogate Ct.) 40 Misc. (N. Y.) 143; *Turnipseed v. Sirrine*, 60 S. Car. 272; *Re McIntyre*, 7 Ont. L. Rep. 548.

*Deposit by Executors with Trust Company Co-executor.* — Joint executors depositing money from time to time with a trust company for convenience and safekeeping, and receiving the usual interest on daily balances, are only chargeable with the amount received, though the trust company is itself one of the executors. *Moore's Estate*, 211 Pa. St. 348, affirming 13 Pa. Dist. 137.

**1227.** 1. *Failure to Settle Accounts.* — *Conery's Succession*, 111 La. 113; *In re Dimmick*, 111 La. 655. See also *West v. Municipal Ct.*, 25 R. I. 84.

*3. Use of Funds by Executor or Administrator — Highest Legal Rate Charged.* — *Flynn's Estate*, 21 Pa. Super. Ct. 130; *Cope's Estate*, 27 Pa. Co. Ct. 366, 4 Lack. Jur. (Pa.) 45; *Thomas v. Hawpe*, 35 Tex. Civ. App. 311; *Walworth v. Bartholomew*, 76 Vt. 1.

*5. Interest Not Generally Chargeable During Period Allowed for Settlement.* — *Tippin v. Perry*, 122 Ga. 120; *Marshall v. Coleman*, 187 Ill. 556, affirming 89 Ill. App. 41; *Dorris v. Miller*, 105 Iowa 564; *Miller's Estate*, 14 Pa. Dist. 163; *Nicholson v. Whitlock*, 57 S. Car. 36; *Tucker v. Richards*, 58 S. Car. 22.

*Interest from Time of Receipt.* — Where an executor receives money belonging to the estate for which he fails to account, he is properly charged with interest from the time of its receipt. *Crawford's Estate*, 10 Pa. Super. Ct. 587; same case on rehearing, 14 Pa. Super. Ct. 85.

**1228.** 1. *Interest Chargeable After Expiration of Period Allowed for Settlement.* — *Haskins v. Martin*, 103 Ill. App. 115; *Owens v. Owens*, 84 Miss. 673; *Johnson v. Pulver*, (Neb. 1901) 95 N. W. Rep. 697; *Redfearn v. Craig*, 57 S. Car. 534.

*3. Debt of Executor or Administrator Draws Interest Until Actual Payment.* — *Phillips v. Duckett*, 112 Ill. App. 587; *In re Dimmick*, 111 La. 655; *Bassett v. Fidelity, etc., Co.*, 184 Mass. 210, 100 Am. St. Rep. 552; *Matter of Davis*, (Surrogate Ct.) 37 Misc. (N. Y.) 326; *Matter of Brintnall*, (Surrogate Ct.) 40 Misc. (N. Y.) 67; *Yost's Estate*, 23 Pa. Super. Ct. 223; *Bard's Estate*, 13 Pa. Dist. 552, 21 Lanc. L. Rev. 81; *Brenneman's Estate*, 14 York Leg. Rec. 14;

- 1229.** In Case of Unnecessary or Unreasonable Litigation. — See note 2.  
 (b) Amount on Which Interest Is Computed — Annual Balances. — See note 3.  
 (c) Simple Interest. — See note 4.
- 1230.** See note 1.  
 (d) Compound Interest. — See note 3.
- 1231.** Thus, the Use of the Funds of the Estate. — See note 1.  
 Delay in Accounting. — See note 2.  
 Failure to Invest. — See note 3.

Miller's Estate, 22 Lanc. L. Rev. 49; McGonigle's Estate, 31 Pittsb. Leg. J. N. S. (Pa.) 27.

**Money Collected as Agent of Decedent.** — Where the representative collected money during the lifetime of decedent as his agent and fails to account for it, he is properly charged with interest from the date of the collection. *Hill v. Fly*, (Tenn. Ch. 1899) 52 S. W. Rep. 731.

**1229. 2. Unreasonable or Unnecessary Litigation.** — See *Fendrick's Estate*, 20 Lanc. L. Rev. 69.

**3. Amount on Which Interest Is Computed.** — *Nicholson v. Whitlock*, 57 S. Car. 36; *Tucker v. Richards*, 58 S. Car. 23; *Turnipseed v. Sirrine*, 60 S. Car. 272.

When the personal representative is not in default, although there is a balance against him in favor of the estate, the interest on the balance is not carried into the account, but stands over until final settlement or until sufficient disbursements have been made to discharge it, after the balance of principal against him has been extinguished. But in restating the account, where the representative should have separated from his general account the accounts of payments to legatees and distributees, long before he made his settlement, he ought to settle under the rule of debtor and creditor, charging interest on money due, and applying payments to the liquidation of the interest first, and then of principal. If a balance should appear at any time in favor of the representative, the same rule is to be applied. *Van Winkle v. Blackford*, 54 W. Va. 621.

**Commissions Retained Without Authority.** — *Kenan v. Graham*, 135 Ala. 585; *Matter of Carter*, 132 Cal. 113; *Davidson v. Story*, 106 Ga. 799; *Matter of Furniss*, 86 N. Y. App. Div. 96.

Otherwise if the retention is referable to consent or agreement by the persons beneficially interested in the estate. *Noble v. Jackson*, 124 Ala. 311, 132 Ala. 230; *Matter of Franklin*, (Surrogate Ct.) 25 Misc. (N. Y.) 107; *Matter of Ross*, (Surrogate Ct.) 33 Misc. (N. Y.) 163.

**4. Only Simple Interest Chargeable as General Rule.** — *In re Barclay*, (1899) 1 Ch. 674.

**1230. 1. Only Simple Interest Chargeable in Cases of Mere Negligence.** — *Offutt v. Divine*, (Ky. 1899) 53 S. W. Rep. 816.

**3. Compound Interest — Positive Misconduct or Wilful Violation of Duty.** — *Canfield v. Canfield*, (C. C. A.) 118 Fed. Rep. 1; *Matter of Sarment*, 123 Cal. 331; *State v. Babb*, 77 Mo. App. 277; *Myers v. Bolton*, 157 N. Y. 393, rehearing denied without opinion 158 N. Y. 665, modifying 89 Hun (N. Y.) 342.

In *Georgia* it is provided by statute that after six years interest shall be charged at the rate of six per cent. per annum, annually compounded. Greater interest may be recovered by

showing that the representative actually received more, or that he used the funds himself to greater profit. *Tippin v. Perry*, 122 Ga. 120.

**Representative Deceased Before Account Is Settled.** — In settling the account of a deceased personal representative compound interest will be charged only to the date of his death and simple interest thereafter, irrespective of the length of time during which the account was in process of settlement, if the delay was not due to his management of the estate. *Walworth v. Bartholomew*, 76 Vt. 1.

**Rule in England.** — The principles on which the rate of interest is to be charged were determined by the rule laid down by Lord Cranworth (4 De G. M. & G. 843) which is to charge the representative only with the interest which he has received, or which he ought to have received, or which it is so fairly to be presumed that he did receive that he is estopped from saying that he did not receive it. Charging compound interest falls within the rule. *In re Barclay*, (1899) 1 Ch. 674.

**1231. 1. Grounds for Charging Compound Interest — Individual Use of Funds.** — *Bemmerly v. Woodward*, 124 Cal. 568; *Walworth v. Bartholomew*, 76 Vt. 1.

It is proper to compute interest on instalments of interest upon sums fraudulently or wrongfully taken from the funds of the estate. *Porter v. Long*, 136 Mich. 150, 10 Detroit Leg. N. 987.

**Individual Claim to Fund.** — On second paragraph of note compare *Porter v. Long*, 136 Mich. 150, 10 Detroit Leg. N. 987.

**Credit for Payments of Interest Voluntarily Made.** — Where the personal representative has paid interest on the funds used by him he will be allowed credit to the extent of the amount paid, against the interest charged. *Owens v. Owens*, 84 Miss. 673.

**Laches of Beneficiaries of Estate.** — When there has been great lapse of time and neglect by the persons interested to assert their claims promptly, only simple interest will be charged. *Matter of Suess*, (Surrogate Ct.) 37 Misc. (N. Y.) 459.

**2. Delay in Accounting.** — *Owens v. Owens*, 84 Miss. 673.

**Calculation of Interest.** — Interest for failure to make annual returns is properly calculated against the administrator upon each separate receipt and in his favor upon each separate disbursement, and not calculated on the balances as they appear in such returns as he did make. *Tippin v. Perry*, 122 Ga. 120.

**3. Failure to Invest for Purposes of Accumulation.** — *Bemmerly v. Woodward*, 124 Cal. 568.  
**Failure to Make Authorized Investments.** — *In re Barclay*, (1899) 1 Ch. 674.

**1232. Annual Rests.** — See note 2.**7. Credits — a. DISBURSEMENTS — (1) General Rule.** — See note 4.

**1232. 2. Annual Rests.** — *In re Barclay*, (1899) 1 Ch. 674; *Matter of Brown*, 113 Iowa 351; *Matter of Stanton*, (Surrogate Ct.) 41 Misc. (N. Y.) 278; *Walworth v. Bartholomew*, 76 Vt. 1.

**Personal Representative Entitled to Income of Estate for Life.** — Where a personal representative is entitled to the income of property of the estate for life, he is not chargeable with interest during the existence of the life estate, and only simple interest from the date of his death can be recovered against his estate. In such case the rule computing interest with annual rests has no application. *Anderson v. Northrop*, 44 Fla. 472.

**Rents and Profits of Real Estate.** — The rule computing interest with annual rests has no application to an accounting by the representative to the heirs or devisees for the rents and profits of real estate, which belong to them and not to the estate. In such case he is liable only for simple interest. *Anderson v. Northrop*, 44 Fla. 472.

**4. Credit for Disbursements.** — It is elementary law that an administrator has no authority to allow or pay any claim unless it exists against the estate. In addition, he is to be allowed proper expenses of his administration of the estate. Beyond this he cannot create any charge against the estate or pay any but lawful obligations charged thereon. *Matter of Blair*, 67 N. Y. App. Div. 116.

**Disbursements Before Letters Were Granted.** — A legal representative is entitled to credit for the value of the services of an attorney before letters were granted, who advised him with reference to his rights and duties in connection with the trust and assisted him in qualifying as such representative. *Baker v. Cauthorn*, 23 Ind. App. 611, 77 Am. St. Rep. 443.

Credit will be allowed for payments made by an executor for services rendered before the issuance of letters, which were necessary to the proper care and preservation of property of the estate. *Matter of Ogden*, (Surrogate Ct.) 41 Misc. (N. Y.) 158.

A heir or devisee is not entitled to recover the expenses of a successful proceeding to remove executors, instituted by him, though he afterwards becomes special administrator of the estate. *Matter of Bell*, 145 Cal. 646.

**Revocation of Authority.** — *Brown v. McGee*, 117 Wis. 389.

**Authority to Make Payment.** — *Turnipseed v. Sirmire*, 60 S. Car. 272.

**Void Administration.** — Where a grant of letters of administration is void, because the person on whose estate the administration is granted was not dead, costs and disbursements though incurred in good faith are not a legal charge against such person or his property. *Clapp v. Houg*, 12 N. Dak. 600, 102 Am. St. Rep. 589.

**Vouchers for Payments.** — Vouchers are usually essential to the right to credit for payments, except those involving very small amounts. *Matter of Hedrick*, 127 Cal. 184; *Crawford v. Clark*, 110 Ga. 729; *Browning v. Earl*, (Ky. 1900) 54 S. W. Rep. 833; *Maynadier v. Arm-*

*strong*, 98 Md. 175; *In re Ford*, 29 Mont. 283; *Matter of Blair*, 49 N. Y. App. Div. 417, 67 N. Y. App. Div. 116; *Matter of Woodward*, 69 N. Y. App. Div. 286; *Matter of Wicke*, 74 N. Y. App. Div. 221; *Conser's Estate*, 40 Oregon 138; *McShan v. Lewis*, 33 Tex. Civ. App. 253.

An administrator is entitled to credit for the payment of bills presented to him, without the production of vouchers therefor, where he entered no objection to the bills when presented, as he is authorized to do by statute where he doubts the validity of claims. *Matter of Robinson*, (Surrogate Ct.) 45 Misc. (N. Y.) 551.

The rule requiring vouchers does not apply to payments, fully proved by competent evidence, for service rendered the representative by agents and assistants employed by him. *Matter of Wagner*, (Surrogate Ct.) 40 Misc. (N. Y.) 490. \*

No voucher is necessary for the payment of a note executed by the administrator where the note as paid was introduced in evidence and identified by him and appears to have been satisfied and discharged in the course of the due administration of the decedent's estate. *Matter of Robinson*, (Surrogate Ct.) 45 Misc. (N. Y.) 551.

A decree of the probate court ordering the disbursement of money included in the inventory and appraisement of an executor or administrator is an appropriate voucher for a credit claimed for payments made in pursuance thereof. *Bickley's Estate*, 14 Pa. Dist. 253, 31 Pa. Co. Ct. 143.

**Disbursements Made by Surviving Partner of Decedent in Settling Partnership Estate.** — Disbursement made by surviving partners on account of the interest of the deceased partner, in settling the partnership estate, are not disbursements by his executors for which vouchers are required; but the latter in claiming credit for such disbursements must prove their necessity and propriety, if objection is taken to them. *Matter of Meyer*, 95 N. Y. App. Div. 443, *affirmed* on opinion below 181 N. Y. 562.

**Burden of Proof.** — An executor or administrator, in settling his account, has the burden of proving that claims paid without authority of an order of court are actually due from the estate. *Eacott, Appellant*, 95 Me. 522; *Witzel's Estate*, 10 Pa. Dist. 462; *Douglass's Estate*, 10 Pa. Dist. 479, 25 Pa. Co. Ct. 566. See also *Cox v. Doty*, (Ky. 1898) 45 S. W. Rep. 1044. *Compare Wade's Estate*, 22 Lanc. L. Rev. 257.

Payment must be proved by the representative by legal evidence before the right to the credit is established. *Hall v. Hall*, (Tenn. Ct. 1900) 59 S. W. Rep. 203; *Royston v. McCulley*, (Tenn. Ch. 1900) 59 S. W. Rep. 725.

The burden of proof is on a representative claiming an allowance against the estate of the amount of a judgment rendered against him personally, to show good faith and diligence in the defense of the action. *Matter of Yetter*, 44 N. Y. App. Div. 404, *affirmed* on opinion below 162 N. Y. 615.

Where vouchers are required and produced, the onus is upon persons contesting the account to show that items contained therein, for which



**1233.** (2) *Expenses of Administration* — (a) *Right to Credit for Expenses.* — See notes 1, 2.

credit is claimed, are not just debts or claims against the estate. *Matter of Sprague*, 40 N. Y. App. Div. 615, *affirmed* without opinion 162 N. Y. 611; *Matter of Warrin*, 56 N. Y. App. Div. 414; *In re Cozine*, 104 N. Y. App. Div. 182.

*Debts of Decedent and Expenses of Administration Distinguished.*—An unassailed voucher for the payment of a debt of the decedent throws upon the contestant the burden of impeaching the justice as well as the fact of the payment of the claim. But the burden of proving the justice and necessity of a payment made upon a claim for attorneys' fees or other expenses of administration, created by the representative, rests upon him. *Matter of Hosford*, 27 N. Y. App. Div. 427, *followed* *Matter of Ogden*, (Surrogate Ct.) 41 Misc. (N. Y.) 158; *Matter of Peck*, 79 N. Y. App. Div. 296, *affirmed* without opinion 177 N. Y. 538; *Matter of Rainforth*, (Surrogate Ct.) 40 Misc. (N. Y.) 609. See also *infra*, this title, **1241**, 1, **1252**, 1.

*Costs and Expenses of Previous Administration.*—Though proper costs and expenses of a previous administration may be paid by a succeeding administrator and he be allowed credit therefor, he in such cases becomes, as it were, an assignee of the claim, and must establish it as a proper credit to the first administrator, or charge upon the estate, which he could have been compelled to pay as representing the trust. *Taylor v. Crook*, 136 Ala. 354, 96 Am. St. Rep. 26.

**1233.** 1. *Right to Credit for Expenses of Administration.*—*Matter of Willard*, 139 Cal. 501; *Bruning v. Golden*, 159 Ind. 199; *Sowles v. Hall*, 73 Vt. 55.

*Special Administrators.*—A special administrator is entitled to credit for expenses necessarily incurred in the performance of his duties, but not for expenses which he had no authority to incur. *In re Ford*, 29 Mont. 283.

*Administrator Handling No Assets.*—An administrator is entitled to reimbursement for any legitimate expense incurred, though no assets passed through his hands. *Adamson v. Parker*, (Ark. 1905) 85 S. W. Rep. 239.

*Will Requiring Distribution Without Compensation.*—A clause in a will requiring executors to make distribution without compensation does not exclude allowance for all proper outlays and executorial costs and expenses. *Fidelity Trust, etc., Co. v. Watkins*, (Ky. 1897) 42 S. W. Rep. 753.

*Will Directing Payment of Testamentary Expenses.*—The term "testamentary expenses," contained in a provision in a will directing their payment, is not to be given a narrow construction. *In re Prince*, (1898) 2 Ch. 225, *cited In re Clemow*, (1900) 2 Ch. 182.

*Out of What Funds Payable.*—In *California*, by statute, if the testator provides by his will, or designates the estate to be appropriated, for the expenses of administration, they must be paid accordingly. If this is impossible because of the insufficiency of the provision or of the estate designated, that portion of the estate not devised or disposed of by the will, if any, must

be appropriated for the purpose. *Matter of Traver*, 145 Cal. 508.

Under Code Civ. Pro. N. Y., § 2793, subd. 6, credits allowed on the judicial settlement of the account are a charge on the surplus proceeds of real estate, in the event of the insufficiency of the personal property to satisfy the allowances. *Matter of Hatch*, 97 N. Y. App. Div. 496, *reversed* 182 N. Y. 320.

*Effect of Partition of Estate.*—The expenses of settling an estate are a lien on the whole, which partition does not divert. *Carey's Estate*, 10 Kulp (Pa.) 227.

*Orders Classifying Claims for Expenses.*—Orders approving and classifying claims in favor of administrators, whether for expenses of administration or for debts due him from the decedent, have not the effect of final judgments, but are subject to objection and revision as long as the administration remains open. *Hardcastle v. Archer*, (Tex. Civ. App. 1904) 81 S. W. Rep. 368.

**2. Necessity of Expenditure.**—Those actual and necessary expenses for which an executor must be reimbursed are those which are contracted in good faith and with reasonable judgment, whether with or without the advice of counsel. *Matter of Stanton*, (Surrogate Ct.) 41 Misc. (N. Y.) 278, *approving* *Matter of Huntley*, (Surrogate Ct.) 13 Misc. (N. Y.) 375.

A personal representative cannot incur or be allowed debts or expenses in excess of the assets belonging to the estate, and can only be allowed a reasonable amount when necessary and proper. *Hancock v. Fidelity Mut. L. Ins. Co.*, (Tenn. Ch. 1899) 53 S. W. Rep. 181.

*In Amount the Claim Must Be Reasonable.*—*Rufe's Estate*, 29 Pa. Co. Ct. 617.

*Survey of Lines Between Lands Devised.*—*Springfield Grocer Co. v. Walton*, 95 Mo. App. 526; *Matter of Stanton*, (Surrogate Ct.) 41 Misc. (N. Y.) 278.

*Payment Essential to Right to Credit.*—*Matter of Blair*, 49 N. Y. App. Div. 417; *Matter of Brintnall*, (Surrogate Ct.) 40 Misc. (N. Y.) 67. See also *infra*, this title, **1243**, 2.

Payment by the trustee is a necessary prerequisite to any claim against the estate, and even then it does not come in as a new lien but on the footing of an ordinary item of expense in the administration of the trust. *Clark's Estate*, 195 Pa. St. 520, *reversing* on other grounds 10 Pa. Super. Ct. 423.

A personal representative is entitled to credit for all proper items of expense incurred while he was authorized to act, though not paid by him until after the revocation of his letters. *Matter of Blair*, 67 N. Y. App. Div. 116, *distinguishing* same case on former appeal 49 N. Y. App. Div. 417.

An order allowing the credit, however, made by a court having jurisdiction is not void but merely irregular, and cannot be collaterally attacked. *Vaughn v. Walsh*, 122 Wis. 486.

*The Burden of Proof.*—See *supra*, this title, **1232**, 4.

*The Expenses Must Be Itemized.*—*McShan v. Lewis*, 33 Tex. Civ. App. 253.

Necessary expenses of administration which

- 1234.** (b) What Are Expenses of Administration — *aa.* IN GENERAL. — See notes 1, 2, 3, 4, 5.  
**1235.** See notes 1, 2, 3.  
**1236.** See notes 2, 3.

the surrogate must ascertain and adjust on the judicial settlement will not be disallowed because the account does not contain them. *Matter of Brandreth*, 64 N. Y. App. Div. 566.

**Cost of Collecting Rents and Profits of Land Not Needed to Pay Debts.** — Where the decedent has no debts, the representative has no right to collect rents or profits of land and burden them with the costs and expenses of their administration. *Duffy's Estate*, 209 Pa. St. 390.

**1234. 1. Expenses of Administration** include such disbursements as a representative is called upon to make in securing the proper and orderly settlement of the affairs of the deceased. The commissions of the representative are not to be included, for these rather constitute, in part, at least, the pay of the representative for seeing that the expenses of administration are incurred and paid. *Matter of Pray*, (Surrogate Ct.) 40 Misc. (N. Y.) 516.

No rule can be laid down which shall catalogue the various kinds of these expenditures or classify them. Much will depend upon the nature of the estate and upon the character of the services for which the charge is made. *Matter of Willard*, 139 Cal. 501.

**Cost of Revenue Stamp for Official Bond.** — An administrator is not entitled to credit for the expense of procuring a revenue stamp for his official bond. *In re Ford*, 29 Mont. 283.

**Expense of Having Copy of Inventory Made.** — *Nolde's Estate*, 27 Pa. Super. Ct. 413, affirming 21 Lanc. L. Rev. 59.

**2. Expenses of Recovering Estate or Collecting Debts.** — *In re Ford*, 29 Mont. 283. See *infra*, this title, **1252. 3 et seq.**

**Expenses of Winding Up Decedent's Business.** — *Wiemann's Succession*, 112 La. 293.

**3. Compensation Paid to Appraisers.** — In the absence of any statute authorizing a special administrator to have appraisers appointed, he is not entitled to credit for expenses incurred by him on account of appraisers. *In re Ford*, 29 Mont. 283.

**4. Expense of Completing and Selling Crops.** — *Reeve's Estate*, 12 Luz. Leg. Reg. (Pa.) 137.

**5. Expenses of Preserving Estate.** — *In re Ford*, 29 Mont. 283; *In re Semple*, 189 Pa. St. 385, reversing 28 Pittsb. Leg. J. (Pa.) 431; *Reeve's Estate*, 12 Luz. Leg. Reg. (Pa.) 137; *In re Hall*, 70 Vt. 458.

**Expense of Storage and Insurance.** — *Nicholson v. Whitlock*, 57 S. Car. 36.

**Keeping of Live Stock.** — *Glosson v. Glosson*, 104 Tenn. 391; *Read v. Franklin*, (Tenn. Ch. 1900) 60 S. W. Rep. 215.

**Land in Foreign State Constituting Personal Assets.** — *Powell v. Foster*, 71 Vt. 160.

**Real Estate.** — No credit can be allowed for expenses incurred in the care and management of land which does not constitute assets of the estate. *Morrison's Estate*, 196 Pa. St. 80.

**Rent of Safe-deposit Box.** — The hire of a safe-deposit box in which to store the papers of the estate is an expense incident to the performance of the duty of the representative to

care for the property of the decedent, for which his commissions are compensation. *Hartson v. Elden*, 58 N. J. Eq. 478.

**1235. 1. Expenses of Sale.** — *In re Osburn*, 36 Oregon 8; *Slocum's Estate*, 14 Pa. Dist. 39.

**2. Printing Expenses — Advertisements.** — *Rabasse's Succession*, 51 La. Ann. 590; *Gregory's Estate*, 9 Kulp (Pa.) 451, 17 Lanc. L. Rev. 30; *Trimmier v. Darden*, 61 S. Car. 220.

A special administrator without authority to pay the debts of the estate is not entitled to credit for expense incurred by him in publishing notice to creditors. *In re Ford*, 29 Mont. 283.

**3. Traveling Expenses Allowed.** — *Byrne's Estate*, 122 Cal. 260; *Main's Appeal*, 73 Conn. 638; *Ladd v. Stephens*, 147 Mo. 319. Compare *Pelham's Estate*, 9 Kulp (Pa.) 347.

**Journey Necessitated by Change of Residence — Removal to Another County in State of Domicil.** — *Marshall v. Coleman*, 89 Ill. App. 41, 187 Ill. 556; *Belcher's Estate*, 34 Pittsb. Leg. J. N. S. (Pa.) 174.

**Unnecessary Traveling Expenses.** — *Matter of Biggars*, (Surrogate Ct.) 39 Misc. (N. Y.) 426. See also *Henderson's Succession*, 113 La. 101.

**Livery Bills.** — *Rufe's Estate*, 29 Pa. Co. Ct. 617.

**Traveling Expenses of Attorney.** — The expenses of attorneys, traveling on legal business in the rendition of services beneficial to the estate, are a proper credit. *Turnipseed v. Sirrine*, 60 S. Car. 272.

**1236. 2. Office Rent and Furnishings.** — *In re Semple*, 189 Pa. St. 385, reversing 28 Pittsb. Leg. J. N. S. (Pa.) 431. See also *Wilson's Estate*, 21 Lanc. L. Rev. 393.

**3. Expense of Procuring Bondsmen Not Allowed.** — *Adamson v. Parker*, (Ark. 1905) 85 S. W. Rep. 239; *Rabasse's Succession*, 51 La. Ann. 590; *Kernan's Succession*, 105 La. 592; *Oteri's Succession*, 108 La. 395; *Felton's Estate*, 7 Pa. Dist. 262; *Orne's Estate*, 7 Pa. Dist. 337, affirmed 192 Pa. St. 626. See also *Frazer v. Frazer*, 76 S. W. Rep. 13, 25 Ky. L. Rep. 473.

**Special Circumstances Rendering Allowance Justifiable.** — *In re Lucas*, (1900) 1 Ir. R. 292.

Where security is dispensed with by the will, executors, if required to give it by order of court, are entitled to credit for the expense incurred in obtaining it. *Yerkes's Estate*, 8 Pa. Dist. 36.

**In Louisiana and Pennsylvania** credit is now authorized by statute for the expense of procuring bonds executed by surety companies. *Kernan's Succession*, 105 La. 592; *Oteri's Succession*, 108 La. 395; *Clark's Estate*, 195 Pa. St. 520, reversing 10 Pa. Super. Ct. 423; *Ryan's Estate*, 7 Lack. Leg. N. (Pa.) 370.

Such a statute is not unconstitutional as contravening a constitutional prohibition against the legislature passing any local or special law "granting to any corporation \* \* \* any special or exclusive privilege or immunity." *Clark's Estate*, 195 Pa. St. 520, reversing 10 Pa. Super. Ct. 423.

An executor is not entitled to credit for a



**1237.** *bb.* EXPENSES OF PROBATE OF WILL AND GRANT OF LETTERS. — See notes 1, 2.  
**The Expenses of Obtaining Letters of Administration.** — See notes 3, 4.

**1238.** *cc.* COMPENSATION PAID TO AGENTS AND ASSISTANTS — **Rule in United States.** — See note 3.

**Special Circumstances.** — See note 4.

premium paid on a bond given to secure the proceeds of a sale of real estate, other than the sale for which the decree requiring the bond was entered; or on a bond given to enable him to retain possession of property of the estate as life tenant. *Mutchmore's Estate*, 14 Pa. Dist. 251.

**1237. 1. Rule Allowing Credit for Expenses of Contest** — *England.* — *In re Prince*, (1898) 2 Ch. 225; *In re Clemow*, (1900) 2 Ch. 182; *Graham v. McCashin*, (1901) 1 Ir. Rep. 404.  
*Alabama.* — *Alexander v. Bates*, 127 Ala. 328.  
*Illinois.* — *Missionary Soc. v. Goheen*, 84 Ill. App. 474.

*Indiana.* — *Bruning v. Golden*, 159 Ind. 199.  
*Louisiana.* — *Kernan's Succession*, 105 La. 592.

*Maryland.* — An executor after the will is probated is required to defend it against a caveat, and will be allowed costs and reasonable counsel fees for doing so; but he will not ordinarily be allowed costs or counsel fees for defending a will which has been caveated before probate. *Harrison v. Clark*, 95 Md. 308.

*Massachusetts.* — *Hampden Trust Co. v. Leary*, 186 Mass. 577.

*New York.* — *Shaffer v. Bacon*, 35 N. Y. App. Div. 248, affirmed without opinion 161 N. Y. 635; *Matter of Ogden*, (Surrogate Ct.) 41 Misc. (N. Y.) 158.

*Tennessee.* — *Read v. Franklin*, (Tenn. Ch. 1900) 60 S. W. Rep. 215.

See also *supra*, this title, **1243. 3 et seq.**

**Statutory Suit to Set Aside Will.** — *In re Fry*, 96 Mo. App. 208.

**Reasonable Grounds for Believing Will Valid Necessary.** — Where executors, who were also named as residuary legatees, had ample opportunities of forming an opinion as to the testamentary capacity of the deceased, and, acting upon their opinion, propounded a will or wills, which in the result were pronounced against after a verdict of a jury, on the ground of testamentary incapacity and want of knowledge and approval of contents, they are not entitled to costs out of the estate. *Twist v. Tye*, (1902) P. 92, followed *Page v. Williamson*, 87 L. T. N. S. 146.

**2. Rule Denying Credit for Expenses of Contest.** — In *Pennsylvania* this is true as a general proposition; but there are several exceptions to it; for instance, if the estate is materially benefited by the controversy, if the contestants seek to destroy the trusts created by the will, if the question was between a genuine will and a forged or spurious one. *Alexander's Estate*, 211 Pa. St. 124, affirming 13 Pa. Dist. 59. See also *Lloyd's Estate*, 10 Pa. Dist. 207, 24 Pa. Co. Ct. 567; *Bergdoll's Estate*, 11 Pa. Dist. 702.

**Expenses Incurred in Obtaining the Testimony of Witnesses** on a contest over a will are not expenses of the administration of an estate by a temporary administrator. *Matter of McNamee*, (Surrogate Ct.) 25 Misc. (N. Y.) 260.

**3. Application for and Contesting Right to Administer.** — *Matter of Pond*, (Surrogate Ct.) 42 Misc. (N. Y.) 165.

*Contra.* — *Cate v. Cate*, (Tenn. Ch. 1897) 43 S. W. Rep. 365.

Where the accountant was duly and regularly appointed and qualified as administrator, it is his duty to defend himself in that position for the protection of the estate, and the estate ought to pay reasonable and proper expenses incurred in so doing. *Yeakel's Estate*, 13 Pa. Dist. 402.

**The Cost of a Stamp on the Administration Bond.** — *Contra, In re Ford*, 29 Mont. 283.

**Traveling Expenses Incurred in Making Application for Letters.** — The rule disallowing expenses incurred in maintaining the right to administration includes railroad fare and expenses of a trip in connection with the application for letters. *Byrne's Estate*, 122 Cal. 260.

**Expenses Incurred After Removal in Seeking Reinstatement.** — The expenses of an administrator, incurred after his removal from office in seeking reinstatement through the courts, are not charges against the estate for which credit can be given. *Byrne's Estate*, 122 Cal. 260.

**4. Unsuccessful Litigation over Right to Administer.** — The costs of an administrator in an unsuccessful contest with a devisee over his right to continue the administration will not be allowed against the estate. *Adamson v. Parker*, (Ark. 1905) 85 S. W. Rep. 239.

Where a creditor of an estate applies for a grant of administration of the estate, the next of kin having delayed doing so, and at the return of the citation letters are granted to the next of kin, the creditor will be allowed his costs. *In re Colwell*, 34 Can. L. J. 578.

**1238. 3. General Rule in United States.** — *Matter of Ogden*, (Surrogate Ct.) 41 Misc. (N. Y.) 158. See also *infra*, this title, **1285. 3.**

**The Ordinary Services.** — *Noble v. Jackson*, 132 Ala. 230; *Matter of More*, 121 Cal. 609; *Matter of Bell*, 145 Cal. 646; *Scudder v. Ames*, 142 Mo. 187; *In re McAlpin*, 8 Ohio Dec. 654; *Douglass's Estate*, 10 Pa. Dist. 479, 25 Pa. Co. Ct. 566; *Wilson's Estate*, 21 Lanc. L. Rev. 393.

**Illustrations — Collecting Testimony.** — See *Matter of Bell*, 145 Cal. 646.

**Employment of Accountant Authorized by Will.** — Where an accountant is employed according to a suggestion by the testator in his will, credit will be allowed for the expense. *Matter of Arnton*, 106 N. Y. App. Div. 326.

**Auctioneers.** — In *Louisiana* the employment of an auctioneer is authorized and his commission regulated by statute. *Rabasse's Succession*, 51 La. Ann. 590; *Trouilly's Succession*, 52 La. Ann. 276; *Landry v. Laplos*, 113 La. 697.

**4. Special Circumstances May Authorize Employment** — *Missouri.* — *Ansley v. Richardson*, 95 Mo. App. 332.

*New York.* — *Merriitt v. Merriitt*, 32 N. Y.



**1239.** See note 1.

**Extraordinary Services.** — See note 2.

**1240.** *dd.* FEES OF ATTORNEYS AND COUNSEL — (aa) *General Principles Regulating Allowance.* — See note 1.

App. Div. 442, *affirmed* without opinion 161 N. Y. 634; *Harrison v. McAdam*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 18; *Matter of Rainforth*, (Surrogate Ct.) 40 Misc. (N. Y.) 609.

*Ohio.* — *Brooks v. Hanna*, 10 Ohio Cir. Dec. 480, 19 Ohio Cir. Ct. 216.

*Oregon.* — *In re Osburn*, 36 Oregon 8.

*Pennsylvania.* — *Moore's Estate*, 211 Pa. St. 343, *affirming* 13 Pa. Dist. 137; *Douglass's Estate*, 10 Pa. Dist. 479, 25 Pa. Co. Ct. 566; *Gelbach's Estate*, 14 Pa. Dist. 51.

*Tennessee.* — *Read v. Franklin*, (Tenn. Ch. 1900) 60 S. W. Rep. 215.

*Vermont.* — *Sowles v. Hall*, 73 Vt. 55, *citing* 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1237 *et seq.*

The courts have been careful not to insist that so much clerical work should be either personally performed by an executor or paid for by him as to make the acceptance of such a position impossible without considerable personal loss. *Matter of Ogden*, (Surrogate Ct.) 41 Misc. (N. Y.) 158, *approving* *Matter of Harbeck*, 81 Hun (N. Y.) 26, *affirmed* 145 N. Y. 648.

**Employment by Executor of Member of His Family.** — Employment by an executor of a member of his family to perform services for an estate merits investigation, but where they appear to be services which if they had been rendered by a disinterested person would pass without question then there is no reason for disallowing the same. *Matter of Wagner*, (Surrogate Ct.) 40 Misc. (N. Y.) 490.

**Appointment by Executors of One of Their Number to Perform Nonexecutorial Duties.** — That there may be circumstances under which it would be wise and prudent for executors to employ one of their number to perform non-executorial duties to the estate is well established. *Russell v. Hilton*, 80 N. Y. App. Div. 178, *modifying* on other grounds (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 642, *affirmed* on opinion below 175 N. Y. 525.

**1239. 1. Necessity and Expediency a Question for the Court.** — *Matter of More*, 121 Cal. 609; *Matter of Willard*, 139 Cal. 501.

**2. Extraordinary Services — Illustrations — Manager of Railroad.** — The expense of a manager for a railroad owned by a corporation in which the estate had a controlling interest is a proper credit. *Matter of Fidelity Loan, etc., Co.*, (Surrogate Ct.) 23 Misc. (N. Y.) 211.

*Real Estate Agent.* — *Matter of Willard*, 139 Cal. 501; *Dyer v. Winston*, 33 Tex. Civ. App. 412.

The executor of an estate, where the same consists of real property, is not bound to do all the ordinary work of a real estate agent, and he is therefore entitled to employ a proper real estate agent, and pay him the usual commissions. *Matter of Wagner*, (Surrogate Ct.) 40 Misc. (N. Y.) 490.

No credit can be allowed for the expense of real estate and other agents employed for the purpose of enhancing the value of the assets of another's estate, though indirectly beneficial

to the estate represented by the employing administrator; or of agents to examine into the value of mining stock which the representative had no authority to sell. *Matter of Bell*, 145 Cal. 646.

**Expenses of Sale — Employment of Auctioneers.** — See *supra*, this title, **1238. 3. Auctioneers.**

**1240. 1. Reasonable Counsel Fees Allowed on Final Settlement — United States.** — *Harrison v. Perea*, 168 U. S. 311.

*Arkansas.* — *Paget v. Brogan*, 67 Ark. 522.

*California.* — *Matter of Kruger*, 123 Cal. 391; *Matter of Straus*, 144 Cal. 553.

*Iowa.* — *Clark v. Sayre*, 122 Iowa 591.

*Louisiana.* — *Benton's Succession*, 106 La. 494.

*Michigan.* — *In re Pfeffer*, 117 Mich. 207.

*Missouri.* — *Langston v. Canterbury*, 173 Mo. 122.

*Nebraska.* — *Burleigh v. Palmer*, (Neb. 1905) 103 N. W. Rep. 1068.

*New Jersey.* — *Hartson v. Elden*, 58 N. J. Eq. 478.

*New York.* — *Reilly v. Porcher*, 46 N. Y. App. Div. 290.

*Ohio.* — *Matter of Wolfe*, 7 Ohio Dec. 220, 4 Ohio N. P. 336; *In re McAlpin*, 8 Ohio Dec. 654.

*Oregon.* — *Re McCullough*, 31 Oregon 86; *In re Osburn*, 36 Oregon 8; *Waite v. Willis*, 42 Oregon 288.

*Pennsylvania.* — *Fitzsimmons v. Safe Deposit, etc., Co.*, 189 Pa. St. 514; *McKown's Estate*, 17 Pa. Super. Ct. 253; *Tasker's Estate*, 14 Pa. Dist. 435.

*Vermont.* — *Sowles v. Hall*, 73 Vt. 55, *citing* 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1237 *et seq.*

*Washington.* — *Nash v. Wakefield*, 30 Wash. 556, *quoting* 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1240.

*West Virginia.* — *Crim v. England*, 46 W. Va. 480, 76 Am. St. Rep. 826; *Thompson v. Nowlin*, 51 W. Va. 346.

*Wisconsin.* — *Brown v. McGee*, 117 Wis. 389.

**The Theory** is that the amount either expended or allowed by the court for the compensation of counsel forms a part of the necessary costs and expenses connected with the settlement and distribution, and is for the benefit and advantage of all parties interested, whether creditors, legatees, or distributees. *Christian's Estate*, 12 Pa. Dist. 368.

**Allowance Not Dependent on Express Statutory Authority.** — *Noble v. Whitten*, 38 Wash. 262.

**Administrators to Collect** — An administrator to collect has no authority to dispose of property of the estate or to collect debts not matured, and is not entitled to credit for attorney's fees for services rendered in such matters. *In re Wincox*, 85 Ill. App. 613, *affirmed* 186 Ill. 445.

**Joint Executors.** — One of two joint executors is entitled to an attorney of his own selection and to credit for the expense of his services. *Matter of Arnton*, 106 N. Y. App. Div. 326.

- 1241.** The Burden of Proof. — See note 1.  
 Prudence and Good Faith. — See note 5.
- 1242.** See note 1.  
 Benefit to the Estate. — See notes 2, 5.
- 1243.** See note 1.  
 Actual Payment. — See note 2.

**Allowance Not Dependent on Contract.** — An administrator is entitled to an allowance for attorney's fees for services beneficial to the estate, of which he was cognizant and for which he expected the estate would pay, though the attorneys had no contract under which they could hold him personally liable. *Marx v. McMorran*, 136 Mich. 406, 11 Detroit Leg. N. 80.

**Time When Allowance Made.** — The usual and ordinary procedure is the hearing and allowance of such claims as those for attorney's fees, on the final accounting of the administrator or executor. *Nash v. Wakefield*, 30 Wash. 556.

The authorization of such fees is not limited to the final settlement of the account, so as to preclude an allowance therefor prior to such settlement; and the probate court, being a court of general and superior jurisdiction, may allow an attorney's fees, even if no final report is filed. *Mills' Estate*, 40 Oregon 424.

An intermediate or annual account or an order on an *ex parte* application making an allowance for attorney's fees is subject to revision during the subsequent court of the administration. *Dorris v. Miller*, 105 Iowa 564; *Matter of Sawyer*, 124 Iowa 485.

A determination of the amount to be allowed an executor for services rendered by attorneys previously representing him, may be fixed on substitution of attorneys, though no account is before the court for adjudication at the time. *Matter of Kasson*, 119 Cal. 489.

**1241. 1. Burden of Proof — California.** — *Firebaugh v. Burbank*, 121 Cal. 186.

*Georgia.* — See *Davidson v. Story*, 106 Ga. 799.

*New York.* — *Matter of Peck*, 79 N. Y. App. Div. 296, affirmed 177 N. Y. 538; *Matter of Baker*, (Surrogate Ct.) 27 Misc. (N. Y.) 126.

*Ohio.* — *In re McAlpin*, 8 Ohio Dec. 654.

*Pennsylvania.* — *Mutchmore's Estate*, 9 Pa. Dist. 293, 24 Pa. Co. Ct. 257.

*South Carolina.* — *Turnipseed v. Surrine*, 60 S. Car. 272.

*Tennessee.* — *Sutton v. Sutton*, (Tenn. Ch. 1900) 58 S. W. Rep. 891; *Hall v. Hall*, (Tenn. Ch. 1900) 59 S. W. Rep. 203.

See also *infra*, this title, **1252. 1.**

**5. Prudence and Good Faith.** — *Byrne's Estate*, 122 Cal. 260.

**1242. 1. Litigation Resulting from Fault of Executor or Administrator.** — *Heck's Estate*, 31 Pittsb. Leg. J. N. S. (Pa.) 347.

**2. Unnecessary Services.** — *Matter of Brignole*, 133 Cal. 162; *Matter of Sawyer*, 124 Iowa 485; *Hall v. Metcalfe*, 114 Ky. 886; *Stout's Estate*, 16 Montg. Co. Rep. (Pa.) 193; *Shamberg's Estate*, 33 Pittsb. Leg. J. N. S. (Pa.) 262. See also *Sands v. Sands*, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 338.

**Administrator Who Is Also an Attorney.** — Where there are no legal or other complications

in the administration of an estate, and the administrator himself is an attorney, and has acted as attorney and agent for the decedent for some time prior to his death, he is not entitled to an allowance for services of an attorney. *Noble v. Whitten*, 38 Wash. 262.

**Services Not for Benefit of Estate.** — *In re Davis*, 31 Mont. 421; *Auer's Estate*, 14 Pa. Dist. 273; *Turnipseed v. Surrine*, 60 S. Car. 272.

**5. Services in Respect to Real Estate.** — No credit will be allowed for services of an attorney in respect to the real estate, where the representative had no power or control over such property, by virtue of his office. *Matter of Ogden*, (Surrogate Ct.) 41 Misc. (N. Y.) 158.

Where services rendered by an executor's counsel in defending against an ejectment suit were beneficial to the estate, there is no hard rule of law preventing the allowance of just and equitable compensation for such services, out of the funds of the estate. *Evans's Estate*, 24 Pa. Super. Ct. 151.

Services rendered to an executor arising out of his unauthorized management and control of real property are not a legitimate charge against the assets of the estate. *Tasker's Estate*, 14 Pa. Dist. 435.

**1243. 1. Unsuccessful Litigation — Good Faith and Diligence.** — See *infra*, this title, **1246. 1.**

**2. Credit for Counsel Fees Not Allowed Until Actual Payment.** — *Contra*, *Smith v. Rhodes*, 68 Ohio St. 500; *Crim v. England*, 46 W. Va. 480, 76 Am. St. Rep. 826.

Where the representative fails or refuses to pay the attorney, the court has no power to in any wise order him to include any sum of money in his account as dues for fees, or to segregate and set apart any sum from the funds of the estate for the use of counsel. The employment is a matter of personal and private agreement. *State v. District Ct.*, 25 Mont. 33. *Contra*, *Smith v. Rhodes*, 68 Ohio St. 500, holding that the probate court has authority to order the amount to be paid from the assets of the estate, and the failure of the administrator to obey the order constitutes a breach of his bond. See *supra*, this title, **935. 2.**

**Notes Given by an Executor to His Counsel.** — *Matter of Blair*, 49 N. Y. App. Div. 417 (affirming (Surrogate Ct.) 28 Misc. (N. Y.) 611), 67 N. Y. App. Div. 116.

**Fixing Amount Which Will Be Allowed in Advance of Payment.** — The executor or administrator has the right to have the court fix the amount of the allowance in advance of payment. *Matter of Dudley*, 123 Cal. 256; *Smith v. Rhodes*, 68 Ohio St. 500.

Moneys paid by a representative to his attorney from funds of the estate are paid at the peril of the representative, until the court has duly adjudicated the claim after all interested parties have had an opportunity to be heard. *Matter of Sullivan*, 36 Wash. 217.

**1243.** (bb) *Matters as to Which Allowance May Be Made* — aaa. *Probate of Will and Grant of Letters.* — See note 3.

**1244.** See notes 1, 2.

*Procuring Letters and Litigating Right to Administer.* — See note 4.

**1245.** See note 1.

bbb. *Advice as to Duties.* — See note 2.

ccc. *Suits to Construe Will.* — See note 3.

**1246.** ddd. *Prosecuting Suits on Behalf of Estate.* — See note 1.

eee. *Resisting Claims Against Estate.* — See note 2.

fff. *Resisting Charges Against Self.* — See note 3.

Before an executor or administrator commences an action concerning the estate, it would be better and safer for him to obtain the direction of the court sanctioning his counsel fees before they are actually paid. *Turnipseed v. Sirrine*, 60 S. Car. 272.

**Payment After Revocation of Letters.** — The fact that payment of counsel fees by an executor is not made until after revocation of his letters, will not preclude an allowance therefor. *Matter of Blair*, 67 N. Y. App. Div. 116, *distinguishing* same case on former appeal, 49 N. Y. App. Div. 417.

**1243. 3. Contest of Will — Rule Allowing Counsel Fees.** — *Alexander v. Bates*, 127 Ala. 328; *Missionary Soc. v. Goheen*, 84 Ill. App. 474; *Fillinger v. Conley*, 163 Ind. 584; *Reed v. Reed*, 74 S. W. Rep. 207, 24 Ky. L. Rep. 2438; *Couchman v. Bush*, (Ky. 1904-5) 83 S. W. Rep. 1039, 1136; *Shaffer v. Bacon*, 35 N. Y. App. Div. 248, *affirmed* without opinion 161 N. Y. 635; *Matter of Blair*, (Surrogate Ct.) 28 Misc. (N. Y.) 611, *affirmed* 49 N. Y. App. Div. 417; *Pate v. Maples*, (Tenn. Ch. 1897) 43 S. W. Rep. 740. See also *supra*, this title, **1236. 4 et seq.**

**Proceedings on Caveat.** — *Harrison v. Clark*, 95 Md. 308; *Tilghman v. France*, 99 Md. 611; *McIntire v. McIntire*, 192 U. S. 116, *affirming* 14 App. Cas. (D. C.) 337.

Attorney's fees incurred by one named as executor in a will, in a contest upon it, are not a claim against the estate where the will has not been probated and no letters have issued to the executor. *Tilghman v. France*, 99 Md. 611.

**If the Executor Is Also a Beneficiary.** — *Bruning v. Golden*, 159 Ind. 109; *Matter of Blair*, (Surrogate Ct.) 28 Misc. (N. Y.) 611.

**1244. 1. In re Souldard, 141 Mo. 642; *Bowman v. Bowman*, 27 Nev. 413 [following early *Nevada* precedents, but saying that "the reasoning of the cases does not give complete satisfaction as to its conclusiveness"]; *Alexander's Estate*, 211 Pa. St. 124, *affirming* 13 Pa. Dist. 459; *Bergdoll's Estate*, 11 Pa. Dist. 702. *Compare*, in *South Carolina*, *Turnipseed v. Sirrine*, 60 S. Car. 272.**

**2. Benefit to Estate.** — *Union Sav. Bank, etc., Co. v. Smith*, 26 Ohio Cir. Ct. 317. See also *Pennsylvania* cases cited in the next preceding note (**1244. 1**).

**4. Application for Letters of Administration — Credit for Counsel Fees Allowed.** — *Matter of Pond*, (Surrogate Ct.) 42 Misc. (N. Y.) 165; *Yeakel's Estate*, 13 Pa. Dist. 402.

**Contest Between Executors.** — See *McKee v. Soher*, 138 Cal. 367.

**Resisting Proceeding to Revoke Letters.** — Credit for counsel fees will not be allowed where the defense is unsuccessful, especially where defendant acted in bad faith. *Dorris v. Miller*, 105 Iowa 564.

**1245. 1. Services of Counsel on Application for Letters.** — *Byrne's Estate*, 122 Cal. 260.

**2. Advice and Assistance of Counsel.** — *Noble v. Jackson*, 124 Ala. 311; *Pate v. Maples*, (Tenn. Ch. 1897) 43 S. W. Rep. 740.

**3. Allowance of Counsel Fees in Suits by Executor or Administrator to Construe Will.** — *Ketchin v. Rion*, 72 S. Car. 153. See also *Chase v. Benedict*, 72 Conn. 322.

**Allowance of Counsel Fees in Suit by Beneficiaries to Construe Will.** — *Contra*, *Ensley v. Ensley*, 105 Tenn. 107.

**1246. 1. Allowance of Counsel Fees in Suits on Behalf of Estate.** — *Noble v. Jackson*, 124 Ala. 311; *Bruning v. Golden*, 159 Ind. 109; *Clark v. Young*, 74 S. W. Rep. 245, 24 Ky. L. Rep. 2395; *Scudder v. Ames*, 142 Mo. 187; *McDowell v. Sutton First Nat. Bank*, (Neb. 1905) 102 N. W. Rep. 615; *Powell v. Foster*, 71 Vt. 160. See also *Briggs v. Walker*, 102 Ky. 359, *affirmed* 171 U. S. 466.

**Proceedings to Sell Land to Pay Debts.** — *Glenn v. Gerald*, 64 S. Car. 236.

**Filing Exceptions to Account of Discharged Executor.** — An administrator *de bonis non*, in filing exceptions to the account of a discharged executor, is under stress of official duty, and he is entitled to allowance for the incidental costs and expenses. *Semple's Estate*, 10 Pa. Dist. 605, 31 Pittsb. Leg. J. N. S. (Pa.) 428, 15 York Leg. Rec. (Pa.) 18.

**Suit on Contract of Third Person to Pay Debts of Estate.** — An administrator successfully maintaining a suit upon a contract whereby the defendant agreed that he would pay the debts of the estate and expenses of administration, so that the estate should be settled solvent, is entitled to recover compensation to his attorney for necessary services rendered the estate. *Stewart v. Rogers*, (Kan. 1905) 80 Pac. Rep. 58.

**2. Allowance of Counsel Fees for Defending Estate.** — *Caldwell v. Hampton*, (Ky. 1899) 53 S. W. Rep. 14; *Newcomb v. Newcomb*, 60 S. W. Rep. 642, 22 Ky. L. Rep. 1359; *Moise's Succession*, 107 La. 717; *Healey v. Cole*, 95 Me. 272; *Geesey v. Geesey*, 96 Md. 630; *Scott's Estate*, 14 York Leg. Rec. (Pa.) 77; *In re Hall*, 70 Vt. 458; *Turk v. Hevener*, 49 W. Va. 204.

**3. Contesting Proper Charges.** — *Jacoway v. Hall*, 67 Ark. 345, *citing* 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1246; *Harris v. Coates*, 8 Idaho 491.

**Proceedings to Remove or to Require Bond —**



- 1247.** ggg. Services Affecting Personal Interests of Executor or Administrator. — See note 2.  
 hhh. Services Affecting Interests of Individual Beneficiaries. — See note 3.

**Scope of Rule.** — It is not enough to warrant a disallowance of credit for attorney's fees that the services rendered were for the benefit of the administrator, unless it appears that he was seeking a personal benefit, in opposition to his duty as trustee. Thus, he is entitled to be reimbursed out of the estate a reasonable sum for counsel, in defending in good faith, and on reasonable grounds, proceedings instituted for his removal or that he be required to give bond. *Noble v. Jackson*, 124 Ala. 311.

**Improper Contests with Creditors and Distributees.** — *Ross v. Battle*, 113 Ga. 742; *McNeely v. McNeely*, 50 La. Ann. 823; *Stonestreet v. Frost*, 123 N. Car. 640.

**1247. 2. Legal Services for Exclusive Benefit of Executor or Administrator — Alabama.** — *Noble v. Jackson*, 124 Ala. 311, 132 Ala. 230.

*California.* — *Firebaugh v. Burbank*, 121 Cal. 186; *McKee v. Soher*, 138 Cal. 367.

*Idaho.* — *Harris v. Coates*, 8 Idaho 491.

*Kentucky.* — *Caldwell v. Hampton*, (Ky. 1899) 53 S. W. Rep. 14; *Thompson v. Thompson*, 65 S. W. Rep. 457, 23 Ky. L. Rep. 1535; *Hood v. Maxwell*, 66 S. W. Rep. 276, 23 Ky. L. Rep. 1791; *Bickel v. Bickel*, 79 S. W. Rep. 215, 25 Ky. L. Rep. 1945; *Clarke v. Garrison*, 79 S. W. Rep. 240, 25 Ky. L. Rep. 1999.

*Louisiana.* — *Benton's Succession*, 106 La. 494.

*Maryland.* — See *Bauernschmidt v. Bauernschmidt*, (Md. 1905) 60 Atl. Rep. 437.

*Missouri.* — *In re Souldar*, 141 Mo. 642.

*Nebraska.* — *McDowell v. Sutton First Nat. Bank*, (Neb. 1905) 102 N. W. Rep. 615.

*New York.* — *Matter of Yetter*, 44 N. Y. App. Div. 404, affirmed on opinion below 162 N. Y. 615.

*Pennsylvania.* — *Kalbfell's Estate*, 17 Pa. Super. Ct. 255, affirming 30 Pittsb. Leg. J. N. S. (Pa.) 325; *Johnston's Estate*, 13 Pa. Dist. 29.

*Texas.* — *Bell v. Goss*, 33 Tex. Civ. App. 158.

*Washington.* — *Noble v. Whitten*, 38 Wash. 262.

**Illustrations.** — Counsel fees incurred by an executor after his removal, in defending a suit for an accounting for losses sustained by the estate through his maladministration, cannot be recovered from the estate. *In re Currier*, 19 Colo. App. 245.

An administrator is not entitled to credit for services rendered by an attorney in advising him concerning his right to compensation. *In re McAlpin*, 8 Ohio Dec. 654.

An administrator is not entitled to credit for payments to counsel rendered necessary by the negligent manner in which the accounts of his administration were kept. *Matter of Van De Veer*, 63 N. Y. App. Div. 495.

Attorneys for the executors of a deceased executor and trustee are not entitled to be paid out of the estate of the first decedent, for services in compromising a devastavit committed by the executor of the first decedent. *Matter of Welling*, 51 N. Y. App. Div. 355, motion for reargument denied 53 N. Y. App. Div. 639.

**3. Litigation of Beneficiaries — Alabama.** — *Foster v. Foster*, 126 Ala. 257.

*Arkansas.* — *Paget v. Brogan*, 67 Ark. 522,

quoting 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1247.

*District of Columbia.* — *McIntire v. McIntire*, 14 App. Cas. (D. C.) 337, affirmed 192 U. S. 116.

*Kentucky.* — *Hood v. Maxwell*, 66 S. W. Rep. 276, 23 Ky. L. Rep. 1791.

*Louisiana.* — *Kernan's Succession*, 105 La. 592; *Benton's Succession*, 106 La. 494.

*Montana.* — *In re Davis*, 31 Mont. 421.

*New York.* — *Matter of Welling*, 51 N. Y. App. Div. 355, motion for reargument denied 53 N. Y. App. Div. 639.

*Pennsylvania.* — *Sunderland's Estate*, 10 Pa. Dist. 358, 25 Pa. Co. Ct. 538, affirmed on opinion below 203 Pa. St. 160; *Bergdoll's Estate*, 11 Pa. Dist. 702.

*Tennessee.* — *Pate v. Maples*, (Tenn. Ch. 1897) 43 S. W. Rep. 740.

Counsel employed by beneficiaries are not entitled to fees out of the estate, as such, though counsel for the administrator consulted with them. *Munhall's Estate*, 33 Pittsb. Leg. J. N. S. (Pa.) 45.

**Agreement as to Counsel Fees.** — Ordinarily, in the distribution of an estate, the court has no authority to award payment of fees of counsel for the distributees; but it may be done pursuant to an agreement by the beneficiary owners of the estate amounting to an assignment of a portion of their distributive shares. *Gross's Estate*, 14 Pa. Dist. 137.

**Litigation over Probate of Will or Directions to Representative.** — Costs incurred by a person beneficially interested in proceedings to obtain the probate of a will or directions from the court for the proper administration of an estate, are properly allowed out of the estate. Otherwise of costs incurred in a proceeding contesting the will. *In re Prince*, (1898) 2 Ch. 225.

**Proceeding to Settle Estate.** — In *Kentucky*, where a proceeding to settle the estate of a decedent is brought by one or more persons interested, for the benefit of themselves and others interested with them, an allowance for the necessary expenses, fees, and costs out of the fund is authorized by statute. *Bailey v. Barclay*, 109 Ky. 636; *Sims v. Birdsong*, 59 S. W. Rep. 749, 22 Ky. L. Rep. 1049.

**Proceedings to Remove Representative.** — A beneficiary is not entitled to credit for fees of counsel rendering services in proceedings instituted to remove the legal representative of the estate. *Matter of Bell*, 145 Cal. 646.

**Litigation of Creditors.** — Credit will not be allowed for services rendered solely for creditors, though they resulted in benefit to the estate; nor for services rendered primarily for creditors, though by mere permission in the name of the administrator, where the estate reaped no benefit therefrom. *In re Officer*, 122 Iowa 553.

Where creditors are authorized to bring a bill in equity for a sale of real estate to pay debts they are entitled to an allowance for attorneys' fees out of the funds of the estate. *Blount County Bank v. Smith*, (Tenn. Ch. 1898) 48 S. W. Rep. 206.

**Services of Attorney for Debtor in Obtaining**

**1248.** iii. Preparation and Settlement of Accounts. — See note 1.

**1249.** See note 1.

jjj. Services Not of Professional Character. — See note 2.

**1250.** kkk. Retaining Fees. — See note 1.

(cc) Amount of Allowance. — See note 3.

**Settlement of Debt.** — Credit will not be allowed an executor for an amount paid an attorney for services in the settlement of a debt due the estate, where the attorney was acting for the debtor. *Matter of Long Island L. & T. Co.*, 92 N. Y. App. Div. 5.

**Services Beneficial to Estate.** — The Orphans' Court has the right to make an allowance out of a fund before it for distribution for the services of counsel in raising such fund, or in establishing the rights of the parties to participate in it. *Belcher's Estate*, 13 Pa. Dist. 327, 34 Pittsb. Leg. J. N. S. (Pa.) 286. See also *Evans's Estate*, 24 Pa. Super. Ct. 151; *Fechter's Estate*, 34 Pittsb. Leg. J. N. S. (Pa.) 323; *Kernan's Succession*, 105 La. 592.

**Attorney Appointed by Court to Represent Absent Heirs under Authority of Statute.** — The fee of an attorney for absent heirs, when such appointment is necessary, is properly chargeable to the portions of the absent heirs, and not to the body of the succession. Where, however, the services of that officer have proved valuable to the succession, a fee is sometimes allowed him out of the succession funds generally. The law, however, does not contemplate this, and it is exceptional. *Kellogg's Succession*, 51 La. Ann. 1304, *approving Harris's Succession*, 29 La. Ann. 743.

Under a California statute of similar character, repealed in 1903, Stat. 1903, c. 206, the attorney so appointed stands in no better position than the persons whom he represents, and his compensation is dependent upon the existence of a fund or property belonging to such person. *Matter of Lux*, 134 Cal. 3; *Matter of Carpenter*, 146 Cal. 661.

**Suit to Set Aside Trust Deed of Beneficiary.** — Costs and attorney's fees to set aside a trust deed, executed by a deceased beneficiary of the estate for all his real and personal property, are not payable out of funds of the estate. *In re Anning*, 34 N. Bruns. 308.

**1248. 1. Allowance of Counsel Fees for Services on Settlement of Account.** — *Jacoway v. Hall*, 67 Ark. 340; *Crutcher v. Board of Missions*, 62 S. W. Rep. 895, 23 Ky. L. Rep. 257; *Seibert v. Bloomfield*, 63 S. W. Rep. 584, 23 Ky. L. Rep. 646; *McNeely v. McNeely*, 50 La. Ann. 823; *Matter of Arnton*, 106 N. Y. App. Div. 326; *In re McAlpin*, 8 Ohio Dec. 654; *Marley's Estate*, 18 Pa. Super. Ct. 303.

**Scope of Rule.** — Where the preparation of the account is not at all intricate, requiring no expert knowledge, no credit for counsel fee will be allowed. *Kernan's Succession*, 105 La. 592.

**Whether There Is or Is Not Litigation.** — *Compare Stout's Estate*, 16 Montg. Co. Rep. (Pa.) 193.

**In New York.** — *Matter of Welling*, 53 N. Y. App. Div. 639, *denying* motion for reargument in 51 N. Y. App. Div. 355.

This statutory provision does not limit the amount which the personal representative may lawfully expend and have allowed, if otherwise

reasonable. *Matter of Mitchell*, (Surrogate Ct.) 39 Misc. (N. Y.) 120, (Surrogate Ct.) 12 N. Y. Annot. Cas. 146.

**Filing New Account on Rejection of One Filed.** — If the account filed is not full and complete or properly verified, the administrator is not entitled to credit for an attorney's fee for services in filing a new account, upon the rejection of the first, or for representing him in a contest of such account. *James v. Craighead*, (Tex. Civ. App. 1902) 69 S. W. Rep. 241.

**Deceased Representative — Settlement by Surety.** — Where the account of a deceased representative is settled by the surety on his bond and not by his executor or administrator, no counsel fee can be allowed the latter. *Haley's Estate*, 9 Pa. Dist. 116, *affirmed* 16 Pa. Super. Ct. 70.

**1249. 1. Improper Contest with Creditors or Distributees.** — *Noble v. Jackson*, 132 Ala. 230; *Matter of Post*, (Surrogate Ct.) 30 Misc. (N. Y.) 551.

Where credit is claimed for the amount of a debt found by the court to be fictitious, no allowance will be made for attorneys' fees. *Matter of Koch*, (Surrogate Ct.) 33 Misc. (N. Y.) 153.

**2. Services Not of a Professional Character — Credit Not Allowed.** — *Matter of Brignole*, 133 Cal. 162; *Matter of Murray*, (Surrogate Ct.) 40 Misc. (N. Y.) 433; *Matter of Ogden*, (Surrogate Ct.) 41 Misc. (N. Y.) 158; *Matter of Pond*, (Surrogate Ct.) 42 Misc. (N. Y.) 165; *In re McAlpin*, 8 Ohio Dec. 654; *Kalbfell's Estate*, 17 Pa. Super. Ct. 255, *affirming* 30 Pittsb. Leg. J. N. S. (Pa.) 325.

**Illustrations.** — The drafting of the inventory and appraisal is mere clerical work which it is the duty of the administrator to perform, and for which he is compensated by the commissions allowed him. *Browning v. Richardson*, 186 Mo. 361.

An executor or administrator is not entitled to credit for the expense of serving notice of suit on heirs, a duty which could have been performed by any officer authorized to make service, on payment of legal fees. *Powell v. Foster*, 71 Vt. 160.

**1250. 1. Credit for Retaining Fees Denied.** — *Tomsky v. Superior Ct.*, 131 Cal. 620.

**3. Only Reasonable Amount Allowed.** — *Matter of Sawyer*, 124 Iowa 485; *Matter of Hayes*, (Surrogate Ct.) 40 Misc. (N. Y.) 500; *Schmidt's Estate*, 185 Pa. St. 579; *Christian's Estate*, 12 Pa. Dist. 368; *Ehrhart's Estate*, 17 York Leg. Rec. (Pa.) 137; *Lynch v. Spicer*, 53 W. Va. 426.

**Elements of Value — Amount of Estate and Value of Services.** — *Gairdner v. Tate*, 110 Ga. 456; *Clarke v. Garrison*, 79 S. W. Rep. 240, 25 Ky. L. Rep. 1999; *Matter of Jones*, (Surrogate Ct.) 28 Misc. (N. Y.) 599; *Matter of Sewell*, (Surrogate Ct.) 32 Misc. (N. Y.) 604; *Matter of Wolfe*, 7 Ohio Dec. 220, 4 Ohio N. P. 336; *McKown's Estate*, 17 Pa. Super. Ct. 253.

**Negligence or Misconduct of Attorney.** — The right to any allowance may be forfeited, or the



**1251. If More Counsel Are Employed. — See note 1.**

Contingent Fees. — See note 2.

By Whom Fixed. — See note 3.

**1252. Evidence. — See notes 1, 2.**

amount allowed cut down, by negligence or misconduct on the part of the attorney. Matter of Kruger, 123 Cal. 391, 143 Cal. 141; Kalbfell's Estate, 17 Pa. Super. Ct. 255, *affirming* 30 Pittsb. Leg. J. N. S. (Pa.) 325.

**Illustrations** — *Alabama*. — Noble v. Jackson, 132 Ala. 230, 124 Ala. 311.

*California*. — Matter of Brignole, 133 Cal. 162; Coursen's Estate, 133 Cal. xix, 65 Pac. Rep. 965.

*Kentucky*. — Bickel v. Bickel, 79 S. W. Rep. 215, 25 Ky. L. Rep. 1945; Clarke v. Garrison, 79 S. W. Rep. 240, 25 Ky. L. Rep. 1999; Root v. Green, 81 S. W. Rep. 243, 26 Ky. L. Rep. 315.

*Louisiana*. — Moise's Succession, 107 La. 717.

*Michigan*. — Marx v. McMorran, 136 Mich. 406, 11 Detroit Leg. N. 80.

*Missouri*. — Ansley v. Richardson, 95 Mo. App. 332.

*Montana*. — *In re* Davis, 31 Mont. 421.

*New York*. — Matter of Feierabend, (Surrogate Ct.) 38 Misc. (N. Y.) 524; Matter of Mitchell, (Surrogate Ct.) 39 Misc. (N. Y.) 120, 12 N. Y. Annot. Cas. 146; Matter of Wagner, (Surrogate Ct.) 40 Misc. (N. Y.) 490; Matter of Ogden, (Surrogate Ct.) 41 Misc. (N. Y.) 158; Matter of Pond, (Surrogate Ct.) 42 Misc. (N. Y.) 165.

*Ohio*. — *In re* McAlpin, 8 Ohio Dec. 654.

*Oregon*. — Conser's Estate, 40 Oregon 138.

*Pennsylvania*. — Evans's Estate, 24 Pa. Super. Ct. 151; Sunderland's Estate, 10 Pa. Dist. 358, 25 Pa. Co. Ct. 538, *affirmed* on opinion below 203 Pa. St. 160.

*Washington*. — Matter of Mason, 26 Wash. 259.

**1251. 1. Unnecessary Number of Attorneys.** — Byrne's Estate, 122 Cal. 260; Matter of Sawyer, 124 Iowa 485; Kalbfell's Estate, 17 Pa. Super. Ct. 255, *affirming* 30 Pittsb. Leg. J. N. S. (Pa.) 325. See also Bayle's Estate, 12 Pa. Dist. 73, 28 Pa. Co. Ct. 125, 19 Montg. Co. Rep. (Pa.) 134.

**2. Contingent Fees.** — Shoenberger's Estate, 211 Pa. St. 99; Thompson v. Nowlin, 51 W. Va. 346, *citing* 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1251.

The contract, itself, cannot, however, be enforced against the estate. Rickel v. Chicago, etc., R. Co., 112 Iowa 148. See *supra*, this title, **935. 2.**

**3. What Is Reasonable Amount Determined by Court** — *United States*. — Harrison v. Perea, 168 U. S. 311.

*Alabama*. — Alexander v. Bates, 127 Ala. 328.

*Arkansas*. — Jacoway v. Hall, 67 Ark. 340.

*California*. — Matter of Dudley, 123 Cal. 256; Matter of Adams, 131 Cal. 415.

*Colorado*. — Doss v. Stevens, 13 Colo. App. 535.

*Illinois*. — See Missionary Soc. v. Goheen, 84 Ill. App. 474.

*Kentucky*. — Newcomb v. Newcomb, 60 S. W. Rep. 642, 22 Ky. L. Rep. 1359; Clarke v. Garrison, 79 S. W. Rep. 240, 25 Ky. L. Rep. 1999.

*Louisiana*. — Rabasse's Succession, 51 La. Ann. 590; Haile's Succession, 52 La. Ann. 1529.

*Michigan*. — *In re* Pfeffer, 117 Mich. 207.

*Missouri*. — Scudder v. Ames, 142 Mo. 187; Ansley v. Richardson, 95 Mo. App. 332.

*New York*. — Matter of Van Alstyne, 62 N. Y. App. Div. 626.

*Ohio*. — *In re* McAlpin, 8 Ohio Dec. 654, note, *affirming* 8 Ohio Dec. 654.

*Oregon*. — *In re* Osburn, 36 Oregon 8.

*Pennsylvania*. — Schmidt's Estate, 185 Pa. St. 579; Simon's Estate, 9 Pa. Dist. 59, *reversed* on other grounds 20 Pa. Super. Ct. 450; Mutchmore's Estate, 9 Pa. Dist. 702; Holt's Estate, 12 Pa. Dist. 205, 28 Pa. Co. Ct. 268; Kalbfell's Estate, 17 Pa. Super. Ct. 255, *affirming* 30 Pittsb. Leg. J. N. S. (Pa.) 325; Snyder's Estate, 18 Pa. Super. Ct. 462.

**Fixing Amount by Agreement with Beneficiaries.** — Sowles v. Hall, 73 Vt. 55. See also Jones v. Harbaugh, 93 Md. 269.

**Review of Decision Fixing Amount.** — That the probate court is authorized to allow costs and extraordinary expenses, "which the court may think proper to allow," does not preclude a review of its action as to the reasonableness of the allowance made. Miller v. Gehr, 91 Md. 709; Geesey v. Geesey, 94 Md. 371.

**Record on Appeal.** — Where the record does not disclose the evidence on which the allowance was made, the order cannot be disturbed on appeal. Seibert v. Bloomfield, 63 S. W. Rep. 584, 23 Ky. L. Rep. 646.

**Discretion of Court.** — Matter of Straus, 144 Cal. 553.

The exercise of discretion includes a consideration of the quantity, character, and result of the services rendered. In arriving at an amount the discretion may also extend to determining the value of the services of the attorney in the particular case, for to the adjudicating court his attainments and professional standing are peculiarly known. McKown's Estate, 17 Pa. Super. Ct. 253.

**1252. 1. Burden of Proving Fairness and Reasonableness Is on Accountant.** — Firebaugh v. Burbank, 121 Cal. 186; Mutchmore's Estate, 9 Pa. Dist. 293, 24 Pa. Co. Ct. 257; Ehrhart's Estate, 17 York Leg. Rec. (Pa.) 137. See also *supra*, this title, **1241. 1.**

**Claim Should Be Itemized and Value of Each Service Proved.** — Noble v. Jackson, 124 Ala. 311; *In re* McAlpin, 8 Ohio Dec. 654.

An account for a definite term is sufficient where the condition of the estate occupied the whole time of the attorney and involved extensive litigation. *In re* Davis, 31 Mont. 421.

In *New York* it has been said, approving the general rule governing the value of attorneys' fees, that "the courts have uniformly refused to limit attorneys' fees to specified and detailed bills of particulars with a specified amount for each item, as in the case of goods sold, or mere manual services rendered." Matter of Sewell, (Surrogate Ct.) 32 Misc. (N. Y.) 604. Compare Matter of McNamee, (Surrogate Ct.) 25 Misc. (N. Y.) 260, *citing* Stokes v. Dale, 1 Dem. (N. Y.) 260.



**1252.** *ee.* COSTS. — See notes 3, 4.

**Evidence of Value Necessary to Allowance.** — It is error to make the allowance without taking evidence as to the value of the services rendered and giving each party opportunity to be heard. *Clark v. Young*, 74 S. W. Rep. 245, 24 Ky. L. Rep. 2395. *Compare* Bayle's Estate, 12 Pa. Dist. 73, 28 Pa. Co. Ct. 125, 19 Montg. Co. Rep. (Pa.) 134, where the court said: "The fee demanded by the counsel who appeared for the estate was not objected to at the audit, and in default of any testimony as to the character or value of the services, we are unable to say that it was excessive." See also note 2.

**1252. 2. Evidence of Value — Opinion of Other Lawyers.** — *Harrison v. Perea*, 168 U. S. 311; *Reed v. Reed*, 74 S. W. Rep. 207, 24 Ky. L. Rep. 2438; *Browning v. Richardson*, 186 Mo. 361; *Pearson's Estate*, 8 Northam. Co. Rep. (Pa.) 23.

Being familiar with the value of the services rendered, the judge in fixing the allowance can act upon his own knowledge of their value. *Jacaway v. Hall*, 67 Ark. 340.

**Amount of Allowance a Question of Law.** — The amount due for an attorney's fee is a question of law, not of fact. *Hall v. Hall*, (Tenn. Ch. 1900) 59 S. W. Rep. 203. *Compare* *Geesey v. Geesey*, 96 Md. 630, where the court said: "It is not possible to accurately determine the real value of the services of an attorney by the amount involved, or by what appears of record in the case, as a great deal of the labor of a careful attorney is performed in the preparation of the case outside of the court house." See also note 1.

Jurisprudence has settled the rule, and consecrated it, that the *quantum* of attorneys' fees in any case where the services have been performed in the presence of the court which is called upon to decide the question is a matter of law, rather than one of fact, and which the court will value as its opinion may dictate, rather than base its judgment upon the opinion of witnesses. *Rabasse's Succession*, 51 La. Ann. 590.

**3. Credit Allowed for Costs of Accounting.** — *Hawaii*. — *Matter of Alina*, 13 Hawaii 388, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1252.

*Louisiana*. — *Conery's Succession*, 106 La. 50; *Benton's Succession*, 106 La. 494.

*Minnesota*. — *Gilman v. Maxwell*, 79 Minn. 377. *Missouri*. — *Ansley v. Richardson*, 95 Mo. App. 332.

*New Jersey*. — *Hartson v. Elden*, 58 N. J. Eq. 478; *King v. Foerster*, 61 N. J. Eq. 584.

*New York*. — *Matter of Arnton*, 106 N. Y. App. Div. 326; *Matter of Santos*, (Surrogate Ct.) 31 Misc. (N. Y.) 76; *Matter of Schaefer*, (Surrogate Ct.) 34 Misc. (N. Y.) 34, *affirmed* 65 N. Y. App. Div. 378, which was *affirmed* without opinion 171 N. Y. 686; *Matter of Guldenkirch*, (Surrogate Ct.) 35 Misc. (N. Y.) 123; *Matter of Foulds*, (Surrogate Ct.) 35 Misc. (N. Y.) 171; *Matter of Brintnall*, (Surrogate Ct.) 40 Misc. (N. Y.) 67; *Matter of Pond*, (Surrogate Ct.) 42 Misc. (N. Y.) 165; *Matter of Dougherty*, (Surrogate Ct.) 43 Misc. (N. Y.) 468.

*Ohio*. — *Rote v. Warner*, 17 Ohio Cir. Ct. 350, 9 Ohio Cir. Dec. 540.

*Pennsylvania*. — *Marley's Estate*, 18 Pa. Super. Ct. 303; *Edenborn's Estate*, 10 Pa. Dist. 184; *Conway's Estate*, 10 Pa. Dist. 509, 18 Lanc. L. Rev. 129; *Ziegler's Estate*, 25 Pa. Co. Ct. 611, 18 Lanc. L. Rev. 393; *Williams' Estate*, 8 Del. Co. Rep. (Pa.) 120; *Rowe's Estate*, 11 Kulp (Pa.) 32; *Hensler's Estate*, 18 Lanc. L. Rev. 317, 2 Blair Co. Rep. (Pa.) 6; *Rambo's Estate*, 15 Montg. Co. Rep. (Pa.) 25.

**Costs of Attempt to Surchage.** — *Fieser's Estate*, 15 Pa. Super. Ct. 447.

**4. Credit Allowed for Costs and Disbursements of Suit** — *England*. — *Re Peel*, 81 L. T. N. S. 504. See also *Phillips v. Howell*, (1901) 2 Ch. 773.

*Alabama*. — *Alexander v. Bates*, 127 Ala. 328.

*Indiana*. — *Bruning v. Golden*, 159 Ind. 199; *Chicago, etc., R. Co. v. Harsham*, 21 Ind. App. 23.

*Kentucky*. — *Cox v. Doty*, (Ky. 1898) 45 S. W. Rep. 1044; *Clark v. Young*, 74 S. W. Rep. 245, 24 Ky. L. Rep. 2395.

*Louisiana*. — *McNeely v. McNeely*, 50 La. Ann. 823.

*Maine*. — *Healey v. Cole*, 95 Me. 272; *Ticonic Nat. Bank v. Turner*, 96 Me. 380.

*Massachusetts*. — *Hampden Trust Co. v. Leary*, 186 Mass. 577.

*Michigan*. — *Porter v. Long*, 124 Mich. 584, 7 Detroit Leg. N. 337.

*New York*. — *McKee v. Lavery*, (Supm. Ct. App. Div.) 58 N. Y. Supp. 990; *Matter of Mahoney*, (Surrogate Ct.) 37 Misc. (N. Y.) 472.

*Pennsylvania*. — *Nolde's Estate*, 27 Pa. Super. Ct. 413, *affirming* 21 Lanc. L. Rev. 59; *Salin's Estate*, 10 Pa. Dist. 97; *Carey's Estate*, 10 Kulp (Pa.) 227.

*Texas*. — *Hanrick v. Gurley*, 93 Tex. 458.

*West Virginia*. — *Turk v. Hevener*, 49 W. Va. 204.

*Wisconsin*. — *Opitz v. Karel*, 118 Wis. 527, 99 Am. St. Rep. 1004.

**Statutory Provisions as to Costs.** — *Whitaker v. Whitaker*, 138 N. Car. 205; *McCarthy v. Speed*, 16 S. Dak. 584; *Ferguson v. Woods*, (Wis. 1905) 102 N. W. Rep. 1094.

**Expenses of Printing Briefs** incurred in litigation which the representative had a right to engage in are a proper credit. *Byrne's Estate*, 122 Cal. 260; *Kernan's Succession*, 105 La. 592; *Turnipseed v. Sirrine*, 60 S. Car. 272.

**Witness Fees.** — *Turnipseed v. Sirrine*, 60 S. Car. 272.

Expenses incurred in obtaining the testimony of witnesses upon a contest over a will are not expenses of the administration of an estate by a temporary administrator. *Matter of McNamee*, (Surrogate Ct.) 25 Misc. (N. Y.) 260.

**Apportionment of Costs to Different Funds.** — Where the real and personal estate are being administered in one action, the costs exclusively occasioned by the administration of the real estate must be borne by the real estate, the general costs of suit being borne by the personal estate. *In re Jones*, (1902) 1 Ch. 92.

**Costs Paid by Solicitor of Executor — Status of Claim.** — The solicitor of an executor who has

**1254.** See notes 1, 2.

**1255.** (3) *Debts of Estate* — (a) *In General*. — See note 2.

**1256.** (b) *What Constitutes Payment*. — See notes 2, 5.

**1257.** (c) *Necessity of Presentation and Allowance Before Payment*. — See notes 2, 3, 4.

paid the costs, or his assignee, has no claim against the estate in respect thereof. *Granger v. O'Neill*, 31 Nova Scotia 462.

**1254. 1. Litigation Affecting Rights of Particular Beneficiaries.** — *Bergdoll's Estate*, 11 Pa. Dist. 702.

An allowance to a guardian *ad litem* on an executor's accounting must be made payable out of the interest of the ward and not out of the general fund. *Matter of Farmers' L. & T. Co.*, 49 N. Y. App. Div. 1; *Brinckerhoff v. Farias*, 52 N. Y. App. Div. 256, *affirming* 170 N. Y. 427.

**Litigation Affecting Individual Interests of Personal Representative.** — *Felsenthal v. Kline*, 214 Ill. 121; *McDowell v. Sutton First Nat. Bank*, (Neb. 1905) 102 N. W. Rep. 615; *Matter of Pond*, (Surrogate Ct.) 42 Misc. (N. Y.) 165; *Eckert's Estate*, 18 Lanc. L. Rev. 58; *Holman's Estate*, 34 Pittsb. Leg. J. N. S. (Pa.) 111; *Roberts v. Lamberton*, 117 Wis. 635.

An administrator *pendente lite* is not entitled to his costs out of the estate, incurred in successfully defending an action brought against him charging him with personal fraud and misconduct in the administration. *In re Dunn*, (1904) 1 Ch. 648.

**2. Litigation Occasioned by Fault of Executor or Administrator — Delay in Preparing Accounts.** — *Harrison v. Perea*, 168 U. S. 311; *Matter of Alina*, 13 Hawaii 388, *citing* 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1254; *Matter of Baker*, (Surrogate Ct.) 27 Misc. (N. Y.) 126; *Matter of Briggs*, (Surrogate Ct.) 31 Misc. (N. Y.) 486; *Payne's Estate*, 32 Pittsb. Leg. J. N. S. (Pa.) 311.

The imposition of costs of an audit on an accountant is a matter depending largely on the circumstances of the case. There is no fixed rule of law which controls regardless of the circumstances. *Fieser's Estate*, 15 Pa. Super. Ct. 447.

**Contests Occasioned by Fraud or Improper Conduct** — *Georgia*. — *Ross v. Battle*, 113 Ga. 742. *Illinois*. — *Marshall v. Coleman*, 187 Ill. 556, *affirming* 89 Ill. App. 41.

*New York*. — *Matter of Hayes*, (Surrogate Ct.) 40 Misc. (N. Y.) 500.

*Pennsylvania*. — *Morrison's Estate*, 196 Pa. St. 80; *Carr's Estate*, 24 Pa. Super. Ct. 369, *reversing* 8 Del. Co. Rep. (Pa.) 556; *Brenneman's Estate*, 14 York Leg. Rec. (Pa.) 14; *Hoffman's Estate*, 15 York Leg. Rec. (Pa.) 114; *Speise's Estate*, 21 Lanc. L. Rev. 185; *Re Schiehl*, 29 Pittsb. Leg. J. N. S. (Pa.) 38.

*Texas*. — *James v. Craighead*, (Tex. Civ. App. 1902) 69 S. W. Rep. 241; *Thomas v. Hawpe*, 35 Tex. Civ. App. 311.

*Wisconsin*. — *Robinson v. Hodgkin*, 99 Wis. 327.

**Mismanagement of Estate.** — *Hunt v. Smith*, 58 N. J. Eq. 25; *Matter of Gabriel*, 44 N. Y. App. Div. 623, *affirmed* without opinion 161 N. Y. 644; *Hoffman's Estate*, 21 Pa. Co. Ct. 203, *affirmed* 10 Pa. Super. Ct. 113.

**Contest Occasioned by Improper Charges.** —

*Adamson v. Parker*, (Ark. 1905) 85 S. W. Rep. 239; *Webb v. Peck*, 131 Mich. 579, 9 Detroit Leg. N. 449; *Matter of Yetter*, 44 N. Y. App. Div. 404, *affirmed* on opinion below 162 N. Y. 615; *Matter of Koch*, (Surrogate Ct.) 33 Misc. (N. Y.) 153; *Matter of Rainforth*, (Surrogate Ct.) 40 Misc. (N. Y.) 609; *Rufe's Estate*, 29 Pa. Co. Ct. 617; *Givler's Estate*, 6 Dauphin Co. Rep. (Pa.) 18; *In re Anning*, 34 N. Bruns. 308.

**Resisting Application for Accounting.** — *Voinché v. Brouillette*, 50 La. Ann. 370; *Matter of Post*, (Surrogate Ct.) 30 Misc. (N. Y.) 551.

**Unnecessary Litigation.** — *Holburn v. Pfannmiller*, 114 Ky. 831; *Ticonic Nat. Bank v. Turner*, 96 Me. 380; *Pauley v. Millsbaugh*, 95 N. Y. App. Div. 208; *Fisher v. Bennett*, (Supm. Ct. Spec. T.) 21 Misc. (N. Y.) 178; *Matter of Stanton*, (Surrogate Ct.) 41 Misc. (N. Y.) 278; *Ianson v. Clyde*, 31 Ont. 579.

**Unsuccessful Contests with Beneficiaries.** — *Lane v. Thorn*, 103 Ill. App. 215; *McNeely v. McNeely*, 50 La. Ann. 823; *Steinway v. Von Bernuth*, 82 N. Y. App. Div. 596; *Rooney v. Bodkin*, 93 N. Y. App. Div. 431; *Flynn's Estate*, 21 Pa. Super. Ct. 130; *Boyle's Estate*, 10 Pa. Dist. 206; *Uffner v. Lewis*, 27 Ont. App. 242.

As a general rule, an executor or administrator will be directed\* personally to pay the costs of his accounting, where he denies assets and they are proved against him. *Matter of Long Island L. & T. Co.*, 92 N. Y. App. Div. 5, *approving In re Mull*, (Surrogate Ct.) 2 N. Y. Supp. 23.

**Costs Incurred After Time When Estate Might Have Been Settled.** — *Harris v. Coates*, 8 Idaho 491.

**1255. 2. Credit for Debts Paid.** — *Emerick v. Hileman*, 71 Ill. App. 512, *affirmed* 177 Ill. 368; *Matter of Peck*, 79 N. Y. App. Div. 296, *affirmed* 177 N. Y. 538.

**1256. 2. What Constitutes Payment — Assumption of Liability by Administrator.** — *Walworth v. Bartholomew*, 76 Vt. 1.

**5. Payment by Set-off.** — *Moise's Succession*, 107 La. 717.

The surrogate has no power to decree a set-off against claims of a decedent which have been reduced to judgment. *Matter of Wait*, (Surrogate Ct.) 39 Misc. (N. Y.) 74, 12 N. Y. Annot. Cas. 141, *citing Stilwell v. Carpenter*, 59 N. Y. 414.

**1257. 2. Claims Paid After Allowance by Probate Court.** — *In re Patrick*, (Neb. 1904) 100 N. W. Rep. 939; *Matter of Sprague*, 40 N. Y. App. Div. 615, *affirmed* without opinion 162 N. Y. 611; *Matter of Watson*, 101 N. Y. App. Div. 550.

A general administrator is entitled to credit for the amount of a claim against the estate in his favor, allowed by a special administrator appointed for the purpose of passing upon it and approved by the court. *In re Pennock*, 122 Iowa 622.

**Fraudulent and Collusive Claims.** — *Marshall v. Coleman*, 187 Ill. 556, *affirming* 89 Ill. App. 41.



**1258.** See note 1.

(d) To What Amount Credit Is Allowed. — See notes 2, 5.

**1259.** (e) For What Debts Credit Is Allowable — *aa.* GENERAL RULE. — See note 1.  
*bb.* DEBTS BARRED BY STATUTE OF LIMITATIONS. — See note 3.

**1260.** *cc.* DEBTS SECURED BY LIEN. — See note 1.

*dd.* DEBTS DUE TO EXECUTOR OR ADMINISTRATOR. — See note 3.

**Void Orders of Court No Protection to Representative.** — *O'Bryan v. Wilson*, (Miss. 1905) 38 So. Rep. 509; *In re Osburn*, 36 Oregon 8.

**Effect of Appeal from Order of Allowance.** — See *supra*, this title, **1174. 3. Order Reversed on Appeal.**

**1257. 3. Payment Before Allowance Is at Risk of Executor or Administrator.** — Matter of Spanier, 120 Cal. 698; Matter of Goss, 98 N. Y. App. Div. 489; *In re Osburn*, 36 Oregon 8; Cessna's Estate, 192 Pa. St. 14; Adams's Estate, 24 Pa. Co. Ct. 444; Bannerman's Estate, 31 Pittsb. Leg. J. N. S. (Pa.) 412; Rafferty v. Potter, 21 R. I. 517.

**4. Credit for Debts Paid Before Allowance** — *Iowa*. — *In re Pennock*, 122 Iowa 622.

*Michigan*. — Houghteling v. Stockbridge, 136 Mich. 544, 11 Detroit Leg. N. 100.

*Mississippi*. — Gordon v. McDougall, 84 Miss. 715.

*Missouri*. — Under the existing statute in Missouri, the allowance of a claim by the court is an essential prerequisite to its payment by the personal representative. See *infra*, this title, **1258. 1.**

*New Jersey*. — Freehold First Nat. Bank v. Thompson, 61 N. J. Eq. 188.

*New York*. — Matter of Myers, 36 N. Y. App. Div. 625; Matter of Meagley, 39 N. Y. App. Div. 83; Matter of Philp, (Surrogate Ct.) 29 Misc. (N. Y.) 263; Matter of Stanton, (Surrogate Ct.) 41 Misc. (N. Y.) 278.

*Pennsylvania*. — Moore's Estate, 198 Pa. St. 611, 48 Atl. Rep. 884.

*West Virginia*. — Van Winkle v. Blackford, 54 W. Va. 631.

*Canada*. — *Re Blank*, 5 N. W. Ter. 230.

See also *supra*, this title, **1232. 4. Burden of Proof.**

**1258. 1. Rule Denying Credit for Claims Paid Without Allowance by Probate Court.** — Langston v. Canterbury, 173 Mo. 122, *distinguishing* Jacobs v. Jacobs, 99 Mo. 427, and McPike v. McPike, 111 Mo. 216; Springfield Grocer Co. v. Walton, 95 Mo. App. 526; Johnson v. Pulver, (Neb. 1901) 95 N. W. Rep. 697. *Contra*, State v. Taylor, 100 Mo. App. 481.

**Temporary Administrators.** — James v. Craighead, (Tex. Civ. App. 1902) 69 S. W. Rep. 241.

**2. Amount of Credit — Payment in Full of Claim Against Insolvent Estate** — *Colorado*. — Clemes v. Fox, 25 Colo. 39.

*Missouri*. — Springfield Grocer Co. v. Walton, 95 Mo. App. 526; State v. Taylor, 100 Mo. App. 481.

*New Jersey*. — Freehold First Nat. Bank v. Thompson, 61 N. J. Eq. 188.

*New York*. — Matter of Philp, (Surrogate Ct.) 29 Misc. (N. Y.) 263; Matter of Gill, (Surrogate Ct.) 42 Misc. (N. Y.) 457, *affirmed* without opinion 101 N. Y. App. Div. 607.

*Oregon*. — *In re Osburn*, 36 Oregon 8.

*Pennsylvania*. — Cessna's Estate, 192 Pa. St. 14.

*Rhode Island*. — Rafferty v. Potter, 21 R. I. 517.

**5. Payment or Purchase at Discount.** — Jacoway v. Hall, 67 Ark. 340; Matter of Rainforth, (Surrogate Ct.) 40 Misc. (N. Y.) 609. See also *supra*, this title, **983. 1 et seq.**

**1259. 1. Claims Founded on Illegal Consideration.** — Matter of Hull, 97 N. Y. App. Div. 258.

**3. Debts Barred by Limitation.** — Marshall v. Coleman, 187 Ill. 556, *affirming* 89 Ill. App. 41; Claghorn's Estate, 10 Pa. Dist. 91; Rowe's Estate, 11 Kulp (Pa.) 36. See also Yocum v. Commercial Nat. Bank, 8 Pa. Dist. 631, *affirmed* 195 Pa. St. 411.

An administrator is not entitled to credit for the payment of such debts, as against a creditor who, although barred by a decree of the Orphans' Court, is still entitled by statute to proceed against the administrator where the latter has neglected to make a final settlement within one year of the time of his administration being granted. Equitable L. Assur. Soc. v. Chesley, 64 N. J. Eq. 348, *reversing* 63 N. J. Eq. 219.

**1260. 1. Credit for Payment of Debts Secured by Lien.** — Swift v. Harley, 20 Ind. App. 614; Russell v. Wheeler, 129 Mich. 41, 8 Detroit Leg. N. 836; Springfield Grocer Co. v. Walton, 95 Mo. App. 526; *In re Patrick*, (Neb. 1904) 100 N. W. Rep. 939. See also *supra*, this title, **1062. 3 et seq.**

**3. Debts Due to Executor or Administrator.** — See the title DEBTS OF DECEDENTS, **1072. 3, 4.**

**Advances to Estate.** — *In re Akana*, 11 Hawaii 420; *In re Woolsey*, (N. J. 1904) 59 Atl. Rep. 463; Hamlin v. Smith, 72 N. Y. App. Div. 601; Connolly's Estate, 198 Pa. St. 137, 146; Ruppel's Estate, 32 Pittsb. Leg. J. N. S. (Pa.) 233; Read v. Franklin, (Tenn. Ch. 1900) 60 S. W. Rep. 215.

Advances made to a life tenant of realty belonging to the estate are unauthorized, and credit will not be allowed therefor. Lakey's Estate, 13 Pa. Dist. 533, 30 Pa. Co. Ct. 287.

The statute of limitations against the claim for reimbursement will not commence to run until the settlement of the account of the representative. Bentley's Estate, 196 Pa. St. 497.

**Set-off of Debts Due Estate.** — An executor or administrator is not entitled to take anything for commissions, so long as he is indebted to the estate. If the amount of his debt is not collectible, the commissions should be applied toward its extinguishment. Kernan's Succession, 105 La. 592. To the same effect, Burbank v. Duncan, (Ky. 1899) 53 S. W. Rep. 19; Linthicum v. Polk, 93 Md. 84; Matter of Brintnall, (Surrogate Ct.) 40 Misc. (N. Y.) 67.

**Sums Expended by Sureties of Representative.** — An administrator is not entitled to credit for sums expended by his sureties in payment of indebtedness of the estate, where the claim of



- 1261.** *cc.* DEBTS CONTRACTED BY EXECUTOR OR ADMINISTRATOR. — See note 2.  
 Debts Contracted in Continuing Decedent's Business. — See note 3.  
*ff.* TAXES. — See note 4.
- 1262.** (4) *Funeral Expenses* — (a) *In General*. — See note 1.  
 (b) *Allowance Against Estates of Married Women*. — See notes 2, 3.
- 1263.** See notes 1, 2.  
 (c) *Amount Allowable*. — See note 3.

the sureties has been fully discharged by mutual arrangement between the persons interested. *Ross v. Battle*, 113 Ga. 742.

**1261. 2. Debts Contracted by the Executor or Administrator.** — *Breckinridge v. Breckinridge*, 98 Va. 561. And see *supra*, this title, **1232. 4. Burden of Proof**.

**3. Debts Incurred in Carrying on Decedent's Business.** — *Fleming v. Kelly*, 18 Colo. App. 23. See also *Scudder v. Ames*, 142 Mo. 187; *supra*, this title, **976. 1**.

**Debts Incurred in Completing Contracts of Decedent.** — *Walsh's Estate*, 35 Pittsb. Leg. J. N. S. (Pa.) 289.

**4. Credit for Taxes Paid on Personalty.** — *Hood v. Maxwell*, 66 S. W. Rep. 276, 23 Ky. L. Rep. 1791; *Matter of Suds*, (Surrogate Ct.) 32 Misc. (N. Y.) 182, *appeal dismissed* 75 N. Y. App. Div. 612.

**Ancillary Administrator.** — *Dorris v. Miller*, 105 Iowa 564; *Matter of Miller*, 116 Iowa 446.

**Taxes Due from Distributees.** — Payment of taxes, such as taxes on income, due from the distributees and not from the estate, is a voluntary payment and no credit can be allowed therefor. *Scudder v. Ames*, 142 Mo. 187, 89 Mo. 496.

**Payments Made under Void Law.** — Credit is properly allowed for payments made in good faith, though the law requiring them is subsequently declared invalid. *Scudder v. Ames*, 142 Mo. 187.

**1262. 1. Credit for Funeral Expenses Paid.** — *Pease v. Christman*, 158 Ind. 642; *Shaffer v. Bacon*, 35 N. Y. App. Div. 248, *affirmed* without opinion 161 N. Y. 635; *In re Osburn*, 36 Oregon 8; *Pettigrew v. Pettigrew*, 207 Pa. St. 313, 99 Am. St. Rep. 795; *Bard's Estate*, 13 Pa. Dist. 552, 21 Lanc. L. Rev. 81; *O'Reilly v. Kelly*, 22 R. I. 151, 84 Am. St. Rep. 833. See also *O'Donnell v. Slack*, 123 Cal. 285.

**2. Husband Liable for Wife's Funeral Expenses.** — *Kenyon v. Brightwell*, 120 Ga. 606, *citing* 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1262; *Stonesifer v. Shriver*, 100 Md. 24; *Doll v. Cash*, 61 N. J. Eq. 108; *Cromwell's Estate*, 14 Pa. Dist. 404.

The husband is bound in law to pay the necessary physician's bills for his wife, and her funeral expenses; but if he fails to pay them her estate is liable therefor. If payment is made out of the funds of the estate, the amount may be set off against the husband's distributive share. *Brand v. Brand*, 109 Ky. 721; *Carpenter v. Hazelrigg*, 103 Ky. 538; *Long v. Beard*, (Ky. 1898) 48 S. W. Rep. 158.

**3. Funeral Expenses of Married Woman Not a Charge on Her Estate.** — *Kenyon v. Brightwell*, 120 Ga. 606, *citing* 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1262; *Stonesifer v. Shriver*, 100 Md. 24.

**Effect of Will in Charging Estate with Funeral**

**Expenses.** — While the direction in the will of a married woman for payment of her funeral expenses will transfer the primary liability from the husband, it will not, as against creditors or persons acquiring interests under the will, justify the husband in subjecting her estate to extravagant expenses, disproportioned to its size. *Williams' Estate*, 14 Pa. Dist. 407.

**1263. 1. Credit Denied for Funeral Expenses of Married Woman — Husband as Executor or Administrator.** — *Stonesifer v. Shriver*, 100 Md. 24.

**2. Contrary Rule — Estate of Married Woman Liable.** — *Pache v. Oppenheim*, 93 N. Y. App. Div. 221, *reversing* on other grounds (Supm. Ct. App. T.) 84 N. Y. Supp. 926; *Matter of Very*, (Surrogate Ct.) 24 Misc. (N. Y.) 139, 28 Civ. Pro. (N. Y.) 163; *Matter of Sworthout*, (Surrogate Ct.) 38 Misc. (N. Y.) 56; *Nashville Trust Co. v. Carr*, (Tenn. Ch. 1900) 62 S. W. Rep. 204. See also generally on the subject, *Kenyon v. Brightwell*, 120 Ga. 606, *citing* 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1262.

**3. Circumstances of Decedent and Position in Life.** — *Phillips v. Duckett*, 112 Ill. App. 587; *Matter of Liss*, (Surrogate Ct.) 39 Misc. (N. Y.) 123; *Cullen's Estate*, 7 Pa. Dist. 394, *affirmed* 8 Pa. Super. Ct. 494; *Immendorf's Estate*, 21 Pa. Co. Ct. 268, 4 Lack. Leg. N. (Pa.) 266, *affirmed* 190 Pa. St. 590; *O'Reilly v. Kelly*, 22 R. I. 151, 84 Am. St. Rep. 833.

Funeral expenses are such reasonable expenses as are necessary for a becoming disposition of a dead person, having in view his or her estate and station in life. *Bard's Estate*, 13 Pa. Dist. 552, 21 Lanc. L. Rev. 81.

**Reasonable Expenses.** — In *Foley v. Brocksmit*, 119 Iowa 457, 97 Am. St. Rep. 324, out of an estate of about five thousand dollars, a charge of five hundred and twenty-six dollars was disallowed as unreasonable, and one hundred and fifty dollars fixed as a proper charge.

In *Matter of Kiernan*, (Surrogate Ct.) 38 Misc. (N. Y.) 394, an outlay of four hundred and ninety dollars for a casket and box out of an estate of six or seven thousand dollars was held unreasonable, and the administrator was only allowed credit for one hundred and seventy-five dollars therefor.

In *Matter of Ogden*, (Surrogate Ct.) 41 Misc. (N. Y.) 158, a charge of four hundred and ninety-five dollars was allowed out of a personal estate of about forty thousand dollars.

In *Howard's Estate*, 27 Pa. Co. Ct. 608, out of an estate of only twenty-eight hundred dollars, eight hundred dollars was allowed, there being no known heirs or unpaid creditors, the funeral being large and the necessary expense considerable.

An allowance of two hundred dollars to an undertaker, in addition to fifty-eight dollars for cost of burial lot and church services and thirty dollars for carriages, out of an estate of

- 1264.** (d) Items of Expense. — See notes 3, 5.  
 Transportation to Distant Place of Burial. — See note 8.
- 1265.** Religious Ceremonies. — See note 2.  
 The Cost of a Burial Lot. — See notes 3, 4, 5.  
 Tombstones and Monuments. — See note 6.
- 1266.** Changing Place of Burial. — See note 2.

the value of two thousand eight hundred and forty-two dollars and eighty-nine cents, cannot be excepted to for illiberality. *Campbell's Estate*, 9 Pa. Dist. 729, 24 Pa. Co. Ct. 480.

**Extravagant Expenditures.** — *Matter of Smith*, 75 N. Y. App. Div. 339, 11 N. Y. Annot. Cas. 427.

**Restriction of Amount by Statute.** — *Sinnott v. Kenaday*, 14 App. Cas. (D. C.) 1, *reversed* on other grounds 179 U. S. 606.

**Record on Appeal.** — The reasonableness of an allowance will not be reviewed, where the record is silent as to the facts on which the lower court based its decision. *Pease v. Christman*, 158 Ind. 642.

**1264. 3. Credit for Cost of Flowers.** — A reasonable sum expended for flowers is a proper charge against the estate. *O'Reilly v. Kelly*, 22 R. I. 151, 84 Am. St. Rep. 833.

**Credit for Cost of Dinner.** — The cost of a dinner may be allowed where necessary for friends and relatives coming from a distance; but not otherwise, where the credit is objected to, though customary at country funerals. *Bard's Estate*, 13 Pa. Dist. 552, 21 Lanc. L. Rev. 81; *Reeves' Estate*, 12 Luz. Leg. Rec. (Pa.) 137. See also *Rust's Estate*, 14 Pa. Dist. 317.

**5. Personal Expenses and Time in Attending Funeral.** — *Bard's Estate*, 13 Pa. Dist. 552, 21 Lanc. L. Rev. 81; *Price's Estate*, 11 Kulp (Pa.) 259.

**8. Transportation to Distant Place of Burial.** — *Matter of Knab*, (Surrogate Ct.) 38 Misc. (N. Y.) 717. See also *O'Donnell v. Slack*, 123 Cal. 285.

**1265. 2. Fee and Traveling Expenses of Clergyman.** — *Nolde's Estate*, 27 Pa. Super. Ct. 413, *affirming* 21 Lanc. L. Rev. 59.

**3. Burial Lot — Credit Allowed For.** — *Peters's Succession*, 114 La. 952; *Matter of Liss*, (Surrogate Ct.) 39 Misc. (N. Y.) 123.

A burial lot is not strictly a funeral expense within the sense and meaning of a statute limiting the amount which can be allowed for funeral expenses; but credit is properly given therefor where the estate goes to the widow and collateral relations, and no prejudice can result to creditors or legatees. *Sinnott v. Kenaday*, 14 App. Cas. (D. C.) 1, *reversed* on other grounds 179 U. S. 606.

**Unnecessary Expense.** — Where the testator had in his lifetime secured a burial lot, credit for the expense of a lot in another place will not be allowed. *Matter of Woodbury*, (Surrogate Ct.) 40 Misc. (N. Y.) 143.

**4. Cost of Burial Lot Allowed by Statute.** — *Marple v. Morse*, 180 Mass. 508.

**5. Cost of Improving Burial Lot Not Allowed.** — *Contra*, *Matter of Liss*, (Surrogate Ct.) 39 Misc. (N. Y.) 123.

**Care of Burial Lot.** — In *Matter of Furniss*, 86 N. Y. App. Div. 96, a credit was allowed for fifty dollars expended by executors for the per-

petual care of the cemetery lot in which the decedent was buried. *Compare In re Koppikus*, (Cal. 1905) 81 Pac. Rep. 732.

**6. Tombstones and Monuments — Credit Allowed to Reasonable Amount.** — *In re Koppikus*, (Cal. 1905) 81 Pac. Rep. 732; *Phillips v. Duckett*, 112 Ill. App. 587; *Pease v. Christman*, 158 Ind. 642; *Matter of Furniss*, 86 N. Y. App. Div. 96; *Lutton's Estate*, 17 Pa. Super. Ct. 342, *affirming* 10 Kulp (Pa.) 161; *Miles's Estate*, 13 Pa. Dist. 264, 30 Pa. Co. Ct. 80; *Bard's Estate*, 13 Pa. Dist. 552, 21 Lanc. L. Rev. 81; *Duffy's Estate*, 9 Kulp (Pa.) 409; *Fisher's Estate*, 16 Lanc. L. Rev. 333, 29 Pittsb. Leg. J. N. S. (Pa.) 168.

A tombstone is not a funeral expense within the sense and meaning of a statute limiting the amount which can be allowed for funeral expenses; but credit is properly given therefor where the estate goes to the widow and collateral relations, and no prejudice can result to creditors or legatees. *Sinnott v. Kenaday*, 14 App. Cas. (D. C.) 1, *reversed* on other grounds 179 U. S. 606.

**Expenditures Held Reasonable.** — In *Sinnott v. Kenaday*, 14 App. Cas. (D. C.) 1, *reversed* on other grounds 179 U. S. 606, five hundred and seventy-five dollars out of an estate of more than thirty-six thousand dollars going to collateral heirs was upheld as reasonable.

In *Conway's Estate*, 10 Pa. Dist. 509, 18 Lanc. L. Rev. 129, seven hundred dollars out of an estate of almost twenty-five thousand dollars going to collateral heirs, was held not to be an extravagant allowance.

**Expenditures Held Unreasonable.** — One thousand and fifty dollars for a monument and the expense incidental to lettering, setting, and fencing it, where the value of the entire estate was only two thousand four hundred and ten dollars. *Matter of Smith*, 75 N. Y. App. Div. 339, 11 N. Y. Annot. Cas. 427.

Where the testator in his lifetime had had a tombstone erected to his memory on a burial lot belonging to his family, credit for the expense of a lot and tombstone elsewhere will not be allowed. *Matter of Woodbury*, (Surrogate Ct.) 40 Misc. (N. Y.) 143.

A monument purchased by a decedent during his lifetime, at a cost of seven hundred dollars, constitutes assets of the estate and may be sold for the payment of debts. *Matter of Willard*, 9 Ohio Dec. 824.

**Payment of Expense a Prerequisite to Credit.** — Actual payment of the money and the erection of the tombstone must be shown, to entitle the representative to the credit. *Ehrhart's Estate*, 17 York Leg. Rec. (Pa.) 137.

**1266. 2. Cost of Changing Place of Burial Allowed.** — But see *Pettigrew v. Pettigrew*, 207 Pa. St. 313, 90 Am. St. Rep. 795, holding that the duties of the executor or administrator terminate with the first interment.



**1267.** (5) *Expenses of Last Illness.* — See note 1.

(6) *Interest.* — See notes 3, 4.

In Regard to Interest on Advances. — See note 5.

**1268.** See note 1.

If Interest Is Charged on Money Received. — See note 2.

(7) *Payments to or for Benefit of Legatees and Distributees* —

(a) In General. — See note 3.

**1269.** As Against the Legatees and Distributees. — See notes 1, 2.

**1267.** 1. Reasonable Amount Only Will Be Allowed. — Where a payment made to a physician for attendance on the decedent during his last illness is clearly excessive, credit for a reasonable amount only will be allowed. *Matter of Ogden*, (Surrogate Ct.) 41 Misc. (N. Y.) 158.

3. Credit for Interest Paid. — *Tippin v. Perry*, 122 Ga. 120; *Wallace's Estate*, 13 Pa. Dist. 155; *Gelbach's Estate*, 14 Pa. Dist. 51.

4. Improperly Permitting Interest to Accumulate. — *Stille's Succession*, 52 La. Ann. 1538; *Heck's Estate*, 31 Pittsb. Leg. J. N. S. (Pa.) 348.

Executor Both Debtor and Creditor to Estate. — Where an executor is both a creditor and a debtor of the estate, and the two debts are of about the same amount, and have been running for a long period of years, if he is charged interest on his debt to the estate he should also be allowed interest on the estate's debt to him; especially so where in order to satisfy his claim against the estate he would have been obliged to use interest-bearing funds. *Sutton's Estate*, 200 Pa. St. 158, 163, reversing 13 Pa. Super. Ct. 492.

5. Creditor Allowed for Interest on Money Advanced. — *Matter of Carpenter*, 146 Cal. 661, quoting 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1267; *Royston v. McCulley*, (Tenn. Ch. 1900) 59 S. W. Rep. 725; *Read v. Franklin*, (Tenn. Ch. 1900) 60 S. W. Rep. 215.

**1268.** 1. Interest on Advances Not Favored. — *Matter of Carpenter*, 146 Cal. 661, quoting 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1267; *Matter of Murphy*, 30 Wash. 9.

Unnecessary Use of Individual Funds. — *Nicholson v. Whitlock*, 57 S. Car. 36.

Interest Not Allowed on Improper Expenditures. — *Royston v. McCulley*, (Tenn. Ch. 1900) 59 S. W. Rep. 725.

2. Interest on Disbursements. — *Royston v. McCulley*, (Tenn. Ch. 1900) 59 S. W. Rep. 725.

3. Payments Without an Order of Distribution. — *Matter of Willey*, 140 Cal. 238; *Read v. Franklin*, (Tenn. Ch. 1900) 60 S. W. Rep. 215. See generally *supra*, this title, **1167**. 4 *et seq.*, **1174**. 5 *et seq.*

Annuities Made Payable Out of the Estate by Will are a charge upon the estate and payable just as debts are payable if there are sufficient assets for the purpose. Such items are not a part of the distribution of the estate, but are a charge upon the estate prior to any distribution. *In re Semple*, 189 Pa. St. 385, reversing 28 Pittsb. Leg. J. N. S. (Pa.) 431.

**1269.** 1. Payment of Legacy or Distributive Share — Credit Allowable as Against Legatee or Distributee — *United States*. — *Nivens v. Nivens*, (C. C. A.) 133 Fed. Rep. 39, reversing (Indian Ter. 1903) 76 S. W. Rep. 114, (Indian Ter. 1901) 64 S. W. Rep. 604.

*Alabama*. — *Horton v. Hill*, 138 Ala. 625.

*California*. — In California the rights of devisees and legatees can only be determined in proceedings for distribution, and matters in an account which require them to be considered in advance of distribution are necessarily improper. Hence credit for such payments cannot be allowed on the settlement, but only on distribution. *Matter of Willey*, 140 Cal. 238. Compare *Matter of Kennedy*, 120 Cal. 458.

*District of Columbia*. — *McIntire v. McIntire*, 14 App. Cas. (D. C.) 337, affirmed 192 U. S. 116.

*Illinois*. — *Richardson v. Ranson*, 99 Ill. App. 258.

*Minnesota*. — *Wheaton v. Pope*, 91 Minn. 299.

*Ohio*. — *In re Davis*, 12 Ohio Cir. Dec. 29.

*Pennsylvania*. — *Hart's Estate*, 9 Pa. Dist. 274; *Hill's Estate*, 19 Lanc. L. Rev. 209, 2 Blair Co. Rep. (Pa.) 252.

*Tennessee*. — *Boring v. Jobe*, (Tenn. Ch. 1890) 53 S. W. Rep. 763.

*Washington*. — *Griffin v. Warburton*, 23 Wash. 231.

Personal Representative of Deceased Executor or Administrator. — A personal representative of a deceased executor, in settling the account of his decedent as executor of the first decedent, is entitled to show payments made by the deceased representative. *Matter of Hull*, 97 N. Y. App. Div. 258.

Payments by Husband as Executor to Wife as Legatee. — An executor whose wife is the residuary legatee under the will is not entitled to credit for money paid to defray her expenses on a trip. The law will not under such circumstances imply any promise by her to repay him. *Bean v. Bean*, 135 N. Car. 92.

2. Prejudice to Other Parties in Interest. — *Stewart v. Fallon*, (N. J. 1904) 58 Atl. Rep. 96; *In re Davis*, 12 Ohio Cir. Dec. 29.

A distributee resisting a credit for the payment of a distributive share can only resist to the extent of his interest in the amount paid. *Guild v. Young*, (Tenn. Ch. 1901) 62 S. W. Rep. 404.

An Overpayment. — *Matter of Robertson*, 51 N. Y. App. Div. 117, affirmed on opinion below 165 N. Y. 675; *Johnson v. Weir*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 683; *Re McIntyre*, 7 Ont. L. Rep. 548.

Payment of Lapsed or Void Legacy. — *Matter of Tatum*, (Surrogate Ct.) 34 Misc. (N. Y.) 25, affirmed 61 N. Y. App. Div. 513, which was affirmed 169 N. Y. 514; *Turnipseed v. Sifrine*, 60 S. Car. 272.

Payments on Advice of Counsel or Probate Judge. — The advice of counsel and of the probate judge cannot change the statute, which requires that all debts shall be first paid, and distribution made of the remainder. Distribution under



**1270.** (b) Support of Decedent's Family. — See notes 1, 2.

**1271.** See note 1.

**1272.** (c) Funeral Expenses of Beneficiaries of Estate. — See note 3.

(8) Disbursements in Respect to Real Estate — (a) General Rule. —

See note 4.

**1273.** Improvements and Repairs. — See note 1.

Insurance. — See note 2.

such advice is made by the administrator at his peril. *James v. West*, 67 Ohio St. 28.

**1270. 1. Advances for Benefit of Widow and Infant Children — General Rule.** — *Clark v. Bettelheim*, 144 Mo. 258; *Reeve's Estate*, 12 Luz. Leg. Reg. (Pa.) 137.

**Authorization by Will.** — *Finley v. Pearson*, 76 S. W. Rep. 374, 25 Ky. L. Rep. 766; *Clough v. Clough*, 71 N. H. 412; *Hartson v. Elden*, 58 N. J. Eq. 478; *Fitzpatrick's Estate*, 12 Pa. Dist. 730.

**2. Credit for Advances to Family Allowed Against Distributive Shares.** — *Calnan v. Savidge*, 68 Kan. 620; *Wiemann's Succession*, 112 La. 293; *Billman's Estate*, 9 Pa. Dist. 728; *Boring v. Jobe*, (Tenn. Ch. 1899) 53 S. W. Rep. 763. See also *Litell v. Hacklev*, (C. C. A.) 126 Fed. Rep. 309; *Matter of Moore*, 103 Iowa 474.

**1271. 1. In New York.** — *Matter of Gearn's*, (Surrogate Ct.) 27 Misc. (N. Y.) 76.

**1272. 3. Allowance Against Distributive Share of Beneficiary.** — Credit for physician's charges and funeral expenses incurred by the death of legatees or distributees is properly allowed against their distributive shares on final settlement of the representative's account. *Matter of Murphy*, 30 Wash. 9.

**4. Disbursements on Account of Realty — General Rule.** — *Springfield Grocer Co. v. Walton*, 95 Mo. App. 526; *In re Corbin*, 101 N. Y. App. Div. 25; *Matter of Sworthout*, (Surrogate Ct.) 38 Misc. (N. Y.) 56; *Matter of Ogden*, (Surrogate Ct.) 41 Misc. (N. Y.) 158; *Peters's Estate*, 16 Pa. Super. Ct. 462; *Hallowell's Estate*, 9 Pa. Dist. 90; *Lakey's Estate*, 13 Pa. Dist. 533, 30 Pa. Co. Ct. 287; *Tasker's Estate*, 14 Pa. Dist. 435; *Reeve's Estate*, 12 Luz. Leg. Reg. (Pa.) 137; *Grover's Estate*, 12 Luz. Leg. Reg. (Pa.) 224; *Read v. Franklin*, (Tenn. Ch. 1900) 60 S. W. Rep. 215. See also *supra*, this title, **1062. 4 ci seq.**

**Charges and Credits.** — Where an administrator is charged in his account with the rents of real estate, he should be credited with all proper disbursements for repairs and the like, made in good faith for the preservation of the property. *Taylor v. Roulstone*, 60 S. W. Rep. 867, 22 Ky. L. Rep. 1515; *Fatjo's Succession*, 52 La. Ann. 1561; *Hall's Estate*, 10 Pa. Dist. 215; *Tasker's Estate*, 14 Pa. Dist. 435.

Where an administrator, acting in good faith, has gone outside of his lawful bounds, and used money of the estate in carrying on a trade or other business or in improvement of real estate, if the profits of his venture are to be brought into the estate, he is entitled to credit for his unauthorized outlays. *Langston v. Canterbury*, 173 Mo. 122.

Where the administratrix, widow of decedent, instead of promptly settling the estate, occupies the real property for a long period of time without charging herself with rent, she will not

be allowed credit for taxes, repairs, water rents and insurance paid by her. *In re Graff*, 123 Mich. 456.

An executor, though charged with the rents and profits of land, is not entitled to credit for the expense of improving it, where his right of possession was disputed by the heirs and eventually adjudicated to have been wrongful. *Anderson v. Northrop*, 44 Fla. 472.

When land occupied by an executor is devised by the will to another for life, and is not needed to pay debts, his liability for rents and profits, if any exists, is to the life beneficiary and not to the estate; and not being chargeable with rents and profits as executor, he cannot be credited in that capacity with money expended for taxes, repairs, or the like. *Clough v. Clough*, 71 N. H. 412.

**Expense Incurred in Performing Decedent's Contract to Sell Realty.** — Where an executor in performing a contract to sell land, executed by the testator, purchases from his widow a release of her dower interest in the premises, he is properly credited with the amount paid. *Re McIntyre*, 7 Ont. L. Rep. 548.

**Expense Incurred in Completing Decedent's Contract to Purchase Realty.** — An executor or administrator is entitled to credit for payments made under a contract to purchase real estate executed by the decedent. *Matter of Davis*, 43 N. Y. App. Div. 331.

**Payment on Order or with Assent of Persons Beneficially Interested.** — *Matter of Foulds*, (Surrogate Ct.) 35 Misc. (N. Y.) 171; *Hill's Estate*, 19 Lanc. L. Rev. 209, 2 Blair Co. Rep. (Pa.) 252; *Breckinridge v. Breckinridge*, 98 Va. 561; *Matter of Alfstad*, 27 Wash. 175; *Van Winkle v. Blackford*, 54 W. Va. 621. See also *Billman's Estate*, 9 Pa. Dist. 728.

**Reimbursement Out of Funds Belonging to Persons Benefited.** — Disbursements made by an executor or administrator in good faith may be properly credited in his account as against the heirs or devisees who are benefited thereby. *Matter of McKay*, (Surrogate Ct.) 33 Misc. (N. Y.) 520; *Van Winkle v. Blackford*, 54 W. Va. 621.

**1273. 1. Improvements and Repairs.** — *Matter of Meagley*, 39 N. Y. App. Div. 83; *Matter of Very*, (Surrogate Ct.) 24 Misc. (N. Y.) 139, 28 Civ. Pro. (N. Y.) 163; *Matter of Foulds*, (Surrogate Ct.) 35 Misc. (N. Y.) 171; *Matter of Stanton*, (Surrogate Ct.) 41 Misc. (N. Y.) 278; *In re O'Donnell*, 9 Kulp (Pa.) 123; *Dunkle's Estate*, 17 Lanc. L. Rev. 61; *Trimmer v. Darden*, 61 S. Car. 220.

**The Increase in the Value of Real Estate.** — *McNeely v. McNeely*, 50 Ia. Ann. 823; *Schrack's Estate*, 9 Pa. Dist. 149.

**2. Insurance of Real Property — Credit Not Allowed.** — *Matter of Very*, (Surrogate Ct.) 24 Misc. (N. Y.) 139, 28 Civ. Pro. (N. Y.) 163;

**1273.** Taxes and Assessments. — See notes 3, 4.

**1274.** (b) Real Estate in Charge of Executor or Administrator. — See note 3.

**1275.** See notes 1, 2, 3.

**1276.** b. ASSETS DELIVERED TO SUCCESSOR OR ASSOCIATE. — See notes 2, 3.

A Delivery of Assets to a Coexecutor. — See note 4.

c. LOSSES OR DECREASE OF ASSETS. — See note 5.

Matter of Foulds, (Surrogate Ct.) 35 Misc. (N. Y.) 171; Dunkle's Estate, 17 Lanc. L. Rev. 61.

**1273. 3. Taxes Levied on Land After Death of Owner.** — Matter of Very, (Surrogate Ct.) 24 Misc. (N. Y.) 139, 28 Civ. Pro. (N. Y.) 163; Matter of Foulds, (Surrogate Ct.) 35 Misc. (N. Y.) 171; Matter of Sworhouth, (Surrogate Ct.) 38 Misc. (N. Y.) 56; Bean v. Bean, 135 N. Car. 92; Wallace's Estate, 13 Pa. Dist. 155; Dunkle's Estate, 17 Lanc. L. Rev. 61; Read v. Franklin, (Tenn. Ch. 1900) 60 S. W. Rep. 215.

**4. Taxes Levied on Land Before Death of Owner.** — Matter of Liss, (Surrogate Ct.) 39 Misc. (N. Y.) 123; Hall's Estate, 8 Pa. Dist. 8; Read v. Franklin, (Tenn. Ch. 1900) 60 S. W. Rep. 215; Breckinridge v. Breckinridge, 98 Va. 561.

**1274. 3. Real Property in Charge of Executor or Administrator — California.** — Matter of Smith, 118 Cal. 462.

Kentucky. — Finley v. Pearson, 76 S. W. Rep. 374, 25 Ky. L. Rep. 766.

Louisiana. — McNeely v. McNeely, 50 La. Ann. 823.

Massachusetts. — Lufkin v. Jakeman, (Mass. 1905) 74 N. E. Rep. 933.

Michigan. — Long v. Landman, 118 Mich. 180.

Mississippi. — Henry v. Henderson, 81 Miss. 743.

Missouri. — State v. Taylor, 100 Mo. App. 481.

New Jersey. — Brearley v. Molten, 62 N. J. Eq. 345.

New York. — Matter of Rogers, 153 N. Y. 316, affirming mem. judgment (Supm. Ct. Gen. T.) 36 N. Y. Supp. 1132; Matter of Hosford, 27 N. Y. App. Div. 427.

North Carolina. — Lambertson v. Vann, 134 N. Car. 108.

Pennsylvania. — Hallowell's Estate, 9 Pa. Dist. 90; Hensler's Estate, 18 Lanc. L. Rev. 317, 2 Blair Co. Rep. (Pa.) 22.

Texas. — Hanrick v. Gurlley, 93 Tex. 458.

Utah. — Matter of Thorn, 24 Utah 209.

**Character of Improvements Permissible.** — Valuable improvements cannot be made without other authority than that derived from the power under the law, but only reasonable repairs. Fitch's Estate, 8 Lack. Leg. N. (Pa.) 150.

**Railroad Property.** — Payments made for necessary repairs to railroad property in the rightful possession of an executor are properly credited to him in his account. Matter of Fidelity Loan, etc., Co., (Surrogate Ct.) 23 Misc. (N. Y.) 211.

**Taxes on Land Sold under Mortgage Executed by Decedent, and Unredeemed.** — Credit will not be allowed an administrator for taxes paid by him on real estate which has been sold under foreclosure of a mortgage given by the decedent and which is unredeemed. McAlpine v. Kratka, 92 Minn. 411.

**Mortgage Contract to Pay Taxes.** — Credit is properly allowed for the payment of the amount of a decree foreclosing a mortgage given by decedent, including taxes covered by the mortgage agreement, though the complaint in the foreclosure proceedings was technically insufficient for the recovery of the taxes. Matter of Armstrong, 125 Cal. 603.

**Missouri Statute Authorizing Completion of "Work in an Unfinished State."** — Rev. Stat. Mo., §§ 100, 101, providing that in case the intestate leaves "work in an unfinished state," the court may authorize such "further labor to be performed as the interest of the estate requires," relate to personal estate and confer no authority on the court to order the improvement of realty. Langston v. Canterbury, 173 Mo. 123; Waldermeyer v. Loebig, 183 Mo., 363.

**1275. 1. Repairs Not Authorized by Naked Power of Sale.** — *In re* Johnson, (Supm. Ct. App. Div.) 52 N. Y. Supp. 1081.

**2. Real Property Necessary for Payment of Debts.** — Where the administrator has obtained an order of court for the sale of real estate for the payment of debts, it is his duty to have the premises attractively presented. Bard's Estate, 13 Pa. Dist. 552, 21 Lanc. L. Rev. 81.

**3. Statutory Provisions.** — Clark v. Bettelheim, 144 Mo. 258; Langston v. Canterbury, 173 Mo. 122, cited Waldermeyer v. Loebig, 183 Mo. 363; Rice v. Conwill, 35 Tex. Civ. App. 341; Matter of Alfstad, 27 Wash. 175.

**1276. 2. Improper Investments by Retiring Executor or Administrator.** — When executors, contrary to their official duty, make improper investments, and one of them as trustee under the will, contrary to his official duty, takes over the same improper investments and holds them in the trust as good, both the trustee and the executors, in their respective official capacities, are accountable to the beneficiaries for loss resulting from such investments, until full compensation has been made. Brigham v. Morgan, 185 Mass. 27, three judges dissenting.

**3. Transfer to Sell as Trustee.** — Beale v. Barnett, 64 S. W. Rep. 838, 23 Ky. L. Rep. 1118; Allam's Estate, 199 Pa. St. 573.

**4. Delivery to and Misappropriation by Co-Executor.** — See the title JOINT EXECUTORS AND ADMINISTRATORS, vol. 17, p. 626. 2 *et seq.*

**5. Credit Allowed for Losses — United States.** — Littell v. Hackley, (C. C. A.) 126 Fed. Rep. 309. California. — Matter of Armstrong, 125 Cal. 603; Matter of Gianelli, 146 Cal. 139.

Michigan. — Houghteling v. Stockbridge, 136 Mich. 544, 11 Detroit Leg. N. 100.

Minnesota. — Harding v. Canfield, 73 Minn. 244.

New Jersey. — Hunt v. Smith, 58 N. J. Eq. 25; Matter of Sharp, 61 N. J. Eq. 601; Horton v. Howell, (N. J. 1903) 56 Atl. Rep. 702.

New York. — Matter of Hosford, 27 N. Y.



**1277. d. COMPENSATION OF EXECUTORS AND ADMINISTRATORS — (1) Right to Compensation — (a) In General.** — See note 1.

**1278. In the United States.** — See note 3.

App. Div. 427; Matter of Ball, 55 N. Y. App. Div. 284; Matter of Van Alstyne, 62 N. Y. App. Div. 626; Matter of Thorp, (Surrogate Ct.) 31 Misc. (N. Y.) 581.

*North Carolina.* — Lambertson v. Vann, 134 N. Car. 108.

*Oregon.* — Conser's Estate, 40 Oregon 138.

*Pennsylvania.* — *In re Semple*, 189 Pa. St. 385, reversing 28 Pittsb. Leg. J. (Pa.) 431; Delp v. Edlis, 190 Pa. St. 25, 43 W. N. C. (Pa.) 535; Connolly's Estate, 198 Pa. St. 137; Orne's Estate, 7 Pa. Dist. 337, affirmed 192 Pa. St. 626; Hall's Estate, 8 Pa. Dist. 8; Thomas's Estate, 8 Pa. Dist. 385; Lehigh's Estate, 11 Pa. Dist. 176; Schilskey's Estate, 12 Pa. Dist. 181, 28 Pa. Co. Ct. 241; Tasker's Estate, 14 Pa. Dist. 435.

*Tennessee.* — Pearson v. Gillenwaters, 99 Tenn. 446, 462, 63 Am. St. Rep. 844.

**Uncollected Debts — Credit Not Allowed — Non-collection Was Due to Fault of Representative.** — Foster v. Foster, 71 S. W. Rep. 524, 24 Ky. L. Rep. 1396; Hallway v. Eckler, 105 Mo. App. 585; McDowell v. Sutton First Nat. Bank, (Neb. 1905) 102 N. W. Rep. 615; Kauffeld's Estate, 28 Pa. Super. Ct. 162, reversing 35 Pittsb. Leg. J. N. S. (Pa.) 174; Campbell's Estate, 32 Pittsb. Leg. J. N. S. (Pa.) 409; Harris's Estate, 12 Luz. Leg. Reg. (Pa.) 58. See also *supra*, this title, **1002. 2 et seq.**

**Losses on Sales.** — Matter of Wagner, (Surrogate Ct.) 40 Misc. (N. Y.) 490; Moore's Estate, (Pa. 1901) 48 Atl. Rep. 884, less fully reported 198 Pa. St. 611.

An executor or administrator is not liable for losses on sales of securities due to a subsequent rise in their market value, where it was his duty to convert them into money because they were not such as were authorized by law. Matter of New York L. Ins., etc., Co., 86 N. Y. App. Div. 247.

Under a will authorizing executors to sell and convey the coal underlying certain of the lands of which the testator died seized, with the usual mining privileges, they have no power to waive and release the right of surface or lateral support; and they cannot be surcharged with the amount they might have received had they done so. Allhouse's Estate, 23 Pa. Super. Ct. 146.

The difference between the par value of securities and a less amount for which they were sold is properly allowed a representative, in the absence of evidence that they were sold for less than their market value. Ladd v. Stephens, 147 Mo. 319.

**Losses Resulting from Continuing the Decedent's Business.** — Smith's Estate, 30 Pittsb. Leg. J. N. S. (Pa.) 188. See *supra*, this title, **975. 2 et seq.**

**Depreciation of Values.** — Matter of Thompson, (Surrogate Ct.) 41 Misc. (N. Y.) 420, affirmed without opinion 87 N. Y. App. Div. 609, 178 N. Y. 554; Van Winkle v. Blackford, 54 W. Va. 621. See also Moore's Estate, 198 Pa. St. 611.

**Satisfaction of Lien on Personalty of Estate.** —

Where the representative satisfies a lien on personalty of the estate, and on a sale of it receives less than the amount so paid out, he is not chargeable for the loss, if he acted in good faith. Matter of Armstrong, 125 Cal. 603.

**Assets Taken from Representative by Receiver.** — Where partnership assets inventoried by the representative have been taken into the possession of a receiver, he is entitled to credit therefor in his account. Kalbfell's Estate, 30 Pittsb. Leg. J. N. S. (Pa.) 273.

**1277. 1. Compensation Not Allowed at Common Law.** — Kenan v. Graham, 135 Ala. 585, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1277; Walton v. Gairdner, 111 Ga. 343, quoting 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1277; Matter of Sprague, (Surrogate Ct.) 46 Misc. (N. Y.) 216; Rote v. Warner, 9 Ohio Cir. Dec. 540, 17 Ohio Cir. Ct. 350.

**1278. 3. Compensation Allowed in United States.** — Kenan v. Graham, 135 Ala. 585; Caldwell v. Hampton, (Ky. 1899) 53 S. W. Rep. 14; Matter of Guldenkirch, (Surrogate Ct.) 35 Misc. (N. Y.) 123; Matter of Foulds, (Surrogate Ct.) 35 Misc. (N. Y.) 171; Matter of Sprague, (Surrogate Ct.) 46 Misc. (N. Y.) 216; Rote v. Warner, 9 Ohio Cir. Dec. 540, 17 Ohio Cir. Ct. 350; Read v. Franklin, (Tenn. Ch. 1900) 60 S. W. Rep. 215.

**Public Administrator.** — Los Angeles County v. Kellogg, 146 Cal. 590.

**Executor Not Acting.** — An agreement that an executor shall receive the amount of his commission in case the will is not probated and the executor does not act, is void as against public policy; and under the statute allowing compensation the right thereto depends upon the rendition of the services and the settlement of the account. Until these two things have taken place, statutory commissions have not been earned, and the executor is not legally entitled to them. Oakeshott v. Smith, 104 N. Y. App. Div. 384. On the validity of agreements to renounce for a consideration, see also *supra*, this title, **754. 7.**

**Representative Who Is Also Beneficiary.** — The fact that an executor or administrator is a beneficiary of the estate, as where an administratrix is also the widow of the decedent and entitled as such to the widow's exemption and distributive share, does not bar the right to compensation. Pelham's Estate, 9 Kulp (Pa.) 347.

In *Louisiana*, a testamentary executor who is also universal legatee is not entitled to commissions. McNeely v. McNeely, 50 La. Ann. 823.

**Administrator of Two Decedents, One the Heir of the Other.** — Where an administrator of two decedents, one of whom is heir to the other, files his accounts in both estates at the same time, he is not entitled to double commissions on the distributive share of the heir, transferred from one estate to the other on the settlement. McGonnigle's Estate, 31 Pittsb. Leg. J. N. S. (Pa.) 28.

**Executors and Administrators on Same Footing**



**1279.** Special or Temporary Administrators. — See note 1.

Executor Acting under Void Will or Void Letters Testamentary. — See notes

3, 4.

Death or Revocation of Authority. — See note 5.

Executor Tenant for Life. — See note 6.

**1280.** (b) Time When Allowance Will Be Made. — See notes 1, 2, 3, 5.

as to Commissions. — In *Georgia* executors and administrators stand on the same footing as to the right to charge commissions. *Lamar v. Lamar*, 118 Ga. 684.

**Liability for Compensation of Person Contracting to Pay Debts and Expenses of Administration of Estate.** — An administrator successfully maintaining a suit upon a contract whereby the defendant agreed that he would pay the debts of the estate and expenses of administration, so that the estate should be settled solvent, is entitled to a judgment sufficiently large to afford him a reasonable compensation for his services as administrator. *Stewart v. Rogers*, (Kan. 1905) 80 Pac. Rep. 58.

**Construction of Statutes.** — The statutes allowing compensation, being in derogation of the common law, must be strictly construed. *Walton v. Gairdner*, 111 Ga. 343.

**1279. 1. Special Administrators Entitled to Compensation.** — *Stone v. Haskins*, 97 Ill. App. 3; *In re Ford*, 29 Mont. 283; *Bell v. Goss*, 33 Tex. Civ. App. 158; *Powell v. Foster*, 71 Vt. 160. See also *Root v. Green*, 81 S. W. Rep. 243, 26 Ky. L. Rep. 315.

**An Administrator Pendente Lite.** — *Harrison v. Clark*, 95 Md. 308.

**3. Executor Acting in Good Faith under Decree Admitting Will to Probate.** — *Brown v. McGee*, 117 Wis. 389, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1279.

**4. Person Acting as Executor under Void Letters Testamentary.** — *Contra*, *Union Sav. Bank, etc., Co. v. Smith*, 26 Ohio Cir. Ct. 317.

**5. Compensation in Case of Death or Revocation of Authority.** — *Matter of Strong*, 119 Cal. 663; *Matter of Douglas*, 60 N. Y. App. Div. 64; *Brown v. McGee*, 117 Wis. 389.

**6. Bequest to Executor for Life.** — See *infra*, this subdivision, 1301. 1.

**1280. 1. Time Fixed by Will.** — A testator may direct that compensation fixed by the will be paid at stated intervals during the term of the administration. *Matter of Ringot*, 124 Cal. 45.

**2. Rule Allowing Credit on Intermediate Accounting.** — *Webb v. Peck*, 131 Mich. 579, 9 Detroit Leg. N. 449; *Van Winkle v. Blackford*, 54 W. Va. 621, where the court said: "The hardship and injustice of postponing such credits until final settlement is too apparent to require an argument to show it."

**Successive Accountings.** — Each account is independent of the other, and the executor, administrator, or trustee is entitled to his compensation, irrespective of the amount therefore allowed. If his labor, trouble, and responsibility are greater than were previously rendered, sufficient ground is shown for an increase of compensation. *Gelbach's Estate*, 14 Pa. Dist. 51.

An executor is entitled to commissions upon moneys realized since the filing of a former ac-

count and not included therein. *Tasker's Estate*, 14 Pa. Dist. 435.

**Estates Requiring Several Years for Settlement.** — When the estate consists of an income-producing property, and the circumstances are such that its settlement properly covers a number of years, it is clearly within the discretion of the probate court, even in making a final settlement where no previous accounts have been rendered, to credit the services of the administrator for each year at the end of the year. *Walworth v. Bartholomew*, 76 Vt. 1.

**Allowance Before Receipt of Fund.** — Where the collection of a mortgage must necessarily precede distribution, commissions are to be allowed precisely as if the amount were already held in cash. *Sunderland's Estate*, 10 Pa. Dist. 358, 25 Pa. Co. Ct. 538, affirmed on opinion below 203 Pa. St. 160; *Fitzpatrick's Estate*, 12 Pa. Dist. 730.

It is erroneous to allow commissions on a sale of real estate before the sale is made, for the proper amount cannot then be determined. *Jennings's Estate*, 10 Pa. Dist. 90.

**Revision of Intermediate Allowances.** — The claims of an administrator for compensation for his own services and expenditures are, of all the credits demanded by him, peculiarly appropriate for consideration and review upon the final report. He is an officer of the court itself, and these matters should be and are at all times subject to the court's revision, until the final report is approved and the order of discharge entered. *Matter of Sawyer*, 124 Iowa 485.

Where excessive commissions have been allowed on one class of property, such fact is properly taken into consideration in fixing the rate to be allowed on another class. *Wirt's Estate*, 11 York Leg. Rec. (Pa.) 145.

**Usual Time of Award.** — Commissions are usually awarded on the settlement of the accounts of executors or trustees. *Matter of Johnson*, 57 N. Y. App. Div. 494, affirmed 170 N. Y. 139, citing *Beard v. Beard*, 140 N. Y. 260.

**3. No Right to Retain Compensation Before Judicial Allowance.** — *Kenan v. Graham*, 135 Ala. 585, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1280; *Hofelt's Estate*, 28 Pittsb. L. J. N. S. (Pa.) 402.

Allowance of commissions is not to be made until the settlement of the account, for the executor may, by his own misconduct in his administration of the estate, deprive himself of the right to the same. *Matter of Furniss*, 86 N. Y. App. Div. 96.

**Exception to Rule.** — The rule has been so far relaxed in favor of the trustee, that where he annually accounts to his *cestui que trust* for the income of the year and pays it over, he may take commissions without judicial order. *Spencer v. Spencer*, 38 N. Y. App. Div. 403. See *infra*, this title, 1286. 1. *Failure to Retain Amount Due.*

**1281.** (d) From What Fund Allowance May Be Made. — See note 1.

(e) For What Compensation Is Allowed. — See note 2.

**1282.** (f) Forfeiture or Loss of Right — *aa.* POWER TO DENY COMPENSATION. — See notes 1, 2.

*bb.* GROUNDS FOR DENYING COMPENSATION — (*aa.*) Acts or Omissions of Representative — General Rule. — See note 3.

**Premature Appropriation — Liability for Interest.** — *Kenan v. Graham*, 135 Ala. 585; *Matter of Carter*, 132 Cal. 113; *Davidson v. Story*, 106 Ga. 799; *Matter of Furniss*, 86 N. Y. App. Div. 96.

Otherwise where the appropriation is referable to consent or agreement by the persons beneficially interested in the estate. *Noble v. Jackson*, 124 Ala. 311, 132 Ala. 230; *Matter of Franklin*, (Surrogate Ct.) 26 Misc. (N. Y.) 107; *Matter of Ross*, (Surrogate Ct.) 33 Misc. (N. Y.) 163.

**1280. 5. Withholding Commissions until Final Distribution.** — *Matter of Johnson*, 57 N. Y. App. Div. 494, affirmed 170 N. Y. 139; *In re Thomas*, 1 Dauphin Co. Rep. (Pa.) 381.

Where the mortgages are of a doubtful or uncertain character, commissions are properly withheld until realization. *Moore's Estate*, 13 Pa. Dist. 137, affirmed 211 Pa. St. 343.

**1281. 1. Commissions Are Not Chargeable on Legacies.** — *Lutjen v. Lutjen*, 63 N. J. Eq. 391, reversed on other grounds, 64 N. J. Eq. 773.

**The Residuary Estate.** — *Lutjen v. Lutjen*, 63 N. J. Eq. 391, reversed on other grounds 64 N. J. Eq. 773.

**Commissions on Income.** — *Brooks v. Hanna*, 10 Ohio Cir. Dec. 480, 19 Ohio Cir. Ct. 216. But see *Offutt v. Divine*, (Ky. 1899) 53 S. W. Rep. 816.

**2. Compensation for Fidelity and for Risk Incurred.** — Commissions are compensation to a trustee for the care, labor, and responsibility attending the settlement of an estate. *Becker v. Espenshade*, 8 Pa. Dist. 525.

**1282. 1. Power to Withhold Compensation Denied.** — The representative will be charged with any loss due to his fault, and credited with his commissions; so that, so far as necessary, his commissions will be applied to the payment of such losses. *Carver's Estate*, 123 Cal. 102. See also *Bemmerly v. Woodward*, 124 Cal. 568.

**2. Power to Withhold Compensation Affirmed.** — *In re Akana*, 11 Hawaii 420, 13 Hawaii 388; *State v. Taylor*, 112 Mo. App. 585; *Matter of Rutledge*, 162 N. Y. 31, 30 Civ. Pro. (N. Y.) 405, 47 L. R. A. 721, affirming mem. judgment 37 N. Y. App. Div. 633, three judges dissenting; *Matter of McCormick*, (Surrogate Ct.) 46 Misc. (N. Y.) 386.

This is not the infliction of a "penalty," for there is another court better adapted both in its procedure and judgment to that end; in the Orphans' Court, it is simply a refusal to reward him as for doing well that which he has done ill. That he did not intentionally wrong his *cestuis que trust* is immaterial on the question of compensation; if they have suffered by his neglect and mismanagement, he has no claim in law or equity to be paid for that sort of management. *Hart's Estate*, 203 Pa. St. 496. To similar effect *Matter of Alina*, 13 Hawaii 388.

**Administrators to Collect.** — In *Illinois* it is pro-

vided by statute, that in case any such collector shall refuse or neglect to deliver over property or money to his successor when legal demand is made therefor he shall forfeit all claims to any commissions. *In re Wincox*, 85 Ill. App. 613, affirmed 186 Ill. 445.

**Executor of Deceased Executor.** — The executors of a deceased executor stand in the shoes of their testator; and where the latter has forfeited the right to commissions, they are not entitled to any on money paid over by them in compromise of a devastavit committed by their decedent. *Matter of Welling*, 51 N. Y. App. Div. 355, motion for reargument denied 53 N. Y. App. Div. 639.

**Order Allowing Compensation Res Judicata in Another Court.** — A court of equity in an action against an administrator for conversion of the assets of the estate, is without power to withhold his compensation where compensation has been allowed him by order of the probate court. *Canfield v. Canfield*, (C. C. A.) 118 Fed. Rep. 1.

**Setting Off Commission Against Debt Due by Representative to Estate.** — See *supra*, this title, 1260. 3. *Set-off of Debts Due Estate.*

**3. Grounds for Denying Compensation — Neglect or Misconduct** — *Alabama*. — *Noble v. Jackson*, 124 Ala. 311.

*Kentucky*. — *Foster v. Foster*, 71 S. W. Rep. 524, 24 Ky. L. Rep. 1396.

*New York*. — *Matter of Wotton*, 59 N. Y. App. Div. 584, affirmed without opinion 167 N. Y. 629; *Matter of Scudder*, (Surrogate Ct.) 21 Misc. (N. Y.) 179; *Matter of Baker*, (Surrogate Ct.) 27 Misc. (N. Y.) 126; *Matter of Hayes*, (Surrogate Ct.) 40 Misc. (N. Y.) 500; *Matter of Rainforth*, (Surrogate Ct.) 40 Misc. (N. Y.) 609. See also *Matter of Yetter*, 44 N. Y. App. Div. 404, affirmed on opinion below 162 N. Y. 615.

*Pennsylvania*. — *Reed's Estate*, 22 Pa. Super. Ct. 635; *Bickley's Estate*, 13 Pa. Dist. 323; *Auer's Estate*, 14 Pa. Dist. 273.

*Tennessee*. — *Bland v. Gollaher*, (Tenn. Ch. 1898) 48 S. W. Rep. 320.

**Discretion of Court.** — Fraud or misconduct of an executor will justify a court before which he makes his accounting in depriving him, in whole or in part, of his executor's commissions; the matter being within the discretion of the court. *Matter of Morris*, 65 N. J. Eq. 699, citing *Jacobus v. Munn*, 38 N. J. Eq. 622.

**Laches of Beneficiaries.** — That the accountant was not compelled by citation to render accounts for fifteen years after he took out letters, in no way excuses him or indicates assent to his methods. *Hart's Estate*, 203 Pa. St. 496.

**Facts Held Insufficient to Justify Disallowance** — *Matter of Ingersoll*, 95 N. Y. App. Div. 211, modifying (Surrogate Ct.) 41 Misc. (N. Y.) 600; *Matter of Wagner*, (Surrogate Ct.) 40 Misc. (N. Y.) 400; *Conway's Estate*, 10 Pa.

- 1282.** Misconduct. — See note 4.  
**1283.** Neglect of Duty. — See note 2.  
**1284.** See notes 1, 2.  
 Failure to Make Periodical Returns. — See note 3.  
**1285.** See note 1.  
 Mistakes. — See note 2.  
 Employment of Agents or Attorneys. — See note 3.  
**1286.** (bb) *Renunciation or Waiver of Right.* — See note 1.

Dist. 509, 18 Lanc. L. Rev. 129; Miller's Estate, 14 Pa. Dist. 163, Ashman, J., *dissenting*; Wert's Estate, 7 Lack. Leg. N. (Pa.) 222, 15 York Leg. Rec. (Pa.) 67; Hoffman's Estate, 15 York Leg. Rec. (Pa.) 114; Benner's Estate, 21 Lanc. L. Rev. 134.

Unless there is gross negligence or fraud an executor will not be deprived of his commissions. Orne's Estate, 7 Pa. Dist. 337, *affirmed* 192 Pa. St. 626.

Commissions will not be disallowed because the manner in which the account was made out might be construed as showing a purpose of getting commissions to which the representative was not entitled, there being no misconduct or improper management of the estate. *In re Dutcher*, 102 N. Y. App. Div. 410.

An executor will be allowed his commissions, though he is liable for a devastavit of his co-executor, where he was not a party to the misconduct. Matter of Dougherty, (Surrogate Ct.) 43 Misc. (N. Y.) 468.

The fact that an accountant was unsuccessful in establishing a claim against the estate is no reason why he should be deprived of his compensation, where he has faithfully performed his duties. Magaldo's Estate, 13 Pa. Dist. 149, 30 Pa. Co. Ct. 97, 20 Montg. Co. Rep. (Pa.) 219.

**1282. 4. Misconduct as Ground for Denying Compensation — Fraud.** — See generally cases cited in the next preceding note (1282. 3).

**Misappropriation of Assets.** — Matter of Koch, (Surrogate Ct.) 33 Misc. (N. Y.) 153.

**Using Trust Funds for Individual Purposes.** — Matter of Adams, 51 N. Y. App. Div. 619, *modifying* on other grounds (Surrogate Ct.) 30 Misc. (N. Y.) 184, *affirmed* without opinion 166 N. Y. 623; Cope's Estate, 27 Pa. Co. Ct. 366, 4 Lack. Jur. (Pa.) 45; Thomas v. Hawpe, 35 Tex. Civ. App. 311; Walworth v. Bartholomew, 76 Vt. 1, where the court said: "There is nothing better settled, nor more universally held, than that a trustee who has used the fund for his own profit cannot have pay for caring for it."

**Mingling Trust Funds with Individual Funds.** — Matter of Wotton, 59 N. Y. App. Div. 584, *affirmed* without opinion 167 N. Y. 629.

**1283. 2. Loss or Injury Resulting from Neglect of Duty.** — Alexander v. Bates, 127 Ala. 328; Matter of Morris, 65 N. J. Eq. 699; Matter of Brintnall, (Surrogate Ct.) 40 Misc. (N. Y.) 67. See also Hall v. Hall, (Tenn. Ch. 1900) 59 S. W. Rep. 203, *citing* Allen v. Shanks, 90 Tenn. 359.

**1284. 1. Compensation for Beneficial Services Notwithstanding Unfaithful Administration.** — McClenaghan v. Perkins, 5 Ont. L. Rep. 129; Matter of Morris, 65 N. J. Eq. 699; Walworth v. Bartholomew, 76 Vt. 1. See also Dolan's Estate, 15 Pa. Super. Ct. 20.

**2. Misconduct Not Ground for Denying Compensation for Prior Faithful Services.** — Where an administrator has not faithfully performed the duties of his trust, his commissions may be disallowed either as a whole or in part, according to the circumstances of the case. Matter of Alina, 13 Hawaii 388. See also Matter of Lazarus, 13 Hawaii 242.

**3. Rule Denying Compensation for Failure to Make Periodical Returns.** — Bland v. Gollaher, (Tenn. Ch. 1898) 48 S. W. Rep. 320; Hays v. Freshwater, 47 W. Va. 217.

**Loss to Estate.** — Guild v. Young, (Tenn. Ch. 1901) 62 S. W. Rep. 404.

**1285. 1. Statutory Provisions — In Georgia.** — Awtrey v. Campbell, 118 Ga. 464.

**In Rhode Island** an executor or administrator is not entitled to commissions if he neglects or refuses to render an account for the space of thirty days after being cited to do so, unless he assigns to the court satisfactory reason therefor. West v. Municipal Ct., 25 R. I. 84.

**In West Virginia** commissions for services during any year of the administration are forfeited by failure to lay before the commissioner of accounts a statement of the receipts for that year, within six months after its expiration, unless within that time the representative has given to the parties entitled to the money received in such year a statement thereof and actually settled therefor with them. Van Winkle v. Blackford, 54 W. Va. 621.

**2. Bona Fide Mistakes Not Ground of Forfeiture.** — Matter of Baker, 72 N. Y. App. Div. 211, *affirmed* without opinion 172 N. Y. 617; Hall's Estate, 8 Pa. Dist. 8.

**3. Employment of Agents or Attorneys.** — McIntire v. McIntire, 14 App. Cas. (D. C.) 337, *affirmed* 192 U. S. 116. See also *supra*, this title, 1238. 3 *et seq.*

Where a person is employed by the accountant to aid him in the performance of services which might have been rendered by himself personally, and thereby he is relieved from their performance, then either the accountant should not be allowed full commissions or he should thereout compensate the assistant he employed. Douglass's Estate, 10 Pa. Dist. 479, 25 Pa. Co. Ct. 566.

**1286. 1. Right to Compensation May Be Renounced or Waived.** — Lamar v. Lamar, 118 Ga. 684; *In re Dimmick*, 111 La. 655; Morton v. Johnston, 124 Mich. 561; Owens v. Owens, 84 Miss. 673; Horwitz's Estate, 7 Pa. Dist. 179, 20 Pa. Co. Ct. 616.

The law does not forbid gratuitous services, even in fiduciary relations, and if acts purport to be done gratuitously no claim for payment can be founded upon them at a later date. McIntire v. McIntire, 192 U. S. 116, *affirming* 14 App. Cas. (D. C.) 337.



**1287.** (cc) *Revocation of Authority.* — See note 1.

(dd) *Compensation Prohibited by Will.* — See note 3.

(ee) *Charging Gross Sum for Services.* — See note 4.

(2) *Amount of Compensation.* — (a) **Commissions** — aa. **IN GENERAL.** —

See note 5.

**1288.** bb. **RATE OF COMMISSIONS** — **Rate Fixed by Statute.** — See note 1.

**Rate Limited by Statute.** — See note 2.

**1289.** **Rate in Discretion of Court Without Statutory Limitation.** — See notes 1, 2.

**What Constitutes Renunciation — Agreement with Next of Kin.** — An administrator may waive his statutory fees, but the record must show an agreement so to do. *Noble v. Whitten*, 38 Wash. 262, citing *Matter of Field*, 33 Wash. 63.

**Failure to Claim Compensation in Probate Court.** — An administratrix, widow of her intestate, entitled to and receiving a considerable estate as distributee, waives her commissions by failing to claim them in the probate proceedings. *In re McDermott*, 13 Ohio Dec. 390.

**Failure to Retain Amount Due.** — *Contra*, *Spencer v. Spencer*, 38 N. Y. App. Div. 403; *Matter of Harper*, (Surrogate Ct.) 27 Misc. (N. Y.) 471; *Matter of Tucker*, (Surrogate Ct.) 29 Misc. (N. Y.) 728. See also *Matter of Johnson*, 57 N. Y. App. Div. 494, modified on other grounds 170 N. Y. 139.

By paying in full without retaining the commissions, where such commissions if afterwards collected would be charged upon other beneficiaries, the right is clearly waived. *Matter of Slocum*, 60 N. Y. App. Div. 438, modified on other grounds 169 N. Y. 153.

**Failure to Claim Commissions in Account.** — An accountant does not waive his right to commissions by omitting to charge them in his account, but the claim therefor may be reserved until the audit and then presented. *Mintzer's Estate*, 13 Pa. Dist. 258.

**Charging Less than Statutory Rate.** — A charge of less than the statutory rate does not preclude the representative from recovering the amount allowed by law, if the services are reasonably worth it. *In re Hall*, 70 Vt. 458.

**Withdrawal of Renunciation.** — Where a waiver of compensation is withdrawn with the consent of the court and without objection by any one, the representative is entitled to commissions. *Carver's Estate*, 123 Cal. 102.

**1287. 1. Revocation of Authority Not Forfeiture of Compensation.** — *Matter of Strong*, 119 Cal. 663; *Brown v. McGee*, 117 Wis. 380.

**Will Adjudged Void.** — *Contra*, *Royston v. McCulley*, (Tenn. Ch. 1900) 59 S. W. Rep. 725.

**Amount of Compensation — Discretion of Court.** — On the resignation of an executor before the administration has been completed he will not be allowed full commissions. The amount to be awarded is within the discretion of the surrogate. *Matter of Douglas*, 60 N. Y. App. Div. 64.

**3. Changed Conditions Rendering Provision Prohibiting Commission Inequitable.** — Where the conditions under which the estate is to be administered are changed by reason of the renunciation by the widow of the testator of the provision made for her by the will, whereby the distributive share of the executor as a legatee is cut down, it is inequitable to hold him to the prohibition and he will be allowed

compensation. *Frazer v. Frazer*, 76 S. W. Rep. 13, 25 Ky. L. Rep. 473.

**4. Charging Gross Sum for Services.** — A charge in the account: "Administration fees, 5 per cent., \$75.74," without a more detailed statement of the particular items, is sufficient. *Main's Appeal*, 73 Conn. 638, distinguishing *Fairman's Appeal*, 30 Conn. 205.

**5. Commissions Allowed in Full of All Services.** — *Firebaugh v. Burbank*, 121 Cal. 186; *Scudder v. Ames*, 142 Mo. 187.

**Agreements for Greater Compensation than Allowed by Statute.** — See *infra*, this title, **1303. 1.**

**1288. 1. Rate of Commissions Fixed by Statute** — *Georgia*. — *Davidson v. Story*, 106 Ga. 799; *Walton v. Gairdner*, 111 Ga. 343; *Lamar v. Lamar*, 118 Ga. 684.

*Louisiana*. — *Haile's Succession*, 52 La. Ann. 1529; *Kernan's Succession*, 105 La. 592.

*Missouri*. — *Browning v. Richardson*, 186 Mo. 361; *Matter of Garrison*, 77 Mo. App. 333.

*Ohio*. — *Rote v. Warner*, 9 Ohio Cir. Dec. 540, 17 Ohio Cir. Ct. 350.

*Texas*. — *Kearney v. Nicholson*, (Tex. Civ. App. 1901) 67 S. W. Rep. 361.

*Washington*. — *Ball*, Annot. Codes and Stat. Wash. (1897), § 6314; *Matter of Mason*, 26 Wash. 259.

**2. Rate of Commissions Limited by Statute** — *Alabama*. — *Noble v. Jackson*, 124 Ala. 311; *Kenan v. Graham*, 135 Ala. 585.

*Arkansas*. — *Adamson v. Parker*, (Ark. 1905) 85 S. W. Rep. 239.

*Colorado*. — *Doss v. Stevens*, 13 Colo. App. 535.

*District of Columbia*. — *Sinnott v. Kenaday*, 14 App. Cas. (D. C.) 1, reversed on other grounds 179 U. S. 606; *McIntire v. McIntire*, 14 App. Cas. (D. C.) 337, affirmed 192 U. S. 116.

*Illinois*. — *Griswold v. Smith*, 214 Ill. 329.

*Kentucky*. — *Morton v. Morton*, 112 Ky. 706; *Reed v. Reed*, 66 S. W. Rep. 819, 23 Ky. L. Rep. 2186; *Glover v. Check*, 71 S. W. Rep. 438, 24 Ky. L. Rep. 1281, modified on other grounds on rehearing 72 S. W. Rep. 302.

*Maryland*. — *Jones v. Harbaugh*, 93 Md. 269.

*New Jersey*. — Under the New Jersey statute (Revision of 1898, Orphans' Court Act, §§ 128, 129), where the amount of the estate is less than \$50,000, the basis of fixing commissions is "the actual pains, trouble, and risk of the executor in settling the estate," and not the basis of the quantum of the estate. Where it exceeds \$50,000 commissions are allowed, not to exceed five per cent. *Weeks v. Selby*, 61 N. J. Eq. 668.

**Facts Held to Justify Allowance of Highest Rate.** — *Hartson v. Elden*, 58 N. J. Eq. 478.

**1289. 1. Rate of Commissions Not Fixed or Limited by Statute** — *New Jersey*. — See *supra*, this title, **1288. 2.**

**1289. Consideration Affecting Exercise of Discretion.** — See notes 3, 4.

*Pennsylvania.* — *Becker v. Espenshade*, 8 Pa. Dist. 525, 16 Lanc. L. Rev. 195.

**1289. 2. The Usual Rate** — *Kentucky.* — *Morton v. Morton*, 112 Ky. 706; *Offutt v. Divine*, (Ky. 1899) 53 S. W. Rep. 816.

*Pennsylvania.* — *Sharp's Estate*, 9 Pa. Dist. 727, 24 Pa. Co. Ct. 417; *Holt's Estate*, 12 Pa. Dist. 205, 28 Pa. Co. Ct. 268; *McCallum's Estate*, 13 Pa. Dist. 279; *Gressle's Estate*, 29 Pa. Co. Ct. 97, 21 Lanc. L. Rev. 73; *Collier's Estate*, 30 Pa. Co. Ct. 607. In several cases it has been held that the usual or minimum rate of commissions is two and one-half per cent, following *Stevenson's Appeal*, 4 Whart. (Pa.) 98, where the court said: "The responsibility which is incurred by the receipt and disbursement of money is a legitimate subject of compensation, and an unvarying rate per cent., without regard to the magnitude of the sum, will always be a just measure of it, because the responsibility increases in proportion to the amount. It is consequently susceptible of a uniform measure, which, we think, may be reasonably put at two and one-half per cent." *Lankenau's Estate*, 12 Pa. Dist. 160, 28 Pa. Co. Ct. 301; *Wilson's Estate*, 13 Pa. Dist. 276, 29 Pa. Co. Ct. 497. This doctrine is, however, overturned by a late case in the Supreme Court, *Moore's Estate*, 211 Pa. St. 343, reversing 13 Pa. Dist. 137, the court saying: "We do not agree with the learned court below in saying that there is a minimum rate fixed by rule of law. There is no set rule as to percentage on the estate in such cases. The rule is fair compensation for the amount and character of labor performed and responsibility involved."

*Tennessee.* — *Hall v. Hall*, (Tenn. Ch. 1900) 59 S. W. Rep. 203.

**Fixing Compensation at Percentage of Estate Proper Though Without Express Authority of Statute.** — *Main's Appeal*, 73 Conn. 638.

**Cases of Exceptional Nature.** — In cases of exceptional nature there is no set rule as to the percentage of the estate. The rule is fair compensation for the amount and character of the labor. *Wistar's Estate*, 192 Pa. St. 289, 44 W. N. C. (Pa.) 391.

Compensation to an accountant is rated by the work and skill which he bestows, and the rate per cent. is simply a convenient method of calculation. To be just, it ought to be variable quantity. The distinction in this respect between commissions on real estate and commissions on personalty is an arbitrary one, and cases constantly occur where the respective rates should be reversed, for the reason that the care of real estate often presents questions of infinitely greater intricacy than the care of personalty. *Kelly's Estate*, 9 Pa. Dist. 387.

**On the Proceeds of Real Estate.** — *Becker v. Espenshade*, 8 Pa. Dist. 525, 16 Lanc. L. Rev. 195; *Mutchmore's Estate*, 9 Pa. Dist. 293, 24 Pa. Co. Ct. 257.

As a general rule the commission allowed to accountants is five per centum upon personalty and three per centum upon real estate, but this rule is not an inflexible one, as the numerous decisions in this state on the subject show. *Barry's Estate*, 12 Pa. Dist. 789.

In *Pennsylvania* the practice has uniformly

prevailed of awarding a lower rate of commissions to accountants where the principal of the fund consists of the proceeds of a sale of realty than where it is composed exclusively of personalty. No adequate reason for the distinction appears ever to have been given, and under existing financial conditions many strong reasons might be urged against it. *Singerly's Estate*, 10 Pa. Dist. 258, 25 Pa. Co. Ct. 268.

**3. Considerations Affecting Exercise of Discretion.** — *Noble v. Jackson*, 124 Ala. 311; *Kenan v. Graham*, 135 Ala. 585; *Offutt v. Divine*, (Ky. 1899) 53 S. W. Rep. 816; *Weeks v. Selby*, 61 N. J. Eq. 668; *Moore's Estate*, 211 Pa. St. 343, reversing 13 Pa. Dist. 137; *Kelly's Estate*, 9 Pa. Dist. 387; *Holt's Estate*, 12 Pa. Dist. 205, 28 Pa. Co. Ct. 268; *Barry's Estate*, 12 Pa. Dist. 789; *Collier's Estate*, 30 Pa. Co. Ct. 608.

The rules governing the compensation of accountants are few and simple. The fiduciary office, for obvious reasons, is not to be regarded nor sought as one of profit; the pay is to be proportioned to the care and labor necessarily bestowed; and it is usually calculated at a rate per cent. upon the amount of the estate, because that method furnishes a scale by which all parties in interest may estimate in advance, with somewhat of precision, the costs of administration. In the nature of things, this rate cannot well be immovable. *Wilson's Estate*, 13 Pa. Dist. 276, 29 Pa. Co. Ct. 497.

**Question Not of Percentage but of Compensation.**

— Commissions are given as a compensation for labor and responsibility. It is a question not of percentage but of compensation. *Fiscus's Estate*, 13 Pa. Super. Ct. 619.

**Not Measured by Actual Receipts.** — Compensation for services is not measured by actual receipts. *Edenborn's Estate*, 10 Pa. Dist. 184.

**Evidence.** — *Kelly's Estate*, 9 Pa. Dist. 387.

Evidence by witnesses deposing to the services rendered in and about the administration is proper, as giving information to the court on which to base the allowance; but opinion evidence of the value of the services rendered is incompetent. *Kenan v. Graham*, 135 Ala. 585.

**Burden of Proof.** — If a greater than the customary rate is claimed by the accountant, the burden is upon him to show unusual labor, service, or trouble warranting its allowance. *Mutchmore's Estate*, 9 Pa. Dist. 293, 24 Pa. Co. Ct. 257.

**4. Rate of Commissions Allowed in Particular Cases — One Per Cent.** — *Weeks v. Selby*, 61 N. J. Eq. 668.

**Two Per Cent.** — *Singerly's Estate*, 10 Pa. Dist. 258, 25 Pa. Co. Ct. 268; *Kercher's Estate*, 21 Lanc. L. Rev. 111.

**Two and One-half Per Cent.** — *Miles's Estate*, 13 Pa. Dist. 264, 30 Pa. Co. Ct. 80; *Scully's Estate*, 31 Pittsb. Leg. J. N. S. (Pa.) 307.

**Three Per Cent.** — *Moore's Estate*, 211 Pa. St. 343, reversing 13 Pa. Dist. 137; *Wilson's Estate*, 13 Pa. Dist. 276, 29 Pa. Co. Ct. 497; *Lahey's Estate*, 13 Pa. Dist. 533, 30 Pa. Co. Ct. 287; *Slocum's Estate*, 14 Pa. Dist. 39; *Pelham's Estate*, 9 Kulp (Pa.) 347; *Carey's Estate*, 10 Kulp (Pa.) 230; *Rowe's Estate*, 11 Kulp (Pa.) 36; *Wirt's Estate*, 11 York Leg. Rec. (Pa.) 145; *Wade's Estate*, 22 Lanc. L. Rev. 257;



**1290.** Review on Appeal. — See note 1.

**1291.** *cc.* ON WHAT PROPERTY COMMISSIONS ARE ALLOWED — (*aa*) *General Rule.* — See notes 1, 2.

**1292.** See note 1.

(*bb*) *Assets Not Received by Executor or Administrator.* — See note 2.

**1293.** (*cc*) *Assets Lost or Wasted.* — See notes 1, 2.

Walsh's Estate, 35 Pittsb. Leg. J. N. S. (Pa.) 289.

**Three and One-half Per Cent.** — Sunderland's Estate, 10 Pa. Dist. 358, 25 Pa. Co. Ct. 538, *affirmed* 203 Pa. St. 160; Price's Estate, 11 Pa. Dist. 229; Lankenau's Estate, 12 Pa. Dist. 160, 28 Pa. Co. Ct. 301.

**Five Per Cent.** — McCallum's Estate, 211 Pa. St. 205; Kelly's Estate, 9 Pa. Dist. 387; Sunderland's Estate, 10 Pa. Dist. 358, 25 Pa. Co. Ct. 538, *affirmed* 203 Pa. St. 160; Chahoon's Estate, 12 Pa. Dist. 229, 28 Pa. Co. Ct. 421; Gelbach's Estate, 14 Pa. Dist. 51; Righter's Estate, 14 Pa. Dist. 440; Pelham's Estate, 9 Kulp (Pa.) 347.

**1290. 1. Review on Appeal — Want of Evidence or Manifest Abuse of Discretion.** — Noble v. Jackson, 132 Ala. 230; Kenan v. Graham, 135 Ala. 585; Griswold v. Smith, 214 Ill. 329; Morton v. Morton, 112 Ky. 706; Moore's Estate, 211 Pa. St. 338, *affirming* 13 Pa. Dist. 137; Mutchmore's Estate, 9 Pa. Dist. 702; *In re Laubach*, 9 Kulp (Pa.) 150.

**1291. 1. Commissions Allowed on All Property Received and Accounted For.** — Matter of Lunalilo, 13 Hawaii 317, *citing* 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1291; Matter of Fernandez, 119 Cal. 579; Matter of Straus, 144 Cal. 553; Allam's Estate, 199 Pa. St. 573.

**Property Not Administered.** — Matter of Garrison, 77 Mo. App. 333.

**Inventory.** — In *New York* the statute will not allow compensation to be made upon the basis of the inventory of the estate, but only for actual service in receiving and disbursing the moneys of the estate. Matter of Whipple, 81 N. Y. App. Div. 589.

**The Inventory.** — Carver's Estate, 123 Cal. 102; Coursen's Estate, 133 Cal. xix, 65 Pac. Rep. 965.

**Commissions on "Personal Estate."** — The words "personal estate" in a statute authorizing commissions on the amount of the personal estate collected and accounted for are broad enough to include stocks, bonds, and other securities. Union Sav. Bank, etc., Co. v. Smith, 26 Ohio Cir. Ct. 317.

**Real Estate Constituting Personal Assets.** — Real estate purchased by a representative at a foreclosure sale under a bond and mortgage owned by decedent, is personal assets; and he is entitled to commissions on the amount for which he resells it. Matter of Franklin, (Surrogate Ct.) 26 Misc. (N. Y.) 107.

**Money Borrowed for Estate.** — An executor is entitled to commissions on money borrowed and disbursed for the benefit of the estate, for which he is chargeable in his account. Fitzpatrick's Estate, 12 Pa. Dist. 730; Gelbach's Estate, 14 Pa. Dist. 51.

**Money Received on Contracts of Decedent.** — An executor is entitled to commissions on money received on contracts of the decedent and ex-

pected in completing such contracts though he also received pay for his services in completing them. Walsh's Estate, 35 Pittsb. Leg. J. N. S. (Pa.) 289.

**Finding as to Value of Property.** — The value of the property coming into the possession of the representative is a question of fact, and the finding of the trial court thereon in fixing the amount of the commissions is conclusive, if not manifestly against the weight of the evidence. Doss v. Stevens, 13 Colo. App. 535.

**2. Excess over Appraisal.** — Matter of Lunalilo, 13 Hawaii 317, *citing* 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1291; Ladd v. Stephens, 147 Mo. 319; Tasker's Estate, 14 Pa. Dist. 435.

**Change in Form of Property.** — A mere change in the form of property will not entitle the representative to commissions upon the amount received, since no additional estate is thereby accounted for. Firebaugh v. Burbank, 121 Cal. 186.

**Increase in Value of Stocks and Like Securities.** — An executor is not entitled to commissions on an enhanced value of stocks and other investments made with money on which commissions have been charged and allowed in a prior account. Davidson's Estate, 204 Pa. St. 381.

**1292. 1. Property of Third Persons.** — See Ketchin v. Rion, 72 S. Car. 153.

An executor is not entitled to commissions on the proceeds of a note claimed by him to be assets of the estate and collected as such, but which in fact did not constitute assets. The commission or allowance fixed by statute for compensation to personal representatives is for the purpose of paying them for the collection and disbursement of money belonging to the decedent. Laughlin v. Boughner, (Ky. 1905) 84 S. W. Rep. 300.

**Property Held in Trust by Decedent.** — *Contra*, Haines v. Hay, 169 Ill. 93, *reversing* on other grounds 67 Ill. App. 445.

**2. Assets Not Received by the Executor or Administrator.** — Coursen's Estate, 133 Cal. xix, 65 Pac. Rep. 965; Lamar v. Lamar, 118 Ga. 684; Bickel v. Bickel, 79 S. W. Rep. 215, 25 Ky. L. Rep. 1945; Edenborn's Estate, 10 Pa. Dist. 184; Righter's Estate, 14 Pa. Dist. 440; Immendorf's Estate, 21 Pa. Co. Ct. 268, 4 Lack. Leg. N. (Pa.) 266, *affirmed* 190 Pa. St. 590; Hofelt's Estate, 28 Pittsb. Leg. J. N. S. (Pa.) 402; De Loach v. Sarratt, 58 S. Car. 117.

**Exceptions to Rule.** — See *infra*, this title, 1294. 2.

**1293. 1. Commissions Not Allowed on Assets Lost by Fault of Representative.** — Matter of Adams, (Supm. Ct. App. Div.) 64 N. Y. Supp. 591, 51 N. Y. App. Div. 619, *modifying* on other grounds (Surrogate Ct.) 30 Misc. (N. Y.) 184, Mueller's Estate, 8 Pa. Dist. 70, *affirmed* 190 Pa. St. 601. See also *supra*, this title, 1282. 2 *et seq.*



**1293.** (*dd*) Receipts and Disbursements. — See notes 3, 4, 5, 6, 7.

**1294.** Meaning and Scope of Terms. — See notes 1, 2.

**1295.** See note 1.

(*ee*) Payment of Legacies or Distributive Shares. — See note 3.

**1296.** (*ff*) Property or Securities Delivered in Specie. — See note 1.

#### Losses for Which Representative Is Given Credit.

— An executor or administrator is not entitled to commissions on sums representing losses in the valuation of the estate, for which he is allowed credit in his account. *Smith's Estate*, 30 Pittsb. Leg. J. N. S. (Pa.) 188; *Heinitsh's Estate*, 21 Lanc. L. Rev. 394.

**1293. 2. Rule Allowing Commissions on Funds Lost.** — See *Matter of Suess*, (Surrogate Ct.) 37 Misc. (N. Y.) 459; *Matter of McCormick*, (Surrogate Ct.) 46 Misc. (N. Y.) 386.

**3. Commissions on Receipts and Disbursements.** — *Noble v. Jackson*, 124 Ala. 311; *Reed v. Reed*, 66 S. W. Rep. 819, 23 Ky. L. Rep. 2186; *Glover v. Check*, 71 S. W. Rep. 438, 24 Ky. L. Rep. 1281, modified on other grounds on rehearing (Ky. 1903) 72 S. W. Rep. 302. See generally in this connection cases cited *supra*, this title, **1188. 1 et seq.**

The receiving of money or other property is not sufficient to entitle the representative to commissions, but the paying out of the funds received must necessarily be done before the statute is satisfied. *Matter of Bidgood*, (Surrogate Ct.) 36 Misc. (N. Y.) 516.

If nothing passes through the administrator's hands, he is entitled to no fees, even though he may have been subjected to considerable trouble and annoyance in his preparation for the administration. *Adamson v. Parker*, (Ark. 1905) 85 S. W. Rep. 239.

**4. Separate Allowance on Receipts and Disbursements — Terms of Statute.** — *Noble v. Jackson*, 124 Ala. 311; *Kenan v. Graham*, 135 Ala. 585; *Davidson v. Story*, 106 Ga. 799; *Walton v. Gairdner*, 111 Ga. 343; *Lamar v. Lamar*, 118 Ga. 684; *Kearney v. Nicholson*, (Tex. Civ. App. 1901) 67 S. W. Rep. 361.

**Disbursements — Payment by an Administrator to Himself.** — In *South Carolina* executors or administrators who may be creditors of the decedent, or to whom any sum of money or other estate may be bequeathed, are not entitled to any commission for paying or retaining to themselves any such debts or legacies. *Rev. Stat. S. Car.*, § 2069; *Ex p. Hilton*, 64 S. Car. 201, 92 Am. St. Rep. 800.

**5. Separate Allowance on Receipts and Disbursements — Construction of Statute.** — *Matter of McCormick*, (Surrogate Ct.) 46 Misc. (N. Y.) 386.

**6. Personal Estate Collected and Accounted For — Michigan.** — The Michigan statute provides for commissions "upon the amount of personal estate collected and accounted for," *Comp. L. Mich.*, § 9438. *Webb v. Peck*, 131 Mich. 579, 9 Detroit Leg. N. 449.

**7. Disbursements as Basis of Commissions.** — *Ladd v. Stephens*, 147 Mo. 319.

For the present rule in *Kentucky* see the cases cited *supra*, this title, **1293. 3.**

**1294. 1. Meaning of Terms "Receipts" and "Disbursements."** — *Lamar v. Lamar*, 118 Ga. 684, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1294, 1295, and notes.

**Receipts — Uncollected or Worthless Claims.** —

*Hinnescheid's Estate*, 12 Luz. Leg. Reg. (Pa.) 23.

**Improper Disbursements.** — *Springfield Grocer Co. v. Walton*, 95 Mo. App. 526.

**Transfer of Assets to Successor in Administration.** — The transfer of assets by a personal representative to his successor in the administration is not such a paying out of the funds of the estate as entitles him to commissions. *Matter of Bidgood*, (Surrogate Ct.) 36 Misc. (N. Y.) 516.

**Executor Who Is Also Trustee.** — An executor is entitled to commissions upon his accounting for receiving the principal of the estate and turning it over to himself as trustee under the will. *Matter of McCormick*, (Surrogate Ct.) 46 Misc. (N. Y.) 386.

**2. Actual Receipt and Payment Out of Money Not Always Necessary.** — *Lamar v. Lamar*, 118 Ga. 684, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1294, 1295.

**Distributee in Possession of Estate Permitted to Retain His Share.** — Where a distributee in possession of the estate, on being sued therefor by the administrator, is allowed by the court to retain the amount of his distributive share, the fact that the administrator does not actually receive and pay out such share does not relieve the estate from the payment of commissions thereon. *Harrison v. Perea*, 168 U. S. 311.

**1295. 1. Carrying on Decedent's Business.** — *Lamar v. Lamar*, 118 Ga. 684, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1294, 1295, and notes.

**The Profits of the Business.** — *Lamar v. Lamar*, 118 Ga. 684.

**3. Commissions Allowed on Legacies and Distributive Shares.** — *Matter of McCormick*, (Surrogate Ct.) 46 Misc. (N. Y.) 386.

**In Texas.** — *Kearney v. Nicholson*, (Tex. Civ. App. 1901) 67 S. W. Rep. 361.

**Commissions on Income.** — See *supra*, this title, **1281. 1. Commissions on Income**; **1286. 1. Failure to Retain Amount Due.**

**1296. 1. Commissions Not Allowed on Specific Legacies Delivered to Legatees — New York.** — *Matter of Whipple*, 81 N. Y. App. Div. 589; *Matter of Fisher*, 93 N. Y. App. Div. 186; *Matter of Robinson*, (Surrogate Ct.) 37 Misc. (N. Y.) 336.

*Pennsylvania.* — *Contra*, *Holt's Estate*, 12 Pa. Dist. 205, 28 Pa. Co. Ct. 268; *Wilson's Estate*, 13 Pa. Dist. 276, 29 Pa. Co. Ct. 497; *Heinitsh's Estate*, 21 Lanc. L. Rev. 394.

**In Alabama** commissions are allowed upon the appraised value of all personal property, and the amount of money and solvent notes distributed, at the same rate as upon disbursements. *Noble v. Jackson*, 124 Ala. 311; *Kenan v. Graham*, 135 Ala. 585.

**Commissions Not Allowed on Specific Chattels Delivered to Next of Kin.** — *Contra*, *Matter of Ross*, (Surrogate Ct.) 33 Misc. (N. Y.) 163.

While commissions are not allowed in such cases it has been held that the representative

**1297.** (*gg*) *Debts Due from Executor or Administrator.* — See note 2.

(*hh*) *Real Estate.* — See notes 4, 5, 6.

*Proceeds of Realty.* — See note 7.

may become entitled to a reasonable allowance, as special compensation, for services beneficial to the estate in caring for and distributing the property in kind. *Glover v. Check*, 71 S. W. Rep. 438, 24 Ky. L. Rep. 1281, *modified* on other grounds on rehearing (Ky. 1903) 72 S. W. Rep. 302; *Reed v. Reed*, (Ky. 1902) 66 S. W. Rep. 819.

Under the *California* statute which provides that "where the property of the estate is distributed in kind, and involves no labor beyond the custody and distribution of the same, the commissions shall be computed on all the estate above the value of twenty thousand dollars, at one-half of the rates fixed in this section," an executor is entitled to full commissions where management and attention beyond the mere labor of custody and distribution was necessary. *Matter of Cudworth*, 133 Cal. 462; *Matter of Towne*, 143 Cal. 507.

**Securities Delivered in Payment of Legacies and Distributive Shares.** — *Matter of Johnson*, 57 N. Y. App. Div. 494, *affirmed* 170 N. Y. 139; *Matter of McCormick*, (Surrogate Ct.) 46 Misc. (N. Y.) 386; *Righter's Estate*, 14 Pa. Dist. 440. *Compare Ex p. Hilton*, 64 S. Car. 201, 92 Am. St. Rep. 800. *Contra* where the payment is authorized to be made only in kind and not in money. *Turnipseed v. Sirrine*, 60 S. Car. 272.

A delivery by an executor of stocks or bonds in discharge of a general legacy is not within the terms of a statute allowing commissions on all sums of money received and disbursed. Nor is such a delivery a delivery in kind within a provision declaring that the ordinary may allow reasonable compensation for that service. *Walton v. Gairdner*, 111 Ga. 343.

**1297. 2. Rule Denying Commissions on Debts of Executors and Administrators.** — *Miles's Estate*, 13 Pa. Dist. 264, 30 Pa. Co. Ct. 80; *Bard's Estate*, 13 Pa. Dist. 552, 21 Lanc. L. Rev. 81; *Brenneman's Estate*, 14 York Leg. Rec. (Pa.) 14; *Heinitsh's Estate*, 21 Lanc. L. Rev. 394.

Executors are not entitled to commissions on money paid by them as individuals in satisfaction of legacies charged on land devised to them. *Glesenkamp's Estate*, 34 Pittsb. Leg. J. N. S. (Pa.) 155.

**Joint Executors.** — An executor is not precluded by the rule from claiming and receiving commissions on indebtedness of his coexecutors. *Huber's Estate*, 22 Lanc. L. Rev. 252.

**4. Commissions Not Allowed on Value of Unsold Land.** — *Glover v. Check*, 71 S. W. Rep. 438, 24 Ky. L. Rep. 1281, *modified* on other grounds on rehearing (Ky. 1903) 72 S. W. Rep. 302; *Matter of Hull*, 97 N. Y. App. Div. 258; *Matter of McGlynn*, (Surrogate Ct.) 41 Misc. (N. Y.) 156.

Though the representative has an agreement with the persons beneficially interested to sell the real estate for them, under which he has sold part and made effort to sell all, he is not entitled to commissions on the value of that remaining unsold. *Haley's Estate*, 9 Pa. Dist. 116, *affirmed* 16 Pa. Super. Ct. 70.

**Management and Care of Real Estate.** — Com-

pensation for the management and care of real estate which is not assets in the hands of the representative is not allowable out of the funds of the estate. *Morrison's Estate*, 196 Pa. St. 80.

An executor is not entitled to compensation for services in managing and improving the real estate against the consent of the heirs, where his right of possession was wrongful. *Anderson v. Northrop*, 44 Fla. 472.

**Land Constituting Personal Assets.** — Land purchased with the funds of the estate constitutes personal assets and the representative is entitled to commissions on its value. *Matter of Ross*, (Surrogate Ct.) 33 Misc. (N. Y.) 163.

**5. Commissions Not Allowed on Rents Collected Without Authority.** — *Myers v. Bolton*, 157 N. Y. 393, *rehearing denied* without opinion 158 N. Y. 665, *modifying* on other grounds 89 Hun (N. Y.) 342; *Read v. Franklin*, (Tenn. Ch. 1900) 60 S. W. Rep. 215.

**Commission Allowed on Rents Lawfully Collected.** — *In re Soulard*, 141 Mo. 642. See also *Van Winkle v. Blackford*, 54 W. Va. 621.

Executors empowered to lease real estate are entitled to commissions on the gross amount of the rent, including sums expended by the tenant for taxes, which the lease requires him to pay. *McCallum's Estate*, 13 Pa. Dist. 279.

**Rents Collected under Agreement with Beneficiaries.** — Where rents are collected by agreement with the persons beneficially interested, and the amount is charged in the account, commissions are properly allowed. *Haley's Estate*, 9 Pa. Dist. 116, *affirmed* 16 Pa. Super. Ct. 70.

Commissions of executors as agents of the parties entitled in making the collection would seem to be proper deductions. *Hallowell's Estate*, 9 Pa. Dist. 90.

**6. Commissions Allowed on Real Estate.** — *Carver's Estate*, 123 Cal. 102; *Noble v. Whitten*, 38 Wash. 262.

**Disbursements in Improvements of Real Estate.** — A personal representative is entitled to commissions on disbursements in the improvement of real estate where he had authority to make the improvements. *Lambertson v. Vann*, 134 N. Car. 108.

**7. Commissions Allowed on Proceeds of Realty.** — *Matter of Fernandez*, 119 Cal. 579; *Matter of Garrison*, 77 Mo. App. 333; *Elstroth v. Young*, 94 Mo. App. 351; *Felton's Estate*, 7 Pa. Dist. 262; *Kelly's Estate*, 9 Pa. Dist. 387; *Sharp's Estate*, 9 Pa. Dist. 727, 24 Pa. Co. Ct. 417; *Singerly's Estate*, 10 Pa. Dist. 258, 25 Pa. Co. Ct. 268; *Tasker's Estate*, 14 Pa. Dist. 435; *Rowe's Estate*, 11 Kulp (Pa.) 36.

Where real estate is sold free and clear of incumbrances upon it, the accountants receiving the full purchase price and paying the incumbrances out of the proceeds, commissions are payable on the full amount. *Price's Estate*, 13 Pa. Dist. 129.

**Sale under Agreement of Heirs.** — *Union Sav. Bank, etc., Co. v. Smith*, 26 Ohio Cir. Ct. 317.

**Unauthorized Sales.** — Where the sale was made without authority the executor or administrator is not entitled to any commissions on the pro-



**1298.** See notes 1, 2.

Equitable Conversion of Realty. — See note 3.

**1299.** Partition of Realty. — See note 1.

Sale of Encumbered Realty. — See note 2.

(ii) *Partnership Estates*. — See note 3.

**1300.** (b) Allowance of Gross Amount. — See note 2.

(c) Per Diem Allowance. — See note 3.

(d) Amount of Compensation Fixed by Will. — See note 4.

**1301.** Effect of Bequest to Executor. — See note 1.

**1302.** Inadequacy of Testamentary Provision. — See note 2.

ceeds. *Garesche v. Levering Invest. Co.*, 146 Mo. 436.

**1298. 1. Receipt of Proceeds Essential to Right to Commissions.** — *Moore's Estate*, 211 Pa. St. 338, *affirming* 13 Pa. Dist. 137.

**Sale by Guardian.** — Where a sale of real property of the estate is effected by a guardian, the services rendered by the personal representative relating to matters of form involving little attention or responsibility, he is not entitled to any commission upon the purchase money. *Dick's Estate*, 183 Pa. St. 647, 41 W. N. C. (Pa.) 367.

**2. Purchase by Creditor of Estate.** — *Wolf v. Wolf*, 36 Tex. Civ. App. 168. See also *Becker v. Espenshade*, 8 Pa. Dist. 525.

**3. Commissions Not Allowed in Case of Mere Equitable Conversion.** — *Matter of Tucker*, (Surrogate Ct.) 29 Misc. (N. Y.) 728. See also *Matter of Johnson*, 57 N. Y. App. Div. 494, *modified* on other grounds 170 N. Y. 139.

**1299. 1. Partition of Realty.** — *Matter of Ross*, (Surrogate Ct.) 33 Misc. (N. Y.) 163.

**2. Sale of Encumbered Realty — Commissions Not Computed on Incumbrances.** — *Moore's Estate*, 211 Pa. St. 343, *reversing* 13 Pa. Dist. 137, *citing* 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1299. Compare *Scully's Estate*, 31 Pittsb. Leg. J. N. S. (Pa.) 307.

**Land Subject to Dower.** — Dower having been admeasured by decree of court, in an action to recover it, the payment of its value is not an executorial duty by virtue of the will, and the executor is not entitled to commissions for such payment. *Matter of Lawrence*, (Surrogate Ct.) 37 Misc. (N. Y.) 702.

**Land Subject to Homestead Exemption.** — An administrator is not entitled to commissions on a portion of the proceeds representing the value of a homestead right in the land. *Elstroth v. Young*, 88 Mo. App. 418. *Contra*, *Elstroth v. Young*, 94 Mo. App. 351.

**3. Administrator Who Is Surviving Partner Not Allowed Compensation for Winding Up Partnership.** — *Porter v. Long*, 124 Mich. 586, 7 Detroit Leg. N. 337, 136 Mich. 150, 10 Detroit Leg. N. 987.

**1300. 2. Allowance of Gross Amount — Illustrations.** — *Noble v. Jackson*, 132 Ala. 230, 124 Ala. 311; *Morton v. Morton*, 112 Ky. 706, 23 Ky. L. Rep. 2079; *Bickel v. Bickel*, 79 S. W. Rep. 215, 25 Ky. L. Rep. 1945; *In re Semple*, 189 Pa. St. 385, *reversing* 28 Pittsb. Leg. J. N. S. (Pa.) 431; *Fiscus's Estate*, 13 Pa. Super. Ct. 615; *Scott's Estate*, 18 Pa. Super. Ct. 375; *Collier's Estate*, 30 Pa. Co. Ct. 607; *Young's Estate*, 4 Lack. Jur. (Pa.) 99; *Smith's Estate*, 30 Pittsb. Leg. J. N. S. (Pa.) 188; *Shamberg's*

*Estate*, 33 Pittsb. Leg. J. N. S. (Pa.) 262; *Guild v. Young*, (Tenn. Ch. 1901) 62 S. W. Rep. 404.

**Burden of Proof.** — In allowance of a gross sum, the burden of proof is upon the representative to establish fully the reasonableness of the charges. *Powell v. Foster*, 71 Vt. 160.

**3. Per Diem Allowances.** — *Powell v. Foster*, 71 Vt. 160.

**4. Compensation May Be Fixed by Will — California.** — *Matter of Ringot*, 124 Cal. 45; *Matter of Runyon*, 125 Cal. 195.

*New York.* — *Matter of Rowe*, (Surrogate Ct.) 42 Misc. (N. Y.) 172; *Matter of Sprague*, (Surrogate Ct.) 46 Misc. (N. Y.) 216.

*Oregon.* — *Conser's Estates*, 40 Oregon 138.

*Pennsylvania.* — *In re Hay*, 183 Pa. St. 296; *Betts's Estate*, 198 Pa. 640.

*Texas.* — *Kearney v. Nicholson*, (Tex. Civ. App. 1901) 67 S. W. Rep. 361.

*Canada.* — *In re Bossi*, 5 British Columbia 446.

**Distribution Without Compensation.** — A provision requiring executors to make distribution without compensation does not exclude the allowance of a reasonable compensation for services necessarily rendered in preparing the estate for distribution. *Fidelity Trust, etc., Co. v. Watkins*, (Ky. 1897) 42 S. W. Rep. 753.

**Provision that Executors Shall Be Liberally Compensated.** — A provision that executors shall be "liberally" compensated means no more than compensation that is fair and just. It might mean, in some cases, less than the maximum statutory allowance, but never more, since that allowance has been determined by the law-makers, in the enactment of the statute, to be a fair and liberal allowance. *Kenan v. Graham*, 135 Ala. 585.

**1301. 1. Mere Bequest to Executor Does Not Deprive Him of Commissions.** — *Sinnott v. Kenaday*, 14 App. Cas. (D. C.) 1, *reversed* on other grounds 179 U. S. 606; *Thome v. Allen*, (Ky. 1899) 49 S. W. Rep. 1068; *Matter of Sprague*, (Surrogate Ct.) 46 Misc. (N. Y.) 216; *McClenaghan v. Perkins*, 5 Ont. L. Rep. 129.

**Void Legacies.** — *Turnipseed v. Sirrine*, 60 S. Car. 272.

**Legacy to Induce Acceptance of Trust.** — Legacies on condition that the legatees act as executors and trustees are plainly offered as inducements to acceptance of the trust, because of the peculiar fitness of the legatees for its execution, and their amount is the testator's measure of compensation for acceptance as distinguished for compensation for services which might be required afterward. *Clark's Estate*, 10 Pa. Dist. 378, 31 Pittsb. Leg. J. N. S. (Pa.) 410.

**1302. 2. Extraordinary Services.** — *Contra*



**1302.** Renunciation of Testamentary Provision. — See note 3.

**1303.** (e) Amount of Compensation Fixed by Agreement. — See note 1.

(f) Successive Administrations. — See notes 2, 4.

**1304.** (g) Special and Temporary Administrators. — See note 2.

(h) Executors Who Are Also Trustees — Right to Double Commissions. — See

note 4.

under the *California* statute. Matter of Runyon, 125 Cal. 195.

**1302. 3. Renunciation of Testamentary Provision Requisite to Allowance of Statutory Compensation.** — Matter of Arkenburgh, 38 N. Y. App. Div. 473, *reversing* on other grounds (Surrogate Ct.) 13 Misc. (N. Y.) 744; Matter of Sprague, (Surrogate Ct.) 46 Misc. (N. Y.) 216.

**Time Within Which Renunciation Must Be Made.** — Matter of Arkenburgh, 38 N. Y. App. Div. 473, *reversing* on other grounds (Surrogate Ct.) 13 Misc. (N. Y.) 744.

**1303. 1. Compensation May Be Fixed by Agreement.** — *Littell v. Hackley*, (C. C. A.) 126 Fed. Rep. 309; *Crutcher v. Board of Missions*, etc., 62 S. W. Rep. 895, 23 Ky. L. Rep. 257; *Jones v. Harbaugh*, 93 Md. 269; *Cummings v. Robinson*, 95 Md. 759; *Fiscus's Estate*, 13 Pa. Super. Ct. 619; *Gross's Estate*, 14 Pa. Dist. 137; *Rambo's Estate*, 15 Montg. Co. Rep. (Pa.) 25; *Powell v. Foster*, 71 Vt. 160; Matter of Field, 33 Wash. 63. See also *Noble v. Jackson*, 124 Ala. 311. See also Matter of Johnson, 57 N. Y. App. Div. 494, *modified* on other grounds 170 N. Y. 139.

**Agreements for Greater Compensation than That Allowed by Statute.** — It has been held that though the persons beneficially interested in the estate can lawfully agree on the value of property for the purpose of the allowance of commissions, thus making further proof on that point unnecessary, they cannot by agreement bind themselves to permit the legal representative to take more of the estate for his own use than the law prescribes, for the services performed by him; that such an agreement is void as without consideration and also in violation of a rule of public policy. Matter of Ross, (Surrogate Ct.) 33 Misc. (N. Y.) 163. See also *supra*, this title, **754. 7, 1278. 3. Executor Not Acting.**

In *California* all contracts between an executor or administrator and an heir, devisee, or legatee, for a higher compensation than allowed by law, are invalidated by express statute. Code Civ. Pro. Cal., § 1618; *Firebaugh v. Burbank*, 121 Cal. 186.

**Agreement Within Statute of Frauds.** — A verbal agreement between an administrator and the persons beneficially interested in the estate that his commissions shall be a lien upon the real property of the estate in the nature of an equitable mortgage, is within the statute of frauds and unenforceable, though possession has been taken by the administrator and improvements erected by him. *Tucker v. Ottenheimer*, (Oregon 1905) 81 Pac. Rep. 360.

**2. Successive Administrations — Apportionment of Compensation.** — Matter of McCormick, (Surrogate Ct.) 46 Misc. (N. Y.) 386.

The fact that the preceding representative has unlawfully withdrawn and retained commissions on the basis of a full, complete, and faith-

ful administration of the trust, cannot affect his successor's right to commissions. The commissions of each are independent and distinct from those of the other, though the fact of there having been two administrators may affect the amount coming to each. *Kernan's Succession*, 105 La. 592.

Where commissions charged for a deceased executor by the executor of his estate, and allowed, are ample compensation for all services rendered the estate of the original decedent, no allowance will be made the executor of the executor for himself personally. *Connolly's Estate*, 198 Pa. St. 137.

So far as the services and expenses of the personal representative of an executor or administrator in settling the account of the administration of his decedent are made necessary by any improper conduct of the administrator, the loss must fall upon his own estate; otherwise they are a proper subject of charge against the estate of the first decedent. *Walworth v. Bartholomew*, 76 Vt. 1.

**4. Allowance to Successive Representatives According to Property Administered by Each.** — *Kernan's Succession*, 105 La. 592; Matter of Whipple, 81 N. Y. App. Div. 589.

The representative of a deceased executor or administrator is entitled to reasonable compensation for settling the accounts of his decedent as representative of the first decedent. *State v. Probate Ct.*, 76 Minn. 132.

**1304. 2. Special and Temporary Administrators — Amount of Compensation in Discretion of Court.** — *In re Ford*, 29 Mont. 283; *Bell v. Goss*, 33 Tex. Civ. App. 158. See also *supra*, this title, **1279. 1.**

**4. Rule Allowing Double Commissions.** — Matter of Union Tr. Co., 70 N. Y. App. Div. 5, *affirming* (Surrogate Ct.) 35 Misc. (N. Y.) 260, *appeal dismissed* 172 N. Y. 494; Matter of Union Trust Co., (Surrogate Ct.) 25 Misc. (N. Y.) 584; Matter of Tucker, (Surrogate Ct.) 29 Misc. (N. Y.) 728; Matter of Lawrence, (Surrogate Ct.) 37 Misc. (N. Y.) 702. See also Matter of Johnson, 57 N. Y. App. Div. 494, *modified* on other grounds 170 N. Y. 139.

Where a sum is given by will in trust to a person for life and the beneficiary dies before it is set apart to him as a separate trust fund, only executor's commissions are allowable. Matter of Lawrence, (Surrogate Ct.) 37 Misc. (N. Y.) 702.

**In Pennsylvania.** — *Evens's Estate*, 21 Lanc. L. Rev. 50; *Keller's Estate*, 21 Lanc. L. Rev. 183; *Glesenkamp's Estate*, 34 Pittsb. Leg. J. N. S. (Pa.) 155.

The statute, which in this respect seems to be only declaratory, provides, in terms, that where the same person fulfils the duties of executor and trustee, he shall not receive more than a single commission upon principal, though he may be allowed a reasonable commission on

**1305.** See note 1.

When Functions as Executor and Trustee Respectively Are Separate. — See note 2.

**1306.** (i) Special Compensation for Extraordinary Services — *aa.* GENERAL RULE. — See note 1.

**1307.** In New York. — See note 1.

*bb.* SPECIAL COMPENSATION ALLOWED BY STATUTE. — See note 2.

**1308.** *cc.* FOR WHAT SERVICES ALLOWED. — See notes 1, 2, 3.

income. Horwitz's Estate, 7 Pa. Dist. 179, 20 Pa. Co. Ct. 616.

Where realty does not pass into the hands of accountants as trustees, but as executors, because of its conversion by the will, in pursuance of which they sold it, they are entitled to commissions for selling it, as executors, and will not be compelled to wait until the termination of the trust. Moore's Estate, 13 Pa. Dist. 137, affirmed 211 Pa. St. 343.

A Conventional Trustee is only entitled to compensation for actual services rendered by him in the execution of his trust; and he is not entitled to commissions on the *corpus* of the estate where he had already been allowed commissions thereon as executor. Kennedy v. Dickey, 79 Md. 295.

**1305. 1. Double Commissions Not Allowed When Trust Is Annexed to Office of Executor.** — Lamar v. Harris, 121 Ga. 285; Matter of Slocum, 169 N. Y. 153, reversing 60 N. Y. App. Div. 438; Matter of Hogarty, 62 N. Y. App. Div. 79; Matter of Union Trust Co., (Surrogate Ct.) 25 Misc. (N. Y.) 584. See also Matter of Smith, 18 Wash. 129.

When Commissions Allowable Only in Capacity of Trustee. — When it is the manifest intention of the testator that the income of the estate shall be received by the trustees directly, without at any time holding it as executors, they are only entitled to commissions on income as trustees. Matter of Union Trust Co., (Surrogate Ct.) 25 Misc. (N. Y.) 584; Matter of Tucker, (Surrogate Ct.) 29 Misc. (N. Y.) 728.

**2. When Functions as Executor and as Trustee Are Separate.** — Matter of Union Trust Co., 70 N. Y. App. Div. 5, affirming (Surrogate Ct.) 35 Misc. (N. Y.) 260, appeal dismissed 172 N. Y. 494.

**1306. 1. Rule Denying Special Compensation.** — Rebasse's Succession, 51 La. Ann. 540.

In Kentucky under the existing statute provision is made for special compensation for extraordinary services. See *infra*, this title, **1307. 2.**

States Having No Fixed Rate of Commissions. — In many states the rate of commissions is left open for the determination of the court, and varies according to the value of the services rendered in the particular case. See *supra*, this title, **1289. 1 et seq.**

An executor is entitled to reasonable compensation for services performed by him beneficial to the estate, which are independent of any duty resting upon him as executor. Moore's Estate, 211 Pa. St. 343, affirming 13 Pa. Dist. 137.

**1307. 1. Rule in New York.** — *In re Hosford*, 27 N. Y. App. Div. 427.

The statutes of our state allow no extra compensation to executors and administrators for

the rendition to the estate of services outside of the scope of their ordinary duties, and since at common law the services were wholly gratuitous, extra compensation, if not within the language of the statute, cannot be allowed. The statute, therefore, controls in all cases when otherwise not provided for; but it cannot govern or restrict when a testator, for reasons of his own, has specially provided that compensation fixed by himself shall be given in addition to that provided by the statute. Matter of Sprague, (Surrogate Ct.) 46 Misc. (N. Y.) 217.

**2. Special Compensation for Extraordinary Services Allowed by Statute** — *Alabama.* — Noble v. Jackson, 124 Ala. 311.

*California.* — Firebaugh v. Burbank, 121 Cal. 186.

*Georgia.* — Bird v. Mitchell, 101 Ga. 46.

*Iowa.* — Fitzgerald v. Paisley, 110 Iowa 98.

*Kentucky.* — Reed v. Reed, 66 S. W. Rep. 819, 23 Ky. L. Rep. 2186; Glover v. Check, 71 S. W. Rep. 438, 24 Ky. L. Rep. 1281, modified on other grounds on rehearing (Ky. 1903) 72 S. W. Rep. 302; Clark v. Young, 74 S. W. Rep. 245, 24 Ky. L. Rep. 2395. See also Offutt v. Divine, (Ky. 1899) 53 S. W. Rep. 816.

*Ohio.* — Matter of Wolfe, 7 Ohio Dec. 220, 4 Ohio N. P. 336; Rote v. Warner, 9 Ohio Cir. Dec. 540, 17 Ohio Cir. Ct. 350.

*Oregon.* — *In re Osburn*, 36 Oregon 8.

*Vermont.* — Powell v. Foster, 71 Vt. 160.

**Discretion of Probate Court.** — Matter of Hedrick, 127 Cal. 184; Bird v. Mitchell, 101 Ga. 46; Matter of Wolfe, 7 Ohio Dec. 220, 4 Ohio N. P. 336; Re McCullough, 31 Oregon 86; Re Partridge, 31 Oregon 297; Sloan v. Duffy, 117 Wis. 480.

**Statement of Claim.** — Matter of Wolfe, 7 Ohio Dec. 220, 4 Ohio N. P. 336; Re Partridge, 31 Oregon 297. See also Sloan v. Duffy, 117 Wis. 480.

**Proof of Claim.** — Fitzgerald v. Paisley, 110 Iowa 98; Re Partridge, 31 Oregon 297.

**Effect of Allowance** — *Georgia.* — In Georgia, by statute, "in no case is the allowance of extra compensation by the ordinary conclusive upon the parties in interest." Gairdner v. Tate, 110 Ga. 456.

**Where Compensation Is Regulated by Will.** — Under the terms of the *California* statutes, commissions for extraordinary services cannot be allowed an executor when the compensation is provided by will, unless he renounces all claims to the compensation under the will. Matter of Runyon, 125 Cal. 195.

**1308. 1. Duties Ordinarily Devolving on an Administrator.** — Noble v. Jackson, 132 Ala. 230; Kenan v. Graham, 135 Ala. 585; Coursen's Estate, 133 Cal. xix, 65 Pac. Rep. 965; Matter of Sawyer, 124 Iowa 485; Morton v. Morton, 112 Ky. 706; Webb v. Peck, 131 Mich. 579, 9



**1309.** See note 1.

**8. Forms and Requisites of the Accounts — In General. —** See note 2.

**1310.** See note 1.

Detroit Leg. N. 449; *Harrison v. McAdam*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 18.

**1308. 2. Special Compensation for Legal Services Allowed by Statute.** — *Alexander v. Bates*, 127 Ala. 328. See also *Courson's Estate*, 133 Cal. xix, 65 Pac. Rep. 965; *Davidson v. Story*, 106 Ga. 799.

Legal services are extraordinary services within the meaning of the statute, and so are all other services involving special skill or learning. *Sloan v. Duffy*, 117 Wis. 480.

**3. Rule Disallowing Compensation for Legal Services.** — *Doss v. Stevens*, 13 Colo. App. 535; *Price's Estate*, 11 Pa. Dist. 229. See also *Noble v. Whitten*, 38 Wash. 262.

A provision in a will empowering a solicitor executor to act as solicitor and charge profit costs, gives him a right which he would not have otherwise. It creates a bounty and not a debt and fails as against creditors of an insolvent estate. *In re White*, (1898) 1 Ch. 297, affirmed (1898) 2 Ch. 217.

**1309. 1. Continuing Business of Decedent.** — *Lamar v. Lamar*, 118 Ga. 684; *Matter of Moriarty*, (Surrogate Ct.) 27 Misc. (N. Y.) 161; *Greiner's Estate*, 14 Pa. Dist. 348; *Smith's Estate*, 30 Pittsb. Leg. J. N. S. (Pa.) 188; *James v. Craighead*, (Tex. Civ. App. 1902) 69 S. W. Rep. 241.

**Management of Real Estate.** — *Sloan v. Duffy*, 117 Wis. 480.

**For Other Instances.** — *Matter of Sawyer*, 124 Iowa 485; *Russell v. Hilton*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 642, modified on other grounds 80 N. Y. App. Div. 178, which was affirmed on opinion below 175 N. Y. 525; *Scott's Estate*, 14 York Leg. Rec. (Pa.) 77; *Fendrick's Estate*, 20 Lanc. L. Rev. 69; *Walsh's Estate*, 35 Pittsb. Leg. J. N. S. (Pa.) 289.

Special compensation is proper for the trouble and expense of caring for and distributing in kind personal or real estate which the representative has no authority to convert into money, commissions not being ordinarily allowable for such services. *Reed v. Reed*, (Ky. 1902) 66 S. W. Rep. 819; *Glover v. Check*, 71 S. W. Rep. 438, 24 Ky. L. Rep. 1281, modified on rehearing on other grounds (Ky. 1903) 72 S. W. Rep. 302.

**2. What Constitutes An Account.** — An account is simply a statement of the items set forth in the inventory, and of subsequent collections and payments and charge for services. *West v. Municipal Ct.*, 25 R. I. 84.

An account of an executor or administrator is not what he chooses to make an account. It must be of some matter as to which either the will itself or the law has imposed on him a duty. *Duffy's Estate*, 209 Pa. St. 390.

**Form and Requisites Prescribed by Statute in Some States.** — *Matter of Adams*, 131 Cal. 415; *In re Davis*, 31 Mont. 421; *Re Partridge*, 31 Oregon 297; *In re Osburn*, 36 Oregon 8; *Re Chambers*, 38 Oregon 131; *Conser's Estate*, 40 Oregon 138; *McShan v. Lewis*, 33 Tex. Civ. App. 253.

**Matters of Distribution.** — *Tasker's Estate*, 14

Pa. Dist. 435; *Brinton's Estate*, 21 Lanc. L. Rev. 76.

In *California* the only items which are properly settled in an account are items relating purely to the administration of the estate — charges of administration and payment of debts of the decedent. Matters relating to distribution are entirely out of place. *Matter of Willey*, 140 Cal. 238. See also *In re Thayer*, (Cal. 1905) 81 Pac. Rep. 658.

The showing required to be made by an executor or administrator before he is entitled to a discharge, that he has paid or delivered the property of the estate to the parties entitled thereto, is not usually styled an account, but it has all the essential attributes thereof. *McAdoo v. Sayre*, 145 Cal. 344.

**Inventory of Assets — Intermediate and Final Accounts.** — Intermediate accounts are only to inform the court and the interested parties of the receipts and disbursements and changes in the property from time to time and need not contain a full inventory of the assets of the estate. This properly belongs to the inventory which is filed, except the actual cash on hand, which the law appears to contemplate should be carried forward in the several accounts rendered to the court. *In re Davis*, 31 Mont. 421.

**Debits and Credits.** — An executor's account, where there is an estate and allowances are expected, must show both debit and expected credits. *Maxwell v. McCreery*, 57 N. J. Eq. 287.

**Accounts as Representative and as Trustee.** — The blending into one account of the transactions of the accountant as representative of the decedent, and as trustee under the will, is always irregular and tends to confusion. *Simon's Estate*, 9 Pa. Dist. 59, reversed on other grounds 20 Pa. Super. Ct. 450.

**Account of Representative of Deceased Executor or Administrator.** — The account of a legal representative settling the accounts of his decedent as executor or administrator should embrace only the receipts and expenditures of his decedent as such executor or administrator. *Tasker's Estate*, 14 Pa. Dist. 435.

**Footings.** — The account should show, in formal terms, the balance remaining in the hands of the accountant, and not leave the amount to be ascertained by calculation. *McCullough's Estate*, 14 Pa. Dist. 7, citing *Ahl's Estate*, 192 Pa. St. 370.

**Second Account.** — A second account should commence with the balance due upon the first, to which should be added the receipts, if any, and credits for expenditures, if any. *Nowland v. Rice*, (Mich. 1904) 101 N. W. Rep. 214.

**Disbursements in Completing Decedent's Contracts.** — Payments made in completing contracts of the decedent out of money received thereon should not be entered in the administration account but included in a separate account. *Walsh's Estate*, 35 Pittsb. Leg. J. N. S. (Pa.) 289.

**1310. 1. Account of Proceeds of Real Estate.** — An executor or administrator in making an



**1310.** Verification. — See note 5.

**9. Effect of Settlement — Intermediate or Partial Settlements.** — See note 6.

**1311.** See notes 2, 3, 4.

account of the proceeds of real estate should set out with reasonable fullness all such sales, giving the day of sale, the location of the land, the amount sold, and the name of the purchaser. *In re Williamson*, 7 Ohio Dec. 24, 4 Ohio N. P. 282.

**Items Relating to Real Estate** should be separately stated from those relating to personal property. *Price's Estate*, 11 Kulp (Pa.) 259.

**1310. 5. Verification by Executor or Administrator Necessary.** — *Crawford v. Clark*, 110 Ga. 729; *Browning v. Earl*, (Ky. 1900) 54 S. W. Rep. 833; *Conser's Estate*, 40 Oregon 138.

**In Wisconsin** it is provided by rule, § 6 of rule 15 of the rules of County Courts, that even in case of no contest a final account shall not be allowed of course by the County Court, but the court shall be satisfied of its correctness before allowing the same. *Fitch Huntington*, (Wis. 1905) 102 N. W. Rep. 1066.

**Judicial Notice.** — There may, perhaps, be items in a final account so entirely within the official knowledge of the county judge, from the records of the estate in his custody, that formal introduction of evidence would be unnecessary in their support. *Fitch v. Huntington*, (Wis. 1905) 102 N. W. Rep. 1066.

**Effect of Verification.** — *Contra*, *Barry v. American White Lead, etc.*, Works, 107 La. 236; *La Sage's Succession*, 112 La. 857. See also *Conery's Succession*, 106 La. 50. *Compare Rabasse's Succession*, 50 La. Ann. 746.

An account is not evidence as to contested items. *Matter of Shively*, 145 Cal. 400.

A credit for small sums "is sustained by the oath of the accountant to the correctness of the account, under the principle of *Everard v. Warren*, 2 Ch. Cas. 249, said to be 'an established principle of equity' (*Gresley's Equity Evidence* \*366) and recognized as such in *Pennsylvania* (*Baker v. Williamson*, 4 Pa. St. 469)." *McCann's Estate*, 11 Pa. Dist. 244.

**6. Effect of Periodical or Partial Settlements — Georgia.** — *Crawford v. Clark*, 110 Ga. 735, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1310; *Tate v. Gaidner*, 119 Ga. 133.

**Iowa.** — *Matter of Sawyer*, 124 Iowa 485.

**Kansas.** — *Young v. Scott*, 59 Kan. 621; *Calman v. Savidge*, 68 Kan. 620.

**Louisiana.** — *Stille's Succession*, 52 La. Ann. 1538; *Miguez v. Delcambre*, 109 La. 1090.

**Maryland.** — *Hoffman v. Hoffman*, 88 Md. 60.

**Michigan.** — *Cheever v. Ellis*, 134 Mich. 645, 10 Detroit Leg. N. 624.

**Minnesota.** — *Kittson v. St. Paul Trust Co.*, 78 Minn. 330, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1310.

**Missouri.** — *Ladd v. Stephens*, 147 Mo. 319; *Ansley v. Richardson*, 95 Mo. App. 332.

**North Carolina.** — *Bean v. Bean*, 135 N. Car. 92.

**Oregon.** — *Re Chambers*, 38 Oregon 134, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1310; *Mills' Estate*, 40 Oregon 424.

**Tennessee.** — *Hall v. Hall*, (Tenn. Ch. 1900) 59 S. W. Rep. 203.

**Texas.** — *McShan v. Lewis*, 33 Tex. Civ. App. 253.

**Virginia.** — *Leavell v. Smith*, 99 Va. 374.

**West Virginia.** — *Dearing v. Selvey*, 50 W. Va. 4.

**Account Not Prima Facie Evidence until Approved by Court.** — The mere filing of an account does not constitute an adjudication. It must be approved by the court before it is binding upon the parties to any extent. *People v. Huffman*, 182 Ill. 390, reversing on other grounds 78 Ill. App. 345. *Compare Jones v. Sugg*, 136 N. Car. 143..

**Errors Apparent on Face of Account.** — No presumption of *prima facie* correctness will sustain items which appear on the face of the account to have been improperly allowed. *Marshall v. Coleman*, 187 Ill. 556, affirming 89 Ill. App. 41.

**Fraud in Stating Account.** — It is especially true that the approval of the annual exhibit of the executor or administrator does not preclude the heirs from contesting the same, where fraud in stating the account is charged. *Thomas v. Hawpe*, 35 Tex. Civ. App. 311.

**Evidence Against Sureties on Representative's Bond.** — The settlement of a partial account is *prima facie* evidence against the sureties on a bond of the representative; and the burden of proof is on them to show that a balance decreed against him therein was properly administered. *Herren's Estate*, 40 Oregon 90; *Rutenic v. Hamakar*, 40 Oregon 444.

**1311. 2. Intermediate Settlements Conclusively as to Persons Contesting — Alabama.** — *Alexander v. Bates*, 127 Ala. 328.

**California.** — *Matter of Marshall*, 118 Cal. 379; *Matter of Fernandez*, 119 Cal. 579; *Matter of Grant*, 131 Cal. 426; *Matter of Bell*, 142 Cal. 97.

**Delaware.** — *State v. Barnett*, 2 Marv. (Del.) 115.

**Kansas.** — *Young v. Scott*, 59 Kan. 621.

**Maryland.** — *Appler v. Merryman*, 91 Md. 706.

**Michigan.** — *Morton v. Johnston*, 124 Mich. 561; *Porter v. Long*, 124 Mich. 584, 7 Detroit Leg. N. 337; *Cheever v. Ellis*, 134 Mich. 645; 10 Detroit Leg. N. 624.

**Minnesota.** — *Kittson v. St. Paul Trust Co.*, 78 Minn. 330, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1311.

**New York.** — *Matter of Prentice*, 160 N. Y. 568, affirming 25 N. Y. App. Div. 209, motion for reargument denied 161 N. Y. 630; *Matter of Douglas*, 60 N. Y. App. Div. 64; *Matter of Union Trust Co.*, 65 N. Y. App. Div. 449, affirmed without opinion 174 N. Y. 541; *Matter of Rainforth*, (Surrogate Ct.) 40 Misc. (N. Y.) 609.

**Ohio.** — *Woodward v. Curtis*, 10 Ohio Cir. Dec. 400, 19 Ohio Cir. Ct. 15.

**Oregon.** — *Herren's Estate*, 40 Oregon 90.

**Pennsylvania.** — *Brown's Estate*, 190 Pa. St. 464; *Galloway's Estate*, 5 Pa. Super. Ct. 272; *Crouse's Estate*, 16 Pa. Super. Ct. 212; *Harned's Estate*, 10 Kulp (Pa.) 183; *Reese's Estate*, 10

**1312. Final Settlements.** — See notes 1, 2, 3.

Kulp (Pa.) 524. See also Thomas's Estate, 184 Pa. St. 640.

*Texas.* — Herbert v. Harbert, (Tex. Civ. App. 1900) 59 S. W. Rep. 594.

A judgment or order of a court having jurisdiction is conclusive of all matters involved which might have been disputed at the hearing, although no objection was in fact made. This rule applies to the settling of accounts, the same as to any other proceeding. Matter of McDougald, 146 Cal. 191.

**Semiannual Returns of Public Administrators.** — The returns required to be made by public administrators under Civ. Code Cal., § 1736, are not judicial settlements such as the accounts of other personal representatives, and do not conclusively establish any facts stated in them. Matter of Hedrick, 127 Cal. 184.

**Executors Who Are Also Trustees.** — Funds distributed to executors as trustees on a partial account are improperly included in a subsequent account by them as executors. Glesenkamp's Estate, 34 Pittsb. Leg. J. N. S. (Pa.) 155.

**Conclusiveness as to Matters Not Involved.** — See *infra*, this title, **1313**, 3, 4.

**1311. 3. Annual Settlement Generally Binding on Executor or Administrator.** — Carver's Estate, 123 Cal. 102; Tate v. Gairdner, 119 Ga. 133; Nowland v. Rice, (Mich. 1904) 101 N. W. Rep. 214; Matter of Douglas, 60 N. Y. App. Div. 64. See also Rabasse's Succession, 50 La. Ann. 746.

**4. Statement of Account Not Admission that Balance Is in Hand.** — Arendale v. Smith, 107 Ga. 494.

**Presumption.** — The statement of the account raises a presumption that the representative has funds in hand to make distribution to the extent that he reports payments as due to distributees. *In re Schooler*, 73 Mo. App. 301.

**1312. 1. Final Settlement Conclusive until Vacated or Set Aside** — *United States.* — Hiller v. Ladd, (C. C. A.) 85 Fed. Rep. 703; Sherman v. American Cong. Assoc., 113 Fed. Rep. 609, affirming 98 Fed. Rep. 495; Clarke v. Eureka County Bank, 116 Fed. Rep. 534.

*Arkansas.* — Washington v. Govan, 73 Ark. 612.

*California.* — Crew v. Pratt, 119 Cal. 139; Ashton v. Heydenfeldt, 124 Cal. 14; McKeeby v. Los Angeles, 125 Cal. 639; Toland v. Earl, 129 Cal. 148, 79 Am. St. Rep. 100; Matter of Grant, 131 Cal. 426; Matter of Pichoir, 146 Cal. 404. See also Matter of Young, 123 Cal. 337.

*Delaware.* — State v. Barnett, 2 Marv. (Del.) 115.

*Illinois.* — People v. Kohlsaatt, 168 Ill. 37, affirming 66 Ill. App. 505.

*Indiana.* — Kuhn v. Boehne, 27 Ind. App. 340.

*Iowa.* — Tucker v. Stewart, 121 Iowa 714.

*Kansas.* — Crane v. Lowe, 59 Kan. 606; Scruggs v. Scruggs, 69 Kan. 489.

*Louisiana.* — Rabasse's Succession, 50 La. Ann. 746; Wiemann's Succession, 112 La. 293.

*Maine.* — Graffam v. Rav, 91 Me. 234.

*Michigan.* — Maney v. Casserly, 134 Mich. 252, 10 Detroit Leg. N. 505; Houghteling v. Stockbridge, 136 Mich. 544, 11 Detroit Leg. N. 100.

*Missouri.* — Smith v. Hauger, 150 Mo. 437;

Bishop v. Chase, 156 Mo. 158, 79 Am. St. Rep. 515; Johnson v. Johnson, 72 Mo. App. 386; Tonnies v. McIntyre, 82 Mo. App. 268; State v. Carroll, 101 Mo. App. 110.

*Nebraska.* — Shelby v. Creighton, 65 Neb. 485.

*New York.* — Matter of Killan, 172 N. Y. 547, reversing on other grounds 66 N. Y. App. Div. 312; Reilly v. Porcher, 46 N. Y. App. Div. 290; Kager v. Brenneman, 47 N. Y. App. Div. 63, 30 Civ. Pro. (N. Y.) 168; Shimmel v. Morse, 57 N. Y. App. Div. 434, affirming (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 257; Skillin v. Central Trust Co., 80 N. Y. App. Div. 206; Matter of Foulds, (Surrogate Ct.) 35 Misc. (N. Y.) 171; Matter of Wait, (Surrogate Ct.) 39 Misc. (N. Y.) 74, 12 N. Y. Annot. Cas. 141; Matter of Stevens, (Surrogate Ct.) 40 Misc. (N. Y.) 377; Matter of David, (Surrogate Ct.) 44 Misc. (N. Y.) 337.

A judicial settlement of the account of an administrator or executor is conclusive evidence against all the parties who were duly cited or appeared, and all persons deriving title from any of them, of the facts stated in the subdivisions of section 2742, Code Civ. Pro.; and the items therein specified practically cover the entire administration of an estate. Matter of Turner, 79 N. Y. App. Div. 495.

*Ohio.* — James v. West, 67 Ohio St. 28; Snider v. Graham, 8 Ohio Cir. Dec. 3, 14 Ohio Cir. Ct. 386; Kinsella v. De Camp, 8 Ohio Cir. Dec. 352, 15 Ohio Cir. Ct. 494; Clark v. Clark, 8 Ohio Cir. Dec. 752, 16 Ohio Cir. Ct. 103; *In re Koehnken*, 25 Ohio Cir. Ct. 245, modifying 11 Ohio Dec. 799, 8 Ohio N. P. 657; Smith v. Hayward, 5 Ohio Dec. 462, 5 Ohio N. P. 501.

*Oklahoma.* — Greer v. McNeal, 11 Okla. 519.

*Oregon.* — Conant's Estate, 43 Oregon 530.

*Pennsylvania.* — Yocum v. Commercial Nat. Bank, 195 Pa. St. 411, affirming 8 Pa. Dist. 631; Patton's Estate, 19 Pa. Super. Ct. 545; Hart's Estate, 12 Pa. Dist. 47, 28 Pa. Co. Ct. 126; Volans's Estate, 12 Pa. Dist. 716; Alexander's Estate, 14 Pa. Dist. 155; Monroe's Estate, 9 Kulp (Pa.) 334; Harned's Estate, 10 Kulp (Pa.) 183.

*Rhode Island.* — Doringh, Petitioner, 20 R. I. 459.

*Texas.* — Long v. Wooters, 18 Tex. Civ. App. 35; Watkins v. Sansom, 22 Tex. Civ. App. 178; Ball v. Ball, (Tex. Civ. App. 1898) 45 S. W. Rep. 605.

*Utah.* — Ehrngren v. Gronlund, 19 Utah 411.

*Wisconsin.* — Vaughn v. Walsh, 122 Wis. 486.

*Canada.* — The Ontario Surrogates' Act, § 72, authorizes an executor or administrator to file in the surrogate court an account of his dealings with the estate, and provides that if the judge has approved thereof in whole or in part, such approval, except in the case of mistake or fraud, shall be binding on all persons notified or present at the proceedings if the executor or administrator is subsequently required to pass his accounts in the high court. Cunningham v. Cunningham, 2 Ont. L. Rep. 511.

**Proceeding Characterized as in Rem.** — Such proceedings have been said not to be, as a rule, *in personam* but *in rem*, and if regular, bind-

**1313.** See note 1.

Persons Who Were Not Made Parties. — See note 2.

ing upon all persons equally, whether they appear personally to take part in the controversies or proceedings or hold themselves aloof. Matter of Crawford, 11 Ohio Cir. Dec. 605, 21 Ohio Cir. Ct. 554, *affirmed* 68 Ohio St. 58.

**Distribution and Discharge Not Essential to Finality of Account.** — The finality and conclusiveness of a decree settling the account is not affected by the fact that distribution has not been made thereunder, the receipts for payments filed and the representative discharged. Froebrieh v. Lane, 45 Oregon 13, 106 Am. St. Rep. 634.

**Effect as to Sales and Investments.** — The settlement is a final and conclusive determination as to the propriety of the sales of securities and the investment of the funds of the estate, prior to the filing of the accounts and therein set forth and disclosed. Matter of Halsted, (Surrogate Ct.) 41 Misc. (N. Y.) 606.

**Effect as to Allowance of Special Compensation — Georgia.** — In Georgia by statute "in no case is the allowance of extra compensation by the ordinary conclusive upon the parties in interest." Gairdner v. Tate, 110 Ga. 456.

**Sufficiency of Assets to Satisfy Order Directing a Payment — New York.** — Under the New York statutes a decree on the judicial settlement of the account, directing payment, is conclusive evidence that there are sufficient assets in the hands of the legal representative to satisfy it, except where the account is stated by the legal representative of a deceased executor or administrator. Matter of Seaman, 63 N. Y. App. Div. 49.

**1312. 2. Final Settlement Conclusive on Sureties of Executor and Administrator.** — See *supra*, this title, **901. 2 et seq.**

**3. Effect on Authority to Appoint an Administrator De Bonis Non.** — Prior to Burns's Annot. Stat. Ind. (1894), § 2395, the approval of the final settlement and account was an adjudication of whether the administrator had turned into the estate all the personality belonging to it, and all claims of whatever nature. Under the act the estate may be opened up for the purpose of administering omitted assets through an administrator *de bonis non* without setting aside such settlement, which continues to be a final adjudication in other respects. Michigan Trust Co. v. Probasco, 29 Ind. App. 109. See *supra*, this title, **793. 5. Effect of Final Discharge.**

**Executor Who Is Also Trustee.** — An actual appropriation or transfer to a trustee by an executor of funds which are to be part of a trust fund, with the rendering of a probate account containing a statement of such appropriation or transfer, and the final allowance of that account in court, works a discharge of the executor's liability as such. Brigham v. Morgan, 185 Mass. 27.

**1313. 1. Final Settlement Alone Does Not Discharge Representative.** — Ramser v. Blair, 123 Ala. 139; Whetstone v. McQueen, 137 Ala. 301; Miguez v. Delcambre, 109 La. 1090; Tonnies v. McIntyre, 82 Mo. App. 268; Matter of Chase, (Surrogate Ct.) 40 Misc. (N. Y.) 616; Rey-

nolds's Estate, 195 Pa. St. 225. Compare People v. Kohlsaat, 66 Ill. App. 505, *affirmed* 168 Ill. 37.

**Contra** if followed by a final decree assigning the residue of the estate to the heirs or distributees, and distribution accordingly. State v. Probate Ct., 84 Minn. 289. Compare Security Trust Co. v. Dent, (C. C. A.) 104 Fed. Rep. 380 (construing Minnesota statute).

Until a decree is entered in the probate court discharging the executor or administrator, the office continues, and the representative remains clothed with the duties of his office, and subject to the control and supervision of the court. Francisce v. Wingfield, 161 Mo. 542.

**Executor Who Is Also Trustee.** — *In re Timmis*, (1902) 1 Ch. 176; Mahoney v. Bernhard, 45 N. Y. App. Div. 499, *affirmed* on opinion below 169 N. Y. 589; Willets v. Haines, 96 N. Y. App. Div. 5, *affirmed* 182 N. Y. 543; Rosen v. Ward, 96 N. Y. App. Div. 262; Hart's Estate, 12 Pa. Dist. 47, 28 Pa. Co. Ct. 126; Henson's Estate, 12 Pa. Dist. 326.

**In Equity**, which looks to the real transactions of the parties, and regards as done what ought to have been done, the power of an executor to maintain a suit must be regarded as terminated, where he is sole residuary legatee and the estate has been fully settled. Moffitt v. Rosencrans, 136 Cal. 416.

**2. Final Settlement Not Conclusive as to Persons Not Parties — United States.** — Scruggs v. Scruggs, 105 Fed. Rep. 28; Canfield v. Canfield, (C. C. A.) 118 Fed. Rep. 1.

*Indiana.* — Rush v. Kelley, 34 Ind. App. 449; State v. Burkam, 23 Ind. App. 271.

*Louisiana.* — Landry v. Landry, 105 La. 362; Miguez v. Delcambre, 109 La. 1090.

*Massachusetts.* — Bassett v. Fidelity, etc., Co., 184 Mass. 210, 100 Am. St. Rep. 552.

*New York.* — Matter of Killan, 172 N. Y. 547, *reversing* 66 N. Y. App. Div. 312; Matter of Gall, 182 N. Y. 270, *modifying* on other grounds mem. judgment, 102 N. Y. App. Div. 624; Matter of Gall, 40 N. Y. App. Div. 114, 42 N. Y. App. Div. 255, 47 N. Y. App. Div. 490; Hetzel v. Easterly, 96 N. Y. App. Div. 517; Matter of Schulz, (Surrogate Ct.) 26 Misc. (N. Y.) 688.

*Washington.* — Matter of Sullivan, 36 Wash. 217.

Where an executor or administrator is required to "render and settle his account" in proceedings for a compulsory accounting under sections 2726 and 2727 of the Code of Civil Procedure, the proceeding is confined to the original parties until it is made to appear "that there is a surplus distributable to creditors or persons interested," and until the surrogate has issued a supplemental citation. Matter of Sogaard, (Surrogate Ct.) 39 Misc. (N. Y.) 519.

**Minor Heirs — Necessity for Guardian.** — Stevens v. Meserve, (N. H. 1905) 61 Atl. Rep. 420; Tysseur's Estate, 31 Pittsb. Leg. J. N. S. (Pa.) 86.

**Executor or Administrator Without Notice.** — A decree settling the account of an executor or administrator without notice to him or knowledge on his part will be set aside at his suit.



**1313.** As to Matters Not Included in the Settlement. — See notes 3, 4.

**1314.** 10. Opening and Setting Aside Settlements — *a.* INTERMEDIATE OR PARTIAL SETTLEMENTS. — See note 1.

Matter of Gorman, 49 N. Y. App. Div. 637. See also Matter of White, 52 N. Y. App. Div. 225, *appeal dismissed without opinion* 170 N. Y. 575.

**Settlement Before Time Has Arrived When Account Can Be Compelled.** — When a final account is settled before the expiration of the statutory period within which an account cannot be compelled, no one is bound except those who are in fact parties to the settlement. *Jones v. Harbaugh*, 93 Md. 269.

**Attorney for Executor or Administrator.** — The right of action of an attorney for services rendered a personal representative is against the latter individually, and he is not a "person interested in the estate," within a statute making a settlement of accounts conclusive on such persons. *Briggs v. Breen*, 123 Cal. 657.

**1313.** 3. Final Settlement Not Conclusive as to Matters Not Adjudicated — *United States.* — *Canfield v. Canfield*, (C. C. A.) 118 Fed. Rep. 1. *California.* — *Matter of Adams*, 131 Cal. 415. See also *Matter of Young*, 123 Cal. 337.

*Colorado.* — *French v. Woodruff*, 25 Colo. 339.

*Illinois.* — *People v. Huffman*, 182 Ill. 390, *reversing on other grounds* 78 Ill. App. 345.

*Indiana.* — *Graham v. Russell*, 152 Ind. 186.

*Iowa.* — *Tucker v. Stewart*, 121 Iowa 714.

*Michigan.* — *Porter v. Long*, 124 Mich. 584, 7 Detroit Leg. N. 337.

*Missouri.* — *Bramell v. Adams*, 146 Mo. 70; *In re Schooler*, 73 Mo. App. 301; *State v. Stuart*, 74 Mo. App. 182.

*New York.* — *Corse v. Chapman*, 153 N. Y. 466, *affirming mem. judgment* (Supm. Ct. Gen. T.) 36 N. Y. Supp. 1124; *Frethey v. Durant*, 24 N. Y. App. Div. 58; *Matter of Arkenburgh*, 38 N. Y. App. Div. 473, *reversing on other grounds* (Surrogate Ct.) 13 Misc. (N. Y.) 744; *Matter of Meyer*, 95 N. Y. App. Div. 443, *affirmed* 181 N. Y. 562; *Hetzl v. Easterly*, 96 N. Y. App. Div. 517; *Matter of Whitbeck*, (Surrogate Ct.) 22 Misc. (N. Y.) 494; *Arkenburgh v. Arkenburgh*, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 760, *affirmed on opinion* below 49 N. Y. App. Div. 636, which was *affirmed without opinion* 176 N. Y. 551; *Harrison v. McAdam*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 18.

*Ohio.* — *Woodward v. Curtis*, 10 Ohio Cir. Dec. 400, 19 Ohio Cir. Ct. 15.

*Pennsylvania.* — *Galloway's Estate*, 5 Pa. Super. Ct. 272; *Spencer's Estate*, 11 Kulp (Pa.) 199.

*Texas.* — *Thomas v. Hawpe*, 35 Tex. Civ. App. 311.

*Virginia.* — *Tidball v. Shenandoah Nat. Bank*, 98 Va. 768.

*Washington.* — *Ball v. Clothier*, 34 Wash. 299.

**What Final Decree Determines.** — A decree on final settlement determines nothing beyond the amount received and paid out by the representative and the balance, if any, in his hands belonging to the estate, or due to him from it. *Matter of Doheny*, 70 N. Y. App. Div. 370, *affirmed without opinion* 171 N. Y. 691.

**Theory as to Distribution.** — The decree of the court upon an account regulating distribution is conclusive only as to the fund then distributed, and does not determine that all subsequent distributions must be made on the same theory. *Stahl's Estate*, 25 Pa. Super. Ct. 402.

**4. Further Accounting.** — *Matter of Mitchell*, (Surrogate Ct.) 41 Misc. (N. Y.) 603; *Mutchmore's Estate*, 9 Pa. Dist. 293, 24 Pa. Co. Ct. 257; *Stouffer's Estate*, 14 Pa. Dist. 108, 30 Pa. Co. Ct. 204; *Pelham's Estate*, 9 Kulp (Pa.) 347; *Rogan's Estate*, 10 Kulp (Pa.) 138; *Reese's Estate*, 10 Kulp (Pa.) 524; *Beyersbach's Estate*, 18 Lanc. L. Rev. 381; *Thomas v. Hawpe*, 35 Tex. Civ. App. 311.

**Scope of Rule.** — In *Pennsylvania* it has been held to be well established that administrators will only be compelled to file supplemental accounts for matters occurring after the settlement of their final accounts. *Irvine's Estate*, 209 Pa. St. 325.

**Supplemental Account to Obtain Credits.** — A supplemental account may be filed for the purpose of obtaining credit for items of expense incurred in the administration and not included in the settlement. *Matter of Blair*, 67 N. Y. App. Div. 116.

**Remedy for Errors in Account.** — An application for a review and not the filing of a supplemental account is the proper remedy for correcting errors in a former account. *Fleming's Estate*, 32 Pittsb. Leg. J. N. S. (Pa.) 439.

**After Final Accounting and Discharge.** — An administrator whose final account has been homologated and who has been discharged cannot be compelled to render a further account so long as the decree of final settlement and discharge remains unopened. *Dauphin's Succession*, 113 La. 208, 112 La. 103.

**Moneys Received After Filing Account but Before Decree Thereon.** — The amount of the proceeds of a sale of property made after the filing of an account but before decree thereon, in excess of the inventory price, should be brought into the account. If this is not done a further accounting for the excess is necessary. *Matter of Mitchell*, (Surrogate Ct.) 41 Misc. (N. Y.) 603. *Contra* of an intermediate account. *Mutchmore's Estate*, 9 Pa. Dist. 293, 24 Pa. Co. Ct. 257, holding that funds received subsequent to the filing form the subject of a further account, and cannot be surcharged on the settlement of the former.

**Unexplained Shrinkage of Assets Between Two Accounts.** — Where there is an unexplained shrinkage of assets between two accounts, the accountant will be ordered to file a further account, explaining the apparent disappearance of assets. *Jennings's Estate*, 10 Pa. Dist. 90.

**1314.** 1. Falsifying, Surcharging, or Correcting Annual Settlements — *Illinois.* — *People v. Huffman*, 182 Ill. 390, *reversing on other grounds* 78 Ill. App. 345; *Marshall v. Coleman*, 187 Ill. 556, *affirming* 89 Ill. App. 41; *Ford v. Stuart First Nat. Bank*, 100 Ill. App. 70, *reversed on other grounds* 201 Ill. 120.

*Iowa.* — In *Iowa* it is provided by statute,

**1314.** *b. FINAL SETTLEMENTS — (1) Jurisdiction — (a) Courts of Probate — General Rule.* — See notes 3, 4.

**1315.** *Equity Power of Courts of Probate.* — See note 1.  
*Statutory Power of Court of Probate.* — See note 2.

(*b*) *Courts of Equity.* — See note 3.

**1316.** (*2*) *Grounds for Setting Aside Final Settlements — (a) In Equity.* — See note 1.

Code Iowa 3398, that "mistakes in settlements may be corrected in the probate court at any time before his final settlement and discharge, and after that time by equitable proceedings, on showing such grounds as will justify the interference of the court." *Dorris v. Miller*, 105 Iowa 564; *In re Cummings*, 120 Iowa 421; *Tucker v. Stewart*, 121 Iowa 714; *Matter of Sawyer*, 124 Iowa 485.

*Louisiana.* — *Stelle's Succession*, 52 La. Ann. 1538.

*Maryland.* — *Hoffman v. Hoffman*, 88 Md. 60. So long as an estate is open (which means not finally closed and settled), the accounts of the executor or administrator in that court are subject to revision and correction as to any matter discovered to be error. *Cummings v. Robinson*, 95 Md. 83.

*Massachusetts.* — *Brigham v. Morgan*, 185 Mass. 27.

*Missouri.* — *Springfield Grocer Co. v. Walton*, 95 Mo. App. 526.

*Nebraska.* — *Boales v. Ferguson*, 55 Neb. 565.

*New York.* — *Matter of Henderson*, 157 N. Y. 423, *affirming* 33 N. Y. App. Div. 545.

*The Burden of Proof.* — *Raison v. Williams*, (Ky. 1897) 42 S. W. Rep. 1108.

*Exceptions to Account.* — Exceptions properly refer to the contents of the account and not to extraneous subjects. The right to file a partial account implies the correlative right to exclude a part. *Galloway's Estate*, 5 Pa. Super. Ct. 272.

*Power to Open Account to Be Cautiously Exercised.* — The power to reopen accounts of executors and administrators, and correct errors therein, should be cautiously exercised, if there is danger of prejudicing the rights of parties who have innocently acted under the account as originally stated. *Hoffman v. Armstrong*, 90 Md. 123; *Geesey v. Geesey*, 94 Md. 371, 96 Md. 630.

*Effect of Assent of Beneficiaries to Approval of Account as Stated.* — The assent of beneficiaries to the approval of accounts as filed is not binding on them where, without their knowledge, the facts contained therein were wilfully misstated by the accountants. *Brigham v. Morgan*, 185 Mass. 27.

**1314. 3. Void Settlements Opened by Court of Probate.** — *Conant's Estate*, 43 Oregon 530.

*Final Settlement Leaving Taxes on Property of Estate Unpaid — Indiana.* — In Indiana a final settlement made without payment of taxes due on property of the estate is illegal, and may be set aside for the purpose of compelling such payment. *Cullop v. Vincennes*, 34 Ind. App. 667.

**4. Errors Corrected Only by Appeal or by Suit in Equity.** — *Smith v. Hauger*, 150 Mo. 427; *State v. Carroll*, 101 Mo. App. 110; *Reilly v. Porcher*, 46 N. Y. App. Div. 290.

A final settlement will not be reversed to

rectify technical and trifling errors, where such action would entail expense upon other persons interested in the succession without benefit to the objecting party. *Peters's Succession*, 114 La. 952.

**1315. 1. Equitable Power of Probate Court to Open Final Settlement.** — *Heppe v. Szczepanski*, 209 Ill. 88, 101 Am. St. Rep. 221; *Matter of Seaman*, 63 N. Y. App. Div. 49.

The power of a surrogate to open his decree on the ground of clear mistake, accident, or fraud is undoubted, but the power should be cautiously exercised. It should never be used for the purpose of enabling the surrogate to review his own decision. The only appropriate method of review is by appeal. *Matter of Walrath*, (Surrogate Ct.) 37 Misc. (N. Y.) 696.

**2. Statutory Power of Probate Court to Open Final Settlement.** — *Clemes v. Fox*, 25 Colo. 39; *Matter of Morris*, 65 N. J. Eq. 699.

*In Massachusetts*, if there is error, the error must be corrected in the probate court, as it may be if there was fraud or if the party in question had not such notice as to be concluded by the decree. *Bassett v. Fidelity, etc., Co.*, 184 Mass. 210, 100 Am. St. Rep. 552.

**3. Final Settlements Set Aside in Equity — Illinois.** — *Anderson v. Anderson*, 178 Ill. 160.

*Indiana.* — *Rush v. Kelley*, 34 Ind. App. 449; *Kingman v. Hawley*, 29 Ind. App. 376.

*Iowa.* — See cases cited *supra*, this title, **1314. 1.**

*Kentucky.* — *Roll v. Stum*, (Ky. 1898) 46 S. W. Rep. 223.

*Michigan.* — *Maney v. Casserly*, 134 Mich. 252, 10 Detroit Leg. N. 505.

*Missouri.* — *Baldwin v. Dalton*, 168 Mo. 20; *sub nom. Baldwin v. Davidson*, 139 Mo. 118, 61 Am. St. Rep. 460.

*New Jersey.* — *Bird v. Hawkins*, 58 N. J. Eq. 229.

*Oregon.* — *Froebrich v. Lane*, 45 Oregon 13, 106 Am. St. Rep. 634.

*Foreign Decree.* — A foreign decree settling the account of a personal representative may be set aside for fraud or imposition in its procurement. *Coleman v. Howell*, 131 N. Car. 125.

*Burden of Proof.* — It is a well-settled rule in equity that one who objects to a stated account must surcharge or falsify. An account rendered by an administrator or executor to the ordinary is a stated account, within the meaning of this rule; and when such an account is attacked in equity the burden of proof is upon him who surcharges or falsifies. *Tate v. Gairdner*, 110 Ga. 133.

**1316. 1. Equitable Grounds for Setting Aside Final Settlements — Fraud, Mistake, or Accident.** — *James v. Gibson*, 73 Ark. 440; *Welch v. Lewis*, 104 Ky. 531; *Woodward v. Curtis*, 10 Ohio Cir. Dec. 400, 19 Ohio Cir. Ct. 15; *Con-*



**1316.** The Fraud. — See notes 2, 3.

Mistakes. — See note 4.

**1317.** (b) Statutory Grounds. — See note 1.

**1318.** (3) *Distinction Between Opening, Settlement, and Surcharging or Falsifying Account.* — See note 1.

ant's Estate, 43 Oregon 530. See also Central Nat. Bank v. Fitzgerald, 94 Fed. Rep. 16.

A court of equity cannot be utilized for the correction of errors and irregularities; and where the party has had an opportunity to be heard in the original proceeding and to have the matters revised on appeal, but has neglected to avail himself thereof, he is not entitled to redress in the equitable forum. Froebrieh v. Lane, 45 Oregon 13, 106 Am. St. Rep. 634.

**Mere Illegal Allowances.** — Ladd v. Nystol, 63 Kan. 23; Baldwin v. Dalton, 168 Mo. 20; Warden v. Busbee, 89 Mo. App. 113.

**1316. 2. Omitting Proper Charges.** — *Contra*, that the proper remedy is to compel the filing of a supplemental account, Stouffer's Estate, 14 Pa. Dist. 108; Beyerbach's Estate, 18 Lanc. L. Rev. 381; Rogan's Estate, 10 Kulp (Pa.) 139.

**Improper Credits.** — Where an administrator has entered into an agreement limiting the amount to be allowed him for compensation and attorney's fees, he is guilty of fraud in taking credit for a larger sum. Froebrieh v. Lane, 45 Oregon 13, 106 Am. St. Rep. 634.

**3. Clear and Satisfactory Evidence of Fraud Required.** — Smith v. Buchanan, (Iowa 1903) 96 N. W. Rep. 1086; Finley's Estate, 196 Pa. St. 140, affirming 8 Pa. Dist. 723. See also Ladd v. Nystol, 63 Kan. 23.

**4. Mistakes of Fact.** — *Contra*, Dorris v. Miller, 105 Iowa 564, where the court said: "This may have been a mistake of law, but equity will, in a proper case, grant relief from such a mistake."

**In Alabama, by Statute**, errors of law or fact, to the injury of any party, without any fault or neglect on his part, may be corrected by a bill in equity. Seals v. Weldon, 121 Ala. 319.

**1317. 1. Statutory Grounds for Setting Aside Final Settlement — The New York Statute.** — Matter of Henderson, 33 N. Y. App. Div. 545, affirmed 157 N. Y. 423; Matter of Douglas, 52 N. Y. App. Div. 303; Matter of McManus, 66 N. Y. App. Div. 53, reversing on other grounds (Surrogate Ct.) 35 Misc. (N. Y.) 678.

**"Other Sufficient Cause."** — Matter of White, 52 N. Y. App. Div. 225, appeal dismissed without opinion 170 N. Y. 575; Matter of Seaman, 63 N. Y. App. Div. 49; Matter of Monteith, (Surrogate Ct.) 27 Misc. (N. Y.) 163. See also Matter of Mount, (Surrogate Ct.) 27 Misc. (N. Y.) 411; Matter of McCormick, (Surrogate Ct.) 27 Misc. (N. Y.) 416.

The failure to file vouchers for payments as required by statute is sufficient ground for vacating and setting aside the decree. Matter of Wicke, 74 N. Y. App. Div. 221.

The principle is clearly recognized and established that the surrogate has power to open or modify his decree for clerical errors, but has not for errors of substance; that the latter errors should be corrected by appeal and not by motion. Matter of Walrath, (Surrogate Ct.) 37 Misc. (N. Y.) 696.

**The Pennsylvania Statute.** — Sherwood's Es-

tate, 206 Pa. St. 465, affirming 26 Pa. Co. Ct. 589; Bailey's Estate, 208 Pa. St. 594; Bickford's Estate, 16 Pa. Super. Ct. 572; Miller's Estate, 7 Pa. Dist. 762; Finley's Estate, 8 Pa. Dist. 723, affirmed 196 Pa. St. 140; Douglass's Estate, 10 Pa. Dist. 478, 25 Pa. Co. Ct. 568; Houseman's Estate, 11 Pa. Dist. 87, 26 Pa. Co. Ct. 477; Lehigh's Estate, 11 Pa. Dist. 176; Dalton's Estate, 14 Pa. Dist. 406; Wright's Estate, 25 Pa. Co. Ct. 594; Rostonski's Estate, 7 Northam. Co. Rep. (Pa.) 214; Wilbur's Estate, 9 Kulp (Pa.) 327; Reese's Estate, 10 Kulp (Pa.) 524; Smith's Estate, 12 York Leg. Rec. (Pa.) 178; Crone's Estate, 14 York Leg. Rec. (Pa.) 89; Ehrhart's Estate, 17 York Leg. Rec. (Pa.) 137; Beyerbach's Estate, 18 Lanc. L. Rev. 381; Fleming's Estate, 32 Pittsb. Leg. J. N. S. (Pa.) 439.

The act requires that the petition set forth specifically the errors in the accounts to which objection is made, and court can only grant a rehearing on the errors alleged. Snyder's Estate, 18 Pa. Super. Ct. 462.

Review can only be demanded as matter of right for error in law apparent on the face of the record or for new matter which has arisen since the decree; though, as a matter of grace, it may be granted for new proof which has since come to light, and which was inaccessible at the original hearing. Poh's Estate, 12 Pa. Dist. 160; Bicking's Estate, 12 Pa. Dist. 257; Price's Estate, 12 Pa. Dist. 693; Been's Estate, 13 Pa. Dist. 695.

On the application for the review, the onus, in the first instance, is upon the petitioner, whether the accountant or another, to establish some good ground to justify vacating the decree of confirmation. Unruh's Estate, 10 Pa. Dist. 293, 25 Pa. Co. Ct. 257, 15 York Leg. Rec. (Pa.) 23; Brooke's Estate, 10 Pa. Dist. 447, 25 Pa. Co. Ct. 416; Bicking's Estate, 12 Pa. Dist. 159, 28 Pa. Co. Ct. 299; Fitch's Estate, 8 Lack. Leg. N. (Pa.) 150.

**The Indiana Statute** provides that a final settlement may be set aside and reopened at any time within three years for illegality, fraud, or mistake in such settlement or in the proper proceedings thereof, by any person interested in the estate who did not appear at such final settlement and was not summoned to attend the same. Graham v. Russell, 152 Ind. 186.

**The Oregon Statute** provides for the relief of a party from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect. Froebrieh v. Lane, 45 Oregon 13, 106 Am. St. Rep. 634.

**Omission of Charges Offset by Credits Omitted.** — Where charges claimed to have been omitted from an account are offset by credits claimed to have been omitted, the court may properly hear evidence on the subject, and, if the contention as to credits is sustained, refuse to open the account. Matter of Morris, 65 N. J. Eq. 699.

**1318. 1. Distinction Between Opening an**



**1318.** (4) *Who May Maintain Proceeding.* — See notes 2, 3.

**1319.** See note 1.

(5) *Time Within Which Proceeding Must Be Brought* — **Rule in Equity.** — See notes 2, 3.

**Rule in Probate Court.** — See note 4.

c. **SETTLEMENTS OUT OF COURT.** — See note 5.

**Account and Surcharging and Falsifying It.** — It is well established that, when an account once settled is opened on proof of fraud or mistake, it is not opened generally, but only in respect to the items proved to have been omitted by fraud or mistake. *Matter of Morris*, 65 N. J. Eq. 699.

It is a familiar principle of equity that, after sufficient steps have been taken with respect to one or more items in an *ex parte* settlement or stated account to surcharge and falsify it in respect thereto, all parties to the bill may, by mere informal specifications, attack the settlement as to other items without limit. *Van Winkle v. Blackford*, 54 W. Va. 621.

When a review of an account has been ordered, the account is before the court *de novo*, and the burden is on the accountant to show its correctness, and not on the party objecting. *Bicking's Estate*, 12 Pa. Dist. 159, 28 Pa. Co. Ct. 299.

**When a Final Settlement Has Been Set Aside.** — *Bishop v. Chase*, 156 Mo. 158, 79 Am. St. Rep. 515.

**Surcharging and Falsifying.** — *Snyder's Estate*, 18 Pa. Super. Ct. 462; *Hensler's Estate*, 18 Lanc. L. Rev. 317, 2 Blair Co. Rep. (Pa.) 6.

**1318. 2. Persons Interested and Injurious Affected** — **Indiana Statute.** — *Smith v. Miller*, 21 Ind. App. 82.

**An Administrator De Bonis Non.** — See *Young v. Scott*, 59 Kan. 621.

**Guardian of Infant Heirs.** — *Roll v. Stum*, (Ky. 1898) 46 S. W. Rep. 223.

**3. Negligence of Petitioner.** — *Poh's Estate*, 12 Pa. Dist. 160, 28 Pa. Co. Ct. 208; *Bicking's Estate*, 12 Pa. Dist. 257; *Been's Estate*, 13 Pa. Dist. 695.

**1319. 1. Ratification of Settlement.** — *Matter of Mount*, (Surrogate Ct.) 27 Misc. (N. Y.) 411; *Poh's Estate*, 12 Pa. Dist. 160, 28 Pa. Co. Ct. 208.

**2. No Positive Limitation in Absence of Statute.** — *Maney v. Casserly*, 134 Mich. 252, 10 Detroit Leg. N. 505.

**Doctrine of Laches Applied.** — *Hiller v. Ladd*, (C. C. A.) 85 Fed. Rep. 703; *Kernell v. Crutcher*, (Tenn. Ch. 1901) 61 S. W. Rep. 1045; *Tidball v. Shenandoah Nat. Bank*, 98 Va. 768; *Hays v. Freshwater*, 47 W. Va. 217.

**3. Statute of Limitations.** — *Seals v. Weldon*, 121 Ala. 319.

**4. Rule in Probate Court — Time Usually Limited.** — In Delaware no account can be opened after the expiration of three years from the settlement or, in the case of persons under disability, from the ceasing of such disability. *Larkin v. Simms*, 2 Penn. (Del.) 543.

In Iowa, the statute has no application where mistake or fraud is charged. *Dorris v. Miller*, 105 Iowa 564.

In Indiana. — *Graham v. Russell*, 152 Ind. 186.

The New York Statute. — *Matter of Henderson*,

157 N. Y. 423, *affirming* 33 N. Y. App. Div. 545; *Matter of Von Glahn*, 53 N. Y. App. Div. 164. See also *Matter of Gall*, 40 N. Y. App. Div. 114, 42 N. Y. App. Div. 255, 47 N. Y. App. Div. 490.

In Pennsylvania. — *Finley's Estate*, 8 Pa. Dist. 723, *affirmed* 196 Pa. St. 140; *Price's Estate*, 12 Pa. Dist. 693; *Myers's Estate*, 13 Pa. Super. Ct. 476; *Van Syckel's Estate*, 26 Pa. Co. Ct. 412; *Creegan's Estate*, 9 Del. Co. Rep. (Pa.) 103. See also *Claghorn's Estate*, 10 Pa. Dist. 91; *Dalton's Estate*, 14 Pa. Dist. 406.

The Act, in limiting the time within which a review may be granted, does not restrict the power of the court to grant relief, except in the cases specified. Where an unconscionable advantage has been taken of a distributee, the Act does not apply. *Yung's Estate*, 9 Pa. Dist. 476, 199 Pa. St. 35, *citing* *Whelen's Appeal*, 70 Pa. St. 410.

An account may be opened after the expiration of five years for fraud on the part of the representative, if the applicant has not been guilty of laches in applying for relief. *Hensler's Estate*, 17 Lanc. L. Rev. 257. See also *Crone's Estate*, 14 York Leg. Rec. (Pa.) 89; *Finley's Estate*, 196 Pa. St. 140.

Where the appeal is addressed to the discretion of the court, the least that can be demanded of the party seeking relief is that his application shall be made with promptitude. *Poh's Estate*, 12 Pa. Dist. 160, 28 Pa. Co. Ct. 208.

A delay of nearly five years is such laches as will bar a petition for review to rectify an alleged error in an account. *Lewis's Estate*, 14 Pa. Dist. 422.

**5. Settlement Between Parties Opened Only in Equity** — *United States*. — *Littell v. Hackley*, (C. C. A.) 126 Fed. Rep. 309; *Burnes v. Burnes*, (C. C. A.) 137 Fed. Rep. 781, *affirming* 132 Fed. Rep. 485.

*Alabama.* — *Norwood v. Tyson*, 138 Ala. 269. *California.* — *Coursen's Estate*, 133 Cal. xix, 65 Pac. Rep. 965.

*Georgia.* — *Kidd v. Huff*, 105 Ga. 209; *Gairdner v. Tate*, 110 Ga. 456.

*Kentucky.* — *Boughner v. Laughlin*, 64 S. W. Rep. 856, 23 Ky. L. Rep. 1166, *extended and affirmed* 76 S. W. Rep. 519, 25 Ky. L. Rep. 860.

*Maryland.* — *Jones v. Harbaugh*, 93 Md. 269; *Cummings v. Robinson*, 95 Md. 759.

*Missouri.* — *Browning v. Richardson*, 186 Mo. 361; *State v. Stuart*, 74 Mo. App. 182.

*New Jersey.* — *Lutjen v. Lutjen*, 64 N. J. Eq. 773, *reversing* 63 N. J. Eq. 391.

*New York.* — *Thompson v. Thompson*, 180 N. Y. 311, *reversing* judgment 88 N. Y. App. Div. 618, 70 N. Y. App. Div. 242; *Murphy v. Murphy*, 44 N. Y. App. Div. 546, *affirmed* without opinion 167 N. Y. 604; *Matter of Irvin*, (Surrogate Ct.) 24 Misc. (N. Y.) 353; *Matter of Franklin*, (Surrogate Ct.) 26 Misc. (N. Y.) 107.

**1320.** See note 1.

**XIV. ADMINISTRATORS WITH THE WILL ANNEXED — 1. Powers and Duties in General.** — See notes 3, 4.

**1321. 2. Testamentary Powers Involving Personal Trust.** — See note 1.

**3. Statutory Extension of Powers.** — See note 2.

*Ohio.* — *In re Koehnken*, 25 Ohio Cir. Ct. 245, *modifying* 11 Ohio Dec. 799, 8 Ohio N. P. 657.

*Pennsylvania.* — *Hertzler's Estate*, 192 Pa. St. 531; *Brownfield's Estate*, 193 Pa. St. 151; *Young's Estate*, 204 Pa. St. 32; *Hoff's Estate*, 7 Pa. Dist. 93; *Mershon's Estate*, 8 Pa. Dist. 154, 22 Pa. Co. Ct. 278; *Root's Estate*, 8 Pa. Dist. 223; *Armstrong's Estate*, 16 Montg. Co. Rep. (Pa.) 9; *Shellenberger's Estate*, 17 York Leg. Rec. (Pa.) 130. See also *Marshall's Estate*, 32 Pittsb. Leg. J. N. S. (Pa.) 247.

*Rhode Island.* — *Tillinghast v. Brown University*, 25 R. I. 284.

*Texas.* — *Hanlon v. Wheeler*, (Tex. Civ. App. 1898) 45 S. W. Rep. 821.

*Virginia.* — *Tate v. Jones*, 98 Va. 544. See also *Preston v. Davis*, 102 Va. 178.

*Washington.* — *Griffin v. Warburton*, 23 Wash. 231.

*Wisconsin.* — *Perkins v. Owen*, 123 Iowa 238.

See also *supra*, this title, **972. 7, 1185. 2, 1186. 3.**

**Relief on Equitable Grounds.** — See particularly the following cases: *Cowen v. Adams*, (C. C. A.) 78 Fed. Rep. 536, 80 Fed. Rep. 448, *affirmed* by a divided court without opinion 174 U. S. 800; *Swinney v. Cockrell*, (Miss. 1905) 38 So. Rep. 360; *State v. Stuart*, 111 Mo. App. 478, same case on former appeals 102 Mo. App. 26, 92 Mo. App. 586, 74 Mo. App. 182; *Duhme v. Mehner*, 6 Ohio Cir. Dec. 78, 18 Ohio Cir. Ct. 706; *In re Fischer*, 189 Pa. St. 179, 43 W. N. C. (Pa.) 436, *modifying* on other grounds 28 Pittsb. Leg. J. N. S. (Pa.) 383, same case *Wehrle's Estate*, 205 Pa. St. 62, *affirming* 32 Pittsb. Leg. J. N. S. (Pa.) 233. See also *Hill's Estate*, 19 Lanc. L. Rev. 179; *Ehrngren v. Gronlund*, 19 Utah 411.

**Hotchpot Statements.** — *Kent v. Kent*, (Va. 1899) 34 S. E. Rep. 32.

**Requisites of Agreement Necessary to Bar Proceeding to Compel Account.** — The Surrogate's Court will not be ousted of jurisdiction in matters of accounting between executors or administrators and those interested in the estates of deceased persons, unless there have been acts of the parties which clearly indicate an intention between the parties to consider the estates settled and distributed, or to consider the executors or administrators discharged from further duty to them. *Kells v. People's Trust Co.*, 82 N. Y. App. Div. 548.

**Real Estate.** — Consent by legatees or distributees to a final settlement and acknowledgment of the payment of their respective shares in full, without an accounting, relates to personal estate only. Final settlements seldom, if ever, involve the title and right of possession to realty. *Boland v. Tiernay*, 118 Iowa 59.

**Executors Who Are Also Trustees.** — A release of liability as executors does not operate to release legal representatives from obligations and duties as trustees. *Matter of Dority*, 40 N. Y. App. Div. 236.

**Persons Not Parties to Agreement.** — As to creditors or other persons interested who are not parties to the agreement, a settlement out of court is not conclusive on an application by them for an accounting. *Clinton's Estate*, 8 Pa. Dist. 661, 23 Pa. Co. Ct. 209; *Kiser's Estate*, 34 Pittsb. Leg. J. N. S. (Pa.) 147.

Though a settlement has been made out of court, an intermediate accounting may be required, in a proper case, under a statute authorizing such an accounting "where an application for an order, permitting an execution to issue on a judgment against the executor or administrator, has been made by the judgment creditor." *Matter of Congregational Unitarian Soc.*, 34 N. Y. App. Div. 387.

**1320. 1. Settlements Out of Court Held Not Conclusive.** — *Francez's Succession*, 49 La. Ann. 1732.

**3. Administrator with Will Annexed Succeeds to Powers and Duties of Executor.** — *McIntire v. McIntire*, 14 App. Cas. (D. C.) 337, *affirmed* 192 U. S. 116; *Ellyson v. Lord*, 124 Iowa 125.

**Power over Real Estate.** — A "substituted administrator" under the *New Jersey Act* of 1901, Laws N. J. 1901, p. 303, which abrogates the common law governing administrators *de bonis non*, is invested with no power and charged with no duty except with respect to the personal estate of the testator. *Hoagland v. Cooper*, 65 N. J. Eq. 407. See *infra*, this title, **1332. 1.**

**Sale of Land for Payment of Debts.** — See *supra*, this title, **1077. 1.**

**Will of Married Woman Disposing of Property under Power of Apportionment.** — Where a married woman exercises a power of appointment by will, and does not name executors, or if executors named by her die or disclaim, the administrator with the will annexed is entitled to control and distribute the fund. *In re Peacock*, (1902) 1 Ch. 552.

**4. Power or Trust Annexed to Office.** — *Brannon v. Ober*, etc., Co., 106 Ga. 168; *Ellyson v. Lord*, 124 Iowa 125; *Merritt v. Merritt*, 32 N. Y. App. Div. 442, *affirmed* 161 N. Y. 634.

**Will Appointing Independent Executor.** — An administrator with the will annexed under a will which appointed an independent executor cannot exercise the powers of such executor. *Roy v. Whitaker*, 92 Tex. 346. See also *supra*, this title, **1242. 5.**

**1321. 1. A Personal Trust Imposed on the Executor.** — *Penn v. Fogler*, 182 Ill. 76, *reversing* 77 Ill. App. 365; *People v. Petrie*, 94 Ill. App. 652, *affirmed* 191 Ill. 497, 85 Am. St. Rep. 268; *Enlow v. Bethel College*, 67 S. W. Rep. 989, 24 Ky. L. Rep. 31; *Horsfield v. Black*, 40 N. Y. App. Div. 264; *Gehr v. McDowell*, 206 Pa. St. 100.

**Continuing Decedent's Business.** — *Best's Estate*, 22 Lanc. L. Rev. 6.

**2. Powers Given to Executor Extended by Statute to Administrator with Will Annexed.** — See *infra*, this title, **1322. 1 et seq.**



**1321.** 4. Power to Sell Real Property. — See note 3.

**1322.** Statutes in the United States. — See note 2.

**1323.** If a Special Trust or Confidence Is Reposed. — See note 2.

But if the Power Is Peremptory. — See note 3.

**1321.** 3. Executor as Devisee in Absolute Ownership. — Where real estate is devised to the executor absolutely and in fee, a power of sale given by the will is merged in the fee and inoperative, and cannot be exercised by an administrator with the will annexed. *Fay v. Taylor*, (Supm. Ct. Spec. T.) 31 Misc. (N. Y.) 32.

**Sale by Trustee under Decree of Court.** — In *Illinois*, if the administrator, as such, has a duty to perform in connection with the property, which requires a construction of the will and which renders it necessary that a sale should be made, he is fully authorized to file a bill for the purpose, and the court may properly construe the will on his application, and appoint a trustee to sell the land. *Stoff v. McGinn*, 178 Ill. 46, followed in *Mulligan v. Lambe*, 178 Ill. 130.

**1322.** 2. In Kentucky. — *DeHaven v. DeHaven*, 104 Ky. 41.

Where an executor has made his final settlement and turned the estate over to himself as trustee, an administrator with the will annexed has no authority to make a sale of the real estate under a power in the will that it "shall be sold whenever the property will bring a fair price, and the proceeds be invested in such a way as the trustee may think best." *Cox v. Shelby County Trust Co.*, 80 S. W. Rep. 789, 26 Ky. L. Rep. 50.

In *Missouri*. — *Francisco v. Wingfield*, 161 Mo. 542.

**The New Jersey Statute** which provides that an administrator with the will annexed shall have the same powers and authority with respect to the sale of lands of the testator as are given to or vested in the executor or executors named in said will, "whether such powers and authority constitute or shall constitute a naked power to sell lands or constitute or shall constitute a special continuing trust, and whether the discharge of the duties of such trust involves or shall involve the exercise by said executors or executor of any discretion either in point of time or method," does not apply where the power to sell devolves on the executors as trustees with trust duties to perform. *Varick v. Smith*, (N. J. 1904) 58 Atl. Rep. 168.

The sale is not valid until its terms have been approved by the Orphans' Court of the county in which the land lies. *In re Devine*, 62 N. J. Eq. 703.

**The Pennsylvania Statute**, for purposes purely administrative, gives to the devise of a power the effect of a devise of the title, and puts an administrator with the will annexed on a footing with a surviving executor, but not on a footing with a testamentary trustee. *Gehr v. McDowell*, 206 Pa. St. 100, approving *Ross v. Barclay*, 18 Pa. St. 179.

**Sale for Purpose of Distribution.** — All of the functions of an executor pass to, or are exercisable by, an administrator with the will annexed. These involve the right to employ all means requisite for their proper performance, as, for example, as a preparation for dis-

tribution, the exercise of a power to sell real estate, where distribution is its ultimate purpose, though the executor has, in general, nothing to do with realty. *Hart's Estate*, 12 Pa. Dist. 47, 28 Pa. Co. Ct. 126.

**Under the Tennessee Statute** providing that "an administrator with the will annexed, appointed instead of an executor resigned, and all administrators with the will annexed, shall have the same power and authority as the executor had by the will of the testator, and may sell land if the executor possessed that power," such administrator has no power or authority to sell land under a will in which no executor was named. *McElroy v. McElroy*, 110 Tenn. 137.

**1323.** 2. Power of Sale Conferred on Executor Nominatim. — *Smith v. McIntyre*, (C. C. A.) 95 Fed. Rep. 585; *Gehr v. McDowell*, 206 Pa. St. 100.

**If the Power of Sale Is Discretionary.** — *Crouse v. Peterson*, 130 Cal. 169, 80 Am. St. Rep. 89, Beatty, C. J., dissenting; *Bigelow v. Cady*, 171 Ill. 129, 63 Am. St. Rep. 230; *Simmons v. Taylor*, 19 N. Y. App. Div. 499; *Scott v. Douglas*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 555; *McElroy v. McElroy*, 110 Tenn. 137.

**Power of Sale to Execute Collateral Trust.** — *Gehr v. McDowell*, 206 Pa. St. 100.

While it is well settled that the functions of an administrator with the will annexed do not extend to the administration of a trust collateral to the office of executor, it is equally well settled that he has the right to do any act involving mere administration or distribution of the general estate, including the sale of realty for payment of debts or purposes of distribution under the provisions of the will. *Snyder's Estate*, 9 Pa. Dist. 128.

The court has no jurisdiction to compel the administrator to exercise a discretionary power of sale, save in exceptional instances. *Bullock's Estate*, 9 Pa. Dist. 690. See also *supra*, this title, 1041. 2.

**3. Peremptory Power of Sale for Administrative Purpose.** — *Smith v. McIntyre*, (C. C. A.) 95 Fed. Rep. 585; *May v. Brewster*, 187 Mass. 524; *Francisco v. Wingfield*, 161 Mo. 542; *Merritt v. Merritt*, 32 N. Y. App. Div. 442, affirmed 161 N. Y. 634; *Ayers v. Courvoisier*, 101 N. Y. App. Div. 97; *Campbell v. Jennings*, (Supm. Ct. Spec. T.) 22 Misc. (N. Y.) 406; *Scott v. Douglas*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 555; *Tarrance v. Reuther*, 185 Pa. St. 279; *McElroy v. McElroy*, 110 Tenn. 137.

**The Distinction.** — *Crouse v. Peterson*, 130 Cal. 169, 80 Am. St. Rep. 89; *Boland v. Tierney*, 118 Iowa 59.

**The Trend of Decision** now is to construe powers vested in an executor as held *virtute officii*, when it is possible to do so. *Crouse v. Peterson*, 130 Cal. 169, 80 Am. St. Rep. 89.

**Order of Court Necessary to Sale in Some States.** — See *Penn v. Fogler*, 77 Ill. App. 365, reversed on other grounds 182 Ill. 76.



**1325.** If No Executor Is Appointed. — See note 1.

**XV. ADMINISTRATORS DE BONIS NON — 1. Powers and Duties in General — a. DOCTRINE AT COMMON LAW. — See note 4.**

**1326.** See notes 1, 2.

**1327.** See note 1.

**Assets Are Administered. — See notes 2, 3, 7.**

**1325. 1. Executor Not Appointed or Not Named in Clause Giving Power of Sale. —** Penn *v. Fogler*, 182 Ill. 76, reversing on other grounds 77 Ill. App. 365. See also *Snyder's Estate*, 9 Pa. Dist. 128. *Contra*, that where no executor is appointed the sale must be made through the chancery court, *Baumeister v. Silver*, 98 Md. 418 (application for appointment of trustees to sell); *McElroy v. McElroy*, 110 Tenn. 137; *Geisler v. Mauk*, (Tenn. Ch. 1898) 48 S. W. Rep. 344.

**4. Administrator De Bonis Non Succeeds Only to Unadministered Assets at Common Law — Georgia. —** *Bailey v. McAlpin*, 122 Ga. 616.

*Illinois. —* *Kinney v. Keplinger*, 172 Ill. 449, reversing 71 Ill. App. 334.

*Indiana. —* *Ormes v. Brown*, 22 Ind. App. 569. *Kentucky. —* *Karn v. Seaton*, 62 S. W. Rep. 737, 23 Ky. L. Rep. 101. See also *Seibert v. Bloomfield*, (Ky. 1901) 63 S. W. Rep. 584, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1325-1327.

*Maine. —* *Hodge v. Hodge*, 90 Me. 505, 60 Am. St. Rep. 285; *Meservey v. Kalloch*, 97 Me. 91.

*Maryland. —* *State v. Fidelity, etc., Co.*, 100 Md. 256.

*New Jersey. —* *Hartson v. Elden*, 58 N. J. Eq. 478.

*Oregon. —* *Herren's Estate*, 40 Oregon 90.

*Pennsylvania. —* *Gressle's Estate*, 29 Pa. Co. Ct. 97, 21 Lanc. L. Rev. 73.

*South Carolina. —* Compare *Redfearn v. Craig*, 57 S. Car. 534.

*Utah. —* *Reed v. Hume*, 25 Utah 248.

*West Virginia. —* *McCreery v. Bluefield First Nat. Bank*, 55 W. Va. 663, quoting 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1325.

**The Duties of an administrator de bonis non** are limited, specific, and temporary in their nature. *Enlow v. Bethel College*, 67 S. W. Rep. 989, 24 Ky. L. Rep. 31.

**A Statutory Provision** that "every administrator who has been and shall be so appointed shall be entitled to demand and receive of the executors of such deceased sole or surviving executor all the unadministered assets of the first testator" is merely declaratory of the common law and does not enlarge the powers of an administrator de bonis non. *Roy v. Squier*, 61 N. J. Eq. 182; *Parker v. Fay*, 61 N. J. Eq. 167.

**1326. 1. Recovery of Assets from Predecessor. —** *Small v. Thompson*, 92 Me. 539; *McCreery v. Bluefield First Nat. Bank*, 55 W. Va. 663, quoting 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1325, 1326.

**Action Against Executor's Personal Representative. —** An action by an administrator de bonis non will not lie to recover assets of the estate from the personal representative of a deceased executor, where they never came into his possession. *Jones v. Willis*, 66 Ohio St. 114.

**Set-off Against Commissions Due to Original Representative. —** An indebtedness due from the original representative for funds of the estate coming into his hands is a proper set-off to commissions due to him. *Burbank v. Duncan*, (Ky. 1899) 53 S. W. Rep. 19.

**2. Recovery of Assets from Third Person. —** *Redfearn v. Craig*, 57 S. Car. 534; *McCreery v. Bluefield First Nat. Bank*, 55 W. Va. 663, quoting 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1326.

**1327. 1. Administrator De Bonis Non Cannot Require Predecessor to Account at Common Law. —** *Bailey v. McAlpin*, 122 Ga. 616; *Hartson v. Elden*, 58 N. J. Eq. 478; *Roy v. Squier*, 61 N. J. Eq. 182; *McCreery v. Bluefield First Nat. Bank*, 55 W. Va. 663, quoting 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1326, 1327.

**2. When Assets Are Administered — Conversion or Change of Form. —** *State v. Fidelity, etc., Co.*, 100 Md. 256; *Parker v. Stevens*, 61 N. J. Eq. 163; *Gressle's Estate*, 29 Pa. Co. Ct. 97, 21 Lanc. L. Rev. 73; *Reed v. Hume*, 25 Utah 248, quoting 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1327. Compare *Redfearn v. Craig*, 57 S. Car. 534.

**Term "Unadministered Assets" Defined. —** The term "unadministered assets" means assets or estate remaining in specie, and unchanged in form. *Roy v. Squier*, 61 N. J. Eq. 182.

**Property Lawfully Distributed** among the persons entitled is not unadministered assets. *Griffin v. Warburton*, 23 Wash. 231.

**3. Sale Is Act of Administration. —** *Reed v. Hume*, 25 Utah 248, quoting 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1327.

**Estoppel. —** Where the surviving member of a partnership, conducted under articles making the real estate of the members partnership property, sells the real estate with the full knowledge and assent of the administrator of the deceased partner, the latter's successor in the administration is estopped from questioning the validity of the sale. *Fidelity Title, etc., Co. v. Bell*, 188 Pa. St. 637.

**7. Alteration of Property in Choses in Action. —** *Reed v. Hume*, 25 Utah 248, quoting 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1327.

**Debt Due from Executor or Administrator. —** A debt owed by the original administrator to the estate becomes assets on his appointment, and is not revived by his death or removal so that it can be sued by an administrator de bonis non. *Hodge v. Hodge*, 90 Me. 505, 60 Am. St. Rep. 285.

**Certificates of Stock** standing in the name of the testator, which the executor has had transferred to himself as executor and pledged as collateral security, are administered assets and cannot be recovered from the pledgee by the administrator de bonis non. *McCreery v. Bluefield First Nat. Bank*, 55 W. Va. 663.

**1328.** Devastavit by Predecessor. — See notes 6, 7.

**1329.** See note 1.

Moneys Collected by an Executor or Administrator. — See note 2.

**1330.** Money Due on Contracts Made by Original Executor or Administrator. — See note 1.

**1331.** Distinction Between Valid and Invalid Acts of Administration. — See note 1.

b. MODERN AMERICAN DOCTRINE. — See note 4.

**1332.** Property of Every Kind. — See note 1.

**1328.** 6. Administrator De Bonis Non Not Responsible for Devastavit by Predecessor. — Gressle's Estate, 29 Pa. Co. Ct. 97, 21 Lanc. L. Rev. 73.

7. Administrator De Bonis Non Cannot Recover for Devastavit by Predecessor. — Goodwynne v. Bellerby, 116 Ga. 901; Ormes v. Brown, 22 Ind. App. 569; Karn v. Seaton, 62 S. W. Rep. 737, 23 Ky. L. Rep. 101; Meservy v. Kallach, 97 Me. 91; State v. Fidelity, etc., Co., 100 Md. 256; Roy v. Squier, 61 N. J. Eq. 182; Herren's Estate, 40 Oregon 90; Reed v. Hume, 25 Utah 248.

**Waiver.** — In a proceeding in equity brought by an administrator *de bonis non* for the settlement of the estate and a recovery against his predecessor for maladministration, to which creditors, heirs, and devisees are made parties, if no objection is taken on this ground, it will be considered as waived. Seibert v. Bloomfield, 63 S. W. Rep. 584, 23 Ky. L. Rep. 646.

**1329.** 1. Cause of Action for Devastavit Belongs to Creditors, Next of Kin, Etc. — Meservy v. Kallach, 97 Me. 91; Hartson v. Elden, 58 N. J. Eq. 478; Herren's Estate, 40 Oregon 90.

**Reason of the Rule.** — An administrator regularly stands in the place of the intestate in respect to causes of action in favor of the latter, and in bringing suit must make it appear that the wrong complained of gave rise to a right in the intestate. A conversion of property by an administrator, or a devastavit by him, is manifestly no wrong to, and does not give rise to a cause of action in favor of, the deceased. The wrong is done to the heirs, legatees, creditors, and distributees. Reed v. Hume, 25 Utah 248.

**2. Money Collected by Original Executor or Administrator.** — Karn v. Seaton, 62 S. W. Rep. 737, 23 Ky. L. Rep. 101; Hodge v. Hodge, 90 Me. 505, 60 Am. St. Rep. 285; Meservy v. Kallach, 97 Me. 91; State v. Fidelity, etc., Co., 100 Md. 256; Reed v. Hume, 25 Utah 248.

**1330.** 1. Money Due on Contracts Made by Original Executor or Administrator — Rule Stated. — The true law is that if the assets are such that the money recovered would belong to the state, the administrator may sue thereon in his representative capacity, and in case of his death or removal the right to collect the assets would go to the administrator *de bonis non*. Goodwynne v. Bellerby, 116 Ga. 901, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1329.

The right of the representative to sue in his individual character will, upon his death, pass his interest to his own administrator; while his right to sue in his representative character, being predicated upon the fact that the assets recovered would belong to the estate, confers upon the administrator *de bonis non* a right of action. The one or the other, should there be collision between their claims, is entitled to

preference, according to the proper result of the inquiry whether the first administrator had become beneficially entitled to the notes as creditor, in consequence of advances or otherwise, or by having charged himself or been charged with the amount of them. Parker v. Fay, 61 N. J. Eq. 167.

**Note Taken in Individual Name of Representative.** — See Roy v. Squier, 61 N. J. Eq. 182.

**Unauthorized Loan.** — Even if an administrator *de bonis non* has the right to repudiate an unauthorized loan made by his predecessor, yet, if he elects to adopt the contract, with full knowledge of all the facts, he is bound by it. He cannot accept the investment and also treat the loan as a devastavit. Wilson v. Stevens, 129 Ala. 630, 87 Am. St. Rep. 86.

**1331.** 1. Assets Improperly Disposed of Recoverable in Equity by Administrator De Bonis Non. — Michigan Trust Co. v. Probasco, 29 Ind. App. 109; Dunne v. American Surety Co., 43 N. Y. App. Div. 94, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1331. Compare Seibert v. Bloomfield, 63 S. W. Rep. 584, 23 Ky. L. Rep. 646.

**4. Modern American Doctrine — Administrator De Bonis Non Succeeds to All Powers and Duties of Predecessor** — Connecticut. — Chamberlin's Appeal, 70 Conn. 363; Bristol Sav. Bank v. Holley, 77 Conn. 225.

Georgia. — Goodwynne v. Bellerby, 116 Ga. 901, Bailey v. McAlpin, 122 Ga. 616.

Iowa. — Ellyson v. Lord, 124 Iowa 125.

Kansas. — American Surety Co. v. Piatt, 67 Kan. 294.

Missouri. — In re Schooler, 73 Mo. App. 301.

New York. — Dunne v. American Surety Co., 43 N. Y. App. Div. 91, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1331; Dunne v. American Surety Co., (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 584.

Oregon. — Herren's Estate, 40 Oregon 90.

West Virginia. — Thompson v. Nowlin, 51 W. Va. 346, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1331.

**1332.** 1. Administrator De Bonis Non May Recover Balance Remaining in Predecessor's Hands. — Chamberlin's Appeal, 70 Conn. 363; Ellyson v. Lord, 124 Iowa 125; Dunne v. American Surety Co., (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 584; Herren's Estate, 40 Oregon 90; Com. v. Wood, 14 Pa. Dist. 509.

**The Assets of an Estate Are Not Regarded as Administered.** — Bristol Sav. Bank v. Holley, 77 Conn. 225.

**Right of Administrator De Bonis Non Exclusive.** — Hart's Estate, 12 Pa. Dist. 47. See also Postal v. Kreps, 23 Ind. App. 101. Contra, Bailey v. McAlpin, 122 Ga. 616.

The representative and not the beneficiary is entitled to sue, except where, because of the



**1334.** Devastavit by Original Executor or Administrator. — See note 1.

Accounting by Original Executor or Administrator. — See note 2.

**1336.** 2. Privy Between Successive Administrators. — See note 1.

Qualification of Rule. — See note 2.

**1338.** XVI. SPECIAL AND TEMPORARY ADMINISTRATORS — 1. In General. — See note 1.

The Collection and Preservation of the Estate. — See notes 2, 3.

incompetency of the former, his refusal to act, or some other reason, he cannot faithfully represent the *cestui que trust*. *McGrotty v. Fletcher*, 96 Fed. Rep. 264.

Where an executor who gave no bond dies before an account is due, it becomes the duty of his administrator so to administer upon the estate of the deceased executor as to provide for the satisfaction of amounts charged against the estate by the probate court; and on his neglect or refusal to act in the premises, and it appearing that all the testator's debts have been paid, legatees under the will may bring and maintain an action against the estate of the deceased executor for an account and to recover amounts due them, fixed by the will. *Jones v. Willis*, 72 Ohio St. 189.

In New Jersey, by statute, Laws N. J. 1901, p. 303, administration *de bonis non* is no more to be granted. The administrator appointed under the act is styled "substituted administrator," and is entitled to demand and receive the whole of the personal estate of his decedent, except such portion as shall have been properly paid out and distributed, and power is expressly given to him to sue and recover, at law or in equity, all the assets from any person, or from the heirs at law or personal representatives chargeable, or their equivalent in value. *Hoagland v. Cooper*, 65 N. J. Eq. 407.

**1334.** 1. Administrator De Bonis Non May Recover Devastavit by Predecessor. — *Goodwynne v. Bellerby*, 116 Ga. 901; *Bailey v. McAlpin*, 122 Ga. 616; *Elyson v. Lord*, 124 Iowa 125; *Dunne v. American Surety Co.*, 43 N. Y. App. Div. 91; *Flanagan v. Fidelity, etc., Co.*, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 424; *Dunne v. American Surety Co.*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 584; *Herren's Estate*, 40 Oregon 90; *Strickland v. Sandmeyer*, 21 Tex. Civ. App. 351.

Limitation of Power to Sue for Devastavit. — *Parker v. Stevens*, 61 N. J. Eq. 163.

An Action on the Bond is the only remedy in some jurisdictions. *Sheeks v. State*, 156 Ind. 508; *Ormes v. Brown*, 22 Ind. App. 569; *Michigan Trust Co. v. Probasco*, 29 Ind. App. 109; *American Surety Co. v. Piatt*, 67 Kan. 294; *Jones v. Willis*, 66 Ohio St. 114.

2. Requiring Settlement of Predecessor's Accounts. — *Bishop v. Chase*, 156 Mo. 158, 79 Am. St. Rep. 515; *Francisco v. Wingfield*, 161 Mo. 542; *Tunncliffe v. Fox*, (Neb. 1903) 94 N. W. Rep. 1032; *Matter of Rogers*, 153 N. Y. 316, affirming (Supm. Ct. Gen. T.) 36 N. Y. Supp. 1132; *Dunne v. American Surety Co.*, 43 N. Y. App. Div. 91; *Dunne v. American Surety Co.*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 584; *Jones v. Wooten*, 137 N. Car. 421.

In New Jersey the right of the successor to compel an accounting arises only when his predecessor has been removed or discharged for some of the causes specified in the statute, such

as refusal to obey an order of court, or the wasting, embezzlement, or misapplication of the funds of the estate. *Hartson v. Elden*, 58 N. J. Eq. 478; *Hoagland v. Cooper*, 65 N. J. Eq. 407.

**1336.** 1. Statutory Provisions in United States. — *Chamberlin's Appeal*, 70 Conn. 363; *Ives v. Beecher*, 75 Conn. 153.

2. Administrator De Bonis Non Bound by Lawful Administrative Acts of Predecessor. — *Thompson v. Nowlin*, 51 W. Va. 346.

Administration after original administration is in the nature of an administration *de bonis non*, and the court is bound to take notice of the proceedings already had by the executor, as shown in his report. *Bell v. Farmers', etc., Nat. Bank*, 33 Tex. Civ. App. 408.

**1338.** 1. Special and Temporary Administrators — Powers Fixed by Letters or by Statute. — *People v. Salomon*, 184 Ill. 490; *In re Wincox*, 85 Ill. App. 613, affirmed 186 Ill. 445; *Sullivan v. Nicoulin*, 113 Iowa 76; *In re Ford*, 29 Mont. 283; *Czech v. Bean*, (County Ct.) 35 Misc. (N. Y.) 729; *Matter of Grant*, (Surrogate Ct.) 27 Civ. Pro. (N. Y.) 21; *Willis v. Pinkard*, 21 Tex. Civ. App. 423; *Ball v. Ball*, (Tex. Civ. App. 1898) 45 S. W. Rep. 605.

Terminology. — A special or temporary administrator is sometimes termed a collector, receiver, or trustee. *Czech v. Bean*, (County Ct.) 35 Misc. (N. Y.) 729.

2. Authority Generally Limited to Collection of Debts and Preservation of Estate. — *In re Wincox*, 85 Ill. App. 613, affirmed 186 Ill. 445; *In re Ford*, 29 Mont. 283. And see generally the cases cited in this subdivision.

Power to Sell Property of Estate. — *Matter of Bell*, 145 Cal. 646; *Matter of Gihon*, (Surrogate Ct.) 27 Misc. (N. Y.) 626; *Matter of Grant*, (Surrogate Ct.) 27 Civ. Pro. (N. Y.) 21.

An administrator to collect has no right or authority to sell property of the estate or accept payment of debts not matured. *In re Wincox*, 85 Ill. App. 613, affirmed 186 Ill. 445.

Analogy to Agent. — The authority of a special administrator, though an officer of the court, is no more than that of an agent. *Sullivan v. Nicoulin*, 113 Iowa 76.

No Power to Invest Funds of Estate. — *People v. Salomon*, 184 Ill. 490; *Matter of Gihon*, (Surrogate Ct.) 27 Misc. (N. Y.) 626.

Compromising Disputed Claims. — A special or temporary administrator, unless expressly authorized to do so, has no authority to compromise a disputed claim. *Germania L. Ins. Co. v. Peetz*, (Tex. Civ. App. 1898) 47 S. W. Rep. 687.

Power to Contract for Services Rendered in Recovering Assets. — A special administrator has no authority to make contracts that will interfere with or prejudice the duties or powers of the general administrator to be thereafter appointed, or encumber the rights and privileges of the heirs or beneficiaries beyond that con-



**1339.** See note 1.

**2. Administrators Pendente Lite.** — See notes 2, 3.

**1310.** See notes 1, 2.

**The Duration of the Authority.** — See notes 3, 4.

ferred upon him by the law. Thus, he cannot bind the estate by a contract to pay for services rendered by others in recovering assets. *McAlpine v. Kratka*, 92 Minn. 411.

In *Kentucky* the curator of the estate of a decedent may pay debts, sue and be sued, and sell such perishable and other goods as the County Court shall order sold. *Moran v. Hammer*, 109 Ky. 333.

**1338. 3. Power to Sue.** — *Pollock v. Cox*, 108 Ga. 430; *Barfield v. Hartley*, 108 Ga. 435; *Sullivan v. Nicoulin*, 113 Iowa 76; *Quinn v. Quinn*, 22 Mont. 403.

**Scope of Power.** — Power to sue exists only to the extent, if any, expressly and impliedly conferred by statute or order of court. *Willis v. Pinkard*, 21 Tex. Civ. App. 423.

**Action to Recover Damages for Conversion of Assets.** — Power to take charge of and preserve the estate and to collect all debts and outstanding owing to it confers no authority to sue for damages for a conversion of assets. *William J. Lemp Brewing Co. v. La Rose*, 20 Tex. Civ. App. 575.

**Actions to Recover Real Property.** — Under the *Georgia* statute a temporary administrator, as such, has no title or interest in the land of his intestate, and cannot maintain an action for its recovery. *Banks v. Walker*, 112 Ga. 542, *distinguishing* *Barfield v. Hartley*, 108 Ga. 435; *Doris v. Story*, 122 Ga. 611.

**Suit to Set Aside Fraudulent Conveyance by Decedent.** — A special or temporary administrator has no power to bring suit to set aside a conveyance of property made by the decedent in fraud of creditors. *Larson v. Johnson*, 72 Minn. 441.

**1339. 1. No Authority to Pay Claims Against Estate.** — *In re Wincox*, 85 Ill. App. 613, *affirmed* 186 Ill. 445; *Richmond v. Campbell*, 71 Minn. 453; *In re Ford*, 29 Mont. 283; *James v. Craighead*, (Tex. Civ. App. 1902) 69 S. W. Rep. 241.

In *New York*. — Where the debts paid are just, and there is a sufficiency of personality to satisfy all indebtedness, payments may be ratified. *Matter of Philp*, (Surrogate Ct.) 29 Misc. (N. Y.) 263.

**No Authority to Submit Claims to Arbitration.** — *Sullivan v. Nicoulin*, 113 Iowa 76.

**Payment of Taxes on Real Estate.** — The power of a special administrator to pay taxes on real estate would depend only in an extreme case upon exigencies that required him to do so to save the personal estate and turn it over to the general administrator. *McAlpine v. Kratka*, 92 Minn. 411.

**2. Analogy to Receivership.** — *Guthrie v. Welch*, 24 App. Cas. (D. C.) 562.

Expressions to the effect that the office of an administrator *pendente lite* is more like that of a receiver than of a general administrator, must be understood in the light of the facts under consideration in the particular case. They are not authority for clothing such temporary administrator with the powers of a chancery re-

ceiver, or conferring equity jurisdiction on the probate court. An administrator *pendente lite* is not authorized to wind up and distribute the estate, but to collect it and hold it, making disbursements, if the court so orders; but he is, to all intents and purposes, for the time being, the administrator of the estate, having no greater powers than a regular administrator has and no more comprehensive title. *Union Trust Co. v. Soderer*, 171 Mo. 675.

The register of the Supreme Court as *ex officio* official administrator under Ordinance No. 9 of 1870, Hong Kong, China, is in the position of a receiver, pending a grant of general administration, and has no power to sue. *Chan Kit San v. Ho Fung Hang*, (1902) A. C. 257.

**3. Powers at Common Law — Collection of Assets.** — *Guthrie v. Welch*, 24 App. Cas. (D. C.) 562; *Perrett's Estate*, 14 Pa. Super. Ct. 611.

An administrator *pendente lite* is to do, while his office lasts, whatever an administrator should do to protect the interests of the estate for those who are entitled to its benefits. He may sue for and collect its assets, guard the estate in the matter of demands against it, and if it appears that there will not be sufficient personality to pay debts, he may apply to the probate court, and obtain authority to take possession of the real estate and collect the rents therefrom. But an administrator *pendente lite* has no more authority to take possession of the real estate than has a regular administrator. *Union Trust Co. v. Soderer*, 171 Mo. 675.

**1340. 1. Statutory Authority.** — See *Bruning v. Golden*, 159 Ind. 199.

**Actions by Administrator Pendente Lite.** — *Sullivan v. Nicoulin*, 113 Iowa 76.

**Participation in the Contest.** — *Harrison v. Clark*, 95 Md. 308; *Union Trust Co. v. Soderer*, 171 Mo. 675.

**May Discharge Decedent's Debts.** — *Baldwin v. Mitchell*, 86 Md. 379.

**Interest on Claim.** — Demand on an administrator *pendente lite* for allowance of a claim against the estate starts interest running upon the amount due. *Ryans v. Hospes*, 167 Mo. 342.

**Executing Contract of Decedent to Sell Lands.** — *Logan's Estate*, 21 Pa. Co. Ct. 455.

**2. Administrator Pendente Lite Cannot Invest Funds, Pay Legacies, or Distribute Estate.** — *Baldwin v. Mitchell*, 86 Md. 379; *Matter of Gihon*, (Surrogate Ct.) 27 Misc. (N. Y.) 626; *Wiley's Estate*, 8 Pa. Dist. 419, 22 Pa. Co. Ct. 547.

A temporary administrator holds the funds entrusted to his hands as a custodian merely, and upon the settlement of his account he should be directed to pay any balance in his hands to the executor or administrator in chief, to be distributed in the course of administration. *Matter of Philp*, (Surrogate Ct.) 29 Misc. (N. Y.) 263.

**3. Powers Cease with Contest Which Occasioned Appointment.** — See *supra*, this title, 803. 2.

**4. Effect of Appeal.** — *Mayer v. Schneider*, 112

**1340.** 3. Administrators Ad Litem. — See note 5.

**1311. XVII. REPRESENTATIVES OF EXECUTORS AND ADMINISTRATORS —**  
As to Other Representatives of Executors and Administrators. — See note 3.

**1342.** See note 1.

**XVIII. INDEPENDENT EXECUTORS.** — See note 5.

**XIX. EXECUTORS DE SON TORT — 1. Definition.** — See note 6.

**2. General Principles.** — See note 7.

Ill. App. 628, *affirmed* 212 Ill. 286; State v. Guinotte, 156 Mo. 513, two judges dissenting; Carroll v. Reid, 158 Mo. 319. See also Matter of Gihon, (Surrogate Ct.) 27 Misc. (N. Y.) 626.

In Texas. — Ball v. Ball, (Tex. Civ. App. 1898) 45 S. W. Rep. 605.

**1340. 5. Administrators Ad Litem.** — In New York an administrator without limited powers, having authority to "prosecute" but not to "collect or compromise," cannot issue execution on a recovery by action; and the defect in the execution is not cured by his subsequently obtaining from the surrogate full power of collection. Lambert v. Metropolitan St. R. Co., (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 579, *affirmed* 56 N. Y. App. Div. 624.

**1341. 3. Powers and Duties of Representatives of Executors and Administrators in General.** — The personal representative of a deceased administrator does not take and administer his trust, but proceeds at once to settle his account, ascertain the balance in his hands, and pay it over to his successor. Walworth v. Bartholomew, 76 Vt. 1.

**1342. 1. Duty to Settle Administration Accounts of Decedent.** — *In re Moehring*, 154 N. Y. 423; Jones v. Willis, 72 Ohio St. 189; Gressle's Estate, 29 Pa. Co. Ct. 97, 21 Lanc. L. Rev. 73; Graham's Estate, 14 Pa. Dist. 5, 18 York Leg. Rec. (Pa.) 147; Cunningham v. Cunningham, 2 Ont. L. Rep. 511. *Contra*, McClellan v. Mangum, 33 Tex. Civ. App. 193. See also *supra*, this title, **1182. 3.**

An account is essential for the purpose of determining the amount due to beneficiaries and as a basis of proceedings by them against the sureties of the deceased representative or otherwise to compel payment. Matter of Irvin, 68 N. Y. App. Div. 158.

**5. Independent Executor — Texas Statute.** — Terrell v. McCown, 91 Tex. 231, *reversing* on other grounds (Tex. Civ. App. 1897) 40 S. W. Rep. 54; Carleton v. Hausler, 20 Tex. Civ. App. 275; Nelson v. Lyster, 32 Tex. Civ. App. 356; Wells v. Houston, (Tex. Civ. App. 1900) 56 S. W. Rep. 233; Epperson v. Reeves, 35 Tex. Civ. App. 167; Glover v. Coit, 36 Tex. Civ. App. 104.

As to the former requirement of consent of the persons entitled, in order to take the estate out of the probate court, see Wood v. Mistretta, 20 Tex. Civ. App. 236.

*The Washington Statute.* — Moore v. Kirkman, 19 Wash. 605; Smith's Estate, 43 Oregon 595; Provident Life, etc., Co. v. Mills, 91 Fed. Rep. 435; Thomas v. Provident Life, etc., Co., (C. C. A.) 138 Fed. Rep. 348, *per* Ross, J.

**Terminology.** — Though not so designated by the statute, an executor acting under a will providing for administration without the probate court is in legal phraseology termed an "inde-

pendent executor." Ellis v. Mabry, 25 Tex. Civ. App. 164.

Except in those articles of the Revised Statutes which relate to acts to be done in the settlement of an estate, the term "executors" includes independent as well as other executors. Roy v. Whitaker, 92 Tex. 346; Farmers, etc., Nat. Bank v. Bell, 31 Tex. Civ. App. 124.

In Washington, wills conferring powers of administration without the intervention of the court are commonly designated as "nonintervention wills." Matter of Macdonald, 29 Wash. 422.

**Scope of Powers.** — An independent executor, in the absence of provisions in the will either enlarging or restricting his powers, has authority to do, without an order of court, every act which an administrator could perform with such order. Carlton v. Goebler, 94 Tex. 93; Stevenson v. Roberts, 25 Tex. Civ. App. 577; Ellis v. Howard Smith Co., 35 Tex. Civ. App. 566.

**Powers of Probate Court.** — The probate court is without power, except such as is especially conferred upon it by statute, to control the administration of such estates; and a decree of the court discharging the executor is without force or effect. Matter of Macdonald, 29 Wash. 422; Baker v. Beach, 85 Fed. Rep. 836.

An independent executor may, when the will has not provided for complete partition of the property, file in the probate court his application for a partition, and in connection therewith may finally settle his accounts. Roy v. Whitaker, (Tex. Civ. App. 1899) 50 S. W. Rep. 491.

**Where Independent Administration Fails for Want of Executor.** — If no executor is named, or if the person or persons named die or refuse to act, the provision for an independent administration fails for want of an executor, and the court must proceed under the general law and assume entire control of the administration. Roy v. Whitaker, 92 Tex. 346; *In re Grant*, 93 Tex. 68.

**Independent Administration Wholly Statutory.** — In the absence of statute a testator may not deny to his legatees and others the right of appeal to the regularly constituted courts. Reilly's Estate, 200 Pa. St. 288, *reversing* on other grounds 6 Northam. Co. Rep. (Pa.) 385.

**6. Executor De Son Tort Defined.** — Atty.-Gen. v. New York Breweries Co., (1898) 1 Q. B. 205, *reversing* (1897) 1 Q. B. 738, *affirmed* (1899) A. C. 62; Willingham v. Rushing, 105 Ga. 72; Allen v. Hurst, 120 Ga. 763; Slate v. Henkle, 45 Oregon 430, *citing* 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1342; *In re Mitchell*, 74 Vt. 186, *citing* 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1342.

**7. When Liability Exists — How Determined.** — Rohn v. Rohn, 204 Ill. 184, 98 Am. St. Rep. 185, *affirming* 98 Ill. App. 509.

**1343.** When Doctrine Applies. — See note 1.

**1344.** 3. Modern American Doctrine. — See notes 4, 5.

**1345.** 4. Acts Constituting Executor De Son Tort — *a.* IN GENERAL. — See notes 1, 2.

*b.* USURPING FUNCTIONS OF EXECUTOR OR ADMINISTRATOR.

— See note 4.

**1346.** See note 3.

**1348.** *c.* ACTS DONE AS AGENT. — See note 2.

**1349.** See note 1.

*f.* ACTS RESPECTING REAL ESTATE. — See note 4.

*g.* ACTS RESPECTING FOREIGN ASSETS. — See note 7.

**1343.** 1. No Executor De Son Tort Where there Is Rightful Representative. — See *Ela v. Ela*, 70 N. H. 163, defining an executor *de son tort* as one who intermeddles with the personal property of a decedent's estate before an administrator has been appointed.

There is a wide difference between the responsibility of one who intermeddles with the goods of a decedent after an executor has been lawfully appointed, and one who intermeddles prior to an appointment. There also seems to be some distinction between those cases where the creditor brings a suit against an executor *de son tort*, and it appears that at a time prior to the bringing of the action a lawful administrator had been appointed to whom the right of action might under some circumstances accrue. *Ebbinger v. Wightman*, 15 Colo. App. 439.

**Statutes Declaring Rule.** — The rule stated in the text is the law in some states by force of the statutes relating to executors *de son tort*. See *Willingham v. Rushing*, 105 Ga. 72.

**1344.** 4. Doctrine Abrogated in United States. — Compare *Stephens v. Atkins*, 110 La. 14, holding that one who takes possession of property of a succession, without legal authority, will be held to account for it or its value.

In New York. — *Ferguson v. Harrison*, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 380.

The Oregon Statute abolishes the office of executor *de son tort*. The intermeddler is responsible to the personal representative, but to him only, and not to creditors or other persons beneficially interested in the estate. *Slate v. Henkle*, 45 Oregon 430.

**5. Doctrine Recognized in United States.** — *Ebbinger v. Wightman*, 15 Colo. App. 439; *Willingham v. Rushing*, 105 Ga. 72.

**1345.** 1. At Common Law a Person Nominated as Executor. — *Wheeler v. Chicago Title, etc., Co.*, 217 Ill. 128. But see, where will was never probated, *Holeton v. Thayer*, 89 Ill. App. 184.

Under the New Hampshire statutes an executor or administrator who intermeddles with the estate before qualifying by giving bond becomes an executor *de son tort*. *Davis v. Davis*, 72 N. H. 326.

Acting under Void Letters of Administration. — *Slate v. Henkle*, 45 Oregon 430. See also *Ellis v. Ellis*, (1905) 1 Ch. 613.

Intermeddler Subsequently Appointed Administrator. — Intermeddling with goods of a decedent renders a person an executor *de son tort* though he is subsequently appointed administrator of the estate. *Rohn v. Rohn*, 98 Ill. App. 509, affirmed 204 Ill. 184, 98 Am. St. Rep. 185.

**2. Acting in Character of Executor Not Essential.** — The Georgia statute provides that if a person "converts to his own use" the property, he shall be deemed an executor in his own wrong. The act of conversion is not an act which a legal representative usually performs, but one which would be as unlawful for him as for any one else. *Allen v. Hurst*, 120 Ga. 763.

**4. Taking Possession of Assets.** — *Ebbinger v. Wightman*, 15 Colo. App. 439.

Corporation Transferring Securities to Intermeddler. — The process of transferring the title to shares and debentures in the register of a corporation, from a deceased owner to one who is not his personal representative, and paying the interest and dividends thereon to such person, involves a "taking possession" of assets. *Atty.-Gen. v. New York Breweries Co.*, (1898) 1 Q. B. 205, reversing (1897) 1 Q. B. 738, affirmed (1899) A. C. 62.

**Taking Possession in Accordance with Wishes of Decedent.** — Taking possession of the estate and attempting to administer it, though in accordance with the wishes of the deceased, constitutes such intermeddler an executor *de son tort*. *Rohn v. Rohn*, 204 Ill. 184, 98 Am. St. Rep. 185, affirming 98 Ill. App. 509.

**Merely Continuing to Retain Possession**, after the death of the decedent, of property rightfully obtained does not constitute one an executor *de son tort*. *McAfee v. Montgomery*, 21 Ind. App. 196.

**1346.** 3. Continuing Decedent's Business. — See *Kelley v. Kelley*, 84 Fed. Rep. 420.

**1348.** 2. Acts Done as Agent of Executor De Son Tort. — *Atty.-Gen. v. New York Breweries Co.*, (1898) 1 Q. B. 205, reversing (1897) 1 Q. B. 738, affirmed (1899) A. C. 62.

**Cases to the Contrary.** — As supporting the second paragraph of the original note see *Rohn v. Rohn*, 98 Ill. App. 506, affirmed 204 Ill. 184, 98 Am. St. Rep. 185.

**1349.** 1. Acts Done as Agent of Decedent. — Compare *Willingham v. Rushing*, 105 Ga. 72.

**4. Intermeddling with Lands Does Not Constitute Executor De Son Tort.** — *Ela v. Ela*, 70 N. H. 163. See also *Holeton v. Thayer*, 89 Ill. App. 184.

**7. Taking Possession of Foreign Assets.** — An executor who takes possession of assets of the testator situated in a foreign country, contrary to the laws of that country, is an executor *de son tort* in such jurisdiction. *Atty.-Gen. v. New York Breweries Co.*, (1898) 1 Q. B. 205, reversing (1897) 1 Q. B. 738, affirmed (1899) A. C. 62.



**1350.** *i.* TAKING ASSETS UNDER COLOR OF TITLE. — See note 2.

*j.* ACTS OF KINDNESS AND CHARITY. — See notes 3, 4.

**1351.** 5. Liabilities of Executor De Son Tort — *a.* IN GENERAL. — See notes 2, 3, 4, 5.

*b.* EXTENT OF LIABILITY. — See note 6.

**1352.** See note 2.

*c.* RELIEF FROM LIABILITY — (1) *Taking Out Letters of Administration.* — See note 3.

(2) *Delivery of Assets to Rightful Representative.* — See note 5.

**1353.** (3) *Proper Administration of Assets Received.* — See notes 1, 4.

**1350.** 2. Taking Goods under Color of Title. — *Willingham v. Rushing*, 105 Ga. 72.

Distributees coming into possession of assets lawfully, and with the consent of the rightful executor or administrator, do not become executors *de son tort*. *Boring v. Jobe*, (Tenn. Ch. 1899) 53 S. W. Rep. 763.

An Administrator, by taking charge of personality in possession of his decedent at the time of death and by doing acts proper for its management and preservation, is not liable as an executor *de son tort*, though the property by the death had reverted to the estate of another person. *Kemry v. Keplinger*, 89 Ill. App. 570.

**3. Acts of Kindness and Charity.** — The acts done merely from kindness and charity, and for no other purpose, which do not create a liability, are limited to such acts as directing a funeral, payment of funeral expenses, preservation of the estate from loss or waste, and the like. *Rohn v. Rohn*, 204 Ill. 184, 98 Am. St. Rep. 185, *affirming* 98 Ill. App. 509.

**4. Directing Funeral.** — *O'Reilly v. Kelly*, 22 R. I. 151, 84 Am. St. Rep. 833.

**1351.** 2. Liabilities in General. — *Slate v. Henkle*, 45 Oregon 430, *citing* 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1351.

An executor *de son tort* is bound to exercise, so far as the estate is concerned, the same diligence in the collection of debts owing to it as if he were a regularly appointed representative. He occupies the same position and assumes the same liabilities as such a representative. *Rohn v. Rohn*, 204 Ill. 184, 98 Am. St. Rep. 185, *affirming* 98 Ill. App. 509.

**Defense of Statute of Limitations.** — See *Doyle v. Foley*, (1903) 2 Ir. R. 95.

**Liability for Probate Duty.** — An executor *de son tort* is as liable to pay probate duty on assets of a testator which he has administered as he would have been had he been named in the will. *Atty.-Gen. v. New York Breweries Co.*, (1898) 1 Q. B. 205, *reversing* (1897) 1 Q. B. 738, *affirmed* (1899) A. C. 62.

**3. Lawful Representatives of Decedent May Sue Executor De Son Tort.** — *Slate v. Henkle*, 45 Oregon 430, *citing* 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1351. See also *supra*, this title, **1343**, *1 et seq.*, **1344**, 4.

**4. Creditors May Sue Executor De Son Tort.** — *Allen v. Hurst*, 120 Ga. 763; *Slate v. Henkle*, 45 Oregon 430, *citing* 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1351; *Cook v. Dodds*, 6 Ont. L. Rep. 608.

**5. While Any Debts Are Unpaid.** — *Slate v. Henkle*, 45 Oregon 430, *citing* 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1351.

**Limitations of Right.** — See *Ebbinger v. Wight-*

*man*, 15 Colo. App. 439; *Gibson v. Gibson*, 77 S. W. Rep. 928, 25 Ky. L. Rep. 1332; *supra*, this title, **1343**, *1 et seq.*, **1344**, 4.

**6. Extent of Liability — Amount of Assets Received.** — *Slate v. Henkle*, 45 Oregon 430, *citing* 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1351.

**Liability for Interest.** — See *Weaver v. Williams*, 75 Miss. 945.

**1352.** 2. Liabilities of Executors De Son Tort Increased by Statute — *The Georgia Statute.* — *Willingham v. Rushing*, 105 Ga. 72; *Allen v. Hurst*, 120 Ga. 763.

*The New Hampshire Statute.* — *Davis v. Davis*, 72 N. H. 326.

*The Wisconsin Statute*, Rev. Stat. 1898, § 3824, providing that any person converting property of the deceased, before the granting of letters testamentary or of administration, shall be liable for double the value of the property so converted, has no application after the issuance of letters, though for a special or temporary and not a general administration. *Dixon v. Sheridan*, (Wis. 1905) 103 N. W. Rep. 239.

**3. Relief from Liability — Taking Out Letters of Administration.** — *Nance v. Gray*, (Ala. 1905) 38 So. Rep. 916; *Casto v. Murray*, (Oregon 1905) 81 Pac. Rep. 883. See also *Atty.-Gen. v. New York Breweries Co.*, (1898) 1 Q. B. 205, *reversing* (1897) 1 Q. B. 738, *affirmed* (1899) A. C. 62.

**5. Delivery of Effects to Rightful Representative After Action Brought.** — *Rohn v. Rohn*, 98 Ill. App. 509, *affirmed* 204 Ill. 184, 98 Am. St. 185; *Slate v. Henkle*, 45 Oregon 430, *citing* 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1352.

**1353.** 1. All Acts Which a Rightful Executor or Administrator Could Have Done. — *Rohn v. Rohn*, 98 Ill. App. 509, *affirmed* 204 Ill. 184, 98 Am. St. Rep. 185. See also *Ellis v. Ellis*, (1905) 1 Ch. 613.

**Just Debts of a Decedent.** — *Slate v. Henkle*, 45 Oregon 430, *citing* 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1352, 1353; *Cooper v. Eyrych*, 41 W. N. C. (Pa.) 370.

Conversely, liability is not avoided by the payment of debts which do not constitute valid charges against the estate. *Weaver v. Williams*, 75 Miss. 945.

**Statutes Abolishing the Office** and making the person who intermeddles liable to the personal representative of the estate and to him only do not take away this right. *Slate v. Henkle*, 45 Oregon 430.

**Burden of Proof.** — An executor *de son tort* who assumes to pay debts without probate has the burden of producing evidence that would be sufficient to establish the claims in the probate

**1354. 6. Validity and Effect of Acts of Executor De Son Tort — c. AS TO RIGHTFUL REPRESENTATIVES.** — See note 6.

**1355. d. EXECUTOR DE SON TORT APPOINTED ADMINISTRATOR.** — See note 1.

court in case of objection. *Holeton v. Thayer*, 89 Ill. App. 184.

**1353. 4. By Statute 43 Eliz., c. 8.** — See *Slate v. Henkle*, 45 Oregon 430, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1353.

**1354. 6. Acts of Executor De Son Tort Binding on Rightful Representative.** — *Burke v. Huff*, 103 Ga. 508.

**Payment of the Just Debts.** — *Slate v. Henkle*, 45 Oregon 430; *Cooper v. Eyrich*, 41 W. N. C. (Pa.) 370.

**Interrupting Statute of Limitations.** — As between the executor *de son tort* and a creditor of the estate the former must be treated as the true representative of the deceased, as respects the payments made by him and their effect. *Cook v. Dodds*, 6 Ont. L. Rep. 608.

**1355. 1. Grant of Administration to Executor De Son Tort — Previous Acts Legalized.** — *Nance v. Gray*, (Ala. 1905) 38 So. Rep. 916, citing 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1355.

**Promise to Pay Debts — Effect on Statute of Limitations.** — See *Cook v. Dodds*, 6 Ont. L. Rep. 608.

**Scope of Rule — Title by Relation.** — The doctrine of title by relation has no application to wrongful acts of a person who, to the prejudice of a third party, officiously intermeddles with the goods and chattels of an intestate before he is appointed administrator of the latter's estate. Title by relation, on principle, must be limited to valid acts done in respect to the goods and chattels of a deceased person prior to appointment as administrator, and is tantamount to ratification. If such doctrine were extended further, it might result in imposing upon the estate of a decedent liability for the torts of a person committed after the death of the intestate and prior to the appointment of the wrongdoer as administrator of such estate. *Castro v. Murray*, (Oregon 1905) 81 Pac. Rep. 883.

Where letters of administration have been subsequently granted to him, the previous acts of an executor *de son tort* to the prejudice of the estate are not made good by the subsequent administration. *Cook v. Dodds*, 6 Ont. L. Rep. 608.

1. EXECUTORY CONTRACT. — See note 1.  
 EXECUTORY DEVISE. — See note 2.

1. 1. Mettel v. Gales, 12 S. Dak. 639.

2. Crawford v. Clark, 110 Ga. 729.

Other Definitions. — Stallcup v. Cronley, (Ky.

1904) 78 S. W. Rep. 441; Rutledge v. Fishburne, 66 S. Car. 155.

## EXEMPLARY DAMAGES.

By H. N. ELDRIDGE.

4. I. INTRODUCTORY. — See note 3.

5. III. GENERAL PRINCIPLES REGULATING — 1. In General. — See note 6.

6. 4. Object and Theory of Exemplary Damages — a. IN GENERAL. — See notes 7, 8.

9. 5. Objections to Doctrine — c. JURISDICTIONS WHERE NOT ALLOWED. — See note 1.

10. 6. Where Act of Defendant Punishable Criminally. — See note 7.

11. But in the Majority of Jurisdictions. — See note 2.

12. 7. Several Defendants — a. IN GENERAL. — See note 7.

13. IV. EXEMPLARY DAMAGES IN ACTIONS FOR TORTS — 1. Statement of Rule. — See note 3.

4. 3. Chappell v. Ellis, 123 N. Car. 259, 68 Am. St. Rep. 822; Goebeler v. Wilhelm, 17 Pa. Super. Ct. 432.

5. 6. Injury Must Be Result of Defendant's Act. — Fohrmann v. Consolidated Traction Co., 63 N. J. L. 391.

6. 7. Haywood v. Hamm, 77 Conn. 158; Fohrmann v. Consolidated Traction Co., 63 N. J. L. 391; Wigton v. Metropolitan St. R. Co., 38 N. Y. App. Div. 207; Gedusky v. Rubinsky, 21 Pa. Co. Ct. 549; Flannery v. Wood, 32 Tex. Civ. App. 250.

8. Alabama. — Birmingham R., etc., Co. v. Ward, 124 Ala. 410, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1 et seq.

California. — Nixon v. Rauer, (Cal. 1901) 66 Pac. Rep. 221.

Connecticut. — Maisenbacker v. Society Concordia, 71 Conn. 369, 71 Am. St. Rep. 213.

Delaware. — Hendle v. Geiler, (Del. 1895) 50 Atl. Rep. 632; Petit v. Colmery, 4 Penn. (Del.) 266.

Georgia. — Berkner v. Dannenberg, 116 Ga. 964.

Maryland. — Medairy v. McAllister, 97 Md. 488; Northern Cent. R. Co. v. Newman, 98 Md. 507.

Missouri. — Ickenroth v. St. Louis Transit Co., 102 Mo. App. 616.

New York. — Craven v. Bloomingdale, 171 N. Y. 439; Stevens v. O'Neill, 51 N. Y. App. Div. 364, affirmed 169 N. Y. 375; Prince v. Socialistic Co-operative Pub. Assoc., (Supm. Ct. App. T.) 31 Misc. (N. Y.) 234.

Pennsylvania. — Goebeler v. Wilhelm, 17 Pa. Super. Ct. 432.

South Carolina. — Watts v. South Bound R. Co., 60 S. Car. 67; Oliver v. Columbia, etc., R. Co., 65 S. Car. 1; Dagnall v. Southern R. Co., 69 S. Car. 110; Beaudrot v. Southern R. Co., 69 S. Car. 160.

Tennessee. — Cumberland Telephone, etc., Co. v. Shaw, 102 Tenn. 313.

Wyoming. — Cosgriff v. Miller, 10 Wyo. 190, 98 Am. St. Rep. 977.

Punitive Damages Are Awarded Not as a Fine or Penalty for a Public Wrong but as a vindication of private rights wrongfully invaded. Watts v. South Bound R. Co., 60 S. Car. 67.

9. 1. Boydan v. Haberstumpf, 129 Mich. 137, 8 Detroit Leg. N. 906; McChesney v. Wilson, 132 Mich. 252; Bowden v. Voorheis, 135 Mich. 648.

10. 7. Where Act Complained of Punishable Criminally. — Borkenstein v. Schrack, 31 Ind. App. 220. See Bendich v. Scobel, 107 La. 242.

11. 2. Cosgriff v. Miller, 10 Wyo. 236, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 13.

12. 7. Several Persons Sued Jointly. — See Boutwell v. Marr, 71 Vt. 1, 76 Am. St. Rep. 746.

13. 3. General Rule as to Exemplary Damages — Alabama. — Birmingham R., etc., Co. v. Nolan, 134 Ala. 329.

California. — Foley v. Martin, 142 Cal. 256, 100 Am. St. Rep. 123.

Connecticut. — Meisenbacker v. Society Concordia, 71 Conn. 369, 71 Am. St. Rep. 213; List v. Miner, 74 Conn. 50.

Georgia. — Southern R. Co. v. O'Bryan, 119 Ga. 147; Woodley v. Coker, 119 Ga. 226; Jacobus v. Congregation of Children of Israel, 107 Ga. 518.

Illinois. — Hight v. Naylor, 86 Ill. App. 508; Kirton v. North Chicago St. R. Co., 91 Ill. App. 554; Mead v. Pollock, 99 Ill. App. 151.

Kansas. — Kansas City, etc., R. Co. v. Little, 66 Kan. 378, 97 Am. St. Rep. 376; Nevins v. Nevins, 68 Kan. 410.

Kentucky. — Ohio Valley Tel. Co. v. Meyer, (Ky. 1900) 56 S. W. Rep. 673.

Maryland. — Northern Cent. R. Co. v. Newman, 98 Md. 507.



- 16.** Various Enumerations in Stating Rule. — See note 2.  
**2.** Necessity for Concurrence of Elements. — See note 3.  
**17.** 3. Torts to the Person. — See note 2.  
**18.** 4. Torts to Personal Property — *a.* IN GENERAL. — See note 3.  
**19.** 5. Torts to Real Property. — See note 6.  
**20.** V. EXEMPLARY DAMAGES IN ACTIONS ON CONTRACTS — 1. In General. — See note 5.  
**21.** 3. Actions on Statutory Bonds — *a.* GENERAL RULE. — See note 3.  
**4.** Contracts to Marry. — See note 7.  
**22.** VI. REQUISITES TO RECOVERY — 2. Malice, Wantonness, or Oppression — *a.* IN GENERAL. — See notes 1, 2.

*Mississippi.*—Cumberland Telephone, etc., Co. v. Cassedy, 78 Miss. 666; Illinois Cent. R. Co. v. Moore, 79 Miss. 766; Vicksburg R., etc., Co. v. Marlett, 78 Miss. 872.

*Missouri.*—Laird v. Chicago, etc., R. Co., 78 Mo. App. 273, 2 Mo. App. Rep. 263.

*New York.*—Oehlhof v. Solomon, 73 N. Y. App. Div. 329; Waltenberg v. Bernhard, (N. Y. City Ct. Gen. T.) 26 Misc. (N. Y.) 659; Wigton v. Metropolitan St. R. Co., 38 N. Y. App. Div. 207.

*North Carolina.*—Chappell v. Ellis, 123 N. Car. 259, 68 Am. St. Rep. 822; Kelly v. Durham Traction Co., 132 N. Car. 368, 133 N. Car. 418; Story v. Norfolk, etc., R. Co., 133 N. Car. 59.

*North Dakota.*—Lindblom v. Sonsteli, 10 N. Dak. 140.

*Oregon.*—Bingham v. Lipman, 40 Oregon 363.

*Pennsylvania.*—Goebeler v. Wilhelm, 17 Pa. Super. Ct. 432.

*South Dakota.*—Baxter v. Campbell, 17 S. Dak. 475.

*Tennessee.*—Cumberland Telephone, etc., Co. v. Shaw, 102 Tenn. 313; Knoxville Traction Co. v. Lane, 103 Tenn. 376.

*Texas.*—St. Louis Southwestern R. Co. v. McArthur, 31 Tex. Civ. App. 205; Western Cottage Piano, etc., Co. v. Anderson, (Tex. Civ. App. 1903) 76 S. W. Rep. 945.

*Virginia.*—Wood v. American Nat. Bank, 100 Va. 306, 4 Va. Sup. Ct. 133.

*Wyoming.*—Cosgriff v. Miller, 10 Wyo. 236, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 12.

**Exemplary Damages Are Only Given** where there is an unlawful act coupled with an intentional wrong. Dorsey v. Atchison, etc., R. Co., 83 Mo. App. 528; Wamsganz v. Wolff, 86 Mo. App. 205.

**16. 2. "Wanton and Wilful" Torts.**—Stembridge v. Southern R. Co., 65 S. Car. 440; Harmon v. Western Union Tel. Co., 65 S. Car. 490; Butler v. Western Union Tel. Co., 65 S. Car. 510; Boyd v. Seaboard Air Line R. Co., 67 S. Car. 218; Aaron v. Southern R. Co., 68 S. Car. 98.

**3. Concurrence of Several Elements.**—Kansas City, etc., R. Co. v. Little, 66 Kan. 378, 97 Am. St. Rep. 376; Vicksburg R., etc., Co. v. Marlett, 78 Miss. 872; Chappell v. Ellis, 123 N. Car. 259, 68 Am. St. Rep. 822.

**17. 2. Recovery of Exemplary Damages for Torts to Person.**—Schofield v. Baldwin, 102 Ill. App. 560; Malott v. Woods, 109 Ill. App. 512.

**18. 3. Recovery of Exemplary Damages for Torts to Personal Property.**—Tanton v. Boom-  
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gaarden, 111 Ill. App. 37; Ellis v. Stine, (Tex. Civ. App. 1900) 55 S. W. Rep. 758.

**19. 6. Exemplary Damages for Torts to Real Property.**—McCarty v. Gray, 95 Ill. App. 559; Johns v. Cumberland Telephone, etc., Co., 80 S. W. Rep. 165, 25 Ky. L. Rep. 2074; Nickerson v. Allen, 110 La. 194; Avera v. Williams, 81 Miss. 714; Hollister v. Ruddy, 66 N. J. L. 68; Gallagher v. Burke, 13 Pa. Super. Ct. 244; Ostrom v. San Antonio, 33 Tex. Civ. App. 683; Cosgriff v. Miller, 10 Wyo. 190, 98 Am. St. Rep. 977.

**20. 5. Rule in Case of Breach of Contract.**—Ford v. Fargason, 120 Ga. 708; Western Union Tel. Co. v. Cross, 74 S. W. Rep. 1098, 25 Ky. L. Rep. 268; Miller v. Baltimore, etc., R. Co., 89 N. Y. App. Div. 457; Moon v. Interurban St. R. Co., (Supm. Ct. App. T.) 85 N. Y. Supp. 363; Richardson v. Wilmington, etc., R. Co., 126 N. Car. 100. See Haber, etc., Hat Co. v. Southern Bell Telephone, etc., Co., 118 Ga. 874.

**21. 3. Official Bonds.**—Johnson v. Williams, 111 Ky. 289, 98 Am. St. Rep. 416.

**7. Breach of Promise of Marriage.**—Jacoby v. Stark, 205 Ill. 34; Richardson v. Wilmington, etc., R. Co., 126 N. Car. 100. But see Trammell v. Vaughan, 158 Mo. 214, 81 Am. St. Rep. 302.

**22. 1. Malice, Wantonness, or Oppression — United States.**—Giddings v. Freedley, (C. C. A.) 128 Fed. Rep. 355; Crawford v. Eidman, 129 Fed. Rep. 992; Murray v. Pannaci, (C. C. A.) 130 Fed. Rep. 529.

*Alabama.*—Hicks v. Swift Creek Mill Co., 133 Ala. 411, 91 Am. St. Rep. 38.

*Arkansas.*—Brown v. Allen, 67 Ark. 386; St. Louis, etc., R. Co. v. Wilson, 70 Ark. 136, 91 Am. St. Rep. 74.

*Connecticut.*—Hayden v. Fair Haven, etc., R. Co., 76 Conn. 355.

*Delaware.*—Petit v. Colmery, 4 Penn. (Del.) 266; Marshall v. Cleaver, 4 Penn. (Del.) 450.

*Georgia.*—Wright v. Hollywood Cemetery Corp., 112 Ga. 884; State Mut. L., etc., Assoc. v. Baldwin, 116 Ga. 855.

*Kentucky.*—Andrews v. Singer Mfg. Co., (Ky. 1899) 48 S. W. Rep. 976; Louisville Press Co. v. Tennelly, 105 Ky. 365; Wood v. Young, (Ky. 1899) 50 S. W. Rep. 541; Frazier v. Malcolm, (Ky. 1901) 62 S. W. Rep. 13; American Nat. Bank v. Morey, 113 Ky. 857, 101 Am. St. Rep. 379.

*Mississippi.*—Southern R. Co. v. Lanning, 83 Miss. 161.

*Missouri.*—Barnett v. Chicago, etc., R. Co., 75 Mo. App. 446; Yowell v. Vaughn, 85 Mo.

**23.** *b. MALICE AS SOLE ESSENTIAL.* — See note 6.

**24.** *c. WHAT IS MALICE IN THIS CONNECTION — (1) In General— Need Not Be Ill Will Toward Person Injured.* — See note 4.

(2) *Act Merely Unlawful.* — See notes 7, 9.

**25.** (5) *Where Defendant Acts in Good Faith.* — See note 1.

**26.** **3. Fraud — Doctrine Not Well Settled.** — See note 5.

**4. Gross Negligence or Recklessness — a. IN GENERAL.** — See note 7.

**28.** *b. CHARACTER OF NEGLIGENCE REQUIRED — (1) In General.* — See note 1.

(2) *Doctrine that Negligence Must Amount to Positive Misconduct.* — See note 3.

App. 206; *Wamsganz v. Wolff*, 86 Mo. App. 205; *Hickey v. Welch*, 91 Mo. App. 4.

*New Jersey.* — *Blackmore v. Ellis*, 70 N. J. L. 264.

*North Carolina.* — *Upchurch v. Robertson*, 127 N. Car. 127; *Kelly v. Durham Traction Co.*, 132 N. Car. 368, 133 N. Car. 418.

*Ohio.* — *Mauk v. Brundage*, 68 Ohio St. 89; *Pittsburgh, etc., R. Co. v. Ensign*, 6 Ohio Cir. Dec. 616; *Wyandot Club v. Sells*, 9 Ohio Dec. 106, 6 Ohio N. P. 64.

*Pennsylvania.* — *Stroud v. Smith*, 194 Pa. St. 502; *Gallagher v. Burke*, 13 Pa. Super. Ct. 244.

*South Carolina.* — *Miller v. Southern R. Co.*, 69 S. Car. 116; *Beaudrot v. Southern R. Co.*, 69 S. Car. 160.

*South Dakota.* — *Baxter v. Campbell*, 17 S. Dak. 475.

*Texas.* — *Bledsoe v. Palmer*, (Tex. Civ. App. 1904) 81 S. W. Rep. 97.

*West Virginia.* — *Bodkin v. Arnold*, 48 W. Va. 108.

*Wisconsin.* — *Haberman v. Gasser*, 104 Wis. 98; *Eggett v. Allen*, 119 Wis. 625.

**22.** **2. Louisville, etc., R. Co. v. Turner**, 100 Tenn. 213.

**23.** **6. Malice as Sole Essential.** — *Hearne v. De Young*, 132 Cal. 357.

**For a Wrongful Act Founded in Malice punitive or exemplary damages may be recovered.** *Blackmore v. Ellis*, 70 N. J. L. 266, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 23.

**24.** **4. Gambill v. Schmuck**, 131 Ala. 321; *Fort v. Southern R. Co.*, 64 S. Car. 423.

**Spite or Ill Will Unnecessary.** — *Courier-Journal Co. v. Sallee*, 104 Ky. 335; *McNamara v. St. Louis Transit Co.*, 182 Mo. 676.

**7. Where Act Merely Unlawful.** — *Kibler v. Southern R. Co.*, 62 S. Car. 271, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 24.

**A Wrongful Act Done Intentionally is not as a matter of law necessarily malicious.** Page *v. Yool*, 28 Colo. 464; *Kibler v. Southern R. Co.*, 62 S. Car. 252. Thus, the wrongful suing out of an attachment does not give rise to an action for punitive damages. *Adkins v. Lacy*, 68 Ark. 170.

**9. Winters v. Cowen**, 90 Fed. Rep. 99, affirmed (C. C. A.) 96 Fed. Rep. 929; *Times Pub. Co. v. Carlisle*, (C. C. A.) 94 Fed. Rep. 762; *Ohio Valley Tel. Co. v. Meyer*, (Ky. 1900) 56 S. W. Rep. 673; *McNamara v. St. Louis Transit Co.*, 182 Mo. 676; *Arnold v. Star Sayings Co.*, 76 Mo. App. 159; *Ickenroth v. St. Louis Transit Co.*, 102 Mo. App. 616, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 24.

**25.** **1. Acts Done in Good Faith.** — *Murray v. Pannaci*, (C. C. A.) 130 Fed. Rep. 529; *Georgia R., etc., Co. v. Gardner*, 115 Ga. 954; *Gerkins v. Kentucky Salt Co.*, (Ky. 1902) 67 S. W. Rep. 821; *Northern Cent. R. Co. v. Newman*, 98 Md. 507; *Gwynn v. Citizens' Telephone Co.*, 69 S. Car. 434, 104 Am. St. Rep. 819; *Scheer v. Kriesel*, 109 Wis. 125.

**26.** **5. Fraud Must Be Either Gross or Malicious.** — *Cable v. Bowls*, 11 Ohio Cir. Dec. 526, 21 Ohio Cir. Ct. 53.

**7. Gross Negligence or Recklessness.** — *Wright v. Hollywood Cemetery Corp.*, 112 Ga. 884; *Harness v. Steele*, 159 Ind. 286; *Louisville, etc., R. Co. v. Keller*, 104 Ky. 768; *Illinois Cent. R. Co. v. Stewart*, (Ky. 1901) 63 S. W. Rep. 596; *Louisville, etc., R. Co. v. Simpson*, 111 Ky. 754; *Smith v. Middleton*, 112 Ky. 588, 99 Am. St. Rep. 308; *Louisville, etc., R. Co. v. McClain*, (Ky. 1902) 66 S. W. Rep. 391; *Chesapeake, etc., R. Co. v. Dodge*, (Ky. 1902) 66 S. W. Rep. 606; *Cincinnati, etc., R. Co. v. Cook*, 113 Ky. 161; *Western Union Tel. Co. v. Spratley*, 84 Miss. 86; *Nashville St. R. Co. v. O'Bryan*, 104 Tenn. 28.

**The Word "Recklessly," When Used Conjointly with "Wantonly,"** always means something more than "negligently." The two words thus conjoined can never import less than such conscious disregard of and indifference to the probable consequences of the act to which they refer as is the legal equivalent of wilful misconduct and intentional wrong. *Highland Ave., etc., R. Co. v. Robinson*, 125 Ala. 483.

**28.** **1. Illinois Cent. R. Co. v. Stewart**, (Ky. 1901) 63 S. W. Rep. 596; *Chesapeake, etc., R. Co. v. Dodge*, (Ky. 1902) 66 S. W. Rep. 606.

**3. What Degree or Kind of Negligence Necessary — California.** — *Turner v. Hearst*, 137 Cal. 232. *Florida.* — *Florida Cent., etc., R. Co. v. Mooney*, 40 Fla. 17.

*Georgia.* — *State Mut. L., etc., Assoc. v. Baldwin*, 116 Ga. 855; *Southern R. Co. v. O'Bryan*, 119 Ga. 147.

*Kansas.* — *Western Union Tel. Co. v. Lawson*, 66 Kan. 660.

*Mississippi.* — See *Western Union Tel. Co. v. Watson*, 82 Miss. 101.

*Missouri.* — *Gildersleeve v. Overstolz*, 90 Mo. App. 518.

*South Carolina.* — *Lewis v. Western Union Tel. Co.*, 57 S. Car. 325; *Watts v. South Bound R. Co.*, 60 S. Car. 67; *Brasington v. South Bound R. Co.*, 62 S. Car. 325, 89 Am. St. Rep. 905; *Oliver v. Columbia, etc., R. Co.*, 65 S. Car. 1; *Boyd v. Blue Ridge R. Co.*, 65 S. Car. 326; *Pickett v. Southern R. Co.*, 69 S. Car. 445.

**29.** Doctrine that Mere "Gross" Negligence Is Insufficient. — See note 1.

(3) *Wilful Design to Injure*. — See note 3.

5. Necessity for Actual Damages — *a*. IN GENERAL. — See note 5.

**30.** *c*. NOMINAL DAMAGES. — See notes 4, 5.

**32.** VII. LIABILITY OF PRINCIPAL FOR ACT OF AGENT — 2. Doctrine that Principal Is Liable for Any Act Done in Line of Agent's Employment — *a*. IN GENERAL. — See note 1.

**33.** *b*. ACTS DONE WHILE OSTENSIBLY DISCHARGING DUTIES. — See note 5.

**34.** 3. Rule Requiring Express Authority or Subsequent Ratification — *a*. IN GENERAL. — See note 4.

**37.** *d*. RATIFICATION BY PRINCIPAL — (4) *Retention in Employment* — (*a*) General Rule. — See note 7.

**40.** VIII. RULE OF EXEMPLARY DAMAGES AS APPLIED TO CORPORATIONS — 2. Liability for Exemplary Damages — *a*. IN GENERAL. — See notes 3, 4.

**42.** X. EVIDENCE — 1. Generally. — See note 4.

**44.** 5. Advice of Counsel. — See note 2.

6. Provocation — *a*. IN GENERAL. — See note 7.

*Tennessee*. — *Knoxville Traction Co. v. Lane*, 111 Tenn. 376.

*Virginia*. — *Wood v. American Nat. Bank*, 100 Va. 306, 4 Va. Sup. Ct. 133.

**29.** 1. Doctrine that Mere "Gross" Negligence Is Insufficient. — *Southern R. Co. v. O'Bryan*, 119 Ga. 147; *Oliver v. Columbia, etc.*, R. Co., 65 S. Car. 1.

In *Watts v. South Bound R. Co.*, 60 S. Car. 67, the court says: "We would here state our view that exemplary damages may not be awarded for what in this state is termed 'gross negligence,' notwithstanding some expressions in the books to the contrary."

3. *Highland Ave., etc.*, R. Co. *v. Robinson*, 125 Ala. 483; *Louisville, etc.*, R. Co. *v. Chism*, (Ky. 1898) 47 S. W. Rep. 251.

5. General Rule as to Actual Damages — *Illinois*. — *Martin v. Leslie*, 93 Ill. App. 44; *Dickinson v. Atkins*, 100 Ill. App. 401.

*Kansas*. — *Stonestreet v. Crandell*, 10 Kan. App. 575, 62 Pac. Rep. 249.

*Missouri*. — *Hoagland v. Forest Park Highlands Amusement Co.*, 170 Mo. 335, 94 Am. St. Rep. 740.

*South Carolina*. — *Appleby v. South Carolina, etc.*, R. Co., 60 S. Car. 48; *Watts v. South Bound R. Co.*, 60 S. Car. 67.

*Texas*. — *Smith v. Dye*, (Tex. Civ. App. 1899) 51 S. W. Rep. 858; *King v. Sassaman*, (Tex. Civ. App. 1899) 54 S. W. Rep. 304; *Lacy v. Gentry*, (Tex. Civ. App. 1900) 56 S. W. Rep. 949; *McCarthy v. Miller*, (Tex. Civ. App. 1900) 57 S. W. Rep. 973; *Rogers v. O'Barr*, (Tex. Civ. App. 1903) 76 S. W. Rep. 593; *Flanery v. Wood*, 32 Tex. Civ. App. 250.

*Contra*. — *Birmingham R., etc., Co. v. Nolan*, 134 Ala. 329.

**30.** 4. Merely Nominal Damages Sustain. — *Mills v. Taylor*, 85 Mo. App. 111.

5. *Lacy v. Gentry*, (Tex. Civ. App. 1900) 56 S. W. Rep. 949; *Malin v. McCutcheon*, 33 Tex. Civ. App. 387.

**32.** 1. Rule Making Principal Liable for Acts of Agent in Line of His Employment. — *Highland Ave., etc.*, R. Co. *v. Robinson*, 125 Ala. 483; *Birmingham R., etc., Co. v. Nolan*, 134 Ala. 329; *St. Louis, etc.*, R. Co. *v. Wilson*, 70 Ark. 136,

91 Am. St. Rep. 74; *Lexington R. Co. v. Cozine*, 111 Ky. 799; *Smith v. Middleton*, 112 Ky. 588; *Boyer v. Coxen*, 92 Md. 366; *Peterson v. Western Union Tel. Co.*, 75 Minn. 368, 74 Am. St. Rep. 502; *Reeves v. Southern R. Co.*, 68 S. Car. 89.

**33.** 5. *Tanger v. Southwest Missouri Electric R. Co.*, 85 Mo. App. 28.

**34.** 4. Rule Requiring Express Authority or Subsequent Ratification. — *McGehee v. McCauley*, (C. C. A.) 91 Fed. Rep. 462, *reversed* (C. C. A.) 103 Fed. Rep. 55; *Palo Alto Bank v. Pacific Postal Tel. Cable Co.*, 103 Fed. Rep. 841; *Nixon v. Rauer*, (Cal. 1901) 66 Pac. Rep. 221; *Maisenbacker v. Society Concordia*, 71 Conn. 369, 71 Am. St. Rep. 213; *Haywood v. Hamm*, 77 Conn. 158; *Fohrmann v. Consolidated Traction Co.*, 63 N. J. L. 391; *Craven v. Bloomingdale*, 171 N. Y. 439; *Grinnell v. Weston*, 95 N. Y. App. Div. 454; *Claiborne v. Chesapeake, etc.*, R. Co., 46 W. Va. 363. See *Patterson v. New Orleans, etc., R., etc., Co.*, 110 La. 797.

**37.** 7. *Retention of Agent*. — *Tanger v. Southwest Missouri Electric R. Co.*, 85 Mo. App. 28.

**40.** 3. Corporations Liable for Exemplary Damages. — *Maisenbacker v. Society Concordia*, 71 Conn. 369, 71 Am. St. Rep. 213; *Fohrmann v. Consolidated Traction Co.*, 63 N. J. L. 391; *Craven v. Bloomingdale*, 171 N. Y. 439; *Dagnall v. Southern R. Co.*, 69 S. Car. 110; *St. Louis Southwestern R. Co. v. McArthur*, 31 Tex. Civ. App. 205; *Claiborne v. Chesapeake, etc.*, R. Co., 46 W. Va. 363.

A Municipal Corporation, however, is not liable for punitive damages unless in exceptional instances. *Ostrom v. San Antonio*, 33 Tex. Civ. App. 683.

4. *Smith v. Middleton*, 112 Ky. 588; *Western Cottage Piano, etc., Co. v. Anderson*, (Tex. Civ. App. 1903) 76 S. W. Rep. 945.

**42.** 4. Evidence of Defendant's Motive. — *Palmer v. Maine Cent. R. Co.*, 92 Me. 399, 69 Am. St. Rep. 513.

**44.** 2. Effect of Advice of Counsel. — *Gedusky v. Rubinsky*, 21 Pa. Co. Ct. 549.

7. Evidence of Provocation — General Rule. —



**45.** *b.* WHERE DEFENDANT'S ACT DISPROPORTIONATE TO PROVOCATION — (1) *In General.* — See note 3.

**47.** 7. Financial Condition of Parties — *a.* EVIDENCE OF DEFENDANT'S WEALTH — GENERAL RULE. — See note 1.

Rationale of Rule. — See note 2.

**51.** 9. Burden of Proof. — See note 2.

**XI. RESPECTIVE FUNCTIONS OF COURT AND JURY — 1. Exemplary Damages as Matter of Right.** — See note 4.

2. Extent and Limits of Jury's Discretion. — See notes 6, 7.

**52.** Conflict of Cases. — See notes 5, 6.

3. Where No Evidence Warranting Exemplary Damages. — See note 7.

**53.** See note 1.

But Although the Question of Punitive Damages Has Been Erroneously Submitted. — See note 2.

*Hendle v. Geiler*, (Del. 1895) 50 Atl. Rep. 632; *Petit v. Colmery*, 4 Penn. (Del.) 266; *Palmer v. Maine Cent. R. Co.*, 92 Me. 399; *Strother v. Aberdeen, etc., R. Co.*, 123 N. Car. 197; *Mahoning Valley R. Co. v. De Pascale*, 70 Ohio St. 179. See *Lochte v. Mitchell*, (Miss. 1900) 28 So. Rep. 877.

**45.** 3. Defendant's Act Disproportionate to the Provocation. — *Hendle v. Geiler*, (Del. 1895) 50 Atl. Rep. 632.

**47.** 1. Evidence of Defendant's Financial Condition. — *Greenberg v. Western Turf Assoc.*, 140 Cal. 357; *Wagner v. Gibbs*, 80 Miss. 53, 92 Am. St. Rep. 598; *Tucker v. Winders*, 130 N. Car. 147; *Hendricks v. Fowler*, 9 Ohio Cir. Dec. 209, 16 Ohio Cir. Ct. 597; *Cumberland Telephone, etc., Co. v. Shaw*, 102 Tenn. 313; *Nashville St. R. Co. v. O'Bryan*, 104 Tenn. 28; *Cosgriff v. Miller*, 10 Wyo. 190, 98 Am. St. Rep. 977. See also *Southern Car, etc., Co. v. Adams*, 131 Ala. 160, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 47, to the effect that the rule in many states allows evidence of defendant's wealth. This case holds, however, that in *Alabama* the rule does not exist.

2. *Cosgriff v. Miller*, 10 Wyo. 190, 98 Am. St. Rep. 977.

**51.** 2. *Gedusky v. Rubinsky*, 21 Pa. Co. Ct. 549.

**4.** Discretion of Jury. — *Sabre v. Mott*, 88 Fed. Rep. 780; *Friedly v. Giddings*, 119 Fed. Rep. 438, affirmed (C. C. A.) 128 Fed. Rep. 355; *Martin v. Leslie*, 93 Ill. App. 44; *Chesapeake, etc., R. Co. v. Dodge*, (Ky. 1902) 66 S. W. Rep. 606; *Ragsdale v. Ezell*, (Ky. 1899) 49 S. W. Rep. 775; *Krup v. Corley*, 95 Mo. App. 640; *Craven v. Bloomingdale*, 54 N. Y. App. Div. 266, reversed 171 N. Y. 439; *Hopkins v. Drowne*, 21 R. I. 20; *Haberman v. Gasser*, 104 Wis. 98; *Gatzow v. Buening*, 106 Wis. 1, 80 Am. St. Rep. 17.

But the Question Whether There Is Any Evidence to justify the assessment by the jury of exemplary damages is for the determination of the court. *Lexington R. Co. v. Fain*, 80 S. W. Rep. 463, 25 Ky. L. Rep. 2243.

6. *Salem v. Webster*, 95 Ill. App. 120, affirmed 192 Ill. 369. But see *Beaudrot v. Southern R. Co.*, 69 S. Car. 160.

7. *Salem v. Webster*, 95 Ill. App. 120, affirmed 192 Ill. 369.

**52.** 5. "Might" Give. — An instruction that the jury "might" give exemplary damages if

they believed that the assault was wilful and malicious, is unobjectionable. *Wood v. Young*, (Ky. 1899) 50 S. W. Rep. 541.

"Were Authorized." — An expression by the court that the jury "were authorized" to award punitive damages is strictly correct and does not carry the implication that they must be awarded. See *Eggett v. Allen*, 119 Wis. 625.

6. It Is Not Within the Discretion of the Jury to Refuse to Award Any Exemplary Damages when a case is made which in law justifies such damages. *Dagnall v. Southern R. Co.*, 69 S. Car. 110.

7. In Cases Where There Is No Evidence Warranting Exemplary Damages. — *Southwestern Tel., etc., Co. v. Whiteman*, 36 Tex. Civ. App. 163.

**53.** 1. *California.* — *Mabb v. Stewart*, 133 Cal. 556.

*Florida.* — *Florida Cent., etc., R. Co. v. Mooney*, 40 Fla. 17.

*Illinois.* — *Goldstein v. Miller*, 93 Ill. App. 103.

*Kentucky.* — *Louisville, etc., R. Co. v. Champion*, (Ky. 1902) 68 S. W. Rep. 143; *American Nat. Bank v. Morey*, 113 Ky. 857, 101 Am. St. Rep. 379; *Cumberland Telephone, etc., Co. v. Hendon*, 114 Ky. 501, 102 Am. St. Rep. 290; *Louisville, etc., R. Co. v. Hall*, (Ky. 1903) 74 S. W. Rep. 280; *Mobile, etc., R. Co. v. Reeves*, (Ky. 1904) 80 S. W. Rep. 471.

*Mississippi.* — *Vicksburg R., etc., Co. v. Marlett*, 78 Miss. 872; *Illinois Cent. R. Co. v. Pearson*, 80 Miss. 26; *Yazoo, etc., R. Co. v. Faust*, (Miss. 1902) 32 So. Rep. 9.

*New York.* — *Craven v. Bloomingdale*, 171 N. Y. 439; *Oehlhof v. Solomon*, (Supm. Ct. App. T.) 33 Misc. (N. Y.) 771, affirmed 73 N. Y. App. Div. 329.

*Pennsylvania.* — *Gedusky v. Rubinsky*, 21 Pa. Co. Ct. 549.

*South Carolina.* — *Myers v. Southern R. Co.*, 64 S. Car. 514; *Pickett v. Southern R. Co.*, 69 S. Car. 445.

*South Dakota.* — *Baxter v. Campbell*, 17 S. Dak. 475.

*Tennessee.* — *Choctaw, etc., R. Co. v. Hill*, 110 Tenn. 396.

*Texas.* — *Western Union Tel. Co. v. Waller*, (Tex. Civ. App. 1898) 47 S. W. Rep. 396.

2. *Kentucky Distilleries, etc., Co. v. Schreiber*, (Ky. 1903) 73 S. W. Rep. 769.

**53. 4. Amount of Recovery — a. RULE OF DISCRETION OF JURY — IN GENERAL.** — See note 3.

**54.** See note 1.

**No Fixed Standard of Measurement.** — See note 2.

**c. RATIO BETWEEN EXEMPLARY AND COMPENSATORY DAMAGES.** — See note 5.

**5. Excessive and Inadequate Damages — The General Rule.** — See note 7.

**55.** See note 1.

**It Is Not Sufficient.** — See note 2.

**56. 6. Elements of Recovery — Costs and Expenses of Litigation — b. AFFIRMATIVE DOCTRINE.** — See note 1.

**58. EXEMPT — EXEMPTION.** — See note 1.

**53. 3. Amount of Recovery — Jury's Discretion.** — *Tyler v. Bowen*, 124 Ala. 452; *Hollins v. Gorham*, (Ky. 1902) 66 S. W. Rep. 823; *Plourde v. Jarvis*, 99 Me. 161; *Yazoo, etc., R. Co. v. Mitchell*, 83 Miss. 179.

**54. 1. Dagnall v. Southern R. Co.**, 69 S. Car. 110.

**2. Petit v. Colmery**, 4 Penn. (Del.) 266.

**5. Flannery v. Wood**, 32 Tex. Civ. App. 250. See *Harkleroad v. Leonard*, 28 Tex. Civ. App. 133.

**7. Excessive or Inadequate Damages — When Finding of Jury Disturbed.** — *Sabre v. Mott*, 88 Fed. Rep. 780; *Page v. Yool*, 28 Colo. 464; *Southern R. Co. v. Wood*, 114 Ga. 140; *Illinois Cent. R. Co. v. Stewart*, (Ky. 1901) 63 S. W. Rep. 596; *Hollins v. Gorham*, (Ky. 1902) 66 S. W. Rep. 823; *Peterson v. Western Union Tel. Co.*, 75 Minn. 368, 74 Am. St. Rep. 502; *Mc-*

*Namara v. St. Louis Transit Co.*, 182 Mo. 676. See *Wagner v. Gibbs*, 80 Miss. 53, 92 Am. St. Rep. 598.

**55. 1. No Actual Damages Found.** — *Hoazland v. Forest Park Highlands Amusement Co.*, 170 Mo. 335, 94 Am. St. Rep. 740.

**2. Hollins v. Gorham**, (Ky. 1902) 66 S. W. Rep. 823; *Beaudrot v. Southern R. Co.*, 69 S. Car. 160.

**56. 1. Rule Allowing Recovery for Expenses of Litigation, Etc.** — *Cowen v. Winters*, (C. C. A.) 96 Fed. Rep. 929, *affirming* 90 Fed. Rep. 99; *Maisenbacker v. Society Concordia*, 71 Conn. 369, 71 Am. St. Rep. 213.

**58. 1. Maine Water Co. v. Waterville**, 93 Me. 586.

**Distinguished from Deduction.** — *State v. Smith*, 158 Ind. 553.

# EXEMPTIONS (FROM EXECUTION).

BY BRISCOE B. CLARK.

**67. II. EXEMPTIONS AT COMMON LAW — 1. No Exemption as a General Rule.**  
— See note 3.

**69. 2. Exceptions at Common Law — d. PROPERTY OF QUASI-PUBLIC CORPORATION.** — See note 5.

**g. COMPENSATION OF PUBLIC OFFICERS AND EMPLOYEES.** — See note 8.

**70. Particular Officers.** — See notes 5, 6.

**71. After Receipt by the Officer.** — See note 1.

**72. IV. CONSTITUTIONALITY OF EXEMPTION LAWS — 1. Power of the Legislatures in General.** — See note 3.

**2. Constitutional Provisions and Limitations.** — See note 4.

**73. Title of Acts and Unity of Subject-matter.** — See notes 7, 8.

**74. Retroactive Laws.** — See note 1.

**V. REPEAL OR MODIFICATION OF EXEMPTION LAWS — 1. No Vested Right to Exemption.** — See note 2.

**3. Effect of Constitutional Provisions for Exemptions.** — See note 5.

**4. Effect of Repeal.** — See note 6.

**75. VI. GENERAL RULES OF CONSTRUCTION — 1. Intention of the Legislature.**  
— See note 2.

**67. 3. No Exemption, as a Rule, at Common Law.**—Doyle v. Hall, 86 Ill. App. 163; Baltimore, etc., R. Co. v. Hollenbeck, 161 Ind. 452; Caldwell v. Renfro, 99 Mo. App. 376; Robinson v. Burke, 70 N. H. 2, 85 Am. St. Rep. 595; Matter of Liddle, (Surrogate Ct.) 35 Misc. (N. Y.) 173.

The Equipment of a Post Office furnished by a third-class postmaster is only protected in so far as the delivery of the mails requires. Turill v. McCarthy, 114 Iowa 681.

**69. 5. Necessary Wearing Apparel Not on the Person Exempt.**—In re Stokes, 4 Am. Bankr. Rep. 560 (decided under New York law), following Bumpus v. Maynard, 38 Barb. (N. Y.) 626, and citing 4 AM. AND ENG. ENCYC. OF LAW (2d ed.) 68.

**8. Compensation Due Public Officers and Employees Exempt at Common Law.**—Dickinson v. Johnson, 110 Ky. 236 (cannot be reached by proceedings in equity).

**70. 5. A Private Watchman** employed by a private corporation to police its property, who is paid by the company and subject to discharge by the company, is not a municipal officer so as to exempt his wages from garnishment, though he is clothed with certain police powers. Tabb v. Mallette, 120 Ga. 97, 102 Am. St. Rep. 78.

**6. Teachers in Public School.**—Clark v. Eltinge, 38 Wash. 376.

**71. 1. Where a Public Officer Purchases Land with His Salary** and has the land transferred to his wife, such land may be subjected to the payment of his debts. Dickinson v. Johnson, 110 Ky. 236, 96 Am. St. Rep. 434.

**72. 3. Exemption Laws Within the Legislative Power.**—Reed v. Holbrook, 113 Ga. 1168.

**4.** The legislature may without curtailment of the right of exemption given by the constitution provide a reasonable method for the ascertainment of the claim of exemption and the quantity and value of the property claimed as exempt. Farris v. Gross, (Ark. 1905) 87 S. W. Rep. 633.

**73. 7. Amendment.**—In re Buelow, 98 Fed. Rep. 86 (amendment of exemption statute must comply with constitutional requirement as to enactment of amending act).

**8. Sufficiency of Title.**—State v. Power, 63 Neb. 496.

**74. 1. Retroactive Laws Unconstitutional.**—The Queen, 93 Fed. Rep. 834.

**2. Power to Modify or Repeal Exemption Laws.**—Phelps-Bigelow Windmill Co. v. North American Trust Co., 62 Kan. 535, per Doster, C. J., concurring, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 74; Kittel v. Domeyer, 175 N. Y. 205.

**5.** The legislature cannot deprive a debtor of an exemption right expressly given by the constitution of the state. Sellers v. Bell, (C. C. A.) 94 Fed. Rep. 801.

**6. No Vested Right in Exemption.**—Reed v. Holbrook, 113 Ga. 1168.

**75. 2. In Missouri,** the only property persons not the head of a family may hold exempt from execution is their wearing apparel, and their tools and implements if they are mechanics and carrying on their trade. The courts have no power to extend the exemption statutes to cover the salary or wages of such persons.



- 76.** 3. Liberal Construction. — See note 1.
- 77.** 4. The Case Must Be Within the Spirit of the Law. — See note 2.
- 78.** VII. OPERATION OF STATUTES WITH RESPECT TO TERRITORIAL LIMITS —
- 2.** The Lex Fori Governs — Result of This Rule. — See note 6.
- 80.** 3. Giving Effect to Foreign Statutes Through Comity — In Other States. — See note 2.
- 84.** VIII. PERSONS ENTITLED TO BENEFIT OF EXEMPTION LAWS — 1. Residence and Citizenship — *a.* EXPRESS RESTRICTION TO RESIDENTS. — See note 2.
- b.* IN THE ABSENCE OF EXPRESS RESTRICTION. — See note 3.
- 85.** *c.* CHANGE OF RESIDENCE AND ABSENCE FROM STATE. — See notes 4, 5.

*Dinkins v. Crunden-Martin Woodenware Co.*, 91 Mo. App. 209.

**76.** 1. Liberal Construction Is the Rule — *United States.* — *Sellers v. Bell*, (C. C. A.) 94 Fed. Rep. 801; *In re Friederick*, 95 Fed. Rep. 282; *In re Jones*, 97 Fed. Rep. 773; *In re Hindman*, 104 Fed. Rep. 331, 43 C. C. A. 558; *Richardson v. Woodward*, (C. C. A.) 104 Fed. Rep. 873; *In re Carpenter*, (C. C. A.) 109 Fed. Rep. 558; *In re Falconer*, (C. C. A.) 110 Fed. Rep. 111; *Bashinshi v. Talbott*, (C. C. A.) 119 Fed. Rep. 337.

*Illinois.* — *Houston v. Maddux*, 179 Ill. 377; *Davis v. Siegel*, 80 Ill. App. 278; *Dickinson v. Rahn*, 98 Ill. App. 245; *McClellan v. Powell*, 109 Ill. App. 222.

*Iowa.* — *Chadwick v. Stout*, 112 Iowa 167, 84 Am. St. Rep. 334; *Cook v. Allee*, 119 Iowa 226.

*Kansas.* — *Emmert v. Schmidt*, 65 Kan. 31.

*Kentucky.* — *Baum v. Turner*, (Ky. 1903) 76 S. W. Rep. 129.

*Minnesota.* — *Olin v. Fox*, 79 Minn. 459; *Boelter v. Klossner*, 74 Minn. 272, 73 Am. St. Rep. 347.

*Mississippi.* — *Gulfport Bank v. O'Neal*, (Miss. 1905) 38 So. Rep. 630.

*Missouri.* — *Bovard v. Ford*, 83 Mo. App. 498; *Caldwell v. Renfro*, 99 Mo. App. 376.

*Montana.* — *Dayton v. Ewart*, 28 Mont. 153.

*Nebraska.* — *Farmers', etc., Bank v. Hoffman*, (Neb. 1903) 96 N. W. Rep. 1044.

*New York.* — *Conklin v. McCauley*, 41 N. Y. App. Div. 452; *King v. Warren*, (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 317.

*North Carolina.* — *Goodwin v. Claytor*, 137 N. Car. 224.

*South Dakota.* — *Long v. Collins*, 15 S. Dak. 259.

*Tennessee.* — *Terry v. McDaniel*, 103 Tenn. 415.

*Wisconsin.* — *Cunningham v. Britson*, 101 Wis. 378.

**77.** 2. Case Must Be Within the Spirit of the Law. — *Moran v. King*, (C. C. A.) 111 Fed. Rep. 733, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 77; *Chadwick v. Stout*, 112 Iowa 167, 84 Am. St. Rep. 334; *Caldwell v. Renfro*, 99 Mo. App. 376.

**78.** 6. Property Exempt under the Laws of Another State. — *Baltimore, etc., R. Co. v. Hollenbeck*, 161 Ind. 452; *Sexton v. Phoenix Ins. Co.*, 132 N. Car. 1; *Goodwin v. Claytor*, 137 N. Car. 224; *Bond v. Turner*, 33 Oregon 551; *Pennsylvania R. Co. v. Rogers*, 52 W. Va. 450, reaffirming *Mahany v. Kephart*, 15 W. Va. 609,

and *Stevens v. Brown*, 20 W. Va. 450; *National Tube Co. v. Smith*, (W. Va. 1905) 50 S. E. Rep. 717, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 78. See also *Chicago, etc., R. Co. v. Sturm*, 174 U. S. 710.

**80.** 2. Doctrine Giving Effect to Foreign Exemption Laws. — See, however, *National Tube Co. v. Smith*, (W. Va. 1905) 50 S. E. Rep. 717.

**84.** 2. *In re Oconee Milling Co.*, (C. C. A.) 109 Fed. Rep. 866 (mere intention to come into state will not entitle person to exemption as a resident, construing Const. N. Car., art. 10, § 1); *Dinkins v. Crunden-Martin Woodenware Co.*, 99 Mo. App. 310.

**A Person Residing on an Indian Reservation** within the state may be a resident of the state so as to entitle him to claim exemptions. *Coey v. Cleghorn*, (Idaho 1904) 79 Pac. Rep. 72.

**Residence Acquired After Levy.** — In *West Virginia*, it is held that if a nonresident acquires a residence within the state after the levy upon property but before sale, he is entitled to exemption rights in the property. *State v. Allen*, 48 W. Va. 154, 86 Am. St. Rep. 29.

**3. Statutes Construed as Impliedly Limited to Residents.** — *Dock v. Cauldwell*, 19 Pa. Super. Ct. 51.

The provision of the *Pennsylvania Act 1845*, § 5, "that the wages of any laborers \* \* \* shall not be liable to attachment in the hands of the employer," prevents the attachment of wages due nonresidents, as such act, though frequently spoken of for convenience' sake as an exemption law, and in a sense being such, is more broadly a law forbidding the taking of jurisdiction by attachment over the subject-matter. It was not intended to confer a personal privilege upon laborers merely, but was intended for the protection of their employers as well. *Little v. Ballietie*, 9 Pa. Super. Ct. 411.

**85.** 4. Removal from State and Loss of Residence. — *Dock v. Cauldwell*, 19 Pa. Super. Ct. 51.

If a resident of the state, with a fixed intention to remove to another state and there reside, in pursuance of such intention goes out of the state, he immediately becomes a nonresident, though he has not acquired a residence in any other state so as to deprive him of the right to claim exemption. *State v. Allen*, 48 W. Va. 154, 86 Am. St. Rep. 29.

**5.** In *Missouri*, it is held that where a debtor was entitled to exemption rights at the time of

- 86.** Mere Intention to Remove. — See note 2.
- 89.** 2. "Head of a Family," "Householder," Etc. — *b.* ACTUAL EXISTENCE OF FAMILY NECESSARY. — See note 1.
- c.* "HOUSEHOLDER." — See note 2.
- 90.** *d.* WHAT CONSTITUTES A "FAMILY" AND THE "HEAD" OF A FAMILY, ETC. — Collection of Persons — Number of Members. — See notes 2, 3.
- Unmarried Persons. — See note 6.
- e.* OBLIGATION TO SUPPORT AND CONDITION OF DEPENDENCE —
- (1) *In General.* — See note 7.
- 91.** (3) *Doctrine that Moral Obligation Is Sufficient.* — See note 3.
- 93.** *f.* LIVING TOGETHER AND KEEPING HOUSE — (2) *Contrary Doctrine.* — See note 4.
- 94.** *g.* WIDOWS AND DESERTED OR DIVORCED WIVES. — See notes 2, 3.
- h.* WIDOWERS AND DESERTED OR DIVORCED HUSBANDS. — See note 7.
- 95.** See note 1.
- i.* MARRIED WOMEN — General Rule. — See note 2.
- 96.** Wife May Be the Head of the Family. — See note 1.
- Abandoned Wife. — See note 2.

the levy of an attachment he did not lose his exemption rights by subsequent removal from the state, as the rights of the parties must be determined by their status at the time of the issuance of the writ of attachment, and a debtor's subsequent change of residence and removal to another state could not have the effect of forfeiting or destroying such vested rights, or, by expanding the scope of the attachment writ, add to its effect, or enlarge the rights of the attaching creditor beyond those existing thereunder at the time of its issuance. *Caldwell v. Renfro*, 99 Mo. App. 376.

**Burden of Proving Change of Residence** is upon party objecting to exemption. *In re Grimes*, 94 Fed. Rep. 800.

**86.** 2. Statutory Provisions to the Contrary. — *Linck v. Troll*, 84 Mo. App. 49.

**89.** 1. Actual Existence Distinguished from Existence in Theory Only. — *Beitz v. Schueller*, 8 Ohio Dec. 674; 7 Ohio N. P. 619 (debtor must show that he is living with and supporting his family).

**2.** "Housekeeper." — One who had kept house, but who has stored his furniture for a year and a half since then, ceases to be a housekeeper. *Mills v. Nichols*, 21 R. I. 574.

**90.** 2. After the Death of the Dependent Members of a Family, the person who was the head of the family during their lives ceases to be a head of a family. *Allen v. Ashburn*, 27 Tex. Civ. App. 239.

**3.** No Particular Number Necessary. — *Bank v. Griffith*, 8 Pa. Dist. 333.

**6.** Unmarried Persons. — *Rolator v. King*, 13 Okla. 37.

**7.** Dependence and Obligation to Support. — *Rolator v. King*, 13 Okla. 40, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 90.

**A Natural Father Supporting a Bastard Child** is not a person who has a family within the meaning of the *Ohio* exemption statute (Rev. Stat., § 5430). *Moore v. Baughman*, 8 Ohio Dec. 396; 7 Ohio N. P. 149.

**91.** 3. Moral or Natural Obligation to Support Sufficient. — *In re Morrison*, 110 Fed. Rep.

734 (construing Ark. Const., art. 9, § 3); *Sternberg v. Levy*, 159 Mo. 617; *Rolator v. King*, 13 Okla. 37.

**93.** 4. Householder. — See, however, *Gregg v. Brickley*, 27 Ind. App. 154, wherein the sending by a father of occasional presents of money, etc., to his children who either lived with their grandparents or supported themselves, was held insufficient to render him a householder within the exemption law.

**94.** 2. Widows. — *White v. Wilson*, 106 Mo. App. 406.

**3.** Widow Living Alone. — *Brown v. Parham*, 25 Ohio Cir. Ct. 640.

**7.** Abandoned Husband. — *Jarboe v. Jarboe*, 106 Mo. App. 459 (married son deserted by his wife and furnishing home for mother and minor brother is the head of a family).

**Divorced Husband.** — *In re Rhodes*, 109 Fed. Rep. 117 (construing *Ohio* statute); *Maag v. Williams*, 92 Mo. App. 674 (where by the decree of divorce the husband was required to support his children, the custody of whom was given to the wife, he continues to be the head of a family).

**95.** 1. Abandoned Husband. — *Johnson v. Larcade*, 110 Ill. App. 611 (deserted husband held not to be entitled to exemption as the head of a family).

**2.** Husband Primarily the Head of the Family. — *Arnold v. Coleman*, 88 Ill. App. 608; *Ness v. Jones*, 10 N. Dak. 587, 88 Am. St. Rep. 755; *Thompson v. Donahoe*, 16 S. Dak. 244; *Blount v. Medbery*, 16 S. Dak. 562.

**96.** 1. Married Woman the Head of a Family. — *Richardson v. Woodward*, 104 Fed. Rep. 873; 44 C. C. A. 235 (construing Const. Va., art. 11); *Arnold v. Coleman*, 88 Ill. App. 608; *Farmers'*, etc., *Bank v. Hoffman*, (Neb. 1903) 96 N. W. Rep. 1044; *Ness v. Jones*, 10 N. Dak. 587, 88 Am. St. Rep. 755.

**Where the Husband Is Insane and confined in an asylum, the wife may be the head of the family.** *Ecker v. Lindskog*, 12 S. Dak. 428.

**2.** Abandoned Wife — Claim of Separate Property. — *Arnold v. Coleman*, 88 Ill. App. 608.

- 97.** *j.* UNMARRIED PERSONS. — See note 2.
- 98.** *3.* Persons Engaged in Particular Occupations — *a.* IN GENERAL. — See note 5.
- 99.** See note 1.
- b.* "MECHANICS." — See notes 2, 3.
- 100.** *c.* "LABORERS." — See note 5.
- Manual Labor. — See notes 6, 7.
- Particular Occupations. — See note 8.
- 101.** See notes 3, 5.
- Clerks, Bookkeepers, Etc. — See note 10.

**97. 2. Unmarried Persons with Dependents.** — *In re Morrison*, 110 Fed. Rep. 734 (construing Ark. Const., art. 9, § 3, and holding unmarried son living with and supporting widowed mother and minor brother to be the head of a family); *Sternberg v. Levy*, 159 Mo. 617 (unmarried man supporting widowed mother and sisters held head of a family); *Duffey v. Reardon*, 70 Ohio St. 328; *Rolator v. King*, 13 Okla. 37 (son living with and supporting widowed mother and sisters held to be the head of a family).

An unmarried man who has residing with him, under his care and maintenance, a married adult brother who is unable to take care of or support himself, is the head of a family. *Webster v. McGauvran*, 8 N. Dak. 274.

**98. 5. Abandonment of Occupation.** — If a person abandons his trade or occupation which entitled him to an exemption, his right to the exemption ceases. *McCord-Collins Co. v. Lazarus*, (Tex. Civ. App. 1899) 50 S. W. Rep. 1048.

**99. 1. General Terms Limited by Policy and Intent of Statute.** — *Desmond v. Young*, 173 Mass. 90.

**2. A Baker Is a Mechanic.** — *In re Osborn*, 104 Fed. Rep. 780 (construing N. Y. Code Civ. Pro., §§ 1390, 1391).

**Mechanic Without Family.** — In the *Washington* statute (Ball. Code, § 5248, subd. 6), exempting "to a mechanic the tools and instruments used to carry on his trade for the support of himself and family," the word "and" preceding family will be construed as "or," so as to entitle a mechanic to such exemption, though he has no family. *Geiger v. Kobilka*, 26 Wash. 171, 90 Am. St. Rep. 733.

**3. A Baker Is a Mechanic or Artisan.** — *In re Petersen*, 95 Fed. Rep. 417 (construing Cal. Code Civ. Pro., § 690, subd. 4).

**100. 5. "Laborers" Defined.** — *Stuart v. Poole*, 112 Ga. 818, 81 Am. St. Rep. 81; *Kline v. Russell*, 113 Ga. 1085; *State v. Land*, 108 La. 512, 92 Am. St. Rep. 392.

**A Locomotive Engineer** is a "laborer" within the *Georgia* Code exempting the wages of laborers. *Smith v. Walker*, 119 Ga. 615, following *Sanner v. Shivers*, 76 Ga. 335; *Johnson v. Hicks*, 120 Ga. 1002.

**Locomotive Engineer** is not a laborer. *State v. Land*, 108 La. 512, 92 Am. St. Rep. 392.

**Fireman of Locomotive** is a laborer. *State v. Land*, 108 La. 512, 92 Am. St. Rep. 392.

**A Brakeman** is a laborer within the meaning of the *Georgia* Code. *Franklin v. Southern R. Co.*, 119 Ga. 855.

**Kalsominer, Paper-hanger, etc.**, is included in

the term "other laborer" used in the Cal. Code Civ. Pro., § 690. *In re Hindman*, (C. C. A.) 104 Fed. Rep. 331.

**Person Taking Care of Stallion** when standing for breeding purposes held a laborer. *Krebs v. Nicholson*, 118 Iowa 134, 96 Am. St. Rep. 370.

**6. A Barber** is a mechanic or laborer. *Terry v. McDaniel*, 103 Tenn. 415.

**Switchmen.** — A railroad switchman is a "laborer" in the sense of article 644 of the *Louisiana* Code of Practice as amended by Act No. 79, p. 123, of 1876, exempting "laborers' wages" from seizure under execution. *Schroeder v. Collins*, 113 La. 778, distinguishing *State v. Land*, 108 La. 512, 92 Am. St. Rep. 392, wherein it was held that a locomotive engineer was not a laborer.

**7. Captain of Canal Boat** is not a laborer. *Shimer v. Rugg*, 7 Northam. Co. Rep. (Pa.) 248.

**A Private Watchman Clothed with Police Powers**, though his duties also call for the doing of manual labor, is not a laborer within the meaning of the *Georgia* statute exempting the wages of laborers. *Tabb v. Mallette*, 120 Ga. 97, 102 Am. St. Rep. 78.

**8. If the Person Does in Fact Do Manual Labor, the Fact that He Also Has Control over Coemployees** will not prevent him from being a laborer. *Stothart v. Melton*, 117 Ga. 460.

**101. 3. Street-car Conductor.** — In *Stuart v. Poole*, 112 Ga. 818, 81 Am. St. Rep. 81, a street-car conductor was held to be a "laborer" (Ga. Civ. Code, § 4732) so as to entitle him to claim his wages as exempt where the evidence showed that his duties required him to keep the car in general order; couple and uncouple cars when used; keep lights in proper condition; keep car rails in proper position; attend to the trolley and keep it in place; turn the seats of the car; remove obstructions from the track; aid in replacing the car when off the track; handle switches, and flag railroad crossings, and look out for accidents at the rear of the car.

**5. Mechanical and Electrical Engineers** are not laborers. *State v. Land*, 108 La. 512, 92 Am. St. Rep. 392.

**10. Clerks, Bookkeepers, Etc.** — *Boynton v. Pelham*, 108 Ga. 794, following *Oliver v. Macon Hardware Co.*, 98 Ga. 249, 58 Am. St. Rep. 300, and *McPherson v. Stroup*, 100 Ga. 228 (clerk in railroad office held not to be a laborer); *Hunter v. Morgan*, 108 Ga. 409 (clerk held not to be a laborer); *Ensel v. Adler*, 110 Ga. 326, following *Oliver v. Macon Hardware Co.*, 98 Ga. 249, 58 Am. St. Rep. 300 (general salesman in clothing store held not to be a laborer); *Kline v. Russell*, 113 Ga. 1085; *Pike v. Sutton*,



**102.** Contractors. — See note 1.

**103.** *e.* "TEAMSTERS." — See note 4.

**104.** *f.* "FARMERS" AND PERSONS "ENGAGED IN AGRICULTURE." —  
A "Farmer." — See note 1.

A Person Is "Engaged in Agriculture." — See note 2.

**106.** *l.* "OTHER PERSON," "OTHER LABORER," ETC. — See note 3.

**107.** *m.* SEVERAL TRADES OR OCCUPATIONS — "Principal" Business. —  
See note 4.

**108.** See note 1.

**109.** 4. Married Women — *a.* IN GENERAL. — See note 1.

*b.* CLAIM IN HUSBAND'S PROPERTY — ABSENCE OF HUSBAND —

See note 3.

**110.** See note 1.

Title to Property Not Affected. — See note 4.

**111.** 9. Right of Exemption as a Personal Privilege. — See note 3.

115 Ga. 688 (clerk in retail store employing one-half his time in drudgery and hard work and the other half in waiting on customers held to be a laborer).

**102.** 1. The Fact that a Locomotive Engineer Is Paid According to the Number of Miles He Runs His Locomotive does not prevent him from being a laborer within the meaning of the *Georgia* Code exempting wages of laborers. *Johnson v. Hicks*, 120 Ga. 1002.

**103.** 4. "Carter." — A contractor who uses his horses in carrying on the work under contract is not a carter. *McManamy v. Pelletier*, 24 Quebec Super. Ct. 127.

**104.** 1. Temporarily engaging in another pursuit without intention, however, of abandoning his former occupation as a farmer, does not prevent a person from claiming exemptions as a farmer. *In re Fly*, 110 Fed. Rep. 141 (decided under *California* law), citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 104, note 1.

**2.** Farmer Engaged in Other Business. — Under the *Quebec* statute a person is not entitled to claim the exemption of horses and oxen given to agriculturists, unless agriculture constitutes his chief occupation. *McManamy v. Pelletier*, 24 Quebec Super. Ct. 127.

**106.** 3. Thresher. — A person whose principal business is the running of a threshing machine is included in the phrase, "or other person," as used in *Kansas* Gen. Stat. 1901, § 3018, subd. 8, exempting tools, etc., of any mechanic, miner, or other person. *Jackman v. Lambertson*, (Kan. 1905) 80 Pac. Rep. 55.

**107.** 4. Productiveness of Several Occupations. — *In re Demaurez*, 5 N. W. Ter. 84.

A person engaged in divers occupations can claim exemptions from seizure only from the implements employed in his main business. *McManamy v. Pelletier*, 24 Quebec Super. Ct. 127.

**108.** 1. Time Devoted to Business. — *In re McCutchen*, 100 Fed. Rep. 779 (construing Const. S. Car., art. 3, § 28).

**109.** 1. Married Women. — *White v. Smith*, 104 Mo. App. 199.

Married Woman Not the Head of Family — *Ohio* Statute. — *Shaw v. Foley*, 62 Ohio St. 30, following *Kimmel v. Paronto*, 52 Ohio St. 468.

South Dakota Statute. — Under the *South Dakota* statute (Laws 1890, c. 86, § 2), providing that "the debtor, if the head of a family, may \* \* \* select from all other of his personal

property not absolutely exempt \* \* \* money or other personal property not to exceed in the aggregate seven hundred and fifty dollars in value, and if a single person not the head of a family, property as aforesaid of the value of three hundred dollars," a married woman, unless she is the head of a family, is not entitled to either the seven hundred and fifty dollars or the three hundred dollars exemption. *Blount v. Medbery*, 16 S. Dak. 562.

**Minnesota Statute.** — Under *Minn. Gen. Stat.* 1894, § 5459, subd. 7, exempting "the provisions for the debtor and his family necessary for one year's support either provided or growing," a married woman living together with her husband and children on her farm is entitled to claim the exemption where the husband has no property himself. The court, however, said that where husband and wife are living together and both have provisions which may be appropriated for the support of the family, the wife is not entitled to the exemption where the husband is alone supporting the family, for in such case there would be no necessity to appropriate any provisions owned by her to the support of the family. *Boelter v. Klossner*, 74 Minn. 272, 73 Am. St. Rep. 347.

**Claim by Both Husband and Wife.** — Under the *Pennsylvania* statute (Act 1849, April 9), providing that property to the value of three hundred dollars owned by or in possession of any debtor shall be exempt from levy on execution, etc., in case of a judgment against a husband and wife where each owns property in severalty, they are both entitled to the exemption. *Friday v. Glasser*, 14 Pa. Super. Ct. 94.

**3. Absence of Husband.** — *Baum v. Turner*, (Ky. 1903) 76 S. W. Rep. 129; *Thompson v. Donahoe*, 16 S. Dak. 244.

**110.** 1. In the Absence of Express Provision. — *Ecker v. Lindskog*, 12 S. Dak. 428 (where husband is insane and confined in asylum, his wife may claim the exemption).

**4. Title to Property.** — Where property of the husband is set apart to the wife as exempt upon his application she does not acquire title to the property and is not entitled to its possession. *Floyd v. Floyd*, 111 Ga. 855.

**111.** 3. Right of Exemption a Personal Privilege. — *Lahr v. Ulmer*, 27 Ind. App. 107; *Grover v. Younie*, 110 Iowa 446; *Seitz v. Starks*, (Mich. 1904) 98 N. W. Rep. 852; *Guntley v. Staed*,

**111. IX. PROPERTY EXEMPT UNDER THE STATUTES — 1. In General.** — See note 4.

**112. 2. Household Goods, Furniture, Etc.** — *a.* IN GENERAL. — See notes 1, 2.

**113. *b.* "NECESSARY" HOUSEHOLD FURNITURE** — Superfluities, Ornaments, Etc. — See note 1.

**114. 3. Provisions, Forage, Crops, Etc.** — *a.* PROVISIONS. — See notes 4, 5.

**116. *b.* FORAGE OR FOOD FOR STOCK.** — See notes 2, 4.

**117. 4. Wearing Apparel, Cloth, Etc.** — *a.* IN GENERAL — Meaning of "Wearing Apparel." — See notes 6, 7.

**118. 6. Tools, Implements, Instruments, Etc.** — *a.* IN GENERAL. — See note 4.

77 Mo. App. 155; *Brown v. Koenig*, 99 Mo. App. 653; *Cunningham v. Brietson*, 101 Wis. 378.

**111. 4. Property Exempt under the Statutes.** — In *Missouri* the debtor is entitled to claim personalty not exceeding three hundred dollars in addition to household furniture. *Rolla State Bank v. Borgfeld*, 93 Mo. App. 62.

**Burial Lot.** — *Avery v. Forest Lawn Cemetery Co.*, 127 Mich. 125; *Pawnee City First Nat. Bank v. Hazels*, 63 Neb. 844.

**Article Used in Conducting Business.** — In *O'Reilly v. Erlanger*, (Supm. Ct. App. T.) 46 Misc. (N. Y.) 278, it was held a question for jury whether a safe, table desk, and candelabra used by an undertaker were exempt under *New York Code Civil Procedure*, § 1391, as articles used in conducting his business.

**112. 1. Books of Minister** necessary to exercise of his calling are exempt. *State v. St. Paul*, 111 La. 71.

**A Dentist's Chair** is not within the Ga. Civ. Code, § 2866, par. 5, exempting a chair suitable for the use of the family. *Burt v. Stocks Coal Co.*, 119 Ga. 629, 100 Am. St. Rep. 203.

**2. Household Furniture — Defined.** — See *State v. St. Paul*, 111 La. 71.

**113. 1. Articles of Luxury, Fancy, and Ornament Excluded — Piano.** — See, however, *Conklin v. McCauley*, 41 N. Y. App. Div. 452 (piano used in education of children held exempt as necessary household furniture).

**Silverware** may constitute household furniture. *McClellan v. Powell*, 109 Ill. App. 222.

**114. 4. Provisions.** — Under *Washington* statutes (Ball. Annot. Codes & Stat., § 5248), allowing, besides the domestic animals there mentioned, provisions and fuel for the comfortable maintenance of the household and family for six months, also food for the animals for six months, and further providing that if the householder shall not possess or shall not desire to retain the animals he may retain other property not to exceed two hundred and fifty dollars in value, the householder is entitled to have provisions and fuel in addition to the two hundred and fifty dollars allowed in lieu of animals. *In re Buelow*, 98 Fed. Rep. 86.

**Wheat.** — Under the *Texas* statute wheat is exempt as provisions. *Bell v. Fox*, (Tex. Civ. App. 1904) 84 S. W. Rep. 384.

**5. Provisions Kept for Sale.** — *In re Lentz*, 97 Fed. Rep. 486 (construing *South Dakota* statute).

**116. 2. Seed Grain.** — Under the *Minnesota* statute (Gen. Stat. 1894, § 5459), exempting "necessary seed grain for the actual personal

use of the debtor," the owner of a farm may claim the exemption of seed grain where he rents the farm on shares, but furnishes the seed. *Matteson v. Munro*, 80 Minn. 340.

**4. Necessity to Own Stock.** — In *Olin v. Fox*, 79 Minn. 459, it was held that under the *Minnesota* statute exempting certain stock "and the necessary food for all the stock mentioned in this section for one year's support," the debtor was entitled to the exemption as to necessary food for the entire amount of stock exempted, though he did not own the animals. In this case the court said: "Certain animals are declared to be exempt, and the necessary food for all mentioned is also declared to be exempt. We are unable to read into this statute a further provision that in order to have the benefit of the exemption the debtor must own the animals."

**117. 6. Clothing Forming Part of the Stock of a Store** is not "wearing apparel." *In re Lentz*, 97 Fed. Rep. 486 (*South Dakota* statute).

**A Fur Coat** may be a "necessary" (*Quebec C. P.*, art. 598). *Robertson v. Honan*, 24 Quebec Super. Ct. 510.

**Masonic Uniform** though worn on special occasions only is exempt as "wearing apparel." *In re Jones*, 97 Fed. Rep. 773 (*Wisconsin* statute).

**7. Watches — Cases Allowing Exemption.** — *Sellers v. Bell*, (C. C. A.) 94 Fed. Rep. 801 (construing *Alabama* Code, exempting "necessary and proper wearing apparel"); *In re Jones*, 97 Fed. Rep. 773, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 117, 118.

**Cases Denying Exemption of Watches.** — *In re Turnbull*, 106 Fed. Rep. 667 (construing Pub. Stat. Mass., c. 171, § 34, exempting "necessary wearing apparel").

**118. 4. Implements of a Baker** are exempt as "working tools." *In re Osborn*, 104 Fed. Rep. 780 (construing N. Y. Code Civ. Pro., §§ 1390, 1391).

**Articles Necessary to Carry on Merchandise Business** are not exempt as tools and implements. *Desmond v. Young*, 173 Mass. 90.

Under the *Wisconsin* statute exempting the tools, implements, and stock in trade to a certain value, the words "tools and implements" should be construed to cover such articles as are usually used in and reasonably necessary to carry on the trade or business of the claimant, and, therefore, a merchant should be allowed to select as exempt safe, showcases, etc. *Cunningham v. Brietson*, 101 Wis. 378.

**Seat in Stock Exchange** is not exempt as the "working tools" of a member of the exchange.



- 119.** *b.* MACHINERY, MACHINES, AND APPLIANCES. — See note 3.  
**121.** *c.* HORSES, OXEN, VEHICLES, AND HARNESS. — See notes 4, 5.  
**123.** *e.* INSTRUMENTS AND BOOKS OF PROFESSIONAL MEN. — See note 1.  
*f.* MUSICAL INSTRUMENTS, FURNITURE, AND MISCELLANEOUS ARTICLES. — See note 5.  
**124.** See note 1.  
*g.* TOOLS AND IMPLEMENTS USED BY EMPLOYEES. — See notes 4, 5.  
**125.** *i.* "NECESSARY" TOOLS OR IMPLEMENTS. — See note 3.  
**126.** 7. Animals, Vehicles, and Teams — *a.* IN GENERAL. — See note 1.  
*b.* ANIMALS — (1) *Horses, Mules, and Colts.* — See note 2.  
**127.** (5) *Swine, Pork, Etc.* — See note 3.  
*c.* VEHICLES AND HARNESS — The Term "Wagon." — See note 7.

*Leggett v. Waller*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 408, *distinguishing* *Keiher v. Shipherd*, (N. Y. City Ct.) 4 Civ. Pro. (N. Y.) 274.

**Soda Water Fountain** is not a trade "tool or apparatus" (Tex. Rev. Stat., §§ 2395, 2397); *McCord-Collins Co. v. Lazarus*, (Tex. Civ. App. 1899) 50 S. W. Rep. 1048.

**Bowling Alley.** — A bowling alley is not exempt under the *Kansas* statute as the tools and implements of the keeper's trade or business. Tools and implements are usable articles employed as means to effect an end. *Williams v. Vincent*, (Kan. 1905) 79 Pac. Rep. 121.

**119. 3. Threshing Machine** and necessary appliances for its operation are exempt as the "necessary tools and instruments" (Kan. Gen. Stat. 1900, § 3018, subd. 8) of the thresher's business. *Jackman v. Lambertson*, (Kan. 1905) 80 Pac. Rep. 55.

**121. 4. Horse and Buggy of Real Estate Agent** are not exempt as "tools and apparatus" of his trade or profession. *Cates v. McClure*, 27 Tex. Civ. App. 459, *following* *Smith v. Horton*, 92 Tex. 21 (denying exemption to bicycles).

**5. Wagon.** — *Johnson v. Lang*, 71 N. H. 251, 93 Am. St. Rep. 509 (wagon held exempt as a tool of plaintiff's occupation).

**Harness.** — *Kirksey v. Rowe*, 114 Ga. 893, 88 Am. St. Rep. 65 (harness held not to be exempt as "common tools of trade").

**123. 1. A Typewriter Is Not a "Tool or Apparatus" Belonging to the Profession of a Physician** so as to entitle the physician to claim the same as exempt (Tex. Rev. Stat. 1895, art. 2395, subd. 5) though used by him for the purpose of correspondence and advertising his business. *Massie v. Atchley*, 28 Tex. Civ. App. 114.

**5. Barber's Chair and Mirror** held exempt as tools. *Terry v. McDaniel*, 103 Tenn. 415.

**Dentist's Chair** is not within Ga. Civ. Code, § 2866, par. 5, exempting "common tools of trade." *Burt v. Stocks Coal Co.*, 119 Ga. 629, 100 Am. St. Rep. 203.

**124. 1. Watches.** — *Watch Belonging to Plumber* is not necessarily exempt under Mass. Pub. Stat., c. 171, § 34, cl. 5, exempting "tools, implements, and fixtures necessary for carrying on his trade or business." *In re Turnbull*, 106 Fed. Rep. 667; *In re Coller*, 111 Fed. Rep. 503 (construing Pub. Stat. Mass., c. 171, § 34, cl. 5).

**4. Cases Holding Tools, etc., Used by Employees**

**Not Exempt.** — See *In re Demaurez*, 5 N. W. Ter. 84.

**5. Cases Holding Tools, etc., Used by Employees Exempt.** — *In re Petersen*, 95 Fed. Rep. 417 (Cal. Code Civ. Pro., § 690, subd. 4).

**125. 3. Question of Fact.** — The question whether the tools and instruments claimed by a mechanic or artisan as exempt "are necessary to carry on his trade" is one of fact, and is to be determined upon common-sense principles in view of the circumstances of the particular case in which the claim for exemption is made. *In re Petersen*, 95 Fed. Rep. 417.

**The Burden of Showing** that a tool claimed by a mechanic is exempt as being necessary for the carrying on of his trade is upon the mechanic. *In re Turnbull*, 106 Fed. Rep. 667.

**126. 1. Colts Exempt as "Horses."** — *Hall v. Miller*, 21 Tex. Civ. App. 336.

**2. "Farm Horse."** — The Ga. Code Civ. Pro. § 2866, exempting one "farm horse," is not restricted to a horse which is worked upon a farm, but includes one used in running a dray for the support of the owner and his family. The word "farm" has reference to the quality and value. *Kirksey v. Rowe*, 114 Ga. 893, 88 Am. St. Rep. 65.

**127. 3. "Swine or Meat of Swine."** — Under the *Vermont* statute exempting the best of swine or meat of a swine, a debtor may select his best swine though he may have on hand part of the meat of a swine. *In re Libby*, 103 Fed. Rep. 776.

**Hog Kept for Exhibition.** — The *Missouri* statute (Rev. Stat. 1899, § 3159) exempting to the head of a family "ten head of choice hogs" is intended to exempt merely hogs for purposes of food, and does not exempt a hog kept for the purpose of exhibition for pay, due to its abnormal size, and which was so profitable in that way that it was withdrawn from the ordinary uses to which such animals are put and devoted to purposes wholly outside of those contemplated by the legislature. *Wabash R. Co. v. Bowring*, 103 Mo. App. 158.

**7. Bicycles.** — *Roberts v. Parker*, 117 Iowa 389, 94 Am. St. Rep. 316 (statute exempting "team with wagon or other vehicle" held to include bicycle).

**One-horse Wagon.** — Under the *Georgia* statute (Code Civ. Pro., § 2866) exempting a "one-horse wagon," the debtor cannot claim as exempt a half interest owned by him in a two-horse



**130.** *c.* REQUIREMENT OF ACTUAL USE, OR USE FOR PARTICULAR PURPOSE—(2) *Working Animals—Team Work.*—See note 3.

**131.** But Young and Unbroken Animals.—See note 1.

(3) *Use to Earn Living.*—See note 2.

**134.** 9. Wages, Salary, Earnings, Etc.—*a.* IN GENERAL.—See note 2.

**135.** *b.* FOR WHAT PERIOD.—See note 2.

*c.* "WAGES" AND "SALARY"—(1) *In General.*—See notes 3, 4, 5.

**136.** "Compensation Paid to Hired Person for Services"—Independent Contractors.—See notes 1, 2.

(2) *Method of Computing Compensation, and Time of Payment.*—

See note 3.

**138.** *d.* EARNINGS, PERSONAL EARNINGS, ETC.—(1) *In General.*—See note 2.

wagon. *Kirksey v. Rowe*, 114 Ga. 893, 88 Am. St. Rep. 65.

**130.** 3. "Work Animals"—May Include Mare.—*White v. Wilson*, 106 Mo. App. 406.

**Racehorse.**—Under the *Vermont* statute exempting horses "kept and used for team work" a race-horse kept and used for racing is not exempt, though the horse may have been used for the purpose of carrying the debtor's children to school, or a member of his family to work. *In re Libby*, 103 Fed. Rep. 776.

**131.** 1. Young and Unbroken Animals.—See, however, *Durke v. Crane*, 112 La. 156 (two-year old unbroken colt, roaming wild on the prairies, held not exempt under statute exempting work horses).

2. *Use to Earn Living.*—*Krebs v. Nicholson*, 118 Iowa 134, 96 Am. St. Rep. 370 (road cart used in moving stallion from stand to stand, held exempt as a wagon or other vehicle by the use of which the debtor habitually earned his living).

**Paper-hanger, Kalsominer, Etc.**—Under Cal. Code Civ. Pro., § 690, where a kalsominer, paper-hanger, etc., uses a horse and wagon to convey the necessary supplies used in his work from job to job, and he could not carry on his business at a profit without a horse for such use, such horse is exempt as one by the use of which he habitually earns his living. *In re Hindman*, (C. C. A.) 104 Fed. Rep. 331.

**134.** 2. Exemption of Wages.—*Margarum v. Moon*, 63 N. J. Eq. 586.

**135.** 2. Restriction to Particular Period.—*Davis v. Siegel*, 80 Ill. App. 278 (wages to amount of eight dollars per week exempted).

**Some Statutes Set No Limit** to the amount of wages or salary exempted. *Hartman v. Mitzel*, 8 Pa. Super. Ct. 22.

**Judgment Necessary to Recover Wages—Computation of Time.**—Under the *Iowa* statute (Code 1897, § 4011) exempting the personal earnings of the debtor "at any time within ninety days next preceding the levy," in case the debtor is required to sue to recover his earnings the time necessarily consumed in recovering the judgment is not to be eliminated, and, therefore, if the wages were in fact earned more than ninety days before the levy they are not exempt where the judgment is recovered therefor. *Chadwick v. Stout*, 112 Iowa 167, 84 Am. St. Rep. 334.

**Where, upon Service of Several Successive Garnishment Writs,** the employer withholds wages

from a laborer instead of paying over the same to him, if the abandonment of the prior writs was not in bad faith, they are not to be taken into consideration in estimating the exemption rights under the last writ. *Choquette v. Ford*, 178 Mass. 6.

3. "Wages" and "Salary."—Philadelphia, etc., *R. Co. v. Sharpe*, 2 Penn. (Del.) 407.

**Compensation for Hire of Team in Connection with Personal Services** of the hirer, where there is no means of extricating the claim for services from the team hire, is not exempt as "wages for labor." *Gray v. Fife*, 70 N. H. 89, 85 Am. St. Rep. 603.

4. **Salary of Comptroller and Auditor** of a railroad company is exempt under the *Missouri* statute as "wages." *Bovard v. Ford*, 83 Mo. App. 498.

5. **Salaries for Services of Deputy Sheriff and Jailer** are not "wages" (45 Vict., c. 17, § 33). *Ex p. Bowes*, 34 N. Bruns. 76.

**136.** 1. **Compensation Paid to Hired Persons.**—See *Cincinnati v. Board of City Affairs*, 10 Ohio Dec. 106, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 136.

Compensation for services rendered in assisting a party to an action "to hunt up witnesses and testimony to defeat a recovery" on a forged note is exempt as "wages" or "salary" under the Pa. Act 1845, April 15, § 5. *Hartman v. Mitzel*, 8 Pa. Super. Ct. 22.

2. **Persons Carrying on Independent Business—Independent Contractors.**—See *Cincinnati v. Board of City Affairs*, 10 Ohio Dec. 106, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 136.

**Payment by the Job** held not exempt as "wages." *Moore v. Hendry*, 111 Ga. 863.

3. The fact that a person is paid for manual labor by the job does not prevent his claim from being exempt as money which is the result of his manual labor. *Rikerd Lumber Co. v. Chrouch*, 135 Mich. 703, 106 Am. St. Rep. 416, citing with approval *Pennsylvania Coal Co. v. Costello*, 33 Pa. St. 244.

**138.** 2. **Gold Dust Taken from Claim by Miner.**—In *Dayton v. Ewart*, 28 Mont. 153, it was held under the *Montana* statute (Code Civ. Pro., § 1222) exempting "the earnings of the judgment debtor for his personal services rendered at any time within thirty days next preceding the levy," that gold dust taken from his claim by a miner within the thirty days preceding the levy was exempt.

- 139.** (2) *Other Elements than Personal Services.* — See note 1.  
 (3) *Employment of Assistants.* — See note 3.  
**140.** *f.* CONTINUANCE OF EXEMPTION AFTER PAYMENT. — See note 2.  
**141.** *h.* SUCCESSIVE GARNISHMENTS — Effect of Previous Exemptions. — See note 2.  
*i.* SALARIES OF OFFICERS OF PUBLIC OR PRIVATE CORPORATIONS. — See note 3.  
*j.* SEAMEN'S WAGES. — See note 6.  
**142.** See note 1.  
 10. Pensions and Bounties — *a.* IN GENERAL — By an Act of Congress. — See note 4.  
**143.** *b.* EXTENT OF PROTECTION — (1) *Under the Act of Congress* — (b) After Receipt by the Pensioner. — See note 3.  
 Most of the Courts. — See note 5.  
**144.** See note 1.  
 (c) Gift or Transfer of Pension Drafts or Money. — See note 2.  
**145.** (2) *Under State Statutes.* — See notes 1, 2.

**139.** 1. *Other Elements than Personal Services of Debtor.* — See *Gray v. Fife*, 70 N. H. 89, 85 Am. St. Rep. 603 (hire of team with driver).

3. *Soundness of This View Doubtful.* — *Matter of Wyman*, 76 N. Y. App. Div. 292.

*Proceeds from Sale of Milk* from cows on debtor's farm held not exempt as earnings from his personal services. *Matter of Wyman*, 76 N. Y. App. Div. 292, applying *Prince v. Brett*, 21 N. Y. App. Div. 190.

**140.** 2. *Delivery to Agent of Employer.* — *Hill v. Arnold*, 116 Ga. 45, wherein it was held that wages were exempt while in the hands of a third person as agent of employer for payment to laborer.

**141.** 2. *Salaries of Officers of Corporations.* — *Choquette v. Ford*, 178 Mass. 6.

3. *"Public Officer."* — *Stewart v. Euard*, 15 Quebec Super. Ct. 262, affirmed 8 Quebec Q. B. 404 (city assessor held a "public officer" within meaning of C. C. P., art. 599).

6. *Process from State Court.* — In *The Queen*, 93 Fed. Rep. 834, it was held that the act of Congress (Rev. Stat., § 4536) providing that "no wages due or accruing to any seaman or apprentice shall be subject to attachment or arrestment from any court" did not exempt wages of a seaman from execution issued from a state court upon a judgment rendered therein.

**142.** 1. *Not Exempt in the Absence of a Statute.* — *The Queen*, 93 Fed. Rep. 834.

4. *Power of Congress.* — *Aubrey v. McIntosh*, 10 Pa. Super. Ct. 275.

*Statute to Be Liberally Construed.* — *Bullard v. Goodno*, 73 Vt. 88.

**143.** 3. *Exempt After Receipt by Pensioner.* — *In re Bean*, 100 Fed. Rep. 262.

5. *Pension Money Not Exempt After Reaching Pensioner.* — *Smith v. Blood*, 106 N. Y. App. Div. 317; *Aubrey v. McIntosh*, 10 Pa. Super. Ct. 275, following *Rozelle v. Rhodes*, 116 Pa. St. 129, 2 Am. St. Rep. 591, and explaining *Holmes v. Tallada*, 125 Pa. St. 133, 11 Am. St. Rep. 880, and *Reiff v. Mack*, 160 Pa. St. 265, 40 Am. St. Rep. 720. See also *Hathorn v. Robinson*, 96 Me. 33.

**144.** 1. *Investments Not Exempt.* — *In re Stout*, 109 Fed. Rep. 794 (construing U. S. Rev. Stat., § 4747); *Aubrey v. McIntosh*, 10 Pa.

Super. Ct. 275, following *Rozelle v. Rhodes*, 116 Pa. St. 129, 2 Am. St. Rep. 591, and explaining *Holmes v. Tallada*, 125 Pa. St. 133, 11 Am. St. Rep. 880, and *Reiff v. Mack*, 160 Pa. St. 265, 40 Am. St. Rep. 720; *Kingwood Bank v. Murdock*, 48 W. Va. 301.

*The Supreme Court of the United States* in *McIntosh v. Aubrey*, 185 U. S. 122, held that under U. S. Rev. Stat., § 4747, exempting money due or to become due to any pensioner, etc., land purchased with pension money was not exempt.

2. *Gift of Pension Draft Valid.* — *Bullard v. Goodno*, 73 Vt. 88.

**145.** 1. *Quebec Statute.* — The Quebec statute C. C. P., art. 599, § 9, exempts pensions granted by the Montreal harbor commissioners to disabled pilots, except as against an alimentary debt incurred while the pension is in force, and such exception does not include a debt incurred before the pension began to run. *Hamelin v. Perrault*, 21 Quebec Super. Ct. 51.

2. *Investment of Pension Money.* — *Tyler v. Ballard*, (Supm. Ct. Spec. T.) 31 Misc. (N. Y.) 540, 7 N. Y. Annot. Cas. 465, 31 Civ. Pro. (N. Y.) 63; *Matter of Stafford*, 105 N. Y. App. Div. 46; *King v. Warren*, (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 317.

*Death of Pensioner.* — Upon the death of the pensioner, the land purchased by him with pension money ceases to be exempt and becomes assets for the payment of his debts. *Smith v. Blood*, 106 N. Y. App. Div. 317.

*Part Payment with Pension Money.* — Though under Code Civ. Pro. N. Y., § 1393, land which has been purchased with pension money is exempt, yet if the purchase money consisted only in part of the pension money, and the landowner subsequently mortgaged the land and sold parts thereof for a greater amount than the pension money put into the land, the land is not exempt. *In re Ellithorpe*, 111 Fed. Rep. 163.

*Death of Pensioner.* — Though land which was purchased with pension money is exempt under Civ. Code N. Y., § 1393, during the life of the pensioner, still after his death the exemption ceases, and the property may be applied to the satisfaction of the pensioner's debts. *Matter of*

- 145.** The Iowa Statute. — See note 3.  
**146.** 11. Life Insurance. — See note 1.  
**147.** 12. Exemptions Not Confined to Any Particular Property — *b*. WHAT MAY BE CLAIMED — (1) *In General*. — See note 2.  
       (2) *Choses in Action* — (a) *In General*. — See note 4.  
**148.** See note 4.  
**149.** (b) *Judgments*. — See note 1.  
       (3) *Money*. — See note 2.

Liddle, (Surrogate Ct.) 35 Misc. (N. Y.) 173, citing *Bank v. Carpenter*, 119 N. Y. 550.

**145.** 3. Iowa Statute. — *Dargan v. Williams*, 66 Neb. 1.

Proceeds of Sale of Coal rights in lands purchased with pension money are exempt. *Smyth v. Hall*, 126 Iowa 627.

**146.** 1. *United States*. — *In re Lange*, 91 Fed. Rep. 361 (construing Iowa Code, § 1805, together with Bankruptcy Act 1806, § 6); *In re Steele*, 98 Fed. Rep. 78 (construing Iowa Code, § 1805, in connection with Bankruptcy Act 1898); *Steele v. Buel*, 104 Fed. Rep. 968, 44 C. C. A. 287 (construing Iowa Code in connection with Bankruptcy Act 1898); *In re Holden*, 114 Fed. Rep. 650, 52 C. C. A. 346 (construing Washington statute, in connection with proviso to section 70a, cl. 5, of the Bankruptcy Act 1898); *In re Niemann*, 124 Fed. Rep. 738 (construing Wis. Rev. Stat., 1898, § 2982, subd. 19).

*California*. — *Matter of Brown*, 123 Cal. 399, 69 Am. St. Rep. 74. See also *Holmes v. Marshall*, 145 Cal. 777, 104 Am. St. Rep. 86.

*Colorado*. — *Hendrie, etc., Mfg. Co. v. Platt*, 13 Colo. App. 15.

*Connecticut*. — *Bartram v. Hopkins*, 71 Conn. 505; *Miles v. Odd Fellows' Mut. Aid Assoc.*, 76 Conn. 132 (benefits payable by Odd Fellows' society held not exempt under Pub. Acts 1895).

*Iowa*. — *O'Melia v. Hoffmeyer*, 119 Iowa 444.

*Maine*. — *Pulsifer v. Hussey*, 97 Me. 434.

*Mississippi*. — *Cozine v. Grimes*, 76 Miss. 294.  
*Nebraska*. — *Coleman v. McGrew*, (Neb. 1904) 99 N. W. Rep. 663.

*New York*. — *Amberg v. Manhattan L. Ins. Co.*, 56 N. Y. App. Div. 343, reversing (Supm. Ct. Tr. T.) 32 Misc. (N. Y.) 89; *Ettenson v. Schwartz*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 669; *Kittel v. Domeyer*, 175 N. Y. 205, reversing 70 N. Y. App. Div. 134.

*Ohio*. — *Klinckhamer Brewing Co. v. Cassman*, 12 Ohio Cir. Dec. 141, 21 Ohio Cir. Ct. 465.

*Washington*. — *Flood v. Libby*, 38 Wash. 366.

*Wisconsin*. — *Ellison v. Straw*, 119 Wis. 502.

Proceeds of Insurance Policy after payment to beneficiary held not to be exempt. *Crumley v. Fuller*, 8 Kan. App. 857, 57 Pac. Rep. 47, following *Reighart v. Harris*, 6 Kan. App. 339.

See, however, *Emmert v. Schmidt*, 65 Kan. 31, disapproving *Reighart v. Harris*, 6 Kan. App. 339 (proceeds of certificates issued by fraternal orders held exempt while on deposit in bank. Kan. Laws 1895, c. 163).

*Illinois* Act 1893, § 9, exempts only money to be paid by a fraternal beneficial society and not money paid. *Martin v. Martin*, 87 Ill. App. 365, affirmed 187 Ill. 200.

*Maine* Stat. 1897, c. 320, § 14, exempts only money to be paid by fraternal beneficiary organizations and not money which has been paid. *Hathorn v. Robinson*, 96 Me. 33.

**Property Purchased with Insurance Money** held exempt under Iowa Code, § 1805, exempting the avails of all policies of life, etc., insurance. *Cook v. Allee*, 119 Iowa 226.

The *New York* law exempting money to be paid by beneficiary societies to members or beneficiaries does not exempt property which has been purchased by the member or beneficiary with money paid to him by the society, but only money owing from the society. *Bull v. Case*, 41 N. Y. App. Div. 392.

**Death of Beneficiary.** — The *Missouri* statute (Act 1897, § 10) relating to fraternal beneficial societies and providing that the money or other benefit already paid or to be paid by such association shall not be liable to attachment or execution, etc., does not perpetually exempt such property, and therefore, in case of the death of the beneficiary before the money has been paid, but after the right thereto has vested, it passes to her executor or administrator as assets for the payment of her debts. *Grand Lodge, etc. v. Dister*, 77 Mo. App. 608.

**147.** 2. *Liquor License*. — Under the *Pennsylvania* Act 1849, April 9, which authorizes the debtor to retain his exemption rights out of the property which is subject to execution, the debtor cannot claim any exemption rights out of a liquor license. *In re Myers*, 102 Fed. Rep. 869.

*In re Olewine*, 125 Fed. Rep. 840 (decided under Pa. Stat.), it was held that a liquor license could be claimed as exemption.

**Stock of Goods in Trade.** — Exemption may be claimed therefrom. *In re Wilson*, 108 Fed. Rep. 197 (construing Va. Code 1887, § 3630).

**4. Choses in Action.** — *Pullman Palace Car Co. v. Henderson*, 120 Ala. 103; *Johnson v. Redwine*, 105 Ga. 449; *Rolla State Bank v. Borgfeld*, 93 Mo. App. 62.

**148.** 4. *Wages*. — *McCormick Harvesting Mach. Co. v. Vaughn*, 130 Ala. 314.

**149.** 1. *Judgments*. — *Day v. Burnham*, 82 Mo. App. 538; *Green v. Baxter*, 91 Mo. App. 633 (equity in assigned judgment); *Bowen v. Holden*, 95 Mo. App. 1; *Caldwell v. Ryan*, (Mo. App. 1904) 70 S. W. Rep. 743.

**A Judgment Is Not Cash** within the meaning of the *Georgia* Civil Code, § 2841, providing that where personalty sought to be excepted consists of cash, before the same shall be finally allowed, it shall, under the direction of the ordinary, be invested in such articles of personal property as the applicant may desire, and in no case shall the allowance of cash without such investment be a valid exception. *Johnson v. Redwine*, 105 Ga. 449.

**2. Money.** — *In re Steed*, 107 Fed. Rep. 682; *In re Falconer*, 110 Fed. Rep. 111, 49 C. C. A. 50 (decided under *Arkansas* statute allowing exemption of specific articles of a certain value);



**149.** (4) *Money in Court.* — See note 3.

(6) *Real Property.* — See note 5.

**150.** 14. *Proceeds and Product of Exempt Property* — *a.* **PROCEEDS** — (1) *In General.* — See note 1.

(2) *Sale, Exchange, or Mortgage of Exempt Property* — (a) *Sale or Exchange.* — See note 2.

**151.** (3) *Involuntary Conversion* — (b) *Judgment for Taking, Conversion, or Injury.* — See note 2.

**152.** (a) *Proceeds of Insurance.* — See note 2.

*b.* **PRODUCT OF EXEMPT PROPERTY.** — See note 3.

**153.** 15. *Title or Right to Support Claim* — *a.* **IN GENERAL.** — See note 1.

**155.** 17. *Partnership Property* — *a.* **CASES ALLOWING EXEMPTION** — (1) *In General.* — See note 1.

*Fullman Palace Car Co. v. Henderson*, 120 Ala. 103; *Fowler v. State*, 99 Md. 594. Compare *Rosser v. Florence*, 119 Ga. 250.

But when the statute exempts specific property merely, the equivalent in money cannot be claimed. *Matter of Sprague*, (Surrogate Ct.) 41 Misc. (N. Y.) 608 (construing N. Y. Code Civ. Pro. 2713), and *disapproving* *Matter of Hembury*, (Surrogate Ct.) 37 Misc. (N. Y.) 454; *In re Woodard*, 95 Fed. Rep. 955 (*North Carolina* statute); *In re Manning*, 112 Fed. Rep. 948 (decided under *Pennsylvania* statute).

**149.** 3. *Money in Court.* — *Rolla State Bank v. Borgfeld*, 93 Mo. App. 62.

**5. Improvements on Real Estate** cannot be set apart as exempt under statutes allowing exemption from personal property. *Lawson v. S. T. Barlow Co.*, (Ky. 1899) 51 S. W. Rep. 314.

**Improvements by Indians on Indian Land** are exempt under Act Cong. May 2, 1890. *In re Grayson*, 3 Indian Ter. 497.

**150.** 1. *Proceeds of Exempt Property.* — *In re Wilson*, 108 Fed. Rep. 197 (construing *Virginia* Code).

**2. Voluntary Sale or Exchange.** — *Robinson v. Burke*, 70 N. H. 2, 85 Am. St. Rep. 595.

**Statutes Allowing Exemptions from Any Property.** — *Koller v. Miller*, 23 Pa. Co. Ct. 235, 17 Lanc. L. Rev. 26.

**Under Georgia Laws.** — *Johnson v. Redwine*, 105 Ga. 449; *Culver v. Tappan*, 113 Ga. 525; *Powers v. Rosenblatt*, 113 Ga. 559.

**151.** 2. *Judgment for Trespass upon or Conversion of Exempt Property.* — *Treat v. Wilson*, 65 Kan. 729; *Wabash R. Co. v. Bowring*, 103 Mo. App. 158; *Long v. Collins*, 15 S. Dak. 259.

See, however, *Robinson v. Burke*, 70 N. H. 2, 85 Am. St. Rep. 595, where a judgment against a third person for conversion was held not to be exempt.

**Costs in Recovering Judgment.** — The judgment for cost recovered by the debtor in such an action on appeal is exempt. *Long v. Collins*, 16 S. Dak. 625, 102 Am. St. Rep. 724.

**Where a Judgment Is Recovered for Wages** and the money is paid on execution to the constable serving the writ, the money is not exempt in the hands of the constable as a claim for wages. *Hewitt v. McNerney*, 73 Conn. 565.

**152.** 2. *Proceeds of Insurance on Exempt Property.* — *Wabash R. Co. v. Bowring*, 103 Mo. App. 158; *Wright v. Brooks*, 101 Tenn. 601.

**3. Product of Exempt Property Exempt.** — *Reed*

*v. Holbrook*, 113 Ga. 1168. See, however, *Anderson v. Cook*, 105 Ga. 496 (wagon paid for with earnings made by hauling therewith held not to be exempt).

**What Constitutes Product or Increment of Exempt Property.** — In order to maintain a claim to chattels which is founded solely on the contention that they are the product or increment of duly exempted personalty, it is incumbent on the claimant to prove affirmatively that the subject-matter of the claim was obtained in exchange of exempted property or the proceeds thereof, or by labor exerted in connection with the use or consumption of such property, so that the newly acquired personalty could with fairness and reason be said to take the place of that which had been set apart. *Culver v. Tappan*, 113 Ga. 525.

**Cotton Produced by the Joint Use of Exempt Property and Supplies Furnished by Head of Family.** — *Brand v. Clements*, 116 Ga. 392, 94 Am. St. Rep. 133.

**Crops Growing on Homestead Are Exempt.** — *Stagg v. Pilaud*, 31 Tex. Civ. App. 245.

**Matured Crops Grown on Homestead** are exempt before severance. *Allen v. Ashburn*, 27 Tex. Civ. App. 239.

**Crops Growing on Homestead** at the time of petition in bankruptcy cannot be claimed as exempt. *In re Hoag*, 97 Fed. Rep. 543 (*Wisconsin* statute).

**Crops Gathered.** — *In re Coffman*, 93 Fed. Rep. 422 (crops gathered must be surrendered to trustee in bankruptcy, not being exempt under *Texas* statute).

**153.** 1. *Title Necessary to Support Claim.* — *Taylor v. Bertram*, (Ky. 1900) 55 S. W. Rep. 553.

**Proceeds of Realty Subject to Lien.** — Where real estate sold in partition proceedings was subject to a lien, the proceeds cannot be claimed as exempt as against such lien. *Albion First Nat. Bank v. Snyder*, (Neb. 1901) 96 N. W. Rep. 285.

**Separate or Community Property.** — Under the *Texas* statute (Rev. Stat. 1895, art. 2395, subd. 9), which exempts to the family two horses, the head of the family can claim as exempt horses which constitute either community property or the separate property of either spouse. *McClelland v. Barnard*, 36 Tex. Civ. App. 118.

**155.** 1. *Partnership Property* — *Cases Allowing Exemptions.* — *In re Stevenson*, 93 Fed. Rep. 789 (construing N. Car. Const., art. 10,

- 156.** *b.* PREVAILING DOCTRINE DENIES EXEMPTION — (1) *In General.*  
 — See note 1.  
**157.** (2) *Dissolution — Assignment for Creditors.* — See note 2.  
 (3) *Conversion of Partnership into Individual Property.* — See note 3.  
 (a) *Sale Between Partners.* — See note 4.  
 (b) *Division of Property.* — See note 5.  
**158.** (d) *Insolvency of Firm.* — See note 2.  
 (4) *Individual Property Used by Firm.* — See note 3.  
 18. *Limitations as to Value or Amount of Property* — *a.* IN GENERAL.  
 — See note 4.  
**159.** *c.* HOLDING PROPERTY BY PAYING EXCESS. — See note 3.  
**160.** 20. *Ownership or Possession of Other Property* — *a.* RIGHT OF SELECTION — (1) *Exemption of Specific Articles.* — See notes 2, 3.

§ 1, and following *Scott v. Kenan*, 94 N. Car. 296; *Burns v. Harris*, 67 N. Car. 140; *In re Grimes*, 94 Fed. Rep. 800 (decided under N. Car. law); *In re Friederick*, 95 Fed. Rep. 282 (construing Wis. Rev. Stat., § 2982, subd. 8, and following *O'Gorman v. Fink*, 57 Wis. 649, 46 Am. Rep. 58, and distinguishing *In re Hughes*, 8 Biss. (U. S.) 107); *In re Duguid*, 100 Fed. Rep. 274 (construing North Carolina statute); *In re Friedrich*, 100 Fed. Rep. 284, 40 C. C. A. 378 (construing Wisconsin statute); *In re Wilson*, 101 Fed. Rep. 571 (construing North Carolina statute).

**Surviving Partner with Consent** of administrator of deceased partner is entitled to claim exemptions from partnership property. *In re Seabolt*, 113 Fed. Rep. 766 (construing North Carolina statute).

**Nonexistence of Individual Property.** — To entitle partners to claim exemptions from the partnership property it must be shown that they have no individual property from which the exemption may be claimed. *In re Steed*, 107 Fed. Rep. 682 (construing North Carolina statute).

**156. 1. Cases Denying Exemption.** — *In re Lentz*, 97 Fed. Rep. 486 (*South Dakota* statute); *In re Beauchamp*, 101 Fed. Rep. 106 (construing Maryland statute); *In re Meriwether*, 107 Fed. Rep. 102 (construing Arkansas statute); *In re Demarest*, 110 Fed. Rep. 638 (construing New Jersey statute); *In re Head*, 114 Fed. Rep. 489 (construing Arkansas statute); *Lynch v. Englehardt-Winning-Davison Mercantile Co.*, 1 Neb. (unofficial) 528, 96 N. W. Rep. 524, following *People v. Roy*, 3 Neb. 261; *Miller v. Waite*, 59 Neb. 319; *Peaslee v. Sanborn*, 68 N. H. 262; *Bateman v. Edgerly*, 69 N. H. 244, 76 Am. St. Rep. 162.

**Individual Doing Business under Partnership Name.** — The fact that an individual does business under a name which may signify a partnership, such as "Red Grocery Company," does not prevent him from claiming exemptions from the stock in trade. *In re Carpenter*, (C. C. A.) 109 Fed. Rep. 558.

**As Against His Individual Creditor** a partner may claim exemptions in the partnership, *Southern Jellico Coal Co. v. Smith*, 105 Ky. 769, distinguishing *Greene v. Taylor*, 98 Ky. 330.

**Surviving Partner** is not entitled to exemption from the partnership funds. *In re Mosier*, 112 Fed. Rep. 138 (decided under Vermont law).

**157. 2. Dissolution of Firm While Insolvent**

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and within four months prior to bankruptcy does not entitle partners to claim exemptions in partnership property. *In re Head*, 114 Fed. Rep. 489 (construing Arkansas statute).

**3. Conversion of Partnership Property into Individual Property.** — *In re Rudnick*, 102 Fed. Rep. 752, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 157.

**4. Sale Between Partners.** — *In re Rudnick*, 102 Fed. Rep. 752, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 157.

**5. Division of Property.** — See, however, *In re Head*, 114 Fed. Rep. 489 (construing Arkansas statute), disapproving *In re Rudnick*, 102 Fed. Rep. 751.

**158. 2. Insolvency of Firm Immaterial.** — *In re Rudnick*, 102 Fed. Rep. 752, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 158.

**3. Store Run in Firm Name — Stock Owned Exclusively by Individual — Entitled to Exemption.** — *In re Meriwether*, 107 Fed. Rep. 102 (construing Arkansas statute).

**4. Limitation as to Value.** — *In re McCutchen*, 100 Fed. Rep. 779 (construing Const. S. Car., art. 3, § 28, as to amount of exemption claimable by wife); *Leggett v. Waller*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 408; *Whitworth v. McKee*, 32 Wash. 83.

The Wyoming statute (Rev. Stat. 1899, § 3951) exempting one-half of the earnings of a debtor for his personal services rendered at any time within sixty days next preceding the levy, and further providing that there shall be exempt in all cases a sum not to exceed fifty dollars, means that in no case shall the exemption be less than fifty dollars, and, therefore, the entire wages for the specified time are exempt if they do not exceed fifty dollars. *Laferty v. Sistalla*, 11 Wyo. 360.

**Partition of Mining Claim.** — Under the Cal. Code of Civ. Pro., § 690, exempting to a miner his mining claim not exceeding a certain value, in case the claim exceeds such value and cannot be partitioned without great prejudice to the interest of the estate in bankruptcy, it should be sold, and the bankrupt allowed to retain out of the proceeds the value limited. *In re Diller*, 100 Fed. Rep. 931.

**159. 3. Holding Property Exceeding Specified Value on Paying Officer the Excess.** — See *In re Oderkirk*, 103 Fed. Rep. 779.

**160. 2. Possession of Other Property — Right of Selection of Debtor.** — *In re Grimes*, 96 Fed. Rep. 529 (N. Car. statute); *McClelland v.*



**161.** *b.* SURRENDER OF OTHER PROPERTY — (1) *In General* — Prevailing Rule. — See note 3.

**162.** *In Some States.* — See note 1.

(2) *Effect of Fraud.* — See note 3.

**163.** *f.* OWNERSHIP OF HOMESTEAD. — See note 3.

**164.** X. LIABILITIES AS AGAINST WHICH EXEMPTIONS MAY BE CLAIMED — 1. *In General.* — See note 3.

**166.** 4. Pre-existing Contracts and Liens — *b.* EXPRESS CONSTITUTIONAL OR STATUTORY EXCEPTION — (2) *Retroactive Statutes Impair the Obligation of Contracts.* — See note 3.

**170.** 5. Judgments and Liabilities Not Based upon Contract — *b.* EXPRESS RESTRICTION TO LIABILITIES EX CONTRACTU — (2) *Judgment or Liability for Tort.* — See note 1.

Particular Torts. — See notes 2, 4, 5, 6.

**171.** (3) *Judgments in Actions Ex Contractu.* — See note 5.

**172.** (5) *Judgment for Statutory Penalty.* — See note 2.

**173.** (8) *Judgments and Liabilities on Bonds* — (b) Bonds and Recognizances in Legal Proceedings. — See note 2.

(9) *Judgment or Liability for Costs.* — See note 3.

Barnard, 36 Tex. Civ. App. 118. See Cloutier v. Georgeson, 13 Manitoba 1 (right of officer to make selection where debtor fails to do so).

Where the Debtor Accepts the Selection Made for Him by the Levying Officer He Cannot Afterwards assert his right of selection. Cleveland Nat. Bank v. Bryant, (Tenn. Ch. 1899) 54 S. W. Rep. 73.

Right of Selection Is Personal and cannot be exercised by one to whom the debtor transfers property. Wabash R. Co. v. Bowring, 103 Mo. App. 158.

**160.** 3. Failure to Make Selection. — Woolfolk v. Lyons, (Ky. 1900) 59 S. W. Rep. 21.

Appropriation by a Debtor to His Own Use of part of attached property to the value of his exemption, defeats any further claim for exemptions from the attached property. Strange v. Gess, 111 Ky. 640.

**161.** 3. Right of Selection Not Affected by Possession of Other Property — Articles Specifically Exempted. — Thibault v. Lennon, 39 Oregon 280, 87 Am. St. Rep. 657, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 161.

**162.** 1. Contrary Rule in Some States Requiring Surrender of Other Property. — Johnson v. Larcade, 110 Ill. App. 611 (express statutory provision requiring surrender of other property must be observed).

3. Concealment as a Selection. — Florida L. & T. Co. v. Crabb, (Fla. 1903) 33 So. Rep. 523.

**163.** 3. Homestead Owned by Wife. — It is otherwise under the Michigan statute. Morley v. National Loan, etc., Co., 120 Mich. 171.

**164.** 3. Exceptions Are to Be Strictly Construed. — Dickinson v. Rahn, 98 Ill. App. 245.

Mercantile Creditors. — Exemption rights may be claimed in a stock of merchandise as against mercantile creditors. *In re Tobias*, 103 Fed. Rep. 68 (construing Virginia statute).

**166.** 3. Retroactive Statutes Impair the Obligation of Contracts — Federal Decisions. — The Queen, 93 Fed. Rep. 834.

**170.** 1. Decisions Denying Exemption as Against Torts — "Debts Contracted," — Blount v. Medbery, 16 S. Dak. 562.

2. Judgment in Trover. — Taylor v. Dwyer, 131 Ala. 91.

4. An Action Against a Physician or Surgeon for Malpractice. — Miller v. Mintun, 73 Ark. 183 (the fact that the complainant alleges that the physician promised careful treatment is immaterial).

5. Judgment or Decree for Fraud. — Paxton v. McDonald, (S. Dak. 1904) 99 N. W. Rep. 1107. See *In re Tobias*, 103 Fed. Rep. 68 (construing Virginia statute).

6. Ejectment and Similar Statutory Actions. — Hardy v. Gunn, 122 Ala. 666, 25 So. Rep. 621, following Penton v. Diamond, 92 Ala. 610, and Stuckey v. McKibbin, 92 Ala. 622.

**171.** 5. Waiver of Tort and Suit in Assumpsit. — Terrill v. Allgaier, 21 Pa. Co. Ct. 346, following Wireman v. Mueller, 18 W. N. C. (Pa.) 84 (action on account rendered by agent who had misappropriated funds of principal — exemption allowed).

**172.** 2. Judgment for Statutory Penalty. — Crawford v. Staton, 133 Ala. 393, following Williams v. Bowden, 69 Ala. 433 (action for penalty for cutting trees).

Recovery of Money Lost at Gaming. — The right to recover money lost at gaming given by Indiana statutes (Burns's Rev. Stat. 1901, §§ 6676, 6678) is not an action *ex contractu*, but depends solely on the statute, and therefore the defendant in such an action is not entitled to benefit of the exemption law (Burns's Rev. Stat. 1901, § 715) giving the right of exemption only when execution or other process is issued on a judgment arising out of or founded on a contract express or implied. State v. Morgan, 160 Ind. 474.

**173.** 2. Contrary Decisions as to Sureties. — King v. Warren, (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 317 (bail bond in criminal proceedings — exemption allowed); Com. v. Brown, 17 Pa. Super. Ct. 520, reversing 9 Pa. Dist. 731 (surety on bond of assignee for benefit of creditors held entitled to exemption).

3. Costs of Execution. — Bowen v. Holden, 95 Mo. App. 1 (exemption may be claimed as against a judgment for costs recovered against



- 173.** Costs as an Incident to the Judgment. — See note 5.  
**174.** 6. Debts Due for Purchase Price. — See note 3.  
**175.** Provision Does Not Give Lien. — See note 2.  
 Purchase Price of Other Property. — See notes 4, 5.  
**176.** 7. Debts Due to Laborers, Mechanics, Etc. — See note 8.  
**177.** A Note Given for Labor. — See note 2.  
 8. Debts Due for Necessaries. — See note 3.

the debtor in the same action in which the judgment by the debtor was recovered).

**173.** 5. *In re Stout*, 109 Fed. Rep. 794 (decided under *Missouri* law), wherein it was held that though exemption could not be claimed against the judgment proper it could against the judgment for costs.

**Judgment Against Plaintiff for Costs.** — Where, in an action instituted by plaintiff for tort, a judgment is rendered against him for costs, plaintiff cannot claim exemption against such judgment under *Alabama* constitution exempting certain personal property from execution on contract debts. *Northern v. Hanners*, 121 Ala. 587, 77 Am. St. Rep. 74, followed in *Crawford v. Slaton*, 133 Ala. 393 (action for penalty for cutting trees).

**174.** 3. Debts Due for Purchase Price. — *McGahan v. Anderson*, (C. C. A.) 113 Fed. Rep. 115 (construing Const. S. Car.); *Watson v. Williams*, 110 Ga. 321; *Gottesman v. Chipman*, 125 Mich. 60; *In re Demaurez*, 5 N. W. Ter. 84.

**Pennsylvania Act 1849.** — *Denlinger v. Burkey*, 18 Lanc. L. Rev. 94.

**Under the Florida Statute 1885**, art. 10, § 1, providing that "no property shall be exempt from sale \* \* \* for the payment of obligations contracted for the purchase of such property," a debtor cannot by selecting personal property as a part of his exemption and excepting the same from operation of a general assignment made by him, clothe such property with an exemption from sale for the payment of obligations contracted for the purchase thereof, and a creditor holding such a claim does not, by sharing in the *pro rata* distribution of the property assigned, lose his right to subject the property for the payment of his claim for purchase money. *Cator v. Blount*, 41 Fla. 138.

**Waiver.** — Taking a note for the purchase price, which provides that title shall remain in the seller until price paid, is not a waiver of the right to subject property to judgment for the purchase price as against the claim of exemption. *De Loach Mill Mfg. Co. v. Latham*, 99 Mo. App. 231.

**In Bankruptcy Proceedings** claims for purchase money will not be enforced against the exempt property, though the state exemption statute (*Iowa* Code) provides the exemption shall not be allowed against purchase money claims. *In re Seydel*, 118 Fed. Rep. 207. See also *In re Butler*, 120 Fed. Rep. 100 (decided under *Georgia* statutes). See, however, *Cannon v. Dexter Broom, etc., Co.*, 120 Fed. Rep. 657, 57 C. C. A. 119; *In re Boyd*, 120 Fed. Rep. 999 (decided under *Iowa* statute); *In re Campbell*, 124 Fed. Rep. 417 (construing *Virginia* Code).

**175.** 2. Necessity for Judgment. — In *Georgia*, if there be no judgment and execution, the question whether the exemption is claimable

cannot arise. *In re Butler*, 120 Fed. Rep. 100, following *Graham v. Richerson*, 115 Ga. 1002.

**4. Exception Limited to the Specific Property.** — *Powers v. Rosenblatt*, 113 Ga. 559.

**Stock of Merchandise.** — The *Virginia* Code, § 3630, provides that exemption shall not extend to any execution order or process issued on a demand for the purchase price, and if a debtor claims exemption rights out of a stock of goods some of which have not been paid for, to defeat the claim of exemption as against vendors of such goods, they must identify in the general stock the goods sold by them and for which they have not been paid, and unless they do so identify the goods the debtor is entitled to claim them as exempt. *In re Tobias*, 103 Fed. Rep. 68. But see *In re Anderson*, 103 Fed. Rep. 854, (C. C. A.) 113 Fed. Rep. 115 (construing Const. S. Car., art. 2, § 32).

Where a stock of goods was set apart as exempt, and the head of the family, without any order of court, continued to carry on the mercantile business, and sold the goods and bought others, one who sold to the head of the family goods which became mingled with the exempt property could not, though the beneficiaries were maintained and supported from the business so carried on, maintain against the head of the family and the beneficiaries a suit for the purchase price of such goods, and obtain a judgment condemning the exempt property to the payment of his debt. At most such a creditor would be entitled to subject to the payment of his debt only such of his goods as he could identify in the stock. *Mitchell v. Simpson Grocery Co.*, 114 Ga. 199, following *Powers v. Rosenblatt*, 113 Ga. 559, and *distinguishing Wegman Piano Co. v. Irvine*, 107 Ga. 65, 73 Am. St. Rep. 109.

**5. New York Statute.** — *Grieb v. Northrup*, 66 N. Y. App. Div. 86.

**176.** 8. Exception of Debts Due to Laborers, Etc. — *Graves v. Ahlgren*, 87 Ill. App. 668; *People v. Haag*, 92 Ill. App. 375.

**Traveling Salesman and Bookkeeper.** — *Dickinson v. Rahn*, 98 Ill. App. 245.

**Skilled Labor** does not fall within the provision of the *Illinois* statute. What is meant by a laborer is one who performs manual labor not requiring special knowledge and skill, and a servant is one who is employed to perform an inferior and menial service. *Dickinson v. Rahn*, 98 Ill. App. 245.

**177.** 2. Taking Note for Labor. — *Graves v. Ahlgren*, 87 Ill. App. 668.

**3. Claim for Cost of Sewing Machine.** — A sewing machine is not, under all circumstances, a necessary article, and the mere fact that it was purchased for the debtor's "own personal use in the manufacture of her clothing" does not show it to be a necessary article. What are necessities cannot be determined by any arbi-

- 178.** Action on Judgment for Necessaries. — See note 1.  
**9.** Debts Due for Board. — See note 3.  
**11.** Debts Due for Rent. — See note 7.
- 180.** **13.** Judgment Against Husband for Alimony or Maintenance. — See note 3.
- 181.** **14.** Liens Enforceable Against Exempt Property — *b.* LANDLORD'S LIENS. — See note 1.
- 182.** *c.* OTHER LIENS. — See note 1.
- 183.** **16.** Showing or Proof as to Date or Nature of Judgment or Claim. — See note 5.
- 184.** **XI. PROCEEDINGS AND PROCESS IN OR AGAINST WHICH EXEMPTIONS MAY BE CLAIMED** — **1.** In General. — See note 3.
- 185.** **4.** Garnishment Proceedings and Trustee Process. — See note 4.
- 186.** **5.** Proceedings Supplementary to Execution. — See note 1.
- 187.** **11.** In Bankruptcy and Insolvency Proceedings. — See notes 4, 5.

trary and inflexible rule; it depends upon the circumstances of each case. The term is a relative one. What would be classed among necessities under the circumstances of one case would not be in another. *Provost v. Piche*, 93 Me. 455.

**Legal Services** in defense of a criminal action constitute necessities, and the same is true of such services rendered in defense of a civil action in which the defendant was subject to arrest. *Fisher v. Shea*, 97 Me. 372.

In *Rich v. Treu*, 25 R. I. 208, legal services were held necessities and therefore wages were not exempt against claim for such services.

**Funeral Expenses of a Deceased Mother** are not a claim for "necessaries" furnished the son. *Watkins v. Schlechter*, 9 Ohio Dec. 590, 7 Ohio N. P. 42.

**Statutory Requirement as to Notice to Debtor** to enforce claim for necessities as against exemptions must be observed. *K. B. Co. v. Batie*, 25 Ohio Cir. Ct. 482.

**178.** **1.** Action on Judgment for Necessaries. — *Garside v. Colby*, 72 N. H. 544.

**3.** Judgment Obtained for Board. — *Hartman v. Mitzel*, 8 Pa. Super. Ct. 22.

**Claim for Provisions, etc., furnished is not a claim for board.** *Philadelphia, etc., R. Co. v. Sharpe*, 2 Penn. (Del.) 407.

**7.** In Bankruptcy Proceedings claims of a landlord for the rent of premises occupied by the trustee in bankruptcy may have precedence over the bankrupt's exemption claims. *In re Grimes*, 96 Fed. Rep. 529.

**180.** **3.** See, however, *Maag v. Williams*, 92 Mo. App. 674, *distinguishing* *Spengler v. Kaufman*, 46 Mo. App. 644, upon the ground that in the latter case the divorced wife was the only member of the family, whereas in the case decided there were children whom the husband was required by the decree of divorce to support; and *Jarboe v. Jarboe*, 106 Mo. App. 459, *following* *Maag v. Williams*, and allowing exemption against garnishment by wife for alimony pending suit for maintenance.

**181.** **1.** In Georgia. — The reason for the decision in Georgia is that the claim for rent is in the nature of purchase money. *Shirling v. Kennon*, 110 Ga. 501.

**Lien of Laborer on Crops.** — Crops may be claimed as exempt as against the lien of a laborer for wages in making crop. *Watson v.*

*Williams*, 110 Ga. 321, *limiting* *Davis v. Meyers*, 41 Ga. 95; *Taliaferro v. Pry*, 41 Ga. 622; *Hartrell v. Fagan*, 43 Ga. 339; *Tift v. Newsom*, 44 Ga. 600.

**182.** **1.** Attorney's Lien on exempt wages collected by him will be upheld as against claim for exemptions. *Halsell v. Turner*, 84 Miss. 432.

**183.** **5.** A Recital in a Judgment that It Is for "Work and Labor" Held Insufficient. — *People v. Haag*, 92 Ill. App. 375; *Smith v. Kennett*, 94 Ill. App. 331.

**184.** **3.** Sequestration Proceedings — Exemptions May Be Claimed Therein. — *Buchi v. Pund*, 24 Pa. Co. Ct. 335, 9 Pa. Dist. 446, 17 Montg. Co. Rep. (Pa.) 11; *First Nat. Bank v. Harkins*, 8 Del. Co. Rep. (Pa.) 134.

**185.** **4.** Exemption from Garnishment. — *Goodwin v. Claytor*, 137 N. Car. 224; *McKenna v. Lucas*, 21 R. I. 509.

**186.** **1.** Proceedings Supplementary to Execution. — *Duffey v. Reardon*, 70 Ohio St. 328.

**187.** **4.** Bankruptcy and Insolvency Proceedings. — *Hartmann v. Wood*, 57 N. Y. App. Div. 23.

**5.** New Bankruptcy Act of 1898. — *In re Hoyt*, 119 Fed. Rep. 987; *In re Lucius*, 124 Fed. Rep. 455; *In re Le Vay*, 125 Fed. Rep. 990; *In re Kane*, (C. C. A.) 127 Fed. Rep. 552; *Evans v. Rounsaville*, 115 Ga. 684 (exemption set apart by federal bankrupt court is not subject to execution); *In re Grayson*, 3 Indian Ter. 497; *Pulsifer v. Hussey*, 97 Me. 434; *Smalley v. Laugenour*, 30 Wash. 307.

The provision of the Bankrupt Act 1898, that the "act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the state laws," pervades the whole act and is to be read into every other section and provision of the act. *Steele v. Buel*, (C. C. A.) 104 Fed. Rep. 968.

In bankruptcy proceedings, the manner in which exemption rights of the bankrupt are to be claimed, set apart, and awarded, is regulated by the Bankrupt Act. *In re Friedrich*, (C. C. A.) 100 Fed. Rep. 284; *In re Grimes*, 96 Fed. Rep. 529; *In re McCutchen*, 100 Fed. Rep. 779; *In re Lynch*, 101 Fed. Rep. 579; *In re White*, 103 Fed. Rep. 774; *In re Hopkins*, 103 Fed. Rep. 781.

**Federal Courts in Bankruptcy Proceedings Follow State Decision** as to the right to exemptions.



**188. 12. Lien of Execution or Attachment — Right of Exemption Acquired After Levy.** — See note 3.

**13. Claim of Exemption as Against Set-off.** — See note 5.

**189. Proceeding to Set Off Judgments.** — See note 2.

**14. In Equity.** — See note 4.

**190. XII. WAIVER, FORFEITURE, AND ESTOPPEL — 1. Waiver — a. POWER TO WAIVE EXEMPTIONS — (1) Express Provisions.** — See note 2.

*In re Stevenson*, 93 Fed. Rep. 789; *In re Woodard*, 95 Fed. Rep. 955; *In re Jones*, 97 Fed. Rep. 773; *In re Beauchamp*, 101 Fed. Rep. 106; *Richardson v. Woodward*, (C. C. A.) 104 Fed. Rep. 873; *In re Meriwether*, 107 Fed. Rep. 102; *Bashinski v. Talbott*, (C. C. A.) 119 Fed. Rep. 337.

**Indemnity Bond.** — A trustee in bankruptcy has no right to demand of the bankrupt an indemnity bond as a condition to turning over the exempt property to the bankrupt. *In re Brown*, 100 Fed. Rep. 441.

**Exemption from Proceeds of Property** should be allowed where the trustee sells the exempt property after refusal to set apart the same to the bankrupt. *In re Brown*, 100 Fed. Rep. 441; *In re Park*, 102 Fed. Rep. 602; *In re Bolinger*, 108 Fed. Rep. 374; *In re Haskin*, 109 Fed. Rep. 789 (decided under *Pennsylvania* statute); *In re Manning*, 112 Fed. Rep. 948 (decided under *Pennsylvania* statute); *In re Hoover*, 113 Fed. Rep. 136; *In re Le Vay*, 125 Fed. Rep. 990; *In re Coddington*, 126 Fed. Rep. 891; *In re Kane*, (C. C. A.) 127 Fed. Rep. 552.

*In re Richard*, 94 Fed. Rep. 633, it was held that where in bankruptcy proceedings the bankrupt for the benefit of the estate permits his exempt property to be sold with the non-exempt property he should be allowed the amount of his exemptions from the proceeds.

**Only Exemptions Allowed by the State Laws** can be claimed in bankrupt proceedings under Bankrupt Act 1898. *In re Staunton*, 117 Fed. Rep. 507.

**Court Costs in Voluntary Bankruptcy Proceedings** take precedence of exemption claims. *In re Hines*, 117 Fed. Rep. 790. See, however, *In re Le Vay*, 125 Fed. Rep. 990 (expenses incurred in preserving estate — decided under *Pennsylvania* statute).

**Amendment of Claim so as to Include Other Property Refused.** — *Moran v. King*, 111 Fed. Rep. 730, 49 C. C. A. 578 (construing *Virginia* statute).

**Claim May Be Amended so as to Include Property** which is required by the bankrupt court to be surrendered on the ground that its conveyance by the bankrupt was an unlawful preference. *In re Anderson*, 110 Fed. Rep. 141.

**188. 3. Marriage After Levy.** — *State v. Allen*, 48 W. Va. 154, 86 Am. St. Rep. 29 (residence acquired after levy).

**5. Cannot Plead Set-off Against Exempt Claim.** — *Higgins v. Dunkleberger*, 23 Pa. Co. Ct. 291, 9 Pa. Dist. 91, 6 Lack. Leg. N. (Pa.) 72, 16 Montg. Co. Rep. (Pa.) 55. See, however, *Lynn v. Stanley Creek Cotton Mills*, 130 N. Car. 621, wherein it was held that the exemption is not available before judgment so as to destroy the right of counterclaim or set-off. Otherwise one

could recover judgment where on a balance struck nothing is due him.

An heir cannot claim exemptions out of the property of his decedent as against claims of the decedent's estate against the heir, and therefore the interest of the heir may be applied in satisfying his indebtedness to the estate without regard to exemption rights. *Duffy v. Duffy*, 155 Mo. 144.

**189. 2. Motion or Application to Set Off Judgments.** — *Caldwell v. Ryan*, (Mo. App. 1904) 79 S. W. Rep. 743.

*In Missouri* it has been held where the plaintiff required a judgment against defendant, a municipal corporation, for three hundred dollars for personal injuries, but judgment in such action for costs was rendered in favor of the defendant for failure of the plaintiff to present his claim to the city council before commencing his suit, that the defendant could not have his judgment for costs set off against the plaintiff's judgment, as against the plaintiff's claim of exemption rights in such judgment. *Bowen v. Holden*, 95 Mo. App. 1.

**4. In Equity.** — *Powers v. Rosenblatt*, 113 Ga. 559; *Avery v. Forest Lawn Cemetery Co.*, 127 Mich. 125; *Fry v. Smith*, 61 Ohio St. 276.

**Appointment of Receiver.** — *Levy v. Rossel*, 82 Miss. 527.

**190. 2. Express Authority to Waive Exemptions.** — *In re Garden*, 93 Fed. Rep. 423 (decided under *Alabama* Code allowing waiver); *McCormick Harvesting Mach. Co. v. Vaughn*, 130 Ala. 314.

*Kansas* Laws 1889, c. 176, requiring the joint consent of husband and wife to a mortgage of exempt personal property, did not repeal the provision of the Landlord and Tenant Act (Gen. Stat. 1897, c. 121, § 5), expressly providing that a tenant could waive in writing the benefit of the exemption laws for debts contracted for rent without the joint consent of his wife. *Kroenert v. Mead*, 59 Kan. 665.

**Waiver in Lease — Effect on Assignee of Term.** — A waiver of the exemption rights as regards the claim for rent contained in a lease is binding on the assignee of the term. *Barhyte v. New Hampshire Real-Estate Co.*, 66 Kan. 390.

**Express Prohibition or Restriction.** — Under the *Iowa* Code, § 3313, providing that the avails of life insurance are not subject to debts of the deceased, except by special contract or arrangement, the fact that the deceased had stated to different persons that he intended the avails of policies upon his life to be used in the payment of his debts, is not such a special contract or arrangement as will render such avails subject to the debts. *O'Melia v. Hoffmeyer*, 119 Iowa 444.

**General Waiver.** — *Miller v. Almon*, 123 Ga. 104, following *Sasser v. Roberts*, 68 Ga. 252.



**192.** (2) *In the Absence of Express Provisions* — (b) *Waiver by Executory Contract* — In *Pennsylvania*. — See note 2.

In *Other States*. — See note 5.

**193.** *Unmarried Debtors*. — See note 2.

**194.** *b. WHO MAY WAIVE — AGENCY* — (1) *In General*. — See note 1.  
(4) *Partners*. — See note 5.

**195.** *c. WHAT CONSTITUTES A WAIVER* — (1) *Executory Contracts*. — See note 1.

*Express Requirements*. — See notes 2, 4.

**196.** *A Written Instrument Is Not Sufficient as a Waiver of Exemptions*. — See note 1.

**197.** (2) *Consent to Levy or Sale* — *Consent to a Sale*. — See note 1.

*A Question of Intention*. — See notes 6, 7.

**198.** (3) *Omission to Claim Exemption*. — See note 3.

**199.** *d. REVOCATION OF WAIVER*. — See notes 1, 2.

*c. EFFECT OF WAIVER* — (1) *In General*. — See note 4.

(2) *Preference of Creditors — Order of Distribution*. — See note 6.

**192.** 2. *Pennsylvania Doctrine Allowing Waiver by Executory Agreement*. — *Wright v. Wright*, 103 Fed. Rep. 580 (construing *Pennsylvania* statute); *Safe-Deposit, etc., Co. v. Wright*, (C. C. A.) 105 Fed. Rep. 155; *Schock v. Waidelich*, 27 Pa. Super. Ct. 215. See also *Rosser v. Florence*, 119 Ga. 250.

5. *Cases Denying Power to Waive by Executory Agreement*. — *In re Carpenter*, (C. C. A.) 109 Fed. Rep. 558 (construing *Florida* statute); *Zachmann v. Zachmann*, 201 Ill. 391, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 192; *Grover v. Younie*, 110 Iowa 446.

**193.** 2. *Unmarried Men*. — *Zachmann v. Zachmann*, 201 Ill. 391, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 192.

**194.** 1. *General Power of Attorney* held not to authorize agent to waive exemptions on behalf of principal. *Lippman v. Anniston First Nat. Bank*, 120 Ala. 123, 74 Am. St. Rep. 28.

5. *Partner Cannot Bind Copartner as to Individual Property*. — *Lippman v. Anniston First Nat. Bank*, 120 Ala. 123, 74 Am. St. Rep. 28.

**195.** 1. *Sufficiency of Waiver by Executory Contract*. — *Sellers v. Bell*, (C. C. A.) 94 Fed. Rep. 801; *In re Woodruff*, 96 Fed. Rep. 317 (*Georgia* statute); *In re Sisler*, 96 Fed. Rep. 402 (*Virginia* statute); *Wright v. Wright*, 103 Fed. Rep. 580 (construing *Pennsylvania* statute); *Rosser v. Florence*, 119 Ga. 250; *Kindig v. Kahler*, 18 Lanc. L. Rev. 190.

2. *Necessity for Writing*. — *Lippman v. Anniston First Nat. Bank*, 120 Ala. 123, 74 Am. St. Rep. 28; *King v. Warren*, (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 317.

4. *Declaration of Waiver in Judgment*. — Where a judgment contains a waiver of exemption, in case of a revival of the judgment by amicable scire facias, the waiver of exemption is lost unless the revival also contains the waiver. *Hayes v. Lentz*, 8 Pa. Dist. 628.

**196.** 1. *Waiver Must Be Clearly Expressed in Instrument*. — *Lippman v. Anniston First Nat. Bank*, 120 Ala. 123, 74 Am. St. Rep. 28.

Under the *Alabama* statute which exempts "personal property" to a certain value and also wearing apparel, a waiver of exemption as to "personal property" should not be construed as including a waiver of the exemption as to wearing apparel. *Sellers v. Bell*, (C. C. A.) 94 Fed. Rep. 801.

**197.** 1. Where before the sale the debtor claimed his exemption rights, his presence at the sale and failure to object thereto are not a waiver of his exemption rights. *Hartmann v. Wood*, 57 N. Y. App. Div. 23.

6. *Waiver a Question of Intention*. — *State v. Gardner*, 32 Wash. 555, 98 Am. St. Rep. 858, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 197.

7. *Conduct Consistent with Claim of Exemption* — *State v. Gardner*, 32 Wash. 555, 98 Am. St. Rep. 858, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 197.

**198.** 3. *Waiver by Omission to Claim Exemption*. — See *Johnson v. Lang*, 71 N. H. 251, 93 Am. St. Rep. 509, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 98.

**199.** 1. *Revocation of Consent*. — *Johnson v. Lang*, 71 N. H. 251, 93 Am. St. Rep. 509, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 197, 198; *Hartmann v. Wood*, 57 N. Y. App. Div. 23.

2. *Waiver under Seal* is irrevocable. *Wright v. Wright*, 103 Fed. Rep. 580; *Safe-Deposit, etc., Co. v. Wright*, 105 Fed. Rep. 155, 44 C. C. A. 421 (both cases construing *Pennsylvania* statute).

4. *Effect of Waiver in General*. — *Wright v. Wright*, 103 Fed. Rep. 580 (construing *Pennsylvania* statute).

*Waiver Enforced in Bankruptcy Proceedings*. — *In re Garden*, 93 Fed. Rep. 423; *In re Sisler*, 96 Fed. Rep. 402; *In re Woodruff*, 96 Fed. Rep. 317. See, however, *Woodruff v. Cheeves*, 105 Fed. Rep. 601, 44 C. C. A. 631; *In re Moore*, 112 Fed. Rep. 289 (construing *Alabama* Const.); *In re Swords*, 112 Fed. Rep. 661; *In re Garner*, 115 Fed. Rep. 200; *In re Tune*, 115 Fed. Rep. 906.

Where an execution issued against a bankrupt shortly before bankruptcy was set aside as an illegal preference, the bankrupt's waiver of exemption as against such execution is defeated also. *In re Bolinger*, 108 Fed. Rep. 374.

*Waiver of Exemption in Favor of One Creditor* does not prevent a claim of exemption as against other creditors. *In re Osborn*, 104 Fed. Rep. 780.

6. *Preference of Creditors — Order of Distribution*. — *Steinger v. Butler*, 2 Dauphin Co. Rep. (Pa.) 385; *Keetley v. Campbell*, 15 Pa. Super. Ct. 415; *Denlinger v. Burkey*, 18 Lanc. L. Rev. 94.

**200.** (3) *Rights of Subsequent Lien Creditors.* — See note 1.

**2.** *Forfeiture* — *a.* *FRAUD* — *In a Few States.* — See note 4.

**201.** See note 1.

**202.** *Prevailing Doctrine Against Forfeiture.* — See note 1.

*Applications of This Doctrine.* — See note 3.

**203.** See note 1.

**204.** *d.* *FILING SCHEDULE OF PROPERTY.* — See note 5.

*e.* *OMISSION OF PROPERTY FROM SCHEDULE* — *A Fraudulent Omission.*

— See note 8.

**205.** **3.** *Estoppel* — *a.* *IN PAIS.* — See note 3.

**200. 1. Waiver by Mortgagee of Lien.** — Where a debtor mortgages exempt property, a waiver of exemption thereby does not confer any benefits upon other creditors attaching the property where the mortgagee expressly waived any rights under his mortgage, though the mortgage was invalid as against the attaching creditors for failure to record the same. *Liberal Bank v. Redlinger*, 95 Mo. App. 279.

**Mortgage of Exempt and Nonexempt Property.** — In *Texas*, however, it is held that where the mortgage covers exempt and nonexempt property, there is not a total waiver of exemptions in favor of creditors generally, and the mortgagor can require the mortgagee to resort to the nonexempt property in release of the exempt property, but if the mortgage is not recorded and creditors subsequently levy upon the non-exempt property, the mortgagor loses his right to require the mortgagee to first exhaust the nonexempt property. *Baughn v. Allen*, (Tex. Civ. App. 1902) 68 S. W. Rep. 207.

**4. In Georgia**, persons claiming exemption rights must come into court with clean hands. *In re Williamson*, 114 Fed. Rep. 190.

**Georgia Code**, § 2830, requiring an exemption claimant to act in perfect good faith, refers to persons claiming the one thousand six hundred dollars homestead exemption, and is not applicable to persons claiming the three hundred dollars personal property exemption. *In re West*, 116 Fed. Rep. 767.

**What Constitutes Fraud.** — *In re Duffy*, 118 Fed. Rep. 926.

**201. 1. Fraudulent Concealment of Property.** — *In re Boorstin*, 114 Fed. Rep. 696 (decided under *Georgia* statutes).

**Sufficiency of Proof of Fraudulent Concealment of Property** — *Construing Georgia Code*, § 2830. — *In re Stephens*, 114 Fed. Rep. 192 (large discrepancy in amount of property not properly accounted for).

**Waiver by Denial of Ownership of the Property.** — *Holmes v. Donovan*, 21 Pa. Co. Ct. 605.

The mere fact that the bankrupt had conveyed land to his wife to evade its subjection to his debts is not such fraudulent concealment of property as to forfeit his right to exemption (Code Ga., § 2830) where prior to bankruptcy proceedings it was reconveyed to the bankrupt and scheduled by him. *In re Thompson*, 115 Fed. Rep. 924.

**202. 1. Prevailing Doctrine — No Forfeiture by Fraud.** — *In re Park*, 102 Fed. Rep. 602 (failure of bankrupt to account for his assets). See also *Bass v. Citizens' Trust Co.*, 32 Ind. App. 583. See, however, *In re Mayer*, 108 Fed. Rep. 599, 47 C. C. A. 512.

The fact that when the property was seized on execution the judgment debtor claimed that the property belonged to his wife does not forfeit his right to claim exemption therein where the value of such property was less than the exemption rights. *Gulfport Bank v. O'Neal*, (Miss. 1905) 38 So. Rep. 630.

**3. Fraudulent Conveyance and Denial of Ownership.** — *Logan v. Rea*, 40 Can. L. J. 44, *distinguishing* *Merchants' Bank v. McKenzie*, 13 Manitoba 19. See, however, *In re White*, 109 Fed. Rep. 635 (construing *Missouri* statute); *Ex p. Bowes*, 34 N. Bruns. 76 (denial by debtor that wages are owing).

In *Coe v. Cleghorn*, (Idaho 1904) 79 Pac. Rep. 72, it was held that where in an attachment the attachment debtor disclaims ownership of the property and on motion the attachment is discharged, in case of the levy of a second writ upon the same property the debtor is not estopped to claim his exemption rights in the property.

**203. 1. Fraudulent Concealment of Property.** — See, however, *In re Taylor*, 114 Fed. Rep. 607 (decided under *Colorado* statutes), where concealment of goods by bankrupt and refusal to surrender them was held to forfeit his right to exemptions.

**204. 5. Omission from Schedule in Bankruptcy.** — Under *Georgia Code*, § 2830, providing for the forfeiture of exemption rights for fraudulent concealment by the creditor of any property at the time he seeks to have the benefit of his exemption, the failure of the bankrupt to make a fair and full disclosure of his property in voluntary partition for bankruptcy works a forfeiture of his exemption rights. *In re Waxelbaum*, 101 Fed. Rep. 228.

**8. In Arkansas**, it is held that intentional failure of the execution debtor to include in his schedule money in his possession, authorizes a disallowance of his claim of exemption as to other property. The statute (Kirby's Dig., § 3906) provides that whenever any resident of the state shall upon the issue against him for the collection of any debt desire to claim any of the exemptions provided for in article 19 of the constitution, he shall prepare a schedule verified by affidavit of all his property including moneys, etc. The court in its opinion said: "The obvious purpose of this statute is to require a full disclosure of all property owned by the debtor at the time, and the only way the court may compel compliance with the terms of the statute is to withhold an allowance of the claim of exemption until such full disclosure be made by the debtor." *Farris v. Gross*, (Ark. 1905) 87 S. W. Rep. 633.

**205. 3. Fraudulent Representations as to**



**206.** *b.* BY JUDGMENT — RES ADJUDICATA. — See note 3.

**207.** XIII. SALES AND OTHER TRANSFERS, AND INCUMBRANCES — 1. In General. — See note 1.

2. Sale, Exchange, Assignment, or Gift — *a.* SALE OR EXCHANGE. — See note 3.

**209.** *c.* EFFECT OF SALE, EXCHANGE, OR ASSIGNMENT. — See note 1. Subsequent Claim by Debtor. — See note 2.

3. Mortgage, Pledge, and Other Liens — *a.* POWER TO MORTGAGE OR PLEDGE. — See note 7.

**210.** *b.* OTHER LIENS. — See note 6.

**211.** *d.* EFFECT OF MORTGAGE OR PLEDGE — (2) *Claim Out of Proceeds of Sale under Mortgage.* — See note 3.

**212.** 4. Restrictions on Power to Sell or Encumber — *a.* IN GENERAL. — See note 4.

**213.** *b.* CONSENT OF WIFE OR ORDER OF COURT. — See note 2.

value of property owned, for the purpose of acquiring credit, may operate as an estoppel to claim exemption. *Fairwell v. Patterson*, 76 Ill. App. 601.

**Justification on Bail Bond.** — The fact that the surety on a bail bond in criminal proceedings in justification states that the property is not exempt from execution does not estop him from claiming his exemption rights. *King v. Warren*, (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 317.

**206.** 3. Where in proceedings in the Surrogate's Court for the sale of a decedent's lands for the payment of debts, the widow and heirs at law of the decedent fail to assert a claim to the land to be sold as exempt, they are estopped, as against an innocent purchaser at the sale pursuant to a decree of the court, to claim that the property was exempt. *Smith v. Blood*, 106 N. Y. App. Div. 317.

**207.** 1. Sales, Transfers, and Incumbrances. — *State v. Lacy*, 18 Ohio Cir. Ct. 379, 10 Ohio Cir. Dec. 111 (waiver of lien of chattel mortgage by judgment against chattel mortgagee and levy of execution on mortgaged chattels). *Kramer v. Wood*, (Tenn. Ch. 1899) 52 S. W. Rep. 1113.

3. May Sell or Exchange. — *Baum v. Turner*, (Ky. 1903) 76 S. W. Rep. 129; *Day v. Burnham*, 82 Mo. App. 538; *Brown v. Koenig*, 99 Mo. App. 653; *Farmers', etc., Bank v. Hoffman*, (Neb. 1903) 96 N. W. Rep. 1044.

**209.** 1. Purchaser Acquires Title as Against Creditors. — *Wabash R. Co. v. Bowring*, 103 Mo. App. 158; *Kramer v. Wood*, (Tenn. Ch. 1899) 52 S. W. Rep. 1113.

2. Vendor Cannot Afterwards Claim Property as Exempt. — *Levy v. Rossel*, 82 Miss. 527 (assignment for benefit of creditor).

7. Debtor May Mortgage Exempt Property. — *Ford v. Fargason*, 120 Ga. 606; *Farmers', etc., Bank v. Hoffman*, (Neb. 1903) 96 N. W. Rep. 1044.

In Bankruptcy Proceedings mortgage liens on exempt property are not enforceable. *In re Hatch*, 102 Fed. Rep. 280.

**210.** 6. Artisan's Lien for Labor. — *Halsell v. Turner*, 84 Miss. 432.

Though an artisan who repairs property specially exempted may have the right to retain the possession of the property until paid, he does not have the right after surrender to subject it to execution for his claim for repairs,

as where a tailor repairs a coat. *Robertson v. Honan*, 24 Quebec Super. Ct. 510.

**211.** 3. In Pennsylvania. — *Keller v. Keller*, 17 Lanc. L. Rev. 25.

**212.** 4. Iowa Code, § 2906, providing that any incumbrance of personal property which may be held exempt from execution by the head of a family shall not be valid unless the same be by written instrument and unless the husband and wife both be living and concur in and sign the same, does not apply to property which is not specifically exempted, but which the debtor might be entitled to select as exempt instead of other property which he owns. *Grover v. Younie*, 110 Iowa 446.

**Limitations Strictly Construed.** — Limitations upon the right of a debtor to transfer the exempt property are in derogation of his common-law right to dispose of his property, and are not to be construed beyond the letter of the law. *Cunningham v. Brictson*, 101 Wis. 378.

**213.** 2. Express Requirement of Wife's Consent or Order of the Court. — *Powers v. Rosenblatt*, 113 Ga. 559 (order of court required); *Kindall v. Lincoln Hardware, etc., Co.*, 8 Idaho 664 (joinder of wife in chattel mortgage required); *Vollmer v. Reid*, (Idaho 1904) 77 Pac. Rep. 325; *Alexander v. Logan*, 65 Kan. 505 (joint consent of husband and wife required); *Lashua v. Myhre*, 117 Wis. 18 (wife's signature to mortgage of exempt property must be witnessed as required by Wis. Rev. Stat. 1898, § 2313).

Though the statute prohibits a husband from mortgaging household exempt property unless the wife joins in the mortgage, a mortgage by him without his wife joining therein is not void so as to be subject to attack by his other creditors. *Cunningham v. Brictson*, 101 Wis. 378.

In Kansas. — *Jackman v. Lambertson*, (Kan. 1905) 80 Pac. Rep. 55; *Searle v. Gregg*, 67 Kan. 1 (joinder of husband in mortgage by wife required).

**Mortgage Covering Exempt and Nonexempt Property.** — A mortgage covering exempt and nonexempt property, though invalid with regard to exempt property for failure of the wife to join therein, is valid as to the nonexempt property. *Skinner v. Winfield First Nat. Bank*, 63 Kan. 842.

**Joinder in Instrument Unnecessary.** — Under the Iowa statute (Iowa Code, § 2906), providing



**214. 5. Voluntary Assignment for the Benefit of Creditors — a. IN GENERAL.** — See note 3.

**220. 6. Fraudulent Conveyances — Property Absolutely Exempt.** — See note 8.

**222. Conveyance Before Selection.** — See notes 3, 4.

**223. XIV. ENFORCEMENT AND PROTECTION OF THE RIGHT — 2. Claiming, Selecting, and Setting Apart of Exemption — a. NECESSITY FOR CLAIM AND SELECTION — (1) In General.** — See note 1.

(2) *Statutes Requiring Claim and Selection.* — See note 2.

**224. (3) Statutes Absolutely Exempting Specific Property.** — See note 3.

**225. (4) Entire Property Within Amount Exempted.** — See note 4.

**226. (5) Successive Executions or Attachments.** — See note 1.

**227. b. TIME OF ASSERTING CLAIM — (1) Express Requirements.** — See note 1.

that "no incumbrance of personal property which may be held exempt from execution by the head of a family \* \* \* shall be of any validity \* \* \* unless the same be by written instrument, and unless the husband and wife, if both be living, consent in the same joint instrument," a chattel mortgage which is signed by both husband and wife is valid though both do not join in the acknowledgment. *Brown v. Koenig*, 99 Mo. App. 653.

**214. 3. Effect in Bankruptcy Proceedings.** — In *Georgia* the fact that the bankrupt had made an assignment for the benefit of creditors does not preclude him from claiming his exemptions in subsequent bankruptcy proceedings superseding such assignment. *In re Talbott*, 116 Fed. Rep. 417. Compare *In re Staunton*, 117 Fed. Rep. 507 (decided under *Pennsylvania* statute).

**220. 8. Property Absolutely and Specifically Exempt.** — *In re Tollett*, 106 Fed. Rep. 866, 46 C. C. A. 11 (decided under law of *Tennessee*); *Skinner v. Jennings*, 137 Ala. 295; *McNally v. White*, 154 Ind. 163, rehearing denied 154 Ind. 174; *Smyth v. Hall*, 126 Iowa 627, following *Marquardt v. Mason*, 87 Iowa 136; *Day v. Burnham*, 82 Mo. App. 538; *Green v. Baxter*, 91 Mo. App. 633; *Lynch v. Englehardt-Winning-Davison Mercantile Co.*, (Neb. 1901) 96 N. W. Rep. 524; *Tyler v. Ballard*, (Supm. Ct. Spec. T.) 13 Misc. (N. Y.) 540; *McClelland v. Barnard*, 36 Tex. Civ. App. 118; *Cunningham v. Britson*, 101 Wis. 378. See, however, *Logan v. Rea*, 40 Can. L. J. 44.

**Wages and Earning.** — *Sternberg v. Levy*, 159 Mo. 617 (investment of exempt wages in insurance for benefit of sister is not a fraud on creditors).

**222. 3. Cases Disallowing Claim of Exemption.** — *In re White*, 109 Fed. Rep. 635 (construing *Missouri* statute).

**Conveyance Before Selection — Cases Disallowing Claim of Exemption.** — *In re Yost*, 117 Fed. Rep. 792 (decided under *Pennsylvania* statute); *McNally v. White*, 154 Ind. 163, rehearing denied 154 Ind. 174.

**In Missouri.** — See, however, *Green v. Baxter*, 91 Mo. App. 633, where the debtor was allowed to claim exemption in a judgment which he had assigned. But in this case the debtor had no other property at time of assignment.

**Fraudulent Preference by Bankrupt.** — Bankrupt cannot, in *Pennsylvania*, claim exemption out of property which he has conveyed to a

creditor and which the creditor is required to surrender on the ground of a fraudulent preference. *In re Long*, 116 Fed. Rep. 113. See also *In re Evans*, 116 Fed. Rep. 909 (decided under *North Carolina* statutes); *In re Coddington*, 126 Fed. Rep. 891 (decided under *Pennsylvania* statute). See, however, *Bashinski v. Talbott*, (C. C. A.) 119 Fed. Rep. 337 (decided under law of *Georgia*).

**4. Property Conveyed by Bankrupt as Unlawful Preference.** — A bankrupt may claim the exemptions in property which he had conveyed to a creditor where such conveyance was set aside by the bankrupt court as a wrongful preference. *In re Falconer*, (C. C. A.) 110 Fed. Rep. 111 (decided under *Arkansas* law).

**223. 1. Waiver by Omission to Claim Exemption.** — *Denlinger v. Burke*, 18 Lanc. L. Rev. 94.

**2. Claim and Selection Necessary.** — *Lahr v. Ulmer*, 27 Ind. App. 107; *Linck v. Troll*, 84 Mo. App. 49; *Gilewicz v. Goldberg*, 69 N. Y. App. Div. 438; *Thibault v. Lennon*, 39 Oregon 280, 87 Am. St. Rep. 657.

**Failure to Give Notice to Select.** — Under the *Mississippi* statute requiring the officer to give notice to the execution defendant to claim and select property which he desires to claim as exempt, the judgment debtor does not lose his right to exempt property where no notice is given him to make the selection. *Gulfpot Bank v. O'Neal* (Miss. 1905) 38 So. Rep. 630.

**224. 3. Absolute Exemption of Specific Articles.** — *Wabash R. Co. v. Bowring*, 103 Mo. App. 158.

**225. 4. Entire Property Within Amount Exempted.** — *Skinner v. Jennings*, 137 Ala. 295; *Grieb v. Northrup*, 66 N. Y. App. Div. 86, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 225; *Gulfpot Bank v. O'Neal*, (Miss. 1905) 38 So. Rep. 630.

**226. 1. Claim as Against Each Execution or Attachment.** — *Parker v. Independence Produce Co.*, 2 Indian Ter. 561; *Wisser v. Wisser*, 8 Pa. Dist. 673. See, however, *Lafferty v. Sistalla*, 11 Wyo. 360 (second service of garnishment).

**227. 1. Selection of property as exempt may be made prior to any levy thereon.** *Grover v. Younie*, 110 Iowa 446.

In voluntary bankruptcy the bankrupt must claim his exemption rights under the state law at the time of filing his petition in bankruptcy. *In re Friedrich*, (C. C. A.) 100 Fed. Rep. 284.

**227.** (2) *In the Absence of Express Requirements* — (a) *Claim After Sale*. — See note 3.

(b) *Claim Before Sale* — *aa. CLAIM AT TIME OF LEVY*. — See note 5.

**228.** See note 1.

*bb. CLAIM AT TIME OF LEVY OR WITHIN A REASONABLE TIME*. — See note 2.

**229.** *cc. CLAIM AT ANY TIME BEFORE SALE*. — See note 1.

**230.** (3) *In Case of Attachment or Garnishment*. — See notes 3, 4.

**232.** *c. EXCUSE FOR OMISSION TO CLAIM OR FOR DELAY* — (2) *Ignorance of Levy*. — See note 1.

*d. WHO MAY ASSERT CLAIM*. — See note 4.

**233.** *Claim by Agent, Wife, or Child*. — See notes 1, 2.

*e. MODE OF CLAIMING, SELECTING, AND SETTING APART* —

(1) *In General*. — See notes 5, 6.

**227. 3. A Claim After Sale.** — *Woolfolk v. Lyons*, (Ky. 1900) 59 S. W. Rep. 21.

**5. Exemption from Partnership Property.** — Where partnership property is levied upon under execution against the partnership, the claims of the individual partners to exemptions should be made without delay or they will be waived. *In re Friederick*, 95 Fed. Rep. 282.

**228. 1. Time of Claim to Render Officer Liable.** — *Linck v. Troll*, 84 Mo. App. 49.

**2. Claim at Time of Levy or Within Reasonable Time Afterwards.** — *Duncan v. Burchinell*, 14 Colo. App. 475, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 226 *et seq.*

**229. 1. Claim at Any Time Before Sale.** — *Stout v. Price*, 24 Ind. App. 368, denying rehearing 24 Ind. App. 360; *Fowler v. State*, 99 Md. 594; *Linck v. Troll*, 84 Mo. App. 49; *White v. Wilson*, 106 Mo. App. 406; *Johnson v. Lang*, 71 N. H. 251, 93 Am. St. Rep. 509; *Hartmann v. Wood*, 57 N. Y. App. Div. 23; *Gilewicz v. Goldberg*, 69 N. Y. App. Div. 438; *State v. Allen*, 48 W. Va. 154, 86 Am. St. Rep. 29.

**230. 3. In Garnishment.** — *Pullman Palace Car Co. v. Henderson*, 120 Ala. 103.

**In Attachment.** — *Hall v. Miller*, 21 Tex. Civ. App. 336 (selection allowed at trial when sheriff failed to give notice to select under Texas statute allowing selection to be made within reasonable time after request by Georgia officer).

**4. Adjudication or Claim in Attachment Not Required.** — *McKenna v. Lucas*, 21 R. I. 509; *State v. Gardner*, 32 Wash. 550, 98 Am. St. Rep. 858 (claim may be made after motion to dissolve attachment); *Messenger v. Murphy*, 33 Wash. 353.

Claim of exemption may be made after judgment sustaining attachment. The judgment sustaining the attachment does not settle the status of the attached property, that is, does not determine whether it is or is not exempt from seizure on attachment. *Johnson v. Bartek*, 56 Neb. 422, following *Hamilton v. Fleming*, 26 Neb. 240; *State v. Carson*, 27 Neb. 501, 20 Am. St. Rep. 681, which the court states overruled *State v. Sanford*, 12 Neb. 425, and *State v. Krumpus*, 13 Neb. 321; and citing in addition *State v. Wilson*, 31 Neb. 462; *Smith v. Johnson*, 43 Neb. 755; *Quigley v. McEvony*, 41 Neb. 73.

**In Garnishment.** — *Steele v. Parker*, 109 Ga. 791; *Rempe v. Ravens*, 68 Ohio St. 113.

**After Money Has Been Paid into Court in garnishment proceedings the defendant may claim**

his exemptions therein. *Rolla State Bank v. Borgfeld*, 93 Mo. App. 62.

**Attachment Execution in Pennsylvania.** — *Heathcote v. Crassly*, 9 Pa. Dist. 137, 3 Dauphin Co. Rep. (Pa.) 10; *Leibfried v. Morrissey*, 9 Pa. Dist. 740. Claim must be made during term when debtor should appear and answer. *Hays v. Lentz*, 12 Pa. Super. Ct. 400; *Hartman v. Weitmeyer*, 2 Dauphin Co. Rep. (Pa.) 341. Claim may be made at same time a motion to quash attachment is made. *Hartman v. Weitmeyer*, 2 Dauphin Co. Rep. (Pa.) 341.

**232. 1. Constructive Notice.** — Where the levy of execution is upon real estate and the property is advertised for sale to satisfy the execution the judgment debtor is charged with notice, and upon his failure to make his claim for exemption his right thereto is lost, though he did not actually know that the property had been levied upon. *Lahr v. Ulmer*, 27 Ind. App. 107.

**4. Assertion of Claim by Garnishee.** — *Seitz v. Starks*, (Mich. 1904) 98 N. W. Rep. 852 (garnishee cannot).

**233. 1. Claim by Agent.** — *White v. Swann*, 68 Ark. 102, 82 Am. St. Rep. 282; *Fowler v. State*, 99 Md. 594 (attorney).

**2. Claim by Wife or Child** — *Arkansas*. — *White v. Swann*, 68 Ark. 102, 82 Am. St. Rep. 282.

*Georgia*. — *Ozburn v. Flournoy*, 109 Ga. 704; *Wood v. Collins*, 111 Ga. 32.

*Kentucky*. — *Baum v. Turner*, (Ky. 1903) 76 S. W. Rep. 129.

*Missouri*. — *State v. Wolf*, 81 Mo. App. 586; *Liberal Bank v. Redlinger*, 95 Mo. App. 279.

*Nebraska*. — *Farmers', etc., Bank v. Hoffman*, (Neb. 1903) 96 N. W. Rep. 1044 (claim by the wife to exemption from husband's property does not change the title to the property).

*Pennsylvania*. — *Bank v. Griffith*, 8 Pa. Dist. 333 (claim by child allowed where father had absconded).

*South Dakota*. — *Thompson v. Donahoe*, 16 S. Dak. 244.

**Refusal of Husband.** — In order that a wife may claim exemption in husband's property it is necessary that the husband should have refused to make the claim. *Hirsch v. Stinson*, 112 Ga. 348.

**5. Right of Exemption Lost by Not Following Statutory Requirements.** — *In re Wilson*, 108 Fed. Rep. 197 (construing *Virginia Code*, 1887, § 3639); *In re Garner*, 115 Fed. Rep. 200 (de-

**234.** (3) *Form and Language of Claim.* — See note 2.

**236.** (5) *Inventory or Schedule, Appraisalment, and Selection* — (a) In General. — See note 3.

(b) *Schedule or Inventory.* — See note 4.

**237.** *Form and Sufficiency of Schedule or Inventory.* — See notes 3, 5.

**238.** See notes 1, 2.

**239.** *A Defective Schedule.* — See note 2.

**241.** (d) *The Selection.* — See note 4.

*By Whom Made.* — See note 6.

**242.** (e) *Contest of Claim of Exemptions.* — See note 6.

*In Alabama.* — See note 7.

**245.** *f. DUTY OF LEVYING OFFICERS* — (2) *Right and Duty to Levy* —

(b) *Selection Necessary.* — See note 3.

**246.** (4) *Inventory, Appraisalment, and Setting Apart.* — See note 3.

**247.** 3. *Remedies on Denial or Infringement of Right* — *a. REMEDIES AT LAW* — (1) *Replevin or Claim and Delivery* — (a) *Action Against Officer* — *By Statute.* — See note 5.

cided under *Virginia* statute); *Leibfried v. Morrissey*, 9 Pa. Dist. 740; *Denlinger v. Burkey*, 18 Lanc. L. Rev. 94.

*Amendment of Claim in Bankruptcy.* — *In re Duffy*, 118 Fed. Rep. 926.

**233.** 6. *Substantial Compliance with Statute Sufficient.* — *Wiser v. Thomas*, (Wash. 1905) 80 Pac. Rep. 854.

The fact that the claim for exemption asks that the exemption be set apart under the wrong constitutional provision does not defeat the exemption. *Reed v. Holbrook*, 113 Ga. 1168.

**234.** 2. *Form and Language of Claim.* — *In re Tobias*, 103 Fed. Rep. 68 (construing *Virginia* Code 1887, § 3639); *Straughn v. Richards*, 121 Ala. 611; *White v. Swann*, 68 Ark. 102, 82 Am. St. Rep. 282; *Rolla State Bank v. Borgfeld*, 93 Mo. App. 62 (need not cite law under which exemption is claimed); *Conklin v. McCauley*, 41 N. Y. App. Div. 452.

*Amendment of Claim.* — *Anniston First Nat. Bank v. Lippman*, 129 Ala. 608; *Ozburn v. Flournoy*, 109 Ga. 704.

**236.** 3. *Failure to Comply with Statutory Requirements.* — *Kahn v. Hayes*, 22 Ind. App. 182.

4. *Schedule or Inventory Necessary.* — *Gullett v. Conley*, 81 Ill. App. 131; *Doyle v. Hall*, 86 Ill. App. 163 (filing voluntary petition in bankruptcy is a compliance with the requirement of the *Illinois* statute that the schedule be delivered to the officer or filed in the court where the execution issued); *Driggs v. Roth*, 97 Ill. App. 39.

*New Schedule on Second Execution.* — *Gullett v. Conley*, 81 Ill. App. 131.

**237.** 3. *Schedule or Inventory Must Comply with Statute as to Form.* — *Driggs v. Roth*, 97 Ill. App. 39.

The schedule need not state that claimant is the head of the family. *Webster v. McGauvran*, 8 N. Dak. 274.

*Schedule by Wife.* — *Hirsch v. Stinson*, 112 Ga. 348 (where schedule is filed by wife for exemption from husband's property it must show that husband refuses to file same).

5. *Verification of Schedule.* — *Kahn v. Hayes*, 22 Ind. App. 182.

**238.** 1. *Property to Be Included.* — *Wood v. Collins*, 111 Ga. 32.

2. *Effect of Omission of Property from Schedule.* — *Wood v. Collins*, 111 Ga. 32.

**239.** 2. *Waiver of Form of Schedule by Acceptance by Officer of Defective Schedule.* — *McClellan v. Powell*, 109 Ill. App. 222.

**241.** 4. *Time of Selection.* — *Johnson v. Larcade*, 110 Ill. App. 611.

6. *Officer Is Not Required to Make Selection for Debtor.* — *Johnson v. Larcade*, 110 Ill. App. 611.

**242.** 6. *Contest of Claim of Exemption.* — *American Paper Co. v. Sullivan*, 34 Wash. 391.

Creditor whose debt is contracted after an exemption has been set apart by the court may show that it was illegal. *Piedmont Nat. Bldg., etc., Assoc. v. Bryant*, 115 Ga. 417.

*Injunction Against Officer from Setting Aside Property as Exempt* pending proceedings to ascertain whether debtor has concealed property in excess of his exemption rights. *Camp v. Mullen*, (Fla. 1903) 35 So. Rep. 399.

*Amendment of Objections to Schedule.* — *Wood v. Collins*, 111 Ga. 32.

7. *Alabama Statute* — *Filing Claim of Exemption by Debtor.* — *Straughn v. Richards*, 121 Ala. 611.

**245.** 3. *When Selection Is Necessary.* — *Cunningham v. Guilbault*, 6 Quebec Pr. 75.

**246.** 3. *Inventory, Appraisalment, and Setting Apart.* — See also *State v. Gardner*, 32 Wash. 550, 98 Am. St. Rep. 858.

**247.** 5. *Replevin or Claim and Delivery under Statute* — *Illinois.* — *Smith v. Kennett*, 94 Ill. App. 331; *McClellan v. Powell*, 109 Ill. App. 222.

*Kansas.* — *Stonestreet v. Crandell*, 10 Kan. App. 575, 62 Pac. Rep. 249; *Redinger v. Jones*, 68 Kan. 627.

*Michigan.* — *Gottesman v. Chipman*, 125 Mich. 60.

*New York.* — *Conklin v. McCauley*, 41 N. Y. App. Div. 452.

*North Dakota.* — *Oliver v. Wilson*, 8 N. Dak. 590, 73 Am. St. Rep. 784.

*Oregon.* — *Thibault v. Lennon*, 39 Oregon 280, 87 Am. St. Rep. 657.

*South Dakota.* — *Thompson v. Donahoe*, 16 S. Dak. 244.



- 249.** That a Special Remedy Is Given by Statute. — See note 1.
- 250.** (2) *Action for Damages* — (a) *Action Against Officer*. — See note 1.  
 (b) *Action Against Creditor* — *aa*, IN GENERAL. — See note 5.
- 252.** (d) *Action Against Purchaser at Execution Sale*. — See note 2.  
 (e) *Form of Action at Law for Damages* — *aa*, TRESPASS — *Action Against Officer* — *Property Absolutely Exempt*. — See note 3.
- 253.** *cc*, TROVER. — See note 9.
- 254.** *dd*, ASSUMPSIT. — See note 2.  
 (3) *Statutory Action for Penalty*. — See note 5.  
 See note 1.  
 (4) *Action on Bond of Officer*. — See note 4.  
 Penalties. — See note 5.
- 256.** (6) *Motion in Attachment*. — See note 1.  
*b*, REMEDIES IN EQUITY — (2) *Injunction* — (a) IN GENERAL. — See note 8.
- 257.** (b) *Injunction Against Proceedings in Another State*. — See notes 1, 2.  
*c*, MANDAMUS. — See note 4.
- 258.** *d*, INDICTMENT FOR VIOLATION OF STATUTE. — See note 3.

**249.** 1. *Special Remedy Not Exclusive*. — Thompson v. Donahoe, 16 S. Dak. 244.

**250.** 1. *Action to Recover Damages — Against Officer*. — Baum v. Turner, (Ky. 1903) 76 S. W. Rep. 129; Linck v. Troll, 84 Mo. App. 49; Wiser v. Thomas, (Wash. 1905) 80 Pac. Rep. 854.

5. *Action Against Creditor for Damages*. — Cooper v. Scyoc, 104 Mo. App. 433, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 250.

**252.** 2. *Action Lies Against Purchaser at Execution Sale*. — White v. Wilson, 106 Mo. App. 406.

3. *Property Absolutely Exempt*. — Oliver v. Wilson, 8 N. Dak. 590, 73 Am. St. Rep. 784.

**253.** 9. *Trover*. — Oliver v. Wilson, 8 N. Dak. 590, 73 Am. St. Rep. 784; Thompson v. Donahoe, 16 S. Dak. 244; Messenger v. Murphy, 33 Wash. 353.

**254.** 2. *Anniston First Nat. Bank v. Lippman*, 129 Ala. 608.

5. *Action for Double or Treble Damages*. — Driggs v. Roth, 97 Ill. App. 39.

*Liability of Justice of Peace*. — State v. Allen, 48 W. Va. 154, 86 Am. St. Rep. 29.

**255.** 1. *Penalty for Evading Exemption Laws*. — Frieden v. Conkling, (Neb. 1903) 96 N. W. Rep. 615 (sufficiency of evidence to show that assignment of claim was with intent to evade exemption laws).

In Hinds v. Sells, 63 Ohio St. 328, the provision of Ohio Rev. Stat., § 7014, in substance prohibiting creditors from transferring or otherwise disposing of claims or from instituting proceedings thereon in another state for the purpose of avoiding the exemption laws of Ohio and imposing a penalty for the violation of the statute, was held constitutional.

4. *Action on Official Bond*. — Fowler v. State, 99 Md. 594; State v. Wolf, 81 Mo. App. 586; Grieb v. Northrup, 66 N. Y. App. Div. 86, following Berry v. Schaad, 50 N. Y. App. Div. 132.

5. *Double or Treble Damages — Liability of Sureties*. — See, however, State v. Allen, 48 W. Va. 154, 86 Am. St. Rep. 29 (sureties on bond of justice of peace held liable where property is levied upon by specially deputed constable).

**256.** 1. *Motion to Dissolve Attachment*. —

Oliver v. Wilson, 8 N. Dak. 590, 73 Am. St. Rep. 784.

Where it is doubtful whether the property taken on attachment is exempt or not, the attachment debtor relegated to a proper action at law to test the liability of the property levied upon to be seized under the writ. Brooks v. Engle, (Iowa 1900) 83 N. W. Rep. 805, citing McLaren v. Hall, 26 Iowa 300; Cox v. Allen, 91 Iowa 466.

*In Garnishment*. — Steele v. Parker, 109 Ga. 791 (necessity for making garnishing plaintiff party to motion).

*Motion to Discharge Garnishee*. — Chamberlain v. Mobile Fish, etc., Co., (Ala. 1904) 37 So. Rep. 690.

8. *Extraordinary Circumstances — Remedy at Law Inadequate*. — Kindall v. Lincoln Hardware, etc., Co., 8 Idaho 664 (injunction against foreclosure of invalid chattel mortgage granted).

**257.** 1. *Proceedings in Another State*. — Biggs v. Colby, (Indian Ter. 1902) 69 S. W. Rep. 910; Margarum v. Moon, 63 N. J. Eq. 586; Galbraith v. Rutter, 20 Pa. Super. Ct. 554.

*Injunction Will Not Lie Against Employer* to restrain him from applying wages of debtor to pay off claim against him. Galbraith v. Rutter, 20 Pa. Super. Ct. 554.

2. *Injunction Should Generally Be Granted*. — National Tube Co. v. Smith, (W. Va. 1905) 50 S. E. Rep. 717, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 257.

4. *Mandamus Against Officer — To Compel Appointment of Appraiser, Etc.* — See American Paper Co. v. Sullivan, 34 Wash. 391.

*Mandamus to Compel Surrender by Sheriff of Exempt Property held to lie*. State v. Gardner, 32 Wash. 550, 98 Am. St. Rep. 858, following State v. Creech, 18 Wash. 186.

*Mandamus will not lie to compel an attaching officer to turn over to the attachment debtor property claimed as exempt, as the officer exercises a discretion in determining whether the debtor is entitled to the exemption*. Oliver v. Wilson, 8 N. Dak. 590, 73 Am. St. Rep. 784.

**258.** 3. *Indictment Against Creditor — Eva-*

**259. e. PERSONS ENTITLED TO MAINTAIN ACTION — Action by Wife. —** See note 4.

**260. f. PRESUMPTION AND BURDEN OF PROOF. —** See notes 1, 2.

**263. h. DAMAGES FOR INFRINGEMENT OF RIGHT — (1) In General. —** See notes 4, 5, 6.

**265. (4) Exemplary Damages. —** See note 1.

(6) *Set-off and Counterclaim.* — See note 3.

**sion of Exemption Laws. —** *State v. Power*, 63 Neb. 496.

**259. 4. Action by Debtor's Wife. —** *Baum v. Turner*, (Ky. 1903) 76 S. W. Rep. 129.

**260. 1. Presumption and Burden of Proof — Status as Head of Family or Householder. —** *Steele v. Parker*, 109 Ga. 791.

**Oral Evidence Is Admissible in Garnishment Proceedings to prove exemption. McKenna v. Lucas**, 21 R. I. 509.

**Nonownership of Provisions or Provender. —** Under the *Kentucky* statute allowing a debtor exemption from other personal property in lieu of provisions and provender not on hand, the burden is upon the debtor to show that he has not on hand the provisions or provender. *Lawson v. S. T. Barlow Co.*, (Ky. 1899) 51 S. W. Rep. 314.

**2. Character of Property as Exempt. — In re** Turnbull, 106 Fed. Rep. 667; *Gilewicz v. Goldberg*, 69 N. Y. App. Div. 438.

In garnishment proceedings the burden is on the plaintiff to prove the allegation in the affidavit for garnishment that the indebtedness garnished was not exempt. *Eastlund v. Armstrong*, 117 Wis. 394.

**263. 4. Measure of Damages in General — Value of Property. —** *Morris v. Williford*, (Tex. Civ. App. 1902) 70 S. W. Rep. 228.

**5. Interest. —** *Morris v. Williford*, (Tex. Civ. App. 1902) 70 S. W. Rep. 228.

**6. Mental Distress** is not an element of damages. *Morris v. Williford*, (Tex. Civ. App. 1902) 70 S. W. Rep. 228.

**265. 1. Recovery of Exemplary Damages. —** *Stonestreet v. Crandell*, 10 Kan. App. 575, 62 Pac. Rep. 249; *Matteson v. Munro*, 80 Minn. 340; *Cooper v. Scyoc*, 104 Mo. App. 414; *Morris v. Williford*, (Tex. Civ. App. 1902) 70 S. W. Rep. 228.

**In an Action for the Statutory Penalty** exemplary damages cannot be recovered. *Johnson v. Larcade*, 110 Ill. App. 611.

**3. The Debt Cannot Be Pleaded as a Set-off or Counterclaim. —** *Treat v. Wilson*, 65 Kan. 729; *Anderson v. Carter*, 29 Tex. Civ. App. 240, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 265; *Stagg v. Piland*, 31 Tex. Civ. App. 245, following *Moore v. Graham*, 29 Tex. Civ. App. 235.

**Set-off of Judgment. —** Where a judgment is recovered for the conversion of exempt property the judgment debtor cannot set off against such judgment a judgment held by him against the party recovering such judgment. *Long v. Collins*, 15 S. Dak. 259.

## EXEMPTIONS (FROM TAXATION).

By W. H. CROW.

**270. I. INTRODUCTORY — DEFINITION — SCOPE OF ARTICLE. —** See note 2.  
True Definition. — See note 4.

**271. II. THE POWER TO CREATE EXEMPTIONS — 1. Constitutional Exemptions —** Provisions Authorizing Legislature to Create Exemptions. — See note 3.

**272. 2. Power of the Legislature — a. PLENARY POWER IN THE ABSENCE OF CONSTITUTIONAL RESTRICTIONS. —** See note 2.

**270. 2. Subjects over Which Sovereign Power of State Does Not Extend Considered Exempt from Taxation. —** See *Dutton v. Board of Review*, 188 Ill. 389, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 270.

**4. True Meaning of Exemption. —** See *Dutton v. Board of Review*, 188 Ill. 389, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 270.

**271. 3. Provisions Merely Authorizing Exemptions Not Self-executing. —** *Engstad v. Grand Forks County*, 10 N. Dak. 54.

**272. 2. Legislative Power to Create Exemptions — United States. —** *Peacock v. Pratt*, (C. C. A.) 121 Fed. Rep. 772.

*Delaware. —* *Sayers v. Wilmington, etc., R. Co.*, 3 Penn. (Del.) 249.

*Kansas. —* *Sumner County v. Wellington*, 66 Kan. 592, 97 Am. St. Rep. 396.

*Michigan. —* *National Loan, etc., Co. v. Detroit*, (Mich. 1904) 99 N. W. Rep. 380, 11 Detroit Leg. N. 68; *Detroit Citizens' St. R. Co. v. Detroit*, 125 Mich. 673.

*Missouri. —* *State v. Westminster College*, 175 Mo. 52.

*New Hampshire. —* *Opinion of Justices*, 70 N. H. 640.

*New York. —* *Matter of Rochester Trust, etc., Co.*, (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 581.

*Oklahoma. —* *Pryor v. Bryan*, 11 Okla. 357.

*Rhode Island. —* *Crafts v. Ray*, 22 R. I. 179.

*Vermont. —* *Colton v. Montpelier*, 71 Vt. 413.

**274.** *c. SURRENDER OF EXEMPTING POWER NEVER IMPLIED.* — See note 1.

*e. EFFECT OF VARIOUS CONSTITUTIONAL PROVISIONS — (2) Requirement of Equal and Uniform Taxation.* — See note 7.

**275.** See note 1.

*Special Exemptions Prohibited.* — See notes 2, 3.

**276.** (3) *Requirement that All Property Shall Be Taxed in Proportion to Its Value.* — See note 1.

**277.** (4) *Prohibition Against Discrimination in Favor of Corporations.* — See note 2.

(5) *Prohibition Against Grants of Special Privileges and Immunities.* — See notes 3, 4.

**278.** (6) *Direct Prohibition of Exemptions.* — See note 4.

**279.** (7) *Effect of Constitutional Exemptions.* — See note 1.

**274.** 1. *Surrender of Exempting Power Not Implied.* — See *Peacock v. Pratt*, (C. C. A.) 121 Fed. Rep. 772; *Territory v. Co-Operative Bldg., etc., Assoc.*, 10 N. Mex. 337.

7. *Requirement of Uniform and Equal Taxation Does Not Prohibit Exemptions.* — *People v. Miller*, 84 N. Y. App. Div. 168, modified 177 N. Y. 461; *Pryor v. Bryan*, 11 Okla. 357.

The Real Property of National Banks may be exempted from direct taxation without violating the uniformity clause, since such property is taxable through the shares of the stockholders. *Middletown Nat. Bank v. Middletown*, 74 Conn. 449.

The Fourteenth Amendment to the Federal Constitution. — A provision of a state constitution imposing a license tax upon sugar refiners but exempting such as refine the products of their own plantations, is not a denial of the equal protection of the laws. *American Sugar Refining Co. v. Louisiana*, 179 U. S. 89, affirming 51 La. Ann. 562.

The taxation of railroad stock of foreign companies in *Alabama*, where the stock of domestic railroad companies is exempted, is not unconstitutional as denying the equal protection of the laws. *Kidd v. Alabama*, 188 U. S. 730.

Where an insurance company has imposed upon it a tax on a percentage of its premiums, there is no unlawful discrimination in exempting it from taxation under another act. The court said: "The protection afforded by the Fourteenth Amendment has never been carried to the extent of requiring that the same tax shall be imposed in the same manner upon every class of property irrespective of its nature, condition or class." *Peacock v. Pratt*, (C. C. A.) 121 Fed. Rep. 772.

**275.** 1. *Uniform Rule of Taxation.* — *Adams v. Kuykendall*, 83 Miss. 571.

*Exemption of Railroad in Consideration of Percentage of Gross Earnings.* — In *Minnesota* it has been decided that an act of the legislature granting exemption from taxation to a railway company in consideration of the payment by the company of a gross-earnings tax, is unconstitutional because it violates the provision requiring uniformity of taxation. *State v. Duluth, etc., R. Co.*, 77 Minn. 433, affirmed as to this point 179 U. S. 302.

But after the state has accepted the gross-earnings tax, it cannot repudiate the exemption

and collect other taxes from the railway. See **387.** 1, *infra*.

2. *Exemptions Must Be General.* — A provision in the constitution of *Kentucky* requiring all taxation to be equal and uniform prohibits the exemption by special law of the property of a county in the state from taxation. *Campbell County v. Newport, etc., Bridge Co.*, 112 Ky. 659.

*Bills and Notes in Payment for Property Within City.* — An exemption in a city charter of bills and notes given in payment for property in the city is within the uniformity clause. *Adams v. Kuykendall*, 83 Miss. 571.

3. *Special Exemptions Prohibited.* — *Howard Sav. Inst. v. Newark*, 63 N. J. L. 65.

**276.** 1. *Requirement that All Property Shall Be Taxed in Proportion to Its Value Does Not Prohibit Exemptions.* — *Pryor v. Bryan*, 11 Okla. 357.

An Exemption Based on Personal Status is unconstitutional under the constitution of *New Jersey*, providing for the taxation of property according to its true value. *Tippett v. McGrath*, 70 N. J. L. 110.

*Effect of Other Similar Provisions.* — Under the constitutional provision in *Rhode Island* that the "burdens of the state are to be fairly divided among its citizens," a law exempting an electrical company from taxation for ten years is constitutional, since the question of the fairness of the law rests with the legislature. *Crafts v. Ray*, 22 R. I. 179.

**277.** 2. *Effect of Requirement that Corporations Be Taxed "the Same as Individuals."* — *Gulf, etc., R. Co. v. Hewes*, 183 U. S. 66; *Layman v. Iowa Telephone Co.*, 123 Iowa 591; *Adams v. Tombigbee Mills*, 78 Miss. 676.

3. *Exemption Open to All Citizens Not Forbidden.* — See *Peacock v. Pratt*, (C. C. A.) 121 Fed. Rep. 772.

4. *Exemptions Based upon Personal Status Are Void.* — In *Tippett v. McGrath*, 70 N. J. L. 110, the court said: "Exemptions from taxation, therefore, of property, real or personal, that are based, not upon any characteristic possessed by such property or upon the uses to which it is put, but upon the personal status of the owners of such property, are void."

**278.** 4. *Express Prohibition.* — See *McLendon v. La Grange*, 107 Ga. 356.

**279.** 1. *Creation or Authorization of Enumerated Exemptions Impliedly Prohibits All*



**280.** See note 1.

**282.** *g.* POWER TO COMMUTE OR LIMIT TAXATION. — See note 3.

**283.** Doctrine that Commutation Implies Payment of Full Equivalent for Taxes Remitted. — See note 1.

**3.** Power of Municipal Corporations. — See note 2.

**284.** See note 3.

Effect on Municipalities of Constitutional Prohibitions of Exemptions. — See note 4.

**285.** III. WHEN EXEMPTIONS EXIST — 1. Presumption Against Exemptions. — See notes 4, 5.

**287.** Effect of Payment by Corporation of Bonus for Charter, or License Tax. — See note 2.

**288.** See note 1.

**Others.** — Gate City Guard *v.* Atlanta, 113 Ga. 883.

Enumeration of Exemptions Does Not Necessarily Subject All Other Property to Taxation. — See Philadelphia *v.* Electric Traction Co., 208 Pa. St. 157.

**280.** 1. Contrary Doctrine in Kansas. — Sumner County *v.* Wellington, 66 Kan. 590, 97 Am. St. Rep. 396.

**282.** 3. Commutations Held Valid. — In Stearns *v.* Minnesota, 179 U. S. 223, reversing 72 Minn. 200, the Supreme Court of the United States decided that a state had power to contract with a railroad company to commute its taxation by receiving a percentage upon its gross earnings. The decision was based upon the position of the state as trustee of lands belonging to the United States, within the borders of the state, and upon the idea that in executing its trust it could, through the legislature, make such provisions as to exemption of the land, which as government property had been non-taxable, as in its judgment would serve as the best means of carrying the trust into execution.

**283.** 1. Commutations Upheld on Theory that an Equivalent Is Paid for Taxes Remitted. — See Wisconsin Industrial School *v.* Clark County, 103 Wis. 651; Monroe Water Works Co. *v.* Monroe, 110 Wis. 11.

**2.** Municipal Corporations Possess No Inherent Power of Exemption. — Columbia Ave. Sav. Fund, etc., Co. *v.* Dawson, 130 Fed. Rep. 152; Yazoo, etc., R. Co. *v.* Adams, 76 Miss. 545; Dallas *v.* Dallas Consol. Electric St. R. Co., 95 Tex. 268; Thomas *v.* Snead, 99 Va. 617, quoting 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 283.

**Exemption in Excess of Powers.** — A city granting exemption to an individual in consideration of a grant of land by the individual to the city, is exceeding its powers as the representative of the state, and such an exemption will not be valid. Leggett *v.* Detroit, (Mich. 1904) 100 N. W. Rep. 566, 11 Detroit Leg. N. 292.

**284.** 3. Extent to Which a Municipality May Grant Exemption. — Thomas *v.* Snead, 99 Va. 617, quoting 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 283, notes 1, 2 and 3. See also Colton *v.* Montpelier, 71 Vt. 413.

**Commutation of Taxes.** — A city contracting with a street railway corporation, pursuant to legislative act, to commute its taxes for city purposes, in consideration of the payment to the city of a percentage of the gross earnings, will be bound by such contract and cannot after-

wards levy additional taxes. Detroit Citizens' St. R. Co. *v.* Detroit, 125 Mich. 673.

**4.** Constitutional Prohibitions of or Restrictions on Exemptions Apply to Municipalities. — McLendon *v.* La Grange, 107 Ga. 356; Shuck *v.* Lebanon, (Ky. 1902) 68 S. W. Rep. 843; Garrison *v.* Laurens, 54 S. Car. 449.

**Where Ad Valorem Taxation Required — Commutation.** — In Georgia, since the constitution requires all taxation to be *ad valorem*, an agreement between a city and a water company providing for a commutation of city taxes is void. Columbia Ave. Sav. Fund, etc., Co. *v.* Dawson, 130 Fed. Rep. 152.

**285.** 4. Taxation the Rule, Exemptions the Exception — Colorado. — Colorado Seminary *v.* Arapahoe County, 30 Colo. 507.

Georgia. — Gate City Guard *v.* Atlanta, 113 Ga. 883.

Missouri. — Fitterer *v.* Crawford, 157 Mo. 51; Adelphia Lodge No. 38 *v.* Crawford, 157 Mo. 356; State *v.* Mission Free School, 162 Mo. 332.

New York. — Jefferson County *v.* Watertown, 98 N. Y. App. Div. 494.

South Dakota. — State *v.* Board of Equalization, 16 S. Dak. 219.

Utah. — Parker *v.* Quinn, 23 Utah 341.

**5.** Exemptions Never Implied — Colorado. — Murray *v.* Montrose County, 28 Colo. 427; Colorado Seminary *v.* Arapahoe County, 30 Colo. 507.

Illinois. — State Council, etc. *v.* Board of Review, 198 Ill. 441.

Iowa. — Lacy *v.* Davis, 112 Iowa 106.

New Jersey. — St. Vincent De Paul *v.* Brakeley, 67 N. J. L. 176.

New York. — People *v.* Feitner, (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 712, affirmed 68 N. Y. App. Div. 639; People *v.* Nowles, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 501; People *v.* Barton, 63 N. Y. App. Div. 581.

Utah. — Parker *v.* Quinn, 23 Utah 341.

**Exemption from Franchise Tax Does Not Include Property Tax.** — The statutory exemption of the part of a city's water-works system lying within its limits will not exempt it from the general tax upon that part of its water system lying within the limits of another city, since its franchise and general property are distinct. People *v.* De Witt, 167 N. Y. 575.

**287.** 2. Payment of Bonus for Franchise. — Dallas *v.* Dallas Consol. Electric St. R. Co., 95 Tex. 268.

**288.** 1. Payment of License Tax. — An ex-

**288. 2. Intent to Exempt Must Be Clear** — *a. GENERAL RULE.* — See note 5.

**292.** Doubt Must Be Solved in Favor of Power to Tax. — See note 3.

**296.** *d. WHETHER EXEMPTION IS INCLUDED IN THE TERM "PRIVILEGES"* — Grant of "Immunities." — See note 1.

**3.** Burden of Proof. — See note 2.

**298. IV. PERSONAL NATURE OF THE PRIVILEGE** — **1. General Rule** — Privilege Not Transferable. — See note 2.

**299.** See note 1.

**300. 3. Assignment of Exemption under Express Authority.** — See note 3.

**302. V. GENERAL RULES OF CONSTRUCTION** — **1. Exempting Statutes Strictly Construed** — *a. RULE STATED.* — See note 1.

emption granted by the charter of a bank in Louisiana, of the capital of the bank from any tax, must be taken to cover a license tax. *Citizens' Bank v. Parker*, 192 U. S. 73.

**288. 5. Intent to Exempt Must Clearly Appear** — *United States.* — *Yazoo, etc., R. Co. v. Adams*, 180 U. S. 1, affirming 77 Miss. 194.

*Idaho.* — *Salisbury v. Lane*, 7 Idaho 370.

*Illinois.* — *In re Walker*, 200 Ill. 566.

*Maryland.* — *Baltimore, etc., R. Co. v. Ocean City*, 89 Md. 89.

*New Jersey.* — *Cooper Hospital v. Camden*, 70 N. J. L. 478.

*New Mexico.* — *U. S. Trust Co. v. Territory*, 19 N. Mex. 416.

*New York.* — *People v. Reilly*, 41 N. Y. App. Div. 378; *People v. Lawler*, 74 N. Y. App. Div. 553, affirmed 179 N. Y. 535.

*Wisconsin.* — *Katzer v. Milwaukee*, 104 Wis. 16; *Douglas County Agricultural Soc. v. Douglas County*, 104 Wis. 429.

**292. 3. Doubts Must Be Solved in Favor of Taxing Power** — *United States.* — *Yazoo, etc., R. Co. v. Adams*, 180 U. S. 1, affirming 77 Miss. 194.

*Illinois.* — *In re Walker*, 200 Ill. 566.

*Iowa.* — *Lacy v. Davis*, 112 Iowa 106.

*Louisiana.* — *Ferrell v. Penrose*, 52 La. Ann. 1481; *Louisiana, etc., R. Co. v. State Board of Appraisers*, 108 La. 14.

*New Mexico.* — *U. S. Trust Co. v. Territory*, 19 N. Mex. 416.

*Wisconsin.* — *Douglas County Agricultural Soc. v. Douglas County*, 104 Wis. 429.

**296. 1. Grant of "Privileges and Immunities" Includes Exemption.** — *Bancroft v. Wicomico County*, 121 Fed. Rep. 874.

**2. Claimant of Exemption Must Establish Same by Clear Proof** — *Illinois.* — *In re Walker*, 200 Ill. 566.

*Kansas.* — *National Council, etc. v. Phillips*, 63 Kan. 799.

*Massachusetts.* — *All Saints v. Brookline*, 178 Mass. 404.

*Missouri.* — *Adelphia Lodge No. 38 v. Crawford*, 157 Mo. 356; *Kansas City Exposition Driving Park v. Kansas City*, 174 Mo. 425.

*Nebraska.* — *Watson v. Cowles*, 61 Neb. 216.

*New Hampshire.* — *State v. Manchester Sav. Bank*, 71 N. H. 535.

*New Jersey.* — *Presbyterian Board, etc. v. Fisher*, 68 N. J. L. 145, quoting 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 296; *Cooper Hospital v. Camden*, 70 N. J. L. 478; *St. Vincent de Paul v. Brakeley*, 67 N. J. L. 176.

*North Dakota.* — *Engstad v. Grand Forks County*, 10 N. Dak. 54.

*South Dakota.* — *State v. Board of Equalization*, 16 S. Dak. 219.

**Compliance with Statute.** — In *Hardin v. Morgan*, 70 N. J. L. 484, the court said: "Exemption from taxation is a favor, and the statutes under which it is allowed must be strictly complied with. Compliance is a condition precedent to the right of exemption."

**298. 2. Exemption Does Not Pass to Purchaser of Property.** — *Long v. Olson*, 115 Iowa 388; *Baltimore, etc., R. Co. v. Ocean City*, 89 Md. 89.

**299. 1. Does Not Pass to Purchaser of Franchises and Property.** — *Lake Drummond Canal, etc., Co. v. Com.*, 103 Va. 337.

**300. 3. Legislature May Authorize Assignment of Exemption.** — *Detroit Citizens' St. R. Co. v. Detroit*, 125 Mich. 675, 7 Detroit Leg. N. 677.

**302. 1. Exemptions Strictly Construed** — *United States.* — *Georgia R., etc., Co. v. Wright*, 132 Fed. Rep. 912; *Yazoo, etc., R. Co. v. Adams*, 180 U. S. 1, affirming 77 Miss. 194.

*Colorado.* — *Murray v. Montrose County*, 28 Colo. 427; *St. John Cathedral v. Treasurer*, 29 Colo. 143.

*Georgia.* — *Brenau Assoc. v. Harbison*, 120 Ga. 935, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 302; *Gate City Guard v. Atlantic*, 113 Ga. 883.

*Idaho.* — *Salisbury v. Lane*, 7 Idaho 370.

*Illinois.* — *State Council, etc. v. Board of Review*, 198 Ill. 441; *In re Walker*, 200 Ill. 566; *Chicago v. Chicago*, 207 Ill. 37.

*Kansas.* — *National Council, etc. v. Phillips*, 63 Kan. 799.

*Kentucky.* — *Middlesboro v. New South Brewing, etc., Co.*, 108 Ky. 351; *German Bank v. Louisville*, 108 Ky. 377.

*Louisiana.* — *State v. American Sugar Refining Co.*, 51 La. Ann. 562; *State v. Assessors*, 52 La. Ann. 223; *State v. Citizens' Bank*, 52 La. Ann. 1086; *Ferrell v. Penrose*, 52 La. Ann. 1481; *Louisiana, etc., R. Co. v. State Board of Appraisers*, 108 La. 14.

*Minnesota.* — *State v. Bishop Seabury Mission*, 90 Minn. 92.

*Missouri.* — *Fitterer v. Crawford*, 157 Mo. 51; *Kansas City Exposition Driving Park v. Kansas City*, 174 Mo. 425.

*New Jersey.* — *St. Vincent de Paul v. Brakeley*, 67 N. J. L. 176; *Presbyterian Board, etc. v. Fisher*, 68 N. J. L. 145.

*New York.* — *People v. Feitner*, (Supm. Ct.

**305.** Reason for the Rule. — See note 1.

*b.* LIMITATIONS OF THE RULE. — See note 3.

**306.** Religious, Charitable, and Educational Institutions. — See note 1.

**307.** Commutation. — See note 5.

**309.** 2. When Exemption Takes Effect — *a.* LEGISLATIVE GRANT — Grant to Take Effect in Future. — See note 1.

**313.** 3. To What Taxes Exemption Applies — *a.* EXEMPTION FROM SPECIFIED TAXES — Commutation for Taxes. — See note 2.

**314.** *b.* GENERAL EXEMPTION — (2) Rule as to Local Assessments — (a) Rule Stated. — See note 2.

**317.** 4. What Property Is Within Exemption — *a.* GENERAL RULE. — See note 1.

**318.** *b.* EXEMPTIONS DEPENDENT UPON USE OF PROPERTY — (1) General Principles. — See note 4.

**320.** See note 1.

Spec. T.) 33 Misc. (N. Y.) 712, *affirmed* 68 N. Y. App. Div. 639; *People v. Nowles*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 501; *People v. Baxton*, 63 N. Y. App. Div. 581; *Binghamton Trust Co. v. Binghamton*, 72 N. Y. App. Div. 341; *People v. Lawler*, 74 N. Y. App. Div. 553, *affirmed* 179 N. Y. 535.

*North Dakota*. — *Engstad v. Grand Forks County*, 10 N. Dak. 54.

*Ohio*. — *Cincinnati v. Lewis*, 66 Ohio St. 49.

*Tennessee*. — *Western Union Tel. Co. v. Harris*, (Tenn. Ch. 1899) 52 S. W. Rep. 748.

*Utah*. — *Parker v. Quinn*, 23 Utah 341.

*Wisconsin*. — *Katzer v. Milwaukee*, 104 Wis. 16; *Douglas County Agricultural Soc. v. Douglas County*, 104 Wis. 429; *Merrill R., etc., Co. v. Merrill*, 119 Wis. 249.

**305.** 1. Reasons for the Rule of Strict Construction. — *Brenau Assoc. v. Harbison*, 120 Ga. 935.

**3.** Limitation of Rule. — *Georgia R., etc., Co. v. Wright*, 132 Fed. Rep. 912. See also *Colorado Seminary v. Arapahoe County*, 30 Colo. 507.

**306.** 1. Relaxation of Rule in Case of Exemptions of Religious, Charitable or Educational Institutions. — *St. John Cathedral v. Treasurer*, 29 Colo. 143; *Phillips Academy v. Andover*, 175 Mass. 118; *Children's Seashore House v. Atlantic City*, 68 N. J. L. 385. See also *Brenau Assoc. v. Harbison*, 120 Ga. 935.

**307.** 5. Commutation. — In *Wisconsin* the law exempting certain railroad property from taxation is given a liberal construction in favor of the railroad companies. *Merrill R., etc., Co. v. Merrill*, 119 Wis. 249.

**309.** 1. Exemption to Take Effect upon Completion of Railroad. — See *Louisiana, etc., R. Co. v. State Board of Appraisers*, 108 La. 14.

**313.** 2. Commutation for City Taxes. — *Detroit Citizens' St. R. Co. v. Detroit*, 125 Mich. 673; *Jefferson County v. Watertown*, 98 N. Y. App. Div. 494.

**314.** 2. Exemption from Taxation Does Not Relieve from Liability for Local Assessments. — *District of Columbia v. Sisters of Visitation*, 15 App. Cas. (D. C.) 300; *Chicago v. Chicago*, 207 Ill. 37; *Tate v. Levee Com'rs*, 84 Miss. 388.

**317.** 1. Exemption of Certain Kinds of Property Only Strictly Limited by Terms of Grant. — Loans secured by property which is exempt from taxation are not for that reason rendered

also not taxable. *Savings, etc., Soc. v. San Francisco*, 131 Cal. 356.

**Exemption of Library Includes Law Library.** — A law library owned by an individual is exempt under the terms of a statute providing that the library owned by each individual and family shall be exempt from taxation. *Patterson v. Board of Review*, 125 Mich. 126, 7 Detroit Leg. N. 451.

**Exemption of Riparian Property Includes Incidental Riparian Rights.** — Riparian rights are mere incidents to and a part of the abutting shore property, and are inseparable therefrom except at the instance and by the act of the owner; so, where riparian property is exempt from taxation, riparian rights incidental thereto are included within such exemption. *State v. St. Paul, etc., R. Co.*, 81 Minn. 422.

**318.** 4. Property Must Be Used for Designated Purposes — *Illinois*. — *Chicago Theological Seminary v. People*, 189 Ill. 439.

*Louisiana*. — *Ferrell v. Penrose*, 52 La. Ann. 1481.

*Massachusetts*. — *Phillips Academy v. Andover*, 175 Mass. 118; *Phi Beta Epsilon Corp. v. Boston*, 182 Mass. 457; *Emerson v. Milton Academy*, 185 Mass. 414.

*Missouri*. — *Adelphia Lodge No. 38 v. Crawford*, 157 Mo. 356.

*Nebraska*. — *Young Men's Christian Assoc. v. Douglas County*, 60 Neb. 642.

*New Hampshire*. — *New London v. Colby Academy*, 69 N. H. 443.

*New Jersey*. — *Cooper Hospital v. Camden*, 70 N. J. L. 478, 68 N. J. L. 691.

*New York*. — *People v. Reilly*, 85 N. Y. App. Div. 71, *affirmed* 178 N. Y. 609; *Pratt Institute v. New York*, 99 N. Y. App. Div. 525.

**320.** 1. Use of Income for Proper Purposes Does Not Exempt Property Producing It — *Maine*. — *Fitterer v. Crawford*, 157 Mo. 51.

*Massachusetts*. — *Phillips Academy v. Andover*, 175 Mass. 118; *Emerson v. Milton Academy*, 185 Mass. 414.

*Nebraska*. — *Young Men's Christian Assoc. v. Douglas County*, 60 Neb. 642.

*New Hampshire*. — *Young Men's Christian Assoc. v. Keene*, 70 N. H. 223.

*New Jersey*. — *Sisters of Peace v. Westervelt*, 64 N. J. L. 510.

*New York*. — *Pratt Institute v. New York*, 99 N. Y. App. Div. 525.



**322.** (2) *Requirement that Use Be Exclusive.* — See note 2.

(3) *Occasional Use of Property for Purposes Not Giving Exemption.*

— See note 3.

**323.** (4) *Property Held for Future Use.* — See note 1.

(5) *Use of Part of Property Only for Purposes Giving Exemption.*

— See note 2.

**324.** (6) *When Use and Ownership Must Be Combined.* — See note 1.

**325.** See note 1.

c. EXEMPTION DEPENDENT UPON OWNERSHIP OF PROPERTY, REGARDLESS OF USE. — See note 3.

**326.** 5. *Exemption in Favor of Certain Classes of "Institutions" Held Restricted to Corporations.* — See note 3.

**328.** VI. PARTICULAR SUBJECTS OF EXEMPTION — 1. Religious Institutions

— b. WHAT IS WITHIN EXEMPTION OF HOUSES OF RELIGIOUS WORSHIP.

— See note 6.

**329.** *Leased Property.* — See note 4.

*South Dakota.* — State v. Board of Equalization, 16 S. Dak. 219.

**Express Grant of Exemption Based on Use of Income.** — In *Virginia*, under Code, § 457, property belonging to certain classes of charitable institutions is exempt from taxation where the proceeds arising from such property are devoted exclusively to charitable purposes. *Staunton v. Mary Baldwin Seminary*, 99 Va. 653.

**322.** 2. *Partial Use for Other than Enumerated Purposes Forfeits Exemption* — *Colorado.* — *Murray v. Montrose County*, 28 Colo. 427.

*Iowa.* — *Lacy v. Davis*, 112 Iowa 106.

*Kentucky.* — *Gray St. Infirmary v. Louisville*, 65 S. W. Rep. 11, 23 Ky. L. Rep. 1274.

*Louisiana.* — See *State v. Assessors*, 52 La. Ann. 233.

*Missouri.* — *Kansas City Exposition Driving Park v. Kansas City*, 174 Mo. 425.

*Nebraska.* — *Watson v. Cowles*, 61 Neb. 216.

*New York.* — *People v. Lawler*, 74 N. Y. App. Div. 553, affirmed 179 N. Y. 535.

*Rhode Island.* — *City of Pawtucket for Opinion*, 24 R. I. 86.

**3.** *Occasional Use for Other Purposes.* — *Curtis v. Androsoggin Lodge No. 24*, 99 Me. 356; *Emerson v. Milton Academy*, 185 Mass. 414; *People's Pass. R. Co. v. Taylor*, 22 Pa. Super. Ct. 156.

**323.** 1. *Intention to Use at Future Time Does Not Give Exemption.* — *Auditor Gen. v. Flint*, etc., R. Co., 119 Mich. 682; *Young Men's Christian Assoc. v. Douglas County*, 60 Neb. 642; *Presbyterian Board, etc. v. Fisher*, 68 N. J. L. 145; *Duluth, etc., R. Co. v. Douglas County*, 103 Wis. 75.

**2.** *Effect of Use of Part of Property Only for Purposes Giving Exemption.* — *State v. Assessors*, 52 La. Ann. 223; *Ferrell v. Penrose*, 52 La. Ann. 1481; *Young Men's Christian Assoc. v. Douglas County*, 60 Neb. 642; *Alleghany Valley R. Co. v. School Dist.*, 29 Pittsb. Leg. J. N. S. (Pa.) 314; *Parker v. Quinn*, 23 Utah 341, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 323. See also *St. Vincent de Paul v. Brakeley*, 67 N. J. L. 176; *People v. Reilly*, 85 N. Y. App. Div. 71, affirmed 178 N. Y. 609.

**Contrary Doctrine in Iowa.** — See *Matter of Dille*, 119 Iowa 575.

**It Is Provided by Statute in some states that**

property used for charitable and religious purposes shall be exempt only to the extent of the portions used for these purposes. See *People v. Barton*, 63 N. Y. App. Div. 581; *Staunton v. Mary Baldwin Seminary*, 99 Va. 653.

**324.** 1. *Construction of Statutes.* — In *North Dakota*, under section 1180, Rev. Codes 1899, declaring "all buildings belonging to institutions of purely public charity, including public hospitals, together with the land actually occupied by such institutions," etc., to be exempt from taxation, it is held that real estate which is used exclusively for purposes of purely public charity but which is not owned by an institution is not exempt from taxation. *Engstad v. Grand Forks County*, 10 N. Dak. 54.

**325.** 1. *Leased Property Held Exempt.* — Under a *Wisconsin* statute exempting property "owned" and necessarily used by a street railroad company, land leased by the company and charged with a license tax, and necessarily used by the company in working its road, is included by the statute. *Merrill R., etc., Co. v. City of Merrill*, 119 Wis. 249.

**3.** *Ownership the Sole Test of Exemption.* — A statute relating to "all property of whatever kind or description belonging to" the Northwestern University applies to all property acquired by the institution prior to the passage of the act. *In re Assessment of Northwestern University*, 206 Ill. 64.

**Private Property of Bishop Not Owned by "Religious Association."** — Under a statute exempting property from taxation which is "owned by any religious association" real estate owned by a bishop is not included. *Katzer v. Milwaukee*, 104 Wis. 16.

**326.** 3. *Institutions Must Be Incorporated to Claim Exemption.* — Where a statute requires incorporation of institutions using buildings as asylums or schools for the care, etc., of feeble-minded or idiotic persons, an institution conducted as a military school is exempt from taxation, although it is not incorporated. *Montclair Military Academy v. Bowden*, 64 N. J. L. 214.

**328.** 6. *Exemption Includes Necessary Land.* — *Louisville v. Werne*, 80 S. W. Rep. 224, 25 Ky. L. Rep. 2196.

**329.** 4. *Exemption Extends to Property*

**329.** *c.* EXEMPTION OF PROPERTY USED FOR RELIGIOUS PURPOSES. — See note 6.

**330.** *d.* WHETHER PARSONAGES ARE EXEMPT. — See note 1.

**332.** 3. Educational Institutions — *a.* CUSTOMARY EXEMPTION. — See note 5.

**333.** *b.* WHAT INSTITUTIONS ARE WITHIN EXEMPTION — Exclusion of Schools Conducted for Profit. — See note 4.

**334.** *c.* WHAT PROPERTY IS WITHIN EXEMPTION — (1) *Exemption of All Property.* — See note 1.

(2) *Exemption Restricted to Property Directly Used for Educational Purposes.* — See note 2.

**335.** (3) *Requirement of Exclusive Use.* — See note 1.

(4) *Requirement that Title to Property Be in Educational Institution.* — See note 2.

**Leased for Use as a Church.** — The same doctrine has been adopted in *Kentucky*. *Louisville v. Werne*, 80 S. W. Rep. 224, 25 Ky. L. Rep. 2196.

**329.** 6. Requirement that Use Be Exclusive. — *In re Walker*, 200 Ill. 566; *City of Pawtucket* for Opinion, 24 R. L. 86; *State v. Board of Equalization*, 16 S. Dak. 219.

**Occupation by Janitor.** — Under the *Pennsylvania* statute it was held that a building erected upon the churchyard but separated from the church, for the occupation of the janitor, was not exempt. *Pittsburg v. Third Presbyterian Church*, 10 Pa. Super. Ct. 302, 20 Pittsb. Leg. J. N. S. (Pa.) 441.

**330.** 1. Construction of Statutes Expressly Exempting Parsonages. — Under a *South Carolina* statute exempting parsonages from taxation, the fact that the minister chooses to rent the parsonage and apply the rent to procuring another residence does not defeat the exemption. *Protestant Episcopal Church, etc., v. Prioleau*, 63 S. Car. 70. But see *Broadway Christian Church v. Com.*, 112 Ky. 448.

**332.** 5. Exemption of Institutions of Learning. — *Com. v. Pollitt*, (Ky. 1903) 76 S. W. Rep. 412.

**Immunity Founded on Public Policy.** — *State v. Bishop Seabury Mission*, 90 Minn. 92.

**Gymnastic Association Exempt.** — *German Gymnastic Assoc. v. Louisville*, 80 S. W. Rep. 201, 25 Ky. L. Rep. 2105.

**333.** 4. Exclusion of Schools Conducted for Profit. — *Brenan Assoc. v. Harbison*, 120 Ga. 929; *Bosworth v. Kentucky Chautauqua Assembly*, 112 Ky. 115.

**334.** 1. All Property Devoted to Education Exempt in Kentucky. — Trust funds and the income thereof which are applied to the maintenance of an educational institution are exempt. *Com. v. Gray*, 115 Ky. 665. See also *Louisville College of Pharmacy v. Louisville*, (Ky. 1904) 82 S. W. Rep. 610.

**Colorado — Use Need Not Be Direct.** — In *Colorado Seminary v. Arapahoe County*, 30 Colo. 507, the court said: "Both upon reason and authority we are of opinion that all property which the seminary owns is exempt from all taxation while it is exclusively used for carrying out the designs of the seminary in the best manner, though not directly and actually used in the school itself."

2. Grounds Necessary for Recreation Are Exempt.

— *Rettew v. St. Patrick's Roman Catholic Church*, 4 Penn. (Del.) 593.

**Farm Used to Supply Food to Scholars.** — *Rettew v. St. Patrick's Roman Catholic Church*, 4 Penn. (Del.) 593.

**Endowment Fund Exempt.** — An endowment fund of a seminary of learning is exempt from taxation where it is invested in farm mortgages and the income is applied exclusively to the maintenance of the institution. *State v. Bishop Seabury Mission*, 90 Minn. 92.

**335.** 1. Use Must Be Exclusive. — In *New York* it has been held that "sleeping rooms and drill rooms, armories and stables, library buildings and buildings occupied by the lessee [principal] as a residence, recreation grounds and dining halls, etc.," are exclusively used for educational purposes. The court said: "The statute should be applied so as to exempt the entire articulated system of an institution, and not merely the rooms or parts of buildings where tasks are conned or lessons are recited." *People v. Mezger*, 98 N. Y. App. Div. 237, affirmed 181 N. Y. 511.

**Dormitories, etc., Exempt.** — *Rettew v. St. Patrick's Roman Catholic Church*, 4 Penn. (Del.) 593; *Harvard College v. Assessors of Cambridge*, 175 Mass. 145.

**Effect of Residence of Teachers in School Building.** — This does not deprive the property of its right to exemption, where their presence on the premises is necessary for the proper conduct of the school business. *St. John Cathedral v. Treasurer*, 29 Colo. 143. But compare *San Antonio v. Seeley*, (Tex. Civ. App. 1900) 57 S. W. Rep. 688.

**Real Estate Owned by a College Secret Society** used principally as a dormitory or boarding house is not exempt from taxation, even though the society be considered as literary or scientific in its nature. *Phi Beta Epsilon Corp. v. Boston*, 182 Mass. 457. See also *People v. Lawler*, 74 N. Y. App. Div. 553, affirmed 179 N. Y. 535.

2. Property Must Be Owned by an Educational Institution. — *McCullough v. Board of Review*, 186 Ill. 15.

Under the *Illinois* statute providing that to make property exempt, the legal or equitable title should be in the educational institution, property used as recreation grounds by a school, title being in an individual, is taxable. *McCullough v. Board of Review*, 186 Ill. 15.

**336.** (5) *Whether Residences of College Officials Are Exempt.* — See notes 1, 2.

**4. Charitable Institutions** — *a. CUSTOMARY EXEMPTION.* — See note 3.

**338.** *b. WHAT IS A CHARITABLE INSTITUTION* — *Institutions Held Exempt as Charities.* — See notes 1, 3.

**339.** See notes 1, 5.

**340.** *c. LIMITATION OF EXEMPTION TO INSTITUTIONS OF "PURELY PUBLIC CHARITY."* — See notes 1, 2.

*Charity Need Not Be Controlled by State.* — See note 4.

**342.** *f. EFFECT OF PAYMENT BY SOME OF THE PERSONS BENEFITED.* — See note 4.

**343.** *g. RULE AS TO SOCIETIES WHOSE BENEFITS ARE CONFINED TO MEMBERS.* — See note 2.

**336. 1. Residences of Officials and Professors Exempt.** — *Phillips Academy v. Andover*, 175 Mass. 118; *Harvard College v. Assessors*, 175 Mass. 145; *Emerson v. Milton Academy*, 185 Mass. 414; *Ursinus College v. Collegeville*, 17 Mont. Co. Rep. (Pa.) 61.

**2. No Exemption Where Rent Is Charged.** — *Amherst College v. Assessors*, 173 Mass. 232.

**3.** In *New York* it is held that property in the hands of an executor is exempt if it be bequeathed to a charitable institution. Though, by the statute, the executor may hold the legacy without payment for a year, the courts will look at the nature of the property. *People v. Wells*, 179 N. Y. 257. But see *Com. v. William*, 102 Va. 778.

**Courts Regard Beneficial Ownership.** — Property granted to a trustee to create a fund which should after five years be paid to a charitable corporation is exempt from taxation. The courts will look at the beneficial ownership, not the mere legal title. *Norton v. Louisville*, (Ky. 1904) 82 S. W. Rep. 621.

**338. 1. Hospital.** — *Cooper Hospital v. Burd-sall*, 63 N. J. L. 85; *Cooper Hospital v. Camden*, 68 N. J. L. 208.

**A Sanitarium** operated for the benefit of the sick and applying its receipts from paying patients to the maintenance of the institution, and not to private profit, is entitled to exemption as a charitable institution. *Michigan Sanitarium, etc., Assoc. v. Battle Creek*, (Mich. 1904) 101 N. W. Rep. 855.

**3. Orphan Asylum.** — *Vink v. Work*, 158 Ind. 638.

**339. 1. Rescue Mission.** — A corporation furnishing aid to the needy, the aged, and crippled, and supplying clothing and food in return for services in cutting wood, the proceeds of the sale of which are applied exclusively to the furtherance of the objects of the institution, is an exclusively charitable institution entitled to exemption. *Paterson Rescue Mission v. High*, 64 N. J. L. 116.

**5. Camp-meeting Association.** — A stock of goods owned by a camp-meeting association and sold to the general public on the grounds of the association is not exempt. *Alton Bay Camp-Meeting Assoc. v. Alton*, 60 N. H. 311.

**340. 1. What Is Purely Public Charity.** — See *Litz v. Johnston*, 65 N. J. L. 169.

**An Infirmary Attached to a Medical College** and paid for by the physicians who operate the

college, which charges patients who are able to pay and which was established to make the college more attractive to students, is not "a purely public charity." *Gray St. Infirmary v. Louisville*, 65 S. W. Rep. 11, 23 Ky. L. Rep. 1274.

**A Bequest to Be Applied in Disseminating and Propagating the Christian Religion** is not within the provision of the constitution exempting "purely public charities" from taxation. *Com. v. Thomas*, 83 S. W. Rep. 572, 26 Ky. L. Rep. 1128.

**A Young Men's Christian Association** is a purely public charity. *Com. v. Young Men's Christian Assoc.*, 116 Ky. 711, 105 Am. St. Rep. 234.

**A Gift to a School District** for the education of the poor and indigent children thereof is a purely public charity. *Com. v. Pallitt*, 76 S. W. Rep. 412, 25 Ky. L. Rep. 790.

**Exclusively for Purposes of Charity.** — Under a statute exempting all property of any charitable institution used exclusively for purposes of charity, a building rented by a lodge which uses the income partly for burial benefits, shared by rich and poor members alike, is not included in the statute. *Ridgeley Lodge No. 23 v. Redus*, 78 Miss. 352.

**Texas — Only Land and Buildings Exempt.** — The clause in the constitution of Texas exempting "all institutions of purely public charity," is construed by the courts as authorizing the exemption only of real estate, with the buildings thereon; so that books, tracts, etc., are not exempt. *Barbee v. Dallas*, 26 Tex. Civ. App. 571.

**2. Charities Confined to Certain Individuals Not Exempt.** — See *Com. v. Lexington Cemetery Co.*, 114 Ky. 165.

**4. Purely Public Charity May Be Administered by Private Corporation.** — The fact that the corporation is a foreign corporation cannot have the effect of removing the property exclusively devoted to charity from the benefits of the exempting law. *St. Vincent de Paul v. Brakeley*, 67 N. J. L. 176.

**342. 4. Payment by Some Persons Benefited Does Not Prevent Exemptions.** — *State v. Assessors*, 52 La. Ann. 223; *Michigan Sanitarium, etc., Assoc. v. Battle Creek*, (Mich. 1904) 101 N. W. Rep. 855.

**343. 2. Rule that Such Institutions Are Not Exempt.** — *State Council, etc., v. Board of Review*, 198 Ill. 441; *National Council, etc., v.*



- 343.** 5. Cemeteries. — See note 3.  
**344.** Exemption Dependent upon Use. — See note 2.  
**345.** 6. Manufacturers — *b.* WHAT CONSTITUTES MANUFACTURING. — See note 3.  
**347.** Illustrations — What Are Not Manufactures. — See note 6.  
 Selling Manufactured Product. — See note 8.  
**348.** *c.* WHAT MANUFACTURERS ARE EXEMPT — (1) Corporations "Wholly Engaged in Carrying on Manufacture Within the State." — See note 1.  
 (2) Manufacturing Companies "Carrying on Business in the State." — See note 3.  
**349.** (4) Manufacturers of Certain Specified Articles. — See note 7.  
**351.** (5) Manufacturers Employing a Certain Number of Hands. — See note 11.  
**352.** 7. Mines. — See note 6.

Phillips, 63 Kan. 799; Newport v. Masonic Temple Assoc., 108 Ky. 341, quoting 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 343; Widow's, etc., Home v. Bosworth, 112 Ky. 200; Fitterer v. Crawford, 157 Mo. 51; Green Bay Lodge No. 259 v. Green Bay, 122 Wis. 452.

**343.** 3. Exemption of Cemeteries. — Elmwood Cemetery Co. v. People, 204 Ill. 468; State v. Lakewood Cemetery Assoc., 93 Minn. 191.

**344.** 2. Exemption Extends to Improvements Necessary for Use of Land as Cemetery. — State v. Lakewood Cemetery Assoc., 93 Minn. 191.

**345.** 3. What Is Manufacturing. — Logs upon the yard, in the hands of the mill operating manufacturer, and lumber, rough and smooth, cut by him from such logs grown on Tennessee soil, are articles manufactured from the "produce of the soil," and exempt under the provisions of section 30, art. 2, of the constitution. Benedict v. Davidson County, 110 Tenn. 183.

**Articles Held to Be Manufactures.** — Lead Boilers, to be placed inside of steel digesters, whether manufactured in a separate manufactory and shipped, or whether they be manufactured upon the ground where they are to be used, constitute manufactured articles. People v. Knight, 67 N. Y. App. Div. 365.

**Ships.** — Com. v. Delaware River Iron Ship Bldg., etc., Works, 2 Dauphin Co. Rep. (Pa.) 232.

**Asphaltum.** — People v. Knight, 99 N. Y. App. Div. 62.

**Fountain Pens.** — People v. Morgan, 48 N. Y. App. Div. 395.

**Mixed Paints.** — People v. Roberts, 51 N. Y. App. Div. 77.

**"Washing and Ironing" Not Manufacturing.** — Com. v. Keystone Laundry Co., 203 Pa. St. 289.

**347.** 6. Production of Electricity for Illuminating Purposes. — Brush Electric Light Co. v. Philadelphia, 8 Pa. Dist. (Pa.) 231. See also Bates Mach. Co. v. Trenton, etc., R. Co., 70 N. J. L. 684, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 266 [347].

**8. Selling of Manufactured Product an Incident to Manufacture.** — But see People v. Morgan, 61 N. Y. App. Div. 373, where, although asphaltum made by a company was used by it in carrying out its own contracts, the company was held to be a manufacturing company within Tax Law, § 183.

**348.** 1. When Foreign Corporation Entitled to Exemption. — In Pennsylvania, under an act exempting from taxation manufacturing companies carrying on business within the state, and whose capital stock is wholly invested in the state, a company answering these requirements but incorporated under the laws of another state will be entitled to exemption. Com. v. American Car, etc., Co., 203 Pa. St. 302. And under the same statute a corporation whose capital stock is exclusively employed in manufacturing in the state is exempt, although its capital stock is owned by a foreign corporation. Com. v. American Cement Co., 203 Pa. St. 208.

**3.** What Constitutes Carrying on Business Within the State. — A corporation cannot, because of its ownership and operation of a dressing mill valued at thirty thousand dollars, secure exemption of the city lot and lumber situated thereon, valued at six hundred and ninety-six thousand dollars, on the ground that they represent capital invested in manufacturing carried on within the state. Yellow Pine Co. v. State Board of Assessors, 70 N. J. L. 590.

A company owning sufficient manufactories in the state to come within the statute, but which has leased its property to another corporation, will not be exempt from taxation. Com. v. Macungie Iron Co., 9 Pa. Dist. 477, 4 Dauphin Co. Rep. (Pa.) 12.

**349.** 7. No Exemption in Favor of Refining of Sugar. — A sugar refining company cannot be held to be entitled to the exemption granted by the statute to the business of "making sugar." State v. American Sugar Refining Co., 51 La. Ann. 562, affirmed 179 U. S. 89.

**Manufacturing "Feed" Company Not Exempt.** — In Louisiana a "feed" company which was organized to manufacture food for cattle and which had never manufactured flour for human consumption, cannot claim an exemption from taxation as a company engaged in manufacturing flour. Atlas Feed Products Co. v. New Orleans, 113 La. 611.

**351.** 11. A Levee Tax is not a "municipal" tax from which such factories are exempted. United R., etc., Co. v. Mevers, 112 La. 897.

**352.** 6. A Mining Claim after Being Proved Is Taxable. — Though a mining claim is by statute not subject to taxation, yet after the claim has ripened into private ownership, it is

**353.** 8. Pensions and Bounties. — See note 1.

Property Purchased in Part with Pension Money. — See note 2.

**354.** 10. Mortgages. — See note 1.**355.** 18. Savings Institutions. — See note 2.**356.** 21. Corporations and Corporate Stock Generally — *a.* INTRODUCTORY. — See note 1.**357.** *b.* WHETHER EXEMPTION OF CAPITAL STOCK AND PROPERTY EXEMPTS SHARES IN HANDS OF SHAREHOLDERS. — See notes 1, 2.*c.* WHETHER EXEMPTION OF SHARES IN HANDS OF SHAREHOLDERS EXEMPTS CAPITAL STOCK AND PROPERTY. — See note 3.**358.** *d.* EXTENT OF EXEMPTION — (2) *What Exemption of Capital Stock Includes.* — See note 5.**359.** (3) *What Property Is Within Exemption.* — See note 2.**361.** *e.* EFFECT OF CHANGE OF NAME, OR IN MANNER OF ACCOMPLISHING OBJECTS OF INCORPORATION. — See note 1.**362.** *f.* EFFECT OF CONSOLIDATION OF CORPORATIONS — (3) *Rule Where Consolidation Has the Effect of Forming an Entirely New Corporation.* — See note 1.no longer exempted. *Salisbury v. Lane*, 7 Idaho 370.**353.** 1. Exemption Extends to Property Purchased with Pension Money. — *Strong v. Walton*, 47 N. Y. App. Div. 114. But see *People v. Reilly*, 41 N. Y. App. Div. 378.The General Rule is that pension money is not exempt after it reaches the pensioner. *Manning v. Spry*, 121 Iowa 191.**2.** Property Exempt Only to Extent of Pension Money Invested Therein. — *Strong v. Walton*, (County Ct.) 27 Misc. (N. Y.) 302, reversed 47 N. Y. App. Div. 114.Property May Be Assessed. — Taxes paid on real estate, partly purchased with pension moneys, cannot be recovered from the city, as the action of the assessors cannot be attacked collaterally, but must first be reviewed on certiorari and set aside. *Broderick v. Yonkers*, 22 N. Y. App. Div. 448, affirmed 163 N. Y. 571.**354.** 1. Mortgages Given as Security for Debts Not Exempt. — *Territory v. Co-operative Bldg., etc., Assoc.*, 10 N. Mex. 337.**355.** 2. Investment by Savings Bank in Railroad Bonds Not Exempt. — Where a statute exempts deposits in savings institutions which are secured by mortgage on real estate, and another statute provides that railroad bonds shall not be exempted, investments of the savings institution in such bonds, though secured by mortgages on real estate, cannot be brought within the terms of the exemption. *State v. Manchester Sav Bank*, 71 N. H. 535.**356.** 1. Special Exemption by Charter. — Where the charter of a corporation authorizes its holding of property to the extent of thirty thousand dollars, property owned by the corporation in excess of that amount, though exclusively for charitable purposes, is not exempt. *Children's Sea Shore House v. Atlantic City*, 65 N. J. L. 488.**357.** 1. Exemption of Capital and Property Does Not Exempt Shares of Stock. — *Cleveland Trust Co. v. Lander*, 62 Ohio St. 266. See also *Penrose v. Chaffraix*, 106 La. 250.

Under a Georgia statute exempting the stock of a railroad company from taxation, the word "stock" was held to mean the capital of the

corporation and not the shares in the hands of the stockholders. *Georgia R., etc., Co. v. Wright*, 132 Fed. Rep. 912.**2.** The Contrary Doctrine has been upheld in Vermont also. *Richardson v. St. Albans*, 72 Vt. 1.**3.** Exemption of Shares Does Not Include Capital Stock and Property. — *Union, etc., Bank v. Memphis*, (C. C. A.) 111 Fed. Rep. 561, reversed 189 U. S. 71.**358.** 5. Patents Purchased with the Proceeds of the Business are included in an exemption of the capital stock. *American Mutoscope Co. v. State Board of Assessors*, 70 N. J. L. 172.**359.** 2. Exemption Extends Only to Property Necessary for Purposes of Corporation. — *Bancroft v. Wicomico County*, 121 Fed. Rep. 874; *Spring Brook Water Co. v. Kelly*, 17 Pa. Super. Ct. 347.Salvation Army — Business Incidental to Purposes. — Where a New York statute provided that the property of the Salvation Army should be exempt, and that it might engage in business incidental to its religious work, a building part of which was used as a salesroom for books, dry-goods, etc., the proceeds of which were to be applied to the religious and missionary purposes of the organization, was held to come within the terms of the statute. *People v. Feitner*, (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 712, affirmed 68 N. Y. App. Div. 639.**361.** 1. New Company with Members in Old Company Entitled to Exemption. — A company, buying the plant of a company in dissolution, some of the members of which were members of the former company, is entitled to the exemption from taxation granted by a statute to any manufacturing company permanently locating within the city. *Mengel Box Co. v. Louisville*, 79 S. W. Rep. 255, 25 Ky. L. Rep. 1861.**362.** 1. Existence of Constitutional Prohibitions Against Exemptions at Time of Consolidation. — Under a Mississippi statute granting exemption from taxation for thirty years to a railroad corporation, the corporation was authorized to consolidate with any other railroad company, and the consolidated company was to have the same privileges as the former company. Before



**363.** 22. Railroad Companies — *b.* WHAT PROPERTY IS WITHIN GENERAL EXEMPTION — In New Jersey. — See note 3.

In Wisconsin. — See note 4.

**364.** Illustrations. — See notes 4, 6.

**365.** Grain Elevators, Warehouses, and Docks. — See note 8.

**366.** See note 1.

*c.* WHAT EXEMPTION OF "RIGHT OF WAY" INCLUDES. — See note 2.

*d.* EXEMPTION OF LANDS GRANTED IN AID OF CONSTRUCTION. — See note 6.

*f.* RULE AS TO BRANCH LINES AND LEASED OR PURCHASED ROADS. — See note 9.

**367.** 24. Public Property and the Instrumentalities of Government — *a.* GENERAL RULE. — See note 11.

**369.** Exemption Not Dependent upon Express Grant. — See note 1.

consolidation the state passed a new constitution providing for taxation of private corporations the same as individuals. The Supreme Court of the United States held that the consolidation acted as a new grant of corporate franchises and that the company was therefore taxable. *Yazoo, etc., R. Co. v. Adams*, 180 U. S. 1, *affirming* 77 Miss. 194.

**363.** 3. Lands of Such Reasonable Quantity as may be fairly anticipated to meet the emergencies of railroad uses are exempt from local taxation. *New Jersey Junction R. Co. v. Jersey City*, 63 N. J. L. 120.

**4.** Property Held for Future Use. — The statute exempting property of railway companies from taxation involves only such property as is reasonably necessary for railway purposes, and not property held in contemplation of future use. *Duluth, etc., R. Co. v. Douglas County*, 103 Wis. 75, *overruling* *Chicago, etc., R. Co. v. Bayfield County*, 87 Wis. 188, which is set out in the original note.

**364.** 4. Railroad Yards. — A space of land used for the storage of large articles between the tracks of a railroad company and its coal dock is necessarily used by it and therefore is exempt. *Grand Rapids, etc., R. Co. v. Grand Rapids*, (Mich. 1904) 100 N. W. Rep. 1012.

**6.** Power Houses of an electric road are held to be exempt in *Pennsylvania*, as being property of a public corporation essential to its franchise. *Philadelphia v. Electric Traction Co.*, 208 Pa. St. 157.

**365.** 8. Grain Elevators and Warehouses Used Merely to Assist in Business of Road Exempt. — *Chicago, etc., R. Co. v. Douglas County*, 122 Wis. 273, 286.

**366.** 1. Elevators or Docks Owned by Railroad Companies and Leased to Others Not Exempt. — *Matter of Erie R. Co.*, 65 N. J. L. 608, *citing* 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 365; *Grand Rapids, etc., R. Co. v. Grand Rapids*, (Mich. 1904) 100 N. W. Rep. 1012. See also *Whitcomb v. Ramsey County*, 91 Minn. 238.

**2.** Right of Way. — Where the charter of a railroad company exempted from taxation "the right of way through the public lands" that part of the right of way passing over the lands of private parties was held not to be exempt under the terms of the charter. *U. S. Trust Co. v. Territory*, 10 N. Mex. 416, *affirmed* 174 U. S. 545.

**6.** Land Grant Exempt under Provision that Property Is Taxed Through Gross Earnings Tax. — *State v. Sioux City, etc., R. Co.*, 82 Minn. 158.

**9.** Purchased Line Not Exempt. — *Bancroft v. Wicomico County*, 121 Fed. Rep. 874.

When Exemption Inures to Purchaser. — An act granting to the purchasing company of a railway the same "rights, immunities, and franchises" as the company which formerly operated the road enjoyed, includes an exemption from taxation granted to the former company. *Bancroft v. Wicomico County*, 121 Fed. Rep. 874. See also *Louisville, etc., R. Co. v. Christian County*, 70 S. W. Rep. 180, 24 Ky. L. Rep. 894.

Under a statute exempting property owned by a railway company or its successors from taxation, a sale of the railroad does not put an end to the exemption. *State v. Colorado Bridge Co.*, (Tex. Civ. App. 1903) 75 S. W. Rep. 818.

**367.** 11. Public Property and the Instrumentalities of Government Not Taxable. — *Reclamation Dist. No. 551 v. Sacramento County*, 134 Cal. 477; *Sumner County v. Wellington*, 66 Kan. 590, 97 Am. St. Rep. 396; *Gachet v. New Orleans*, 52 La. Ann. 813; *Howard Sav. Inst. v. Newark*, 63 N. J. L. 547.

Property Must Be Owned by State or Municipality. — Under a provision of the *Georgia* Constitution, authorizing the general assembly to exempt from taxation "all public property," an armory owned by the citizens using it does not come within the provision, and, therefore, an act of the assembly exempting such an armory from taxation is unconstitutional. *Gate City Guard v. Atlanta*, 113 Ga. 883.

County Property Exempt Though Situated Outside of County. — *Warren County v. Nall*, 78 Miss. 726.

Property of Reclamation District Exempt. — The property acquired by a reclamation district of the state of California, organized for the purpose of draining and reclaiming swamp lands, is entitled to exemption. *Reclamation Dist. No. 551 v. Sacramento County*, 134 Cal. 477.

Land to Be Vested in City upon Confirmation of Order of Condemnation Not Exempt. — *Matter of Board of Education*, 59 N. Y. App. Div. 258, *reversed* 169 N. Y. 456.

**369.** 1. Immunity of Property of the United



**370.** See note 1.

Exemption of State, County, and Municipal Property Dependent upon Use for Public Purposes. — See note 3.

c. WHAT PROPERTY OF MUNICIPALITIES IS EXEMPT. — See notes 6, 7.

**371.** See notes 1, 4.

Municipal Waterworks. — See notes 7, 8.

Limitation of Exemption in New York. — See note 9.

**372.** d. RULE AS TO GOVERNMENT SECURITIES. — See note 1.

**373.** United States Legal-tender Notes. — See note 1.

Investment in Government Bonds, etc., to Escape Taxation. — See note 5.

**374.** g. QUASI-PUBLIC CORPORATIONS. — See note 4.

**382.** VII. TERMINATION OF EXEMPTIONS — 2. By Act of the Beneficiary — c. RELEASE OR WAIVER OF EXEMPTION. — See notes 1, 2.

States from State Taxation Rests upon Fundamental Principles of Government. — *Sumner County v. Wellington*, 66 Kan. 592, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 368 [369]; *Gachet v. New Orleans*, 52 La. Ann. 813.

**370.** 1. Object of Express Exemptions. — *Howard Sav. Inst. v. Newark*, 63 N. J. L. 547.

3. Exemption of County or Municipal Property Dependent upon Use for Public Purposes. — *Councilmen v. Com.*, 82 S. W. Rep. 1008, 26 Ky. L. Rep. 957; *Cincinnati v. Lewis*, 66 Ohio St. 49; *Stiles v. Newport*, 76 Vt. 154.

Public Property Occupied by Individual under Contract of Sale, Exempt. — In *Massachusetts* where the city has contracted to sell land to an individual, such property is exempt as long as it continues to be the property of the commonwealth, although the individual is in possession and engaged in manufacturing. *Corcoran v. Boston*, 185 Mass. 325.

6. Fire Department Exempt. — *Long Branch Firemen's Relief Assoc. v. Johnson*, 62 N. J. L. 625.

7. Public Park. — *Henderson v. Hughes County*, 13 S. Dak. 576.

**371.** 1. Public Dispensary. — A dispensary building and the stock of liquors which it contains, owned by a municipal corporation and operated by it, are exempt as "public property," within the meaning of Pol. Code (1895, § 762) of *Georgia*. *Walden v. Whigham*, 120 Ga. 646.

4. Bonds Held by City. — Bonds of an electric lighting company acquired by a city in return for the transfer of the plant to the company, and the proceeds of which are applied by the city to lighting its streets, are not exempt under the *Kentucky* Constitution, authorizing the legislature to exempt "public property used for public purposes." *Councilmen v. Com.*, (Ky. 1904) 82 S. W. Rep. 1008.

Warrants, issued by the city and representing its indebtedness, are not exempt as being public property. *Easton v. Board of Review*, 183 Ill. 255.

7. Waterworks Exempt. — *Sumner County v. Wellington*, 66 Kan. 590, 97 Am. St. Rep. 396; *Clarksville v. Montgomery County*, (Tenn. Ch. 1901) 62 S. W. Rep. 33.

Lands Adjoining a Stream, purchased by a water-works company engaged in supplying the public demand, are incidental to public use and nontaxable. *Spring Brook Water Co. v. Kelly*, 5 Lack. Leg. N. (Pa.) 299.

Waterworks Partly Used for City Purposes. — In *Williams v. Park*, 72 N. H. 305, it was held that the part of a system of waterworks which was operated by a city and devoted to public use was exempt, but the part used to furnish another city and private individuals with water supply was subject to taxation.

Private Company Furnishing Water to Municipality. — The supplying of water in accordance with the provisions of its charter, by a private corporation to a municipality, does not constitute such a public use as will exempt the corporation from taxation. *Godfrey v. Bennington Water Co.*, 75 Vt. 350.

8. Contrary Doctrine in *Kentucky* and *Pennsylvania*. — *Negley v. Henderson*, (Ky. 1900) 55 S. W. Rep. 554.

9. Limitation of Exemption of Property of Municipalities in New York. — *People v. Duryea*, 59 N. Y. App. Div. 488. See also *People v. De Witt*, 59 N. Y. App. Div. 493, 167 N. Y. 575.

In *New Hampshire* a similar statute exists, and a waterworks lying without the town limits is not exempt from taxation, and such property is taxable in the town where it lies. *Newport v. Unity*, 68 N. H. 587, 73 Am. St. Rep. 626.

**372.** 1. United States Securities and Investments Therein Exempt from State Taxation. — *Hooper v. State*, (Ala. 1904) 37 So. Rep. 662; *Howard Sav. Inst. v. Newark*, 63 N. J. L. 547; *Com v. Provident Life, etc., Co.*, 9 Pa. Dist. 479, 3 Dauphin Co. Rep. (Pa.) 130.

Money or Property Secured by Pledge of United States bonds is taxable. *Hooper v. State*, (Ala. 1904) 37 So. Rep. 662.

**373.** 1. Orders Drawn on the United States Treasury are not entitled to exemption. *Hibernia Sav., etc., Soc. v. San Francisco*, 139 Cal. 205, 96 Am. St. Rep. 100.

Rule as to Greenbacks. — Since Act Cong. Aug. 13, 1894, greenbacks are not exempt from taxation by the states. *Patton v. Commercial Bank*, 10 Ohio Dec. 321.

5. Fraudulent Investment in Government Securities to Avoid Taxation. — *In re People's Bank*, 203 Ill. 300.

**374.** 4. All Quasi-public Corporations Exempt from Local Taxation in *Pennsylvania*. — *Ridgway Light, etc., Co. v. Elk County*, 191 Pa. St. 465.

**382.** 1. What Amounts to a Renunciation of Exemption. — Where a borough council granted to a company an exemption for five years from

**383. 3. By Repeal of Grant — a. GENERAL RULE AS TO RIGHT TO REPEAL EXEMPTIONS.** — See note 3.

**384. Intent to Repeal Must Be Manifest.** — See note 1.

**385. b. RIGHT TO GRANT IRREPEALABLE EXEMPTIONS.** — See note 1.

**c. WHAT EXEMPTIONS ARE IRREPEALABLE.** — See notes 3, 4.

**Exemptions Which Have Induced Citizens to Invest Their Means or Embark in New Enterprises.** — See note 5.

**386. Exemptions Contained in Charters of Corporations.** — See note 1.

**387. Express Provision Subjecting Charter to Repeal or Amendment.** — See note 1.

**d. EFFECT OF CONSTITUTIONAL PROHIBITION OF EXEMPTIONS.**

— See note 2.

municipal taxation, and the local authorities exempted the property for four years inclusive, which exemption was accepted by the company without objection, they thereby waived the exemption for the additional year. *Liondale Bleach Dye, etc., Works*, 68 N. J. L. 215.

**382. 2. Waiver Must Be Clear.** — See *New Jersey Zinc Co. v. Hancock*, 63 N. J. L. 506.

**383. 3. When Exemptions May Be Repealed.** — *Miller v. Hageman*, 114 Iowa 195; *State v. Assessors*, 52 La. Ann. 223; *Female Orphan Soc. v. Assessors*, 109 La. 537.

**384. 1. Legislative Intent to Repeal Exemption Must Be Manifest.** — *Sayers v. Wilmington, etc., R. Co.*, 3 Penn. (Del.) 249; *Children's Seashore House v. Atlantic City*, 68 N. J. L. 385; *People v. De Witt*, 59 N. Y. App. Div. 493, 167 N. Y. 575. See also *Taté v. Leveé Com'rs*, 84 Miss. 388.

**Express Repeal.** — *Adams v. Yazoo, etc., R. Co.*, 77 Miss. 194, affirmed 180 U. S. 1.

**385. 1. Cases Holding Contrary Doctrine.** — See *Wells v. Savannah*, 107 Ga. 1.

**3. Exemption Irrepealable When Subject of Contract.** — *State v. Alabama Bible Soc.*, 134 Ala. 632; *Penrose v. Chaffraix*, 106 La. 250. See also *Georgia R., etc., Co. v. Wright*, 132 Fed. Rep. 912.

**What Not a Contract.** — A general provision in a state statute that the rate of taxation prescribed for railroads should not apply to certain roads was held by the United States Supreme Court not to constitute such a contract with a railroad company constructing its line in accordance with the provisions of the act, as could not be repealed by later statute. *Wisconsin, etc., R. Co. v. Powers*, 191 U. S. 379.

**When Mere Privilege Exemption May Be Withdrawn.** — A statute exempting from a general road or street tax any property owner who should pay a certain special tax confers a privilege only and not a contract right, and accordingly the exemption may be withdrawn at any time. *Miller v. Hageman*, 114 Iowa 195.

**Burden on Beneficiary to Establish Contract.** — "When such an exemption is claimed by any citizen of the government, it is incumbent upon him to clearly show the existence of an express contract unambiguous and definite, in creating by its terms the exemption claimed." *Wells v. Savannah*, 107 Ga. 1.

**4. There Must Be a Consideration.** — *Miller v. Hageman*, 114 Iowa 195; *St. Anna's Asylum v. Parker*, 109 La. 592. See also *Cooper Hospital v. Camden*, 68 N. J. L. 691.

**5. Investment of Means or Embarking in New Enterprises on Faith of Exemption.** — *Middles-*

*boro v. New South Brewing, etc., Co.*, 108 Ky. 351, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 385.

**386. 1. Exemptions Contained in Corporate Charters Irrepealable.** — *Bancroft v. Wicomico County*, 121 Fed. Rep. 874; *State v. Alabama Bible Soc.*, 134 Ala. 632; *Cooper Hospital v. Camden*, 68 N. J. L. 691.

**Tax Not Contemplated in Charter Exemption.** — A provision in the charter of a corporation granting it exemption from taxation on its capital will not save it from a license tax which was not contemplated by its charter exemption. *State v. Citizens Bank*, 52 La. Ann. 1086.

**Increase of Tax Not Included in Exemption.** — It has been held in *Tennessee* that an exemption of a company except from all *ad valorem* taxes, in consideration of the payment of a privilege tax, will not exempt the company from an additional privilege tax. *Western Union Tel. Co. v. Harris*, (Tenn. Ch. 1899) 52 S. W. Rep. 748.

**387. 1. Exemptions Granted Subject to Provision that All Charters or Grants May Be Repealed or Amended May Be Withdrawn.** — *Louisville v. Louisville Bank*, 174 U. S. 439; *State v. Northern Cent. R. Co.*, 90 Md. 447; *State v. Duluth*, 77 Minn. 433, affirmed 179 U. S. 302; *Pratt Institute v. New York*, 99 N. Y. App. Div. 525.

**Provision that Corporate Property Taxable Like That of Individuals.** — In *Gulf, etc., R. Co. v. Hewes*, 183 U. S. 66, it was held that an exemption granted to a railroad by the *Mississippi* legislature for twenty years might be withdrawn under the constitutional provision that the property of corporations should be subject to taxation the same as that of individuals, and the state decisions construing such provision.

**Acceptance of a Percentage of the Gross Earnings** of a railroad in lieu of other taxes will prevent the withdrawal of the exemption and levy of other taxes after the road has been constructed on the strength thereof, notwithstanding the existence of a general law providing that all corporate charters shall be liable to repeal or amendment. *Stearns v. Minnesota*, 179 U. S. 223, reversing 72 Minn. 200; *Duluth, etc., R. Co. v. St. Louis County*, 179 U. S. 302, reversing 77 Minn. 433.

**2. Adoption of Constitutional Prohibition of Exemptions Repeals Previous Grants.** — *Cooper Hospital v. Camden*, 68 N. J. L. 691. See also *Campbell County v. Newport, etc., Bridge Co.*, 112 Ky. 659.

**Contrary Doctrine in Missouri.** — *State v. Westminster College*, 175 Mo. 52.



**388. 5. Effect of Termination of Exemption as Regards Taxation for the Current Year.** — See note 3.

**389. EXERCISE.** — See note 1.

**EXHIBIT.** — See note 5.

**390. EXHIBITION.** — See note 2.

[**EXIDOS.** — See note 2a.]

**391. EXISTENCE — EXISTING.** — See note 1.

**392. EXPECT.** — See note 3.

**393. EXPECTANCY — [EXPECTATION.]** — See notes 1, 2.

**394. EXPENSE.** — See note 2.

**388. 3. Property Cannot Be Taxed for Current Year When Exemption Ceases After Final Assessment of Taxes.** — *Baltimore v. Jenkins*, 96 Md. 192.

**389. 1. Patents.** — An English merchant, who, in pursuance of a contract made in England, delivers a patented article at a foreign port to an English importer, does not make, use, *exercise*, or vend the protected invention within the realm. *Saccharin Corp. v. Reitmeyer*, (1900) 2 Ch. 659.

**5. Present — Debts of Decedents.** — See *Fitzgerald v. Union Sav. Bank*, 65 Neb. 97.

**390. 2. Exhibition.** — Playing a piano in a saloon is not an *exhibition* under the *New York* statute prohibiting *exhibitions* without taking out a license. *People v. Campbell*, 51 N. Y. App. Div. 565.

**2a. In School Trustees v. Galveston, etc., R. Co.,** (Tex. Civ. App. 1902) 67 S. W. Rep. 148, the court said: "There was testimony to the effect that the particular land in controversy was what was known as the 'ejidos' or *exidos* of the old city of San Fernando and the city of San Antonio. The Spanish word *exidos* was shown to mean 'commons,' or land set apart to public use."

**391. 1. Existence Not Known — Succession.** — In *Martinez v. Wall*, 107 La. 737, the court said: "In case a succession shall be opened in favor of a person whose *existence* is not known, such inheritance shall devolve exclusively on those who would have had a concurrent right with him to the estate or those on whom the inheritance should have devolved if such person had not *existed*." The words 'whose *existence* is not known' give a well-defined meaning. They do not refer to a person temporarily absent, who may or may not be alive at the time of the death of another, of whom, if he were present, or his *existence* known, he would be a legal heir. They refer to one whose absence has been so long prolonged, and under such circumstances, as to throw great doubt upon his *existence*, and great doubt as to whether he would afterwards be heard from."

**392. 3. In Atkinson, etc., R. Co. v. Hamlin**, 67 Kan. 476, the court said: "The word *expect* is defined: 'To look for (mentally); to look forward to, as to something that is believed to be about to happen or come.'"

**393. 1. Ayers v. Chicago Title, etc., Co.,** 187 Ill. 42; *McDonald v. Bayard Sav. Bank*, 123 Iowa 416; *Robbins's Estate*, 199 Pa. St. 500.

**2. Future Estate.** — *Ayers v. Chicago Title, etc., Co.*, 187 Ill. 42 (holding such an estate subject to an inheritance tax); *Matter of Brandreth*, 169 N. Y. 437; *Rudd v. Cornell*, 58 N. Y. App. Div. 216; *Woodbridge v. Bockes*, 170 N. Y. 596.

In the *Illinois* Inheritance Tax Act the term *expectation* is used, not to denote an *expectation* of becoming vested both with the title and the possession where neither is now vested, but to denote a condition where the title is vested and the possession is deferred. The term "in *expectation*" is used in contradistinction to "in possession." Both contemplate a title vested and indefeasible, but in one instance the right of enjoyment is immediate — "in possession;" in the other is postponed — "in *expectation*." As used in this statute, these words last quoted refer to the future possession of a vested estate which is subject to the immediate enjoyment of another. *People v. McCormick*, 208 Ill. 445.

**394. 2. Bowery Bank v. Hart**, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 412, quoting 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 394.

**Attorney's Fees Held Not Within the Term.** — *Whitlow v. Whitlow*, 109 Ky. 573; *Bowery Bank v. Hart*, 77 N. Y. App. Div. 121.

**Expenses of the Company.** — "On the meaning of the words 'all *expenses* of the company,' as used by the parties, we entertain no doubt. The effect of the contract was that plaintiff was to run the entire business as sole manager, was to take twenty per cent. of the gross premiums received, pay the *expenses* and keep the balance saved as his compensation. The *expenses* meant everything paid out in the course of the business for the purpose of running it, all costs, outlays, and charges incident to its maintenance and prosecution. *Prima facie* everything which the company would have had to pay out in the prosecution of the business in the ordinary way, was a part of the '*expenses* of the company' which by his contract the plaintiff assumed. Taxes were a part of such *expenses* due annually as part of the price of doing the business, just as a license fee would be in the case of auctioneers or dealers within the license tax statutes." *Kane v. Schuylkill F. Ins. Co.*, 190 Pa. St. 205, per Mitchell, J.

**Expenses of the Action** mean such items and disbursements as are allowed by statute, and do not include traveling *expenses*. *Putney v. McDow*, 54 S. Car. 172.



## EXPERIMENTS (IN EVIDENCE).

By E. G. CHILTON.

**399. III. ADMISSIBILITY OF EVIDENCE OF EXPERIMENTS — 2. Criterion for Admissibility** — Evidence of Experiments May Be Proof of Most Satisfactory Nature. — See note 5.

**400. 3. Question of Admissibility One for Court to Determine — a. IN GENERAL.** — See note 3.

**b. TO WHAT EXTENT A MATTER OF JUDICIAL DISCRETION.** — See note 4.

**402. 8. Experiments Made with the Special View to Their Introduction in Evidence.** — See note 3.

**403. IV. EVIDENCE OF EXPERIMENTS WITH REFERENCE TO ITS OBJECTS AND PURPOSES — 2. Experiments to Prove that from Given Conditions a Certain Result Would Follow — a. IN GENERAL.** — See note 3.

**404.** See note 2.

**b. REBUTTING PROOF.** — See note 4.

**405. 3. Experiments to Prove that from Given Conditions an Alleged Result Would Not or Need Not Follow — a. DIFFERENT RESULTS UNDER SIMILAR CONDITIONS.** — See note 1.

**407. c. RULE AS TO SIMILARITY OF CIRCUMSTANCES AND CONDITIONS — (1) General Rule.** — See note 1.

**408. (2) Extent and Limits of Rule.** — See note 2.

**399. 5. Schweinfurth v. Cleveland, etc., R. Co.,** 60 Ohio St. 215.

**400. 3. Question of Similarity for Court.** — The question of the similarity of conditions and circumstances attending the experiment is within the province of the court. *Halverson v. Seattle Electric Co.*, 35 Wash. 600.

**4. Discretion of Court.** — *Thiel v. Kennedy*, 82 Minn. 142, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 400; *Lillie v. State*, (Neb. 1904) 100 N. W. Rep. 316; *Carr v. American Locomotive Co.*, 26 R. I. 180; *Konold v. Rio Grande Western R. Co.*, 21 Utah 379, 81 Am. St. Rep. 693, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 400; *Halverson v. Seattle Electric Co.*, 35 Wash. 600.

**402. 3. Cheetham v. Union R. Co., (R. I. 1904)** 58 Atl. Rep. 881.

**403. 3. Experiments to Show that Certain Results Would Follow.** — *People v. Thompson*, 122 Mich. 411. See also *Lillie v. State*, (Neb. 1904) 100 N. W. Rep. 316.

**404. 2. Experiments to Show Powder Marks.** — *Lillie v. State*, (Neb. 1904) 100 N. W. Rep. 316.

**4. Evidence of Experiments in Rebuttal.** — *Lillie v. State*, (Neb. 1904) 100 N. W. Rep. 316.

**405. 1. Experiments to Show that an Alleged Result Would Not or Need Not Follow.** — *Cheetham v. Union R. Co., (R. I. 1904)* 58 Atl. Rep. 881.

In an action for slander it was held to be error to exclude evidence of an experiment tending to show whether the voice of a person standing where the defendant stood could have been

heard by the plaintiff and his witnesses. *Gambrill v. Schooley*, 95 Md. 260.

**407. 1. General Rule as to Similarity of Circumstances and Conditions.** — *American Bell Telephone Co. v. National Telephone Mfg. Co.*, 109 Fed. Rep. 976, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 406; *Chicago City R. Co. v. Brecher*, 112 Ill. App. 106; *Hauser v. People*, 210 Ill. 253; *People v. Thompson*, 122 Mich. 411; *Cheetham v. Union R. Co., (R. I. 1904)* 58 Atl. Rep. 881; *Konold v. Rio Grande Western R. Co.*, 21 Utah 379, 81 Am. St. Rep. 693; *Hardwick Sav. Bank, etc., Co. v. Drenan*, 72 Vt. 438; *Rowe v. Northport Smelting, etc., Co.*, 35 Wash. 110; *Halverson v. Seattle Electric Co.*, 35 Wash. 600; *Zimmer v. Fox River Valley Electric R. Co.*, 123 Wis. 643. See also *Gambrill v. Schooley*, 95 Md. 260.

**408. 2. Extent and Limits of Rule as to Similarity of Circumstances and Conditions.** — *Sonoma County v. Stofen*, 125 Cal. 32; *Chicago City R. Co. v. Brecher*, 112 Ill. App. 106; *La Port Carriage Co. v. Sullender*, (Ind. App. 1904) 71 N. E. Rep. 922; *Rupe v. State*, 42 Tex. Crim. 477; *Konold v. Rio Grande Western R. Co.*, 21 Utah 379, 81 Am. St. Rep. 693; *Rowe v. Northport Smelting, etc., Co.*, 35 Wash. 110, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 408; *Zimmer v. Fox River Valley Electric R. Co.*, 123 Wis. 643.

**Conditions as Closely Identical as Possible.** — In *Lillie v. State*, (Neb. 1904) 100 N. W. Rep. 316, evidence of an experiment to illustrate at what distance from a curtain a shot must be fired to powder-mark the curtain was held to be admissible if the conditions attending the ex-

**409.** See note 1.

(3) *Similarity of Circumstances and Conditions Question for Court to Determine.* — See notes 2, 3.

**4.** *Experiments in Support or Explanation of Opinion Evidence* — *a.* IN GENERAL. — See note 5.

**410.** *Rationale of Rule.* — See note 1.

*b.* *WHETHER EXPERT WITNESS PERMITTED TO TESTIFY AS TO EXPERIMENTS ON DIRECT EXAMINATION OR ONLY ON CROSS-EXAMINATION.* — See note 4.

**411.** *V. EVIDENCE OF EXPERIMENTS WITH REFERENCE TO THE MANNER AND MEANS OF ITS INTRODUCTION* — 1. *Experiments in Presence of Jury* — *a.* IN GENERAL. — See note 2.

**412.** *b.* *EXPERIMENTS BY JURORS THEMSELVES.* — See note 3.

**413.** 2. *Experiments Out of Presence of Jury.* — See note 3.

periment were as closely identical as possible with the conditions of the transaction in question.

**409.** 1. *Lack of Similarity of Circumstance and Condition Affects Not the Competency, but the Weight, of Evidence of Experiments.* — *Hauser v. People*, 210 Ill. 253. See also *Lillie v. State*, (Neb. 1904) 100 N. W. Rep. 316

2. *Question for Court to Determine.* — *Zimmer v. Fox River Valley Electric R. Co.*, 123 Wis. 643.

3. *Halverson v. Seattle Electric Co.*, 35 Wash. 600.

5. *Experiments in Support of Opinion Evidence.* — *People v. Thompson*, 122 Mich. 411, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 409; *Konold v. Rio Grande Western R. Co.*, 21 Utah 379, 81 Am. St. Rep. 693, quoting 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 409.

**410.** 1. *People v. Thompson*, 122 Mich. 411, quoting 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 410.

4. *This Precise Question Was Decided.* — See *People v. Thompson*, 122 Mich. 411, quoting 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 410, and supporting the general rule there laid down.

**411.** 2. *Experiments in Presence of Jury.* — *Schweinfurth v. Cleveland, etc., R. Co.*, 60 Ohio St. 215; *Carr v. American Locomotive Co.*, 26 R. I. 180.

**412.** 3. *Experiments Made by the Jury.* — *Wilson v. U. S.*, (C. C. A.) 116 Fed. Rep. 484, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 412, and holding that it was error for a trial judge to permit a jury to determine an essential fact by experiment in the jury room, thereby depriving the defendants of an opportunity to contest the correctness of the experiment.

**413.** 3. *Lillie v. State*, (Neb. 1904) 100 N. W. Rep. 316. See also *Gambrill v. Schooley*, 95 Md. 260; *Zimmer v. Fox River Valley Electric R. Co.*, 123 Wis. 643.

# EXPERT AND OPINION EVIDENCE.

BY THEODOR MEGAARDEN.

## 421. IV. GENERAL PRINCIPLES AS TO ADMISSIBILITY AND COMPETENCY —

### 1. General Rule Regarding Opinions. — See notes 4, 5.

**421. 4. Opinion Evidence Not Favored.** — *Meehan v. Great Northern R. Co.*, (N. Dak. 1904) 101 N. W. Rep. 183; *Crouse v. Chicago*, etc., R. Co., 104 Wis. 473.

It has been said that "expert evidence should not be allowed except in cases where there is clearly a necessity for it." *Coe v. Van Why*, 33 Colo. 315.

In *Fireman's Ins. Co. v. J. H. Mohlman Co.*, (C. C. A.) 91 Fed. Rep. 85, the court said that it agreed with the view that "the cases in which opinions of witnesses are allowable constitute exceptions to the general rule, and the exceptions are not to be extended or enlarged so as to include new cases, except as a necessity to prevent a failure of justice — as when better evidence cannot be had."

**5. Facts, Not Opinions, Usually Required** — *United States*. — *Foster v. Murphy*, (C. C. A.) 135 Fed. Rep. 47; *In re De Gottardi*, 114 Fed. Rep. 328; *Chicago G. W. R. Co. v. Price*, (C. C. A.) 97 Fed. Rep. 423; *Kriesel v. Sun Ins. Office*, (C. C. A.) 88 Fed. Rep. 243.

*Alabama*. — *Henderson v. Brunson*, (Ala. 1904) 37 So. Rep. 549; *Southern R. Co. v. Bonner*, (Ala. 1904) 37 So. Rep. 702; *Central of Georgia R. Co. v. Martin*, 138 Ala. 531; *National Surety Co. v. Mabry*, 139 Ala. 217; *Wildman v. State*, 139 Ala. 125; *Hill v. State*, 137 Ala. 66; *Southern R. Co. v. Shelton*, 136 Ala. 191; *Holmes v. State*, 136 Ala. 80; *Birmingham R., etc., Co. v. Jackson*, 136 Ala. 279; *Western R. Co. v. Arnett*, 137 Ala. 414; *Mann v. State*, 134 Ala. 1; *Louisville, etc., R. Co. v. Banks*, 132 Ala. 471; *Louisville, etc., R. Co. v. Tegner*, 125 Ala. 593; *Turner v. State*, 124 Ala. 59; *Baker v. State*, 122 Ala. 1; *Miller v. Mayer*, 124 Ala. 434; *Bessemer Land, etc., Co. v. Campbell*, 121 Ala. 50, 77 Am. St. Rep. 17; *Louisville, etc., R. Co. v. Brinkerhoff*, 119 Ala. 606; *Birmingham R., etc., Co. v. Franscomb*, 124 Ala. 621. See *Louisville, etc., R. Co. v. Sandlin*, 125 Ala. 585.

*Arkansas*. — *Young v. State*, 70 Ark. 156; *Little Rock Traction, etc., Co. v. Nelson*, 66 Ark. 494.

*California*. — *People v. Murphy*, 146 Cal. 502.

*Connecticut*. — *Brennan v. Berlin Iron Bridge Co.*, 74 Conn. 382; *Barber v. International Co.*, 73 Conn. 587; *Harris v. Ansonia*, 73 Conn. 359. See *Dore v. Babcock*, 72 Conn. 408.

*Delaware*. — *Price v. Charles Warner Co.*, 1 Penn. (Del.) 462. See *State v. Day*, (Del. 1904) 58 Atl. Rep. 946.

*District of Columbia*. — *Tubins v. District of Columbia*, 21 App. Cas. (D. C.) 267.

*Florida*. — *Nickles v. State*, (Fla. 1904) 37 So. Rep. 312; *Sylvester v. State*, (Fla. 1903) 35 So. Rep. 142; *Jones v. State*, 44 Fla. 74.

*Georgia*. — *Central of Georgia R. Co. v. Bagley*, 121 Ga. 781; *Delegal v. State*, 109 Ga. 518; *Central of Georgia R. Co. v. Goodwin*, 120 Ga. 83; *Milledgeville v. Wood*, 114 Ga. 370; *Turner v. State*, 114 Ga. 421.

*Illinois*. — *Nordgren v. People*, 211 Ill. 425; *Smythe v. Evans*, 209 Ill. 376, *reversing* 108 Ill. App. 145; *Chicago, etc., Electric R. Co. v. Mawman*, 206 Ill. 182; *Henry v. Stewart*, 185 Ill. 448, *affirming* 85 Ill. App. 170; *Schlesinger v. Scheunemann*, 114 Ill. App. 459; *Cleveland, etc., R. Co. v. Alfred*, 113 Ill. App. 236; *Illinois Steel Co. v. McNulty*, 105 Ill. App. 594; *Illinois Steel Co. v. Sitar*, 98 Ill. App. 300, *affirmed* 199 Ill. 116; *Phenix Ins. Co. v. Mills*, 89 Ill. App. 58; *Roberts v. Chicago, etc., R. Co.*, 78 Ill. App. 526; *American Express Co. v. Risley*, 77 Ill. App. 476, *affirmed* 179 Ill. 295. See *Chicago v. Murdock*, 212 Ill. 9; *Delahoyde v. People*, 212 Ill. 554; *Illinois Steel Co. v. Mann*, 197 Ill. 186; *Chicago v. Peck*, 196 Ill. 260; *Chicago, etc., R. Co. v. Pendergast*, 75 Ill. App. 133; *Patterson v. Johnson*, 114 Ill. App. 329, *decree affirmed* 214 Ill. 481.

*Indiana*. — *Pichon v. Martin*, (Ind. App. 1905) 73 N. E. Rep. 1009; *Cleveland, etc., R. Co. v. Osgood*, (Ind. App. 1905) 73 N. E. Rep. 285; *Ætna Powder Co. v. Earlandson*, 33 Ind. App. 251; *T. J. Moss Tie Co. v. Huff*, 32 Ind. App. 466; *Clay County v. Redifer*, 32 Ind. App. 93; *Eureka Block Coal Co. v. Wells*, 29 Ind. App. 1; *Insurance Co. of North America v. Osborn*, 26 Ind. App. 88; *Chicago, etc., R. Co. v. Ross*, 24 Ind. App. 222; *Rains v. State*, 152 Ind. 69; *Maier v. Board of Public Works*, 151 Ind. 197. See *Golibart v. Sullivan*, 30 Ind. App. 428; *Pittsburgh, etc., R. Co. v. Martin*, 157 Ind. 216; *Ft. Wayne v. Christie*, 156 Ind. 172; *State v. David*, 25 Ind. App. 297; *Jeffersonville v. McHenry*, 22 Ind. App. 10.

*Iowa*. — *Healy v. Patterson*, 123 Iowa 73; *Collins v. Chicago, etc., R. Co.*, 122 Iowa 231; *State v. Evans*, 122 Iowa 174; *Faville v. State Trust Co.*, (Iowa 1903) 96 N. W. Rep. 1109; *State v. King*, 122 Iowa 1; *Perry v. Clarke County*, 120 Iowa 96; *Wolfson v. Allen Bros. Co.*, 120 Iowa 455; *Sheldon v. Bigelow*, 118 Iowa 586; *State v. Pasnau*, 118 Iowa 501; *Swanson v. Keokuk, etc., R. Co.*, 116 Iowa 304; *Creager v. Johnson*, 114 Iowa 249; *Barron v. Collenbaugh*, 114 Iowa 71; *Richardson v. Webster City*, 111 Iowa 427; *Shambaugh v. Current*, 111 Iowa 121; *Chew v. O'Hara*, 110 Iowa 81; *Taylor v. Star Coal Co.*, 110 Iowa 40. See *Vohs v. A. E. Shorthill Co.*, 124 Iowa 471; *Christensen v. Thompson*, 123 Iowa 717; *Wendel v. Mallory Commission Co.*, 122 Iowa 712; *Coldren v. Le Gore*, 118 Iowa 212; *Trott v. Chicago, etc., R. Co.*, 115 Iowa 80, *rehearing denied*



115 Iowa 88; *Wray v. Warner*, 111 Iowa 64; *State v. McIntosh*, 109 Iowa 209.

*Kansas*. — *Rothschild v. Hays*, 9 Kan. App. 193.

*Kentucky*. — *U. S. Fidelity, etc., Co. v. Blackley*, (Ky. 1905) 85 N. W. Rep. 196; *Ætna L. Ins. Co. v. Kaiser*, 115 Ky. 539; *Wright v. Com.*, (Ky. 1903) 72 S. W. Rep. 340; *Smith v. Com.*, 113 Ky. 19; *Warren Deposit Bank v. Younglove*, 112 Ky. 767, (Ky. 1902) 67 S. W. Rep. 47; *Schweitzer v. Citizens Gen. Electric Co.*, (Ky. 1899) 52 S. W. Rep. 830. See *Montgomery County v. Bean*, (Ky. 1904) 82 S. W. Rep. 240.

*Louisiana*. — *Shreveport v. Schulsinger*, 113 La. 9; *State v. Robertson*, 111 La. 35.

*Maine*. — *Soloman v. American Mercantile Exch.*, 93 Me. 436, 74 Am. St. Rep. 366. See *Carter v. Clark*, 92 Me. 225.

*Maryland*. — *Wells, etc., Council v. Littleton*, 100 Md. 416; *Bentley, etc., Co. v. Edwards*, 100 Md. 652; *Tall v. Baltimore Steam Packet Co.*, 90 Md. 248. See *Black v. Westminster First Nat. Bank*, 96 Md. 399.

*Massachusetts*. — *Plunger Elevator Co. v. Day*, 184 Mass. 130; *Com. v. Burton*, 183 Mass. 461; *P. P. Emory Mfg. Co. v. Reed*, 182 Mass. 166; *Stone v. Com.*, 181 Mass. 438. See *Gomes v. New Bedford Cordage Co.*, 187 Mass. 124; *McCoy v. Jordan*, 184 Mass. 575.

*Michigan*. — *People v. Row*, 135 Mich. 505, 10 Detroit Leg. N. 841; *Brown v. Kennedy*, 132 Mich. 464, 9 Detroit Leg. N. 694; *Furbush v. Maryland Casualty Co.*, 131 Mich. 234, 9 Detroit Leg. N. 293; *Dompier v. Lewis*, 131 Mich. 144, 9 Detroit Leg. N. 299; *Mack v. Cole*, 130 Mich. 84; *Berube v. Wheeler*, 128 Mich. 32. See *Derham v. Derham*, 125 Mich. 109, 7 Detroit Leg. N. 430.

*Minnesota*. — *Veum v. Sheeran*, 88 Minn. 257; *Steinbauer v. Stone*, 85 Minn. 274; *State v. Pierce*, 85 Minn. 101; *Swanson v. Andrus*, 84 Minn. 168; *Robbins v. Legg*, 80 Minn. 419; *Moldenhauer v. Minneapolis St. R. Co.*, 80 Minn. 426; *Conrad v. Swanke*, 80 Minn. 438; *Fonda v. St. Paul City R. Co.*, 77 Minn. 336. See *McGrath v. Great Northern R. Co.*, 80 Minn. 450; *Burnett v. Great Northern R. Co.*, 76 Minn. 461.

*Mississippi*. — *American Express Co. v. Bradford*, 82 Miss. 130; *Cumberland Telephone, etc., Co. v. Odeneal*, (Miss. 1899) 26 So. Rep. 966.

*Missouri*. — *Stevens v. Larwill*, 110 Mo. App. 140; *McCloskey v. Pulitzer Pub. Co.*, 107 Mo. App. 260; *Hendley v. Globe Refinery Co.*, 106 Mo. App. 20; *Shaefer v. Missouri Pac. R. Co.*, 98 Mo. App. 445; *State v. Terry*, 172 Mo. 213; *Rumsey v. Peoples R. Co.*, 154 Mo. 215; *Dammann v. St. Louis*, 152 Mo. 186; *Walker v. Davis*, 83 Mo. App. 374; *Taylor v. Jackson*, 83 Mo. App. 641; *Schermer v. McMahon*, 108 Mo. App. 36; *Heman Constr. Co. v. O'Brien*, 81 Mo. App. 639. See *Binsbacher v. St. Louis Transit Co.*, 108 Mo. App. 1; *Wheeler v. Chestnut*, 95 Mo. App. 546; *May v. Crawford*, 150 Mo. 504; *Pope v. Ramsey*, 78 Mo. App. 157, 2 Mo. App. Rep. 191.

*Montana*. — *Bramlett v. Flick*, 23 Mont. 95. See *Lander v. Sheehan*, 32 Mont. 25.

*Nebraska*. — *Bullard v. Laughlin*, (Neb. 1903) 96 N. W. Rep. 159; *Martin v. Connell*, (Neb. 1902) 91 N. W. Rep. 516; *Orcutt v. Polsley*, 59 Neb. 575; *Read v. Valley Land, etc., Co.*, 66 Neb. 423. See *Winterringer v. Warder, etc.,*

*Co.*, (Neb. 1901) 95 N. W. Rep. 619; *Barr v. Post*, 56 Neb. 698.

*New Jersey*. — *Riley v. Camden, etc., R. Co.*, 70 N. J. L. 289. See *Hendrickson v. Dwyer*, 70 N. J. L. 223.

*New Mexico*. — *Territory v. Claypool*, 11 N. Mex. 568.

*New York*. — *Schutz v. Union R. Co.*, 181 N. Y. 33; *People v. Rodawald*, 177 N. Y. 408; *People v. Smith*, 172 N. Y. 210; *Parish v. Baird*, 160 N. Y. 302; *Leonard v. Union R. Co.*, 98 N. Y. App. Div. 204; *Carpenter v. New York Evening Journal Pub. Co.*, 96 N. Y. App. Div. 376; *Nelson v. Young*, 91 N. Y. App. Div. 457, *affirmed without opinion* 180 N. Y. 523; *Dubois v. Williamson*, 93 N. Y. App. Div. 361; *M. S. Huey Co. v. Rothfeld*, (Supm. Ct. App. T.) 84 N. Y. Supp. 883; *Boyd v. Daily*, 85 N. Y. App. Div. 581, *affirmed without opinion* 176 N. Y. 556, 613; *Woarms v. Becker*, 84 N. Y. App. Div. 491; *Jennings v. Supreme Council, etc.*, 81 N. Y. App. Div. 76; *Smith v. Castle*, 81 N. Y. App. Div. 638; *United Press v. A. S. Abell Co.*, 79 N. Y. App. Div. 550, *affirmed without opinion* 178 N. Y. 578; *Wittman v. New York*, 80 N. Y. App. Div. 585; *Cosgrove v. Metropolitan St. R. Co.*, 74 N. Y. App. Div. 166, *affirmed without opinion* 173 N. Y. 628; *Clary-Squire v. Press Pub. Co.*, 58 N. Y. App. Div. 362; *Galligan v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 33 Misc. (N. Y.) 87; *Rowley v. Parsons*, 45 N. Y. App. Div. 174; *Dean v. New York*, 45 N. Y. App. Div. 605, *reversed* 167 N. Y. 13; *Comesky v. Postal Tel.-Cable Co.*, 41 N. Y. App. Div. 245; *Diefendorf v. Thomas*, 37 N. Y. App. Div. 49; *Chanler v. New York El. R. Co.*, 34 N. Y. App. Div. 305. See *Levy v. Huwer*, 80 N. Y. App. Div. 499, *affirmed without opinion* 176 N. Y. 612; *Voisin v. Commercial Mut. Ins. Co.*, 60 N. Y. App. Div. 139; *Gardner v. Friederich*, 25 N. Y. App. Div. 521, *affirmed without opinion* 163 N. Y. 568.

*North Carolina*. — *Cogdell v. Wilmington, etc., R. Co.*, 130 N. Car. 313; *Raynor v. Wilmington Seacoast R. Co.*, 129 N. Car. 195; *Jeffries v. Seaboard Air Line R. Co.*, 129 N. Car. 236; *State v. McLaughlin*, 126 N. Car. 1080.

*North Dakota*. — *Meehan v. Great Northern R. Co.*, (N. Dak. 1904) 101 N. W. Rep. 183; *Fisher v. Betts*, 12 N. Dak. 197; *Tetrault v. O'Connor*, 8 N. Dak. 15.

*Ohio*. — *A. H. Pugh Printing Co. v. Yeatman*, 12 Ohio Cir. Dec. 477, 22 Ohio Cir. Ct. 584; *Circleville v. Sohn*, 11 Ohio Cir. Dec. 193, 20 Ohio Cir. Ct. 368; *Watson v. Erie R. Co.*, 10 Ohio Dec. 454; *Brandon v. Lake Shore, etc., R. Co.*, 8 Ohio Cir. Dec. 642; *Aidt v. State*, 1 Ohio Cir. Dec. 337. See *Ashtabula Rapid Transit Co. v. Dagenbach*, 11 Ohio Cir. Dec. 307.

*Oregon*. — *Ruckman v. Imbler Lumber Co.*, 42 Oregon 231; *State v. Ogden*, 39 Oregon 195; *State v. Mims*, 36 Oregon 315; *Chan Sing v. Portland*, 37 Oregon 68; *State v. Barrett*, 33 Oregon 194. See *State v. McDaniel*, 39 Oregon 161; *Stamper v. Raymond*, 38 Oregon 16.

*Pennsylvania*. — *Born v. Philadelphia, etc., R. Co.*, 198 Pa. St. 409; *Reiter v. McJunkin*, 194 Pa. St. 301; *Card v. Columbia Tp.*, 191 Pa. St. 254; *Beardslee v. Columbia Tp.*, 188 Pa. St. 496, 68 Am. St. Rep. 883; *Miller v. Miller*, 187 Pa. St. 572; *Underhill v. Wynkoop*, 15 Pa. Super. Ct. 230; *Com. v. Kay*, 14 Pa. Super. Ct. 376.

See *Harvey v. Susquehanna Coal Co.*, 201 Pa. St. 63, 88 Am. St. Rep. 800.

*Rhode Island*.—*Granite Bldg. Corp. v. Greene*, 25 R. I. 586; *State v. Babcock*, 25 R. I. 224; *Stone v. Pendleton*, 21 R. I. 332. See *Carr v. American Locomotive Co.*, 26 R. I. 180; *Charbonnel v. Seabury*, 23 R. I. 543.

*South Carolina*.—*Morrow v. Gaffney Mfg. Co.*, 70 S. Car. 244; *Carson v. Southern R. Co.*, 68 S. Car. 55; *Jones v. Seaboard Air Line R. Co.*, 67 S. Car. 181; *Kibler v. Southern R. Co.*, 62 S. Car. 252; *Hicks v. Southern R. Co.*, 63 S. Car. 559, *rehearing* (S. Car. 1901) 38 S. E. Rep. 866; *Welch v. Clifton Mfg. Co.*, 55 S. Car. 568; *Gillman v. Florida Cent., etc.*, R. Co., 53 S. Car. 210. See *Hyland v. Southern Bell Telephone, etc.*, Co., 70 S. Car. 315; *Davis v. Collins*, 69 S. Car. 460; *Willis v. Western Union Tel. Co.*, 69 S. Car. 531, 104 Am. St. Rep. 828.

*South Dakota*.—*Henry v. Taylor*, 16 S. Dak. 424; *Ashton v. Ashton*, 11 S. Dak. 610. See *La Rue v. St. Anthony, etc., Elevator Co.*, 17 S. Dak. 91; *Olson v. Burlington, etc.*, R. Co., 12 S. Dak. 326.

*Tennessee*.—*Cumberland Tel., etc., Co. v. Dooley*, 110 Tenn. 104; *Page v. Knights, etc.*, (Tenn. Ch. 1900) 61 S. W. Rep. 1068; *Cooper v. Overton*, 102 Tenn. 211, 73 Am. St. Rep. 864; *Knights of Pythias v. Allen*, 104 Tenn. 623; *Brown v. Odill*, 104 Tenn. 250, 78 Am. St. Rep. 914. See *McKarsie v. Citizens' Bldg., etc., Assoc.*, (Tenn. Ch. 1899) 53 S. W. Rep. 1007.

*Texas*.—*Dunn v. Newberry*, (Tex. Civ. App. 1905) 86 S. W. Rep. 626; *Quinn v. Galveston, etc., R. Co.*, (Tex. Civ. App. 1905) 84 S. W. Rep. 395; *Elliott v. Ferguson*, (Tex. Civ. App. 1904) 83 S. W. Rep. 56; *Bonn v. Galveston, etc., R. Co.*, (Tex. Civ. App. 1904) 82 S. W. Rep. 808; *Missouri, etc., R. Co. v. Huddleston*, (Tex. Civ. App. 1904) 81 S. W. Rep. 64; *Oakes v. Prather*, (Tex. Civ. App. 1904) 81 S. W. Rep. 557; *Freeman v. State*, 46 Tex. Crim. 318; *Chenault v. State*, 46 Tex. Crim. 351; *Texas Southern R. Co. v. Long*, 35 Tex. Civ. App. 339; *Thurman v. State*, 45 Tex. Crim. 569; *Martin v. Texas Briqueette, etc., Co.*, (Tex. Civ. App. 1903) 77 S. W. Rep. 651; *Von Diest v. San Antonio Traction Co.*, 33 Tex. Civ. App. 577; *Dallas Electric Co. v. Mitchell*, 33 Tex. Civ. App. 424; *Poling v. San Antonio, etc., R. Co.*, 32 Tex. Civ. App. 487; *Stanley v. State*, 44 Tex. Crim. 606; *Over v. Missouri, etc., R. Co.*, (Tex. Civ. App. 1903) 73 S. W. Rep. 535; *Barnard v. State*, 45 Tex. Crim. 67; *Terry v. State*, (Tex. Crim. 1903) 72 S. W. Rep. 382; *Boyer v. St. Louis, etc., R. Co.*, (Tex. Civ. App. 1903) 72 S. W. Rep. 1038; *Frederickson v. State*, 44 Tex. Crim. 288; *Murmuth v. State*, (Tex. Crim. 1902) 67 S. W. Rep. 508; *Morton v. State*, 43 Tex. Crim. 533; *Hilje v. Hettich*, 95 Tex. 321; *Shaw v. Gilmer*, (Tex. Civ. App. 1902) 66 S. W. Rep. 679; *Hamilton v. McAuley*, 27 Tex. Civ. App. 256; *Funderburk v. State*, (Tex. Crim. 1901) 64 S. W. Rep. 1059; *Houston, etc., R. Co. v. Rippetoe*, (Tex. Civ. App. 1901) 64 S. W. Rep. 1016; *Lipscomb v. Houston, etc., R. Co.*, 95 Tex. 5, 93 Am. St. Rep. 804, *modifying* (Tex. Civ. App. 1901) 62 S. W. Rep. 954; *Texas, etc., R. Co. v. Wooldridge*, (Tex. Civ. App. 1901) 63 S. W. Rep. 905; *Rupe v. State*, 42 Tex. Crim. 477; *San Antonio v. Porter*, 24 Tex. Civ. App. 444; *Curtis v. State*, (Tex.

Crim. 1900) 59 S. W. Rep. 263; *San Antonio, etc., R. Co. v. Morgan*, 24 Tex. Civ. App. 58; *Martin v. State*, 42 Tex. Crim. 144; *Swanner v. State*, (Tex. Crim. 1900) 58 S. W. Rep. 72; *Robinson v. State*, (Tex. Crim. 1900) 57 S. W. Rep. 811; *Thompson v. State*, 42 Tex. Crim. 140; *A. J. Anderson Electric Co. v. Cleburne Water, etc., Co.*, 23 Tex. Civ. App. 328; *Clay v. State*, 41 Tex. Crim. 653; *Spangler v. State*, 41 Tex. Crim. 424; *De Walt v. Houston, etc., R. Co.*, 22 Tex. Civ. App. 403; *San Antonio, etc., R. Co. v. Lynch*, (Tex. Civ. App. 1900) 55 S. W. Rep. 517; *Marshall v. McAllister*, 22 Tex. Civ. App. 214; *Taylor v. State*, 41 Tex. Crim. 148; *Ratliff v. State*, (Tex. Crim. 1899) 49 S. W. Rep. 583; *San Antonio, etc., R. Co. v. Woodley*, 20 Tex. Civ. App. 216; *Mayton v. Sonnefield*, (Tex. Civ. App. 1898) 48 S. W. Rep. 608; *Arndt v. Boyd*, (Tex. Civ. App. 1898) 48 S. W. Rep. 771. See *Krueger v. Brenham Furniture Mfg. Co.*, (Tex. Civ. App. 1905) 85 S. W. Rep. 1156; *Chicago, etc., R. Co. v. Williams*, (Tex. Civ. App. 1904) 83 S. W. Rep. 248; *Taylor v. San Antonio, etc., R. Co.*, 36 Tex. Civ. App. 658; *International, etc., R. Co. v. Greedy*, 36 Tex. Civ. App. 536; *International, etc., R. Co. v. Villareal*, 36 Tex. Civ. App. 532; *Gatt v. Shive*, (Tex. Civ. App. 1904) 82 S. W. Rep. 303; *Sherman Oil, etc., Co. v. Dallas Oil, etc., Co.*, (Tex. Civ. App. 1903) 77 S. W. Rep. 961; *Montgomery v. State*, 45 Tex. Crim. 373; *Davison v. State*, 44 Tex. Crim. 586; *Galveston, etc., R. Co. v. Collins*, 31 Tex. Civ. App. 70; *St. Louis Southwestern R. Co. v. Byers*, (Tex. Civ. App. 1902) 70 S. W. Rep. 558; *Spars v. State*, (Tex. Crim. 1902) 69 S. W. Rep. 533; *Gulf, etc., R. Co. v. Steele*, 29 Tex. Civ. App. 328; *Schuwirth v. Thumma*, (Tex. Civ. App. 1902) 66 S. W. Rep. 691; *Ash v. Fidelity Mut. L. Assoc.*, 26 Tex. Civ. App. 501; *Ft. Worth, etc., R. Co. v. Harlan*, (Tex. Civ. App. 1901) 62 S. W. Rep. 971; *Matkins v. State*, (Tex. Crim. 1901) 62 S. W. Rep. 911; *Spangler v. State*, 42 Tex. Crim. 233; *Tollett v. State*, (Tex. Crim. 1901) 60 S. W. Rep. 964; *Galveston, etc., R. Co. v. Eckles*, 26 Tex. Civ. App. 179; *Paul v. Chenault*, (Tex. Civ. App. 1900) 59 S. W. Rep. 579; *International, etc., R. Co. v. Newburn*, (Tex. Civ. App. 1900) 58 S. W. Rep. 542, *affirmed* 94 Tex. 310; *Supreme Council, etc., v. Landers*, 23 Tex. Civ. App. 625; *Neely v. State*, (Tex. Crim. 1900) 56 S. W. Rep. 625; *Vogt v. Geyer*, (Tex. Civ. App. 1898) 48 S. W. Rep. 1100; *Galveston, etc., R. Co. v. Bohan*, (Tex. Civ. App. 1898) 47 S. W. Rep. 1050.

*Utah*.—*Meyers v. Highland Boy Gold Min. Co.*, 28 Utah 96; *Black v. Rocky Mountain Bell Telephone Co.*, 26 Utah 451; *Jensen v. McCormick*, 26 Utah 142; *Nichols v. Oregon Short Line R. Co.*, 25 Utah 240; *Reese v. Morgan Silver Min. Co.*, 17 Utah 480.

*Vermont*.—*Wilmington Sav. Bank v. Waste*, 76 Vt. 331.

*Virginia*.—*Norfolk, etc., R. Co. v. Briggs*, 103 Va. 105; *House v. House*, 102 Va. 235.

*Washington*.—*State v. Stockhammer*, 34 Wash. 262; *De Wald v. Ingle*, 31 Wash. 616, 96 Am. St. Rep. 927; *State v. Roller*, 30 Wash. 692; *State v. Gates*, 28 Wash. 689. See *Tilden v. Gordon*, 34 Wash. 92; *State v. Norris*, 27 Wash. 453.

*Wisconsin*.—*Lounsbury v. Davis*, (Wis.



1905) 102 N. W. Rep. 941; *J. V. Le Clair Co. v. Rogers-Ruger Co.*, (Wis. 1905) 102 N. W. Rep. 346; *John O'Brien Lumber Co. v. Wilkinson*, 123 Wis. 272; *Miles v. Stanke*, 114 Wis. 94; *Waupaca Electric Light, etc., Co. v. Milwaukee Electric R., etc., Co.*, 112 Wis. 469; *Yerkes v. Northern Pac. R. Co.*, 112 Wis. 184, 88 Am. St. Rep. 961; *Doan v. Willows Springs*, 101 Wis. 112. See *Lightfoot v. Winnebago Traction Co.*, 123 Wis. 479; *Strasser v. Goldberg*, 120 Wis. 621.

*Canada.*—*Smith v. Mason*, 1 Ont. L. Rep. 594. See *Doland v. Grand Valley Irrigation Co.*, 28 Colo. 150.

**Knowledge, Intention, Purpose, or Mental Attitude of Third Persons.**—A witness cannot ordinarily testify as to the knowledge of a fact possessed by another. Whether such other person had the knowledge in question is a conclusion to be drawn, not by the witness, but by the jury. *Ashford v. Ashford*, 136 Ala. 631, 96 Am. St. Rep. 82; *Hager v. National German-American Bank*, 105 Ga. 116; *State v. Worthen*, 111 Iowa 267; *International, etc., R. Co. v. Bearden*, 31 Tex. Civ. App. 58.

Thus, a witness who has related a conversation which he had with a third person, and stated where the plaintiffs were when it took place, will not be permitted to testify that he thought the plaintiffs overheard the conversation. *Urdangen v. Doner*, 122 Iowa 533.

But in an action to recover damages for personal injuries sustained by the plaintiff while a passenger on the defendant's street car, by being struck by a marble slab which projected from a passing wagon that collided with the car, it was held that, on the question of the plaintiff's contributory negligence, it was competent to admit the testimony of a witness, who was on the other side of the car, to the effect that he both saw and heard the collision, and that, in his opinion, it made a noise loud enough to be heard by any one in the car who had hearing at all. *Jones v. United R., etc., Co.*, 99 Md. 64.

Testimony that a certain thing was seen by another is not competent evidence. *Handley v. Missouri Pac. R. Co.*, 61 Kan. 237. Thus, in an action to recover for injuries sustained by the plaintiff while working for the defendant as a section hand, by being run over by a hand car, it was held proper to exclude the testimony of a witness that the plaintiff knew of the approach of the hand car in time to enable him to get out of the way. *Chicago, etc., R. Co. v. Long*, 26 Tex. Civ. App. 601.

And in an action to recover damages for physical injuries sustained by the plaintiff while she was attempting to board the defendant's train with her children and for mental suffering in consequence of being separated from the children, it was held that the testimony of a witness that the ticket agent saw the children before he gave them the tickets, was the statement of a fact and not the conclusion of the witness. *International, etc., R. Co. v. Anchonda*, 33 Tex. Civ. App. 24.

A witness cannot be permitted to answer a question as to what was the understanding of others with reference to a business transaction. *Crusoe v. Clark*, 127 Cal. 341.

In an action to recover the amount due on

an account stated, the testimony of the agent and adjuster who represented to the plaintiff that the defendant fully understood that he owed and was to pay the plaintiff the amount of the balance was held to be incompetent; what the defendant understood was a mere conclusion of the witness and inadmissible. *Plano Mfg. Co. v. Kautenberger*, 121 Iowa 213.

While a witness cannot ordinarily testify to the understanding of the parties to a conversation in effecting a contract, testimony as to the "understanding" may be admissible when the word is evidently used in the sense of agreement. *Mallory Commission Co. v. Elwood*, 120 Iowa 632.

It is not competent for a witness to testify directly as to another's intentions. *Durrence v. Northern Nat. Bank*, 117 Ga. 385; *Watson v. Butterfield Min. Co.*, 24 Utah 222.

Thus, it has been held that witnesses could not be permitted to state their conclusions as to what was the purpose and intention of the grantor in a deed. *McKnight v. Reed*, 30 Tex. Civ. App. 204.

And in an action brought to recover for services alleged to have been rendered by the plaintiff to the defendant's testatrix during her lifetime, the testimony of the plaintiff that the testatrix, who had left the plaintiff a legacy, intended to pay the plaintiff otherwise than by the legacy was held to be incompetent. *Farrington v. Minturn*, 70 N. J. L. 627.

But in an action involving the question whether there had been a dedication of a certain road, it was held proper to admit the testimony, as to the intention of the owners of the land, of a witness who, at the time of the alleged dedication, was a partner of one of the proprietors in the business of selling land, and, as such, was the agent of the proprietors, and must have known the intention of his principals in respect to the dedication of the road. *Spencer v. Peterson*, 41 Oregon 257.

A witness should not be permitted to testify directly and without qualification that another acted in good faith and without notice. *Durrence v. Northern Nat. Bank*, 117 Ga. 385.

A witness may not state the purpose of a corporation in doing a certain act; the purpose is only to be inferred by the jury from conversations, acts, and conduct. *Wooley v. Maynes, etc., Co.*, 18 Utah 232.

A question asked a witness as to why a bank required a certain indorsement of a note was held to have been properly disallowed for the reason that it did not call for a fact but merely for a reason. *Lytle v. Dothan Bank*, 121 Ala. 215.

It has been held that it was error to permit a witness in a trial for murder to express an opinion that the defendant was envious of the deceased. *People v. Dowd*, 127 Mich. 140.

Questions as to whether the testatrix was a person easily influenced; as to what influence her uncle and aunt exercised over her; to what extent she had been influenced by her aunt; whether she was afraid of her uncle, and other like questions, have been held to have been properly excluded on the ground that the questions did not call for facts, but for mere opinions and conclusions from facts. *Michael v. Marshall*, 201 Ill. 70. And it has been held



that a witness cannot properly be asked as to a testator's attitude of mind as regards his wife. *Vivian's Appeal*, 74 Conn. 257.

**Belief or Understanding, Intention or Purpose of Witness.** — A witness cannot testify to what he simply thought, or his undisclosed belief. See *Wabash R. Co. v. Smillie*, 97 Ill. App. 7. Thus it has been held that a witness cannot be permitted to state what he understood by a remark made by another. *State v. Anderson*, 30 Wash. 14.

Where a witness had testified to all that was said and done at the time of a sale of personality, it was held that it was not error to refuse to allow him to state to whom he thought the sale was made. "The inference or understanding to be properly drawn from what occurred at that time was to be determined by the court and jury, and the unexpressed thought or understanding of the witness was wholly immaterial." *Gentry v. Singleton*, (C. C. A.) 128 Fed. Rep. 679.

It is error to permit a witness to state the understanding which he obtained from a conversation, or the impression which it made upon him, instead of requiring him to testify to the substance of the conversation. *Larkinsville Min. Co. v. Flippo*, 130 Ala. 361; *Diehl v. State*, 157 Ind. 549. But, although a witness is not permitted to state the impression made on him by a conversation, he may give the substance of the conversation, without repeating the exact language used. *Green v. State*, 96 Md. 384.

The belief of a witness may sometimes be a material inquiry so as to be admissible in evidence. Thus, in an action to recover for damages accruing to the plaintiff in consequence of the alleged negligence of the defendants in burning grass, it was held that the testimony of one of the defendants that he did not think that there was any danger in burning the grass was admissible. *Dunn v. Newberry*, (Tex. Civ. App. 1905) 86 S. W. Rep. 626.

And it has been held in an action to recover damages for injuries alleged to have been received in passing along a defective sidewalk, that the plaintiff was properly asked whether or not she thought, when she attempted to pass over the walk, that she could do so with safety in view of her knowledge of its condition. It was said that "her thought about the matter was a material inquiry. If she knew the walk was unsafe, and that it was imprudent for her to attempt to pass over it, it was her duty to take another one. But knowledge of its unsafe condition was not enough, as a matter of law, to require her to take another route. It should also appear that she knew, or ought to have known, that it was imprudent for her to attempt to pass over it." *Yeager v. Spirit Lake*, 115 Iowa 593.

The belief of the accused as to the apparent necessity to kill in order to save his own life or protect him from great personal injury must be based on facts and circumstances justifying such belief, and where the evidence authorizes the submission of this question to the jury, the belief of the accused is material, and it is error to refuse to permit him who is permitted by statute to become a witness in his own behalf to testify to his belief based on such facts and circumstances. *Lane v. State*, 44 Fla. 105.

Thus, it has been held that it is proper for an accused person, who takes the witness stand in his own behalf, to state the facts transpiring just prior to and at the time he killed the deceased, and the further fact that because of these circumstances he entertained then and there the belief that he was about to be killed by the deceased, and acted under that belief when he, himself, shot the deceased. *State v. Austin*, 104 La. 409.

It has been held that the defendant in an action for malicious prosecution may testify as to whether he was influenced by malice in bringing the prosecution. *Autry v. Floyd*, 127 N. Car. 186.

In an action by a physician to recover for medical services, a witness, when asked which of two men directed the injured man to be taken to the doctor, answered: "My impression is that it was J. That is what I think." The defendant objected to the evidence, but the court held that it was admissible on the ground that the witness was really testifying to a fact, not to an opinion, and was entitled to give his evidence in the form in which he gave it if he could not do better. *Harris v. Fitzgerald*, 75 Conn. 72.

The testimony of witnesses as to their secret or undisclosed intentions or motives has sometimes been excluded. Thus, in an action by a real estate agent to recover a commission the court refused to permit the plaintiff to answer this question: "As a real estate agent, for whom were you acting in this sale?" It was held that the ruling was correct for the reason that, under the circumstances of the case, the question called for a statement of the plaintiff's undisclosed purpose instead of a statement of a fact. *Downing v. Buck*, 135 Mich. 636, 10 Detroit Leg. N. 910.

And in an action to recover damages for the negligent killing of the plaintiff's intestate by being run over by the defendant's switch engine, the engineer was asked whether the engine was wantonly or recklessly managed. It was held that the question was properly disallowed, for the reason that the witness could not properly be interrogated as to his private intentions or motives in operating his engine, but merely as to the facts tending to show his motives. *Louisville, etc., R. Co. v. Banks*, 132 Ala. 471.

A defendant in attachment who had testified, when examined as a witness on behalf of the claimant, that he had bought the cow levied upon, was asked by the claimant on the re-direct examination "for whom the cow attached was bought." The witness was not permitted to answer. This ruling was sustained on the ground that the question called for a conclusion of the witness, which embraced a secret or undiscovered intention at the time of the purchase of the cow. *Arnold v. Cofer*, 135 Ala. 364.

In an action to recover possession of certain goods which had been sold by the plaintiff to the defendant under a contract providing that payment should be made in cash when the goods were delivered, it was claimed by the defendant that there had been a waiver by the plaintiff of the provision for cash payment on delivery. The admission of testimony by the plaintiff that he did not intend to part with the

goods except for cash was held to be error. *Witte Mfg. Co. v. Reilly*, 11 N. Dak. 203.

Where it was proposed to prove by a husband that "at no time had he and his wife intended to ratify and adopt" a sale to himself by an administrator of land in which the wife had an interest as heir at law, it was held that such testimony was rightly excluded by the court. *Carey v. Moore*, 119 Ga. 92.

But a witness may frequently be permitted to testify to his motive, intention, and state of mind. Thus, it has been held that the defendant in a prosecution for burglary may testify as to his intent. *State v. Tough*, 12 N. Dak. 425.

The theory of the state on a trial for murder being that the defendant and his father had gone to the plantation of the deceased with a view to precipitating a difficulty, it was held that the father, who had been separately indicted for the same homicide, when put on the stand in behalf of the son, might testify that he "did not intend to have any difficulty." *Alexander v. State*, 118 Ga. 26.

In an action involving the question whether there had been a waiver by a mortgagee of his mortgage lien, it was held to be error not to permit the mortgagee to testify as to his intention about waiving the lien. *Mayers v. McNeese*, (Tex. Civ. App. 1902) 71 S. W. Rep. 68.

In an action to set aside a decree foreclosing a vendor's lien it was held that it was not error to permit officers of a corporation to testify that they had no intention to defraud the corporation in accepting service of citation. *Fox v. Robbins*, (Tex. Civ. App. 1902) 70 S. W. Rep. 597.

In an action on promissory notes it was held to be proper to permit a witness, who was a director in the plaintiff bank, to testify that he thought that he was lending the money to the defendant company, there being two firms of the same name. *Farmers' Bank v. Saling*, 33 Oregon 394.

**Good Faith of Witness.** — On the question of whether the plaintiff was a passenger it was held that he might testify that he was riding on the train in good faith. *Fitzgibbon v. Chicago, etc., R. Co.*, 119 Iowa 261.

Where the question whether one entered into possession of land in good faith is involved in a case, it is competent for him to testify affirmatively that he paid for it in good faith. *Acme Brewing Co. v. Central R., etc., Co.*, 115 Ga. 494.

**Knowledge of Witness.** — The testimony of the plaintiff in an action to recover for injuries received by being run over by a street car, that he was not aware that the car was moving on or toward him before it struck him, has been held not to be the statement of a conclusion but of a concrete fact. *Birmingham R., etc., Co. v. Jackson*, 136 Ala. 270.

**Probable Conduct of Witness under Given Circumstances.** — A witness cannot be permitted to express an opinion as to what his conduct would have been in a hypothetical case. *Yerkes v. Northern Pac. R. Co.*, 112 Wis. 184; *Hill v. American Surety Co.*, 107 Wis. 19, rehearing denied 107 Wis. 32.

But in an action to recover for personal injuries received by being struck by one of the

defendant's trains, while walking on its track, in consequence of the alleged negligence of those in charge of the train in failing to ring the bell or blow the whistle, it was held that it was error to permit the plaintiff to state what he would have done had he heard the whistle. *International, etc., R. Co. v. Davis*, (Tex. Civ. App. 1905) 84 S. W. Rep. 669.

**Testimony Relating to Conversations.** — A witness cannot be permitted to state what certain persons, who were engaged in a conversation which he did not hear, were talking about. *McClure v. State*, (Tex. Crim. 1899) 53 S. W. Rep. 111.

It has been held that the defendant in an action for malicious prosecution will not be permitted to testify that he related to his counsel, before instituting the criminal prosecution, all the facts and circumstances within his knowledge, as it would be the statement of a mere conclusion, which it is the province of the jury to draw from the entire evidence adduced on the trial. *Jensen v. Halstead*, 61 Neb. 249.

It has been held that it was proper to exclude a question asking a witness, who had testified to a conversation, whether the whole of the conversation was correctly embodied in a written document in evidence. "The question called for something that the court and jury were to pass upon, not the witness, and his opinion was not admissible." *Union State Bank v. Hutton*, (Neb. 1901) 95 N. W. Rep. 1061.

It has been held that the trial court properly ruled against questions asked a witness as to whether the plaintiff and defendant "disputed" or "agreed" in a conversation had between them. The question, it was said, called for a conclusion or opinion of the witness. *Fields v. Copeland*, 121 Ala. 644.

**Character and Habits of Industry.** — The individual opinion of a witness as to the character of a person is not admissible on the question of reputation. *State v. Thoenke*, 11 N. Dak. 386. See the title CHARACTER IN EVIDENCE, 5 AM. AND ENG. ENCYC. OF LAW (2d ed.) 881, note 1.

But it has been held that in an action to recover damages for the death of a person by a wrongful act, a witness may testify as to what were the habits of the deceased, in respect to industry. *Wilcox v. Wilmington City R. Co.*, 2 Penn. (Del.) 157.

Testimony that the plaintiff in an action to recover for personal injuries was a hard-working woman has been held to be the statement of a fact and not of a conclusion. *St. Louis, etc., R. Co. v. Smith*, 34 Tex. Civ. App. 612.

It has been held in a suit by a wife to recover for the wrongful death of her husband, that the plaintiff was properly permitted to testify that the deceased was industrious. The testimony was not merely the expression of an opinion; the habit of industry is a fact to be established by any one having knowledge. *Pearl v. Omaha, etc., R. Co.*, 115 Iowa 535.

**Deadly Character of Weapon.** — It has been held that any witness, after examining a physical instrument, may testify to the opinion that it is a deadly weapon. *Perry v. State*, 110 Ga. 234.

But see *Moran v. State*, 120 Ga. 846, holding that whether a stick exhibited to the jury was



a deadly weapon was not matter to be proved by the opinion of a nonexpert, the jury being as competent as the witness to determine whether it was an instrument likely to produce death. And see *McDuffie v. State*, 121 Ga. 580.

**Dangerous Character of Place.**—The opinions of witnesses as to the dangerous character of a place are not admissible when there is nothing in the situation which a brief description will not enable the jury fully to understand. *McDonald v. Duluth*, 93 Minn. 206; *Siegler v. Mellinger*, 203 Pa. St. 256; *Salsberg v. Dallas*, 10 Kulp (Pa.) 47; *Seifred v. Pennsylvania R. Co.*, 206 Pa. St. 399; *Marshall v. McAllister*, 22 Tex. Civ. App. 214.

Where the plaintiff was injured by a piece of glass which fell from a window of the defendant's building, it was held that it was not proper to ask a witness whether she thought the window was safe. *Detzur v. B. Stroh Brewing Co.*, 119 Mich. 282.

The opinions of witnesses as to whether a road, sidewalk, or street was in a safe or unsafe condition are ordinarily not admissible in actions to recover for personal injuries alleged to have been received in consequence of the defective condition of the place in question. *Milledgeville v. Wood*, 114 Ga. 370; *Holton v. Hicks*, 9 Kan. App. 179; *Lindley v. Detroit*, 131 Mich. 8; *Brown v. Owosso*, 130 Mich. 107; *Bradley v. Spickardsville*, 90 Mo. App. 416; *Metz v. Butte*, 27 Mont. 506; *Closser v. Washington Tp.*, 11 Pa. Super. Ct. 112; *Gordon v. Sullivan*, 116 Wis. 543.

Where the plaintiff was injured by stepping into a hole in a grating which covered an opening in a sidewalk, it was held that the testimony of a witness that the grating was too light was a mere conclusion and inadmissible. *Lentz v. Dallas*, 96 Tex. Civ. App. 258, *reversing* (Tex. Civ. App. 1902) 69 S. W. Rep. 166.

And so too it is not permissible for a witness to state his "conclusion," drawn from facts testified to by him, that, at the place where the plaintiff's intestate attempted to cross the defendant's railroad track, there was less danger to a pedestrian than there was at a near-by crossing. *Savannah, etc., R. Co. v. Evans*, 121 Ga. 391.

But the testimony of witnesses that a sidewalk was in a rotten, shaky, and bad condition, was not open to the objection that it was the mere expression of an opinion. *Harrison v. Ayrshire*, 123 Iowa 528.

In an action to recover the value of a mule alleged to have been negligently killed by the defendant railroad company, it was held to be error to permit witnesses to testify to their conclusion that the place at which the mule was killed was a "dangerous" place for killing stock, and that it could be closed up by a fence constructed in a particular manner. *Southern Kansas R. Co. v. Cooper*, 32 Tex. Civ. App. 592.

In quo warranto proceedings brought for the purpose of forfeiting the charter of the defendant road company it was held to be error to allow witnesses to give their opinion as to whether the roadbed of the defendant was reasonably safe and fit for travel. *People v. Detroit, etc., Plank-Road Co.*, 125 Mich. 366, 7 Detroit Leg. N. 548.

Where the evidence was conflicting as to

whether the plaintiff's foot was caught between the switch-rail and the rail of the main line of the defendant's railroad, or was thrust into a hole under the main line rail and was crushed by the rail when pressed down by the car running over it, it was held that testimony that there was no connection between the plaintiff's being hurt and the switch-rail was nothing more than permitting the witness to state what the fact was. *San Antonio, etc., R. Co. v. Brooking*, (Tex. Civ. App. 1899) 51 S. W. Rep. 537. See also *infra*, this title, 488, 9.

**Condition of Repair of House.**—It has been held to be proper to refuse to permit a witness to testify whether a house which has been destroyed by fire was in good repair, because merely an opinion. *McMahon v. Dubuque*, 107 Iowa 62, 70 Am. St. Rep. 143.

**Condition of Machines or Appliance.**—In an action to recover for damages sustained in a collision at a crossing, it was held that witnesses for the plaintiff were properly permitted to state that they had been over the crossing frequently on the night of the accident, and that the semaphore at that place was in good working order and working all right. *Chicago, etc., R. Co. v. Vipond*, 212 Ill. 199, *affirming* 112 Ill. App. 558.

On the question whether the plaintiff was chargeable with knowledge of the defective condition of the cover to the manhole of a sewer, by which the injury sued for was alleged to have been caused, it was held that a witness might testify that there was nothing about the sewer hole or about the cover to indicate where it was getting too weak for a person to step upon, and that it would require a personal inspection of the cover to ascertain whether or not it was in a disintegrated condition. The testimony was not objectionable on the ground that it was an expression of opinion by the witness. *Allen B. Wrisley Co. v. Burke*, 203 Ill. 250.

**Condition of Goods Shipped.**—In an action to recover damages against a carrier for negligence in carrying a consignment, it has been held that the testimony of a witness as to the condition of the goods when they reached the destination is not objectionable as being a mere conclusion of the witness. *Illinois Cent. R. Co. v. Foulks*, 191 Ill. 57, *affirming* 92 Ill. App. 391.

**Possibility of Discovering Defect in Sidewalk.**—In an action against a village to recover damages for personal injuries, in consequence of a sidewalk being defective, a witness for the defendant was asked how it could be possible to disclose a defect previous to the accident. It was held that the court correctly sustained an objection to the question. "The matter of inquiry was not to determine how a defect in the plank could possibly be discovered, but whether under the conditions and circumstances shown by the evidence, the defendant, in the exercise of ordinary care, could have discovered and repaired the defective walk. The question called for a conclusion of the witness upon facts to which he testifies. To allow this would invade the province of the jury. The purpose and effect would be to substitute the judgment of the witness for that of the jury." *Upper Alton v. Green*, 112 Ill. App. 439.

**Vicious Character of Animal.**—In an action to



recover damages for injuries sustained by being bitten by dogs, it was held that it was not error to refuse to permit witnesses to answer questions which called for mere conclusions of the witnesses as to the character of the dogs, and as to whether, in the opinion of the witness, he had any reason to suppose the dogs were of a ferocious nature. *Chicago, etc., R. Co. v. Kuckkuck*, 197 Ill. 304.

**Profane Character of Language Used.**—Where articles of impeachment are preferred against a policeman, one of the specifications charging him with "cursing and using profane and vulgar language" in and about the guardhouse, it is error to allow a witness to testify, over proper objection of the defendant, that witness had heard defendant use language which witness "considered profane and vulgar and cursing," without stating literally or in substance what was the language used. Whether such language was in fact vulgar, profane or cursing, was a matter to be determined by the court. *Lamb v. Brunswick*, 121 Ga. 345.

**Character of House.**—It has been held that the testimony of a witness that he walked "into a gambling house" was not objectionable as being a mere opinion or conclusion. *State v. Williams*, 111 La. 205.

**Ownership.**—It has been said that the ownership of property is ordinarily a simple fact to which a witness having the requisite knowledge may testify directly. *Hunnicut v. Higginbotham*, 138 Ala. 472, 100 Am. St. Rep. 45; *Olson v. O'Connor*, 9 N. Dak. 504, 81 Am. St. Rep. 595.

On the ground that the title to personal property is ordinarily a simple fact to which a witness having the requisite knowledge can testify directly, witnesses are frequently permitted to testify as to who owns a particular chattel. *Rasco v. Jefferson*, (Ala. 1905) 38 So. Rep. 246; *Muller v. Abramson*, (Supm. Ct. App. T.) 25 Misc. (N. Y.) 520.

Thus, it has been held that the plaintiff in an action to recover damages for conversion of personal property may testify that the property was hers, even though the question of her ownership was for the ultimate determination of the jury. *Pichler v. Reese*, 171 N. Y. 577, *affirming Simon v. Reese*, 50 N. Y. App. Div. 621.

And it has been held that the understanding of one of the parties interested in the purchase of certain coal was admissible upon the question of the ownership of the coal. *Union Hosiery Co. v. Hodgson*, 72 N. H. 427.

In holding that the defendant in an action for slander was properly permitted to state that certain property belonged to him, it was said that it was the statement of a fact as well as an opinion. *Murphy v. Olberding*, 107 Iowa 547.

Even when direct testimony is not admissible the fact that a witness has given direct testimony as to ownership is not reversible error if the testimony is subsequently qualified by a statement of the facts relative to it, or tending to show ownership, and upon which the testimony was based. *Olson v. O'Connor*, 9 N. Dak. 504, 81 Am. St. Rep. 595.

But it has been held that when ownership is a material and ultimate fact to be determined

in an action, and is controverted upon the trial, the witnesses should testify to the principal facts within their knowledge which bear upon such question, and not give their mere opinions and conclusions thereon. *Olson v. O'Connor*, 9 N. Dak. 504, 81 Am. St. Rep. 595.

It has been held that the ownership of personal property levied upon in execution by the judgment debtor could not be established by the conclusion of a witness. *Cullers v. Gray*, (Tex. Civ. App. 1900) 57 S. W. Rep. 305.

In an action to recover possession of certain personal property, the defendant claimed title and right of possession under a contract of purchase from D. D., while a witness stated that he was the owner. In holding that the testimony was clearly a conclusion and therefore improper, the court said: "There are cases where one may state the fact as to whether or not he is or was the owner of the property, but this is not one of them. To allow a witness in such a case as this to state that he was the owner at a certain time would be to permit him to decide the very matter at issue. It was for the court and jury to determine this question." *A. A. Cooper Wagon, etc., Co. v. Barnt*, 123 Iowa 32.

It has been held that the testimony of a party to a suit that he was the owner of certain land was only an opinion, and incompetent, as title to land cannot be established in that way. *Benson v. Files*, 70 Ark. 423.

And it has been held to be proper to refuse to allow a witness to state who owned certain real property, or whose money went into the property. *Gonzales v. Adoue*, (Tex. Civ. App. 1900) 56 S. W. Rep. 543, *reversed* on another point 94 Tex. 120.

But in trespass to try title to land involving the question whether the property was the separate property of a married woman, it was held to be error to exclude testimony that the land was paid for with her separate property. *Barrett v. Eastham*, 28 Tex. Civ. App. 189.

It has been held that it was proper to exclude testimony as to whether a bank with which certain promissory notes had been deposited as collateral security exercised any acts of ownership over the notes. *Red River Valley Nat. Bank v. Monson*, 11 N. Dak. 423.

In an action involving a question as to the ownership of certain certificates of deposit, the testimony of the cashier of a bank as to how the certificates of deposit were left with him, and for whom he was handling them, was held to have been properly excluded. "It was for the jury to determine, from what was said and done, whom this deposit was made by, and for whom it was held." *Mains v. Webber*, 131 Mich. 213, 9 Detroit Leg. N. 269.

**Possession of Realty.**—When it is material to an issue on trial, a witness may testify who was in the actual possession of designated realty at a given time. *Carney v. Hennessey*, 74 Conn. 107, 92 Am. St. Rep. 199; *Sweeney v. Sweeney*, 121 Ga. 203; *Baltes Land, etc., Co. v. Sutton*, 32 Ind. App. 14.

A witness may be asked who was in possession of a tract of land at a particular date. Unless there is something in the form of a question or of the previous questions put to witnesses indicating that the word is used in

the narrow sense of "seizin" the question is unobjectionable. *Nathan v. Dierssen*, 146 Cal. 63.

Thus it has been held that it is proper to permit witnesses in an action of ejectment involving a question of adverse possession to state who was "in possession" and who was "in control" of the premises. *Knight v. Knight*, 178 Ill. 553.

The statement by a witness that he was in possession of certain land is a statement of a collective fact and not of an opinion or conclusion. *Wright v. State*, 136 Ala. 139.

It has been held that the testimony of a witness as to who occupied a certain room was not objectionable on the ground that it was a mere conclusion of the witness. *State v. Brundige*, 118 Iowa 92.

But it has been held that, in an action of ejectment wherein the defendant relied on adverse possession for seven years under color of title, it was not erroneous to refuse to permit a witness for the defendant to testify that its possession was notorious. The testimony would have been simply as to a conclusion of the witness. *Acme Brewing Co. v. Central R., etc., Co.*, 115 Ga. 494.

In the trial of a claim case in which the plaintiff in a *fi. fa.* undertook to show that the defendant in *fi. fa.* had been in possession of the property at the time of levy, it was held that it was error to allow a witness to testify, over the objection of the claimant, that it was his understanding that the defendant was in possession, and that defendant "seemed" to be in possession. These were conclusions of the witness, and he should have been made to give the facts within his knowledge, in order that the court might determine whether such facts showed that defendant was in possession. *Howell v. Simpson Grocery Co.*, 121 Ga. 461.

**Occupation of Room under Homestead Law.** — In a case involving a question of homestead exemption, it was held that the claimant should not have been allowed to testify that he reserved a part of the house "to live in;" whether the reservation, if there was any, was for the purpose of continued occupation as a home was to be gathered from the tangible facts and circumstances in evidence. *Bland v. Putman*, 132 Ala. 613.

**Claim of Title.** — It has been held in an action of trespass to try title that a witness may testify that the property was claimed by a certain person. *Rice v. Melott*, 32 Tex. Civ. App. 426.

And it has been held not to be error to permit the plaintiff in a suit to try title to land, to testify as to whether he had ever known of any one setting up a claim to the land in controversy until the claim in his suit. *Boston v. McMenamy*, 29 Tex. Civ. App. 272.

**Insolvency.** — It has been held that a witness cannot be permitted to give his opinion as to the solvency of a person or concern; he must testify to facts showing solvency or insolvency. *Pioneer Sav., etc., Co. v. Peck*, 20 Tex. Civ. App. 111.

Thus it has been held to be error to admit the testimony of a bank examiner on the trial of a defendant for receiving a deposit after the insolvency of the bank of which he was cashier, to the effect that the bank was insolvent at the

time when its doors were closed pursuant to the direction of the defendant. *State v. Stevens*, 16 S. Dak. 309.

On the other hand it has been held that the general manager of a corporation may testify as to whether it is or is not solvent. Insolvency is one of those general facts, like possession, value, and others of like character, which in many cases can be directly testified to by one in a position to know, without the items of fact on which the general statement is based being first disclosed. *Campbell v. Park*, (Iowa 1904) 101 N. W. Rep. 861.

It has been held that when a witness has stated facts showing that a person was insolvent, his additional statement in the same connection that he was insolvent is harmless. *Davis v. Davis*, 20 Tex. Civ. App. 310.

**Payment.** — It has been held that a witness could not be asked whether he made a certain payment, when the question goes directly to and involves the identical question to be tried; the witness should be asked to state the facts constituting the payment. *Hicks v. Williams*, 112 Iowa 691.

Where the defendant introduced evidence tending to show a payment made on the claim sued on, by the purchase and satisfaction of a mortgage by the decedent upon the property of the plaintiff, said mortgage having been paid for by the decedent giving his own individual checks therefor, it was error to allow the plaintiff upon rebuttal to answer the question of her counsel, "Now, whose money actually paid off that loan?" *Moyer v. Knapp*, 9 Kan. App. 226.

**Settlement of Claim for Insurance.** — In an action for damages under an insurance policy, it was held that a question asking the secretary of the insurance company as to whether he had made a settlement with the insured, was properly excluded as calling for an opinion of the witness. *Norris v. Equitable F. Assoc.*, (S. Dak. 1905) 102 N. W. Rep. 306.

**Negligence.** — A witness cannot testify as to his opinion on the question of the defendant's negligence. *Fitch v. Mason City, etc., Traction Co.*, 116 Iowa 716.

A question which calls for the opinion of a witness on the existence of prudence under given circumstances is not permissible. *Huachuca Water Co. v. Swain*, 4 Ariz. 113.

**Contributory Negligence.** — Witnesses cannot be allowed to express an opinion as to whether the plaintiff in an action to recover for personal injuries was negligent. *Little Rock Traction, etc., Co. v. Nelson*, 66 Ark. 494; *St. Louis, etc., R. Co. v. Nelson*, 20 Tex. Civ. App. 536.

Thus, in an action by an oil-well shooter to recover damages sustained by the explosion of the nitroglycerine with which he worked, it was held that a witness could not testify whether, in his opinion, it was ordinary care and prudence in that business for a shooter, when the sun was shining, to allow his wagon, in the condition it was usually in, to stand open when he had taken out the cans; since such interrogatories called for the determination of an issue which was for the jury. It was said that if the witness had been qualified, he could have sworn to the chemical action of the sun's rays on the nitroglycerine in the wagon, but it would



not be for him to say whether such exposure was negligence, as that was an inference to be drawn from the circumstances proven. *Bradford Glycerine Co. v. Kizer*, (C. C. A.) 113 Fed. Rep. 894.

In an action for the death of the plaintiff's intestate, a brakeman who was alleged to have been killed while in the defendant's employ by being struck by the arm of a mail crane erected on the side of the road, it was held that the trial court erred in allowing testimony that it was not improper or an act of carelessness for a brakeman to sit on top of a car at the side, with his feet hanging down. The court said that "it was proper to prove by the witnesses what the custom was in regard to sitting on the side of cars, and all facts known to the witnesses showing the reasons for it. But the conclusion whether it was proper or improper for a brakeman to ride in this way on the side of a rapidly moving train, considering the objects along the side of the track and the other dangers incident thereto, was a question for the jury, to be determined by common knowledge and observation, and not from the opinion of witnesses, to whose judgment the jury might defer, instead of exercising their own, as the law contemplates they should do." *Louisville, etc., R. Co. v. Milliken*, (Ky. 1899) 51 S. W. Rep. 796.

The plaintiff in an action to recover damages for personal injuries cannot, of course, be permitted to indicate to the jury his opinion on the question of his own negligence. *Texas Southern R. Co. v. Long*, 35 Tex. Civ. App. 339.

It has been held to be error to permit a plaintiff in an action to recover for personal injuries to testify that she "was going carefully" when injured by falling into a hole in a defective sidewalk. *Litchfield v. Anglim*, 83 Ill. App. 55.

In an action to recover for injuries sustained by the plaintiff in consequence of being thrown out of his wagon which came in collision with the car of the defendant railroad company as he was driving across a street, it was held that the court properly refused to allow the plaintiff to answer a question as to what his judgment was as to whether there was a chance for him to cross the track of the defendant, he having already testified that he had formed such a judgment. "Whether the plaintiff was negligent or not did not depend upon the plaintiff's judgment, but upon that of the jury whose duty it was to decide whether he showed the caution which a man of ordinary prudence would observe." *Whitman v. Boston El. R. Co.*, 181 Mass. 138.

In an action to recover for injuries sustained while crossing a street, by being run over by the defendant's sleigh, it was held that the plaintiff was properly allowed to testify that before attempting to cross he looked up and down the street, saw no one but the defendant coming toward him, and thought he would have plenty of time. *McCrohan v. Davison*, 187 Mass. 466.

**Estimates of Lapse of Time.** — As to the value of testimony as to the lapse of time, see *Desrosiers v. Bourn*, 26 R. I. 156.

**Depth of Hole.** — In an action for injuries sus-

tained by stepping into a hole in the defendant's street, it was held that the fact that witnesses merely estimated the depth of the hole by visual observation, instead of actually making mechanical measurements, while it affected the weight to be given to their testimony by the jury did not render such testimony incompetent. *Miller v. New York*, 104 N. Y. App. Div. 33.

**Sufficiency of Time Limited for Doing Work.** — It has been held that it was not error to refuse to permit a witness to state his opinion as to whether the time limited in a paving contract for doing the work was too short. *Maier v. Board of Public Works*, 151 Ind. 197.

**Range of Vision.** — In a murder case it was held that the testimony of a witness as to whether it was light enough for the defendant to have seen the deceased at the time of the killing was not open to the objection that it was the expression of an opinion. *State v. McDowell*, 129 N. Car. 523.

On a trial for murder, where a witness had testified that he was sitting on a rock several hundred feet from the house in which the defendant resided, when he heard certain shots fired, and that a few minutes thereafter he saw the defendant come out of the house, and the defendant offered evidence that a person sitting on the rock could not see the house, it was held that, the rock having been identified, witnesses were properly permitted to testify that the house could be seen therefrom. *People v. Clarke*, 130 Cal. 642.

It has been held that, on the trial of an issue of *devisavit vel non*, a witness was properly permitted to testify, from his knowledge of the room in which the alleged testator died, and the arrangement of the furniture, that the testator could, from his position on the bed, see the subscribing witnesses sign the alleged will. *Burney v. Allen*, 127 N. Car. 476.

In an action involving the question as to the dangerous character of a crossing, witnesses were permitted to testify as to whether trains could be seen under certain conditions. *Martin v. Baltimore, etc., R. Co.*, 2 Marv. (Del.) 123.

In an action against a railroad to recover for injuries received at a public road crossing, the plaintiff, as a witness in her own behalf, was asked: "Where was the first point at which the train could be seen on account of the bushes there at that point?" It was held that the question was not objectionable as calling for a mere conclusion, the court saying: "The office of the proposed testimony was to show how nearly the bushes about which she had testified extended along the road which she was traveling up to the track of the railway. She had already testified that an approaching train could not be seen through these bushes. Of necessary consequence a person approaching the railway would have to clear them before he could see along the track. The question was intended merely to fix this point of clearance with reference to the track, its distance from the track; and it called for no mere conclusion of the witness." *Kansas City, etc., R. Co. v. Weeks*, 135 Ala. 614.

It has been said that whether one can see a train from a given position, may call for an opinion if the person asked has never seen a train from such position, and is not entirely



familiar with the situation. But if he has under such conditions seen a train, or is so familiar with the surroundings as to know that a train can be seen, his statement is a statement of fact and not an opinion. *Cleveland, etc., R. Co. v. Moss*, 89 Ill. App. 1.

On a trial for manslaughter a witness was asked whether the defendant could, from the position which he occupied, have seen the deceased or any one else coming along a certain road until he reached a stated point. It was held that the question was objectionable as calling merely for the expression of opinion on the part of the witness. *Ferguson v. State*, 134 Ala. 63, 92 Am. St. Rep. 17.

In an action to recover damages for injuries received by falling into a trench, a witness was asked whether an ordinarily prudent person in passing over a certain way could fail to perceive the trench. The court sustained an objection to the question, and the ruling was upheld on review on the ground that the question called for an opinion on the question of prudence, or want of prudence, which was a question of fact for the jury. *Huachuca Water Co. v. Swain*, 4 Ariz. 113.

On a trial for rape a witness who had looked over the ground was asked whether certain objects would interfere with the line of vision between defendant's house and the straw stack where it was claimed the ravishment occurred. On objection, the question was excluded. It was held that the ruling did not constitute error, the court saying: "The question was leading, and no prejudice resulted, in any event. The witness gave the exact situation and conditions, and it was for the jury to say whether or not one of defendant's main witnesses could have seen what she said she saw. Moreover, the conditions were not the same as they were when the ravishment is said to have occurred." *State v. Carpenter*, 124 Iowa 5.

In a prosecution for an assault with intent to kill, it was held that unless a witness had made the experiment "under precisely similar conditions and circumstances" he was not a competent witness to give his opinion as to whether the prosecuting witness could identify the defendant under the circumstances and conditions testified to by him. *Keyser v. State*, 95 Md. 96.

**Direction, Audibility, and Character of Sounds.**—It has been held that a witness in a murder case was properly permitted to state that shots heard by him came from the direction of a certain place. *Com. v. Best*, 180 Mass. 492.

In an action for damages on account of injuries received by the defendant at a highway crossing it was held to be proper to allow a witness to testify whether he would or would not under the circumstances detailed by him have heard the bell ring or whistle blow had a statute requiring the giving of signals at crossings been complied with. *Gosa v. Southern R. Co.*, 67 S. Car. 347.

But it has been held that it was proper to exclude a question asking a witness as to whether he was in a position to hear any signal of the approach of the defendant's train of cars which occasioned the injury to the plaintiff. The witness, it was said, should have been asked to state his position, leaving it to the jury to determine whether he could or could not have

heard a signal. *McGeary v. Old Colony R. Co.*, 21 R. I. 76.

And it has been held not to be error to exclude the testimony of a witness on the trial of a defendant for rape as to whether a person passing along the road near the spot where the rape was alleged to have occurred could have heard a cry of distress from the prosecutrix. All of the circumstances having been given to the jury,—the nature of the time (whether stormy or not), etc.—the jury were as competent as the witness to draw a conclusion whether a cry of distress from one like the prosecutrix could have been heard by a person of ordinary faculties. *State v. Taylor*, 57 S. Car. 483, 76 Am. St. Rep. 575.

It has been held that it was not error to exclude testimony of a person who was not shown to be an expert in acoustics as to whether a person in one room could hear a conversation going on in another room on a certain night. *Wheeler v. State*, 112 Ga. 43.

It has been held not to be error to exclude the testimony of a witness, who was not an expert, as to how far the voice of a switchman who "had a good, strong voice, and always used it to the full extent" could be heard on a certain stormy night. *Welch v. New York, etc., R. Co.*, 176 Mass. 393.

In an action to recover for the death of the plaintiff's intestate in consequence of the derailment of one of the defendant's street cars on which the deceased was a passenger, the theory of the trial was that the defendant was not liable unless the motorman or conductor knew, or ought to have known, that the wheels were off the track, and thus were negligent in not stopping the car. In the course of the trial the plaintiff sought to prove by a witness accustomed to ride upon street cars and over the bridge in question, and who was familiar with the noise and motion which they made in their ordinary passing over the scene of the accident, whether the noise and motion of the car as it approached and ran on the bridge was usual or unusual. It was held that it was error to exclude this testimony, since it came within the rule which permits a witness to state the identity of a person, the size and weight of an object, the time when an occurrence took place, and the distance of the witness when he saw what took place. *Beers v. West Side R. Co.*, 101 N. Y. App. Div. 308.

**Competency of Servants.**—It has been held that the incompetency and carelessness of an engineer, being issues in the case, were questions for the jury to determine, and it was error to permit witnesses to state their conclusions and opinions on these questions. *Stoll v. Daly Min. Co.*, 19 Utah 271.

"The question as to whether or not the mine boss [by reason of whose alleged incompetency the plaintiff's injuries were claimed to have been caused] was incompetent was the very question upon which the jury were called to pass, and therefore opinions of witnesses should not be given, but facts should be stated by the witnesses, and from these facts the jury permitted to draw the proper conclusions." *Purkey v. Southern Coal, etc., Co.*, (W. Va. 1905) 50 S. E. Rep. 755.

Where contributory negligence was the de-

fense to an action for injuries to the plaintiff's traction engine alleged to have been caused by the insufficiency and want of repair of a highway, it was held erroneous to permit the plaintiff to state his opinion that the employee who was steering the engine at the time of the accident had the necessary knowledge and ability to safely steer a traction engine. *Johnson v. Highland*, (Wis. 1905) 102 N. W. Rep. 1085.

It has been held to be error to permit the manager of the defendant street-railway company to give his opinion that the motorman in charge of the street car in which the plaintiff was a passenger when he was hurt was in every way competent, and one of the best on the road. It was said that "the purpose of this evidence was, of course, to rebut the charge of negligence made in the pleadings, and which plaintiff's testimony tended to support, and to show that it was improbable that the car was suddenly jerked forward by any improper action of said motorman. If his competency was to be passed upon by the jury, they should have been furnished with facts upon that subject, and not the mere opinion of the witness." *Langston v. Southern Electric R. Co.*, 147 Mo. 457.

In an action to recover for the death of the plaintiff's intestate, the want of negligence of the deceased being an issue in the case, it was held error to allow testimony that the intestate was "a careful, prudent, and cautious engineer." It was said that "it was undoubtedly proper to show that the deceased was a competent engineer, for the purpose of showing his earning capacity, but that did not authorize questions of the character under consideration." *Mosnat v. Chicago, etc., R. Co.*, 114 Iowa 151. See also *infra*, this title, 458. 7.

**Duties of Servants.**—"The opinion of men who have had experience in and are acquainted by personal contact in their every-day employment, and by knowledge acquired in this manner, with the running and movement of trains, and the method of handling them; and of the duties of those who are employed in their management, may be given to the jury in a case when the matter to be decided by the jury involves the duty under certain circumstances of one who is in control of the movements of a train of cars, or is assisting in the duties that go with its management. But, after having explained the duties that the exigencies require to be performed, the witness may not be called upon for and give his opinion as to what relation certain facts bear to the controversy between the parties, and how they affect the issues on trial to the jury; and the admission of such evidence is error." *Lake Erie, etc., Co. v. Mulcahy*, 9 Ohio Cir. Dec. 82, 16 Ohio Cir. Ct. 204.

On questions of negligence, witnesses have sometimes been permitted to testify as to the duties of the defendant's servants. *Pittsburgh, etc., R. Co. v. Nicholas*, (Ind. App. 1905) 73 N. E. Rep. 105; *Blanchard-Hamilton Furniture Co. v. Colvin*, 32 Ind. App. 398.

It has been held to be competent to show the duties of a fireman by qualified witnesses. *Storrie v. Grand Trunk Elevator Co.*, 104 Mich. 297, 10 Detroit Leg. N. 454.

In an action to recover for injuries sustained by the plaintiff in consequence of the moving of a car which he was engaged in repairing, it

was held that a witness was properly permitted to testify that it was the duty of the switchmen, in making up trains, to couple the cars together and set the air brakes, so that the train would stand and not be moved, as a means of safety to the car inspectors and repairers in the discharge of their duties. *St. Louis Southwestern R. Co. v. Rea*, (Tex. Civ. App. 1904) 84 S. W. Rep. 428.

In an action to recover damages for injuries sustained by the plaintiff while alighting from one of the defendant's trains on which he had been traveling as a passenger, it was held to be error to exclude a question asked a witness who was the conductor of the train if it was not the duty of the brakeman, when he saw a passenger about to do something which would probably result in injury to himself, to give caution and warning to the passenger. *Long v. Red River, etc., R. Co.*, (Tex. Civ. App. 1905) 85 S. W. Rep. 1048.

The plaintiff in an action to recover damages for injuries while coupling cars was asked who had authority to start the engine. It was held that the question was not objectionable as calling for an opinion. *Wimber v. Iowa Cent. R. Co.*, 114 Iowa 551.

So, too, where the question was involved of the extent to which the plaintiff in such a case was subject to a foreman's orders, it was held that a witness who knew what were the foreman's duties might state them. *Western Stone Co. v. Muscial*, 196 Ill. 382, 89 Am. St. Rep. 325.

It was also held that a witness was properly permitted to testify that it was the plaintiff's duty, before making the coupling, to see that the foreman was where he could receive signals. *Missouri, etc., R. Co. v. Baker*, (Tex. Civ. App. 1900) 58 S. W. Rep. 964.

But in an action to recover for injuries sustained by the plaintiff, while working for the defendant as a lineman, by the breaking and falling of a pole on which the defendant's wires were suspended, it was held that a question asking a witness whether it was part of the business of a lineman to make an inspection of the poles was properly ruled out for the reason that it called for an opinion of the witness in regard to the legal effect of a contract. *McIsaac v. Northampton Electric Lighting Co.*, 172 Mass. 89, 70 Am. St. Rep. 244.

In an action to recover for the death of the plaintiff's intestate while in the employ of the defendant it was held that, while testimony as to the general nature of the duties of the defendant and his ordinary and customary work was competent, it was error to admit testimony of his duty at the particular time when he was injured. *Quinlan v. Chicago, etc., R. Co.*, 113 Iowa 89.

**Authority of Agents and Servants.**—It has been held that the testimony of a witness as to whether he had authority from the defendant to make a particular contract was properly excluded. *American Telephone, etc., Co. v. Green*, (Ind. 1905) 73 N. E. Rep. 707.

But the testimony of an agent whose authority was by parol, as to his authority to do a certain act, has been held not to be objectionable as involving a conclusion. *Joseph v. Struller*, (Supm. Ct. App. T.) 25 Misc. (N. Y.) 173.

In an action to recover for the death of a



fireman in the employ of the defendant, it was held that certain witnesses were properly permitted to testify, in effect, that the engineers of the defendant had superintendence and direction and command over the firemen. *Galveston, etc., R. Co. v. Ford*, 22 Tex. Civ. App. 131.

The testimony of a witness who was the conductor of a train that he had control over the movements of the train and over the crew has been held to be admissible in evidence as a statement of a fact. *Galveston, etc., R. Co. v. Brown*, (Tex. Civ. App. 1900) 59 S. W. Rep. 930, *reversed* on another point 95 Tex. 2.

**Conclusions of Law.**—When the authority of an agent is a conclusion of law deducible from various facts, he may not directly testify to it. Where the authority of an Indian agent over a certain Indian was a conclusion of law deducible from the constitution and statutes, and from the situation and relations of the Indian, the agent was incompetent to testify what his authority was. *Farrell v. U. S.*, (C. C. A.) 110 Fed. Rep. 942.

**Extent and Effect of Injuries.**—In an action for personal injuries it was held that the court did not err in sustaining an objection to a question asked the plaintiff as to what was the effect of the injury on his health. The question, it was said, "called for the mere conclusion and opinion of the witness upon a matter as to which, not being an expert, he was incompetent to testify." *Kozlowski v. Chicago*, 113 Ill. App. 513.

In an action to recover for injuries alleged to have been sustained by the plaintiff's horse through the defendant's negligence, it was held to have been error to permit the plaintiff to testify, without stating any facts, that the horse could not be used after the accident for the same purpose that he had been used before. *Reid v. New York City R. Co.*, (Supm. Ct. App. T.) 93 N. Y. Supp. 533.

But it has frequently been held that the plaintiff in an action to recover damages for personal injuries may testify as to the effect on him of the injuries alleged to have been received. *Sellman v. Wheeler*, 95 Md. 751.

It has been held that it was not error to permit the plaintiff in an action for personal injuries to testify that before his injury his health had been good. *Isherwood v. H. L. Jenkins Lumber Co.*, 87 Minn. 388.

The testimony of the plaintiff to the effect that his injuries incapacitated him from following his former occupation, was held to be not a conclusion merely but the statement of a fact to which the witness might properly testify. *Southern Kansas R. Co. v. Sage*, (Tex. Civ. App. 1904) 80 S. W. Rep. 1038; *St. Louis Southwestern R. Co. v. McDowell*, (Tex. Civ. App. 1903) 73 S. W. Rep. 974.

The plaintiff in an action to recover damages for personal injuries, after stating the manner in which she was injured, in detailing the result of the injury sustained by her, said: "I was upset in every particular; every function of my body, I think, was out of order from the shock, and I suffered terribly in every way." It was held that no error was committed in admitting this evidence; while the statement was in a certain sense the expression of an opinion, it was in a broader sense the statement of a

fact—that is, the condition her person was in as a result of the injury. *Chicago City R. Co. v. Saxby*, 213 Ill. 274, 104 Am. St. Rep. 218.

The plaintiff in an action to recover for personal injuries, after stating that she had suffered from headaches since the injuries were sustained but not before, was asked to what she attributed the headaches. She answered: "I attribute the headaches to the injury in my back. It runs right up my back and up the back of my head." In holding that the testimony was not incompetent, the court said: "Ordinarily, the testimony of experts is required to determine the cause of physical ailments. The question first asked called for doubtful testimony, but the answer as given was admissible. It was competent for the witness to describe the pain in the back of her head, and that it ran up her back from the place of the injury, and the fact that she gave her conclusion as to the connection between the injury and the pain in the head cannot be said to have been injurious in the light of the remainder of the answer." *Lindley v. Detroit*, 131 Mich. 8.

It has been held proper to admit the testimony of nonexpert witnesses in an action for personal injuries that the plaintiff could not see and hear and turn his head as well as he could before he was injured. *Chicago, etc., R. Co. v. Long*, 26 Tex. Civ. App. 601.

In an action by a husband to recover for personal injuries to his wife, it has been held that the testimony of the husband to the effect that she had been able to perform all of the ordinary duties of the household and family prior to the injury, but not thereafter, was admissible. *Chicago, etc., R. Co. v. Armes*, 32 Tex. Civ. App. 32.

In an action for personal injuries it was held that a witness who had observed the manner in which the plaintiff used her foot in walking after she recovered from the injury, so far as recovery had taken place up to the time of the trial, was properly permitted, against objections by the defendant's counsel, to answer a question as to what she saw regarding such use; there was nothing in the question to suggest that it called for opinion evidence of any kind. *Collins v. Janesville*, 111 Wis. 348.

**Appearance or Character of Wound or Injury.**—It is competent for a witness, though not an expert, to describe a wound which he has seen. *Sanders v. State*, 134 Ala. 74.

In an action to recover damages for an assault and battery it was held that a witness who was not an expert should have been permitted to testify whether the plaintiff's injury appeared recent or otherwise. *Robinson v. Halley*, 124 Iowa 443.

It is not necessary that a witness in a prosecution for murder should have qualified as a medical expert in order that he may be heard to testify as to the passage of a bullet through the heart and liver of the deceased, where it appears that he assisted in the autopsy, is giving the result of his personal observation, and is able to identify the organs mentioned, as such, from having seen them taken from the body of the deceased. *State v. Lyons*, 113 La. 959.

But it has been held that, although a witness may testify that a bullet went in at one place on the body and came out at another place, it is error to permit a witness to testify, on the



trial of a defendant for murder, that the shot which inflicted the mortal wound on the body of the deceased appeared to have been fired from above, and struck the body in a downward slanting direction. *Cavaness v. State*, 45 Tex. Crim. 209.

**Appearance of Injured Member.**—In a prosecution for murder it was held that the testimony of witnesses, who were not shown to be experts, as to the appearance of the deceased's leg just before he died, that it "looked dark" an inch or so from where it had been amputated, was not objectionable on the ground that it related to matter calling for expert evidence. The witness testified merely to a fact and not to a conclusion resting in opinion, or to an opinion based on any hypothetical statement. *Pitts v. State*, 140 Ala. 70.

**Circumstances of Death.**—It has been held that it was competent for a witness, though not a physician, to testify on a trial for murder that he was present when the deceased died under an operation performed on him at a hospital. *Thomas v. State*, 139 Ala. 80.

**Construction and Legal Effect of a Contract.**—The opinion of a witness as to the construction and legal effect of a contract is incompetent. *Chicago University v. Emmert*, 108 Iowa 500; *Burwell, etc., Co. v. Chapman*, 59 S. Car. 581; *Richardson v. Wilmington, etc., R. Co.*, 126 N. Car. 100.

Thus, testimony as to what was the place of delivery under a contract of sale has been held to be incompetent. *Althouse v. McMillan*, 132 Mich. 145.

It has been held that the recipient of a letter offering a settlement cannot testify as to the meaning of the letter for the purpose of showing the construction which should be placed upon it. *Clarke v. Springfield Second Nat. Bank*, 177 Mass. 257.

In an action in which the plaintiff, who was one of two partners, endeavored to establish his right to sue individually under a pleaded assignment to him of all his copartners' interest, it was held to be error to permit him to testify that the copartner "transferred his right—everything—to me;" the facts should have been shown. *Mardowitz v. Goldberg*, (Supm. Ct. App. T.) 87 N. Y. Supp. 234.

It has been held that since the question whether an alleged sale was an absolute and unconditional sale depended upon the facts and circumstances of the transaction, including the bill of sale, the trial court properly excluded a statement by the person who drew the bill of sale to the effect that the sale was without any reservation of interest to the seller. *Ward v. Shirley*, 131 Ala. 568.

Testimony of a witness as to whether a bond was a common-law bond or a statutory bond, has been held to have been properly excluded. *United Sheet Metal Works v. Dodge*, 129 Cal. 390.

The expression of an opinion by a witness as to whether a lost instrument was a bill of sale or mortgage is clearly illegal evidence. *Stuart v. Mitchum*, 135 Ala. 546.

A question which seeks to have a witness determine whether a certain transaction constituted a "loan" has been held to be objectionable. *Spreckels v. Butler*, 128 Cal. 645.

In an action to recover the purchase price of certain horses, a witness testified that the defendant "acknowledged that he took the horses at a valuation of fifty dollars per head." It was held that the defendant's motion to strike out the testimony as a conclusion and opinion of the witness was properly denied, since the witness manifestly used the word "acknowledged" as the equivalent of "stated" or "said." *Hunter v. Davis*, (Iowa 1905) 103 N. W. Rep. 373.

In an action to recover damages for the breach of a contract whereby the defendant was bound to furnish the plaintiff at a fixed price with all the goods of a certain kind which the plaintiff should need, for a certain year, it was held that it was proper to ask a witness, who was the manager and treasurer of the plaintiff and was familiar with the business and the orders sent by the plaintiff to the defendant, whether "those orders were required for the needs of the plaintiff's business." *New York Cent. Iron Works Co. v. U. S. Radiator Co.*, 174 N. Y. 331.

Questions addressed to witnesses concerning the existence, execution, and whereabouts of a deed, but which in form also call for oral statements of conclusions as to its contents, are improper. *Laster v. Blackwell*, 128 Ala. 143.

It has been held that the court improperly refused to allow a witness to state whether or not she signed a note as her husband's surety. *Compton v. Smith*, 120 Ala. 233.

**Genuineness of Written Instrument.**—It has been held to be error to allow a witness to testify, over a proper objection, that an instrument "bore upon its face indications of being genuine." *Gress Lumber Co. v. Georgia Pine Shingle Co.*, 120 Ga. 751.

**Validity of Title.**—The mere opinion of lawyers or of title guarantee companies is not sufficient to establish defective title. *Hess v. Eggers*, (N. Y. City Ct. Gen. T.) 37 Misc. (N. Y.) 845, affirmed (Supm. Ct. App. T.) 38 Misc. (N. Y.) 726.

**Performance of Contracts.**—A question asked a witness in an action for work and labor done as to whether the work was done according to the contract between the parties was held to be subject to the objection that it called for a conclusion which, if material, should have been left to inference from proof of the contract specifications and the work as actually done. *La Fayette R. Co. v. Tucker*, 124 Ala. 514.

On the ground that a question whether the work to be performed under a contract progressed without unnecessary delay involved, to a certain extent, the opinion of the witness, it was held that the question was rightly excluded. *Amsden v. Parmelee*, 177 Mass. 522.

But in an action to recover damages for breach of contracts to drive and sort logs, it was held that one of the plaintiffs was properly asked whether the defendant drove and sorted all of the logs specified in the contracts. *Belows v. Crane Lumber Co.*, 119 Mich. 424.

In an action to recover money due on a contract it was held that, since the contract was a verbal one and the parties differed materially as to its terms, the plaintiff was entitled to state to the jury, after giving his version of the terms of the contract, that the work had been per-

formed in accordance therewith. *Taulbee v. Moore*, 106 Ky. 749.

**Membership in Benefit Association.** — It has been held that a clerk in the office of the supreme secretary of a beneficial association cannot give his opinion as to whether a particular person is a member of the association. *Wagner v. Supreme Lodge, etc.*, 128 Mich. 660, 8 Detroit Leg. N. 815.

**Existence of Partnership Relation.** — The fact of partnership may be testified to by any one who has knowledge of the fact. *Hardenburgh v. Fish*, 61 N. Y. App. Div. 333 (holding that the statement of a witness that a certain firm was composed of persons named was not open to the objection that it was a conclusion and hearsay); *Farmers' Bank v. Saling*, 33 Oregon 394.

In an action to recover for supplies furnished and work and labor performed for the defendants while operating a mine under a lease, the question arose as to whether the defendant C. was interested in the lease, and it was, therefore, held error to permit a witness, who was one of the miners who had performed the labor for which the suit was brought, to answer a question asking him for whom he was working. It was held that in order to show the partnership of the defendant C. it was permissible only to prove by the witnesses facts from which the law would presume the partnership. A witness is not allowed to state a conclusion of law. *Crewford v. Birkins*, 16 Colo. App. 532.

**Existence of Relation of Master and Servant.** — In an action to recover for personal injuries sustained in the service of the defendant, in which it was urged as a defense that the plaintiff was an independent contractor, it was held that a witness was properly permitted to state that the plaintiff was foreman for the defendant. *Southern Cotton Oil Co. v. Wallace*, 23 Tex. Civ. App. 12.

It has been held that the admission of testimony that one person is in the employ of another is not error where the witness states all the facts upon which the opinion is based. *Daugherty v. State*, (Tex. Crim. 1904) 80 S. W. Rep. 624.

**Existence of Relation of Principal and Agent.** — It has been held that testimony that one person is the agent of another is competent although the relation of principal and agent is a legal one, depending upon the existence of certain facts, and the statement that it exists may be in the nature of a conclusion, yet the relation is also a condition of which any one having personal knowledge of it may testify, subject, however, to the test of cross-examination. *Heusinkveld v. St. Paul F. & M. Ins. Co.*, 106 Iowa 229.

It has been said that a witness may, in the discretion of the court, be permitted to testify that one person was the agent of another, leaving the facts which would constitute the agency to be brought out on cross-examination. *Service v. Dering Invest. Co.*, 20 Wash. 668.

But on the other hand it has been held that it is not competent for a witness to testify that one person was the agent of another. Whether an agency exists, or whether one has authority to act for another, is a question of law, to be determined from the facts, and the mere opinion of a witness that one is an agent or representa-

tive of another is of no value. *Stuart v. Asher*, 15 Colo. App. 403.

It has been held that it is not competent for a witness to state that a person named, with whom he negotiated a contract with a corporation, was the agent of that corporation, because it is the statement of a conclusion. *Southern Home Bldg., etc., Assoc. v. Winans*, 24 Tex. Civ. App. 544.

**Existence of Relation of Carrier and Passenger.** — In an action to recover for the death of the plaintiff's husband, alleged to have been caused by the wreck of the defendant's train while he was riding thereon as a passenger, witnesses were permitted to testify that the deceased was riding as a passenger on the train, but it was held that, since the witnesses used the expression in its ordinary (not in its legal) sense, for the want of a better word to distinguish between the train crew and others seeking or taking transportation thereon, this was not prejudicial error. *San Antonio, etc., R. Co. v. Lynch*, (Tex. Civ. App. 1900) 55 S. W. Rep. 517.

**Existence of Marriage Relation.** — In a prosecution for bigamy it has been held that a witness should not be permitted to state that the defendant and a woman named "were married" on a certain occasion. *Sokel v. People*, 212 Ill. 238.

**Official Character of Person.** — That a person was a public officer at a certain time has been held to be competent testimony in an action in which it was sought to show that the person in question was acting as a public officer. *State v. Haskins*, 109 Iowa 656, 77 Am. St. Rep. 360.

**Earning Capacity.** — In an action to recover for a death by wrongful act a witness will not be permitted to state what was the earning capacity of the deceased. *Wilcox v. Wilmington City R. Co.*, 2 Penn. (Del.) 157.

**Effect of Nuisance on Health.** — In an action to abate a nuisance it was held that nonexpert witnesses were properly permitted to testify that the odors arising from a sewer made them sick. *Suddeth v. Boone*, 121 Iowa 258.

**Effect of Emptying Sewage into Stream.** — In an action to recover damages for emptying sewage into a stream running through the plaintiff's land, it was held that the testimony of a witness that after the sewage was turned into the stream the water was slimy, nasty, and sticky, was admissible. *Hollenbeck v. Marion*, 116 Iowa 69.

**Effect of Water on Land and Crops.** — In an action to recover damages for polluting a stream, it was held that questions as to what effect the polluted water had upon the plaintiff's lands and crops did not call for the opinions, inferences, or conclusions of the witnesses from the facts, but for tangible, visible facts themselves, which resulted from a combination of other existing facts. *Watson v. Colusa-Parrot Min., etc., Co.*, (Mont. 1905) 79 Pac. Rep. 14.

**Concealment of Property.** — On a trial for larceny the statement of the witness who went to the defendant's house to search for meat, "that he did not find it concealed or under suspicious circumstances," was, on the objection of the state, excluded. In holding that there was no error in excluding the evidence, the court said: "Whether the meat found by the witness was or was not concealed was but



**422. Necessity of Receiving Opinions.** — See notes 1, 2.

the conclusion or opinion of the witness. He should have stated the facts as to the finding, that the jury might determine whether there was or was not a concealment. What, in his opinion, might have not been a concealment, in the opinion of another might have been." *Hollis v. State*, 123 Ala. 74.

**Voluntary Character of Confession.** — On a trial for larceny the policeman who arrested the defendant was asked if the defendant was offered any inducement, or compelled by threats, to make the statement which he made shortly after his arrest. It was held that an objection to the question on the ground that it called for the conclusion of the witness and for his opinion was properly overruled. *Brown v. State*, 124 Ala. 76. To the same general effect see *People v. Jackson*, 138 Cal. 462.

**Fact of Having Made False Representations.** — A statement by a witness that he had not made any false representations as to the value of a mine has been held not to be the expression of an opinion, but the statement of a fact. *Williams v. Long*, 139 Cal. 186.

**Fact of Self-defense.** — In an action to recover damages for an alleged assault and damages, the defendant cannot properly be permitted to testify that he acted in self-defense. *Evans v. Elwood*, 123 Iowa 92.

It has been held that it is not competent for a witness while testifying to the particulars of a difficulty which he had seen take place between two other persons, to express his opinion that at a given moment the time had come for one of them "to either run or fight." *Lowman v. State*, 109 Ga. 501.

**Defendant Fleeing from Justice.** — On the trial of a defendant for an aggravated assault, a witness who was asked if the defendant had not been a fugitive from justice for a period after the alleged assault answered that if fugitive from justice meant out of the state, he was. It was held that the admission of this testimony was not error, since the witness did not give an opinion, but stated the fact that the defendant was out of the state. *Sebastian v. State*, 41 Tex. Crim. 248.

**Overcrowded Condition of Street Car.** — In an action to recover for injuries received by the plaintiff while a passenger upon the defendant's street car, one of the questions at issue being whether the plaintiff was negligent in riding upon the running board of the car, it was held that the plaintiff was properly permitted to testify that the car was so crowded that it was impossible for her to get in before she was injured. The objection that the testimony was the mere statement of a conclusion was held not to have been well taken. *Indianapolis St. R. Co. v. Haverstick*, (Ind. App. 1905) 74 N. E. Rep. 34.

**Truth of Publication Claimed to Be a Libel.** — It is not competent in actions for libel, as a general rule, for the defendant to testify to the conclusion that the published article was true. *Davis v. Hamilton*, 88 Minn. 64.

**Usage.** — When a witness shows himself competent to testify to a usage, his statement as to the custom is not the expression of an opinion but the statement of a fact which is com-

petent. *Thayer v. Smoky Hollow Coal Co.*, 121 Iowa 121.

**Abandonment of Easement.** — Abandonment is a mixed question of law and fact. It is competent for a witness to give the facts relied on to show abandonment, and the conclusion from these facts is for the jury. A witness should not be allowed to testify that an easement has been abandoned, without giving the facts. *Gaston v. Gainesville, etc., Electric R. Co.*, 120 Ga. 516.

**Instrumentality of Agent in Effecting Sale.** — In an action by a real estate broker to recover commissions for the sale of a farm, the seller defended on the ground that another agent induced the purchaser to buy. The purchaser was called as a witness, and asked who, as agent, induced him to enter into the negotiations and contract. It was held that an objection to the question was properly sustained, for the reason that it called for an inference drawn by the witness from his own mental processes, and did not relate to an existing fact. *Johnson v. Dysert*, (Kan. 1905) 79 Pac. Rep. 652.

**Location of Surveyor's Line.** — The testimony of a witness as to the location of a surveyor's line between his land and that of a neighbor has been held to have been properly excluded. The testimony could only have been an opinion, and, though supported by long possession, that possession might not have been in conformity with the original and true boundary. *Hamilton v. Smith*, 74 Conn. 374.

**Existence of Road.** — In a case in which the principal point in controversy was whether there was or was not a public road at a certain place, it was held to be error to permit a witness to answer a question as to whether there was a public road at the place which was claimed to be the location of the alleged road. *Big Lake Special Drainage Dist. v. Highway Com'rs*, 199 Ill. 132.

**422. 1. Best Evidence.** — *Milledgeville v. Wood*, 114 Ga. 370; *Patterson v. Johnson*, 114 Ill. App. 329, *decree affirmed* 214 Ill. 481; *Pope v. Ramsey*, 78 Mo. App. 157, 2 Mo. App. Rep. 191; *Pursley v. Edge Moor Bridge Works*, 56 N. Y. App. Div. 71, *affirmed without opinion* 168 N. Y. 589; *Brady v. Shirley*, (S. Dak. 1904) 101 N. W. Rep. 886; *San Antonio, etc., R. Co. v. Griffith*, (Tex. Civ. App. 1902) 70 S. W. Rep. 438.

**2. California.** — *Raymond v. Glover*, 122 Cal. 471.

**Connecticut.** — *Barber v. Manchester*, 72 Conn. 675.

**Delaware.** — *Martin v. Baltimore, etc., R. Co.*, 2 Marv. (Del.) 123.

**Florida.** — *Alford v. State*, (Fla. 1904) 36 So. Rep. 436; *Higginbotham v. State*, 42 Fla. 573, 89 Am. St. Rep. 237.

**Georgia.** — *Southern Mut. Ins. Co. v. Hudson*, 115 Ga. 638; *Milledgeville v. Wood*, 114 Ga. 370.

**Illinois.** — *Chicago, etc., R. Co. v. Randolph*, 199 Ill. 125.

**Iowa.** — *Trott v. Chicago, etc., R. Co.*, 115 Iowa 80, *rehearing denied* 115 Iowa 88; *Stewart v. Anderson*, 111 Iowa 329.

**Nebraska.** — *Russell v. State*, 66 Neb. 497.



**422. 2. General Rule Regarding Expert Evidence — The General Rule. —** See note 3.

*New York.* — *Ward v. St. Vincent's Hospital*, 78 N. Y. App. Div. 317.

*Pennsylvania.* — *Philadelphia v. Dobbins*, 24 Pa. Super. Ct. 136.

*South Carolina.* — *Dent v. South Bound R. Co.*, 61 S. Car. 329; *Virginia-Carolina Chemical Co. v. Kirven*, 57 S. Car. 445.

*Tennessee.* — *Cumberland Tel., etc., Co. v. Dooley*, 110 Tenn. 104.

*Texas.* — *Murmutt v. State*, (Tex. Crim. 1902) 67 S. W. Rep. 508.

**422. 3. The Rule and Its Reason —** *United States.* — *Allen v. Field*, (C. C. A.) 130 Fed. Rep. 641; *Crane v. Fry*, (C. C. A.) 126 Fed. Rep. 278; *Wabash Screen Door Co. v. Black*, (C. C. A.) 126 Fed. Rep. 721; *Chicago G. W. R. Co. v. Price*, (C. C. A.) 97 Fed. Rep. 423.

*Arkansas.* — *West v. State*, 71 Ark. 144.

*California.* — *Dyas v. Southern Pac. Co.*, 140 Cal. 296.

*Colorado.* — *Wilson v. Harnette*, 32 Colo. 172.

*Connecticut.* — *State v. Cook*, 75 Conn. 267.

*Georgia.* — *Milledgeville v. Wood*, 114 Ga. 370.

*Illinois.* — *Catlin v. Traders Ins. Co.*, 83 Ill. App. 40; *World's Columbian Exposition v. Pasteur-Chamberland Filter Co.*, 82 Ill. App. 94; *Union Show Case Co. v. Blindauer*, 75 Ill. App. 358, *affirmed* 175 Ill. 325.

*Indiana.* — *Logansport, etc., Natural Gas Co. v. Coate*, 29 Ind. App. 299; *Fralich v. Barlow*, 25 Ind. App. 383.

*Iowa.* — *Guinn v. Iowa, etc., R. Co.*, 125 Iowa 301; *Sylvester v. Ammons*, 126 Iowa 140; *Boyer v. Chicago, etc., R. Co.*, 123 Iowa 248; *Hollenbeck v. Marion*, 116 Iowa 69; *Patton v. Lund*, 114 Iowa 201; *Bradley v. Iowa Cent. R. Co.*, 111 Iowa 562; *State v. McIntosh*, 109 Iowa 209; *Long v. Travellers Ins. Co.*, 113 Iowa 259.

*Kansas.* — *State v. Ryno*, 68 Kan. 348; *Missouri, etc., R. Co. v. Merrill*, 61 Kan. 671, *overruled* 65 Kan. 436.

*Maine.* — *Conley v. Portland Gas Light Co.*, 99 Me. 57.

*Massachusetts.* — *Com. v. Best*, 180 Mass. 492; *Brady v. Norcross*, 174 Mass. 442; *Knight v. Overman Wheel Co.*, 174 Mass. 455.

*Michigan.* — *Miller v. Meade Tp.*, 128 Mich. 98.

*Minnesota.* — *Dell v. McGrath*, 92 Minn. 187; *Byard v. Palace Clothing House Co.*, 85 Minn. 363; *Nutzmann v. Germania L. Ins. Co.*, 78 Minn. 504.

*Missouri.* — *Buckalew v. Quincy, etc., R. Co.*, 107 Mo. App. 575; *Pope v. Ramsey*, 78 Mo. App. 157, 2 Mo. App. Rep. 191; *Fischer v. Edward Heitzberg Packing, etc., Co.*, 77 Mo. App. 108; *Skinner v. E. F. Kerwin Ornamental Glass Co.*, 103 Mo. App. 550.

*Nebraska.* — *Horst v. Lewis*, (Neb. 1905) 103 N. W. Rep. 460, *affirming* (Neb. 1904) 98 N. W. Rep. 1046; *Western Union Tel. Co. v. Church*, (Neb. 1902) 90 N. W. Rep. 878; *Read v. Valley Land, etc., Co.*, 66 Neb. 423; *Missouri Pac. R. Co. v. Fox*, 60 Neb. 531.

*New Hampshire.* — *State v. Greenleaf*, 71 N. H. 606.

*New York.* — *People v. Krist*, 168 N. Y. 19; *Finn v. Cassidy*, 165 N. Y. 584; *Littlejohn v.*

*Shaw*, 159 N. Y. 188; *Starer v. Stern*, 100 N. Y. App. Div. 393; *Levy v. Tiger*, (Supm. Ct. App. T.) 90 N. Y. Supp. 366; *McQuade v. Metropolitan St. R. Co.*, 84 N. Y. App. Div. 637; *Cramer v. Slade*, 66 N. Y. App. Div. 59; *Pursley v. Edge Moor Bridge Works*, 56 N. Y. App. Div. 71, *affirmed* without opinion 168 N. Y. 589.

*Ohio.* — *Ohio, etc., Torpedo Co. v. Fishburn*, 61 Ohio St. 608, 76 Am. St. Rep. 437; *State v. Toledo R., etc., Co.*, 24 Ohio Cir. Ct. 321.

*Oklahoma.* — *Willett v. Johnson*, 13 Okla. 563.

*Oregon.* — *Farmers Nat. Bank v. Woodell*, 38 Oregon 294.

*Pennsylvania.* — *Com. v. Farrell*, 187 Pa. St. 408.

*South Dakota.* — *Hedlun v. Holy Terror Min. Co.*, 16 S. Dak. 261.

*Tennessee.* — *Knights of Pythias v. Steele*, 108 Tenn. 624.

*Texas.* — *Elliott v. Ferguson*, (Tex. Civ. App. 1904) 83 S. W. Rep. 56; *Gammel-Statesman Pub. Co. v. Monfort*, (Tex. Civ. App. 1904) 81 S. W. Rep. 1029; *International, etc., R. Co. v. Mills*, 34 Tex. Civ. App. 127; *Hickey v. State*, 45 Tex. Crim. 297; *Texas, etc., R. Co. v. Cochran*, 29 Tex. Civ. App. 383; *Houston, etc., R. Co. v. Hopson*, (Tex. Civ. App. 1902) 67 S. W. Rep. 458; *Gulf, etc., R. Co. v. Matthews*, 28 Tex. Civ. App. 92; *rehearing* 28 Tex. Civ. App. 99; *Galveston, etc., R. Co. v. Robinett*, (Tex. Civ. App. 1899) 54 S. W. Rep. 263. See *Bath v. Houston, etc., R. Co.*, 34 Tex. Civ. App. 234.

*Utah.* — *Palquist v. Mine, etc., Supply Co.*, 25 Utah 257; *Faulkner v. Mammoth Min. Co.*, 23 Utah 437; *Beaman v. Martha Washington Min. Co.*, 23 Utah 139; *State v. Webb*, 18 Utah 441; *Olson v. Oregon Short Line R. Co.*, 24 Utah 460.

*Vermont.* — *McGovern v. Hays*, 75 Vt. 104; *Baker v. Sherman*, 71 Vt. 439; *Morrisette v. Canadian Pac. R. Co.*, 76 Vt. 267.

*Virginia.* — *Parlett v. Dunn*, 102 Va. 459; *Norfolk R., etc., Co. v. Corletto*, 100 Va. 355.

*Washington.* — *Edwards v. Burke*, 36 Wash. 107.

*Wisconsin.* — *Allen v. Voje*, 114 Wis. 1; *Baxter v. Chicago, etc., R. Co.*, 104 Wis. 307.

*Canada.* — *Smith v. Canada Pac. R. Co.*, 34 Nova Scotia 22; *Mackay v. Frappier*, 2 Quebec Pr. 82.

See also *infra*, this title, 458. 7.

**When Facts Can Be Stated.** — Where mere descriptive language is inadequate to convey to the jury the precise facts or their bearing on the issue, the description of the witness must of necessity be allowed to be supplemented by his opinion, in order to put the jury in position to make the final decision of the fact. *Michigan Cent. R. Co. v. Waterworth*, 11 Ohio Cir. Dec. 621, 21 Ohio Cir. Ct. 495; *Cleveland, etc., R. Co. v. Ullom*, 11 Ohio Cir. Dec. 321, 20 Ohio Cir. Ct. 512; *Whitaker v. Campbell*, 187 Pa. St. 113.

But where the circumstances can be fully and adequately described to the jury, and are such that their bearing on the issue can be estimated by all men, without special knowledge or training, opinions of witnesses, expert or other, are not admissible. *Woeckner v. Erie Electric Motor Co.*, 187 Pa. St. 206; *Whitaker v. Camp-*

- 423.** The Test of the Admissibility of Expert Testimony. — See notes 1, 3, 4  
Speculative Data. — See note 7.
- 424.** Abstract Questions of Science. — See note 4.

bell, 187 Pa. St. 113; Philadelphia v. Dobbins, 24 Pa. Super. Ct. 136. See also *infra*, this title, 488. 9.

**Expert Witness May Be a Party to the Action.**

—The fact that a witness is a party to the action does not disqualify him to testify as an expert. Standefer v. Aultman, etc., Machinery Co., 34 Tex. Civ. App. 160.

**Opinion Expressed Must Be That of the Witness.**

—Although the opinion of a witness testifying as an expert in handling natural gas may be competent, he cannot testify what opinion other experienced gas men might have on the subject. Indiana Natural, etc., Gas Co. v. Anthony, 26 Ind. App. 307.

**Opinion Expressed Must Be That Entertained at the Time of the Trial.** —It has been held that, on the direct examination, a witness is confined to the expression of the opinion which he entertains at the time of the trial and cannot be permitted to state what was his opinion at a former time. McGovern v. Hays, 75 Vt. 104.

**Conjectures of Witness.** —It has been said that where a witness, though qualified to express an opinion, testifies that he "guesses" or "expects" so and so to be the case, such testimony will be rejected, unless it sufficiently appears that these terms are used to express his opinion or judgment; and it is for the court to determine whether this is so. Hunter v. Helsley, 98 Mo. App. 616.

**Reasons for Opinions Admissible.** —An expert witness may state the ground and reasons for his opinion. People v. Bird, 124 Cal. 32; Williams v. State, (Fla. 1903) 34 So. Rep. 279; Leslie v. Granite R. Co., 172 Mass. 468; Spivey v. State, 43 Tex. Crim. 496.

A witness who has testified as to the value of property may state the elements which influence the opinion. Cram v. Chicago, 94 Ill. App. 199.

It has been said that the mere opinions of witnesses without the facts on which they are based are of very little value, and this is especially true where the witnesses are, by situation or interest, biased and not impartial. Pannell v. Louisville Tobacco Warehouse Co., 113 Ky. 630.

It has been held that a witness, testifying as a medical expert, cannot be permitted to state that certain symptoms observed by him were the result of poisoning, without communicating to the jury the facts known to him. He must first detail the symptoms; then only will he be allowed to express an opinion based thereon. State v. Simonis, 39 Oregon 111.

**423. 1. Common or Uncommon Subject-matter Not the Test.** —Northern Supply Co. v. Wanguard, 123 Wis. 1.

3. Caven v. Bodwell Granite Co., 97 Me. 381; Meehan v. Great Northern R. Co., (N. Dak. 1904) 101 N. W. Rep. 183.

**4. Test of Admissibility.** —Illinois Cent. R. Co. v. Smith, 208 Ill. 608, reversing 111 Ill. App. 177; Maier v. Board of Public Works, 151 Ind. 197; Clay County v. Redifer, 32 Ind. App. 93; Stephens v. Gardner Creamery Co., 9 Kan.

App. 883, 57 Pac. Rep. 1058; Caven v. Bodwell Granite Co., 97 Me. 381; Schrodt v. St. Joseph, 109 Mo. App. 627; Meehan v. Great Northern R. Co., (N. Dak. 1904) 101 N. W. Rep. 183; Farmers' Nat. Bank v. Woodell, 38 Oregon 294, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 423; Com. v. Farrell, 187 Pa. St. 408; International, etc., R. Co. v. Mills, 34 Tex. Civ. App. 127; Parlett v. Dunn, 102 Va. 459; State v. Hull, 45 W. Va. 767; Johnson v. Highland, (Wis. 1905) 102 N. W. Rep. 1085.

As a general rule, the opinions of witnesses are not to be received in evidence merely because such witnesses may have had more experience or greater opportunities of observation than others, unless such opinions relate to matters of skill and science. Chicago, etc., R. Co. v. Lewandowski, 190 Ill. 301; Hellyer v. People, 186 Ill. 550; Brewster v. Weir, 93 Ill. App. 588.

**7. Speculative Data.** —Graney v. St. Louis, etc., R. Co., 157 Mo. 666; East Tennessee, etc., R. Co. v. Lindamood, 111 Tenn. 457; St. Louis Southwestern R. Co. v. Ball, 28 Tex. Civ. App. 287; Crouse v. Chicago, etc., R. Co., 104 Wis. 473; Selleck v. Janesville, 104 Wis. 570, 76 Am. St. Rep. 892.

It has been held to be error to permit a physician to testify on the trial of a defendant for murder that people who are insane do not kill people for money. Earp v. State, (Miss. 1905) 38 So. Rep. 288.

**Mere Conjectures Inadmissible.** —Knights of Pythias v. Allen, 104 Tenn. 623.

**424. 4.** Fox v. Buffalo Park, 21 N. Y. App. Div. 321, affirmed without opinion 163 N. Y. 559; International, etc., R. Co. v. Mills, 34 Tex. Civ. App. 127; Galveston, etc., R. Co. v. Bohan, (Tex. Civ. App. 1898) 47 S. W. Rep. 1050. See Sullivan v. Rome, 86 N. Y. App. Div. 107. Compare People v. Farley, 124 Cal. 594.

As a general rule expert testimony is not admissible as to the ultimate facts which are to be found by the court or jury. Illinois Cent. R. Co. v. Smith, 208 Ill. 608, reversing 111 Ill. App. 177; Collinsville v. Eichmann, 108 Ill. App. 655; Missouri, etc., Telephone Co. v. Vandevort, 67 Kan. 269; Taylor v. Grand Ave. R. Co., 185 Mo. 239; Graney v. St. Louis, etc., R. Co., 157 Mo. 666; Chicago, etc., R. Co. v. Holmes, (Neb. 1903) 94 N. W. Rep. 1007; Read v. Valley Land, etc., Co., 66 Neb. 423; Schutz v. Union R. Co., 181 N. Y. 33; Summerlin v. Carolina, etc., R. Co., 133 N. Car. 550; Philadelphia v. Dobbins, 24 Pa. Super. Ct. 136, 142; State v. Stevens, 16 S. Dak. 309; Bath v. Houston, etc., R. Co., 34 Tex. Civ. App. 234; Lounsbury v. Davis, (Wis. 1905) 102 N. W. Rep. 941.

It has been said that expert testimony is not permitted to go to the extent of deciding issues of fact on which the jury must pass, for that would be substituting the expert's testimony, or the opinion of the expert who gives it, for the verdict of the jury. Jesse v. Smith, 46 Tex. Crim. 444.

Hence an expert witness should not be permitted to express his opinion on the question



**424. V. QUALIFICATIONS OF EXPERTS — 1. Expert Defined. —** See note 5.

of the defendant's negligence in an action for a tort. *Quinn v. Galveston, etc., R. Co.,* (Tex. Civ. App. 1905) 84 S. W. Rep. 395.

In an action to recover for the death of the plaintiff's intestate in a runaway alleged to have been caused by the unnecessary blowing of the whistle on one of the defendant's locomotive engines, it was held that the opinion of an experienced railroad man, testifying as an expert, that the blowing of the whistle was unnecessary, was incompetent. *Chicago, etc., R. Co. v. Cummings,* 24 Ind. App. 192.

In an action to recover damages for injuries sustained by plaintiff by having his hand caught in cog-wheels which were not boxed or cased, applying the general rule that a witness should not be permitted to express an opinion on the very question to be determined by the jury, it has been held to be error to testify that the cog-wheels should have been covered. *Marks v. Harriet Cotton Mills,* 135 N. Car. 287.

It has been held that the opinion of a witness that the kind of block signals used on a trolley road are not such as to insure reasonable safety to the employees operating the cars of that road, is incompetent and irrelevant; that conclusion being a question for the jury alone to determine from all the evidence in the case. *Bergen County Traction Co. v. Bliss,* 62 N. J. L. 410.

A medical witness in a criminal prosecution cannot be permitted to express his opinion on the merits of the case. *State v. Hull,* 45 W. Va. 767.

An expert witness cannot give his opinion as to whether the defendant in a criminal case knew the difference between right and wrong. *State v. Brown,* 181 Mo. 192.

In a proceeding for the appointment of a guardian of property for the defendant, it was held that a medical witness was properly allowed to express his opinion as to the mental soundness of the defendant, but could not properly be permitted to state whether or not, in his judgment, the defendant possessed sufficient ability to understand in a reasonable measure the nature and effect of her acts in business transactions; the ultimate question as to the extent of the defendant's capacity to reasonably understand and transact business matters was clearly within the exclusive province of the jury. *McGibbons v. McGibbons,* 119 Iowa 140.

In an action for personal injuries it was held not to be error to refuse to allow a physician to review the testimony of plaintiff in the case, and then give his opinion as to "the reasonableness, the correctness, or otherwise of the statements" therein. *Gulf, etc., R. Co. v. Bell,* 24 Tex. Civ. App. 579.

But the mere fact that the opinion called for may cover the very issue which the jury is to pass on is not conclusive that it is not the subject of expert or opinion testimony. *Western Coal, etc., Co. v. Berberich,* 94 Fed. Rep. 329; *Hutchinson Cooperage Co. v. Snider,* (C. C. A.) 107 Fed. Rep. 633, holding that a witness was properly permitted to testify that a machine like a model put in evidence was impracticable and dangerous. *Sieber v. Great Northern R. Co.,* 126 Minn. 269; *Littlejohn v. Shaw,* 159 N. Y. 188.

Thus, opinion evidence, it has been said, may not be given where an opinion is asked as to the precise ultimate fact in issue which is to be tried by the jury, but such testimony is not necessarily incompetent if it calls for an opinion as to a matter which is evidentiary only, and merely tends to establish a fact which may be involved in the issue. *Ohio, etc., Torpedo Co. v. Fishburn,* 61 Ohio St. 608, 76 Am. St. Rep. 437; *State v. Toledo R., etc., Co.,* 24 Ohio Cir. Ct. 321.

And it has been said that it is not a valid objection to opinion evidence that the opinion covers the whole ground of the inquiry which the jury are to decide, if the case is one to be wholly resolved by opinion evidence. *Firemen's Ins. Co. v. J. H. Mohlman Co.,* (C. C. A.) 91 Fed. Rep. 85.

In *Pursley v. Edge Moor Bridge Works,* 56 N. Y. App. Div. 71, affirmed without opinion 168 N. Y. 589, the court quoted from the opinion in *Dougherty v. Milliken,* 163 N. Y. 527, 79 Am. St. Rep. 608, as follows: "It may be broadly stated as a general proposition that there are two classes of cases in which expert testimony is admissible. To the one class belong those cases in which the conclusions to be drawn by the jury depend upon the existence of facts which are not common knowledge, and which are peculiarly within the knowledge of men whose experience or study enables them to speak with authority upon the subject. If, in such cases, the jury with all the facts before them can form a conclusion thereon, it is their sole province to do so. In the other class, we find those cases in which the conclusions to be drawn from the facts stated, as well as knowledge of the facts themselves, depend upon professional or scientific knowledge or skill not within the range of ordinary training or intelligence. In such cases, not only the facts, but the conclusions to which they lead, may be testified to by qualified experts. The distinction between these two kinds of testimony is apparent. In the one instance, the facts are to be stated by the experts and the conclusion is to be drawn by the jury; in the other, the expert states the facts and gives his conclusion in the form of an opinion which may be accepted or rejected by the jury."

When a question which must be determined by the jury depends upon certain facts which are the subject of expert evidence, but which can easily be placed before the jury by the evidence of experts, expert witnesses may be inquired of as to such facts, but it is the province of the jury alone to apply those facts to the question at issue. *Cramer v. Slade,* 66 N. Y. App. Div. 59.

It has been said that on a question which is put in issue by the pleadings a witness can only give his opinion on a state of facts hypothetically stated. *Hicks v. Southern R. Co.,* 63 S. Car. 559, rehearing (S. Car. 1901) 38 S. E. Rep. 866.

**424. 5. Expert Defined — United States. —** *L. Bucki, etc., Lumber Co. v. Atlantic Lumber Co.,* (C. C. A.) 121 Fed. Rep. 233, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 424.



**425.** 2. Sources of Knowledge. — See notes 1, 2, 3, 4.

**426.** 3. Degree of Expertness Required. — See notes 3, 4.

**427.** Expert in Another Occupation. — See notes 1, 2.

*Alabama.* — *Matthews v. Farrell*, 140 Ala. 298; *Golson v. State*, 124 Ala. 8.

*Illinois.* — *Chicago, etc., Electric R. Co. v. Mawman*, 206 Ill. 182; *Schlesinger v. Scheunemann*, 114 Ill. App. 459; *North Kankakee St. R. Co. v. Blatchford*, 81 Ill. App. 609.

*Michigan.* — *Graves v. Kennedy*, 119 Mich. 621.

*Missouri.* — *Haviland v. Kansas City, etc., R. Co.*, 172 Mo. 106; *Graney v. St. Louis, etc., R. Co.*, 157 Mo. 666.

*Oregon.* — *State v. Simonis*, 39 Oregon 111.

*Pennsylvania.* — *Com. v. Farrell*, 187 Pa. St. 408; *Com. v. Pioso*, 17 Pa. Super. Ct. 45.

*South Carolina.* — *State v. Davis*, 55 S. Car. 339.

*Texas.* — *Wehner v. Lagerfelt*, 27 Tex. Civ. App. 520.

*Washington.* — *State v. Rutledge*, 37 Wash. 523.

**Qualifications of Medical Experts.** — It has been held that it is not necessary for a physician to be examined by a medical board before he is qualified to testify as an expert. This is necessary in order to authorize him to practice medicine legally, but it has nothing to do with his qualification as an expert witness. *Sebastian v. State*, 41 Tex. Crim. 248.

And it has been held that if a man be in reality an expert on any given subject belonging to the domain of medicine, his opinion may be received by the court, although he has not a license to practice medicine. But such testimony should be received with great caution, and only after the trial court has become fully satisfied that on the subject as to which the witness is called for the purpose of giving an opinion he is fully competent to speak. *People v. Rice*, 159 N. Y. 400. But compare *McCann v. Ullman*, 109 Wis. 574.

**425. 1. Knowledge from Experience Received.** — *Wisecarver v. Long*, 120 Iowa 59; *White v. Farmers' Mut. F. Ins. Co.*, 97 Mo. App. 590; *Fischer v. Edward Heitzberg Packing etc., Co.*, 77 Mo. App. 108; *State v. Davis*, 55 S. Car. 339; *Bearden v. State*, 44 Tex. Crim. 578; *Baxter v. Chicago, etc., R. Co.*, 104 Wis. 307.

**Extent of Experience.** — It has been held that a witness having testified that he had used dynamite in blasting for twenty years and had had one experience with frozen dynamite, the court correctly ruled that he had not been shown to be qualified to answer the question whether, from his experience and what he had read, frozen dynamite was more liable to explode, when subjected to pressure, than dynamite in a plastic condition. *Currelli v. Jackson*, 77 Conn. 115.

A witness who testified that he had been in the soda fountain business twenty years and was acquainted with them, with setting them up, and with their method of working, was held to be competent to state what, in his judgment, was the trouble with a fountain which he had set up and which would not work. *Tufts v. Verkuyll*, 124 Mich. 242.

**2. Knowledge from Study Sufficient.** — *Bradford*

*Glycerine Co. v. Kizer*, (C. C. A.) 113 Fed. Rep. 894; *Scott v. State*, (Ala. 1904) 37 So. Rep. 357; *People v. Phelan*, 123 Cal. 551; *Maxwell v. Wilmington City R. Co.*, 1 Marv. (Del.) 199; *Isenhour v. State*, 157 Ind. 517, 87 Am. St. Rep. 228; *State v. Donovan*, (Iowa 1905) 102 N. W. Rep. 791, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 425; *Scott v. Astoria R. Co.*, 43 Oregon 26, 99 Am. St. Rep. 710.

**3. Budge v. Morgan's Louisiana, etc., R., etc., Co.**, 108 La. 349; *Conley v. Portland Gas Light Co.*, 99 Me. 57; *Gray v. Brooklyn Heights R. Co.*, 175 N. Y. 448, reversing 72 N. Y. App. Div. 424; *State v. Barrett*, 33 Oregon 194; *Missouri, etc., R. Co. v. Baker*, (Tex. Civ. App. 1902) 68 S. W. Rep. 556.

A witness is not qualified to testify as to how long a deceased person had been dead merely because he sat on the jury of the coroner who held the inquest over the body. *White v. State*, 136 Ala. 58.

**4. Desultory Reading Insufficient.** — *Conley v. Portland Gas Light Co.*, 99 Me. 57; *Wehner v. Lagerfelt*, 27 Tex. Civ. App. 520.

**426. 3. General Rule as to Degree of Expertness.** — *Consolidated Stone Co. v. Williams*, 26 Ind. App. 131, 84 Am. St. Rep. 278; *Missouri Pac. R. Co. v. Fox*, 60 Neb. 531; *Wilson v. F. C. Linde Co.*, 47 N. Y. App. Div. 327; *Morrisette v. Canadian Pac. R. Co.*, 76 Vt. 267.

It has been said that "it is not necessary that one should be a scientist in order to qualify him to testify as an expert." *State v. Davis*, 55 S. Car. 339.

It has been held that the testimony of witnesses that they, as physicians, were familiar with the massage treatment, the methods employed in giving it, and the reasonable requirements on the part of the patient in order to receive such treatment, sufficiently demonstrated that they were possessed of special knowledge which qualified them to testify whether it is reasonably necessary, in giving the massage treatment to a woman, to require her to expose her person to the view of the operator and whether it is customary where the operator is a man. *Bartell v. State*, 106 Wis. 342.

A witness who had built derricks and knew how they were ordinarily constructed and operated may give an opinion as to the perfect or imperfect character of a particular derrick, though he had never owned or constructed a derrick precisely like the one in question. *Scandell v. Columbia Constr. Co.*, 50 N. Y. App. Div. 512.

**4. Witness Need Not Be Engaged in the Occupation at Time Testimony Given.** — *Baker v. McKinney*, 87 Mo. App. 361.

**427. 1. Expert in Another and Related Occupation.** — *People v. Benham*, 160 N. Y. 402.

The general effect of curves on the speed of an electric car may be shown by a witness who is an expert in the running of steam but not of electric railroads. *Atlanta R., etc., Co. v. Monk*, 118 Ga. 449.

**Yardmaster on Construction of Car.** — A yardmaster, who had charge of switchmen and

**428. 4. Summary.** — See note 2.

brakemen, and had been a switchman himself, has been permitted to testify respecting the manner of the construction of the truss rod or bolt of a car, and to express an opinion as to its being properly or improperly constructed. *Missouri Pac. R. Co. v. Fox*, 60 Neb. 531.

**Bridge Builder on Pile Driving Machine.** — A foreman of bridge building on a railroad who is familiar with a certain pile driving machine, having used it, may testify as to whether the pile driver was properly constructed. *Koon v. Southern R. Co.*, 69 S. Car. 101.

**Bookkeeper on Effect of Erasing Compound.** — A bookkeeper who had used a particular acid for six or seven years continuously, and who had performed a number of experiments with it himself, and had witnessed others perform experiments with it, on different kinds of paper, including that like the check in question, was a competent witness to testify as to the effect of such acid upon paper in making erasures. *Birmingham Nat. Bank v. Bradley*, (Ala. 1900) 30 So. Rep. 546.

**Stock Raisers on Shipment of Cattle.** — Witnesses who have had experience in raising and handling cattle may testify as to whether certain cattle were in a condition to be shipped by rail over a given route. *Southern Pac. R. Co. v. Arnett*, (C. C. A.) 111 Fed. Rep. 849.

**427. 2. Expert in Remote and Disconnected Vocation.** — *Piehl v. Albany R. Co.*, 30 N. Y. App. Div. 166, *affirmed* without opinion 162 N. Y. 617. See *Caven v. Bodwell Granite Co.*, 97 Me. 381.

**Car Repairers as to Cause of Derailment of Car.** — Men without scientific knowledge and without practical experience in the handling of moving cars and trains, who may be employed as car inspectors and charged with the duty of seeing that the parts and appliances of the cars are safe and sound and in their proper positions, do not thereby become qualified as experts in the matter of the causes which may operate to derail a car or to prevent its trucks from working properly. *Budge v. Morgan's Louisiana, etc., R., etc., Co.*, 108 La. 349.

**Steam Fitter on Operation of Steam Plaz's.** — It has been held that a witness who qualified as a steam fitter was not competent to testify as to what it would be necessary to do to a steam plant in order to prevent an accident of a certain kind. *Paul E. Wolff Shirt Co. v. Frankenthal*, 96 Mo. App. 307.

**Mining Engineer and Consulting Chemist on Sewer Construction.** — A mining engineer and consulting chemist who had never, as a scientist, investigated the ventilation of sewers, and had never given the subject of sewers a particular or special study, has been held incompetent to testify as to the proper manner in which to eliminate gases from sewers so as to render them nonexplosive. *Fuchs v. St. Louis*, 167 Mo. 620.

**Barber on Firearms.** — It has been held that a barber who had had no experience with broken metals, except razors and shears and bicycles, and had seen only two broken gun barrels, and those when a boy in Italy, and knew nothing of the manufacture of guns or the composition of the metal of which gun barrels are made, was

not competent to testify that there was a defect in the metal of the barrel of a gun which burst when it was discharged. *Favo v. Remington Arms Co.*, 67 N. Y. App. Div. 414.

**Lapidaries.** — Dealers in real precious stones only have been held not to be competent to testify as to the commercial uses of imitations of precious stones. *Lorsch v. U. S.*, 119 Fed. Rep. 476.

**X-Ray Photographer.** — In an action to recover for personal injuries, a witness who had taken X-ray photographs of the injured joint was asked to explain why there were no light lines running across at the foot of the perpendicular bones of the leg, and replied that it was because there was a fracture close to the ankle joint which afterwards filled up with cartilage. The defendant insisted that this was a conclusion which the witness was not qualified to draw. The witness subsequently testified that in the experience he had had in photographing ankle joints in their natural condition the light lines appeared between the bones, and upon further inquiry that he had taken some sixteen hundred pictures of joints in different parts of the body, and that he considered himself qualified to say whether the white line would appear in a joint in normal condition. But it was held that this did not make him an expert as to the character of the injury and the subsequent process to which this difference in the photograph was due. *Sias v. Consolidated Lighting Co.*, 73 Vt. 35.

**428. 2. Discretion of Trial Judge — United States.** — *Glasier v. Nichols*, 112 Fed. Rep. 877. *Arizona.* — *Gila Valley, etc., R. Co. v. Lyon*, (Ariz. 1905) 80 Pac. Rep. 337.

*Connecticut.* — *Palmer v. Hartford Dredging Co.*, 73 Conn. 182.

*Delaware.* — *Creswell v. Wilmington, etc., R. Co.*, 2 Penn. (Del.) 210.

*District of Columbia.* — *Bradley v. District of Columbia*, 20 App. Cas. (D. C.) 169.

*Florida.* — *Schley v. State*, (Fla. 1904) 37 So. Rep. 518; *Davis v. State*, 44 Fla. 32.

*Georgia.* — *Wheeler v. State*, 112 Ga. 43.

*Illinois.* — *Grand Lodge, etc., v. Randolph*, 186 Ill. 89.

*Indiana.* — *La Porte Carriage Co. v. Sullender*, (Ind. App. 1904) 71 N. E. Rep. 922; *Buckeye Mfg. Co. v. Woolley Foundry, etc., Works*, 26 Ind. App. 7.

*Iowa.* — *State v. Donovan*, (Iowa 1905) 102 N. W. Rep. 791.

*Louisiana.* — *State v. Mathis*, 106 La. 263.

*Massachusetts.* — *Bowen v. Boston, etc., R. Co.*, 179 Mass. 524; *Barker v. Lawrence Mfg. Co.*, 176 Mass. 203; *Howland v. Westport*, 172 Mass. 373; *Childs v. O'Leary*, 174 Mass. 111; *Manning v. Lowell*, 173 Mass. 100. See *A. J. Tower Co. v. Southern Pac. Co.*, 184 Mass. 472. *Michigan.* — *People v. Kinney*, 124 Mich. 486.

*Minnesota.* — *Martin v. Courtney*, 75 Minn. 255.

*Missouri.* — *Schrodt v. St. Joseph*, 109 Mo. App. 627.

*New York.* — *Finn v. Cassidy*, 165 N. Y. 584; *Hart v. Maloney*, 101 N. Y. App. Div. 37; *Brunnemer v. Cook, etc., Co.*, 89 N. Y. App. Div.



**428. VI. THE VARIOUS KINDS OF EXPERTS — 2. Accountants. — See note 6.**

3. Actuaries. — See notes 8, 9.

**429. 5. Architects, Carpenters, and Builders — a. WHEN COMPETENT — (1) Generally. — See note 1.**(2) *As to Value and Cost of Building.* — See notes 12, 13, 14.**430. (3) *As to Durability* — Strength of Timbers. — See notes 5, 8.**

406, reversed on another point 180 N. Y. 188; People v. Flechter, 44 N. Y. App. Div. 199. See Piehl v. Albany R. Co., 30 N. Y. App. Div. 166, affirmed without opinion 162 N. Y. 617.

Oregon. — Farmers' Nat. Bank v. Woodell, 38 Oregon 294.

Pennsylvania. — Stevenson v. Ebervale Coal Co., 203 Pa. St. 316.

Rhode Island. — Ennis v. Little, 25 R. I. 342, 401.

South Dakota. — Waterhouse v. Jos. Schlitz Brewing Co., 16 S. Dak. 592.

Utah. — Garr v. Cranney, 25 Utah 193; Olson v. Oregon Short Line R. Co., 24 Utah 460.

Washington. — Halverson v. Seattle Electric Co., 35 Wash. 600, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 428; Traver v. Spokane St. R. Co., 25 Wash. 225, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 428; State v. Melvern, 32 Wash. 7; Czarecki v. Seattle, etc., R., etc., Co., 30 Wash. 288.

Wisconsin. — Northern Supply Co. v. Wanger, 123 Wis. 1.

See Virginia-Carolina Chemical Co. v. Kirven, 57 S. Car. 445.

The competency of a witness to testify as an expert is, in the first instance, a matter which is to be decided by the trial judge, and his decision will not be reversed unless shown to be clearly erroneous. Bradford Glycerine Co. v. Kizer, (C. C. A.) 113 Fed. Rep. 894; Conley v. Portland Gas Light Co., 99 Me. 57; Muskeget Island Club v. Nantucket, 185 Mass. 303; White v. McPherson, 183 Mass. 333; Toland v. Paine Furniture Co., 179 Mass. 501; Schmuck v. Hill, (Neb. 1901) 96 N. W. Rep. 158; Missouri Pac. R. Co. v. Fox, 60 Neb. 531; State v. Webb, 18 Utah 441.

It has been held that a physician was properly permitted to testify that certain wounds were sufficient to produce death. Horst v. Lewis, (Neb. 1905) 103 N. W. Rep. 460, affirming (Neb. 1904) 98 N. W. Rep. 1046.

**Whether Death Accidental.** — It has been held incompetent for a physician who had not seen the body of a deceased person, and was not in attendance during his illness, to state whether, in his opinion, the death was the result of accident or design. Manhattan L. Ins. Co. v. Beard, 112 Ky. 455.

**Time of Death.** — In a prosecution for murder, it was held that the court properly admitted the testimony of a physician relating to the probable length of time which intervened from the time the deceased had eaten his supper until his death, as indicated by the appearance of the contents of the stomach and the stage of digestion, the witness, as an expert, having made an examination of the stomach of the deceased. State v. Mortensen, 26 Utah 312.

**428. 6. Accountants.** — State v. Mathis, 106 La. 263; Rosenfeld v. Siegfried, 91 Mo. App. 169; Daniels v. Fowler, 123 N. Car. 35; State v.

Stevens, 16 S. Dak. 309. See Smythe v. Evans, 209 Ill. 376, reversing 108 Ill. App. 145.

When books of account, which are material to an issue on trial, are properly received in evidence, and, being in court, open to inspection by all parties, require a long examination of many details, it is proper to receive balances of summaries from an expert witness, who has made the same, on proper foundation being laid. State v. Clements, 82 Minn. 434.

**Profits as Disclosed by Books.** — It has been held that the statements of a bookkeeper, based on his examination of books of accounts, that profits of a certain amount were shown, was inadmissible; it was for the jury to ascertain the amount of the profits. Smythe v. Evans, 209 Ill. 376, reversing 108 Ill. App. 145. But compare Plank v. Indiana Mut. Bldg., etc., Assoc., 28 Ind. App. 259.

**8. Actuaries.** — Witnesses engaged in the insurance business have been held competent to testify as to the value of a particular insurance business. Graves v. Kennedy, 119 Mich. 621.

**9.** Chicago, etc., R. Co. v. Neff, 25 Ind. App. 107.

An expectancy of life in the plaintiff beyond that given in the mortality table cannot be shown by the testimony of experts, basing their opinions on the mortality tables, and the hypothesis that the plaintiff resembled his father and grandfather, who lived to advanced ages. Hamilton v. Michigan Cent. R. Co., 135 Mich. 95, 10 Detroit Leg. N. 711.

**429. 1. Architects, Carpenters, and Builders.** — N. & M. Friedman Co. v. Atlas Assur. Co., 133 Mich. 212, 10 Detroit Leg. N. 139.

**12. Opinions as to Value.** — Smith v. Frio County, (Tex. Civ. App. 1900) 66 S. W. Rep. 711.

**13. Cost of Construction.** — Jenkins v. Charleston St. R. Co., 58 S. Car. 373.

**14. Cost of Reconstruction.** — See Walter v. Hangen, 71 N. Y. App. Div. 40.

It has been held that a witness who was not a bricklayer, but a roofer and cornice maker, was not competent to testify as to the cost of taking down certain brick walls and rebuilding them. Brunold v. Glasser, (County Ct.) 25 Misc. (N. Y.) 285.

**430. 5.** The trial court may properly find that a witness who had been a contractor and builder for fourteen years, but who had never made any study with reference to the bearing strength of wood, is not qualified as an expert to testify to the weight which could be borne by a spruce plank twenty feet long, twelve inches wide and two inches thick, with a knot as large as the palm of a man's hand in the middle of it. Thompson v. Worcester, 184 Mass. 354.

**8.** A witness who has for years been engaged in the erection and maintenance of bridges and similar structures is competent to testify as to



**431.** 7. Attorneys at Law — Foreign Laws. — See note 5.

**432.** See notes 1, 2.

**433.** 15. Chemists — *a.* IN GENERAL — Definition. — See note 2.

Basis of Opinion. — See note 3.

Constituents of Compounds. — See note 5.

Explosions. — See note 8.

Blood Stains. — See note 12.

**434.** *b.* POISONS. — See notes 1, 3.

20. Engineers — *a.* CIVIL ENGINEERS — (1) *Overflow of Water* —

Harbors. — See note 15.

the durability of hemlock planking of a bridge. *Bush v. Delaware, etc.*, R. Co., 166 N. Y. 210, affirming 54 N. Y. App. Div. 616.

**431.** 5. Attorneys at Law. — *Badische Anilin, etc.*, *Fabrik v. Klipstein*, 125 Fed. Rep. 543; *Mexican Nat. R. Co. v. Slater*, (C. C. A.) 115 Fed. Rep. 593, affirmed 194 U. S. 120. See *De Sonora v. Bankers' Mut. Casualty Co.*, 124 Iowa 576, 104 Am. St. Rep. 367. But see *Clardy v. Wilson*, 24 Tex. Civ. App. 196.

The existence and meaning of foreign laws, as well written as unwritten, may be proved by calling professional persons to give their opinions on the subject. *Sierra Madre Constr. Co. v. Brick*, (Tex. Civ. App. 1900) 55 S. W. Rep. 521.

Where an expert witness giving evidence of the law of Chile was described merely as a solicitor and notary public practicing in London, who "had had extensive practice for many years in the law of the South American republics generally and of Chile in particular," the court, whilst acting on his evidence, expressed a doubt whether evidence of foreign law from a witness described as above was sufficient. In *Goods of Whitelegg*. (1899) P. 267, 81 L. T. N. S. 234, 68 L. J. P. 97.

It is admissible to prove the law of another state by persons learned therein. *Palmer v. Hudson River State Hospital*, 10 Kan. App. 98.

On the other hand it has been held that the written laws of a sister state cannot be proved by the testimony of an expert witness. *Johnson v. Hesser*, 61 Neb. 631.

In *Ohio*, it has been held that notwithstanding the provisions of section 5244, Rev. Stat. of Ohio, which provide the method by which the statutes of other states may be proved in the state of Ohio, they may also be proved by oral testimony of persons learned in the law who testify as experts with respect thereto. *Brady v. Palmer*, 10 Ohio Cir. Dec. 27, 19 Ohio Cir. Ct. 687.

See also the title FOREIGN LAWS.

**432.** 1. *Patterson v. Kennedy*, 122 Mich. 343.

2. *Union Cent. L. Ins. Co. v. Caldwell*, 68 Ark. 505.

**Construction of Statutes of Sister States.** — It has been held that the opinion of a lawyer learned in the law of a sister state is not admissible on a question as to the construction of a statute of that state. *Clark v. Eltinge*, 38 Wash. 376.

**433.** 2. Chemists. — *Cook v. Hollister Drug Co.*, 13 Hawaii 684, quoting 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 433.

**Existence of Chemical with Certain Properties.** — Where it was a part of the case for the prose-

cution in a trial for forgery to prove that certain writing on a check had been removed and other writing substituted in its place, it was held that it might be shown by expert testimony that there is a fluid by means of which writing may be removed from paper. *People v. Dole*, 122 Cal. 486, 68 Am. St. Rep. 50.

3. *Bradford Glycerine Co. v. Kizer*, (C. C. A.) 113 Fed. Rep. 894, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 433.

5. *Badische Anilin, etc.*, *Fabrik v. Klipstein*, 125 Fed. Rep. 543.

It has been held that on the trial of one charged with selling oleomargarine containing coloring matter, it is not error to permit a chemist experienced in the analysis of food products to testify that the article sold resembles, or is a substitute for, or an imitation of, butter. *State v. Ehinger*, 67 Ohio St. 51.

8. Chemists have been held to be competent to testify as to the volume, explosion pressure, and effect of gas generated by the discharge of a gun. *Long v. Travellers' Ins. Co.*, 113 Iowa 259.

12. On a trial for murder a witness who was examined for the state testified that he had been practicing medicine for about two years and was a county physician; that he had had considerable experience in examining blood spots, and had examined the defendant's leggings with a low-power lens, and that he found some stains on them that looked like blood. In regard to the objection that it was not shown that the witness had knowledge to qualify him to testify as an expert, it was said that the qualification of the witness was a matter addressed to the discretion of the trial court, and that the force and value of his opinion was open to be combated by other proof that the opinion was worthless, and this value was for the jury to determine in connection with all the evidence. *White v. State*, 133 Ala. 122. See also the title BLOOD STAINS.

**434.** 1. Effect of Morphine. — *Scott v. State*, (Ala. 1904) 37 So. Rep. 357.

3. Effect of Bichloride of Mercury. — A duly qualified chemist may be permitted to give his opinion as to the effect of applications of bichloride of mercury to the face. *Cook v. Hollister Drug Co.*, 13 Hawaii 684.

15. Manner of Making Street Improvements. — In a proceeding to collect an assessment for a street improvement, the testimony of a witness who was a civil engineer, in the employ of the city when the improvements were made, was held admissible as to the manner in which the work was done. *Fralich v. Barlow*, 25 Ind. App. 383.

- 435.** (3) *Scouring of River.* — See note 4.  
 (5) *Fountains and Drains.* — See note 7.  
**436.** *d.* MECHANICAL ENGINEERS. — See notes 7, 11.  
**437.** 23. Farmers and Stock Raisers — Crops. — See notes 7, 8.  
 Overflow of Land. — See note 10.  
**438.** Burning Fallow. — See note 2.

**435. 4.** On the question whether a river was navigable at all seasons at a point where a boat collided with a bridge, the testimony of a civil engineer was held to be competent where it appeared that he had had eight years' experience in charge of a government snag-boat; had observed and studied the currents of the river at similar places, and had knowledge of the locality in question acquired by frequently passing over it, though at a lower state of water. *Chico Bridge Co. v. Sacramento Transp. Co.*, 123 Cal. 178.

**7. Necessity of Ditches.**—In an action for damages in appropriating a right of way, it was held that it was proper to admit the testimony of an engineer as to whether certain ditches, which were excavated for drainage, were necessary in the safe construction of the roadbed. *Guinn v. Iowa, etc., R. Co.*, 125 Iowa 301.

**436. 7. Whether Machine Safe or Unsafe.**—A mechanical engineer of seven years' experience is competent to testify as to whether the explosion of a tank used for rendering fat was due to defects rendering the tank unsafe. *Fischer v. Edward Heitzberg Packing, etc., Co.*, 77 Mo. App. 108.

**11. Effect of Sand in Stopping Electric Cars.**—A witness who had testified that he had been an engineer on a steam railroad for fourteen years, that he was familiar with the effect of sand on a track, that he was familiar with the track of the defendants' electric railway and had frequently ridden on the defendants' electric cars, and that he knew something of electric cars, having made them and electricity a subject of study, but had never operated an electric car, was held to be competent to testify as to whether an electric car could be stopped more suddenly by the application of sand to the track than it could without sand. *Maxwell v. Wilmington City R. Co.*, 1 Marv. (Del.) 199.

**437. 7. Baker v. Cotney.** (Ala. 1905) 38 So. Rep. 131; *Shoemaker v. Crawford*, 82 Mo. App. 487; *Farmers' Nat. Bank v. Woodell*, 38 Oregon 294; *Chicago, etc., R. Co. v. Longbottom*, (Tex. Civ. App. 1904) 80 S. W. Rep. 542. See *La Rue v. St. Anthony, etc., Elevator Co.*, 17 S. Dak. 91.

**Value of Growing Crop.**—A farmer has been held to be competent to testify as to the value of growing wheat. *Baldwin v. Curth*, 9 Ohio Cir. Dec. 594, 17 Ohio Cir. Ct. 174.

**8. Auckland v. Lawrence.** 19 Colo. App. 291, (Colo. App. 1904) 78 Pac. Rep. 1035.

**Cause of Injury to Cotton Crop.**—An experienced farmer in cotton culture has been held to be competent to testify as to whether an injury done to a cotton crop was caused by the Mexican weevil. *Virginia-Carolina Chemical Co. v. Kirven*, 57 S. Car. 445.

**10. Effect of Overflow Water on Land.**—The opinions of farmers living in the vicinity are competent as to the probable effect of overflow

water on the plaintiff's land. *Walker v. Davis*, 83 Mo. App. 374.

**438. 2. Deterioration of Cotton Seed.**—A witness who had had ten years' experience in the business of inspecting cotton seed for the purpose of ascertaining its condition and value was held to be competent to testify as to the extent which cotton seed, which he had examined, had deteriorated in value by delay and want of care in transportation. *San Antonio, etc., R. Co. v. Josey*, (Tex. Civ. App. 1903) 71 S. W. Rep. 606.

**Condition of Threshing Machinery.**—It is proper to permit testimony that certain threshing machinery was old and worn out to be given by a witness who had been farming for about thirty years and during that time had worked around threshers, and had run a horse-power thresher for ten years in one county, and another for seven years in another county, and was familiar with the working of threshers, and the manner of operating them. *Standefer v. Aultman, etc., Machinery Co.*, 34 Tex. Civ. App. 160.

**Sufficiency of Enclosure to Turn Cattle.**—In an action to recover damages caused by the defendant's cattle breaking into the plaintiff's enclosure, the plaintiff, having qualified as an expert, may testify that, in his opinion, his fence was sufficient to turn any and all kinds of cattle of ordinary disposition with reference to breaking fences. *Trammell v. Turner*, (Tex. Civ. App. 1904) 82 S. W. Rep. 325.

**Number of Cattle on Range.**—The testimony of an experienced stock raiser as to the probable number of cattle on a certain range has been held to be admissible. *Cabaness v. Holland*, 19 Tex. Civ. App. 383.

**Increase of Animals.**—A witness who has dealt in sheep for about twenty-six years and is familiar with the sheep industry may testify as to the average increase of lambs in a flock of sheep of a given number in the spring. *Matter of More*, 121 Cal. 609.

A witness who had been in the cattle business for many years was competent to testify as to the effect of close herding and driving of cattle upon their increase. *Proctor v. Irvin*, 22 Mont. 547.

**Condition of Cattle.**—In an action to recover damages on a shipment of cattle, it was held not to be error to permit testimony to the effect that the cattle did not have "dry murrain," to be given by a witness who testified that he knew something about the disease mentioned; that he thought he knew in a general way how it affected cattle, although he did not know what produced the disease; that it was supposed to be dry grass; that he owned the pasture from which the cattle had been taken; that it was abundantly supplied with grass and water; that the cattle at the time of shipment were fat and without disease; that immediately thereafter other cattle had been placed in the pasture, and

**439. 33. Lumbermen.** — See note 1.

**34. Machinists — a. MERITS, DEFECTS, AND CONDITION OF MACHINERY — Cotton Gin.** — See note 6.

**Elevator Devices.** — See note 10.

**Construction.** — See note 11.

dry murrain had not been developed. *Ft. Wayne, etc., R. Co. v. Hagler*, (Tex. Civ. App. 1905) 84 S. W. Rep. 692.

A witness who has been engaged in the handling of cattle may testify on the trial of a defendant for cattle theft that the condition of the cattle when found in the possession of the defendant showed that they had been driven hard. *Kennon v. State*, 46 Tex. Crim. 359.

**Shipment of Cattle.** — An expert shipper of cattle is competent to express an opinion as to whether it would have been necessary to feed cattle at a certain station on the route over which they were shipped, if they had been properly shipped and expeditiously transported. *Gulf, etc., R. Co. v. Irvine*, (Tex. Civ. App. 1903) 73 S. W. Rep. 540.

A witness who had been a dealer in cattle all of his life, buying, selling, and shipping them on railroads, who within the year had bought cattle several times in and around A, and who had shipped cattle several times from A to B, was held to be qualified to testify as to the value of certain cattle shipped from A to a place near B, and whether they could be loaded and transported with safety without partitions in the cars in which they were placed, and also as to what would be a reasonable time for the transportation. *Louisville, etc., R. Co. v. Landers*, 135 Ala. 504.

A cattle shipper of large experience who for several years shipped cattle between certain points is competent to state what was a reasonable time for the trip. *McCrary v. Chicago, etc., R. Co.*, 109 Mo. App. 567. See also *International, etc., R. Co. v. McGehee*, (Tex. Civ. App. 1904) 81 S. W. Rep. 804.

In an action to recover damages resulting from delay in the transportation of cattle, it has been held that it is proper to admit the testimony of qualified witnesses as to the transportable condition of the cattle when they were offered for transportation and as to the effect upon them and their value of delay and bad treatment received from the railway companies, and as to what constituted overloading, and as to what was a reasonable time to transfer them from one carrier to another. *Chicago, etc., R. Co. v. Carroll*, 36 Tex. Civ. App. 359.

A witness who had had several years' experience buying and shipping cattle was held competent to give an opinion as to the probable falling off in weight of cattle shipped a certain distance within a certain time. *Cleveland, etc., R. Co. v. Heath*, 22 Ind. App. 47.

In an action to recover damages for the breach of a contract to carry cattle, it was held that a witness who had bought and shipped cattle to market for several years, had cut the cattle in question, assisted in loading them, and accompanied them to the destination, was properly permitted to testify that "the bad condition of the cattle was caused by bad handling and delay in getting to market." *St. Louis, etc., R. Co. v. White*, (Tex. Civ. App. 1903) 76

S. W. Rep. 947, reversed on other points 97 Tex. 493.

**Whether a Mare Is with Foal.** — The testimony of farmers and stockmen who were familiar with the handling and care of mares while with foal, and their appearance during the period of gestation, was competent on the question of whether a mare was with foal. *Boyer v. Chicago, etc., R. Co.*, 123 Iowa 248.

**Relationship Between Mare and Colt.** — It has been held that testimony by experienced stockmen that a colt belonged to a certain mare, which it had been following, was admissible. *Miller v. Territory*, (Ariz. 1905) 80 Pac. Rep. 321.

It is competent for a witness, who is shown to be a stockman, and familiar with cattle, and who is also shown to have a knowledge of hides taken from cattle from having seen and examined such hides in the course of his business, and who in that connection is able to state the difference in appearance of hides taken from slaughtered animals and those taken from fallen animals (that is, animals dying from natural causes), to give in evidence before the jury his opinion as to whether a certain hide exhibited to him soon after it was taken from an animal was the hide of an animal which was slaughtered or the hide of an animal which died from natural causes. *Clay v. State*, 41 Tex. Crim. 653.

**439. 1. Lumbermen.** — A witness who was an expert lumberman and had been in the logging business for thirty or thirty-five years is competent to testify as to the physical characteristics of "merchantable timber" within the meaning of those words as employed in a logging contract. *Wagar Lumber Co. v. Sullivan Logging Co.*, 120 Ala. 558.

**Quantity of Lumber.** — Witnesses shown to have special knowledge in the premises, and to be experts in respect to what trees were suitable to be made into cross-ties, and the number of cross-ties in given standing trees, etc., have been held competent to testify as to the number of cross-ties which could be cut from trees standing on a tract of land. *Thornton v. Savage*, 120 Ala. 449.

**6. Novelty and Usefulness of Improvements in Glass Press.** — A witness who has a general knowledge of the various kinds of presses for pressed glassware and has had a familiarity with their operation for a great many years has been held competent to testify as to the novelty and usefulness of an alleged improvement. *Haley v. Flaccus*, 193 Pa. St. 521.

**10. Sufficiency of Elevator Cable.** — A witness who had been familiar with wire cables, having worked about and with them for several years, and had repaired cables on elevators, though he had never constructed an elevator, has been held to be qualified to testify as to sufficiency of an elevator cable. *Stomne v. Hanford Produce Co.*, 108 Iowa 137.

**11. Proper Construction of Machinery.** — Mc-



**440. Dangers.** — See note 7.

Cause of Breakage. — See note 11.

*b. OPERATION OF MACHINERY.* — See note 13.**441. 35. Manufacturers.** — See note 4.**442. 39. Millers and Millwrights — When Incompetent.** — See note 12.

40. Miners — Condition of Mines. — See notes 14, 15.

**443. 43. Painters and Photographers.** — See note 11.**444. 45. Physicians and Surgeons — *b. CAUSE OF DEATH* — (1) *General Rule.*** — See note 17.**445. (3) *Isolated Causes* — Drowning.** — See note 8.

Faul v. Madera Flume, etc., Co., 134 Cal. 313; Snyder v. Holt Mfg. Co., 134 Cal. 324; Kumberger v. Congress Spring Co., 158 N. Y. 339.

**Proper Operation of Machine.** — It has been held that a witness who had thirteen years' experience in working with a certain machine was properly permitted to give testimony as to the proper mode of operating the machine. Punkowski v. New Castle Leather Co., 4 Penn. (Del.) 544.

**440. 7. Dangerous Nature of Machinery.** — Volland Buggy Body Co. v. Spry, 80 S. W. Rep. 1092, 26 Ky. L. Rep. 228.

**11. Manner in Which Accident Happened.** — In an action against a master by a servant to recover damages for injuries received in consequence of being caught in machinery, it was held that there was no error in allowing an engineer, who was familiar with the minute details of the machinery, and who came almost instantly after the catastrophe, to testify, from his knowledge of the machinery, and the situation in which he found the plaintiff, "what there was on the shaft that could have caught him." Neidlinger v. Yoost, (C. C. A.) 99 Fed. Rep. 240.

**13. Difficulty of Operating Machine.** — In an action to recover damages sustained by a minor employed by the defendant while he was operating a machine for pressing and embossing books which was alleged to be of a dangerous character and only intended to be handled and operated by men of experience, it was held proper to admit the testimony of a witness with long experience in the work that it was only customary to put employees at work on machines of like character after they had become experienced. Gammel-Statesman Pub. Co. v. Monfort, (Tex. Civ. App. 1904) 81 S. W. Rep. 1029.

**441. 4. Manufacturers of Condensed Milk.** — It has been held that witnesses who had from eight to twenty-five years' experience in manufacturing, handling, dealing in, and shipping condensed milk were competent to testify in reference to the effect of heat and cold on milk, and the effect of transferring condensed milk from refrigerator cars to box cars and carrying it a long distance in the latter. St. Louis Southwestern R. Co. v. Elgin Condensed Milk Co., 175 Ill. 557, 67 Am. St. Rep. 238.

**442. 12. Cause of Breaking of Pulley.** — It has been held that a millwright whose duty it was to look after the pulleys in a mill was not competent to testify as to what caused the breaking of a certain pulley. Duntley v. Inman, 42 Oregon 334.

**14. Donk Bros. Coal, etc., Co. v. Stroff,** 200

Ill. 483, affirming 100 Ill. App. 576, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 442.

**Qualification of Mining Expert.** — It was held that it was not error to refuse to permit certain witnesses to answer questions as to how long it would take to dig holes or excavate cuts of given dimensions where it did not appear that the witnesses had experience in mining in ground of the character of the ground to which the question had reference, and the question, as asked, was not confined to any particular season of the year. Walton v. Wild Goose Min., etc., Co., (C. C. A.) 123 Fed. Rep. 209.

**15. Expert miners may testify as to whether, in their judgment, certain conditions as to a road render it safe or otherwise.** Henrietta Coal Co. v. Campbell, 211 Ill. 216, affirming 112 Ill. App. 452.

**443. 11. Skill of Fellow Photographer.** — A photographer may testify as to the degree of skill possessed by another photographer with whom he has worked side by side and with whose work he is familiar. Stevens v. Walton, 17 Colo. App. 440.

**444. 17. Opinion as to Cause of Death Competent.** — Supreme Tent, etc., v. Stensland, 206 Ill. 124, affirmed 105 Ill. App. 267; People v. Benham, 160 N. Y. 402; State v. Foote, 58 S. Car. 219, quoting 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 444; Knights of Pythias v. Steele, 108 Tenn. 624. Compare Lake Shore, etc., R. Co. v. Shook, 9 Ohio Cir. Dec. 9, 16 Ohio Cir. Ct. 665.

**Physical Capacity of Injured Person.** — A medical expert may testify as to the physical exertion which a person might be capable of notwithstanding the existence of a certain injury. Birmingham R., etc., Co. v. Ellard, 135 Ala. 433. And see Dixon v. State, 139 Ala. 104.

It has been held to be proper to permit a physician to testify how far a man could ordinarily walk after being shot through the heart. State v. McLaughlin, 149 Mo. 19.

**Effect of Injury on Ability to Work.** — It has been held that a physician may testify as to the effect of the loss of a foot on the ability of a person to perform the work of a carpenter or miner. Southern Pac. R. Co. v. Hall, (C. C. A.) 100 Fed. Rep. 760.

In an action for personal injuries it was held that it was not error to allow one of the plaintiff's medical experts to testify that the injuries received by the plaintiff incapacitated him to the extent of about two-thirds — that is to say, he was only capable of performing one-third as much manual labor as before the accident. Conrad v. Ellington, 104 Wis. 367.

**445. 8. State v. Wilcox,** 132 N. Car. 1120.

**445.** Poison. — See note 9.

**446.** Suffocation. — See note 2.

c. DISEASE — (2) *Duration*. — See note 8.

d. EFFECT OF DRUGS. — See note 11.

**447.** e. HEALTH. — See note 2.

f. INJURIES AND WOUNDS — (1) *Cause and Effect* — General Rule.

— See notes 3, 5, 6, 7.

Concussion. — See notes 8, 9, 11.

**445.** 9. See *Knights of Pythias v. Steele*, 108 Tenn. 624.

**446.** 2. *Strangulation*. — A physician may testify as to whether death could have been caused by strangulation. *Supreme Tent, etc., v. Stensland*, 206 Ill. 124, *affirming* 105 Ill. App. 267.

8. *Existence of Disease*. — A physician may state his opinion as to whether, certain symptoms existing, a person could be in good health. *Missouri, etc., R. Co. v. Johnson*, (Tex. Civ. App. 1898) 49 S. W. Rep. 265, *affirmed* 92 Tex. 380.

*Whether Disease Is Difficult to Diagnose*. — It has been held that where an expert witness is competent to testify as to nature and symptoms of a disease, he may be permitted, at the request of either party to the issue, to testify whether the disease is easy or difficult to diagnose. *Baldi v. Metropolitan Ins. Co.*, 18 Pa. Super. Ct. 599.

11. *Effect of Drugs*. — See *Shorb v. Webber*, 188 Ill. 126, *affirming* 89 Ill. App. 474.

*Effect of Poisons*. — A physician may be qualified to testify as to the effect of prussic acid on the human system, though he is not a toxicologist. *People v. Benham*, 160 N. Y. 402.

*Symptoms of Poisoning*. — The mere fact that a witness is a regularly-licensed and practicing physician is not of itself sufficient, as a matter of law, to qualify him to give an expert opinion as to whether certain symptoms observed by him were caused by poison. *State v. Simonis*, 39 Oregon 111.

**447.** 2. *Condition of Person's Health*. — In an action to recover for personal injuries a physician, testifying for the plaintiff, gave such answers as the following: "He is a physical wreck, as well as a mental wreck." "He is in that condition of health in which there is absolutely no enjoyment of life to him, and can be none." "There is evidence of constant pain — plenty of it." It was held that these answers were properly stricken out for the reason that they were simply general conclusions. *Sterling v. Detroit*, 134 Mich. 22, 10 Detroit Leg. N. 399.

*Capacity for Physical Exertion*. — After a physician had testified to the state of health of the defendant in a prosecution for murder, immediately before and after the commission of the crime, it was held that his opinion as to whether the defendant was capable of the physical exertion necessary to the execution of the crime was admissible in evidence. *Dixon v. State*, 130 Ala. 104. See *infra*, this title, **448.** 4.

*Effect of Nuisance on Health*. — It has been held that the admission of testimony of physicians in an action to recover damages for maintaining a nuisance, as to the probable effect of the alleged nuisance on the health of the plaintiff's family, was not error simply because the

witnesses were not the physicians who attended the plaintiff's family. *Adams Hotel Co. v. Cobb*, 3 Indian Ter. 50.

3. *Opinions of Cause of Wounds or Injuries Admissible*. — *West Chicago St. R. Co. v. Dougherty*, 209 Ill. 241; *United R., etc. Co. v. Seymour*, 92 Md. 425, *citing* 12 AM AND ENG. ENCYC. OF LAW (2d ed.) 447; *Tracey v. Metropolitan St. R. Co.*, 49 N. Y. App. Div. 197, *affirmed* without opinion 168 N. Y. 653; *Oliver v. Columbia, etc., R. Co.*, 65 S. Car. 1; *St. Louis Southwestern R. Co. v. Laws*, (Tex. Civ. App. 1901) 61 S. W. Rep. 498; *Barker v. Ohio River R. Co.*, 51 W. Va. 423, 90 Am. St. Rep. 808, *citing* 12 AM AND ENG. ENCYC. OF LAW (2d ed.) 447; *Hallum v. Omro*, 122 Wis. 337.

5. *Wagner v. Metropolitan St. R. Co.*, 79 N. Y. App. Div. 591, *affirmed* without opinion 176 N. Y. 610; *Jones v. American Warehouse Co.*, 137 N. Car. 337; *State v. Johnson*, 66 S. Car. 23.

6. See *People's Gas Light, etc., Co. v. Porter*, 102 Ill. App. 461.

7. *Kiser v. Southern R. Co.*, 67 S. Car. 419.

8. *Concussion*. — It has been said that "it would be competent for a physician or surgeon, who is properly qualified to give an opinion, to state that an injury might have been caused by a fall from a car, or that such a fall, in other words, could have produced it; but when he is called upon to say that the injury was caused by the fall from a car and not by a fall from any other elevated place, or in any other way that might just as well have produced the same result, it is beyond his competency as an expert to speak upon the subject, for he will then be deciding a fact and not merely giving an expert opinion founded upon a given state of facts." *Summerlin v. Carolina, etc., R. Co.*, 133 N. Car. 550.

9. *State v. Greenleaf*, 71 N. H. 606.

In an action to recover for the death of the plaintiff's intestate, it was held that it was not error to permit a physician to state as a matter of opinion that a bruise on the head of the deceased was caused by falling from his wagon and striking on the frozen ground. *Shorb v. Webber*, 188 Ill. 126, *affirming* 89 Ill. App. 474.

In an action for personal injuries it was held that it was not error to allow one of the plaintiff's medical experts to testify to the effect that a man riding along over a corduroy road on a wagon with four wheels, and pitched out over the wheel into a hole, striking his shoulder on the logs, might suffer such an injury as that received by the plaintiff. *Conrad v. Ellington*, 104 Wis. 367.

11. *Manner of Receiving the Injury*. — It has been held that a physician, testifying as an expert, was properly permitted to state what might or might not have caused the plaintiff's injuries,



**448. Effect.** — See note 4.**(2) Infliction — Instrument of Infliction.** — See notes 8, 13.

though what in fact caused them was a question for the jury. *Sachra v. Manilla*, 120 Iowa 562.

A physician who has qualified as an expert may testify that the physical condition in which he found the plaintiff in an action to recover for personal injuries could have been caused by a severe fall. *Kankakee v. Steinbach*, 89 Ill. App. 513.

So, too, medical experts may testify that the plaintiff might have received the injuries which they found, on examination, she suffered from, by a fall which she had described. *Illinois Cent. R. Co. v. Treat*, 179 Ill. 576, *affirming* 75 Ill. App. 327.

**448. 4. Alabama.** — *Birmingham R., etc., Co. v. Ellard*, 135 Ala. 433.

*Massachusetts.* — *Sullivan v. Boston El. R. Co.*, 185 Mass. 602.

*Michigan.* — *Noller v. Wright*, (Mich. 1904) 101 N. W. Rep. 553, 11 *Detroit Leg. N.* 578.

*Missouri.* — *Redmon v. Metropolitan St. R. Co.*, 185 Mo. 1, 105 Am. St. Rep. 558; *Wood v. Metropolitan St. R. Co.*, 181 Mo. 433; *Robinson v. St. Louis, etc., R. Co.*, 103 Mo. App. 110.

*Nebraska.* — *South Omaha v. Sutcliffe*, (Neb. 1904) 101 N. W. Rep. 997. See *Barr v. Post*, 56 Neb. 698.

*New York.* — *Cole v. Fall Brook Coal Co.*, 159 N. Y. 59, *affirming* 87 Hun (N. Y.) 584; *Graham v. Joseph H. Bauland Co.*, 97 N. Y. App. Div. 141; *Bruss v. Metropolitan St. R. Co.*, 66 N. Y. App. Div. 554; *Wagner v. Metropolitan St. R. Co.*, 79 N. Y. App. Div. 591, *affirmed* without opinion 176 N. Y. 610.

*North Carolina.* — *Jones v. American Warehouse Co.*, 137 N. Car. 337; *State v. Wilcox*, 132 N. Car. 1120.

*Texas.* — *Galveston, etc., R. Co. v. Williams*, 26 Tex. Civ. App. 153.

*Wisconsin.* — *Werner v. Chicago, etc., R. Co.*, 105 Wis. 300.

**Whether Deafness Due to Accident.** — A physician may be asked whether the deafness of the plaintiff in one of his ears was the natural and probable result of the accident. *Baltimore City Pass R. Co. v. Tanner*, 90 Md. 315.

**Symptoms Attending Injury.** — A physician may be permitted to describe the symptoms that would be apparent and would ordinarily and necessarily accompany an injury such as that which it is claimed that the plaintiff received; testimony as to the symptoms which would follow such an injury would naturally aid the jury in determining whether the conditions, testified to by the plaintiff, were the result of the injury he sustained. *Cole v. Fall Brook Coal Co.*, 159 N. Y. 59, *affirming* 87 Hun (N. Y.) 584.

It has been said that the decision of the trial court will not be reversed unless it is manifestly against the weight of the evidence. *Corse v. Minnesota Grain Co.*, (Minn. 1905) 102 N. W. Rep. 728.

But it is sometimes said in effect that if the decision of the trial court is supported by any evidence it ordinarily will not be reviewed. *Burns v. Delaware, etc., Tel., etc., Co.*, 70 N. J. L. 745; *State v. Wilcox*, 132 N. Car. 1120;

*Fritz v. Western Union Tel. Co.*, 25 Utah 263; *Watriss v. Trendall*, 74 Vt. 54.

The uncontroverted testimony of a witness that he is familiar with gunshot wounds has been held to qualify him to testify as an expert that a wound which he had examined was made by a bullet. *Patton v. State*, (Tex. Crim. 1904) 80 S. W. Rep. 86.

**Statements of Witness as to Competency.** — The statement of the witness that he is not competent to testify as an expert is sometimes controlling (*Frederickson v. State*, 44 Tex. Crim. 288; *Wehner v. Lagerfelt*, 27 Tex. Civ. App. 520), but not always. Where the testimony of a witness shows him to be an expert in the matter concerning which he is called on to give his opinion, his testimony may properly be received as that of an expert, although he disclaims being an expert. *Walker v. Scott*, 10 Kan. App. 413; *McGovern v. Hays*, 75 Vt. 104; *State v. Boice*, 24 Wash. 514.

**Showing Competency by Cross-examination.** — It is sufficient that the competency of a witness to testify as an expert was shown on cross-examination. *Hough v. Grants Pass Power Co.*, 41 Oregon 531.

**Incompetency Shown on Cross-examination.** — It has been said that the fact that witnesses may have been shaken as experts in the cross-examination does not go to the admissibility of their testimony, but rather to its strength. *Grooms v. State*, 40 Tex. Crim. 319.

**Evidence of Competency.** — In determining the question of the competency of a witness called to give expert testimony, the court is not confined to the statements of such witness. The testimony of other witnesses touching his competency is admissible. *Wright v. Schnaier*, (Supm. Ct. App. T.) 35 Misc. (N. Y.) 37.

8. *Bowers v. State*, 122 Wis. 163.

**13. Character of Instrument.** — A witness, testifying as a medical expert, may be permitted to state his opinion, based on his examination of wounds, as to the character of the weapon used in inflicting them. *Sebastian v. State*, 41 Tex. Crim. 248.

But in an action to recover damages for injury to the plaintiff's foot it was held to be error to permit physicians to testify as to whether the injury had been caused by the foot getting crushed between two even or uneven surfaces. *Illinois Cent. R. Co. v. Smith*, 208 Ill. 608, *reversing* 111 Ill. App. 177.

**Axe.** — It has been held to be proper to admit the testimony of a doctor of medicine to the effect that "the wound upon the head of the deceased could have been inflicted" with a certain axe, which was exhibited. *State v. Breaux*, 104 La. 540.

**Naked Fist.** — Where a physician had testified that there was a comminuted fracture of the left cheek bone of the deceased, and also other wounds and fractures of the inner table of the skull of the deceased, it was competent to ask the physician whether, in his opinion as a physician, the comminuted fracture of the cheek bone could have been produced by a man's naked fist. *Clemons v. State*, (Fla. 1904) 37 So. Rep. 647.



**449. Amount of Force Used.**— See note 4.

**Direction of Blow.**— See note 6.

**Position of Body or of Assailant.**— See notes 7, 8, 9, 11:

(3) *Permanence, Etc.*— In General.— See note 12.

**449. 4. Number of Blows.**— Physicians have been permitted to testify that wounds found on the body of a deceased person were produced by more than one blow. *State v. Greenleaf*, 71 N. H. 606; *People v. Schmidt*, 168 N. Y. 568.

**6. Direction from Which Blow Came.**— A medical expert, after describing a wound and its location and giving his opinion as to the character of the weapon by which it was caused, may testify to the opinion that the blow came from the rear of the injured person. *Perry v. State*, 110 Ga. 234.

**Course of Bullet.**— In a prosecution for murder it has been held that a surgeon who has held an autopsy may give his opinion regarding the course of the bullet. *State v. Buralli*, 27 Nev. 41.

A witness in a murder case had been a practicing physician and surgeon for fifteen years, but had only had one case of gunshot wound, and in that case there was only a wound of entrance; but he had taken a regular course of lectures on medical jurisprudence, had studied the standard authorities on the subject of gunshot wounds, had read the reports of army surgeons on the subject, and had himself conducted the autopsy in the case on trial, so that he was not only able to express a general opinion in answer to a hypothetical question, but was able to state the particular grounds on which his opinion was founded. It was held that he was properly permitted to give his opinion as an expert on the question of exit and entrance of a bullet in the body of the deceased. *People v. Phelan*, 123 Cal. 551.

It has been held in a murder case that a witness, in describing the wounds of the deceased, may illustrate the course of the bullets by placing himself and counsel for the state in position and pointing with his hand at the place of entrance and at an angle that would make the place of exit. *Morton v. State*, 43 Tex. Crim. 533.

**7. Position of Body or of Assailant.**— *People v. Milner*, 122 Cal. 171; *Jones v. State*, 44 Fla. 74. See *Cavaness v. State*, 45 Tex. Crim. 209; *Hardin v. State*, 40 Tex. Crim. 208.

It has been held to be error to permit physicians to state how a wounded person was struck, whether from in front or behind, without a minute description of the wounds, their location and character, etc., so that the jury might have an opportunity to judge of that matter themselves. *Parrott v. Com.*, (Ky. 1898) 47 S. W. Rep. 452.

It has been held to have been error to allow a physician testifying as an expert in a trial for murder to state, after his examination of the wounds received by the deceased, his opinion of the position of the arm of the deceased at the time he received the gunshot wound which caused his death, and his reasons for that opinion. *Wilson v. U. S.*, (Indian Ter. 1904) 82 S. W. Rep. 924.

**8. State v. Buralli**, 27 Nev. 41. See *Wells v.*

*Territory*, 14 Okla. 436, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 449.

**Position of Body of Deceased Person.**— It has been held that in a prosecution for murder, where the death of the victim was occasioned by a gunshot wound, the theory of the defense being suicide of deceased, it is competent for a physician, who has examined the body and the surroundings at the place where it was found, to testify as to the position in which the body must have lain for the blood to take the course from the wound that it did. *Dinsmore v. State*, 61 Neb. 418.

**9. See Thomas v. State**, 45 Tex. Crim. 111.

**11. Intentional or Accidental Infliction.**— It is not error to refuse to permit a physician to express an opinion as to whether a wound was accidentally or purposely inflicted. *Treat v. Merchants' L. Assoc.*, 198 Ill. 431, reversing 98 Ill. App. 59.

**12. Opinion as to Permanence of Injury.**— *Graham v. Joseph H. Bauland Co.*, 97 N. Y. App. Div. 141 *Maier v. New York Cent.*, etc., R. Co., 20 N. Y. App. Div. 161, affirmed without opinion 162 N. Y. 633; *Walden v. Jamestown*, 79 N. Y. App. Div. 433, affirmed 178 N. Y. 213; *Jones v. American Warehouse Co.*, 137 N. Car. 337.

**Character and Seriousness of Injuries.**— The character of the injuries sustained by a plaintiff, as well as their probable duration and the professional care required for their alleviation, are proper subjects of expert medical testimony. *Martin v. Southern Pac. R. Co.*, 130 Cal. 285.

A physician may give his opinion as to the seriousness of injuries. *Jowell v. State*, 44 Tex. Crim. 328.

Thus, a medical expert may express his opinion as to whether injuries are slight or serious. *St. Louis Southwestern R. Co. v. Rea*, (Tex. Civ. App. 1904) 84 S. W. Rep. 428.

Physicians have been allowed to testify as to the seriousness of a shock sustained by the plaintiff in an action to recover for personal injuries. *Haines v. Lake Shore*, etc., R. Co., 129 Mich. 475, 8 Detroit Leg. N. 1035.

It has been held to be proper to permit a physician to testify, on the trial of a defendant for assault with intent to murder, that the blow inflicted on the person assaulted would have resulted in death had not a surgical operation been performed. *Henry v. State*, (Tex. Crim. 1899) 49 S. W. Rep. 96.

A physician may testify in a personal injury case that the plaintiff's injury was enhanced by reason of a natural defect in his leg, and may state the reasons for his opinion. *Nebonne v. Concord R. Co.*, 68 N. H. 296.

**Duration of Effect of Injury.**— A qualified physician may be permitted to give his opinion as to the length of time an injury would be likely to manifest itself in the condition of the person injured. *Klingaman v. Fish*, etc., Co., (S. Dak. 1905) 102 N. W. Rep. 601; *San Antonio*, etc., R. Co. v. *Moore*, 31 Tex. Civ. App. 371.

**450.** See notes 1, 2, 3, 4.

**451.** See note 1.

Illustrations. — See notes 5, 10.

Shamming Injuries. — See note 12.

**452.** *g. INSANITY — (1) Prevailing Rule.* — See notes 2, 3, 4, 5.

**Fatal Character of Wound.** — On a trial for murder the physician who attended the deceased after he had received the wound which was claimed to have caused his death, was permitted to state that in his opinion the wound was fatal. It was held that this was not error. *Sims v. State*, 139 Ala. 74, 101 Am. St. Rep. 17.

It has been held that it was proper to admit the testimony of a physician to the effect that, in his opinion, unless an operation which he considered very dangerous was performed upon the plaintiff in an action to recover for personal injuries, the plaintiff's injury would shorten her life expectancy one-half. *Houston Electric Co. v. McDade*, (Tex. Civ. App. 1904) 79 S. W. Rep. 100.

**Life Expectancy of Injured Person.** — It has been held to be error to permit a physician to give his opinion, without reference to mortality tables, as to the life expectancy of an injured person before and after sustaining the injuries. *Chicago, etc., R. Co. v. Long*, 26 Tex. Civ. App. 601.

**Necessity of Future Medical Attendance and Nursing.** — It has been held to be error to permit a physician, testifying as an expert in an action for personal injuries, to testify that the plaintiff will require medical attendance and services of nurses in the future. It was said that "it was proper for the doctor to describe his patient's condition, to state to what extent he was disabled, his inability to care for himself, and to state any other circumstance within his observation and knowledge bearing upon the reasonable certainty of a continuance of these disabilities in the future, — that is to say, he might give evidence as to the physical facts, and his opinion upon the permanency of existing conditions; but when he has testified that the injury is permanent and that the patient is paralyzed and helpless, it seems hardly necessary or proper to permit him to enter the domain of common knowledge, and say that because of these conditions the injured person will require nursing and medical attendance in the future. When conditions so palpable as were shown in this case are under consideration, it does not require the aid of an expert to reach the conclusion that both nursing and medical attention would be necessary in the future." *Crouse v. Chicago, etc., R. Co.*, 104 Wis. 473. This case was followed in *Selleck v. Janesville*, 104 Wis. 570, 76 Am. St. Rep. 892.

**450. 1. Must Not Be Speculative.** — *Pittsburgh, etc., R. Co. v. Moore*, 110 Ill. App. 304; *Briggs v. New York Cent., etc., R. Co.*, 177 N. Y. 50, reversing 84 N. Y. App. Div. 633; *Higgins v. United Traction Co.*, 96 N. Y. App. Div. 60; *Rosenblatt v. Joseph M. Cohen House Wrecking Co.*, 91 N. Y. App. Div. 413; *Huba v. Schenectady R. Co.*, 85 N. Y. App. Div. 199; *Bellemare v. Third Ave. R. Co.*, 46 N. Y. App. Div. 557; *Lentz v. Dallas, etc. Tex.* 258, reversing (Tex. Civ. App. 1902) 69 S. W. Rep. 166.

**2. Maher v. New York Cent., etc., R. Co.**, 20

N. Y. App. Div. 161, affirmed without opinion 162 N. Y. 633; *Clegg v. Metropolitan St. R. Co.*, 1 N. Y. App. Div. 207, affirmed without opinion 159 N. Y. 550; *Walden v. Jamestown*, 79 N. Y. App. Div. 433, affirmed 178 N. Y. 213; *Stembridge v. Southern R. Co.*, 65 S. Car. 440; *St. Louis Southwestern R. Co. v. Rea*, (Tex. Civ. App. 1904) 84 S. W. Rep. 428. See *Edwards v. Burke*, 36 Wash. 107.

**Probable Result of Wound.** — *Robinson v. State*, (Tex. Crim. 1901) 63 S. W. Rep. 869.

**Probable Future Effects of Injuries.** — *Norfolk R., etc., Co. v. Spratley*, 103 Va. 379.

**3. Taylor v. Ballard**, 24 Wash. 191.

A medical expert may testify to the probable results of a present physical condition. *Rosenblatt v. Joseph M. Cohen House Wrecking Co.*, 91 N. Y. App. Div. 413.

**4. Ayres v. Delaware, etc., R. Co.**, 158 N. Y. 254; *Klingaman v. Fish, etc., Co.*, (S. Dak. 1905) 102 N. W. Rep. 601, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 450.

**451. 1. Higgins v. United Traction Co.**, 96 N. Y. App. Div. 69; *Bellemare v. Third Ave. R. Co.*, 46 N. Y. App. Div. 557. But compare *Graham v. Joseph H. Bauland Co.*, 97 N. Y. App. Div. 141.

In an action for personal injuries it was held that a physician, testifying as an expert, was properly permitted to state whether the injuries from which the plaintiff was suffering "were liable to be permanent." *Hallum v. Omro*, 122 Wis. 337. And see *Faber v. C. Reiss Coal Co.*, (Wis. 1905) 102 N. W. Rep. 1049.

**5. Dog Bites.** — A physician may testify as to the effect of the laceration of the human flesh by the teeth of a dog and as to the character of wounds so inflicted. *Sanders v. O'Callaghan*, 111 Iowa 574.

**10. Walden v. Jamestown**, 178 N. Y. 213, affirming 79 N. Y. App. Div. 433; *Maher v. New York Cent., etc., R. Co.*, 20 N. Y. App. Div. 161, affirmed without opinion 162 N. Y. 633.

**12. Whether or Not Symptoms Are Feigned.** — *McGrew v. St. Louis, etc., R. Co.*, 32 Tex. Civ. App. 265.

**452. 2. General Practitioner Competent as to Insanity.** — *Porter v. State*, 140 Ala. 87; *People v. Sowell*, 145 Cal. 292; *Bishop v. Com.*, 109 Ky. 558, reversing on rehearing 58 S. W. Rep. 817, 22 Ky. L. Rep. 760. See *Lorts v. Wash.*, 175 Mo. 487; *State v. Palmer*, 161 Mo. 152. But compare *Abbott v. Com.*, 107 Ky. 624.

It has been held that a witness was competent to testify as to the sanity of a defendant in a criminal case where it appeared that he had graduated at a regular medical college, and had a license to practice medicine from the board of examiners of the state, and had practiced therein for eighteen months; that the medical college he so attended had an insane pavilion, which would accommodate about thirty patients; that while he was there he had an opportunity to see and study about one hundred such cases; that during his practice of eighteen months he



**452.** (2) *Testamentary Capacity.* — See notes 7, 8.

**453.** *h. MALPRACTICE.* — See note 1.

*k. RAPE — Penetration.* — See note 10.

*Violent Connection.* — See note 13.

had had four such cases to treat. *Lowe v. State*, 118 Wis. 641.

A witness, who was allowed to state that in his opinion a testator was sane, testified that he had been in general practice more than twenty-one years, had held a position in one hospital and had been connected with another hospital for twelve years, had been medical examiner for a county for ten years, and had treated at least one hundred people in the course of his practice. In sustaining the ruling of the court below admitting the testimony, the court said: "Whether a witness called as an expert has the necessary qualifications is, in the first instance, a matter for the judge presiding at the trial to pass upon, and his decision will not be reversed unless clearly erroneous. \* \* \* We cannot say upon this testimony that the decision of the presiding judge was plainly erroneous." *White v. McPherson*, 183 Mass. 533.

**Basis of Opinion.** — It has been held that a physician can testify as to the mental capacity of a testator without first stating the facts and circumstances on which the opinion was formed. *Jones v. Collins*, 94 Md. 403.

In an action to recover for personal injuries, a physician cannot properly be asked to give an opinion based on the mental condition of the plaintiff prior to the accident, of which he has no knowledge, and of which there has been no proof. *Driscoll v. Ansonia*, 73 Conn. 743, 47 Atl. Rep. 718.

Letters written by a person may constitute a sufficient basis for the opinion of a skilled physician or alienist on the question of the writer's sanity, and are therefore admissible in evidence for the purpose of obtaining the opinion of an expert witness. *Blume v. State*, 154 Ind. 343.

**Whether Particular Act Indicates Insanity.** — It has been held that a witness testifying as a medical expert on a trial for murder was properly allowed to testify, in effect, that certain language attributed to the defendant indicated a feeling of ill will grounded upon an actual condition of things, and not a mere illusion, and an intelligent purpose to injure the persons described in the question. *Wheeler v. State*, 158 Ind. 687.

**Statement of Test of Delusional Insanity.** — A witness who is a physician, and who has testified as an expert for the defendant, and has stated that the defendant was suffering from acute delusions of insanity, may properly be asked on cross-examination: "In discussing the act of a person, is not this the test of delusional insanity: Did he do the act under the delusion believing it to be other than it was?" and the further question: "Then, if that person does the act knowing what it was, believing it to be exactly as it was, is he laboring under any delusion?" *Williams v. State*, (Fla. 1903) 34 So. Rep. 279.

**452.** 3. See *McGibbons v. McGibbons*, 119 Iowa 140.

It has been held to be error to allow physi-

cians to testify that a person was "unable to take care of himself and his affairs." *In re Rush*, (Supm. Ct. Spec. T.) 53 N. Y. Supp. 581.

**4. Knowledge of Right and Wrong.** — *State v. Peel*, 23 Mont. 358, 75 Am. St. Rep. 529.

**5.** See *Lindsey v. White*, (Tex. Civ. App. 1901) 61 S. W. Rep. 438.

**7.** *Baker v. Baker*, 202 Ill. 595; *Page v. Beach*, 134 Mich. 51, 10 Detroit Leg. N. 337; *In re Peterson*, 136 N. Car. 13.

It has been held that witnesses, in cases involving mental capacity, after stating the facts within their knowledge, may give their opinion, formed from those facts, of the soundness or unsoundness of the mind of the party in question, but cannot be permitted to express an opinion whether such party had sufficient mental capacity to make a contract or execute a will, as the case may be. *Nashville, etc., R. Co. v. Brundige*, (Tenn. 1905) 84 S. W. Rep. 805.

**8.** *Wallace v. Whitman*, 201 Ill. 59. See *infra*, this title, 492. 2.

**453.** 1. **Physicians of Conflicting Schools.** — It has been held that in an action for malpractice, a physician or surgeon is entitled to have his treatment of his patient tested by the rules and principles of the school of medicine to which he belongs. *Martin v. Courtney*, 75 Minn. 255. See *Grainger v. Still*, 187 Mo. 197.

But in an action to recover damages for injuries received by reason of the negligent, careless treatment by an employee of the defendants who claimed to be "magnetic healers," it was held that although the physicians who testified on the part of the plaintiff did not claim or pretend to know anything about the practice of magnetic healing, they were nevertheless competent, from education and experience, to testify whether the treatment which the plaintiff underwent was proper in any case, and especially in her condition. *Longan v. Weltmer*, 180 Mo. 322.

And it has been held that a physician who applies the X-rays, not for medical purposes, but to locate a foreign substance in the body of his patient, is not entitled to have the question of his care and skill in applying it determined by the opinions of physicians of his own school. *Henslin v. Wheaton*, 91 Minn. 219.

**10.** The testimony of a physician as to the condition in which he found the sexual organs of the prosecutrix after an alleged rape is admissible in evidence. *People v. Benc*, 130 Cal. 159.

**13.** *People v. Benc*, 130 Cal. 159; *Lawlor v. Wolff*, 180 Mass. 448.

It has been held that a medical witness, who is examined as an expert in the trial of an indictment for rape, after stating that he had been called on to examine the prosecutrix, and the result of his examination, will not be allowed to express the opinion to the jury that no girl would have voluntarily submitted to the suffering necessary to have brought about this result. *State v. Hull*, 45 W. Va. 767.



**454. m. SUFFERING AND PAIN.** — See note 1.

Personal Injuries. — See note 4.

**455. 50. Surveyors — Location of Survey — Construction — By Whose Survey.** — See note 1.

51. Tailors. — See note 11.

**456. 55. Veterinary Surgeons and Horsemen — a. COMPETENCY.** — See note 6.**457. c. OPERATION AND EFFECT OF DISEASE.** — See note 12.**458. 56. Well Diggers.** — See note 5.**VII. THE VARIOUS SUBJECTS OF EXPERT TESTIMONY — 1. Introductory****— a. MATTERS OF COMMON EXPERIENCE INADMISSIBLE.** — See note 7.**454. 1.** See *Comstock v. Georgetown Tp.*, (Mich. 1904) 100 N. W. Rep. 788.**4.** See *Salem v. Webster*, 95 Ill. App. 120, affirmed 192 Ill. 369.It has been held that the physician who attended an injured person may testify how long the patient continued to suffer pain after being hurt. *Wilkins v. Missouri Valley*, (Iowa 1903) 96 N. W. Rep. 868.**455. 1. Measurement of Land.** — Testimony as to the measurement of a tract of land by a witness who has measured it is competent, though the witness is not a surveyor. *Gunkel v. Seiberth*, 85 S. W. Rep. 733, 27 Ky. L. Rep. 455.**11. Injury to Clothes.** — Witnesses who have been in business handling custom-made clothes may testify as to the effect on such clothes of getting them wet. *Sonneborn v. Southern R. Co.*, 65 S. Car. 502.**456. 6. Montgomery St. R. Co. v. Hastings**, 138 Ala. 432.In an action to recover damages for the negligent killing of a horse, a witness who had dissected the horse testified that from his experience he was able to say whether the different organs were in normal condition. He was not a veterinary surgeon, but had had considerable experience in dissecting horses and other animals, and said he was able to distinguish between healthy and diseased organs. It was held that he was competent to testify as to whether the organs were in a healthy condition. *Wisecarver v. Long*, 120 Iowa 59.**457. 12. Effect of Injury on Value of Horse.** — A witness who had studied veterinary surgery for about a year was held to be competent to testify as to the effect of an injury on the value of a horse which he had seen. *Montgomery St. R. Co. v. Hastings*, 138 Ala. 432.**458. 5. Mode of Digging Well.** — It has been held to be proper to admit the testimony of experienced well diggers as to whether filling the space outside of a pump pipe with pounded stone and gravel would have the effect of stopping the flow of water. *Boston v. Hewitt*, 8 Okla. 401.**7. Rule as to Matters of Common Experience — United States.** — *Southern Pac. R. Co. v. Hall*, (C. C. A.) 100 Fed. Rep. 760, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 458; *Pitt Gas Co. v. Evansville Contract Co.*, (C. C. A.) 123 Fed. Rep. 63; *W. J. Lemp Brewing Co. v. Ort*, (C. C. A.) 113 Fed. Rep. 482; *Hunt v. Kile*, (C. C. A.) 68 Fed. Rep. 49; *Fireman's Ins. Co. v. J. H. Mohlman Co.*, (C. C. A.) 91 Fed. Rep. 85.*Alabama.* — *Decatur Car-Wheel, etc., Co. v. Mehaffey*, 128 Ala. 242; *Western R. Co. v. Arnett*, 137 Ala. 414.*California.* — *Kahn v. Triest-Rosenberg Cap Co.*, 139 Cal. 340; *Kerrigan v. Market-St. R. Co.*, 138 Cal. 506; *People v. Benc*, 130 Cal. 159; *Raymond v. Glover*, 122 Cal. 471; *People v. Milner*, 122 Cal. 171.*Colorado.* — *Shapter v. Pillar*, 28 Colo. 209; *Davis v. Shepherd*, 31 Colo. 141.*Connecticut.* — *Irving v. Shethar*, 71 Conn. 434.*Florida.* — *Jones v. State*, 44 Fla. 74.*Illinois.* — *Illinois Cent. R. Co. v. Smith*, 208 Ill. 608, reversing 111 Ill. App. 177; *Gundlach v. Schott*, 192 Ill. 509, 85 Am. St. Rep. 348; *Chicago, etc., R. Co. v. Lewandowski*, 190 Ill. 301; *Hellyer v. People*, 186 Ill. 550; *McMahan v. Swain*, 106 Ill. App. 392; *North Kankakee St. R. Co. v. Blatchford*, 81 Ill. App. 609.*Indiana.* — *Buckeye Mfg. Co. v. Woolley Foundry, etc., Works*, 26 Ind. App. 7; *Clay County v. Redifer*, 32 Ind. App. 93; *Githens v. McDonnell*, 24 Ind. App. 395.*Iowa.* — *State v. Armour Packing Co.*, 124 Iowa 323; *Cahow v. Chicago, etc., R. Co.*, 113 Iowa 224; *State v. Peterson*, 110 Iowa 647.*Kansas.* — *Stephens v. Gardner Creamery Co.*, 9 Kan. App. 883, 57 Pac. Rep. 1058; *Holton v. Hicks*, 9 Kan. App. 179. See *Missouri, etc., R. Co. v. Merrill*, 61 Kan. 671.*Kentucky.* — *Vollman Buggy Body Co. v. Spry*, 80 S. W. Rep. 1092, 26 Ky. L. Rep. 228. See *Miller v. Early*, 58 S. W. Rep. 789, 22 Ky. L. Rep. 825.*Louisiana.* — *State v. Moore*, 52 La. Ann. 605.*Maine.* — *Boothby v. Lacasse*, 94 Me. 392.*Maryland.* — *Baltimore Belt R. Co. v. Sattler*, 100 Md. 306; *Cahill v. Baltimore*, 93 Md. 233.*Massachusetts.* — *Lawler v. Wolff*, 180 Mass. 448; *Welch v. New York, etc., R. Co.*, 176 Mass. 393.*Minnesota.* — *McDonald v. Duluth*, 93 Minn. 206. See *Dell v. McGrath*, 92 Minn. 187.*Mississippi.* — *Earp v. State*, (Miss. 1905) 38 So. Rep. 288; *Allen v. St. Louis Transit Co.*, 183 Mo. 411; *Koenig v. Union Depot R. Co.*, 173 Mo. 698; *Hurst v. Kansas City, etc., R. Co.*, 163 Mo. 309, 85 Am. St. Rep. 539; *Lee v. Knapp*, 155 Mo. 610; *Schermer v. McMahon*, 108 Mo. App. 36; *Dammann v. St. Louis*, 152 Mo. 186. See *White v. Farmers' Mut. F. Ins. Co.*, 97 Mo. App. 590.*Nebraska.* — *Missouri Pac. R. Co. v. Fox*, 56 Neb. 746; *Read v. Valley Land, etc., Co.*, 66 Neb. 423.

*Nevada*. — *Powell v. Nevada, etc., R. Co.*, (Nev. 1904) 78 Pac. Rep. 978.

*New Hampshire*. — *Nourie v. Theobald*, 68 N. H. 564.

*New York*. — *Schutz v. Union R. Co.*, 181 N. Y. 33; *Nelson v. Young*, 91 N. Y. App. Div. 457, affirmed without opinion 180 N. Y. 523; *Lane v. New York Cent., etc., R. Co.*, 93 N. Y. App. Div. 40; *Winters v. Naughton*, 91 N. Y. App. Div. 80; *Dittman v. Edison Electric Illuminating Co.*, 87 N. Y. App. Div. 68; *White v. Cazenovia*, 77 N. Y. App. Div. 547; *Clary-Squire v. Press Pub. Co.*, 58 N. Y. App. Div. 362; *Galligan v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 33 Misc. (N. Y.) 87; *Ward v. Troy*, 55 N. Y. App. Div. 192; *Miller v. Erie R. Co.*, 34 N. Y. App. Div. 217. See *Finn v. Cassidy*, 165 N. Y. 584.

*North Dakota*. — *Meehan v. Great Northern R. Co.*, (N. Dak. 1904) 101 N. W. Rep. 183.

*Ohio*. — See *Aidt v. State*, 1 Ohio Cir. Dec. 337.

*Oregon*. — *Farmers' Nat. Bank v. Woodell*, 38 Oregon 294. See *Duntley v. Inman*, 42 Oregon 334.

*Pennsylvania*. — *Salsberg v. Dallas*, 10 Kulp (Pa.) 47.

*Rhode Island*. — *Ennis v. Little*, 25 R. I. 342, 401. See *McGarrity v. New York, etc., R. Co.*, 25 R. I. 269.

*Texas*. — *International, etc., R. Co. v. Mills*, 34 Tex. Civ. App. 127; *Locke v. International, etc., R. Co.*, 25 Tex. Civ. App. 145; *Galveston, etc., R. Co. v. English*, (Tex. Civ. App. 1900) 59 S. W. Rep. 626, rehearing denied (Tex. Civ. App. 1900) 59 S. W. Rep. 912; *Gulf, etc., R. Co. v. Bell*, 24 Tex. Civ. App. 579; *Clay v. State*, 41 Tex. Crim. 653; *Hardin v. State*, 40 Tex. Crim. 208.

*Utah*. — *Johnson v. Union Pac. Coal Co.*, 28 Utah 46; *Mathews v. Daly-West Min. Co.*, 27 Utah 193. See *Fritz v. Western Union Tel. Co.*, 25 Utah 263.

*Vermont*. — *Magoon v. Before*, 73 Vt. 231.

*Virginia*. — *Southern R. Co. v. Mauzy*, 98 Va. 692.

*Washington*. — *State v. Rutledge*, 37 Wash. 523; *State v. Gates*, 28 Wash. 689.

*West Virginia*. — *State v. Hull*, 45 W. Va. 767.

*Wisconsin*. — *Crouse v. Chicago, etc., R. Co.*, 104 Wis. 473; *Selleck v. Janesville*, 104 Wis. 570, 76 Am. St. Rep. 892.

In *Brewster v. Weir*, 93 Ill. App. 588, it was said that "where the matter of inquiry lies within the common experience of men of common education in the ordinary walk of life, the opinions of experts are inadmissible, as the jury are competent to draw the true inferences from the facts proved."

And in *Meyer v. Meyer*, 86 Ill. App. 417, it was said: "If, when furnished with all the facts and circumstances surrounding the matter in controversy an ordinary man could determine all the elements of that question without interposing the judgment of another whose expertness on some question of science, skill, or trade rendered such judgment necessary, then such expert testimony would not be competent; and in so far as the expert testimony would be competent it would be a part of the ultimate judgment or determination arrived at." See also

*Meehan v. Great Northern R. Co.*, (N. Dak. 1904) 101 N. W. Rep. 183.

**Subjects of Expert Testimony.** — Any subject wherein a person may become specially learned, or skilled, is within the broad field of opinion evidence. *Northern Supply Co. v. Wangard*, 123 Wis. 1.

It has been said that considerable latitude is given the trial judge in determining whether or not a question at issue is a proper subject of expert testimony. *Read v. Valley Land, etc., Co.*, 66 Neb. 423. And, again, it has been said that the question whether a matter is one upon which the opinion of a qualified expert is admissible must be left largely to the judge who controls the trial. *Barker v. Lawrence Mfg. Co.*, 176 Mass. 203.

**Fitness and Sufficiency of Machines, Appliances, Tools, or Material.** — Expert evidence as to whether an appliance is safe or dangerous is not admissible when the construction of the appliance, with reference to its being safe or unsafe, is open to the observation and understanding of any man of ordinary sense. *Van Edwards v. Barber Asphalt Paving Co.*, 92 Mo. App. 221.

Where a tool or appliance is of very simple construction, so that the jury is competent to judge of its adequacy, expert testimony is not admissible as to whether it is a proper tool or appliance. *Bookman v. Masterson*, 83 N. Y. App. Div. 4.

Expert testimony as to whether a machine is dangerous is not admissible where the elements and the degree of the danger involved in using it can be understood by persons of common intelligence without the aid of experts. *Gleason v. Smith*, 172 Mass. 50.

It has been held that it was improper to admit expert testimony as to the safety of a hoisting apparatus which was not a complicated piece of machinery, but was exceedingly simple in construction and operation, and its construction and condition of repair were such that all the facts pertaining to it could be fully explained to the jury. *Coe v. Van Why*, 33 Colo. 315.

A mining engineer cannot be asked whether a machine which has been described is a safe machine and appliance to hoist a certain weight. *Luman v. Golden Ancient Channel Min. Co.*, 140 Cal. 700.

In an action to recover for injuries sustained by the plaintiff by the fall of a plank which was being lowered with one tackle only and without the use of any guy ropes, it was held to be error to permit witnesses to testify, in substance, whether the method adopted by the defendant for doing the work at which the plaintiff was injured was or was not safe. "This," it was said, "was an issue in the case which the jury could readily determine upon a statement of all the facts concerning the size and weight of the plank, the character and strength of the tackle, and the places from which and to which it was proposed to move the timber. No special training or experience was required in order to enable them to draw a correct conclusion as to these matters, and hence the aid of opinion evidence was needless, and its admission improper." *Kelpy v. Triest*, 73 N. Y. App. Div. 597.

It has been held that the condition of a flog-



ging hammer, used in a machine shop for striking chisels and similar instruments, and the question of its suitability for the purpose, were not subjects of expert testimony. *Vant Hul v. Great Northern R. Co.*, 90 Minn. 329.

In an action to recover for personal injuries sustained by being struck with spalls of rock flying from under the stroke of a sledgehammer, the handle of which was alleged to be defective, wielded by a fellow-workman, it was held to be error to permit the plaintiff to testify that a defect in the handle made the tool dangerous. It was said that the admission of this evidence was a hurtful error, because it was permitting a witness to invade the province of the jury, whose duty it was to determine whether the handle in question was or was not dangerous. *Nash v. Dowling*, 93 Mo. App. 156.

The opinion of a witness as to whether a certain plank, if sound, would have held a man of the plaintiff's weight and size, has been held to be inadmissible on the ground that the witness could well have described the plank and its condition and the jury would then have been just as competent to form an opinion as to its strength and safety as the witness. *Cogdell v. Wilmington, etc., R. Co.*, 132 N. Car. 852, 130 N. Car. 313.

But when the inquiry is whether a machine is properly constructed, or is suitable for the use to which it is put, whether it can be operated without danger, or in what respects it will be dangerous to the one operating it, there can be no doubt that the testimony of experts will ordinarily be competent. *Hutchinson Cooperage Co. v. Snider*, (C. C. A.) 107 Fed. Rep. 633.

Thus, an expert witness may properly testify whether a machine of intricate and complex construction will do the work for which it is intended. *Buckeye Mfg. Co. v. Woolley Foundry, etc., Works*, 26 Ind. App. 7.

When a machine is difficult of description and the danger which arises from its operation may not easily be explained or understood without the aid of the opinions of experts of experience, who are familiar with such machines and their operation, expert testimony is admissible as to whether or not there is any danger attending the operation of the machine. *Gammel-Statesman Pub. Co. v. Monfort*, (Tex. Civ. App. 1904) 81 S. W. Rep. 1029.

It has been held to be proper to admit expert testimony as to whether a certain valve was safe (*Beunk v. Valley City Desk Co.*, 128 Mich. 562, 8 Detroit Leg. N. 767), as to whether a particular scaffold was safe, suitable, or proper (*Jenks v. Thompson*, 83 N. Y. App. Div. 343, *affirmed* 179 N. Y. 20), whether a laundry mangle was out of repair (*Coleman v. Perry*, 28 Mont. 1), as to whether a gasoline engine was properly constructed (*Charter Gas-Engine Co. v. Kellam*, 79 N. Y. App. Div. 231), as to whether a casting was or was not sufficiently strong for the purpose for which it was to be used (*Frederick Mfg. Co. v. Devlin*, (C. C. A.) 127 Fed. Rep. 71), as to whether a certain bolt and nut were sufficient for the coupling together of two parts of a machine (*Snyder v. Holt Mfg. Co.*, 134 Cal. 324), as to whether a rope was of sufficient strength to do the work to which it was put (*Consolidated Stone Co. v. Williams*, 26 Ind. App. 131, 84 Am. St. Rep.

278), as to whether a pulley was sufficiently strong in view of the purpose for which it had been used (*Wabash Screen Door Co. v. Black*, (C. C. A.) 126 Fed. Rep. 721; *Indiana Bituminous Coal Co. v. Buffey*, 28 Ind. App. 108), as to whether certain hooks, which were used to support a staging, were sufficient to support a given weight (*Little v. Head, etc., Co.*, 69 N. H. 494), as to whether a block and hook, constituting a part of a painter's apparatus for supporting himself when working on high structures, was reasonably safe (*Anderson v. Fielding*, 92 Minn. 42), as to the relative strength of wrought and cast iron as the material for a part of a machine (*McFaul v. Madera Flume, etc., Co.*, 134 Cal. 313), as to the durability of different kinds of timber (*Bush v. Delaware, etc., R. Co.*, 166 N. Y. 210, *affirming* 54 N. Y. App. Div. 616), as to whether a pile driver and appliances were or were not safe (*Koon v. Southern R. Co.*, 69 S. Car. 101), as to the sufficiency of certain piles to support a given weight (*Pursley v. Edge Moor Bridge Works*, 56 N. Y. App. Div. 71, *affirmed* without opinion 168 N. Y. 589), as to whether the different parts of a structure are sufficiently strong for the purposes for which they are intended (*Fox v. Buffalo Park*, 21 N. Y. App. Div. 321, *affirmed* without opinion 163 N. Y. 559), as to whether a foundation wall was sufficiently strong to support the building which was erected upon it (*Cochran v. Sess*, 49 N. Y. App. Div. 223, *reversed* on another point 168 N. Y. 372), and as to whether a furnace pit which was uncovered and did not have any railings around it, was properly constructed (*Behsmann v. Waldo*, (N. Y. City Ct. Gen. T.) 36 Misc. (N. Y.) 863, *affirmed* without opinion (Supm. Ct. App. T.) 38 Misc. (N. Y.) 820). See *supra*, 440. 7.

In an action to recover for the death of the plaintiff's intestate by the explosion of a boiler, it was held that expert evidence was admissible on the question as to whether a cast-iron elbow, with the pressure to which it was subjected, was reasonably safe, and, if unsafe, whether its dangerous condition was so obvious as to have been observable by the defendant's expert, had he exercised ordinary care. *Innes v. Milwaukee*, 103 Wis. 582.

In an action to recover the price of a fan and piping furnished the defendant to remove dust from the sand-blast room in the defendant's factory, it was held that expert testimony offered by the defendant to show what would be a suitable apparatus to exclude dust from the defendant's sand-blast room, and explanatory of the infirmities in the machinery furnished by plaintiff, should have been received. *Skinner v. E. F. Kerwin Ornamental Glass Co.*, 103 Mo. App. 650.

It has been held that the construction of derricks, the principles under which they are operated, the mechanical forces involved, the effect of imperfect construction, and the results necessarily incident thereto, are not matters of which ordinary persons have knowledge, and, therefore, are proper subjects of expert testimony. *Dyas v. Southern Pac. Co.*, 140 Cal. 296.

Thus, it has been held that expert testimony is admissible upon the question of the perfect



or imperfect construction of a derrick. *Seandell v. Columbia Constr. Co.*, 50 N. Y. App. Div. 512.

The manner in which a hoisting apparatus should be constructed, placed in position, and fastened so as to make it reasonably safe and suitable for the work to be done, is, it has been held, a proper subject of expert evidence. *Parlett v. Dunn*, 102 Va. 459.

Expert testimony as to the common means of guying a derrick for the purpose of raising heavy weights has been held to be admissible in evidence. *Scheider v. American Bridge Co.*, 78 N. Y. App. Div. 163.

Whether an iron crank or handle forming part of a hoisting apparatus is properly welded so as to preserve its tensile strength is not a matter of common knowledge but is a proper subject of expert testimony. *Murphy v. Mars-ton Coal Co.*, 183 Mass. 385.

It has been held that the charge of negligence relied on in the complaint being in part the alleged improper construction of an elevator used in defendant's building in carrying persons and freight to and from different floors of the building, the question whether the same was properly constructed was held a proper subject for expert testimony. *Craig v. Benedictine Sisters Hospital Assoc.*, 88 Minn. 535.

In an action to recover for injuries received by being struck by a beetle head which came off the handle, it was held that the mechanics who were employed by the defendants to make the beetles were competent to testify whether the material used was fit for the purpose. *Daly v. Lee*, 39 N. Y. App. Div. 188, *affirmed* without opinion 167 N. Y. 537.

It has been held that expert testimony on the question whether there is any danger or possibility of the key which holds the door in a spark arrester in position falling down during the operation of the engine, if once in position, may be given. *Jamieson v. New York, etc., R. Co.*, 11 N. Y. App. Div. 50, *affirmed* without opinion 162 N. Y. 630.

In an action to recover for personal injuries sustained by the plaintiff by reason of the negligence of the defendant in failing to keep certain electric wires properly insulated near which the plaintiff was required to work, it was held that expert evidence as to how long before the plaintiff's injury the defect in the insulation of the wires occurred was admissible. The subject of insulation of electric wires is not a matter of such general knowledge as to exclude expert evidence on the subject. *Bernier v. St. Paul Gaslight Co.*, 92 Minn. 214.

**Whether Machine Can Be Operated by Minor.** — It has been held that a properly qualified witness might testify as to whether a certain machine could be safely operated by a minor. *Punkowski v. New Castle Leather Co.*, 4 Penn. (Del.) 544.

But it has been held to be improper to permit an expert witness to testify as to whether a boy sixteen years of age would appreciate the dangers of operating a certain machine. *Vollman Buggy Body Co. v. Spry*, 80 S. W. Rep. 1092, 26 Ky. L. Rep. 228.

**Power of Engine.** — It has been held that the opinion of an expert witness as to the power which an engine would develop under proper

conditions was admissible. *Schuwirth v. Thumma*, (Tex. Civ. App. 1902) 66 S. W. Rep. 691.

**Method of Doing Work.** — It has been held that expert testimony as to the manner in which a garment should have been altered was admissible. *Moschcowitz v. Flint*, (Supm. Ct. App. T.) 33 Misc. (N. Y.) 480.

Expert witnesses may testify to their opinion as to the proper method of putting in a switch point. *Buckalew v. Quincy, etc., R. Co.*, 107 Mo. App. 575.

It has been held that expert testimony as to the proper way to fill up excavations in streets to prevent them from becoming soft and miry is admissible. *Seamons v. Fitts*, 21 R. I. 236.

Testimony as to the method adopted to remodel and improve the interior of a building and as to the safety of the construction has been held to be admissible. *N. & M. Friedman Co. v. Atlas Assur. Co.*, 133 Mich. 212, 10 Detroit Leg. N. 139.

The time when sugar beets should be thinned in order to obtain the best results has been held to be a proper subject of expert testimony. *Farmers', etc., Nat. Bank v. Woodell*, 38 Oregon 294.

In an action to recover damages for the death of plaintiff's intestate, caused by the negligence of the engineer of defendant's train, on which deceased was fireman, in "bucking" snow, it was held that the question whether the method adopted by the engineer was a proper and prudent one, and what would have been the proper and prudent course, under the circumstances, were subjects for expert evidence, not being matters of common knowledge. *Sieber v. Great Northern R. Co.*, 76 Minn. 269.

The proper way of turning a stone so as not to bring an undue strain on the derrick with which it is being handled has been held to be a proper subject of expert evidence. *Leslie v. Granite R. Co.*, 172 Mass. 468.

The defendant in an action to recover the contract price of boring a well having insisted, after the boring of the well, on having the space outside the pump pipe filled with pounded stone and gravel, the testimony of experienced well diggers was offered by the plaintiffs to show that such filling would have the effect to stop the flow of water. It was held that this was admissible as expert testimony. *Boston v. Hewitt*, 8 Okla. 401.

In a case in which error in allowing witnesses to testify as experts was claimed on the ground that the matter about which they testified (the proper construction of a sewer) was "within the range of common experience and observation," the court, in holding that the claim was not well founded, said: "Persons having experience in excavating, and in protecting against the caving in of earth, may have peculiar knowledge of the character of soils, and of the best methods of protection, that is not acquired by common experience and observation." *Degenhart v. Gent*, 97 Ill. App. 145.

It has been held that the manner of operating a hydraulic pressure elevator, and the training, skill, and experience needed by the operator, is not a matter of such common knowledge as to preclude the giving of expert testimony on

the subject. *Nutzmann v. Germania L. Ins. Co.*, 78 Minn. 504.

It has been held that the process of stringing a cable wire on the arms of poles erected for that purpose is so plain and simple that it is well within the scope of common observation and knowledge, and can be intelligently comprehended by a jury without the aid of opinion evidence. *Meehan v. Holyoke St. R. Co.*, 186 Mass. 511.

It is proper to admit expert testimony as to how many linemen there should be in stringing wires over feed wires, and where the men should be stationed. *Fritz v. Western Union Tel. Co.*, 25 Utah 263.

The proper conduct of a log boom, and what is practicable to be done, and what not, is a matter of expert knowledge, and the proper subject of expert testimony. *Crane v. Fry*, (C. C. A.) 126 Fed. Rep. 278.

It has been held that expert testimony as to the manner of operating a hand car is admissible. *International, etc., R. Co. v. Martinez*, (Tex. Civ. App. 1900) 57 S. W. Rep. 689.

In an action for negligent killing while deceased was being hoisted in a "skip" out of an incline shaft of defendant's mine, it is competent to inquire how the "skip" was ordinarily operated, for the purpose of tending to show that the defendant had notice of the engineer's negligence; and experts may be asked what effect such running would have on the "skip" when so operated on the track described. *Beaman v. Martha Washington Min. Co.*, 23 Utah 139.

It has been held that the construction and use of a belt shifter is not a matter of such common knowledge as to preclude the giving of expert evidence on the subject. *Thiel v. Kennedy*, 82 Minn. 142.

In an action for injuries sustained by the plaintiff by the breaking of a belt in the defendant's woolen mill where the plaintiff was employed, it was held that it was not error to allow the introduction of expert testimony as to the lacing of belts in mills of a different character from the one in which the plaintiff was employed. *McGar v. National, etc., Worsted Mills*, 22 R. I. 347.

It has been held that in the trial of an action for the negligent discharge of a nitroglycerine torpedo in an oil well, it is competent for a witness who, by experience in such work, has made himself familiar with the character and explosive qualities of that article, and the effect of the explosion of it in forcing out gas, and the dangers incident to the contact of such gas with the atmosphere and with fire, to testify as an expert, whether or not the hour of 7.30 P. M., in the month of September, is a proper time to explode such torpedo in a well located in a village within eighty to two hundred feet of buildings in which lights or fires are burning. *Ohio, etc., Torpedo Co. v. Fishburn*, 61 Ohio St. 608, 76 Am. St. Rep. 437.

In an action to recover for injuries received by the plaintiff while in the employ of the defendant as a brakeman, in which the question whether the plaintiff was negligent in his effort to pass from a coal car to a box car, it was held that the trial court should have admitted expert testimony as to what was the proper way

in which to pass from one car to another. *Missouri, etc., R. Co. v. Merrill*, 61 Kan. 671, overruled 65 Kan. 436.

**Character and Use of Tools.** — On the trial for burglary, tools and implements which were found in the possession of the defendants at the time of their arrest having been introduced in evidence, it was held not to be error to receive expert testimony as to the character and use of the instruments. *State v. Minot*, 79 Minn. 118.

**Quality and Condition of Articles of Commerce.** — Expert opinion evidence is sometimes admissible as to the quality and condition of particular articles of commerce. *Littlejohn v. Shaw*, 159 N. Y. 188, affirming 6 N. Y. App. Div. 492; *Northern Supply Co. v. Wangard*, 123 Wis. 1.

**Perishable Character of Fruit.** — It has been held that whether bananas transported from one place to another would decay during the journey, and to what extent, is a matter of peculiar and special knowledge among persons engaged in the business of dealing in tropical fruit, and is a proper subject for expert or opinion evidence. *Fruit Dispatch Co. v. Murray*, 90 Minn. 286.

**Duties of Servants.** — In an action to recover for the death of a brakeman in the employ of the defendant while making a coupling, it was held that it was proper to admit expert testimony as to the duties of a brakeman in inspecting coupling appliances when making couplings of cars, and also the duty of car inspectors regarding the inspection and observation of defective appliances on cars in use. *Missouri Pac. R. Co. v. Fox*, 60 Neb. 531.

**Competency of Servants.** — The competency of servants has been held to be a proper subject of expert testimony. *Rowe v. Such*, 134 Cal. 573; *International, etc., R. Co. v. Jackson*, 25 Tex. Civ. App. 619; *Postal Tel. Cable Co. v. Coote*, (Tex. Civ. App. 1900) 57 S. W. Rep. 912. See also *supra*, this title, 421. 5.

A physician who had an opportunity to observe the manner in which a nurse did her work was properly permitted to express his opinion as to whether she was a skilful and competent nurse. *Ward v. St. Vincent's Hospital*, 78 N. Y. App. Div. 317.

Experts who had examined the defendant's motorman to ascertain if he was competent to do the work, may testify as to the result of the examination. Such testimony is directly in point as tending to show that the defendant did not carelessly or negligently employ the motorman. *Lake St. El. R. Co. v. Fitzgerald*, 112 Ill. App. 312.

**Fire-arms.** — An expert witness may state how far a pistol of a certain calibre will powderburn. *Head v. State*, 40 Tex. Crim. 265.

And the distance at which powder stains are caused by the discharge of a gun has been held to be a proper subject of expert testimony. *Long v. Travellers Ins. Co.*, 113 Iowa 259.

The extent to which shots fired from a shotgun will scatter at various distances is a proper subject of expert testimony. *Bearden v. State*, 44 Tex. Crim. 578.

Witnesses who have had many years' experience with firearms have been permitted to state their opinion as to the kind of weapon with



which a wound was inflicted. *Franklin v. Com.*, 105 Ky. 237.

On the trial of a defendant for murder an expert witness was allowed to testify that the bullets found in the body of the deceased were marked by rust in the same way that they would have been if they had been fired through a certain rifle, and that it took at least several months for the rust found in the rifle to form. It was objected that these were not matters for expert testimony, but the court said that it saw no reason to doubt that the testimony was properly admitted. *Com. v. Best*, 180 Mass. 492.

**Questions of Law.**—An expert witness cannot be permitted to testify to matters which are questions of law. *State v. Thompson*, (Iowa 1905) 103 N. W. Rep. 377.

When the matter inquired about involves the application of rules of law to a given state of facts, even an expert should not be permitted to give an opinion. *Fulcher v. White*, (Tex. Civ. App. 1899) 48 S. W. Rep. 881.

An expert may aid the jury, but he cannot perform the functions of a juror, or, under the guise of giving testimony, state a legal conclusion. Thus, an expert may give his opinion as to medical facts, but he cannot determine the legal classification of such facts and testify that hernia was or was not "a contributing cause" of an injury. That is a mixed question of law and fact, to be determined in the light of all the evidence; and it would be as improper to permit such testimony as it would be in an ordinary case to allow a witness to say that a particular act amounted to negligence, or to contributory negligence, or that another fact was the proximate or a remote cause. *Travelers Ins. Co. v. Thornton*, 119 Ga. 455.

As to whether a witness may state who became liable for a certain bill, see *Quincy Gas, etc., Co. v. Baumann*, 203 Ill. 255, *affirming* 104 Ill. App. 600.

**Construction of Writing.**—Expert testimony as to the construction which is to be placed on a written instrument, such as a contract or will, is not admissible. *Wright v. Michigan Cent. R. Co.*, (C. C. A.) 130 Fed. Rep. 843; *McFarland v. McFarland*, 177 Ill. 208; *Independent School Dist. v. Sweargin*, 119 Iowa 702; *Groton Bridge, etc., Mfg. Co. v. Alabama, etc., R. Co.*, 80 Miss. 162; *R. M. Gilmour Mfg. Co. v. Cornell*, (Supm. Ct. App. T.) 26 Misc. (N. Y.) 752.

Experts may be called to define terms of art, to explain the principles of their science, where such principles are necessary to be understood, to state the condition and practice of their business, when material; but not to instruct the court as to the meaning of a contract. Sometimes a definition of a term or explanation of a principle may be decisive of the meaning of a document, but it is for the court to draw the conclusion; the opinion of any one else is immaterial. *Fuller v. Metropolitan L. Ins. Co.*, 70 Conn. 647, holding that evidence was inadmissible to explain the meaning of an insurance policy.

**Effect of Words "Protest Waived."**—A witness cannot state his opinion as to the effect of the words "protest waived" on a note, since the effect of the words is a matter of law to be determined by the court. *Schwartz v. Wilmer*, 90 Md. 136.

**Legal Sufficiency of Instruments.**—The legal sufficiency of documents in evidence is for the court, and it cannot be testified to by witnesses. *Rankin v. Sharples*, 206 Ill. 301, holding that the testimony of a patent lawyer as to the legal sufficiency of an alleged license to use patents was inadmissible.

**Sufficiency of Title.**—Where, on a bill for specific performance, the defendant alleges defective title to the plaintiff's property, the sufficiency of the title is a question of law and not a proper subject of expert testimony. *Evans v. Gerry*, 174 Ill. 595.

**Ambiguity of Writing.**—It has been held not to be error to refuse to permit an expert witness to testify that a certain telegraphic order relating to the movement of a train was unambiguous. Whether or not a writing is ambiguous is a question for the court and not for a witness. *Elliott v. Western, etc., R. Co.*, 113 Ga. 301.

**Performance of Contract.**—In an action to recover a balance claimed to be due on a building contract, it was said that it was improper to permit the defendants to interrogate their witnesses, experts in the construction of buildings, whether they considered the structure erected a substantial compliance by plaintiff with the terms of the contract, and whether, in their opinion, the building was constructed in a good and workmanlike manner. *Zimmerman v. Conrad*, (Mo. App. 1903) 74 S. W. Rep. 139.

**Nature of Building Operation.**—In an action on a mechanic's lien in which there was no dispute as to the character or extent of the alterations in an old building, it was held that it was proper to reject expert testimony as to whether the building operation was an alteration of an old building, or resulted in the construction of a new one; the facts being undisputed, the question was one of law to be determined by the court. *Caldwell v. Keating*, 18 Pa. Super. Ct. 297.

**What Constitutes "Practicing Medicine."**—On the trial of a defendant for violating a statute regulating the practice of medicine, it was held to have been proper to exclude the testimony of a physician as to whether a person who was engaged in the defendant's business would be regarded as practicing medicine. *People v. Lehr*, 196 Ill. 361.

**Waiver of Defense.**—It has been held that whether certain acts of an agent operate as a waiver of any defense which otherwise might have been made to an action on the bond is a conclusion which cannot be controlled by the opinion of the agent as a witness. *Getchell, etc., Lumber, etc., Co. v. Peterson*, 124 Iowa 599.

**Meaning of Terms.**—Expert testimony is admissible to explain the meaning of technical terms. *Heyworth v. Miller Grain, etc., Co.*, 174 Mo. 171; *Woodruff v. Klee*, 47 N. Y. App. Div. 638; *Texas, etc., R. Co. v. Mortensen*, 27 Tex. Civ. App. 106.

Thus, a term which may have acquired a peculiar meaning by the usage of trade may be explained by expert evidence. *Wallace v. Leher*, 65 N. J. L. 195.

Expert testimony as to the meaning of entries in books of accounts has been held to be admissible. *Paxton v. State*, 59 Neb. 460, 80 Am. St. Rep. 689.



Where a track-crossing agreement provided that the lessee should provide, at its own expense, necessary switchmen and signals, it was held that the terms "necessary signals and switchmen" could be explained by expert testimony. *Louisville, etc., R. Co. v. Illinois Cent. R. Co.*, 174 Ill. 448.

But except as to terms of art, or trade, or science, expert evidence is not admissible as to the meaning of terms. *Groton Bridge, etc., Mfg. Co. v. Alabama, etc., R. Co.*, 80 Miss. 162.

It is essential to the admission of the trade meaning of a word that such meaning should differ from the ordinary dictionary meaning or that of common speech. *U. S. v. Nordlinger*, (C. C. A.) 121 Fed. Rep. 690, *reversing* 115 Fed. Rep. 828.

When the technical meaning of a word is in dispute, but there is no controversy as to its ordinary meaning, it is not error to refuse to permit a witness who is not an expert to testify as to the meaning of the word. *Butte, etc., Consol. Min. Co. v. Montana Ore Purchasing Co.*, (C. C. A.) 121 Fed. Rep. 524.

Under a statute (Cal. Code Civ. Proc., § 1863), which provides that "when the characters in which an instrument is written are difficult to be deciphered, or the language of the instrument is not understood by the court, the evidence of persons skilled in deciphering the characters, or who understand the language, is admissible to declare the characters or the meaning of the language," it has been held that expert testimony is not admissible unless it appears that the characters in which an instrument is written are difficult to be deciphered, or that the language of the instrument is not understood by the court. *People v. King*, 125 Cal. 369.

See the title *PAROL EVIDENCE*, vol. 21, p. 1104 *et seq.*

**Deadly Character of Weapon.**—The question whether a weapon in evidence is or is not a deadly weapon is not, ordinarily, a proper subject of opinion evidence. *Majors v. State*, 83 Miss. 439.

On the trial of a defendant for an aggravated assault, a physician who was asked whether, in his opinion, based upon the nature and character of the wounds, the weapon used was such as was calculated to produce death, answered that in his opinion the weapon would have produced death if the force had been sufficient—that it was a matter of force more than of the weapon. It was held that there was no error. *Sebastian v. State*, 41 Tex. Crim. 248.

**Questions of Time.**—Expert testimony as to what is a reasonable time to transfer cattle from one carrier to another has been held to be admissible in an action to recover damages resulting from delay in the transportation of cattle. *Chicago, etc., R. Co. v. Carroll*, 36 Tex. Civ. App. 359.

The question as to whether a certain delay at an intermediate station in the transportation would be reasonable or unreasonable, has been held to be a proper subject of expert testimony. *Chicago, etc., R. Co. v. Kapp*, (Tex. Civ. App. 1904) 83 S. W. Rep. 233.

The length of time after death when *rigor mortis* may be expected to set in is a proper

subject for expert medical testimony. *Com. v. Farrell*, 187 Pa. St. 408.

**Determining Age of Trees.**—It has been held that a person who has special skill in determining the age of trees may be permitted to express an opinion as to the age of trees which he has examined. *Baker v. Sherman*, 71 Vt. 439.

**Range of Vision.**—The probability of objects being visible under given circumstances has sometimes been deemed a proper subject of expert testimony. *Barker v. Lawrence Mfg. Co.*, 176 Mass. 203.

Thus, an experienced railroad engineer has been permitted to state his opinion as to the distance an object could be seen in front of a headlight. *Olson v. Oregon Short Line R. Co.*, 24 Utah 460.

It has been held that a witness who was shown to be experienced as a locomotive engineer was properly permitted to testify as to how far the engineer on a train could see by the light thrown by a headlight of a particular description. *Southern R. Co. v. Bonner*, (Ala. 1904) 37 So. Rep. 702.

In an action to recover for the death of the plaintiff's husband who was killed by being run over by one of the defendant's trains, it was held proper to admit the testimony of an experienced engineer as to the distance an object on the track can be seen by an engineer while operating an engine. *Missouri, etc., R. Co. v. Jones*, 35 Tex. Civ. App. 584.

In sustaining the refusal of the trial court to permit a witness in a murder case to testify as an expert in relation to the quantity and quality of the light of the moon on the night of the tragedy, the court said: "It was proper to show the phase of the moon and the condition of the atmosphere as facts, but an opinion as to the quantity and quality of the light was not a subject for expert testimony." *Green v. State*, 154 Ind. 655.

**Overcrowded Condition of Car.**—In an action to recover for the death of the plaintiff's intestate while riding on the defendant's work car, where the jurors were fully advised by the evidence as to the size of the car, the space therein occupied by the tools, and the number of men in the car, and from this testimony they were as well qualified to judge of the conditions inside the car as the witnesses, it was held that the trial court did not err in refusing to permit a number of witnesses for the defendant to state that the car was not overcrowded. *Chicago Terminal Transfer R. Co. v. O'Donnell*, 213 Ill. 545.

**Presence of and Danger from Germs.**—Expert witnesses have been permitted to testify regarding the presence of germs and bacteria in water polluted by sewage, how far these germs could be carried, and the dangers resulting therefrom. *Hollenbeck v. Marion*, 116 Iowa 69.

**Defective Condition of Road.**—In an action to recover for personal injuries alleged to have been received in consequence of the defective condition of a road, the testimony of a witness claimed to be an expert was held to have been properly ruled out for the reason that it "related to a matter on which the common experience and observation of the jury qualified them to pass when the actual condition of the way had been described to them, and on which they

needed no assistance from an expert." *Edwards v. Worcester*, 172 Mass. 104.

**Questions of Cause and Effect.**—The opinions of expert witnesses as to which of two or more causes produced a given effect are not admissible, in evidence, where the conditions necessary to the operation of the different causes can be described with sufficient clearness, so that the jury can understand them, and intelligently form an opinion. *Meehan v. Great Northern R. Co.*, (N. Dak. 1904) 101 N. W. Rep. 183.

The testimony of expert witnesses as to the cause of the explosion of a locomotive engine has been held to be admissible. *Missouri, etc., R. Co. v. Sherman*, (Tex. Civ. App. 1899) 53 S. W. Rep. 386.

In *Beunk v. Valley City Desk Co.*, 128 Mich. 562, 8 Detroit Leg. N. 767, it was held that it was not error to permit an expert witness to express an opinion as to the cause of the explosion of a boiler in view of his explanations and reasons subsequently given.

The opinion of contractors and builders that a fire which burned off the ceiling joists or floor joists of a building would occasion the fall of the building in the manner in which it fell, has been held to be admissible. *N. & M. Friedman Co. v. Atlas Assur. Co.*, 133 Mich. 212, 10 Detroit Leg. N. 139.

In an action to recover damages alleged to have been caused by the negligent management and operation of certain reservoir dams by defendant, a log-driving company, whereby plaintiff's land was overflowed and flooded, it was held that the opinion of a witness as to what produced this overflow and flooding, should not have been received in evidence, as this was not a subject for expert testimony. *Akin v. St. Croix Lumber Co.*, 88 Minn. 119.

A witness who has qualified as an expert may properly be permitted to give his opinion as to the cause of a depreciation in value of realty in a certain part of a city. "It is for such witnesses," it was said, "to interpret such causal relations of proved facts as are not obvious without special knowledge of the subject." *Gordon v. Kings County El. R. Co.*, 23 N. Y. App. Div. 51, *affirmed* without opinion 164 N. Y. 563.

Expert testimony has been held to be admissible as to the effect of the presence of an elevated railway and its operation generally on the abutting premises in the streets through which it runs. *Steigerwald v. Manhattan R. Co.*, 50 N. Y. App. Div. 487.

It has been held that whether a heavy car being drawn along, off the track, by the train, could disturb the alignment of the rails, was a matter of common knowledge, and not the subject of expert evidence. *Cronk v. Wabash R. Co.*, 123 Iowa 349.

And it has been held that experienced railroad engineers and conductors are not competent to testify as to whether a train of cars could have passed over the body of a man and left it in the condition in which it was found. *Aidt v. State*, 1 Ohio Cir. Dec. 337.

But on the other hand the question whether a person standing on a railroad track would be thrown from the track or run over when struck by a train running at a given rate of speed has been held to be a proper subject of expert testi-

mony. *Gulf, etc., R. Co. v. Matthews*, 28 Tex. Civ. App. 92, *rehearing* 28 Tex. Civ. App. 99.

It has been held that where a defamatory article contains an imputation on the solvency and stability of a large newspaper concern, it is proper, in the trial of an action to recover damages occasioned by the libel, to show by expert proof the general effect of such an article on the business of such a publisher. *Bee Pub. Co. v. World Pub. Co.*, 59 Neb. 713.

The testimony of an expert witness as to the effect of wear on rubber matting has been held not to be open to the objection that it related to a matter of common knowledge. *Toland v. Paine Furniture Co.*, 179 Mass. 501.

In an action to recover damages to the plaintiff's meadow and hedge by fire alleged to have been set by an engine of the defendant railroad company, it was held that the testimony of witnesses who were qualified to express an opinion, and who had seen the meadow and hedge after the fire, was competent as to the effect of the flames. *Bradley v. Iowa Cent. R. Co.*, 111 Iowa 562.

In an action to recover for injuries sustained by the plaintiff by an electric shock as he stepped on a slot rail, expert testimony that if the slot rail was charged with electricity and plaintiff stepped on it, under conditions existing at the time which were recited in the hypothetical question, he would receive an electric shock, was held to be admissible. *Ludwig v. Metropolitan St. R. Co.*, 71 N. Y. App. Div. 210, *reversed* on another point 174 N. Y. 546.

It has been held in an action to recover damages to cattle shipped by the plaintiff over the defendant's railway, that, on the issue as to damages to the cattle from the time of the arrival at their destination to the unloading and delivery to the plaintiff, it was competent for the defendants to prove by an expert in handling and shipping cattle that the plaintiff's cattle would have suffered no more from remaining in the cars until the next morning than they would have suffered from being unloaded in the mud and rain on the night of their arrival. *Galveston, etc., R. Co. v. Botts*, (Tex. Civ. App. 1902) 70 S. W. Rep. 113.

**Quantity of Water Used by Factory.**—In an action which involved a question as to the accuracy of a water-meter used in the defendant's manufacturing plant, it was held that the court properly admitted expert testimony that it was impossible for a plant running in the ordinary way to use up the quantities of steam which the meter would show to have been generated during the time stated, and the jury were permitted to draw the inference from this that the meter could not have properly registered the amount of water which passed through it. *Underfeed Stoker Co. v. Detroit Salt Co.*, 135 Mich. 431, 10 Detroit Leg. N. 829.

**Practicability of Cutting Timber for Market.**—The practicability of cutting certain timber for the market may be established by the testimony of an experienced lumberman. *Belding v. Archer*, 131 N. Car. 287.

**Blood Stains.**—The length of time within which blood would coagulate to a certain consistency has been held to be a proper subject of expert testimony. *State v. Warren*, 41 Oregon 348. See the title BLOOD STAINS, vol. 4, p. 587.



**459. b. OPINIONS BASED ON TESTIMONY OF OTHERS — (i) Experts — General Rule.** — See note 2.

**Opinion Based on Evidence of Other Witnesses.** — See note 3.

**Hypothetical State of Facts.** — See note 8.

**459. 2.** *People v. Sowell*, 145 Cal. 292; *Ware Cattle Co. v. Anderson*, 107 Iowa 231; *McGrath v. Great Northern R. Co.*, 80 Minn. 450; *Cobb v. St. Louis, etc., R. Co.*, 149 Mo. 609; *Schaaf v. Fries*, 77 Mo. App. 346; *Cuebas v. Klein*, (N. Y. City Ct. Gen. T.) 61 N. Y. Supp. 923; *Lazarus v. Ludwig*, 45 N. Y. App. Div. 486; *Morrison v. State*, 40 Tex. Crim. 473; *Collins v. Janesville*, 111 Wis. 348.

**Basis of Opinion.** — The opinion of an expert witness is not admissible where it does not appear that he has knowledge of facts, hypothetical or actual, on which an opinion can be based. *Challis v. Lake*, 71 N. H. 90.

The testimony of a witness who testifies to opinions is founded either on personal knowledge of the facts, or else is based on facts shown by the testimony of others, or on a hypothesis specially framed on certain facts assumed to be proved for the purpose of the inquiry. *Western Coal, etc., Co. v. Berberich*, (C. C. A.) 94 Fed. Rep. 329. See *People v. Krist*, 168 N. Y. 19, 15 N. Y. Crim. 532.

**Opinion Based on Personal Knowledge of Witness.** — Where the only point as to which opinion evidence is directed is properly a matter of scientific investigation, an expert in that line may testify directly thereto from personal investigation. *Green v. Ashland Water Co.*, 101 Wis. 258, 70 Am. St. Rep. 911.

When a witness has actual knowledge of the subject concerning which he is testifying as an expert, his testimony need not be brought out by hypothetical questions. *Clegg v. Metropolitan St. R. Co.*, 1 N. Y. App. Div. 207, affirmed without opinion 159 N. Y. 550.

A hypothetical statement of facts as the basis for the opinion of a medical expert as to the cause of death is not necessary when the opinion is based on the personal observation or examination of the witness. *State v. Foote*, 58 S. Car. 218.

But in an action to recover the price of boilers sold to the defendant, it was held that expert testimony that the boilers leaked and were defective because of faulty construction and defective material was not admissible in the absence of testimony that the boilers were in the same condition when they were examined by the expert witness as they were at the time when they were delivered to the defendant. *Schmitz v. Stahl*, (Supm. Ct. App. T.) 26 Misc. (N. Y.) 788.

**Opinions Based on Hearsay.** — A witness, though a physician, cannot be permitted to express his opinion as to the insanity of a person, based on what he has been told by others; he can only give his opinion based on facts within his knowledge, or, if testifying as an expert, on the facts as detailed by other witnesses in the case. *Navasota First Nat. Bank v. McGinty*, 29 Tex. Civ. App. 539.

Medical experts cannot base their testimony as to the physical condition of a deceased person on the statement which had been made by the deceased. *Matter of James*, 124 Cal. 653.

It is improper to permit a physician, testifying as an expert, to express an opinion as to the sanity of a defendant based on statements made by him concerning his previous personal history. *State v. Soper*, 148 Mo. 217.

Since the opinion of the witness may have been based, in whole or in part, on what he had heard of the defendant, it was held that it was, in a trial for murder in which the sole defense was that the accused was insane at the time of the homicide, improper and illegal to allow the following question to be propounded to an expert witness, the answer thereto being in the negative: "State whether, in your opinion, from your examination of [the accused], from all that you know of him, have observed of him, or heard of him, he was laboring, at the time this crime was committed, under any overmastering delusion." *Flanagan v. State*, 106 Ga. 109.

**3. Witness Need Not Hear All the Evidence.** — Where an opinion of the witness is based on facts testified to by others, it is not necessary that he should have heard all the evidence. It is sufficient if it appears that he has heard all the testimony which is material to the subject of the inquiry. *Western Coal, etc., Co. v. Berberich*, (C. C. A.) 94 Fed. Rep. 329.

**8. Hypothetical Questions — California.** — *People v. Griffith*, 146 Cal. 339.

*Illinois.* — *Cook v. People*, 177 Ill. 146.

*Iowa.* — *Lucas v. McDonald*, 126 Iowa 678.

*Kentucky.* — *Clark v. Com.*, 111 Ky. 443.

*Minnesota.* — *Fonda v. St. Paul City R. Co.*, 77 Minn. 336.

*New Hampshire.* — *Challis v. Lake*, 71 N. H. 90.

*New York.* — *Finn v. Cassidy*, 165 N. Y. 584; *Cole v. Fall Brook Coal Co.*, 159 N. Y. 59, affirming 87 Hun (N. Y.) 584.

*North Carolina.* — *Summerlin v. Carolina, etc., R. Co.*, 133 N. Car. 550.

*Utah.* — *Palmquist v. Mine, etc., Supply Co.*, 25 Utah 257; *Nichols v. Oregon Short Line R. Co.*, 25 Utah 240.

*Wisconsin.* — *Schissler v. State*, 122 Wis. 365; *Allen v. Voje*, 114 Wis. 1; *Werner v. Chicago, etc., R. Co.*, 105 Wis. 300. See *McNamara v. McNamara*, 108 Wis. 613.

Expert witnesses are permitted to give their opinion on a given state of facts hypothetically presented, whether personally cognizant or not of some or all of the facts of the particular case. *Fireman's Ins. Co. v. J. H. Mohlman Co.*, (C. C. A.) 91 Fed. Rep. 85.

An expert witness may give an opinion as to the sanity or insanity of an individual based solely on a hypothetical question, without any personal knowledge or acquaintance with the individual inquired of. *Parrish v. State*, 139 Ala. 16.

It has been held in an action to recover for injuries to a shipment of cattle, that it would not be necessary for witnesses acquainted with the market value of cattle generally and who saw the cattle at point of destination, to have



**459.** (2) *Nonexperts.* — See note 11.

**460.** See note 1.

**2. The Subjects Classified and Considered — a. ANIMALS — Cattle. —**

See notes 3, 5.

seen or known the cattle when shipped or *en route*, in order to testify to the value of such cattle at destination in the condition in which they arrived there and the condition they would have been in if properly carried, provided proper hypothetical questions were propounded. *San Antonio, etc., R. Co. v. Barnett*, 27 Tex. Civ. App. 498.

Question put to an expert on direct examination should be framed hypothetically, unless there is no conflict of evidence as to the facts or the witness is personally acquainted with them. *Chicago, etc., R. Co. v. Glenney*, 175 Ill. 238.

Thus, the opinion of an expert witness as to the cause of an accident is incompetent when it is based on the existence of certain facts and conditions at the time of the accident, of which he has no personal knowledge and has not heard all the evidence in the case, unless the opinion is elicited by a question entirely hypothetical in form. *Bergen County Traction Co. v. Bliss*, 62 N. J. L. 410.

The hypothetical question to an expert witness should not contain matter which there is no evidence tending to support. However, technical accuracy is not required as to this. It is for the jury to scrutinize the evidence and to determine what part of the question is true or supported by the evidence and what is not, and the adverse party may ask for instructions that the jury do not accept the facts as true, but that they should determine whether such facts were in evidence, and that they might disregard the opinion of the expert if not based on facts in evidence. *Parrish v. State*, 139 Ala. 16.

It has been held to be within the discretion of the court to allow hypothetical questions which are in part without any support in the evidence, on the statement of counsel that the lacking evidence will be thereafter supplied. *Pittsburgh, etc., R. Co. v. Moore*, 110 Ill. App. 304.

A hypothetical question is not improper simply because it includes only a part of the facts in the record. *Brooks v. Sioux City*, 114 Iowa 641.

Hypothetical questions need only be based on what the evidence tends to prove, and they need not cover all of that. *Kirsher v. Kirsher*, 120 Iowa 337.

But the hypothetical question propounded to an expert witness should embrace substantially all the facts where there is no dispute as to them. *Parrish v. State*, 139 Ala. 16; *Catlin v. Trader's Ins. Co.*, 83 Ill. App. 40.

A hypothetical question may be put in accordance with any reasonable theory of the effect of the evidence. *Williams v. State*, (Fla. 1903) 34 So. Rep. 279.

Where there is any evidence tending to establish a fact a party has a right to base his hypothetical question on that evidence regardless of the preponderance of the evidence upon that subject, and he is not obliged to accept the theories of the opposite party as to what the

evidence tends to prove. *Lake Erie, etc., R. Co. v. Delong*, 109 Ill. App. 241; *Catlin v. Traders Ins. Co.*, 83 Ill. App. 40.

If the evidence is in conflict, the hypothetical question may and should properly embrace only the facts tending to support the particular theory of the respective party, and the opposing party, if desirable, on cross-examination of the witness, may propound questions to him embracing the facts which tend to support his theory. *Parrish v. State*, 139 Ala. 16.

In cross-examining expert witnesses it is not necessary that the examiner confine himself to the facts established in the case. He may assume almost any state of facts, for the purpose of testing the witness's credibility, and the extent of his knowledge. *Taylor v. Star Coal Co.*, 110 Iowa 40.

A hypothetical question which is based on the facts, as the evidence of one of the parties tends to show them, is not improper though it is not in all respects accurate. *Allison v. Parkinson*, 108 Iowa 154.

A hypothetical question need not state the facts testified to in the case when the question is framed on the assumption of certain facts, but counsel may assume the facts in accordance with his theory of them. It is not essential that he should state the facts as they actually exist. *Western Coal, etc., Co. v. Berberich*, (C. C. A.) 94 Fed. Rep. 329.

**459. 11. Opinion of Nonexpert Based on Testimony of Others.** — *Ragland v. State*, 125 Ala. 12; *Kight v. Metropolitan R. Co.*, 21 App. Cas. (D. C.) 494; *Jones v. State*, 44 Fla. 74; *People v. Kinney*, 124 Mich. 486; *Schaaf v. Fries*, 77 Mo. App. 346; *State v. Peel*, 23 Mont. 358, 75 Am. St. Rep. 529; *Beardslee v. Columbia Tp.*, 188 Pa. St. 496, 68 Am. St. Rep. 883; *Davis v. Collins*, 69 S. Car. 460; *Missouri, etc., R. Co. v. Baker*, (Tex. Civ. App. 1902) 68 S. W. Rep. 556; *Faber v. C. Reiss Coal Co.*, (Wis. 1905) 102 N. W. Rep. 1049. But compare *Burney v. Allen*, 127 N. Car. 476.

**460. 1.** *Ragland v. State*, 125 Ala. 12; *People v. Silverman*, 181 N. Y. 235; *Cannon v. State*, 41 Tex. Crim. 467.

A nonexpert witness cannot give an opinion as to the sanity or insanity of the individual inquired of, based in whole or in part on an abstract hypothetical question, but must base his opinion solely on his own personal knowledge, observation, acquaintance, experience, etc., with the individual inquired of. *Parrish v. State*, 139 Ala. 16.

**3. Age of Cattle.** — See *Leiby v. Clear Spring Water Co.*, 205 Pa. St. 634.

**5. Increase in Weight of Cattle in Pasture.** — The probable gain of cattle while in pasture is, it has been held, a proper subject of expert testimony. *Ware Cattle Co. v. Anderson*, 107 Iowa 231.

**Fact of Blindness.** — The question whether a mule is or is not blind is not a proper subject of expert evidence. *Rarden v. Cunningham*, 136 Ala. 263.

**460. Horses.** — See notes 9, 11.

**The Value of Animals.** — See note 12.

**b. DAMAGES — Qualifications of Witnesses.** — See note 13.

**Basis of Opinion.** — See note 14.

**461. See note 1.**

**Opinion as to Value Both Before and After Injury.** — See notes 2, 3.

**460. 9. Barber v. Manchester, 72 Conn. 675.**

But in an action to recover for injuries resulting from alleged negligence in placing two telephone poles on the side of the highway in such a way as to frighten horses, and where the location, condition, color, and appearance of the poles, and all of the circumstances surrounding them, could have been easily described by witnesses, the opinions of experts as to whether the poles were calculated to frighten horses were held to be inadmissible. *Missouri, etc., Telephone Co. v. Vandevort, 67 Kan. 269.*

**Disposition of Horse.** — Testimony as to the disposition of a horse was held to have been properly admitted where two of the witnesses were women who had driven the horse a number of times, and the others were men who had either driven it or seen it frequently, one of them being a former owner. *Pioneer Fireproof Constr. Co. v. Sunderland, 188 Ill. 341.*

**11. Condition of Horses.** — *State v. Cook, 75 Conn. 267.*

**12. Kinds of Wolves.** — In a prosecution for defrauding a county by falsely collecting wolf bounties, expert testimony as to the kinds of wolves found in the state was held to be competent. *State v. McIntosh, 109 Iowa 209.*

**13. Auckland v. Lawrence, (Colo. App. 1904) 78 Pac. Rep. 1935; Hoadley v. M. Seward, etc., Co., 71 Conn. 640; Taylor v. Jackson, 83 Mo. App. 641; Watson v. Colusa Parrot Min., etc., Co., (Mont. 1905) 79 Pac. Rep. 14; Texas, etc., R. Co. v. Maddox, 26 Tex. Civ. App. 297. See Shimer v. Easton R. Co., 205 Pa. St. 648; McCartney v. Philadelphia, 22 Pa. Super. Ct. 257; International, etc., R. Co. v. Aten, (Tex. Civ. App. 1904) 81 S. W. Rep. 346; Missouri, etc., R. Co. v. Davidson, 25 Tex. Civ. App. 134.**

It has been held that opinions of witnesses not personally acquainted with land appropriated for railroad purposes are not admissible as to the value of the land actually taken or damages to the residue, it not being a question of expert evidence; but a person so acquainted and conversant with the land may state the circumstances and respects in which the land is prejudiced or benefited by the railroad, and may then express his opinion as to value of the land after completion of the road as compared with what it was before. *Kay v. Glade Creek, etc., R. Co., 47 W. Va. 467.*

**Owner of Land.** — The owner of land, who has qualified as an expert, may testify in eminent domain proceedings on the question of damages. *Loloff v. Sterling, 31 Colo. 102.*

**14. Basis of Opinion.** — *Allen v. Field, (C. C. A.) 130 Fed. Rep. 641; Bailey v. Mill Creek Coal Co., 20 Pa. Super. Ct. 186; Millam v. Southern R. Co., 58 S. Car. 247, quoting 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 460; Jenkins v. Charleston St. R. Co., 58 S. Car. 373; Wilson v. Southern R. Co., 65 S. Car. 421. See Muncie Pulp Co. v. Martin, (Ind. 1904) 72*

*N. E. Rep. 882; Elwood Planing Mills Co. v. Harting, 21 Ind. App. 408.*

Testimony of a witness as to what would be the permanent damages to land because of a nuisance having given the locality a bad reputation is mere speculation and not admissible in evidence. *San Antonio v. Mackey, 22 Tex. Civ. App. 145.*

In an action to recover damages for injuries to the plaintiff's carriage, it was held that a witness who had no particular remembrance of the condition of the carriage before it was injured, was not qualified to express an opinion as to the difference between the value of the carriage before it had been injured and after it was repaired. *Eureka Stable Co. v. Metropolitan St. R. Co., (Supm. Ct. App. T.) 32 Misc. (N. Y.) 700.*

**461. 1. St. Louis, etc., R. Co. v. Hall, 71 Ark. 302; Axtell v. Northern Pac. R. Co., 9 Idaho 392; Kochmann v. Baumeister, 73 N. Y. App. Div. 309; Tootle v. Kent, 12 Okla. 674; U. S. v. McCann, 40 Oregon 13; Tenney v. Rapid City, 17 S. Dak. 283; C. H. Dean Co. v. Standifer, (Tex. Civ. App. 1904) 83 S. W. Rep. 230; De Wald v. Ingle, 31 Wash. 616, 96 Am. St. Rep. 927. See Richardson v. Webster City, 111 Iowa 427; Steinbauer v. Stone, 85 Minn. 274; Randall v. U. S. Leather Co., 72 N. Y. App. Div. 317; Comesky v. Postal Tel.-Cable Co., 41 N. Y. App. Div. 245. But see Oliver v. Columbia, etc., R. Co., 65 S. Car. 1. But compare Gillman v. Florida Cent., etc., R. Co., 53 S. Car. 210; Ingram v. Wishkah Boom Co., 35 Wash. 191.**

It has been held to be error to allow a plaintiff in an action to recover for personal injuries to testify to the "fair and reasonable value of his time" during the first year after he was injured. *Whipple v. Rich, 180 Mass. 477.*

It has been held to be erroneous to allow one of several defendants, while testifying as a witness, to give to the jury his opinion as to the amount of damages which he and his codefendants had sustained in consequence of alleged fraudulent representations of the plaintiff. *McCrary v. Pritchard, 119 Ga. 876.*

**2. Baltimore-Belt R. Co. v. Sattler, 100 Md. 306; Boyer v. St. Louis, etc., R. Co., (Tex. Civ. App. 1903) 72 S. W. Rep. 1038. See Illinois Cent. R. Co. v. Smith, 110 Ky. 203; International, etc., R. Co. v. Aten, (Tex. Civ. App. 1904) 81 S. W. Rep. 346.**

It is an invasion of the province of the jury in the trial of a cause to permit an expert to give his opinion as to the amount of damages which should be awarded. *Read v. Valley Land, etc., Co., 66 Neb. 423.*

The witness must state facts, and it is the province of a jury, on the facts in evidence, to find the amount of the damages. *St. Louis, etc., R. Co. v. Ayres, 67 Ark. 371.*

Thus it is not competent for a witness to

**461.** Opening Streets. — See note 4.

**462.** *c.* INSURANCE — (1) *Materiality of Nondisclosure* — (a) In General — Upon Nature of Inquiry. — See note 4.

**463.** (2) *Increase of Risk* — (a) Generally. — See notes 6, 7.

**464.** (3) *Interpretation of Policy*. — See note 6.

**466.** *d.* NAUTICAL AND MARINE SUBJECTS — (2) *Management of Craft* — (e) *Collisions*. — See note 2.

**468.** *e.* RAILROADING — (1) *Permanent Way* — *Rails*. — See note 4.  
Roadbed in General. — See note 7.

testify to his opinion that the breach of a given contract by one of the parties thereto caused damages to the other in a lump sum stated. Foote, etc., Co. v. Malony, 115 Ga. 985.

In an action against a carrier to recover damages for loss of goods in transportation, it was held that it was not error to exclude the testimony of a witness estimating the amount of the plaintiff's loss. Missouri, etc., R. Co. v. Davidson, 25 Tex. Civ. App. 134.

It has been said that generally "a witness is never permitted to estimate the amount of the damage for the doing or not doing of a particular act, which a party has sustained thereby." This is the province of the jury, and a witness cannot be allowed to usurp it. The rule generally is that a witness should state facts, and the jury should find from the facts in evidence what the damages are, if any. St. Louis, etc., R. Co. v. Hall, 71 Ark. 302.

In an action to recover damages a witness may state the facts on which the damages are predicated, and in a proper case, if qualified, may give his opinion on a question of value, when material; but he cannot express an opinion as to the amount of damages sustained by the plaintiff, because that is exclusively within the province of the jury, under the instruction of the court. Pacific Livestock Co. v. Murray, 45 Oregon 103.

In an action sounding in damages it is not competent for a witness to state the sum which he thinks is the plaintiff's damage, because, even if the witness is expert in the particular subject, he is liable to include in his general estimate elements of damages which the law does not recognize. Sallee v. St. Louis, 152 Mo. 615.

**461.** 3. McCrary v. Chicago, etc., R. Co., 109 Mo. App. 567; Watson v. Colusa-Parrot Min., etc., Co., (Mont. 1905) 79 Pac. Rep. 14; Dent v. South Bound R. Co., 61 S. Car. 329; Schuler v. Lincoln Tp., 12 S. Dak. 460. See Sallee v. St. Louis, 152 Mo. 615. Compare Owen v. Chicago, etc., R. Co., 109 Mo. App. 608.

The conclusion of a witness as to the amount of damages sustained by cattle has been held to be admissible where the witness shows himself qualified to express an opinion, and the evidence further indicates that in giving his estimate he takes into consideration only the legitimate elements of damage. Ft. Worth, etc., R. Co. v. Waggoner Nat. Bank, 36 Tex. Civ. App. 293.

In a case in which the court, instead of requiring witnesses to estimate the market value of land, immediately before and after the injury complained of, allowed them to give the difference between such values, without first stating the values, the practice was condemned

but it was held that it was not reversible error. Parrott v. Chicago G. W. R. Co., (Iowa 1905) 103 N. W. Rep. 352.

**4.** Darlington v. Allegheny City, 189 Pa. St. 202, 29 Pittsb. Leg. J. N. S. (Pa.) 284, 43 W. N. C. (Pa.) 442.

**462.** 4. It has been held to be error to admit the testimony of a medical examiner for an insurance company as to whether a risk would have been accepted by the company had certain alleged facts been disclosed. New Era Assoc. v. Mactavish, 133 Mich. 68, 10 Detroit Leg. N. 109; Murphy v. Prudential Ins. Co., 205 Pa. St. 444.

**463.** 6. Increase of Risk. — Catlin v. Traders Ins. Co., 83 Ill. App. 40.

7. It has been held that it was proper to exclude testimony of witnesses who were asked their opinions whether named acts of the plaintiff in an action on an insurance policy increased the risk of fire to the dwelling house which was burned. Southern Mut. Ins. Co. v. Hudson, 115 Ga. 638.

**464.** 6. See Trenton Potteries Co. v. Title Guarantee, etc., Co., 176 N. Y. 65, affirming 68 N. Y. App. Div. 636; National Fraternity v. Karnes, 24 Tex. Civ. App. 607.

Expert testimony as to the usage and object of inserting the *pro rata* clause in policies of insurance is not admissible to contradict the plain meaning of a policy, after its meaning has been settled by the construction of the courts. Home Ins. Co. v. Continental Ins. Co., 180 N. Y. 389, 105 Am. St. Rep. 772.

**466.** 2. Lambert v. La Conner Trading, etc., Co., 37 Wash. 113.

**468.** 4. Safety of Track. — A witness, who has qualified himself as an expert by showing a long service in the railroad business in various capacities, may testify as to the safety of a track. San Antonio, etc., R. Co. v. Brooking, (Tex. Civ. App. 1899) 51 S. W. Rep. 537.

7. See San Antonio, etc., R. Co. v. Waller, 27 Tex. Civ. App. 44.

Persons having several years' experience in railroad, and having knowledge as to the manner of constructing roadbeds and maintaining the same have been held to be competent to testify, and to express an opinion, as to whether the roadbed at a certain place was properly or improperly constructed. Missouri Pac. R. Co. v. Fox, 60 Neb. 531.

A witness who is shown to be skilled and experienced in respect of track construction and of track conditions is competent to give an opinion as to whether a track at the point of a derailment was in a defective and unsafe condition. Northern Alabama R. Co. v. Shea, (Ala. 1904) 37 So. Rep. 796.

A railroad engineer may testify that the



**468.** Cattle Guards. — See note 12.

**469.** (2) *Rolling Stock and Appliances* — Kind of Train. — See note 2.

Freight-car Appliances. — See note 4.

**470.** (3) *Operation of Railways* — (a) Sufficiency and Capacity of Train Crew. — See note 2.

rough and uneven condition of a railroad track was liable to throw a coupling pin out of place and thus to part a train. *Chicago G. W. R. Co. v. Price*, (C. C. A.) 97 Fed. Rep. 423.

**Relative Safety of Blocked and Unblocked Switches.** — It has been held that testimony as to the relative safety of blocked and unblocked switches may be given by a witness who has been a railroad man for twenty-seven years, first as a section hand or trackman, next as a section foreman, and last as a flagman at a street crossing and by a witness who has been a section hand for thirty years, and is experienced in regard to the construction of frogs, switches, and yard arrangements. *Galveston, etc., R. Co. v. Hughes*, 22 Tex. Civ. App. 134.

**468. 12. Condition of Cattle Guard.** — It has been held that whether a cattle guard was in a condition to turn cattle away and to prevent them from passing over it was a proper subject of expert testimony. *Johnson v. Detroit, etc., R. Co.*, 135 Mich. 33, 10 Detroit Leg. N. 801.

**469. 2. Kind of Train.** — The testimony of railroad experts is not necessary to determine whether a particular train is an "accommodation" train. *Gray v. Chicago, etc., R. Co.*, 189 Ill. 400.

**Kind of Track.** — The testimony of experienced railroad men as to whether a certain track was or was not a side track has been held to be admissible. *State v. Toledo R., etc., Co.*, 24 Ohio Cir. Ct. 321.

**Weight of Engine.** — A witness having had experience as an engineer and section boss has been considered competent to give his estimate of the weight of an engine which he had inspected. *E. E. Jackson Lumber Co. v. Cunningham*, (Ala. 1904) 37 So. Rep. 445.

**Indications of Broken Axle.** — It has been held that an expert should have been permitted to testify as to whether the peculiar action of an engine indicated a broken axle. *Brownfield v. Chicago, etc., R. Co.*, 107 Iowa 254.

**Fitness or Condition of Engine.** — A properly qualified witness may give his opinion as to whether an engine which conducts itself in a given way is or is not in proper working order. *Texas, etc., R. Co. v. Watson*, 190 U. S. 287.

Where one witness had testified that an engine had emitted sparks as large as the end of his little finger and another witness testified that the sparks were as large as a cow pea, it was held that an experienced engineer was properly permitted to testify that he had heard all the testimony, and that no engine in proper condition should have thrown sparks as large as a cow pea, and as large as a pin head. *Louisville, etc., R. Co. v. Marbury Lumber Co.*, 132 Ala. 520, 90 Am. St. Rep. 917.

**Proper Construction of Car.** — A person who is a yard master of a railroad company, having charge of switchmen and brakemen, and who has been a switchman himself, and has handled cars of all kinds, and is acquainted with the mode of construction, may be permitted to tes-

tify as an expert respecting the manner of construction of certain parts of a car involved in the controversy, and to express an opinion thereon as to what is a proper or improper construction. *Missouri Pac. R. Co. v. Fox*, 60 Neb. 531.

**Width of Cars.** — An experienced railroad man has been permitted to state the width of a car of a certain class. *Missouri, etc., R. Co. v. St. Clair*, 21 Tex. Civ. App. 345.

**Whether Defects in Brake Discoverable by Inspection.** — The testimony of a brakeman as to whether a certain defect in a brake staff could have been discovered by a proper inspection has been held to be admissible. *International, etc., R. Co. v. Collins*, 33 Tex. Civ. App. 58.

**4. Injuries to Freight Car Indicating Unsafe Handholds.** — It has been held that a witness who has been engaged as a railroad man for ten years in the capacity of brakeman and conductor, working for various roads, is competent to testify as to whether the fact that the corner of a car has been injured in a collision, or "cornered," would necessarily indicate any damage to the handhold. *Missouri, etc., R. Co. v. Baker*, (Tex. Civ. App. 1902) 68 S. W. Rep. 536.

**470. 2. Necessity of Track Walker.** — An expert railroad man in the care of railroad tracks may testify as to whether it was necessary to have a track walker in a railroad yard where an accident has occurred, in order to keep the tracks unobstructed, free or safe, so that trains could be run over them. *Galveston, etc., R. Co. v. Bohan*, (Tex. Civ. App. 1898) 47 S. W. Rep. 1050.

**Cause of Derailment.** — It has been held that expert testimony as to whether a broken axle might have derailed a train is admissible. *Brownfield v. Chicago, etc., R. Co.*, 107 Iowa 254.

**Cause of Lurching of a Train.** — In an action to recover for injuries alleged to have been received by the plaintiff while a passenger on one of the defendant's trains, in consequence of the lurching of the train, it was held that the skilled evidence of the conductor of another road, as to whether the lurching of a train may be caused by the manipulation of the engine, or whether there is a difference, apparent to those in the carriage, in the motion of trains under the management of different drivers, should have been received. *Smith v. Canada Pac. R. Co.*, 34 Nova Scotia 22.

**Management of Engine.** — A properly qualified witness may give his opinion whether an engine under a given state of facts was properly operated. *Texas, etc., R. Co. v. Watson*, 190 U. S. 287.

In an action to recover damages for injuries caused by a fire set by an engine operated by the defendant, it was held that it was proper to admit the testimony of experienced railroad men as to whether the engine was properly managed at the time when the fire was alleged

**471.** (c) Performance of Duties by Train Crew — Performance of Whole Duty. — See notes 7, 8.

[Using Flag. — See note 11a.]

**472.** (d) Management of Trains — *bb.* SPARKS FROM ENGINE. — See note 4. Whether Emitted from Certain Spark Arresters. — See note 5.

**473.** *cc.* SPEED OF TRAINS — Applications of Rule. — See notes 1, Liberal Rule. — See note 6.

**474.** Checking Speed. — See notes 5, 8.

to have been set. *Texas Southern R. Co. v. Hart*, 32 Tex. Civ. App. 212.

**Safe Rate of Speed.** — It has been held that experienced railroad men may give their opinion as to what would be a safe rate of speed under given circumstances. *Galveston, etc., R. Co. v. Ford*, 22 Tex. Civ. App. 131.

A witness who had had a long experience as a brakeman and whose duties had to do with the regulation of the speed of the train under the varying circumstances of curve, grade, and the like, incident to a line of railway, has been held entitled to state his opinion as to whether a train at a particular time and place was running at a dangerously high speed. *Northern Alabama R. Co. v. Shea*, (Ala. 1904) 37 So. Rep. 796.

In an action to recover for the death of the plaintiff's husband which was alleged to have been caused by the negligence of the defendant while he was a passenger on one of the defendant's street cars, it was held that a witness who had testified that he was familiar with the road throughout its entire length, and knew the curve; that he had been a motorman over this same line for six or seven months; that he was familiar with the speed of cars; and that, in his judgment, the car was running through the curves at the time of the accident at between seven and eight miles per hour, was competent to give an opinion as to the proper rate of speed. *Halverson v. Seattle Electric Co.*, 35 Wash. 600.

**Danger in Running Trains Backward.** — It has been held that experienced railroad men are competent to testify as to whether it is dangerous to run a train backward. *Chicago, etc., R. Co. v. Grimm*, 25 Ind. App. 494; *Louisville, etc., R. Co. v. Scott*, 108 Ky. 392.

**471. 7.** In an action to recover for personal injuries sustained by the plaintiff at a crossing, it was held that the engineer of the train by which the plaintiff was injured was properly permitted to testify as to what he did to stop his train when he saw there was likely to be an accident, and that he did not know of anything more which he could have done to stop the train. *McGovern v. Hays*, 75 Vt. 104.

**8.** On the ground that it is not the province of a witness to deduce inferences, or to express opinions upon facts to which he has testified, it has been held that a motorman who had testified as to what he had done to avert a threatened collision, could not be asked whether he knew of anything which he could have done, but did not do, to avert the collision. *Springfield Consol. R. Co. v. Puntenney*, 200 Ill. 9, affirming 101 Ill. App. 95.

In an action to recover damages alleged to have been sustained by the plaintiff by the sudden starting of the defendant's street car as he was attempting to get on the car, it was held

that since a question as to whether the conductor could have stopped the car and prevented the injury if he had been on the rear platform of the motor car, or the front platform of the trailer, could have been answered only by an opinion on the part of the witness, it was properly excluded. *Von Diest v. San Antonio Traction Co.*, 33 Tex. Civ. App. 577.

**11a. Using Flag.** — In an action to recover for personal injuries sustained by the plaintiff, by being thrown from a hand car of which he was in charge as foreman of the crew, and which was suddenly stopped as it was passing around a curve, to avoid a collision with an approaching train, it was held proper to admit the testimony of a witness on the question of contributory negligence, that the curve on which the accident occurred was not such an one as required the use of a flag. *Gulf, etc., R. Co. v. Minter*, (Tex. Civ. App. 1905) 85 S. W. Rep. 477.

**472. 4. Sparks.** — *Chicago, etc., R. Co. v. Kreig*, 22 Ind. App. 393; *Jamieson v. New York, etc., R. Co.*, 11 N. Y. App. Div. 50, affirmed without opinion 162 N. Y. 630.

**5.** See *Chicago, etc., R. Co. v. Kreig*, 22 Ind. App. 393; *Peck v. New York Cent., etc., R. Co.*, 165 N. Y. 347, reversing 37 N. Y. App. Div. 110.

Expert testimony as to whether engines equipped in a certain manner could throw out sparks so as to set a fire has been held to be admissible. *Bowen v. Boston, etc., R. Co.*, 179 Mass. 524.

Thus it has been held that a witness who had been a locomotive engineer for sixteen years was competent to testify as to whether a spark arrester of a certain description in first-class condition would prevent the escape from the engine of sparks or fire that would ignite property on the right of way. *Kansas City, etc., R. Co. v. Blaker*, 68 Kan. 244.

But it has been held that the statement of a witness that the openings in certain spark arresters would allow only a small spark to escape was purely a conclusion, and, therefore, was properly stricken out. *Swanson v. Keokuk, etc., R. Co.*, 116 Iowa 304.

**473. 1.** *Norfolk, etc., R. Co. v. Tanner*, 100 Va. 379.

A witness who had been working as a section hand for four months has been held competent to testify as to the speed of a hand car on which he was riding. *Haworth v. Kansas City Southern R. Co.*, 94 Mo. App. 215.

**2. Trainmen.** — *Northern Alabama R. Co. v. Shea*, (Ala. 1904) 37 So. Rep. 796.

**6. Nonexpert May Testify as to Speed of Train.** — *Norfolk, etc., R. Co. v. Tanner*, 100 Va. 379.

**474. 5. Checking Speed of Train.** — *Atlanta R., etc., Co. v. Monk*, 118 Ga. 449; *Vanarsdell*

**475.** See notes 2, 4, 6.*f. VALUE* — (1) *Generally*. — See note 8.*Market Value*. — See notes 9, 10, 11.*Qualifications of Witnesses*. — See notes 12, 13, 14.

*v. Louisville, etc.*, R. Co., 65 S. W. Rep. 858, 23 Ky. L. Rep. 1666; *Mulligan v. Third Ave. R. Co.*, 61 N. Y. App. Div. 214. See *Norfolk R., etc.*, Co. *v. Corletto*, 100 Va. 355.

The distance within which a street car in motion may be stopped by the use of the brake is a question on which an expert may properly give an opinion. *Indianapolis St. R. Co. v. Seerley*, (Ind. App. 1904) 72 N. E. Rep. 169.

**474.** 8. *Buckman v. Missouri, etc.*, R. Co., 100 Mo. App. 30; *Olson v. Oregon Short Line R. Co.*, 24 Utah 460.

**475.** 2. *Railroad Builder*. — *Cox v. Norfolk, etc.*, R. Co., 126 N. Car. 103.

4. *Motormen*. — *South Covington, etc.*, R. Co. *v. Weber*, 82 S. W. Rep. 986, 26 Ky. L. Rep. 922; *Heinzle v. Metropolitan St. R. Co.*, 182 Mo. 528; *Traver v. Spokane St. R. Co.*, 25 Wash. 225. But see *Bliss v. United Traction Co.*, 75 N. Y. App. Div. 235.

*Experienced Street Car Operatives*. — *Meng v. St. Louis, etc.*, R. Co., 108 Mo. App. 553.

A witness, who had run as a motorman on electric cars for nearly three years, working on different lines, and had worked in the shops to learn something about electricity before he was put on a line, was held competent to testify as to the usual means of stopping an electric car, and what is ordinarily the quickest way to stop such a car. *Atlanta R., etc., Co. v. Monk*, 118 Ga. 449.

6. *Section Hands*. — It has been held that a witness who had been in the railroad business as a section hand for fourteen years, during which period, on numerous occasions, he had observed freight and passenger trains stopped, was competent to testify as to the time required to stop a train. *Buckman v. Missouri, etc.*, R. Co., 100 Mo. App. 30.

8. *Questions of Value*. — *Baden v. State*, (Tex. Crim. 1903) 74 S. W. Rep. 769.

9. *Market Value*. — See *Ohio Southern R. Co. v. Snyder*, 5 Ohio Dec. 480, 5 Ohio N. P. 461.

10. *McCrary v. Chicago, etc.*, R. Co., 109 Mo. App. 567.

11. *McRae v. Lonsby*, (C. C. A.) 130 Fed. Rep. 17; *Allison v. Wall*, 121 Ga. 822; *Houghtaling v. Chicago G. W. R. Co.*, 117 Iowa 540; *Levee Com'rs v. Dillard*, 76 Miss. 641; *Sallee v. St. Louis*, 152 Mo. 615; *Glaser v. Home Ins. Co.*, (Supm. Ct. App. T.) 47 Misc. (N. Y.) 89; *Vroom v. Sage*, 100 N. Y. App. Div. 285, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 475; *Kaufman v. Abrams*, (Supm. Ct. App. T.) 90 N. Y. Supp. 1068; *Gallagher v. Kingston Water Co.*, 25 N. Y. App. Div. 82, affirmed without opinion 164 N. Y. 602; *Footte v. Lorain, etc.*, R. Co., 11 Ohio Cir. Dec. 685, 21 Ohio Cir. Ct. 319; *Ruckman v. Imbler Lumber Co.*, 42 Oregon 231; *Hewitt v. Pittsburg, etc.*, R. Co., 19 Pa. Super. Ct. 304.

In an action to recover damages for injuries to the plaintiff's horse alleged to have been caused by the defendant's negligence, it was held that the value of live stock may be proved by opinion evidence, but whether there is a

market for stock which has been injured is not provable by such evidence. *Texas, etc.*, R. Co. *v. Meeks*, (Tex. Civ. App. 1903) 74 S. W. Rep. 329.

In an action to recover damages for injuries to horses shipped over the defendant's railroad, it was held that testimony showing the value of the horses had they arrived at the destination in "good condition" was not open to the objection that it was "an opinion and conclusion of the witness, and not based upon a sufficient statement of the facts as to what the witness would consider a good and proper condition." It was said that the term "good condition" was sufficiently explicit, and if the defendant desired to test what the witness meant by the use of the term, it could have done so by cross-examination. *Texas, etc.*, R. Co. *v. White*, 35 Tex. Civ. App. 521.

*Advertising Spaces*. — The value of advertising spaces may be established by the testimony of witnesses who are qualified by special experience and knowledge to give their opinions as to the value of the space. *World's Columbian Exposition v. Pasteur-Chamberland Filter Co.*, 82 Ill. App. 94.

12. *Qualification of Witness*. — *United States*. — *Union Pac. R. Co. v. Lucas*, (C. C. A.) 136 Fed. Rep. 374; *Gorman v. Park*, (C. C. A.) 100 Fed. Rep. 553.

*Illinois*. — *Cleveland, etc.*, R. Co. *v. Patton*, 203 Ill. 376; *Sewell v. Chicago Terminal Transfer R. Co.*, 177 Ill. 93; *Reebie v. Brackett*, 109 Ill. App. 631; *Chicago City R. Co. v. T. W. Jones Furniture Transit Co.*, 92 Ill. App. 507; *Maxwell v. Habel*, 92 Ill. App. 510.

*Iowa*. — *Tuttle v. Cone*, 108 Iowa 468.

*Kentucky*. — *Louisville, etc.*, R. Co. *v. Jones*, (Ky. 1899) 52 S. W. Rep. 938.

*Mississippi*. — *Levee Com'rs v. Nelms*, 82 Miss. 416.

*Missouri*. — *Sprague v. Sea*, 152 Mo. 327; *N. O. Nelson Mfg. Co. v. Shreve*, 104 Mo. App. 474.

*Montana*. — *Watson v. Colusa-Parrot Min., etc.*, Co., (Mont. 1905) 79 Pac. Rep. 14; *Porter v. Hawkins*, 27 Mont. 486.

*Nebraska*. — *South Omaha v. Ruthjen*, (Neb. 1904) 99 N. W. Rep. 240; *Chicago, etc.*, R. Co. *v. Buel*, 56 Neb. 205.

*New Hampshire*. — *Harris v. Smith*, 71 N. H. 330.

*New York*. — *Glaser v. Home Ins. Co.*, (Supm. Ct. App. T.) 47 Misc. (N. Y.) 89.

*Texas*. — *North Texas Constr. Co. v. Bostick*, (Tex. Civ. App. 1904) 80 S. W. Rep. 109, reversed on other points (Tex. 1904) 83 S. W. Rep. 12; *Texas, etc.*, R. Co. *v. Maddox*, 26 Tex. Civ. App. 297.

It has been said that the rule excluding "opinions" is not applied so strictly to questions of "values" and "estimates" as to many other subjects. *Mobile, etc.*, R. Co. *v. Riley*, 119 Ala. 260.

As to property which has no market value, any one familiar with its nature and use may



**476.** See note 1.

give an opinion as to the value. *Houghtaling v. Chicago G. W. R. Co.*, 117 Iowa 540.

A person of ordinary intelligence generally has such a knowledge of property in common use as to entertain a proper conception of its value, which opinion he may state to a jury when the value of such property is controverted. *Ruckman v. Imbler Lumber Co.*, 42 Oregon 231.

Expert witnesses are not required to prove the reasonable market value of chattels in common use, and the reasonable market price of which is within the knowledge of persons of ordinary intelligence and experience. *Filson v. Territory*, 11 Okla. 351.

**475, 13.** *Motton v. Smith*, 27 R. I. 57, 62; *Lines v. Alaska Commercial Co.*, 29 Wash. 133.

The rule that any one familiar with values in question may testify is uniformly construed liberally. *Sylvester v. Ammons*, 126 Iowa 140.

**14. General Rule as to Qualifications—United States.**—*Glazier v. Nichols*, 112 Fed. Rep. 877. *Alabama.*—*Schloss v. Inman*, 129 Ala. 424; *Andrews v. Tucker*, 127 Ala. 602.

*Illinois.*—*Haldeman v. Schuh*, 109 Ill. App. 259.

*Indiana.*—*Muncie Pulp Co. v. Martin*, (Ind. 1904) 72 N. E. Rep. 882.

*Iowa.*—*Gillespie v. Ashford*, 125 Iowa 729.

*Kentucky.*—*Gerkins v. Kentucky Salt Co.*, 67 S. W. Rep. 821, 23 Ky. L. Rep. 2415; *Miller v. Early*, 58 S. W. Rep. 789, 22 Ky. L. Rep. 825.

*Michigan.*—*Grabowsky v. Baumgart*, 128 Mich. 267, 8 Detroit Leg. N. 793; *Graves v. Kennedy*, 119 Mich. 621.

*Mississippi.*—*Levee Com'rs v. Dillard*, 76 Miss. 641.

*Nebraska.*—*Green v. Lancaster County*, 61 Neb. 473.

*New Jersey.*—*Riley v. Camden, etc., R. Co.*, 70 N. J. L. 289; *Elvins v. Delaware, etc., Tel., etc., Co.*, 63 N. J. L. 243, 76 Am. St. Rep. 217.

*New York.*—*Kelly v. Home Sav. Bank*, 103 N. Y. App. Div. 141, *reversing* (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 102; *Ferguson v. Buckell*, 101 N. Y. App. Div. 213; *Ravin v. Subin*, (Supm. Ct. Spec. T.) 31 Misc. (N. Y.) 742; *Gruel v. Yetter*, (N. Y. City Ct. Gen. T.) 55 N. Y. Supp. 443; *Eno v. Christ*, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 24.

*North Dakota.*—*Minneapolis Threshing Mach. Co. v. McDonald*, 10 N. Dak. 408.

*Oregon.*—*Ruckman v. Imbler Lumber Co.*, 42 Oregon 231.

*Rhode Island.*—*Williams v. Hathaway*, 21 R. I. 566; *Motton v. Smith*, 27 R. I. 57.

*Texas.*—*J. P. Watkins Land Mortg. Co. v. Campbell*, 98 Tex. 372; *Texas, etc., R. Co. v. Smith*, 35 Tex. Civ. App. 351; *Eastern Texas R. Co. v. Scurlock*, 97 Tex. 305, *reversing* (Tex. Civ. App. 1903) 75 S. W. Rep. 366; *Chicago, etc., R. Co. v. Douglass*, 33 Tex. Civ. App. 262; *Missouri, etc., R. Co. v. Dilworth*, 95 Tex. 327; *Gulf, etc., R. Co. v. Burroughs*, 27 Tex. Civ. App. 422; *Texas, etc., R. Co. v. White*, 25 Tex. Civ. App. 278; *Gulf, etc., R. Co. v. Staton*, (Tex. Civ. App. 1899) 49 S. W. Rep. 277; *Halfi v. Goldfrank*, (Tex. Civ. App. 1899) 49 S. W.

Rep. 1095. But see *Shelton v. Willis*, 23 Tex. Civ. App. 547.

*Virginia.*—*Wadley v. Com.*, 98 Va. 803. See *Norfolk, etc., R. Co. v. Briggs*, 103 Va. 105.

*Wisconsin.*—*Rylander v. Laursen*, (Wis. 1905) 102 N. W. Rep. 341.

Testimony as to the value of property, whether delivered by expert or nonexpert witnesses, must be based on adequate knowledge of the thing, and a knowledge of the state of the market. *Schaaf v. Fries*, 77 Mo. App. 346.

**Opinion of Farmer as to Value of Wheat.**—It has been held that a farmer engaged in raising and marketing wheat is presumed to know the value thereof, and may testify thereto without showing familiarity with the market. *Linde v. Gaffke*, 81 Minn. 304.

A witness who is thoroughly conversant with a business and with its management in all its details is competent to give his opinion of the value of the good will of the concern founded on his knowledge. *White v. Jones*, 79 N. Y. App. Div. 373.

**Wagon.**—In an action for injury to the plaintiff's wagon by a collision with the defendant's street car, it was held that the plaintiff who had bought four wagons, and had sold some, during eight years devoted to a business which called for the continual use of a wagon, was competent to give his opinion as to the value of the wagon. *Haan v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 34 Misc. (N. Y.) 523.

**Price of Board.**—In an action to recover a sum due for board it was held that witnesses who lived in the vicinity of the place where the board was furnished, and knew the price, were competent to give their opinions as to what was a reasonable price for the board. *Watriss v. Trendall*, 74 Vt. 54.

**Owner of Property.**—The testimony of the owner as to the value of articles of personal property is not admissible where it does not appear that he has any knowledge as to the value. *Motton v. Smith*, 27 R. I. 57.

But it has been held that the owner of a bicycle who had considerable experience with bicycles, had bought four or five, had often priced them in store, and had taken an interest in them, was competent to testify to the value of the bicycle. *Osborne v. State*, (Tex. Crim. 1900) 56 S. W. Rep. 53.

**476. 1.** *Pennsylvania R. Co. v. Hunsley*, 23 Ind. App. 37; *Edwards v. Renstrom*, 63 Kan. 883, 65 Pac. Rep. 249. See *Cuebas v. Klein*, (N. Y. City Ct. Gen. T.) 61 N. Y. Supp. 923. But compare *Eureka Stable Co. v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 32 Misc. (N. Y.) 700. See also *infra*, this title, **477. 5.**

It has been held that the trial court properly excluded the opinion of a witness who had been in the mining business as to the value of a mine when the witness had never been inside of the mine, and told the court and jury that, from his experience, he would be unwilling to buy any mine without going down into it and examining it. *Glazier v. Nichols*, 112 Fed. Rep. 877.

**476.** (2) *The Subject-matter* — (a) *Personalty* — *aa. ANIMALS* — *Cattle*. — See note 4.

**477.** *Dogs*. — See note 1.

*Horses*. — See notes 4, 5, 6.

**478.** See note 1.

*dd. CLOTHING*. — See note 9.

*ee. CROPS*. — See note 10.

**479.** *gg. FURNITURE* — *Second-hand Furniture*. — See note 4.

*Household Furniture*. — See note 5.

**480.** *mm. LUMBER*. — See notes 2, 4.

**476. 4. Cattle**. — Louisville, etc., R. Co. v. Landers, 135 Ala. 504; Chandler v. Parker, 65 Kan. 860, 70 Pac. Rep. 368.

In an action for injury to domestic animals, the statement of the plaintiff, as a witness in his own behalf, that he is a farmer, and has been twenty years on the farm, is sufficient to qualify him to testify as to the value of the animals killed. Choctaw, etc., R. Co. v. Deperade, 12 Okla. 367.

In an action to recover the value of certain cattle, it was held that a farmer who had owned the cattle in question was a competent witness as to their value. Cathcart v. Rogers, 115 Iowa 30.

Witnesses who had had fully ten years' experience in handling and shipping cattle, and who had shipped cattle repeatedly during that period to the Kansas City market, and were familiar with the different grades of cattle, and had made it their business, like other stockmen, to keep themselves posted as to the value of different grades of cattle by consulting the market reports and conferring with commission men who were engaged in buying and selling stock in each of the aforesaid markets, were held competent to testify as to the market value of cattle at a given time, either in Kansas City or Chicago. Missouri, etc., R. Co. v. Truskett, (C. C. A.) 104 Fed. Rep. 728, affirmed without opinion 186 U. S. 480.

It has been held that an expert witness may testify as to the market value of cattle similar to those in controversy, although he has never seen the cattle in controversy. Edwards v. Renstrom, 63 Kan. 883, 65 Pac. Rep. 249.

**Sheep**. — A butcher, who was in the business of buying sheep, cattle, and hogs, and a stock buyer who bought sheep in a speculative way and knew their value have been held competent witnesses to testify as to the value of a ram for breeding purposes. State v. McKeavitt, 106 Iowa 748.

**477. 1. Dogs**. — St. Louis, etc., R. Co. v. Philipot, 72 Ark. 23; American Express Co. v. Bradford, 82 Miss. 130.

**4. Horses**. — Montgomery St. R. Co. v. Hastings, 138 Ala. 432; Burlington, etc., R. Co. v. Campbell, 14 Colo. App. 141; Cleveland, etc., R. Co. v. Patton, 203 Ill. 376; Chicago, etc., R. Co. v. Calumet Stock Farm, 194 Ill. 9, 88 Am. St. Rep. 68; Louisville, etc., R. Co. v. Frazee, (Ky. 1903) 71 S. W. Rep. 437; Millam v. Southern R. Co., 58 S. Car. 247, quoting 12 AM AND ENG. ENCYC. OF LAW (2d ed.) 477.

**5.** In an action to recover for injuries to a horse, it was held that it was error to permit a witness to testify as to the value of the horse

before the accident, where there was no evidence that he had even seen the horse before the accident. Manning v. Interurban St. R. Co., (Supm. Ct. App. T.) 88 N. Y. Supp. 386. But see *supra*, 476. 1.

**6.** In an action to recover the value of a horse alleged to have been killed through the negligence of the defendant railroad, it was held that testimony as to value of the horse by the plaintiff and his neighbors, who knew it, was competent, although they did not profess to be experts. Louisville, etc., R. Co. v. Jones, (Ky. 1899) 52 S. W. Rep. 938.

**478. 1.** Chaperon v. Portland Electric Co., 41 Oregon 39.

**9.** Houghtaling v. Chicago G. W. R. Co., 117 Iowa 540.

**10. Crops**. — In proving the value of a quantity of growing corn which had been destroyed by water, it was held proper to ascertain from a witness that he had knowledge of the yield and of the value of corn in the neighborhood in the fall following the injury, and of the cost of cultivation to maturity, and then to ask him to state, in view of that knowledge, what in his opinion was the value of the plant at the time of its destruction. St. Joseph, etc., R. Co. v. McCarty, (Neb. 1902) 92 N. W. Rep. 750.

**479. 4.** Glaser v. Home Ins. Co., (Supm. Ct. App. T.) 47 Misc. (N. Y.) 89.

It has been said that as to furniture which has been in use any one familiar with its nature and use may give an opinion as to its value. Houghtaling v. Chicago G. W. R. Co., 117 Iowa 540.

**5.** Chicago City R. Co. v. T. W. Jones Furniture Transit Co., 92 Ill. App. 507; Lincoln Supply Co. v. Graves, (Neb. 1905) 102 N. W. Rep. 457. See Reebie v. Brackett, 109 Ill. App. 631; Munro v. Stowe, 175 Mass. 169.

**Household Goods**. — Any one familiar with the value of household goods and property that are in common use may testify as to their value without its being shown that he is an expert on such values. Maxwell v. Habel, 92 Ill. App. 510.

**Articles of Common Use in Restaurant**. — A witness whose business is that of a restaurant keeper is competent to testify as to the value of articles of every-day use in a restaurant. Gorman v. Park, (C. C. A.) 100 Fed. Rep. 553.

**480. 2. Lumber**. — Beaudry v. Duquette, 92 Minn. 158.

**4. Logs**. — A witness who had been employed in the logging business for a number of years, and had learned the general market value of pine lumber, and, prior to testifying, had learned

**480.** *nn.* MACHINERY — Farm Machinery. — See note 8.

*oo.* MERCHANDISE — Merchants. — See notes 12, 13.

A Clerk. — See note 14.

*pp.* MINING CLAIMS. — See note 17.

**481.** *tt.* PAINTING. — See note 5.

*vv.* PIANO. — See note 8.

*xx.* SAILING CRAFT — Ships. — See note 11.

**482.** *yy.* STOCK OF CORPORATION. — See note 1.

(b) **Reality** — *aa.* GENERAL RULE AS TO QUALIFICATIONS. — See note 3.

of market values from reported prices and from sales made by him, was held competent to testify as to the value of certain logs. *St. Paul Boom Co. v. Kemp*, (Wis. 1905) 103 N. W. Rep. 259.

In an action to recover damages for the destruction of a quantity of saw logs and standing timber by fire, it was held proper to admit testimony as to the value of the logs by a witness who testified that he had worked on logs about fifteen winters, had sawed about one hundred and fifty of the plaintiff's logs which were burned, and knew their value, but that he had never bought or sold logs himself. *Rylander v. Laursen*, (Wis. 1905) 102 N. W. Rep. 341.

**480. 8.** See *Minneapolis Threshing Mach. Co. v. McDonald*, 10 N. Dak. 408.

**12. Merchandise.** — *Sylvester v. Ammons*, 126 Iowa 140; *Madden v. Phoenix Ins. Co.*, 70 S. Car. 295; *Belknap v. Groover*, (Tex. Civ. App. 1900) 56 S. W. Rep. 249.

**13.** See *Frick v. Kabaker*, 116 Iowa 494.

The value of a stock of millinery goods may be testified to by a witness who has frequently priced and bought similar articles at retail and in a general way knows their values. *Langdon v. Wintersteen*, 58 Neb. 278.

It has been held that when it appears that goods, or a part of them, are to some extent shopworn and deteriorated in value, a witness who has never seen them, or one whose only knowledge of value is derived from the inspection of invoices and the examination of trade catalogues of prices, or one who is ignorant of the kind of manufacture and of the description of the form and structure of the articles in controversy, is incompetent to testify as to values. *Merchants' Nat. Bank v. McDonald*, 63 Neb. 363.

In an action to recover damages for the loss of a stock of merchandise by fire, a witness was allowed to give the valuation of the stock of goods which the plaintiff had on hand on the day prior to the fire, based on a cursory view, not made with any purpose of valuation, nor any expectation such as would have caused him to give especial attention to the matter. It was held that this was not reversible error, since the defendant could not have been prejudiced by the evidence, which was of little value, and was doubtless so considered by the jury. *Norfolk, etc., R. Co. v. Briggs*, 103 Va. 105.

**14.** *Knight v. Rothschild*, 172 Mass. 546.

**17. Mining Claim.** — See *Gillespie v. Ashford*, 125 Iowa 729.

**Value of Ore.** — A mining engineer and geologist, who had had large experience in that capacity in the neighborhood of a mining claim, was held competent to testify to the value of

ore which had been taken from the claim. *Golden Reward Min. Co. v. Buxton Min. Co.*, (C. C. A.) 97 Fed. Rep. 413.

**Value of a Lead.** — The question whether a lead is such as to justify a reasonably prudent person in following it, with an expenditure of time and money with the hope of finding gold in paying quantities, is a proper subject of expert testimony. *Wilson v. Harnette*, 32 Colo. 172.

**481. 5. Pictures.** — It has been held that a witness who testified that he had been "in the storage, teaming, and auctioneering business, \* \* \* and also art sales," was not shown to be qualified to testify as to the value of certain oil paintings. *Ellis v. Thomas*, 84 N. Y. App. Div. 626.

**8. Pianos.** — See *Lines v. Alaska Commercial Co.*, 29 Wash. 133.

**11. Vessels.** — In an action to recover damages for injuries to a vessel it was held that the plaintiff, who owned the vessel and had owned others, was competent to express an opinion as to the value of the vessel before the injury. *Michaud v. Grace Harbor Lumber Co.*, 122 Mich. 305.

**482. 1. Corporate Stock.** — The treasurer of a corporation was allowed to state what, in his opinion, would be the fair market value of the stock of the corporation of which there had been no sales. It was held that the evidence was properly admitted in the absence of any possible evidence of ordinary market value. *Aldrich v. Bay State Constr. Co.*, 186 Mass. 489.

**3. Real Estate — Basis of Opinion — California.** — *Norris v. Crandall*, 133 Cal. xix, 65 Pac. Rep. 568; *Garwood v. Wheaton*, 128 Cal. 399.

*District of Columbia.* — *Eckington, etc., R. Co. v. McDevitt*, 18 App. Cas. (D. C.) 497.

*Illinois.* — *Sewell v. Chicago Terminal Transfer R. Co.*, 177 Ill. 93; *Haldeman v. Schuh*, 109 Ill. App. 259.

*Indiana.* — *Chicago, etc., R. Co. v. Brown*, 157 Ind. 544.

*Massachusetts.* — *Sirk v. Emery*, 184 Mass. 22; *Old Colony R. Co. v. Robinson*, 176 Mass. 387; *Manning v. Lowell*, 173 Mass. 100.

*Mississippi.* — *Levee Com'rs v. Dillard*, 76 Miss. 641.

*Missouri.* — *Schrodt v. St. Joseph*, 109 Mo. App. 627; *Steam Stone Cutter Co. v. Scott*, 157 Mo. 520.

*Montana.* — *Sweeney v. Montana Cent. R. Co.*, 25 Mont. 543.

*Nebraska.* — *Greeley County v. Gebhardt*, (Neb. 1902) 89 N. W. Rep. 753.

*New York.* — *Ferguson v. Buckell*, 101 N. Y. App. Div. 213; *Gordon v. Kings County El. R. Co.*, 23 N. Y. App. Div. 51, affirmed without opinion 164 N. Y. 563.



*Ohio*. — *Foote v. Lorain, etc., R. Co.*, 11 Ohio Cir. Dec. 685, 21 Ohio Cir. Ct. 319; *Ohio Southern R. Co. v. Snyder*, 5 Ohio Dec. 480, 5 Ohio N. P. 461.

*Oregon*. — *Neppach v. Oregon, etc., R. Co.*, (*Oregon* 1905) 80 Pac. Rep. 482.

*Pennsylvania*. — *Reed v. Pittsburg, etc., R. Co.*, 210 Pa. St. 211; *Leiby v. Clear Spring Water Co.*, 205 Pa. St. 634; *Shimer v. Easton R. Co.*, 205 Pa. St. 648; *Smith v. Pennsylvania R. Co.*, 205 Pa. St. 645; *Friday v. Pennsylvania R. Co.*, 204 Pa. St. 405; *Gearhart v. Clear Spring Water Co.*, 202 Pa. St. 292; *Hewitt v. Pittsburg, etc., R. Co.*, 19 Pa. Super. Ct. 304.

*Tennessee*. — *Wray v. Knoxville, etc., R. Co.*, 113 Tenn. 544, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 482.

*Texas*. — *J. P. Watkins Land Mortg. Co. v. Campbell*, 98 Tex. 372; *Cluck v. Houston, etc., R. Co.*, 34 Tex. Civ. App. 452; *Chicago, etc., R. Co. v. Douglass*, 33 Tex. Civ. App. 262; *Eastern Texas R. Co. v. Scurlock*, 97 Tex. 305, reversing (*Tex. Civ. App.* 1903) 75 S. W. Rep. 366.

*Washington*. — *Seattle, etc., R. Co. v. Roeder*, 30 Wash. 244.

**Illustrations.** — In determining the value of real estate there are two well-recognized principles: The value may be shown by the testimony of experts, or by that of ordinary witnesses, who have special knowledge of the property. The value of lands is not a question of science or skill on which only experts can express an opinion. The opinions of ordinary witnesses who are acquainted with the property, know its situation, size, appearance, location, etc., are admissible for the purpose of showing value. If they are able to testify that they know the value of the land in that neighborhood, know the property in question, and are able to describe it from actual observation, they are competent to testify concerning its value. *Wickstrum v. Carter*, 9 Kan. App. 439.

It has been said that "when an injury is done to property which is not commonly bought and sold, and a case arises in which the amount of that injury must be ascertained, it is proper to allow testimony to be given of its value for the special purpose for which it is used, and to allow that testimony to be given by persons who show themselves qualified to testify thereto from knowledge derived from experience in their own business in which they have dealt with similar property." *Cochrane v. Com.*, 175 Mass. 299, 78 Am. St. Rep. 491.

It has been held that it is competent for a witness familiar with the particular land to say what crops it has been producing, its location, distance from transportation, the character of its soil, and from all this knowledge to give his opinion of its value. No showing of any expert training is required. *Levee Com'r's v. Nelms*, 82 Miss. 416.

It has been held that persons who have resided for several years and own property in the immediate neighborhood of property alleged to have been damaged by grading a street in front of such property, and who seem, upon examination, to be well informed of its situation, condition, and value, are competent witnesses on the question of its value. *South Omaha v. Ruthjen*, (*Neb.* 1904) 99 N. W. Rep. 240.

In an action in which the value of the use

and occupation of certain property was in question, it was held that the fact that the plaintiff had occupied the premises for business purposes sufficiently showed his competency as to testify of the value. *Ish v. Marsh*, (*Neb.* 1901) 96 N. W. Rep. 58.

It is error to permit testimony as to the value of land to be given by witnesses who do not know what land in the neighborhood, and of the character of the land in question, had been bought and sold for. *Texas, etc., R. Co. v. Smith*, 35 Tex. Civ. App. 351.

In an action to recover damages for the flooding of land, it is error to allow testimony as to the value of the land by a witness who is not acquainted with the properties in the vicinity, and has no knowledge of their value. *Lynch v. Troxell*, 207 Pa. St. 162.

Mere observation of a piece of real estate, although continued and attentive, is not sufficient to qualify one as an expert respecting its value. *Riley v. Camden, etc., R. Co.*, 70 N. J. L. 289.

In an action to recover damages for the burning of plaintiff's pear orchard, it was held that where it appeared that certain witnesses knew nothing about the plaintiff's orchard, their opinion, based upon their general knowledge of the condition of pear orchards in the section of the country in which plaintiff's orchard was situated, that such orchards added nothing to the value of the land on which they grew, was not admissible for the purpose of showing that plaintiff's orchard was without value. *Gulf, etc., R. Co. v. Burroughs*, 27 Tex. Civ. App. 422.

In a condemnation proceeding by a railroad company to take the whole of a lot of land for the purposes of its roadbed and station buildings, the opinions of persons residing near the property, and who have known it for a considerable period of time, though not dealers in real estate, nor specially informed as to prices, are admissible evidence on the question of its value. *Guyandotte Valley R. Co. v. Buskirk*, (*W. Va.* 1905) 50 S. E. Rep. 521.

**Tax Assessor.** — An assessor of taxes, who states that he can only make a statement as to what certain land is taxed for, is not competent to express an opinion as to the value of the land. *Spink v. New York, etc., R. Co.*, 26 R. L. 115.

**Competency of Owner of Land.** — It has been held that the rule which requires those who testify to the value of real estate to qualify themselves by proof of knowledge of market value derived from sales or purchases, does not apply to the owner of lands and buildings who has purchased and used them himself. His purchase, his ownership, and his use qualify him to give an estimate of their value. *Union Pac. R. Co. v. Lucas*, (*C. C. A.*) 136 Fed. Rep. 374.

The owner of land appropriated by a railroad company for right of way, who has resided upon and cultivated the land, and is familiar with the value thereof, is a competent witness on the question of its value. *Chicago, etc., R. Co. v. Buel*, 56 Neb. 205.

**Storage.** — It has been held that a witness who knew the capacity of a building in which certain goods were stored, the amount paid for rent, and the space occupied by the goods, was competent to testify as to the value of the

**483.** See notes 1, 3, 5.

8, 10.

*bb. PARTICULAR KINDS OF REAL PROPERTY — (bb) City Property.* — See notes

(*cc*) *Farm Lands.* — See note 11.

**484.** (*dd*) *Houses and Buildings.* — See notes 1, 2, 7.

(*ff*) *Mill Property.* — See note 11.

**485.** (*gg*) *Mineral Lands.* — See note 1.

(*ll*) *Water Power.* — See note 9.

**486.** (*c*) *Services* — *aa. GENERAL RULE AS TO COMPETENCY.* — See note 1.

(*cc*) *Carpenter Work.* — See note 5.

storage. Such knowledge enabled the witness "to estimate what proportionate part of the premises were required for the storage, and the rental value of such part in relation to the whole." *Chapman v. Tiffany*, 70 N. H. 249.

**483. 1. Knowledge of Actual Sales.** — *Wickstrum v. Carter*, 9 Kan. App. 439; *Long v. Pruyne*, 128 Mich. 57, 92 Am. St. Rep. 443; *Levee Com'rs v. Nelms*, 82 Miss. 416; *Greeley County v. Gebhardt*, (Neb. 1902) 89 N. W. Rep. 753.

**3.** *Cochrane v. Com.*, 175 Mass. 299, 78 Am. St. Rep. 491.

**5.** See *Eno v. Christ*, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 24; *Williams v. Hathaway*, 21 R. I. 566.

**8. City Property.** — *Gordon v. Kings County El. R. Co.*, 23 N. Y. App. Div. 51, *affirmed* without opinion 164 N. Y. 563; *Reed v. Pittsburg, etc., R. Co.*, 210 Pa. St. 211.

**10. Lawyer with Experience in Examining Titles.** — *Norris v. Crandall*, 133 Cal. xix, 65 Pac. Rep. 568.

**11. Farm Lands.** — *Pennsylvania R. Co. v. Hunsley*, 23 Ind. App. 37; *Greeley County v. Gebhardt*, (Neb. 1902) 89 N. W. Rep. 753.

**Meadow Lands.** — On the question of what it would be worth to replace the plaintiff's meadow, which was alleged to have been destroyed by fire, a person who testified that he had experience with timothy meadows, and knew what it was worth to restore them; that he owned land in the vicinity, and had lived one and one-quarter miles from plaintiff's land for thirty-one years, and was familiar with it, was held to be a competent witness. *Thompson v. Keokuk, etc., R. Co.*, 116 Iowa 215.

**484. 1. Houses.** — *Smith v. Frio County*, (Tex. Civ. App. 1900) 66 S. W. Rep. 711.

**2.** *German-American Ins. Co. v. Paul*, 2 Indian Ter. 625.

**7.** *Porter v. Hawkins*, 27 Mont. 486; *Cummins v. German-American Ins. Co.*, 192 Pa. St. 359, holding that it is not necessary that the witness should be a carpenter.

In an action on an insurance policy to recover for the loss of a barn destroyed by fire, it was held that farmers, who had built and owned barns, knew their value, and were acquainted with the plaintiff's barn and its condition before the fire, were competent to testify as to its value. *Home Ins. Co. v. Sylvester*, 25 Ind. App. 207.

**Insurance Agent.** — The testimony of an insurance agent as to the cost of a building similar to one which was destroyed by fire has been held to be competent. *Enix v. Iowa Cent. R. Co.*, 111 Iowa 748.

**11. Lakeside Mfg. Co. v. Worcester, 186 Mass. 552.**

In an action to recover damages for loss sustained by the plaintiff, a riparian owner, by reason of the deposit of coal dirt in his mill dam and race and on a portion of his land, it was held that the value of the property as a whole, including both the farm and the mill site, could not be testified to by a witness whose knowledge was limited to the value of farm lands in the vicinity. *Bachert v. Lehigh Coal, etc., Co.*, 208 Pa. St. 362.

**485. 1.** It has been held that an expert witness testifying in proceedings to condemn lands in an oil-bearing territory may testify as to the matters which would influence him from the standpoint of a contemplating buyer in determining the market value of the land, the number of wells which could economically be placed on the land, and ordinary losses therefrom, and the general relation of outlay to income. *Southern Pac. R. Co. v. San Francisco Sav. Union*, 146 Cal. 290, 106 Am. St. Rep. 36.

**9.** See *Lakeside Mfg. Co. v. Worcester*, 186 Mass. 552.

**486. 1.** *Cowdery v. McChesney*, 125 Cal. xix, 58 Pac. Rep. 62; *Hart v. Miller*, 29 Ind. App. 222; *Green v. Green*, 82 S. W. Rep. 1011, 26 Ky. L. Rep. 1007; *Walbridge v. Tuller*, 125 Mich. 218, 7 Detroit Leg. N. 498; *Bosard v. Powell*, 79 Mo. App. 184, 2 Mo. App. Rep. 354; *Harris v. Smith*, 71 N. H. 330; *Shirk v. Brookfield*, 77 N. Y. App. Div. 295; *Matter of Benton*, 71 N. Y. App. Div. 522; *Seth Thomas Clock Co. v. Dobbins*, 16 Pa. Super. Ct. 325.

**Person Rendering the Services.** — The plaintiff in an action for services rendered may testify to the value of the services rendered. *Stevens v. Walton*, 17 Colo. App. 440; *McCormick Harvesting Mach. Co. v. Davis*, 61 Neb. 406 (holding that one who has kept a team for another is entitled to the value of such keeping); *Campbell v. Cayey*, 59 N. Y. App. Div. 621.

**Opinion of Husband as to Value of Wife's Services.**

— In an action by a husband to recover for personal injuries to his wife, it has been held that the opinion of the plaintiff as to the value of his wife's services is admissible. *Chicago, etc., R. Co. v. Armes*, 32 Tex. Civ. App. 32.

**Sum for Which Witnesses Would Have Done the Work.** — Upon an issue of *quantum meruit* witnesses should not be allowed to state whether they would have done the work at prices less than those charged. *Syson v. Hieronymus*, 127 Ala. 482.

**5. Carpenter Work.** — *Worden v. Connell*, 196 Pa. St. 281.

- 486.** (*dd*) *Domestic Service*. — See note 7.  
 (*ff*) *Legal Services*. — See notes 11, 12.

- 487.** See note 4.

(*hh*) *Loan Brokerage*. — See note 12.

- 488.** (*ij*) *Medical Services*. — See notes 1, 2.

(*kk*) *Nursing*. — See note 4.

*Nurses*. — See notes 5, 6.

*Indiana Rule*. — See note 7.

(*ll*) *Real-estate Brokerage*. — See note 8.

**VIII. NONEXPERT OPINION — 1. General Rule.** — See note 9.

- 486.** 7. *Sprague v. Sea*, 152 Mo. 327.

11. *Legal Services*.—*Wilson v. Union Distilling Co.*, 16 Colo. App. 429; *Sexton v. Bradley*, 110 Ill. App. 495, *appeal dismissed* 210 Ill. 128. See *Fitchburg Steam Engine Co. v. Potter*, 211 Ill. 138, *reversing* 110 Ill. App. 430.

It has been said that an expert witness, who is testifying to the value of legal services, should be asked what is the fair, usual, and customary fee, when it appears that there is a usual and customary fee for the services performed, but when such is not the case it is proper to prove what the services were reasonably and fairly worth. *Maneaty v. Steele*, 112 Ill. App. 19. *Compare* *Sexton v. Bradley*, 110 Ill. App. 495, *appeal dismissed* 210 Ill. 128.

12. *Gregory Grocery Co. v. Beaton*, 10 Kan. App. 256.

**487.** 4. It has been held that lawyers are competent to testify as to services performed by a layman which are of the same general character as those frequently and usually performed by members of the bar. *McClellan v. Duncombe*, 52 N. Y. App. Div. 189.

12. *Boyd v. Vale*, 84 N. Y. App. Div. 414.

**488.** 1. *Medical Services*.—*Cate v. Hutchinson*, 58 Neb. 232; *MacEvitt v. Maass*, 64 N. Y. App. Div. 382; *Camp v. Ristine*, 101 Tenn. 534.

2. *Griffith v. McCandless*, 9 Kan. App. 794; *Lawrence v. Methuen*, 187 Mass. 592.

4. *Beringer v. Dubuque St. R. Co.*, 118 Iowa 135; *Allison v. Parkinson*, 108 Iowa 154. But see *Cameron Mill, etc., Co. v. Anderson*, 34 Tex. Civ. App. 229, holding that a physician was not competent to testify as to the value of the services of a professional nurse.

5. *Cowdery v. McChesney*, 125 Cal. xix, 58 Pac. Rep. 62; *Ryans v. Hospes*, 167 Mo. 342.

It has been held that the fact that a witness has had long experience in nursing, and perhaps knows the value of the services of trained nurses, does not necessarily qualify the witness to testify to the value of a domestic without any experience whatever as a nurse, who attends somewhat to a member of the household. *Weidman v. Thompson*, 53 N. Y. App. Div. 22.

6. See *Green v. Green*, 82 S. W. Rep. 1011, 26 Ky. L. Rep. 1007.

7. See *Green v. Green*, 82 S. W. Rep. 1011, 26 Ky. L. Rep. 1007.

8. *Services in Sale of Electric Light Plant*. — It has been held that men who had long experience in dealings involving the value of brokers' services in the sale of railroad plants and corporations having public franchises might properly testify as to the value of services in the sale or purchase of an electric lighting cor-

poration, and the mere fact that their experience had not been with electric lighting plants was not of controlling importance. *Hart v. Maloney*, 101 N. Y. App. Div. 37.

9. *Opinions of Nonexperts — General Rule — United States*.—*Queenan v. Oklahoma*, 190 U. S. 548, *affirming* 11 Okla. 261; *Robinson v. Louisville R. Co.*, (C. C. A.) 112 Fed. Rep. 484, *citing* 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 488; *Fireman's Ins. Co. v. J. H. Mohlman Co.*, (C. C. A.) 91 Fed. Rep. 85.

*California*.—*Raymond v. Glover*, 122 Cal. 471. See *Kaltschmidt v. Weber*, 145 Cal. 596. *Connecticut*.—*Spencer's Appeal*, 77 Conn. 628; *Nesbit v. Crosby*, 74 Conn. 554; *Hamilton v. Smith*, 74 Conn. 374; *Vivian's Appeal*, 74 Conn. 257; *Dean v. Sharon*, 72 Conn. 667; *Parber v. Manchester*, 72 Conn. 675.

*Florida*.—*Alford v. State*, (Fla. 1904) 36 So. Rep. 436, *quoting* 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 488; *Higginbotham v. State*, 42 Fla. 573, 89 Am. St. Rep. 237.

*Georgia*.—*City Electric R. Co. v. Smith*, 121 Ga. 663.

*Illinois*.—*Illinois Cent. R. Co. v. Prickett*, 210 Ill. 140, *affirming* 109 Ill. App. 468, *citing* 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 488; *Illinois Cent. R. Co. v. Behrens*, 208 Ill. 20, *affirming* 106 Ill. App. 471; *Chicago, etc., R. Co. v. Randolph*, 199 Ill. 126; *Ring v. Lawless*, 190 Ill. 520; *Entwistle v. Meikle*, 180 Ill. 9.

*Iowa*.—*Rothrock v. Cedar Rapids*, (Iowa 1905) 103 N. W. Rep. 475; *Robinson v. Halley*, 124 Iowa 443; *Craig v. Wabash R. Co.*, 121 Iowa 471; *Trott v. Chicago, etc., R. Co.*, 115 Iowa 80; *rehearing denied* 115 Iowa 88; *Stewart v. Anderson*, 111 Iowa 329. See *Hollenbeck v. Marion*, 116 Iowa 69.

*Missouri*.—*Taylor v. Jackson*, 83 Mo. App. 641; *Walker v. Davis*, 83 Mo. App. 374.

*Montana*.—*Porter v. Hawkins*, 27 Mont. 486.

*Nebraska*.—*Russell v. State*, 66 Neb. 497; *Read v. Valley Land, etc., Co.*, 66 Neb. 423.

*New Jersey*.—*State v. Laster*, 71 N. J. L. 586.

*North Carolina*.—*Whitaker v. Hamilton*, 126 N. Car. 465.

*Ohio*.—*Baltimore, etc., R. Co. v. Van Horn*, 12 Ohio Cir. Dec. 106, 21 Ohio Cir. Ct. 337; *Baltimore, etc., R. Co. v. Stoltz*, 9 Ohio Cir. Dec. 638, 18 Ohio Cir. Ct. 93.

*Pennsylvania*.—*Whitaker v. Campbell*, 187 Pa. St. 113.

*South Carolina*.—*State v. Davis*, 55 S. Car. 339; *Dent v. South Bound R. Co.*, 61 S. Car. 329; *Easler v. Southern R. Co.*, 59 S. Car. 314, *citing* 12 AM. AND ENG. ENCYC. OF LAW (2d



ed.) 488, 489; Virginia-Carolina Chemical Co. v. Kirven, 57 S. Car. 445.

*South Dakota.* — Brady v. Shirley, (S. Dak. 1904) 101 N. W. Rep. 886. See Olson v. Burlington, etc., R. Co., 12 S. Dak. 326.

*Tennessee.* — Cumberland Tel., etc., Co. v. Dooley, 110 Tenn. 104; Jones v. Galbraith, (Tenn. Ch. 1900) 59 S. W. Rep. 350.

*Texas.* — Krueger v. Brenhan Furniture Mfg. Co., (Tex. Civ. App. 1905) 85 S. W. Rep. 1156; Gulf, etc., R. Co. v. Miller, 35 Tex. Civ. App. 116, affirmed (Tex. 1904) 83 S. W. Rep. 182; Logan v. State, (Tex. Crim. 1899) 53 S. W. Rep. 694; Martin v. State, 40 Tex. Crim. 660; Miller v. State, (Tex. Crim. 1899) 50 S. W. Rep. 704; Bennett v. State, 39 Tex. Crim. 639.

*Washington.* — Peterson v. Seattle Traction Co., 23 Wash. 115, judgment affirmed on rehearing 23 Wash. 643.

*West Virginia.* — State v. Henry, 51 W. Va. 283.

See Louisville, etc., R. Co. v. Sandlin, 125 Ala. 585; McDonald v. Wood, 118 Ala. 589; Handley v. Missouri Pac. R. Co., 61 Kan. 237; People v. Smith, 172 N. Y. 210; Gardner v. Friederich, 25 N. Y. App. Div. 521, affirmed without opinion 163 N. Y. 568. See also *supra*, 454, 9, 10.

**Questions of Time.** — A witness may sometimes be permitted to state his opinion as to the time of an occurrence. Kipper v. State, 45 Tex. Crim. 377.

And testimony to the effect that a period was but a short time has been held to be admissible. Atlanta, etc., R. Co. v. Strickland, 116 Ga. 439.

Where dates have not been specially noted or time measured by a timepiece, it is competent for a witness to give his opinion as to how long a time elapsed between given facts. Allison v. Wall, 121 Ga. 822.

It has been held that a witness who has stated his familiarity with the route between two places, the nature of the road, etc., having traveled it himself, may testify as to the time it would take for a person to go from one of the places to the other and return. Woods v. State, (Tex. Crim. 1903) 75 S. W. Rep. 37.

But, although the opinion of a witness as to what would be a reasonable time to do a task is admissible under some circumstances, the testimony of a witness may be excluded when it is sought to give the opinion of the witness as to the very matter in issue, and involving his opinion not only as to what could be done, but also what, as a matter of law, should have been done. Allison v. Wall, 121 Ga. 822.

It has been held that a witness who testified to having heard the report of the gun fired in an affray, and also testified to having seen another witness, ten or fifteen minutes before the firing of the gun, going away from the scene of the affray after water to a well that such witness testified was about three-eighths of a mile from the scene of the shooting, will not be allowed to state whether such water-carrying witness had time to get back to the scene of the affray before such shooting, on the ground that such evidence would be merely the expression of the witness's opinion, which the jury could arrive at as well as such witness from the data given. Carter, J.,

*dissenting.* Nickles v. State, (Fla. 1904) 37 So. Rep. 312.

It has been held to be proper to admit opinion evidence as to what would be a reasonable time for performing an unusual task or special work, where all the elements and data for making the calculation could not be detailed to the jury, or presented to them in such a way that they could themselves make the calculation. But where it is possible to state the data from which the jury could make a calculation, it is not admissible for an expert to testify as to what, in his opinion, would be a reasonable time for the performance of the act under consideration. Allison v. Wall, 121 Ga. 822.

In an action to recover damages sustained by the plaintiff while alighting from the defendant's train in consequence of the alleged negligence of the defendant in starting the train before the plaintiff had time to get off, it was held error to exclude the testimony of a witness as to whether the passengers on the train had had sufficient time to alight, the witness having first stated the facts on which the opinion was based. Easler v. Southern R. Co., 59 S. Car. 314.

But in other cases similar testimony has been excluded. Thus, in an action to recover damages for personal injuries sustained by the plaintiff's wife in consequence of the premature starting of the defendant's train on which she was a passenger, while she was alighting therefrom, it was held proper to exclude the testimony of a witness, who was not shown to be an expert, that the train was not stopped long enough to enable the passengers to alight in safety. San Antonio, etc., R. Co. v. Jackson, (Tex. Civ. App. 1905) 85 S. W. Rep. 445.

And in another action by a passenger against a carrier, it was held that the court did not err in excluding testimony of witnesses that, in their judgment, the train was not stopped a sufficient length of time to permit the plaintiff to alight in safety; it was said that this was an issue of fact for the jury, and the witnesses should therefore have stated the facts, and not given their solution of the issue. Texas, etc., R. Co. v. Lee, 21 Tex. Civ. App. 174.

**Questions of Distance.** — See *infra*, this title, 493, 8.

**Questions of Size.** — See *infra*, this title 493, 8.

**Audibility of Obscene Language.** — In sustaining the admission, on a trial for using obscene language in the presence of women, of testimony of witnesses that, in their judgment, the language of the defendant could have been heard by the women, the court said that the statements of the witnesses were not of conclusions merely, but, being based on knowledge of the manner of the utterances and of the situation of the women, they were statements of collective facts proper to be admitted in evidence. Rollings v. State, 136 Ala. 126.

**Intoxicating Character of Beverage.** — A witness may testify as to the intoxicating properties of a beverage of which he has drunk, without being an expert. Murry v. State, 46 Tex. Crim. 128; Sebastian v. State, 44 Tex. Crim. 508.

It has been held that witnesses were prop-

erly permitted to testify on the trial of a defendant for violating a law prohibiting the sale of intoxicating liquors, that a malt tonic drunk by them would, in their opinion, have intoxicated them, judging by the effect it had upon them, if they had drunk it in sufficient quantities, and that what they did drink had an intoxicating effect. *Hartsel v. State*, (Tex. Crim. 1902) 68 S. W. Rep. 285.

At witness need not be an expert in order to be competent to testify that, in his opinion, a certain liquor is whiskey. *Johnson v. State*, (Tex. Crim. 1900) 55 S. W. Rep. 818.

**Footprints, Tracks, Etc.**—Where a state witness shows that he had had a reasonable opportunity to become acquainted with the tracks or footprints of the defendant, it is competent for such witness to testify that, in his opinion, certain tracks or footprints which he saw near the scene of the alleged crime immediately after it occurred were those of the defendant, because the matter of such testimony cannot otherwise be reproduced or made palpable to the jury. *Alford v. State*, (Fla. 1904) 36 So. Rep. 436.

Thus, it has been held that a witness may express his opinion on the trial of a defendant for homicide as to the correspondence of the tracks found near the scene of the homicide with the boots or shoes worn by the deceased. *Weaver v. State*, 43 Tex. Crim. 340.

Evidence as to the tracks being found near the place where the murder for which the defendant was being tried was claimed to have been committed, and that the shoes of the defendant fitted the tracks, has been held to have been properly admitted. *State v. Sexton*, 147 Mo. 89.

It has been held proper to permit a witness on the trial of a defendant for murder to describe certain tracks which he found leading to and from the body of the deceased and the house of the defendant, without expressing any opinion that the tracks were those of the defendant, speaking of a peculiarity of the track of the right foot, which showed marks of tacks in the sole of the right shoe, and to testify that he measured the tracks and afterwards measured the defendant's shoes, producing the measurements before the jury, and that the right shoe of the prisoner had tacks in the sole which made marks corresponding with the marks he had observed in the tracks going to and from the dead body towards the prisoner's house. *State v. Davis*, 55 S. Car. 339.

A witness on a trial for murder having testified that he saw the defendant come out of the mouth of a ditch where the body of the deceased was found, that he saw the tracks in the ditch which were made with shoes without soles or heels, and that he traced the tracks down to a point where he saw the defendant leave the ditch, he may be permitted to testify further that the tracks found at the point where he saw the defendant leave the ditch were made by the defendant. *Davis v. State*, 126 Ala. 44.

A witness in a murder case who had testified that he saw two tracks on or near the body of the deceased, was asked by the solicitor, "Were the two tracks of the same kind, or different kinds?" In reply he stated, against

the objection of defendant, that he "saw two different tracks, made by different sized shoes." It was held that this was not an opinion of the witness from facts stated, in identification of the tracks, as to who made them, but it was a statement of a physical fact merely—open to the senses of any one—that there were two tracks at the place where the body was found, which were made by different sized shoes. *Littleton v. State*, 128 Ala. 31..

In a murder case it was held proper to admit testimony connecting tracks found near the body of the deceased with the horse which the defendant rode on the day of the homicide. *Russell v. State*, 66 Neb. 497, reversing 62 Neb. 512.

It has been held that, on a trial for murder, it was competent for a witness to testify that a track which he saw near the defendant's barn and house looked, at one place, like the track of a person running, and, at another place, like that of a person walking. These statements were not of opinion merely, but were descriptive of facts. *Smith v. State*, 137 Ala. 22.

Testimony that certain tracks were those of a horse, and indicating his motion—whether walking, running, or jumping—has been held to be clearly admissible. *Craig v. Wabash R. Co.*, 121 Iowa 471.

It has been held not to be error, on the trial of a defendant for murder, to permit evidence of the coincidence between the hand of the accused and a bloody print of a hand on the wall of the house where the crime was committed, the hand of the accused having been placed thereon at the request of persons who were with him in that house. *State v. Miller*, 71 N. J. L. 527.

It has been said that a witness, in order to identify tracks found at the scene of a transaction with those of an accused, must, before he can testify as to such similarity, show some knowledge in regard to the tracks testified about. He must have measured them, or must be enabled to testify to some peculiarity between the tracks found at the scene and those shown otherwise to have been the tracks made by the accused. *Thompson v. State*, 45 Tex. Crim. 397.

Thus, it has been held to be error to permit a witness to testify on the trial of a defendant for murder that he had seen tracks near the place of the homicide, that he saw the defendant at the examining trial, and that, in his opinion, the defendant's foot was of a size to have made the track which he had seen. To render evidence of this nature admissible, some measurement must have been made as a basis for a comparison. *Mosely v. State*, (Tex. Crim. 1902) 67 S. W. Rep. 103.

Where a witness, on the trial of a defendant for murder, testified that tracks which he had observed near the place of the homicide were those of a No. 8 or 9 shoe, and that the impression of the heel of the right foot, as it appeared on the ground, was that it was made by a shoe worn off on one side of the heel, it was held that the testimony was not sufficiently definite to qualify him to express an opinion that the tracks were those of the defendant. *Smith v. State*, 45 Tex. Crim. 405.

It has been held that, on the trial of a



defendant for arson, a witness was permitted to go too far in giving his opinion that the tracks found by him and tracks made by the defendant's horse were one and the same track. He should have given the facts as to the size and shape of the tracks in question, whether shod or not, stating the similarity, and might then have stated that the track made by the defendant's horse was exactly similar in size and shape to the tracks found on the ground. *Hester v. State*, (Tex. Crim. 1899) 51 S. W. Rep. 932.

A witness may sometimes be permitted to testify as to footprints or tracks without having taken measurements. Thus, the testimony of a witness, on the trial of a defendant for murder, that tracks found near the scene of the homicide were similar to those made by the defendant has been held to be admissible, though the witness did not measure the tracks; the objection that no measurement of the tracks was made by the witness would go, it was said, rather to the weight than the admissibility of the testimony. *Baines v. State*, 43 Tex. Crim. 490.

**Nature of Appliance Used in Breaking into Building.**—On the trial of a defendant for burglary, it was held to be proper to admit the testimony of a witness that a door had been broken open with a chisel. It was said that "it was as competent for the witness to say that the impression on the door-facing was made by a chisel as to say that a track was made by a man or a horse." *State v. Ellsworth*, 130 N. Car. 690.

**Comparison Between Spots on Clothing.**—It has been held not to be erroneous to permit evidence of the resemblance between spots on the clothing produced and spots which had been cut from the same clothing and used by experts in determining whether they were spots of blood. *State v. Miller*, 71 N. J. L. 527.

**Similarity Between Photographs and Object Photographed.**—See *Hebbe v. Maple Creek*, 121 Wis. 668. See the title PHOTOGRAPHS.

**Appearance of Break in Appliance.**—In an action to recover damages for injuries received by the explosion of the boiler of an engine, it was held that nonexpert witnesses were properly permitted to testify that the breaks and cracks in the broken stay-bolts of the boiler of the exploded engine had the appearance of being old or new breaks or cracks. Whether a break or crack in a stay-bolt was old or new was indicated by the appearance of the broken or cracked portions of the bolts. This could not be produced so palpably to the jurors as it was observed by the witnesses, in any other manner than by stating the appearance of such broken or cracked portions of the bolts and denominating the appearance as old or new. *Illinois Cent. R. Co. v. Prickett*, 210 Ill. 140, affirming 109 Ill. App. 468.

**Bloodstains.**—It has been held that it was not error to permit a witness to state that he supposed that certain stains found on clothes which the defendant on trial for murder wore at the time of the killing were bloodstains. *State v. Henry*, 51 W. Va. 283. See the title BLOODSTAINS, vol. 4, p. 587.

**Condition of Sidewalk.**—In an action on a special tax bill for repairs on a sidewalk in

front of premises owned by the defendants, it was held that it was proper to permit one of the owners of the property who had the property repaired and inspected the work, to state that the sidewalk was left in good condition. *Heman Constr. Co. v. O'Brien*, 81 Mo. App. 639. But see *supra*, this title, 421. 5.

**Dangerous Character of Crossing.**—In an action to recover damages to property received in a collision with one of the defendant's trains at a crossing, it was held that a witness, after testifying to his familiarity with the scene of the accident and the surroundings, was properly permitted to state whether the crossing was or was not dangerous. *Martin v. Baltimore, etc., R. Co.*, 2 Marv. (Del.) 123. But see *supra*, this title, 421. 5.

**Disposition of Person.**—Testimony has been held admissible on the trial of a defendant for murder that the deceased was a man of ungovernable temper. *Ex p. McCoy*, (Tex. Crim. 1904) 82 S. W. Rep. 1044.

**Discretion of Infant.**—In an action to recover for the death of an infant, wherein it was urged as a defense that the deceased was chargeable with contributory negligence, it was held that the opinions of witnesses as to his discretion were properly admitted. *St. Louis, etc., R. Co. v. Shifflet*, (Tex. Crim. App. 1900) 56 S. W. Rep. 697.

**Susceptibility of Testator to Influence of Others.**—Witnesses, who have had opportunities to form opinions of value on the subject, may testify their opinions as to whether a testator possessed such qualities of mind as did or did not render him easily persuaded by others. *Patten v. Cilley*, 67 N. H. 520.

It has been held that, on an issue as to whether a testator was unduly influenced by a certain person, a witness who is qualified by personal acquaintance with their relations, to give an opinion on the subject, may be permitted to do so. *Pattee v. Whitcomb*, 72 N. H. 240.

**Calibre of Revolver.**—The opinion of a witness, who is used to handling firearms, as to the calibre of a revolver is admissible under the rule admitting the opinions of nonexpert witnesses. *State v. Laster*, 71 N. J. L. 586.

**Freshness of Cartridges.**—It has been held that a witness, though not shown to be an expert, was properly allowed to give his opinion as to the freshness of the cartridges in a revolver which had been taken from the defendant when he was arrested. *Jackson v. U. S.*, (C. C. A.) 102 Fed. Rep. 473.

**Infliction of Wound.**—In a prosecution for murder, it was held not to be prejudicial error to allow a witness, who was not shown to be an expert, to testify that the wound in deceased's breast was a round hole, and about the size of a guinea egg; and that, in his opinion, from the examination of the size and nature of the wound in the body of deceased, the gun was fired within a few feet of the deceased; and that he based his opinion upon the fact that he had frequently seen beeves shot with a shotgun, and knew the character of wound a shotgun would make in a beef steer when fired at close range. *Thomas v. State*, 45 Tex. Crim. 111.

**Character of Blow Struck.**—In an action on an insurance policy it was held that a witness was properly allowed to testify as to the char-



**489.** See note 1.**2. Basis of Nonexpert Opinion.** — See note 2.

acter of the blow struck the insured, stating whether it was a light or heavy blow. *Stout v. Pacific Mut. L. Ins. Co.*, 130 Cal. 471.

**Expense of Maintenance.** — In an action by a married woman against her husband for maintenance of herself and child, it was held that testimony was properly received from witnesses familiar with the plaintiff and her circumstances of life, and with the expenses of housekeeping, to show what, in their opinion, her board and clothing, and that of her child, would fairly cost a year. *Cunningham v. Cunningham*, 75 Conn. 64.

**Negligence of Defendant.** — On the question whether a defendant was negligent in doing or not doing a particular thing, the opinion of a witness is incompetent. *Nyback v. Champagne Lumber Co.*, (C. C. A.) 109 Fed. Rep. 732.

**Responsibility for Arrest.** — In an action for false imprisonment, it was held that a detective who was concerned in the arrest should have been permitted to testify whether it was made by the police department, acting for itself, or at the request of the defendant. *Waters v. Anthony*, 20 App. Cas. (D. C.) 124.

**Genuineness of Handwriting.** — Witnesses, although not handwriting experts, may testify as to whether certain writing is that of a person whom they have seen write, and with whose handwriting they are familiar. *Yelton v. Black*, (Ky. 1904) 82 S. W. Rep. 634; *Bess v. Com.*, (Ky. 1904) 82 S. W. Rep. 576. See the title **HANDWRITING**, vol. 15, p. 252.

**When the Facts Can Be Presented to the Jury.** — The opinion of a witness is not admissible in evidence when all the facts and circumstances upon which the opinion is founded are capable of being clearly detailed and described, so that the jurors may be able readily to form correct conclusions therefrom.

*United States.* — *Fireman's Ins. Co. v. J. H. Mohlman Co.*, (C. C. A.) 91 Fed. Rep. 85.

*Arkansas.* — *Little Rock Traction, etc., Co. v. Nelson*, 66 Ark. 294.

*Georgia.* — *Thomas v. State*, 122 Ga. 151; *Central of Georgia R. Co. v. Goodwin*, 120 Ga. 83; *Sumner v. Sumner*, 118 Ga. 590; *Southern Mut. Ins. Co. v. Hudson*, 115 Ga. 638 (holding that it was not error to exclude the testimony of witnesses, who were asked their opinions whether named acts of the plaintiff in an action on an insurance policy increased the risk of fire to the dwelling which was burned); *Milledgeville v. Wood*, 114 Ga. 370.

*Illinois.* — *Phenix Ins. Co. v. Mills*, 89 Ill. App. 58; *Batchelor v. Union Stock Yard, etc., Co.*, 88 Ill. App. 395.

*Indiana.* — *Insurance Co. of North America v. Osborn*, 26 Ind. App. 88. See *Ætna Powder Co. v. Earlandson*, 33 Ind. App. 251.

*Iowa.* — *State v. Reinheimer*, 109 Iowa 624.

*Maryland.* — *Tucker v. State*, 89 Md. 471.

*Nebraska.* — *Read v. Valley Land, etc., Co.*, 66 Neb. 423.

*New York.* — *Sullivan v. Rome*, 86 N. Y. App. Div. 107.

*North Carolina.* — *Cogdell v. Wilmington, etc., R. Co.*, 130 N. Car. 313.

*North Dakota.* — *Meehan v. Great Northern R. Co.*, (N. Dak. 1904) 101 N. W. Rep. 183.

*Oregon.* — *State v. Barrett*, 33 Oregon 194.

*Pennsylvania.* — *Seifred v. Pennsylvania R. Co.*, 206 Pa. St. 399; *Siegler v. Mellinger*, 203 Pa. St. 256, 93 Am. St. Rep. 768; *Reese v. Clark*, 198 Pa. St. 312; *Woelckner v. Erie Electric Motor Co.*, 187 Pa. St. 206; *Philadelphia v. Dobbins*, 24 Pa. Super. Ct. 136; *Salsberg v. Dallas*, 10 Kulp (Pa.) 47.

*Tennessee.* — *Cumberland Tel., etc., Co. v. Dooley*, 110 Tenn. 104.

**Conclusiveness of Decision of Trial Court on Question of Competency.** — The question whether a nonexpert witness is or is not competent to express an opinion is largely within the discretion of the trial judge. *Kriesel v. Sun Ins. Office*, (C. C. A.) 88 Fed. Rep. 243; *Kight v. Metropolitan R. Co.*, 21 App. Cas. (D. C.) 494; *Collins v. People*, 194 Ill. 506; *Clarke v. Philadelphia, etc., Coal, etc., Co.*, 92 Minn. 418; *Pattee v. Whitcomb*, 72 N. H. 249; *State v. Barry*, 11 N. Dak. 428.

**489. 1.** *Queenan v. Oklahoma*, 190 U. S. 548. It has been said that the opinions of a nonexpert witness "are received rather as statements of impressions or conclusions in the nature of facts of which the witness has knowledge, than as opinions." *Turner's Appeal*, 72 Conn. 305.

**Collective Facts.** — A witness has been permitted to state the effect of an agreement between the parties to a contract on the theory that he was stating a collective fact rather than a conclusion of his own. *Shafer v. Hausman*, 139 Ala. 237.

**2. Basis of Opinion.** — *United States.* — *Pilcher v. U. S.*, (C. C. A.) 113 Fed. Rep. 248; *Kriesel Co. v. Sun Ins. Office*, (C. C. A.) 88 Fed. Rep. 243.

*Alabama.* — *Osborne v. State*, 140 Ala. 84; *Dominick v. Randolph*, 124 Ala. 557. See *Ragland v. State*, 125 Ala. 12.

*Arkansas.* — *Jarvis v. State*, 70 Ark. 613, 67 S. W. Rep. 76.

*Connecticut.* — *Turner's Appeal*, 72 Conn. 305.

*District of Columbia.* — *Horton v. U. S.*, 15 App. Cas. (D. C.) 310, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 489; *Raub v. Carpenter*, 17 App. Cas. (D. C.) 505.

*Georgia.* — *Atlanta Consol. St. R. Co. v. Bagwell*, 107 Ga. 157.

*Illinois.* — *Illinois Cent. R. Co. v. Prickett*, 210 Ill. 140, affirming 109 Ill. App. 468, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 489; *Wallace v. Whitman*, 201 Ill. 59.

*Iowa.* — *Hawley v. Griffin*, (Iowa 1900) 82 N. W. Rep. 905; *State v. Robbins*, 109 Iowa 650; *Alvord v. Alvord*, 109 Iowa 113. See *Manatt v. Scott*, 106 Iowa 203, 68 Am. St. Rep. 293. Compare *State v. McKnight*, 119 Iowa 79.

*Louisiana.* — *State v. Smith*, 106 La. 33.

*Maryland.* — *Brashears v. Orme*, 93 Md. 442.

*Michigan.* — *Roberts v. Bidwell*, (Mich. 1904) 98 N. W. Rep. 1000, 10 Detroit Leg. N. 1016; *People v. Kinney*, 124 Mich. 486.

*Nebraska.* — *Bothwell v. State*, (Neb. 1904)

**490.** See note 1.

**3. Subjects of Nonexpert Opinion — a. AGE.** — See note 2.

**b. APPEARANCE, CONDUCT, AND Demeanor.** — See notes 3, 4, 5, 6, 7, 8, 11.

99 N. W. Rep. 669; *Read v. Valley Land, etc., Co.*, 66 Neb. 423; *Lamb v. Lynch*, 56 Neb. 135; *Snider v. State*, 56 Neb. 309.

*New York.* — *Hartshorn v. Metropolitan L. Ins. Co.*, 55 N. Y. App. Div. 471; *Smith v. Smith*, (Supm. Ct. App. T.) 32 Misc. (N. Y.) 702; *People v. O'Donnell*, 51 N. Y. App. Div. 115.

*North Dakota.* — *State v. Barry*, 11 N. Dak. 428.

*Pennsylvania.* — *Hepler v. Hosack*, 197 Pa. St. 631.

*Texas.* — *Missouri, etc., R. Co. v. Baker*, (Tex. Civ. App. 1902) 68 S. W. Rep. 556.

But see *State v. Hooloway*, 156 Mo. 222. *Compare Jones v. Galbraith*, (Tenn. Ch. 1900) 59 S. W. Rep. 350.

It has been said that "while as to ordinary matters that come under common observation, a nonexpert witness may give an opinion, yet the witness should be able to show that he has some knowledge, some familiarity with the subject about which he is called on to give an opinion, before he is permitted to testify to that opinion." *Muth v. St. Louis, etc., R. Co.*, 87 Mo. App. 422.

**490.** 1. See *supra*, this title, **459.** 11.

**Opinion Formed After the Event.** — On a trial for murder a witness who knew the defendant was permitted to state his opinion as to the defendant's mental condition which he had formed prior to the killing, but was not permitted to state whether he had formed an opinion since the killing as to the defendant's condition at that time. *Queenan v. Oklahoma*, 190 U. S. 548.

**2. Age.** — *Winter v. State*, 123 Ala. 1; *Dittfurth v. State*, 46 Tex. Crim. 424; *Simpson v. State*, 45 Tex. Crim. 320; *St. Louis Southwestern R. Co. v. Bowles*, 32 Tex. Civ. App. 118; *Earl v. State*, 44 Tex. Crim. 467; *Donley v. State*, 44 Tex. Crim. 428.

It has been held that a witness may testify, from seeing a baby on a particular occasion, with reference to its being a new-born baby, or one that had been born some time. *Stewart v. Anderson*, 111 Iowa 329.

**Basis of Opinion.** — It has been said that to entitle opinion evidence of the age of a person to any weight, the facts and circumstances on which the opinion is based should be given and the witness should first describe, as far as practicable, the appearance of the individual whose age is in question. *Hartshorn v. Metropolitan L. Ins. Co.*, 55 N. Y. App. Div. 471.

**3. Appearance and Conduct — Alabama.** — *Parish v. State*, 139 Ala. 16.

*California.* — *People v. Benc*, 130 Cal. 159.

*Connecticut.* — *Spencer's Appeal*, 77 Conn. 638.

*Florida.* — *Fields v. State*, (Fla. 1903) 35 So. Rep. 185; *Mitchell v. State*, 43 Fla. 584; *Higginbotham v. State*, 42 Fla. 573. See *Sylvester v. State*, (Fla. 1903) 35 So. Rep. 142.

*Illinois.* — *Cicero, etc., St. R. Co. v. Richter*, 85 Ill. App. 591.

*Iowa.* — *State v. McKnight*, 119 Iowa 79. See *State v. Wright*, 112 Iowa 436.

*Louisiana.* — *State v. Marceaux*, 50 La. Ann. 1137.

*New York.* — *Webb v. Yonkers R. Co.*, 51 N. Y. App. Div. 194; *Farrell v. Metropolitan St. R. Co.*, 51 N. Y. App. Div. 456. But compare *People v. Smith*, 172 N. Y. 210.

*Texas.* — *Jackson v. State*, 44 Tex. Crim. 259; *Jowell v. State*, 44 Tex. Crim. 328; *Bain v. State*, 46 Tex. Crim. 96; *Cannon v. State*, 41 Tex. Crim. 467. But compare *Spangler v. State*, 41 Tex. Crim. 424.

*Utah.* — *Fritz v. Western Union Tel. Co.*, 25 Utah 263.

*Washington.* — *Peterson v. Seattle Traction Co.*, 23 Wash. 615, judgment affirmed on rehearing 23 Wash. 643.

See *Com. v. Gearhardt*, 205 Pa. St. 387.

It has been held to be proper to permit a witness to be asked how the actions of certain persons appeared to him. *Taylor v. State*, (Tex. Crim. 1900) 56 S. W. Rep. 753.

**Peculiarities of Manner.** — Witnesses who testified in support of a will were each asked in substance whether he or she during the time mentioned observed in the testatrix "any peculiarities of manner, speech, or conduct;" and answered "no" or "never." It was held that the question did not call for an opinion, but for a fact, and was clearly admissible. *Hogan v. Roche*, 179 Mass. 510.

**Pregnancy of Woman.** — A statement by a witness that a woman "was in a family way" is the mere statement of a collective fact, and is therefore admissible. *Littleton v. State*, 128 Ala. 31.

**4. Intoxication.** — *Birmingham R., etc., Co. v. Mullen*, 138 Ala. 614; *Dozier v. State*, 130 Ala. 57; *State v. Cather*, 121 Iowa 106; *League v. Ehmke*, 120 Iowa 464; *Edwards v. Worcester*, 172 Mass. 104; *Marshall v. Riley*, (Supm. Ct. App. T.) 38 Misc. (N. Y.) 770; *Donoho v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 30 Misc. (N. Y.) 433; *People v. Gaynor*, 33 N. Y. App. Div. 98; *St. Louis Southwestern R. Co. v. Wright*, (Tex. Civ. App. 1904) 84 S. W. Rep. 270; *Pace v. State*, (Tex. Crim. 1904) 79 S. W. Rep. 531. See *Clarke v. Philadelphia, etc., Coal, etc., Co.*, 92 Minn. 418.

**5. Mental Anguish.** — It has been held to be proper to permit a witness to testify on the trial of a defendant for rape that the prosecutrix just after the time of the commission of the alleged rape was "hallooing like she was in distress." It was said that "while the testimony involved to some extent the opinion of the witness, it was the result of his observation of a condition of things which he could not otherwise reproduce to the jury, unless he had perfect faculties for imitation of the voice of another — a feat far beyond most witnesses." *State v. Taylor*, 57 S. Car. 483, 76 Am. St. Rep. 575.

**Suffering Pain.** — See *Chicago, etc., R. Co. v. Williams*, (Tex. Civ. App. 1904) 83 S. W. Rep. 248.



**491. d. HEALTH.** — See notes 2, 3, 4, 5.

**e. IDENTITY.** — See note 9.

**490. 6. Angry.** — *Field v. State*, (Fla. 1903) 35 So. Rep. 185; *State v. Tighe*, 27 Mont. 327; *Catlett v. State*, (Tex. Crim. 1901) 61 S. W. Rep. 485; *Logan v. State*, (Tex. Crim. 1899) 53 S. W. Rep. 694; *Bennett v. State*, 39 Tex. Crim. 639.

**7. Excited, Calm, or Otherwise.** — *Jones v. State*, (Tex. Crim. 1905) 85 S. W. Rep. 5; *Peterson v. Seattle Traction Co.*, 23 Wash. 615, judgment affirmed on rehearing 23 Wash. 643.

It has been held that the statement of a witness that the "defendant acted like he thought five or six men were after him" was a mere conclusion and was properly excluded. *Bell v. State*, 140 Ala. 57.

**Nervous.** — *Webb v. Yonkers R. Co.*, 51 N. Y. App. Div. 194.

**Frightened.** — *State v. Tighe*, 27 Mont. 327.

**8. Friendly or Hostile.** — *State v. Utley*, 132 N. Car. 1022.

**11. Offensive or Insulting.** — *Rutherford v. St. Louis Southwestern R. Co.*, 28 Tex. Civ. App. 625.

**491. 2. Health** — *Delaware*. — *Wilcox v. Wilmington City R. Co.*, 2 Penn. (Del.) 157.

*District of Columbia*. — *Metropolitan R. Co. v. Martin*, 15 App. Cas. (D. C.) 552.

*Illinois*. — *Chicago, etc., R. Co. v. Randolph*, 199 Ill. 126; *Supreme Lodge, etc., v. Jones*, 113 Ill. App. 241; *Pioneer Reserve Assoc. v. Jones*, 111 Ill. App. 156; *Lake Erie, etc., R. Co. v. Delong*, 109 Ill. App. 241.

*Iowa*. — *Reininghaus v. Merchants' L. Assoc.*, 116 Iowa 364.

*Massachusetts*. — *O'Neil v. Hanscom*, 175 Mass. 313.

*Ohio*. — *Myers v. Lucas*, 8 Ohio Cir. Dec. 431, 16 Ohio Cir. Ct. 545.

*Pennsylvania*. — *Baldi v. Metropolitan Ins. Co.*, 18 Pa. Super. Ct. 599.

*Texas*. — *Stallings v. State*, (Tex. Crim. 1901) 63 S. W. Rep. 127; *St. Louis Southwestern R. Co. v. Brown*, 30 Tex. Civ. App. 57; *Morrison v. State*, 40 Tex. Crim. 473.

*Vermont*. — *Billings v. Metropolitan L. Ins. Co.*, 70 Vt. 477.

*Washington*. — *Peterson v. Seattle Traction Co.*, 23 Wash. 615, judgment affirmed on rehearing 23 Wash. 643.

In trespass to try title, it was held competent to prove by the wife of a deceased person, who was with him at the time that it was claimed a certain deed was executed by him, that he was paralyzed and could not speak. Such testimony, it was said in effect, was not a conclusion of the witness, but a statement of facts within her own knowledge. *Abee v. Bargas*, (Tex. Civ. App. 1901) 65 S. W. Rep. 489.

But it has been held that the testimony of nonexpert witnesses as to the general health and physical condition of the plaintiff in an action for personal injuries before and after the accident is not admissible. *Fallon v. Rapid City*, 17 S. Dak. 570.

**3. Appearance of Suffering.** — *Green v. Pacific Lumber Co.*, 130 Cal. 435; *Chicago, etc., R. Co. v. Randolph*, 199 Ill. 126; *Isherwood v. H. L. Jenkins Lumber Co.*, 87 Minn. 388; *St. Louis Southwestern R. Co. v. Burke*, 36 Tex.

Civ. App. 222; *Werner v. Chicago, etc., R. Co.*, 105 Wis. 300.

**4. Weak and Helpless Condition.** — *Birmingham R., etc., Co. v. Franscomb*, 124 Ala. 621; *Chicago, etc., R. Co. v. Randolph*, 199 Ill. 126.

**5. Character of the Disease from Which a Person Suffers.** — While it is competent for a non-expert witness to testify that a person is "sick," "diseased," or "has a fever," these being statements of such facts as are perceptible to the senses and not mere expressions of opinion, yet it is not competent for such witness to testify, if the evidence sought calls for an opinion instead of a statement of fact, until the witness shall have placed himself within the rule as to expert testimony. To state that a person is sick, or diseased, is a statement of a fact which does not necessarily involve professional knowledge or skill, but to state the particular kind of disease necessarily involves some degree of professional knowledge and skill, and consequently the expression of an opinion. Hence it has been held to be error to permit a witness who was not an expert to testify that a person had suffered a stroke of paralysis. *Dominick v. Randolph*, 124 Ala. 557.

**9. Brady v. Shirley**, (S. Dak. 1904) 101 N. W. Rep. 886; *State v. Montgomery*, 17 S. Dak. 500; *Osgood v. State*, (Tex. Crim. 1899) 49 S. W. Rep. 94.

The opinion of a witness as to the identity of a person seen by him is admissible in all cases where the witness has a previous personal acquaintance with or knowledge of such person, and bases his opinion on such acquaintance or knowledge. *Roberson v. State*, 40 Fla. 509.

The opinion of a state witness that a person seen by her near the scene of the crime was the defendant is admissible testimony where it appears that such witness bases her opinion upon her own knowledge of or acquaintance with the defendant; but such testimony is not competent if it appears from her testimony that she may have based her opinion on other grounds than her knowledge of the defendant, and her recognition and identification of him from seeing him near the scene of the crime. *Alford v. State*, (Fla. 1904) 36 So. Rep. 436.

**Illustrations — Persons.** — *State v. Richards*, 126 Iowa 497; *State v. Costner*, 127 N. Car. 566, 80 Am. St. Rep. 809; *State v. Welch*, 33 Oregon 33; *State v. Powers*, 72 Vt. 168; *Paulson v. State*, 118 Wis. 89. But compare *State v. Rutledge*, 37 Wash. 523.

**Footprints.** — See *supra*, this title. **488. 9. Machine Used When Person Was Injured.** — *Swift v. Zerwick*, 88 Ill. App. 558.

**Written Instrument.** — *Baltes Land, etc., Co. v. Sutton*, 32 Ind. App. 14; *Gaines v. State*, (Tex. Crim. 1903) 77 S. W. Rep. 10.

**Cattle.** — *Chrisman-Sawyer Banking Co. v. Strahorn-Hutton-Evans Commission Co.*, 80 Mo. App. 438, 2 Mo. App. Rep. 504.

**Money.** — *State v. Clark*, 27 Utah 55.

**Land.** — *Dorlan v. Westervitch*, 140 Ala. 283; *Boddy v. Henry*, 113 Iowa 462.

**Identifying by Voice.** — *Filcher v. U. S.*, (C. C. A.) 113 Fed. Rep. 248.



**492. f. INSANITY — Prevailing Rule. — See note 2.**

**Identifying Wagon by Sound.** — *Com. v. Best*, 180 Mass. 492.

**Dynamite or Other Explosives.** — A witness need not be an expert to be competent to testify to the fact that there was no dynamite or other explosive substance in a particular house. *Davis v. State*, (Ala. 1904) 37 So. Rep. 676.

**492. 2. United States.** — *Queenan v. Oklahoma*, 190 U. S. 548.

*Alabama.* — *Bell v. State*, 140 Ala. 57; *Porter v. State*, 140 Ala. 87; *Parrish v. State*, 139 Ala. 16; *Kroell v. State*, 139 Ala. 1; *Ragland v. State*, 125 Ala. 12; *Dominick v. Randolph*, 124 Ala. 557.

*Connecticut.* — *State v. Cross*, 72 Conn. 722; *Turner's Appeal*, 72 Conn. 305. See *Allis v. Hall*, 76 Conn. 322.

*Delaware.* — *Steele v. Helm*, 2 Marv. (Del.) 237.

*Idaho.* — *State v. Shuff*, 9 Idaho 115.

*Illinois.* — *Chicago Union Traction Co. v. Lawrence*, 211 Ill. 373; *Cicero, etc., St. R. Co. v. Richter*, 85 Ill. App. 591.

*Indiana.* — *Blume v. State*, 154 Ind. 343.

*Iowa.* — *Matter of Selleck*, 125 Iowa 678; *Stutsman v. Sharpless*, 125 Iowa 335; *Matter of Hull*, 117 Iowa 738; *Hertrich v. Hertrich*, 114 Iowa 643, 89 Am. St. Rep. 389; *Hawley v. Griffin*, (Iowa 1900) 82 N. W. Rep. 905; *Manatt v. Scott*, 106 Iowa 203, 68 Am. St. Rep. 293; *Kirsher v. Kirsher*, 120 Iowa 337. See *State v. Wright*, 112 Iowa 436; *Matter of Howe*, 112 Iowa 220; *State v. Robbins*, 109 Iowa 650.

*Kansas.* — *Howard v. Carter*, (Kan. 1905) 80 Pac. Rep. 61; *Grimshaw v. Kent*, 67 Kan. 463; *Zirkle v. Leonard*, 61 Kan. 636.

*Kentucky.* — *Wright v. Com.*, (Ky. 1903) 72 S. W. Rep. 340; *Abbott v. Com.*, 107 Ky. 624.

*Louisiana.* — *State v. Lyons*, 113 La. 959.

*Maryland.* — *Struth v. Decker*, 100 Md. 368; *Waits v. State*, 99 Md. 30; *Jones v. Collins*, 94 Md. 403; *Brashears v. Orme*, 93 Md. 442.

*Michigan.* — *Roberts v. Bidwell*, (Mich. 1904) 68 N. W. Rep. 1000, 10 Detroit Leg. N. 1016; *People v. Casey*, 124 Mich. 279. See *Page v. Beach*, 134 Mich. 51, 10 Detroit Leg. N. 337.

*Missouri.* — *State v. Bronstine*, 147 Mo. 520.

*Montana.* — *Spencer v. Spencer*, (Mont. 1905) 79 Pac. Rep. 320.

*Nebraska.* — *Clarke v. Irwin*, 63 Neb. 539.

*North Carolina.* — *Whitaker v. Hamilton*, 126 N. Car. 465.

*Ohio.* — *Kettemann v. Metzger*, 23 Ohio Cir. Ct. 61.

*Oklahoma.* — *Queenan v. Territory*, 11 Okla. 261, affirmed 23 U. S. Sup. Ct. Rep. 762.

*Pennsylvania.* — *Hepler v. Hosack*, 197 Pa. St. 631; *Com. v. Brown*, 193 Pa. St. 507; *Com. v. Cressinger*, 193 Pa. St. 326; *Com. v. Wireback*, 190 Pa. St. 138, 70 Am. St. Rep. 625. See *Kane's Estate*, 206 Pa. St. 204; *Com. v. Gearhardt*, 205 Pa. St. 387.

*South Carolina.* — *Scarborough v. Baskin*, 65 S. Car. 558.

*South Dakota.* — *Halde v. Schultz*, 17 S. Dak. 465. But compare *Apland v. Pott*, 16 S. Dak. 185.

*Tennessee.* — *Jones v. Galbraith*, (Tenn. Ch. 1900) 59 S. W. Rep. 350.

*Texas.* — *Lyles v. State*, (Tex. Crim. 1905)

86 S. W. Rep. 763; *Galloway v. San Antonio, etc., R. Co.*, (Tex. Civ. App. 1903) 78 S. W. Rep. 32; *Johnson v. State*, 42 Tex. Crim. 618; *Williams v. State*, (Tex. Crim. 1899) 53 S. W. Rep. 859; *Merritt v. State*, 40 Tex. Crim. 359. See *Cannon v. State*, 41 Tex. Crim. 467. But see *Freeman v. State*, 46 Tex. Crim. 318.

*Utah.* — *Matter of Van Alstine*, 26 Utah 193. *Washington.* — *Higgins v. Nethery*, 30 Wash. 239.

*Wisconsin.* — *Lowe v. State*, 118 Wis. 641; *Hempton v. State*, 111 Wis. 127. See *Crawford v. Christian*, 102 Wis. 51.

**Degree of Mental Capacity.** — It has been held that the degree or *quantum* of mental capacity which the party whose act is called in question must have, to enable him to make a valid contract, is a question of law for the court to decide, and whether said party has the required *quantum* is a question of fact to be found by the jury from all the evidence; and the opinions of witnesses are not competent on either point. *Nashville, etc., R. Co. v. Brundige*, (Tenn. 1905) 84 S. W. Rep. 805.

Thus, it has been held to be error to permit a witness to testify that a person is not competent to make contracts, any more than a child of immature age and understanding. *Mills v. Cook*, (Tex. Civ. App. 1900) 57 S. W. Rep. 81.

And it has been held that the capacity of a person, whom it is sought to have adjudged a lunatic, to manage and control his own business is not a proper subject of opinion evidence. Those who have seen and conversed with him could properly give their opinion on the question of his insanity, but the vital one, *i. e.*, the degree of his mental incapacity on that account, and the extent to which he may have been incapacitated thereby from managing his business, the jury should have determined from all the evidence on the subject. It was not a question which required peculiar skill or knowledge to comprehend. *Shapter v. Pillar*, 28 Colo. 209.

It has been held that it is not competent to ask a nonexpert witness, on the trial of an action to contest the validity of a will, whether the testatrix was in a condition to make a will, as the question calls for the opinion of the witness as to the degree of mental capacity required by law for the making of a will. *Hopkins v. Wheeler*, 21 R. I. 533, 79 Am. St. Rep. 819, wherein it was said: "The uniform practice in this court has been to permit nonexpert witnesses to testify to facts which they had observed bearing on the mental condition of the testator, and then to give their opinions as to his mental condition, derived from those facts."

In *Hayes v. Candee*, 75 Conn. 131, *Torrance, C. J.*, in delivering the opinion of the court, said: "Upon the question of sanity or insanity, or the degree of general mental capacity, in most of our courts the opinions of qualified witnesses, expert and nonexpert, will be received in evidence; while upon the question of the existence of sufficient mental capacity to do certain legal acts, such as making a contract, a deed, or a will, the opinions of witnesses, however well qualified, in many, perhaps in most, of our courts, will not be received in evidence. The opinion of the witness in the

**493.** See notes 1, 2.

first class of cases is said to be an inference of fact which is or may be helpful to the jury or other trier; while in the second class of cases the opinion is said to be or to involve an inference or conclusion of law, to be drawn by the court, or by the jury under the instructions of the court, and not by a mere witness. It is said that the distinction is between an opinion as to the mental condition of a party as a mere matter of fact, and an opinion as to his legal capacity to do certain legal acts, which last is said to involve matter of law." But it was further said that "an opinion as to the mental capacity of a party to make a deed or a will or a contract is quite frequently simply the witness's way of stating the mental condition of the party, and when this is really the case, it would seem as if, on principle, the opinion should be admitted."

It has been held that a witness who had given the history of the life of a defendant in a criminal case, detailing many circumstances tending to indicate that he was of unsound mind, and testified that from birth to the day on which the offense was alleged to have been committed he was of unsound mind, should have been permitted to give an opinion as to whether he was capable of knowing or appreciating the difference between right and wrong. *State v. McGruder*, 125 Iowa 741.

In an action to cancel and annul a deed alleged to have been executed by a deceased person, it was held that the refusal of the court to permit nonexpert witnesses to state whether the decedent was, in their opinion, competent to execute the deed in question was not reversible error where they testified fully as to all facts which they knew; and some of these facts as detailed by the witnesses were the conclusions of the witnesses, from their knowledge and the appearance of the deceased, of his mental and physical condition at or about the time of the execution of the deed. *Clum v. Barkley*, 20 Wash. 103.

**Basis of Opinion.**—The opinion of a nonexpert witness as to the mental condition of a person must be founded on his own observation. *State v. Peel*, 23 Mont. 358, 75 Am. St. Rep. 529. He cannot be permitted to express an opinion based on what he has been told by others. *Navasota First Nat. Bank v. McGinty*, 29 Tex. Civ. App. 539.

As a general rule, the opinion of a nonexpert witness as to a person's sanity is only admissible after the witness has stated the facts which he has observed and on which the opinion is based. *Jarvis v. State*, 70 Ark. 613, 67 S. W. Rep. 76; *Raub v. Carpenter*, 17 App. Cas. (D. C.) 505; *Horton v. U. S.*, 15 App. Cas. (D. C.) 310; *State v. Smith*, 106 La. 33; *Brashears v. Orme*, 93 Md. 442; *Roberts v. Bidwell*, (Mich. 1904) 98 N. W. Rep. 1000, 10 Detroit Leg. N. 1016; *Bothwell v. State*, (Neb. 1904) 99 N. W. Rep. 669; *Lamb v. Lynch*, 56 Neb. 135; *Snider v. State*, 56 Neb. 309; *People v. Spencer*, 179 N. Y. 408; *State v. Barry*, 11 N. Dak. 428; *State v. Miller*, 5 Ohio Dec. 703. See also *supra*, this title, **452. 8.**

The witness must not only detail the facts and circumstances on which his opinion rests,

but these must be such as tend to support or justify his conclusion. *Alvord v. Alvord*, 109 Iowa 113; *Watts v. State*, 99 Md. 30; *Berry Will Case*, 93 Md. 560; *Brashears v. Orme*, 93 Md. 442. See *Ramsdell v. Ramsdell*, 128 Mich. 110; *Farnsworth v. Noffsinger*, 46 W. Va. 410.

The testimony of a witness that a testator whose mental capacity is in question "acted foolish" without stating any facts on which the opinion is based, is incompetent. *Wallace v. Whitman*, 201 Ill. 59.

But it has been held that while a nonexpert witness must state the facts on which his opinion is based when giving an opinion that a person is of unsound mind, this is not necessary when he testifies that a person is sane (*State v. Halloway*, 156 Mo. 222); for in that case, it has been said, the subject of the testimony would not give manifestations of certain eccentricities which usually mark the conduct of a mind diseased. *State v. Soper*, 148 Mo. 217.

Thus, it has been held that a nonexpert witness may give an opinion that the person inquired of was sane, by first merely denying generally the existence of any facts showing an abnormal or unnatural state of mind, and without specifying any of such facts. *Parrish v. State*, 139 Ala. 16.

And it is not error to allow nonexpert witnesses on the subject of the sanity of the accused to testify that they know the accused and have seen nothing in his appearance or conduct to indicate insanity. *Harndon v. State*, 111 Ga. 178.

**Subscribing or Attesting Witnesses.**—The attesting witnesses to a will are competent witnesses as to the testator's mental capacity on the trial of an action to set aside the will. *Entwistle v. Meikle*, 180 Ill. 9.

It has been held that the opinion of a subscribing witness to a will as to the mental capacity of the maker thereof is competent without any qualifications. *Hertrich v. Hertrich*, 114 Iowa 643, 89 Am. St. Rep. 389.

And it has been held that a subscribing witness to a paper alleged to be a will, though not an expert, may testify to his opinion concerning the sanity of the alleged testator, without stating the facts on which such opinion is founded. *Scott v. McKee*, 105 Ga. 256.

A subscribing witness to a will may testify as to the sanity of the testator without first stating that at the time of the execution of the will he investigated the mental capacity of the testator. *Jones v. Collins*, 94 Md. 403.

**Competency of Witnesses a Question for the Trial Court.**—As to whether a nonexpert witness is qualified to express an opinion as to the mental capacity of a person is a matter which rests largely within the discretion of the trial court. *Parrish v. State*, 139 Ala. 16; *Matter of Hull*, 117 Iowa 738; *State v. Lyons*, 113 La. 959; *Clarke v. Irwin*, 63 Neb. 539; *Hempton v. State*, 111 Wis. 127.

**493. 1.** *Johnson v. Cochrane*, 91 Hun (N. Y.) 165, *affirmed* without opinion 159 N. Y. 555; *People v. O'Donnell*, 51 N. Y. App. Div. 115.

**2.** *Turner's Appeal*, 72 Conn. 305; *People v.*



**493. Minority Rule.** — See note 4.  
**g. SPEED.** — See note 5.

Casey, 124 Mich. 279. See *Hawley v. Griffin*, (Iowa 1900) 82 N. W. Rep. 905.

In order to justify the admission of the testimony of a witness who is not an expert, as to the sanity of a person, there must appear to have been such a close and intimate relation between the two as will warrant the conclusion that the opinion of the witness is justified by his opportunities for observation. *Jarvis v. State*, 70 Ark. 613, 67 S. W. Rep. 76.

It has been said that whether the testimony offered be in support of the proposition of sanity or insanity, to render such testimony competent by a nonexpert witness, it must be shown that the witness has had long and intimate acquaintance with the person in question — this long and intimate acquaintance in contradistinction to a casual acquaintance and occasional conversations and interviews. *Domink v. Randolph*, 124 Ala. 557.

It has been said that the weight or effect of nonexpert opinion evidence as to the sanity of a person necessarily depends on the means of knowledge of the witness, and the facts upon which they are based, possible of delineation, and the capacity of the witness to interpret correctly what he has observed. *Baker v. Baker*, 202 Ill. 595.

If a nonexpert witness gives an opinion without sufficient knowledge of facts to support it, opposing counsel may, upon cross-examination, show that it is of little value and should have little weight. It may be attacked in argument, and the jury may be instructed that the weight to be given to such opinion depends on the intelligence of the witness, his acquaintance with the person whose mental condition is the subject of investigation, his means of observation, and his veracity. *Chicago Union Traction Co. v. Lawrence*, 211 Ill. 373.

**Statute Requiring "Intimate Acquaintance."** — The determination of the question as to whether the acquaintance of the witness with the person whose sanity is in question was sufficiently intimate to qualify him to testify, under a statute requiring him to be an "intimate acquaintance," is committed to the discretion of the trial court, and a reviewing court will not interfere with the exercise of that discretion unless there has been a clear abuse of it. *Matter of McKenna*, 143 Cal. 580; *People v. Manoogian*, 141 Cal. 592; *Matter of Keegan*, 139 Cal. 123; *Keithley's Estate*, 134 Cal. 9.

**493. 4.** *McCoy v. Jordan*, 184 Mass. 575; *Ratigan v. Judge*, 181 Mass. 572. Compare *Hogan v. Roche*, 179 Mass. 510.

**5. Speed.** — *Robinson v. Louisville R. Co.*, (C. C. A.) 112 Fed. Rep. 484, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 488; *Louisville, etc., R. Co. v. Orr*, 121 Ala. 489; *Price v. Charles Warner Co.*, 1 Penn. (Del.) 462; *Chicago City R. Co. v. Bundy*, 210 Ill. 39, affirming 109 Ill. App. 637; *Texas, etc., R. Co. v. Crockett*, 27 Tex. Civ. App. 463. See *Gulf, etc., R. Co. v. Bell*, 24 Tex. Civ. App. 579. Compare *Mott v. Detroit, etc., R. Co.*, 120 Mich. 127.

It has been held to be error to exclude the

testimony of a witness that a train "was going very fast." It was said that "a witness might know and truthfully say that a train was running fast or slow and yet be unable to state the speed in miles per hour, and such inability would not render his testimony of no value, or incompetent upon the question of speed." *Overtown v. Chicago, etc., R. Co.*, 181 Ill. 323, reversing 80 Ill. App. 515.

In an action wherein the plaintiff sought to recover damages for personal injuries claimed to have been sustained through the defendant's negligent operation of a street car, it was held that there was no error in allowing the plaintiff when testifying as to the speed of the car, to say "it looked very fast to me." This expression was but a statement indicative of the speed as it appeared to her and not a statement of her opinion. *Montgomery St. R. Co. v. Shanks*, 139 Ala. 489.

But it has been held that the testimony of a witness that a car was "going as fast as it could" was beyond the realm of common observation, and was properly stricken out. *Pfeiffer v. Chicago City R. Co.*, 96 Ill. App. 10.

And it has been held that the testimony of a witness that he "saw the car coming down at a terrible speed" should have been stricken out for the reason that it conveyed to the jury no measurement of the rate of speed of the car, except that it conveyed to them the fact that it was such a rate as the witness disapproved. *Chicago City R. Co. v. Wall*, 93 Ill. App. 411.

A witness having testified that she knew when the cars of the defendant were going full speed and when they were not, it was held that she was properly permitted to testify as to whether the car which struck the plaintiff's intestate, and on which she was a passenger, was or was not at the time running at full speed. *Potter v. O'Donnell*, 199 Ill. 119, affirming 101 Ill. App. 546.

Any man of average intelligence and experience who sees a moving vehicle of any kind is competent in law to form and express an opinion as to its speed; it is not necessary that he should have had special experience. *Louisville, etc., R. Co. v. Stewart*, 128 Ala. 313; *Metropolitan R. Co. v. Blick*, 22 App. Cas. (D. C.) 194; *Atlanta, etc., R. Co. v. Strickland*, 116 Ga. 439; *West Chicago St. R. Co. v. Dedloff*, 92 Ill. App. 547.

Thus, witnesses who have the ordinary, but no special, qualifications are competent to testify as to the speed of a train or street car. *Flanagan v. New York Cent., etc., R. Co.*, 70 N. Y. App. Div. 505, affirmed without opinion 173 N. Y. 631; *Toledo Electric St. R. Co. v. Westenhuber*, 12 Ohio Cir. Dec. 22, 22 Ohio Cir. Ct. 67; *Baltimore, etc., R. Co. v. Van Horn*, 12 Ohio Cir. Dec. 106, 21 Ohio Cir. Ct. 337.

It has been said that it is only necessary that the witness should possess a knowledge of time and distance. *Covell v. Wabash R. Co.*, 82 Mo. App. 180; *Omaha St. R. Co. v. Larson*, (Neb. 1903) 97 N. W. Rep. 824; *McVey v. Chesapeake, etc., R. Co.*, 46 W. Va. 111.



**493. h. STOPPAGE OF TRAIN — CONDITION OF TRACK. — See note 6.**

Condition of Track. — See note 7.

**i. TEMPERATURE, ETC. — See note 8.**

Witnesses who have had no special knowledge or experience in the running or management of railway trains, but have the knowledge of the average ordinary persons with some familiarity with moving trains, are competent to testify as to the speed of a train. *Baltimore, etc., R. Co. v. Stoltz*, 9 Ohio Cir. Dec. 638, 18 Ohio Cir. Ct. 93.

It has been held that a witness, after testifying in substance that he had driven horses for over twenty years, and was familiar with the speed of wagons, was properly permitted to give his judgment as to the speed of a trolley car, although he did not say in terms that his experience in driving had given him knowledge of the speed of trolley cars. *Garduhn v. Union R. Co.*, 50 N. Y. App. Div. 602.

Ordinary witnesses who are acquainted with the speed of trains and street cars are competent to express an opinion as to how fast a moving train or street car which they have observed was going. *Chicago, etc., R. Co. v. Gunderson*, 174 Ill. 495; *Gregory v. Wabash R. Co.*, 126 Iowa 230; *Cronk v. Wabash R. Co.*, 123 Iowa 349; *Mertz v. Detroit Electric R. Co.*, 125 Mich. 11, 7 Detroit Leg. N. 393.

A witness accustomed to observing the running of trains, and who observed one at the time of an accident, and noticed its speed, may give his opinion, together with all the facts on which it is based, as to the rate of speed at which the train was running. *Union Pac. R. Co. v. Ruzicka*, 65 Neb. 621.

It has been said that the speed of a train is not a question of science, but may be shown by an ordinary witness who has given attention to the running of trains and possesses a knowledge of time and distance. The inexperience of a witness in timing the speed of trains, or the fact that he has given the matter little attention, goes to the weight rather than the admissibility of his testimony. *Atchison, etc., R. Co. v. Holloway*, (Kan. 1905) 80 Pac. Rep. 31.

A witness who is accustomed to travel on railroads may be permitted to testify as to the speed of a train. *Norfolk, etc., R. Co. v. Tanner*, 100 Va. 379.

Passengers on a street car who were regular passengers on the line on which the car was run have been held competent witnesses as to the speed at which the car was running at the time of an accident. *Johnsen v. Oakland, etc., Electric R. Co.*, 127 Cal. 608.

Witnesses who have been in the habit of riding on street cars and observing somewhat their speed are competent to give their opinion as to the speed of a car. *Ashtabula Rapid Transit Co. v. Dagenbach*, 11 Ohio Cir. Dec. 307.

It has been held that witnesses who were accustomed to railroad travel, many of whom rode daily on street cars, and some of whom had also traveled frequently on steam railroads, were competent to express an opinion as to the speed of a street car which they had observed. *Aston v. St. Louis Transit Co.*, 105 Mo. App. 226.

A witness who was a passenger on a street car at the time of an accident, who was a civil engineer of eleven years' experience, and at one time had been connected with the railroad business, and was accustomed to time the speed of cars by the watch, was held to be competent to testify to the speed of the car. *Fisher v. Union R. Co.*, 86 N. Y. App. Div. 365.

But it has, on the other hand, been held to be error to permit witnesses who showed from their evidence that they had never had any experience in operating street cars, had traveled very little on such cars, and had paid no attention to the speed at which they ordinarily run, to give their opinions of the speed of a street car. *Muth v. St. Louis, etc., R. Co.*, 87 Mo. App. 422.

And it has been held that a nonexpert, who can testify to the rate of speed of a street-railway car only as the result of a mathematical calculation made after the event, is not a competent witness on the subject. *Mathiesen v. Omaha St. R. Co.*, (Neb. 1903) 97 N. W. Rep. 243, reversing (Neb. 1902) 92 N. W. Rep. 639.

Before a witness can be permitted to testify that a car was going fast or slow, he must at least be able to say that he had noticed the speed. *Garduhn v. Union R. Co.*, 50 N. Y. App. Div. 602.

**Opinion as to Speed Based on Noise Made by Car.** — Ordinarily a witness will not be permitted to give an opinion as to the speed of a street car, judging alone from the noise made by the car. *Campbell v. St. Louis, etc., R. Co.*, 175 Mo. 161.

**493. 6.** See *Vanarsdell v. Louisville, etc., R. Co.*, 65 S. W. Rep. 858, 23 Ky. L. Rep. 1666; *Flynn v. Louisville R. Co.*, 110 Ky. 662.

On cross-examination a brakeman was asked the following questions: (1) "What is the difference in a long train and in a short train with reference to stopping it?" (2) "If there is air on two-thirds of the cars, would you have to put on as many brakes or as soon as if you had air only on a part of it?" It was held that the questions were not objectionable, as calling for an expert opinion. *Southern R. Co. v. Crowder*, 135 Ala. 417.

Where a witness was not shown to know anything about the time or distance within which a train could be stopped under any circumstances or conditions, it was held that he should not have been allowed to give his opinion that defendant's train could have been stopped on the occasion of the injury to the plaintiff within a distance of two hundred yards. *Alabama G. S. R. Co. v. Burgess*, 119 Ala. 555, 72 Am. St. Rep. 943.

7. A witness who was not an expert, but who was familiar with the condition of the track at a curve where the track was alleged to be defective, and had noticed how it was affected by the passing of trains, was held competent to testify as to the effect of the passing of trains over the curve. *Louisville, etc., R. Co. v. Sandlin*, 125 Ala. 585.

**8. Questions of Temperature.** — It has been

**495. IX. COMPENSATION OF EXPERT WITNESSES — 2. Taxing Expert Witness Fees as Costs —** *b. IN ENGLAND.* — See note 3.

**497. 4. General Right of Expert Witness to Demand Extra Compensation —** *a. AT COMMON LAW.* — See note 1.

[**X. WEIGHT OF EXPERT TESTIMONY.** — See note 13*a*.]

said that where weather conditions are exceptional, the impressions of witnesses may be given in general terms, but reliable testimony concerning temperature can be expressed only in degrees as observed by the witness or recorded by signal service officers, when such testimony is available. *Peterson v. Chicago, etc., R. Co.*, (S. Dak. 1905) 102 N. W. Rep. 595.

**Questions of Distance.** — When a witness knows the distance between two points, he may, of course, state it, since this is not a statement of an opinion, but of a fact within his knowledge. *Neely v. State*, (Tex. Crim. 1900) 56 S. W. Rep. 625.

And a witness may sometimes be permitted to give his opinion as to the distance between two points. *San Antonio, etc., R. Co. v. Griffith*, (Tex. Civ. App. 1902) 70 S. W. Rep. 438; *Kipper v. State*, 45 Tex. Crim. 377.

The opinion of a surveyor as to the distance from one certain point to another, with which he is familiar, is admissible under the rule admitting nonexpert opinions. *State v. Laster*, 71 N. J. L. 586.

In an action to recover for injuries sustained by plaintiff while alighting from one of the defendant's railroad cars on which she had been carried as a passenger, it was held that it was not error to permit her to testify that the distance from the car steps to the ground was too great for her to step safely. *International, etc., R. Co. v. Clark*, (Tex. Civ. App. 1902) 71 S. W. Rep. 587, *reversed* on another point 96 Tex. 349.

It seems that a witness may testify as to whether two persons were within a hearing distance of each other. *Raymond v. Glover*, 122 Cal. 471.

**Questions as to Size.** — It has been held that it would be proper to permit a witness for the state in a prosecution for burglary, after describing the size of an opening in a certain window in the house alleged to have been burglarized, to express his opinion as to whether the defendant or his companions, considering the size of the opening and their size, would have been able to enter at the opening. *Murmut v. State*, (Tex. Crim. 1902) 67 S. W. Rep. 508.

In an action to recover for injuries alleged to have been received by stepping into a hole in a sidewalk, it was held to be proper to admit the testimony of two witnesses that the hole was large enough for each of them to get his foot into. *San Antonio v. Talerico*, (Tex. Civ. App. 1903) 78 S. W. Rep. 28, *affirmed* 98 Tex. 151.

**495. 3. Expenses of Expert Witnesses.** — Expenses of expert witnesses, in their character as such, cannot be allowed, as between party and party, on a rate exceeding that fixed by the scale relating thereto. *Maconchy v. New Zealand*, (1900) 1 Ir. R. 22.

**497. 1. At Common Law — Right to Extra Compensation Denied.** — *North Chicago St. R. Co. v. Zeiger*, 182 Ill. 9, 74 Am. St. Rep. 157, *affirming* 78 Ill. App. 463.

**13*a*. Weight of Expert Testimony.** — The weight to be given to expert testimony is for the jury. *Denison v. Shawmut Min. Co.*, 135 Fed. Rep. 864; *Barber v. Manchester*, 72 Conn. 675; *Modern Steel Structural Co. v. Van Buren County*, 126 Iowa 606; *State v. Carpenter*, 124 Iowa 5; *Berry Will Case*, 93 Md. 560; *Fruit Dispatch Co. v. Murray*, 90 Minn. 286; *McNamara v. St. Louis Transit Co.*, 106 Mo. App. 349; *Gorman v. St. Louis Transit Co.*, 96 Mo. App. 602; *Highfill v. Missouri Pac. R. Co.*, 93 Mo. App. 219; *State v. Miller*, 5 Ohio Dec. 703. But *compare* *Richmond's Estate*, 206 Pa. St. 219; *Klein's Estate*, 207 Pa. St. 191. The jury may accept or reject the testimony of experts as they would that of any other witnesses (*Nyback v. Champagne Lumber Co.*, (C. C. A.) 109 Fed. Rep. 732; *Lafayette Bridge Co. v. Olsen*, (C. C. A.) 108 Fed. Rep. 335; *White v. State*, 133 Ala. 122; *Baker v. Richmond City Mill Works*, 105 Ga. 225; *State v. Lyons*, 113 La. 959; *Walbridge v. Barrett*, 118 Mich. 433; *Restetsky v. Delmar Ave., etc., R. Co.*, (Mo. App. 1904) 85 S. W. Rep. 665; *Kingsbury v. Joseph*, 94 Mo. App. 298; *Hoyberg v. Henske*, 153 Mo. 63; *Schlesinger v. Dunne*, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 531, *citing* 12 AM. AND ENG. ENCYC. OF LAW (2d. ed.) 423; *International, etc., R. Co. v. Mills*, 34 Tex. Civ. App. 127; *Galveston, etc., R. Co. v. Bohan*, (Tex. Civ. App. 1898) 47 S. W. Rep. 1050; *Baxter v. Chicago, etc., R. Co.*, 104 Wis. 307; *Blouin v. Quebec*, 16 Quebec Super. Ct. 303. Especially when it is contradicted by other testimony. *Matter of Phillips*, (Surrogate Ct.) 34 Misc. (N. Y.) 442; *McClellan v. Duncombe*, 52 N. Y. App. Div. 189.

And ordinarily the opinions of expert witnesses on a matter which is to be found by the jury are not binding upon them, although uncontroverted. *Baltimore, etc., R. Co. v. Baltimore*, 98 Md. 535; *Lincoln Land Co. v. Phelps County*, 59 Neb. 249.

The opinions of expert witnesses as to insanity are not conclusive upon the jury; they are to be weighed like other evidence. Such evidence is intended to aid the jury, and its value depends largely on the intelligence, experience, honesty, and impartiality of the witnesses and their opportunity of knowing the traits and habits of the person whose mind is under investigation. Its weight is solely a question for the jury; they may reject it all, though it is without conflict. *Parrish v. State*, 139 Ala. 16.

It has been said that it is only in cases where the evidence, and the facts to be deduced therefrom, are undisputed, and the case concerns a matter of science or specialized art, or other matter of which a layman can have no



knowledge, that a jury must accept the opinion of experts as conclusive. *Mortazsky v. Wirth*, 74 Minn. 146.

In an action involving the defendant's authorship of a letter, specimens of the writing of a third person, who is alleged to have written the letter, cannot be excluded from the evidence for the reason that an expert on handwriting testified that there was no similarity between the excluded specimen of handwriting and the letter. It is for the jury to pass on the question of similarity, and an expert witness cannot be substituted for the jury in passing upon the question. *People v. Storke*, 128 Cal. 486.

Expert testimony is to be weighed and judged like any other, and the same tests applied thereto. *State v. Kelly*, 77 Conn. 266, wherein it was held that the trial court did not err in refusing to instruct the jury that the evidence of experts is of the very lowest order and the most unsatisfactory character; that all testimony founded on opinion merely is weak and uncertain, and should in every case be weighed with great caution; and that the court properly instructed the jury, in effect, that such testimony was to be weighed and judged like any other, and the same tests applied thereto.

It has been said that the testimony of expert witnesses must be considered in view of their general knowledge upon the subject as to which they testify, as well as of the particular case and of their opportunity for examination of the facts upon which opinions are based, and the sufficiency of the reasons given for such opinions, and if it should appear that they are formed without the aid of facts necessary to enable the witnesses to come to a conclusion, the opinions must be disregarded, no matter how confidently they are testified to by the witnesses. *McQuade v. Metropolitan St. R. Co.*, 84 N. Y. App. Div. 637.

The value of the answers of expert witnesses to hypothetical questions must be based solely on the truth of the facts on which they are based, and if the facts are not found to be as stated, the answers are of no value, and cannot be considered at all. *Kirsher v. Kirsher*, 120 Iowa 337.

It has been held that where the opinion of a medical expert is based on a hypothetical question, it is proper to instruct the jury that if the assumed facts, or any of them, are not true, the opinion must be rejected by the jury. *Dudley v. Gates*, 124 Mich. 440.

The opinion of experts being divided, a court will ordinarily follow the opinions of those whose reasons for their conclusion commend themselves most strongly to the judgment of the court. *Evans v. Fox*, 22 Pa. Co. Ct. 537, 8 Pa. Dist. 383.

It has been said that the fact that an expert has testified that a method adopted was not safe or proper is not sufficient to sustain a finding of negligence, when other experts consider that it was safe and proper. *McMullen v. New York*, 104 N. Y. App. Div. 337.

It has been held that evidence of physicians as to testamentary capacity is entitled to greater weight than that of nonprofessional persons, provided they have had personal observation and knowledge of the person whose mental

capacity is in question; otherwise, it is not. *Ward v. Brown*, 53 W. Va. 227.

It has been held that where there is direct contradiction between equally credible witnesses, the evidence of those who speak from facts within their personal knowledge should be preferred to that of experts giving opinions based upon extra-judicial statements and municipal reports. *Crawford v. Montreal*, 30 Can. Sup. Ct. 406.

In an action to enforce a contract for the sale of land it was held that the testimony of the person who prepared the contract at the instance of the defendant's intestate was of far greater value than the opinion of witnesses that the signature was not genuine. *Wilson v. Keeling*, (Ky. 1899), 50 S. W. Rep. 539.

In an action against a railroad company to recover for the death of an animal, it was held that testimony of the engineer that he used all the means at his command (stating what he had done), and that he could not stop the train before running over the animal, was not impeached or contradicted by the testimony of expert witnesses that, in their opinion, the train could have been stopped in a shorter time than the engineer stated, especially when the experts testified that they would take the testimony of the engineer as to the fact in preference to their opinion, and when, also, their opinion was based on the hypothesis that every car in the train was equipped with air brakes, and the evidence showed that not more than two-thirds of the cars were so equipped. *Western, etc., R. Co. v. Robinson*, 119 Ga. 331.

The weight of expert testimony being for the jury, it is better for the trial court, instead of instructing the jury as to the comparative weight to be given to the testimony of expert witnesses, to permit the entire evidence to go to the jury, to be weighed and considered by them in the light of all the evidence on the question. *In re Peterson*, 136 N. Car. 13.

It has been held that it is error for the court to instruct the jury that the testimony of expert witnesses is unreliable, giving reasons why it is unreliable. *Matter of Blake*, 136 Cal. 306, 89 Am. St. Rep. 135.

And it has likewise been held that it is error to instruct the jury that the evidence of physicians testifying as experts only, on the trial of an issue *devisavit vel non*, is entitled to great weight. *Ward v. Brown*, 53 W. Va. 227.

Where two witnesses testified that a chain used in unloading iron from a steamship had been by them subjected both to test and inspection shortly before it was put into use, and the test and inspection was amply adequate to warrant the belief that the chain was not dangerously defective, it was held that the trial court was clearly right in refusing to discredit their testimony because two persons who were called as experts testified that in their opinion a crack must have been present which could have been seen by a careful observer. *Johnston v. Turnbull*, (C. C. A.) 130 Fed. Rep. 769.

In a case in which there was testimony as to the mental capacity of a testator by witnesses who had personal observation and knowledge upon which to base their opinions, and by witnesses who testified in answer to hypothetical questions, it was held to be error to instruct



**498. EXPIRE — EXPIRATION.** — See note 1.

the jury in effect that the opinions of the medical witnesses who had no personal knowledge or observation, but based their testimony upon hypothetical questions, was entitled to peculiar importance; it cannot be said that expert witnesses, speaking merely as to matters of opinion, and basing their opinions upon hypothetical questions, are entitled to more credit than witnesses who had knowledge of facts gathered from personal observation and who based their opinions upon actual facts and not supposed cases. *In re Peterson*, 136 N. Car. 13.

It has been held not to be error to instruct a jury that where physicians who are witnesses in the case have testified as to matters within their personal knowledge, their testimony is to be weighed just like that of other witnesses. *Woodward v. Iowa L. Ins. Co.*, 104 Tenn. 49.

It has been held not to be error for the court to charge the jury "that 'the testimony of experts introduced for the purpose of establishing insanity or mental unsoundness, if paid for,

should be received with great caution and carefully weighed by the jury,'" and that "it was lawful and proper for an expert physician to charge a reasonable compensation or fee for his professional opinion or services.'" *Bateman v. Ryder*, 106 Tenn. 712, 82 Am. St. Rep. 910.

**Testimony Prepared with Assistance of Counsel.** — Where the answer of an expert witness to a question of the complainant's counsel had been prepared by counsel for the complainant in his office, not from any notes of the witness, and the typewritten sheets were submitted to the witness on the morning of the examination, who revised them until they exactly represented his opinion on the subject, and on the trial, in answer to the question of counsel, read the answer so prepared from a typewritten copy, it was held that the testimony was entitled to little weight. *Emerson Co. v. Nimocks*, 88 Fed. Rep. 280.

**498. 1. Forfeiture.** — *Matter of Guaranty Bldg.*, 52 N. Y. App. Div. 142.

**EXPLOSIONS AND EXPLOSIVES.**

By F. G. BAMMAN.

**500. II. GENERAL RULES AS TO LIABILITY FOR EXPLOSIONS — No Liability in Absence of Negligence.** — See notes 1, 2.

**501.** Where the Person Having or Using Explosives Is Chargeable with Negligence. — See note 3.

Contributory Negligence of Person Injured. — See note 4.

**502. III. FACT OF EXPLOSION AS EVIDENCE OF NEGLIGENCE — Fact of Explosion Held Prima Facie Evidence of Negligence.** — See note 1.

Contrary Doctrine. — See note 2.

**500. 1. No Liability for Damage by Explosion in Absence of Negligence.** — *Kleebauer v. Western Fuse, etc., Co.*, 138 Cal. 497, 94 Am. St. Rep. 62; *Holland House Co. v. Baird*, 169 N. Y. 136, reversing 49 N. Y. App. Div. 180; *Kilbride v. Carbon-Dioxide, etc., Co.*, 201 Pa. St. 552; *Barnes v. Zettlemoyer*, 25 Tex. Civ. App. 468.

Where it did not appear that the defendant's foreman knew, or that it was a matter of common knowledge, that a certain composition was explosive, there was held to be no liability to the employee injured by an explosion caused by particles of such substance being blown into a light by the foreman's suddenly starting the machinery. *O'Reilly v. Bowker Fertilizer Co.*, 174 Mass. 202.

**Enlarging Well by Explosion of Nitroglycerine.** — See *Zahniser v. Pennsylvania Torpedo Co.*, 190 Pa. St. 350.

**Licensee or Trespasser.** — A railroad company is not liable for injuries to a trespasser or mere licensee, resulting from the explosion of tanks containing sulphuric acid stored in its freight yards, where such explosion was the result of merely passive negligence. *Means v. Southern California R. Co.*, 144 Cal. 473.

But where one is aware of the presence of a trespasser, and negligently explodes a giant fire-

cracker, the former cannot avoid liability for the injury on the ground that the latter is a trespasser. *Herrick v. Wixom*, 121 Mich. 384.

**2. Fletcher v. Rylands — Negligence Immaterial.** — See *Ducrr v. Consolidated Gas Co.*, 86 N. Y. App. Div. 14.

In *Bradford Glycerine Co. v. St. Marys Woolen Mfg. Co.*, 60 Ohio St. 560, 71 Am. St. Rep. 740 (following *Fletcher v. Rylands*, L. R. 3 H. L. 330) where nitroglycerine stored on defendant's land exploded and damaged property a mile away, the defendant was held absolutely liable for the damage done. See also *Laugabough v. Anderson*, 12 Ohio Cir. Dec. 341, 22 Ohio Cir. Ct. 178.

**501. 3. Liability for Servant's Negligence — Signal Torpedoes.** — Where a signal torpedo is properly placed and secured, and properly in use, the railroad company will not be liable to a child who is injured by removing it and causing it to explode. *Louisville, etc., R. Co. v. Hart*, 70 S. W. Rep. 830, 24 Ky. L. Rep. 1123.

**4. Contributory Negligence.** — *Riggs v. Standard Oil Co.*, 130 Fed. Rep. 199.

**502. 1.** See *Ducrr v. Consolidated Gas Co.*, 86 N. Y. App. Div. 14.

**2. Fact of Explosion Not Prima Facie Evidence of Negligence.** — *Littman v. New York*, 36 N. Y.

**502.** Explosion of Steam Boiler. — See note 3.

**503.** Effect of Contract Relationship Between Parties. — See notes 3, 4.

**IV. LIABILITY OF MASTER TO SERVANT.** — See note 5.

**504.** See note 1.

Duty of Master to Know Condition of Machinery. — See note 2.

**505.** Explosion Due to Latent Defect. — See notes 1, 2.

Person Employed in Blasting. — See note 3.

Unexploded Blast. — See note 4.

Negligence to Fellow Servant. — See note 5.

Contributory Negligence. — See note 6.

**506. V. STORING AND KEEPING EXPLOSIVES** — Liability Where Keeping Amounts to Nuisance. — See note 1.

App. Div. 189, *affirmed* without opinion 159 N. Y. 559; *Glaser v. Seitz*, (Supm. Ct. Tr. T.) 35 Misc. (N. Y.) 341; *Zahniser v. Pennsylvania Torpedo Co.*, 190 Pa. St. 350. See also *Standard Oil Co. v. Murray*, (C. C. A.) 119 Fed. Rep. 572; *Lodge v. United Gas Imp. Co.*, 209 Pa. St. 553.

**502. 3. Boiler Explosions.** — *Anderson v. Hays Mfg. Co.*, 207 Pa. St. 106.

**503. 3. Explosion Prima Facie Evidence of Negligence When Person Injured Is Not Employer.** — *In re California Nav., etc., Co.*, 110 Fed. Rep. 670.

**4. Explosion Not Evidence of Negligence in Favor of Employee.** — *In re California Nav., etc., Co.*, 110 Fed. Rep. 670.

**5. Master Not Liable in Absence of Negligence.** — *Browne v. King*, 100 Fed. Rep. 561, 40 C. C. A. 545; *Fuller v. New York, etc., R. Co.*, 175 Mass. 424; *Mooney v. Beattie*, 180 Mass. 451; *Bell v. Consolidated Gas, etc., Co.*, 36 N. Y. App. Div. 242; *Hutchinson v. Parker*, 39 N. Y. App. Div. 133, *affirmed* 169 N. Y. 579. See also *Kopf v. Monroe Stone Co.*, 133 Mich. 286, 10 Detroit Leg. N. 185.

**504. 1. Master Liable When Chargeable with Negligence.** — *Carter v. Clarke*, 78 L. T. N. S. 76; *Durand v. Asbestos, etc., Co.*, 19 Quebec Super. Ct. 39; *Alaska United Gold Min. Co. v. Muset*, (C. C. A.) 114 Fed. Rep. 66; *Riverton Coal Co. v. Shepherd*, 207 Ill. 395; *Angel v. Jellico Coal Min. Co.*, 115 Ky. 728; *Welch v. Bath Iron Works*, 98 Me. 361; *Merryman v. Hall*, 124 Mich. 263; *Smith v. New York, etc., R. Co.*, 86 N. Y. App. Div. 188, *affirmed* 178 N. Y. 635; *Shannon v. Consolidated Tiger, etc., Min. Co.*, 24 Wash. 119; *McMillan v. North Star Min. Co.*, 32 Wash. 579, 98 Am. St. Rep. 908.

Where an employee was injured by an explosion caused by the presence of rust or water in certain holes in castings which he was filling with molten iron, the employer being chargeable with knowledge of the presence of such rust or water and of the danger of explosion therefrom, and the employee being free from contributory negligence, a recovery was allowed. *Dyer v. Brown*, 64 N. Y. App. Div. 89, *dismissed* 170 N. Y. 616.

**2. Duty of Master to Know Condition of Machinery.** — *Hall v. Emerson-Stevens Mfg. Co.*, 94 Me. 445; *Baxter v. Chicago, etc., R. Co.*, 104 Wis. 307. See also *Koehler v. New York Steam Co.*, 84 N. Y. App. Div. 221; *Konold v. Rio Grande Western R. Co.*, 21 Utah 379, 81 Am. St. Rep. 693.

**505. 1. Latent Defect.** — See *Konold v. Rio Grande Western R. Co.*, 21 Utah 379, 81 Am. St. Rep. 693.

Where there is no evidence of any defect in a boiler or water gauge which was discoverable by the exercise of ordinary care, a master is not liable to an employee who is injured by jumping from a window in fright at the bursting of a water gauge. *Girard v. Griswold*, 177 Mass. 57.

**2.** *Bell v. Consolidated Gas, etc., Co.*, 36 N. Y. App. Div. 242. See also *Kilbride v. Carbon Dioxide, etc., Co.*, 201 Pa. St. 552.

**3.** *Chambers v. Chester*, 172 Mo. 461.

**4. Plaintiff Injured While Drilling Out Unexploded Blast.** — *Davis v. Trade Dollar Consol. Min. Co.*, 117 Fed. Rep. 122, 54 C. C. A. 636; *Browne v. King*, 100 Fed. Rep. 561, 40 C. C. A. 545; *Livengood v. Joplin-Galena Consol. Lead, etc., Co.*, 179 Mo. 229. See also *Lanza v. Le Grand Quarry Co.*, 124 Iowa 659; *Welch v. Bath Iron Works*, 98 Me. 361; *Hutchinson v. Parker*, 39 N. Y. App. Div. 133, *affirmed* 169 N. Y. 579.

One who is injured by the explosion of an unexploded blast drilled out by a fellow servant, cannot recover for the injuries where he had equal opportunity with his employer to know the dangerous condition of the place and assumed the risk. *Stalder v. Huntington*, 153 Ind. 354.

Where the foreman of one gang of workmen failed to give to the workmen who followed his gang notice of the presence of unexploded blasts, it was held that the master was liable to a workman injured because of such neglect. *McMillan v. North Star Min. Co.*, 32 Wash. 579, 98 Am. St. Rep. 908; *Shannon v. Consolidated Tiger, etc., Min. Co.*, 24 Wash. 119.

**5. Fellow Servant.** — *Sievers v. Eyre*, 122 Fed. Rep. 734; *State v. Schwind Quarry Co.*, 97 Md. 696; *Livengood v. Joplin-Gelena Consol. Lead, etc., Co.*, 179 Mo. 229; *Bell v. Consolidated Gas, etc., Co.*, 36 N. Y. App. Div. 242; *Hutchinson v. Parker*, 39 N. Y. App. Div. 133, *affirmed* 169 N. Y. 579. See also *Lanza v. Le Grand Quarry Co.*, 124 Iowa 659; *Mielke v. Chicago, etc., R. Co.*, 103 Wis. 1, 74 Am. St. Rep. 834.

**6.** See *Riverton Coal Co. v. Shepherd*, 207 Ill. 395.

**506. 1. Liability Absolute Where Keeping Amounts to Nuisance.** — *Ricker v. McDonald*, 80 N. Y. App. Div. 300; *Reilly v. Erie R. Co.*, 72 N. Y. App. Div. 476, *affirmed* without opinion 177 N. Y. 547.

**506.** Keeping Explosives in Violation of Statute or Ordinance. — See note 2.  
When Keeping of Explosives Constitutes Nuisance. — See notes 3, 4, 5.

**507.** Question of Nuisance for Jury. — See note 2.  
Liability Where Keeping Is Negligent. — See note 3.  
Remedy by Injunction. — See note 4.

**508.** VI. SALE OF EXPLOSIVES. — See note 2.

VII. PARTICULAR CASES OF EXPLOSIONS CONSIDERED — 1. Blasting —

a. GENERAL RULES AS TO LIABILITY. — See note 4.

**509.** See notes 1, 2.

**510.** Liability for Negligence. — See note 1.  
Actual Trespass Not Necessary. — See note 3.  
Contributory Negligence. — See note 5.

b. DUTY TO TAKE PRECAUTIONS TO PREVENT INJURY — (1) *Generally*. — See note 7.

**511.** Blasting Without Proper Precautions Enjoined. — See note 5.

(2) *Duty to Give Warning of Contemplated Blast*. — See note 6.

**506.** 2. Question of Negligence Immaterial Where Keeping Is Illegal. — See *Ricker v. McDonald*, 89 N. Y. App. Div. 300.

**3.** *Reilly v. Erie R. Co.*, 72 N. Y. App. Div. 476, affirmed without opinion 177 N. Y. 547; *Feltz v. Delaware, etc., R. Co.*, 5 Lack. Leg. N. (Pa.) 150; *McGregor v. Camden*, 47 W. Va. 193.

**4.** Keeping Explosives in Public Place Not of Itself a Nuisance. — *Kleebauer v. Western Fuse, etc., Co.*, 138 Cal. 497, 94 Am. St. Rep. 62.

**5.** Keeping of Explosives Held to Be Nuisance. — *Indiana, etc., Gas Co. v. McMath*, 26 Ind. App. 154; *Ft. Worth, etc., R. Co. v. Beauchamp*, 95 Tex. 496, 93 Am. St. Rep. 864.

**507.** 2. *Kleebauer v. Western Fuse, etc., Co.*, 138 Cal. 497, 94 Am. St. Rep. 62; *Reilly v. Erie R. Co.*, 72 N. Y. App. Div. 476, affirmed without opinion 177 N. Y. 547; *Barnes v. Zettlemoyer*, 25 Tex. Civ. App. 468.

**3.** Liability for Negligence in Keeping Explosives. — *Nelson v. McLellan*, 31 Wash. 208, 96 Am. St. Rep. 902. See also *Affick v. Bates*, 21 R. I. 281, 79 Am. St. Rep. 801.

**4.** Enjoining Erection of Magazine. — See *McGregor v. Camden*, 47 W. Va. 193.

**508.** 2. *Waters-Pierce Oil Co. v. Davis*, 24 Tex. Civ. App. 508; *Weiser v. Holzman*, 33 Wash. 87, 99 Am. St. Rep. 932, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 508. See also *Guinea v. Campbell*, 22 Quebec Super. Ct. 257.

Where a dealer sold gasoline without labeling it as required by statute, and a daughter of the vendee was injured by an explosion caused by using it to start a fire, under the belief that it was coal oil, the vendor was held to be liable. *Ives v. Welden*, 114 Iowa 476, 89 Am. St. Rep. 379.

But where a druggist filled an order for phosphorus by sending a quantity properly labeled it was held that, the dangerous character of phosphorus being a matter of common knowledge, the vendor was not liable for injuries resulting from its explosion while being handled, though he gave no special warning and though the purchaser was an illiterate person. *Gibson v. Torbert*, 115 Iowa 163, 91 Am. St. Rep. 147.

**Sale for Resale.** — See *Riggs v. Standard Oil Co.*, 130 Fed. Rep. 199.

The common-law rule is that in the absence

of an express warranty that oil is suitable for illuminating purposes, the doctrine of *caveat emptor* applies, and the defendant would not be liable for injuries caused by an explosion of oil, in the absence of fraud or deceit, or of the defendant's knowledge of its dangerous qualities. *National Oil Co. v. Rankin*, 68 Kan. 679.

**4.** Blasting Near Public Highway. — *Sullivan v. Dunham*, 161 N. Y. 290, affirming 35 N. Y. App. Div. 342, and distinguishing the cases wherein the injury was not direct, but was consequential.

**509.** 1. Blasting in Thickly Settled City — Liability Held Absolute. — See *Fitz Simons, etc., Co. v. Braun*, 199 Ill. 390.

**2.** Liability Generally Dependent on Negligence. — *Murphy v. Hallivan*, 93 N. Y. App. Div. 48.

**Blasting in Railroad Construction — Damnum Absque Injuria.** — Although a railroad in a proper case and manner may resort to blasting, it is liable for trespass if it hurls rocks upon the person of another. But if the person injured is guilty of contributory negligence in not heeding warnings his recovery is barred. *Cary v. Morrison*, 129 Fed. Rep. 177, 63 C. C. A. 267.

**510.** 1. Negligence Is Attended with Liability. — *St. Nicholas Skating, etc., Co. v. Cody*, (Supm. Ct. App. T.) 26 Misc. (N. Y.) 764; *Wheeler v. Norton*, 92 N. Y. App. Div. 368.

**3.** *Fitz Simons, etc., Co. v. Braun*, 199 Ill. 390. See also *Holland House Co. v. Baird*, 169 N. Y. 136.

**5.** *Smith v. Day*, 100 Fed. Rep. 244, 40 C. C. A. 366, reversing on other grounds 86 Fed. Rep. 62; *Cary v. Morrison*, 129 Fed. Rep. 177, 63 C. C. A. 267.

**7.** High Degree of Care Required. — *Fitz Simons, etc., Co. v. Braun*, 199 Ill. 390; *St. Nicholas Skating, etc., Co. v. Cody*, (Supm. Ct. App. T.) 26 Misc. (N. Y.) 764. See also *Wheeler v. Norton*, 92 N. Y. App. Div. 368.

**511.** 5. Injunction. — An injunction will not be granted to restrain blasting where no negligence is shown, the act is not unlawful, and the plaintiff has an adequate remedy at law. *De Carvajal v. Young Men's Christian Assoc.*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 727.

**6.** Duty to Give Notice of Contemplated Blast. — *Cary v. Morrison*, 129 Fed. Rep. 177, 63 C. C. A. 267. See also *Cameron v. New England Telephone, etc., Co.*, 182 Mass. 310.



- 512.** *c.* **BLASTING DONE BY INDEPENDENT CONTRACTOR.** — See note 3.  
**2. Boiler Explosions — Liability of Person Using Boiler.** — See note 7.  
**514.** **3. Explosion of Illuminating or Other Gas.** — See notes 3, 4, 5.  
**515.** **Duty to Inspect and Repair Pipes and Mains.** — See notes 1, 2.  
**Negligence of Company's Employee.** — See note 3.  
**Negligence in Turning On or Shutting Off Gas.** — See note 4.  
**Evidence of Precautions Taken.** — See note 6.  
**516.** **Explosion Caused by Act of Third Person.** — See notes 1, 2.  
**Contributory Negligence.** — See notes 3, 4.  
**Courts Take Judicial Notice that Natural Gas.** — See notes 6, 7.  
**517.** **4. Discharge of Fireworks.** — See note 1.

**Notice to Employee.** — In *Donovan v. Ferris*, 128 Cal. 48, 79 Am. St. Rep. 25, it was held that the master's liability ceased when he had employed a suitable person to give notice, and therefore a fellow servant could not recover for injuries caused by a blast though no warning had been given as usual by the foreman. See also *Kelly Island Lime, etc., Co. v. Pachuta*, 69 Ohio St. 462, 100 Am. St. Rep. 706.

**512. 3. Rule Applied Where City Employs Independent Contractor.** — *Stalder v. Huntington*, 153 Ind. 354.

**7. Liability for Damage from Boiler Explosion Depends on Negligence.** — *Anderson v. Hays Mfg. Co.*, 207 Pa. St. 106.

**514. 3. A Landlord Is Liable to His Tenant.** — *Indianapolis Abattoir Co. v. Temperly*, 159 Ind. 651, 95 Am. St. Rep. 330.

**Transporting Natural Gas.** — In *Indiana* it was held that laying a pipe conveying natural gas on the surface of a part of the highway usually untraveled, where it was hidden by grass, was unlawful and a nuisance, and the plaintiff, who was injured by an explosion caused by his running a traction engine over the pipe, could recover therefor. *Indiana Natural, etc., Gas Co. v. McMath*, 26 Ind. App. 154.

**4. Gas Company Liable for Explosion Only in Absence of Due Care.** — See *Kleebauer v. Western Fuse, etc., Co.*, 138 Cal. 497, 94 Am. St. Rep. 62, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 514.

**5. Standard of Skill.** — *United Oil Co. v. Roseberry*, 30 Colo. 177; *Baudler v. People's Gas Light, etc., Co.*, 108 Ill. App. 187; *Triple-State Natural Gas, etc., Co. v. Wellman*, 114 Ky. 79.

**515. 1. Gas Company Liable for Explosion When Negligent.** — *Baudler v. People's Gas Light, etc., Co.*, 108 Ill. App. 187; *Consolidated Gas Co. v. Getty*, 96 Md. 683; *Koplan v. Boston Gas Light Co.*, 177 Mass. 15; *Tiehr v. Consolidated Gas Co.*, 51 N. Y. App. Div. 446. See also *Smith v. Pawtucket Gas Co.*, 24 R. I. 292, 96 Am. St. Rep. 713.

**Liability of Municipality.** — A city employee searching for a leak lit a piece of paper, located the leak, and covered the flame with dirt for the purpose of extinguishing it. Gas accumulated in the plaintiff's subterranean tunnel a few minutes later and exploded. It was held that negligence on the part of the employee was not shown, and the city was not liable for the damage resulting from the explosion. *Littman v. New York*, 36 N. Y. App. Div. 180, affirmed 150 N. Y. 559.

**2. Baudler v. People's Gas Light, etc., Co.**, 108 Ill. App. 187; *Consolidated Gas Co. v. Getty*, 96

Md. 683; *Koplan v. Boston Gas Light Co.*, 177 Mass. 15; *Heb v. Consolidated Gas Co.*, 201 Pa. St. 443.

**3. Tipton Light, etc., Co. v. Newcomer**, 33 Ind. App. 42; *German-American, Ins. Co. v. Standard Gas Light Co.*, (Supm. Ct. Tr. T.) 34 Misc. (N. Y.) 594.

**4. Turning On Gas.** — *United Oil Co. v. Roseberry*, 30 Colo. 177.

**6. Proving Precautions.** — See *United Oil Co. v. Roseberry*, 30 Colo. 177.

**516. 1. When Act of Third Person Causes Leak.** — *Consolidated Gas Co. v. Getty*, 96 Md. 683; *Koplan v. Boston Gas Light Co.*, 177 Mass. 15.

**2. Where Third Person Acts for Injured Person.** — The house owner cannot recover from the company for injury to his house where the tenant's negligence was the immediate cause of the explosion. *Creel v. Charleston Natural Gas Co.*, 51 W. Va. 129, 90 Am. St. Rep. 772.

But it has been held that the wife is not the agent of the husband so as to charge him with her negligence in igniting gas which the defendant negligently allowed to escape. *Baudler v. People's Gas Light, etc., Co.*, 108 Ill. App. 187.

**The Company Is Not Liable for Act of a Third Person.** — *McKenna v. Bridgewater Gas Co.*, 193 Pa. St. 633.

**3. Contributory Negligence Bar to Recovery.** — See *Triple-State Natural Gas, etc., Co. v. Wellman*, 114 Ky. 79.

**Going Near to Escaping Gas with a Light.** — *King v. Consolidated Gas Co.*, 90 N. Y. App. Div. 166.

**4. Existence of Contributory Negligence for Jury.** — *People's Gas Light, etc., Co. v. Amphlett*, 93 Ill. App. 194.

**6. Inflammability of Naphtha Judicially Noticed.** — It is a matter of common knowledge that naphtha is explosive and courts will so treat it. *Standard Oil Co. v. Wakefield*, 102 Va. 824.

**7. See Tipton Light, etc., Co. v. Newcomer**, 33 Ind. App. 42.

**517. 1. Liability for Damage by Fireworks.** — *Herrick v. Wixom*, 121 Mich. 384, 389; *Bianki v. Greater American Exposition Co.*, (Neb. 1902) 92 N. W. Rep. 615. See also *Consolidated Fireworks Co. v. Koehl*, 190 Ill. 145, affirmed 103 Ill. App. 152.

**Independent Contractor.** — It has been held that the owner of a place of amusement who invites the public to witness a display of fireworks is not liable for injury caused by the negligence of an independent contractor who had entire charge of the display. *Sebeck v.*

- 517.** Setting Off Fireworks in Street. — See note 2.  
**518.** Contributory Negligence. — See note 3.  
 5. Discharge of Firearms. — See note 4.

- 520.** EXPORT — EXPORTATION. — See note 4.  
**522.** EXPOSE — EXPOSURE. — See note 1.

Plattdutsche Volkfest Verein, (C. C. A.) 124 Fed. Rep. 11, affirming 64 N. J. L. 624, 81 Am. St. Rep. 512; Deyo v. Kingston Consol. R. Co., 94 N. Y. App. Div. 578.

**517. 2. Discharge in Street.** — See Frost v. Josselyn, 180 Mass. 389.

**518. 3. Contributory Negligence.** — To the same effect as Scanlon v. Wedger, 156 Mass. 462, stated in the original note, see Frost v. Josselyn, 180 Mass. 389.

**4. Care Required in Using Firearms.** — The question whether a father is negligent in giving a rifle to his minor son, who permits a younger brother to carry it while loaded, resulting in injury to the plaintiff, should be left with the jury. Taylor v. Seil, 120 Wis. 32.

**Pointing Gun — Negligence Per Se.** — Under Stat. Wis. (1898), § 4391, it is unlawful inten-

tionally to point a gun or pistol at another. Horton v. Wylie, 115 Wis. 505, 95 Am. St. Rep. 953.

**Spring Gun.** — Where the defendant, a farmer, set a spring gun for the purpose of protecting a melon patch, and the plaintiff was injured while crossing the defendant's field, the defendant was held liable for the injuries inflicted although the plaintiff was a trespasser. Grant v. Hass, 31 Tex. Civ. App. 688. See further the title NUISANCES, 701, 4 et seq.

**520. 4. Export and Import.** — Dooley v. U. S., 183 U. S. 151.

**522. 1. Exposure to Unnecessary Danger — Insurance.** — Hoffman v. Standard L., etc., Ins. Co., 127 N. Car. 337; Irwin v. Phoenix Acc., etc., Ins. Assoc., 127 Mich. 630.

## EX POST FACTO LAWS.

BY H. W. HOYE.

**525. I. DEFINITION AND GENERAL NATURE.** — See note 1.

**526.** Confined to Penal and Criminal Proceedings. — See note 1.

**528. III. CLASSIFICATION — 1. Laws Classed as Ex Post Facto — a. IN GENERAL.** — See note 1.

*b.* LAWS CREATING NEW CRIMES. — See note 4.

**529. d. LAWS CHANGING PUNISHMENT.** — See notes 3, 4.

**530.** See note 1.

**525. 1. Phrase Defined.** — People v. Cox, 67 N. Y. App. Div. 344, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 525; State v. Rooney, 12 N. Dak. 144.

**Marshall's Definition.** — See Iowa v. Jones, 128 Fed. Rep. 626; State v. Rooney, 12 N. Dak. 144.

**Other Definitions.** — Meffert v. State Board of Medical Registration, 66 Kan. 710.

**526. 1. Inapplicable to Civil Proceedings.** — De Pass v. Bidwell, 124 Fed. Rep. 615; Meffert v. State Board of Medical Registration, 66 Kan. 710; State v. Tyree, (Kan. 1904) 77 Pac. Rep. 290.

**528. 1. Ex Post Facto Laws Classified.** — State v. Tyree, (Kan. 1904) 77 Pac. Rep. 290; McGuire v. State, 76 Miss. 504; State v. Kyle, 166 Mo. 287; State v. Rock, 20 Utah 38.

**4. What Not Ex Post Facto Act.** — A statute making certain acts criminal that were lawful previous to its passage, is not rendered an *ex post facto* law by the fact that an indictment under it charges the accused with offenses committed before as well as after the enactment of the statute, the provisions of the act relating wholly to future offenses. Morgan v. Com., 98 Va. 812.

**529. 3. Laws Mitigating Punishment.** — McGuire v. State, 76 Miss. 504.

**4. Examples of Laws Increasing — Loss of Credit for Good Behavior.** — Where the punishment for a crime at the time it was committed was imprisonment for not less than five years nor more than twenty-five, a statute providing that the court imposing sentence shall not fix the limit or duration of the term of imprisonment, is an *ex post facto* law, since it deprives the defendant of his right of credit for good behavior. State v. Tyree, (Kan. 1904) 77 Pac. Rep. 290, affirmed 78 Pac. Rep. 525; People v. Johnson, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 550.

**Examples of Laws Mitigating — Change from Death Penalty to Imprisonment.** — McGuire v. State, 76 Miss. 504.

**Change of Time for Executing Death Sentence.** — A statute is in mitigation which provides that a person condemned to death shall be executed on a day from six to nine months after sentence, instead of, as formerly, from three to six months after sentence. State v. Rooney, 12 N. Dak. 144.

**530. 1. A Statute Relating to Matters of Prison Discipline** alone is not *ex post facto*. Storti's Case, 180 Mass. 57.

**A Statute Changing the Place of Confinement** of a convicted murderer awaiting execution from the county jail to the state penitentiary is

**531. e.** LAWS CHANGING RULES OF EVIDENCE. — See note 1.

**f.** LAWS IMPOSING A PENALTY OR THE DEPRIVATION OF A RIGHT. — See note 3.

**532. h.** LAWS ALTERING SITUATION OF ACCUSED TO HIS DISADVANTAGE. — See note 5.

**533. 2. Laws Classed as Not Ex Post Facto**—**a.** LAWS REGULATING PROCEDURE. — See note 1.

**535. b.** LAWS INCREASING PUNISHMENT BECAUSE OF PRIOR OFFENSES. — See note 1.

not *ex post facto*. *State v. Rooney*, 12 N. Dak. 144. See also *Storti's Case*, 180 Mass. 57, wherein Holmes, C. J., said: "The mode of confinement is no part of the punishment."

**531. 1. Changes in Rules of Evidence.** — See *Iowa v. Jones*, 128 Fed. Rep. 626, holding that a statute increasing the punishment for habitual criminals was not *ex post facto* as changing the rules of evidence.

**3. Statute Creating Legal Liability That Did Not Before Exist.** — *State v. Board of Education*, 12 Ohio Cir. Dec. 423.

**Qualifications for a Doctor.** — See *Meffert v. State Board of Medical Registration*, 66 Kan. 710, holding that a statute authorizing the revocation of a physician's license on the ground of immorality, operates, not as a punishment, but as a protection to the citizens of the state. And see the title *PHYSICIANS AND SURGEONS*, vol. 22, p. 781.

**A Statute Regulating the Practice of Dentistry** is not *ex post facto*. *State v. Chapman*, 69 N. J. L. 464, affirmed (N. J. 1904) 57 Atl. Rep. 1133.

**532. 5. Situation of Person Altered to His Disadvantage.** — *State v. Edwards*, 109 La. 236; *People v. Johnson*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 550.

**Illustrations.** — A statute permitting the disbarment of an attorney in a civil action for acts which when committed could only result in disbarment after a trial and conviction in a criminal action, is an *ex post facto* law. *State v. Fourchy*, 106 La. 743.

A statute providing that under an indictment for manslaughter a verdict for assault in any degree may be brought in, is an *ex post facto* law as respects indictments found before the statute went into effect. *People v. Cox*, 67 N. Y. App. Div. 344.

In *State v. Rock*, 20 Utah 38, it was held that at the time the crime charged against the respondent was committed, prior to the admission of the state, it was his constitutional right, under the laws of Congress, and the territorial laws then in force in the territory, to have his case brought before a grand jury, and a present-

ment by indictment of that body, in accordance with the laws then in force. Upon its admission into the Union, the state did not acquire power to provide, in respect to offenses, whether felonies or misdemeanors, committed within its limits while it was a territory, for the filing of informations by the prosecuting attorney, in the absence of a presentment and indictment by a legally constituted grand jury.

**533. 1. Mode of Procedure May Be Changed.** — *Willis v. State*, 134 Ala. 450, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 533; *State v. Cook*, 52 La. Ann. 114; *State v. Fourchy*, 106 La. 743. See also *People v. Cox*, 67 N. Y. App. Div. 344.

**Jury Regulations.** — A statute providing for the selection of a petit jury from a venire of thirty talesmen instead of thirty-four is not an *ex post facto* law. *State v. Cook*, 52 La. Ann. 114. But see *Barlow v. State*, 25 Ohio Cir. Ct. 805, in which it was held that a statute changing the mode of drawing a jury, passed after the offense charged was committed, was an *ex post facto* law.

**Statutes as to Indictments.** — A statute authorizing proceedings in criminal actions by information instead of by indictment is not an *ex post facto* law. *State v. Kyle*, 166 Mo. 287. But compare *State v. Rock*, 20 Utah 38.

A statute providing for a common form of indictment for larceny and embezzlement, but affecting neither the rules of evidence nor the punishment of the crime, is not unconstitutional as an *ex post facto* law. *Com. v. Kelley*, 184 Mass. 320.

**535. 1. Additional Punishment on Account of Prior Offenses.** — *McDonald v. Massachusetts*, 180 U. S. 311, affirming 173 Mass. 322, 73 Am. St. Rep. 293. See also the title *CUMULATIVE PUNISHMENT*.

**Illustrations.** — A statute providing heavy penalties for habitual criminals is not *ex post facto*, because the accused had completed the sentences for his previous crimes before the passage of the act. *Iowa v. Jones*, 128 Fed. Rep. 626.



## EXPOSURE OF PERSON.

- 536.** II. AS AN OFFENSE AT COMMON LAW — 1. In General. — See note 2.  
**537.** III. AS A STATUTORY OFFENSE. — See note 1.  
**538.** IV. ELEMENTS OF OFFENSE — 1. The Number of Persons Who See the Exposure — *a.* AT COMMON LAW. — See notes 1, 2.  
*b.* UNDER STATUTE. — See note 4.

### **541. EXPRESS.** — See note 2.

**536.** 2. Indecent Exposure of Person Offense at Common Law. — *Gilmore v. State*, 118 Ga. 299, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 536; *State v. Conway*, 2 Marv. (Del.) 453.

**537.** 1. Consent of Observer Immaterial. — *State v. Martin*, 125 Iowa 715.

**Mississippi Statute.** — The exposure must be wilfully and lewdly made. *Stark v. State*, 81 Miss. 397.

**538.** 1. Exposure Seen by One Person Only. —

*Morris v. State*, 109 Ga. 351, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 538; *Lockhart v. State*, 116 Ga. 557.

2. Exposure Seen by One Which Others Were in Situation to See. — *State v. Conway*, 2 Marv. (Del.) 453.

4. Exposure Without Being Seen. — *State v. Martin*, 125 Iowa 715; *State v. Bauguess*, 106 Iowa 107.

**541.** 2. Express Direction. — See *McCoy v. Conrad*, 64 Neb. 150.

## EXPRESS COMPANIES.

By J. E. BRADY.

**545.** II. RIGHTS, DUTIES, AND LIABILITIES — 3. Duty to Receive and Carry. — See note 4.

**546.** 4. Liability to Owner of Goods — *a.* IN GENERAL. — See note 3.

**548.** *b.* FOR NEGLIGENCE. — See notes 1, 2.

*c.* FOR DELAY. — See notes 4, 5.

**549.** *e.* BURDEN OF PROOF. — See note 3.

**545.** 4. In Indiana, by statute, an express company, as well as other common carriers, must "receive and carry upon the same terms merchandise or other articles delivered to it by other consignors or express companies." *Adams Express Co. v. State*, 161 Ind. 328.

**546.** 3. Liable as Insurer. — *Burke v. U. S. Express Co.*, 87 Ill. App. 505; *Hamil v. New York, etc., Express Co.*, 177 Mass. 474.

**Loss of Goods by Express Company Does Not Constitute Conversion.** — *Goldbowitz v. Metropolitan Express Co.*, (Supm. Ct. App. T.) 91 N. Y. Supp. 318.

**Conversion.** — To render the express company liable in conversion there must be an absolute refusal to return the goods to the owner, or the excuses on which the refusal is made must be shown to be in bad faith. *Rubin v. Wells-Fargo Express Co.*, (Supm. Ct. App. T.) 85 N. Y. Supp. 1108.

**548.** 1. Liability for Negligence. — *Rieser v. Metropolitan Express Co.*, (Supm. Ct. App. T.) 45 Misc. (N. Y.) 632.

2. Care and Diligence Required. — *U. S. Express Co. v. Council*, 84 Ill. App. 491; *Burke v.*

*U. S. Express Co.*, 87 Ill. App. 505; *Campe v. Weir*, (Supm. Ct. App. T.) 28 Misc. (N. Y.) 243.

**Loss by Fire.** — A mere showing that goods delivered to an express company were destroyed by fire is not in itself proof that the company was negligent. *Rowan v. Wells*, 80 N. Y. App. Div. 31.

4. Liability for Delay. — See also *Adams Express Co. v. Bratton*, 106 Ill. App. 563.

5. Reasonable Time. — What constitutes a reasonable time is a question for the jury. *Adams Express Co. v. Bratton*, 106 Ill. App. 563.

**549.** 3. Burden of Proof. — *Burke v. U. S. Express Co.*, 87 Ill. App. 505. See also *Farr v. Adams Express Co.*, 100 Mo. App. 574; *Adams Express Co. v. Bratton*, 106 Ill. App. 563. But see *Rowan v. Wells*, 80 N. Y. App. Div. 31.

Where it is shown that goods were delivered to the company properly packed, with notice of their breakable nature, and were received at destination in a damaged condition, the burden of proving due care is thrown upon the company. *Rieser v. Metropolitan Express Co.*, (Supm. Ct. App. T.) 45 Misc. (N. Y.) 632.

**550.** See note 1.

*g.* TERMINATION OF LIABILITY — DELIVERY — (1) *In General.*

— See note 4.

**551.** (2) *To Whom Delivery Should Be Made.* — See note 3.

**552.** To the True Owner. — See note 1.

Delivery to Wrong Person. — See note 2.

**553.** (3) *Place of Delivery.* — See note 1.

Special Contract. — See note 2.

**555.** (5) *Goods Sent C. O. D.* — (a) When Consignee Fails or Refuses to Accept.

— See notes 1, 2, 4.

(e) Right of Consignee to Examine. — See note 6.

**556.** *h.* AS WAREHOUSEMAN — (2) *After Termination of Transportation.* — See note 5.

**558.** *i.* WHO MAY SUE — (1) *In General.* — See note 1.

(2) *Consignor or Consignee.* — See note 2.

**559.** See note 1.

**560.** 7. Liability for Acts and Declarations of Agents. — See note 2.

**561.** III. LIMITATION OF LIABILITY — 1. How Effected — *a.* BY SPECIAL CONTRACT — (1) *In General.* — See note 3.

**559.** 1. Injury Prima Facie Proof of Negligence. — *Rieser v. Metropolitan Express Co.*, (Supm. Ct. App. T.) 45 Misc. (N. Y.) 632.

4. When Liability Ceases. — See also *Burr v. Adams Express Co.*, 71 N. J. L. 263.

**551.** 3. To the Consignee or His Agent. — *Security Trust Co. v. Wells*, 81 N. Y. App. Div. 426, affirmed 178 N. Y. 620.

Inability to Locate Consignee. — Where the express company was unable to find the consignee and tendered the goods back to the shipper, the latter cannot recover the goods and also damages for nondelivery. *Brookstone v. Westcott Express Co.*, (Supm. Ct. App. T.) 29 Misc. (N. Y.) 634.

**552.** 1. Delivery to True Owner. — *Security Trust Co. v. Wells*, 81 N. Y. App. Div. 426, affirmed 178 N. Y. 620.

2. Liability for Misdelivery. — *Security Trust Co. v. Wells*, 81 N. Y. App. Div. 426, affirmed 178 N. Y. 620.

**553.** 1. Delivery at Place of Business Necessary. — *Cappel v. Weir*, (Supm. Ct. App. T.) 45 Misc. (N. Y.) 419.

2. Delivery to Another Express Company to complete transportation under a stipulation contained in the contract absolves the forwarding express company from liability. *Mills v. Weir*, 82 N. Y. App. Div. 396.

**555.** 1. Liability as Warehouseman. — *Byrne v. Fargo*, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 543.

2. Delivery to Insolvent Consignee. — An express company is liable to the consignor of goods delivered to an insolvent consignee, where the company had been requested to stop the shipment in transit and return. *Rosenthal v. Weir*, 54 N. Y. App. Div. 275, affirmed 170 N. Y. 148.

4. Goods Subject to Consignor's Order. — *Byrne v. Fargo*, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 543.

6. Consignee May Examine Before Accepting. — *Brand v. Weir*, (Supm. Ct. App. T.) 27 Misc. (N. Y.) 212.

Knowledge of Damage by Express Company. — Where the agent delivering goods shipped

C. O. D. had knowledge of the fact that they were damaged, it was his duty to make such fact known to the consignee. *Hardy v. American Express Co.*, 182 Mass. 328.

**556.** 5. Liability After Effort to Deliver. — *Levy v. Weir*, (Supm. Ct. App. T.) 38 Misc. (N. Y.) 361.

Delivery to Wrong Person. — An express company is responsible to the owner of goods which the former delivered to one not the consignee even though its liability at the time of delivery was only that of warehouseman. *Security Trust Co. v. Wells*, 81 N. Y. App. Div. 426, affirmed 178 N. Y. 620.

**558.** 1. Action Brought by Owner. — *Levy v. Weir*, (Supm. Ct. App. T.) 38 Misc. (N. Y.) 361; *Frankfurt v. Weir*, (Supm. Ct. App. T.) 40 Misc. (N. Y.) 683.

Action by Bailee. — The bailee of property who consigns the same to an express company for shipment may bring an action to recover for an injury thereto. *U. S. Express Co. v. Council*, 84 Ill. App. 491.

Offer to Return Goods. — In a suit against an express company to recover charges paid on a C. O. D. shipment the party suing must first have offered to return the goods. *Hardy v. American Express Co.*, 182 Mass. 328.

2. Action Brought by Consignee. — *Frankfurt v. Weir*, (Supm. Ct. App. T.) 40 Misc. (N. Y.) 683.

Presumption of Ownership. — The presumption that the consignee is owner of the goods may be rebutted. *Levy v. Weir*, (Supm. Ct. App. T.) 38 Misc. (N. Y.) 361.

**559.** 1. Action Brought by Consignor. — *Levy v. Weir*, (Supm. Ct. App. T.) 38 Misc. (N. Y.) 361.

**560.** 2. Liability for Acts of Agents. — *Springer v. Westcott*, 166 N. Y. 117.

**561.** 3. Liability Limited by Contract. — *U. S. Express Co. v. Council*, 84 Ill. App. 491; *Gowling v. American Express Co.*, 102 Mo. App. 366; *Michaels v. Adams Express Co.*, 71 N. J. L. 41; *Bernstein v. Weir*, (Supm. Ct. App. T.) 40 Misc. (N. Y.) 635; *Mills v. Weir*, 82 N. Y. App. Div. 396. See also *Rieser v. Metropolitan*

**563.** (2) *What Constitutes.* — See notes 1, 2.

**565.** (4) *Law Governing.* — See note 2.

2. *Extent of Limitation* — *a.* AMOUNT OF LIABILITY LIMITED. —

See note 5.

**566.** See notes 1, 2.

*b.* TIME FOR BRINGING SUIT OR MAKING CLAIM LIMITED. — See note 3.

**567.** See note 1.

**568.** IV. MEASURE OF DAMAGES. — See note 1.

**569.** Market Value. — See note 1.

Express Co., (Supm. Ct. App. T.) 45 Misc. (N. Y.) 632; *Pittman v. Pacific Express Co.*, 24 Tex. Civ. App. 595.

An express company may, "by special contract with the shipper, limit its liability for losses resulting from its negligence." *Campe v. Weir*, (Supm. Ct. App. T.) 28 Misc. (N. Y.) 243.

A limitation of liability to "less than the use of ordinary care" is not binding on the shipper. *U. S. Express Co. v. Burke*, 94 Ill. App. 29.

"Forwarders Only." — The limiting of an express company's liability to that of a forwarder does not relieve the company for a failure to return a shipment stopped *in transitu*. *Rosenthal v. Weir*, 54 N. Y. App. Div. 275, *affirmed* 170 N. Y. 148.

*Limitation of Liability to Own Line.* — A clause in the contract which limits the express company's liability to losses occurring on its own lines does not relieve it from liability for a delivery made to a person other than the consignee. *Security Trust Co. v. Wells*, 81 N. Y. App. Div. 426, *affirmed* 178 N. Y. 620.

**563. 1. Shipper's Signature Unnecessary.** — *Adams Express Co. v. Carnahan*, 29 Ind. App. 606, 94 Am. St. Rep. 279; *Graves v. Adams Express Co.*, 176 Mass. 280. See also *Bernstein v. Weir*, (Supm. Ct. App. T.) 40 Misc. (N. Y.) 635. But see *Jacobson v. Adams Express Co.*, 1 Ohio Cir. Dec. 212.

2. *Assent Presumed from Acceptance.* — *Graves v. Adams Express Co.*, 176 Mass. 280; *Bernstein v. Weir*, (Supm. Ct. App. T.) 40 Misc. (N. Y.) 635; *Mills v. Weir*, 82 N. Y. App. Div. 396.

*Clear Proof of Express Assent Necessary.* — *Adams Express Co. v. Bratton*, 106 Ill. App. 563.

**565. 2. What Law Governs.** — *McMillan v. American Express Co.*, 123 Iowa 236; *Powers Mercantile Co. v. Wells*, 93 Minn. 143; *Pittman v. Pacific Express Co.*, 24 Tex. Civ. App. 595. But see *Jacobson v. Adams Express Co.*, 1 Ohio Cir. Dec. 212.

*Limitation of Time* "is governed by the law of the forum in which the suit is brought." *Adams Express Co. v. Walker*, 83 S. W. Rep. 106, 26 Ky. L. Rep. 1025.

5. *Amount of Liability Limited.* — *Adams Express Co. v. Carnahan*, 29 Ind. App. 606, 94 Am. St. Rep. 279; *Graves v. Adams Express Co.*, 176 Mass. 280; *Wilson v. Platt*, (Supm. Ct. App. T.) 84 N. Y. Supp. 143; *Rowan v. Wells*, 80 N. Y. App. Div. 31; *Frankfurt v. Weir*, (Supm. Ct. App. T.) 40 Misc. (N. Y.) 683; *Bernstein v. Weir*, (Supm. Ct. App. T.) 40 Misc. (N. Y.) 635. See also *Wells v. Bell*, 65 Ohio St. 408.

A limitation of liability is not binding on the

consignee where the express company failed to stop the goods *in transitu* when requested to do so. *Rosenthal v. Weir*, 54 N. Y. App. Div. 275, *affirmed* 170 N. Y. 148.

*Burden of Proof.* — The recitals in the written contract as to the value of the shipment are not conclusive, but the burden of controverting them and showing that they are not binding and enforceable is upon the shipper. *U. S. Express Co. v. Joyce*, (Ind. App. 1904) 69 N. E. Rep. 1015.

**566. 1. View that Amount May Be Limited Though Company Negligent.** — *Adams Express Co. v. Carnahan*, 29 Ind. App. 606, 94 Am. St. Rep. 279; *Bernstein v. Weir*, (Supm. Ct. App. T.) 40 Misc. (N. Y.) 635. See also *Wilson v. Platt*, (Supm. Ct. App. T.) 84 N. Y. Supp. 143.

2. *Contrary View.* — *Adams Express Co. v. Walker*, 83 S. W. Rep. 106, 26 Ky. L. Rep. 1025; *Gowling v. American Express Co.*, 102 Mo. App. 366.

*Illinois Statute.* — Common carriers cannot under Rev. Stat. Ill., 1899, c. 27, limit their common-law liability to make safe delivery. *Pittman v. Pacific Express Co.*, 24 Tex. Civ. App. 595. See also *Powers Mercantile Co. v. Wells*, 93 Minn. 143.

3. *A Limitation of Six Months* within which suit must be brought was held unenforceable, being an attempt to vary the statute. *Adams Express Co. v. Walker*, 83 S. W. Rep. 106, 26 Ky. L. Rep. 1025.

**567. 1. Limitation May Be Waived.** — *Frankfurt v. Weir*, (Supm. Ct. App. T.) 40 Misc. (N. Y.) 683.

*A Stipulation Limiting the Time for Presenting a Claim* is not binding on the consignor where the express company made a wrongful delivery of the shipment and a claim was presented as soon as the fraud was discovered. *Security Trust Co. v. Wells-Fargo Express Co.*, 81 N. Y. App. Div. 426, *affirmed* 178 N. Y. 620.

**568. 1. Measure of Damages.** — Where a trunk was held for several days for the payment of an excessive charge it was held that the owner could not recover damages sustained by inability to fill certain theatrical engagements without the contents of the trunk. *Brown v. Weir*, 95 N. Y. App. Div. 78.

**569. 1. Recovery for Loss.** — Where goods are damaged so as to constitute a total loss the consignee may refuse to accept, and hold the express company for the value. *Brand v. Weir*, (Supm. Ct. App. T.) 27 Misc. (N. Y.) 212.

*Measure of Damages.* — Damages for injury to goods are measured by the difference between the market value before the injury and that after the damage was done. *Wells-Fargo Ex-*



**570. EXPRESS TRUST.** — See note 4.

**572. EXTEND.** — See note 4.

**573.** See note 1.

**574. EXTENT, WRIT OF.** — See note 2.

[**EXTENUATE.** — See note 2a.]

[**EXTERIOR.** — See note 2b.]

**EXTINGUISH—EXTINGUISHMENT.** — See note 5.

**575.** See note 1.

press Co. v. Williams, (Tex. Civ. App. 1902) 71 S. W. Rep. 314.

**Limited Liability.**—Under a contract with an express company which limited the damages recoverable to an amount stipulated therein as the value of the shipment it was held that the shipper could recover the actual amount of loss caused by the negligence of the express company, though he disposed of the property at destination for a sum greater than the value named in the contract. U. S. Express Co. v. Joyce, (Ind. App. 1904) 69 N. E. Rep. 1015.

**570. 4.** Martin v. Martin, (Iowa 1903) 94 N. W. Rep. 493; Wilson v. Welles, 79 Minn. 53; Kaphan v. Toney, (Tenn. Ch. 1899) 58 S. W. Rep. 909.

**572. 4.** Flagler v. Hearst, 62 N. Y. App. Div. 25.

**An Extension of a Railway,** as the word signifies, is a prolongation of it from one of its termini to some other designated point. Trenton St. R. Co. v. Pennsylvania R. Co., 63 N. J. Eq. 281.

In Bohmer v. Haffen, 35 N. Y. App. Div. 388, the court said: "In considering the provisions of chapter 676 of the Laws of 1892, in relation to *extensions* by street surface railroad corporations, it would seem that the word *extend* was not intended to be used in its restricted sense of prolongation in a given direction, but rather that it was intended to enable the railroad company to acquire a right of construction, maintenance, and operation of additional routes which might be operated in connection with its existing lines."

**Extension of Note.** — A joint and several promissory note contained the following provision: "We, the makers, sureties, guarantors, and indorsers hereon, agree to *extensions* of this note without notice, hereby ratifying such *extensions* and binding ourselves for payment hereof as if no *extension* of time for or forbearance of payment had been granted or made." It was held that the words "*extension* of time for payment" and "forbearance" must be regarded as signifying an actual *extension* of time of payment and an actual forbearance to sue, resting upon a positive agreement therefor. Wellington Nat. Bank v. Thomson, 9 Kan. App. 667.

**Extension of Mortgage.** — See People's State Bank v. Francis, 8 N. Dak. 369.

**573. 1.** Municipal Council v. McMurray, (1900) A. C. 206; Rosin v. Lidgerwood Mfg. Co., 89 N. Y. App. Div. 246, quoting 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 572, 573; New York Cent., etc., R. Co. v. Buffalo, etc., Electric R. Co., 96 N. Y. App. 471.

"The word *extend*, both by etymology and by common usage, is an exceedingly flexible term,

lending itself to a great variety of meanings, which must in each case be gathered from the context, which is owing to the fact that it is essentially a relative term, referring to something already begun; hence, in a concrete sense, it has no persistent meaning, although abstractly it always implies increase or amplification as distinguished from inception, as, for instance, the *extension* of a man's business, or of his line of credit, or of the due-time of his debts. *Extension* in space may be in any direction; it is not confined to mere linear prolongation." Middlesex, etc., Traction Co. v. Metlar, 70 N. J. L. 98.

**574. 2.** Nason v. Fowler, 70 N. H. 293; Mt. Holly v. French, 75 Vt. 1.

**2a. Equivalent to Mitigate.** — The word *extenuate* in an instruction that implied malice would be inferred when the killing took place without any cause which would, in law, justify, excuse, or *extenuate* the homicide, has the same meaning as "mitigate," and refers to a reduction of the grade of the offense, as well as to a reduction of the punishment. Connell v. State, (Tex. Crim. 1904) 81 S. W. Rep. 746.

**2b. Exterior of Building—Lease.** — Under a lease of a hotel building, providing that the landlord should keep the *exterior* of the building in repair and the tenant the interior, it was held that a wooden platform or sidewalk running from the outer wall of the hotel building to a railroad platform, used for access to and egress from the hotel, and also as a refreshment pavilion in connection with the hotel, was embraced within the meaning of the word *exterior*, and that damages were recoverable from the landlord for injuries sustained because of his failure to keep such platform in repair. May v. Ennis, 78 N. Y. App. Div. 552.

**5.** In construing a state statute providing that no obligation or liability in favor of the state shall be remitted, released, or *extinguished*, the court said: "If there is any conflict in the statute, it must be found in the remaining words 'remitted,' 'released,' *extinguished*, and which, for the purposes of this case, may be considered as convertible terms prohibiting a cancellation of obligations of the class embraced in the constitution." Custer County v. Story, 26 Mont. 517.

**575. 1.** Woodrough v. Douglas County, (Neb. 1904) 98 N. W. Rep. 1002.

**Equivalent to Payment.** — Under a statute providing that partial payment on a debt bearing interest shall be first applied to the *extinguishment* of the interest then due, the word *extinguishment* as thus used is equivalent to the word "payment." Louisville Trust Co. v. Kentucky Nat. Bank, 102 Fed. Rep. 442.

# EXTORTION.

\* BY BASIL JONES.

- 576.** I. DEFINITION — The Ordinary Meaning. — See note 1.  
**577.** In Technical Sense. — See notes 1, 2.  
II. WHO MAY COMMIT — 1. In General. — See note 3.  
**579.** Effect of Statute Enumerating Officers or Classes. — See note 2.  
**580.** III. ESSENTIAL ELEMENTS — 1. The Intent — *a.* IN GENERAL. — See note 4.  
**581.** *c.* EFFECT OF IGNORANCE OF LAW. — See note 6.  
**582.** 2. Color of Office. — See note 6.  
**583.** 3. The Thing Extorted — *a.* IN GENERAL. — See note 2.  
*b.* RECEIVING HIGHER FEES THAN ALLOWED BY LAW. — See note 5.  
**584.** *c.* RECEIVING FEES WHERE NONE ARE DUE. — See notes 3, 4.  
**585.** *f.* VOLUNTARY PAYMENT TO OFFICER. — See note 4.  
**587.** IV. REMEDIES AND PUNISHMENT — 2. Civil Action — *b.* FOR PENALTY — (1) *In General.* — See note 4.  
**588.** (2) *Who May Sue for Penalty.* — See note 1.

**576.** 1. Extortion in Ordinary Sense. — State *v. Logan*, 104 La. 760, quoting 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 576.

Definition under Montana Statute. — *In re McCabe*, 29 Mont. 28.

Extortion under Color of Official Right as Defined by New York Penal Code, § 556. — *People v. Summers*, (Supm. Ct.) 40 Misc. (N. Y.) 384.

**577.** 1. Extortion in Technical Sense. — State *v. Logan*, 104 La. 760, quoting 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 577; *Com. v. Brown*, 23 Pa. Super. Ct. 470.

2. Extortion in Technical Sense Provided for by Statute. — State *v. Logan*, 104 La. 760, quoting 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 577.

Construction of Statute. — The Pennsylvania Act of May 26, 1897, providing for the recovery of a penalty for extortion, being a penal statute, is subject to strict construction, only to the extent, however, that nothing is to be taken by intentment against the party charged. *Wilson v. Barrett*, 24 Pa. Super. Ct. 68.

3. Who May Commit Extortion — In General. — *Com. v. Brown*, 23 Pa. Super. Ct. 470.

Chinese Inspector. — *Williams v. U. S.*, (C. C. A.) 93 Fed. Rep. 396.

School Director. — *Com. v. Brown*, 23 Pa. Super. Ct. 470.

**579.** 2. *Com. v. Brown*, 23 Pa. Super. Ct. 470.

**580.** 4. Question of Law. — Where, under the admitted state of facts, the officer has taken a fee in excess of that authorized by statute, it is the duty of the court to instruct that he is liable for the penalty imposed by statute, and an instruction leaving the question of liability to the jury is error. *Wilson v. Barrett*, 24 Pa. Super. Ct. 68.

**581.** 6. Ignorance of Law No Defense to Civil Action. — *Wilson v. Barrett*, 24 Pa. Super. Ct. 68.

**582.** 6. Indictment for Conspiracy to Extort. — *Com. v. Brown*, 23 Pa. Super. Ct. 470.

**583.** 2. The Thing Extorted in General. — See *Com. v. Brown*, 23 Pa. Super. Ct. 470.

5. Taking Higher Fees — Extortion under Statute. — *Mitchell v. Wheeler*, (Colo. App. 1904) 77 Pac. Rep. 361; *State v. Reeves*, 44 Fla. 179; *Wilson v. Barrett*, 24 Pa. Super. Ct. 68.

Statute Strictly Construed. — *Mitchell v. Wheeler*, (Colo. App. 1904) 77 Pac. Rep. 361.

**584.** 3. Under Colo. Sess. Laws 1891, p. 240, § 17, an officer charging, demanding, or taking any fees provided for by the statute, when the services for which the fees are prescribed are not actually done, is rendered liable to a penalty. *Mitchell v. Wheeler*, (Colo. App. 1904) 77 Pac. Rep. 361.

4. Under Mills's Annot. Colo. Stat., § 1501, any officer wilfully and knowingly demanding or receiving any fee or compensation where none is authorized by law is liable to imprisonment, fine, and civil action for three times the value of the amount so taken. *Mitchell v. Wheeler*, (Colo. App. 1904) 77 Pac. Rep. 361.

**585.** 4. Indictment for Conspiracy to Extort. — In an indictment for conspiracy to extort money it is not necessary to allege that the payment was not made voluntarily. *Com. v. Brown*, 23 Pa. Super. Ct. 470.

**587.** 4. Action for Penalty under Statute in United States. — *Mitchell v. Wheeler*, (Colo. App. 1904) 77 Pac. Rep. 361; *State v. Reeves*, 44 Fla. 179; *O'Shea v. Kavanaugh*, 65 Neb. 639; *Wilson v. Barrett*, 24 Pa. Super. Ct. 68.

Remedy by Motion to Retax Costs Does Not Prevent Recovery of Penalty. — *O'Shea v. Kavanaugh*, 65 Neb. 639.

**588.** 1. Party Damaged to Sue for Penalty. — *State v. Reeves*, 44 Fla. 179.

Action by Partnership. — A cause of action in favor of a copartnership against an officer to

**588. EXTRA.** — See note 5.

recover the penalty provided by statute does not abate by the dissolution of the copartnership, but survives to the individual members. *O'Shea v. Kavanaugh*, 65 Neb. 639.

**588. 5. An Extra Brakeman** has been de-

scribed to mean one who has no regular employment but takes the place of a regular employee when off duty. *Louisville, etc., R. Co. v. Mulfinger*, (Ky. 1904) 80 S. W. Rep. 499.

## EXTRADITION

BY BASIL JONES.

**591. I. INTERNATIONAL EXTRADITION — 1. Definition.** — See note 1.

**3. In the Absence of Treaty — No Extradition in Absence of Treaty.** — See note 4.

**592. Surrender of Fugitive as a Matter of Comity.** — See note 1.

**593. 4. Extradition Treaties — b. CONSTITUTIONALITY.** — See note 1.

**5. Extradition Laws.** — See note 2.

**6. Offenses for Which Fugitive May or May Not Be Extradited —**

**a. GENERALLY.** — See note 4.

**591. 1.** "Extradition may be sufficiently defined to be the surrender by one nation to another of an individual accused or convicted of an offense outside of its own territory, and within the territorial jurisdiction of the other, which, being competent to try and to punish him, demands the surrender." *Terlinden v. Ames*, 184 U. S. 270.

**4. No Obligation to Deliver Fugitive in Absence of Treaty.**—*Terlinden v. Ames*, 184 U. S. 270; *Knox v. State*, 164 Ind. 226.

**Treaty Not Necessary to Validity of Statute Providing for Extradition.**—*Grin v. Shine*, 187 U. S. 181.

"Congress has the right to provide for the return of a fugitive criminal to the foreign country from which he has fled; and, waiving any requirement of entire reciprocity from the foreign country, it may, by statute, without treaty, provide for such return. This power has been exercised by the federal government for years without question. It is a power exercised by every sovereign state, sometimes in accordance with the provisions of a treaty, sometimes without any treaty, as a matter of international comity." *In re Neely*, 103 Fed. Rep. 626, affirmed 180 U. S. 121.

**592. 1. Discharge of One Committed for Extradition — United States Rev. Stat., § 5273.** — See *Wright v. Henkel*, 190 U. S. 40; *In re Dawson*, 101 Fed. Rep. 253.

**Under the English Treaty with Germany**, provision is also made for the discharge of a person arrested for extradition where he has been detained for two months. It seems that where sufficient evidence upon the original charge has been produced within two months of the arrest to justify a committal upon that charge, the magistrate is entitled, after the expiration of the two months, to receive evidence upon charges other than that on which the prisoner was arrested. *In re Blumm*, (1901) 1 K. B. 764.

**593. 1. Extradition Treaties Constitutional.** — *Neely v. Henkel*, 180 U. S. 109; *Terlinden v.*

*Ames*, 184 U. S. 270; *In re Neely*, 103 Fed. Rep. 626, affirmed 180 U. S. 121.

**Act of June 6, 1900, Regulating Extradition Between United States and Cuba Constitutional.** — *Neely v. Henkel*, 180 U. S. 109.

**2. Delivery of Fugitive Without Act of Congress.** — *Terlinden v. Ames*, 184 U. S. 270.

**4. See** *In re Frank*, 107 Fed. Rep. 272; *U. S. v. Piazza*, 133 Fed. Rep. 998.

**Offense Must Be Crime in Both Countries.** — The general principle of international law is that in all cases of extradition the act on account of which extradition is demanded must be considered criminal in both countries. *Wright v. Henkel*, 190 U. S. 40.

**Offenses under State Laws.** — In determining whether or not the act for which extradition is demanded is a crime, reference is had to the laws of the state where the fugitive is found, not alone to the laws of the United States. *Wright v. Henkel*, 190 U. S. 40; *Pettit v. Walshe*, 194 U. S. 205; *In re Wright*, 123 Fed. Rep. 463.

**Ascertainment as to Whether Offense Is Extraditable under the Treaty.** — "A demand for extradition will not be made unless the authorities of the country requesting it are satisfied, from the papers and evidence submitted, that the offense for which extradition is sought is one that, as the law then is in the demanding country, will be fairly embraced within the terms of the treaty; and the authorities of the country from which the surrender is sought are not authorized to grant the warrant of extradition unless upon examination it appears that the offense upon which the application is based is one which, under the law then existing in that country, would come within the extraditable crimes named in the treaty." *Cohn v. Jones*, 100 Fed. Rep. 639.

Where there is evidence of the commission of an act which is recognized as a crime by the law of *Canada* and the law of the country demanding the extradition of the accused person,



**594.** *b.* POLITICAL OFFENSES. — See note 1.

*d.* OFFENSES NOT ENUMERATED IN TREATY. — See note 5*a*.

**595.** *e.* OFFENSES COMMITTED IN A THIRD COUNTRY. — See note 2.

**7.** Who May Be Extradited — *a.* GENERALLY. — See note 3.

**596.** *b.* CITIZENS OF ASYLUM COUNTRY — No Exemption to Citizens in Absence of Treaty Stipulation. — See note 2.

**597.** 8. Trial of Prisoner in Certain Cases — *a.* FOR OFFENSE OTHER THAN THAT FOR WHICH HE WAS EXTRADITED — No Trial for Different Offense. — See note 2.

**599.** II. INTERSTATE EXTRADITION — 3. The Constitutional Provision. — See notes 6, 7, 8.

4. Extradition Laws — *a.* THE ACT OF CONGRESS. — See note 9.

**600.** 5. Status of the Territories in Respect to Extradition. — See note 8.

**601.** 6. Extradition to and from the District of Columbia — Act of Congress Providing for Extradition from District. — See note 1.

7. Extraditable Crimes. — See notes 3, 5.

extradition will lie, though in the proceedings therefor the offense is referred to by a wrong name. *In re Gross*, 25 Ont. App. 83.

Whether Extraditable Crime Has Been Committed a Mixed Question of Law and Fact. — *Terlingen v. Ames*, 184 U. S. 270.

Crimes Not Limited to Common-law Definition. — *Cohn v. Jones*, 100 Fed. Rep. 639. See also *State v. Spiegel*, 111 Iowa 701.

Use of General Terms. — When an extradition treaty uses general names, such as "murder," "arson," and the like, in defining the classes of crimes for which persons may be extradited, the question whether a given offense comes within the treaty must be determined by the law as it exists in the two countries at the time the extradition is applied for. *Cohn v. Jones*, 100 Fed. Rep. 639. See also *State v. Spiegel*, 111 Iowa 701.

Extraditable Offenses under Treaty with Canada. — *Re Cohen*, 8 Can. Crim. Cas. (Ont.) 251.

"Child Stealing" Extraditable Offense under Treaty with Canada. — *Rex v. Watts*, 3 Ont. L. Rep. 368.

What Constitutes Embezzlement Within Provisions of Treaty with France. — *In re Balensi*, 120 Fed. Rep. 864.

Embezzlement an Extraditable Crime under Treaty with Germany. — *In re Reiner*, 122 Fed. Rep. 109.

**594.** 1. *Knox v. State*, 164 Ind. 226.

The English Treaties seem also to exclude offenses of a political nature. *Rex v. Holloway Prison*, 71 L. J. K. B. 935, 87 L. T. N. S. 332.

5*a.* Offenses Not Enumerated in Treaty. — *Knox v. State*, 164 Ind. 226.

Offenses Not in Purview of Treaty at Time of Adoption Not Included. — *Cohn v. Jones*, 100 Fed. Rep. 639.

**595.** 2. The fact that the country where the offense was committed subsequently comes under the control of the power seeking extradition is not sufficient, but it must have been in the jurisdiction of that power at the time the offense was committed. *In re Taylor*, 118 Fed. Rep. 196.

3. Statutes Regulating Extradition with Foreign Territory under Control of United States. — See *Neely v. Henkel*, 180 U. S. 109.

Indictment Not Essential. — Under the treaty with Mexico providing for the surrender of per-

sons accused of certain crimes it is not essential that a person shall have been charged or accused in an indictment, but it is sufficient if the offense is charged in an information, where charge upon information is in due form of law in the state where the alleged crime was committed. *State v. Rowe*, 104 Iowa 323.

**596.** 2. *In re Neely*, 103 Fed. Rep. 626, affirmed 180 U. S. 121.

Under the Act of June, 1900, regulating extradition with foreign countries occupied by or under the control of the United States, it is not a function of the court to determine whether or not the fugitive will have a fair and impartial trial, but solely to ascertain whether the evidence shows a probable cause that the fugitive is guilty of the offense charged. *In re Neely*, 103 Fed. Rep. 631, affirmed 180 U. S. 109.

**597.** 2. Prisoner Cannot Be Tried for Offense Other than That for Which He Was Extradited. — *Cohn v. Jones*, 100 Fed. Rep. 639; *Knox v. State*, 164 Ind. 226.

Trial for Different Offense — Arrest While Voluntarily Returning. — One who is arrested on an American vessel while voluntarily returning, though after his extradition has been agreed on with a foreign government, may be tried for another offense than that which formed the basis of the issuance of the extradition papers. *Ward v. State*, 102 Tenn. 724.

**599.** 6. Constitutional Provision Relating to Interstate Extradition. — See also *Eaton v. West Virginia*, (C. C. A.) 91 Fed. Rep. 760.

7. See *Ex p. Dawson*, (C. C. A.) 83 Fed. Rep. 306.

8. *Matter of Maney*, 20 Wash. 509, 72 Am. St. Rep. 130.

9. *Hyatt v. People*, 188 U. S. 691; *Eaton v. West Virginia*, (C. C. A.) 91 Fed. Rep. 760; *Matter of Foye*, 21 Wash. 250.

**600.** 8. Power of Federal Judges of Indian Territory under Act of May 2, 1890. — *Ex p. Dickson*, (Indian Ter. 1902) 69 S. W. Rep. 943.

Power of Congress to Regulate Extradition to and from Territories. — *Ex p. Dickson*, (Indian Ter. 1902) 69 S. W. Rep. 943.

**601.** 1. *Hayes v. Palmer*, 21 App. Cas. (D. C.) 450.

3. Offense Charged Must Be Public Offense. — *In re Tod*, 12 S. Dak. 393, 76 Am. St. Rep. 616.

**601. 8. Who May Be Extradited** — *a.* **MUST BE A PERSON CHARGED WITH CRIME.** — See note 6.

*b.* **MUST BE A FUGITIVE FROM JUSTICE** — (1) *Generally.* — See note 7.

**602.** (2) *Who Is a Fugitive from Justice* — *aa.* **GENERALLY.** — See notes 2, 3.

**603.** But the Mere Fact that the Accused Has Left the Jurisdiction. — See note 1.

*bb.* **MUST HAVE BEEN ACTUALLY PRESENT IN DEMANDING STATE.** — See note 3.

**604.** See note 1.

(3) *Whether Accused Is a Fugitive a Question for Executive.* — See note 4.

**601. 5.** *Katyuga v. Cosgrove*, 67 N. J. L. 213. See also *State v. Justus*, 84 Minn. 237.

**Finding of Indictment in Sister State Prima Facie Evidence that Acts Charged Constitute a Crime.** — *In re Renshaw*, (S. Dak. 1904) 99 N. W. Rep. 83.

**6.** *In re Strauss*, (C. C. A.) 126 Fed. Rep. 327; *State v. Clough*, 71 N. H. 594; *In re Renshaw*, (S. Dak. 1904) 99 N. W. Rep. 83; *In re Tod*, 12 S. Dak. 393, 76 Am. St. Rep. 616, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 601; *Ex p. Dickson*, (Indian Ter. 1902) 69 S. W. Rep. 943. See also *People v. Stockwell*, 135 Mich. 341, 10 Detroit Leg. N. 805; *Katyuga v. Cosgrove*, 67 N. J. L. 213.

**7. Accused Must Be a Fugitive from Justice.** — *In re Strauss*, (C. C. A.) 126 Fed. Rep. 327; *In re Tod*, 12 S. Dak. 393, 76 Am. St. Rep. 616, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 601; *Matter of Foye*, 21 Wash. 250.

**602. 2. Who Is a Fugitive from Justice.** — *In re Tod*, 12 S. Dak. 393, 76 Am. St. Rep. 616.

**Convicted Persons Passing Through Another State** while being taken to the penitentiary are not fugitives from justice so that the officer in whose charge they are is required to extradite them before conducting them to their destination. *Matter of Maney*, 20 Wash. 509, 72 Am. St. Rep. 130.

**3.** *Hyatt v. People*, 188 U. S. 691; *State v. Clough*, 71 N. H. 594; *In re Tod*, 12 S. Dak. 393, 76 Am. St. Rep. 616; *Ex p. Dickson*, (Indian Ter. 1902) 69 S. W. Rep. 943. See also *Hayes v. Palmer*, 21 App. Cas. (D. C.) 450.

**603. 1.** *In re Tod*, 12 S. Dak. 393, 76 Am. St. Rep. 616.

**3. Actual Presence of Accused Necessary.** — *Hyatt v. People*, 188 U. S. 691; *Munsey v. Clough*, 196 U. S. 364; *Hayes v. Palmer*, 21 App. Cas. (D. C.) 450; *State v. Clough*, 71 N. H. 594.

The surrender of one accused of crime in another state, in violation of the rule that extradition will be granted only where the offense was committed by one actually present in the demanding state, is not warranted on the theory that it may be shown on the trial that the accused actually committed the crimes at a later day than laid in the indictment, while temporarily in the state for a few hours, where no claim is made that such is the fact. *People v. Hyatt*, 172 N. Y. 176, 92 Am. St. Rep. 706, affirmed 188 U. S. 691.

The doctrine of the necessity of the corporeal presence within a state of an offender at the time of the commission of an alleged offense therein, to render him a fugitive from justice

and extraditable from another state, does not tend to render the several states asylums for criminals who may inflict injury upon persons or property within a state when not actually present therein, since each state has power to punish crimes committed within its borders. *People v. Hyatt*, 172 N. Y. 176, 92 Am. St. Rep. 706, affirmed 188 U. S. 691.

**Subsequent Presence Insufficient.** — That one not personally present in a state at the date of the commission of the alleged crime of larceny and false pretense was subsequently present in the state for a single day nearly a year before the institution of any prosecution against him does not entitle such state to demand him from another as fugitive from justice. *People v. Hyatt*, 172 N. Y. 176, 92 Am. St. Rep. 706, affirmed 188 U. S. 691.

**604. 1.** One who has committed crimes in the state may be extradited therefor, although the indictment upon which the executive warrant was issued also charges the commission of crimes after his departure from the state. *State v. Clough*, 71 N. H. 594.

**4.** *Munsey v. Clough*, 196 U. S. 364; *Hayes v. Palmer*, 21 App. Cas. (D. C.) 450; *Katyuga v. Cosgrove*, 67 N. J. L. 213; *State v. Clough*, 71 N. H. 594; *State v. Clough*, 72 N. H. 178. See also *State v. Justus*, 84 Minn. 237; *Ex p. White*, 39 Tex. Crim. 497; *Matter of Baker*, 21 Wash. 259; *In re Sylvester*, 21 Wash. 263; *Matter of Foye*, 21 Wash. 250.

**Executive Writ Prima Facie Evidence that Accused Is Fugitive from Justice.** — *Hyatt v. People*, 188 U. S. 691; *In re Bloch*, 87 Fed. Rep. 981; *Eaton v. West Virginia*, (C. C. A.) 91 Fed. Rep. 760; *Hayes v. Palmer*, 21 App. Cas. (D. C.) 450; *State v. Justus*, 84 Minn. 237; *State v. Clough*, 71 N. H. 594; *Katyuga v. Cosgrove*, 67 N. J. L. 215; *People v. Hyatt*, 172 N. Y. 176, 92 Am. St. Rep. 706, affirmed 188 U. S. 691; *In re Renshaw*, (S. Dak. 1904) 99 S. W. Rep. 83.

**Compliance with Legal Prerequisites Presumed.** — It seems to be well settled that the warrant of a governor of a state, authorizing the extradition of a person charged with an offense against the laws of a sister state, is *prima facie* evidence that all essential legal prerequisites have been observed; and if the proceedings, when produced, appear to be regular, such presumption becomes conclusive evidence of the right to extradite the person charged with the offense. *People v. Police Com'r*, 100 N. Y. App. Div. 483.

**Legal Proof Not Essential.** — *State v. Clough*, 72 N. H. 178.

**604.** *c.* PERSON IN CUSTODY OF ASYLUM STATE — Postponement of Surrender. — See notes 6, 7.

Waiver of Jurisdiction by Asylum State. — See note 8.

**605.** 9. Duty and Authority of Executive in Respect to Arrest and Delivery of Fugitive — *a.* GENERAL CHARACTER OF EXECUTIVE DUTY — No Discretion in Executive. — See notes 1, 2.

Executive Duty an Imperfect Obligation. — See note 3.

*b.* REVOCATION OF EXECUTIVE WARRANT. — See note 4.

**606.** *d.* POWER OF COURTS TO REVIEW ACTION OF EXECUTIVE. — See note 2.

10. Trial of Prisoner in Certain Cases — *a.* FOR OFFENSE OTHER THAN THAT FOR WHICH HE WAS EXTRADITED. — See note 4.

**607.** *b.* IN A CIVIL PROSECUTION. — See notes 1, 2.

Extradition Procured as Pretext to Bring Accused into Jurisdiction. — See note 3.

*c.* WHEN BROUGHT INTO JURISDICTION BY FORCE OR UNDER INVALID PROCESS. — See notes 5, 6, 7.

11. Arrest of Fugitive Before Demand. — See note 9.

**608.** 12. Appointment and Character of Agent to Receive Fugitive — Appointment of Receiving Agent. — See note 2.

**604.** 6. Person Held in Custody of Asylum State. — *People v. Hagan*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 85, 15 N. Y. Crim. 346.

Extradition of Person at Large on Bail Postponed. — *People v. Hagan*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 85, 15 N. Y. Crim. 346.

7. See *People v. Hagan*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 85, 15 N. Y. Crim. 346.

8. *People v. Hagan*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 85, 15 N. Y. Crim. 346.

Waiver of Jurisdiction an Executive Function. — *People v. Hagan*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 85, 15 N. Y. Crim. 346.

**605.** 1. *In re Tod*, 12 S. Dak. 393, 76 Am. St. Rep. 616.

Executive Cannot Delegate Duties. — The duty of examining requisition papers, passing upon their validity, and issuing the warrant devolves upon the executive personally and cannot be delegated. *In re Tod*, 12 S. Dak. 393, 76 Am. St. Rep. 616.

Requisition May Be Made by Acting Governor. — *State v. Justus*, 84 Minn. 237.

2. Duty of Executive Absolute. — *People v. Hyatt*, 172 N. Y. 176, 92 Am. St. Rep. 706, affirmed 188 U. S. 691; *Matter of Foye*, 21 Wash. 250.

3. No Power to Compel Executive to Deliver Fugitive. — *Katyuga v. Cosgrove*, 67 N. J. L. 213.

4. Executive Warrant May Be Revoked. — See *People v. Hagan*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 85, 15 N. Y. Crim. 346.

**606.** 2. Executive Action Reviewable. — *Munsey v. Clough*, 196 U. S. 364; *Eaton v. West Virginia*, (C. C. A.) 91 Fed. Rep. 760; *State v. Clough*, 72 N. H. 178; *People v. Police Com'r*, 100 N. Y. App. Div. 483; *In re Tod*, 12 S. Dak. 393, 76 Am. St. Rep. 616. See also *Hyatt v. People*, 188 U. S. 691. See also *Ex p. Dawson*, (C. C. A.) 83 Fed. Rep. 306; *State v. Clough*, 71 N. H. 594.

Burden of Proving Illegality of Warrant on Defendant. — *In re Renshaw*, (S. Dak. 1904) 99 N. W. Rep. 83; *Ex p. White*, 39 Tex. Crim. 497.

Compliance of Executive with Statutory Requirements Presumed. — *In re Tod*, 12 S. Dak. 393,

76 Am. St. Rep. 616; *Ex p. White*, 39 Tex. Crim. 497.

4. Fugitive May Be Tried for Different Offense from That for Which He Was Surrendered. — *In re Walker*, 61 Neb. 803; *Knox v. State*, 164 Ind. 226. See also *State v. Dunn*, 66 Kan. 483.

**607.** 1. No Exemption from Civil Prosecution. — *In re Walker*, 61 Neb. 803.

2. Contrary Doctrine. — *White v. Marshall*, 23 Ohio Cir. Ct. 376.

One who after having been extradited is released on bail, and thereafter voluntarily returns to stand trial on the charge on which he was extradited, is not subject to civil process when he does not delay in leaving the jurisdiction after his acquittal. *Murray v. Wilcox*, 122 Iowa 188, 101 Am. St. Rep. 263.

Civil Prosecution Arising from Same Transaction. — One voluntarily returning to be tried on a criminal charge cannot again be imprisoned on a capias for a debt growing out of the crime. *Pavona v. Di Jorio*, 23 Pa. Co. Ct. 382.

3. See *In re Walker*, 61 Neb. 803; *White v. Marshall*, 23 Ohio Cir. Ct. 376.

5. *People v. Hyatt*, 172 N. Y. 176, 92 Am. St. Rep. 706, affirmed 188 U. S. 691; *Ex p. Baker*, 43 Tex. Crim. 281, 96 Am. St. Rep. 871; *White v. Marshall*, 23 Ohio Cir. Ct. 376; *Ex p. Camp*, 8 Ohio Dec. 681, 7 Ohio N. P. 614.

6. Kidnapping Prisoner. — *People v. Hyatt*, 172 N. Y. 176, 92 Am. St. Rep. 706, affirmed 188 U. S. 691; *Ex p. Camp*, 8 Ohio Dec. 681, 7 Ohio N. P. 614.

7. *People v. Hyatt*, 172 N. Y. 176, 92 Am. St. Rep. 706, affirmed 188 U. S. 691.

9. Arrest under Magistrate's Warrant in Pennsylvania. — *Com. v. Rhodes*, 8 Pa. Dist. 732.

Period of Detention. — *Com. v. Rhodes*, 8 Pa. Dist. 732.

Right to Give Bail. — *Com. v. Rhodes*, 8 Pa. Dist. 732.

**608.** 2. Compensation of Receiving Officer under Statutes. — *Kroutinger v. Board of Examiners*, 8 Idaho 463; *Wilson v. Bradley*, 105 Ky. 52, affirmed (Ky. 1899) 48 S. W. Rep. 1088; *State v. Allen*, 180 Mo. 27; *Goldfon v. Allegheny County*, 8 Pa. Dist. 387, 30 Pittsb.



- 610. EXTRAORDINARY CARE.** — See note 1.  
**EXTRAORDINARY DILIGENCE.** — See note 2.  
**EXTREME.** — See note 4.  
**[EYE-SPLICE.** — See note 5*a*.]  
**FABRIC.** — See note 6.  
**611. FACE.** — See note 2.

Leg. J. N. S. (Pa.) 16; Bose *v.* York County, 11 York Leg. Rec. (Pa.) 77.

**610. 1.** See Cowden *v.* Shreveport Belt R. Co., 106 La. 239.

**2.** Florida Cent., etc., R. Co. *v.* Lucas, 110 Ga. 121.

**4. Extreme Bodily or Mental Weakness — Testamentary Capacity.** — See Matter of Nelson, 132 Cal. 182.

**5*a*.** An *eye-splice* is one made by splicing the end of a rope into itself. Trapp *v.* McClellan, 68 N. Y. App. Div. 363.

**6. Revenue Laws.** — See Converse *v.* U. S., 113 Fed. Rep. 817.

**611. 2. Face Value.** — Supreme Council, etc., *v.* Storey, (Tex. Civ. App. 1903) 75 S. W. Rep. 901. See Olson *v.* Tanner, 117 Wis. 544.

**The Face of the Record** in matters pertaining to motions in arrest of judgment does not mean the *face* of the indictment. It embraces the record of the case as made up to that point. State *v.* Haines, 51 La. Ann. 731.

## FACTORS' ACTS.

BY B. B. CLARK.

**614. I. IN GENERAL.** — See note 1.

**615.** See note 2.

**616. II. CONSTRUCTION OF THE STATUTES — 1. General Rule.** — See note 2.  
**2. Who Are Agents Within the Meaning of the Statutes.** — See note 3.  
**Statutes Applicable Only to Mercantile Transactions.** — See note 4.

**619. 4. What Documents of Title Are Within the Statute.** — See note 3.

**621. 5. Character and Sufficiency of Agent's Possession — *b*. INTRUSTED**

**WITH** — Possession of Agent Must Be with Consent of Owner. — See note 1.

**623. 6. Persons Within the Protection of the Statutes — Must Correspond to Purchaser for Value.** — See note 2.

**624. Transaction Must Be in Ordinary Course of Business.** — See note 1.

**614. 1.** Foerderer *v.* Tradesmen's Nat. Bank, (C. C. A.) 107 Fed. Rep. 219; Wyeth *v.* Renz-Bowles Co., (Ky. 1902) 66 S. W. Rep. 825; Regier *v.* Craver, 54 Neb. 507.

**615. 2. Pennsylvania Act.** — See Foerderer *v.* Tradesmen's Nat. Bank, (C. C. A.) 107 Fed. Rep. 219.

**Scotland Act.** — See Inglis *v.* Robertson, (1898) A. C. 616.

**616. 2. Statutes Strictly Construed.** — Foerderer *v.* Tradesmen's Nat. Bank, (C. C. A.) 107 Fed. Rep. 219.

**3. Effect of Secret Agreement.** — One who is intrusted with the lawful evidence of the title to merchandise, to enable him to sell it and remit the proceeds, becomes an agent of the factor within the *New York Factors' Act*, though in a secret agreement between himself and his principal he is designated as a trustee. New York Security, etc., Co. *v.* Lipman, 157 N. Y. 551.

**4. Statutes Apply to Mercantile Agents Only.** — Inglis *v.* Robertson, (1898) A. C. 616.

**619. 3. Bill of Lading.** — See Cahn *v.* Pockett's Bristol Channel Steam Packet Co., (1899) 1 Q. B. 643.

**621. 1. Possession Must Be with Consent of Owner.** — Inglis *v.* Robertson, (1898) A. C. 616.

**Possession of Bill of Lading Where Draft Unaccepted.** — Where a bill of lading accompanied by a draft for acceptance is sent to the buyer, the fact that the buyer does not accept the draft does not prevent his possession of the bill of lading from being with the consent of the seller, so as to bring the transaction within the *English Sale of Goods Act* of 1893. Cahn *v.* Pockett's Bristol Channel Steam Packet Co., (1899) 1 Q. B. 643.

**623. 2. One Who Has Taken Goods under an Agreement of Hire and Purchase** is a person who had "agreed to buy goods" within the meaning of the *English Factors' Act* of 1889. Wyld *v.* Legge, 84 L. T. N. S. 121.

**624. 1. Transactions in Ordinary Course of Business.** — See Inglis *v.* Robertson, (1898) A. C. 616.

**The Mere Consignment of Goods to a Factor for Sale** does not invest him with the indicia of ownership so as to estop the consignor from recovering the property from one, though a *bona fide* purchaser, to whom the factor disposes of the goods outside of the ordinary course of business. Romeo *v.* Martucci, 72 Conn. 504, 72 Am. St. Rep. 327.

# FACTORS OR COMMISSION MERCHANTS.

BY B. B. CLARK.

## 628. I. DEFINITIONS AND EXISTENCE OF RELATIONSHIP — Definition of Factor.

— See note 1.

## 631. III. EXTENT OF AUTHORITY — 2. Implied Powers — *a.* TO SELL AND TO BUY GENERALLY — Power to Sell Implied. — See note 3.

### 632. Sale in Ordinary Course of Business. — See notes 1, 2.

Power to Buy Goods. — See note 3.

*b.* USAGE AS AFFECTING POWERS OF FACTOR — (1) *In General.*

— See note 5.

### 633. *c.* TO SELL IN NAME OF FACTOR. — See note 2.

*d.* TO SELL ON CREDIT. — See note 3.

### 634. *e.* TO TRANSFER GOODS IN PAYMENT OF FACTOR'S DEBT. — See note 4.

### 635. *f.* TO BARTER. — See note 1.

### 636. *j.* TO RESHIP TO OTHER MARKETS. — See note 2.

*k.* TO RECEIVE PAYMENT — (1) *In General.* — See note 3.

### 638. *p.* TO DELEGATE AUTHORITY. — See note 5.

**628. 1. Definition.** — *Romeo v. Martucci*, 72 Conn. 504, 72 Am. St. Rep. 327; *M. M. Walker Co. v. Dubuque Fruit, etc., Co.*, 113 Iowa 428, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 628; *Rowland v. Dolby*, 100 Md. 272, quoting 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 628; *White v. Boyd*, 124 N. Car. 177; *Northern Electrical Mfg. Co. v. J. C. Wagner Co.*, 108 Wis. 584; *Beardsley v. Schmidt*, 120 Wis. 405.

An agreement whereby the owner of a canning factory agrees to ship to another the entire output of his factory for sale on commission creates the relation of principal and factor, and does not make the factor a joint owner of the goods. *Elwell v. Coon*, (N. J. 1900) 46 Atl. Rep. 580.

**Consignment to Factor Distinguished from Sale.** — *Norton v. Fisher*, 113 Iowa 595; *Dorsh v. Lea*, 18 Pa. Super. Ct. 447; *Northern Electrical Mfg. Co. v. J. C. Wagner Co.*, 108 Wis. 584.

**Necessity for Possession.** — To constitute one a factor he must have the actual or constructive possession of the goods to be sold. *Willingham v. Rushing*, 105 Ga. 72; *People's Bank v. Frick Co.*, 13 Okla. 179.

**Power of Legislature to Regulate Business of Produce Commission Merchants.** — See *Lasher v. People*, 183 Ill. 226, 75 Am. St. Rep. 103; *People v. Berrien* Circuit Judge, 124 Mich. 664, 83 Am. St. Rep. 352 (requirement of bond and license fee unconstitutional); *State v. Wagener*, 77 Minn. 483, 77 Am. St. Rep. 681.

**631. 3. Implied Power to Sell.** — *Romeo v. Martucci*, 72 Conn. 504, 72 Am. St. Rep. 327; *Hassett v. Cooper*, 20 R. I. 585, wherein the contract was construed not to require prior submission to the consignor of the terms of sale before selling.

**632. 1. Sale in Ordinary Course of Business.** — *Halsey v. Bird*, 99 Fed. Rep. 525, 39 C. C. A.

638; *Foerderer v. Tradesmen's Nat. Bank*, 107 Fed. Rep. 219, 46 C. C. A. 243.

**A Sale of the Business Itself**, including stock in hand, good will, and merchandise held on consignment, is not a sale in the ordinary course of business. *Romeo v. Martucci*, 72 Conn. 504, 72 Am. St. Rep. 327.

**2. Regier v. Craver, etc., Plow Co.**, 54 Neb. 507.

**3. Becherer v. Asher**, 23 Ont. App. 202.

**5. Rule Applied to Factors.** — *Foerderer v. Tradesmen's Nat. Bank*, 107 Fed. Rep. 219, 46 C. C. A. 243; *Kelley v. Maguire*, 99 Ill. App. 317; *Macnutt v. Shaffner*, 37 Can. L. J. 406.

**633. 2. Factor May Sell in His Own Name.** — *Beardsley v. Schmidt*, 120 Wis. 405.

**3. Sales on Credit.** — *Western Union Cold Storage Co. v. Winona Produce Co.*, 84 Ill. App. 678, 94 Ill. App. 618, reversed 197 Ill. 457; *M. M. Walker Co. v. Dubuque Fruit, etc., Co.*, 113 Iowa 428; *People's Bank v. Frick Co.*, 13 Okla. 179.

**634. 4. Transfer in Payment of His Own Debt.** — *Halsey v. Bird*, 99 Fed. Rep. 525, 39 C. C. A. 638; *Childs v. Waterloo Wagon Co.*, 167 N. Y. 576, affirming 37 N. Y. App. Div. 242; *Hoffman v. Kramer*, 123 N. Car. 566; *People's Bank v. Frick Co.*, 13 Okla. 179; *Garden v. Neily*, 31 Nova Scotia 89; *Macnutt v. Shaffner*, 37 Can. L. J. 406.

**635. 1. Power to Barter Not Implied.** — See *Romeo v. Martucci*, 72 Conn. 504, 77 Am. St. Rep. 327.

**636. 2. Power to Reship Not Implied.** — See *Romeo v. Martucci*, 72 Conn. 504, 77 Am. St. Rep. 327.

**3. Factor May Receive Payment.** — *Adams v. Fraser*, (C. C. A.) 82 Fed. Rep. 211.

**638. 5. Delegation of Authority.** — *People's Bank v. Frick Co.*, 13 Okla. 179.

- 639.** *q.* TO PLEDGE — (1) *General Rule.* — See note 4.
- 641.** (2) *Qualifications of General Rule* — *Pledge to Extent of Factor's Lien* — See note 3.
- 642.** (4) *Remedy of Principal.* — See note 2.
- 643.** IV. DUTIES AND LIABILITIES OF PARTIES INTER SE — 1. Of Factor to Principal — *a.* USAGE AS AFFECTING DUTIES AND LIABILITIES OF FACTOR. — See note 3.
- 644.** *b.* GOOD FAITH — (1) *General Rule.* — See note 1.
- (2) *Making Profit Out of Agency.* — See note 2.
- 645.** (3) *Sales by Factor to Himself.* — See note 1.
- c.* FIDELITY TO INSTRUCTIONS — (1) *General Rule.* — See note 2.
- 647.** (4) *Particular Instructions* — (a) *Instructions as to Time of Sale.* — See note 2.
- 650.** (5) *Qualifications and Exceptions* — (c) *Change of Circumstances and Emergencies.* — See note 1.
- (d) *Advances by Factor* — *aa.* IN GENERAL — *In America.* — See note 3.
- 651.** *bb.* CONSIGNMENTS WITH INSTRUCTIONS. — See note 1.
- cc.* CONSIGNMENTS WITHOUT INSTRUCTIONS — *General Rule.* — See note 2.
- 652.** *Modified Rule.* — See note 3.
- dd.* SPECIAL AGREEMENTS AS TO SALE FOR REIMBURSEMENT. — See note 5.
- 653.** (e) *Ratification or Waiver of Departure from Instructions* — *By Acquiescence.* — See note 2.
- 654.** *d.* DUTY TO INFORM PRINCIPAL. — See note 6.

**639.** 4. Factor Cannot Pledge. — *Halsey v. Bird*, 99 Fed. Rep. 525, 39 C. C. A. 638; *Foerderer v. Tradesmen's Nat. Bank*, 107 Fed. Rep. 219, 46 C. C. A. 243; *Romeo v. Martucci*, 72 Conn. 504, 77 Am. St. Rep. 327.

**641.** 3. Pledge to Extent of Lien. — *Halsey v. Bird*, 99 Fed. Rep. 525, 39 C. C. A. 638; *Chambers v. Hubbard*, 51 La. Ann. 887.

**642.** 2. Trover Against Factor. — *Halsey v. Bird*, 99 Fed. Rep. 525, 39 C. C. A. 638.

**643.** 3. Usage as Affecting Duties and Liabilities of Factor. — *Charlotte Oil, etc., Co. v. Hartog*, 85 Fed. Rep. 150, 29 C. C. A. 56; *Kelley v. Maguire*, 99 Ill. App. 317.

*A Usage Contrary to the General Law.* — *Western Union Cold Storage Co. v. Winona Produce Co.*, 197 Ill. 457, 94 Ill. App. 618.

*Positive Instructions Control Usage.* — *Western Union Cold Storage Co. v. Winona Produce Co.*, 197 Ill. 457.

**644.** 1. Good Faith. — *Stirneman v. Smith*, 100 Fed. Rep. 600, 40 C. C. A. 581; *Benedict v. Inland Grain Co.*, 80 Mo. App. 449, 2 Mo. App. Rep. 598.

*Disputing Principal's Title.* — *Britton v. Ferrin*, 171 N. Y. 235.

**2.** *Buying up Debts Against Principal.* — *Britton v. Ferrin*, 171 N. Y. 235, *affirming* (Supm. Ct. App. Div.) 67 N. Y. Supp. 1129.

*The Factor Must Account for the Price Which He Actually Received*, though such selling price may be above the market price. *Armour v. Gaffey*, 30 N. Y. App. Div. 121, *affirmed* 165 N. Y. 630.

**645.** 1. Factor Cannot Purchase for Himself. — *State v. Edwards*, (Minn. 1905) 102 N. W. Rep. 607.

**2.** *Fidelity to Instructions Required.* — *Foerderer v. Tradesmen's Nat. Bank*, 107 Fed. Rep. 219, 46 C. C. A. 243; *Lippmann v. Brown*, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 632.

**647.** 2. Instructions as to Time of Sale. — *Willis v. Thacker*, 20 Tex. Civ. App. 233.

**650.** 1. *Selling Goods of a Perishable Nature to Prevent Loss* is an example of proper deviation from instructions. *Lippmann v. Brown*, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 632.

**3.** *Rule Allowing Factors to Sell to Reimburse for Charges.* — *Willingham v. Rushing*, 105 Ga. 72.

*Effect of Tender of Advances.* — After the principal has tendered to the factor the amount of his advances and charges and revoked the authority to sell, the factor cannot, on refusal of such tender, sell to reimburse himself. *M. M. Walker Co. v. Dubuque Fruit, etc., Co.*, 106 Iowa 245.

**651.** 1. *Sale Permitted After Reasonable Notice and Refusal to Repay.* — *Blaisdale Co. v. Lee*, 127 N. Car. 365, *citing* 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 651.

**2.** *Consignments Without Instructions.* — *M. M. Walker Co. v. Dubuque Fruit, etc., Co.*, 113 Iowa 428.

**652.** 3. *Notice to Principal Essential — Instruction Not to Sell.* — See *M. M. Walker Co. v. Dubuque Fruit, etc., Co.*, 113 Iowa 428.

**5.** *Agreement to Withhold Goods from Market.* — See *Blaisdale Co. v. Lee*, 127 N. Car. 365, wherein the particular agreement was held to be insufficient to show a waiver of the right to sell for repayment of advances.

**653.** 2. *Acquiescence.* — *Willis v. Thacker*, 20 Tex. Civ. App. 233.

**654.** 6. *Informing Principal.* — *Western Union Cold Storage Co. v. Winona Produce Co.*, 197 Ill. 457, *citing* 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 564; *Benedict v. Inland Grain Co.*, 80 Mo. App. 449, 2 Mo. App. Rep. 598.

*Circumstances Requiring Information as to Name of Purchaser.* — See *Mobile Fruit, etc., Co. v. Potter*, 78 Minn. 487; *Western Union Cold Storage Co. v. Winona Produce Co.*, 197 Ill. 457.



**655.** *e.* DUTY IN REGARD TO THE CARE OF GOODS — Injuries to Goods. — See note 1.

**658.** *g.* DUTY IN REGARD TO THE SALE — (2) *As to Time of Sale.* — See notes 3, 4, 5.

**659.** (4) *As to Price of Sale.* — See notes 1, 2.

Special Contract as to Price to Be Received. — See note 3.

(5) *In Regard to Credit Sales* — (a) *In General* — Contractual Liability on Credit Sales.. — See note 5.

**660.** (c) *Ascertaining Responsibility of Purchaser.* — See note 1.

(d) *Disclosing Name of Purchaser.* — See note 2.

**663.** *h.* CARE OF FUNDS — *Commingling Funds.* — See note 4.

**666.** *l.* KEEPING AND RENDERING ACCOUNTS — *Must Keep Regular Accounts.* — See note 8.

**667.** *Must Render Account.* — See note 1.

*m.* DEGREE OF SKILL AND DILIGENCE REQUIRED OF FACTOR — General Rule. — See note 3.

**668.** *Errors of Judgment.* — See note 1.

**655.** 1. *Care in Regard to Goods Consigned.* — *Hunter v. Davis*, (Iowa 1905) 103 N. W. Rep. 373 (death of a horse).

Where Goods Are Returned by the Factor in a Damaged Condition, the burden is upon him to show that the injury was such as might have occurred even with the exercise of due care. *Ives v. Freisinger*, 70 N. J. L. 257.

Degree of Care. — The factor must exercise such care as a reasonably prudent man would take of his own property. *Ives v. Freisinger*, 70 N. J. L. 257.

**658.** 3. *Time of Sale Within Sound Discretion of Factor.* — *Prokop v. Gourlay*, 65 Neb. 504, holding that the factor has a reasonable time within which to sell; *Willis v. Thacker*, 20 Tex. Civ. App. 233, holding that the factor is not liable for loss resulting from a decline in price where he has used reasonable diligence in making the sale.

4. *Unnecessary Delay in Sale.* — *Roberts v. Cobb*, 76 Minn. 420; *Benedict v. Inland Grain Co.*, 80 Mo. App. 449, 2 Mo. App. Rep. 598.

What Is Unreasonable Delay. — See *Usborne v. Stephenson*, 36 Oregon 328, 78 Am. St. Rep. 778 (delay of one year in the sale of hops).

5. *When Loss Results from Selling Instead of Holding.* — *Charlotte Oil, etc., Co. v. Hartog*, 85 Fed. Rep. 150, 29 C. C. A. 56.

**659.** 1. *Must Sell at Market Price.* — *Bouldin v. Atlantic Rice Mills Co.*, (Tex. Civ. App. 1905) 86 S. W. Rep. 795.

If, however, the factor exercises reasonable care and skill to obtain a fair market value, he is not liable, though he in fact sold the property below its market value. *Drumm-Flato Commission Co. v. Union Meat Co.*, 33 Tex. Civ. App. 587.

2. *No Liability for Failure to Sell Above Market Price.* — *Wise-Kottwitz Commission Co. v. Bond*, (Tenn. Ch. 1898) 47 S. W. Rep. 174.

3. *Special Contract as to Price to Be Received.* — *Mackenzie v. Hodgkin*, 126 Cal. 591, 77 Am. St. Rep. 209; *Estrella Vineyard Co. v. Butler*, 125 Cal. 232 (guaranty of price); *Childs v. Waterloo Wagon Co.*, 37 N. Y. App. Div. 242, affirmed 167 N. Y. 576.

An agreement by a factor to sell "for the highest obtainable price" does not increase his

common-law duty, but merely requires that he shall sell at the price which he is able to receive by the exercise of reasonable and diligent effort. *Craig v. Harrison Switzer Milling Co.*, 103 Ill. App. 486.

Proof of Guaranty of Price. — See *Wise-Kottwitz Commission Co. v. Bond*, (Tenn. Ch. 1898) 47 S. W. Rep. 174.

5. *Tustin Fruit Assoc. v. Earl Fruit Co.*, (Cal. 1898) 53 Pac. Rep. 693.

**660.** 1. *Reasonable Diligence as to Responsibility of Purchaser.* — *Western Union Cold Storage Co. v. Winona Produce Co.*, 94 Ill. App. 618, reversed 197 Ill. 457.

2. *When Purchaser's Name Should Be Disclosed.* — The law has no hard and fast rule that the principal shall be notified of the name of the purchaser, but if such information is necessary, or becomes necessary in order to enable the principal to act with reference to the sale, the duty at once arises and becomes obligatory on the factor. *Western Union Cold Storage Co. v. Winona Produce Co.*, 197 Ill. 457. See also *Mobile Fruit, etc., Co. v. Potter*, 78 Minn. 487.

**663.** 4. *Should Not Commingle Funds.* — *Compare Vandelle v. Rohan*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 239.

**666.** 8. *Must Keep Regular Accounts.* — *Armour v. Gaffey*, 30 N. Y. App. Div. 121, affirmed 165 N. Y. 630 (unfavorable presumptions from destruction of accounts).

*Acquiescence by Principal in Form of Account.* — See *Everingham v. Halsey*, 108 Iowa 710.

**667.** 1. *Must Render Account Within Reasonable Time.* — *Britton v. Ferrin*, 171 N. Y. 235, affirming (Supm. Ct. App. Div.) 67 N. Y. Supp. 1129; *Bouldin v. Atlantic Rice Mills Co.*, (Tex. Civ. App. 1905) 86 S. W. Rep. 795.

3. *Reasonable Skill and Diligence Required.* — *Roberts v. Cobb*, 76 Minn. 420; *Benedict v. Inland Grain Co.*, 80 Mo. App. 449, 2 Mo. App. Rep. 598; *Drumm-Flato Commission Co. v. Union Meat Co.*, 33 Tex. Civ. App. 587; *Bouldin v. Atlantic Rice Mills Co.*, (Tex. Civ. App. 1905) 86 S. W. Rep. 795.

**668.** 1. *Errors of Judgment.* — *Kelley v. Maguire*, 99 Ill. App. 317; *Craig v. Harrison-Switzer Milling Co.*, 103 Ill. App. 486.

- 668.** Question of Law or Fact. — See note 2.
- 669.** 2. Of Principal to Factor — *a.* REMUNERATION FOR SERVICES — (1) *In General* — Amount of Compensation. — See note 4.  
(2) *On What Transactions Commissions Allowable* — (a) *In General*. — See note 5.
- 670.** Sales. — See note 1.  
(b) *Acceptances and Advances*. — See note 6.
- 672.** (3) *Loss of Commissions* — Forfeiture for Misconduct. — See note 1.  
*b.* REIMBURSEMENT — (1) *Expenditures*. — See notes 4, 5, 6.  
(2) *Advances to Principal* — (a) *In General*. — See note 7.
- 673.** See note 1.  
Forfeiture in Whole or in Part of Right to Reimbursement. — See note 3.
- 674.** (b) *Primary and Secondary Liability of Principal* — Rule Requiring Resort to Goods Consigned. — See note 4.
- 676.** V. LIEN OF FACTOR — 1. *In General*. — See note 3.
- 678.** When Goods Are Sold. — See note 1.
- 679.** 2. The Indebtedness Secured — *a.* LIABILITIES INCURRED BY FACTOR. — See note 2.  
*b.* LIEN FOR GENERAL BALANCE OF ACCOUNTS. — See note 3.
- 680.** Balance of Account Against Factor. — See note 1.  
3. When Lien Attaches — *a.* NECESSITY FOR POSSESSION. — See note 3.

**668.** 2. Question for Jury or Court. — *Benedict v. Inland Grain Co.*, 80 Mo. App. 449, 2 Mo. App. Rep. 598; *Walker v. McCaull*, 13 S. Dak. 512 (duty to have wheat reinspected for grade).

**669.** 4. A Special Contract for commission at a certain percentage on sales does not entitle the factor to such commission on government bounties to which the principal was entitled, as in case of sugar bounties. *Romero v. Newman*, 50 La. Ann. 80.

**5.** On What Transactions Commissions Allowable. — *Allen-West Commission Co. v. Hudgins*, (Ark. 1905) 86 S. W. Rep. 289.

**670.** 1. Sales Not Made by Factor. — A factor is not entitled to commissions on subsequent sales by the principal to a person to whom the factor made the original sale. *Taylor v. Johnston*, (Tex. Civ. App. 1902) 70 S. W. Rep. 1022.

**6.** Commissions on Advances and Acceptances Allowed. — *Kahn v. Beclnel*, 108 La. 296.

**672.** 1. An Honest Mistake in Keeping Accounts does not forfeit commissions. *Everingham v. Halsey*, 108 Iowa 710.

**4.** Expenses Incurred Chargeable in Account. — *Vandelle v. Rohan*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 239; *Willis v. Thacker*, 20 Tex. Civ. App. 233.

**5.** Personal Liability of Principal for Expenditures. — *Kelley v. Maguire*, 99 Ill. App. 317; *Botany Worsted Works v. Wendt*, (Supm. Ct. Tr. T.) 22 Misc. (N. Y.) 156.

**6.** Protection of Lien. — A factor is not entitled to be reimbursed for expenses incurred in protecting his lien upon the appointment of a receiver for the principal. *Fidelity Ins. Trust, etc., Co. v. Roanoke Iron Co.*, 91 Fed. Rep. 19.

**7.** Principal Personally Liable for Payment of Advances. — *Lippmann v. Brown*, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 632. See also *Park v. Standard Spinning Co.*, 135 Fed. Rep. 860.

Advances on Purchase for Principal. — See

*Beakley v. Rainier*, (Tex. Civ. App. 1903) 78 S. W. Rep. 702.

**673.** 1. Proceeds of Sale Not Enough to Cover Advances — Recovery for Difference. — *Blaisdale Co. v. Lee*, 127 N. Car. 365; *Groos v. Brewster*, 34 Tex. Civ. App. 140.

**3.** Forfeiture of Right to Reimbursement. — *Foerderer v. Tradesmen's Nat. Bank*, 107 Fed. Rep. 219, 46 C. C. A. 243.

**674.** 4. Rule Requiring Resort to Goods Consigned. — *Compare Parmenter v. American Box-Mach. Co.*, 44 N. Y. App. Div. 47, appeal dismissed 162 N. Y. 648.

**676.** 3. Factor Entitled to Lien. — *Ryttenberg v. Schefer*, 131 Fed. Rep. 313; *Plattner Implement Co. v. International Harvester Co.*, (C. C. A.) 133 Fed. Rep. 376; *Ermeling v. Gibson Canning Co.*, 105 Ill. App. 196; *M. M. Walker Co. v. Dubuque Fruit, etc., Co.*, 106 Iowa 245; *Rowland v. Dolby*, 100 Md. 272, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 676; *Elwell v. Coon*, (N. J. 1900) 46 Atl. Rep. 580; *Porter v. Schendel*, (Supm. Ct. App. T.) 25 Misc. (N. Y.) 779.

**678.** 1. Proceeds of Goods Sold. — *Lafferty v. Hall*, (Ky. 1898) 44 S. W. Rep. 426.

**679.** 2. Factor to Purchase — Unliquidated Liability for Damages. — A factor purchasing goods for his principal has not a lien upon the goods purchased to indemnify him against a claim by a third person for damages arising out of the refusal of the principal to complete the purchase made by the factor. *Beakley v. Rainier*, (Tex. Civ. App. 1903) 78 S. W. Rep. 702.

**3.** Lien Covers General Balance. — *Johnson v. Clark*, 20 Ind. App. 247; *Lafferty v. Hall*, (Ky. 1898) 44 S. W. Rep. 426.

**680.** 1. Balance of Account Against Factor. — *M. M. Walker Co. v. Dubuque Fruit, etc., Co.*, 106 Iowa 245.

**3.** Possession Essential to Existence of Lien. — *Ryttenberg v. Schefer*, 131 Fed. Rep. 313; *Ermel-*

**681. b. CHARACTER OF POSSESSION — (1) In General — Possession Must Be Lawful and in Good Faith.** — See note 1.

**682. c. SUFFICIENCY OF POSSESSION — (1) In General — Constructive Possession.** — See note 3.

**685. 4. Waiver and Loss of Lien — b. CONTRACT INCONSISTENT WITH CONTINUANCE OF LIEN.** — See note 2.

c. SURRENDER OF POSSESSION. — See note 4.

**686. e. BY MISCONDUCT.** — See note 1.

**687. 6. Lien of Factor Is Personal.** — See notes 1, 3.

**688. 7. Enforcement of Lien — Where Goods Are Sold.** — See note 1.

**8. Rights of Factor Arising Out of Lien — a. IN GENERAL.** — See note 2.

**689. b. PRIORITY OF LIEN — Advances by Third Persons on Bill of Lading.** — See note 3.

**690. VI. RELATION OF FACTOR TO THIRD PERSONS — 1. Rights of Factor Against Third Persons — a. ACTION FOR PRICE OF GOODS SOLD.** — See note 1.

ing *v. Gibson Canning Co.*, 105 Ill. App. 196; *M. M. Walker Co. v. Dubuque Fruit, etc., Co.*, 106 Iowa 245; *Lafferty v. Hall*, (Ky. 1898) 44 S. W. Rep. 426; *Rowland v. Dolby*, 100 Md. 272, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 680; *Elwell v. Coon*, (N. J. 1900) 46 Atl. Rep. 580; *People's Bank v. Frick Co.*, 13 Okla. 179.

**Advances Made on Agreement to Consign.** — An equitable lien may exist for advances without possession, as where advances are made on agreement to consign, though the goods are not shipped to the factor. *Triest v. Noval*, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 386.

**681. 1. Possession of Factor Must Be Lawful.** — *People's Bank v. Frick Co.*, 13 Okla. 179.

**Possession Taken on Sunday.** — The fact that the factor who was entitled to the possession of the goods took possession of them on Sunday does not render such possession unlawful so as to defeat his lien. *Rosenbaum v. Hayes*, 10 N. Dak. 311.

**682. 3. Constructive Possession.** — *Rosenbaum v. Hayes*, 10 N. Dak. 311, wherein the court said: "It certainly cannot be claimed that the change of possession necessary to sustain a factor's lien must be of a more open and decisive character than is required in a sale of personal property, and it would seem that a transfer of possession which would be good as against attaching creditors of a vendor would be sufficient to sustain a factor's lien. No rule has been, or in the nature of things can be, formulated which will universally determine what particular facts will constitute a change of possession such as the law requires. Necessarily each case must turn upon its own facts."

**685. 2. Taking Security for the Indebtedness** was held in *Rosenbaum v. Hayes*, 10 N. Dak. 311, not to show a waiver of the lien.

**4. Surrender of Possession.** — *Erming v. Gibson Canning Co.*, 105 Ill. App. 196; *M. M. Walker Co. v. Dubuque Fruit, etc., Co.*, 106 Iowa 245; *Rowland v. Dolby*, 100 Md. 272; *Pallen v. Bogy*, 78 Mo. App. 88, 2 Mo. App. Rep. 232.

**Where the Factor Regains Possession**, his lien revives. *Rosenbaum v. Hayes*, 8 N. Dak. 461.

**686. 1. Wrongful Disposition of the Goods** may defeat the lien. *Foerderer v. Tradesmen's Nat. Bank*, (C. C. A.) 107 Fed. Rep. 219. See

also *M. M. Walker Co. v. Dubuque Fruit, etc., Co.*, 113 Iowa 428.

**Claiming Title to Property as a Waiver of Lien.** — See *Rosenbaum v. Hayes*, 8 N. Dak. 461.

**687. 1. Lien Is a Personal Privilege.** — *M. M. Walker Co. v. Dubuque Fruit, etc., Co.*, 106 Iowa 245.

**Transfer of Lien.** — The factor may transfer his lien on the goods for advances made by him and for proper charges due to him, but this must be done under certain conditions and limitations, with express notice of the lien to the party to whom the goods are delivered, and with the right on the part of the factor to retake them into his custody when he may be instructed to sell them. *Halsey v. Bird*, (C. C. A.) 99 Fed. Rep. 525.

**3. Assignee of Factor.** — *In re Meyer*, 106 Fed. Rep. 828.

**688. 1. Where the Factor Receives Notes in Payment** he cannot transfer such notes without rendering himself personally liable to his principal, but can only enforce his lien thereon by legal proceedings. *People's Bank v. Frick Co.*, 13 Okla. 179.

**2. Factor Has Special Property.** — *Rosenbaum v. Hayes*, 8 N. Dak. 461; *Beardsley v. Schmidt*, 120 Wis. 405.

Where a factor makes advances he obtains an interest in the property in his possession, and his right in the property is something more than a mere lien. *Willingham v. Rushing*, 105 Ga. 72.

**689. 3. One Who Has Made Advances Without Receiving Bill of Lading.** — *Johnson v. Clark*, 20 Ind. App. 247.

In *Hollins v. Hubbard*, 165 N. Y. 534, affirming 38 N. Y. App. Div. 629, it appeared that the principal drew a draft upon a bank and wrote to the bank a letter directing the factor to turn over to the bank the bill of lading sent to him. The factor, without knowledge of such draft, and upon receipt of the order from the bank for the bill of lading, promised to turn it over to the bank, whereupon the bank honored the draft. Subsequently the principal failed, and it was held that the lien of the factor was superior to the claim of the bank; that the factor had not by his promise to turn over the bill of lading to the bank, estopped himself from asserting his lien.

**690. 1. Factor May Sue for Price of Goods.** —



**690.** *c.* ACTION FOR TORTS RELATING TO GOODS. — See note 3.

**691.** *d.* PRINCIPAL'S RIGHT TO CONTROL ACTION BY FACTOR. — See note 2.

**2. Liability of Factor to Third Persons — a. FACTOR SELLING GOODS NOT BELONGING TO HIS PRINCIPAL.** — See note 4.

**692.** Factor with Notice of True Ownership. — See note 1.

**694. VII. RELATION OF PRINCIPAL TO THIRD PERSONS — 1. Liabilities and Rights Arising Out of Contracts by Factor — a. ACTION BY PRINCIPAL ON CONTRACT BY FACTOR — (2) *Undisclosed Principal.*** — See note 3.

**695. 2. Principal's Title to the Property and Its Proceeds, and Resulting Rights — a. IN GENERAL.** — See notes 6, 7.

*b.* ATTACHMENT AND EXECUTION BY CREDITORS OF FACTOR. — See note 8.

**696. c. PRINCIPAL'S RIGHT TO FOLLOW THE PROPERTY AND ITS PROCEEDS — (1) *In General.*** — See note 3.

**697.** (2) *Insolvency and Bankruptcy of Factor.* — See note 1.

**698. VIII. ACTIONS BY PRINCIPAL AGAINST FACTOR — 1. Assumpsit — Goods Sold and Delivered.** — See note 6.

**699. 2. Trover.** — See note 2.

**700. 4. Necessity for Demand in Action by Principal for Proceeds — Unreasonable Neglect in Rendering Account.** — See note 3.

**701. 5. Damages in Action Against Factor — c. FOR NEGLIGENCE OF DUTY — (1) *In General.*** — See note 2.

Beardsley *v.* Schmidt, 120 Wis. 405. See, however, Ermeling *v.* Gibson Canning Co., 105 Ill. App. 196.

**690. 3. Torts Relating to Goods.** — Porter *v.* Schendel, (Supm. Ct. App. T.) 25 Misc. (N. Y.) 779.

**691. 2. Principal's Control over Action by Factor.** — Beardsley *v.* Schmidt, 120 Wis. 405, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 691.

**4. Factor Selling Goods Not Belonging to His Principal — Contra.** — Flannery *v.* Harley, 117 Ga. 483; White *v.* Boyd, 124 N. Car. 177 (*distinguishing and disapproving* Abernathy *v.* Wheeler, 92 Ky. 320, 36 Am. St. Rep. 593, cited in the original note). See also Dolliff *v.* Robbins, 83 Minn. 498; Arkansas City Bank *v.* Cassidy, 71 Mo. App. 186; Hughes *v.* Abston, 105 Tenn. 70 (selling mortgaged property shipped from another state).

**Factor's Possession Due to Carrier's Negligence.** — It has been held that a factor is liable to a third person for selling property belonging to him though a common carrier was guilty of negligence in permitting the property to be diverted from its true destination by means of a forged waybill, and placed in the possession of the factor by a forged bill of lading. Johnson *v.* Martin, 87 Minn. 370, 94 Am. St. Rep. 706.

**692. 1. Notice of True Ownership.** — Peebles *v.* Werner, 51 S. Car. 401 (liability to person having lien on property); Post *v.* Houston Rice Milling Co., 35 Tex. Civ. App. 642.

**694. 3. Undisclosed Principal.** — Cushman *v.* Snow, 186 Mass. 169.

**695. 6. Title in Principal — *United States.*** — Ryttenberg *v.* Schefer, 131 Fed. Rep. 313; *In re Taft*, (C. C. A.) 133 Fed. Rep. 511.

*Connecticut.* — Romeo *v.* Martucci, 72 Conn. 504, 72 Am. St. Rep. 327.

*Massachusetts.* — Cushman *v.* Snow, 186 Mass. 169.

*Missouri.* — McDonald-Crowley-Farmer Commission Co. *v.* Boggs, 78 Mo. App. 28, 2 Mo. App. Rep. 134.

*New York.* — Parmenter *v.* American Box Mach. Co., 44 N. Y. App. Div. 47, *appeal dismissed* 162 N. Y. 648; Westervelt *v.* Phelps, 54 N. Y. App. Div. 244, *affirmed* 171 N. Y. 212; Britton *v.* Ferrin, 171 N. Y. 235, *affirming* (Supm. Ct. App. Div.) 67 N. Y. Supp. 1129; Haebler *v.* Luttgen, 2 N. Y. App. Div. 390, *affirmed* 158 N. Y. 693; Childs *v.* Waterloo Wagon Co., 37 N. Y. App. Div. 242, *affirmed* 167 N. Y. 576.

*Oklahoma.* — People's Bank *v.* Frick Co., 13 Okla. 179.

*Wisconsin.* — Gay *v.* Osborne, 102 Wis. 641.

**7. *In re Taft*, (C. C. A.) 133 Fed. Rep. 511.**

**8. Distress for Rent.** — Dorsh *v.* Lea, 18 Pa. Super. Ct. 447.

**696. 3. Equitable Principle of Following Trust Funds Applied to Factors.** — Bills *v.* Schliep, (C. C. A.) 127 Fed. Rep. 103; Deming Co. *v.* Webb, 76 Mo. App. 329; Regier *v.* Craver, 54 Neb. 507; Childs *v.* Waterloo Wagon Co., 167 N. Y. 576, *affirming* 37 N. Y. App. Div. 242; Britton *v.* Ferrin, 171 N. Y. 235, *affirming* (Supm. Ct. App. Div.) 67 N. Y. Supp. 1129; Farrell's Estate, 17 Pa. Super. Ct. 240.

**697. 1. Insolvency and Bankruptcy of Factor.** — *In re Taft*, (C. C. A.) 133 Fed. Rep. 511; Cushman *v.* Snow, 186 Mass. 169.

**698. 6. Action for Goods Sold and Delivered.** — Holden *v.* Maxfield, (Minn. 1904) 101 N. W. Rep. 955.

**699. 2. Trover and Conversion.** — Anker *v.* Smith, (Supm. Ct. App. T.) 87 N. Y. Supp. 479.

**700. 3. Unreasonable Neglect to Render Account.** — Haebler *v.* Luttgen, 2 N. Y. App. Div. 390, *affirmed* 158 N. Y. 693.

**701. 2. Where Goods Are Injured Through the Factor's Neglect** the principal may recover the difference in their value as damaged and

**704. IX. TERMINATION OF RELATION — By Principal. —** See note 4.

**705. Termination by Operation of Law. —** See note 3.

**X. CRIMINAL AND PENAL LIABILITY OF FACTOR. —** See note 4.

**706. FACTORY — MANUFACTORY. —** See note 1.

**708. FAIL — FAILURE. —** See note 3.

**709. See note 1.**

**710. FAIR — FAIRLY. —** See notes 1, 2.

their value undamaged. *Iyes v. Freisinger*, 70 N. J. L. 257.

**704. 4. Termination of Relation. —** Gragard's Succession, 106 La. 298; *Elwell v. Coon*, (N. J. 1900) 46 Atl. Rep. 580; *Outerbridge v. Campbell*, 87 N. Y. App. Div. 597; *Anker v. Smith*, (Supm. Ct. App. T.) 87 N. Y. Supp. 479.

**Sale by Principal. —** *M. M. Walker Co. v. Dubuque Fruit, etc., Co.*, 106 Iowa 245, 113 Iowa 428.

**705. 3. Death of Principal. —** *Willingham v. Rushing*, 105 Ga. 72.

**4. Prosecution under Minnesota Statute Regarding Report of Sale by Grain Commission Merchant. —** See *State v. Edwards*, (Minn. 1905) 102 N. W. Rep. 697.

**706. 1. Fire Escapes. —** See *Harnischel v. Texas Drug Co.*, 26 Tex. Civ. App. 1.

**English Statutes — Workmen's Compensation and Factory Acts — Engine House. —** An engine-house and machinery, forming part of the premises of a workhouse, were used for the purpose of generating electrical energy for lighting the workhouse and infirmary, and for other purposes. One of the engines in the engine house was unfenced. It was held that the engine house was a nontextile *factory* within the meaning of section 149, subs. 1, of the Factory and Workshop Act, 1901. *Mill End Guardians v. Hoare*, (1903) 2 K. B. 483.

**Ship in Dock. —** A workman employed in loading or unloading a ship lying in a dock is employed on or in or about a *factory* within the meaning of section 7, subs. 1, of the Workmen's Compensation Act, 1897. *Cattermole v. Atlantic Transport Co.*, (1902) 1 K. B. 204. See also *Griffin v. Haulder Line*, (1904) 1 K. B. 510.

The fact that repairs are being made to a ship in a dock does not make the dock a "ship-building yard" within the meaning of the Factory and Workshop Act, 1878, Sched. IV., Part II. (24), and therefore a *factory* within the meaning of section 7 of the Workmen's Compensation Act, 1897. *Spencer v. Livett*, (1900) 1 Q. B. 498.

**Wharf. —** A wharf at the side of a canal, on which no machinery is used, is not a *factory* within the meaning of section 7 of the Workmen's Compensation Act, 1897, unless it is a wharf to which some provision of the factory acts is applied by the Factory and Workshop Act, 1895. *Hall v. Snowden*, (1899) 2 Q. B. 136.

**Ice House. —** By statute (Laws N. Y. 1897, c. 415) it is provided, among other things, that "shafting, set screws, and machinery of every description shall be properly guarded" by the owners of *factories* where machinery is used. The statute declares that the term *factory* shall

be construed to include also "mill, workshop, or other manufacturing or business establishment where one or more persons are employed at labor." In construing this statute the court said: "We think that a commercial ice house, which is extensively equipped with machinery, and in which numerous operatives are employed, is a *factory*, within the meaning of the statute." *Rabe v. Consolidated Ice Co.*, (C. C. A.) 113 Fed. Rep. 907.

**Size of Building. —** The fact that a building comes within section 105, subs. 2 (b), of the Factory and Workshop Act, 1901, as being a building which exceeds thirty feet in height, and in which more than twenty persons, not being domestic servants, are employed for wages, does not make such a building a *factory* for the purposes of the Workmen's Compensation Act, 1897. *Dyer v. Swift Cycle Co.*, (1904) 2 K. B. 36.

**708. 3. In American Credit Indemnity Co. v. Carrollton Furniture Mfg. Co., (C. C. A.) 95 Fed. Rep. 115, the court said: "The word *failure*, when used in its commercial sense, and as employed in mercantile life, means a suspension of payment, or an enforced suspension of business, and the nature of the *failure* means the kind or distinguishing characteristic of the suspension, whether voluntary or enforced."**

**Fail and Refuse. —** See *Brought v. Cherokee Nation*, (Indian Ter. 1902) 69 S. W. Rep. 937.

**709. 1. Preferences — Failing Circumstances. —** *Martin v. Bigelow*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 298.

**710. 1. Fair Ground. —** In construing a Connecticut statute prohibiting the sale of provisions "from any wagon or temporary stand," "within one mile of the *fair* ground of any incorporated society," without the consent of the executive committee of such society, the court said: "We think they used the words *fair* ground in the present act as the equivalent of the words 'exhibition or *fair*' in the former act. The present act, then, must be held to forbid the lawful sale of provisions within one mile of a *fair* ground only while an 'exhibition or *fair*' of the kind contemplated by the statute is being held on such ground." *State v. Reynolds*, 77 Conn. 131.

**2. Fair Preponderance of Evidence. —** De St. Aubin v. Field, 27 Colo. 414; *Hynes v. Metropolitan St. R. Co.*, (N. Y. City Ct. Gen. T.) 31 Misc. (N. Y.) 825; *Carstens v. Earles*, 26 Wash. 676.

**Fair Cash Value. —** In *National Bank of Commerce v. New Bedford*, 175 Mass. 262, the court said: "Generally speaking, when a statute requires the *fair* cash value of property on a certain day to be ascertained, Pub. Stat., c. 13, § 8, it refers to the actual judgment of the

**715. FALSE — FALSELY.** — See note 1.

**716.** See note 1.

**717.** See note 1.

public as expressed in the price which some one will pay, not to what the court at a later time may think would have been a wiser opinion. It means the highest price that a normal purchaser, not under peculiar compulsion, will pay at that time to get that thing."

**The Fair Market Value** of shares of stock under the Inheritance Tax Law is not what the stocks would bring at a forced sale, but what they would bring at a sale after due notice of the facts, and under fair conditions in the ordinary course of business. *Walker v. People*, 192 Ill. 106.

**Administrator's Sale.** — *James v. Nease*, (Tex. Civ. App. 1902) 69 S. W. Rep. 110.

**Fair Consideration — Bankruptcy Act.** — In construing the Federal Bankruptcy Act providing that "all conveyances, transfers," etc., "made by a bankrupt within four months next preceding his bankruptcy, with intent to hinder, delay, or defraud his creditors, shall be void, except as to purchasers in good faith and for a present, *fair* consideration," the court said: "The word *fair*, as there used, signifies no

more than honest or free from suspicion. It was evidently not intended as the equivalent of 'adequate,' unless the inadequacy was such as to indicate a purpose on the part of the vendor to cheat or wrong his creditors." *Myers v. Fultz*, 124 Iowa 437.

**715. 1. Intentionally Untrue.** — See *State v. Henderson*, 72 Minn. 74.

**False — False Entries — National Banks.** — *U. S. v. Young*, 128 Fed. Rep. 111.

**716. 1.** *Gerardo v. Brush*, 120 Mich. 409.  
**False Swearing.** — *Gerardo v. Brush*, 120 Mich. 409.

**717. 1. Perjury.** — *State v. Brown*, 110 La. 591.

**Synonymous with Sham.** — A sham answer is one that is *false*. The words "sham" and *false* are synonymous. *Howe v. Elwell*, 57 N. Y. App. Div. 357.

**False or Unjust — English Weights and Measures Act.** — See *Lane v. Rendall*, (1899) 2 Q. B. 673; *London County Council v. Payne*, (1904) 1 K. B. 194.



# FALSE IMPRISONMENT.

BY THEODOR MEGAARDEN.

## **721. I. DEFINITION AND SCOPE OF ARTICLE — Definition. — See note 1.**

Other Definitions. — See note 2.

## **722. II. GENERAL PRINCIPLES — 3. Unlawful Detention Gist of False Imprisonment. — See note 8.**

## **724. 4. Imprisonment Shown — Presumption of Illegality. — See notes 2, 3, 4.**

## **5. Motive, Malice, and Provocation — a. MOTIVES OF DEFENDANT — TO WHAT EXTENT MATERIAL. — See note 6.**

**721. 1. Definition.**— *Whaley v. Lawton*, 62 S. Car. 91, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 721.

False imprisonment consists in imposing an unlawful restraint upon one's freedom of locomotion or action. *Efroymson v. Smith*, 29 Ind. App. 451, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 721.

False imprisonment is an unlawful detention of the person of another against his will. *McCaffrey v. Thomas*, 4 Penn. (Del.) 437, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 721; *Marshall v. Cleaver*, 4 Penn. (Del.) 450.

False imprisonment is an unlawful arrest and detention of the person of another, either with or without a warrant of arrest. *Petit v. Colmery*, 4 Penn. (Del.) 266.

**2. Other Definitions of False Imprisonment.**— False imprisonment has been defined to be a trespass committed by one man against the person of another, by unlawfully arresting him and detaining him without any legal authority. *Snead v. Bonnoil*, 166 N. Y. 325, affirming 49 N. Y. App. Div. 330.

False imprisonment is the unlawful arrest or detention of a person without warrant, or by an illegal warrant, or a warrant illegally executed, and either in a prison or place used temporarily for that purpose, or by force and constraint without confinement. *Miller v. Fano*, 134 Cal. 103.

**Restraint May Be With or Without Process of Law.**— False imprisonment is the unlawful restraint of a person contrary to his will, either with or without process of law. *Reynolds v. Price*, (Ky. 1900) 56 S. W. Rep. 502; *Johnson v. McDaniel*, 5 Ohio Dec. 717.

False imprisonment has been defined to be "the unlawful detention of a person contrary to his will, either with or without process of law," but the Supreme Court of *Wisconsin* declared in *Murphy v. Martin*, 58 Wis. 276, that "an imprisonment, even though caused by a malicious prosecution, is not false, unless extrajudicial or without legal process." See *Wells v. Johnston*, 52 La. Ann. 713.

**A Violation of Personal Liberty.**— By the *Georgia Penal Code*, § 106, false imprisonment is a violation of the personal liberty of a person, and consists in confinement or detention of such

person without sufficient legal authority. *Gordon v. Hogan*, 114 Ga. 354.

**722. 8. Gist of Action the Unlawful Detention — United States.**— *Davis v. Johnson*, (C. C. A.) 101 Fed. Rep. 952.

*Delaware.*— *Petit v. Colmery*, 4 Penn. (Del.) 266; *Marshall v. Cleaver*, 4 Penn. (Del.) 450; *McCaffrey v. Thomas*, 4 Penn. (Del.) 437.

*Illinois.*— *Markey v. Griffin*, 109 Ill. App. 212.

*Kentucky.*— *Bennett v. Lewis*, 66 S. W. Rep. 523, 23 Ky. L. Rep. 2037; *Reynolds v. Price*, (Ky. 1900) 56 S. W. Rep. 502.

*Louisiana.*— *Wells v. Johnston*, 52 La. Ann. 713.

*New York.*— *Emmerich v. Thorley*, 35 N. Y. App. Div. 452.

*Ohio.*— *Johnson v. McDaniel*, 5 Ohio Dec. 717.

*Pennsylvania.*— *Mihalyik v. Klein*, 22 Pa. Super. Ct. 193; *Kessler v. Hoffman*, 9 Pa. Dist. 365.

*Canada.*— *Cole v. Cooke*, 12 Quebec K. B. 529, 8 Can. Crim. Cas. 300, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 722.

**724. 2. Imprisonment Shown — Presumption of Illegality.**— *Burch v. Franklin*, 7 Ohio Dec. 510, 7 Ohio N. P. 155.

**3. Burden of Proof.**— *Black v. Marsh*, 31 Ind. App. 53; *Edger v. Burke*, 96 Md. 715; *Jackson v. Knowlton*, 173 Mass. 94; *Thompson v. Buchholz*, 107 Mo. App. 121.

**4.** It has been held that if the plaintiff was arrested under a search warrant, the burden was upon him to show that the arrest was made unlawfully. *Petit v. Colmery*, 4 Penn. (Del.) 266.

**6.** *Oates v. Bullock*, 136 Ala. 537, 96 Am. St. Rep. 38; *Reynolds v. Price*, (Ky. 1900) 56 S. W. Rep. 502; *Lange v. Illinois Cent. R. Co.*, 107 La. 687; *Wells v. Johnston*, 52 La. Ann. 713; *Palmer v. Maine Cent. R. Co.*, 92 Me. 399, 69 Am. St. Rep. 513; *Dunlevy v. Wolferman*, 106 Mo. App. 46; *Snead v. Bonnoil*, 166 N. Y. 325, affirming 49 N. Y. App. Div. 330; *Ring v. Mitchell*, (Supm. Ct. Spec. T.) 45 Misc. (N. Y.) 493; *Texas Midland R. Co. v. Dean*, (Tex. Civ. App. 1904) 82 S. W. Rep. 524; *Regan v. Jessup*, 34 Tex. Civ. App. 74; *Cole v. Cooke*, 12 Quebec K. B. 529, 8 Can. Crim. Cas. 300.

**725.** See notes 2, 4.

**726.** See notes 1, 3.

*b.* MALICE NOT ESSENTIAL ELEMENT. — See note 4.

**727.** See note 1.

**728.** 6. Probable Cause. — See notes 1, 3.

7. Advice of Counsel. — See notes 4, 5.

**729.** 8. Waiver of False Imprisonment. — See note 3.

**730.** 10. Evidence of Character and Reputation. — See notes 2, 4, 5.

It has been said, when an officer had made an arrest on his own responsibility without a warrant, for a fraudulent evasion of the payment of fare to a carrier, that the good faith of the officer, and his belief that a fraudulent evasion of fare had been consummated under his eyes, were material in an action against the carrier for the false imprisonment, and evidence that the officer acted in good faith was held to be admissible. *Dixon v. New England R. Co.*, 170 Mass. 242.

**725. 2. Motive as Affecting Measure of Damages.** — *Dunlevy v. Wolferman*, 106 Mo. App. 46, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 725.

**4. Arrest under Statute Abrogated by the Constitution.** — The fact that a statute relied upon by the defendant as justifying the arrest had not been judicially declared to have been abrogated by the condition did not, it has been held, exempt him from liability for the wrongful arrest, if the statute had in fact been abrogated. *Roberts v. Hackney*, 109 Ky. 269.

**726. 1. Evidence of Good Faith in Mitigation of Damages.** — *Roberts v. Hackney*, 109 Ky. 269. 3. *Begley v. Com.*, 60 S. W. Rep. 847, 22 Ky. L. Rep. 1546.

**4. Malice Not Essential.** — *Markey v. Griffin*, 109 Ill. App. 212; *Garnier v. Squires*, 62 Kan. 321; *Monson v. Rouse*, 86 Mo. App. 97; *Strozzi v. Wines*, 24 Nev. 394, 395; *Jacobs v. Third Ave. R. Co.*, 71 N. Y. App. Div. 199, 34 Misc. (N. Y.) 512, reversing (N. Y. City Ct. Gen. T.) 33 Misc. (N. Y.) 802; *Kelly v. Durham Traction Co.*, 132 N. Car. 368, 133 N. Car. 418; *Cole v. Cooke*, 12 Quebec K. B. 529, 8 Can. Crim. Cas. 300.

**Under the Georgia Code.** — The *Georgia Civil Code*, § 3852, provides that, where the imprisonment is by virtue of a "warrant" void for want of jurisdiction in the court to issue it, an action for false imprisonment will lie, if the warrant is sued out in bad faith, and that in such a case good faith must be determined from the circumstances of the case. *Berger v. Saul*, 113 Ga. 869.

**Proof of Malice When Pleaded.** — It has been held that, although it is not necessary to plead malice, if malice is averred it must be shown. *Fuqua v. Gambill*, 140 Ala. 464.

**727. 1. Bacon v. Bacon**, 76 Miss. 458.

**Malice and Probable Cause as Affecting Damages.** — It has been said that the motives of the defendant (probable cause or malice) may be shown in aggravation or mitigation of damages. *Kossouf v. Knarr*, 206 Pa. St. 146.

**728. 1. Davis v. Johnson**, (C. C. A.) 101 Fed. Rep. 952, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 728; *Monson v. Rouse*, 86 Mo. App. 97; *Strozzi v. Wines*, 24 Nev. 394, 395. Compare *Fuqua v. Gambill*, 140 Ala. 464.

3. *Bergeron v. Peyton*, 106 Wis. 377, 80 Am. St. Rep. 33.

**Evidence of Existence of Probable Cause.** — Where the complaint in an action for false imprisonment charges that the defendant maliciously caused the arrest of the plaintiff, the defendant may be permitted to show that he had probable cause to procure the plaintiff's arrest, for the purpose of reducing the amount of the damages. *Oates v. Bullock*, 136 Ala. 537, 96 Am. St. Rep. 38.

**4. Advice of Counsel.** — *Young v. Gormley*, 120 Iowa 372; *Lange v. Illinois Cent. R. Co.*, 107 Ia. 687.

Advice of counsel does not protect one who acts in bad faith. *Burbanks v. Lepovsky*, 134 Mich. 384, 10 Detroit Leg. N. 493.

5. *Young v. Gormley*, 120 Iowa 372; *Johnson v. McDaniel*, 5 Ohio Dec. 717. See *Bennett v. Eddy*, 120 Mich. 300.

**729. 3. Pleading Guilty and Paying Fine.** — It has been held that although a person has been wrongfully arrested for hawking goods without a license, if he pleads guilty to the charges, pays the fine imposed, and subsequently pays the fees fixed for the privilege of hawking, he cannot bring an action of false imprisonment. *Jones v. Foster*, 43 N. Y. App. Div. 33.

On the other hand it has sometimes been held that the right to bring an action for false imprisonment is not waived by pleading guilty to the offense charged. *McCullough v. Greenfield*, 133 Mich. 463, 10 Detroit Leg. N. 280.

And it has been held that a person who has been wrongfully arrested for attempting to evade payment of fare to a carrier of passengers does not lose his right to sue for the false imprisonment by paying the amount of the fare and the costs of prosecution. *Palmer v. Maine Cent. R. Co.*, 92 Me. 399, 69 Am. St. Rep. 513.

Where the plaintiff, who had been wrongfully arrested without a warrant, pleaded guilty in order to secure his discharge, it was held that he was entitled to recover the damages that accrued up to the time when the plea of guilty was entered. *Texas, etc., R. Co. v. Parker*, 29 Tex. Civ. App. 264.

The record of a justice of the peace which contained a false recital that the plaintiff pleaded guilty to the charge against him, has been denied any effect in an action for false imprisonment, where the arrest was made upon a warrant which was based upon a complaint which charged no offense. *Alabama, etc., R. Co. v. Kuhn*, 78 Miss. 114.

**730. 2. Evidence of Character and Reputation — General Rule.** — *Texas Midland R. Co. v. Dean*, (Tex. Civ. App. 1904) 82 S. W. Rep. 524; *Clairborne v. Chesapeake, etc., R. Co.*, 46 W. Va. 363.

**Character as Affecting Question of Probable**

**731. 12. False Imprisonment as Distinguished from Malicious Prosecution.**

— See note 6.

**733.** See notes 2, 3.**III. WHAT CONSTITUTES FALSE IMPRISONMENT — 1. In General. —**

See note 5.

**2. The Detention or Restraint — b. MEANS OF ACCOMPLISHING —****(1) Necessity for Actual Force. —** See note 7.**734.** See notes 1, 2.**735.** (2) *Manual Touching Unnecessary.* — See note 6.(3) *Imprisonment by Words Alone.* — See note 8.**737.** (6) *Imprisonment Must Be Against Will of Complaining Party. —*

See notes 1, 5.

**Cause.** — In *Johnson v. McDaniel*, 5 Ohio Dec. 717, the jury were instructed that if they believed from the evidence that the plaintiff, up to the time of her arrest, had uniformly borne a good reputation as a law-abiding and well-behaved person, and that the defendants knew that such was her reputation, then that fact was a proper one to be considered, in connection with all the other facts in the case, in determining whether or not the defendants had a reasonable cause to believe, and did believe, in good faith, that the plaintiff was guilty of the offense charged against her.

**730. 4.** *Davis v. Sanders*, 133 Ala. 275.5. *San Antonio, etc., R. Co. v. Griffin*, 20 Tex. Civ. App. 91.

**731. 6. False Imprisonment Essentially Different from Malicious Prosecution.** — *Davis v. Johnson*, (C. C. A.) 101 Fed. Rep. 952, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 731.

**The Two Actions Different in Allegation and Proof.** — An averment of the issuance of process, properly describing it, and the plaintiff's arrest and imprisonment by virtue thereof, is essential in an action for malicious prosecution but not in an action for false imprisonment. *Davis v. Sanders*, 133 Ala. 275.

**Distinctions Between the Two Actions Stated.** — It takes less to constitute false imprisonment than malicious prosecution. False imprisonment is an interference with the personal liberty of the party complaining which is unlawful and without authority. In malicious prosecution the arrest would be by process lawful and regular in itself, but sued out from malicious motives and without probable cause. *Dunlevy v. Wolferman*, 106 Mo. App. 46.

In an action for malicious prosecution it must be shown that the prosecution was conducted under the legal forms of the law, with malice and without probable cause. In cases for false imprisonment, it is only necessary to show "any intentional detention of the person of another not authorized by law. It is any illegal imprisonment without any process whatever, or under color of process wholly illegal, without regard to the question whether any crime has been committed, or a debt due." *McCaskey v. Garrett*, 91 Mo. App. 354.

The action for false imprisonment cannot be maintained where the process was regular and the arrest under it lawful. *Ma-Ka-Ta-Wah-Qua-Twa v. Rebok*, 111 Fed. Rep. 13.

**Necessity for Termination of Criminal Prosecution.** — In an action for false imprisonment it is not necessary that the termination of the

criminal prosecution should be shown. *Davis v. Johnson*, (C. C. A.) 101 Fed. Rep. 952.

**Termination of Action — Arrest in Civil Action.** — Under the *Georgia* Code, neither the institution nor the prosecution of a civil suit in a court which has no jurisdiction thereof affords ground for the bringing by the defendant of an action against the plaintiff for malicious prosecution, but where such a suit is brought maliciously and without probable cause, and the defendant is in consequence restrained of his liberty, he may maintain against the plaintiff an action for false imprisonment, without regard to whether final judgment was entered in the unauthorized suit or not. *Berger v. Saul*, 113 Ga. 869.

**733. 2.** *Ma-Ka-Ta-Wah-Qua-Twa v. Rebok*, 111 Fed. Rep. 13.

**Imprisonment under Legal Process.** — Where the arrest of the plaintiff was made by a duly qualified officer, under process fair on its face, issued from a court of competent jurisdiction, the plaintiff's remedy, if he has any, is by an action for malicious prosecution. *Lisabelle v. Hubert*, 23 R. I. 456.

**3.** See *Dougherty v. Snyder*, 97 Mo. App. 495.5. *Reynolds v. Price*, (Ky. 1900) 56 S. W. Rep. 502; *Wells v. Johnston*, 52 La. Ann. 713.

**7. Actual Force Not Necessary.** — *Dunlevy v. Wolferman*, 106 Mo. App. 46, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 733.

**Restraint from Fear of Violence.** — *Garnier v. Squires*, 62 Kan. 321.

**734. 1.** *Stevens v. O'Neill*, 51 N. Y. App. Div. 364, affirmed 169 N. Y. 375; *Bingham v. Lipman*, 40 Oregon 363, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 734.2. See *Meyer v. State*, (Tex. Crim. 1899) 49 S. W. Rep. 600.

**735. 8. Submission Must Be to Reasonably Apprehended Force.** — *Franklin v. Amerson*, 118 Ga. 860; *Goodell v. Tower*, 77 Vt. 61.

8. *Dunlevy v. Wolferman*, 106 Mo. App. 46, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 735; *Stevens v. O'Neill*, 51 N. Y. App. Div. 364, affirmed 169 N. Y. 375.

**737. 1.** *Stevens v. O'Neill*, 51 N. Y. App. Div. 364, affirmed 169 N. Y. 375.

**5. Exhibition of Documents.** — A wrongful arrest of a person for selling personal property which he had hired cannot be justified on the ground that at the time of the arrest he failed to exhibit writings which would have shown that the charge was unfounded. *Gordon v. Hogan*, 114 Ga. 354.

**Voluntarily Submitting to Imprisonment. — In**



**738.** *c.* PLACE OF CONFINEMENT. — See note 1.

**739.** 3. The Unlawfulness of the Detention or Restraint — *a.* IN GENERAL. — See notes 2, 3.

**740.** See note 1.

*b.* WHERE RESTRAINT IS ORIGINALLY UNLAWFUL — (1) *Arrest Without Warrant* — (a) In General. — See note 4.

(b) Rule as to Probable Cause — *aa.* ARREST BY OFFICER OF LAW. — See note 5.

**741.** See note 1.

a case in which it appeared that the plaintiff, who had been wrongfully arrested and imprisoned for the nonpayment of a license tax, could have relieved himself from the damages which he sustained by the payment of the tax, in which case he would have had his remedy against the city to recover the money paid without serious injury or damage to himself, it was said that he ought not to be permitted to make use of the imprisonment which had in a sense been voluntarily submitted to by him, for the purpose of recovering damages. *Cottam v. Oregon City*, 98 Fed. Rep. 570.

**738.** 1. *Lovick v. Atlantic Coast Line R. Co.*, 129 N. Car. 427; *Goodell v. Tower*, 77 Vt. 61.

**739.** 2. *Detention Must Be Unlawful.* — *Van v. Pacific Coast Co.*, 120 Fed. Rep. 699; *Ma-Ka-Ta-Wah-Qua-Twa v. Rebok*, 111 Fed. Rep. 13, quoting 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 739; *Bennett v. Lewis*, 66 S. W. Rep. 523, 23 Ky. L. Rep. 2037, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 739; *Dougherty v. Snyder*, 97 Mo. App. 495; *Loughman v. Long Island R. Co.*, 83 N. Y. App. Div. 629; *Tobin v. Bell*, 73 N. Y. App. Div. 41; *Jones v. Foster*, 43 N. Y. App. Div. 33; *Emmerich v. Thorley*, 35 N. Y. App. Div. 452; *Hindman v. Hutchinson*, 30 Pittsb. Leg. J. N. S. (Pa.) 422.

A complaint does not state facts sufficient to constitute a cause of action for false imprisonment which does not show that the process under which the plaintiff was arrested was void or irregular and unlawful, even though malice in procuring the arrest is averred. *Ring v. Mitchell*, (Supm. Ct. Spec. T.) 45 Misc. (N. Y.) 493.

**Arrest to Enforce Sentence of Court.** — The fact that the minutes of a mayor's court fail to show exactly what sentence was intended and understood to be imposed, affords no sufficient reason for inflicting damages upon that officer and upon the town marshal for the execution of such sentence, where it appears that it might lawfully have been imposed, and that it was executed in good faith and without malice. *Gammage v. Malaffey*, 110 La. 1008.

**Caring for Injured Person.** — Where a boy, who had been injured while attempting to climb upon defendant's freight train, was first taken to a private house, then transferred a distance of one or two miles by the crew of the train to the residence of the company's physician, and thereafter carried to a hospital against his protests, it was held that he could not maintain an action for false imprisonment against the defendant. *Ollet v. Pittsburg, etc., R. Co.*, 201 Pa. St. 361.

**Refusal of Officer to Assist Prisoner to Get Bail.** — The refusal of an officer who has made an arrest for a bailable offense to go with the

prisoner to see a person for the purpose of getting him to go bail, is not sufficient to make the officer liable for false imprisonment. *Calderone v. Kiernan*, 23 R. I. 578.

3. *Ma-Ka-Ta-Wah-Qua-Twa v. Rebok*, 111 Fed. Rep. 13, quoting 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 739; *Page v. Citizens Banking Co.*, 111 Ga. 73, 78 Am. St. Rep. 144, quoting 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 739.

**740.** 1. *Page v. Citizens Banking Co.*, 111 Ga. 73, 78 Am. St. Rep. 144, quoting 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 740; *Bennett v. Lewis*, 66 S. W. Rep. 523, 23 Ky. L. Rep. 2037.

4. *United States.* — *Park v. Taylor*, (C. C. A.) 118 Fed. Rep. 34.

*Alabama.* — *Mitchell v. Gambill*, 140 Ala. 545; *Gambill v. Schmuck*, 131 Ala. 321.

*Georgia.* — *Franklin v. Amerson*, 118 Ga. 860; *Gordon v. Hogan*, 114 Ga. 354.

*Indiana.* — *Harness v. Steele*, 159 Ind. 286.

*Kentucky.* — *Schneider v. McGill*, (Ky. 1901) 64 S. W. Rep. 835.

*Louisiana.* — *Wells v. Johnston*, 52 La. Ann. 713.

*Michigan.* — *Tillman v. Beard*, 121 Mich. 475.

*Missouri.* — *State v. Evans*, 83 Mo. App. 301.

*New York.* — *Snead v. Bonnoil*, 166 N. Y. 325, affirming 49 N. Y. App. Div. 330; *Savage v. McMillan*, 37 N. Y. App. Div. 103.

*Ohio.* — *Burch v. Franklin*, 7 Ohio Dec. 519, 7 Ohio N. P. 155.

*Texas.* — *Parham v. Shockler*, (Tex. Civ. App. 1903) 73 S. W. Rep. 839; *Texas, etc., R. Co. v. Parker*, 29 Tex. Civ. App. 264; *San Antonio, etc., R. Co. v. Griffin*, 20 Tex. Civ. App. 91.

**Effect of Conviction for Offense Different from That Charged.** — If an arrest has been made without a warrant and without probable cause on a charge of having committed a felony, the illegality of the arrest upon an unfounded charge is not cured by a subsequent charge and conviction for another offense. *Snead v. Bonnoil*, 166 N. Y. 325, affirming 49 N. Y. App. Div. 330.

5. **Arrest for Felony Without Warrant.** — *Harness v. Steele*, 159 Ind. 286; *Schneider v. McGill*, (Ky. 1901) 64 S. W. Rep. 835; *Brish v. Carter*, 98 Md. 445; *Edger v. Burke*, 96 Md. 715; *Jackson v. Knowlton*, 173 Mass. 94; *Friesenhan v. Maines*, (Mich. 1904) 100 N. W. Rep. 172, 11 Detroit Leg. N. 169; *Thompson v. Fisk*, 50 N. Y. App. Div. 71.

**741.** 1. **Arrest for Misdemeanor Without Warrant — Commission in Presence of Arresting Officer.** — *McCaffrey v. Thomas*, 4 Penn. (Del.) 437; *Marshall v. Cleaver*, 4 Penn. (Del.) 450; *Easton v. Conn.*, 82 S. W. Rep. 996, 26 Ky. L. Rep. 960; *Richardson v. Dybedahl*, 14 S. Dak. 126. See *Parkham v. Shockler*, (Tex. Civ. App. 1903) 73 S. W. Rep. 839.

- 741.** *bb.* ARREST BY PRIVATE INDIVIDUAL. — See notes 4, 5.  
 (c) What Constitutes Probable Cause — *aa.* IN GENERAL. — See note 6.  
**742.** See note 2.  
*cc.* RELIANCE UPON ANONYMOUS LETTER. — See note 6.  
 (d) Whether Probable Cause Question of Law or Fact. — See notes 7, 8.  
**743.** (e) Burden of Proof. — See note 1.

An officer who has made an arrest for a misdemeanor without a warrant when called upon to justify the arrest must be able to show that the offense was committed in his presence. *Markey v. Griffin*, 109 Ill. App. 212.

**Statutory Authority of Conductors.** — Under a South Carolina statute (S. Car. Civ. Stat., § 2173) clothing conductors of railroad trains with all the powers of constables under the common law to make arrests, a conductor may lawfully arrest a passenger who is guilty of disorderly conduct in his presence. *Loggins v. Southern R. Co.*, 64 S. Car. 321.

**Apparent Attempt to Steal Ride on Train.** — Where the conduct of a person who has boarded a train is such as to afford reasonable ground and probable cause for believing that he is violating a statute against stealing rides upon trains, his arrest by the conductor, who is by law authorized to cause the arrest of a person who is violating the statute, does not render the railroad company liable although it be shown that the person was not, as a matter of fact, violating or attempting to violate the statute. *Summers v. Southern R. Co.*, 118 Ga. 174; *Southern R. Co. v. Gresham*, 114 Ga. 183.

**741. 4. Arrest Without Warrant by Private Person.** — *Mitchell v. Gambill*, 140 Ala. 545; *Golibart v. Sullivan*, 30 Ind. App. 328; *Garnier v. Squires*, 62 Kan. 321; *Begley v. Com.*, 60 S. W. Rep. 847, 22 Ky. L. Rep. 1546; *Grinnell v. Weston*, 95 N. Y. App. Div. 454; *Bergeron v. Peyton*, 106 Wis. 377, 80 Am. St. Rep. 33.

5. See *Palmer v. Maine Cent. R. Co.*, 92 Me. 399, 69 Am. St. Rep. 513.

Where the defendant, not being an officer with process, had illegally arrested and detained the plaintiff against his will when no criminal offense had been committed or attempted by the plaintiff in the presence of the defendant, he was liable in an action for false imprisonment; want of reasonable or probable cause is not an essential element of the cause of action. *Hight v. Naylor*, 86 Ill. App. 508.

6. *Van v. Pacific Coast Co.*, 120 Fed. Rep. 699, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 741; *Lyons v. Carroll*, 107 La. 471; *Edger v. Burke*, 96 Md. 715. See *Brish v. Carter*, 98 Md. 445; *Grinnell v. Weston*, 95 N. Y. App. Div. 454.

**What Constitutes Reasonable Cause.** — Reasonable cause does not depend upon whether the person arrested was in fact guilty, but upon the officer's belief, based upon reasonable grounds. The officer may act upon appearances, and if the apparent facts are such that a discreet and prudent person would be led to the belief that the person arrested is guilty, he is justified in making the arrest, although it turns out later that he was really innocent. It is sufficient that there is an honest belief of guilt and that reasonable grounds exist for such belief. *Thompson v. Fisk*, 50 N. Y. App. Div. 71.

Reasonable or probable cause is defined to be such a state of facts in the mind of a prosecutor as would lead a person of ordinary caution and prudence to believe or entertain an honest and strong suspicion that the person is guilty. It does not depend upon the actual state of the case in point of fact, but upon the honest and reasonable belief of the party commencing the prosecution. *Richardson v. Dybedahl*, 14 S. Dak. 126.

It has been said that probable cause is a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in his belief that the person accused is guilty of the offense with which he or she is charged. It does not depend upon the guilt or innocence of the accused person. This rule is founded upon grounds of public policy in order to encourage the exposure and punishment of crime. Public policy requires that a person be protected who, in good faith, and upon reasonable grounds, causes an arrest upon a criminal charge, and the law will not subject him to liability therefor. But a groundless suspicion, unwarranted by the conduct of the accused, or by facts known to the accuser, when the accusation is made, and which would not be strong enough to warrant a cautious person in believing the accused guilty, will not exempt the accuser from liability to the accused for damages in causing his arrest. *Johnson v. McDaniel*, 5 Ohio Dec. 717.

**Commission of Felony.** — It has been said that if no felony has been committed there is want of probable cause sufficient to justify an arrest without a warrant. *Burch v. Franklin*, 7 Ohio Dec. 519, 7 Ohio N. P. 155.

**742. 2.** See *Johnson v. McDaniel*, 5 Ohio Dec. 717.

**6. Description Contained in Printed Offer of Reward.** — Where an arrest was made without a warrant, in reliance upon a description contained in an advertisement and offer of reward appearing in a foreign periodical of unknown reputation or standing, over the signature of a private person who was unknown to the officer making the arrest, it was held that the jury was justified in finding that there was an absence of probable cause. *State v. Evans*, 83 Mo. App. 301.

**7. Probable Cause — Whether Question of Law or Fact.** — *Gambill v. Schuack*, 131 Ala. 321; *Schneider v. McGill*, (Ky. 1901) 64 S. W. Rep. 835; *Londy v. Driscoll*, 175 Mass. 426; *Bennett v. Eddy*, 120 Mich. 300; *Snead v. Bonnoil*, 166 N. Y. 325, affirming 49 N. Y. App. Div. 330; *Grinnell v. Weston*, 95 N. Y. App. Div. 454; *Thompson v. Fisk*, 50 N. Y. App. Div. 71.

**8. Savage v. McMillan**, 37 N. Y. App. Div. 153.

**743. 1. Burden of Proof.** — In an action for false imprisonment in which it appeared that the plaintiff had been arrested on a warrant procured by the defendants, it was said that

**743.** (f) Conviction on Charge as Evidence of Probable Cause. — See notes 4, 5.

(g) Wrongful Arrest Without Warrant — Continuation of Imprisonment on Valid Warrant. — See notes 6, 7.

**744.** (2) Arrest on Void Warrant. — See note 2.

**745.** c. DETENTION ORIGINALLY LAWFUL BUT SUBSEQUENTLY UNLAWFUL — (1) In General. — See note 5.

**746.** (2) Arrest Without Process — Delay in Procuring Warrant. — See note 1.

(3) Delay in Presentment of Prisoner for Examination or Trial —

(a) In General. — See note 2.

**747.** See note 4.

(b) Delay in Presentment on Account of Prisoner's Intoxication. — See note 5.

(c) Release Without Presentment. — See notes 7, 8.

the burden of proving want of reasonable cause was upon the plaintiff. *Johnson v. McDaniel*, 5 Ohio Dec. 717.

In an action to recover damages for false imprisonment, if the arrest was made without a warrant, the burden is upon the defendant to show reasonable cause or grounds for the arrest. *McCaffrey v. Thomas*, 4 Penn. (Del.) 437; *Marshall v. Cleaver*, 4 Penn. (Del.) 450; *Edger v. Burke*, 96 Md. 715; *Jackson v. Knowlton*, 173 Mass. 94; *Thompson v. Buchholz*, 107 Mo. App. 121; *Snead v. Bonnoil*, 166 N. Y. 325, *affirming* 49 N. Y. App. Div. 330; *Bergeron v. Peyton*, 106 Wis. 377, 80 Am. St. Rep. 33.

But of course the defendant is in no position to complain of an instruction to the effect that the plaintiff must prove that there was an absence of probable cause for the arrest. *Stevens v. O'Neill*, 51 N. Y. App. Div. 364, *affirmed* 169 N. Y. 375.

It has been said that where an officer who has made an arrest for a misdemeanor not committed in his presence, without a warrant, interposes the defense that, under the circumstances, there was likely to be a failure of justice if he did not make the arrest without a warrant, it is incumbent upon him to establish the defense. *Franklin v. Amerson*, 118 Ga. 860.

**743.** 4. *McCullough v. Greenfield*, 133 Mich. 463, 10 Detroit Leg. N. 280, *quoting* 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 743.

**Disagreement of Jury.** — A disagreement of the jury and a subsequent *nolle pros.* does not establish *prima facie* want of probable cause. *Burbanks v. Lepovsky*, 134 Mich. 384, 10 Detroit Leg. N. 493.

5. The verdict of a jury acquitting plaintiff of the charge on which he was arrested is evidence that the defendant had no reasonable ground for making the arrest. *Butler v. Stockdale*, 19 Pa. Super. Ct. 98.

**6. Wrongful Arrest Without Warrant — Subsequent Detention under Valid Warrant.** — *McCullough v. Greenfield*, 133 Mich. 463, 10 Detroit Leg. N. 280.

7. Where a person has been arrested without a warrant, by the direction of an officer who has a warrant and who subsequently takes the person arrested into his custody, it has been held that although the first arrest was illegal the second was not and that the jury should be instructed that the person arrested can recover damages only to the time of the lawful arrest. *McCullough v. Greenfield*, 133 Mich. 463.

**744.** 2. Arrest on Void Warrant. — *Stephens v. Wilson*, 115 Ky. 27; *Whaley v. Lawton*, 62 S. Car. 91, *citing* 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 744; *Goodell v. Tower*, 77 Vt. 61, *citing* 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 744.

**745.** 5. Original Imprisonment Lawful — Subsequent Detention Unlawful. — *Harness v. Steele*, 159 Ind. 286.

**746.** 1. *Harness v. Steele*, 159 Ind. 286, *citing* 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 746; *Brish v. Carter*, 98 Md. 445; *Leger v. Warren*, 62 Ohio St. 500, 78 Am. St. Rep. 738; *Butler v. Stockdale*, 19 Pa. Super. Ct. 98. But compare *Friesenhan v. Maines*, (Mich. 1904) 100 N. W. Rep. 172, 11 Detroit Leg. N. 169.

2. *Markey v. Griffin*, 109 Ill. App. 212; *Tobin v. Bell*, 73 N. Y. App. Div. 41; *Snead v. Bonnoil*, 49 N. Y. App. Div. 330, *affirmed* 166 N. Y. 325, *citing* 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 726, 740.

**Arrest for Purpose of Recovering Money.** — Although a private individual may, when a felony has been committed, justifiably arrest a suspected person without a warrant for the purpose of bringing him before an examining magistrate, if done upon probable cause, a private individual is not justified in arresting the suspected person without a warrant not for the purpose of bringing him before a magistrate, but for the sole purpose of compelling and inducing him to repay, to the person arresting him, money which he has obtained by means of a larceny. *Bergeron v. Peyton*, 106 Wis. 377, 80 Am. St. Rep. 33.

**747.** 4. Delay in Compliance with Request of Prisoner. — It has been said that if a person under arrest requests delay, or desires to be taken before some magistrate other than the one nearest and most accessible, and the officer complies with such request, neither he nor one who advises him in so doing can be held liable for false imprisonment. *Richardson v. Dybedahl*, 14 S. Dak. 126.

5. But see *Markey v. Griffin*, 109 Ill. App. 212.

7. *Harness v. Steele*, 159 Ind. 286, *citing* 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 747; *Stewart v. Feeley*, 118 Iowa 524. But compare *Mayer v. Vaughan*, 11 Quebec K. B. 340, *affirming* 20 Quebec Super. Ct. 549.

8. Where the plaintiff had consented to his discharge and the termination of the proceedings against him, it was held that he had no cause of action against the sheriff who made



**748.** (4) *Unlawful Restraint After Right of Discharge.* — See note 1.

**751.** IV. FALSE IMPRISONMENT AS CIVIL WRONG — 2. Who Liable for False Imprisonment — *a.* LIABILITY OF PERSON CAUSING, INSTIGATING, OR PROCURING IMPRISONMENT — (1) *In General.* — See note 2.

**752.** See notes 1, 3.

(2) *Procuring Arrest on Voidable Warrant* — (a) *Warrant Voidable for Irregularity in Procuring.* — See note 5.

**753.** See note 1.

**754.** (b) *Warrant Voidable for Error Simply.* — See note 4.

the arrest for not granting him a hearing before a magistrate. *Mulberry v. Fuellhart*, 203 Pa. St. 573.

**748.** 1. *Mee v. Cruikshank*, 86 L. T. N. S. 708, 66 J. P. 89; *St. Louis v. Karr*, 85 Mo. App. 608.

**751.** 2. *Georgia.* — *Gordon v. Hogan*, 114 Ga. 354.

*Iowa.* — *Young v. Gornley*, 120 Iowa 372.

*Kentucky.* — *Reynolds v. Price*, (Ky. 1900) 56 S. W. Rep. 502.

*Louisiana.* — *Lange v. Illinois Cent. R. Co.*, 107 La. 687; *Parker v. McGlin*, 52 La. Ann. 1514. See *Lyons v. Carroll*, 51 La. Ann. 1542.

*Michigan.* — *Burbanks v. Lepovsky*, 134 Mich. 384, 10 Detroit Leg. N. 493.

*Mississippi.* — *Bacon v. Bacon*, 76 Miss. 458.

*Missouri.* — *Thompson v. Buchholz*, 107 Mo. App. 121; *Monson v. Rouse*, 86 Mo. App. 97, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 751.

*New York.* — *Grinnell v. Weston*, 95 N. Y. App. Div. 454; *Savage v. McMillan*, 37 N. Y. App. Div. 103.

*Ohio.* — *Burch v. Franklin*, 7 Ohio Dec. 519, 7 Ohio N. P. 155.

*Pennsylvania.* — *Buchanan v. Goettmann*, 29 Pittsb. Leg. J. N. S. (Pa.) 302.

*South Carolina.* — *Whaley v. Lawton*, 62 S. Car. 91.

*Vermont.* — *Goodell v. Tower*, 77 Vt. 61, quoting 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 751.

See *Mayer v. Vaughan*, 11 Quebec K. B. 340, affirming 20 Quebec Super. Ct. 549.

**Communicating Suspicions to Officers.** — One who communicated his suspicions as to who committed a crime, to detectives when approached by them for information, the suspicions, though unfounded in fact, having been not unreasonable under the circumstances, is not liable for the false imprisonment of the person whom he suspected of the crime, by the detectives, who apparently acted upon their own motion in making the arrest. *Waters v. Anthony*, 20 App. Cas. (D. C.) 124.

**Identification After Arrest.** — The mere fact that the defendant identified the plaintiff after he had been arrested and taken before the defendant by the officer, did not, it has been held, make him liable for false imprisonment, where he was honestly mistaken, although the plaintiff was not the person whom the officer wished to arrest. *Miller v. Fano*, 134 Cal. 103.

**Arrest for Evading Payment of Fare.** — It has been held that when a passenger upon a railroad train has been arrested by the agent of the railroad company for traveling "without having previously paid his fare, and with intent to avoid payment thereof," he is entitled, in his

action to recover damages for the arrest, to prove a custom of the company under which he reasonably might and honestly did believe that a ticket which he had purchased from the company, and which he tendered as his fare, was lawful payment for the trip he was making at the time of the arrest. If the plaintiff was free from an actual intent to avoid payment of fare, then he did not incur the penalty or subject himself to the arrest claimed to be sanctioned by the statute, and the defendant's attempted justification failed. *Tidey v. Erie R. Co.*, 66 N. J. L. 382, affirmed without opinion 67 N. J. L. 353.

**Proof of Defendant's Connection with Imprisonment Necessary.** — Before one can be subjected to damages for false imprisonment, proof must be presented from which a jury can find that the arrest was caused by one from whom the damages are sought, or that such person had something to do or was connected in some way with the imprisonment. *Noad v. Canadian Pac. R. Co.*, 56 N. Y. App. Div. 33.

**752.** 1. *Whaley v. Lawton*, 62 S. Car. 91, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 752; *Goodeil v. Tower*, 77 Vt. 61, quoting 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 752.

If a party authorizes, encourages, directs, or assists an officer to do an unlawful act, or procures an unlawful arrest without process, or participates in the unlawful arrest or imprisonment, such party is liable. *Miller v. Fano*, 134 Cal. 103.

**3. Mere Presence of Defendant Not Sufficient to Render Liable.** — *Shinglemeyer v. Wright*, 124 Mich. 230.

**Arrest of Passenger in Presence of Carrier's Servant.** — In an action against a carrier of passengers for the wrongful arrest without a warrant of the plaintiff, a passenger of the defendant, by a police officer, in the presence of the defendant's station agent, it was said that it was the duty of the agent, as the servant of the defendant, to have protested against the unlawful arrest. *Texas Midland R. Co. v. Dean*, (Tex. Civ. App. 1904) 82 S. W. Rep. 524.

**5. Arrest under Voidable Warrant.** — *Alabama, etc.*, *R. Co. v. Kuhn*, 78 Miss. 114; *Regan v. Jessup*, 34 Tex. Civ. App. 74, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 752.

**753.** 1. *Defective Affidavit.* — It has been held that a person who causes the arrest of another in a civil action upon an affidavit which is so radically defective as not to bring the case within the statute providing for such arrests, is liable in an action for false imprisonment. *Ekmoto v. Marsh*, 130 Cal. 66, 80 Am. St. Rep. 73.

**754.** 4. *Writ Not Void Because Wrongfully*

**755.** (3) *Procuring Arrest on Void Warrant.* — See note 1.

**756.** Merely Stating Facts. — See note 1.

Entering Complaint. — See note 2.

Some Additional Circumstance Requisite. — See note 3.

It Has, However, Been Held Generally in Some Cases. — See note 5.

**757.** (4) *Procuring Arrest Without Warrant.* — See note 2.

But There Is a Difference. — See notes 3, 4, 5.

**Issued.** — *Krauskopf v. Tallman*, 38 N. Y. App. Div. 273, *affirmed* without opinion 170 N. Y. 561; *Bryan v. Stewart*, 123 N. Car. 92; *Smith v. Jones*, 16 S. Dak. 337.

It has been held that although the police justice issuing a warrant erred in his judgment as to the sufficiency of the deposition upon which the warrant was issued, the prosecutor is not liable. *Jones v. Foster*, 43 N. Y. App. Div. 33.

**755. 1. Where Warrant Void.** — *Oates v. Bullock*, 136 Ala. 537, 96 Am. St. Rep. 38; *Strozzi v. Wines*, 24 Nev. 394, 395; *Stahl v. Roof*, 164 N. Y. 162; *Holz v. Rediske*, 116 Wis. 353.

**Where Magistrate Issuing Warrant Has No Jurisdiction.** — *Washer v. Slater*, 67 N. Y. App. Div. 385.

**Arrest on Insufficient Affidavit.** — *Fukamoto v. Marsh*, 130 Cal. 66, 80 Am. St. Rep. 73.

It has been held that where a statute confers upon a court or magistrate the power to issue a warrant of arrest in a civil case, upon certain showing to be made by affidavit or verified complaint, the statute being in derogation of personal liberty, such showing is a condition precedent to the issuance of such warrant, and a warrant of arrest, predicated on affidavit or complaint, which does not contain the requisite showing, is void for want of legal authority in the court or magistrate to issue it, and an arrest thereunder is illegal, making the person obtaining such warrant liable in damages for false imprisonment in an action by the person so arrested. *Strozzi v. Wines*, 24 Nev. 394, 395.

**Arrest on Insufficient Information.** — *Mihalyik v. Klein*, 22 Pa. Super. Ct. 193.

**Procuring Warrant for Arrest on Charge Not Constituting an Offense.** — Alabama, etc., *R. Co. v. Kuhn*, 78 Miss. 114.

**Arrest under Void Process in Civil Action.** — *Berger v. Saul*, 113 Ga. 869.

**Warrant Issued for Offense Which Is Not a Crime.** — *Whaley v. Lawton*, 62 S. Car. 91.

**Warrant Through Error of Officer Issuing.** — It is well settled that a person who makes a proper and sufficient complaint before a magistrate for the purpose of having a proper and sufficient warrant of arrest issued thereon for the person complained against is not liable for false imprisonment, when the magistrate without fault on the part of the complainant in fact issues a paper intended to be a warrant but which is void on its face and the person charged is arrested and restrained of his liberty thereunder. *Oates v. Bullock*, 136 Ala. 537, 96 Am. St. Rep. 38.

**756. 1. Imprisonment for Violation of Void Ordinance.** — *Tillman v. Beard*, 121 Mich. 475; *Gilbert v. Satterlee*, 101 N. Y. App. Div. 313, *affirming* (Supm. Ct. Tr. T.) 43 Misc. (N. Y.) 292.

**Imprisonment under Unconstitutional Statute.** — It has been held that a complaint which was

framed and filed under an unconstitutional statute did not state a cause for commitment, and the arrest and commitment of the plaintiff thereunder were a nullity and constituted a false imprisonment for which the person who preferred the charges set forth in the complaint was liable in damages. *Scott v. Flowers*, 60 Neb. 675, *overruled* 61 Neb. 620.

**2. Whitney v. Hanse**, 36 N. Y. App. Div. 420; *Smith v. Jones*, 16 S. Dak. 337.

Although the complaint and warrant upon which the plaintiff was arrested did not contain sufficient averments to make a case under the ordinance which he had violated, the person whose only connection with the arrest was making the complaint was held not to be liable for false imprisonment. *Doty v. Hurd*, 124 Mich. 671.

A person making complaint to a magistrate is not necessarily answerable for whatever judicial action the magistrate may of his own motion take in the premises. If the magistrate misconceives the proper remedy, without the suggestion or intervention of the complainant in that particular, the latter is not liable for such error. *McCaskey v. Garrett*, 91 Mo. App. 354.

**Filing Information of Insanity.** — A person who files an information of insanity in a court of competent jurisdiction is not liable in an action of false imprisonment for the arrest and detention of the person against whom the information is filed, under a writ which is issued in due course of the proceedings. *Dougherty v. Snyder*, 97 Mo. App. 495.

**3. Some Additional Circumstance Requisite.** — A person who not only makes a complaint, but instigates the issuance of an illegal warrant and the making of an arrest thereunder, is liable for the false imprisonment. *Monson v. Rouse*, 86 Mo. App. 97.

**Inducing Magistrate to Issue Warrant in Violation of Law.** — If the complainant, instead of merely laying his complaint before the magistrate, induces the magistrate to issue a warrant, before the issuing of the warrant has been sanctioned by the prosecuting attorney as required by law, he is liable for the false imprisonment. *Brueckner v. Frederick*, 109 Mo. App. 614.

**5. Tillman v. Beard**, 121 Mich. 475, *citing* 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 756.

**757. 2. Park v. Taylor**, (C. C. A.) 118 Fed. Rep. 34; *Palmer v. Maine Cent. R. Co.*, 92 Me. 399, 69 Am. St. Rep. 513; *Lovick v. Atlantic Coast Line R. Co.*, 129 N. Car. 427; *Grinnell v. Weston*, 95 N. Y. App. Div. 454; *Texas Midland R. Co. v. Dean*, (Tex. Civ. App. 1904) 82 S. W. Rep. 524.

**3. Sundmaker v. Gaudet**, 113 La. 887; *Shinglemeyer v. Wright*, 124 Mich. 230.

It has been held that where the object in view is the protection or enforcement of a private right, and a warrant is procured where none is

**758.** (6) *Whether Defendant Procured Imprisonment Question of Fact for Jury.* — See note 5.

*b. LIABILITY OF JUDICIAL OFFICERS — (1) In General.* — See note 6.

**759.** See note 1.

*Mistake of Law.* — See note 2.

*Where Officer Acts Maliciously or Corruptly.* — See note 4.

**760.** (2) *Acts Which, as Judicial, Exempt from Liability* — *Arrest on Void Ordinance.* — See notes 1, 2, 3.

(3) *Where Magistrate Has No Jurisdiction.* — See note 5.

**761.** See notes 2, 3.

(4) *Where Magistrate Acts Beyond His Jurisdiction.* — See note 4.

**762.** See note 2.

*c. LIABILITY OF EXECUTIVE OFFICERS — (2) Arrest on Warrant Void on Its Face.* — See note 7.

**763.** *Where Magistrate Has No Jurisdiction.* — See note 1.

authorized, and an arrest made, the individual procuring it and all others participating are liable. *Strozzi v. Wines*, 24 Nev. 394, 395.

**757.** 4. *Grinnell v. Weston*, 95 N. Y. App. Div. 454.

5. *Dixon v. New England R. Co.*, 179 Mass. 242.

**758.** 5. *Defendant's Participation Question of Fact.* — *Oates v. Bullock*, 136 Ala. 537, 96 Am. St. Rep. 38; *Gordon v. Hogan*, 114 Ga. 354; *Martin v. Golden*, 180 Mass. 549; *Texas Midland R. Co. v. Dean*, (Tex. Civ. App. 1904) 82 S. W. Rep. 524.

6. *Liability of Judicial Officers.* — *Dixon v. Cooper*, 109 Ky. 29, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 758; *Roth v. Shupp*, 94 Md. 55, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 758; *Gardner v. Couch*, (Mich. 1904) 100 N. W. Rep. 673, 11 Detroit Leg. N. 340, rehearing denied (Mich. 1904) 101 N. W. Rep. 802, 11 Detroit Leg. N. 684; *Olmsted v. Edson*, (Neb. 1904) 98 N. W. Rep. 415; *Gilbert v. Satterlee*, 101 N. Y. App. Div. 313, affirming (Supm. Ct. Tr. T.) 43 Misc. (N. Y.) 292; *Comstock v. Eagleton*, 11 Okla. 487; *Smith v. Jones*, 16 S. Dak. 337; *Hennessey v. Farquhar*, 35 Nova Scotia 22; *Parker v. Etter*, 33 Nova Scotia 52.

**759.** 1. *Members of Court of Road Commissioners.* — It has been held that the members of a court of road commissioners could not be held liable for a false imprisonment where it did not appear that the action taken by them was without or beyond their jurisdiction. *McMichael v. Blasingame*, 108 Ga. 298.

2. *Liability in Case of Mistake as to the Law.* — *Cottam v. Oregon City*, 98 Fed. Rep. 570; *McVeigh v. Ripley*, 77 Conn. 136; *Roth v. Shupp*, 94 Md. 55, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 759; *Olmsted v. Edson*, (Neb. 1904) 98 N. W. Rep. 415; *Jones v. Foster*, 43 N. Y. App. Div. 33; *Comstock v. Eagleton*, 11 Okla. 487; *Parker v. Etter*, 33 Nova Scotia 52.

4. *Where Officer Acts Maliciously.* — *Cottam v. Oregon City*, 98 Fed. Rep. 570; *Dixon v. Cooper*, 109 Ky. 29, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 759. But see *Kessler v. Hoffman*, 9 Pa. Dist. 365.

**760.** 1. *Gilbert v. Satterlee*, 101 N. Y. App. Div. 313, affirming (Supm. Ct. Tr. T.) 43 Misc. (N. Y.) 292.

2. *Olmsted v. Edson*, (Neb. 1904) 98 N. W. Rep. 415.

3. *McVeigh v. Ripley*, 77 Conn. 136.

5. *Where Magistrate Without Jurisdiction.* — *Berger v. Saul*, 113 Ga. 869, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 760; *Stephens v. Wilson*, 115 Ky. 27; *Goedell v. Tower*, 77 Vt. 61; *Heller v. Clarke*, 121 Wis. 71; *Holz v. Rediske*, 116 Wis. 353; *Labelle v. McMillan*, 34 N. Bruns. 488. See *Cottam v. Oregon City*, 98 Fed. Rep. 570.

A Mayor who causes the arrest of a person for an offense over which he has no jurisdiction, tries the person so arrested, finds him guilty and causes him to be imprisoned, is liable for the false imprisonment. *State v. McDaniel*, 78 Miss. 1, 84 Am. St. Rep. 618.

*Issuance of Subpoena Without Authority.* — Where a justice of the peace issued a subpoena which he had no authority to issue, for the reason that the action described therein was not pending, and when the person summoned did not respond the justice thereupon issued a warrant for his arrest for contempt of court, it was held that the justice was liable in an action for false imprisonment if he acted corruptly or with malice. *Chambers v. Oehler*, 107 Iowa 155.

**761.** 2. *Arrest on Warrant Without Complaint or Information.* — *Church v. Pearne*, 75 Conn. 350; *Kossouf v. Knarr*, 206 Pa. St. 146.

3. *McKelvey v. Marsh*, 63 N. Y. App. Div. 396.

4. *Magistrate Acting Beyond His Jurisdiction.* — But it has been held that a probate judge in passing and rendering judgment in a bastardy case pending in his court acts judicially, and is not amenable to a civil action for false imprisonment, though the judgment was erroneous, and in rendering such judgment he erroneously exceeds the jurisdiction of his court. *Comstock v. Eagleton*, 11 Okla. 487.

**762.** 2. See *Berger v. Saul*, 113 Ga. 869, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 762.

7. *Where Warrant Void on Its Face.* — *Stephens v. Wilson*, 115 Ky. 27, quoting 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 762, 763; *Jacques v. Parks*, 96 Me. 268.

**763.** 1. *Where Magistrate Has No Jurisdiction.* — *Church v. Pearne*, 75 Conn. 350; *Stephens v.*



- 763.** Officer Presumed to Know Jurisdiction. — See note 2.
- 764.** (3) *Arrest on Warrant Valid on Its Face* — (a) General Rule. — See note 1.
- 765.** See note 5.
- 766.** See note 1.
- The Officer's Exemption Continues. — See note 2.
- 767.** (4) *Where Warrant Contains Misnomer*. — See note 5.
- 768.** (5) *Where Wrong Person Arrested*. — See note 1.
- (7) *Where Officer Acts Wantonly and Oppressively*. — See note 5.
- 769.** See note 1.
- (8) *Liability of Person Instigating Arrest Though Officer Not Liable*. — See note 4.
- 770.** (9) *Persons Assisting Officer*. — See note 1.
- The True Rule Is Believed to Be. — See note 4.
- d. LIABILITY OF PRINCIPAL FOR IMPRISONMENT BY AGENT —
- (1) *General Rule*. — See note 7.
- 771.** Express Authority Unnecessary. — See notes 1, 2.
- Act Within General Scope of Authority. — See note 3.

Wilson, 115 Ky. 27, quoting 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 763; *Heller v. Clarke*, 121 Wis. 71.

**763.** 2. Officer Presumed to Know Jurisdiction. — *Stephens v. Wilson*, 115 Ky. 27.

**764.** 1. *Chambers v. Oehler*, 107 Iowa 155; *Calderone v. Kiernan*, 23 R. I. 578; *Lisabelle v. Hubert*, 23 R. I. 456; *Regan v. Jessup*, 34 Tex. Civ. App. 74, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 764; *Holz v. Rediske*, 116 Wis. 353.

**Arrest under Judgment of Municipal Court.** — A judgment of a municipal court imposing a sentence that the accused pay a fine in a given amount, has been held to be in the nature of a warrant for the arrest of the accused, and an officer who makes an arrest thereunder will not be liable either for malicious arrest or false imprisonment if he acts in good faith in attempting to execute the judgment. *Williams v. Sewell*, 121 Ga. 665.

**765.** 5. *Chambers v. Oehler*, 107 Iowa 155.

**766.** 1. See *Chambers v. Oehler*, 107 Iowa 155.

2. The law is not settled that an action for false imprisonment will not lie where the arrest has been made pursuant to an order granted by an officer having jurisdiction, even where the order has been subsequently vacated. *Ring v. Mitchell*, (Supm. Ct. Spec. T.) 45 Misc. (N. Y.) 493.

**767.** 5. Sufficiency of Designation. — The person to be arrested is sufficiently described by a warrant which gives only the initial letter of his first name, especially when he goes by and is commonly designated by the initial letter of his given name. *Cox v. Durham*, (C. C. A.) 128 Fed. Rep. 870.

**Mistake in or Omission of Middle Name.** — Since the law knows or recognizes but one given name, the omission of the initial letter of the middle given name, or a mistake made in the initial letter of that name, is not regarded as material. *Cox v. Durham*, (C. C. A.) 128 Fed. Rep. 870.

**768.** 1. Wrong Person Arrested. — *Miller v. Fano*, 134 Cal. 103. See *Wells v. Johnston*, 52 La. Ann. 713.

5. *Rauma v. Lamont*, 82 Minn. 477.

**Handcuffing Prisoner.** — The placing of handcuffs upon a prisoner cannot ordinarily be regarded as undue harshness or discourtesy. *McCullough v. Greenfield*, 133 Mich. 463, 10 Detroit Leg. N. 280. See *infra*, **780.** 2, *Liability of Officer for Handcuffing Prisoner*.

**Failure of Officer to Disclose His Official Character.** — An officer in making an arrest for a misdemeanor did not have on any uniform, and while he wore his official badge, it was concealed under the lapel of his coat, and was not shown to the plaintiff and she was not told by him that he was an officer. On the ground that to make an arrest lawful it is necessary that the person arrested should in some way know that he is arrested by lawful authority, it was held that the officer in attempting to make the arrest occupied no better position than a mere private person who without a warrant attempts to arrest another person for an alleged misdemeanor. *Franklin v. Amerson*, 118 Ga. 860.

**769.** 1. But see *Petit v. Colmery*, 4 Penn. (Del.) 266.

4. *Grinnell v. Weston*, 95 N. Y. App. Div. 454.

**770.** 1. *Edger v. Burke*, 96 Md. 715.

4. See *Rauma v. Lamont*, 82 Minn. 477.

7. Liability of Principal for Acts of Agent. — *Vrchocka v. Rothschild*, 100 Ill. App. 268; *Efroymson v. Smith*, 29 Ind. App. 451; *Cordner v. Boston*, etc., R. Co., 72 N. H. 413; *Jacobs v. Third Ave. R. Co.*, 71 N. Y. App. Div. 199, 34 Misc. (N. Y.) 512, reversing (N. Y. City Ct. Gen. T.) 33 Misc. (N. Y.) 802; *Kelly v. Durham Traction Co.*, 132 N. Car. 368, 133 N. Car. 418; *Lovick v. Atlantic Coast Line R. Co.*, 129 N. Car. 427; *Texas*, etc., R. Co. v. *Parker*, 29 Tex. Civ. App. 264; *Cobb v. Simon*, 119 Wis. 597, 100 Am. St. Rep. 909. See *Mee v. Cruikshank*, 86 L. T. N. S. 708, 66 J. P. 89.

**771.** 1. Express Authority Unnecessary. — *Vrchocka v. Rothschild*, 100 Ill. App. 268.

2. Authority for Particular Act Not Necessary. — *Pinkerton v. Martin*, 82 Ill. App. 589; *Texas*, etc., R. Co. v. *Parker*, 29 Tex. Civ. App. 264, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 771.

3. Where Imprisonment Within General Scope

**772.** And Though the Agent, in a Particular Case, in Fact Exceeds His Authority. — See note 2.

What Sufficient to Charge Principal. — See note 3.

**773.** (2) *Effect of Subsequent Ratification.* — See note 3.

(3) *What Is Within Scope of Employment.* — See notes 6, 8.

**774.** See note 2.

**775.** (4) *Whether Defendant Liable as Principal Question of Fact for Jury.* — See note 1.

(6) *Imprisonment by Special Police Officer — Whether Agent of Employer or State.* — See note 3.

**776.** *e.* LIABILITY OF CLIENT FOR IMPRISONMENT BY ATTORNEY. — See note 1.

of Authority. — *McLeod v. New York, etc., R. Co.*, 72 N. Y. App. Div. 116.

**Liability of Carrier of Passengers.** — It has been held that the rule relieving a master from liability for an injury caused by his servant, when not acting within the scope of his employment, does not apply to relieve a carrier from liability for the false imprisonment of a passenger by the carrier's servant, but the carrier is liable although the servant was not acting within the scope of his employment if the false imprisonment was made or caused by him while in the course of the discharge of his duties. *McLeod v. New York, etc., R. Co.*, 72 N. Y. App. Div. 116; *Texas Midland R. Co. v. Dean*, (Tex. Civ. App. 1905) 85 S. W. Rep. 1135, *reversing* (Tex. Civ. App. 1904) 82 S. W. Rep. 524. See the cases supplementing the title CARRIERS OF PASSENGERS, vol. 5, 542. 1, and 551. 1 *et seq.*

**772. 2. Liability of Principal Though Agent Exceeds Authority.** — *Efroymsen v. Smith*, 29 Ind. App. 451.

3. *Daniel v. Atlantic Coast Line R. Co.*, 136 N. Car. 517.

**773. 3. Effect of Ratification by Principal.** — *Pinkerton v. Sydnor*, 87 Ill. App. 76. See *Martin v. Golden*, 180 Mass. 549.

6. **Question of Fact for Determination of Jury.** — *Vrchotka v. Rothschild*, 100 Ill. App. 268.

8. **Scope of Employment.** — It was held that the defendant construction company was not liable for the arrest of the plaintiff for violating a labor contract by a servant of the defendant who was not a general agent but a clerk employed to keep books, to manage the commissary, and to collect and pay claims. *Vara v. R. M. Quigley Constr. Co.*, 114 La. 261.

The plaintiff was arrested at the instance of the agent of the defendant railroad, who was cashier in an office at one of the defendant's stations, whose duties were to collect money for freight, give receipts therefor, sell tickets to passengers, take care of the money received by him and forward it to the proper officer of the defendant company. The plaintiff was arrested on a charge of having stolen money from the cash drawer in the office of which the agent was in charge. It was held that in causing the arrest to be made he was not acting within the scope of his employment. *Daniel v. Atlantic Coast Line R. Co.*, 136 N. Car. 517.

**Employees in Defendants' Store.** — In an action for the false imprisonment of the plaintiff while in the defendants' store, by employees of the de-

fendants, it was said that there being evidence tending to show that the persons doing the acts complained of were servants of the defendants and engaged in the business of the defendants at the time, apparently with the design of protecting defendants' property, acting without hesitation, as if in pursuance of established practice, the burden of disproving the authority was transferred to the defendants. *Vrchotka v. Rothschild*, 100 Ill. App. 268.

**Arrest by Street Railway Conductor.** — The conductor of a street railway, who had been sworn in as a special public officer under a statute which was intended to confer authority upon such officers to arrest offenders upon the premises and cars of railroad corporations, upon view of offenses there committed, arrested the plaintiff without a warrant on a charge of having stolen money at a time previous to the arrest. The conductor merely suspected the plaintiff of having stolen the money. It was held that the arrest was not within the scope of the conductor's employment. *Cordner v. Boston, etc., R. Co.*, 72 N. H. 413.

**774. 2.** It has been held that a principal cannot be held liable for a wrongful arrest by an agent, simply because the principal had by general printed instructions urged its agents and employees to use the utmost diligence in the performance of their duties. *Waters v. Anthony*, 20 App. Cas. (D. C.) 124.

**775. 1.** *Vrchotka v. Rothschild*, 100 Ill. App. 268; *Craven v. Bloomington*, 171 N. Y. 439, *reversing* (Supm. Ct. Tr. T.) 54 N. Y. App. Div. 266, 30 Misc. (N. Y.) 650; *Lovick v. Atlantic Coast Line R. Co.*, 129 N. Car. 427; *Missouri, etc., R. Co. v. Warner*, 19 Tex. Civ. App. 463.

**Where the Agency Is Undisputed.** — Where the evidence was undisputed that the person making the arrest was the agent of the defendant in arresting and prosecuting the plaintiff, it was not error to so instruct the jury and to refuse an instruction, asked by the defendant, to the effect that the defendant would not be liable for the acts of its agent done beyond the scope of his authority. *San Antonio, etc., R. Co. v. Griffin*, 20 Tex. Civ. App. 91.

3. **Character in Which Agent Acts a Question of Fact.** — *Tyson v. Joseph H. Bauland Co.*, 68 N. Y. App. Div. 310; *Missouri, etc., R. Co. v. Warner*, 19 Tex. Civ. App. 463.

**776. 1. Client's Liability for Acts of Attorney.** — *Brueckner v. Frederick*, 109 Mo. App. 614.

**776. f. LIABILITY OF ATTORNEY.** — See note 3.

**g. LIABILITY OF PRIVATE CORPORATIONS.** — See note 4.

**h. LIABILITY OF MUNICIPAL CORPORATIONS.** — See note 5.

**777. The Officers and Agents.** — See note 2.

**i. LIABILITY WHERE SEVERAL ACT JOINTLY.** — See note 3.

**778. But It Is Not Necessary to Prove a Conspiracy.** — See note 1.

**j. EXTENT OF LIABILITY** — (1) *Natural and Probable Consequences.*

— See note 2.

(2) *Liability for Independent Illegal Acts of Officers.* — See note 3.

**779. A Person Properly Instigating an Arrest.** — See notes 1, 2.

**k. MEASURE OF DAMAGES AND ELEMENTS OF RECOVERY** —

(1) *In General.* — See note 3.

**776. 3.** In an action to recover damages for the plaintiff's false imprisonment under a warrant issued by a justice of the peace, wherein it was sought to hold an attorney liable for the imprisonment by reason of the advice and counsel given by him to his client, and to the justice in behalf of his client, it was held that he was not liable if in all he did he acted in good faith. But it was said that if, on the other hand, an attorney advises a magistrate as to the law knowing that his advice is erroneous, or if he wilfully misadvises the justice for some purpose of his own, he is liable. *Roth v. Shupp*, 94 Md. 55.

**4.** *Lange v. Illinois Cent. R. Co.*, 107 La. 687; *Alabama, etc., R. Co. v. Kuhn*, 78 Miss. 114.

**5. Liability of Municipal Corporations.** — *Carter v. Worcester County*, 94 Md. 621; *Gaul v. Ellice Tp.*, 3 Ont. L. Rep. 438.

A city cannot, of course, be held liable for damages because a police judge renders an erroneous judgment. *Crosdale v. Cynthiana*, (Ky. 1899) 50 S. W. Rep. 977.

**777. 2. Liability of Mayor.** — *Young v. Gormley*, 120 Iowa 372.

**Liability of President of Village.** — The president of a village who orders an arrest to be made by a police officer without a warrant for the violation of a village ordinance is liable for the false imprisonment. *Tillman v. Beard*, 121 Mich. 475.

**Liability of County Commissioners for False Imprisonment by Road Supervisor.** — Where the plaintiff had been wrongfully arrested by a road supervisor under a statute which had not gone into effect, it was held that the members of the board of county commissioners, by whom the supervisor had been appointed, but who did not procure or instigate or have any knowledge of the arrest, were not liable. *Carter v. Worcester County*, 94 Md. 621.

**3. Liability Joint and Several.** — *Golibart v. Sullivan*, 30 Ind. App. 428; *Jacques v. Parks*, 96 Me. 268; *Allison v. Hobbs*, 96 Me. 26; *Scott v. Flowers*, 60 Neb. 675, *overruled* 61 Neb. 620; *Bingham v. Lipman*, 40 Oregon 363.

**Liability of Partnership for Malicious Arrest.** — It has been held that a partnership is liable for a malicious arrest under the *Georgia Code* when the process under which the arrest was made was sued out in the interest of the partnership and under the direction of the persons composing the same. *Page v. Citizens Banking Co.*, 111 Ga. 73, 78 Am. St. Rep. 144, *citing* 12 Am. AND ENG. ENCYC. OF LAW (2d ed.) 739, 740.

**778. 1.** *Oakes v. Oakes*, 55 N. Y. App. Div.

576, *affirmed* without opinion 167 N. Y. 625; *Bingham v. Lipman*, 40 Oregon 363.

**2.** A corporation which has employed an agent to make an arrest has been held responsible for the failure of the agent to keep his promise to inform the prisoner's wife of the arrest, thereby making the incarceration more oppressive. *San Antonio, etc., R. Co. v. Griffin*, 20 Tex. Civ. App. 91.

**3.** *Waters v. Anthony*, 20 App. Cas. (D. C.) 124; *Grinnell v. Weston*, 95 N. Y. App. Div. 454.

**Acts of Trainmen in Caring for Injured Person.**

— A person who had been injured while endeavoring to climb upon a freight train of the defendant company was taken in charge by the crew of the train and first placed in a private house and then carried to the residence of the company's physician and later transferred to a hospital. It was held that these acts of the employees of the defendant company were not within the scope of their employment, which was that of a crew of a freight train, and that the defendant railroad company could not be held liable for a false imprisonment. *Ollet v. Pittsburg, etc., R. Co.*, 201 Pa. St. 361.

**779. 1.** *Richardson v. Dybedahl*, 14 S. Dak. 126.

**Damages Accruing After Prisoner Is Taken on a Warrant from the Persons Arresting Him.**

— Where the plaintiff had been arrested by the defendants, and after having been detained for two days was taken on a warrant before a United States commissioner, it was held that the defendants were not responsible for the damage that accrued to the plaintiff after he was taken on the warrant issued by the commissioner. *Wyatt v. Hill*, 71 Vt. 468.

**2.** *Jacobs v. Third Ave. R. Co.*, 71 N. Y. App. Div. 199, 34 Misc. (N. Y.) 512, *reversing* (N. Y. City Ct. Gen. T.) 33 Misc. (N. Y.) 802.

**3. Compensation the General Rule.** — *Maier v. Wilson*, 139 Cal. 514; *Petit v. Colmery*, 4 Penn. (Del.) 266; *Marshall v. Cleaver*, 4 Penn. (Del.) 450; *McCaffrey v. Thomas*, 4 Penn. (Del.) 437; *Golibart v. Sullivan*, 30 Ind. App. 428; *Mumford v. Starmont*, (Mich. 1905) 102 N. W. Rep. 662, 11 Detroit Leg. N. 802; *Mihalyik v. Klein*, 22 Pa. Super. Ct. 193; *Texas, etc., R. Co. v. Parker*, 29 Tex. Civ. App. 264.

**Injury to Character or Reputation.** — In an action in which the trial court limited the recovery to compensatory damages, and no special damages were alleged as to any injury to the plaintiff's reputation, it was held to be error for the court to charge the jury that they should take



**779.** (2) *Punitive Damages in Actions for False Imprisonment* —(a) **General Rule.** — See note 4.**780.** See notes 1, 2, 3.**781.** See note 1.(b) **What Is "Malice" in This Connection.** — See note 2.(c) **Several Defendants Sued Jointly.** — See note 3.(d) **Existence of Elements for Punitive Damages Question of Fact for Jury.** — See

note 4.

into consideration the question of injury to the plaintiff's character and assess such damages as would fairly compensate him for "the injury, if any, to his reputation." *Bergeron v. Peyton*, 106 Wis. 377, 80 Am. St. Rep. 33.

**Circumstances of Arrest and Detention.** — All the facts and circumstances connected with the plaintiff's unlawful imprisonment are admissible in evidence. *Miller v. Fano*, 134 Cal. 103, holding that testimony as to the treatment of the plaintiff in jail was admissible in evidence.

It has been held that, upon the question of damages in an action for false imprisonment under an attachment for contempt, it is competent to show the manner of the arrest and all that was said at the office of the justice while the plaintiff was held under the warrant of attachment. *Holz v. Rediske*, 116 Wis. 353.

**Discomforts of and Treatment in Prison.** — The plaintiff in an action for false imprisonment may testify as to the discomforts of the prison and his treatment during the imprisonment. *Fuqua v. Gambill*, 140 Ala. 464; *San Antonio, etc., R. Co. v. Griffin*, 20 Tex. Civ. App. 91.

**Newspaper Accounts of Plaintiff's Arrest and Imprisonment.** — Newspaper accounts of the arrest and commitment of the plaintiff, without comments thereon, having been admitted in evidence, after the genuineness and authenticity of the publications, and the extent to which they were circulated, had first been established, it was held that they were competent as affecting the question of damages. *Scott v. Flowers*, 60 Neb. 675, *overruled* 61 Neb. 620. But see *Butler v. Stockdale*, 19 Pa. Super. Ct. 98.

**779. 4.** *Parker v. McGlin*, 52 La. Ann. 1514; *Bingham v. Lipman*, 40 Oregon 363.

**780. 1.** In *Schneider v. McGill*, (Ky. 1901) 64 S. W. Rep. 835, the court, in holding that the trial court erred in instructing the jury that it might award punitive damages as a warning to the defendant and others, said: "It is doubtful if the jury should ever be told that punitive damages are permitted as a punishment of the defendant, the better practice being to simply say, after stating for what causes exemplary or punitive damages may be awarded, that, if the jury thus believe, they may, in the exercise of a sound discretion, give exemplary or punitive damages not exceeding the amount claimed."

**2. Where Defendant's Conduct Malicious or Oppressive.** — *Petit v. Colmery*, 4 Penn. (Del.) 266; *Marshall v. Cleaver*, 4 Penn. (Del.) 450; *Hight v. Naylor*, 86 Ill. App. 508; *Rauma v. Lamont*, 82 Minn. 477; *Craven v. Bloomingdale*, 171 N. Y. 439, *reversing* 54 N. Y. App. Div. 266, (Supm. Ct. Tr. T.) 30 Misc. (N. Y.) 650; *Grinnell v. Weston*, 95 N. Y. App. Div. 454; *Kelly v. Durham Traction Co.*, 132 N. Car. 368, 133 N. Car. 418; *Tucker v. Winders*, 130 N. Car. 147; *Bingham v. Lipman*, 40 Oregon 363.

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Punitive damages are not recoverable in false imprisonment in the absence of malice or oppression. *Maher v. Wilson*, 139 Cal. 514; *Clairborne v. Chesapeake, etc., R. Co.*, 46 W. Va. 363.

**Liability of Officer for Handcuffing Prisoner.** — The use of handcuffs in making an arrest does not alone constitute the employment of such unnecessary and brutal force as justifies the imposition of punitive damages. *Edger v. Burke*, 96 Md. 715.

An officer had two prisoners who were strangers to him; it was long after dark and he had a considerable distance to go with them. Except that he handcuffed them together there was nothing in his conduct to indicate wantonness or malice. It was held that the jury should have been instructed that there was no wantonness or malice, and that they should not find additional damages because the prisoners were handcuffed. *McCullough v. Greenfield*, 133 Mich. 463, 10 Detroit Leg. N. 280.

**Evidence of Reputed Wealth of Defendant.** — It has been held that in an action for false imprisonment evidence of the reputed wealth of the defendant is competent in considering the question of punitive damages. *Tucker v. Winders*, 130 N. Car. 147.

**3. Evidence of Good Faith.** — *Bacon v. Bacon*, 76 Miss. 458; *Pincham v. Dick*, 30 Tex. Civ. App. 230.

**Defendant's Provocation.** — In actions for false imprisonment, when exemplary damages are claimed, the defendant may, in mitigation of these, show to the jury that he was resisted by the plaintiff in his effort to effect the arrest of the latter, and any relevant circumstances showing a reasonable provocation for a resort to force on the part of the officer in making the arrest. *Petit v. Colmery*, 4 Penn. (Del.) 266.

**Evidence of Amount Earned by Officer.** — In an action against an officer for false imprisonment it has been held that he may testify as to how much he earned as going in mitigation of damages. *McCaffrey v. Thomas*, 4 Penn. (Del.) 437.

**781. 1. Malice or Motive Immaterial Where Punitive Damages Not Claimed.** — *Texas Midland R. Co. v. Dean*, (Tex. Civ. App. 1904) 82 S. W. Rep. 524; *Bergeron v. Peyton*, 106 Wis. 377, 80 Am. St. Rep. 33.

**2. Need Not Be Hatred or Ill Will.** — *Gambill v. Schmuck*, 131 Ala. 321; *Pinkerton v. Martin*, 82 Ill. App. 589; *Harness v. Steele*, 159 Ind. 286; *Stevens v. O'Neill*, 51 N. Y. App. Div. 364, *affirmed* 169 N. Y. 375. See *Johnson v. McDaniel*, 5 Ohio Dec. 717.

**3. Several Defendants Sued Jointly — Different Liabilities.** — See *Love v. Halladay*, (Mich. 1905) 102 N. W. Rep. 1027, 12 Detroit Leg. N. 9.

**4. Craven v. Bloomingdale**, 171 N. Y. 439, *reversing* 54 N. Y. App. Div. 266, (Supm. Ct. Tr.

**781.** *Liability of Corporations in Exemplary Damages.* — See note 5.

**782.** (3) *To What Extent Damages in Discretion of Jury.* — See notes 1, 2, 3, 5.

**A Few Illustrative Instances.** — See note 7.

T.) 30 Misc. (N. Y.) 650; *Tucker v. Winders*, 130 N. Car. 147; *San Antonio, etc., R. Co., v. Griffin*, 20 Tex. Civ. App. 91. See *Grinnell v. Weston*, 95 N. Y. App. Div. 454.

**Actions on Official Bond.** — In an action on the bond of a police officer to recover damages for making an unlawful arrest, it has been held that punitive damages are not recoverable. *Easton v. Com.*, 82 S. W. Rep. 996, 26 Ky. L. Rep. 960.

**781. 5. Liability of Corporations in Punitive Damages.** — It has been said that whatever the true rule may be, where it is sought to charge a corporation with exemplary damages on account of the malicious acts of its subordinate agents, there can be no room for controversy that where the officers actually wielding the whole executive power of the corporation participated in and directed all that was planned and done, their malicious, wanton, or oppressive intent may be treated as the intent of the corporation itself, for which it is liable to answer in exemplary damages. *Bingham v. Lipman*, 40 Oregon 363.

**Liability of Principal for Act of Agent.** — It has been held that exemplary or punitive damages, being awarded, not by way of compensation to the sufferer, but by way of punishment of the offender, and as warning to others, can only be awarded against one who has participated in the offense. A principal, therefore, though of course liable to make compensation for injuries done by his agent within the scope of his employment, cannot be held liable for exemplary or punitive damages, merely by reason of wanton, oppressive, or malicious intent on the part of the agent. It must appear that the acts of the agent were expressly or impliedly authorized or ratified by the principal. *Craven v. Bloomingdale*, 171 N. Y. 439, *reversing* 54 N. Y. App. Div. 266, (Supm. Ct. Tr. T.) 30 Misc. (N. Y.) 650.

**782. 1. Jury's Discretion.** — *Young v. Gormley*, 120 Iowa 372; *Bergeron v. Peyton*, 106 Wis. 377, 80 Am. St. Rep. 33.

It has been held that where evidence has been introduced in an action for false imprisonment tending to show that mental and physical pain had resulted from the wrongful act, it is not error to instruct the jury that there is no fixed rule for computing damages of this nature, but that the same are left to the enlightened conscience and intelligence of impartial jurors. *Southern R. Co. v. Gresham*, 114 Ga. 183.

**2. Golibert v. Sullivan**, 30 Ind. App. 428; *Dunlevy v. Wolferman*, 106 Mo. App. 46; *Pincham v. Dick*, 30 Tex. Civ. App. 230.

**3. Refusal of Court to Disturb Verdict as Inadequate Damages.** — See *Bergeron v. Peyton*, 106 Wis. 377, 80 Am. St. Rep. 33.

Although the plaintiff's arrest by the defendant, a police officer, was technically an unlawful arrest, in that the plaintiff was committing neither any crime, nor a breach of the peace, yet where it appeared that the defendant arrested the plaintiff because he believed her insane and in need of care for her own safety, and that there was an absence of any violence and of any

indignity other than the mere peaceful and orderly transportation of the plaintiff to a place of safety when she was momentarily exposing herself to a far higher degree of notoriety and disgrace, it was held that the court could not say that the jury acted wholly outside of their proper province in finding only nominal damages. *Wegner v. Risch*, 114 Wis. 270.

**5. Palmer v. Maine Cent. R. Co.**, 92 Me. 399, 69 Am. St. Rep. 513.

**7. Damages Held Not Excessive.** — A verdict for two hundred dollars for the false imprisonment of the plaintiff under void process has been held not to be excessive where there was evidence tending to show bad faith on the part of the defendants. *Strozzi v. Wines*, 24 Nev. 394, 395.

A judgment for three hundred dollars has been held not to be excessive damages for wrongfully arresting the plaintiff on an unfounded charge of theft, detaining him for one hour, and exposing him to the gaze of the public as under arrest. *Hight v. Naylor*, 86 Ill. App. 508.

Where an innocent woman was arrested on an unlawful warrant on a charge of arson, imprisoned seven hours, and compelled to remove her clothes before strange men for the purpose of being searched, it was held that a verdict for eight hundred dollars was not excessive. *McKelvey v. Marsh*, 63 N. Y. App. Div. 396.

A verdict for four hundred and fifty dollars against an officer for wrongfully arresting the plaintiff with undue force and keeping him in jail two and one-half hours, and a verdict of three hundred and fifty dollars against a person who assisted the officer in making the arrest, have been held not to be excessive. *Rauma v. Lamont*, 82 Minn. 477.

It has been held that a verdict for one thousand two hundred and seventy-one dollars was not excessive where the plaintiff had been wrongfully arrested, handcuffed, and detained in a detective agency for more than three days and nights and chained to a bed during one of the nights. *Pinkerton v. Sydnor*, 87 Ill. App. 76.

A verdict for one thousand five hundred dollars has been held not to be excessive for the imprisonment of a sane woman in an insane asylum for a period of three months. *Bacon v. Bacon*, 76 Miss. 458.

Where the plaintiff had been unlawfully restrained and searched by the employees in the defendant's store and accused of having committed a theft, it was held that a verdict for two thousand dollars was not excessive. *Efroymson v. Smith*, 29 Ind. App. 451.

**Damages Held Excessive.** — A verdict for two thousand five hundred dollars has been held excessive for the detention and searching of the plaintiff in the defendant's store on an unfounded charge of shoplifting, where there were no circumstances of public disgrace or insult nor physical violence. *Cobb v. Simon*, 119 Wis. 597, 100 Am. St. Rep. 909.

Where the plaintiff had been arrested for an

- 783.** (4) *Damages for Physical Suffering.* — See note 1.  
 (5) *Damages for Mental Suffering.* — See notes 2, 3.  
*Such Damages Compensatory and Not Vindictive.* — See note 5.  
 (6) *Loss of Time and Interruption of Business.* — See note 6.  
**784.** (7) *Expenses Incurred to Secure Release.* — See note 1.  
**785.** V. FALSE IMPRISONMENT AS A CRIMINAL OFFENSE. — See note 6.

ordinary misdemeanor, and was kept in custody for only three hours and suffered no unusual indignity, and no violence, a judgment for four thousand dollars was held to be excessive. *Schneider v. McGill*, (Ky. 1901) 64 S. W. Rep. 835.

**783. 1. Discomforts of Prison.** — Damages are recoverable for the discomforts undergone by the plaintiff while in jail. *San Antonio, etc., R. Co. v. Griffin*, 20 Tex. Civ. App. 91.

**2. Mental Suffering.** — *Harness v. Steele*, 159 Ind. 286; *State v. Evans*, 83 Mo. App. 301; *Lovick v. Atlantic Coast Line R. Co.*, 129 N. Car. 427; *Butler v. Stockdale*, 19 Pa. Super. Ct. 98; *Goodell v. Tower*, 77 Vt. 61.

**3. Evidence Admissible — Shame, Humiliation, and Disgrace.** — The plaintiff in an action for false imprisonment may be allowed to testify that he felt humiliated by the arrest. *Mumford v. Starmont*, (Mich. 1905) 102 N. W. Rep. 662, 11 Detroit Leg. N. 802.

The plaintiff may properly be permitted to testify that he was in a complete state of nervous collapse for two days following his arrest, and that he did not fully recover from this state of nervous prostration for at least two months. *Bailey v. Warner*, (C. C. A.) 118 Fed. Rep. 395.

**Evidence of Domestic Relations.** — It has been

held that the testimony of the plaintiff that he is married and has a family is not admissible in evidence. *Bergeron v. Peyton*, 106 Wis. 377; *Holz v. Rediske*, 116 Wis. 353.

**Evidence Showing Circumstances of Arrest.** — It has been held that a plaintiff may show in aggravation of damages that the arrest was made in the presence of his mother, wife, and son. *Young v. Gormley*, 120 Iowa 372.

**5. Young v. Gormley**, 120 Iowa 372.

**6. Loss of Time — Interruption of Business.** — *Young v. Gormley*, 120 Iowa 372; *Goodell v. Tower*, 77 Vt. 61.

**Evidence of Inability to Secure Employment.** — Evidence of plaintiff, who was a newspaper reporter, that during the week succeeding his arrest and prior to his discharge he applied to several newspapers for employment as a reporter, but was refused employment when it was learned that he had not been released from arrest, has been held to be competent, as tending to show the actual damages sustained. *Bailey v. Warner*, (C. C. A.) 118 Fed. Rep. 395.

**784. 1.** But see *McCaffrey v. Thomas*, 4 Penn. (Del.) 437.

**785. 6.** *Meyer v. State*, (Tex. Crim. 1899) 49 S. W. Rep. 600.

## FALSE PERSONATION.

BY JOHN D. MARTIN.

- 787. III. THE STATUTORY OFFENSE — 1. In General.** — See note 1.  
**2. Obtaining Property by False Personation.** — See note 3.  
**788. 5. Personating Officer.** — See notes 3, 4, 5.

**787. 1. Naturalization Statute.** — In U. S. v. York, 131 Fed. Rep. 323, it is held that U. S. Rev. Stat., § 5424, is expressly confined to a "person applying to be admitted a citizen, or appearing as a witness for any such person."

**3. Personation Must Be Inducement.** — A representation made a year before the prosecutor parted with his money is too remote upon which to found a conviction under the statute last above mentioned. *U. S. v. Farnham*, 127 Fed. Rep. 478.

In *Georgia*, where one pretending to be an officer makes an arrest and threatens to prosecute for a crime unless money is paid to settle therefor, and the money is paid to prevent such prosecution, it is held that the offense is not cheating and swindling under the statute covering that crime, but blackmail under another statute against extorting money by threatening to accuse of crime. *Jackson v. State*, 118 Ga. 125.

**788. 3. Authority of Government.** — In *Texas*

it is said that branch pilots, appointed by the governor, are not officers, but conceding that they are some sort of officers, the act creating branch pilots makes no provision for the execution of any laws by them, and one cannot be punished for personating a branch pilot, under a statute against personating executive officers. *Petterson v. State*, (Tex. Crim. 1900) 58 S. W. Rep. 100.

**Pretending to Act under Authority of United States.** — It is a statutory offense against the United States government falsely to impersonate an officer or employee of the United States, and in such character to demand or obtain from the United States or from some person any money or other thing of value. The elements of the offense do not limit the wrongful act to such as extorting money under the guise of asserting a claim due to the United States, but include the holding of one's self out as such officer or employee for the purpose, among other things, of giving him such credit or standing as will en-



**788.** Where Prosecutor Parted with Property for Unlawful Purpose.— See note 6.

**789.** 9. Personating Voter. — See note 5.

**790.** 10. Personating Dead Person. — See note 3.

**IV. RELATION TO OTHER OFFENSES — 1. As a False Pretense. —** See note 6.

able him to obtain money for his private use and with intent to defraud. *U. S. v. Ballard*, 118 Fed. Rep. 757; *U. S. v. Taylor*, 108 Fed. Rep. 621, holding further that the first part of the statute, that "every person who \* \* \* falsely assumes or pretends to be an officer or employee acting under the authority of the United States," etc., makes an important element of the offense to consist of making use of the assumed position for the purpose of extorting money or property from another either in satisfaction of an alleged claim of the United States, or to secure immunity from punishment for an alleged offense.

**788.** 4. Intent to Defraud. — See *U. S. v. Taylor*, 108 Fed. Rep. 621.

**5. Statute Against Demanding or Obtaining. —** Under a statute punishing the false impersonation of an officer or employee of the United States and in such character to "demand or obtain," etc., while the indictment should charge in the conjunctive that the defendant demanded and obtained, it is not necessary that both the demanding and the obtaining should be proven. *U. S. v. Ballard*, 118 Fed. Rep. 757.

**Obtaining "Thing of Value."** — Obtaining the use and rent of a lodging room is obtaining a thing of value under the statute making it an offense to impersonate an officer or employee of the United States and in such character to demand or obtain "any money \* \* \* or other

valuable thing," etc. *U. S. v. Ballard*, 118 Fed. Rep. 757.

**6.** See *Jackson v. State*, 118 Ga. 125. And see *supra*, **787. 3.**

**789. 5. One Personated Must Be Elector — Proof. —** Under a statute in *Missouri* making it a felony for one to personate an elector, it is necessary to prove that the person whom the defendant is charged to have represented himself to be was a qualified elector at the time of the alleged personation, and the register containing the name of the alleged elector is not proof against the defendant that such person was a qualified elector, and cannot by itself overcome the presumption of innocence. *State v. Nolan*, 168 Mo. 446, 90 Am. St. Rep. 466; *State v. O'Brien*, 168 Mo. 404; *State v. Shelley*, 166 Mo. 616.

**790. 3. Personation of Dead Person. —** See *U. S. v. York*, 131 Fed. Rep. 323, for particular United States statute relating to naturalization.

**6. False Personation as a False Pretense. —** *State v. Marshall*, 77 Vt. 262.

Merely using a letterhead containing the name of another, such name being also that of the writer, is not a false pretense, where there is no representation in the letter that the writer is such other person. *Cowan v. State*, 41 Tex. Crim. 617.

## FALSE PRETENSES AND CHEATS.

BY JOHN LEHMAN.

**794. I. CHEATS AT COMMON LAW — 2. Nature and Classification — a. IN GENERAL. —** See note 2.

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**797. 1. Selling by False Weights and Measures. —** *People v. Hart*, (Ct. Gen. Sess.) 35 Misc. (N. Y.) 182.

**800. 2. Statute 30 Geo. II., c. 24, Concerning Cheats by False Pretenses. —** See *People v. Hart*, (Ct. Gen. Sess.) 35 Misc. (N. Y.) 182.

**804. 1. False Pretense Defined. —** *People v. Miller*, 169 N. Y. 340; *People v. Hart*, (Ct. Gen. Sess.) 35 Misc. (N. Y.) 182; *State v. Taylor*, 131 N. Car. 711; *State v. Torrence*, 127 N. Car. 550; *State v. Stewart*, 9 N. Dak. 409.

To constitute the offense, it is enough if a material part of the pretense be false; that it be

made with the intent to defraud, and that it induces the person sought to be wronged to part with his property. *Wilkerson v. State*, 140 Ala. 155.

A false pretense may consist in any act, word, symbol, or token calculated to deceive another, and knowingly and designedly employed by any person with intent to defraud another of money or other personal property. *State v. Lynn*, 3 Penn. (Del.) 316.

**To Procure a Gift. —** See *infra*, **845. 2.**

**4. Need Not Purport to Create Obligation. —** It is not necessary, to constitute a false pretense, that the writing shall purport to create an obligation. *State v. Bourne*, 86 Minn. 432; *State v. Stewart*, 9 N. Dak. 409.

**806. d. FROM LARCENY — (1) In General.** — See note 1.

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**806. 1. Distinction Between Larceny and False Pretense.** — Foster v. State, 117 Ga. 39; State v. Styner, 154 Ind. 131; State v. Buck, 186 Mo. 15; State v. Copeman, 186 Mo. 108, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 805; People v. Miller, 169 N. Y. 339; State v. Taylor, 131 N. Car. 711 (holding, however, that under the statute in North Carolina the question of title or ownership is not material in a charge of obtaining property by false pretenses); State v. Edwards, 51 W. Va. 220, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 805. See also Powell v. State, 44 Tex. Crim. 273.

**3. Offense Deemed to Be False Pretenses.** — Where the charge was that the false representations and pretenses were made for the purpose of inducing the prosecuting witness to execute and deliver to the defendant a bank check, represented by the defendant and believed by the prosecuting witness to be for one hundred and twenty-five dollars, but which was in fact for seven hundred and twenty-five dollars, it was held that there was an obtaining of property by false pretenses. State v. Styner, 154 Ind. 131.

**807. 1. Instance in Which It Has Been Held that the Offense Was Larceny.** — People v. Sumner, 33 N. Y. App. Div. 338, affirmed 161 N. Y. 652, supporting the first paragraph of the original note.

**2. Where Possession Is Obtained by Fraud** or by a trick the delivery is incomplete, and if the possession was obtained with the intent to convert the property the offense is larceny. State v. Edwards, 51 W. Va. 220. To the same effect see Verberg v. State, 137 Ala. 73. And see the title LARCENY.

**808. 4.** See for such statutes Com. v. Burton, 183 Mass. 461; State v. Southall, 77 Minn. 296; People v. Monroe, 64 N. Y. App. Div. 130 (wherein it is said that the common-law crime of obtaining money under false pretenses has lost its distinctive character by being included in that of larceny); People v. Miller, 169 N. Y. 340; People v. Wheeler, 169 N. Y. 487; People v. Rothstein, 89 N. Y. App. Div. 292, affirmed 180 N. Y. 148; People v. Putnam, 90 N. Y. App. Div. 125, affirmed 179 N. Y. 518; State v. Edwards, 51 W. Va. 220. See also Jones v. State, (Tex. Crim. 1899) 49 S. W. Rep. 387.

**810. 1. Pretense Must Relate to Existing or Past Fact.** — Wilkerson v. State, 140 Ala. 155; Mitchell v. State, 70 Ark. 30; Holton v. State, 109 Ga. 127; State v. Carter, 112 Iowa 15; Cook v. State, (Neb. 1904) 98 N. W. Rep. 810; People v. Miller, 169 N. Y. 340; People v. Hart,

(Ct. Gen. Sess.) 35 Misc. (N. Y.) 182; State v. Whidbee, 124 N. Car. 796.

**5. Future Event.** — West v. State, 63 Neb. 257; Cook v. State, (Neb. 1904) 98 N. W. Rep. 810.

**A Threat to Do an Act** is not a false pretense. People v. Wheeler, 169 N. Y. 487.

**811. 3. Promise to Do Thing Is Not False Pretense.** — Wilkerson v. State, 140 Ala. 155; Mitchell v. State, 70 Ark. 30; Edge v. State, 114 Ga. 113; Dickerson v. State, 113 Ga. 1035; Cook v. State, (Neb. 1904) 98 N. W. Rep. 810; People v. Miller, 169 N. Y. 339; People v. Hart, (Ct. Gen. Sess.) 35 Misc. (N. Y.) 182; State v. Knott, 124 N. Car. 814.

**Contract to Perform Services.** — In Georgia it is provided by statute that if one contract to perform services for another with intent to procure money or other thing of value and not to perform the service, to the loss and damage of the hirer, etc., he shall be deemed a common cheat and swindler, etc., and the statute was held not to violate the constitutional inhibition against imprisonment for debt. Lamar v. State, 120 Ga. 312.

The statute does embrace a case of one who makes a contract to purchase an article of merchandise and agrees to pay a sum of money therefor, and after the contract is completed agrees that if the purchase price is not paid he will perform service or labor to the value of such purchase price. Calhoun v. State, 119 Ga. 312.

**Statute in North Carolina as to Advances.** — In North Carolina the statute makes it an offense to obtain "advances upon representation of the ownership of property and promising to apply the same to payment of the debt, and failing to do so," and the provision is held not to be in conflict with the constitutional inhibition of "imprisonment for debt except in cases of fraud." State v. Torrence, 127 N. Car. 550.

**812. 3. Pretense and Promise Combined or Concurrent.** — State v. Vandenburg, 159 Mo. 230, quoting 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 812; Smith v. State, 116 Ga. 587; Holton v. State, 109 Ga. 127.

**Conversely,** if the promise and not the representation of fact is the inducement, no offense is committed. People v. Hart, (Ct. Gen. Sess.) 35 Misc. (N. Y.) 182.

**813. 3. False Pretense Amounting Only to Opinion Not Indictable.** — Holton v. State, 109 Ga. 127; Cook v. State, (Neb. 1904) 98 N. W. Rep. 810; People v. Hart, (Ct. Gen. Sess.) 35 Misc. (N. Y.) 182.

**814. 2. Divisibility of Pretense.** — Wilker-

**815.** (6) *Continuing Pretense.* — See note 1.

(7) *Pretense Arising Out of Contracts.* — See note 5.

**816.** (8) *Pretense Must Be Calculated to Deceive.* — See note 5.

**817.** *An Absurd or Irrational Representation.* — See notes 1, 3.

**818.** See note 1.

*Means of Detection at Hand.* — See note 2.

**819.** (9) *Pretense Must Be the Inducement to Parting with Property.* — See note 2.

son *v.* State, 140 Ala. 155, holding that it is enough if a material part of the pretense be false.

**Question for Court.** — The court should instruct the jury which of the alleged representations are material. *West v. State*, 63 Neb. 257.

**815. 1. Continuing Pretense.** — *Wilkerson v. State*, 140 Ala. 155; *Doxey v. State*, (Tex. Crim. 1905) 84 S. W. Rep. 1061, holding, however, that the representation involved, having been made for another purpose, was not sufficiently proximate to the obtaining of the thing on account of which the accused was charged.

**When Reaffirmation Necessary.** — Where statements are made as a basis of obtaining credit, but are not acted on until some time after they are made, they cannot be the foundation of a prosecution for cheating and swindling, unless the person making the statements expressly reaffirmed their truth, or at the time of obtaining the credit knew, or had reason to believe, that it was extended on the faith of such previous statements. *Broznack v. State*, 109 Ga. 514.

**Representation Believed to Be True When Made.** — Where a representation of ownership of title to a piece of land is made by one who believes it to be true at the time, and afterwards, and before he consummates the sale, he finds he has no title, if he knows the purchaser is still relying on the representation, and he remains silent with intent to deceive, he is guilty, otherwise not. *Crawford v. State*, 117 Ga. 247.

5. See *supra*, **811. 3.**

**816. 5. Pretense Must Be Calculated to Deceive.** — *State v. Carter*, 112 Iowa 15.

**It Is Not Necessary to Exhaust Every Effort** to ascertain whether one is attempting to practice a fraud. *Com. v. Scroggin*, 60 S. W. Rep. 528, 22 Ky. L. Rep. 1338.

**817. 1. Absurd or Irrational Pretense.** — *State v. Lawrence*, 178 Mo. 350; *In re False Pretenses*, 9 Ohio Dec. 825.

**Weak-minded Persons.** — It is no defense to a charge of victimizing a weak-minded person that the representations made by the defendant were absurd and irrational. *People v. Bird*, 126 Mich. 631.

**3. Pretense Need Not Be Such as Would Deceive Person of Ordinary Caution.** — *Leffer v. State*, 153 Ind. 82, 74 Am. St. Rep. 300 (overruling all earlier cases in that state which hold otherwise); *State v. Southall*, 77 Minn. 206 (which was a charge of statutory larceny); *State v. Hubbard*, 170 Mo. 346; *State v. Stewart*, 9 N. Dak. 409; *Harrison v. State*, 44 Tex. Crim. 243. See also *Keyes v. People*, 197 Ill. 638. And see *infra*, **837. 6.**

**818. 1.** *State v. Hood*, 3 Penn. (Del.) 418; *People v. Hart*, (Ct. Gen. Sess.) 35 Misc. (N. Y.) 182, where it is said that the criminal law

does not protect men from the consequences of their own credulity or folly.

**2. Where Defrauded Party Has Means of Detection at Hand, False Pretense Not Indictable.** — *State v. Lawrence*, 178 Mo. 350; *Cowan v. State*, 41 Tex. Crim. 617.

But a defendant cannot escape liability on the ground merely that the person deceived could have ascertained the falsity of the representation. *In re False Pretenses*, 9 Ohio Dec. 825.

**Where Liability Does Not Depend on Diligence.** — Verbal representations as to the ownership of property and as to the character of a paper as a receipt for such property might be sufficient to induce a loan without making a careful inspection of the paper, and in such a case the question of guilt does not necessarily depend upon diligence used in ascertaining the character of the paper. *Elmore v. State*, 138 Ala. 50.

**Representation by One of Superior Knowledge.** — Where the representation was by a lawyer to induce a woman to retain him to prevent a pretended threatened prosecution, it was said that the attorney's words carried with them the weight of superior knowledge, acting upon the responsibility of a sacred trust, and that under such circumstances what might otherwise amount to a naked lie would be a false pretense. *People v. Monroe*, 64 N. Y. App. Div. 130.

**819. 2. Pretense Must Be Means of Obtaining Property** — *Alabama.* — *Wilkerson v. State*, 140 Ala. 155.

*California.* — *People v. Cadot*, 138 Cal. 527.

*Florida.* — *Edwards v. State*, 45 Fla. 22.

*Illinois.* — *Simmons v. People*, 187 Ill. 327.

*Indiana.* — *Stifel v. State*, 163 Ind. 628.

*Iowa.* — *State v. Carter*, 112 Iowa 15.

*Missouri.* — *State v. Bohle*, 182 Mo. 58.

*New York.* — *People v. Whiteman*, 72 N. Y. App. Div. 90 (which, however, was a prosecution for statutory larceny); *People v. Livingstone*, 47 N. Y. App. Div. 283; *People v. Hart*, (Ct. Gen. Sess.) 35 Misc. (N. Y.) 182.

*Texas.* — *Thorpe v. State*, 40 Tex. Crim. 346; *Hunter v. State*, 46 Tex. Crim. 498, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 819.

See also *State v. Miller*, 153 Ind. 229; *State v. Seipel*, 104 La. 67 (wherein an instruction involving this element was approved); *People v. Luttermoser*, 122 Mich. 562; *State v. Mortimer*, 82 Miss. 443.

**Prosecution Based on Fraudulent Judgment.** — A prosecution for swindling cannot be predicated on a judgment rendered by a court of competent jurisdiction. *Hunter v. State*, 46 Tex. Crim. 498.

Where one who had insured his life pretended to have been killed, and disappeared and concealed himself, he cannot be convicted of obtaining money under false pretenses predicated upon the recovery of a judgment on the policy



**820.** See note 2.

**821.** Pretense Made After Property Obtained. — See note 3.  
Need Not Be the Sole Inducement. — See notes 5, 6.

**822.** Effect of Representations. — See note 3.

(10) Pretense Need Not Be Personally Made. — See note 4.

(11) Pretense Need Not Be in Words — Acts Sufficient. — See note 6.

**823.** (12) Writing Required in Case of Certain Pretenses. — See note 1.

(13) Defendant's Knowledge of Falsity of Pretense. — See note 2.

**824.** 5. The Intent — *a.* IN GENERAL. — See note 3.

**825.** *b.* INTENT TO DEFRAUD A PARTICULAR PERSON. — See note 3.

*c.* WHEN INTENT NOT FRAUDULENT. — See note 4.

**826.** 6. The Obtaining of Property — *a.* IN GENERAL. — See note 2.

**827.** Obtaining by Accused or for His Benefit. — See note 1.

Right of Property Must Be Parted With. — See note 2.

by his executor, there being no privity between the executor and the assured in the transaction. *State v. Fraker*, 148 Mo. 143.

**820.** 2. *State v. Lynn*, 3 Penn. (Del.) 316.

**821.** 3. Pretense Made After Property Obtained. — *State v. Pickett*, 174 Mo. 663; *Roby v. State*, 61 Neb. 218.

5. Pretense Need Not Be Sole Inducement. — *Braxton v. State*, 117 Ga. 703; *State v. Dexter*, 115 Iowa 678; *State v. Carter*, 112 Iowa 15; *State v. Morgan*, 109 Tenn. 157; *Cowan v. State*, 41 Tex. Crim. 617.

6. *State v. Hulder*, 78 Minn. 524, holding in a prosecution for obtaining money from a railroad company by the defendant's falsely representing himself to have been injured, the fact that the claim agent of the railroad company said that he settled with the defendant in order to get rid of him does not necessarily show that said agent did not rely upon the defendant's statements. See also *West v. State*, 63 Neb. 257.

**822.** 3. Effect of Representations Is Question for Jury. — *Berreyesa v. Territory*, (Ariz. 1904) 76 Pac. Rep. 472; *People v. Stockwell*, 135 Mich. 341; *State v. Stewart*, 9 N. Dak. 409.

4. Pretense to Agent. — *State v. Taylor*, 131 N. Car. 711; *State v. Stewart*, 9 N. Dak. 409. See also *People v. Cadot*, 138 Cal. 527.

6. Pretense Need Not Be in Words. — *State v. Lynn*, 3 Penn. (Del.) 316; *Crawford v. State*, 117 Ga. 247; *State v. Southall*, 77 Minn. 296 (which was a prosecution for statutory larceny); *Hunter v. State*, 46 Tex. Crim. 498.

**823.** 1. Means or Ability to Pay — New York. — *People v. Rothstein*, 95 N. Y. App. Div. 292, affirmed 180 N. Y. 148.

The statutory requirement is not operative where the representation made and relied on is as to the existence of a source extraneous to the defendant, from which payment or security is to be had. *People v. Rothstein*, 95 N. Y. App. Div. 292, affirmed 180 N. Y. 148.

2. Knowledge of Falsity of Pretense Essential. — *Crawford v. State*, 117 Ga. 247; *Waterman v. State*, 114 Ga. 262; *Holton v. State*, 109 Ga. 127; *People v. Hart*, (Ct. Gen. Sess.) 35 Misc. (N. Y.) 182; *Doxey v. State*, (Tex. Crim. 1905) 84 S. W. Rep. 1061; *Hunter v. State*, 46 Tex. Crim. 498.

Honesty in Religious Belief. — In a prosecution for obtaining money under a pretense of being the apostles of Christ, if defendants were honest in their belief of the truth of their representa-

tion they cannot be convicted. *People v. Bird*, 126 Mich. 631.

**824.** 3. Intent to Defraud Essential. — *People v. Cadot*, 138 Cal. 527; *Edwards v. State*, 45 Fla. 22; *Blum v. State*, 94 Md. 375 (involving representations to a mercantile agency); *State v. Lutton*, 65 N. J. L. 605; *People v. Hart*, (Ct. Gen. Sess.) 35 Misc. (N. Y.) 182; *Baker v. State*, 120 Wis. 135.

Swindling. — In *Texas* intent to defraud is not an essential element of the statutory crime of swindling. *McPearson v. State*, (Tex. Crim. 1904) 79 S. W. Rep. 522. But see *Cowan v. State*, 41 Tex. Crim. 617.

**825.** 3. Intent to Defraud Particular Person Not Essential. — *State v. Ridge*, 125 N. Car. 658, holding that naming the person in the indictment is surplusage, and a variance cannot be predicated on the proof of another person than the one named.

In *Minnesota*, in a prosecution for statutory larceny by false pretenses, it is held that there is no variance between proof tending to show that a particular person was defrauded and an allegation in the indictment that defendant intended to defraud another person. *State v. Bourne*, 86 Minn. 432.

Under a charge of obtaining money from a particular person, evidence that such person took the security offered and gave a pawn ticket in the name of "Capital City Loan Co.," under which name he conducted business, does not create a variance. *Elmore v. State*, 138 Ala. 50.

4. Rule Confined to Liquidated Amount or Ascertained Duty. — The rule of the text has no application where there is no evidence of a liquidated amount to be paid, or other ascertained duty due. It is no defense to a prosecution for falsely representing the extent of injuries received in a railroad accident, and thereby obtaining compensation for the injuries as falsely represented, that the defendant had in fact sustained some injury. *Com. v. Burton*, 183 Mass. 461.

**826.** 2. Property Must Have Been Obtained. — See also as supporting the text by rulings as to requirements of allegation in the indictment, *State v. Kelly*, 170 Mo. 151; *State v. Hubbard*, 170 Mo. 346.

**827.** 1. *State v. Balliet*, 63 Kan. 707.

2. Right of Property in Thing Must Be Parted With. — But see *State v. Balliet*, 63 Kan. 707.

**827.** *c.* DEFENDANT INTERESTED IN PROPERTY OBTAINED. — See note 4.

*d.* DELIVERY OF PROPERTY. — See note 7.

**828.** *f.* INJURY OR PREJUDICE TO DEFRAUDED PARTY. — See notes 2, 3.

**829.** *g.* CONVERSION OF PROPERTY. — See note 2.

**832.** *h.* THE PROPERTY OR THING OBTAINED — (2) *Valuable Thing*. — See note 2.

**834.** (6) *Signature to Written Instrument* — (a) *In General*. — See note 1. *Instrument Must Be of Value*. — See note 2.

(b) *Signature to Conveyance of Land*. — See note 3.

**835.** (d) *Delivery of Instrument*. — See note 3.

7. *When Offense Complete*. — See note 5.

**836.** 8. *Who May Commit Offense* — A *Minor*. — See note 2.

*Agent*. — See note 3.

9. *Particular Instances of False Pretenses* — *a.* MEANS AND RESOURCES — OWNERSHIP OF PROPERTY — (1) *In General*. — See note 5.

*Ownership of Property*. — See note 6.

**837.** *Title to Land*. — See note 1.

**827.** 4. *Where Defendant Interested in Property Obtained*. — See *State v. Mendenhall*, 24 Wash. 12, holding that under the particular facts there was no partnership so as to make such defense available.

7. *Obtaining from Agent*. — See *Fields v. State*, 121 Ala. 16, where the evidence of sales of goods was not confined to sales by the firm to whom the alleged representations were made, but was extended to sales by clerks of said firm.

**828.** 2. *Fraud Must Be Committed*. — *People v. Cadot*, 138 Cal. 527; *People v. Hart*, (Ct. Gen. Sess.) 35 Misc. (N. Y.) 182.

3. *There Must Be Injury*. — *Lively v. State*, (Tex. Crim. 1903) 74 S. W. Rep. 321.

*Value of Security Taken*. — While the evidence must show that the person alleged to have been defrauded sustained injury and damage by reason of the representations, this is shown by proof that security taken upon the faith of such representations was of less value than it would have been if the representations had been true. *Rucker v. State*, 114 Ga. 13. See also *infra*, 832. 2.

**829.** 2. *Swindling — Statutory Offense by Executor, Administrator, or Guardian*. — In *Texas*, though the section of the Penal Code defining swindling makes a fraudulent pretense in the obtaining of the property an element, such element is dispensed with in another section which makes it swindling for an executor, administrator, or guardian to convert the trust property to his own use. *Walls v. State*, 45 Tex. Crim. 329.

**832.** 2. *Valuable Thing*. — A promissory note is a valuable thing within the meaning of the statute. *State v. Vandenburg*, 159 Mo. 230. And this whether the maker is solvent or not. *Holton v. State*, 109 Ga. 127.

**834.** 1. *Obtaining Signature to Written Instrument*. — *State v. Tripp*, 113 Iowa 698 (under a statute making it a crime to procure, by false pretenses, the signature to an instrument the false making of which would be punished as forgery, and holding that a deed in blank as to the grantee is such an instrument);

*Com. v. Scroggin*, 60 S. W. Rep. 528, 22 Ky. L. Rep. 1338.

2. See also *infra*, 849. 9.

3. *Included under General Statute*. — The offense is also included in a general statute against obtaining, by false pretenses, the signature to a written instrument. *Moline v. State*, (Neb. 1904) 100 N. W. Rep. 810.

**835.** 3. *Inducement to Delivery*. — But if the false pretense is after the signature of the instrument and induces the delivery and not the signature, it seems the offense of procuring the signature is not committed. See *Moline v. State*, 67 Neb. 164.

5. *Offense Complete When Property Obtained*. — See *infra*, 855. 6.

**836.** 2. *Minor Indictable for False Pretenses*. — *Lively v. State*, (Tex. Crim. 1903) 74 S. W. Rep. 321, holding that it does not matter that the articles procured were not necessities.

3. *Agent*. — *State v. Mendenhall*, 24 Wash. 12.

5. *False Representation of Means or Resources*. — *State v. Carter*, 112 Iowa 15.

*Financial Standing of Firm*. — A representation by the defendant as to the financial standing of a firm of which he is a member is a representation of the financial standing of the individuals composing the firm, including that of defendant himself. *Berkenfield v. People*, 191 Ill. 272.

6. *Pretense as to Owning Property*. — *Moore v. People*, 190 Ill. 331.

*Giving Mortgage*. — *State v. Hubbard*, 170 Mo. 346; *Lively v. State*, (Tex. Crim. 1903) 74 S. W. Rep. 321.

**837.** 1. *Title to Land*. — *Crawford v. State*, 117 Ga. 247; *Holton v. State*, 109 Ga. 127, holding that a representation of title is a representation of a fact and not the expression of a mere opinion.

*Larceny by False Pretense under New York Statute*. — If a party falsely represents that he has title to property, whereby he secures the agreed price without vesting the title in the purchaser, the statutory crime is committed. But it is otherwise where after the false representation is made the party acquires title and vests it

- 837.** (2) *As to Incumbrances on Property.* — See note 6.  
**838.** (3) *Giving Check.* — See note 2.  
**840.** *b. AS TO INDEBTEDNESS DUE.* — See note 3.  
*c. AS TO VALIDITY OF CLAIMS FOR MONEY.* — See note 4.  
**841.** *d. AS TO BUSINESS — BUSINESS RELATIONSHIPS — OCCUPATION.* — See note 2.  
**843.** *g. AS TO GENUINENESS — Worthless Bills and Notes.* — See note 6.  
**845.** *i. AS TO PERSONAL STATUS OR CONDITION — (3) Being in a Necessitous Condition.* — See note 2.  
*j. AS TO IDENTITY.* — See note 3.  
*l. AS TO POSSESSING SUPERNATURAL POWER.* — See note 7.  
**847.** 10. *Jurisdiction of Offense — a. IN GENERAL.* — See note 5.  
**848.** *Place Where Property Obtained — Property Delivered to Common Carrier.* — See note 1.

**Pretense Made by Letter.** — See note 3.

in the purchaser, who thus gets and pays for all for which he bargained. *People v. Wheeler*, 169 N. Y. 487.

**837. 6. Misrepresentation that Property Is Unencumbered.** — *Keyes v. People*, 197 Ill. 638, holding that such a misrepresentation will support a verdict of guilty although the defrauded party could have ascertained the falsity of the statement by an examination of the mortgage records.

**838. 2. Giving Worthless Check Is False Pretense.** — *Rex v. Cosnett*, 84 L. T. N. S. 800, 65 J. P. 472; *State v. Johnson*, 77 Minn. 267 (under the statute making the offense larceny). In the case last cited it is held that in negotiating a check the maker does not necessarily represent that he then has with the bank funds out of which the check will be paid, but that he does represent by the act of passing the check that it is a good and valid order and that the existing state of facts is such that in the ordinary course of business the check will be paid; that the gist of the offense is the intent to defraud. See *State v. Seipel*, 104 La. 67, where an instruction on this phase of the subject was approved. *Contra*, *Blackwell v. State*, 41 Tex. Crim. 104.

**Difference between Personal Check and One Payable to Order.** — In *People v. Whiteman*, 72 N. Y. App. Div. 90, which, however, was a prosecution for statutory larceny, the court said: "The rule is necessarily quite different with reference to the criminal liability in having a personal check cashed, and in having a check payable to one's order cashed. In the former case he is presumed to know the condition of his own bank account; but where a person asks to have a check payable to his order cashed, while he guarantees payment, it is evident that he may not know whether the account of the drawer of the check is good, and he will not be liable criminally unless he makes some express material representation, or knows that the check is not good."

**840. 3. As to Indebtedness Due.** — *State v. Carter*, 112 Iowa 15.

**4. As to Validity of Claims.** — *Rex v. Taylor*, 65 J. P. 457.

**Prosecution Based on Fraudulent Judgment.** — See *supra*, 819. 2.

**841. 2. Com. v. Scroggin**, 60 S. W. Rep. 528, 22 Ky. L. Rep. 1338.

**843. 6. "Time Checks."** — False government "time checks" are false representations, even though they are such that if genuine they would not be of any validity. *State v. Southall*, 77 Minn. 296.

**Confederate Bills.** — The representation that certain bills were good and lawful money of the United States, whereas they were Confederate bills which had for some time been worthless, was a false representation of a material existing fact, and in the case at bar was held to be such a representation as the defrauded party had a right to rely upon. *Pinney v. State*, 156 Ind. 167.

**845. 2. To Procure Gift.** — It is no less a crime, under the statute against obtaining money, etc., by false pretenses, to deceive another into yielding money or other property as a gift, than in yielding it under the pretense of trade. *State v. Styner*, 154 Ind. 131; *State v. Carter*, 112 Iowa 15.

**3. Identity.** — In *Cowan v. State*, 41 Tex. Crim. 617, a firm under the name of B. M. Williams & Co. ordered goods by mail, writing on paper containing the firm name; there was another B. M. Williams in the same town who was known to the house to whom the order was sent, but there was no representation that the Williams of the firm sending the order was identical with the other, and it was held that the letter-head alone was not a false representation, under the statute against conspiracy to swindle. *Baker v. State*, 120 Wis. 135.

**7. Medium.** — To defraud by a pretense of being a medium is punishable, and it is not a defense that the representation was such as would not deceive persons of ordinary comprehension and prudence. *People v. Gilman*, 121 Mich. 187, 80 Am. St. Rep. 490, which was a prosecution for conspiracy to cheat.

**847. 5. Offense Committed in Place Where Property Obtained.** — *Graham v. People*, 181 Ill. 477; *Dechard v. State*, (Tex. Crim. 1900) 57 S. W. Rep. 813; *State v. Marshall*, 77 Vt. 262.

**848. 1. Delivery to Carrier Is Delivery to Defendant.** — *In re Stephenson*, 67 Kan. 556.

**3. Pretense Made by Letter.** — *Com. v. Schmunk*, 207 Pa. St. 544, where the letter was written in Pennsylvania and sent to New York, and the goods were delivered to a carrier in New York and received by defendant in Pennsylvania.



**849.** 11. Grade of Offense and Punishment — Punishment. — See notes 8, 9.

**850.** 12. Attempt to Commit. — See note 1.

Acts Considered Attempts. — See note 2.

**852.** 13. Conspiracy to Commit — *a.* IN GENERAL — Success or Failure Immaterial. — See note 4.

*b.* EVIDENCE. — See note 7.

**853.** III. OFFENSES OF KINDRED NATURE — 1. Presenting False Claims to Public Officers — *a.* IN GENERAL. — See note 3.

**854.** 2. Confidence Game. — See note 3.

**849.** 8. *People v. Wynn*, 140 Cal. 661.

**9. Value of Property.** — In a case of swindling by giving a mortgage on property not owned as well as property owned, the value of the property which defendant owned is deducted from that of the property obtained by the representations, the statute making the value of the property obtained the test of the grade of the offense. *Lively v. State*, (Tex. Crim. 1903) 74 S. W. Rep. 321.

**Market Value.** — Where the value of the property obtained is material, it is the actual market value and not the cost to the person defrauded. *Tuttle v. State*, (Tex. Crim. 1899) 49 S. W. Rep. 82.

**Instrument in Writing.** — Where the punishment depends upon the value of the thing obtained, the value of an instrument in writing under the statute against procuring a signature to an instrument in writing, must be taken to be the amount of the liability expressed therein or assumed thereby. *Moline v. State*, (Neb. 1904) 100 N. W. Rep. 810.

**850.** 1. **Specific Offense.** — The charge of an attempt to commit the crime of obtaining money under false pretenses is the charge of a specific offense under the statute. See *People v. Howard*, 135 Cal. 266; *State v. Woodward*, 156 Mo. 143; *State v. Riddell*, 33 Wash. 325.

In *Illinois* it is held that inasmuch as the statute defines the offense of an attempt to obtain money by means of a confidence game as being distinct from that of obtaining money by such means, conviction of the offense of an attempt cannot be had where the proof shows the consummated offense. *Graham v. People*, 181 Ill. 477.

2. See *Reg. v. Button*, (1900) 2 Q. B. 597, 69 L. J. Q. B. 901, where defendant contested in athletic sports in the name of another who had been entered, taking advantage of the latter's record, and afterwards represented that he was the person whose name appeared in the entry, but did not claim the prizes won, and it was held that this was sufficient to justify a conviction for an attempt.

**852.** 4. **Success or Failure of Conspiracy.** — *People v. Gilman*, 121 Mich. 187, 80 Am. St. Rep. 400.

**7. Words and Acts of Conspirators.** — Words of one of several engaged in swindling under the statute, though not in the presence of the others, but leading up to and being a part of the offense, are admissible against all. *State v. Evans*, 88 Minn. 262. See also *Com. v. Clancy*, 187 Mass. 191, where the acts of defendants (conspirators) were held admissible in a prosecution for statutory larceny.

**853.** 3. **False Claim Against Town.** — See

*State v. Peebles*, 93 Minn. 311, wherein the statute was held to have been violated by the procuring of the payment of a false claim against a town, where the chairman of the town board of supervisors caused orders to be issued in payment of work for the county, which was not a proper charge against the town, and payment of which had not been authorized by the town board.

**Defrauding County — Under General Statute.** — See, under a general statute against obtaining money by false pretenses, sustaining indictments for thus defrauding a county, *State v. White*, 4 Penn. (Del.) 6; *Harrison v. State*, 44 Tex. Crim. 243.

The presenting of a false claim, knowing it to be false, is a pretense. *People v. Luttermoser*, 122 Mich. 565.

**Effect of Invalidity of Claim.** — The fact that at the time of the alleged offense there was no provision of law authorizing the payment by the county of the claim is no reason why the procurement of its payment by false pretenses is not punishable. *Berreyesa v. Territory*, (Ariz. 1904) 76 Pac. Rep. 472. See also *People v. Howard*, 135 Cal. 266, where the offense was an attempt to commit the crime.

**Want of Authority in Particular Officers.** — The powers and duties of particular officers cannot be called in question in determining whether the offense is charged, such powers and duties not entering into the statutory definition of the crime. *State v. Voute*, 68 Ohio St. 274. See also *Wilson v. State*, 156 Ind. 631; *State v. Stewart*, 9 N. Dak. 409. But compare *State v. Lawrence*, 178 Mo. 350.

**854.** 3. **Confidence Game.** — *Du Bois v. People*, 200 Ill. 157, 93 Am. St. Rep. 183 (like *Maxwell v. People*, 158 Ill. 248, set out in the original note); *Graham v. People*, 181 Ill. 477; *State v. Evans*, 88 Minn. 262 (where the evidence was held sufficient to convict of swindling under the statute, the facts justifying the conclusion that the defendant, with others, was a "bunco steerer"); *State v. Edgen*, 181 Mo. 582 (under a statute against the swindle known as "three-card monte," which is said to be a sleight-of-hand game or trick, played with three cards, one of which is usually a court card, the performer throwing the cards face down upon a table in such a manner as to deceive the eye of the onlooker, who is induced to bet that he can pick out the court card). See *Cruthers v. State*, 161 Ind. 139, holding that the statute against "bunco steering" has no extraterritorial force or operation, and the offense thereby defined cannot be committed partly within the state of Indiana and partly without.

**855. IV. DEFENSES — Payment or Restoration.** — See note 6.

**856. Defrauded Party in the Wrong.** — See note 3.

**V. EVIDENCE — 1. As to the Pretenses — a. IN GENERAL.** — See note 6.

**Onus of Proof.** — See note 7.

**857. Must Be Proved as Laid.** — See note 1.

**Proof of One False Pretense Sufficient.** — See note 4.

**858. c. DOCUMENTARY EVIDENCE.** — See notes 5, 6.

**d. ADMISSIONS.** — See note 7.

**Sleight-of-Hand Performance — Short-change Trick.** — The statute in *Minnesota* against swindling by means of "three-card monte, so-called, or of any other form or device, sleight-of-hand, or other means whatever, by use of cards \* \* \* or any other instrument, trick, or device," etc., covers swindling by sleight-of-hand and tricks as well as by means of a fraudulent mechanical device or false token. *State v. Smith*, 82 Minn. 342.

**855. 6. Subsequent Restoration or Payment.** — *Lowe v. State*, 111 Ga. 650.

**856. 3. Defrauded Party in Wrong.** — *Gilmore v. People*, 87 Ill. App. 128.

**6. Proof of Oral Pretense — California.** — *People v. Chrones*, 141 Cal. xviii, 75 Pac. Rep. 180.

**7. State Must Prove Falsity of Pretense.** — *Lee v. State*, 120 Ga. 194. See also *Fleming v. State*, 114 Ga. 526, wherein the evidence did not show falsity of the alleged representation and was insufficient to support a conviction.

**Admissibility of Testimony.** — In a prosecution for procuring the execution of a deed by false pretenses, testimony that the defendant was seen near the house of the prosecutor on a certain day is admissible as tending to show that a receipt which defendant claimed was for a cash payment to the prosecutor was written by defendant and to rebut the testimony of a witness for the defendant that said witness went to the prosecutor's house alone and got the receipt, the prosecutor having testified that he never signed a receipt, but signed a blank paper represented to him to be an insurance paper, and that the defendant and the said witness were at his house together at the time. *State v. Moats*, 108 Iowa 13.

**857. 1. Pretense Must Be Proved as Laid.** — *Mitchell v. State*, 70 Ark. 30; *Fambrough v. State*, 113 Ga. 934; *Carey v. State*, 112 Ga. 226; *State v. Moats*, 108 Iowa 13; *State v. Riley*, 65 N. J. L. 624; *Tuttle v. State*, (Tex. Crim. 1899) 49 S. W. Rep. 82. See also *Reagan v. State*, 112 Ga. 372.

**Insufficient Proof to Sustain Conviction.** — *Mitchell v. State*, 70 Ark. 30, wherein it was held that where the only witness testifying against the defendant on the point was unable to say whether the defendant stated a fact or stated what would be done in the future, the evidence was insufficient to overcome the legal presumption of innocence.

**For Evidence Held Sufficient to Sustain Conviction,** see *Holton v. State*, 109 Ga. 127; *Moore v. People*, 190 Ill. 331; *State v. Carter*, 112 Iowa 15; *State v. Stewart*, 9 N. Dak. 409.

**Person to Whom Representation Made.** — An allegation of a representation to one member of a firm is not sustained by proof of a representa-

tion to another member of the firm. *Broznack v. State*, 109 Ga. 514.

Where the person in whose hands the defendant is alleged to have represented he had money is described as county superintendent of education, whether the statement is treated as that of the pleading or of the defendant, it is merely descriptive of the person, and it is not necessary to show his continuance in office at the date of the alleged offense. *Amos v. State*, 123 Ala. 50.

**4. Proof of One False Pretense Sufficient.** — *Woods v. State*, 133 Ala. 162; *Moore v. People*, 190 Ill. 331; *State v. Dexter*, 115 Iowa 678; *State v. Tripp*, 113 Iowa 698; *Baker v. State*, 120 Wis. 135.

**858. 5. Documentary Evidence.** — *State v. Marshall*, 77 Vt. 262, holding further that where the defendant personates another and refers to a rating book of a mercantile agency for the financial rating of such person, the book may be introduced in evidence.

**6. Certified Copy of Deed.** — Under a charge of procuring, by false pretenses, the signature to a deed blank as to the grantee, a certified copy of the deed from the records, which the prosecutor testifies is the deed he executed except that the original was blank as to the grantee, is admissible, notice having been served on the defendant to produce the original. *State v. Tripp*, 113 Iowa 698.

**7. State v. Riddell**, 33 Wash. 325.

**Postal Card Written by Third Person.** — *Amos v. State*, 123 Ala. 50, in which case it was held that a postal card received by the prosecutor from the person in whose hands the defendant represented that he had money, saying that the writer owed defendant nothing, was admissible where defendant was present when the postal card was received by the prosecutor, and upon being shown the card admitted that he had lied.

**Testimony of Wife in Civil Suit.** — In a prosecution for obtaining property under a false pretense of ownership of other property, testimony that in another suit in which both the defendant and his wife were parties the latter testified that she owned said property is admissible, because defendant could have denied it if it had been untrue. *State v. Dexter*, 115 Iowa 678.

**Defendant Cannot Be Compelled to Give Evidence Against Himself,** and his books which had been turned over to receivers in a creditors' suit cannot be used against him over his objection in a criminal prosecution for obtaining goods by false pretenses. *Blum v. State*, 94 Md. 375.

**Confession Must Be Corroborated — Alabama.** — The rule requiring independent proof of the *corpus delicti* prevails in Alabama. *State v. Johnson*, 140 Ala. 658.



**859.** 1. AS TO PARTICULAR INSTANCES OF THE PRETENSE — (1) *As to Means and Resources — Ownership of Property.* — See note 1.

**861.** *f.* AS TO KNOWLEDGE OF FALSITY OF PRETENSE. — See note 4.

**862.** Evidence of Similar Transactions. — See note 1.

**863.** 2. As to Intent — Intent Inferred. — See note 4.

**864.** Defendant May Repel Intent. — See note 1.

3. As to Obtaining the Property — Some Definite Portion of the Goods Obtained. — See note 3.

**865.** As to Inducement to Parting with Property. — See note 1.

**859.** 1. Ownership of Unencumbered Property — *Parol Evidence as to Description.* — Where the defendant represented that he owned certain property which was unencumbered, and it appeared that at the date of the representation there was outstanding a writing which amounted to a lien on his property, but the description of the property in said writing differed from that in the accusation, the difference in description may be explained by parol evidence, to show that the property was the same. *Rucker v. State*, 114 Ga. 13.

**861.** 4. How Knowledge of Falsity of Pretense Shown. — *State v. Riddell*, 33 Wash. 325.

Where the false pretense (in a prosecution for statutory larceny) consists in representations as to the amount of sales in a business which the prosecutor was induced to buy, evidence that immediately after the purchase by the prosecutor the sales of the business were much less than they were represented to have been just before the purchase, is competent on the question of the falsity of the representation. *Com. v. Clancy*, 187 Mass. 191.

**862.** 1. Evidence of Similar Transactions. — *Du Bois v. People*, 200 Ill. 159, 93 Am. St. Rep. 183; *State v. Carter*, 112 Iowa 15 (holding, however, that it is necessary to show not only the representation in the similar transaction, but also the falsity of such representation); *State v. Dexter*, 115 Iowa 678; *Com. v. Lubinsky*, 182 Mass. 142; *People v. Noblett*, 96 N. Y. App. Div. 293, holding that in a prosecution for falsely representing the profits of a business for a particular time, and exhibiting a statement falsely showing such profits, evidence of similar transactions during the preceding year was admissible, if not for the purpose of showing similar transactions, then as showing that the statement above mentioned was false because it included all or some portion of the money obtained in the other transactions referred to.

**Similar Offenses of Larceny by False Pretenses.** — The rule stated in the original text applies to prosecutions for larceny under the statute, committed by means of false pretenses. *Com. v. Clancy*, 181 Mass. 191; *State v. Southall*, 77 Minn. 296; *People v. Putnam*, 90 N. Y. App. Div. 125, affirmed 179 N. Y. 518; *Baker v. State*, 120 Wis. 135.

**Extent of Rule.** — The rule stated in the original text does not open the door to general vilification and admit proof of loose morals or general dishonest tendencies. So proof of conversations with and statements by accused, some months prior to the transaction involved in the charge, totally unconnected with such transaction, is not admissible. *Baker v. State*, 120 Wis. 135.

**863.** 4. Acts and Conduct of Accused at and after Commission of Crime Admissible. — *Com. v. Burton*, 183 Mass. 461; *State v. Luxton*, 65 N. J. L. 605. See also *People v. Howard*, 135 Cal. 266.

**Disposition of Goods.** — See also to the same effect as this paragraph of the original note, *Blum v. State*, 94 Md. 375.

**Conversations with Others than Defrauded Party.** may be shown in a prosecution for statutory swindling, without regard to the presence or absence of such defrauded party at the conversations. *McPherson v. State*, (Tex. Crim. 1904) 79 S. W. Rep. 522.

**864.** 1. Defendant May Disprove Intent. — Where the state has proved by the prosecutor that to the best of his recollection the defendant represented that he had money and credit at the First National Bank of Waco, Texas, although he might have said State National Bank of Waco, Texas, the defendant should be permitted to prove that he had credit at the "Waco State Bank," of Waco, Texas, and that checks drawn by him on that bank would have been paid, as such evidence tends to show that defendant was not guilty of fraud and pretense. *Powell v. State*, 44 Tex. Crim. 273.

While the defendant, charged with obtaining money by means of false representations as to the extent of injuries he had received, may testify that he did not intend to defraud, he cannot testify that he was seriously injured, or that he did not obtain money by making false pretenses, as such questions call for mere conclusions and inferences which were for the jury. *Com. v. Burton*, 183 Mass. 461.

3. Proof of Some Definite Portion of Goods Obtained Sufficient. — *State v. Dexter*, 115 Iowa 678.

**Sufficiency of Evidence of Delivery.** — Testimony of a witness as to what was done in the way of delivering the property is admissible, and testimony that the defendant bought the goods upon representations made by him and requested their delivery to a certain address, and that he knew of their transfer to the place where he directed the officers to find them, is sufficient over the objection that there was no proof of their delivery. *State v. Bohle*, 182 Mo. 58.

**Description of Property Must Be Proved as Alleged.** — *State v. Appleby*, 63 N. J. L. 526. See also *Dechard v. State*, (Tex. Crim. 1900) 57 S. W. Rep. 813.

**865.** 1. Evidence to Show Reliance. — Evidence that warnings of the falsity of defendant's representations were not believed is competent on the question whether reliance was placed on defendant's representations. *Com. v. Burton*, 183 Mass. 461.



## FAMILY.

**866. I. THE HOUSEHOLD.** — See note 1.

**867. One Person.** — See note 1.

**868. Members of the Household but Not Relatives.** — See notes 2, 3.

**869. Servants.** — See note 1.

**II. RELATIONSHIP.** — See note 3.

**871. Children — Grandchildren.** — See note 1.

**872. Stepchildren.** — See note 2.

**873.** See note 1.

**III. HUSBAND AND WIFE.** — See notes 2, 3.

**874. IV. SEPARATION.** — See note 3.

**866. 1.** *Goss v. Harris*, 117 Ga. 345, *quoting* 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 866; *Norwegian Old People's Home Soc. v. Wilson*, 176 Ill. 94; *Betts v. Mills*, 8 Okla. 351.

**Other Definitions.** — *Bennett's Estate*, 134 Cal. 320; *Fullerton v. Sherrill*, 114 Iowa 511; *Leake v. Lucas*, 65 Neb. 359; *People v. Sagazei*, (Ct. Gen. Sess.) 27 Misc. (N. Y.) 727; *Relator v. King*, 13 Okla. 37; *Betts v. Mills*, 8 Okla. 351; *Floyd v. State*, (Tex. Crim. 1902) 68 S. W. Rep. 690.

**Estray Law.** — See *Floyd v. State*, (Tex. Crim. 1902) 68 S. W. Rep. 690.

**Widow's Allowance.** — See *Goss v. Harris*, 117 Ga. 345.

**Married Man.** — The husband while living with his wife is part of the family, and medical attendance of which he stands in need is a family necessity, within the meaning of the *Nebraska* statute. *Leake v. Lucas*, 65 Neb. 359.

**867. 1. One Person.** — *Fullerton v. Sherrill*, 114 Iowa 511; *Ellinger v. Thomas*, 64 Kan. 180, holding that a man whose wife was dead and children moved away, and who had no one else associated in the family relation, could not claim a homestead exemption. See also *Bathey v. Barker*, 62 Kan. 517; *Baum v. Turner*, (Ky. 1903) 76 S. W. Rep. 129; *Floyd v. State*, (Tex. Crim. 1902) 68 S. W. Rep. 690 (estrays law).

**Widow Alone** not entitled to benefit of a homestead exemption. *Fullerton v. Sherrill*, 114 Iowa 511.

**868. 2.** See *Beilstein v. Beilstein*, 194 Pa. St. 152, 75 Am. St. Rep. 692.

**3. Persons Entitled to Support.** — *Goss v. Harris*, 117 Ga. 345.

**Homestead Law.** — *Gordon v. Stewart*, (Neb. 1903) 96 N. W. Rep. 624; *Betts v. Mills*, 8 Okla. 351; *American Nat. Bank v. Cruger*, 31 Tex. Civ. App. 17.

**869. 1. Servants.** — *People v. Sagazei*, (Ct.

Gen. Sess.) 27 Misc. (N. Y.) 727. See also *Beilstein v. Beilstein*, 194 Pa. St. 152.

**3. Relationship.** — *Matter of Bennett*, 134 Cal. 320; *Goss v. Harris*, 117 Ga. 345, *citing* 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 869.

In this case it was held that a minor daughter married at the time of her father's death and not a member of his household, but living with and supported by her husband, was not entitled to a year's support from his estate. *Leake v. Lucas*, 65 Neb. 359.

**Benefit Society.** — To bring a brother within a clause of a beneficial society limited to a family or dependents, it is necessary to prove that he was in fact one of the family and in part at least dependent upon the members of the society for support. *Supreme Council, etc., v. McGinness*, 59 Ohio St. 531. And see *Norwegian Old People's Home Soc. v. Wilson*, 176 Ill. 94.

**Father Member of Son's Family — Benefit Society.** — *Ferbrache v. Grand Lodge, etc.*, 81 Mo. App. 268.

**871. 1. Children.** — *People v. Sagazei*, (Ct. Gen. Sess.) 27 Misc. (N. Y.) 727; *Beilstein v. Beilstein*, 194 Pa. St. 152; *Harkness v. Harkness*, 9 Ont. L. Rep. 705.

**Examples.** — An eldest son by a prior marriage is entitled to share in a fund as a member of the family of the testator. *Hutson v. Jenson*, 110 Wis. 26.

**872. 2. Stepchildren.** — *Matter of Bennett*, 134 Cal. 320.

**873. 1. Stepchildren Included — Beneficial Society Certificate.** — *Tepper v. Supreme Council, etc.*, 61 N. J. Eq. 638.

**2. People v. Sagazei**, (Ct. Gen. Sess.) 27 Misc. (N. Y.) 727.

**3.** But a wife abandoned by her husband is not entitled to a bond to provide for a family. *People v. Sagazei*, (Ct. Gen. Sess.) 27 Misc. (N. Y.) 727.

**874. 3.** See *Kehoe v. Ames*, 96 Me. 155.

## FAMILY AGREEMENTS OR SETTLEMENTS.

**875. I. DEFINITION.** — See note 1.

**II. WHEN EQUITY WILL UPHOLD** — 1. In General. — See notes 2, 3.

**876. 2. Settlement Founded on Mistake.** — See note 3.

**877. 6. Adequacy of Consideration.** — See notes 2, 3.

**878. FAMILY EXPENSES.** — See notes 2, 4.

**880. FANCY.** — See note 4.

**881. FARE.** — See note 2.

**FARM — FARMING.** — See note 4.

**884.** See note 1.

**FARMER.** — See note 2.

**885. FAST.** — See note 3.

**875. 1.** Willey v. Hodge, 104 Wis. 81, 76 Am. St. Rep. 852, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 875.

**2. Family Settlements Favored in Equity.** — Bunel v. O'Day, 125 Fed. Rep. 303, quoting 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 875; Burnes v. Burnes, (C. C. A.) 137 Fed. Rep. 781; St. Clair v. Marquell, 161 Ind. 56, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 875; Emmons v. Harding, 162 Ind. 154, quoting 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 875; Brenneman's Estate, 17 Pa. Super. Ct. 75. See also Perdue v. Perdue, 107 Mo. App. 500.

An agreement in writing, under seal, based by its own recitals on a "valuable consideration," between brothers and sisters, the purpose of which is the equalization of the distribution of an estate, and therefore in the nature of a family settlement, is a binding and enforceable obligation. Brenneman's Estate, 17 Pa. Super. Ct. 75.

**3. General Rule as to Support of Family Agreements by Courts of Equity.** — Bunel v. O'Day, 125 Fed. Rep. 303, quoting 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 875.

**876. 3. Where All Parties Act under Mistake of Fact or Law.** — Williams v. Whittell, 69 N. Y. App. Div. 340.

**Clear Proof of Fraud or Mistake Essential.** — Burnes v. Burnes, (C. C. A.) 137 Fed. Rep. 781.

**877. 2. Adequacy of Consideration Not to Be Questioned.** — Bunel v. O'Day, 125 Fed. Rep. 303; Burnes v. Burnes, (C. C. A.) 137 Fed. Rep. 781.

**3. Settlement of Family Dispute a Sufficient Consideration.** — Willey v. Hodge, 104 Wis. 81, 76 Am. St. Rep. 852, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 877.

**878. 2.** Gilman v. Matthews, (Colo. App. 1904) 77 Pac. Rep. 366.

**Necessaries.** — See Gilman v. Matthews, (Colo. App. 1904) 77 Pac. Rep. 366.

**4. Rent of House.** — See Straight v. McKay, 15 Colo. App. 60.

**880. 4. Fancy Berries.** — In construing a contract for the sale of *fancy* berries, the court said: "The evidence tended to show that *fancy* berries in the cranberry trade does not

mean berries of a particular variety, or possessing any one unusual quality; but generally, berries of excellent quality. There was much testimony that *fancy* berries at one season of the year are different from *fancy* berries at another season, and all agreed that the term *fancy* refers to quality." Cape Cod Cranberry Sales Co. v. Whitney, 177 Mass. 387.

**881. 2.** See De Grauw v. Long Island Electric R. Co., 43 N. Y. App. Div. 505.

**4.** In re Drake, 114 Fed. Rep. 231.

**Detached Lots of Land.** — Scoville v. Mason, 76 Conn. 459; In re Drake, 114 Fed. Rep. 231.

**Parol Evidence.** — Compare Hallett v. Taylor, 177 Mass. 6.

**Farm Horse or Mule.** — The word *farm* in the phrase "one *farm* horse or mule" in a statute exempting such from execution has reference to quality and value, and was not inserted in the law with a view to prescribing the kind of work in which the exempted animal was to be employed. Kirksey v. Rowe, 114 Ga. 893.

**884. 1. Farming.** — Within the purview of a statute exempting persons engaged chiefly in *farming* from involuntary bankruptcy proceedings, *farming* is understood to mean the business of cultivating land, or employing it for the purposes of husbandry. In re Drake, 114 Fed. Rep. 231; Wulbern v. Drake, (C. C. A.) 120 Fed. Rep. 495. Compare Dearborn Bank v. Matney, 132 Fed. Rep. 75.

**2. Insurance — Classification of Risks.** — One having regular clerical employment in a city, but whose home is upon a *farm*, where he spends his Sundays and one night in each week, the management of which is, in his absence, entirely in the hands of men hired by him for the purpose, is not a *farmer*, within the terms of an accident insurance policy classing *farming* as a hazardous employment. Johnson v. London Guarantee, etc., Co., 115 Mich. 86.

**885. 3. Running Fast.** — The lower court instructed that if the jury believed from the evidence that the defendant's car which struck the plaintiff was at the time running *fast*, or without sounding a gong or bell, they should find for the plaintiff. On appeal the court said: "It is seriously contended that the use of the

**886. FATHER.** — See note 1.

**FAULT.** — See note 4.

**889. FEE.** — See note 1.

**891.** See note 1.

**FEED.** — See note 2.

word *fast* in the above instruction is prejudicial error. *Fast* is defined by Mr. Webster: 'Moving rapidly; quick in motion; rapid; swift.' This is the meaning usually given the word, and is the one intended by the instruction." South Covington, etc., St. R. Co. v. Beatty, (Ky. 1899) 50 S. W. Rep. 239.

**Charter Party.** — Hulthen v. Stewart, (1903) A. C. 389.

**Fast Bill of Exceptions.** — Holder v. Jelks, 116 Ga. 134.

**Fast Writ of Error.** — Bacon v. Jones, 116 Ga. 136.

**886. 1. The Word Father in an Act Concerning Wills Held to Include Mother.** — Walker v. Hyland, 70 N. J. L. 69.

**Father Presumed Legal Father.** — In an action against a probate judge to recover a statutory penalty for issuing a marriage license to a minor, the court said: "An examination of the complaint discloses that it contains the averment that the plaintiff is her *father*. The argument is made that the statute confers the right of action upon the legal parent, or parent in contemplation of law, and not upon a putative *father* (section 2848); that the use of the word *father* under the rules of construction of pleading must be construed as having reference to putative rather than legal *father*. To adopt this construction would be to presume, or rather to impute to the parents of the girl a violation by them, not only of the laws of their state, but of decency, gentility, and morality. No such presumption can be indulged. On the

contrary, we will presume, if need be, that he is her legal *father* — that she was the offspring of a legitimate wedlock, a marriage solemnized in accordance with the requirements of the law and of Christianity." Crook v. Webb, 125 Ala. 457.

**4. Fault Distinguished from Error.** — The Manitoba, 104 Fed. Rep. 154.

**Fault and Negligence.** — Savannah, etc., R. Co. v. Austin, 104 Ga. 614.

**889. 1. Finley v. Territory,** 12 Okla. 639, quoting 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 889.

**Fees, Salaries, and Wages.** — Wood v. Wood, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 50.

**Clerk's Fees.** — See Ellis County v. Thompson, 95 Tex. 22.

**Mileage and Per Diem Allowance Included in Term Fees.** — Burrows v. Balfour, 39 Oregon 488. But see Seiler v. State, 160 Ind. 605.

**891. 1. Fee and Fee Simple.** — Bowen v. John, 201 Ill. 295, quoting 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 890 [891]; Matter of New York, 74 N. Y. App. Div. 197.

**2. Feed — Patent Law.** — "The word *feed* admits of some ambiguity. The '*feed* mechanism' is a part of the machine, which clamps and controls the material. The material, when so clamped, partakes of the movements of the *feed* mechanism. The material may thus be considered a part of the *feed*." Per Brown, J., Jones Special Mach. Co. v. Pentucket Variable Stitch Sewing-Mach. Co., (C. C. A.) 104 Fed. Rep. 560.



# FELLOW SERVANTS.

BY THEODOR MEGAARDEN.

- 897.** II. STATEMENT OF FELLOW-SERVANT RULE. — See note 4.  
**898.** III. ORIGIN AND PREVALENCE OF THE RULE. — See note 4.  
**901.** Rule in Other Countries. — See note 6.  
**902.** IV. REASONS FOR THE RULE — Public Policy. — See note 2.

**897. 4. Cases in Which the Rule Is Stated.** — St. Louis, etc., *R. Co. v. Brown*, 67 Ark. 295; *Peterson v. New York, etc., R. Co.*, 77 Conn. 351; *Wells v. O'Hare*, 209 Ill. 627, quoting 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 897; *Missouri Pac. R. Co. v. Lyons*, 34 Neb. 633; *McLaine v. Head, etc., Co.*, 71 N. H. 294, 93 Am. St. Rep. 522.

In *Illinois*, where the different-department limitation is recognized, the rule is stated as follows: Where one servant is injured by the negligence of another servant, where they are co-operating with each other in a particular business in the same line of employment, or their duties are such as to bring them into habitual association, so that they may exercise a mutual influence upon each other promotive of proper caution, and the master is guilty of no negligence in employing the servant causing the injury, the master is not liable. *Illinois Cent. R. Co. v. Swisher*, 74 Ill. App. 164, affirmed 182 Ill. 533; *Chicago, etc., R. Co. v. Stallings*, 90 Ill. App. 609; *Chicago, etc., R. Co. v. Swan*, 70 Ill. App. 331, affirmed 176 Ill. 424.

**Wanton Character of Fellow-servant's Act.** — In the absence of proof that the master was negligent in keeping a malicious, wanton, or wilful servant in his employ, the fellow-servant doctrine exempts him from liability to a servant for even the wilful or wanton negligence of a fellow servant. *Chicago, etc., R. Co. v. Thompson*, 99 Ill. App. 277.

**898. 4. Cases in Which the Rule Is Applied** — *United States*. — *Carr v. Shields*, 125 Fed. Rep. 827.

*Alabama*. — *Northern Alabama R. Co. v. Mansell*, 138 Ala. 548.

*Connecticut*. — *Nolan v. New York, etc., R. Co.*, 70 Conn. 159.

*Georgia*. — *Kerr v. Crown Cotton Mills*, 105 Ga. 510.

*Illinois*. — *Swift v. McInerney*, 90 Ill. App. 294.

*Indiana*. — *Standard Pottery Co. v. Moudy*, (Ind. App. 1905) 73 N. E. Rep. 188, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 953, 954.

*Maine*. — *Demers v. Deering*, 93 Me. 272; *Cowan v. Umbagog Pulp Co.*, 91 Me. 26.

*Maryland*. — *Maryland Clay Co. v. Goodnow*, 95 Md. 330.

*Massachusetts*. — *Fay v. Wilmarth*, 183 Mass. 71; *Regan v. Lombard*, 181 Mass. 329; *Cogan v. Burnham*, 175 Mass. 391; *Gilmore v. Mitineague Paper Co.*, 169 Mass. 471.

*Mississippi*. — *Farquhar v. Alabama, etc., R. Co.*, 78 Miss. 193.

*New Hampshire*. — *Fournier v. Columbian*

*Mfg. Co.*, (N. H. 1899) 44 Atl. Rep. 104; *Lebarge v. Berlin Mills Co.*, 68 N. H. 373.

*New Jersey*. — *Levene v. Standard Oil Co.*, 64 N. J. L. 63; *McDonald v. Standard Oil Co.*, 69 N. J. L. 445.

*New York*. — *Karch v. Kipp*, (Supm. Ct. App. T.) 90 N. Y. Supp. 404; *Klos v. Hudson River Ore, etc., Co.*, 77 N. Y. App. Div. 566; *Mulligan v. Ballon*, 73 N. Y. App. Div. 486; *Hutchinson v. Parker*, 39 N. Y. App. Div. 133, affirmed without opinion 169 N. Y. 579; *Gallagher v. McMullin*, 25 N. Y. App. Div. 571.

*Oregon*. — *Duff v. Willamette Steel Works*, 45 Oregon 479.

*Rhode Island*. — *Sullivan v. Nicholson File Co.*, 21 R. I. 540.

*Wisconsin*. — *Kreider v. Wisconsin River Paper, etc., Co.*, 110 Wis. 645; *Dahlke v. Illinois Steel Co.*, 100 Wis. 431; *McMahon v. Ida Min. Co.*, 101 Wis. 102.

*Canada*. — *Day v. Canadian Pac. R. Co.*, 36 N. Bruns. 323.

**Rejection of Rule in Quebec.** — See *Evans v. Louisiana Lumber Co.*, 111 La. 534, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 901.

**Louisiana.** — While the fellow-servant doctrine is not given as broad an application in Louisiana as in *England* and in many of the *United States*, it is clearly recognized. *Bell v. Globe Lumber Co.*, 107 La. 725. The Louisiana courts have said that under article 2320 of the Civil Code, an extreme position in regard to the fellow-servant rule cannot well be sustained. "We think that the master can be held liable 'even when the immediate negligence is that of a person who in some sense is the coservant of the person injured.'" *Evans v. Louisiana Lumber Co.*, 111 La. 534, quoting 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 909.

**901. 6. Rule in Mexico.** — The common-law doctrine as to the nonliability of the employer to an employee for the negligence of a fellow servant does not exist in Mexico, but, on the contrary, railway companies in the republic of Mexico are liable for all faults or accidents growing out of the negligence, imprudence, or want of capacity of their employees, and the employee of a railroad corporation does not assume as one of the risks of his employment the negligence of his cosmployee to the exclusion of the employer's liability. *Mexican Cent. R. Co. v. Sprague*, (C. C. A.) 114 Fed. Rep. 544.

**902. 2. Basis of the Fellow-servant Rule — Public Policy.** — *Voight v. Anglo-American Provision Co.*, 202 Ill. 462; *Pagels v. Meyer*, 193 Ill. 172, 88 Ill. App. 169; *Illinois Cent. R. Co. v.*

**902.** Servant Presumed to Take upon Himself Ordinary Risks of His Employment. — See note 4.

**903.** See note 1.

**V. EXTENT AND LIMITATIONS OF THE RULE — 1. Liability of Tortfeasor Not Affected — b. LIABILITY OF THE NEGLIGENT FELLOW SERVANT.** — See note 3.

**904. c. LIABILITY OF MASTER FOR HIS OWN NEGLIGENCE — (1) General Rule.** — See note 2.

**905. (3) In Discharge of Positive Duties to Servants.** — See note 2.

**d. CONCURRENT NEGLIGENCE OF MASTER AND FELLOW SERVANT**

**— In General.** — See note 4.

**Liability of the Master.** — See note 7.

Swisher, 74 Ill. App. 164, *affirmed* 182 Ill. 533; Hammarberg v. St. Paul, etc., Lumber Co., 19 Wash. 537.

**902. 4. Same — Implied Contract.** — Dishon v. Cincinnati, etc., R. Co., 126 Fed. Rep. 194, *affirmed* (C. C. A.) 133 Fed. Rep. 471; Brush Electric Light, etc., Co. v. Wells, 110 Ga. 192, *citing* 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 902; Wells v. O'Hare, 209 Ill. 627, *citing* 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 902; World's Columbian Exposition v. Bell, 76 Ill. App. 591; Southern Indiana R. Co. v. Harrell, 161 Ind. 689, *reversing* (Ind. App. 1903) 66 N. E. Rep. 1016; Collingwood v. Illinois, etc., Fuel Co., 125 Iowa 537; Kentucky, etc., Bridge, etc., Co. v. Sydor, 82 S. W. Rep. 989, 26 Ky. L. Rep. 951; Missouri Pac. R. Co. v. Lyons, 54 Neb. 633; McDonald v. Standard Oil Co., 69 N. J. L. 445; Olsen v. Nixon, 61 N. J. L. 671; Vogel v. American Bridge Co., 180 N. Y. 373.

**903. 1. Both Reasons Recognized.** — Chicago, etc., R. Co. v. White, 209 Ill. 124. See McGinn v. McCormick, 109 La. 396.

**3. Kalleck v. Deering,** 169 Mass. 200; Knutter v. New York, etc., Telephone Co., 67 N. J. L. 646.

**904. 2. Master Liable for His Own Negligence.** — Swensen v. Bender, (C. C. A.) 114 Fed. Rep. 1; Grace, etc., Co. v. Probst, 208 Ill. 147; Street's Western Stable Car Line v. Bonander, 196 Ill. 15; Consolidated Coal Co. v. Scheiber, 167 Ill. 539; Dill v. Marmon, (Ind. App. 1904) 71 N. E. Rep. 669; Knutter v. New York, etc., Telephone Co., 67 N. J. L. 646.

**905. 2. Liability of Master for Negligence in Discharge of Positive Duties to Servants.** — Swensen v. Bender, (C. C. A.) 114 Fed. Rep. 1; Farrell v. Eastern Machinery Co., 77 Conn. 484, 107 Am. St. Rep. 46; Chicago, etc., R. Co. v. Bell, 111 Ill. App. 280, *reversed* 209 Ill. 25; McGinn v. McCormick, 109 La. 396; Hill v. Big Creek Lumber Co., 108 La. 162; Browning v. Kasten, 107 Mo. App. 59; Ralph v. American Bridge Co., 30 Wash. 500; Grant v. Keystone Lumber Co., 110 Wis. 229, 100 Am. St. Rep. 883; Sault Ste. Marie Pulp, etc., Co. v. Myers, 33 Can. Sup. Ct. 23, *affirming* 3 Ont. L. Rep. 600.

**Violation of Statute Against Overworking Servants.** — The fellow-servant doctrine has no application in an action to recover damages under a statute providing that an employer shall not permit or require servants who have been employed twenty-four hours to go on duty again until they have had at least eight hours' rest. Pelin v. New York Cent., etc., R. Co., 102 N. Y. App. Div. 71.

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**4. Application of Rule Between Master and Servant.** — See Charman v. Lake Erie, etc., R. Co., 105 Fed. Rep. 449, applying the *Indiana* statute.

**7. Master Liable Notwithstanding Concurrent Negligence of Fellow Servant — United States.** — Shugart v. Atlanta, etc., R. Co., (C. C. A.) 133 Fed. Rep. 505; Pennsylvania R. Co. v. Jones, (C. C. A.) 123 Fed. Rep. 753; Cudahy Packing Co. v. Anthes, (C. C. A.) 117 Fed. Rep. 118; The Anchoria, 113 Fed. Rep. 982, *affirmed* without opinion (C. C. A.) 120 Fed. Rep. 1017; Mexican Cent. R. Co. v. Glover, (C. C. A.) 107 Fed. Rep. 356; Felton v. Harbeson, (C. C. A.) 104 Fed. Rep. 737; Maupin v. Texas, etc., R. Co., (C. C. A.) 99 Fed. Rep. 49; Kennedy v. Grace, etc., Co., 92 Fed. Rep. 116.

*Arkansas.* — Neal v. St. Louis, etc., R. Co., 71 Ark. 445; Kansas City, etc., R. Co. v. Becker, 67 Ark. 1.

*California.* — Keast v. Santa Ysabel Gold Min. Co., 136 Cal. 256.

*Colorado.* — Tanner v. Harper, 32 Colo. 156; Denver, etc., R. Co. v. Sipes, 26 Colo. 17.

*Connecticut.* — Farrell v. Eastern Machinery Co., 77 Conn. 484, 107 Am. St. Rep. 46.

*Georgia.* — Colley v. Southern Cotton Oil Co., 120 Ga. 258; Jackson v. Merchants', etc., Transp. Co., 118 Ga. 651; Loveless v. Standard Gold Min. Co., 116 Ga. 427, *quoting* 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 905; Augusta v. Owens, 111 Ga. 464.

*Illinois.* — Hansell-Elcock Foundry Co. v. Clark, 214 Ill. 414, *citing* 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 905; Shickle-Harrison, etc., Iron Co. v. Beck, 212 Ill. 268; Chicago, etc., Coal Co. v. Moran, 210 Ill. 9; Missouri Malleable Iron Co. v. Dillon, 206 Ill. 145; Chicago, etc., R. Co. v. Wise, 206 Ill. 453, *affirming* 106 Ill. App. 174, *citing* 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 905; Armour v. Golkowsky, 202 Ill. 144, *citing* 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 905; Chicago, etc., R. Co. v. Gillison, 173 Ill. 264, 64 Am. St. Rep. 117; Chicago, etc., R. Co. v. House, 172 Ill. 601, *affirming* and *adopting* opinion in 71 Ill. App. 147; Chicago City R. Co. v. Enroth, 113 Ill. App. 285; Chicago, etc., R. Co. v. Bell, 111 Ill. App. 280, *reversed* 209 Ill. 25; Chicago, etc., R. Co. v. Wise, 106 Ill. App. 180, *quoting* 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 905; Illinois Cent. R. Co. v. Johnson, 95 Ill. App. 54, *judgment affirmed* 191 Ill. 594; Swift v. O'Neill, 88 Ill. App. 162, *affirmed* 187 Ill. 337; Norris v. Illinois Cent. R. Co., 88 Ill. App. 614; Swift v. Rutkowski, 82 Ill. App. 108, *affirmed* 182 Ill. 18.

*Indiana.* — Louisville, etc., R. Co. v. Heck,

**908.** Where Fellow Servant Could Have Prevented Injury. — See note 1.

Master's Negligence Must Contribute to Injury. — See note 2.

**909.** See note 1.

**910.** 2. Liability of Master for Negligence of Servants in Certain Cases —

*b.* INCOMPETENT FELLOW SERVANTS — (1) *General Rule.* — See notes 1, 2.

151 Ind. 292; *Lauter v. Duckworth*, 19 Ind. App. 535.

*Iowa.* — *Buehner v. Creamery Package Mfg. Co.*, 124 Iowa 445, 104 Am. St. Rep. 354; *Klaffke v. Bettendorf Axle Co.*, 124 Iowa 224; *Beresford v. American Coal Co.*, 124 Iowa 34, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 905.

*Kansas.* — *Schwarzschild v. Drysdale*, 69 Kan. 119.

*Kentucky.* — *Linck v. Louisville, etc., R. Co.*, 107 Ky. 370.

*Louisiana.* — *McGinn v. McCormick*, 109 La. 396; *Hill v. Big Creek Lumber Co.*, 108 La. 162; *Stucke v. Orleans R. Co.*, 50 La. Ann. 172.

*Michigan.* — *Hayes v. Stearns*, 130 Mich. 287, 9 Detroit Leg. N. 15.

*Minnesota.* — *Swanson v. Oakes*, 93 Minn. 404; *Thomas v. Smith*, 90 Minn. 379.

*Mississippi.* — *Bradford v. Taylor*, 85 Miss. 409.

*Missouri.* — *Cole v. St. Louis Transit Co.*, 183 Mo. 81; *Irmer v. St. Louis Brewing Co.*, 69 Mo. App. 17.

*New Hampshire.* — *Sirois v. Henry*, (N. H. 1905) 59 Atl. Rep. 936.

*New Jersey.* — *Cole v. Warren Mfg. Co.*, 63 N. J. L. 626; *Campbell v. T. A. Gillespie Co.*, 69 N. J. L. 279; *Belleville Stone Co. v. Mooney*, 60 N. J. L. 323.

*New York.* — *Sutter v. New York Cent., etc., R. Co.*, 79 N. Y. App. Div. 362; *Meeker v. C. R. Remington, etc., Co.*, 53 N. Y. App. Div. 592; *Tetherton v. U. S. Talc Co.*, 41 N. Y. App. Div. 613, affirmed without opinion 165 N. Y. 665; *Strauss v. New York, etc., R. Co.*, 91 N. Y. App. Div. 583; *Franck v. American Tartar Co.*, 91 N. Y. App. Div. 571; *Auld v. Manhattan L. Ins. Co.*, 34 N. Y. App. Div. 491, affirmed without opinion 165 N. Y. 610; *Wood v. New York Cent., etc., R. Co.*, 32 N. Y. App. Div. 606.

*Ohio.* — *Lake Shore, etc., R. Co. v. Feller*, 11 Ohio Cir. Dec. 799, 21 Ohio Cir. Ct. 605.

*South Carolina.* — *Bodie v. Charleston, etc., R. Co.*, 66 S. Car. 302.

*Tennessee.* — *Russell v. Dayton Coal, etc., Co.*, 109 Tenn. 49, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 905.

*Texas.* — *Bonn v. Galveston, etc., R. Co.*, (Tex. Civ. App. 1904) 82 S. W. Rep. 808; *Consumers' Cotton Oil Co. v. Jonte*, 36 Tex. Civ. App. 18; *Texas Cent. R. Co. v. Pelfrey*, 35 Tex. Civ. App. 501; *Ray v. Pecos, etc., R. Co.*, (Tex. Civ. App. 1904) 80 S. W. Rep. 112; *Texas, etc., R. Co. v. Lee*, 32 Tex. Civ. App. 23; *American Cotton Co. v. Smith*, 29 Tex. Civ. App. 425; *Galveston, etc., R. Co. v. Sherwood*, (Tex. Civ. App. 1902) 67 S. W. Rep. 776; *Texas, etc., R. Co. v. Maupin*, 26 Tex. Civ. App. 385; *Houston, etc., R. Co. v. White*, 23 Tex. Civ. App. 280; *Havenman v. Ft. Worth, etc., R. Co.*, 20 Tex. Civ. App. 610; *International, etc., R. Co. v. Zapp*, (Tex. Civ. App. 1898) 40 S. W. Rep. 673; *Missouri, etc., R. Co. v. Hannig*, 20 Tex. Civ. App. 649; *International, etc., R. Co. v. Bonatz*,

(Tex. Civ. App. 1898) 48 S. W. Rep. 767; *Trinity, etc., R. Co. v. Brown*, (Tex. Civ. App. 1898) 46 S. W. Rep. 926; *Missouri, etc., R. Co. v. Ferch*, 18 Tex. Civ. App. 46; *Galveston, etc., R. Co. v. Jackson*, (Tex. Civ. App. 1898) 44 S. W. Rep. 1072.

*Utah.* — *Hicks v. Southern Pac. R. Co.*, 27 Utah 526; *Jenkins v. Mammoth Min. Co.*, 24 Utah 513; *Pool v. Southern Pac. R. Co.*, 20 Utah 210.

*Virginia.* — *Virginia, etc., R. Co. v. Bailey*, 103 Va. 205; *Norfolk, etc., R. Co. v. Phillips*, 100 Va. 368.

*Washington.* — *Conine v. Olympia Logging Co.*, 36 Wash. 345; *Howe v. Northern Pac. R. Co.*, 30 Wash. 569; *Ralph v. American Bridge Co.*, 30 Wash. 500; *Czarecki v. Seattle, etc., R., etc., Co.*, 30 Wash. 288; *Costa v. Pacific Coast Co.*, 26 Wash. 138; *Brabon v. Seattle, 29 Wash. 6*; *Keating v. Pacific Steam Whaling Co.*, 21 Wash. 415; *Sroufe v. Moran Bros. Co.*, 28 Wash. 381, 92 Am. St. Rep. 847.

*Wisconsin.* — *Grant v. Keystone Lumber Co.*, 119 Wis. 229, 100 Am. St. Rep. 883; *Lago v. Walsh*, 98 Wis. 348.

*Canada.* — *Sault Ste. Marie Pulp, etc., Co. v. Myers*, 33 Can. Sup. Ct. 23, affirming 3 Ont. L. Rep. 600.

See *Troxler v. Southern R. Co.*, 122 N. Car. 902.

The rule that, where there is combined negligence of an employee and a fellow servant, the master is liable for injury inflicted in the course of the employment is, of course, subject to the limitation that if the master's negligence is known and acquiesced in by the injured servant without complaint, he is precluded from a recovery. *Cerrillos Coal R. Co. v. Deserant*, 9 N. Mex. 49.

**908. 1. Master's Negligence Contributing to Injury.** — *American Tin-Plate Co. v. Williams*, 30 Ind. App. 46; *Grant v. Keystone Lumber Co.*, 119 Wis. 229, 100 Am. St. Rep. 883.

**2. Master Not Liable Unless His Negligence Contributed to Injury.** — See *Maryland Clay Co. v. Goodnow*, 95 Md. 330.

**909. 1. Applicability of Doctrine of Proximate and Remote Cause.** — *Vizelich v. Southern Pac. R. Co.*, 126 Cal. 587. See *Bodie v. Charleston, etc., R. Co.*, 66 S. Car. 302.

**910. 1. Statement of the Rule.** — *Hall v. Bedford Quarries Co.*, 156 Ind. 460, quoting 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 910.

If the master has failed to exercise ordinary or reasonable care in the selection of his servants, in consequence of which he has in his employ a servant who, by reason of habitual drunkenness, negligence, or other vicious habits, or by reason of want of the requisite skill to discharge the duties which he is employed to perform, or for any other cause, is unfit for the service in which he is engaged, and if, in consequence of such unfitness, an injury happens to another servant, the master must answer for the damages suffered by such servant, unless the



**912.** (2) *Extent and Limitations of the Rule* — (b) *Degree of Care Required of Master.* — See note 3.

**913.** (c) *What Constitutes Ordinary or Reasonable Care* — *aa. In General.* — See note 1.

**915.** *bb. NEGLIGENCE IN RETAINING INCOMPETENT SERVANTS* — (*aa*) *In General.* — See note 2.

(*bb*) *With Actual Knowledge of Incompetency.* — See note 4.

**916.** (*cc*) *Notice of Incompetency to Master's Agent.* — See note 1.

**917.** See notes 1, 2.

(*dd*) *With Implied or Constructive Notice of Incompetency.* — See note 3.

**918.** (3) *Application of the Rule* — (a) *Prerequisites* — *bb. INCOMPETENCY OF THE SERVANT.* — See note 1.

person injured had notice of the incompetency, or had equal opportunities with the employer to obtain notice. *Nutzmann v. Germania L. Ins. Co.*, 78 Minn. 504.

In *Lamb v. Littman*, 128 N. Car. 361, it was said that while a master is not responsible to fellow servants for a failure in duty in not using ordinary care in selecting competent servants, he is under obligation to them to exercise due care and caution in the selection of his representative or *alter ego*, who orders, commands, and controls those committed to his charge.

**910. 2. Cases Recognizing and Applying the Rule.** — *Delaware.* — *Murphy v. Hughes*, 1 Penn. (Del.) 250.

*Georgia.* — *Riverside Mills v. Jones*, 121 Ga. 33; *Gunn v. Willingham*, 111 Ga. 427.

*Illinois.* — *Illinois Cent. R. Co. v. Smiesni*, 104 Ill. App. 194; *Consolidated Coal Co. v. Seniger*, 79 Ill. App. 456, *affirmed* 179 Ill. 370; *World's Columbian Exposition v. Bell*, 76 Ill. App. 591.

*Indiana.* — *Indianapolis, etc., Rapid Transit R. Co. v. Foreman*, 162 Ind. 85, 102 Am. St. Rep. 185.

*Iowa.* — *Scott v. Iowa Telephone Co.*, 126 Iowa 524.

*Kentucky.* — *Kentucky, etc., Bridge, etc., Co. v. Sydor*, 82 S. W. Rep. 989, 26 Ky. L. Rep. 951.

*Louisiana.* — *Dixon v. Pittsburg, etc., Lumber Co.*, 52 La. Ann. 1109.

*Minnesota.* — *Nutzmann v. Germania L. Ins. Co.*, 78 Minn. 504; *Jenson v. Great Northern R. Co.*, 72 Minn. 175, 71 Am. St. Rep. 475.

*New Jersey.* — *Chandler v. Atlantic Coast Electric R. Co.*, 61 N. J. L. 380.

*New York.* — *Baird v. New York Cent., etc., R. Co.*, 64 N. Y. App. Div. 14, *affirmed* without opinion 172 N. Y. 637; *Malay v. Mt. Morris Electric Light Co.*, 41 N. Y. App. Div. 574.

*Ohio.* — *Lake Shore, etc., R. Co. v. Ehlert*, 25 Ohio Cir. Ct. 37.

*Pennsylvania.* — *Stasch v. Cornwall Ore Bank, Co.*, 19 Pa. Super. Ct. 113.

*South Carolina.* — *Hicks v. Southern R. Co.*, 63 S. Car. 559.

*Texas.* — *Galveston, etc., R. Co. v. Sherwood*, (Tex. Civ. App. 1902) 67 S. W. Rep. 776; *Postal Tel. Cable Co. v. Coote*, (Tex. Civ. App. 1900) 57 S. W. Rep. 912.

*Utah.* — *Stoll v. Daly Min. Co.*, 19 Utah 271.

*Washington.* — *Carlson v. Wilkeson Coal, etc., Co.*, 19 Wash. 473.

*Wisconsin.* — *Kamp v. Cox*, 122 Wis. 206; *Curran v. A. H. Stange Co.*, 98 Wis. 508; *Mait-*

*land v. Gilbert Paper Co.*, 97 Wis. 476, 65 Am. St. Rep. 137.

See *Nofsinger v. Goldman*, 122 Cal. 609.

**912. 3. Master. Must Exercise Ordinary or Reasonable Care.** — *Illinois Cent. R. Co. v. Smiesni*, 104 Ill. App. 194; *Louisville, etc., R. Co. v. Pointer*, 113 Ky. 966, *citing* 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 912.

**913. 1. Meaning of Words "Ordinary Care."** — *Illinois Cent. R. Co. v. Smiesni*, 104 Ill. App. 194.

**915. 2. Retention of Incompetent Servants.** — *Kamp v. Cox*, 122 Wis. 206.

**4. Same — With Actual Knowledge of Incompetency.** — *Jenson v. Great Northern R. Co.*, 72 Minn. 175, 71 Am. St. Rep. 475.

**916. 1. Notice to Servant Invested with Power to Employ and Discharge Servants.** — *Giordano v. Brandywine Granite Co.*, 3 Penn. (Del.) 423; *Malay v. Mt. Morris Electric Light Co.*, 41 N. Y. App. Div. 574; *Texas, etc., R. Co. v. Lee*, 32 Tex. Civ. App. 23; *Kamp v. Cox*, 122 Wis. 206. See *Weeks v. Scharer*, (C. C. A.) 129 Fed. Rep. 333.

**917. 1. Notice to Servant Having No Authority or Control over Incompetent Servant.** — *Weeks v. Scharer*, (C. C. A.) 129 Fed. Rep. 333, holding that notice to a servant who possessed the power temporarily to suspend co-workers was not notice to the master.

**2. Notice to Servant Not Empowered to Employ and Discharge Servants.** — *Weeks v. Scharer*, (C. C. A.) 111 Fed. Rep. 330.

But it has, on the other hand, been held that in order to charge the master with notice of the incompetency of a servant, it is not necessary that notice of the incompetency should have been acquired by an agent who is empowered to discharge the incompetent servant. *East Tennessee, etc., R. Co. v. Wright*, 100 Tenn. 56, holding that knowledge acquired by a conductor in charge of a train touching the recklessness or misconduct of the engineer is notice to the company, since the conductor is the immediate superior of the engineer, and represents the company while in charge of the train.

**3. Implied Notice of Incompetency.** — *Scott v. Iowa Telephone Co.*, 126 Iowa 524; *Kamp v. Cox*, 122 Wis. 206.

**918. 1. Incompetency of Negligent Servant Must Appear.** — *Giordano v. Brandywine Granite Co.*, 3 Penn. (Del.) 423; *Gunn v. Willingham*, 111 Ga. 427; *Park v. New York Cent., etc., R. Co.*, 155 N. Y. 215, 63 Am. St. Rep. 663; *Malay v. Mt. Morris Electric Light Co.*, 41

**918.** *cc.* INJURY MUST BE DUE TO INCOMPETENCY. — See note 2.

**919.** See note 1.

*dd.* NEGLIGENCE OF MASTER — General Rule. — See note 2.

In Retention of Incompetent Servants. — See note 3.

**920.** (b) Where Injured Servant Has Knowledge of the Other's Incompetency. — See notes 3, 5.

**921.** See note 1.

Presumption as to Competency of Fellow Servants. — See notes 2, 4.

Equality of Master's and Servant's Means of Information. — See notes 5, 6.

Promise by Employer to Remove Incompetent Servant. — See note 7.

**923.** *c.* SUPERIOR SERVANTS — (2) *At the Common Law* — (c) *Ohio Doctrine*. — See notes 1, 2.

N. Y. App. Div. 574; *Bruce v. Penn Bridge Co.*, 197 Pa. St. 439.

**918.** 2. Injury Must Result from Fellow Servant's Incompetency. — *Malay v. Mt. Morris Electric Light Co.*, 41 N. Y. App. Div. 574; *Norfolk, etc., R. Co. v. Phillips*, 100 Va. 368, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 918; *Adams v. Snow*, 106 Wis. 152; *Kliefoth v. Northwestern Iron Co.*, 98 Wis. 495.

**919.** 1. Where Negligence of Incompetent Servant Is Not Shown. — *Central R. Co. v. Keegan*, (C. C. A.) 82 Fed. Rep. 174; *Giordano v. Brandywine Granite Co.*, 3 Penn. (Del.) 423; *Norfolk, etc., R. Co. v. Phillips*, 100 Va. 368, quoting 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 919.

2. Master Must Have Been Negligent — *Dela-ware*. — *Giordano v. Brandywine Granite Co.*, 3 Penn. (Del.) 423.

*Georgia*. — *Gunn v. Willingham*, 111 Ga. 427; *Ingram v. Hilton, etc., Lumber Co.*, 108 Ga. 194.

*Louisiana*. — *Bell v. Globe Lumber Co.*, 107 La. 725.

*Massachusetts*. — *Delory v. Blodgett*, 185 Mass. 126, 102 Am. St. Rep. 328.

*Missouri*. — *Smith v. St. Louis, etc., R. Co.*, 151 Mo. 391.

*New Hampshire*. — *Hilton v. Fitchburg R. Co.*, (N. H. 1904) 59 Atl. Rep. 625.

*New Mexico*. — *Cerrillos Coal R. Co. v. De-serant*, 9 N. Mex. 49.

*New York*. — *Park v. New York Cent., etc., R. Co.*, 155 N. Y. 215, 63 Am. St. Rep. 663; *Gillen v. McAllister*, 97 N. Y. App. Div. 310; *Lambrecht v. Pfizer*, 49 N. Y. App. Div. 82; *Malay v. Mt. Morris Electric Light Co.*, 41 N. Y. App. Div. 574.

*Wisconsin*. — *Maitland v. Gilbert Paper Co.*, 97 Wis. 476, 65 Am. St. Rep. 137.

3. Retention of Incompetent Servant — Where Master Is Not Chargeable with Knowledge of Incompetency. — *Olsen v. North Pac. Lumber Co.*, 106 Fed. Rep. 298; *Walkowski v. Penokee, etc., Consol. Mines*, 115 Mich. 629; *Lambrecht v. Pfizer*, 49 N. Y. App. Div. 82.

**920.** 3. Continuance in Employment with Knowledge of Fellow Servant's Incompetency Viewed as an Assumption of the Risk. — *Weeks v. Scharer*, (C. C. A.) 111 Fed. Rep. 330.

5. Same — Nonliability of Master. — *Weeks v. Scharer*, (C. C. A.) 111 Fed. Rep. 330; *Illinois Cent. R. Co. v. Smiesni*, 104 Ill. App. 194; *Indianapolis, etc., Rapid Transit R. Co. v. Foreman*, 162 Ind. 85, 102 Am. St. Rep. 185; *Johnson v. Portland Stone Co.*, 40 Oregon 436, cit-

ing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 920; *Kamp v. Cox*, 122 Wis. 206.

**921.** 1. Circumstances Justifying Continuance in Service. — See *Bell v. Globe Lumber Co.*, 107 La. 725.

2. Right of Servant to Assume that Fellow Servant Is Competent. — *Olsen v. North Pac. Lumber Co.*, (C. C. A.) 100 Fed. Rep. 384; *Bosworth v. Rogers*, (C. C. A.) 82 Fed. Rep. 975; *Giordano v. Brandywine Granite Co.*, 3 Penn. (Del.) 423; *Galveston, etc., R. Co. v. Sherwood*, (Tex. Civ. App. 1902) 67 S. W. Rep. 776; *Lawrence v. Texas Cent. R. Co.*, 25 Tex. Civ. App. 293.

4. *Lawrence v. Texas Cent. R. Co.*, 25 Tex. Civ. App. 293.

5. Equality of Master's and Servant's Means of Information. — *Lawrence v. Texas Cent. R. Co.*, 25 Tex. Civ. App. 293.

6. *Galveston, etc., R. Co. v. Sherwood*, (Tex. Civ. App. 1902) 67 S. W. Rep. 776.

7. Continuing in Employment upon Master's Promising to Remove Incompetent Servant. — *Curran v. A. H. Stange Co.*, 98 Wis. 598; *Maitland v. Gilbert Paper Co.*, 97 Wis. 476, 65 Am. St. Rep. 137.

**923.** 1. Rule in Ohio. — *Kelly Island Lime, etc., Co. v. Pachuta*, 69 Ohio St. 462, 100 Am. St. Rep. 706; *Wellston Coal Co. v. Smith*, 65 Ohio St. 70, 87 Am. St. Rep. 547; *Pennsylvania R. Co. v. Hickley*, 11 Ohio Cir. Dec. 379, 20 Ohio Cir. Ct. 668; *Hawks v. Lake Shore, etc., R. Co.*, 8 Ohio Cir. Dec. 414, 16 Ohio Cir. Ct. 377; *Lake Shore, etc., R. Co. v. Corcoran*, 8 Ohio Dec. 49, 14 Ohio Cir. Ct. 377; *Lake Erie, etc., R. Co. v. Mulcahy*, 9 Ohio Cir. Dec. 82, 16 Ohio Cir. Ct. 204.

Statutory Adoption of the Doctrine. — The doctrine of the *Ohio* cases has been recognized and extended by a statute relating to actions against railroad companies. *Ohio Rev. Stat.*, §§ 3365-22. See *Cleveland, etc., R. Co. v. Shanower*, 70 Ohio St. 166; *New York, etc., R. Co. v. Roe*, 25 Ohio Cir. Ct. 628; *Erie R. Co. v. McCormick*, 24 Ohio Cir. Ct. 86; *Froelich v. Toledo, etc., R. Co.*, 24 Ohio Cir. Ct. 359; *Hill v. Lake Shore, etc., R. Co.*, 12 Ohio Cir. Dec. 241, 22 Ohio Cir. Ct. 291; *Andrews Bros. Co. v. Burns*, 12 Ohio Cir. Dec. 305, 22 Ohio Cir. Ct. 437; *Roe v. New York, etc., R. Co.*, 13 Ohio Dec. 260.

The effect of the *Ohio* statute cannot be evaded by giving servants nominal authority. *Kane v. Erie R. Co.*, (C. C. A.) 133 Fed. Rep. 681, reversing 128 Fed. Rep. 474.

2. The *Ohio* rule has been stated as follows: "The only question to be determined is whether

**924.** (d) Adoption of the Doctrine in the United States — *bb.* RULE IN ILLINOIS, TENNESSEE, AND UTAH. — See note 1.

**926.** Application of the Illinois Rule. — See notes 1, 2, 3.

*cc.* RULE IN KENTUCKY. — See note 4.

**927.** See note 1.

*dd.* RULE IN TEXAS. — See note 2.

**928.** See notes 1, 2.

one servant is given by the master authority or power to control and direct the work and labor of another servant. Often servants labor together in a common work, and they direct each other what to do, or one who is more experienced than the other may direct how the work shall be done; but that does not determine the question whether the master is liable for the negligence of either by which the other is injured; but the liability of the master is determined entirely by a solution of the question whether or not the master has placed one under the direction of the other, or whether he has given one control over another servant in performing a certain work; if he has, and the inferior is injured by the carelessness of the superior, then the liability exists." *Toomey v. Avery Stamping Co.*, 11 Ohio Cir. Dec. 216, 20 Ohio Cir. Ct. 183.

**924.** 1. Rule in Illinois. — Illinois Cent. R. Co. *v.* Atwell, 198 Ill. 200; *La Salle v. Kostka*, 190 Ill. 130; *Rock Island Sash, etc., Works v. Pohlman*, 99 Ill. App. 670; *Driscoll v. Chicago, etc., R. Co.*, 97 Ill. App. 668; *Kirk v. Senzig*, 79 Ill. App. 251.

**Rule in Tennessee.** — It has been declared that the real test of whether one servant stands to another in the relation of vice-principal is not the comparative rank of the two servants, but the authority to give orders, as a vice-principal to the subordinate servant, in directing him when, where, and how to work. *Ohio River, etc., R. Co. v. Edwards*, 111 Tenn. 31, holding that a subforeman of a section gang who was not shown to have authority to give orders was the fellow servant of the members of the gang.

The conductor of a train is not a fellow servant of the members of his crew, when acting in the capacity of conductor. *Alabama G. S. R. Co. v. Baldwin*, 113 Tenn. 409.

**Rule in Utah.** — *Dryburg v. Mercur Gold Min., etc., Co.*, 18 Utah 410, containing an *obiter* discussion of the common-law rule.

**926.** 1. Extent and Limitation of the Illinois Rule. — *Baier v. Selke*, 211 Ill. 512, reversing 112 Ill. App. 568; *Meyer v. Illinois Cent. R. Co.*, 177 Ill. 591; *Westville Coal Co. v. Schwartz*, 177 Ill. 272, affirming 75 Ill. App. 468; *Dolese, etc., Co. v. Schultz*, 101 Ill. App. 569; *Blah v. West Chicago St. R. Co.*, 100 Ill. App. 393; *Kellyville Coal Co. v. Humble*, 87 Ill. App. 437; *Chicago Architectural Iron Works v. Nagel*, 80 Ill. App. 492; *Ohio River, etc., R. Co. v. Edwards*, 111 Tenn. 31; *National Fertilizer Co. v. Travis*, 102 Tenn. 16. See *Chicago, etc., R. Co. v. Goltz*, 71 Ill. App. 414.

In order to bring a servant within the rule holding the master liable for his acts when he is discharging the ordinary duties of a servant, the service or act in which he is engaged must be that of a fellow servant, and not one which it is his duty to do, or which he may do, as a

superior or vice-principal. *Alabama G. S. R. Co. v. Baldwin*, 113 Tenn. 409, holding that the conductor in giving an order to the engineer to move his engine backward was acting as a vice-principal.

2. Consolidated Coal Co. *v.* Fleischbein, 207 Ill. 593, affirming 109 Ill. App. 509; *Chicago Hair, etc., Co. v. Mueller*, 203 Ill. 558; *William Graver Tank Works v. O'Donnell*, 191 Ill. 236; *Norton v. Nadebok*, 190 Ill. 595; *Consolidated Coal Co. v. Gruber*, 188 Ill. 584; *Pittsburg Bridge Co. v. Walker*, 170 Ill. 550; *Illinois Cent. R. Co. v. Johnson*, 95 Ill. App. 54, judgment affirmed 191 Ill. 594; *Chicago v. Cronin*, 91 Ill. App. 466; *Metropolitan West Side El. R. Co. v. Skola*, 83 Ill. App. 659, judgment affirmed 183 Ill. 454, 75 Am. St. Rep. 120.

3. *Ohio River, etc., R. Co. v. Edwards*, 111 Tenn. 31.

4. Kentucky Doctrine. — *Chesapeake, etc., R. Co. v. Board*, 77 S. W. Rep. 189, 25 Ky. L. Rep. 1118; *Kentucky Distilleries, etc., Co. v. Schreiber*, 73 S. W. Rep. 769, 24 Ky. L. Rep. 2236; *Louisville, etc., R. Co. v. Crady*, 73 S. W. Rep. 1126, 24 Ky. L. Rep. 2339; *Board v. Chesapeake, etc., R. Co.*, 70 S. W. Rep. 625, 24 Ky. L. Rep. 1079; *Illinois Cent. R. Co. v. Stewart*, 63 S. W. Rep. 596, 23 Ky. L. Rep. 637; *Illinois Cent. R. Co. v. Josey*, 110 Ky. 342, 96 Am. St. Rep. 455; *Illinois Cent. R. Co. v. Coleman*, 59 S. W. Rep. 13, 22 Ky. L. Rep. 878; *Louisville, etc., R. Co. v. Hawkins*, (Ky. 1899) 51 S. W. Rep. 426.

**Superior Servant Discharging Duties of Co-laborer.** — In *Ashland Coal, etc., R. Co. v. Wallace*, 101 Ky. 626, it was held that there can be no recovery against the master if the negligent servant, although the plaintiff's superior, was not acting in the capacity of a superior at the time of the accident, but was engaged in the same kind of labor as that of the plaintiff.

**927.** 1. Illinois Cent. R. Co. *v.* Elliott, 82 S. W. Rep. 374, 26 Ky. L. Rep. 669; *Illinois Cent. R. Co. v. Coleman*, 59 S. W. Rep. 13, 22 Ky. L. Rep. 878; *Louisville, etc., R. Co. v. Foard*, 104 Ky. 456.

Under section 241 of the Kentucky constitution there may be a recovery for the death of a servant resulting from the ordinary negligence of a superior servant. *Southern R. Co. v. Barr*, (Ky. 1900) 55 S. W. Rep. 900; *Linck v. Louisville, etc., R. Co.*, 107 Ky. 370.

2. Rule in Texas. — *Roberts v. Fielder Salt Works*, (Tex. Civ. App. 1903) 72 S. W. Rep. 618; *Postal Tel. Cable Co. v. Coote*, (Tex. Civ. App. 1900) 57 S. W. Rep. 912.

**928.** 1. *Sauls v. Chicago, etc., R. Co.*, 36 Tex. Civ. App. 155.

2. Power of Employment and Discharge Necessary. — *Bering Mfg. Co. v. Femelat*, 35 Tex. Civ. App. 36; *Houston Ice, etc., Co. v. Pisch*, 33 Tex. Civ. App. 684; *Young v. Hahn*, 96 Tex.



**928.** *cc.* RULE IN NORTH CAROLINA. — See note 4.

**929.** See note 1.

*ff.* RULE IN OTHER STATES. — See note 2.

99, *reversing* (Tex. Civ. App. 1902) 69 S. W. Rep. 203; *Maughmer v. Behring*, 19 Tex. Civ. App. 299.

**928.** 4. *Harris v. Balfour Quarry Co.*, 137 N. Car. 204; *Haltom v. Southern R. Co.*, 127 N. Car. 255; *Means v. Carolina Cent. R. Co.*, 126 N. Car. 424; *Pleasants v. Raleigh, etc.*, Air Line R. Co., 121 N. Car. 492, 61 Am. St. Rep. 674. See *Turrentine v. Wellington*, 136 N. Car. 308.

A section master has been considered to be a vice-principal as to the employees under him. *Allison v. Southern R. Co.*, 129 N. Car. 336; *Johnson v. Southern R. Co.*, 122 N. Car. 955.

**929.** 1. *Lamb v. Littman*, 132 N. Car. 978. But see *Bryan v. Southern R. Co.*, 128 N. Car. 387.

2. *Georgia*. — According to the later Georgia cases the superior-servant limitation is rejected in that state. *Cedartown Cotton Co. v. Hanson*, 118 Ga. 176; *Shepherd v. Southern Pine Co.*, 118 Ga. 292; *Hamby v. Union Paper Mills Co.*, 110 Ga. 1; *Cates v. Itner*, 104 Ga. 679.

The rule that the master is not liable to one of his servants for injuries resulting from the carelessness of another, when both are engaged in a common service, although the injured person was under the control and direction of the servant who caused the injury, whether a true rule or not, has no application to the case of a child who is injured in consequence of the negligence of a superintendent under whose orders the child was at work, and which orders the child was obliged to obey. *Southern Agricultural Works v. Franklin*, 111 Ga. 319.

*Kansas*. — The fact that one member of a switch crew has the switch list, makes selection of cars, gives signals, and to that extent takes the lead, does not make him the superior of the other members of the crew. *Higgins v. Atchison, etc., R. Co.*, (Kan. 1905) 79 Pac. Rep. 679.

*Louisiana*. — For later cases showing a tendency to recognize the superior-servant limitation in Louisiana, see *infra*, cases supplementing page 933, note 2.

*Missouri*. — For cases recognizing the superior-servant limitation see the following: *Bien v. St. Louis Transit Co.*, 108 Mo. App. 399; *Hunt v. Desloge Consol. Lead Co.*, 104 Mo. App. 377; *Donnelly v. Aida Min. Co.*, 103 Mo. App. 349; *Borden v. Falk Co.*, 97 Mo. App. 566; *Reed v. Missouri, etc., R. Co.*, 94 Mo. App. 371; *Sims v. Omaha, etc., R. Co.*, 89 Mo. App. 197; *Steube v. Christopher, etc., Architectural Iron, etc., Co.*, 85 Mo. App. 640.

The law is settled in this state that an employee, of whatever grade, may occupy a dual position. In the performance of some duties or some acts he may be the representative of the master, and as to others he may be a collaborer or fellow servant with others engaged in the same department of service. *Garland v. Missouri, etc., R. Co.*, 85 Mo. App. 579.

In *Deputy v. Chicago, etc., R. Co.*, 110 Mo. App. 110, it is said, in effect, that a servant having authority may act in a dual capacity; that is to say, while he directs and controls others he is the master, but while he is engaged as a

laborer with other laborers he is a fellow servant.

The superior-servant rule has no application when the negligent and injured servant are co-servants of the same master, under the control and supervision of the same foreman or superintendent, and are engaged upon the same particular piece of work, the only difference in grade between them being such as arises from their respective personalities and the nature of the particular part of the work which each performs. *Richardson v. Mesker*, 171 Mo. 666.

An employee in a mine, who hired and discharged men, superintended the underground work in the mine, and directed the men where and how to work, has been held not to be the fellow servant of the men under him, notwithstanding the fact that he worked with the men and performed the same character and grade of labor which they performed. *Carter v. Baldwin*, 107 Mo. App. 217.

The mere fact that the negligent servant could in all probability have obtained the discharge of the injured servant by complaining to their common foreman is not sufficient to show that they were not fellow servants. *Hawk v. McLeod Lumber Co.*, 166 Mo. 121.

The mere fact that the negligent servant does not have the power to employ and discharge laborers is not conclusive upon the question of whether he is an employee for whose negligence the master is liable to other servants. *Hawk v. Jacob Dold Packing Co.*, 96 Mo. App. 173.

It has been held that although the negligent act be that of the foreman while himself engaging in the work of those employed under his charge, yet that fact does not cause him to lose his character as vice-principal. *Strode v. Conkey*, 105 Mo. App. 12.

*Nebraska*. — It has been held that the negligent act of a foreman, with general control and authority to employ and discharge workmen, in ordering a subject workman upon an elevator, and himself operating the elevator with negligence, to the workman's injury, was properly regarded by the trial court as not the act of a fellow servant, but of a vice-principal. *Swift v. Bleise*, 63 Neb. 739.

A foreman, who has the management, superintendence, and control of a branch of defendant's work, is not a fellow servant with workmen under him. *New Omaha Thomson-Houston Electric Light Co. v. Baldwin*, 62 Neb. 180, where it was said that, whatever may be the rule elsewhere, in *Nebraska* the liability of the employer for the actions of a vice-principal grows out of the fact that he is directly intrusted with authority, that the movements of those under him are directed by him, and that he is held to be the direct representative of his principal.

*South Carolina*. — For cases recognizing the superior-servant limitation see the following: *Hyland v. Southern Bell Telephone, etc., Co.*, 70 S. Car. 315; *Hicks v. Southern R. Co.*, 63 S. Car. 559.

A conductor and the employees under his

**933. (e) Rejection of the Doctrine — *bb*. APPROVED DOCTRINE. — See note 2.**

direction and control do not sustain to each other the relation of fellow servants. *Rhodes v. Southern R. Co.*, 68 S. Car. 494.

In order to charge a railroad company with liability under the *South Carolina* constitutional provision it is immaterial whether the person "having a right to control or direct" employees was appointed by a representative of the company or by the workmen themselves. *Rutherford v. Southern R. Co.*, 56 S. Car. 446.

*Utah*. — The superior-servant limitation seems to prevail in Utah. *Hicks v. Southern Pac. R. Co.*, 27 Utah 526, holding a railroad company liable to a section hand for the negligence of the section foreman.

*Washington*. — *Grout v. Tacoma Eastern R. Co.*, 33 Wash. 524; *Gaudie v. Northern Lumber Co.*, 34 Wash. 34; *Nelson v. S. Willey Steamship, etc., Co.*, 26 Wash. 548; *Uren v. Golden Tunnel Min. Co.*, 24 Wash. 261; *Keating v. Pacific Steam Whaling Co.*, 21 Wash. 415.

*Wyoming*. — In applying the law of Wyoming the Supreme Court of Utah has said that on principle and by the weight of authority, persons engaged in the service of the master, who are intrusted by him with the management or direction of his general work, or with some particular part thereof, are not fellow servants with the subordinate employees, but are vice-principals. *Johnson v. Union Pac. Coal Co.*, 28 Utah 46.

**933. 2. Superior-servant Doctrine Rejected — *United States*.** — *New England R. Co. v. Conroy*, 175 U. S. 323; *Lach v. Burnham*, 134 Fed. Rep. 688; *Phoenix Bridge Co. v. Castleberry*, (C. C. A.) 131 Fed. Rep. 175, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 933; *Weeks v. Scharer*, (C. C. A.) 129 Fed. Rep. 333, 111 Fed. Rep. 330; *Fournier v. Pike*, 128 Fed. Rep. 991; *Pistoner v. American Can Co.*, 119 Fed. Rep. 496; *McDonald v. Buckley*, (C. C. A.) 109 Fed. Rep. 290; *Louisville, etc., R. Co. v. Stuber*, (C. C. A.) 108 Fed. Rep. 934, reversing 102 Fed. Rep. 421; *Lochbaum v. Oregon R., etc., Co.*, (C. C. A.) 104 Fed. Rep. 852; *Cincinnati, etc., R. Co. v. Gray*, (C. C. A.) 101 Fed. Rep. 623; *Stevens v. Chamberlin*, (C. C. A.) 100 Fed. Rep. 378; *Briegal v. Southern Pac. R. Co.*, (C. C. A.) 98 Fed. Rep. 958; *Thomas v. Cincinnati, etc., R. Co.*, 97 Fed. Rep. 245; *Olson v. Oregon Coal, etc., Co.*, 96 Fed. Rep. 109; *Yager v. Receivers*, 88 Fed. Rep. 773; *Flippin v. Kimball*, (C. C. A.) 87 Fed. Rep. 258; *Gaynon v. Durkee*, (C. C. A.) 87 Fed. Rep. 302.

*California* — *Donovan v. Ferris*, 128 Cal. 48, 79 Am. St. Rep. 25.

*Colorado*. — See *Molique v. Iowa Gold Min., etc., Co.*, 18 Colo. App. 223.

*Connecticut*. — *Whittlesey v. New York, etc., R. Co.*, 77 Conn. 100, 107 Am. St. Rep. 21; *Kelly v. New Haven Steamboat Co.*, 74 Conn. 343, 92 Am. St. Rep. 220.

*Georgia*. — See *supra*, the cases supplementing page 929, note 2, Georgia.

*Idaho*. — *Sartin v. Oregon Short Line R. Co.*, 27 Utah 447, applying the law of Idaho.

*Indiana*. — *Standard Pottery Co. v. Moudy*, (Ind. App. 1905) 73 N. E. Rep. 188, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 953, 954; *Dill v. Marmon*, 164 Ind. 507; *Ft. Wayne Gas*

*Co. v. Nieman*, 33 Ind. App. 178; *Southern Indiana R. Co. v. Martin*, 160 Ind. 280; *American Telephone, etc., Co. v. Bower*, 20 Ind. App. 32; *Smallwood v. Bedford Quarries Co.*, 28 Ind. App. 692; *Ross v. Union Cement, etc., Co.*, 25 Ind. App. 463.

*Indian Territory*. — *St. Louis, etc., R. Co. v. Arnett*, (Tex. Civ. App. 1905) 84 S. W. Rep. 599, applying the law of Indian Territory.

*Iowa*. — *McQueeney v. Chicago, etc., R. Co.*, 120 Iowa 522; *Barnicle v. Connor*, 110 Iowa 238.

*Louisiana*. — The superior-servant limitation is favored in the late Louisiana cases. *Stucke v. Orleans R. Co.*, 50 La. Ann. 172; *Evans v. Louisiana Lumber Co.*, 111 La. 534; *Wilson v. Banner Lumber Co.*, 108 La. 590; *Vicars v. Cumberland Tel., etc., Co.*, 52 La. Ann. 2153.

*Maine*. — *McCarthy v. Claflin*, 99 Me. 290; *Small v. Allington, etc., Mfg. Co.*, 94 Me. 551, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 933; *Cowan v. Umbagog Pulp Co.*, 91 Me. 26.

*Maryland*. — *State v. Schwind Quarry Co.*, 97 Md. 696.

*Massachusetts*. — *Ahern v. Hildreth*, 183 Mass. 296; *Healey v. George F. Blake Mfg. Co.*, 180 Mass. 270; *Meehan v. Speirs Mfg. Co.*, 172 Mass. 375.

*Michigan*. — The superior-servant limitation is clearly rejected in the later Michigan cases. *Randa v. Detroit Screw Works*, 134 Mich. 343, 10 Detroit Leg. N. 504; *Mikolajczak v. North American Chemical Co.*, 129 Mich. 80, 8 Detroit Leg. N. 870; *Wellihan v. National Wheel Co.*, 128 Mich. 1, 8 Detroit Leg. N. 487; *Lipan v. Hall*, 128 Mich. 523, 8 Detroit Leg. N. 750; *Andre v. Winslow Bros. Elevator Co.*, 117 Mich. 560.

It has been held that, upon the facts of the case, a conductor of a freight train was the fellow servant of a brakeman on the train. *Ott v. Lake Shore, etc., R. Co.*, 10 Ohio Cir. Dec. 85, 18 Ohio Cir. Ct. 395, decided under the law of Michigan.

*Minnesota*. — *Dixon v. Union Iron Works*, 90 Minn. 492; *O'Neil v. Great Northern R. Co.*, 80 Minn. 27.

*New Hampshire*. — *Galvin v. Pierce*, 72 N. H. 79; *McLaine v. Head, etc., Co.*, 71 N. H. 294, 93 Am. St. Rep. 522.

*New Jersey*. — *Curley v. Hoff*, 62 N. J. L. 758; *Olsen v. Nixon*, 61 N. J. L. 671; *Enright v. Oliver*, 69 N. J. L. 357, 101 Am. St. Rep. 710; *Knutter v. New York, etc., Telephone Co.*, 67 N. J. L. 646.

*New Mexico*. — *Deserant v. Cerrillos Coal R. Co.*, 9 N. Mex. 495.

*New York*. — *Larssen v. Delaware, etc., R. Co.*, 59 N. Y. App. Div. 202.

*Oklahoma*. — *Ruemmeli-Braun Co. v. Cahill*, 14 Okla. 422.

*Oregon*. — *Wagner v. Portland*, 40 Oregon 389; *Johnson v. Portland Stone Co.*, 40 Oregon 436.

*Pennsylvania*. — *Duffy v. Platt*, 205 Pa. St. 296; *Johnson v. Western New York, etc., R. Co.*, 200 Pa. St. 314; *Hughes v. Leonard*, 199 Pa. St. 123; *Casey v. Pennsylvania Asphalt Paving Co.*, 198 Pa. St. 348, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 933; *Ricks v. Flynn*, 196 Pa. St. 263; *Duncan v. A. & P.*

**941. (f) Statutory Recognition of the Doctrine — aa. IN GENERAL. —** See note 3.

Roberts Co., 194 Pa. St. 563; *Prevost v. Citizens' Ice, etc., Co.*, 185 Pa. St. 617, 64 Am. St. Rep. 659.

*Rhode Island*. — *Milhench v. E. Jenckes Mfg. Co.*, 24 R. I. 131; *Morgridge v. Providence Telephone Co.*, 20 R. I. 386, 78 Am. St. Rep. 879.

*Vermont*. — *Sias v. Consolidated Lighting Co.*, 73 Vt. 35; *Lambert v. Missisquoi Pulp Co.*, 72 Vt. 278.

*Virginia*. — The superior-servant limitation is rejected in the following cases: *Southern R. Co. v. Mauzy*, 98 Va. 692; *Moore Lime Co. v. Richardson*, 95 Va. 326, 64 Am. St. Rep. 785.

*West Virginia*. — The superior-servant limitation is rejected in *West Virginia*. *Cochran v. Shanahan*, 51 W. Va. 137.

*Wisconsin*. — *Okonski v. Pennsylvania, etc., Fuel Co.*, 114 Wis. 448; *Wiskie v. Montello Granite Co.*, 111 Wis. 443, 87 Am. St. Rep. 885, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 933.

*Canada*. — *Ferguson v. Galt Public School Board*, 27 Ont. App. 480.

**941. 3. Statutory Recognition of Superior-servant Limitation — Arkansas.** — Under the Arkansas statute (*Sand. & H. Dig.*, Ark. 1894, § 6248), providing that all persons engaged in the service of any railway corporation "who are intrusted by such corporation with the authority of superintendence, control, or command of other persons in the employ or service of such corporation, or with the authority to direct any other employee in the performance of any such duties, are vice-principals of such corporation, and are not fellow servants with such employee," it has been held that the foreman of a section gang, who has authority to employ and discharge help and who has control of the men in the gang in the performance of their duty, is a vice-principal. *Haworth v. Kansas City Southern R. Co.*, 94 Mo. App. 215.

For other cases applying the statute see the following: *St. Louis, etc., R. Co. v. Furry*, (C. C. A.) 114 Fed. Rep. 898; *St. Louis, etc., R. Co. v. Thurmond*, 70 Ark. 411; *St. Louis, etc., R. Co. v. Touhey*, 67 Ark. 209.

*Indiana*. — For cases construing the Indiana statute see *infra*, cases supplementing page 945, note 4 *et seq.*

*Ohio*. — Under the Ohio statute (87 Ohio Laws, p. 150) providing that in all actions against railroad companies for injuries to employees "it shall be held, in addition to the liability now existing by law, that every person in the employ of such company, actually having power or authority to direct or control any other employee of such company, is not the fellow servant, but superior of such other employee; also, that every person in the employ of such company having charge or control of employees in any separate branch or department shall be held to be the superior and not fellow servant of employees in any other branch or department who have no power to direct or control in the branch or department in which they are employed," it has been held that a locomotive engineer may be held to be a superior servant although the fireman is the only coemployee under him. *Erie R. Co. v. Kane*, (C. C. A.) 118 Fed. Rep. 223.

*Texas*. — By the Texas Act of 1897 (Tex. Gen. Laws 1897, Sp. Sess., p. 14, c. 6; Sayles's Tex. Civ. Stat., art. 4560h), amending the earlier statutes, employees of railroads are not fellow servants unless they "are in the same grade of employment." *El Paso, etc., R. Co. v. Kelly*, (Tex. Civ. App. 1904) 83 S. W. Rep. 855; *Galveston, etc., R. Co. v. Butshek*, 34 Tex. Civ. App. 194.

A porter at a station, engaged at the time of the accident in unloading freight from one of the cars of a local freight train, and a brakeman on the train whose duty it was to bring the freight to the door of the car and call out the character of the freight, were held not to be fellow servants for the reason that they were not employed in the "same grade of employment" within the meaning of article 4560h of Sayles's Texas Civil Statutes. *Gulf, etc., R. Co. v. Elmore*, 35 Tex. Civ. App. 56.

A master has been held liable for the negligence of a superior in furnishing a servant under him with a defective tool and directing him to use it. *Gulf, etc., R. Co. v. Whisenhunt*, (Tex. Civ. App. 1904) 81 S. W. Rep. 332.

A defendant railroad company has been held liable to a servant assisting an engineer to remove an obstruction in a well. *Galveston, etc., R. Co. v. Roth*, (Tex. Civ. App. 1905) 84 S. W. Rep. 1112.

Under the Texas statute it has been held that a railroad company is not liable for the death of a hostler through the negligence of round-house employees who were his assistants. *Gulf, etc., R. Co. v. Howard*, 97 Tex. 513.

Since an engineer has the right to superintend and direct the fireman they are not fellow servants and the railroad is liable to the fireman for the engineer's negligence. *Houston, etc., R. Co. v. Stuart*, (Tex. Civ. App. 1898) 48 S. W. Rep. 799.

But where there was a conflict of evidence as to whether the engineer had any authority over the fireman it was held that the question whether they were fellow servants was for the jury. *Galveston, etc., R. Co. v. Ford*, (Tex. Civ. App. 1898) 46 S. W. Rep. 77.

A railroad company is liable to a brakeman for the negligence of a conductor who has absolute control over the brakeman. *Galveston, etc., R. Co. v. Robinett*, (Tex. Civ. App. 1899) 54 S. W. Rep. 263.

A railroad company has been held liable to a member of a bridge gang for injuries received in consequence of another member of the gang leaving a tool on the track in front of an approaching train, it being the special duty of the foreman of the gang to supervise the members of the gang and see that they left a free and unobstructed track for the approaching train. *Texas, etc., R. Co. v. Carlin*, 189 U. S. 354, affirming (C. C. A.) 111 Fed. Rep. 777.

Although the foreman of a gang of trackmen is a vice-principal under the Texas statute, the employer is liable to him or his representatives for the negligence of the men under his charge. *Texas, etc., R. Co. v. Smith*, (C. C. A.) 114 Fed. Rep. 728; *Galveston, etc., R. Co. v. Perry*, (Tex. Civ. App. 1905) 85 S. W. Rep. 62.

**Constitutional Provisions in Mississippi. — Un-**



**943.** *bb. LIABILITY FOR NEGLIGENCE OF SERVANTS EXERCISING SUPERINTENDENCE.* — See note 1.

**Construction of the Statutes — Servant Must Be Intrusted with Superintendence.**  
— See note 2.

der the constitutional provision in Mississippi that a railroad corporation shall be liable to an employee "where the injury results from the negligence of a superior agent or officer, or of a person having the right to control or direct the services of the party injured," but which does not provide that the injury must have been received while the superior is in the exercise of the superintendence intrusted to him, it is not essential to a recovery that the injured employee should at the time of the accident have been executing some special order or command of a superior officer. *Southern R. Co. v. Cheaves*, 84 Miss. 565, wherein it is said: "Our constitution plainly means that wherever an employee is injured by the negligence of a superior officer, or of a person having the right to direct or control his services, such employee is entitled to recover, whether he is at the time obeying any special command born of the exigencies of the occasion, or is engaged merely and simply in the discharge of his ordinary routine duties; such superior officer or person also being engaged in discharging simply the primary duties of his station, and not the positive duties of the master."

A fireman who is under the direction of the engineer may recover against the railroad company for injuries sustained through the engineer's negligence. *Cheaves v. Southern R. Co.*, 82 Miss. 48, on second appeal 84 Miss. 565.

A locomotive engineer is not a superior agent or officer to a yardmaster. *Farquhar v. Alabama, etc., R. Co.*, 78 Miss. 193.

A person who had been appointed foreman of a switching crew for the night of the accident, but was of the same rank as the other members of the crew, whom he could neither employ nor discharge, and whose duties as foreman were little more than to announce the places for the cars as fixed by usage or the switch list, was held not to be a "superior agent or officer" or "a person having the right to control or direct the services of the party injured." *Fenwick v. Illinois Cent. R. Co.*, (C. C. A.) 100 Fed. Rep. 247.

**Utah.** — The superior-servant limitation has been recognized by statute in Utah. See *Dryburg v. Mercur Gold Min., etc., Co.*, 18 Utah 410.

Under the Utah statute, which is substantially the same as the statutes of *Arkansas* and *Texas*, the master is liable for the negligence of the superior servant even while he is not exercising his authority of superintendence, control, command, or direction, but is discharging the primary duty of a servant. *Southern Pac. R. Co. v. Schoer*, (C. C. A.) 114 Fed. Rep. 466.

**943. 1. Alabama.** — See *Southern R. Co. v. Shields*, 121 Ala. 460, 77 Am. St. Rep. 66.

**New York.** — Section 1 of the New York Employers' Liability Act (N. Y. Laws 1902, c. 600) gives an employee, or his personal representative in case the injury results in death, the right to compensation where he has been injured by reason "of the negligence of any

person in the service of the employer intrusted with and exercising superintendence, whose sole or principal duty is that of superintendence, or, in the absence of such superintendent, of any person acting as superintendent with the authority or consent of such employer." For cases construing the New York statute see the following: *Bellegarde v. Union Bag, etc., Co.*, (Supm. Ct. Tr. T.) 41 Misc. (N. Y.) 106, 90 N. Y. App. Div. 577, affirmed 181 N. Y. 519; *McHugh v. Manhattan R. Co.*, 179 N. Y. 378.

**Texas.** — In Texas it has been provided by statute (Tex. Gen. Laws 1897, Sp. Sess., p. 14, c. 6) that "all persons engaged in the service of any person, receiver, or corporation, controlling or operating a railroad or street railway the line of which shall be situated in whole or in part in this state, who are intrusted by such person, receiver, or corporation with the authority of superintendence, control, or command of other servants or employees of such person, receiver, or corporation, or with the authority to direct any other employee in the performance of any duty of such employee, are vice-principals of such person, receiver, or corporation, and are not fellow servants with their coemployees." For cases construing the Texas statute see *supra*, the cases supplementing page 941, note 3, *Texas*.

**Contributory Negligence of Injured Servant.** — Both the *Massachusetts* and *New York* acts apply only when an employee "is himself in the exercise of due care and diligence at the time." *Sievers v. Eyre*, 122 Fed. Rep. 734.

**2. Liability of Master Limited to Negligence of Superintendent.** — *Carr v. Shields*, 125 Fed. Rep. 827, in which the *New York* statute (N. Y. Laws 1902, c. 609, p. 1748) is applied; *Hunter v. Kansas City, etc., R., etc., Co.*, (C. C. A.) 85 Fed. Rep. 379; *Freeman v. Sloss Sheffield Steel, etc., Co.*, 137 Ala. 481; *Beatty v. Weed*, 186 Mass. 99; *Whelton v. West End St. R. Co.*, 172 Mass. 555; *Trimble v. Whittin Mach. Works*, 172 Mass. 150; *Cavagnaro v. Clark*, 171 Mass. 359; *McManus v. Staples*, 171 Mass. 150; *Cunningham v. Lynn, etc., St. R. Co.*, 170 Mass. 298; *McLaughlin v. Interurban St. R. Co.*, 101 N. Y. App. Div. 134; *Gulf, etc., R. Co. v. Howard*, 97 Tex. 513.

An employee who is ordinarily engaged in manual labor cannot be regarded as a person having superintendence intrusted to him in the sense of the *English* act. *Falconer v. McCabe*, Sc. Ct. of Sess. 3 F. 210.

A yardmaster having charge of the movement of cars in the yard has been held to be a person exercising superintendence, in an action to recover for injuries received in consequence of the yardmaster's negligence in directing the movement of cars in the yard. *Brady v. New York, etc., R. Co.*, 184 Mass. 225.

A servant in charge of a gang of twenty-three men at work in a stone quarry, who was accustomed to give directions to all these men, who had sometimes discharged men, and who was accustomed to mark with chalk lines the places

**944.** Negligence Must Be Connected with the Exercise of the Superintendence. — See note 1.

What Constitutes a Person "Whose Sole or Principal Duty Is That of Superintendence." — See note 3.

**945.** See notes 1, 2.

cc. LIABILITY FOR NEGLIGENCE OF SERVANT TO WHOM INJURED SERVANT OWES OBEDIENCE. — See note 4.

where drilling was to be done, but never drilled himself, was held to be a person exercising superintendence within the meaning of the statute, although there was another superintendent of the whole business, who, however, was not in the habit of staying in the quarry, and sometimes did not come for a whole day. *Mahoney v. Bay State Pink Granite Co.*, 184 Mass. 287.

The fact that a servant was a section foreman having charge of a gang of men whose duty it was under his instructions to unload or transfer freight from one car to another, while he selected the cars that were to be unloaded, and checked the freight as it was transferred, is sufficient evidence for the consideration of the jury that he was intrusted with superintendence within the meaning of the statute. *Murphy v. New York, etc., R. Co.*, 187 Mass. 18.

Where a person who has been intrusted with superintendence, but has no authority to delegate his authority, appoints another person to act in his place, the person so appointed is not intrusted with superintendence within the meaning of the statute. *Boyd v. Indian Head Mills*, 131 Ala. 356.

**Foreman of Blasting Operations.** — The foreman of a company engaged in the excavation of a tunnel, who was charged with the duty of supervising the preparing of the work of the drillers for the reception of the explosives; of directing the placing of the dynamite in the holes; of causing the men to remove therefrom to a place of safety prior to the firing of the blast, and also of directing that the blast should be fired, has been held to be a person exercising superintendence within the meaning of the *New York* statute. *McBride v. New York Tunnel Co.*, 101 N. Y. App. Div. 448.

**The Operator of an Elevator in a Department Store** is not a person having any superintendence intrusted to him within the *Canadian* statute. *Carnahan v. Robert Simpson Co.*, 32 Ont. 328.

**944. 1. Liability Limited to Negligence Connected with the Exercise of Superintendence.** — *Western R. Co. v. Milligan*, 135 Ala. 205, 93 Am. St. Rep. 31; *Hoffman v. Holt*, 186 Mass. 572; *Joseph v. George C. Whitney Co.*, 177 Mass. 176; *Riou v. Rockport Granite Co.*, 171 Mass. 162; *O'Brien v. Look*, 171 Mass. 36; *Green v. Smith*, 169 Mass. 485.

Placing a defective appliance in the hands of a servant and directing him to use it has been held to be an act of superintendence. *McCabe v. Shields*, 175 Mass. 438.

The starting of a machine by a superintendent during the temporary absence of the operator from his usual place for the purpose of adjusting a part of the machine at another place has been held to be an act of superintendence. *Roche v. Lowell Bleachery*, 181 Mass. 480.

If a superintendent orders a particular work

to be done without giving direction as to how it shall be done, the master is not liable for the negligence of the servants engaged in the work for doing it in an improper manner. *Gorman v. Woodbury*, 173 Mass. 180.

It has been held that it was competent for the jury to find that a person who was superintending the digging of a trench in walking along the bank of the trench, and in stopping to look down upon the workmen, was engaged in an act of superintendence, and that it was for the jury to say whether, in view of a crack in the earth at that place, it was negligent for him to stand where he did without giving any warning. *McCoy v. Westborough*, 172 Mass. 504.

A railroad company is liable for the negligence of a person intrusted with the selection of cars to be loaded, in selecting a defective car. *Illinois Car, etc., Co. v. Walch*, 132 Ala. 490.

**Giving of Signal to Start by Train Dispatcher** has been held to be an act of superintendence. *McHugh v. Manhattan R. Co.*, 179 N. Y. 378.

**Negligence of Superintendent Necessary.** — In order that there may be a recovery under these statutes there must, of course, be negligence on the part of the superintendent. *La Belle v. Montague*, 174 Mass. 453; *Fairman v. Boston, etc., R. Co.*, 169 Mass. 170.

Where a servant was injured by the negligence of a coservant in selecting a defective appliance from the stock of suitable appliances furnished by the master, there can be no recovery on the ground that the superintendent did not prevent the selection of the defective appliance. So close an oversight and control of workmen by a superintendent is not necessary and would not be practicable, and is not required by due care. *Morrison v. Whitier Mach. Co.*, 184 Mass. 39.

A superintendent may be negligent in failing to give a servant a necessary warning. *Postal Tel. Cable Co. v. Hulsey*, 132 Ala. 444; *Cote v. Lawrence Mfg. Co.*, 178 Mass. 295.

**3. Instances of Persons Held Not to Be Superintendents.** — *Mulligan v. McCaffery*, 182 Mass. 420.

**945. 1.** *Canney v. Walkeine*, (C. C. A.) 113 Fed. Rep. 66 (construing the *Massachusetts* statute); *Solari v. Clark*, 187 Mass. 229; *Gardner v. New England Telephone, etc., Co.*, 170 Mass. 156.

**2. Instances of Persons Held to Be Superintendents.** — *Pierce v. Arnold Print Works*, 182 Mass. 260.

**4. Indiana.** — For cases construing the *Indiana* statute see the following: *Southern R. Co. v. Blevins*, (C. C. A.) 130 Fed. Rep. 688; *Baltimore, etc., R. Co. v. Hunsucker*, 33 Ind. App. 27; *Indiana Mfg. Co. v. Buskirk*, 32 Ind. App. 414; *Terre Haute, etc., R. Co. v. Rittenhouse*, 28 Ind. App. 633.

There can be no recovery under the *Indiana*



**946. Construction of the Statutes.** — See notes 1, 2, 3, 4.**d. VICE-PRINCIPALS — (2) Statement of Vice-principal Limitation.**  
— See note 6.

statute unless the offending party is a railroad or other corporation. *Ft. Wayne Gas Co. v. Nieman*, 33 Ind. App. 178.

**946. 1. Construction of the Provisions.** — *Postal Tel. Cable Co. v. Hulsey*, 115 Ala. 193; *Ft. Wayne Gas Co. v. Nieman*, 33 Ind. App. 178; *Southern Indiana R. Co. v. Martin*, 160 Ind. 280; *Hodges v. Standard Wheel Co.*, 152 Ind. 680; *Ferguson v. Galt Public School Board*, 27 Ont. App. 480.

Where the plaintiff had been injured through the negligence of an employee whom the regular foreman had temporarily left in charge of the work, and who at the time of the injury was assisting the plaintiff in the work, it was held that the statute did not apply. *Hodges v. Standard Wheel Co.*, 152 Ind. 680.

But the mere fact that the negligent servant may have done some work similar to that done by the injured servant and his coemployees does not take a case out of the statute. *Terre Haute, etc., R. Co. v. Rittenhouse*, 28 Ind. App. 633.

Under the *Indiana* statute a master has been held liable to a servant who had been ordered into a place of danger and who was injured through the negligence of the person superintending the work, in giving an order to the injured servant's collaborer which increased his peril, without giving him warning. *Louisville, etc., R. Co. v. Wagner*, 153 Ind. 420.

A servant has been permitted to recover for injuries received in obeying the order of the president of a manufacturing corporation directing him to do an act which was connected with the practical operation of the plant. *Consumers' Paper Co. v. Eyer*, 160 Ind. 424.

**2.** *Postal Tel. Cable Co. v. Hulsey*, 115 Ala. 193; *Ft. Wayne Gas Co. v. Nieman*, 33 Ind. App. 178; *Muncie Pulp Co. v. Davis*, 162 Ind. 558; *Southern Indiana R. Co. v. Martin*, 160 Ind. 280; *Thacker v. Chicago, etc., R. Co.*, 159 Ind. 85.

The mere fact that the person giving the order was a foreman is not sufficient to bring the case within the *Indiana* statute. *Southern Indiana R. Co. v. Martin*, 160 Ind. 280.

Where a foreman of a section crew which is being transported on a hand car in a proper manner, signals one of the men to apply the brake, and the instruction to stop the car is carried out in such a manner as to endanger the lives of those on the car, the statute does not apply, the act not being done in obedience to the foreman's order. *Thacker v. Chicago, etc., R. Co.*, 159 Ind. 85.

Proof that the servant was injured while conforming to the order or direction of one employee, to whose order and direction he was bound to conform, and that his injury was caused by the negligence of another coemployee, who had no such authority, does not bring a case within subdivision 2 of paragraph 1 of the *Indiana* statute. *Indianapolis, etc., Rapid Transit R. Co. v. Foreman*, 162 Ind. 85, 102 Am. St. Rep. 185.

**3.** The *Indiana* statute (*Burns's Ann. Stat. Ind.* 1901, § 7083), it has been held, covers a

case of negligence where the person, having the right to give orders, gave an order which he knew, or from his experience ought to have known, might result in injuries to the employee. *Southern R. Co. v. Blevins*, (C. C. A.) 130 Fed. Rep. 688.

**4.** *McLean v. Pere Marquette R. Co.*, (Mich. 1904) 100 N. W. Rep. 748, 11 Detroit Leg. N. 358.

But it has been held in *Indiana* that the statute applies only to cases where the employee is acting under the special order or direction of one to whose orders and directions at the time of the injury he is bound to conform. *Indiana Mfg. Co. v. Buskirk*, 32 Ind. App. 414; *Grand Rapids, etc., R. Co. v. Pettit*, 27 Ind. App. 120. But compare *Indianapolis Gas Co. v. Shumack*, 23 Ind. App. 87.

It has been held that the *Indiana* provision was not intended to create a liability based on an order or direction, where such order or direction was as broad as the whole service, and where the injured servant, without the compulsion of an order or direction from one whose order or direction he was required to obey, was at the time governing himself according to his own judgment as to what was proper. *Southern Indiana R. Co. v. Harrell*, 161 Ind. 689, reversing (Ind. App. 1903) 66 N. E. Rep. 1016.

**Failure to Give Warning.** — The failure of one servant to warn another of danger has been held not to bring the case within the statute. *Postal Tel. Cable Co. v. Hulsey*, 115 Ala. 193.

**6. Master Liable for Negligence of Vice-principal — United States.** — *Bunker Hill, etc., Min., etc., Co. v. Jones*, (C. C. A.) 130 Fed. Rep. 813; *Port Blakely Mill Co. v. Garrett*, (C. C. A.) 97 Fed. Rep. 537.

*California.* — *Skelton v. Pacific Lumber Co.*, 140 Cal. 507.

*Colorado.* — *Roche v. Denver, etc., R. Co.*, 19 Colo. App. 204. See *McKean v. Colorado Fuel, etc., Co.*, 18 Colo. App. 285.

*Georgia.* — *Hilton, etc., Lumber Co. v. Ingram*, 119 Ga. 652.

*Illinois.* — *Rogers v. Cleveland, etc., R. Co.*, 211 Ill. 126, quoting 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 946; *Baier v. Selke*, 211 Ill. 512, reversing 112 Ill. App. 568; *Spring Valley Coal Co. v. Robizas*, 111 Ill. App. 49, affirmed 207 Ill. 226; *Alton Paving, etc., Co. v. Hudson*, 74 Ill. App. 612, affirmed 176 Ill. 270.

*Indiana.* — *Dill v. Marmon*, (Ind. App. 1904) 71 N. E. Rep. 669; *American Rolling Mill Co. v. Hullinger*, (Ind. 1903) 67 N. E. Rep. 986; *Southern Indiana R. Co. v. Martin*, 160 Ind. 280; *Thacker v. Chicago, etc., R. Co.*, 159 Ind. 85, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 946; *Ross v. Union Cement, etc., Co.*, 25 Ind. App. 463.

*Iowa.* — *Collingwood v. Illinois, etc., Fuel Co.*, 125 Iowa 537; *Beresford v. American Coal Co.*, 124 Iowa 34.

*Kansas.* — *Coffeyville Vitrified Brick, etc., Co. v. Shanks*, 69 Kan. 306; *Good-Eye Min. Co. v. Robinson*, 67 Kan. 510.

*Kentucky.* — *Covington Sawmill, etc., Co. v. Clark*, 116 Ky. 461.



**948.** (3) *Who Are Vice-principals* — (a) Definition of Term "Vice-principal," — See note 2.

(b) *Vice-principals and Superior Servants Distinguished.* — See note 3.

**949.** See note 1.

*Louisiana.* — *Stucke v. Orleans R. Co.*, 50 La. Ann. 172.

*Maine.* — *Hall v. Emerson-Stevens Mfg. Co.*, 94 Me. 445.

*Michigan.* — *Geller v. Briscoe Mfg. Co.*, 136 Mich. 330, 11 Detroit Leg. N. 31.

*Minnesota.* — *Borgerson v. Cook Stone Co.*, 91 Minn. 91; *Peterson v. American Grass Twine Co.*, 90 Minn. 343; *Hjelm v. Western Granite Contracting Co.*, (Minn. 1905) 102 N. W. Rep. 384.

*Missouri.* — *Fogarty v. St. Louis Transfer Co.*, 180 Mo. 490; *Bien v. St. Louis Transit Co.*, 108 Mo. App. 399; *Jones v. Kansas City, etc., R. Co.*, 178 Mo. 528, 101 Am. St. Rep. 434; *Bane v. Irwin*, 172 Mo. 306.

*Montana.* — *Allen v. Bell*, 32 Mont. 69.

*New Hampshire.* — *Wallace v. Boston, etc., R. Co.*, 72 N. H. 504; *Sirois v. Henry*, (N. H. 1905) 59 Atl. Rep. 936.

*New Jersey.* — *Burns v. Delaware, etc., Tel., etc., Co.*, 70 N. J. L. 745; *Cole v. Warren Mfg. Co.*, 63 N. J. L. 626; *Smith v. Erie R. Co.*, 67 N. J. L. 636.

*New York.* — *Simone v. Kirk*, 173 N. Y. 7, reversing 57 N. Y. App. Div. 461; *Eastland v. Clarke*, 165 N. Y. App. Div. 420; *Eaton v. New York Cent., etc., R. Co.*, 163 N. Y. 391, 79 Am. St. Rep. 600; *Sutter v. New York Cent., etc., R. Co.*, 79 N. Y. App. Div. 362. See *Vogel v. American Bridge Co.*, 180 N. Y. 373.

*Ohio.* — *Lake Shore, etc., R. Co. v. Feller*, 11 Ohio Cir. Dec. 799, 21 Ohio Cir. Ct. 605.

*Oklahoma.* — *Neeley v. Southwestern Cotton Seed Oil Co.*, 13 Okla. 356; *Ruemmeli-Braun Co. v. Cahill*, 14 Okla. 422.

*Oregon.* — *Hough v. Grants Pass Power Co.*, 41 Oregon 531; *Wagner v. Portland*, 40 Oregon 389; *Johnson v. Portland Stone Co.*, 40 Oregon 436.

*Pennsylvania.* — *Butterman v. McClintic-Marshall Constr. Co.*, 206 Pa. St. 82, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 946; *Ricks v. Flynn*, 196 Pa. St. 263; *Prevost v. Citizens' Ice, etc., Co.*, 185 Pa. St. 617, 64 Am. St. Rep. 659.

*Rhode Island.* — *Vartanian v. New York, etc., R. Co.*, 25 R. I. 398.

*South Carolina.* — *Wilson v. Charleston, etc., R. Co.*, 51 S. Car. 79.

*Texas.* — *Young v. Hahn*, 96 Tex. 99, reversing (Tex. Civ. App. 1902) 69 S. W. Rep. 203; *Bonn v. Galveston, etc., R. Co.*, (Tex. Civ. App. 1904) 82 S. W. Rep. 808; *Bering Mfg. Co. v. Femelat*, 35 Tex. Civ. App. 36; *Waxahachie Oil Co. v. McLain*, 27 Tex. Civ. App. 334.

*Utah.* — *Anderson v. Daly Min. Co.*, 16 Utah 28; *Pool v. Southern Pac. R. Co.*, 20 Utah 210.

*Virginia.* — *Norfolk, etc., R. Co. v. Phillips*, 100 Va. 368.

*Washington.* — *Metzler v. McKenzie*, 34 Wash. 470; *Bateman v. Peninsular R. Co.*, 20 Wash. 133; *Sroufe v. Moran Bros. Co.*, 28 Wash. 381, 92 Am. St. Rep. 847; *Rush v. Spokane Falls, etc., R. Co.*, 23 Wash. 501.

*Wisconsin.* — *Jarnek v. Manitowoc Coal, etc.,*

*Co.*, 97 Wis. 537. See also *Williams v. North Wisconsin Lumber Co.*, (Wis. 1905) 102 N. W. Rep. 589.

**Voluntary Assumption of Duty by Master.** — It has been said that whether the doing of a particular thing is or is not one of the positive duties of a master, if the master undertakes to do the thing in question, he thereby assumes the duty and becomes liable for negligence in its performance. *Consolidated Coal Co. v. Scheiber*, 167 Ill. 539; *Bresnahan v. Lonsdale Co.*, (R. I. 1900) 51 Atl. Rep. 624.

**Concurrent Negligence of Vice-principal and Fellow Servant** charges the master with liability. *St. Louis, etc., R. Co. v. Haist*, 71 Ark. 258, 100 Am. St. Rep. 65. See *supra*, the cases supplementing page 905, note 7.

**948. 2. Vice-principal Defined.** — *Decatur Cereal Mill Co. v. Gogerty*, 80 Ill. App. 632, affirmed 180 Ill. 197; *Dill v. Marmon*, 164 Ind. 507; *Thacker v. Chicago, etc., R. Co.*, 159 Ind. 85, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 948; *American Telephone, etc., Co. v. Bower*, 20 Ind. App. 32; *Collingwood v. Illinois, etc., Fuel Co.*, 125 Iowa 537; *Hjelm v. Western Granite Contracting Co.*, (Minn. 1905) 102 N. W. Rep. 384; *Allen v. Bell*, 32 Mont. 69; *Burns v. Delaware, etc., Tel., etc., Co.*, 70 N. J. L. 745; *Prevost v. Citizens' Ice, etc., Co.*, 185 Pa. St. 617, 64 Am. St. Rep. 659.

**3. Confusion of Terms "Vice-principal" and "Superior Servant."** — The distinction between a vice-principal and a superior servant is not always recognized in *Ohio*. See *Roe v. New York, etc., R. Co.*, 13 Ohio Dec. 260.

**949. 1. Status of a Servant as a Vice-principal Not Dependent on Rank** — *Colorado.* — *McKean v. Colorado Fuel, etc., Co.*, 18 Colo. App. 285.

*Connecticut.* — *Leonard v. Mallory*, 75 Conn. 433; *Kelly v. New Haven Steamboat Co.*, 74 Conn. 343, 92 Am. St. Rep. 220; *Brennan v. Berlin Iron Bridge Co.*, 74 Conn. 382.

*Georgia.* — *Cedartown Cotton Co. v. Hanson*, 118 Ga. 176; *Shepherd v. Southern Pine Co.*, 118 Ga. 292.

*Illinois.* — *Baier v. Selke*, 211 Ill. 512, reversing 112 Ill. App. 568.

*Indiana.* — *Dill v. Marmon*, 164 Ind. 507; *Southern Indiana R. Co. v. Harrell*, 161 Ind. 689, reversing (Ind. App. 1903) 66 N. E. Rep. 1016; *Thacker v. Chicago, etc., R. Co.*, 159 Ind. 85, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 949; *Southern Indiana R. Co. v. Martin*, 160 Ind. 280; *Smallwood v. Bedford Quarries Co.*, 28 Ind. App. 692; *Perigo v. Indianapolis Brewing Co.*, 21 Ind. App. 338; *American Telephone, etc., Co. v. Bower*, 20 Ind. App. 32; *Kerner v. Baltimore, etc., R. Co.*, 149 Ind. 21.

*Iowa.* — *Collingwood v. Illinois, etc., Fuel Co.*, 125 Iowa 537; *Beresford v. American Coal Co.*, 124 Iowa 34.

*Kansas.* — *Coffeyville Vitrified Brick, etc., Co. v. Shanks*, 69 Kan. 306.

*Maine.* — *McCarthy v. Clafin*, 99 Me. 290; *Small v. Allington, etc., Mfg. Co.*, 94 Me. 551.

*Michigan.* — *Randa v. Detroit Screw Works,*

**949.** (c) **Dual Status of Employees** — *aa.* IN GENERAL. — See note 2.

*bb.* VICE-PRINCIPAL DOING COSERVANT'S WORK. — See note 3.

**951.** (d) **Instances of Vice-principals** — *bb.* EMPLOYEES PROVIDING MACHINERY AND APPLIANCES — (*aa.*) *General Rule.* — See note 1.

134 Mich. 343, 10 Detroit Leg. N. 504; La Barre v. Grand Trunk Western R. Co., 133 Mich. 192, 10 Detroit Leg. N. 146.

*Minnesota.* — Hjelm v. Western Granite Contracting Co., (Minn. 1905) 102 N. W. Rep. 384; O'Neil v. Great Northern R. Co., 80 Minn. 27; Dixon v. Union Iron Works, 90 Minn. 492.

*New Hampshire.* — Hilton v. Fitchburg R. Co., (N. H. 1904) 59 Atl. Rep. 625; Galvin v. Pierce, 72 N. H. 79; Wallace v. Boston, etc., R. Co., 72 N. H. 504; McLaine v. Head, etc., Co., 71 N. H. 294, 93 Am. St. Rep. 522.

*New Jersey.* — Knutter v. New York, etc., Telephone Co., 67 N. J. L. 646.

*New York.* — Braunberg v. Solomon, 102 N. Y. App. Div. 330; Wootton v. Flatbush Gas Co., 102 N. Y. App. Div. 294; Klos v. Hudson River Ore., etc., Co., 77 N. Y. App. Div. 566; Sutter v. New York Cent., etc., R. Co., 79 N. Y. App. Div. 362; Flet v. Hunter Arms Co., 74 N. Y. App. Div. 572; Denenfeld v. Baumann, 40 N. Y. App. Div. 502.

*Oregon.* — Wagner v. Portland, 40 Oregon 389; Mast v. Kern, 34 Oregon 247, 75 Am. St. Rep. 580.

*Pennsylvania.* — Ricks v. Flynn, 196 Pa. St. 263.

*Rhode Island.* — Milhench v. E. Jenckes Mfg. Co., 24 R. I. 131; Morgridge v. Providence Telephone Co., 20 R. I. 386, 78 Am. St. Rep. 879.

*Wisconsin.* — Baumann v. C. Reiss Coal Co., 118 Wis. 330; Okonski v. Pennsylvania, etc., Fuel Co., 114 Wis. 448; Wiskie v. Montello Granite Co., 111 Wis. 443, 87 Am. St. Rep. 885.

See Roe v. New York, etc., R. Co., 13 Ohio Dec. 260.

**Assumption of Authority by Servant.** — A fellow servant, without the master's knowledge, cannot, by an assumption of authority, convert himself into a vice-principal or *alter ego* of the master. Hilton, etc., Lumber Co. v. Ingram, 119 Ga. 652, 100 Am. St. Rep. 201.

**949. 2. Same Servant Both Vice-principal and Fellow Servant.** — Weeks v. Scharer, (C. C. A.) 111 Fed. Rep. 330; Decatur Cereal Mill Co. v. Gogerty, 80 Ill. App. 632, *affirmed* 180 Ill. 197; Southern Indiana R. Co. v. Harrell, 161 Ind. 689, *reversing* (Ind. App. 1903) 66 N. E. Rep. 1016; Peterson v. American Grass Twine Co., 90 Minn. 343; Fogarty v. St. Louis Transfer Co., 180 Mo. 490; Russell Creek Coal Co. v. Wells, 96 Va. 416; Norfolk, etc., R. Co. v. Phillips, 100 Va. 368, *citing* 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 949; Czarecki v. Seattle, etc., R., etc., Co., 30 Wash. 288; Sroufe v. Moran Bros. Co., 28 Wash. 381, 92 Am. St. Rep. 847; Shannon v. Consolidated Tiger, etc., Min. Co., 24 Wash. 119.

**3. Vice-principal Doing Fellow Servant's Work — Master Not Liable** — *United States.* — Lach v. Burnham, 134 Fed. Rep. 688; The Miami, (C. C. A.) 93 Fed. Rep. 218.

*Connecticut.* — Leonard v. Mallory, 75 Conn. 433.

*Indiana.* — American Telephone, etc., Co. v. Bower, 20 Ind. App. 32; Kerner v. Baltimore,

etc., R. Co., 149 Ind. 21; Southern Indiana R. Co. v. Harrell, 161 Ind. 689, *reversing* (Ind. App. 1903) 66 N. E. Rep. 1016; Thacker v. Chicago, etc., R. Co., 159 Ind. 85; Ross v. Union Cement, etc., Co., 25 Ind. App. 463.

*Iowa.* — McQueeney v. Chicago, etc., R. Co., 120 Iowa 522; Barnicle v. Connor, 110 Iowa 238. See Collingwood v. Illinois, etc., Fuel Co., 125 Iowa 537.

*Massachusetts.* — Hooe v. Boston, etc., R. Co., 187 Mass. 67.

*Minnesota.* — Dixon v. Union Iron Works, 90 Minn. 492.

*New Hampshire.* — Galvin v. Pierce, 72 N. H. 79.

*New York.* — Madigan v. Oceanic Steam Nav. Co., 178 N. Y. 242, 102 Am. St. Rep. 495, *reversing* 82 N. Y. App. Div. 206; Maltby v. Belden, 167 N. Y. 307, *reversing* 45 N. Y. App. Div. 384; Di Vito v. Cragie, 165 N. Y. 378; Capasso v. Woolfolk, 163 N. Y. 472; Perry v. Rogers, 157 N. Y. 251; Riola v. New York Cent., etc., R. Co., 97 N. Y. App. Div. 252; Ryan v. Third Ave. R. Co., 92 N. Y. App. Div. 306; Kelly v. Hogan, (Supm. Ct. App. T.) 37 Misc. (N. Y.) 761; Brown v. Terry, 67 N. Y. App. Div. 223; O'Brien v. Buffalo Furnace Co., 68 N. Y. App. Div. 451; Larssen v. Delaware, etc., R. Co., 59 N. Y. App. Div. 202; O'Connor v. Hall, 52 N. Y. App. Div. 428; Kennedy v. Allentown Foundry, etc., Works, 49 N. Y. App. Div. 78; Denenfeld v. Baumann, 40 N. Y. App. Div. 502; Gibbons v. Brush Electric Illuminating Co., 36 N. Y. App. Div. 140.

*Pennsylvania.* — Duffy v. Platt, 205 Pa. St. 296; Shugard v. Union Traction Co., 201 Pa. St. 562; Casey v. Pennsylvania Asphalt Paving Co., 198 Pa. St. 348; Ricks v. Flynn, 196 Pa. St. 263.

*Rhode Island.* — Morgridge v. Providence Telephone Co., 20 R. I. 386, 78 Am. St. Rep. 879; Frawley v. Sheldon, 20 R. I. 258.

*Virginia.* — Southern R. Co. v. Mauzy, 98 Va. 602, 2 Va. Sup. Ct. 575.

**951. 1. Servants Supplying Machinery and Appliances Are Vice-principals** — *United States.* — National Steel Co. v. Lowe, (C. C. A.) 127 Fed. Rep. 311; Port Blakely Mill Co. v. Garrett, (C. C. A.) 97 Fed. Rep. 537; Lehigh Valley Coal Co. v. Warrek, (C. C. A.) 84 Fed. Rep. 866. See Maxfield v. Graveson, (C. C. A.) 131 Fed. Rep. 841.

*Alaska.* — Gibson v. Canadian Pac. Nav. Co., 1 Alaska 407.

*California.* — Shea v. Pacific Power Co., 145 Cal. 680; Hall v. Marshutz, (Cal. 1903) 71 Pac. Rep. 692.

*Colorado.* — Roche v. Denver, etc., R. Co., 19 Colo. App. 204; Denver, etc., R. Co. v. Sipes, 26 Colo. 17.

*Connecticut.* — Rincicotti v. John J. O'Brien Contracting Co., 77 Conn. 617.

*Illinois.* — Leonard v. Kinnare, 174 Ill. 532; Edward Hines Lumber Co. v. Ligas, 172 Ill. 315, 64 Am. St. Rep. 38, *affirming and adopting* opinion in 68 Ill. App. 523.

**952.** (bb) *Limitations of the Rule — Where Providing or Adjusting Appliances Is Part of Injured Servant's Employment.* — See note 2.

*Indiana.* — *Sievers v. Peters Box, etc., Co.*, 151 Ind. 642.

*Maine.* — *Hall v. Emerson-Stevens Mfg. Co.*, 94 Me. 445.

*Massachusetts.* — *Chisholm v. New England Telephone, etc., Co.*, 185 Mass. 82; *Ellis v. Thayer*, 183 Mass. 309; *Haskell v. Cape Ann Anchor Works*, 178 Mass. 485; *Copithorne v. Hardy*, 173 Mass. 400.

*Minnesota.* — *Swanson v. Oakes*, 93 Minn. 404.

*Mississippi.* — *Bradford v. Taylor*, 85 Miss. 409.

*New York.* — *Vogel v. American Bridge Co.*, 88 N. Y. App. Div. 68, *reversed* 180 N. Y. 373; *Sutter v. New York Cent., etc., R. Co.*, 79 N. Y. App. Div. 362; *Sarno v. Atlantic Stevedoring Co.*, 66 N. Y. App. Div. 611; *Woods v. Long Island R. Co.*, 11 N. Y. App. Div. 16, *affirmed* without opinion 159 N. Y. 546.

*North Carolina.* — *Orr v. Southern Bell Telephone, etc., Co.*, 132 N. Car. 691; *Wright v. Southern R. Co.*, 128 N. Car. 77.

*Oklahoma.* — *Necley v. Southwestern Cotton Seed Oil Co.*, 13 Okla. 356.

*Pennsylvania.* — *Lininger v. Westinghouse Air Brake Co.*, 210 Pa. St. 62; *Butterman v. McClintic-Marshall Constr. Co.*, 206 Pa. St. 82. But see *Buck v. New Jersey Zinc Co.*, 204 Pa. St. 132.

*Rhode Island.* — *Crandall v. Stafford Mfg. Co.*, 24 R. I. 555.

*Tennessee.* — *Gann v. Nashville, etc., R. Co.*, 101 Tenn. 380, 70 Am. St. Rep. 687.

*Texas.* — *Missouri, etc., R. Co. v. Hutchens*, 35 Tex. Civ. App. 343; *Terrell Compress Co. v. Arrington*, (Tex. Civ. App. 1898) 48 S. W. Rep. 59.

*Virginia.* — *Norfolk, etc., R. Co. v. Phillips*, 100 Va. 368.

*Washington.* — *Bailey v. Cascade Timber Co.*, 35 Wash. 295, 32 Wash. 319.

*Wisconsin.* — *Jarneke v. Manitowoc Coal, etc., Co.*, 97 Wis. 537.

See *Anderson v. Elder*, 105 La. 672; *Lake Shore, etc., R. Co. v. Corcoran*, 6 Ohio Cir. Dec. 773, 14 Ohio Cir. Ct. 377.

**Employee Intrusted with Selection of Cars to Be Used.** — It has been held that the employee of a railroad who is charged with the duty of selecting the cars to be used is performing a duty which belongs to the master and which cannot be delegated in such a manner as to relieve the master from liability for negligence in its performance. *Spring Valley Coal Co. v. Robizas*, 111 Ill. App. 49, *affirmed* 207 Ill. 226; *McLean v. Pere Marquette R. Co.*, (Mich. 1904) 100 N. W. Rep. 748, 11 Detroit Leg. N. 358; *Quinn v. Brooklyn Heights R. Co.*, 91 N. Y. App. Div. 489.

A master is liable for the continued use of a defective car by a servant who has authority to order a car turned in when it is out of order and another car brought out in its place. *Cole v. St. Louis Transit Co.*, 183 Mo. 81.

**Bridge Builders Supplied with Defective Timbers.** — It has been held that a master is liable for injury to a servant by running a splinter into

his hand while handling timber which was furnished by the master, and which was in such a defective and dangerous condition as to make its handling hazardous and dangerous. *Louisville, etc., R. Co. v. Semonis*, (Ky. 1899) 51 S. W. Rep. 612.

**Duty in Providing a Water Cooler.** — A master has been held liable for the negligence of a servant in providing a water cooler which was not reasonably safe for the purpose. *Geller v. Briscoe Mfg. Co.*, 136 Mich. 330, 11 Detroit Leg. N. 31.

**Negligence in Testing New Machine.** — A master has been held to be liable for the negligence of a servant in causing the machinery in the master's machine shop to run at a dangerously high rate of speed while testing a new machine. *Skelton v. Pacific Lumber Co.*, 140 Cal. 507.

**952. 2. Appliances Constructed or Adjusted by Workmen Using Them.** — *Enright v. Oliver*, 69 N. J. L. 357, 101 Am. St. Rep. 710; *Warszawski v. McWilliams*, 64 N. Y. App. Div. 63; *O'Connor v. Hall*, 52 N. Y. App. Div. 428; *Okonski v. Pennsylvania, etc., Fuel Co.*, 114 Wis. 448; *Liermann v. Milwaukee Dry-Dock Co.*, 110 Wis. 599; *Grams v. C. Reiss Coal Co.*, (Wis. 1905) 102 N. W. Rep. 586; *Williams v. North Wisconsin Lumber Co.*, (Wis. 1905) 102 N. W. Rep. 589; *Ferguson v. Galt Public School Board*, 27 Ont. App. 480. See *W. R. Trigg Co. v. Lindsay*, 101 Va. 193.

Where the structure, apparatus, or appliances are a part of or incidental to the work being carried on, and the workmen construct them as a part of their employment, each employee assumes the risk attending the negligence of fellow workmen in respect thereto. *Gittens v. William Porten Co.*, 90 Minn. 512.

To the plaintiff and S., the servants of the defendant, was assigned the duty of loading a pile-driver hammer upon a wagon. In doing this they used a tree standing by as a tackle post, which was uprooted, fell, and injured the plaintiff, by reason of the force applied in an attempt to swing the hammer upon the wagon by the use of the tackle. S. selected the tree and directed the work as foreman. It was held, upon the special facts of the case, that the tree was not an appliance furnished by the defendant, but a mere temporary instrumentality provided by the servants themselves during the progress of the work, and that in selecting the tree S. was not acting as a vice-principal. *Bell v. Lang*, 83 Minn. 228.

It has been held that the adjustment of a chain on a brake rod so that the shoes of the brake would press against the wheels of the car was not the duty of a brakeman, and that the employer was liable for negligence in not having a brake properly adjusted. *Woods v. Long Island R. Co.*, 11 N. Y. App. Div. 16, *affirmed* without opinion 159 N. Y. 546.

**Selecting Emery Wheel for Machine.** — It has been held that a master was not liable for the negligence of a foreman in instructing a workman to use an emery wheel which was of a size unsuitable to the gear of the machine upon which it was to be used. *Randa v. Detroit*



**952.** Appliance Provided by Workman Not Charged with That Duty. — See note 3.

**953.** Selection of Defective Appliance or Material from Supply Provided by Master. — See note 2.

Employee Charged with Care of Switches. — See notes 3, 4.

**954.** Unskilful or Negligent Use of Appliances by Servants. — See note 1.

Screw Works, 134 Mich. 343, 10 Detroit Leg. N. 504.

**Insecure Fastening of Ladder.** — If the master has furnished servants with a suitable ladder he is not liable to one of the servants for the negligence of a coservant in failing to fasten the ladder properly when making use of it. *Balleng v. New York, etc., Steamship Co.*, (Supm. Ct. App. T.) 28 Misc. (N. Y.) 238; *Kiffin v. Wendt*, 39 N. Y. App. Div. 229.

**952.** 3. See *McKean v. Colorado Fuel, etc., Co.*, 18 Colo. App. 285.

**Car Starter Sending Out Car Marked to Be Withdrawn.** — It has been held that a street-railway company is not liable for the act of a car starter in sending out a car which the car inspector has marked to be withdrawn from the service. The decision was placed on the ground that the car starter's act was not that of a servant acting within the scope of his authority, but the act of a mere volunteer having no authority whatever. *Shaw v. Manchester St. R. Co.*, (N. H. 1904) 58 Atl. Rep. 1073.

**953.** 2. Selection by Fellow Servant of the Defective Appliance — *Maine.* — *Amburg v. International Paper Co.*, 97 Me. 327; *Rounds v. Carter*, 94 Me. 535.

*Massachusetts.* — *Gauges v. Fitchburg R. Co.*, 185 Mass. 76; *Morrison v. Whittier Mach. Co.*, 184 Mass. 39; *Meehan v. Speirs Mfg. Co.*, 172 Mass. 375; *Kalleck v. Deering*, 169 Mass. 200.

*Michigan.* — *Flaws v. West Bay City Shipbuilding Co.*, 132 Mich. 169, 9 Detroit Leg. N. 573.

*Missouri.* — *Herbert v. Wiggins Ferry Co.*, 107 Mo. App. 287.

*New Jersey.* — *Campbell v. T. A. Gillespie Co.*, 69 N. J. L. 279; *Enright v. Oliver*, 69 N. J. L. 357, 101 Am. St. Rep. 710.

*New York.* — *Vogel v. American Bridge Co.*, 180 N. Y. 373; *Ivers v. Minnesota Dock Co.*, 84 N. Y. App. Div. 27; *Flet v. Hunter Arms Co.*, 74 N. Y. App. Div. 572; *Moore v. McNeil*, 35 N. Y. App. Div. 323; *Vincent v. Mauterstock*, 30 N. Y. App. Div. 308.

*Pennsylvania.* — *Miller v. McKeesport Connecting R. Co.*, 205 Pa. St. 60; *Buck v. New Jersey Zinc Co.*, 204 Pa. St. 132; *O'Dowd v. Burnham*, 19 Pa. Super. Ct. 464.

*Washington.* — *Metzler v. McKenzie*, 34 Wash. 470. But see *Bailey v. Cascade Timber Co.*, 32 Wash. 319.

See *Hilton v. Fitchburg R. Co.*, (N. H. 1904) 59 Atl. Rep. 625. Compare *Kerr-Murray Mfg. Co. v. Hess*, (C. C. A.) 98 Fed. Rep. 56; *Farrell v. Eastern Machinery Co.*, 77 Conn. 484, 107 Am. St. Rep. 46.

**Workman Substituting Defective Appliance.** — A master who furnishes to his servant safe and suitable appliances with which to do the work upon which he is engaged is not responsible for injuries received by the servant by reason of defects in appliances substituted, by a fellow servant, for those furnished by the master.

*Campbell v. New Jersey Dry Dock, etc., Co.*, 61 N. J. L. 382.

**Selection of Defective Cars.** — It has been held that where a master has provided his servants with a number of safe cars, he cannot be held liable for the negligence of the plaintiff's coservant in selecting from the cars so provided one which is unsafe. *Maryland Clay Co. v. Goodnow*, 95 Md. 330.

**3.** In *Richey v. Southern R. Co.*, 69 S. Car. 387, a railroad company was held liable to an engineer for the negligence of a brakeman in setting a switch improperly.

In an action by an engineer to recover damages for injuries received in consequence of the negligence of a brakeman on the train in leaving open a switch, it was said that the brakeman was the agent of the company to see that the switch was closed; but this seems to be only a dictum, since the fellow-servant rule could probably not have any application to the case under the *Texas* statutes. *St. Louis Southwestern R. Co. v. Kelton*, 28 Tex. Civ. App. 137.

**4. Same — Held Not to Be a Vice-principal.** — But see opinion by Bartlett, J., in *Hallett v. New York Cent., etc., R. Co.*, 167 N. Y. 543, reversing 42 N. Y. App. Div. 123.

**954.** 1. Negligent or Unskilful Use of Appliances by Fellow Servants — *United States.* — *Maxfield v. Graveson*, (C. C. A.) 131 Fed. Rep. 841.

*Connecticut.* — *Peterson v. New York, etc., R. Co.*, 77 Conn. 351; *McQueeney v. Norcross*, 75 Conn. 381; *Leonard v. Mallory*, 75 Conn. 433.

*Indiana.* — *Standard Pottery Co. v. Moudy*, (Ind. App. 1905) 73 N. E. Rep. 188, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 953, 954; *Kerner v. Baltimore, etc., R. Co.*, 149 Ind. 21.

*Maine.* — *Stewart v. International Paper Co.*, 96 Me. 30.

*Missouri.* — *Grattis v. Kansas City, etc., R. Co.*, 153 Mo. 380, 77 Am. St. Rep. 721.

*New Hampshire.* — *Manning v. Manchester Mills*, 70 N. H. 582.

*New Jersey.* — *McLaughlin v. Camden Iron Works*, 60 N. J. L. 557.

*New York.* — *Quigley v. Levering*, 167 N. Y. 58; *Tydemann v. Prince Line*, 102 N. Y. App. Div. 279; *Walters v. George A. Fuller Co.*, 82 N. Y. App. Div. 254, construing § 18 of the New York Labor Law (N. Y. Laws 1897, c. 415); *Wagner v. New York, etc., R. Co.*, 76 N. Y. App. Div. 552; *O'Connor v. Hall*, 52 N. Y. App. Div. 428; *Balleng v. New York, etc., Steamship Co.*, (Supm. Ct. App. T.) 28 Misc. (N. Y.) 238; *Kiffin v. Wendt*, 39 N. Y. App. Div. 229. See *Braunberg v. Solomon*, 102 N. Y. App. Div. 330.

*Pennsylvania.* — *Shugard v. Union Traction Co.*, 201 Pa. St. 562.

*Washington.* — *Metzler v. McKenzie*, 34 Wash. 470.

*Wisconsin.* — *Prybilski v. Northwestern Coal R. Co.*, 98 Wis. 413.

**954.** *cc. EMPLOYEES PROVIDING PLACE TO WORK — (aa) General Rule.* — See notes 2, 3.

**955.** *(bb) Application of the Rule — In General.* — See note 1.

*Compare Gibson v. Canadian Pac. Nav. Co., 1 Alaska 407; Bradford v. Taylor, 85 Miss. 409.*

**Negligent Loading of Freight Car.** — It has been held that a section hand could not recover from the railroad company for injuries received by being struck by a timber projecting beyond the side of a passing freight car which had been negligently loaded by the conductor and brakeman on the train. *Miller v. Michigan Cent. R. Co., 123 Mich. 374.*

**Failure to Use Appliances Provided.** — A master who has provided his servants with proper appliances or material cannot be held liable to one servant for the failure of co-servants to make use of the appliances or material furnished. *Kelly v. New Haven Steamboat Co., 74 Conn. 343, 92 Am. St. Rep. 220; Trimble v. Whitin Mach. Works, 172 Mass. 150; Lenderink v. Rockford, 135 Mich. 531, 10 Detroit Leg. N. 832; Erickson v. Victoria Copper Min. Co., 130 Mich. 476, 9 Detroit Leg. N. 120; Jackson v. Lincoln Min. Co., 106 Mo. App. 441; Sofield v. Guggenheim Smelting Co., 64 N. J. L. 605; Clark v. Riter-Conley Co., 39 N. Y. App. Div. 598; Ulrich v. New York Cent., etc., R. Co., 25 N. Y. App. Div. 465; Miller v. McKeesport Connecting R. Co., 205 Pa. St. 60; Okonski v. Pennsylvania, etc., Fuel Co., 114 Wis. 448.*

But a master may be liable to one servant for the negligence of a co-servant in discarding an appliance provided for the greater safety of the servants, under conditions charging the master with notice that the appliance was not used. *Espenlaub v. Ellis, 34 Ind. App. 163.*

**Omission to Use Signal Flag.** — A railroad company which has properly equipped a hand car with signal flags cannot be held responsible for the omission of the foreman of a section gang to make use of the flags. *Whittlesey v. New York, etc., R. Co., 77 Conn. 100, 107 Am. St. Rep. 21.*

**954. 2.** *Franck v. American Tartar Co., 91 N. Y. App. Div. 571.*

**3. Employees Providing Place to Work Are Vice-principals — United States.** — *National Steel Co. v. Lowe, (C. C. A.) 127 Fed. Rep. 311; Swensen v. Bender, (C. C. A.) 114 Fed. Rep. 1; Port Blakely Mill Co. v. Garrett, (C. C. A.) 97 Fed. Rep. 537; F. C. Austin Mfg. Co. v. Johnson, (C. C. A.) 89 Fed. Rep. 677.*

*Colorado.* — *Roche v. Denver, etc., R. Co., 19 Colo. App. 204; Carleton Min., etc., Co. v. Ryan, 29 Colo. 401.*

*Georgia.* — *Southern Bauxite Min., etc., Co. v. Fuller, 116 Ga. 695.*

*Illinois.* — *Missouri Malleable Iron Co. v. Dillon, 206 Ill. 145; John S. Metcalf Co. v. Nystedt, 203 Ill. 333; Frost Mfg. Co. v. Smith, 197 Ill. 253; Spring Valley Coal Co. v. Rowatt, 196 Ill. 156; Westville Coal Co. v. Schwartz, 177 Ill. 272, affirming 75 Ill. App. 468; Consolidated Coal Co. v. Scheiber, 167 Ill. 539.*

*Iowa.* — *Cushman v. Carbondale Fuel Co., 116 Iowa 618; Blazenic v. Iowa, etc., Coal Co., 102 Iowa 706.*

*Kansas.* — *Good-eye Min. Co. v. Robinson, 67*

*Kan. 510, quoting 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 954; Kansas City Car, etc., Co. v. Sawyer, 7 Kan. App. 146.*

*Kentucky.* — *Tradewater Coal Co. v. Johnson, 72 S. W. Rep. 274, 24 Ky. L. Rep. 1777; Vandyke v. Memphis, etc., Packet Co., 71 S. W. Rep. 441, 24 Ky. L. Rep. 1283. See Peter, etc., Steam Stone Works v. Green, 76 S. W. Rep. 844, 25 Ky. L. Rep. 946.*

*Louisiana.* — *Ingham v. John B. Honor Co., 113 La. 1040; Stucke v. Orleans R. Co., 50 La. Ann. 172.*

*Maine.* — *Stewart v. International Paper Co., 96 Me. 30.*

*Massachusetts.* — *Hooe v. Boston, etc., R. Co., 187 Mass. 67; Chisholm v. New England Telephone, etc., Co., 185 Mass. 82.*

*New Jersey.* — *Belleville Stone Co. v. Mooney, 60 N. J. L. 323.*

*New York.* — *Simone v. Kirk, 173 N. Y. 7, reversing 57 N. Y. App. Div. 461; Duggan v. Phelps, 82 N. Y. App. Div. 509; Hoelter v. McDonald, 82 N. Y. App. Div. 423; Eichholz v. Niagara Falls Hydraulic Power, etc., Co., 68 N. Y. App. Div. 441, affirmed without opinion 174 N. Y. 519; Tetherton v. U. S. Talc Co., 41 N. Y. App. Div. 613, affirmed without opinion 165 N. Y. 665.*

*Ohio.* — *Henry J. Spieker Co. v. Ferguson, 25 Ohio Cir. Ct. 671; Lake Shore, etc., R. Co. v. Feller, 11 Ohio Cir. Dec. 799, 21 Ohio Cir. Ct. 605.*

*Oregon.* — *Hough v. Grants Pass Power Co., 41 Oregon 531.*

*Pennsylvania.* — *Lillie v. America Car, etc., Co., 209 Pa. St. 161; Butterman v. McClintic-Marshall Constr. Co., 206 Pa. St. 82.*

*Rhode Island.* — *Vartanian v. New York, etc., R. Co., 25 R. I. 398.*

*Texas.* — *Merchants', etc., Oil Co. v. Burns, (Tex. Civ. App. 1903) 72 S. W. Rep. 626.*

*Utah.* — *Anderson v. Daly Min. Co., 16 Utah 28; Downey v. Gemini Min. Co., 24 Utah 431, 91 Am. St. Rep. 798; Pool v. Southern Pac. R. Co., 20 Utah 210.*

*Virginia.* — *Russell Creek Coal Co. v. Wells, 96 Va. 416.*

*Washington.* — *Czarecki v. Seattle, etc., R., etc., Co., 30 Wash. 288; Costa v. Pacific Coast Co., 26 Wash. 138; Shannon v. Consolidated Tiger, etc., Min. Co., 24 Wash. 119; Rush v. Spokane Falls, etc., R. Co., 23 Wash. 501.*

*Wisconsin.* — *Bauman v. C. Reiss Coal Co., 118 Wis. 330; Welty v. Lake Superior Terminal, etc., R. Co., 100 Wis. 128.*

*Canada.* — *Grant v. Acadia Coal Co., 32 Can. Sup. Ct. 427, reversing 34 Nova Scotia 319.*

But compare *Sias v. Consolidated Lighting Co., 73 Vt. 35.*

**955. 1. Instances of the Application of the Rule.** — A railroad company has been held liable for the negligence of an employee in preparing and fitting stakes in a car to hold lumber in place. *Port Blakely Mill Co. v. Garrett, (C. C. A.) 97 Fed. Rep. 537.*

When the piling of bridge timber required the superintendence of an experienced person to see



**955.** Railway Track and Roadbed. — See notes 2, 3.

**956.** Staging and Scaffold Cases. — See notes 1, 2.

**957.** See note 1.

**Foreman Assigning Servant Place to Work.** — See note 2.

that the timber was so piled as not to endanger the safety of employees working in the vicinity, it was said that it could not be declared as a matter of law that a person selected to superintend the piling of the timber was not a vice-principal. *Brennan v. Berlin Iron Bridge Co.*, 74 Conn. 382.

It has been held that an employee of a railroad company who is appointed to warn car repairers at work in the company's yard of the approach of cars which are being shifted, is not a vice-principal. *Rex v. Pullman's Palace Car Co.*, 2 Marv. (Del.) 337.

But in *Donovan v. Ferris*, 128 Cal. 48, 79 Am. St. Rep. 25, it was held that the master was not liable for the negligence of the foreman in his quarry in failing to warn the workmen under him of the firing of a blast.

**Workmen Digging and Sheathing or Bracing Trench.** — A master may be liable to workmen who are engaged in laying a sewer pipe for the negligence of the workmen who opened the trench in failing to sheathe or brace the sides of the trench properly. *Schmit v. Gillen*, 41 N. Y. App. Div. 302.

**Negligence of Gas Tester.** — A gas tester whose only duty was to examine and ascertain whether there were any noxious gases in the places where the miners were required to work, and to warn the miners not to enter those places in case he found gases to exist there, has been held to be the fellow servant of an ordinary miner. *Hughes v. Oregon Imp. Co.*, 20 Wash. 294.

**955. 2. Employee Constructing Railroad Track.** — *Wright v. Southern R. Co.*, 128 N. Car. 77, 123 N. Car. 280.

3. *Louisville, etc., R. Co. v. Pointer*, 113 Ky. 966, applying the law of *Virginia*; *Chesapeake, etc., R. Co. v. Venable*, 111 Ky. 41. See *Chicago, etc., R. Co. v. Eaton*, 194 Ill. 441, 88 Am. St. Rep. 161, 96 Ill. App. 570.

**Obstructions on Track.** — In *Illinois* it has been held that where a railroad company receives information of an obstruction on its track, it becomes the duty of the company to use reasonable diligence to warn the servants to whom the obstruction is a danger, and it cannot escape liability for a failure to discharge that duty by delegating it to others. *Rogers v. Cleveland, etc., R. Co.*, 211 Ill. 126.

A railroad company may be liable for the negligence of its servants who have charge of the track, in leaving obstructions on the track over which a servant who is acting as a brakeman stumbles and falls, he having no knowledge of the presence of the obstructions. *Linck v. Louisville, etc., R. Co.*, 107 Ky. 370.

**956. 1. Where Completed Scaffold Is Furnished to Servant.** — *Chambers v. American Tin Plate Co.*, (C. C. A.) 129 Fed. Rep. 561; *F. C. Austin Mfg. Co. v. Johnson*, (C. C. A.) 89 Fed. Rep. 677; *Edward Hines Lumber Co. v. Ligas*, 172 Ill. 315, 64 Am. St. Rep. 38, affirming and adopting opinion in 68 Ill. App. 523; *Parkhurst v. Swift*, 31 Ind. App. 521; *Kansas City Car,*

*etc.*, *Co. v. Sawyer*, 7 Kan. App. 146; *Ingham v. John B. Honor Co.*, 113 La. 1040; *McCarthy v. Claffin*, 99 Me. 290; *Cole v. Warren Mfg. Co.*, 63 N. J. L. 626; *Henry J. Spieker Co. v. Ferguson*, 25 Ohio Cir. Ct. 671.

**2. Where Construction of Scaffold Is Incidental to Work Being Done** — *United States*. — *Phoenix Bridge Co. v. Castleberry*, (C. C. A.) 131 Fed. Rep. 175, quoting 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 956.

*Indiana*. — *Perigo v. Indianapolis Brewing Co.*, 21 Ind. App. 338.

*Maine*. — *Pellerin v. International Paper Co.*, 96 Me. 388. See *Beal v. Bryant*, 99 Me. 112; *McCarthy v. Claffin*, 99 Me. 290.

*Missouri*. — *Herbert v. Wiggins Ferry Co.*, 107 Mo. App. 287.

*New Jersey*. — *Pfeiffer v. Dialogue*, 64 N. J. L. 707; *Olsen v. Nixon*, 61 N. J. L. 671.

*New York*. — *Swain v. Brooklyn Alcatraz Asphalt Co.*, 57 N. Y. App. Div. 56; *Moore v. McNeil*, 35 N. Y. App. Div. 323; *Vincent v. Mauterstock*, 30 N. Y. App. Div. 308.

*Texas*. — *Maughamer v. Behring*, 19 Tex. Civ. App. 299.

*Vermont*. — *Lambert v. Missisquoi Pulp Co.*, 72 Vt. 278.

*Washington*. — *Metzler v. McKenzie*, 34 Wash. 470.

See *Ferguson v. Galt Public School Board*, 27 Ont. App. 480.

**Effect of New York "Labor Law."** — In New York the former rule that where the master has committed the details of the construction of a scaffold to his servants, and their negligence in carrying out those details results in injury to a fellow servant, the master is not liable, has been held to be changed by the "Labor Law" (N. Y. Laws 1897, p. 461, c. 415), and the master is liable under such circumstances. *Holloway v. McWilliams*, 97 N. Y. App. Div. 360; *Kuss v. Fried*, (N. Y. City Ct. Gen. T.) 32 Misc. (N. Y.) 628; *Stewart v. Ferguson*, 34 N. Y. App. Div. 515. *Contra*, *Stewart v. Ferguson*, 44 N. Y. App. Div. 58.

**957. 1. Kerr-Murray Mfg. Co. v. Hess, (C. C. A.) 98 Fed. Rep. 56; *Farrell v. Eastern Machinery Co.*, 77 Conn. 484, 107 Am. St. Rep. 46; *Kansas City Car, etc., Co. v. Sawyer*, 7 Kan. App. 146; *Beal v. Bryant*, 99 Me. 112. See *Phoenix Bridge Co. v. Castleberry*, (C. C. A.) 131 Fed. Rep. 175.**

**2. Superior Servant Directing Subordinate to Work in Dangerous Place.** — *Stucke v. Orleans R. Co.*, 50 La. Ann. 172; *Stahl v. Duluth*, 71 Minn. 341; *Holman v. Kempe*, 70 Minn. 422; *Bane v. Irwin*, 172 Mo. 306; *Eichholz v. Niagara Falls Hydraulic Power, etc., Co.*, 68 N. Y. App. Div. 441, affirmed without opinion 174 N. Y. 519; *Bering Mfg. Co. v. Femelat*, 35 Tex. Civ. App. 36; *Horne v. La Crosse Box Co.*, 123 Wis. 399. See *Evans v. Louisiana Lumber Co.*, 111 La. 534; *Cerrillos Coal R. Co. v. Deserant*, 9 N. Mex. 49; *Gunn v. Le Roi Min. Co.*, 10 British Columbia 59. But compare *Casey v. Pennsylvania Asphalt Paving Co.*, 198 Pa. St. 348.



**957.** Where Servant's Work Involves Furnishing Work Place. — See note 4.

Place Rendered Unsafe by Progress of Work. — See note 5.

**958.** Place Rendered Unsafe by Negligence of Fellow Servant. — See note 1.

dd. EMPLOYEES CHARGED WITH INSPECTION AND REPAIRS — (aa) *In General.* — See note 2.

(bb) *Employees Making General Provision for Inspection and Repairs.* — See note 3.

**959.** (cc) *Employees Executing Inspection and Repairs* — bbb. *Conflicting Doctrines.* — See note 2.

A cable railway company has been held liable to a workman who was ordered by a track-master to go down into the hole through which the cable ran, and assured by him that he would tell the engineer not to start the machinery, which order he neglected to give. *Mullane v. Houston, etc., R. Co.*, (Supm. Ct. App. T.) 21 Misc. (N. Y.) 10.

But on the other hand it has been said that the fact that a foreman places the men under him in a dangerous place is not a matter affecting the master if the danger arises out of the manner of performing the details of the work. *Ulrich v. New York Cent., etc., R. Co.*, 25 N. Y. App. Div. 465.

**957. 4. Where the Work Place and Employment Are Independent.** — *McQueeney v. Chicago, etc., R. Co.*, 120 Iowa 522; *Fay v. Wilmarth*, 183 Mass. 71; *McLaine v. Head, etc., Co.*, 71 N. H. 294, 93 Am. St. Rep. 522; *Curley v. Hoff*, 62 N. J. L. 758; *Perry v. Rogers*, 157 N. Y. 251; *Page v. Naughton*, 63 N. Y. App. Div. 377; *Houston Ice, etc., Co. v. Pisch*, 33 Tex. Civ. App. 684. See *Ross v. Union Cement, etc., Co.*, 25 Ind. App. 463. But see *Tradewater Coal Co. v. Johnson*, 72 S. W. Rep. 274, 24 Ky. L. Rep. 1777.

The rule requiring the master to furnish his servants with a reasonably safe place in which to work does not apply where the place of work is one that the servants themselves undertake to erect and provide as one of the duties and undertakings of their common employment. In such a case, if any injury occurs to an employee by reason of negligent construction, caused by the carelessness of a coemployee, the master is not liable. *Enright v. Oliver*, 69 N. J. L. 357, 101 Am. St. Rep. 710.

**5. Where Work Place Is Necessarily Unsafe by Reason of Nature of Work.** — *Dill v. Marmon*, 164 Ind. 507; *Livengood v. Joplin-Galena Consol. Lead, etc., Co.*, 179 Mo. 229; *Di Vito v. Crape*, 165 N. Y. 378; *Brown v. Terry*, 67 N. Y. App. Div. 223. See *Capasso v. Woolfolk*, 163 N. Y. 472. But compare *Simone v. Kirk*, 173 N. Y. 7, reversing 57 N. Y. App. Div. 461.

It has been said that where the nature of the business, as in the case of blasting operations in a mine, is extremely dangerous, and conditions are necessarily continually changing by reason of placing and setting off blasts, whereby dangerous conditions arise continually through the acts of the servant, without the knowledge of the master, the employer cannot be held responsible therefor without his fault, but such temporary dangerous conditions arise from the nature of the employment, and are among the natural and ordinary risks and hazards attending the employment, for which the master is not liable. *Anderson v. Dalv Min. Co.*, 16 Utah 28.

**958. 1. Work Place Rendered Unsafe by Neg-**

**ligence of Fellow Servant** — *Indiana.* — *Perigo v. Indianapolis Brewing Co.*, 21 Ind. App. 338.

*Maine.* — *Stewart v. International Paper Co.*, 96 Me. 30.

*Massachusetts.* — *McRea v. Hood Rubber Co.*, 187 Mass. 326. See *Regan v. Lombard*, 181 Mass. 329.

*New Hampshire.* — *Bodwell v. Nashua Mfg. Co.*, 70 N. H. 390.

*New Jersey.* — *Sofield v. Guggenheim Smelting Co.*, 64 N. J. L. 605.

*New York.* — *Madigan v. Oceanic Steam Nav. Co.*, 178 N. Y. 242, 102 Am. St. Rep. 495, reversing 82 N. Y. App. Div. 206; *Belt v. Henry Du Bois' Sons Co.*, 97 N. Y. App. Div. 392; *Koszowski v. American Locomotive Co.*, 96 N. Y. App. Div. 40; *Lynch v. Bush Co.*, 89 N. Y. App. Div. 286, 180 N. Y. 547; *Peet v. H. Remington, etc., Pulp, etc., Co.*, 86 N. Y. App. Div. 101; *Warszawski v. McWilliams*, 64 N. Y. App. Div. 63; *Page v. Naughton*, 63 N. Y. App. Div. 377; *Hale v. Wayside Knitting Co.*, 59 N. Y. App. Div. 395; *Schott v. Onondaga County Sav. Bank*, 49 N. Y. App. Div. 503; *Rhodes v. Lauer*, 32 N. Y. App. Div. 206.

*Oregon.* — *Johnson v. Portland Stone Co.*, 40 Oregon 436.

*Rhode Island.* — *Burke v. National India-Rubber Co.*, 21 R. I. 446.

*Utah.* — *Anderson v. Daly Min. Co.*, 16 Utah 28.

*Virginia.* — *Russell Creek Coal Co. v. Wells*, 96 Va. 416.

*Wisconsin.* — *Wiskie v. Montello Granite Co.*, 111 Wis. 443, 87 Am. St. Rep. 885.

It has been held that a guard employed by an express company to ride in its cars and protect them from robbers cannot recover for injuries received through the negligence of the express messenger in piling baggage in a car in which both servants were riding. *Wells v. Page*, 29 Tex. Civ. App. 489.

**2. Master Must Provide for Inspection and Repair of Machinery and Premises.** — *Simone v. Kirk*, 173 N. Y. 7, reversing 57 N. Y. App. Div. 461; *Sim v. Dominion Fish Co.*, 2 Ont. L. Rep. 69.

**3. Employees Charged with Duty of Providing for Inspection and Repairs.** — *Phoenix Bridge Co. v. Castleberry*, (C. C. A.) 131 Fed. Rep. 175.

**959. 2. View that Inspectors and Repairers Are Not Vice-principals.** — *Woodward Iron Co. v. Cook*, 124 Ala. 349; *National Enameling, etc., Co. v. Cornell*, 95 Md. 528, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 959; *Cuddy v. Szczepansky*, 10 Ohio Cir. Dec. 263, 19 Ohio Cir. Ct. 356; *Wood v. Canadian Pac. R. Co.*, 30 Can. Sup. Ct. 110, affirming 6 British Columbia 561. But see *Hooe v. Boston, etc., R. Co.*, 187 Mass. 67.

According to the later *New Jersey* cases the

**960.** See note 1.

**962.** ccc. Car Inspectors and Repairers. — See note 1.

**963.** ddd. Employees Intrusted with Maintenance of Railroad Track. — See notes 1, 2, 3, 4.

**964.** See note 1.

(dd) *Where the Inspection and Repairs Are Incidental to Use of Appliances.* — See

note 5.

duty of inspection and repair is one of the positive duties which the law imposes upon the master, and which is not fully discharged by the employment of competent persons to make inspections and repairs, so that the master is responsible for the negligence of the servants employed for the purpose. See *infra*, the cases supplementing page 960, note 1.

**960. 1. View that Inspectors and Repairers Are Vice-principals** — *United States*. — Bunker Hill, etc., Min., etc., Co. *v.* Jones, (C. C. A.) 130 Fed. Rep. 813; Cumberland Telephone, etc., Co. *v.* Bills, (C. C. A.) 128 Fed. Rep. 272; National Steel Co. *v.* Lowe, (C. C. A.) 127 Fed. Rep. 311; Cudahy Packing Co. *v.* Anthes, (C. C. A.) 117 Fed. Rep. 118; Swift *v.* Short, (C. C. A.) 92 Fed. Rep. 567.

*California*. — Shea *v.* Pacific Power Co., 145 Cal. 680.

*Connecticut*. — Rincicotti *v.* John J. O'Brien Contracting Co., 77 Conn. 617.

*Kentucky*. — Tradewater Coal Co. *v.* Johnson, 72 S. W. Rep. 274, 24 Ky. L. Rep. 1777.

*Maine*. — Twombly *v.* Consolidated Electric Light Co., 98 Me. 353.

*Missouri*. — Huth *v.* Dohle, 76 Mo. App. 671.

*Nebraska*. — Chicago, etc., R. Co. *v.* Kellogg, 54 Neb. 127.

*New Jersey*. — Hopwood *v.* Benjamin Atha, etc., Co., 68 N. J. L. 707; Smith *v.* Erie R. Co., 67 N. J. L. 636; Cole *v.* Warren Mfg. Co., 63 N. J. L. 626.

*New Mexico*. — Cerrillos Coal R. Co. *v.* Deserant, 9 N. Mex. 49.

*New York*. — Byrne *v.* Eastmans Co., 163 N. Y. 461, reversing 27 N. Y. App. Div. 270; Eaton *v.* New York Cent., etc., R. Co., 163 N. Y. 391, 79 Am. St. Rep. 600; Newton *v.* New York Cent., etc., R. Co., 96 N. Y. App. Div. 81; Franck *v.* American Tartar Co., 91 N. Y. App. Div. 571; Smith *v.* New York, etc., R. Co., 86 N. Y. App. Div. 188, affirmed without opinion 178 N. Y. 635; Hoes *v.* Ocean Steamship Co., 56 N. Y. App. Div. 259, affirmed without opinion 170 N. Y. 581; McKnight *v.* Brooklyn Heights R. Co., (Supm. Ct. Tr. T.) 23 Misc. (N. Y.) 527; Bailey *v.* Delaware, etc., Canal Co., 27 N. Y. App. Div. 305. *Contra*, Koehler *v.* New York Steam Co., 84 N. Y. App. Div. 221.

*Pennsylvania*. — Lillie *v.* America Car, etc., Co., 209 Pa. St. 161; Marsh *v.* Lehigh Valley R. Co., 206 Pa. St. 558.

*Rhode Island*. — Vartanian *v.* New York, etc., R. Co., 25 R. I. 398.

*Texas*. — Missouri, etc., R. Co. *v.* Hutchens, 35 Tex. Civ. App. 343; Terrell Compress Co. *v.* Arrington, (Tex. Civ. App. 1898) 48 S. W. Rep. 59; Missouri, etc., R. Co. *v.* Ferch, 18 Tex. Civ. App. 46.

*Virginia*. — Norfolk, etc., R. Co. *v.* Phillips, 100 Va. 368, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 960.

*Washington*. — Bateman *v.* Peninsular R. Co., 20 Wash. 133.

But see Frazee *v.* Stott, 120 Mich. 624.

**Negligence of Gas Tester.** — The owner of a coal mine has been held liable for the negligence of a gas tester on the ground that the gas tester is a vice-principal. *Costa v. Pacific Coast Co.*, 26 Wash. 138.

**"Dog Setter" in Sawmill Injured Through Negligence of "Iron Hunter."** — The plaintiff occupied the position in the defendant's mill of a "dog setter," whose duties consisted in adjusting the "dogs," which were iron hooks or braces fastened in the log after it had been put upon the saw carriage, for the purpose of holding it firmly in position as the carriage conveyed it to the saw. He was injured through the alleged negligence of an "iron hunter," whose duty it was to locate and remove any iron spikes left in the logs which had been rafted. The alleged negligence was the failure to remove a piece of iron in a log. It was held that the "iron hunter" or inspector was not a fellow servant with the plaintiff within the fellow-servant rule. *Covington Sawmill, etc., Co. v. Clark*, 116 Ky. 461.

**962. 1. Car Inspector and Repairer Held to Be a Vice-principal.** — *McDonald v. Michigan Cent. R. Co.*, 132 Mich. 372, 102 Am. St. Rep. 426, 9 Detroit Leg. N. 700; *Chicago, etc., R. Co. v. Kellogg*, 54 Neb. 127; *Eaton v. New York Cent., etc., R. Co.*, 163 N. Y. 391, 79 Am. St. Rep. 600; *Newton v. New York Cent., etc., R. Co.*, 96 N. Y. App. Div. 81; *Smith v. New York, etc., R. Co.*, 86 N. Y. App. Div. 188, affirmed without opinion 178 N. Y. 635; *Norfolk, etc., R. Co. v. Phillips*, 100 Va. 368.

**Employees Charged with Inspection of Loaded Cars.** — *Bailey v. Delaware, etc., Canal Co.*, 27 N. Y. App. Div. 307, following *Byrnes v. New York, etc., R. Co.*, 113 N. Y. 251.

**963. 1. Servants Charged with Maintenance of Track Not Vice-principals.** — *Woodward Iron Co. v. Cook*, 124 Ala. 349.

**2. Servants Charged with Maintenance of Track Held to Be Vice-principals.** — *Hamilton v. Michigan Cent. R. Co.*, 135 Mich. 95, 10 Detroit Leg. N. 711; *Smith v. Erie R. Co.*, 67 N. J. L. 636, criticising and explaining *Harrison v. Central R. Co.*, 31 N. J. L. 203.

**3. Same — Roadmasters.** — *Missouri, etc., R. Co. v. Keefe*, (Tex. Civ. App. 1905) 84 S. W. Rep. 679.

**4. Same — Section Foreman.** — *Wright v. Southern R. Co.*, 128 N. Car. 77; *Bateman v. Peninsular R. Co.*, 20 Wash. 133.

**964. 1. Same — Track Inspectors.** — *Hamilton v. Michigan Cent. R. Co.*, 135 Mich. 95, 10 Detroit Leg. N. 711; *Hoelter v. McDonald*, 82 N. Y. App. Div. 423.

**5. Where Inspection and Repairs Are Incidental to Use of the Appliance.** — *Ryan v. Smith*, (C. C. A.) 85 Fed. Rep. 758; *Helling v. Schindler*, 145

**965.** (cc) *Where Injured and Negligent Employees Are Both Repairers.* — See note 1.  
(ff) *Inspection of Cars Received for Transportation.* — See note 5.

**966.** cc. EMPLOYEES CHARGED WITH SELECTION AND RETENTION OF SERVANTS. — See notes 1, 2.

**967.** ff. EMPLOYEES CHARGED WITH ESTABLISHMENT OF PROPER RULES AND REGULATIONS — (aa) *General Rule.* — See notes 1, 2, 3.

Cal. 303; *Campbell v. T. A. Gillespie Co.*, 69 N. J. L. 279; *Koszowski v. American Locomotive Co.*, 96 N. Y. App. Div. 40; *Manning v. Genesee River, etc., Steamboat Co.*, 66 N. Y. App. Div. 314; *Bell v. Consolidated Gas, etc., Co.*, 36 N. Y. App. Div. 242; *Sias v. Consolidated Lighting Co.*, 73 Vt. 35; *Williams v. North Wisconsin Lumber Co.*, (Wis. 1905) 102 N. W. Rep. 589; *Grams v. C. Reiss Coal Co.*, (Wis. 1905) 102 N. W. Rep. 586. See *Twombly v. Consolidated Electric Light Co.*, 98 Me. 353; *Livengood v. Joplin-Galena Consol. Lead, etc., Co.*, 179 Mo. 229.

**Cleaning and Oiling Machinery.** — The duty of inspection has been held not to extend to cleaning and oiling machinery when these are mere details of the work. *Quigley v. Levering*, 167 N. Y. 58.

**Negligence While Executing Work of Inspection or Repair.** — In *Meeker v. C. R. Remington, etc.*, Co., 53 N. Y. App. Div. 592, the court said that it was not prepared to hold that the master is liable for the negligent act of a foreman or superintendent in inspecting or repairing machinery, tools, or appliances, or in the work of making a place safe for his employees, where such negligent act results in direct, immediate injury to another servant, while the work of inspection or repairing or making the place safe is in progress, as distinguished from a failure to execute sufficient inspections and repairs.

**965. 1.** *Stevens v. Chamberlin*, (C. C. A.) 100 Fed. Rep. 378; *Richardson v. Mesker*, 171 Mo. 666.

It has been held that a rule of a railroad company that "at all stoppings of trains the brakemen or trainmen must inspect the wheels, brakes, and trucks of the car and report any defects immediately to the conductor," does not have the effect of devolving the duty of inspection upon trainmen equally with car inspectors so as to make trainmen and the regular inspectors fellow servants. *Eaton v. New York Cent., etc., R. Co.*, 163 N. Y. 391, 79 Am. St. Rep. 600.

5. See *Vartanian v. New York, etc., R. Co.*, 25 R. I. 398.

But it has been held that if a railroad company employs a competent person to inspect cars received from other roads and to reject cars which are not in a condition to go forward safely, the company is not liable for the negligence of the inspector in making the inspection. *Lellis v. Michigan Cent. R. Co.*, 124 Mich. 37.

**966. 1.** **Master Must Have Invested Servant with Authority.** — *Hilton, etc., Lumber Co. v. Ingram*, 110 Ga. 652, 100 Am. St. Rep. 204.

**2.** **View that Master Is Liable for Agent's Negligence.** — *Elliott v. Canadian Pac. R. Co.*, 129 Fed. Rep. 163; *Brady v. Western Union Tel. Co.*, (C. C. A.) 113 Fed. Rep. 909; *Murphy v. Hughes*, 1 Penn. (Del.) 250; *Woodson v. Johnston*, 109 Ga. 454; *Bonn v. Galveston, etc., R.*

*Co.*, (Tex. Civ. App. 1904) 82 S. W. Rep. 808; *Galveston, etc., R. Co. v. Eckles*, 25 Tex. Civ. App. 179; *Postal Tel. Cable Co. v. Coote*, (Tex. Civ. App. 1900) 57 S. W. Rep. 912. See *Hill v. Big Creek Lumber Co.*, 108 La. 162.

**Selection of Servant for Particular Task from Competent Servants Provided by Master.** — Applying the principle that if proper appliances or instrumentalities have been provided by the master he is not liable to one servant for the negligence of a coemployee in making an improper selection (see *supra*, the cases supplementing page 953, note 2), it has been held that when the master performs the duty imposed by law of employing competent servants, and a fellow servant of the plaintiff, without the master's knowledge or authority, selects from the competent servants thus employed one who is unsuited for the special task created by an emergency, and transfers him from work he can do to work he cannot do, the act of thus assigning him is not the act of the master but that of a fellow servant. But if the person making such assignment to the new duty was authorized to employ and discharge, and to make such assignment to meet the emergency, and if he knew of the incompetency of the servant to perform the new task, his negligence would be treated as the negligence of the master. *Hilton, etc., Lumber Co. v. Ingram*, 119 Ga. 652, 100 Am. St. Rep. 204.

In analogy with the rule that a master who has furnished a sufficient supply of suitable tools or materials is not liable to a servant for an injury resulting from the selection by another servant of something not suitable for the particular purpose, it has been held that a master who has furnished a suitable supply of competent servants for the work is not liable to a servant for the selection by another in connection with the details of the work of a servant who is not qualified to do the particular task. *Hilton v. Fitchburg R. Co.*, (N. H. 1904) 59 Atl. Rep. 625.

**Superintendent of Mine Assuming Duties of Hoisting Engineer.** — A mining company has been held liable to a miner for injuries received through the unskillfulness of the superintendent of the mine who attempts to act as hoisting engineer without possessing the necessary skill. *Beresford v. American Coal Co.*, 124 Iowa 34.

**967. 1.** *Wallace v. Boston, etc., R. Co.*, 72 N. H. 504; *Devoe v. New York Cent., etc., R. Co.*, 174 N. Y. 1, reversing 70 N. Y. App. Div. 495; *Daley v. Brown*, 167 N. Y. 381, affirming 45 N. Y. App. Div. 428; *Wagner v. Portland*, 40 Oregon 389; *Bain v. Northern Pac. R. Co.*, 120 Wis. 412.

2. *Pool v. Southern Pac. R. Co.*, 20 Utah 210.

3. **Liability of Master for Want of Compliance with Rules** — *United States*. — *Northern Pac. R. Co. v. Dixon*, 194 U. S. 338; *Pennsylvania R. Co. v. Fishack*, (C. C. A.) 123 Fed. Rep.



**967.** (bb) *Employees Having Control of Train Schedules.* — See note 5.

**968.** See notes 2, 4, 5.

(cc) *Telegraph Operators.* — See note 6.

**969.** gg. *EMPLOYEES CHARGED WITH DUTY OF INSTRUCTING SERVANTS.* — See notes 2, 4.

465; *Maier v. Union Pac., etc., R. Co., (C. C. A.)* 106 Fed. Rep. 309; *Little Rock, etc., R. Co. v. Barry, (C. C. A.)* 84 Fed. Rep. 944.

*Maryland.* — *State v. South Baltimore Car Works,* 99 Md. 461, quoting 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 967.

*Michigan.* — *Miller v. Michigan Cent. R. Co.,* 123 Mich. 374; *Whalen v. Michigan Cent. R. Co.,* 114 Mich. 512.

*Missouri.* — *Garland v. Missouri, etc., R. Co.,* 85 Mo. App. 579.

*New Hampshire.* — *McLaine v. Head, etc., Co.,* 71 N. H. 294, 93 Am. St. Rep. 522.

*New Mexico.* — *Cerrillos Coal R. Co. v. Deserant,* 9 N. Mex. 49.

*New York.* — *Quigley v. Levering,* 167 N. Y. 58; *Corcoran v. New York, etc., R. Co.,* 46 N. Y. App. Div. 201; *Savage v. Nassau Electric R. Co.,* 42 N. Y. App. Div. 241, affirmed without opinion 168 N. Y. 680; *Bruen v. Uhlmann,* 30 N. Y. App. Div. 453.

*Virginia.* — *Driver v. Southern R. Co.,* 103 Va. 650; *Norfolk, etc., R. Co. v. Cromer,* 101 Va. 667.

See *infra*, cases supplementing page 968, note 5.

It has been held that, although it was the duty of the defendant cable-car company to make provision for warning the plaintiff, who was at work replacing the wheels upon which the cable ran, of the approach of cars, having employed a competent person to give the necessary warning, it was not liable for the negligence of the person so appointed in omitting to give the warning. *Ryan v. Third Ave. R. Co.,* 92 N. Y. App. Div. 306.

Where the system of the working of a stone quarry was one whereby no protection was afforded to the workmen engaged in another portion of the quarry, apart from the blasting, from injury from flying stones, caused by the explosions of the blasts in the rock, except the warning word "fire" given at the time the fuse was communicated to the explosives of the blast, and one of the rules of the master was that no employee should leave his work to seek safety from the dangers of the blast until the warning "fire" was given by the foreman, whose duty it was to light the fuse, it became and was the duty of the master in the exercise of reasonable care to have such warning announced long enough before the explosion for such workmen or employees, in the exercise of ordinary care, to reach a place of safety; and this duty being delegated to such boss or foreman, does not relieve the master from the liability to answer for the neglect of the boss or foreman to perform that duty. This neglect is not an incidental act of the coservice. *Belleville Stone Co. v. Mooney,* 60 N. J. L. 323.

**Duty of Railroad to Provide System of Signals.** — While it is the duty of a railroad company to exercise reasonable care in providing a system of signals, the duty to carry out the system by giving the signals is the duty of the employee,

incident to his employment, and for the failure of the employee to perform that duty the employer cannot be held responsible by another employee engaged in the common employment. *Miller v. Central R. Co.,* 69 N. J. L. 413.

**967. 5. Employees Controlling Movement of Trains — Train Dispatcher.** — *Northern Pac. R. Co. v. Mix, (C. C. A.)* 121 Fed. Rep. 476; *Maier v. Union Pac., etc., R. Co., (C. C. A.)* 106 Fed. Rep. 309; *Felton v. Harbeson, (C. C. A.)* 104 Fed. Rep. 737; *Missouri, etc., R. Co. v. Elliott, (C. C. A.)* 102 Fed. Rep. 96; *Louisville, etc., R. Co. v. Heck,* 151 Ind. 292; *Missouri, etc., R. Co. v. Elliott,* 2 Indian Ter. 407; *Wallace v. Boston, etc., R. Co.,* 72 N. H. 504; *Brommer v. Philadelphia, etc., R. Co.,* 205 Pa. St. 432.

**968. 2. Same — Division Superintendent.** — *Louisville, etc., R. Co. v. Heck,* 151 Ind. 292.

**4. Same — Other Employees.** — *Morrison v. Northern Pac. R. Co.,* 34 Wash. 70.

**Car Starter.** — The car starter of a street railway, whose authority is similar to that of a train dispatcher, has been held to be a vice-principal, and not the fellow servant of a car repairer who is injured by the negligent starting of a car upon which he is at work. *Quinn v. Brooklyn Heights R. Co.,* 91 N. Y. App. Div. 489.

**5. See *supra*, cases supplementing page 967, note 3.**

**6. Northern Pac. R. Co. v. Dixon,** 194 U. S. 338; *Illinois Cent. R. Co. v. Bentz, (C. C. A.)* 69 Fed. Rep. 657. See *Northern Pac. R. Co. v. Mix, (C. C. A.)* 121 Fed. Rep. 476. See *infra*, the case supplementing page 1007, note 3.

**Rule under Virginia Constitution.** — Under section 162 of the Virginia constitution, which abolishes the fellow-servant doctrine so far as it affects the liability of the railroad company for injuries to its servant resulting from the acts or omissions of a coemployee "charged with dispatching trains or transmitting telegraphic or telephonic orders therefor," a railroad company is liable to an engineer for injuries sustained in consequence of the negligence of a telegraph operator in failing to deliver an order to the conductor of the train. *Virginia, etc., R. Co. v. Clower,* 102 Va. 867.

**969. 2. General Rule — United States.** — *Thomas v. Cincinnati, etc., R. Co.,* 97 Fed. Rep. 245.

*Illinois.* — *Shickle-Harrison, etc., Iron Co. v. Beck,* 212 Ill. 268; *Alton Paving, etc., Co. v. Hudson,* 74 Ill. App. 612, affirmed 176 Ill. 270.

*Iowa.* — *Collingwood v. Illinois, etc., Fuel Co.,* 125 Iowa 537; *Klaflke v. Bettendorf Axle Co.,* 125 Iowa 224.

*Minnesota.* — *Hjelm v. Western Granite Contracting Co., (Minn. 1905)* 102 N. W. Rep. 384; *Peterson v. American Grass Twine Co.,* 90 Minn. 343.

*Montana.* — *Allen v. Bell,* 32 Mont. 69.

*New Hampshire.* — *Sirois v. Henry, (N. H. 1905)* 59 Atl. Rep. 936.

**970. hh. EMPLOYEES INTRUSTED WITH SUPERVISION.** — See notes 1, 2, 3.**ii. EMPLOYEE IN CHARGE OF ENTIRE BUSINESS OR DISTINCT DEPARTMENT —****General Rule.** — See note 4.

*New York.* — *Eastland v. Clarke*, 165 N. Y. 420; *O'Connor v. Barker*, 25 N. Y. App. Div. 121; *Strauss v. Haberman Mfg. Co.*, 23 N. Y. App. Div. 1. See *Sullivan v. Metropolitan St. R. Co.*, 53 N. Y. App. Div. 89, *affirmed* without opinion 170 N. Y. 570.

*Texas.* — *Waxahachie Oil Co. v. McLain*, 27 Tex. Civ. App. 334.

*Washington.* — *Shannon v. Consolidated Tiger, etc.*, Minn. Co., 24 Wash. 119. See *Goe v. Northern Pac. R. Co.*, 30 Wash. 654.

*Wisconsin.* — *Baumann v. C. Reiss Coal Co.*, 118 Wis. 330.

*Canada.* — *Gunn v. Le Roi Min. Co.*, 10 British Columbia 59.

**Duty to Give Warnings of Danger.** — If in the discharge of the master's duty it becomes necessary to give servants warning of dangers that arise in the course of the employment, it is not enough that the master has provided competent persons to give them; the warnings must be given. *Coffeyville Vitriified Brick, etc., Co. v. Shanks*, 69 Kan. 306; *Borgerson v. Cook Stone Co.*, 91 Minn. 91; *Stasch v. Cornwall Ore Bank Co.*, 19 Pa. Super. Ct. 113.

But it has on the other hand been held that a master is not liable to one servant for the failure to give another servant warning of danger in accordance with agreement, the situation of the injured servant and the promise to warn him being connected with the carrying out of the details of the work in hand. *Schott v. Onondaga County Sav. Bank*, 49 N. Y. App. Div. 503; *Byrnes v. Brooklyn Heights R. Co.*, 36 N. Y. App. Div. 355.

In *Schott v. Onondaga County Sav. Bank*, 49 N. Y. App. Div. 503, it was said: "Generally speaking, it may be asserted that when an assurance of safety is given respecting a danger from which the master is bound to protect his employee, the master is obligated by that assurance, whether it be given by himself or by some subordinate who, for the time being, represents him; but, on the other hand, if the assurance relates to a mere detail of the work, the master is not bound, even though it be given by his *alter ego*."

It has been held that a railroad company is not liable for the failure of the foreman of a section gang employed on the track to give the members of the gang notice of the approach of a train as he had promised to do. *Riola v. New York Cent., etc., R. Co.*, 97 N. Y. App. Div. 252.

**969. 4. Same — In Case of Inexperienced Minor Employees.** — *Waxahachie Oil Co. v. McLain*, 27 Tex. Civ. App. 334.

**970. 1.** In *Louisiana* it has been said that the master must be held responsible for such reasonable constant and steady supervision of his servants that they will not be permitted to become grossly or criminally negligent. *Hill v. Big Creek Lumber Co.*, 108 La. 162. But see *Dill v. Marmon*, (Ind. App. 1904) 71 N. E. Rep. 669, holding that the law does not impose upon the master an absolute duty to oversee and supervise the executive details of mechan-

ical work carried on by his employees. And see *Dill v. Marmon*, 164 Ind. 507.

**2.** It is not the duty of a master to take supervision of the work, or to direct the manner of doing it. *Ulrich v. New York Cent., etc., R. Co.*, 25 N. Y. App. Div. 465.

**3.** *Steube v. Christopher, etc., Architectural Iron, etc., Co.*, 85 Mo. App. 640. See *Hill v. Winston*, 73 Minn. 80.

It has been said that if there was negligence on the part of a superintendent of a master engaged in blasting operations, in failing properly to supervise the firing of dynamite blasts, the master would be liable if supervision by the master or his superintendent was necessary. *Hooe v. Boston, etc., R. Co.*, 187 Mass. 67.

**Employers' Liability Acts.** — The statutes which have been enacted in *England* and some of the *United States* make a master liable to servants for the acts of coemployees in the exercise of superintendence. See *supra*, the cases supplementing page 943, note 1 *et seq.*

**4. General Rule.** — *Northern Pac. R. Co. v. Dixon*, 194 U. S. 338; *Chicago House Wrecking Co. v. Birney*, (C. C. A.) 117 Fed. Rep. 72; *Alaska United Gold Min. Co. v. Muset*, (C. C. A.) 114 Fed. Rep. 66; *Ft. Wayne v. Christie*, 156 Ind. 172; *Parkhurst v. Swift*, 31 Ind. App. 521; *Beresford v. American Coal Co.*, 124 Iowa 34; *Prevost v. Citizens' Ice, etc., Co.*, 185 Pa. St. 617, 64 Am. St. Rep. 659; *Ricks v. Flynn*, 196 Pa. St. 263; *Butterman v. McClintic-Marshall Constr. Co.*, 206 Pa. St. 82. See *Dill v. Marmon*, (Ind. App. 1904) 71 N. E. Rep. 669; *Roberts v. Fielder Salt Works*, (Tex. Civ. App. 1903) 72 S. W. Rep. 618.

**Application of the Rule.** — It has been said that to make a superintendent a vice-principal, so as to hold the master liable for his negligence, the latter must relinquish all supervision of the work, and intrust to him not only its supervision and direction, but the selection and employment of laborers, and the procuring of materials, machinery, etc., necessary for the service. *Maryland Clay Co. v. Goodnow*, 95 Md. 330. And see *La Salle v. Kostka*, 190 Ill. 130, wherein it is said: "Where a master confers authority upon one of his employees to take charge and control of a certain class of workmen in carrying on some particular branch of his business, such employee, in governing and directing the movements of the men under his charge with respect to that branch of the business, is the direct representative of the master, and not a mere fellow servant; and all commands given by him within the scope of his authority are in law the commands of the master."

It has been held in *Michigan* that an assistant roadmaster is a vice-principal. *La Barre v. Grand Trunk Western R. Co.*, 133 Mich. 192, 10 Detroit Leg. N. 146.

It has been held that where a complaint averred that the plaintiff was injured through the negligence of the defendant's superintendent having full charge and control of the defendant's work in and about the defendant's quarry,

**971. Criticism of the Rule.**— See note 3.

*e. DIFFERENT-DEPARTMENT LIMITATION*—(2) *Statement of the Limitation.*— See note 4.

it was not open to the objection that appeared therefrom that the negligence relied upon was the negligence of a fellow servant. *Southern Indiana R. Co. v. Moore*, (Ind. App. 1904) 71 N. E. Rep. 516.

An employer is liable in damages for physical injuries to an employee resulting from the negligence of one who was the general superintendent of the business of the former, and who, on the occasion when the injuries were sustained, was acting as the employer's *alter ego*, and not in the capacity of a fellow servant of the person injured. *Woodson v. Johnston*, 109 Ga. 454.

Where a municipal corporation is engaged in operating a rock quarry which it owns, a person placed there by its authority as general superintendent of the work, with power to direct the movements of its laborers, not joining with them in the labor, and being as to this business the city's sole and only representative, is the vice-principal, and not the fellow servant of the workmen under his charge; and this is so whether it was within the scope of his authority to engage the workmen or not. *Augusta v. Owens*, 111 Ga. 464.

In *Bonnin v. Crowley*, 112 La. 1025, it was held that an employee is not the fellow servant of the manager of the master.

But an ordinary foreman does not, it has been held, come within the application of the rule. *Mikolajczak v. North American Chemical Co.*, 129 Mich. 80, 8 Detroit Leg. N. 870.

Thus, it has been held that the foreman of a shop for the repair of freight cars is not the head of a distinct department; he is the head of one of the many branches—the freight-repair branch—of a distinct department, the mechanical department. *Grady v. Southern R. Co.*, (C. C. A.) 92 Fed. Rep. 491.

It has been held that a yardmaster cannot be held a vice-principal of a railroad company rather than a fellow servant of a trainman, on the ground that he is the head of a great department of the company. *Pennsylvania R. Co. v. Fishack*, (C. C. A.) 123 Fed. Rep. 465.

A working foreman who was in charge of the construction of an elevator in a building and employed the plaintiff to assist him, is not a vice-principal. *Andre v. Winslow Bros. Elevator Co.*, 117 Mich. 560.

An employee who is placed in charge of a crew of men operating a pile driver by a master who is engaged in building structural iron work, bridges, wharves, and in pile driving, is not a vice-principal. *Hughes v. Leonard*, 199 Pa. St. 123.

It has been said that to bind the master for the acts of the superintendent, such superintendent must not only have control of the entire business or entire department, but this control and management which he exercises must be entire and absolute. *Ruemmel-Braun Co. v. Cahill*, 14 Okla. 422.

**971. 3. Uncertainty of the Rule.**— See criticisms of the doctrine of "departmental control" by Canty, J., in *Holman v. Kempe*, 70 Minn. 422.

**4. Cases Applying the Different-department Limitation**— *Georgia.*— In *Brush Electric Light, etc., Co. v. Wells*, 110 Ga. 192, the earlier cases of *Cooper v. Mullins*, 30 Ga. 150, 76 Am. Dec. 638, and *Krogg v. Atlanta, etc., R. Co.*, 77 Ga. 202, 4 Am. St. Rep. 79, are explained and distinguished, and it is held that the rule to the effect that the fellow-servant rule is not applicable where the servant injured is employed in a department of the general service which is separate and distinct from that of the servant whose negligence caused the injury, is not recognized in Georgia, and the court cites 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 971 *et seq.* to the proposition that the great preponderance of judicial authority elsewhere is unquestionably against such a restriction of the fellow-servant rule.

*Illinois.*— *Illinois Steel Co. v. Bauman*, 178 Ill. 351; *Chicago City R. Co. v. Leach*, 208 Ill. 198, 100 Am. St. Rep. 216, reversing 104 Ill. App. 30.

*Kentucky.*— *Louisville, etc., R. Co. v. Lowe*, 80 S. W. Rep. 768, 25 Ky. L. Rep. 2317; *Angel v. Jellico Coal Min. Co.*, 115 Ky. 728.

*Louisiana.*— There seems to be a tendency to recognize the different-department limitation in Louisiana.

In *Dobson v. New Orleans, etc., R. Co.*, 52 La. Ann. 1127, it was held that a defendant company was not liable for damages to a foreman of a gang of laborers engaged in hauling dirt who was injured by the negligence of the conductor of the dirt train, and the decision seems to have been placed on the ground that there was no coassociation or fellow-service between the conductor and the plaintiff. And see *Evans v. Louisiana Lumber Co.*, 111 La. 534.

Where servants are engaged in different duties in the same establishment an injury resulting to one by the carelessness or negligence of another in the course of the latter's peculiar work does not fall within the rule which exempts the master from liability by reason of a fellow servant's negligence. *Merritt v. Victoria Lumber Co.*, 111 La. 159.

*Tennessee.*— *Freeman v. Illinois Cent. R. Co.*, 107 Tenn. 340; *Louisville, etc., R. Co. v. Jackson*, 106 Tenn. 438.

*Washington.*— *Conine v. Olympia Logging Co.*, 36 Wash. 345; *Hammarberg v. St. Paul, etc., Lumber Co.*, 19 Wash. 537; *Uren v. Golden Tunnel Min. Co.*, 24 Wash. 261.

**Recognition of the Limitation in the South Carolina Constitution.**— See *McDaniel v. Charleston, etc., R. Co.*, 70 S. Car. 95.

**Statutory Recognition of the Limitation.**— In *Arkansas* a statute which is the same in substance as that of *Texas* has been enacted. See *St. Louis, etc., R. Co. v. Furry*, (C. C. A.) 114 Fed. Rep. 898, wherein it was held that a fireman who was injured in consequence of the failure of a telegraph operator to deliver an order was not a fellow servant of the operator.

**Same—In Texas.**— Under the *Texas* statute the fellow-servant rule cannot prevent a recovery by a brakeman who is injured resulting



**973.** (5) *Application of the Doctrine — Consociation Between Servants in Different Departments.* — See note 3.

Instances in the Application of the Doctrine. — See note 4.

**975.** (6) *Criticism of the Doctrine.* — See notes 2, 3.

**976.** (7) *Rejection of the Doctrine.* — See note 2.

**3. Statutory Limitations of the Rule — a. IN GENERAL.** — See note 5.

**977.** *b. EXCEPTIONS APPLICABLE TO RAILROAD EMPLOYEES — (1) In General.* — See note 1.

(2) *Contracts Limiting Liability.* — See note 2.

**978.** (3) *General Statutes Whose Scope Is Confined to Railroad Employees — (a) In General.* — See note 2.

(b) *Constitutionality of Statutes.* — See note 5.

from the negligent misplacement of a switch with which he had nothing to do. *International, etc., R. Co. v. Johnson*, 23 Tex. Civ. App. 160.

**Same — In Ohio.** — *Roe v. New York, etc., R. Co.*, 13 Ohio Dec. 260. See *Froelich v. Toledo, etc., R. Co.*, 24 Ohio Cir. Ct. 359, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 971 and 972.

It has been held that as to a brakeman on the same train an engineer is not an employee in a "separate branch or department." *Hill v. Lake Shore, etc., R. Co.*, 12 Ohio Cir. Dec. 241, 22 Ohio Cir. Ct. 291.

On the ground that a switch tender and a locomotive engineer were in different departments within the meaning of the statute, a railroad company has been held liable for the negligence of the engineer resulting in an injury to the switch tender. *Lake Shore, etc., R. Co. v. Pero*, 12 Ohio Cir. Dec. 25, 22 Ohio Cir. Ct. 130.

**Same — In Utah.** — A form of the different-department limitation is recognized by statute in Utah. See *Dryburg v. Mercur Gold Min., etc., Co.*, 18 Utah 410.

**973. 3. Rule Inapplicable Where Close Consociation Exists Between the Servants.** — *Chicago, etc., R. Co. v. White*, 209 Ill. 124.

It has been said in *Missouri* that the mere fact that the injured and the negligent servants are engaged in different departments does not prevent them from being fellow servants. *Fox v. Jacob Dold Packing Co.*, 96 Mo. App. 173.

**4. Instances of the Application of the Doctrine.** — In *Kentucky* an engineer on one train may recover for injuries received through the gross negligence of an engineer on another train. *Cincinnati, etc., R. Co. v. Roberts*, 110 Ky. 856. And it has been held that there may be a recovery against the common master for injuries inflicted upon one laborer by the gross negligence of another of the same grade, in the same line of employment, but so disconnected as not to give the one a right or opportunity for controlling, admonishing, or even observing the manner of the collaborer's doing his work. *Louisville, etc., R. Co. v. Edmonds*, 64 S. W. Rep. 727, 23 Ky. L. Rep. 1049. And the courts of this state seem to have gone so far as to hold that employees are engaged in different departments if they are not working under the direction of the same superior or boss. *Mayfield Woolen Mills v. Frazier*, 80 S. W. Rep. 456, 25 Ky. L. Rep. 2263.

**975. 2. Different-department Limitation Criti-**

cised. — *Grattis v. Kansas City, etc., R. Co.*, 153 Mo. 380, 77 Am. St. Rep. 721.

**3. Qualification of the Different-department Limitation.** — See *Northern Pac. R. Co. v. Dixon*, 194 U. S. 338.

**976. 2. Cases Rejecting the Doctrine.** — *Louisville, etc., R. Co. v. Stuber*, (C. C. A.) 108 Fed. Rep. 934, reversing 102 Fed. Rep. 421; *Colley v. Southern Cotton Oil Co.*, 120 Ga. 258; *Brush Electric Light, etc., Co. v. Wells*, 110 Ga. 192, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 976; *Enright v. Oliver*, 69 N. J. L. 357, 101 Am. St. Rep. 710; *Olmstead v. Raleigh*, 130 N. Car. 243; *Okonski v. Pennsylvania, etc., Fuel Co.*, 114 Wis. 448. See *Indianapolis, etc., Rapid Transit R. Co. v. Andis*, 33 Ind. App. 625. See also *supra*, cases supplementing page 971, note 4.

**5. Statutes Allowing Recovery by "Any Person" Injured, Etc.** — *Linck v. Louisville, etc., R. Co.*, 107 Ky. 370; *Edmonson v. Kentucky Cent. R. Co.*, 105 Ky. 479.

**977. 1. General Rule Still in Force.** — *Railey v. Garbutt*, 112 Ga. 288; *McCosker v. Hilton, etc., Lumber Co.*, 110 Ga. 328; *McLeod v. Chicago, etc., R. Co.*, 125 Iowa 270.

The *Texas* statute upon the subject of fellow servants relating to employees in the service of railway companies, etc., has no application to an employee in a cotton gin, *Consumers' Cotton Oil Co. v. Jonte*, 36 Tex. Civ. App. 18; or to employees of express companies, *Wells v. Page*, 29 Tex. Civ. App. 489.

**2. Agreements of Employees Limiting Railroad's Liability.** — By the express provision of the *Iowa* statutes agreements limiting the liability of railroads are void. *O'Brien v. Chicago, etc., R. Co.*, 116 Fed. Rep. 502.

**978. 2. Employee Must Be Free from Contributory Negligence.** — *Louisville, etc., R. Co. v. Wade*, (Fla. 1903) 35 So. Rep. 863.

**6. Statutes Not Within Provisions Against Special or Class Legislation.** — *O'Brien v. Chicago, etc., R. Co.*, 116 Fed. Rep. 502; *Indianapolis Union R. Co. v. Houlihan*, 157 Ind. 494; *Powell v. Sherwood*, 162 Mo. 605; *Baltimore, etc., R. Co. v. Hottman*, 25 Ohio Cir. Ct. 140; *Froelich v. Toledo, etc., R. Co.*, 24 Ohio Cir. Ct. 359, quoting 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 978; *Roe v. New York, etc., R. Co.*, 13 Ohio Dec. 260, quoting 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 978. See *Terre Haute, etc., R. Co. v. Rittenhouse*, 28 Ind. App. 633.

**Ohio Statute.** — The Ohio statute which extends the common-law rule formulated by the courts of that state by providing that railroad

**979.** See note 1.

(c) Upon What Corporations and Persons Liability Rests. — See note 6.

**980.** Street Railroads. — See note 3.

Receivers. — See note 5.

(d) What Injuries Are Within Statutes — *aa.* GEORGIA STATUTE. — See note 7.

companies shall be liable not only for the negligence of a servant who exercises authority over the injured employee but for the negligence of a servant who, exercising authority in one branch or department, causes injury to an employee in another who exercises no authority there, does not violate the second section of the Bill of Rights of the constitution of Ohio, which provides that "all political power is inherent in the people; government is instituted for their equal protection and benefit." *Kane v. Erie R. Co.*, (C. C. A.) 133 Fed. Rep. 681, *reversing* 128 Fed. Rep. 474.

**979. 1. Not in Conflict with Fourteenth Amendment.** — *Cincinnati, etc., R. Co. v. Thibaud*, (C. C. A.) 114 Fed. Rep. 918 (sustaining the constitutionality of the *Indiana* statute, which applies to every railroad or other corporation except municipal); *Callahan v. St. Louis Merchants' Bridge Terminal R. Co.*, 170 Mo. 473, *affirmed* without opinion 194 U. S. 628; *Powell v. Sherwood*, 162 Mo. 605; *Froelich v. Toledo, etc., R. Co.*, 24 Ohio Cir. Ct. 359, *quoting* 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 979; *Roe v. New York, etc., R. Co.*, 13 Ohio Dec. 260, *quoting* 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 679.

**6. Railroad Construction Companies.** — The *North Carolina* statute does not apply to actions by servants for independent contractors engaged in work for railroad companies. *Avery v. Southern R. Co.*, 137 N. Car. 130.

**Logging Roads.** — The owner of a road operated in connection with a sawmill for hauling logs from the woods to the mill and transporting employees from the mill to the woods, is not a railroad company within the meaning of the *Georgia* statute. *Railey v. Garbutt*, 112 Ga. 288.

And the *Minnesota* statute, it has been held, is not applicable to a logging road built for private purposes, and which is not a public railroad, used by the public, and is not a common carrier. *Williams v. Northern Lumber Co.*, 113 Fed. Rep. 382.

The *Wisconsin* statute (Wis. Rev. Stat. 1898, § 1816) embraces within its provisions only such railroad companies as are engaged in a general railroad business for the carriage of passengers and freight and does not extend to a private railroad operated by a logging and lumber company. *McKivergan v. Alexander, etc., Lumber Co.*, (Wis. 1905) 102 N. W. Rep. 332.

**980. 3. Street Railroads.** — Street railways are not within the *Iowa* and *Missouri* statutes. *McLeod v. Chicago, etc., R. Co.*, 125 Iowa 270; *Godfrey v. St. Louis Transit Co.*, 107 Mo. App. 193; *Stocks v. St. Louis Transit Co.*, 106 Mo. App. 129; *Johnson v. Metropolitan St. R. Co.*, 104 Mo. App. 588; *Sams v. St. Louis, etc., R. Co.*, 53.

But a chartered street railroad has been held to be a railroad within the meaning of the *Georgia* statute. *Savannah, etc., R. v. Williams*, 117 Ga. 414.

**5. Statutes Which Include Receivers.** — *Powell v. Sherwood*, 162 Mo. 605.

**7. Georgia Statute.** — The *Georgia* fellow-servant law applies to railroad employees injured in the course of their service or employment with such corporation, whether they are running trains or rendering any other service. *Sigman v. Southern R. Co.*, 135 N. Car. 181 (holding that where the plaintiff was injured by the negligence of a fellow servant while working upon and repairing a bridge of the defendant railroad, he was entitled to the benefit of the statute); *Southern R. Co. v. Johnson*, 114 Ga. 329.

The presumption which arises under the *Georgia* statute arises only in cases against railroad companies. *Railey v. Garbutt*, 112 Ga. 288.

**Missouri Statute.** — Under the *Missouri* statute (Mo. Rev. Stat., § 2873) making railroad corporations liable for all damages sustained by any agent or servant thereof while engaged in the work of operating such railroad, by reason of the negligence of any other agent or servant thereof, provided the person injured was not guilty of contributory negligence, it has been held that the right to recover is not limited to cases where the injury is inflicted by reason of the negligence of a fellow servant while actually moving a train or engine, but that the law embraces all cases where the injury is inflicted upon an employee while engaged in the work of operating a railroad, by reason of the negligence of any fellow servant who is likewise engaged in the work of operating a railroad, and that the term "operating such railroad" includes all work that is directly necessary for running trains over a track, and that it includes section hands who are engaged in working upon, repairing, or putting in shape the track, roadbed, bridges, etc., over which the trains must run. *Callahan v. St. Louis Merchants' Bridge Terminal R. Co.*, 170 Mo. 473, *affirmed* without opinion 194 U. S. 628.

The *Missouri* statute applies to section hands engaged in the repair of railroad tracks (*Thompson v. Chappell*, 91 Mo. App. 297; *Stubbs v. Omaha, etc., R. Co.*, 85 Mo. App. 192) and to section hands riding on hand cars. *Rice v. Wabash R. Co.*, 92 Mo. App. 35.

The doctrine that the liability of the master is confined to the acts done within the real or apparent scope of the authority confided to his agents or servants, has not been at all affected by the *Missouri* fellow-servant act. That legislation was merely intended to put the employees of a railroad company upon the same footing, as to recovery for personal injuries, which supports the right of nonemployees to such redress. While the former are no longer debarred from relief because the injury complained of was occasioned by the act of a fellow servant, still, like the latter, they can only fasten a liability upon the railroad company when the injury has been caused by the negligence of some one acting within the real or ostensible authority in-



**981.** *bb.* IOWA STATUTE. — See note 1.

trusted to him by such corporation. *Hamlett v. Chicago, etc., R. Co.*, 89 Mo. App. 354; *Bequette v. St. Louis, etc., R. Co.*, 86 Mo. App. 601.

**Texas Statute Making Railroads Liable to Servants Operating Cars, Locomotives, and Trains.**

— By the Texas statute (Rev. Stat. Tex., art. 4560*ca*) every person, receiver, or corporation operating a railroad is made liable for "damages sustained by any servant or employee thereof while engaged in the work of operating the cars, locomotives, or trains of such person, receiver, or corporation, by reason of the negligence of any other servant or employee of such person, receiver, or corporation, and the fact that such servants or employees were fellow servants with each other shall not impair or destroy such liability." Under this statute the fellow-servant doctrine does not apply to servants who are engaged in operating cars, locomotives, or trains, and they are entitled to recover for injuries received while so engaged through the negligence of servants of the railroad. *Galveston, etc., R. Co. v. McAdams*, (Tex. Civ. App. 1905) 84 S. W. Rep. 1076. But while the effect of the act is to suspend the law of fellow servants as to persons employed to operate cars, locomotives, or trains while they are actually engaged in the work, it does not affect their relations to other employees beyond the time of their active employment in that work. Under this statute it has been held that a roundhouse employee, known as a hostler, whose duty it is to take charge of engines in the yard, has been held to come within the provisions of this statute only when he is in actual charge of an engine. *Gulf, etc., R. Co. v. Howard*, 97 Tex. 513, holding that the defendant railroad company was not liable for the death of a hostler who was run over and killed, while on his way to take charge of a locomotive and before he began to perform the act of operating the machinery, in consequence of the negligence of the defendant's servants who were operating the locomotive at the time.

A railroad company has been held liable under the statute to a fireman who was injured in consequence of the negligence of the conductor in failing to keep a proper lookout. *Missouri, etc., R. Co. v. Keaveney*, (Tex. Civ. App. 1904) 80 S. W. Rep. 387.

The statute applies to employees operating locomotives in yards at stations, or in and about roundhouses, coal chutes, etc. *Gulf, etc., R. Co. v. Howard*, (Tex. Civ. App. 1903) 75 S. W. Rep. 803; *Missouri, etc., R. Co. v. Baker*, (Tex. Civ. App. 1900) 58 S. W. Rep. 964, holding that the statute applies to a yard switchman engaged in the work of making up a train.

A railroad company is liable to a servant who is injured while making a coupling through the negligence of the servant in charge of the engine. *Gulf, etc., R. Co. v. Wilder*, 33 Tex. Civ. App. 72.

Laborers engaged in loading a train of flat cars with dirt or gravel, and hauling the train to make a fill on the main line of the defendant's railroad, have been held to be engaged in operating a train within the meaning of the statute. *Texas Cent. R. Co. v. Pelfrey*, 35 Tex. Civ. App. 501.

But on the other hand workmen engaged in unloading steel rails from a standing car are not within the statute. *Lakey v. Texas, etc., R. Co.*, 33 Tex. Civ. App. 44.

Thus, it has been held that a servant whose employment was that of a section hand, while engaged in unloading cross-ties from a freight car standing on a side track was not operating the car within the meaning of the statute. *Lawrence v. Texas Cent. R. Co.*, 25 Tex. Civ. App. 293.

The operation of a hand car or a push car is within the purview of the statute. *San Antonio, etc., R. Co. v. Stevens*, (Tex. Civ. App. 1904) 83 S. W. Rep. 235; *Perez v. San Antonio, etc., R. Co.*, 28 Tex. Civ. App. 255.

A push car eight or ten feet long and three or four feet high for the transportation of rocks is a "car" within the meaning of the statute. *Texas, etc., R. Co. v. Webb*, 31 Tex. Civ. App. 498.

And placing a hand car or push car upon the track has been held to be the operation of a car within the meaning of the statute. *Houston, etc., R. Co. v. Jennings*, 37 Tex. Civ. App. 375; *Seery v. Gulf, etc., R. Co.*, 34 Tex. Civ. App. 89.

But where a roundhouse hostler and an engine wiper were, at the time of the accident resulting in an injury to one of them, engaged in the common work of cleaning an engine and putting it in order, it was held that the statute did not apply. *Cloyd v. Galveston, etc., R. Co.*, (Tex. Civ. App. 1904) 84 S. W. Rep. 408; *Galveston, etc., R. Co. v. Cloyd*, (Tex. Civ. App. 1903) 78 S. W. Rep. 43.

**981. 1.** The statute is not limited in its application to those employees who are immediately connected with the operation of trains. *Stebbins v. Crooked Creek R., etc., Co.*, 116 Iowa 513, holding that an employee who was engaged in transferring rails from one car to another by means of the use of a locomotive engine moving on the railroad track came within the statute.

To entitle a servant to recover under the *Iowa* statute, it is not necessary that his employment should have been connected with the use and operation of the railway; even though his employment may have had nothing whatever to do with the movement of trains, yet, if the performance of his duties brought him into a situation where he was exposed to the perils and hazards arising from such operation or movement, and he was thus injured by the negligence of a coemployee, he is within the protection of the statute. *Williams v. Iowa Cent. R. Co.*, 121 Iowa 270, holding that an employee who was engaged in unloading steel rails from a car by means of two cables, one end of which was clamped to the track and the other hooked to a rail on the car, after which the car was moved forward, pulling the rail from the load, was entitled to the benefit of the statute.

A car cleaner engaged in his work on a baggage car standing in the defendant's yard, where switch engines and other engines were frequently run back and forth switching and turning cars, making up trains, and sometimes moving the cars in which the cleaners were at the time employed, has been held to be clearly



**981.** Wrong Must Be by Negligence of Employees Engaged in Moving Engines, Etc. — See note 2.

**983.** *cc.* KANSAS STATUTE. — See note 1.

*dd.* MINNESOTA STATUTE. — See notes 4, 5.

**984.** *cc.* WISCONSIN STATUTE. — See note 2.

**985.** (4) *Negligence of Person Having Charge or Control of Engine, Train, Switch, Etc.* — See note 1.

within the statute. *Jensen v. Omaha, etc., R. Co.*, 115 Iowa 404.

A section hand who is injured while riding on a hand car by the collision of the car with another hand car may recover under the statute. *Smith v. Chicago G. W. R. Co.*, (Iowa 1899) 80 N. W. Rep. 658.

A brakeman has been held to be entitled to recover for injuries received through the negligence of a coal heaver while assisting him to coal an engine. *Reddington v. Chicago, etc., R. Co.*, (Iowa 1898) 75 N. W. Rep. 679.

A section hand who was pushed from a hand car on which he was riding by another employee on the car who was trying to escape a blow aimed at him by a third employee has been held not to be entitled to recover under the statute, for the reason that the act of one of the employees in striking another was not an act done within the scope of his duty. *Kincade v. Chicago, etc., R. Co.*, 107 Iowa 682.

**981. 2.** *Williams v. Chicago, etc., R. Co.*, 106 Mo. App. 61, decided under the Iowa statute; *Depuy v. Chicago, etc., R. Co.*, 110 Mo. App. 110, decided under the laws of Iowa.

It has been held that the Iowa statute does not apply to a servant who is not engaged in the operation of a railway, but in the reconstruction of an old and theretofore abandoned railway track, preparatory to a resumption of its use as a railway. *Mitchell v. Wabash R. Co.*, 97 Mo. App. 411.

**983. 1.** *Injuries Must Occur in Use and Operation of Road.* — See *Riley v. Grand Island Receivers*, 72 Mo. App. 280, decided under the Kansas statute.

**4.** *Bain v. Northern Pac. R. Co.*, 120 Wis. 412, decided under the Minnesota statute.

**5. Test — Illustrations.** — The statute does not apply when the risk incurred is no other than or different in kind from that incurred in other employments than railroading. *O'Niel v. Great Northern R. Co.*, 80 Minn. 27.

Where a section hand was struck by a ten-pound piece of slate or stone which was thrown from a passing engine in accordance with an established custom by a fireman who was engaged in sorting slate and stone from the coal, it was held that the injuries arose out of a hazard peculiar to the operation of railroads. *Swartz v. Great Northern R. Co.*, 93 Minn. 339.

The mere fact that a servant is injured by being struck by a lump of coal falling from the tender of an engine which has been run upon a side track and is standing perfectly still does not bring the case within the operation of the statute. Under these circumstances the danger of the contents of the tender becoming dislodged and falling is not at all different from or in any respect greater than that in the case of a stationary coal bin not connected with the railroad. *Weisel v. Eastern R. Co.*, 79 Minn. 245.

**Statute Applicable to Railroad Operated by Mining Company.** — *Kline v. Minnesota Iron Co.*, 93 Minn. 63.

**Statute Applicable to "Logging Railroad."** — *Schus v. Powers-Simpson Co.*, 85 Minn. 447.

**Statutes Applicable to Partnership Engaged in Railroad Construction.** — *Roe v. Winston*, 86 Minn. 77.

**984. 2. Test — Employment at Time of Injury.** — While a conductor was standing by the side of a car which was being unloaded, watching an open switch connecting the side track with the main line, and waiting to close the door of the car when it should be unloaded, he was struck by a bale of goods thrown from the car. It was held that he was not, at the time of his injury, engaged in "operating, running, riding upon, or switching" the train, engine, or car, within the meaning of the statute. *Medberry v. Chicago, etc., R. Co.*, 106 Wis. 191, *Dodge and Winslow, JJ., dissenting.*

**Employees Riding on Hand Car to and from Work.** — It has been held by the Supreme Court of Minnesota that where track repairers were, at their request and for their convenience, furnished with hand cars to be used in riding to and from work, and the cars were wholly under the control of the employees, an employee riding on one of the cars did not come within the provisions of the Wisconsin statute. *Benson v. Chicago, etc., R. Co.*, 78 Minn. 303.

**985. 1. What Is Meant by Charge or Control — Massachusetts Statute.** — A person who is stationed in a tower in a railroad yard and has complete manual control of a switch after receiving signals and orders from one below is a person in "charge or control of \* \* \* any switch" within the meaning of the Massachusetts statute, even though another person gives him directions or exercises supervision over him in such a way as to be in charge of the switch in a broad sense, so that the railroad company might be liable for his negligence in giving directions or in failing to give proper directions. *Welch v. New York, etc., R. Co.*, 176 Mass. 393.

But a person having control of a switch is not a person in charge or control of a train. *Fairman v. Boston, etc., R. Co.*, 169 Mass. 170.

A station agent whose duty it is to transmit the orders of another servant to the men in charge of trains as they arrive at the station, but who does not himself give any orders or assume any control, is not a person in charge or control of a train. *Fairman v. Boston, etc., R. Co.*, 169 Mass. 170.

A yardmaster having charge of the movement of cars in a railroad yard has been held to be a person in charge or control of a train. *Brady v. New York, etc., R. Co.*, 184 Mass. 225.

And an engineer is such a person. *Fairman v. Boston, etc., R. Co.*, 169 Mass. 170.

**Alabama Statute.** — A fireman on a locomotive

**986.** See notes 1, 2.

**987.** See note 2.

under his ordinary or general duties as such, in his relation to the engineer, while the engineer is present and in charge of the engine, cannot be said to be a person who has the charge or control. And if the fireman is in the cab of the engine by the direction and to carry out the orders of the engineer, who is under the engine for the purpose of packing the hot box, the engineer cannot recover for injuries received through the negligence of the fireman in carrying out his orders, on the ground that the fireman was in control of the engine. *Louisville, etc., R. Co. v. Goss*, 137 Ala. 319.

A section foreman who, with his force, did the work of repairing the track, is a "person in the charge or control of any part of the track of a railway" within the meaning of subdivision 5 of the Alabama act. *Alabama G. S. R. Co. v. Davis*, 119 Ala. 572.

**Indiana Statute.** — To bring a case within the Indiana statute it is not necessary that the injured person should have been an employee upon or connected with the train in charge of the person to whom the negligence is attributed, or any other train, or subject to the orders or management of the negligent person, or that the injury should have been inflicted by a train, in motion or otherwise, or that the injury should have been coincident with the negligent act or omission or immediately thereafter, or that the injury should have occurred while the person to whom negligence is attributed had charge of the train. The negligence, however, must occur while the person to whom it is attributed "has charge," and must be negligence in his service of having charge of a train upon a railway. It must be negligence in the exercise of the duty of having charge of a train upon a railway. *Chicago, etc., R. Co. v. Richards*, 28 Ind. App. 46.

There may be a recovery under the Indiana statute for injuries to a locomotive engineer, *Pittsburgh, etc., R. Co. v. Gipe*, (Ind. 1903) 65 N. E. Rep. 1034; and for injuries to a fireman through the negligence of the engineer on the same train, *Cleveland, etc., R. Co. v. Bergschicker*, 162 Ind. 108; and for injuries to the conductor of a train through the negligence of the engineer of the same train, *Pittsburgh, etc., R. Co. v. Collins*, 163 Ind. 569.

In order to entitle a servant to recover under the Indiana statute it is not necessary that he should have been obeying or conforming to the order of some superior at the time of the injury. *Indianapolis Union R. Co. v. Houlihan*, 157 Ind. 494.

**Canadian Statute.** — A motorman on an electric car has been held to be "a person who has charge or control" of a machine or engine within the meaning of the Workmen's Compensation Act of Canada. *Toronto R. Co. v. Snell*, 31 Can. Sup. Ct. 241, *affirming Snell v. Toronto R. Co.*, 27 Ont. App. 151, *affirmed* 31 Can. Sup. Ct. 241.

**986. 1. Person in Charge of a Signal.** — A brakeman on a train which has become stalled, who is sent forward to signal an approaching train of the danger of a collision, has been held

to be a person in charge of a signal within the meaning of the *Indiana* statute. *Cowen v. Ray*, (C. C. A.) 108 Fed. Rep. 320.

**2. What Constitutes a Train.** — An electric car has been held not to be a "train upon a railway" within the meaning of the *Indiana* statute. *Indianapolis, etc., Rapid Transit R. Co. v. Andis*, 33 Ind. App. 625.

**What Constitutes an Engine.** — A pile-driving machine which consisted of a steam engine placed on a flat car at one end, and the driver used in raising the hammer at the other end of the car, and all forming one machine, which could be self-propelled from place to place, has been held not to be a "locomotive engine" within the meaning of the *Indiana* statute. *Jarvis v. Hitch*, 161 Ind. 217, *reversing* (Ind. App. 1902) 65 N. E. Rep. 608.

In order that the *Alabama* act may apply the engine must be "upon a railway or some part of the track of a railway." *Alabama G. S. R. Co. v. Davis*, 119 Ala. 572.

A person in charge of a stationary engine, not being in charge, etc., of an engine on the track of a railway, is not comprehended by the *Alabama* statute. *Whatley v. Zenida Coal Co.*, 122 Ala. 118.

An electric car does not come within the definition of "locomotive engine," as used in the *Indiana* statute. *Indianapolis, etc., Rapid Transit R. Co. v. Andis*, 33 Ind. App. 625.

**Locomotive Engine or Train upon a Railroad.** — A street railway car operated by electricity upon a street railway track is not a "locomotive engine or train upon a railroad" within the meaning of the *Massachusetts* statute. *Fallon v. West End St. R. Co.*, 171 Mass. 249.

**Hand Car.** — A hand car is within the meaning of the *Texas* statute. *Texas, etc., R. Co. v. Smith*, (C. C. A.) 114 Fed. Rep. 728.

**Persons in Charge of Switch Yard.** — Under the *Indiana* statute a master is made an absolute guarantor that servants shall not be harmed by the negligence of a servant in charge of a switch yard. *Charman v. Lake Erie, etc., R. Co.*, 105 Fed. Rep. 449.

Under the *Indiana* statute making railroad companies liable for the negligence of any person in charge of a "switch yard" it has been held that a railroad company is not liable for the negligence of a brakeman on a train which is run upon a side track, in failing to turn the switch properly. *Baltimore, etc., R. Co. v. Little*, 149 Ind. 167.

And the statute creates no liability for injuries caused by the negligence of persons in charge of a switch. *Indianapolis, etc., Rapid Transit R. Co. v. Andis*, 33 Ind. App. 625.

**987. 2.** To bring a case within the provision of the *Alabama* act which makes the master liable by reason of the negligence of any person who has charge or control "of any part of the track of a railway," it is not essential that the track occasioning the injury should be finished or in charge of the regular section foreman. If it has reached such stage of construction as to become "the track of a railway" and has been adopted for use, though irregularly, negli-

**987. Gross or Wilful Negligence.** — See note 4.

**c. DEFECT IN CONDITION OF WAYS, WORKS, MACHINERY, ETC.** — See note 7.

**Negligence of Employer.** — See note 8.

**988. Negligence of Employee in Handling Appliances.** — See note 1.

**d. ACT OR OMISSION IN OBEDIENCE TO RULES OF EMPLOYER.**

— See notes 2, 3.

**989. 7. Extraordinary Risks Interposed by Master Without Warning.** — See note 4.

**990. 8. Illegal Employment — Sunday Work.** — See note 1.

**9. Rule Applicable Only to Servants.** — See note 2.

gence of the employee in charge of it, regardless of whether he be what is known as a section foreman or a construction foreman, is chargeable to the employer. *Southern R. Co. v. Howell*, 135 Ala. 639.

**987. 4. But compare** *Alabama G. S. R. Co. v. Williams*, 140 Ala. 230.

**Wanton, Wilful, and Intentional Misconduct of Fellow Servants.** — Employees have a right of action under the *Alabama* act for the wanton, wilful, or intentional misconduct of fellow servants, as well as for their mere negligence. *Southern R. Co. v. Moore*, 128 Ala. 434.

**7. Defect in Condition of Ways, Works, Machinery, Etc.** — *Carter v. Clarke*, 78 L. T. N. S. 76; *Miller v. King*, 34 Can. Sup. Ct. 710; *Lamoureux v. Fournier dit Larose*, 33 Can. Sup. Ct. 675; *Ferguson v. Galt Public School Board*, 27 Ont. App. 480; *Stamer v. Hall Mines*, 6 British Columbia 579; *Cooper v. Hamilton Steel, etc., Co.*, 8 Ont. L. Rep. 354; *Markle v. Donaldson*, 7 Ont. L. Rep. 376, *affirmed* 8 Ont. L. Rep. 682. See *Southern R. Co. v. Moore*, 128 Ala. 434.

The omission of packing in a frog in a manufacturer's private line of railway has been held to be a defect in the condition or arrangement of the defendants' works, machinery, or plant within the meaning of the *Canadian* statute. *Cooper v. Hamilton Steel, etc., Co.*, 8 Ont. L. Rep. 353.

**8. Evidence of Negligence of Employer Not Essential.** — *Copithorne v. Hardy*, 173 Mass. 400.

Under the *Canadian* statute the rule is the same as in *Massachusetts*. *Markle v. Donaldson*, 7 Ont. L. Rep. 376, *affirmed* 8 Ont. L. Rep. 682.

**988. 1. Trimble v. Whitin Mach. Works**, 172 Mass. 150.

**2. Baltimore, etc., R. Co. v. Little**, 149 Ind. 167.

**3. Special Order or Direction Not Necessary.** — To charge the employer with liability under the *Indiana* act it is not necessary that the injured servant should have been acting, at the time of the accident, in the execution of any special order or direction; it is sufficient if he was acting in the line of his duty as an employee. *Cincinnati, etc., R. Co. v. Thiebaud*, (C. C. A.) 114 Fed. Rep. 918.

**989. 4. Liability of Master for Extraordinary Risks Created After Employment.** — *Molique v. Iowa Gold Min., etc., Co.*, 18 Colo. App. 223.

**990. 1. Emergency Employee.** — It has been held that, while a servant who employs an assistant for an emergency acts for and stands in

the place of the master in making the employment, after the servant so employing an emergency man has resumed his place and entered upon the performance of his work as a servant he ceases to represent the master, and the emergency employee becomes his fellow servant. *Marks v. Rochester R. Co.*, 41 N. Y. App. Div. 66.

**2. Application of the Rule Limited to Defendant's Servants.** — *Kentucky, etc., Bridge, etc., Co. v. Sydor*, 82 S. W. Rep. 989, 26 Ky. L. Rep. 951; *Murray v. Dwight*, 161 N. Y. 301; *Lauro v. Standard Oil Co.*, 74 N. Y. App. Div. 4; *Hoadley v. International Paper Co.*, 72 Vt. 79; *Carroll v. Chicago, etc., R. Co.*, 99 Wis. 399, 67 Am. St. Rep. 872.

**Shipper of Live Stock Riding on Drover's Pass.** — A shipper of live stock, who receives from the railroad company undertaking the transportation of such stock a free pass, to enable him to care for his stock in transit, does not, by accepting the pass, become the servant of the railroad company, and is not within the fellow-servant rule. *Omaha, etc., R. Co. v. Crow*, 54 Neb. 747, 69 Am. St. Rep. 741.

**Independent Contractor.** — The fellow-servant doctrine does not prevent a recovery for injuries received by an independent contractor through the negligence of the servants of his principal. *Gayle v. Missouri Car, etc., Co.*, 177 Mo. 427.

**Injury After Working Hours.** — The rule may be applicable although the accident happened after the injured servant's working hours. "It is never a test of the application of the fellow-servant doctrine to any given case whether or not the injury was received by the servant during working hours or when he was at work after working hours. The sole test of its application thereto is whether at the time of the injury the servant was doing something which it was his duty or he had a right to do under the contract. If he was so acting, the doctrine applies; if not, it does not apply." *Dishon v. Cincinnati, etc., R. Co.*, 126 Fed. Rep. 194, *affirmed* (C. C. A.) 133 Fed. Rep. 471.

But as a general rule, in order that the fellow-servant rule may be available to an employer, the injured servant must be engaged as an employee at the time when he is injured. *Sullivan v. New York, etc., R. Co.*, 73 Conn. 203.

Thus, in an action to recover for injuries sustained by a servant after working hours, the fellow-servant doctrine has been held to be inapplicable. *Orman v. Salvo*, (C. C. A.) 117 Fed. Rep. 233.



**990. VI. WHO ARE FELLOW SERVANTS — 1. In General. —** See note 3.

**2. Definitions —** Where the Superior-servant and Different-department Limitations Are Rejected. — See note 6.

**991. Where Superior-servant and Different-department Limitations Prevail. —** See note 1.

**3. Necessity of a Common Employment. —** See notes 2, 4.

"The rule as to fellow servants had no application to one who, though in the employment of the principal whose servant's negligence occasioned the injury, was not, when injured, engaged in the performance of his duties as such employee, but had left the scene of his labors and was engaged in the pursuit of his own ends." Louisville, etc., R. Co. v. Wade, (Fla. 1903) 35 So. Rep. 863.

It has been held that the fellow-servant doctrine has no application in an action to recover for injuries received by the defendant's servant after he had finished his day's work as a track-layer and was on his way home on the defendant's street car. Peterson v. Seattle Traction Co., 23 Wash. 615.

And it has been held that a conductor who rides home to visit his family on Sunday, without payment of fare, on the train of his employer, is not, while so riding after his work has ceased, the fellow servant of the trainmen. Illinois Cent. R. Co. v. Leiner, 202 Ill. 624.

Where the plaintiff, who was employed in the defendant's workshop, at the time of the accident had finished his employment for the day, and had left the workshop and grounds of the defendant and was moving along a public highway in the city with the same rights as any other citizen would have, the fellow-servant doctrine could have no application. Fletcher v. Baltimore, etc., R. Co., 168 U. S. 135.

**990. 3. Common Employment in Service of Same Master Necessary. —** Weeks v. Scharer, (C. C. A.) 111 Fed. Rep. 330; Bosworth v. Rogers, (C. C. A.) 82 Fed. Rep. 975.

**Relation Not Dependent on Length of Association or Acquaintance. —** Whether particular servants are fellow servants does not depend upon the accident of acquaintance or the length of time the men have worked together. Chicago, etc., R. Co. v. White, 209 Ill. 124; Chicago, etc., R. Co. v. Bell, 209 Ill. 25; Chicago City R. Co. v. Leach, 208 Ill. 198, 100 Am. St. Rep. 216, reversing 104 Ill. App. 30; World's Columbian Exposition v. Lehigh, 196 Ill. 612; World's Columbian Exposition v. Bell, 76 Ill. App. 591; Klees v. Chicago, etc., R. Co., 68 Ill. App. 244.

**6. Definition. —** See Spees v. Boggs, 198 Pa. St. 112, 82 Am. St. Rep. 792.

Generally speaking, a fellow servant may be said to be one who serves and is under the control of the same master as another servant engaged in the same common pursuit. Hurl v. New York Cent., etc., R. Co., 68 N. Y. App. Div. 400.

All serving a common master, working under the same control, deriving authority and compensation from the same source, and engaged in the same general business, although in different grades or departments, are fellow servants, and take the risk of each other's negligence. W. R. Trigg Co. v. Lindsay, 101 Va. 103.

**991. 1. Same —** Where the Different-depart-

ment Limitation Prevails. — Where one employee is injured by the negligence of another while they are co-operating with each other in a particular business in the line of their employment and the due observance of their duties, necessarily exercising an influence upon each other promotive of proper caution, they are to be considered as fellow servants. Chicago, etc., R. Co. v. Bell, 209 Ill. 25; Cleveland, etc., R. Co. v. Lawler, 94 Ill. App. 36.

To come within the scope of the Kentucky fellow-servant rule the servants must be engaged in the same field of labor and the same grade of employment, the one not superior or subordinate to the other. Edmonson v. Kentucky Cent. R. Co., 105 Ky. 479.

**2. Common Employment Necessary. —** Hurl v. New York Cent., etc., R. Co., 68 N. Y. App. Div. 400; McTaggart v. Eastman's Co., (Supm. Ct. App. T.) 28 Misc. (N. Y.) 127, affirming (N. Y. City Ct. Gen. T.) 27 Misc. (N. Y.) 184; Hammarberg v. St. Paul, etc., Lumber Co., 19 Wash. 537.

To constitute servants of the same master fellow servants, it is essential that they shall be, at the time of the injury, directly co-operating with each other in a particular business in the same line of employment, or that their duties shall bring them into habitual association, so that they may exercise an influence upon each other promotive of proper caution. Chicago, etc., R. Co. v. Mikesell, 113 Ill. App. 146.

**4. Hammarberg v. St. Paul, etc., Lumber Co.,** 19 Wash. 537.

In Illinois, where the different-department limitation is recognized, it has been said that to create the fellow-servant relation, the servants must be directly co-operating with each other in a particular work at the time of the injury, or their usual duties must be such as to bring them into such habitual association as will afford them the power and opportunity of exercising an influence, each upon the other, promotive of their mutual safety. Indiana, etc., R. Co. v. Otstot, 212 Ill. 429, affirming 113 Ill. App. 37; Chicago City R. Co. v. Leach, 208 Ill. 198, 100 Am. St. Rep. 216, reversing 104 Ill. App. 30; Chicago, etc., R. Co. v. Wise, 206 Ill. 453, affirming 106 Ill. App. 174; Duffy v. Kivilin, 195 Ill. 630; Pagels v. Meyer, 193 Ill. 172, 88 Ill. App. 169; Otstot v. Indiana, etc., R. Co., 103 Ill. App. 136; Tierney v. Chicago Junction R. Co., 92 Ill. App. 631; Chicago Architectural Iron Works v. Nagel, 80 Ill. App. 492; Illinois Cent. R. Co. v. Swisher, 74 Ill. App. 164, affirmed 182 Ill. 533; Chicago, etc., R. Co. v. Swan, 70 Ill. App. 331, affirmed 176 Ill. 424.

But it is not necessary to the existence of the relation that the servants should be both "directly co-operating with each other in a particular business in the same line of employment," and that their duties should be such "as to bring them into habitual association, so

**992.** See notes 1, 2.

that they may exercise a mutual influence upon each other promotive of proper caution;" it is sufficient if either of these conditions exist. *Chicago, etc., R. Co. v. Stallings*, 90 Ill. App. 609.

**992.** 1. *Mann v. O'Sullivan*, 126 Cal. 61, 77 Am. St. Rep. 149.

Whenever coemployees under the control of one master are engaged in the discharge of duties directed to one common end, such duties being so closely related that each employee must know he is exposed to the risk of being injured by the negligence of another, they are fellow servants, and each assumes the risk to which he is thus exposed. *Donnelly v. Cudahy Packing Co.*, 68 Kan. 653.

**2. Employment on Same Piece of Work Not Necessary.** — *Northern Pac. R. Co. v. Dixon*, 194 U. S. 338; *New England R. Co. v. Conroy*, 175 U. S. 323; *Indianapolis, etc., Rapid Transit R. Co. v. Andis*, 33 Ind. App. 625; *Indianapolis, etc., Rapid Transit R. Co. v. Foreman*, 162 Ind. 85, 102 Am. St. Rep. 185; *Buck v. New Jersey Zinc Co.*, 204 Pa. St. 132; *Spees v. Boggs*, 198 Pa. St. 112, 82 Am. St. Rep. 792; *Wilson v. Charleston, etc., R. Co.*, 51 S. Car. 91; *Grant v. Keystone Lumber Co.*, 119 Wis. 229, 100 Am. St. Rep. 883; *MacCarthy v. Whitcomb*, 110 Wis. 113. See *Chicago City R. Co. v. Leach*, 208 Ill. 198, 100 Am. St. Rep. 216, *reversing* 104 Ill. App. 30.

It is not necessary to the existence of the fellow-servant relation that the servants should be engaged "in the same operation or particular work;" it is sufficient that they are employed to perform duties "tending to accomplish the same general purposes." *Louisville, etc., R. Co. v. Stuber*, (C. C. A.) 108 Fed. Rep. 934, *reversing* 102 Fed. Rep. 421.

**Work of Different Character.** — To constitute the fellow-servant relation it is not necessary that both the injured and the negligent employee should have been engaged in doing work of the same character. *Woodward Iron Co. v. Cook*, 124 Ala. 349; *Koszowski v. American Locomotive Co.*, 96 N. Y. App. Div. 40.

**Louisiana Rule.** — But it has been said that to bring a case within the fellow-servant rule of Louisiana the negligent and the injured servants "must be men in the same common employment and engaged in the same common work under that common employment." *Merritt v. Victoria Lumber Co.*, 111 La. 159, holding that a servant who was employed in a saw-mill to keep the floor and passageway of the workshop clear of trash or pieces of timber, and a sawyer, were not fellow servants.

**Rule under Texas Statute Relating to Railroads.** — In Texas it is provided by a statute relating to persons, receivers, and corporations controlling or operating railroads (Laws 1897, Sp. Sess., c. 6; Rev. Stat., art. 4560g) that "all persons who are engaged in the common service of such person, receiver, or corporation, controlling or operating a railroad or street railway, and who while so employed are in the same grade of employment and are doing the same character of work or service, and are working together at the same time and place and at the

same piece of work and to a common purpose, are fellow servants with each other. Employees who do not come within the provisions of this section shall not be considered fellow servants." Under this statute it has been held that section men on a hand car who were carrying their tools back to the tool house after the day's work had been finished, and section men who were walking to the tool house with their tools were not fellow servants; they were not doing the "same character of work" or working together "at the same piece of work," within the meaning of the statute. *Long v. Chicago, etc., R. Co.*, 94 Tex. 53.

A switchman on one engine and a fireman on another in the same yard, each engine doing a different kind of switch work, although they used the same tracks to some extent, have been held not to be fellow servants. *Masterson v. Galveston, etc., R. Co.*, (Tex. Civ. App. 1897) 42 S. W. Rep. 1001.

A roundhouse employee who is injured while keeping alive the fire in an engine which is standing in the roundhouse over the cinder pit, through the negligence of a person who is running an engine into the roundhouse and who acts under the orders of an outside foreman, is not within the fellow-servant doctrine. *Texas, etc., R. Co. v. Scruggs*, 23 Tex. Civ. App. 712.

A "cleator" or "sealer" who inspects the doors of freight cars and the fastenings thereon, and prepares the cars for workmen to work in them, and a truckman who takes his truck into a car and, when the truck is loaded, carries the load to the place indicated by the check clerk, are not fellow servants within the statute. *Missouri, etc., R. Co. v. Hutchins*, 35 Tex. Civ. App. 343.

The engineer on one train and the brakeman on another train are not fellow servants, within the definition of the term as used in the *Texas* statutes. *Houston, etc., R. Co. v. Patterson*, 20 Tex. Civ. App. 255.

The switchmen on two different engines engaged in switching in the same yard are not fellow servants. *Galveston, etc., R. Co. v. Masterson*, (Tex. Civ. App. 1899) 51 S. W. Rep. 1091.

Laborers handling rails and a workman who has been detailed to give directions are fellow servants within the statute. *Lakey v. Texas, etc., R. Co.*, 33 Tex. Civ. App. 44.

**Rule under Utah Statute.** — It is provided by statute in Utah (Utah Rev. Stat. 1898, § 1343) that all persons engaged in the service of any person, firm, or corporation, foreign or domestic, doing business in this state, "and who, while so engaged, are in the same grade of service and are working together at the same time and place and to a common purpose, neither of such persons being intrusted by such employer with any superintendence or control over his fellow employees, are fellow servants with each other, provided that nothing herein contained shall be so construed as to make the employees of such employer fellow servants with other employees engaged in any other department of service of such employer. Employees who do not come within the provisions of this section



- 992.** 4. Necessity of a Common Master — *a.* GENERAL RULE. — See note 3.
- 993.** *b.* REASONS FOR THE RULE. — See note 1.
- c.* EMPLOYEES OF DIFFERENT RAILROAD COMPANIES — In General. — See note 2.
- Effect of Agreement under Which One Road Uses Track or Station of the Other. — See note 3.
- 994.** See notes 1, 2, 3.
- d.* EMPLOYEES OF PALACE-CAR COMPANY AND EMPLOYEES OF RAILROAD. — See note 5.
- 995.** *f.* SERVANTS OF PRINCIPAL AND INDEPENDENT CONTRACTOR. — See note 2.

shall not be considered fellow servants." Under this statute it has been held that a miner and the operator of the elevator in a mine are not fellow servants. *Jenkins v. Mammoth Min. Co.*, 24 Utah 513. See *Dryburg v. Mercur Gold Min., etc., Co.*, 18 Utah 410.

**992.** 3. Common Master Necessary — *United States.* — *Robinson v. Pittsburg Coal Co.*, (C. C. A.) 129 Fed. Rep. 324; *The Gladestry*, (C. C. A.) 128 Fed. Rep. 591; *Bosworth v. Rogers*, (C. C. A.) 82 Fed. Rep. 975.

*Alabama.* — *Holmes v. Birmingham Southern R. Co.*, 140 Ala. 208.

*Colorado.* — *Union Gold Min. Co. v. Crawford*, 29 Colo. 511.

*Connecticut.* — *Brennan v. Berlin Iron Bridge Co.*, 74 Conn. 382.

*Illinois.* — *Chicago Transit Co. v. Campbell*, 110 Ill. App. 366; *Tierney v. Chicago Junction R. Co.*, 92 Ill. App. 631; *John Spry Lumber Co. v. Duggan*, 80 Ill. App. 394, *affirmed* and opinion adopted 182 Ill. 218; *Illinois Cent. R. Co. v. McCowan*, 70 Ill. App. 345.

*Kentucky.* — *Kentucky, etc., Bridge, etc., Co. v. Sydor*, 82 S. W. Rep. 989, 26 Ky. L. Rep. 951.

*Missouri.* — *Dale v. Hill O'Meara Constr. Co.*, 108 Mo. App. 90.

*New Jersey.* — *Norman v. Middlesex, etc., Traction Co.*, 68 N. J. L. 728; *Jansen v. Jersey City*, 61 N. J. L. 243.

*New York.* — *Moran v. Carlson*, 95 N. Y. App. Div. 116; *Thornton v. Hogan*, 82 N. Y. App. Div. 500; *Harrington v. Erie R. Co.*, 79 N. Y. App. Div. 26; *Lauro v. Standard Oil Co.*, 74 N. Y. App. Div. 4; *Hurl v. New York Cent., etc., R. Co.*, 68 N. Y. App. Div. 400; *Mills v. Thomas Elevator Co.*, 54 N. Y. App. Div. 124, *affirmed* without opinion 172 N. Y. 660.

*North Carolina.* — *Hopper v. Southern Express Co.*, 133 N. Car. 375.

*Pennsylvania.* — *Connelly v. Faith*, 190 Pa. St. 553.

*Vermont.* — *Sherman v. Delaware, etc., Canal Co.*, 71 Vt. 325.

**Servants Paid by Common Master.** — "Subjection to control and direction by the same general master in the same common object," and not the fact that employees are paid by the same general master, is the test of fellow service. *Ingram v. Hilton, etc., Lumber Co.*, 108 Ga. 194.

**Employment by Agent of Defendant.** — It has been held that if the plaintiff was employed and paid by a person who was acting as the mere agent of the defendant the relation of master and servant existed between the plaintiff and the defendant, and the plaintiff was the fellow

servant of the other servants of the defendant who were engaged in the common employment. *Norman v. Middlesex, etc., Traction Co.*, 68 N. J. L. 728.

**Pennsylvania Statute of 1868.** — It was provided by the Act of April 4, 1868, "that when any person shall sustain personal injury or loss of life while lawfully engaged or employed on or about the roads, works, depots, and premises of a railroad company, or in or about any train or car therein or thereon, of which company such person is not an employee, the right of action and recovery in all such cases against the company shall be such only as would exist if such person were an employee." By statute the general rule that those only are fellow servants who are employed by the same master is considerably relaxed. *Laporte v. Pittsburg, etc., R. Co.*, 209 Pa. St. 469; *Peplinski v. Pennsylvania R. Co.*, 203 Pa. St. 52; *Kelly v. Union Traction Co.*, 199 Pa. St. 322, *affirming* 9 Pa. Dist. 69; *Weaver v. Philadelphia, etc., R. Co.*, 202 Pa. St. 620.

**993.** 1. *Hopper v. Southern Express Co.*, 133 N. Car. 375, *citing* 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 993.

2. **Servants of Different Railroads.** — *Kelly v. Union Traction Co.*, 199 Pa. St. 322, *affirming* 9 Pa. Dist. 69; *Sherman v. Delaware, etc., Canal Co.*, 71 Vt. 325.

**Employees of Railroad Company and Employees of Depot Company** are not fellow servants. *Brady v. Chicago, etc., R. Co.*, (C. C. A.) 114 Fed. Rep. 100.

3. **Servants of Different Roads Where One Uses Tracks or Station of the Other.** — *Tierney v. Chicago Junction R. Co.*, 92 Ill. App. 631.

**994.** 1. **Same — Recovery Permitted Against Company Owning Road.** — *Hurl v. New York Cent., etc., R. Co.*, 68 N. Y. App. Div. 400.

2. **Same — Actions by Servants of the Road Owning the Track or Station.** — *Bosworth v. Rogers*, (C. C. A.) 82 Fed. Rep. 975.

3. *Shugart v. Atlanta, etc., R. Co.*, (C. C. A.) 133 Fed. Rep. 505.

5. **Servants of Palace-car Company and Railroad Company Respectively.** — *M'Dermion v. Southern Pac. R. Co.*, 122 Fed. Rep. 669, *quoting* 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 994.

**995.** 2. **Servants of Principal and Servants of Independent Contractor.** — *John Spry Lumber Co. v. Duggan*, 80 Ill. App. 394, *affirmed* and opinion adopted 182 Ill. 218; *Mills v. Thomas Elevator Co.*, 54 N. Y. App. Div. 124, *affirmed* without opinion 172 N. Y. 660; *Coates v. Chapman*, 195 Pa. St. 109; *Hoadley v. International Paper Co.*, 72 Vt. 79.



**996.** See note 1.

*h.* SERVANTS OF CONTRACTOR AND SUBCONTRACTOR. — See note 3.

*i.* SERVANT OF ONE MASTER UNDER CONTROL OF ANOTHER. — See note 5.

**997.** See note 1.

**998.** *j.* SERVANTS OF ONE MASTER VOLUNTARILY ASSISTING SERVANTS OF ANOTHER. — See note 1.

**5. Instances of Fellow Servants —** *b.* RAILROAD EMPLOYEES — Trainmen on the Same Train. — See note 3.

**999.** Same — Engineer and Trainmen. — See notes 1, 3, 4.

**Independent Contractor and Servants of Principal.** — One who is himself an independent contractor is not a servant of the principal and consequently is not a fellow servant of the principal's servants. *Gayle v. Missouri Car, etc., Co.*, 177 Mo. 427.

**996. 1** The mere fact that one who has contracted to erect a building has given instructions to his foreman to obey directions of a superintendent who was employed by the owner of the building to see that the contract was complied with, has been held not to make the employees of the contractor and those of the owner coemployees within the meaning of the rule respecting the negligence of fellow servants. *Coates v. Chapman*, 195 Pa. St. 109.

**3. Servants of Contractor and Subcontractor Respectively.** — *Dale v. Hill O'Meara Constr. Co.*, 108 Mo. App. 90; *Jansen v. Jersey City*, 61 N. J. L. 243.

**5. Servant of One Employer under Control of Another.** — *Grace, etc., Co. v. Probst*, 208 Ill. 147; *Parkhurst v. Swift*, 31 Ind. App. 521; *Delory v. Blodgett*, 185 Mass. 126, 102 Am. St. Rep. 328; *Norman v. Middlesex, etc., Traction Co.*, 68 N. J. L. 728; *Breslin v. Sparks*, 97 N. Y. App. Div. 69; *Cunningham v. Syracuse Imp. Co.*, 20 N. Y. App. Div. 171; *Hastings v. Le Roi*, No. 2, 34 Can. Sup. Ct. 177, affirming 10 British Columbia 9. See *Quinn v. National Sugar Refining Co.*, 102 N. Y. App. Div. 47.

**997. 1. Servant's Want of Knowledge of Change of Masters.** — *Brennan v. Berlin Iron Bridge Co.*, 74 Conn. 382; *Missouri, etc., R. Co. v. Ferch*, 18 Tex. Civ. App. 46.

**998. 1. Where Servants of One Master Voluntarily Assist Servants of Another.** — *Murray v. Dwight*, 161 N. Y. 301. See *Longa v. Stanley Hod Elevator Co.*, 69 N. J. L. 31.

**3. Employees on the Same Train.** — *Hale v. Kansas City Southern R. Co.*, (C. C. A.) 120 Fed. Rep. 735. See *Connelly v. Faith*, 190 Pa. St. 553.

**Brakemen on Same Train.** — There can be no recovery against a railroad company for the negligence of one brakeman in giving a signal to back the train resulting in injury to another. *Hawks v. Lake Shore, etc., R. Co.*, 8 Ohio Cir. Dec. 414, 16 Ohio Cir. Ct. 377.

**Fireman and Brakeman on Same Train** are fellow servants. *St. Louis, etc., R. Co. v. Brown*, 67 Ark. 295; *Southern R. Co. v. Clifford*, 110 Ky. 727.

**The Engineers on a Train Drawn by Two Engines** are fellow servants. *Cincinnati, etc., R. Co. v. Roberts*, 110 Ky. 856.

**Conductor and Engineer on Same Train** are fel-

low servants. *Edmonson v. Kentucky Cent. R. Co.*, 105 Ky. 479.

**Engineer and Baggage-man on Same Train.** — In *Illinois*, where the different-department limitation has been adopted, the engineer and baggage-man on the same train cannot be said to be fellow servants as a matter of law. *Chicago, etc., R. Co. v. Swan*, 176 Ill. 424, affirming 70 Ill. App. 331.

**999. 1. Engineer and Trainman Injured Through Engineer's Negligence — Held Not to Be Fellow Servants.** — *Illinois Cent. R. Co. v. Stewart*, 63 S. W. Rep. 596, 23 Ky. L. Rep. 637.

**Engineer and Fireman.** — A railroad company has been held to be liable for the negligence of an engineer resulting in injury to the fireman while making a coupling which he has been directed to make. *Pennsylvania R. Co. v. Hickley*, 11 Ohio Cir. Dec. 379, 20 Ohio Cir. Ct. 668.

Under the *Utah* statute which recognizes the superior-servant limitation a railroad company is liable for an injury to a fireman in consequence of the negligence of the engineer, although the negligence was committed while the engineer was not exercising his authority to superintend the action of the fireman or to direct him in the performance of any of his duties. *Southern Pac. R. Co. v. Schoer*, (C. C. A.) 114 Fed. Rep. 466.

**Fireman Temporarily Acting as Engineer and Brakeman.** — In *Kentucky* the engineer of the train is not a fellow servant with a brakeman, and when the fireman for a time acts as engineer in his absence from the engine, he is then engineer, and is not a fellow servant of the brakeman. *Louisville, etc., R. Co. v. Sullivan*, 76 S. W. Rep. 525, 25 Ky. L. Rep. 854.

**3. Engineer and Fireman on Same Train.** — It has been held that there can be no recovery by a fireman for the negligence of the engineer on the same train. *Illinois Cent. R. Co. v. Butler*, 69 Ill. App. 128; *Sanks v. Chicago, etc., R. Co.*, 112 Ill. App. 385; *Cleveland, etc., R. Co. v. Lawler*, 94 Ill. App. 36; *Brewster v. Chicago, etc., R. Co.*, 114 Iowa 144 (wherein the cause of action arose under the law of *Illinois*); *Bell v. Globe Lumber Co.*, 107 La. 725; *Grattis v. Kansas City, etc., R. Co.*, 153 Mo. 380, 77 Am. St. Rep. 721.

**4. Briegal v. Southern Pac. R. Co.**, (C. C. A.) 98 Fed. Rep. 958.

**Engineer and Fireman Who Is Injured Through Engineer's Negligence.** — *Meyer v. Illinois Cent. R. Co.*, 177 Ill. 591; *Baltimore, etc., R. Co. v. Reed*, 158 Ind. 25, 92 Am. St. Rep. 293; *Norfolk, etc., R. Co. v. Cromer*, 101 Va. 667.

- 1001.** Same — Conductor and Members of His Crew. — See notes 1, 2.  
**1002.** See note 1.  
**1003.** Same — Trainmen and Other Employees Riding on the Train. — See note 1.  
**1004.** See note 1.  
 Employees on Different Trains. — See note 2.  
**1005.** See notes 1, 2.

**1001. 1. Conductor and Trainhand Injured through Conductor's Negligence — Held Not to Be Fellow Servants.** — *Lake Erie, etc., R. Co. v. Mulcahy*, 9 Ohio Cir. Dec. 82, 16 Ohio Cir. Ct. 204; *Rhodes v. Southern R. Co.*, 68 S. Car. 494; *Hicks v. Southern R. Co.*, 63 S. Car. 559; *Alabama G. S. R. Co. v. Baldwin*, 113 Tenn. 409; *Grout v. Tacoma Eastern R. Co.*, 33 Wash. 524; *Howe v. Northern Pac. R. Co.*, 30 Wash. 569.

In *Kentucky* a railroad company is liable for injuries sustained by a fireman in consequence of the negligence of the conductor of the train. *Cincinnati, etc., R. Co. v. Maley*, 76 S. W. Rep. 334, 25 Ky. L. Rep. 690.

**2. Same — Held to Be Fellow Servants.** — *New England R. Co. v. Conroy*, 175 U. S. 323 (wherein it is said that in *Chicago, etc., R. Co. v. Ross*, 112 U. S. 377, the court went too far in holding that a conductor of a freight train is, *ipso facto*, a vice-principal of the company); *North Chicago St. R. Co. v. Dudgeon*, 69 Ill. App. 57; *Grattis v. Kansas City, etc., R. Co.*, 153 Mo. 380, 77 Am. St. Rep. 721; *Ott v. Lake Shore, etc., R. Co.*, 10 Ohio Cir. Dec. 85, 18 Ohio Cir. Ct. 395, decided under the law of *Michigan*.

**Motorman and Conductor on Same Street Car** are fellow servants. *McLeod v. Chicago, etc., R. Co.*, 125 Iowa 270.

**1002. 1. Conductor and Engineer Where the Conductor Is Injured Through the Brakeman's Negligence.** — There can be no recovery by a conductor for injuries sustained through the negligence of the engineer, although the conductor is acting as brakeman at the time of the accident. *Linck v. Louisville, etc., R. Co.*, 107 Ky. 370.

**Conductor and Motorman on Same Street Car.** — The conductor of a street car cannot recover for injuries received through the negligence of the motorman. *Godfrey v. St. Louis Transit Co.*, 107 Mo. App. 193.

**1003. 1. Trainmen and Other Employees of the Company Riding on the Train — Held to Be Fellow Servants.** — *Louisville, etc., R. Co. v. Stuber*, (C. C. A.) 108 Fed. Rep. 934, reversing 102 Fed. Rep. 421; *Tomlinson v. Chicago, etc., R. Co.*, (C. C. A.) 97 Fed. Rep. 252; *Railey v. Garbutt*, 112 Ga. 288; *Indianapolis, etc., Rapid Transit R. Co. v. Andis*, 33 Ind. App. 625; *Indianapolis, etc., Rapid Transit R. Co. v. Foreman*, 162 Ind. 85, 102 Am. St. Rep. 185; *McLaughlin v. Interurban St. R. Co.*, 101 N. Y. App. Div. 134. *Contra*, *Dickinson v. West End St. R. Co.*, 177 Mass. 365, 83 Am. St. Rep. 284; *McNulty v. Pennsylvania R. Co.*, 182 Pa. St. 479, 61 Am. St. Rep. 721.

**1004. 1. Same — Held Not to Be Fellow Servants.** — See *Dobson v. New Orleans, etc., R. Co.*, 52 La. Ann. 1127.

**2. Rule Where Different-department Limitation Is Not Recognized.** — *Beaumont v. Northern Pac. R. Co.*, (C. C. A.) 109 Fed. Rep.

532; *Maier v. Union Pac., etc., R. Co.*, (C. C. A.) 106 Fed. Rep. 309; *Little Rock, etc., R. Co. v. Barry*, (C. C. A.) 84 Fed. Rep. 944; *Stephani v. Southern Pac. R. Co.*, 19 Utah 196 (decided under the common law of *Nevada*); *Pleasants v. Raleigh, etc., Air Line R. Co.*, 121 N. Car. 492, 61 Am. St. Rep. 674; *Welsh v. Pennsylvania R. Co.*, 192 Pa. St. 69; *Hoover v. Carbon County Electric R. Co.*, 191 Pa. St. 146; *Hicks v. Southern R. Co.*, 63 S. Car. 559; *MacCarthy v. Whitcomb*, 110 Wis. 113.

**Flagman of One Train and Engineer of Another** are fellow servants. *Miller v. Central R. Co.*, 69 N. J. L. 413.

**Workmen on Different Hand Cars** are fellow servants. *Baltimore, etc., R. Co. v. Henderson*, 31 Ind. App. 441.

**Employees on Different Street Cars.** — Although the different-department limitation is recognized in *Missouri*, it has been held that the conductor on one street car and the motorman on another car are fellow servants, since they are both in the operating department of the company, and charged with the management of cars. *Stocks v. St. Louis Transit Co.*, 106 Mo. App. 129.

**1005. 1. Rule Where Different-department Limitation Is Favored — Employees on Different Trains Held to Be Fellow Servants.** — *Chicago City R. Co. v. Leach*, 208 Ill. 198, 100 Am. St. Rep. 216, reversing 104 Ill. App. 30; *Chicago, etc., R. Co. v. Thompson*, 99 Ill. App. 277; *Sanner v. Atchison, etc., R. Co.*, 17 Tex. Civ. App. 337. But see *Stocks v. St. Louis Transit Co.*, 106 Mo. App. 129, wherein it was said that the doctrine of *Relyea v. Kansas City, etc., R. Co.*, 112 Mo. 86, 53 Am. & Eng. R. Cas. 578, in favor of the departmental test of co-service, has been shaken by later decisions.

**Members of Different Switch Crews in Same Yard.** — It has been held that where two switching crews are in the employ of the same railway company, subject to the control and direction of the same yardmaster, no member of either of said crews having any right of control or direction over any member of the other crew, both crews simultaneously engaged in switching the same cars from one part to another of the same switch yard, then the two crews and the members thereof are consociated in the same department of duty or line of employment, and each member of one crew is the fellow servant of each member of the other crew. *Missouri Pac. R. Co. v. Lyons*, 54 Neb. 633. And see *Chicago, etc., R. Co. v. Hartley*, 90 Ill. App. 284.

It has also been held that the members of a switching crew and a road crew whose employment requires them to do switch work in the same yards are fellow servants. *Klees v. Chicago, etc., R. Co.*, 68 Ill. App. 244.

**2. Cincinnati, etc., R. Co. v. Roberts**, 110 Ky. 856.

In *Illinois* it has been said that the courts will not hold as a matter of law that employees

**1005.** Trainmen and Trackmen. — See note 3.

**1006.** See note 1.

**1007.** See note 1.

Telegraph Operator and Trainmen — Prevailing Rule. — See note 3.

Same — Where Different-department Rule Prevails. — See note 4.

**1008.** Yard Master and Yard Hand. — See notes 1, 2.

Inspectors or Repairers and Other Employees. — See note 4.

**1009.** Other Employees — In General. — See note 1.

on different trains are fellow servants in the absence of proof that their habitual duties brought them into habitual consociation. *Wabash R. Co. v. Bhymer*, 112 Ill. App. 225, reversed and remanded 214 Ill. 579.

**Under Ohio Statutes.** — Under the act of the Ohio legislature (87 Ohio Laws, p. 150) providing that every person in the employ of a railroad company "having charge or control of employees in any separate branch or department shall be held to be the superior and not fellow servant of employees in any other branch or department who have no power to direct or control in the branch or department in which they are employed," it has been held that an engineer upon one train is not the fellow servant of a fireman upon another train although the only employee over whom the engineer has control is his fireman. *Erie R. Co. v. Kane*, (C. C. A.) 118 Fed. Rep. 223.

**1005. 3. Trainmen and Sectionmen** are fellow servants. *Dishon v. Cincinnati*, etc., R. Co., 126 Fed. Rep. 194 (holding that the fellow-servant relation existed between the plaintiff, a section hand, and trainmen, although it was after working hours when the accident happened and the plaintiff was on his way home); *Slavens v. Northern Pac. R. Co.*, (C. C. A.) 97 Fed. Rep. 255; *Miller v. Michigan Cent. R. Co.*, 123 Mich. 374; *Wright v. Northampton*, etc., R. Co., 122 N. Car. 852.

**Trainmen and a Bridge Builder and Repairer** are fellow servants. *Tomlinson v. Chicago*, etc., R. Co., (C. C. A.) 97 Fed. Rep. 252.

**Trainmen and a Flagman** are fellow servants. *O'Neil v. Pittsburg*, etc., R. Co., 130 Fed. Rep. 204.

**Yardmaster and Fireman on Switch Engine** are fellow servants. *Pennsylvania R. Co. v. Fishack*, (C. C. A.) 123 Fed. Rep. 465.

**1006. 1. Trackmen and Trainmen Held Not to Be Fellow Servants.** — *Chicago*, etc., R. Co. v. Cullen, 87 Ill. App. 374, judgment affirmed 187 Ill. 523; *Freeman v. Illinois Cent. R. Co.*, 107 Tenn. 340. See *Chesapeake*, etc., R. Co. v. Venable, 111 Ky. 41.

**Trainmen and Station Agent.** — A conductor acting as brakeman in making up a train, and the station agent, have been held not to be fellow servants. *Louisville*, etc., R. Co. v. Jackson, 106 Tenn. 438.

**1007. 1. Fellow Service of Trackmen and Trainmen Dependent on Extent of Consociation.** — *Ottot v. Indiana*, etc., R. Co., 103 Ill. App. 136. See *Chicago*, etc., R. Co. v. Eaton, 96 Ill. App. 570, affirmed 194 Ill. 441, 88 Am. St. Rep. 161.

**Gateman at Crossing and Foreman of Switch Crew** cannot be said, as a matter of law, to be fellow servants. *Chicago*, etc., R. Co. v. Wise, 206 Ill. 453, affirming 106 Ill. App. 174.

**3. Telegraph Operator and Trainmen Held to**

**Be Fellow Servants.** — See *supra*, the cases supplementing page 968, note 6.

**Engineer on Train and Tower Switchman** have been held to be fellow servants even in *Illinois*, where a form of the different-department limitation is recognized. *Cleveland*, etc., R. Co. v. Lawler, 94 Ill. App. 36.

**4. Telegraph Operator and Trainmen Held Not to Be Fellow Servants.** — *Northern Pac. R. Co. v. Dixon*, 194 U. S. 338; *Louisville*, etc., R. Co. v. Jackson, 106 Tenn. 438.

Under the *Arkansas* statute which recognizes both the superior-servant and different-department limitations, a fireman and a telegraph operator have been held not to be fellow servants. *St. Louis*, etc., R. Co. v. Furry, (C. C. A.) 114 Fed. Rep. 898.

**1008. 1. General Yard Master and Yard Foreman** are fellow servants. *Cincinnati*, etc., R. Co. v. Gray, (C. C. A.) 101 Fed. Rep. 623.

**Yard Master and Foreman of Switching Gang** are fellow servants. *Thomas v. Cincinnati*, etc., R. Co., 97 Fed. Rep. 245.

**2. Yard Master Held Not to Be a Fellow Servant with Subordinate Employees.** — Under the *Arkansas* statute recognizing the superior-servant limitation a yard foreman is not the fellow servant of the members of a switch crew over whom he had control. *St. Louis*, etc., R. Co. v. Touhey, 67 Ark. 209.

**4. Car Repairer Injured Through Negligence of Brakeman or Switchman.** — *Fullmer v. New York Cent.*, etc., R. Co., 208 Pa. St. 598.

**Yard Master and Car Repairer in Same Yard** are fellow servants. *State v. South Baltimore Car Works*, 99 Md. 461.

**Master Car Builder and Foreman of Car Repair Shops** are fellow servants. *Grady v. Southern R. Co.*, (C. C. A.) 92 Fed. Rep. 491.

**1009. 1. Foreman and Members of Wrecking Crew** are fellow servants. *Flippin v. Kimball*, (C. C. A.) 87 Fed. Rep. 258.

**Foreman and Workman in Railway Machine Shop** are fellow servants. *Gaynon v. Durkee*, (C. C. A.) 87 Fed. Rep. 302.

**Section Foreman and the Section Hands** are fellow servants. *Lochbaum v. Oregon R.*, etc., Co., (C. C. A.) 104 Fed. Rep. 852.

**Employee in Charge of Drawbridge and Section Hands** are fellow servants. *Illinois Cent. R. Co. v. Bishop*, 76 Miss. 758.

**Carpenter and Laborers in Gang Setting Poles Along Railroad.** — A carpenter who works with a gang of laborers in setting poles along a railroad, but is not vested with authority over the laborers, and is with them under the authority of a foreman, is not a person intrusted "with authority of superintendence, control, or command," or "with authority to direct" under the *Arkansas* statute. *Hunter v. Kansas City*, etc., R., etc., Co., (C. C. A.) 85 Fed. Rep. 379.



**1010.** Same — Laborers Loading or Unloading Cars, and Other Employees. — See note 5.

Employees in and About Roundhouse. — See note 6.

**1011.** Roundhouse and Other Employees. — See note 1.

*c.* EMPLOYEES ON AND ABOUT VESSELS — Seamen or Other Employees on Same Vessel. — See note 4.

Mates and Members of Crew. — See note 5.

**1012.** Master of Vessel and Members of Crew. — See notes 1, 2, 3.

Workmen Loading and Unloading Vessels. — See note 6.

**Car Repairer and Foreman of Switch Crew.** — In *Utah*, where there is a statute which recognizes a form of the different-department limitation in defining fellow servants, a car repairer at work in the yard may recover for the negligence of the foreman of a switch crew in the yard. *Pool v. Southern Pac. R. Co.*, 20 *Utah* 210.

**Members of Two Switching Crews in Same Yard** have been held to be fellow servants as a matter of law. *Chicago, etc., R. Co. v. Driscoll*, 176 *Ill.* 330.

**1010. 5. Employees Loading or Unloading Cars and Employees Placing Cars in Position.** — *La Barre v. Grand Trunk Western R. Co.*, 133 *Mich.* 102, 10 *Detroit Leg. N.* 146 (holding that a member of a section gang injured while engaged in loading cars could not recover for the negligence of the engineer in starting the train); *Overton v. McCabe*, 35 *Tex. Civ. App.* 133, applying the law of *Indian Territory*.

**Subforeman in Charge of Transfer Table, and Workman Unloading Car**, have been held to be fellow servants. *Peterson v. New York, etc., R. Co.*, 77 *Conn.* 351.

**Workmen Unloading Train, and Trackmaster.** — It has been held that the fellow-servant doctrine prevented a recovery by a member of a crew which was engaged in removing gravel from a ballasting train who was injured through the negligence of a trackmaster. *Day v. Canadian Pac. R. Co.*, 36 *N. Bruns.* 323.

**6. Roundhouse Employees.** — *Chicago, etc., R. Co. v. Bell*, 209 *Ill.* 25.

**Head Hostler and Wiper** have been held to be fellow servants. *Smith v. St. Louis, etc., R. Co.*, 151 *Mo.* 391.

**1011. 1. Yard and Roundhouse Employee.** — *Indiana, etc., R. Co. v. Otstot*, 212 *Ill.* 429.

In *Kentucky* an employee known as a hostler, whose duty it was to take charge of the engines in the yard, is not a fellow servant of a car inspector at work in the yard. *Louisville, etc., R. Co. v. Lowe*, 80 *S. W. Rep.* 768, 25 *Ky. L. Rep.* 2317; *Louisville, etc., R. Co. v. Lowe*, (*Ky.* 1902) 66 *S. W. Rep.* 736.

But it has been held that the question whether an employee in a roundhouse, whose duties were to take engines from the station to the roundhouse when they came in off the road and to fetch them from the roundhouse to the station when they were to go out on the road, and a section man at work in the yard, are fellow servants, is a question for the jury. *Indiana, etc., R. Co. v. Otstot*, 212 *Ill.* 429, *affirming* 113 *Ill. App.* 37; *Otstot v. Indiana, etc., R. Co.*, 103 *Ill. App.* 136.

**Fireman and Inspector in Roundhouse.** — Under the *Arkansas* statute a locomotive fireman and a locomotive inspector employed in a round-

house are not fellow servants. *Kansas City, etc., R. Co. v. Becker*, 67 *Ark.* 1.

**Engineer and Fire Knocker.** — Under the *Arkansas* statute a locomotive engineer who supervises others is not the fellow servant of a fire knocker who has no one under him. *St. Louis, etc., R. Co. v. Thurmond*, 70 *Ark.* 411.

**4. Ship's Carpenter and Kitchen Boy.** — A carpenter and a kitchen boy on a steamship are fellow servants. *The Esperanza*, 133 *Fed. Rep.* 1015.

**Engineer and Oiler in Engine Room** are fellow servants. *McCarron v. Dominion Atlantic R. Co.*, 134 *Fed. Rep.* 762.

**5. The Miami, (C. C. A.)** 93 *Fed. Rep.* 218.

**Mate of Pilot Boat and Seaman in Small Boat** which has been lowered from the pilot boat are fellow servants. *Carlson v. United New York Sandy Hook Pilots Assoc.*, 93 *Fed. Rep.* 468.

**Assault on Seaman by Captain of the Watch.** — The fellow-servant doctrine cannot be invoked to prevent a recovery by a deck hand for an assault committed upon him by another deck hand who has been placed in temporary charge of the deck hands by the mate; when a deck hand is thus selected as captain of the watch he is for the time being an officer of the vessel within the meaning of section 5347 of the United States Revised Statutes which makes it a crime for the officer of an American vessel to wilfully beat or wound a member of the crew without just cause. *Memphis, etc., Packet Co. v. Hill, (C. C. A.)* 122 *Fed. Rep.* 246.

**1012. 1. Master of Vessel and Seamen Held to be Fellow Servants.** — *Sievers v. Eyre*, 122 *Fed. Rep.* 734; *Olson v. Oregon Coal, etc., Co.*, 96 *Fed. Rep.* 109; *Larssen v. Delaware, etc., R. Co.*, 59 *N. Y. App. Div.* 202.

**Officers of Vessel and Engineer.** — It has been held that the captain, chief engineer, and other employees on board a steamship are all fellow servants with an engineer. *Wyman v. The Steamship Duart Castle*, 6 *Can. Exch.* 387.

**2. Workman on Dredge and Captain of Tug Boat.** — Where the plaintiff at the time of the accident was engaged in placing a fender between a pile driver and a dredge belonging to the defendant and was injured, according to his claim, by being crushed between them by a tug which belonged to the defendant and was part of the dredging outfit coming up against either the pile driver or dredge, negligently and without warning, it was held that the plaintiff and the captain of the tug were fellow servants. *Belt v. Henry Du Bois' Sons Co.*, 97 *N. Y. App. Div.* 392.

**3. Keating v. Pacific Steam Whaling Co.**, 21 *Wash.* 415.

*Ryan v. Smith, (C. C. A.)* 85 *Fed. Rep.*

**1013.** *d.* EMPLOYEES IN AND ABOUT MINES. — See notes 5, 6, 7.

**1014.** *e.* EMPLOYEES IN MILLS, FACTORIES, ETC. — See note 2.

758; *Tydeman v. Prince Line*, 102 N. Y. App. Div. 279.

**Stevadore and Members of Crew** are not fellow servants. *Sansol v. Compagnie Générale Transatlantique*, 101 Fed. Rep. 390. Thus a sailor placed at the winch by the officers of a vessel is not a fellow servant of the employees of a stevedore. *The Elton*, 131 Fed. Rep. 562.

**Winchman Employed by Vessel and Servant of Firm of Stevedores** are not fellow servants. *The Gladestry*, (C. C. A.) 128 Fed. Rep. 591.

**Watchman on Vessel and Derrick Engineer** employed by different masters are not fellow servants. *Robinson v. Pittsburg Coal Co.*, (C. C. A.) 129 Fed. Rep. 324.

**1013. 5. Miners or Other Employees and Engineer in Charge of Hoist Engine.** — *Spring Valley Coal Co. v. Patting*, (C. C. A.) 86 Fed. Rep. 433; *Consolidated Coal Co. v. Seniger*, 79 Ill. App. 456, *affirmed* 179 Ill. 370; *Stoll v. Daly Min. Co.*, 19 Utah 271, wherein the *Utah Fellow-servant Act* of 1896 was not applicable.

A workman loading rock down in a quarry and a workman stationed on the bank of the quarry to give signals to the hoisting engineer have been held to be fellow servants. *Shaw v. Bambrick-Bates Constr. Co.*, 102 Mo. App. 666.

In *Illinois*, where the different-department limitation prevails, it has been held that a miner and a hoisting engineer are not fellow servants when their respective duties do not bring them into association with each other. *Spring Valley Coal Co. v. Patting*, 210 Ill. 342, *affirming judgment* 112 Ill. App. 4. And the engineer of the hoisting elevator and a mule driver riding on the elevator cannot be said to be fellow servants as a matter of law. *Duffy v. Kivilin*, 195 Ill. 630.

**Under Utah Statute Defining Fellow Servants.** — A miner and the operator of the elevator in a mine are not, it has been held, engaged in the same service, and working together at the same time and place, to a common purpose, so as to be fellow servants within the Utah statute. *Jenkins v. Mammoth Min. Co.*, 24 Utah 513.

**6. Miners and Ordinary Mining Boss.** — *Alaska Min. Co. v. Whelan*, 168 U. S. 86; *Cerrillos Coal R. Co. v. Deserant*, 9 N. Mex. 495, *approved* 9 N. Mex. 498, 500; *Velas v. Patton Coal Co.*, 197 Pa. St. 380; *Anderson v. Daly Min. Co.*, 16 Utah 28.

**Mining Boss Employed Pursuant to Statute and Other Employees.** — *Williams v. Thacker Coal, etc., Co.*, 44 W. Va. 599.

**Shift Boss and Workmen under Him.** — *Weeks v. Scharer*, (C. C. A.) 129 Fed. Rep. 333.

**Shift Foreman and Members of Another Shift.** — The foreman of a shift which has stopped work in a tunnel has been held to be a fellow servant of the members of a new shift. *Davis v. Trade Dollar Consol. Min. Co.*, (C. C. A.) 117 Fed. Rep. 122.

**7. Miscellaneous Instances of Fellow Service Between Mine Employees.** — *Cerrillos Coal R. Co. v. Deserant*, 9 N. Mex. 49.

An outside boss, or "top boss," whose duty it is to take charge of coal after it is taken from the mine, and to lower timber and material

for the workmen underground, is the fellow servant of ordinary miners. *Hughes v. Oregon Imp. Co.*, 20 Wash. 294.

An employee at the bottom of the shaft of a mine filling buckets, and an employee at the mouth of the shaft emptying the buckets as they came up and returning them, have been held to be fellow servants. *Adams v. Snow*, 106 Wis. 152.

**Tubmen.** — Two "tub-hustlers," one working at the bottom and the other at the mouth of a shaft, have been held to be fellow servants, although they were working under different foremen. *Jackson v. Lincoln Min. Co.*, 106 Mo. App. 441.

**Employees in Mine and Employees in Mill** connected by a tramway and operated as one enterprise by the same company have been held to be fellow servants. *Molique v. Iowa Gold Min., etc., Co.*, 18 Colo. App. 223.

**Dirt Scratcher and Boss Driver.** — It has been held to be error to take the question whether a "dirt scratcher" and a "boss driver" are fellow servants away from the jury. *Kellyville Coal Co. v. Humble*, 87 Ill. App. 437.

**Track Layer and Employee Keeping Up Furnace Fire in Air Shaft.** — Under the different-department limitation, which is recognized in *Kentucky*, it has been held that a track layer in a mine and an employee who keeps up the furnace fires in the air shafts are not fellow servants. *Angel v. Jellico Coal Min. Co.*, 115 Ky. 728.

**Miner and Tool Carrier.** — A miner and a "tool carrier" are not fellow servants within the *Utah* statute for the reason that they are not engaged in the same grade of service, and working together at the same time and place, and to a common purpose. *Jenkins v. Mammoth Min. Co.*, 24 Utah 513.

**Workmen in Quarries.** — *O'Neal v. Clydesdale Stone Co.*, 207 Pa. St. 378.

**Drillers and Powderman in Quarry** are fellow servants. *Johnson v. Portland Stone Co.*, 40 Oregon 436.

**1014. 2. Mill and Factory Employees.** — *Devin v. Planters' Oil Mill*, (Miss. 1903) 33 So. Rep. 492; *Burke v. National India-Rubber Co.*, 21 R. I. 446.

**A Deck Hand and a Sawyer** have been held to be fellow servants. *Hawk v. McLeod Lumber Co.*, 166 Mo. 121.

**Sawyer and Edger in Sawmill** have been held to be fellow servants. *Grant v. Keystone Lumber Co.*, 119 Wis. 229, 100 Am. St. Rep. 883.

**Operator of Rollers in Flouring Mill and Workmen Replacing Drill with Sharp Rollers** have been held to be fellow servants. *Frazee v. Stott*, 120 Mich. 624.

**Night Watchman and Engineer in Sawmill** are fellow servants. *McCosker v. Hilton, etc., Lumber Co.*, 110 Ga. 328.

**Engineer of Mill Railroad and Woodcutter.** — A woodcutter, and a locomotive engineer in charge of a train used for the purpose of hauling timber to a sawmill and of transporting employees of their common master from the mill to their respective places of work, are fellow servants. *Railey v. Garbutt*, 112 Ga. 288.

**1015.** *f.* BUILDERS, CARPENTERS, MASONS, ETC. — In General. — See note 2.

**1016.** Builder's Laborer and Foreman. — See note 1.  
 Person Superintending Erection of Building and Employee Working Thereon. — See note 3.

*g.* OTHER EMPLOYEES — In General. — See note 4.

**A Bobbin Girl and the Weavers in a Woolen Mill** who are not directed by the same boss have been held not to be fellow servants in *Kentucky* where an extreme form of the different-department limitation is recognized. *Mayfield Woolen Mills v. Frazier*, 80 S. W. Rep. 456, 25 Ky. L. Rep. 2263.

**Employee Carrying Away Trash, and Sawyer.** — Under the very narrow fellow-servant rule which obtains in *Louisiana* it has been held that a sawyer and a person who is employed in the mill to keep the floor and passageway of the workshop clear of trash and pieces of timber are not fellow servants. *Merritt v. Victoria Lumber Co.*, 111 La. 159.

**"Dogger" or Carriageman and Sawyer.** — In *Louisiana* it has been held that a "dogger" or carriageman and a sawyer are not fellow servants, but it is not clear whether the conclusion was reached by applying the superior-servant or different-department limitation, or either. *Evans v. Louisiana Lumber Co.*, 111 La. 534.

**Millwright and Sawyer.** — In a case which seems to make an extreme application of the principle underlying the different-department limitation a company operating a lumber mill was held liable to a sawyer who, while working at his bench, was struck by a chisel which had carelessly been left on a beam above him by a millwright who was repairing the beams. *Hammarberg v. St. Paul, etc., Lumber Co.*, 19 Wash. 537.

**Head Sawyer and Tail Sawyer.** — It has been held that a head sawyer and a tail sawyer could not be said, as a matter of law, to be fellow servants. *Hendricks v. Lesure Lumber Co.*, 92 Minn. 318, rehearing denied 92 Minn. 322.

**1015. 2.** Workmen Employed on or about the Same Structure. — *World's Columbian Exposition v. Lehigh*, 196 Ill. 612; *Enright v. Oliver*, 69 N. J. L. 357, 100 Am. St. Rep. 710, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1015; *Olmstead v. Raleigh*, 130 N. Car. 243.

The superintendent or foreman of a contractor engaged in constructing a building, and the engineer who operated an elevator used to carry materials, have been said to be fellow servants. *Davy and McLennan, JJ.*, in *Ingram v. Fosburgh*, 73 N. Y. App. Div. 129.

**Carpenters and Persons Carrying Away Trash.** — It has been held that a carpenter employed in the construction of a building and the driver of a cart employed in the removal of debris which accumulated in the course of the work were fellow servants. *Johnson v. Metropolitan St. R. Co.*, 104 Mo. App. 588; *Brynes v. Brooklyn Heights R. Co.*, 36 N. Y. App. Div. 355.

A day laborer and a carpenter, who are employed and paid by the same common master, for whom they work in the same building under the same foreman, in the same common employment with an immediate common object — the

erection of an addition to the building — are fellow servants. *Spillane v. Eastman's Co.*, (Supm. Ct. App. T.) 33 Misc. (N. Y.) 463, reversing (N. Y. City Ct. Gen. T.) 32 Misc. (N. Y.) 235.

**Operator of Derrick and Workman Receiving the Load.** — One who is engaged with others in raising, by means of a derrick, timbers which are being used in the construction of a house, and whose particular duties are to stand on a scaffold and receive and detach such timbers from the derrick, is a fellow servant of one who stands on the ground and operates the machinery which elevates such timbers. *Gunn v. Willingham*, 111 Ga. 427.

**Mason's Helper and Workman Operating Derrick** are fellow servants. *McQueeney v. Norcross*, 75 Conn. 381.

**Hod Carrier and Truck Driver.** — It has been held that a hod carrier, employed in the building of an addition to the defendant's building, and a truck driver employed in connection with a meat business conducted by the defendant, although in the employ of the same master, were employed in such different capacities and at such different classes of work that they could not be deemed fellow servants engaged in the same common work, and performing duties and services for the same general purposes, so as to relieve the common employer of the consequences of the neglect of either. *McTaggart v. Eastman's Co.*, (Supm. Ct. App. T.) 28 Misc. (N. Y.) 127.

**Sewer Builders.** — The bricklayers who build a sewer are fellow servants of the laborers who excavate and sheathe the trench. *Curley v. Hoff*, 62 N. J. L. 758.

**A Workman Building a Retaining Wall and a Teamster Unloading Stone** to be used in the building of the wall are fellow servants. *Rhodes v. Lauer*, 32 N. Y. App. Div. 206.

**1016. 1.** Foreman and Laborers of Builder Held to Be Fellow Servants. — *Phoenix Bridge Co. v. Castleberry*, (C. C. A.) 131 Fed. Rep. 175; *Fournier v. Pike*, 128 Fed. Rep. 991; *McDonald v. Buckley*, (C. C. A.) 109 Fed. Rep. 290; *Kelly v. Jutte, etc., Co.*, 98 Fed. Rep. 380; *Yager v. Receivers*, 88 Fed. Rep. 773.

**3.** *Chicago House Wrecking Co. v. Birney*, (C. C. A.) 117 Fed. Rep. 72. But see *McDonald v. Buckley*, (C. C. A.) 109 Fed. Rep. 290.

Whether the negligent servant was a superintendent to the extent that with reference to the duties performed by him he must be held to be a vice-principal, is a question of fact. *Fournier v. Pike*, 128 Fed. Rep. 991.

**4.** *Operator of Elevator and Other Employers.* — An elevator boy and a bell boy in a hotel are fellow servants. *Kitchen Bros. Hotel Co. v. Dixon*, (Neb. 1904) 98 N. W. Rep. 816.

The operator of an elevator and a janitor who cleans the shaft are fellow servants. *Tubelovich v. Lathrop*, 104 Ill. App. 82.



**1018.** Foreman and Workmen under His Control. — See note 1.

**VII. CONFLICT OF LAWS.** — See note 5.

**1019.** As to Matters Wherein the Laws of the Two States Differ. — See note 2.

A carpenter repairing an elevator shaft and the operator of the elevator are fellow servants. *Mann v. O'Sullivan*, 126 Cal. 61, 77 Am. St. Rep. 149.

The operator of an elevator in an hotel and the plaintiff who was engineer and electrician in the hotel have been held to be fellow servants. *McCarty v. Rood Hotel Co.*, 144 Mo. 397.

A boy operating an elevator in a dry goods store, and a girl employed in the tailoring or dressmaking department of the store who rides on the elevator in going to and from work and in connection with her duties, are fellow servants. *Spees v. Boggs*, 198 Pa. St. 112, 82 Am. St. Rep. 792; *Carnahan v. Robert Simpson Co.*, 32 Ont. 328.

The operator of an elevator and a meat truckman in a packing house who rides on the elevator in the performance of his duties are fellow servants. *Donnelly v. Cudahy Packing Co.*, 68 Kan. 653.

**Assistant Engineer and Laundry Woman in Club House**, both of whom were intrusted with the operation of certain parts of the machinery which caused the accident, were held to be fellow servants. *Dooling v. Deutscher Verein*, 97 N. Y. App. Div. 39.

**Express Messenger and Guard.** — A guard employed by an express company to ride in the cars of the company to protect them from robbery, and an express messenger, both riding in the same car, are fellow servants. *Wells v. Page*, 29 Tex. Civ. App. 489.

**Workmen Loading Different Truck Carts Moving Dirt** have been held to be fellow servants. *Potter v. Louisville, etc., R. Co.*, (Ky. 1899) 50 S. W. Rep. 1.

**Lineman and Engineer of Electric Light Company** are fellow servants in the jurisdictions where the different-department limitation is not recognized. *Brush Electric Light, etc., Co. v. Wells*, 110 Ga. 192.

**Driver and Fireman on Hose Cart.** — It has been said that the driver of a hose cart and a fireman riding thereon are not fellow servants, but the point was not involved in the determination of the case. *Brabon v. Seattle*, 29 Wash. 6.

**1018. 1. Foreman and Workmen under His Control** — *United States*. — *Lach v. Burnham*, 134 Fed. Rep. 688; *Pistoner v. American Can Co.*, 119 Fed. Rep. 496.

*California*. — *Donovan v. Ferris*, 128 Cal. 48, 79 Am. St. Rep. 25.

*Connecticut*. — *Whittlesey v. New York, etc., R. Co.*, 77 Conn. 100, 107 Am. St. Rep. 21; *Leonard v. Mallory*, 75 Conn. 433.

*Georgia*. — *Cedartown Cotton Co. v. Hanson*, 118 Ga. 176.

*Indiana*. — *Standard Pottery Co. v. Moudy*, (Ind. App. 1905) 73 N. E. Rep. 188, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 953, 954; *Dill v. Marmon*, 164 Ind. 507; *Ft. Wayne Gas Co. v. Nieman*, 33 Ind. App. 178; *Southern Indiana R. Co. v. Martin*, 160 Ind. 280; *American Telephone, etc., Co. v. Bower*, 20 Ind. App. 32; *Southern Indiana R. Co. v. Hatrell*, 161 Ind. 689, reversing (Ind. App. 1903) 66 N. E.

Rep. 1016; *Thacker v. Chicago, etc., R. Co.*, 159 Ind. 85.

*Iowa*. — *McQueeney v. Chicago, etc., R. Co.*, 120 Iowa 522.

*New Jersey*. — *Olsen v. Nixon*, 61 N. J. L. 671; *Enright v. Oliver*, 69 N. J. L. 357, 101 Am. St. Rep. 710.

*New York*. — *Vogel v. American Bridge Co.*, 180 N. Y. 373; *Denenfeld v. Baumann*, 40 N. Y. App. Div. 502; *Braunberg v. Solomon*, 102 N. Y. App. Div. 330; *Wootton v. Flatbush Gas Co.*, 102 N. Y. App. Div. 294.

*Pennsylvania*. — *Duffy v. Platt*, 205 Pa. St. 296; *Johnson v. Western New York, etc., R. Co.*, 200 Pa. St. 314; *Hughes v. Leonard*, 199 Pa. St. 123; *Casey v. Pennsylvania Asphalt Paving Co.*, 198 Pa. St. 348; *Velas v. Patton Coal Co.*, 197 Pa. St. 380; *Duncan v. A. & P. Roberts Co.*, 194 Pa. St. 563; *Prevost v. Citizens' Ice, etc., Co.*, 185 Pa. St. 617, 64 Am. St. Rep. 659; *O'Dowd v. Burnham*, 19 Pa. Super. Ct. 464.

*Rhode Island*. — *Morgridge v. Providence Telephone Co.*, 20 R. I. 386, 78 Am. St. Rep. 879; *Frawley v. Sheldon*, 20 R. I. 258.

*Utah*. — *Sartin v. Oregon Short Line R. Co.*, 27 Utah 447, applying the law of Idaho.

*Vermont*. — *Lambert v. Missisquoi Pulp Co.*, 72 Vt. 278.

*Virginia*. — *Moore Lime Co. v. Richardson*, 95 Va. 326, 64 Am. St. Rep. 785.

*Canada*. — *Ferguson v. Galt Public School Board*, 27 Ont. App. 480.

In *Louisiana* the foreman of a gang of workmen over whom he has complete control is not a fellow servant of the men under him. *Vicars v. Cumberland Tel., etc., Co.*, 52 La. Ann. 2153.

And in *Kentucky* where the superior-servant limitation is recognized the foreman of a section crew is not the fellow servant of the members of the crew while riding on a hand car with them in charge of the brake. *Illinois Cent. R. Co. v. Josey*, 110 Ky. 342, 96 Am. St. Rep. 455.

**5. Action Arising under Statute Enforceable Elsewhere.** — *Bain v. Northern Pac. R. Co.*, 120 Wis. 412, overruling *Anderson v. Milwaukee, etc., R. Co.*, 37 Wis. 321.

**1019. 2. Lex Loci Controls Right of Action.** — *Kansas City, etc., R. Co. v. Becker*, 67 Ark. 1; *Brewster v. Chicago, etc., R. Co.*, 114 Iowa 144, 89 Am. St. Rep. 348; *Fogarty v. St. Louis Transfer Co.*, 180 Mo. 490; *Johnson v. Union Pac. Coal Co.*, 28 Utah 46; *Sartin v. Oregon Short Line R. Co.*, 27 Utah 447, applying the law of Idaho.

It has been held that, in the absence of any evidence to the contrary, the presumption is that the *lex loci delicti* is the same as *lex fori*. *MacCarthy v. Whitcomb*, 110 Wis. 113.

**The Existence of the Common-law Doctrine of Fellow Servants** in the jurisdiction in which the accident occurred is to be presumed. *Baltimore, etc., R. Co. v. Reed*, 158 Ind. 25, 92 Am. St. Rep. 203; *Baltimore, etc., R. Co. v. Jones*, 158 Ind. 87; *Rosemand v. Southern R. Co.*, 66 S. Car. 91.

**1019.** The Federal Courts. — See note 5.

**VIII. QUESTIONS OF LAW AND FACT — 1. Whether Employees Are Fellow Servants** — Generally a Question of Fact. — See note 7.

**1020.** When the Facts Are Undisputed. — See note 1.

Employee Acting in Dual Capacity. — See notes 2, 3.

**1021.** 2. Incompetency of Fellow Servant. — See note 1.

**IX. EVIDENCE — 1. Burden of Proof** — *a.* EXISTENCE OF RELATION OF FELLOW SERVANTS. — See note 2.

Burden on Plaintiff to Show Difference in Rank Between Servants. — See note 3.

**1022.** *d.* NEGLIGENCE OF MASTER. — See notes 2, 3, 4.

**Employers' Liability Acts Denied Extraterritorial Effect.** — A statute of the state in which an action is brought extending the common-law right to recover against the master for an injury received by one servant for the negligence of another cannot be applied in an action to recover for an injury received in another state when it is not shown that a similar statute has been enacted in that state. *Baltimore, etc., R. Co. v. Reed*, 158 Ind. 25, 92 Am. St. Rep. 293; *Baltimore, etc., R. Co. v. Jones*, 158 Ind. 87.

**Whether One Employee Stands to Another in the Relation of a Fellow Servant** is not to be determined by the law of the state in which the contract was made, but by the law of the state in which the accident happened, and in the absence of a statute there the federal rule in relation to the law of fellow servants must be applied by the United States courts. *Pennsylvania R. Co. v. Fishack*, (C. C. A.) 123 Fed. Rep. 465.

**1019.** 5. *Louisville, etc., R. Co. v. Stuber*, (C. C. A.) 108 Fed. Rep. 934, *reversing* 102 Fed. Rep. 421.

**7. Whether Employees Are Fellow Servants Generally a Question for Jury** — *Illinois*. — *Indiana, etc., R. Co. v. Otstot*, 212 Ill. 429, *affirming* 113 Ill. App. 37; *Illinois Southern R. Co. v. Marshall*, 210 Ill. 562, *affirming* 112 Ill. App. 514; *Chicago City R. Co. v. Leach*, 208 Ill. 198, 100 Am. St. Rep. 216, *reversing* 104 Ill. App. 30; *Consolidated Coal Co. v. Fleischbein*, 207 Ill. 593, *affirming* 109 Ill. App. 509; *Missouri Malleable Iron Co. v. Dillon*, 206 Ill. 145; *Chicago Hair, etc., Co. v. Mueller*, 203 Ill. 558; *Duffy v. Kivilin*, 195 Ill. 630; *Supple v. Agnew*, 191 Ill. 439; *Norton v. Nadebok*, 190 Ill. 595; *Illinois Steel Co. v. Bauman*, 178 Ill. 351; *Westville Coal Co. v. Schwartz*, 177 Ill. 272, *affirming* 75 Ill. App. 468; *Chicago, etc., R. Co. v. Swan*, 176 Ill. 424, *affirming* 70 Ill. App. 331; *Pittsburg Bridge Co. v. Walker*, 170 Ill. 550; *Consolidated Coal Co. v. Scheiber*, 167 Ill. 539; *Chicago, etc., R. Co. v. Mikesell*, 113 Ill. App. 146; *Chicago, etc., R. Co. v. Stallings*, 90 Ill. App. 609; *Kellyville Coal Co. v. Humble*, 87 Ill. App. 437; *American Express Co. v. Risley*, 77 Ill. App. 476, *affirmed* 179 Ill. 295; *Alford v. Dannenberg*, 76 Ill. App. 376, *affirmed* 177 Ill. 331; *Kolb v. Carrington*, 75 Ill. App. 159; *Braun v. Conrad Seipp Brewing Co.*, 72 Ill. App. 232.

*South Carolina*. — *Wilson v. Charleston, etc., R. Co.*, 51 S. Car. 79.

*Utah*. — *Dryburg v. Mercur Gold Min., etc., Co.*, 18 Utah 410.

It has been said that the definition of fellow servants is a question of law; whether a given

case falls within that definition is a question of fact. *Otstot v. Indiana, etc., R. Co.*, 103 Ill. App. 136; *Chicago Architectural Iron Works v. Nagel*, 80 Ill. App. 492.

The definition of fellow servants being a question of law, an instruction which permits the jury to determine for themselves the question of law as to what constitutes fellow servants is, of course, erroneous. *Illinois Steel Co. v. Rolewicz*, 113 Ill. App. 312.

**1020.** 1. **When Facts Undisputed a Question of Law.** — *Spring Valley Coal Co. v. Patting*, 210 Ill. 342, *affirming judgment* 112 Ill. App. 4; *Chicago City R. Co. v. Leach*, 208 Ill. 198, 100 Am. St. Rep. 216, *reversing* 104 Ill. App. 30; *Meyer v. Illinois Cent. R. Co.*, 177 Ill. 591; *Chicago, etc., R. Co. v. Driscoll*, 176 Ill. 330; *Tubelovish v. Lathrop*, 104 Ill. App. 82; *Shaw v. Bambrick-Bates Constr. Co.*, 102 Mo. App. 666; *Tierney v. Chicago Junction R. Co.*, 92 Ill. App. 631; *Metropolitan West Side El. R. Co. v. Skola*, 83 Ill. App. 659, *judgment affirmed* 183 Ill. 454, 75 Am. St. Rep. 120; *Klees v. Chicago, etc., R. Co.*, 68 Ill. App. 244; *Donnelly v. Cudahy Packing Co.*, 68 Kan. 653; *MacCarthy v. Whitcomb*, 110 Wis. 113.

**2. Consumers' Cotton Oil Co. v. Jonte**, 36 Tex. Civ. App. 18.

**Massachusetts Statute.** — It has been held to be a question for the jury whether the plaintiff's injury was due to the negligence of a "person in the service of the employer, intrusted with and exercising superintendence" within the meaning of the Massachusetts statute. *Cavagnaro v. Clark*, 171 Mass. 359.

**3. Fogarty v. St. Louis Transfer Co.**, 180 Mo. 490, decided under the law of *Illinois*.

**1021.** 1. **Incompetency of Fellow Servant — Master's Knowledge.** — *Webster Mfg. Co. v. Schmidt*, 77 Ill. App. 49; *Stoll v. Daly Min. Co.*, 19 Utah 271.

**2. Burden on Defendant to Prove Person Causing Injury to Be a Fellow Servant.** — *Chicago, etc., R. Co. v. House*, 172 Ill. 601, *affirming and adopting opinion in* 71 Ill. App. 147; *Chicago, etc., R. Co. v. Mikesell*, 113 Ill. App. 146. See *Mott v. Chicago, etc., R. Co.*, 102 Ill. App. 412.

**3. Chicago City R. Co. v. Leach**, 208 Ill. 198, 100 Am. St. Rep. 216, *reversing* 104 Ill. App. 30; *Shaw v. Bambrick-Bates Constr. Co.*, 102 Mo. App. 666.

**1022.** 2. **Presumption of Exercise of Care by Master in Selection of Servant.** — *Chicago, etc., R. Co. v. Myers*, 83 Ill. App. 469; *W. R. Triggs Co. v. Lindsay*, 101 Va. 193; *Grams v. C. Reiss Coal Co.*, (Wis. 1905) 102 N. W. Rep. 586.

**1022.** *e.* KNOWLEDGE BY SERVANT OF FELLOW SERVANT'S INCOMPETENCY. — See note 5.

**1023.** 2. Admissibility — *a.* INCOMPETENCY OF FELLOW SERVANT — (2) *Admissions of Master.* — See note 3.

**1025.** (4) *Habitual Acts of Negligence.* — See note 1.

(5) *General Reputation.* — See note 3.

*b.* NOTICE TO MASTER — (2) *General Reputation* — (a) *In General.* — See note 6.

**1026.** *Reputation Among Limited Number of Persons.* — See note 1.

**1027.** (3) *Specific Acts of Negligence.* — See note 3.

*c.* NOTICE TO INJURED EMPLOYEE — *General Reputation.* — See note 6.

3. Sufficiency — Negligence of Master — *a.* IN GENERAL. — See note 9.

**1028.** *b.* KNOWLEDGE OF SPECIFIC ACTS OF NEGLIGENCE. — See note 4.

**1029. FELONIOUS — FELONIOUSLY.** — See note 3.

**1022.** 3. *Morrow v. St. Paul City R. Co.*, 71 Minn. 326.

4. *Dysart v. Kansas City, etc., R. Co.*, 145 Mo. 83.

**Proof of Incompetency at Time of Employment.** — In *Minnesota* a *prima facie* case of negligence is made out against the master if it be proved that at the time of his employment the servant whose negligence has caused another to be injured was unfit and incompetent to perform the service required of him, and the burden is then on the master to disprove his own negligence. *Nutzmann v. Germania L. Ins. Co.*, 78 Minn. 504; *Morrow v. St. Paul City R. Co.*, 71 Minn. 326.

5. *Indianapolis, etc., Rapid Transit R. Co. v. Foreman*, 162 Ind. 85, 102 Am. St. Rep. 185. See *Indianapolis, etc., R. Co. v. Andis*, 33 Ind. App. 625.

**1023.** 3. **Declarations of the Master's Agent** after the accident are not admissible to show that the negligent servant was incompetent. *Kamp v. Cox*, 122 Wis. 206.

**1025.** 1. **Habitual Acts of Carelessness as Evidence of Incompetency.** — Consolidated Coal Co. v. Seniger, 179 Ill. 370, *affirming* 79 Ill. App. 456; *Galveston, etc., R. Co. v. Davis*, 92 Tex. 372.

**Habits of Intemperance.** — Testimony that a servant was a drinking man has been held to be inadmissible to show incompetency when there was no evidence that he was drunk at the time of the accident or that he had ever been drunk while on duty. *Galveston, etc., R. Co. v. Davis*, 92 Tex. 372.

Evidence of the drinking habits of a servant which is otherwise incompetent is not admissible simply because a rule of the defendant company provided that "the use of intoxicating liquors is strictly forbidden" and declared that "total abstinence is necessary to safety in operating the road." *Galveston, etc., R. Co. v. Davis*, 92 Tex. 372.

3. *Park v. New York Cent., etc., R. Co.*, 155 N. Y. 215, 63 Am. St. Rep. 663.

**6. General Reputation Admissible to Show Notice.** — *Park v. New York Cent., etc., R. Co.*, 155 N. Y. 215, 63 Am. St. Rep. 663; *O'Donnell*

*v. American Sugar-Refining Co.*, 41 N. Y. App. Div. 307; *Galveston, etc., R. Co. v. Eckles*, 25 Tex. Civ. App. 179; *Stoll v. Daly Min. Co.*, 19 Utah 271.

That the master knew or should have known of a servant's incompetency may be shown by evidence tending to establish that such incompetency was generally known in the community, but it is not admissible to establish the general reputation of the servant without any reference to specific acts of incompetency. *Lambrech v. Pfizer*, 49 N. Y. App. Div. 82.

**1026.** 1. **General Reputation Among Fellow Servants.** — Evidence of the servant's general reputation among his fellow servants is not admissible to show that the master knew or should have known of the servant's incompetency. *Lambrech v. Pfizer*, 49 N. Y. App. Div. 82.

**1027.** 3. *Stoll v. Daly Min. Co.*, 19 Utah 271. See *Barkley v. New York Cent., etc., R. Co.*, 35 N. Y. App. Div. 238.

**6. General Reputation as Notice to Injured Employee.** — See *Postal Tel. Cable Co. v. Coote*, (Tex. Civ. App. 1900) 57 S. W. Rep. 912.

**9. Sufficiency of Evidence to Establish Negligence of Master.** — See *Carlson v. Wilkeson Coal, etc., Co.*, 19 Wash. 473.

**Evidence of Servant's Intemperate Habits.** — The master's negligence in employing an unfit or incompetent servant is not established by evidence that the servant had been known to drink intoxicating liquor, if there is no evidence that he was ever intoxicated, or that the master had knowledge that he drank intoxicating liquor, much less that he drank to excess. *Delory v. Bodgett*, 185 Mass. 126, 102 Am. St. Rep. 328.

**1028.** 4. **Incompetency Not Established by Single Act of Negligence as a General Rule.** — *Chicago, etc., R. Co. v. Myers*, 83 Ill. App. 469; *Galveston, etc., R. Co. v. Davis*, 92 Tex. 372.

**1029.** 3. **Criminal.** — *Hocker v. Com.*, (Ky. 1902) 70 S. W. Rep. 291; *Matter of Van Orden*, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 215; *People v. Mosier*, 73 N. Y. App. Div. 5.

**Feloniously Means Wickedly and Against the Admonition of the Law.** — *State v. Wilkerson*,



**1032. FELONY.** — See notes 1, 2.

**1034. FEMALE.** — See note 1.

170 Mo. 189; *State v. Allen*, 171 Mo. 562. Compare *State v. Miller*, 159 Mo. 113.

**Feloniously Means Wrongfully and Wickedly, and Also Refers to the Punishment Imposed by Law.** — *State v. Privitt*, 175 Mo. 207.

**Feloniously and Unlawfully.** — *Carroll v. State*, 71 Ark. 403.

**Perjury.** — *Williams v. People*, 26 Colo. 272.

**Wilfully and Maliciously.** — The words "unlawfully, maliciously, and *feloniously*," used in an indictment for wounding less than mayhem, are not the equivalent of "wilfully and maliciously," employed in the statute (Act 17 of 1888) relating to that offense. "Unlawfully" and *feloniously* were not necessary to be used, and neither supplied the place of "wilfully." *State v. Robinson*, 104 La. 224.

**Necessity of Instruction — Homicide.** — *State v. Parker*, 172 Mo. 191.

**Robbery.** — *State v. Spray*, 174 Mo. 569; *Keeton v. State*, 70 Ark. 163.

**Misdemeanor.** — *State v. Harwell*, 129 N. Car. 550.

**Larceny.** — *State v. Rutherford*, 152 Mo. 131; *State v. Halpin*, 16 S. Dak. 170; *State v. Smith*, Smith, 31 Wash. 247.

**Receiving Stolen Goods.** — *State v. Miller*, 159 Mo. 113; *People v. Hartwell*, 166 N. Y. 361.

**1032. 1. Common Law.** — *Considine v. U. S.*, (C. C. A.) 112 Fed. Rep. 344; *People v. Reilly*, 49 N. Y. App. Div. 218.

**2. Statutes.** — *Berkowitz v. U. S.*, (C. C. A.) 93 Fed. Rep. 455; *Considine v. U. S.*, (C. C. A.) 112 Fed. Rep. 344, quoting 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1032; *Keeton v. State*, 70 Ark. 163; *People v. Smith*, 143 Cal. 597; *Williams v. People*, 26 Colo. 272; *People v. George*, 186 Ill. 122; *Brewster v. People*, 183 Ill. 146; *Sutherland v. Sutherland*, 27 Ind. App. 301; *State v. Clemenson*, 123 Iowa 524; *State v. Warner*, 60 Kan. 94; *Com. v. Rowe*, 112 Ky. 482; *People v. Reilly*, 49 N. Y. App. Div. 218; *State v. Hogan*, 8 N. Dak. 301; *State v. Polacheck*, 101 Wis. 427.

**Infamous Crimes.** — *Berkowitz v. U. S.*, (C. C. A.) 93 Fed. Rep. 455.

**United States.** — *Considine v. U. S.*, (C. C. A.) 112 Fed. Rep. 344.

**Same — Breaking into a Post Office is not a felony.** *Considine v. U. S.*, (C. C. A.) 112 Fed. Rep. 346.

**Bribery.** — The word *felony* in Const. Wis., art. iv., § 15, exempting legislators from arrest in all cases except treason, *felony*, and breach of the peace, must be limited to such offenses as were *felonies* at the time the constitution was adopted. Bribery, not being at that time a *felony*, though made so by subsequent legislation, is not within the exception. *State v. Polacheck*, 101 Wis. 427.

**1034. 1. Female.** — *Jackson v. State*, 137 Ala. 80.

## FENCES.

BY BASIL JONES.

**1037. I. DEFINITION — A Fence.** — See note 1.

**II. MANNER OF BUILDING — 1. Material.** — See note 5.

**1038. 2. Sufficiency of Fences — b. UNDER STATUTE.** — See note 2.

**1039. 3. Negligence in Building and Maintaining — b. BARBED-WIRE FENCES — Construction of, Not Negligence.** — See note 2.

**Liability for Negligently Building.** — See note 3.

**1037. 1. Definition.** — See *Ft. Worth*, etc., R. Co. v. *Swan*, 97 Tex. 338.

**5. Hedge Not a Fence Within Provision of Tex. Rev. Stat. 1895, art. 2502.** — *Brown v. Johnson*, (Tex. Civ. App. 1903) 73 S. W. Rep. 49.

**1038. 2. Sufficient Fence Defined by Statute.** — *Plath v. Grand Forks*, etc., R. Co., 10 British Columbia 299; *Spencer v. Morgan*, (Idaho 1905) 79 Pac. Rep. 459.

**Lawful Fence under Virginia Statute.** — *Poin-dexter v. May*, 98 Va. 143.

**1039. 2. Building a Barbed-wire Fence Is Not Per Se Negligence.** — *Golden v. Coonan*, 107 Iowa 209; *Quigley v. Clough*, 173 Mass. 429, 73 Am. St. Rep. 303; *Kuhnert v. Angell*, 10 N. Dak. 63, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1039; *Bishop v. Gulf*, etc., R. Co., (Tex. Civ. App. 1903) 75 S. W. Rep. 1086; *Plath v. Grand Forks*, etc., R. Co., 10 British Columbia 299.

**Erection Along Sidewalk Prohibited by Massachusetts Statute.** — *Quigley v. Clough*, 173 Mass. 429, 73 Am. St. Rep. 303.

**3. Negligence in Construction of Barbed-wire Fence.** — *Winkler v. Carolina*, etc., R. Co., 126 N. Car. 370, 78 Am. St. Rep. 663; *Kuhnert v. Angell*, 10 N. Dak. 63, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1039; *Kuhnert v. Angell*, 8 N. Dak. 198; *Abilene Oil Co. v. Briscoe*, 27 Tex. Civ. App. 157; *Garrioch v. McKay*, 13 Manitoba 404.

**Owner Liable for Injury Caused by Failure to Place Safeguard Prescribed by Statute.** — *Siglin v. Coos Bay Co.*, 35 Oregon 79, 76 Am. St. Rep. 463.

**The North Dakota Statute**, which provides that any one who shall knowingly and wilfully place a barbed-wire fence across a well-traveled trail without placing thereon a suitable protection shall be liable for all damages by reason

- 1039. III. FENCES INCLOSING LANDS — 1. Obligation to Maintain —**  
**a. GENERAL DOCTRINE — (1) At Common Law — (a) General Rule.** — See note 4.  
**1040. Liability for Trespass by Cattle.** — See note 1.  
 (2) *In the United States — (a) Common-law Rule Adopted.* — See note 5.  
**1042. (b) Common-law Rule Not Adopted — aa. GENERALLY.** — See note 1.  
**1044. (3) Operation of Law Requiring a Fence — (a) Generally.** — See note 3.  
**1045. (b) Cattle Driven upon Lands.** — See note 1.  
 (c) *Right to Drive Off Trespassing Animals.* — See note 2.  
**1046. (d) Injury to Trespassing Animals — aa. WILFUL OR CARELESS INJURY.** — See note 2.  
**1047. bb. ACCIDENTAL INJURY — Generally.** — See notes 1, 2.  
**b. PARTITION FENCES — (2) By Agreement or Covenant — (a) Effect of Statute Upon — aa. GENERALLY.** — See note 4.  
**1048. bb. AS TO EVIDENCE OF THE AGREEMENT.** — See notes 3, 4.

thereof, does not render liable an agent who, in accordance with his principal's instructions, had directed a subagent to erect a fence across the trail with the protection prescribed by the statute, but where horses are injured by reason of the subagent's failure to erect the safeguard. *Kuhnert v. Angell*, 10 N. Dak. 63.

**Precautions Required under North Carolina Statute.** — *Winkler v. Carolina, etc.*, R. Co., 126 N. Car. 370, 78 Am. St. Rep. 663.

**1039. 4. Owner's Common-law Obligation to Keep Cattle from Trespassing.** — *Perry v. Cobb*, (Indian Ter. 1903) 76 S. W. Rep. 289; *Muir v. Thixton*, 78 S. W. Rep. 466, 25 Ky. L. Rep. 1688; *Rinehart v. Kansas City Southern R. Co.*, (Mo. App. 1904) 80 S. W. Rep. 910; *Gronwey v. Wabash R. Co.*, 102 Mo. App. 442; *Pacific Livestock Co. v. Murray*, 45 Oregon 103; *Erdman v. Gottshall*, 9 Pa. Super. Ct. 295; *Poindexter v. May*, 98 Va. 143; *Plath v. Grand Forks, etc.*, R. Co., 10 British Columbia 299. See also *Sinard v. Southern R. Co.*, 101 Tenn. 473.

**1040. 1. Liability for Trespass by Cattle.** — *Gronwey v. Wabash R. Co.*, 102 Mo. App. 442.

**5. States that Adopt the Common-law Rule — New Mexico.** — The common-law rule as to the liability of railroad companies for injury to stock applies in this Territory, except in so far as it has been modified by statutory enactment and judicial determination as to its applicability to existing conditions. *Pecos Valley, etc.*, R. Co. v. *Cazier*, (N. Mex. 1905) 79 Pac. Rep. 714.

**North Dakota.** — Common-law rule declared by statute, exception being made as to certain counties and as to trespasses occurring during certain months. *Ely v. Rosholt*, 11 N. Dak. 559, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1042.

**Oregon.** — *Pacific Livestock Co. v. Murray*, 45 Oregon 103.

**Statutes.** — By *Oregon Laws* 1901, p. 128, the exceptions contained in the Act of 1872 were extended so as to apply to certain additional counties. *Pacific Livestock Co. v. Murray*, 45 Oregon 103.

**Pennsylvania.** — *Erdman v. Gottshall*, 9 Pa. Super. Ct. 295.

**Statutes.** — *Erdman v. Gottshall*, 9 Pa. Super. Ct. 295.

**1042. 1. States that Do Not Adopt the Com-**

**mon-law Rule — Alabama.** — See *Flowers v. Grant*, 129 Ala. 275.

**Idaho.** — *Johnson v. Oregon Short Line R. Co.*, 7 Idaho 355.

**Indian Territory.** — *Perry v. Cobb*, (Indian Ter. 1903) 76 S. W. Rep. 289.

**Kentucky.** — *Muir v. Thixton*, 78 S. W. Rep. 466, 25 Ky. L. Rep. 1688.

**Missouri.** — *Gillespie v. Hendren*, 98 Mo. App. 622; *Rinehart v. Kansas City Southern R. Co.*, (Mo. App. 1904) 80 S. W. Rep. 910.

**Texas.** — *Texas, etc.*, R. Co. v. *Seay*, (Tex. Civ. App. 1902) 69 S. W. Rep. 177.

**Virginia.** — *Poindexter v. May*, 98 Va. 143.

**Fence Laws Constitutional.** — *Poindexter v. May*, 98 Va. 143.

**1044. 3. Operation of Laws Requiring a Fence.** — *Poindexter v. May*, 98 Va. 143.

**The Manitoba Boundary Lines Act** does not supersede the common-law liability of an owner of cattle for all their trespasses except such as are due to defects in fences which the complainant is bound as between himself and such owner to keep up; and such owner will be liable for the trespasses committed by his cattle unless it is shown that the complainant was bound to keep up and repair the particular part of the fence through which the cattle entered. The common-law rule is not displaced by a joint liability to keep up fences. *Garricch v. McKay*, 13 Manitoba 404.

**1045. 1. Cattle Driven upon Lands.** — *Poindexter v. May*, 98 Va. 143.

2. *Poindexter v. May*, 98 Va. 143.

**1046. 2. Wilful or Careless Injury to Trespassing Cattle.** — *Winkler v. Carolina, etc.*, R. Co., 126 N. Car. 370, 78 Am. St. Rep. 663; *Pecos Valley, etc.*, R. Co. v. *Cazier*, (N. Mex. 1905) 79 Pac. Rep. 714.

**Owner of Unfenced Land Liable for Injury Caused by Attractive Nuisance.** — *Muir v. Thixton*, 78 S. W. Rep. 466, 25 Ky. L. Rep. 1688.

**1047. 1. Accidental Injury to Trespassing Cattle.** — *Muir v. Thixton*, 78 S. W. Rep. 466, 25 Ky. L. Rep. 1688.

2. *Land Unsafe for Pasturage.* — *Muir v. Thixton*, 78 S. W. Rep. 466, 25 Ky. L. Rep. 1688.

4. *Partition Fence by Agreement, Statute Existing.* — *Collins v. Cochran*, 121 Ga. 785, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1047.

**1048. 3. Whether Agreement as to Partition**

**1018.** *cc.* AS TO MANNER OF BUILDING — Statute May Be Varied by Agreement. — See note 5.

**1049.** (b) By Covenant in a Deed — *aa.* EFFECT OF COVENANT — Runs with Land. — See note 2.

Creates an Incumbrance. — See note 3.

**1050.** (3) *By Prescription* — (b) Effect of Statute. — See note 1.

(4) *By Statute* — (b) Between What Lands Required — *aa.* GENERALLY. — See note 2.

**1052.** (e) Location — *aa.* GENERALLY. — See note 2.

*bb.* ON WHAT LAND. — See note 3.

**1053.** (d) Who Must Build and Maintain — *aa.* GENERALLY. — See note 1.

**1054.** *cc.* AFTER DIVISION — (*bb.*) *Enforced Contribution* — Against Unwilling Neighbor. — See note 1.

Manner of Enforcing — By Building Entire Fence and Recovering. — See note 2.

Double Value. — See note 3.

**1055.** (f) Fence Viewers — *aa.* NATURE OF THE OFFICE. — See note 1.

*bb.* PRINCIPAL DUTIES — (*aa.*) *To Assign Portions.* — See note 2.

*cc.* NOTICE OF PROCEEDINGS. — See note 4.

*dd.* VALIDITY AND EFFECT OF PROCEEDINGS. — See note 5.

**1056.** (5) *Failure to Maintain* — (b) Liability for Trespass by Cattle — *aa.* BEFORE DIVISION. — See note 3.

**1057.** *cc.* AFTER DIVISION. — See notes 1, 2, 3.

Fence Is Within the Statute of Frauds. — *De Mers v. Rohan*, 126 Iowa 488.

**1048.** 4. Writing Required by Statute. — *De Mers v. Rohan*, 126 Iowa 488.

5. Agreements Varying the Statute. — *Hoar v. Hennessy*, 29 Mont. 253; *Collins v. Cochran*, 121 Ga. 785.

**1049.** 2. Covenant to Fence Runs with Land. — Chicago, etc., R. Co. v. McEwen, (Ind. App. 1904) 71 N. E. Rep. 926; *Brown v. Southern Pac. R. Co.*, 36 Oregon 128, 78 Am. St. Rep. 761, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1049.

3. Covenant to Fence, Incumbrance on Land. — *Brown v. Southern Pac. R. Co.*, 36 Oregon 128, 78 Am. St. Rep. 761, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1049.

**1050.** 1. Effect of Statute. — See *Scott v. Jackson*, 93 Ill. App. 529. See also *Miles v. Tomlinson*, 110 Iowa 322.

2. Under Oregon Statute Owner Must Fence. — *Oliver v. Hutchison*, 41 Oregon 443.

Division Fences — Validity of Kentucky Statute Requiring Erection by Railroad Given Right of Way. — *Steadd v. Southern R. Co.*, 109 Ky. 214.

**1052.** 2. Line of Partition Fence. — *Hoar v. Hennessy*, 29 Mont. 253.

Fence May Be Located on One Owner's Land by Agreement. — *Hoar v. Hennessy*, 29 Mont. 253.

3. Should Be Equally on the Land of Parties. — *Kelly v. Donnelly*, 19 Pa. Super. Ct. 456; *Hoar v. Hennessy*, 29 Mont. 253.

**1053.** 1. Duty to Make and Maintain in Just Proportion. — *Hoar v. Hennessy*, 29 Mont. 253.

**1054.** 1. Enforced Contribution. — *Tomlinson v. Bainaka*, 163 Ind. 112.

Indiana Statute Constitutional. — *Tomlinson v. Bainaka*, 163 Ind. 112.

2. Manner of Enforcement under Indiana Statute. — *Tomlinson v. Bainaka*, 163 Ind. 112.

3. Recovery of Double Value. — *Day v. Dolan*, 174 Mass. 524.

**1055.** 1. Fence Viewers. — *Boyd v. Shoop*, 107 Iowa 10.

Powers of Fence Commissioners Under North Carolina Statute. — *Edwards v. Public Road Supervisors*, 127 N. Car. 62.

Under the Maine Statute the office of fence viewer must either be filled by election at the annual town meeting, or by appointment by the selectmen. *Bradford v. Hawkins*, 96 Me. 484.

2. Division by Viewers. — See *Miles v. Tomlinson*, 110 Iowa 322. See also *Day v. Dolan*, 174 Mass. 524.

Assessment by County Commissioners for Fences under North Carolina Statute. — *Harper v. New Hanover County*, 133 N. Car. 106.

Powers Limited by Terms of Notice, under Illinois Statute. — *Scott v. Jackson*, 93 Ill. App. 529.

No Power to Establish Disputed Line under Iowa Statute. — *Boyd v. Shoop*, 107 Iowa 10.

Assessments by Public Fencing Board under Arkansas Statute. — *Stiwell v. Fencing Dist.* No. 6, 71 Ark. 28.

4. Sufficiency of Notice. — *Day v. Dolan*, 174 Mass. 524.

5. Validity of Proceedings. — *Scofield v. Haire*, 122 Mich. 265.

**1056.** 3. Liability for Trespass by Cattle Before Division of Fence. — *Gillespie v. Hendren*, 98 Mo. App. 622; *De Mers v. Rohan*, 126 Iowa 488; *Growney v. Wabash R. Co.*, 102 Mo. App. 442.

**1057.** 1. Cattle Owner's Neglect. — *Growney v. Wabash R. Co.*, 102 Mo. App. 442.

2. No Remedy for Trespass Due to His Own Failure to Repair. — *Perry v. Cobb*, (Indian Ter. 1903) 76 S. W. Rep. 289.

3. No Defense that Plaintiff's Portion Is Out of Repair. — See *Peterson v. Lacey*, (Iowa 1905) 102 N. W. Rep. 153.



**1058.** (6) *Malicious Erection*. — See notes 1, 2.

Statutes. — See note 4.

c. *ANIMALS TO BE FENCED AGAINST*. — See note 5.

When Cattle Lawfully on Highway. — See note 7.

**1059.** 2. *Property in Fences* — a. *GENERALLY*. — See notes 2, 4.**1060.** *Personality by Agreement*. — See note 3.b. *IN PARTITION FENCES AND RIGHT TO REMOVE THEM*. —

See notes 4, 5.

Removal Regulated by Statute. — See note 6.

**1061.** IV. *RAILROAD FENCES* — 1. *Obligation to Fence in Absence of Statute*. — See note 4.**1058.** 1. *No Liability for Fences Erected on One's Own Land*. — *Whitlock v. Uhle*, 75 Conn. 423; *Giller v. West*, 162 Ind. 17.*Injunction Will Not Lie to Restrain One from Erecting a Fence on His Own Land*, although his land bounds that of the petitioner on three sides in such a manner that the fence will also inclose a tract belonging to the petitioner. *Slaughter v. Cullup*, 22 Tex. Civ. App. 578.*Inclosing Public Land*. — The act of a person in fencing his own land and extending the fence up to a point where it connects immediately with the fence of adjoining land owned by another is not unlawful, although access to public lands belonging to the government is thereby prevented. It is only when a person builds a fence for the purpose of inclosing the public lands that the inclosure becomes unlawful under 23 U. S. Stat. 321. *Potts v. U. S.*, (C. C. A.) 114 Fed. Rep. 52.2. *Injunction to Prevent Erection in Violation of Contract*. — *Silverfield v. Frank*, 43 Oregon 502.4. *Statutes*. — *Whitlock v. Uhle*, 75 Conn. 423; *Horan v. Byrnes*, 70 N. H. 531; *Horan v. Byrnes*, 72 N. H. 93, 101 Am. St. Rep. 670.*Connecticut Statute*. — The mere fact that the objectionable structure was added to one in other respects lawful, for the purpose of injuring the plaintiff, is not inconsistent with the existence of the defendant's unlawful intent. *Whitlock v. Uhle*, 75 Conn. 423.*New Hampshire Statute Constitutional*. — *Horan v. Byrnes*, 72 N. H. 93, 101 Am. St. Rep. 670.*Personal Spite or Ill-will Not an Essential Element*. — *Whitlock v. Uhle*, 75 Conn. 423.5. *Perry v. Cobb*, (Indian Ter. 1903) 76 S. W. Rep. 289.7. *When Lawfully on Highway*. — *Luscombe v. Great Western R. Co.*, (1899) 2 Q. B. 313.**1059.** 2. *Fences Are Part of the Freehold*. — *Siglin v. Coos Bay Co.*, 35 Oregon 79, 76 Am. St. Rep. 463; *State v. Buck*, 74 Vt. 29.4. *Fence Passes with Land*. — *Anderson v. Atlantic Coast Line R. Co.*, 59 S. Car. 350.**1060.** 3. *Personality under an Agreement*. — *State v. Buck*, 74 Vt. 29, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1060.4. *Property in Partition Fences*. — *Scheer v. Kriesel*, 109 Wis. 125.*Trespasser Cannot Enjoin Removal of Fence from Property in Another's Possession*. — *Currier v. Jones*, 121 Iowa 160.*The Vermont Statute Providing for a Written Agreement* relating to division fences does not prevent the admission of parol evidence to show ownership of a partition fence or of material of which it is made. *State v. Buck*, 74 Vt. 29.5. *Partition Fences on the Line Between Lands*. — See *Scheer v. Kriesel*, 109 Wis. 125.*Removal for Purpose of Rebuilding*. — *Ropes v. Flint*, 182 Mass. 473.*Right of One Owner to Maintain Petitory Action Against the Other under Canadian Statute*. — *Proulx v. Renaud*, 23 Quebec Super. Ct. 511.*Injunction Will Lie to Prevent Removal*. — *Hoff v. Olson*, 101 Wis. 118, 70 Am. St. Rep. 903.*Injunction to Prevent Removal*. — The destruction of a fence by a trespasser, and his threat to repeat such act as often as the fence should be replaced, entitle the owner of the premises invaded to an injunction against the trespasser, even though the latter may not be insolvent. *Lynch v. Egan*, 67 Neb. 541.6. *Removal of Division Fence under Statutes*. — *Brown v. Johnson*, (Tex. Civ. App. 1903) 73 S. W. Rep. 49.*The Missouri Statute Providing for the Recovery of Damages* for throwing down fences was intended to protect the owner's close and not his fences as such, and no recovery can be had for leaving open a fence which does not constitute a part of an inclosure. *Wilson v. Burton*, 96 Mo. App. 686.*Criminal Liability under Statute* — *Alabama*. — *Wallace v. State*, 124 Ala. 87; *Shaw v. State*, 125 Ala. 80; *Boyett v. State*, 132 Ala. 23.*Arkansas*. — *State v. Culbreath*, 71 Ark. 80.*Georgia*. — *Shrouder v. State*, 121 Ga. 615.*Missouri*. — *State v. Hays*, 110 Mo. App. 440.*North Carolina*. — *State v. Fender*, 125 N. Car. 649; *State v. Campbell*, 133 N. Car. 640.*Texas*. — *Elkins v. State*, 40 Tex. Crim. 589; *Natho v. State*, (Tex. Crim. 1899) 51 S. W. Rep. 398; *Scott v. State*, (Tex. Crim. 1900) 56 S. W. Rep. 61; *Jessel v. State*, 42 Tex. Crim. 72; *Dennis v. State*, 43 Tex. Crim. 464; *Burch v. State*, (Tex. Crim. 1902) 67 S. W. Rep. 500; *McCuen v. State*, 43 Tex. Crim. 612; *Ball v. State*, 44 Tex. Crim. 185; *Smith v. State*, 44 Tex. Crim. 218; *Caudle v. State*, (Tex. Crim. 1903) 74 S. W. Rep. 545; *Smith v. State*, (Tex. Crim. 1904) 79 S. W. Rep. 34; *Kalklosch v. State*, 46 Tex. Crim. 94; *Pate v. State*, 46 Tex. Crim. 483.*A Hedge Is Not a Fence* within the meaning of *Texas Rev. Stat.* 1895, arts. 2501, 2502, allowing a joint owner of a partition fence to remove his part of a division fence upon giving six months' notice, and an injunction will be granted restraining such removal. *Brown v. Johnson*, (Tex. Civ. App. 1903) 73 S. W. Rep. 49.**1061.** 4. *Railroad Companies Not Required*

**1063. In States Not Adopting the Common-law Rule. — See note 1.****2. Obligation to Fence under Statutes — a. STATUTORY DUTY. —**

See note 2.

to Fence. — Georgia Southern, etc., R. Co. v. Wisenbaker, 113 Ga. 604; Pecos Valley, etc., R. Co. v. Cazier, (N. Mex. 1905) 79 Pac. Rep. 714; Crary v. Chicago, etc., R. Co., (S. Dak. 1904) 100 N. W. Rep. 18; Sinard v. Southern R. Co., 101 Tenn. 473; Grand Trunk R. Co. v. James, 31 Can. Sup. Ct. 420. See also Lee v. Brooklyn Heights R. Co., 97 N. Y. App. Div. 111.

**Division Fences — Duty of Railroad under Kentucky Statute.** — Owensboro, etc., R. Co. v. Courts, 109 Ky. 154.

**Liability under Agreement to Fence.** — Howard v. Maysville, etc., R. Co., 70 S. W. Rep. 631, 24 Ky. L. Rep. 1051.

**1063. 1. Company Not Liable in Absence of Negligence.** — Crary v. Chicago, etc., R. Co., (S. Dak. 1904) 100 N. W. Rep. 18.

**Railroad Only Liable for Failure to Exercise All Reasonable Diligence.** — Georgia Southern, etc., R. Co. v. Wisenbaker, 113 Ga. 604.

**2. Notice.** — By the Kentucky statute the railroad is required to construct and maintain one-half of the fence between it and the adjoining landowner. Where the landowner has erected his portion of the fence, it is the duty of the railroad to erect its portion without notice. Parish v. Louisville, etc., R. Co., (Ky. 1904) 78 S. W. Rep. 186.

**Obligation to Fence under Statutes — England.** — Luscombe v. Great Western R. Co., (1899) 2 Q. B. 313.

**Canada.** — Quebec Cent. Co. v. Pellerin, 12 Quebec K. B. 152; Grand Trunk R. Co. v. James, 31 Can. Sup. Ct. 420; Gloucester Tp. v. Canada Atlantic R. Co., 3 Ont. L. Rep. 85; Davidson v. Grand Trunk R. Co., 5 Ont. L. Rep. 574; Tabb v. Grand Trunk R. Co., 8 Ont. L. Rep. 203; McKellar v. Canadian Pac. R. Co., 14 Manitoba 614.

**Arkansas.** — St. Louis, etc., R. Co. v. Hood, 67 Ark. 357.

**Idaho.** — Patrie v. Oregon Short Line R. Co., 6 Idaho 448; Johnson v. Oregon Short Line R. Co., 7 Idaho 355.

**Illinois.** — Malott v. Mapes, 111 Ill. App. 340; Chicago, etc., R. Co. v. Hand, 113 Ill. App. 144; Rabbermann v. Pierce, 77 Ill. App. 405.

**Indiana.** — Terre Haute, etc., R. Co. v. Salmon, 161 Ind. 131; Terre Haute, etc., R. Co. v. Salmon, 34 Ind. App. 564; Chicago, etc., R. Co. v. Croy, 33 Ind. App. 461; Evansville, etc., R. Co. v. Butts, 26 Ind. App. 418; Evansville, etc., R. Co. v. Huffman, 32 Ind. App. 425; Chicago, etc., R. Co. v. Wood, 30 Ind. App. 650; Chicago, etc., R. Co. v. Brown, 33 Ind. App. 603; Terre Haute, etc., R. Co. v. Erdel, 163 Ind. 348.

**Iowa.** — Norman v. Chicago, etc., R. Co., 110 Iowa 283; Pothast v. Chicago G. W. R. Co., 110 Iowa 458; Cagwin v. Chicago, etc., R. Co., 113 Iowa 175.

**Kansas.** — Atchison, etc., R. Co. v. Ash, 9 Kan. App. 889; Iola Electric R. Co. v. Jackson, (Kan. 1905) 79 Pac. Rep. 662.

**Kentucky.** — Owensboro, etc., R. Co. v. Courts, 109 Ky. 154; Parish v. Louisville, etc., R. Co., 78 S. W. Rep. 186, 25 Ky. L. Rep. 1524.

**Maine.** — Cotton v. Wiscasset, etc., R. Co., 98 Me. 511.

**Michigan.** — Clement v. Pere Marquette R. Co., (Mich. 1904) 100 N. W. Rep. 999, 11 Detroit Leg. N. 465.

**Minnesota.** — Nickolson v. Northern Pac. R. Co., 80 Minn. 508; Marengo v. Great Northern R. Co., 84 Minn. 397, 87 Am. St. Rep. 369.

**Mississippi.** — Yazoo, etc., R. Co. v. Young, (Miss. 1900) 28 So. Rep. 826; Yazoo, etc., R. Co. v. Harrington, 85 Miss. 366.

**Missouri.** — Kingsbury v. Missouri, etc., R. Co., 156 Mo. 379; Duncan v. St. Louis, etc., R. Co., 111 Mo. App. 193; Boggs v. Missouri, etc., R. Co., 156 Mo. 389; Darby v. Missouri, etc., R. Co., 156 Mo. 391; Wilkerson v. St. Louis, etc., R. Co., 106 Mo. App. 336; Phillips v. St. Louis, etc., R. Co., 107 Mo. App. 203; Warden v. Missouri, etc., R. Co., 78 Mo. App. 664, 2 Mo. App. Rep. 345; Hannah v. Metropolitan St. R. Co., 81 Mo. App. 78; Dietrich v. Hannibal, etc., R. Co., 89 Mo. App. 36; Moon v. Missouri Pac. R. Co., 83 Mo. App. 458; Huss v. Wabash R. Co., 84 Mo. App. 111; Hurd v. Chappell, 91 Mo. App. 317; Webb v. Southern Missouri, etc., R. Co., 92 Mo. App. 53; Growney v. Wabash R. Co., 102 Mo. App. 442.

**Montana.** — Menard v. Montana Cent. R. Co., 22 Mont. 340; Beaudin v. Oregon Short Line R. Co., 31 Mont. 238.

**Nebraska.** — Chicago, etc., R. Co. v. Sevcek, (Neb. 1904) 101 N. W. Rep. 981.

**New Hampshire.** — Flint v. Boston, etc., R. Co., (N. H. 1905) 59 Atl. Rep. 938.

**New Mexico.** — Pecos Valley, etc., R. Co. v. Cazier, (N. Mex. 1905) 79 Pac. Rep. 714.

**Ohio.** — Lake Shore, etc., R. Co. v. Liidtkke, 69 Ohio St. 384.

**South Dakota.** — Crary v. Chicago, etc., R. Co., (S. Dak. 1904) 100 N. W. Rep. 18.

**Tennessee.** — Mobile, etc., R. Co. v. Thompson, 101 Tenn. 197; Louisville, etc., R. Co. v. Patton, 104 Tenn. 40.

**Texas.** — Ft. Worth, etc., R. Co. v. Swan, 97 Tex. 338.

**Vermont.** — Delphia v. Rutland R. Co., 76 Vt. 84; Quimby v. Boston, etc., R. Co., 71 Vt. 301.

**Virginia.** — Sanger v. Chesapeake, etc., R. Co., 102 Va. 86.

**Washington.** — Taylor v. Spokane Falls, etc., R. Co., 32 Wash. 450.

**Wisconsin.** — Cole v. Duluth, etc., R. Co., 104 Wis. 460.

**Roads to Which Applicable.** — A road operated by a manufacturing and mining company for its own benefit, and not for the use of the public, is subject to the provisions of the fence laws, even though its trains are not operated regularly, but only at the discretion of the owner. Webb v. Southern Missouri, etc., R. Co., 92 Mo. App. 53.

**Provisions Not Applicable to Existing corporations.** — Menard v. Montana Cent. R. Co., 22 Mont. 340.

**Indiana Statute Remedial and Liberally Constructed.** — Evansville, etc., R. Co. v. Huffman, 32 Ind. App. 425.

**1064.** Landowner's Right to Fence and Recover Cost. — See note 1.

**1065.** *b.* CONSTITUTIONALITY OF STATUTES. — See notes 1, 2.

Nature of the Penalties Imposed for Failure to Fence. — See note 3.

**1066.** See notes 2, 3.

**British Columbia Statute Ultra Vires.**— The provision in the British Columbia Cattle Protection Act 1891, as amended in 1895, to the effect that a Dominion railway company, unless they erect proper fences on their railway, shall be responsible for cattle injured or killed thereon, is *ultra vires* of the provincial parliament. *Madden v. Nelson*, etc., R. Co., (1899) A. C. 626.

**Duty to Fence Homestead Entry.**— A homestead entry, after it is entered, is private property within the meaning of the statute requiring railroad companies to fence their track when their right of way "passes through or along, or abuts upon or is contiguous to private property." *Johnson v. Oregon Short Line R. Co.*, 7 Idaho 355.

**The Kentucky Statute** providing that the railroad company shall bear the entire cost of the fencing of land through which a right of way has been donated it, has no application to a company to which a right of way has been donated before the enactment of the statute. *Ringo v. Chesapeake*, etc., R. Co., 111 Ky. 679; *Stead v. Southern R. Co.*, 109 Ky. 214.

Nor does the statute apply where the right of way has been acquired by adverse possession and before the statute was enacted. *Louisville*, etc., R. Co. *v. Thompson*, (Ky. 1901) 64 S. W. Rep. 515.

The provision requiring the fencing to be done by the landowner, where he has received compensation from the company for erecting its half of the division fence, does not place upon the landowner the burden of showing that he has not been compensated therefor, but it is the duty of the company to show affirmatively that the owner or his vendor has received compensation for such purpose. *Owensboro*, etc., R. Co. *v. Townsend*, 107 Ky. 291.

**Under Mo. Rev. Stat.** 1899, § 2867, the railroad may fence or not at its discretion, but where it fails to fence it relieves the plaintiff, in a suit to recover for the killing of stock, from the burden of proving negligence, except where the accident occurred at a portion of the railroad inclosed by a legal fence, or at the crossing of any public highway, and makes proof of the fact of the injury, and that the road was not fenced at the place of its occurrence, a *prima facie* case against the railroad. *Hillman v. Gray's Point Terminal R. Co.*, 99 Mo. App. 271.

**1064. 1. Owner's Right to Build and Recover from Company.**— *Illinois Cent. R. Co. v. Hill*, 75 Ill. App. 621; *Terre Haute*, etc., R. Co. *v. Salmon*, 34 Ind. App. 564; *Chicago*, etc., R. Co. *v. Wood*, 30 Ind. App. 650; *Terre Haute*, etc., R. Co. *v. Erdel*, 163 Ind. 348; *Evansville*, etc., R. Co. *v. Butts*, 26 Ind. App. 418; *Evansville*, etc., R. Co. *v. Huffman*, 32 Ind. App. 425; *Chicago*, etc., R. Co. *v. Croy*, 33 Ind. App. 461; *Crary v. Chicago*, etc., R. Co., (S. Dak. 1904) 100 N. W. Rep. 18.

**To Entitle the Landowner to Recover**, under the *Indiana* statute, the fence must be built as

nearly as practicable on the dividing line, and a fence built within the right of way is not a sufficient compliance with the statute. *Chicago*, etc., R. Co. *v. Wood*, 30 Ind. App. 650.

**Owner May Recover for Restoring Fence with New Material.**— *Terre Haute*, etc., R. Co. *v. Erdel*, 163 Ind. 348.

**Landowner May Repair under Indiana Statute.**— *Terre Haute*, etc., R. Co. *v. Salmon*, 34 Ind. App. 564.

**Right under South Dakota Statute Limited to Owner and Does Not Include Lessee.**— *Crary v. Chicago*, etc., R. Co., (S. Dak. 1904) 100 N. W. Rep. 18.

**Double Value Recoverable under Illinois Statute.**— *Malott v. Mapes*, 111 Ill. App. 340.

**1065. 1. Fencing Acts a Valid Exercise of Police Power.**— *Terre Haute*, etc., R. Co. *v. Salmon*, 161 Ind. 131, *citing* 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1065; *Louisville*, etc., R. Co. *v. Kice*, 109 Ky. 786; *Yazoo*, etc., R. Co. *v. Harrington*, 85 Miss. 366; *Kingsbury v. Missouri*, etc., R. Co., 156 Mo. 379; *Pecos Valley*, etc., R. Co. *v. Cazier*, (N. Mex. 1905) 79 Pac. Rep. 714; *Sanger v. Chesapeake*, etc., R. Co., 102 Va. 86.

**2. Validity of Penalties for Nonperformance of Duty.**— *Terre Haute*, etc., R. Co. *v. Salmon*, 161 Ind. 131, *citing* 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1065; *Kingsbury v. Missouri*, etc., R. Co., 156 Mo. 379; *Pecos Valley*, etc., R. Co. *v. Cazier*, (N. Mex. 1905) 79 Pac. Rep. 714.

**3. Double Damages.**— *Cagwin v. Chicago*, etc., R. Co., 113 Iowa 175; *Warden v. Missouri*, etc., R. Co., 78 Mo. App. 664, 2 Mo. App. Rep. 345; *Huss v. Wabash R. Co.*, 84 Mo. App. 111; *Hurd v. Chappell*, 91 Mo. App. 317; *Kingsbury v. Missouri*, etc., R. Co., 156 Mo. 379; *Boggs v. Missouri*, etc., R. Co., 156 Mo. 389; *Wilkinson v. St. Louis*, etc., R. Co., 106 Mo. App. 336; *Phillips v. St. Louis*, etc., R. Co., 107 Mo. App. 203.

**1066. 2. Absolute Liability.**— *Louisville*, etc., R. Co. *v. Kice*, 109 Ky. 786; *Menard v. Montana Cent. R. Co.*, 22 Mont. 340; *Ft. Worth*, etc., R. Co. *v. Swan*, 97 Tex. 338; *Cole v. Duluth*, etc., R. Co., 104 Wis. 460. See also *Terre Haute*, etc., R. Co. *v. Salmon*, 161 Ind. 131; *Atchison*, etc., R. Co. *v. Ash*, 9 Kan. App. 889.

**3. Attorney's Fees Recoverable under Illinois Statute.**— *Rabbermann v. Pierce*, 77 Ill. App. 405.

**Attorney's Fees Recoverable under Indiana Statute.**— *Terre Haute*, etc., R. Co. *v. Erdel*, 163 Ind. 348; *Terre Haute*, etc., R. Co. *v. Salmon*, 161 Ind. 131.

**Provision for Attorney's Fee Unconstitutional under Missouri Statute.**— *Paddock v. Missouri Pac. R. Co.*, 155 Mo. 524. See also *Brown v. Missouri*, etc., R. Co., 104 Mo. App. 691.

**Penalty Recoverable under Mississippi Statute.**— See *Yazoo*, etc., R. Co. *v. Young*, (Miss. 1900) 28 So. Rep. 826.

**Recovery of Double the Cost of the Fence Erected**



**1066. c. PURPOSE OF STATUTES — FOR WHOSE BENEFIT INTENDED.**

— See notes 4, 5.

**1067. d. UPON WHOM THE DUTY TO FENCE RESTS. — See note 1.****1068. Owners Also Liable. — See note 2.****1069. Receiver. — See note 1.***e. DUTY NOT TRANSFERABLE. — See note 2.***1070. f. WHEN THE STATUTORY DUTY ATTACHES. — See note 1.****1071. When Liability Begins. — See note 1.***g. AGREEMENT WITH ADJOINING LANDOWNER TO FENCE. —*

See note 2.

**1072. Not Released from Duty to Others. — See note 1.***Written Agreements Run with the Land. — See note 2.***1073. h. WHERE RAILROAD OWNS THE ADJACENT LAND. — See note 3.**by Landowner. — *Illinois Cent. R. Co. v. Hill*, 75 Ill. App. 621.Under the Kentucky Statute the railroad company is subject to a fine for every day after the expiration of four months from notice, for failure to erect a fence. *Parish v. Louisville, etc., R. Co.*, (Ky. 1904) 78 S. W. Rep. 186.**1066. 4. Purpose Disclosed in Statute. —** *Lake Shore, etc., R. Co. v. Liidtkke*, 69 Ohio St. 384.**5. Statutes Not Generally Regarded as Adjoining Landowners Solely. —** *Johnson v. Oregon Short Line R. Co.*, 7 Idaho 355; *Terre Haute, etc., R. Co. v. Salmon*, 161 Ind. 131, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1066; *Fowbel v. Wabash R. Co.*, 125 Iowa 215; *Rinehart v. Kansas City Southern R. Co.*, (Mo. App. 1904) 80 S. W. Rep. 910; *Phillips v. St. Louis, etc., R. Co.*, 107 Mo. App. 203; *Mobile, etc., R. Co. v. Thompson*, 101 Tenn. 197; *International, etc., R. Co. v. Richmond*, 28 Tex. Civ. App. 513, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1066; *Quimby v. Boston, etc., R. Co.*, 71 Vt. 301; *Sanger v. Chesapeake, etc., R. Co.*, 102 Va. 86; *Quebec Central Co. v. Pellerin*, 12 Quebec K. B. 152. Compare *Growney v. Wabash R. Co.*, 102 Mo. App. 442.**All Stock Owners Protected under Virginia Statute. —** *Sanger v. Chesapeake, etc., R. Co.*, 102 Va. 86.**Purpose of Enactment Also to Prevent Trespass by Cattle Straying. —** *Kingsbury v. Missouri, etc., R. Co.*, 156 Mo. 379.**Lessee May Recover for Failure to Erect Fence. —** *Yazoo, etc., R. Co. v. Young*, (Miss. 1900) 28 So. Rep. 826.**1067. 1. Purchaser Without Notice of Contract to Erect Fence Not Bound Thereby. —** *Bailey v. Southern R. Co.*, 110 Ky. 231.**Lessee Subject to Duties Imposed on Lessor. —** *Howard v. Maysville, etc., R. Co.*, 70 S. W. Rep. 631, 24 Ky. L. Rep. 1051.**Electric Railway Purchasing Railroad Liable for Failure to Fence. —** *Hannah v. Metropolitan St. R. Co.*, 81 Mo. App. 78.**1068. 2. Owner Liable for Lessee's Breach of His Agreement to Fence. —** *Howard v. Maysville, etc., R. Co.*, 70 S. W. Rep. 631, 24 Ky. L. Rep. 1051.**1069. 1. Receiver's Liability. —** See *Peirce v. Rabbermann*, 77 Ill. App. 619; *Rabbermann v. Pierce*, 77 Ill. App. 405.**2. No Recovery by One Erecting a Fence, under****Contract, for Injuries Caused by Defects in Construction. —** *Rabbermann v. Pierce*, 77 Ill. App. 405.**1070. 1. Construction in Twelve Months Required by Indiana Statute. —** *Chicago, etc., R. Co. v. Croy*, 33 Ind. App. 461.**1071. 1. When Liability for Damages for Failure to Fence Attaches. —** *Wilkerson v. St. Louis, etc., R. Co.*, 106 Mo. App. 336.**Burden on Defendant to Show Lack of Reasonable Time. —** *Wilkerson v. St. Louis, etc., R. Co.*, 106 Mo. App. 336.**2. Agreement for Fencing Valid as Between Railroad and Adjoining Owner. —** *Johnson v. Oregon Short Line R. Co.*, 7 Idaho 355; *Brown v. Southern Pac. R. Co.*, 36 Oregon 128, 78 Am. St. Rep. 761, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1071; *Delphia v. Rutland R. Co.*, 76 Vt. 84; *Sanger v. Chesapeake, etc., R. Co.*, 102 Va. 86; *Quebec Cent. Co. v. Pellerin*, 12 Quebec K. B. 152, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1071.**Railroad May Recover, under Vermont Statute, Where Owner Fails to Comply with Agreement. —** *Delphia v. Rutland R. Co.*, 76 Vt. 84.**1072. 1. Railroad Companies Not Relieved from Duty to Others Not Parties to the Agreement. —** *Johnson v. Oregon Short Line R. Co.*, 7 Idaho 355; *Rinehart v. Kansas City Southern R. Co.*, (Mo. App. 1904) 80 S. W. Rep. 910; *Brown v. Southern Pac. R. Co.*, 36 Oregon 128, 78 Am. St. Rep. 761, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1072; *International, etc., R. Co. v. Richmond*, 28 Tex. Civ. App. 513; *Sanger v. Chesapeake, etc., R. Co.*, 102 Va. 86; *Quebec Cent. Co. v. Pellerin*, 12 Quebec K. B. 152, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1072.**Under the Vermont Statute, the duty to erect is owed to the adjoining owner, not to the general public. *Delphia v. Rutland R. Co.*, 76 Vt. 84.****2. Agreement Does Not Run with Land Where Contrary Intention Appears. —** *Brown v. Southern Pac. R. Co.*, 36 Oregon 128, 78 Am. St. Rep. 761.**Subsequent Lessee with Notice Bound by Agreement. —** *Brown v. Southern Pac. R. Co.*, 36 Oregon 128, 78 Am. St. Rep. 761.**1073. 3. In Illinois, where the company has fenced in its property adjoining the right of way, it is not necessary that an additional fence should be placed between the property and the**

**1073. i. LIABILITY FOR FAILURE TO MAINTAIN.** — See note 4.

right of way, and the company will not be held liable for injuries to an animal trespassing within the inclosure. *Chicago, etc., R. Co. v. Tice*, 111 Ill. App. 161.

**1073. 4. Generally Liable to All Injured by Breach of Statutory Duty to Fence** — *Idaho*. — *Patrie v. Oregon Short Line R. Co.*, 6 Idaho 448; *Johnson v. Oregon Short Line R. Co.*, 7 Idaho 355.

*Indiana*. — *Chicago, etc., R. Co. v. Brown*, 33 Ind. App. 603; *Chicago, etc., R. Co. v. Croy*, 33 Ind. App. 461.

*Iowa*. — *Norman v. Chicago, etc., R. Co.*, 110 Iowa 283.

*Kansas*. — *Atchison, etc., R. Co. v. Ash*, 9 Kan. App. 889; *Iola Electric R. Co. v. Jackson*, (Kan. 1905) 79 Pac. Rep. 662.

*Kentucky*. — *Parish v. Louisville, etc., R. Co.*, 78 S. W. Rep. 186, 25 Ky. L. Rep. 1524.

*Minnesota*. — *Nickolson v. Northern Pac. R. Co.*, 80 Minn. 508.

*Missouri*. — *Kingsbury v. Missouri, etc., R. Co.*, 156 Mo. 379; *Boggs v. Missouri, etc., R. Co.*, 156 Mo. 389; *Redmond v. Missouri, etc., R. Co.*, 104 Mo. App. 651; *Rinehart v. Kansas City Southern R. Co.*, (Mo. App. 1904) 80 S. W. Rep. 910; *Phillips v. St. Louis, etc., R. Co.*, 107 Mo. App. 203; *Warden v. Missouri, etc., R. Co.*, 78 Mo. App. 664, 2 Mo. App. Rep. 345; *Moon v. Missouri Pac. R. Co.*, 83 Mo. App. 458; *Schlottzhauer v. Missouri, etc., R. Co.*, 89 Mo. App. 65.

*Montana*. — *Menard v. Montana Cent. R. Co.*, 22 Mont. 340; *Beaudin v. Oregon Short Line R. Co.*, 31 Mont. 238.

*Nebraska*. — *Chicago, etc., R. Co. v. Sevcek*, (Neb. 1904) 101 N. W. Rep. 981.

*New York*. — *Lee v. Brooklyn Heights R. Co.*, 97 N. Y. App. Div. 111.

*Ohio*. — See *Lake Shore, etc., R. Co. v. Liidtkke*, 69 Ohio St. 384.

*Tennessee*. — *Mobile, etc., R. Co. v. Tiernan*, 102 Tenn. 704.

*Texas*. — *Ft. Worth, etc., R. Co. v. Swan*, 97 Tex. 338.

*Vermont*. — *Quimby v. Boston, etc., R. Co.*, 71 Vt. 301.

*Washington*. — *Taylor v. Spokane Falls, etc., R. Co.*, 32 Wash. 450.

*Wisconsin*. — *Cole v. Duluth, etc., R. Co.*, 104 Wis. 460.

*Canada*. — *Grand Trunk R. Co. v. James*, 31 Can. Sup. Ct. 420; *Davidson v. Grand Trunk R. Co.*, 5 Ont. L. Rep. 574.

**Failure to Fence Must Be Cause of Injury.** — *Norman v. Chicago, etc., R. Co.*, 110 Iowa 283; *Southern Kansas R. Co. v. McKay*, (Tex. Civ. App. 1898) 47 S. W. Rep. 479.

**Neglect to Fence Merely Prima Facie Evidence of Negligence under New Mexico Statute.** — *Pecos Valley, etc., R. Co. v. Cazier*, (N. Mex. 1905) 79 Pac. Rep. 714.

**Railroad Not Liable for Injuries Caused by Fright.** — *McKellar v. Canadian Pac. R. Co.*, 14 Manitoba 614.

**Kentucky Statute — Division of Loss Between Owner and Company.** — *Louisville, etc., R. Co. v. Kice*, 109 Ky. 786.

**Liability under Tenn. Act of 1891 Limited to**

**Loss or Injury by Collision.** — *Sinard v. Southern R. Co.*, 101 Tenn. 473.

**Liability Not Limited to Loss or Injury Caused by Collision under Missouri Statute.** — *Boggs v. Missouri, etc., R. Co.*, 156 Mo. 389.

**Under Texas Rev. Stat., Art. 4528**, it is only where stock is killed or injured by locomotives and cars of railroads, in running over their respective railways, that a railway company, which has failed to fence its road, can be held absolutely liable to the owner for the value of the animal injured. *San Antonio, etc., R. Co. v. Tamborello*, (Tex. Civ. App. 1902) 67 S. W. Rep. 926.

**Company Only Liable for Failure to Exercise Ordinary Care under Texas Statute.** — *Ft. Worth, etc., R. Co. v. Roberts*, 29 Tex. Civ. App. 566.

**Bridge.** — Where the fences of the company extend to a bridge which is left open, leaving a passage underneath for cattle, it is not required that the fences shall extend along the right of way below the bridge, provided they are sufficient to prevent the cattle from going on the track. *Cagwin v. Chicago, etc., R. Co.*, 113 Iowa 175.

**Culvert.** — A railway company is under no obligation to erect or maintain a fence on each side of a culvert across a watercourse; and where cattle went through the culvert into a field and from thence to the highway, and straying on the railway track were killed, the company was held not liable to their owner. *Grand Trunk R. Co. v. James*, 31 Can. Sup. Ct. 420.

**Elevation of Abutting Land.** — The railroad company is not liable where it has placed a fence in the manner required by law, but by reason of the raising of the level of the adjoining land the height of its fence is so diminished that cattle may go on its right of way from the adjoining land. *Chicago, etc., R. Co. v. Hand*, 113 Ill. App. 144.

**Inability of Company to Construct Fence on Extreme Limit of Right of Way No Defense.** — *Evansville, etc., R. Co. v. Huffman*, 32 Ind. App. 425.

**Fence Must Extend Through Inclosed Fields.** — *Louisville, etc., R. Co. v. Patton*, 104 Tenn. 40.

**Duty to Fence Both Sides of Track.** — *Louisville, etc., R. Co. v. Patton*, 104 Tenn. 40.

**Parallel Tracks of Different Lines.** — The fact that several railroad tracks run parallel to each other, and that a track of another company is also immediately adjacent and parallel thereto, will not excuse either company from complying with the statutory obligation to fence their tracks for the benefit of the public. *Marengo v. Great Northern R. Co.*, 84 Minn. 397, 87 Am. St. Rep. 369.

**Construction of Insufficient Fence Not Compliance with Statute.** — *Chicago, etc., R. Co. v. Croy*, 33 Ind. App. 461.

**Where the Fence Has Been Destroyed by the Landowner's Son**, the company is not liable for the killing of cattle of the tenant of the landlord which entered through the opening so made. *Best v. Ulster, etc., R. Co.*, 35 N. Y. App. Div. 623.

**Railroad Liable to Lessee for Damage Caused by Failure to Erect.** — *Yazoo, etc., R. Co. v. Young*, (Miss. 1900) 28 So. Rep. 826.

**1074.** A Failure to Maintain the Fence. — See notes 1, 2.

**1075.** Company Not Relieved by Law Prohibiting Stock from Running at Large. — See note 1.

*j.* DUTY TO FENCE AT PARTICULAR PLACES — (1) *Generally.* —

See note 2.

**1076.** See note 1.

(2) *Depot Grounds.* — See note 2.

**1078.** Questions of Law and Fact. — See note 1.

**1074. 1. Failure to Maintain.** — Chicago, etc., R. Co. v. Seveck, (Neb. 1904) 101 N. W. Rep. 981; Terre Haute, etc., R. Co. v. Salmon, 34 Ind. App. 564. See also Chicago, etc., R. Co. v. Croy, 33 Ind. App. 461.

**Railroad Not Liable in Absence of Actual or Implied Notice of Defect.** — Schlotzhauer v. Missouri, etc., R. Co., 89 Mo. App. 65.

**Ordinary Care to Repair Fences Required under Texas Statute.** — Galveston, etc., R. Co. v. Reitz, 27 Tex. Civ. App. 411.

**Liability under Agreement with Owner.** — "An agreement by a railroad company with a landowner to build and maintain fences and cattle guards in consideration of his grant of a right of way, is *prima facie* binding on the company to pay the landowner for injuries to his animals entering on the track in consequence of the company's fault in failing to maintain fences in accordance with the terms of the contract." Evans v. Southern R. Co., 133 Ala. 482.

**2. Railroad Entitled to Reasonable Time in Which to Repair.** — Dietrich v. Hannibal, etc., R. Co., 89 Mo. App. 36.

**1075. 1. Effect of Law Against Animals Running at Large.** — Growney v. Wabash R. Co., 102 Mo. App. 442; Kingsbury v. Missouri, etc., R. Co., 156 Mo. 379; Rinehart v. Kansas City Southern R. Co., (Mo. App. 1904) 80 S. W. Rep. 910.

**2. Places to Which Statutory Duty to Fence Does Not Extend.** — Chicago, etc., R. Co. v. Blair, 75 Ill. App. 659; Hathaway v. Detroit, etc., R. Co., 124 Mich. 610, 7 Detroit Leg. N. 351; Nickolson v. Northern Pac. R. Co., 80 Minn. 508; Marengo v. Great Northern R. Co., 84 Minn. 397, 87 Am. St. Rep. 369; Ellis v. Mississippi River, etc., R. Co., 89 Mo. App. 241; Hurd v. Chappell, 91 Mo. App. 317; Downey v. Mississippi River, etc., R. Co., 94 Mo. App. 137; Hillman v. Grays Point Terminal R. Co., 99 Mo. App. 271; Redmond v. Missouri, etc., R. Co., 104 Mo. App. 651; Chicago, etc., R. Co. v. Seveck, (Neb. 1904) 101 N. W. Rep. 981; Mobile, etc., R. Co. v. Thompson, 101 Tenn. 197. See also Atchison, etc., R. Co. v. Ash, 9 Kan. App. 889; Southern Kansas R. Co. v. McKay, (Tex. Civ. App. 1898) 47 S. W. Rep. 479; Grand Trunk R. Co. v. James, 31 Can. Sup. Ct. 420.

**Railroad Not Required to Erect Cattle Guards at Intersection of Its Own Fences.** — Anderson v. Atlantic Coast Line R. Co., 59 S. Car. 350.

**Fencing Off Parallel Track.** — Where a landowner has removed gates placed between parallel tracks at a private crossing, one whose stock has been killed on the track of one of the roads from which the gates have been removed cannot recover on the ground of the failure of the company to erect gates. Fowbel v. Wabash, etc., R. Co., 125 Iowa 215.

**Natural Barriers.** — Natural barriers are equivalent to a legal fence where they answer the purpose of a fence and are used as such in connection with a fence; but where there is no attempt to fence the track, and the barriers, though competent for the purpose, are not used as a fence, and there is free access at each end of such barriers, they cannot be held to constitute a fence. Taylor v. Spokane Falls, etc., R. Co., 32 Wash. 450.

**1076. 1.** Duncan v. St. Louis, etc., R. Co., 111 Mo. App. 193; Hillman v. Grays Point Terminal R. Co., 99 Mo. App. 271; Hurd v. Chappell, 91 Mo. App. 317; Southern Kansas R. Co. v. McKay, (Tex. Civ. App. 1898) 47 S. W. Rep. 479. See also Atchison, etc., R. Co. v. Ash, 9 Kan. App. 889; Cole v. Duluth, etc., R. Co., 104 Wis. 460.

**Question for Jury.** — Wabash R. Co. v. Warren, 113 Ill. App. 173.

**2. Depot Grounds Need Not Be Fenced.** — Chicago, etc., R. Co. v. Blair, 75 Ill. App. 659; Hathaway v. Detroit, etc., R. Co., 124 Mich. 610, 7 Detroit Leg. N. 351; Nickolson v. Northern Pac. R. Co., 80 Minn. 508; Marengo v. Great Northern R. Co., 84 Minn. 397, 87 Am. St. Rep. 369; Ellis v. Mississippi River, etc., R. Co., 89 Mo. App. 241; Downey v. Mississippi River, etc., R. Co., 94 Mo. App. 137; Redmond v. Missouri, etc., R. Co., 104 Mo. App. 651; Beaudin v. Oregon Short Line R. Co., 31 Mont. 238; Chicago, etc., R. Co. v. Seveck, (Neb. 1904) 101 N. W. Rep. 981. See also Mobile, etc., R. Co. v. Thompson, 101 Tenn. 197.

**What Depot Grounds Include.** — A railroad company is not excused from liability for failure to fence at a point which is not a regular stopping place of trains for either discharging or receiving freight or passengers, but at which passengers are permitted to get on and off the trains, though tickets cannot be procured to or from this point. Duncan v. St. Louis, etc., R. Co., 111 Mo. App. 193.

**1078. 1. Question of Mixed Law and Fact.** — Downey v. Mississippi River, etc., R. Co., 94 Mo. App. 137; Texas, etc., R. Co. v. Seay, (Tex. Civ. App. 1902) 69 S. W. Rep. 177; Cole v. Duluth, etc., R. Co., 104 Wis. 460. See also Nickolson v. Northern Pac. R. Co., 80 Minn. 508.

**Extent of Switch Yard Required a Question of Fact.** — Downey v. Mississippi River, etc., R. Co., 94 Mo. App. 137.

**Extent of Depot Grounds.** — Where the grounds left unfenced and treated by a railway company as depot grounds are unusually extensive, and the *locus in quo* is outside of and beyond the switches and side tracks, and is not used as a place of access by the public or patrons, either for freight or passengers, and only for the passing or standing of trains, the question whether



**1078.** (3) *Within Cities and Villages.* — See notes 2, 3.

**1079.** Statutes. — See note 2.

(4) *Highway Crossings.* — See note 3.

**1080.** (5) *Private Crossings.* — See note 1.

*k.* CHARACTER OF FENCE REQUIRED. — See notes 2, 3.

**1081.** See note 2.

*Gates and Bars.* — See notes 7, 8.

it is necessary for and used as depot grounds is properly for the jury. *Cole v. Duluth*, etc., R. Co., 104 Wis. 460.

**Under the Wisconsin Statute** a railroad is absolutely liable for the killing of animals if they came upon its road at a point (not in fact depot grounds) where it was unfenced, even though it omitted the fence in good faith because it considered the locality depot grounds. *Cole v. Duluth*, etc., R. Co., 104 Wis. 460.

**Burden of Showing Necessity of Omitting Fence on the Company.** — *Marengo v. Great Northern R. Co.*, 84 Minn. 397, 87 Am. St. Rep. 369.

**1078. 2. Fencing Statute Applies to Cities.** — *Nickolson v. Northern Pac. R. Co.*, 80 Minn. 508; *Tabb v. Grand Trunk R. Co.*, 8 Ont. L. Rep. 203. See also *Rubein v. Brooklyn Heights R. Co.*, 61 N. Y. App. Div. 478.

**In Missouri — Statutory Provisions.** — *Downey v. Mississippi River*, etc., R. Co., 94 Mo. App. 137; *Downey v. Mississippi River*, etc., R. Co., 94 Mo. App. 137; *Hurd v. Chappell*, 91 Mo. App. 317.

**Duty to Fence in District of Columbia by Statute and Ordinance.** — *Baltimore*, etc., R. Co. *v. Cumberland*, 176 U. S. 232.

**Unused Streets.** — A portion of the inclosure on one side of the railroad was platted, and lots, blocks, streets, and alleys were staked out; but as no lots or blocks were sold, nor streets or alleys used as such, and as the platted portion was still used for agricultural purposes only, the platting did not relieve the company from the duty of fencing its road, nor absolve it from liability for the loss. *Iola Electric R. Co. v. Jackson*, (Kan. 1905) 79 Pac. Rep. 662.

**3. Fences Not Required at Crossings.** — *Marengo v. Great Northern R. Co.*, 84 Minn. 397, 87 Am. St. Rep. 369; *Downey v. Mississippi River*, etc., R. Co., 94 Mo. App. 137.

**Fences Not Required at Legally Platted but Unopened Street.** — *Marengo v. Great Northern R. Co.*, 84 Minn. 397, 87 Am. St. Rep. 369.

**1079. 2. Statutes Exempting from Duty to Fence in Cities.** — *Lee v. Brooklyn Heights R. Co.*, 97 N. Y. App. Div. 111; *Sanger v. Chesapeake*, etc., R. Co., 102 Va. 86. See also *Ellis v. Mississippi River*, etc., R. Co., 89 Mo. App. 241; *Chicago*, etc., R. Co. *v. Blair*, 75 Ill. App. 659; *Chicago*, etc., R. Co. *v. Seveck*, (Neb. 1904) 101 N. W. Rep. 981.

**3. Highway Crossings.** — *Chicago*, etc., R. Co. *v. Seveck*, (Neb. 1904) 101 N. W. Rep. 981; *Gloucester Tp. v. Canada Atlantic R. Co.*, 3 Ont. L. Rep. 85. See also *Chicago*, etc., R. Co. *v. Blair*, 75 Ill. App. 659; *Evansville*, etc., R. Co. *v. Butts*, 26 Ind. App. 418; *Hillman v. Gray's Point Terminal R. Co.*, 99 Mo. App. 271.

**Highway Parallel to Track — Duty to Fence Off Right of Way.** — *Ft. Worth*, etc., R. Co. *v. Roberts*, 29 Tex. Civ. App. 566.

**Highway Parallel to Track.** — *Sanger v. Chesapeake*, etc., R. Co., 102 Va. 86.

**1080. 1. Obstruction of Private Ways Prohibited by Tennessee Statute.** — *Mobile*, etc., R. Co. *v. Thompson*, 101 Tenn. 197.

**2. Under Maine Statute.** — *Cotton v. Wiscasset*, etc., R. Co., 98 Me. 511.

**Under Michigan Statute.** — *Clement v. Pere Marquette R. Co.*, (Mich. 1904) 100 N. W. Rep. 999, 11 Detroit Leg. N. 465.

**Under Mississippi Statute.** — *Yazoo*, etc., R. Co. *v. Harrington*, 85 Miss. 366.

**Under Missouri Statute.** — *Rinchart v. Kansas City Southern R. Co.*, (Mo. App. 1904) 80 S. W. Rep. 910.

**Under New York Statute.** — See *Lee v. Brooklyn Heights R. Co.*, 97 N. Y. App. Div. 111.

**Under Ohio Statute.** — *Lake Shore*, etc., R. Co. *v. Liidtk*, 69 Ohio St. 384.

**3. Legal Fence Held Sufficient.** — *Dietrich v. Hannibal*, etc., R. Co., 89 Mo. App. 36.

**Railroad Not Required to Fence Off Right of Way.** — If the track is protected at all points, this is sufficient, and it is not essential that the company should fence off the whole of its right of way. *Cagwin v. Chicago*, etc., R. Co., 113 Iowa 175.

**Opening for Culvert Renders Fence Insufficient.** — *Kingsbury v. Missouri*, etc., R. Co., 156 Mo. 379.

**Railroad Not Required to Erect Fence Which Will Turn Breachy Stock.** — *Dietrich v. Hannibal*, etc., R. Co., 89 Mo. App. 36.

**1081. 2. Texas Statute.** — *International*, etc., R. Co. *v. Richmond*, 28 Tex. Civ. App. 513, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1081.

**7. Gate a Part of the Fence.** — *Fowbel v. Wabash R. Co.*, 125 Iowa 215; *Mobile*, etc., R. Co. *v. Tiernan*, 102 Tenn. 704.

**Liability under Texas Statute for Failure to Make Opening in Fence Dividing Inclosure.** — *San Antonio*, etc., R. Co. *v. Grier*, 20 Tex. Civ. App. 138.

**8. Gates Must Be Kept in Condition.** — *Wirstlin v. Chicago*, etc., R. Co., 124 Iowa 170; *Mobile*, etc., R. Co. *v. Tiernan*, 102 Tenn. 704.

**Ordinary Care Required in Construction and Maintenance of Gate.** — *Wirstlin v. Chicago*, etc., R. Co., 124 Iowa 170.

**Under the Texas Statute** the company is only liable where it has failed to exercise ordinary care to keep the gate in repair. *Missouri*, etc., R. Co. *v. Bradshaw*, (Tex. Civ. App. 1904) 83 S. W. Rep. 897.

**Notice of Defects.** — The rule is that a railway company will not become liable unless it has actual notice of the defects, or ought, in the exercise of reasonable care, to have had notice, and a sufficient time has elapsed within which to make the repairs. Notice may, of course, be inferred from lapse of time, and the question of

**1082.** *Keeping Gates Closed.* — See notes 1, 2.

*Cattle Guards.* — See note 3.

**1083.** See notes 1, 4.

*Sufficiency of Erection.* — See note 5.

**1084.** See note 1.

*7. ANIMALS TO BE FENCED AGAINST.* — See note 2.

notice and of reasonable time for repair or reconstruction is for the jury. *Wirstlin v. Chicago, etc., R. Co.*, 124 Iowa 170.

**1082. 1. Reasonable Diligence to Keep Gates Closed.** — *Connolly v. Central Vermont R. Co.*, 4 N. Y. App. Div. 221, *affirmed* 158 N. Y. 675; *Mobile, etc., R. Co. v. Tiernan*, 102 Tenn. 704.

**2. Duty to Keep Gate Closed Held to Rest on Landowner.** — *Swanson v. Chicago, etc., R. Co.*, 79 Minn. 398; *Missouri, etc., R. Co. v. Bredshaw*, (Tex. Civ. App. 1904) 83 S. W. Rep. 897.

*Under the Texas Statute* requiring companies to fence their roads, it is necessary that the track shall be completely inclosed, and a fence which leaves one end of the track open is not a sufficient compliance. *Ft. Worth, etc., R. Co. v. Swan*, 97 Tex. 338.

**Obligation Mutual.** — Where a railroad company has put in gates at a railroad crossing in the country, it is not required to station a guard at such crossing to keep the gate closed. Between the company and the other parties interested in maintaining the gate the obligation to keep the same properly closed is mutual, and demands the exercise of ordinary care from each. *Mooers v. Northern Pac. R. Co.*, 80 Minn. 24.

**3. Cattle Guards Part of Fence.** — *Johnson v. Oregon Short Line R. Co.*, 7 Idaho 355; *Chicago, etc., R. Co. v. Brown*, 33 Ind. App. 603; *Iola Electric R. Co. v. Jackson*, (Kan. 1905) 79 Pac. Rep. 662; *Quimby v. Boston, etc., R. Co.*, 71 Vt. 301.

**Right of Owner of Inclosed Land to Compel Erection under Arkansas Statute.** — *Kansas City, etc., R. Co. v. Lowther*, 68 Ark. 238.

**Duty of Company to Erect under Arkansas Statute — Notice Required.** — *St. Louis, etc., R. Co. v. Hood*, 67 Ark. 357; *St. Louis, etc., R. Co. v. Mendenhall*, 71 Ark. 133.

**Duty to Erect under Iowa Statute.** — *Guinn v. Iowa, etc., R. Co.*, 125 Iowa 301.

**Duty to Erect under South Carolina Statute.** — *Burnett v. Southern R. Co.*, 62 S. Car. 281.

**Duty to Erect under Texas Statute.** — See *Southern Kansas R. Co. v. McKay*, (Tex. Civ. App. 1898) 47 S. W. Rep. 479.

**Inclosures in Which to Be Erected, under Texas Statute.** — *Southern Kansas R. Co. v. Isaacs*, 20 Tex. Civ. App. 466.

**Sufficiency of Guard under Michigan Statute.** — *Clement v. Pere Marquette R. Co.*, (Mich. 1904) 100 N. W. Rep. 999, 11 Detroit Leg. N. 465.

**Who May Compel Erection under Georgia Statute.** — One in possession of land under a bond for title, with a part of the purchase money paid, is not the "owner" of such land within the meaning of the Act of November 11, 1889, imposing upon railway companies the duty of erecting and maintaining cattle guards at designated points along their lines of road. *Hardin v. Chattanooga Southern R. Co.*, 113 Ga. 357.

**Statute Requiring Erection of Cattle Guards and**

**Gates Not Applicable to Roads Having Right of Way Fenced Before Enactment.** — *Owazarzak v. Gulf, etc., R. Co.*, 31 Tex. Civ. App. 229.

**1083. 1. Iola Electric R. Co. v. Jackson**, (Kan. 1905) 79 Pac. Rep. 662.

**Failure to Erect Cattle Guards a Failure to Fence.** — *Chicago, etc., R. Co. v. Brown*, 33 Ind. App. 603. See also *St. Louis, etc., R. Co. v. Hood*, 67 Ark. 357.

**Necessity Caused by Opening of Highway — Duty of County to Pay Cost.** — *Atchison, etc., R. Co. v. Lyon County*, 8 Kan. App. 597.

**The Georgia Statute** imposes upon a railroad company no duty to build or maintain at its own expense cattle guards on its right of way, except at public roads or private ways established pursuant to law, and on the dividing line of adjoining landowners. *Southern R. Co. v. Harrell*, 104 Ga. 602.

**Company Liable for Injury Caused by Failure to Erect.** — *Pothast v. Chicago G. W. R. Co.*, 110 Iowa 458.

**4. Propriety of Erection.** — It is well settled that if cattle guards could not have been placed at the crossing where animals go onto the track, without endangering the life or limb of the railway's employees in transacting the business of the road with the public, and in performing the necessary work connected with the operation of the cars, such as switching cars, trains, etc., no liability arises for omitting to so place them. But the question whether the cattle guards can properly be omitted is not to be determined by the railway alone; where the evidence is conflicting on this point the question is for the determination of the jury. *Gilpin v. Missouri, etc., R. Co.*, (Mo. App. 1903) 77 S. W. Rep. 118.

**5. Sufficiency of Erection under Indiana Statute.** — *Pennsylvania R. Co. v. Newby*, 164 Ind. 109.

**Cattle Guard Filled with Sand.** — Even though the company is under no obligation to erect a cattle guard at a particular point, it is not thereby released from liability if a cattle guard which it has erected at such a point has become so filled as to afford a passageway for cattle. *Hathaway v. Detroit, etc., R. Co.*, 124 Mich. 610.

If the cattle guard is so filled with sand that there is a path across it which may be readily traveled by cattle, the company is liable for injury to cattle crossing there and struck while on the right of way by its train, without regard to what induced the cattle to go there, as long as the owned was not in wilful fault. *Pothast v. Chicago G. W. R. Co.*, 110 Iowa 458.

**1084. 1. Must Be Sufficient for All Ordinary Uses.** — See *Pothast v. Chicago G. W. R. Co.*, 110 Iowa 458. See also *Johnson v. Detroit, etc., R. Co.*, (Mich. 1905) 102 N. W. Rep. 744.

**2. Animals Railroad Must Fence Against.** — *Chicago, etc., R. Co. v. Tice*, 111 Ill. App. 161; *Growney v. Wabash R. Co.*, 102 Mo. App. 442; *Brown v. Missouri, etc., R. Co.*, 104 Mo. App.

**1084.** *m.* WHETHER DUTY TO FENCE AGAINST CHILDREN. — See note 3.

**1085.** See note 1.

### FERMENTED LIQUORS. — See note 3.

691; *Farmer's Bank v. Chicago, etc.*, R. Co., 109 Mo. App. 165; *Flint v. Boston, etc.*, R. Co., (N. H. 1905) 59 Atl. Rep. 938. See also *Rubein v. Brooklyn Heights R. Co.*, 61 N. Y. App. Div. 478. Compare *Rinehart v. Kansas City Southern R. Co.*, (Mo. App. 1904) 80 S. W. Rep. 910.

**Animals on Property with Express or Implied Consent of Landowner Protected.** — *Payne v. Current River R. Co.*, 75 Mo. App. 14.

**Where Landowner's Fence Is Defective.** — If the stock gets into the field of one owning land adjoining a railway, by reason of its being unfenced or defectively fenced, and strays from there on the railway track which is unfenced or defectively fenced, the company is liable for injuries to the stock. *Farmers' Bank v. Chicago, etc.*, R. Co., 109 Mo. App. 165.

**Cattle on Highway.** — A railway company, whose premises adjoin a public highway, is not bound to fence against cattle straying upon the highway, and not merely passing and repassing along it, although they are upon the highway

by permission of the owner of the soil. *Luscombe v. Great Western R. Co.*, (1899) 2 Q. B. 313.

**1084. 3. No Duty to Fence Against Intelligent Persons.** — *Lake Shore, etc.*, R. Co. *v. Liidtk*, 69 Ohio St. 384.

**Fence Required by Ordinance — Contributory Negligence a Question of Fact.** — *Baltimore, etc.*, R. Co. *v. Cumberland*, 176 U. S. 232.

**1085. 1. Infants Injured on Account of Failure to Fence.** — See *Baltimore, etc.*, R. Co. *v. Cumberland*, 12 App. Cas. (D. C.) 598. See also *Nickolson v. Northern Pac. R. Co.*, 80 Minn. 508; *Marengo v. Great Northern R. Co.*, 84 Minn. 397, 87 Am. St. Rep. 369; *Tabb v. Grand Trunk R. Co.*, 8 Ont. L. R. 203.

**3. Fermented Liquors.** — *State v. Watts*, 101 Mo. App. 658 (beer); *People v. Kinney*, 124 Mich. 486.

**Fermented Liquor Distinguished from Intoxicating.** — *People v. Kinney*, 124 Mich. 486.

## FERRIES.

By BRISCOE B. CLARK.

**1088. II. NATURE AND EXTENT OF RIGHT — 1. In General — A Franchise.** — See note 2.

**Real Property.** — See note 3.

**1089. 5. Right of Ferry Is Subject to Rights of the Public in Navigable Waters.** — See note 4.

**6. The Grant of a Ferry Franchise as a Contract Protected by the Federal Constitution.** — See note 7.

**1090. III. ACQUISITION OF FERRY FRANCHISE — 1. Necessity for Legislative Grant.** — See note 2.

**1088. 2. Right to Operate a Ferry a Franchise.** — *Hudspeth v. Hall*, 111 Ga. 510; *Peru v. Barrett*, (Me. 1905) 60 Atl. Rep. 968; *In re Spease Ferry*, 138 N. Car. 219.

**Change in Termini.** — The general rule of the common law that, where a public way is for any cause impassable, the public have a right to pass over adjacent lands in order to continue their journey, and to do so as long as the necessity continues, has been applied with regard to the change of the termini of a ferry where the line of travel from the original termini became impassable. *McInnis v. Pace*, 78 Miss. 550.

**3. Ferry Franchise an Incorporeal Hereditament.** — *Evans v. Krouting*, 9 Idaho 153; *Sistersville Ferry Co. v. Russell*, 52 W. Va. 356 (a legal ferry franchise is vested property).

**1089. 4. Right of Ferry Subject to Rights of Public in Navigable Waters.** — *State v. Faudre*, 54 W. Va. 122, 102 Am. St. Rep. 927, *per*

*Poffenbarger, J.*, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1089.

**Collision Between Ferryboat Leaving Wharf and a Steamboat — Duty of Latter to Give Room for Manœuvring of Ferryboat.** — *New York v. New York, etc.*, *Ferry Co.*, 130 Fed. Rep. 397.

**7. Obligation of Contracts.** — See, however, *Robinson v. Lamb*, 126 N. Car. 492.

**1090. 2. Hudspeth v. Hall**, 111 Ga. 510; *Warren v. Tanner*, (Ky. 1900) 56 S. W. Rep. 167; *McInnis v. Pace*, 78 Miss. 550; *Parsons v. Hunt*, (Tex. Civ. App. 1904) 81 S. W. Rep. 120, 98 Tex. 420; *State v. Faudre*, 54 W. Va. 122, 102 Am. St. Rep. 927, *per Poffenbarger, J.*

**A Municipal Corporation** has not power to operate a ferry without legislative authority. *Hoggard v. Monroe*, 51 La. Ann. 683.

**Private Ferry.** — The right to establish a private ferry was incident to the ownership of the land on both sides of the water desired to be



**1090.** By Prescription. — See note 4.

**1091.** 2. Power of Government to Grant Ferry Franchise — *a.* POWER OF STATES. — See note 2.

Ferry Across Boundary Rivers. — See notes 3, 4.

**1092.** Extent of Franchise. — See note 2.

Grants by General and Special Laws. — See note 4.

Power to Grant Exclusive Franchise. — See note 6.

*d.* DELEGATION OF POWER TO SUBORDINATE BODIES — (1) *In General.* — See note 10.

**1093.** See note 3.

(2) *Extent of Delegated Power.* — See note 4.

Power of Subordinate Body to Grant Exclusive Franchise. — See note 6.

**1094.** See note 1.

(3) *Execution of the Delegated Power.* — See notes 2, 3.

crossed, but the owner of such private ferry was not entitled to charge and collect toll for crossing. *Hudspeth v. Hall*, 111 Ga. 510.

**1090.** 4. Right Acquired by Prescription. — *Hudspeth v. Hall*, 111 Ga. 510. See also *Evans v. Krountinger*, 9 Idaho 153. Compare *Tuscaloosa County v. Foster*, 132 Ala. 392.

**1091.** 2. *In re Spease Ferry*, 138 N. Car. 219.

3. Ferry Franchises Across Boundary Rivers Between States. — See *Parsons v. Hunt*, (Tex. Civ. App. 1904) 81 S. W. Rep. 120, 98 Tex. 420.

The state of Ohio has the right to establish ferries on the Ohio side of the Ohio river and fix their charges for ferryage over that river from Ohio to West Virginia. *State v. Faudre*, 54 W. Va. 122, 102 Am. St. Rep. 927, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1091.

4. Power of Dominion Government of Canada. — *Perry v. Clergue*, 5 Ont. L. Rep. 357.

Interference with Interstate Commerce. — See *Caulbe v. Craig*, 94 Mo. App. 675.

**1092.** 2. Extent of Franchise over Boundary Waters. — See *State v. Faudre*, 54 W. Va. 122, 102 Am. St. Rep. 927, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1092.

4. *In re Spease Ferry*, 138 N. Car. 219, quoting 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1092.

6. Power to Grant Exclusive Franchises. — See, however, *Robinson v. Lamb*, 126 N. Car. 492; *In re Spease Ferry*, 138 N. Car. 219.

10. Delegation of Power to Subordinate Bodies. — *In re Spease Ferry*, 138 N. Car. 219, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1090 [1092].

**1093.** 3. Effect of Delegation upon Power of Legislature. — *Roy v. Henderson*, 132 Ala. 175.

4. Extent of Authority. — *Clark County Ct. v. Warner*, 116 Ky. 801; *Caulbe v. Craig*, 94 Mo. App. 675; *Alabama Ferry Co. v. Leathers*, 30 Tex. Civ. App. 16.

*Georgia Code*, § 613, prohibiting the establishment of ferries within three miles of where public bridges have been erected, does not prohibit the ordinary, under the general power to establish ferries, from establishing a ferry within three miles of an existing ferry. *Hudspeth v. Hall*, 111 Ga. 510.

*North Carolina Act 1901*, prohibiting the establishment of a ferry within the three-mile limit of an existing ferry, does not have a retroactive effect so as to render invalid a ferry

license within such limit theretofore granted by the subordinate body upon whom the power to establish ferries was conferred. *Robinson v. Lamb*, 129 N. Car. 16.

The restriction in the *North Carolina* statute against establishing ferries within two miles of an existing ferry did not prohibit the establishment of a ferry across Stinking Gut, a cut-off of the Pasquotank river, though it was within two miles of an existing ferry on such river. *Robinson v. Lamb*, 131 N. Car. 229.

Power of County to Operate Ferry. — *Kadderly v. County Ct.*, 32 Oregon 560 (mandamus to compel operation and the purchase of a new boat).

Under the *California* statute authorizing counties to establish and operate ferries "within the county" a county is not authorized to establish and operate a ferry across a river or stream constituting a boundary line between it and another county. *Johnston v. Sacramento County*, 137 Cal. 204.

Power of Municipality to Operate Ferry — Legislative Grant of Power Is Necessary. — *Hoggard v. Monroe*, 51 La. Ann. 683.

Effect of Grant of Exclusive Franchise by Legislature. — General power conferred upon subordinate bodies to establish ferries is restricted by an exclusive grant of a ferry franchise by special act of the legislature, and such subordinate body has no power to establish ferries within the limits of such exclusive franchise. *In re Spease Ferry*, 138 N. Car. 219.

6. *Green v. Ivey*, 45 Fla. 338.

**1094.** 1. An Unauthorized Grant of Exclusive Franchise Not Void in Toto. — *Combs v. Sewell*, (Ky. 1901) 60 S. W. Rep. 933.

2. Exercise of Power. — *Green v. Ivey*, 45 Fla. 338; *Prince v. Police Jury*, 112 La. 257 (remedying defective exercise of power).

Grant of Privilege to Highest Bidder. — *Wilson v. Gabler*, 11 S. Dak. 206.

Since Cal. Pen. Code, § 2843 *et seq.*, provides for the granting of ferry privileges to riparian owners and gives a preference in the grant to owners on the left bank of the stream, Stat. 1893, p. 288, requiring that franchises be sold to the highest bidder, does not apply to the grant of ferry privileges. *Pool v. Simmons*, 134 Cal. 621.

3. Sufficiency of Notice of Application. — *Combs v. Sewell*, (Ky. 1901) 60 S. W. Rep. 933; *Clark County Ct. v. Warner*, 116 Ky. 801.

**1095. 3. Who May Acquire Franchise — a. IN GENERAL.** — See notes 1, 2.

Tenancy in Common. — See note 3.

Grant of Ferry Franchise by Subordinate Bodies. — See note 4.

**b. RIGHT OF RIPARIAN OWNERS.** — See note 5.

**1096. Preference Given Riparian Owners.** — See note 2.

**1097. 4. The Grant.** — See note 2.

**6. Acquisition of Right to Land and Embark.** — See note 4.

Right to Land and Embark in Public Highway. — See note 6.

**1098. Under Power of Eminent Domain.** — See note 2.

**IV. TRANSFER OF FRANCHISES — 1. In General.** — See note 4.

**1099. 3. Who May Question Transfer.** — See note 8.

**1100. V. PROTECTION OF FRANCHISES — 1. What Constitutes an Infringement — a. IN GENERAL.** — See note 1.

Affidavit of Publication of Notice. — Pool v. Simmons, 134 Cal. 621.

Sufficiency of Description of Location of Ferry. — Sistersville Ferry Co. v. Russell, 52 W. Va. 356.

**1095. 1. Municipal Corporation.** — Peru v. Barrett, (Me. 1905) 60 Atl. Rep. 968.

**2. Ownership of Land on One Side of the Ohio River.** — Under the West Virginia statute (c. 44, § 2), providing that any person "who owns or who has contracted for the use of land at the point at which he wishes to establish the same may present his application" for a ferry, a person who owns land on the West Virginia side of the Ohio river may make application for a ferry. Sistersville Ferry Co. v. Russell, 52 W. Va. 356. See also State v. Faudre, 54 W. Va. 122, 102 Am. St. Rep. 927.

**3. Tenants in Common.** — Blackwood v. Tanner, 112 Ky. 672.

**4. Wilson v. Gabler,** 11 S. Dak. 206.

**5. Riparian Owner No Right to Operate Ferry.** — Tuscaloosa County v. Foster, 132 Ala. 392.

**1096. 2. Preference Given Riparian Owners by Statute.** — Pool v. Simmons, 134 Cal. 621.

The preference given to riparian owners by the Alabama statute (Ala. Code 1896, § 2503) does not confer upon the riparian owner an absolute right to maintain a ferry, but still leaves it discretionary with the Commissioners' Court to grant him a license to establish a ferry. Tuscaloosa County v. Foster, 132 Ala. 392.

**1097. 2. The rule that the order of the County Court laying out a public road amounts to the establishment of such road is applicable to the establishment of ferries, and the order of such court allowing a petition for the establishment of the ferry and ordering that the ferry be settled, laid out, and established, operates as a valid establishment of such ferry.** Robinson v. Lamb, 129 N. Car. 16.

**4. Right to Land and Embark.** — Parsons v. Hunt, 98 Tex. 420; State v. Faudre, 54 W. Va. 122, 102 Am. St. Rep. 927 (cannot land on private property without consent of landowners), citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1097.

**6. Right to Land on Public Wharf — Interstate Commerce.** — A ferry from one state to another under franchise granted by the state from which the ferry departs, is engaged in interstate commerce, and its landing at a public wharf in the state of its destination cannot be prohibited or

taxed, but it may be made to pay wharfage. State v. Faudre, 54 W. Va. 122, 102 Am. St. Rep. 927.

**1098. 2. Acquisition of Right under Power of Eminent Domain.** — Pool v. Simmons, 134 Cal. 621.

**4. States Holding Ferry Franchise Transferable.** — Evans v. Krouting, 9 Idaho 153, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1098.

**Statutory Restrictions on Power to Transfer.** — Brooker v. Maysville, etc., R. Co., (Ky. 1904) 83 S. W. Rep. 117; Paynter v. Miller, (Ky. 1904) 80 S. W. Rep. 469.

**Statute Requiring Consent of County Court to transfer of ferry right renders invalid a transfer without such consent.** Davis v. Connolly, (Ky. 1900) 55 S. W. Rep. 691. See also Wilson v. Sullivan, (Ky. 1903) 77 S. W. Rep. 193.

**Power of County to Lease Ferry.** — The Washington statute (Act March 6, 1899), authorizing counties to operate and maintain ferries, authorizes a county to lease a ferry owned by it. State v. King County, 29 Wash. 359.

**1099. 8. Who May Question Transfer.** — Evans v. Krouting, 9 Idaho 153, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1099.

**1100. 1. What Constitutes Infringement of Right.** — McInnis v. Pace, 78 Miss. 550.

**A Ferry Operated by a Number of Persons for the Use of Their Several Families,** such persons combining in the purchase of a boat and hire of a ferryman, is an infringement. Warren v. Tanner, (Ky. 1900) 56 S. W. Rep. 167.

**Railroad Bridges.** — See Brigham v. Reg., 6 Can. Exch. 414, affirmed 30 Can. Sup. Ct. 620.

**Transportation of Customers for Store.** — Where a merchant controlled land on both sides of a river near the location of a ferry, and had a store on one side and a warehouse on the opposite side of the river, and kept two row-boats by which he transported his customers and their purchases without charge, there being no public crossings, except the ferry, nearer than three and one-half miles above and another seven miles below the ferry, and this privilege was known to those trading with him, and was an inducement to increase and did increase his business and diminished the profits of the ferry, it was held that this was in effect a transportation of persons and property for hire, and that he was liable to the holder of the ferry franchise for interfering with his profits. Peru v. Barrett, (Me. 1905) 60 Atl. Rep. 968.



**1100.** Distance of Rival Ferry. — See note 4.

**1101.** Private Ferry. — See note 1.

*b.* ESTABLISHING RIVAL FERRIES, BRIDGES, ETC., BY LEGISLATIVE AUTHORITY — When Franchise Is Exclusive. — See note 4.

When Franchise Not Exclusive. — See note 6.

**1102.** See note 1.

**2.** Remedy for Infringement — *a.* REMEDY AT LAW — (1) *In General.* — See note 2.

**1104.** (3) *Forfeiture of Franchise as a Defense.* — See notes 1, 2.

(4) *Measure of Damages.* — See note 3.

*b.* INJUNCTION TO RESTRAIN INFRINGEMENT. — See note 7.

**1105.** Necessity that Franchise Be Exclusive. — See note 2.

**1106.** VI. DUTIES AND LIABILITIES OF OWNER — 1. Duty to Maintain and Operate. — See note 3.

**1107.** 3. Liability for Negligence — *a.* IN GENERAL. — See note 2.

**1108.** Effect of Giving Bond and of Penalty. — See note 3.

Effect of Lease. — See note 6.

**1109.** Contributory Negligence. — See note 1.

**1100.** 4. Distance of Rival Ferry. — *Peru v. Barrett*, (Me. 1905) 60 Atl. Rep. 968.

**1101.** 1. Private Ferry. — *Warren v. Tanner*, (Ky. 1900) 56 S. W. Rep. 167; *McInnis v. Pace*, 78 Miss. 550; *Peru v. Barrett*, (Me. 1905) 60 Atl. Rep. 968.

What Constitutes a Private Ferry as Distinguished from a Public Ferry. — *Hudspeth v. Hall*, 111 Ga. 510.

4. Establishment of Rival Franchise by Legislature When Franchise Exclusive. — See, however, *Robinson v. Lamb*, 126 N. Car. 492.

6. When Franchise Not Exclusive. — *Green v. Ivey*, 45 Fla. 338; *Hudspeth v. Hall*, 111 Ga. 510, 113 Ga. 4, 84 Am. St. Rep. 200; *McInnis v. Pace*, 78 Miss. 550; *Sistersville Ferry Co. v. Russell*, 52 W. Va. 356, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1101.

**1102.** 1. Subordinate Bodies. — *Pool v. Simmons*, 134 Cal. 621; *Hudspeth v. Hall*, 113 Ga. 4, 84 Am. St. Rep. 200.

Discretion in Establishing Additional Ferries. — Where power is conferred upon subordinate bodies to license ferries, the question whether such body shall exercise its right to establish additional ferries at a particular locality is left to the discretion of such body. *Green v. Ivey*, 45 Fla. 338.

Review of Decision of Subordinate Body. — *Sistersville Ferry Co. v. Russell*, 52 W. Va. 356.

2. Action on Case for Infringement. — *Green v. Ivey*, 45 Fla. 338; *Blackwood v. Tanner*, 112 Ky. 672; *Sistersville Ferry Co. v. Russell*, 52 W. Va. 356. See, however, *Peru v. Barrett*, (Me. 1905) 60 Atl. Rep. 968.

**1104.** 1. Forfeiture of Franchise as a Defense. — *Green v. Ivey*, 45 Fla. 338, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1103 (validity of license cannot be attacked for irregularities not rendering it void).

2. It is otherwise if the grant of the franchise to defendant was void. *Hudspeth v. Hall*, 113 Ga. 4, 84 Am. St. Rep. 200.

3. Measure of Damages. — *Blackwood v. Tanner*, 112 Ky. 672, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1104; *McInnis v. Pace*, 78 Miss. 550.

7. Enjoining Infringements. — *Green v. Ivey*,

45 Fla. 338; *Davis v. Connolly*, (Ky. 1900) 55 S. W. Rep. 691; *Warren v. Tanner*, (Ky. 1900) 56 S. W. Rep. 167; *Combs v. Sewell*, (Ky. 1900) 59 S. W. Rep. 526; *McInnis v. Pace*, 78 Miss. 550; *Cauble v. Craig*, 94 Mo. App. 675.

**1105.** 2. Franchise Need Not Be Exclusive. — *Green v. Ivey*, 45 Fla. 338; *Hudspeth v. Hall*, 111 Ga. 510; *Cauble v. Craig*, 94 Mo. App. 675.

**1106.** 3. Duty to Maintain and Operate Ferry. — *In re Spease Ferry*, 138 N. Car. 219.

**1107.** 2. Liability of Ferryman for Negligence. — *Combs v. Sewell*, (Ky. 1900) 59 S. W. Rep. 526; *Sparkman v. Graham*, 79 Miss. 376.

Liability of Servant for Injuries Through Defective Appliances. — *Chesapeake, etc., R. Co. v. Sparrow*, 98 Va. 630, 2 Va. Sup. Ct. 526.

Defective Exits from Boat. — *Townsend v. Boston*, 187 Mass. 283.

Liability of Municipality. — A municipal corporation operating a ferry without legislative authority is not liable for injuries through the negligent operation of the same. *Hoggard v. Monroe*, 51 La. Ann. 683.

A municipality operating a ferry for profit under statutory authority may become liable to the same extent as other ferrymen for injuries resulting from negligent operation of the same. *Townsend v. Boston*, 187 Mass. 283. See also *Rosen v. Boston*, 187 Mass. 245.

Property Carried Gratuitously. — *Frierson v. Frazier*, (Ala. 1904) 37 So. Rep. 825.

Duty to Provide Boat with Barrier. — *Frierson v. Frazier*, (Ala. 1904) 37 So. Rep. 825.

**1108.** 3. Effect of Bond on Common-law Remedy. — See *Sparkman v. Graham*, 79 Miss. 376.

6. Unauthorized Lease. — If, however, the lease of the ferry privilege is unauthorized the lessor of the franchise is not relieved from liability for injuries occurring while the ferry is being operated by the lessee. *Brooker v. Maysville, etc., R. Co.*, (Ky. 1904) 83 S. W. Rep. 117.

**1109.** 1. What Constitutes Contributory Negligence. — *Townsend v. Boston*, 187 Mass. 283 (following another team off boat).

Contributory Negligence. — Failure to unhitch team as requested by ferryman held contributory negligence. *Frierson v. Frazier*, (Ala. 1904) 37 So. Rep. 825.



**1109. b. LIABILITY AS TO PROPERTY** — Property in Possession of Ferryman. — See note 2.

Possession of Property Retained by Passenger. — See note 3.

**1110. c. LIABILITY AS TO PASSENGERS** — (1) *In General* — Approaches to Boat. — See note 6.

**1111. Improved Appliances.** — See note 1.

Dangers Not to Be Anticipated. — See note 2.

Degree of Skill. — See note 3.

Presumption of Negligence. — See note 5.

**1112. (2) Contributory Negligence of Passenger.** — See note 1.

**VII. RIGHT OF FERRYMAN TO TOLL.** — See note 8.

**1113. VIII. STATUTORY REGULATION OF FERRIES** — Regulation of Ferries under Police Power. — See note 3.

Regulation of Ferries Across Boundary Rivers Between Two States. — See note 6.

Delegation of Power to Subordinate Bodies. — See note 8.

**1114. X. TERMINATION OF FRANCHISE** — 1. By Forfeiture. — See note 5.

**1115. 3. By Expiration of Franchise.** — See note 7.

**1109. 2. Ferryman as Common Carriers** — Property in Possession of Ferryman. — *Hudspeth v. Hall*, 111 Ga. 510.

Private Ferry. — See, however, *Frierson v. Frazier*, (Ala. 1904) 37 So. Rep. 825.

**3. Possession of Property Retained by Passenger.** — *Frierson v. Frazier*, (Ala. 1904) 37 So. Rep. 825; *Roussel v. Aumais*, 18 Quebec Super. Ct. 474 (team kept under charge of passenger).

**1110. 6. Passageway to Boat.** — *Bartnik v. Erie R. Co.*, 36 N. Y. App. Div. 246.

Passageway Habitually Used by Foot Passengers, though designed for vehicles, must be kept in reasonably safe condition for foot passengers. *Wolf v. Brooklyn Ferry Co.*, 54 N. Y. App. Div. 67.

**1111. 1. Negligence cannot be predicated on the use of the means afforded passengers to land, where such means had been in common use for many years and had never been found dangerous or ineffective.** *Scribner v. Long Island R. Co.*, (Supm. Ct. App. T.) 88 N. Y. Supp. 351.

**2. Extraordinary Character of Accident does not relieve the ferryman from liability, if in fact caused by his negligent act.** *Cash v. New York Cent., etc., R. Co.*, 56 N. Y. App. Div. 473.

**3. Utmost Degree of Skill Required.** — *Bartnik v. Erie R. Co.*, 36 N. Y. App. Div. 246.

Boat Striking Wharf with Unusual Force. — *Cash v. New York Cent., etc., R. Co.*, 56 N. Y. App. Div. 473 (passenger thrown by surge of other passengers). See, however, *Aiken v. Southern Pac. Co.*, 104 La. 157, where it was held that the fact that plaintiff was thrown down by reason of the boat striking the approaches to the wharf was insufficient to show negligence.

**5. Presumption of Negligence Applied in Case of Ferryman.** — *Bartnik v. Erie R. Co.*, 36 N. Y. App. Div. 246 (breaking of chain support of bridge). See, however, *Aiken v. Southern Pac. Co.*, 104 La. 157 (passenger thrown from boat striking wharf).

Passenger Stepping on Ice on ferryboat held to show a *prima facie* case for recovery. *Rosen v. Boston*, 187 Mass. 245.

**1112. 1. Stepping to Side of Gangway for Foot Passengers** to avoid passengers leaving boat is not necessarily contributory negligence. *Bartnik v. Erie R. Co.*, 36 N. Y. App. Div. 246, citing *Hazman v. Hoboken Land, etc., Co.*, 50 N. Y. 53.

Movements in Attempting to Regain Footing after being thrown down held not to be contributory negligence. *Cash v. New York Cent., etc., R. Co.*, 56 N. Y. App. Div. 473.

Look Before Stepping. — *Dougherty v. New York Cent., etc., R. Co.*, (Supm. Ct. App. T.) 86 N. Y. Supp. 746 (finding against contributory negligence held sustained by the evidence).

**8. Covenant for Passage Toll Free.** — See *Potts v. Park*, 106 Ky. 202.

**1113. 3. Regulation of Ferries under Police Power.** — *Evans v. Kroutinger*, 9 Idaho 153; *In re Spease Ferry*, 138 N. Car. 219.

Strict Construction of Statute. — A statute regulating the operation of ferries and imposing penalties for breach of the regulations is a penal statute, and, therefore, to be strictly construed. *State v. Arkadelphia Lumber Co.*, 70 Ark. 329.

Posting Ferry Rates. — *State v. Arkadelphia Lumber Co.*, 70 Ark. 329.

**6. Ferry Between States.** — The state of West Virginia has no right to regulate tolls charged by a ferry established by the state of Ohio, where it is with regard to the ferriage charged on persons departing from the state of Ohio. *State v. Faudre*, 54 W. Va. 122, 102 Am. St. Rep. 927.

**8. Extent of Delegated Power.** — *Robinson v. Lamb*, 126 N. Car. 492 (power of county commissioners to fix tolls subject to review).

**1114. 5. Revocation of Ferry Privilege by County Court.** — *Combs v. Sewell*, (Ky. 1900) 50 S. W. Rep. 526, (Ky. 1901) 60 S. W. Rep. 933.

**1115. 7. By Expiration of Franchise.** — *Cauble v. Craig*, 94 Mo. App. 675.

















